

# **Authorized Law Reporting in the Digital Age**

**A Paper delivered at the Bar Common Room**

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***Why do courts still require the citation of authorized reports?***

1. The advantage of widespread reporting of legal decisions on the internet is that the sources of the law have become much more readily available both to practitioners and members of the public. The disadvantage is that there are now even larger mountains of information available for the practitioner to analyse. In the common law system based on judicial precedent, rather than a statement of general principles in a code, we need to sort the wheat from the chaff when deciding which decisions are authoritative. The authorised reports of significant decisions developed by common lawyers to help make our system more comprehensive, consistent and rational have become even more important in the internet age because it is those reports and the apparatus of digests and encyclopaedic works built on them which enable us to analyse, classify, categorise and summarise the important legal principles established and developed by our courts.
2. Some of that process of analysis, classification, categorising and summarising is done by systematic catchwording, the production of head notes, the reporting of arguments and the listing of statutes and decisions cited and discussed. The process of selection of cases to be reported and the effort that goes into ensuring their accuracy is probably even more important to the overall reliability of the system.
3. Let me mention first the selection process which Peter Allen will speak about in greater detail next week. Then I shall talk about the process of trying to ensure greater accuracy in reporting and finally address the future of authorised reporting.

*Selection*

4. One of the most experienced law reporters in Australia is Naida Haxton, the first woman to enter private practice at the Bar in Queensland. For many years now she has lived in Sydney and was, until recently, the editor of the New South Wales Law Reports. Her predecessor was Justice Dyson Heydon and her successor is Bret Walker SC. She had a long history as a legal reporter

and was highly regarded for her skill and experience. In 1998 she published an article in the Australian Bar Review about law reporting and risk management in citing unreported judgments. There she conveniently summarised the criteria for reportability which are used by most editors of authorised reports to select judgments for reporting. Peter Allen will speak about them in detail next week. They include:<sup>1</sup>

- (i) a case which introduces a new principle or new rule of law;
- (ii) a case which materially modifies an existing principle of law or settles a doubtful question of law;
- (iii) a case which applies an existing principle in a novel area;
- (iv) a case in which the language of legislation is definitively interpreted;
- (v) a case in which clauses, phrases or words in common use in documents (eg, wills, contracts, insurance policies, charter parties) are construed;
- (vi) a case in which the rules of practice of the court are interpreted and their application extended, modified or applied to obscure or unsettled points;
- (vii) all cases which for any reason are peculiarly instructive.

Those cases which are ‘peculiarly instructive’ may include the following:

- (a) a decision that an authority in another jurisdiction will be followed, ‘so turning probability into certainty’;
- (b) a decision that an old or criticised authority is still good law;
- (c) a decision in an area where the law is changing, either to show a tendency that will lead to overruling earlier authority or to show that the courts are not yet ready to go so far;
- (d) a decision explaining a decision the exact application of which was arguable;
- (e) a decision whether a case should be decided according to one well-known rule or another; that is to say, that certain facts are material and others are not;
- (f) a case of particular interest to a section of the community, for example, doctors, lawyers, stockbrokers, accountants, farmers;

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<sup>1</sup> Naida J Haxton, *Law Reporting and Risk Management – Citing Unreported Judgments* (1998) 17 Aust Bar Review 85, 87-88.

- (g) a case which brings the law together particularly where there is no relevant case within the jurisdiction but there are cases in, for example, New Zealand, England and the Americas;
  - (h) a case which brings the law up to date – that is, where no decision upon the point has been given anywhere for many years and the law is in effect re-affirmed;
  - (i) a decision on a matter or a principle in relation to which there is a paucity of authority.
5. The importance of that process was emphasised by Lord Bingham at a symposium held at Cambridge in March 2000, when he said that, without such a selection process:<sup>2</sup>

“The quick, effortless and relatively inexpensive availability of vast new swathes of material hitherto inaccessible unorganised, unfiltered, unedited, presents a very real risk to the system which may ... simply succumb under the weight of the material presented.”

6. In other words, the selection of authoritative decisions for reporting using the principles outlined, is an important part of the process of making practitioners and, through them, the courts, aware of new developments in the law,<sup>3</sup> filtering out as mere noise the cases that are simply restatements of existing principles.

#### *Accuracy and Classification*

7. The contents of each reportable judgment are verified. The accuracy of all citations, references and quotations is checked against the original source material. The decision is styled for the printer consistently in a way which makes the material more readable and is edited to provide lists of cases in the judgment and/or argument and summaries of the submissions. Head notes and catchwords are also supplied, approved by the editors with the approved version being forwarded to the judges involved for comment and checking in

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<sup>2</sup> See the transcript of the First Symposium on Law Reporting, Legal Information and Electronic Media in the New Millennium held at Cambridge in United Kingdom in March 2000 published by Smith Bernal International at p. 13.

<sup>3</sup> Proceedings of the Second International Symposium on Official Law Reporting 30 July 2004 at pp. 15 from Mr R C Williams, editor of the Law Reports and the Weekly Law Reports for the Incorporated Council of Law Reporting for England and Wales.

respect of queries about the text.<sup>4</sup> The judges' involvement at this stage is what distinguishes authorised series of reports from the unauthorised.

