

Improving the Use of Court Decisions in the Federal Circuit Court

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1. Introduction

The Federal Circuit Court is one of the few courts in the world that can be described as a ‘digital native’.² The label ‘digital native’ came from an article by Prensky³ in 2001 ‘*Digital Natives, Digital Immigrants*’ where he discusses the failure of modern educators to meet the needs of children who are ‘digital natives’ as a result of children born in the last 30 years growing up in an increasingly media rich environment, and thus learning and thinking differently.⁴ Whilst the phrase was coined by educationalists, we are also seeing different behaviours from lawyers and un-represented litigants who are digital natives, compared to digital immigrants. These behaviours, and the more general need to ‘democratise’ the law have driven changes made by the Federal Circuit Court from the ways in which the more traditional courts operate.

The effect of this difference in internal culture of the court is manifest in an IT culture that focuses upon structural changes effected by IT, rather than simply re-formatting information. The internet has provided a method by which case law can now be made truly accessible to the public, as of right, at a very modest cost. In this respect Professor Greenleaf has argued, since the mid 1990s, that:

... official bodies should accept that they have seven obligations in the provision of essential legal information if they are to give optimal support to the rule of law and other values:

1. Provision in a completed form, including additional information best provided at source, such as the consolidation of legislation, and the addition of catchwords (index terms) or even summaries to cases.
2. Provision in an authoritative form, such as use of court-designated citations for cases and (eventually) use of digital signatures to authenticate the versions distributed.
3. Provision in the form best facilitating dissemination, which should always now mean in electronic form, should in most cases be possible by email or more sophisticated forms of data delivery, and should be possible in a form facilitating conversion.
4. Provision on a marginal-cost-recovery basis to anyone, so that governments do not attempt to profit from the sale of public legal information, thereby creating artificial barriers to access to law.

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² Although the judges and senior administrators of the court are all ‘digital immigrants’ (and indeed some remain staunchly resistant to emigrating).

³ (2001) 9(5) *On the Horizon* 1–6.

⁴ Of course, there are others that argue differently, or take issue at some of his definitions. Wikipedia has a good summary and key references.

5. Provision with no re-use restrictions or licence fees, subject only to such minimal restrictions as are necessary to preserve the integrity of published data.

6. Preservation of a copy in the care of the public authority, so that an archive of the data is preserved to enable greater competition whenever a new entrant wishes to publish the data, a whether or not the public authority publishes the data itself.

7. Non-discriminatory recognition of citations, so that Court-designated citations are not removed from “reported” cases, ending the privileged status of citations of “official” reports.⁵

In 2015, it seemed that it is only the seventh of these propositions that remains outstanding within Australia. It is this seventh principle that the Federal Circuit Court has achieved in the publication of its judgments and with its 2015 Practice Note with respect to the citation of its judgments and the use of judgments from other courts. This is a significant structural change to the culture of the law with respect to case law. I wish to address two important reasons for making this change, discuss the role of ‘Authorised Reports’ and then outline the details of how the change has been effected.

2. *The ongoing need to ‘democratise’ the law*

It is a fundamental principle of our legal system that ignorance of the law is no excuse.⁶ If ignorance is no excuse, it stands to reason that the ordinary citizen must be placed in a position to learn what the law is (at least to the extent that this is reasonably possible). In this regard, in *Coleman v Power*⁷ Gleeson CJ referred to the important statement of Scott LJ in *Blackpool Corporation v Locker*,⁸ saying that:

‘the rule that ignorance of the law is no excuse is “the working hypothesis on which the rule of law rests in British democracy”. Most significantly his Lordship went on to make the point that the corollary of the rule is that information as to the content of the law should be readily accessible to the public.’

In *Australian Competition & Consumer Commission v Anglo Estates Pty Ltd*⁹ French J restated the rule in terms more apt for those in the antipodes, saying that

⁵ Greenleaf G ‘Jon Bing and the History of Computerised Legal Research – Some Missing Links’ in Olav Torvund and Lee Bygrave (Eds) *Et tilbakeblikk på fremtiden* (“Looking back at the future”) 61-75, Institutt for Rettsinformatikk, Oslo, 2004.

⁶ The reverse hypothesis, is unsustainable, as Windeyer J said: ‘The statement that everyone is presumed to know the law is now strongly discountenanced ... on the ground that it is obviously untrue that everyone does know all the law’: see *Iannella v French* [1968] HCA 14; (1968) 119 CLR 84 at [26] (decided, somewhat ironically, on April Fools’ day). Gleeson CJ acknowledged that the presumption is ‘fictional’, later recounting Professor Glanville Williams’ comment ‘that almost the only knowledge of law that many people possess is the knowledge that ignorance of the law is no excuse’ before noting that ‘[t]his does not mean that people are presumed to know the law . Such a presumption would be absurd’: see *Ostrowski v Palmer* [2004] HCA 30; 218 CLR 493; 206 ALR 422; 78 ALJR 957.

⁷ [2004] HCA 39; 220 CLR 1; 209 ALR 182; 78 ALJR 1166 (1 September 2004) at [140].

⁸ [1948] 1 KB 349 at 361.

⁹ [2005] FCA 20 at [60]

‘... the rule that ignorance of the law is no excuse is the working hypothesis on which the rule of law rests in Australian democracy.’

In 1948, when *Blackpool Corporation v Locker*¹⁰ was decided, there were real practical difficulties to enabling free access to the law. Scott LJ made the point, with respect to sub-delegated legislation, that if there is no obligation to publish, then:

John Citizen may remain in complete ignorance of what rights over him and his property have been secretly conferred by the minister on some authority of other, and what residual rights have been left to himself. For practical purposes, the rule of law, of which the nation is so justly proud, breaks down because the aggrieved subject’s legal remedy is gravely impaired ... [and] ... appear to me *ex debito juitiæ* to demonstrate the crying need of immediate publication ...

Not long before, the Chancellor’s Commission on Law Reporting had rejected proposals to restrict litigants to reliance upon cases reported in the Authorised Reports on the grounds that it would strike ‘at the base of “one of the pillars of freedom, that the administration of justice must be public.”’¹¹ More recently, Justice Lindsay has noted that the ‘availability, accessibility and content of reports of the processes and decisions, of Australian courts are central to the concept of “law” in Australian society.’¹²

The central importance of the case law being readily available, as opposed to merely a text book or bureaucrat’s summary on a web page, lies in the fundamental nature of the doctrine of precedent. As Bacon so eloquently expresses it:

It is a sound precept not to take the law from the rules, but to make the rule from the existing law. For the proof is not to be sought from the words of the rule, as if it were the text of law. The rule, like the magnetic needle, points at the law, but does not settle it.¹³

Even in modern times when so much law is to be found in statute, and the words are the text of the law, there are such broad discretions that access to examples of application of the statutory rules, in order to identify the normative outcomes, is essential to a nuanced understanding of the legal rules.

If ignorance of the law is no excuse, and realistic access to justice expected for every citizen, then the case law must be freely available in a format that can not only be accessed, but used by ordinary citizens in the courts. The only realistic way to achieve this is to allow decisions found on AustLII to be relied upon in court.

3. *Law and ‘Digital Natives’*

The advent of large legal databases, available over the internet for instant access and research, coupled with the relatively inexpensive availability of 4G WiFi and

¹⁰ [1948] 1 K.B. 349 at 361.

¹¹ As cited in Dawson, *JP The Oracles of the Law* (Hein and Co, NY: 1986) at 84

¹² Lindsay G, “The Future of Authorised Law Reporting in Australia” (Paper, Australian Law Librarians Association: 11 June 2013) at [6].

¹³ As cited in Holdsworth, “Case Law” (1934) 50 LQR 180 at 189

the almost universal penetration of smart phones has changed the courtroom forever. As Berring explains ‘Many lawyers ... remain creatures of the old information, and will never change their views of how things ought to be. However, they are being superseded by newer researchers, who come to the progression as devotees of electronic information.’¹⁴

In the court room, many young lawyers no longer bring copies of legislation, court rules, or cases, instead relying upon their ability to access this information with a tablet or smart phone. To older lawyers, used to dragging large brief cases full of books to the court room (often just in case a point arises) the almost carefree attendance of younger lawyers with only a writing pad and a few documents appears like a lack of preparation. In some cases it is a lack of preparation, with the lawyer comforted by the thought that they can look things up in court (rather like the false comfort that one can look up answers in an open book exam); but in other cases there is a change in how lawyers access the law, and their preparations. Remarkably, we are also seeing a retreat to statutory provisions and first principles by many young lawyers, presumably driven by the overwhelming volume of case law now available and changes in legal education: no doubt this will soon lead to a greater demand for machine analysis of cases to better expose the decision making norms.