8. The process of checking accuracy is an important aspect of the system which is not always appreciated. I first came across it when I was Sir Harry Gibbs' associate in 1973 and was rung by the formidable Miss Jean Malor, then the case editor for the Australian Law Journal Reports. She was editing a judgment of Sir Harry's. He was meticulous. So was his secretary. I tried to be so too. On the whole I think I was. Nonetheless all of us had managed to let through a judgment where, almost throughout, the words applicant and respondent had been transposed. Miss Malor sounded rather indignant. I felt embarrassed. Sir Harry was imperturbable. Thereafter I redoubled my efforts to ensure the accuracy of further judgments that I checked. Nobody is perfect, however, even in the present day.
9. Recently I was reading – carefully - the decision of the High Court last year in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.<sup>5</sup> I had heard an argument in the Court of Appeal where the rule in *Barnes v Addy* was discussed. I later began to write a judgment in the matter. I needed to consider *Farah Constructions* in some detail. I commenced that task by reading the Australian Law Journal report. You will see on the slide the result of my close reading of paragraph [177] in the ALJRs.
10. I do not normally write on my reports, not even the unauthorised reports such as the Australian Law Journal Reports. But, in reading this paragraph closely, I came to realise that this version of the judgment, in referring to the first limb of the rule in *Barnes v Addy* in that paragraph seemed to be incorrect. In context their Honours could only have been referring to the second limb of that rule. That is why I wrote in the margin. When I looked at the same paragraph in the Commonwealth Law Reports I saw that the word had been corrected.

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<sup>4</sup> See Haxton, *op. cit.*, p. 88.

<sup>5</sup> (2007) 230 CLR 89.

11. I suspect that the source of the correction was the law reporter or editor of the Commonwealth Law Reports. That process of close reading and analysis required to properly headnote and catchword a judgment as well as to edit it carefully, check and verify its contents is what leads to the discovery of such errors and their correction. That is one reason why we judges prefer the citation of authorised reports – we and others have checked them and we have authorised the report.

***What is the future of authorized reports in the digital age?***

*Conquering mountains of information*

12. “Lawyers, like the rest of humanity, face the threat of ‘disintermediation’ (broadly, being cut out of some supply chain) by smart systems” says Professor Susskind, the legal technology specialist and IT Adviser to the Lord Chief Justice of England.<sup>6</sup> He has also said at the Cambridge symposium to which I have already referred, that the task of law reporting has become more important than ever because, until we learn to conquer the gap between data processing and knowledge processing, we are in deep trouble. The value added by law reporting was the “metadata” that can guide users through the huge mass of available information.<sup>7</sup> I gather that he believes that significant numbers of lawyers may be “disintermediated” in the near future. I suspect that editors and law reporters are not likely to be the first to be cut.
13. The availability of legal information on the internet is, to use the language of “1066 and All That” a “good thing” – especially because there is no access fee. Those decisions have also been enhanced by the introduction of catchwords, numbered paragraphs and a universal citation system for unreported decisions which have made them more readily accessible. Still, I do not use Austlii when I am searching for the case law on a topic. I find its search tools unsophisticated and liable to produce far too much information that will be irrelevant.

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<sup>6</sup> Professor Richard Susskind, *The End of Lawyers Pt 3* extracted in *The Times* 5 November 2007; <http://business.timesonline.co.uk/tol/business/law/article2522535.ece>

<sup>7</sup> Proceedings of the Second International Symposium on Official Law Reporting 30 July 2004 at pp. 16-17.

14. I much prefer the tools available through the legal publishers where skilful lawyers have analysed, classified, categorised and summarised the information contained in important judgments. This is particularly so where those decisions have been singled out for reporting in an authorised series of reports. I do not wish to have to read every case in which a particular set of search terms appears or every case which merely cites an earlier leading decision. I want to find the relevant decisions that are likely to say something useful about the legal principle involved. That is what I have to apply – principle - not a welter of individual decisions. No wonder the House of Lords’ rule is that unreported decisions may only be cited by leave.<sup>8</sup> The problem is that there are now so many specialised series of reports that very few decisions go unreported.
15. In that context it is the process of selective, verified authorised reporting that enables us best to analyse and track the development of legal principle. Although those reports will be consulted mainly on the internet in the future, the “metadata” associated with them by the process of selection, verification, catchwording, headnoting and reporting of argument, including the cases and statutes cited to the judges, is what makes them most valuable to the practitioners and the courts and to the integrity of the system.

### *Conclusion*

16. In my experience the introduction of computerised publication of law reports has made it significantly easier to find relevant decisions, particularly because of the tools of analysis provided by the authorised reports, digests and encyclopaedic works, not simply because the information is there. Once the relevant decisions have been found, it is also much easier, in my view, to discover how they have been treated by subsequent courts and to discover whether they are still authoritative.
17. It remains, however, a time consuming, sometimes tedious task to analyse the relevant decisions to see whether they say anything new. If they are in a series

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<sup>8</sup> *Roberts Petroleum Ltd v Kenny Ltd* [1983] 2 AC 192, 202 and the Practice Statement (Court of Appeal: Authorities) reported at [1996] 1 WLR 854.

of authorised reports you should be confident that they have been selected because they show some change or development in principle worthy of closer analysis by you. In a world flooded with available information you need as many reliable signposts as possible and the process of authorised reporting provides them for us. Please cite them.