The ready availability of materials that are free to access, primarily on AustLII, has resulted in AustLII being the most common source of legal materials used electronically in the court room. I suspect that the subscription services currently face three key difficulties that do not confront AustLII:

- (a) The subscription services remain relatively expensive, and often out of the reach of smaller firms;
- (b) Subscription services face the difficulty of having to protect their content as it is their business asset, thus often do not appear to have provided login systems that allow lawyers from firms to easily use their own devices;
- (c) The subscription services are often slower to load on a device as a result of the complex screen rendering designs.

It also seems likely that in the future subscription services will face the difficulty that their rendering of information does not easily permit re-use of the information, even for the most simple things such as occurs with screen scrapers for automated bibliography programs, such as Zotero.¹⁵

The most significant change in behaviours is that of the self-represented¹⁶ litigant. The array of un-represented litigants highlights at least one criticism of Prensky’s thesis: not all digital natives are adept with the new technology.

¹⁴ Berring R “Chaos, Cyberspace and Tradition: Legal Information Transmogrified” (1997) 12 *Berkeley Technology Law Journal* 189 at 190.

¹⁵ Zotero is a free bibliographic program that runs stand alone or as a plugin to a web browser (Similar to EndNote) allowing bibliographic details to be captured from material viewed in a web browser to save re-typing those details into a database: see www.zotero.com

¹⁶ In this paper, all litigants that appear without a lawyer representing them are referred to as un-represented. Those choosing to appear without a lawyer (sometimes, even when they have legal aid available to them) are referred to as self-represented.

However, in those adept with new technology, their capacity to overwhelm the court and their opponents with material is greatly enhanced by the use of resources like AustLII. The well prepared un-represented litigant may come to court armed with numerous authorities (sometimes relying upon single (or even partial) sentences from each case). Some bring clean copies of judgments, others produce tattered and incomplete copies of decisions, many assume that the court will be familiar with every AustLII case (or have it available on the bench) and that they don't need to provide copies to the court. This makes the need to judicial access to the internet, from the bench, or at least a court office that can access the internet and print material important in such cases.

On an entirely pragmatic level, whilst the appeal courts may be able to insist upon 'Authorised' versions of decisions from the parties, the battle is long lost in the busy trial courts, even with many lawyers. The courts must respond by changing with the new socio-legal cultures that technology has brought.

4. *The Role of 'Authorised' Law Reports*

As Holdsworth explains, 'The authorised reports had the privilege of exclusive citation ... In 1863 Lord Westbury laid down the rule, which now prevails, that any report signed by a barrister may be cited, and the rule ... that an unpublished report vouched for by a barrister may also be cited.'¹⁷ The establishment of the authorised reports in Britain was in answer to the many inaccuracies in the nominate reports.¹⁸ Today, they are no more than 'a construct of the age of print.'¹⁹

4.1 *Accuracy and Verifiability*

As the courts usually publish their decisions on AustLII, there is no longer any real doubt that the decision on AustLII is accurate. The need for the decision to be reported by a member of the bar in a published form is now otiose.

The remaining potential risk of inaccuracy comes only from potential ineptitude or petty fraud when a litigant hands up what appears to be a decision of a court. This has recently been effectively overcome by AustLII providing a certified version of the decisions that can be downloaded. In light of the level of security that AustLII now offers for certainty that a decision is an accurate reproduction of the original, the role of the authorised reports in ensuring there is a definitive and verifiable version available has been overtaken by the new technology.

¹⁷ Holdsworth, *Essays in Law and History* (Clarendon Press, Oxford: 1946) (Lawbook Exchange, NJ: 1995 facsimile edition) at 284.

¹⁸ See, for example, Oldham, J, "Detecting Non-Fiction: Sleuthing among Manuscript Case Reports for what was *Really Said*" in Stebbins, P, (Ed.) *Law Reporting in Britain* (Hambledon Press, London: 1995 at 133.

¹⁹ Lindsay G, "The Future of Authorised Law Reporting in Australia" (Paper, Australian Law Librarians Association: 11 June 2013) at [7].

4.2 *Selection of Important cases*

The growth of the free access to law movement has been a particularly disruptive technology for the business of law reporting. What was almost a monopoly upon the publication of law reports in the 20th Century came to an end with the commencement of AustLII and its equivalents around the world. As the internet databases have become more comprehensive, there is little need to have law reports or subscription services for access to the content of the decisions. Similarly, simple links between cases by use of citators has been overtaken by computer databases as LawCite demonstrates on AustLII.

What remains for the publishers is the challenge to add value to their report series, not by providing more but by providing less. Even in the 19th Century, one of the ills it was hoped that the Authorised Law Reports in Britain would address was the over-supply of case reports.²⁰ That is, providing subscribers with a selection of cases that are likely to be useful authorities, and excluding the decisions that appear to be aberrant. As Bryan identifies, the real role of a set of law reports (authorised or subject reports) relates to the extent to which the selection of ‘gold’ from the ‘dross’ can be achieved by the reporters.²¹

As the volume of judgments is enormous, identification of relevant and significant judgments is difficult, despite the benefits of modern search engines. Not surprisingly, the ‘gold’ is relatively easy to find on a retrospective search of how often a case is cited in the years following its publication (and this can easily be done by computer search). The real skill is in identifying the ‘gold’ at the time that the decision is made in order to select the particular decision for inclusion in a limited set of reports.

It is in this area that we can look to the courts to better format judgments, and the new technologies for assistance. The lack of an effective schema or ontology for legal decisions presents the next challenge for AustLII and the various courts, as it is through effective tagging and structuring of data that it can be more effectively used. Already Google has commenced a project to provide a scheme for data tagging (see Schema.org) more generally. It is only a matter of time before the courts and legislature will be expected to mark up their documents in accordance with a schema developed for law.

It is clear that even with Prof. Greenleaf’s principles fully realised, there remains ample room for commercial publishers to add considerable value by publishing secondary material. Remarkably, the significant inroad into this area has not been made by a mainstream commercial publisher but the small innovative group at BarNet’s Jade database, which leverages off the AustLII data, is truly harnessing the ideas of Web 2.0 by cleverly restructuring the AustLII data to present it in a form far more useful to the practicing lawyer.

Of course, even with all legislation, legislative instruments and case law freely available on-line, for most citizens it is simply an overwhelming quagmire of material from which they have real difficulty identifying what is relevant to them.

²⁰ Dawson, JP *The Oracles of the Law* (Hein and Co, NY: 1986) at 81.

²¹ The colourful terms come from Bryan, M “The Modern History of Law Reporting” (2012) 11 *University of Melbourne Collections* 32.

It is in this area that the public are already making greater demands upon the courts to value add to the text of the decisions, such as by the provision of catchwords and summaries. For example, in 2010, Pelly published an array of complaints about the High Court, including the removal of catchwords in 2010, and even a complaint that the High Court hands down too many judgments on the one day, rather than spreading judgments over several days to make reporting more convenient for journalists.²²

As different publishers have developed their own catchwords, and have various courts, the power of catchwords as a careful taxonomy of cases has fallen away. Today catchwords are often no more than a loose ‘folksonomy’.²³ It will be very interesting over the next few years to observe whether the loss of a highly structured ‘taxonomy’ of catchwording will be effectively replaced by more powerful search engines: I suspect not. AustLII could, if it were funded, produce a catchword wiki, allowing users to help develop a catchword taxonomy (perhaps with leading scholars editing the different sections) that allowed users to add the catchwords to cases in AustLII’s database, and making it simply for those producing judgments to look-up, copy and paste an appropriate set of catchwords from the taxonomy. If such a system were supported by the courts, it would offer the possibility of creating a particularly useful structure, not only by reference to legal rules, but also normative outcomes, for research.

The response of most government agencies has been to simply publish ever larger web pages (rather like electronic guides and brochures) but not leverage upon the ideas of Web 2.0 and the concepts of the Semantic Web. It is only through these new ways of identifying and presenting a useful subset of data that we can harness the benefits of new technologies for identifying relevant legal information.

4.3 The risk of an information elite

A brief consideration of the role of the Authorised Reports would not be complete without giving some consideration to an unforeseen and darker side to the effect of the development of the reports. At the time they were established the Authorised Reports were comparably priced with other forms of reporting, and were implemented for the reasons set out above. The Authorised Reports have become a rare commodity, in the almost exclusive possession of the legal profession – and save for a visit to a law library, the upper echelons of the legal profession. It is rare to find law reports in a public library, but free internet connections and PC’s are common, making free legal sites completely accessible.

A system requiring citations to come from the Authorised Reports cuts against the ideal (however flawed it may be) of autodidacticism (‘the idea that anyone with the gumption to pursue knowledge can run it down’) which ‘sounds strongly for us.’²⁴ The continuation of rules requiring references to the Authorised Reports

²² Pelly, M, “Too much to expect High Court answer on catchwords” (*The Australian*: 9 July 2010).

²³ See generally <https://en.wikipedia.org/wiki/Folksonomy>

²⁴ Berring R “Chaos, Cyberspace and Tradition: Legal Information Transmogrified” (1997) 12 *Berkeley Technology Law Journal* 189 at 206.

arguably creates an elitism or inner circle of legal professionals that is inimical to the principles of open justice and access to justice.

5. The Federal Circuit Court and Authorised Reports

The Federal Circuit Court has no authorised reports for its judgments, nor would one expect there to be a set of ‘authorised reports’ for a busy trial court of broad jurisdiction. However, since its commencement in 2001 the court has published around 28,000 judgments on AustLII. This remains only a subset of the total number of judgments as most family law judgments are not published on AustLII due to the lack of resources necessary to fund the anonymising of the reasons: the balance the court has struck is selecting some family law judgments for internet publication, as well as anonymising and publishing any family law decisions that a party or member of the public requests.

Whilst the Federal Circuit Court is not an appellate court (save with respect to various tribunals) there are nonetheless judgments that are significant, hence there are a large number of decisions published in subject area reports.

In order to deal with the uncertainty as to the requirement for an authorised version of a report to be used in court (which sometimes led to dry legal arguments wasting much time) the court has approached the problem as a ‘digital native’ and embraced the internet as the primary means of disseminating reliable versions of its decisions.

Thus, in April of this year (2015) the Chief Judge issued the Practice Note 1/2015:

Citations of decisions of Australian Courts and Tribunals – AustLII

1. When citing a judgment to the Federal Circuit Court, the neutral citation for the judgment must be provided, if the judgment has such a citation. Other citations for the judgment may be provided in addition. If the judgment is included in a series of authorised reports, the authorised report citation should be provided as an additional citation.
2. Where a judgment is by the Federal Circuit Court, any copy provided to the Federal Circuit Court may be a copy of:
 - a) The version of the judgment available from AustLII in the ‘Signed by AustLII’ format.
 - b) A version of the judgment published in a series of law reports by a commercial publisher or a council of law reporting.
 - c) Versions from other sources and in such other formats as the Federal Circuit Court decides to accept.
3. Where a judgment is by any other Court or Tribunal, any copy provided to the Federal Circuit Court may be a copy of:
 - a) The version of the judgment available from AustLII in the ‘Signed by AustLII’ format.
 - b) A version of the judgment published in a series of law reports by a commercial publisher or a council of law reporting.
 - c) Versions from other sources and in such other formats as the Federal Circuit Court decides to accept.

4. When providing a copy of a judgment to the Federal Circuit Court, parties are required to check that the copy provided has not been replaced by any more recent copy of the judgment. This may be achieved by use of the updating facility provided in electronic copies of the 'Signed by AustLII' judgments, or by equivalent means.
5. The decisions of the Federal Circuit Court (formerly the Federal Magistrates Court) as published on AustLII are authenticated reports of the decisions of the Court and may be relied upon as such.

Explanatory Notes:

1. By 'neutral citation' is meant a citation in the style adopted by Australian courts and tribunals since 1998.
2. Citations should be as in this example, for a hypothetical 5th decision made by the High Court in 2015, subsequently published in the authorised reports, and in other reports: *Smith v Jones* [2015] HCA 5; (2016) 245 CLR 532; (2015) 101 ALJR 454 where HCA is the agreed designator for 'High Court of Australia'.

The effect of this practice note is to implement three important changes to court practice:

1. The parties may rely upon an AustLII version of any judgment when referring a judge of the Federal Circuit Court to an authority;
2. The parties are required to give the media neutral citation; and
3. The court has declared that its own decisions, as published on AustLII, are its 'authenticated' decisions.

These changes are primarily aimed at ensuring that all litigants have access to the law in its written form. All of the judgments on AustLII are available without charge, and may now be used, as of right, when arguing cases in the Federal Circuit Court. The potential barrier of having access to expensive reports series, or subscription data bases is no longer in place for those without such resources.

The purpose of requiring the media neutral citation also enhances access to justice and fair hearings. If an un-represented party receives written submissions with case references, they will include citations that can be used to access the material on the free AustLII database.

Finally, the court's decision to treat the AustLII versions of its own decisions as 'authenticated' means that they can be used in any other court as an 'authorised' version of the decision.

So far as I am aware, the Federal Circuit Court is the first court to take this step of effecting such a structural change to facilitate full and open access to case law in Australia, by allowing the use of free legal databases to their maximum potential for all citizens.