

# THE AUSTRALIAN LAW LIBRARIANS ASSOCIATION

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## THE FUTURE OF AUTHORISED LAW REPORTING IN AUSTRALIA

By Justice Geoff Lindsay

### INTRODUCTION

1. "The Future of Authorised Law Reporting in Australia" is a topic ripe for discussion.
2. We live in an age of transition, in which (as we imagine) old, settled patterns have been displaced and new ones have yet to emerge.
3. In common with the rest of the world we are endeavouring to adapt to our ends (within the community of law and the community at large) information technology that seems to advance exponentially, and to embrace chaos as an aspiration. We are trying to adapt from the age of print to an electronic age, not yet certain whether they are, or are destined to become, true alternatives.
4. Within the Australian legal system we are also working through the implications of the call to independent thought implicit in enactment of the *Australia Acts* 1986 (Imp and Cth), with the High Court of Australia as the nation's ultimate court of appeal. Inevitably, our jurisprudence must fundamentally change, even if subtly. Having been anchored in English law, legal history, tradition and thought, Australians now have to find their law within their own experience more than has been required, or allowed, in earlier times.
5. Fundamental to the search for law in Australia, and the development of Australian law, is the content and form of the legal literature which we, as Australians, consult, produce and value.
6. 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.

## **THE CONCEPT OF AN “AUTHORISED” LAW REPORT**

7. The concept of an “authorised” law report is a construct of the age of print. It is associated with the idea that law can be found in volumes of printed text; published with the approval, if not under the authority of judges; dedicated to the dissemination of edited reports of reasons for judgment; selected by an editor in whose judgement the legal community reposes trust.
8. The concept of an “authorised” law report is surprisingly uncertain in content.
9. The concept is probably, still, lodged in the consciousness of Australian lawyers because of the publication of reports of the Council of Law Reporting in London in and after 1865. The reports published by that body continue to be known to Australian lawyers (or, at least, litigation lawyers of mature vintage) as “The Authorised Reports”.
10. The classic account of how the English legal system moved from a centuries-old tradition of hotch potch, commercial publication of law reports associated with the names of particular reporters (“the nominate reports”) to a centralised system of “official” law reports published by the Council (*via* a system of “authorised reporters”) is told by WTS Daniel, *The History and Origin of the Law Reports* (London, 1884). See also: LW Abbott, *Law Reporting in England 1485-1585* (London, 1973); W Holdsworth, *A History of English Law*, Volume 12, pp 101-162 (The 18<sup>th</sup> Century); Volume 13, pp 424-444 (Early 19<sup>th</sup> Century); Volume 15, pp 248-275 (Mid-Later 19<sup>th</sup> Century); JH Baker (ed), *Judicial Records, Law Reports, and the Growth of Case Law* (Berlin, 1989); C Stebbings (ed), *Law Reporting in Britain* (London, 1995).
11. Formal law reporting did not come to New South Wales until 1862. Historical accounts of law reporting in Australia, before and after that date, incorporating a treatment of the New South Wales perspective, can be found in (a) the introductory pages of Professor Castles’ *Annotated Bibliography of Printed Materials on Australian Law, 1788-1900* (Law Book Co, Sydney, 1994); and (b) the joint paper of Dr JM Bennett and Nada Haxton entitled “Law Reporting and Legal Authoring” presented as chapter 11 in G Lindsay and C Webster (ed), *No Mere Mouthpiece : Servants of all yet of none* (LexisNexis Butterworths, Australia, 2002).
12. Before 1862 colonial lawyers in New South Wales depended on local and overseas newspapers for “law reports” that were more prominent, and more fulsome, in their presentation of reports of court cases than we are today accustomed to receive from journalists.

13. In discussions about law reporting in Australia, an “authorised” law report is generally *assumed* to be a form of publication of the reasons for judgment of judges in a form approved by the judges.
14. That understanding of an “authorised” law report cannot now stand without qualification because, throughout Australia, judges all pretty much publish their own judgments, *via* official websites like Caselaw or the equivalent.
15. There now has to be something more than the approval of judges to distinguish an “authorised” law report. That “something more” probably boils down to two components. First, an authoritative selection of cases for reporting by an editor of acknowledged expertise and reputation. Secondly, value-added editorial services, including an informative “headnote” summary of the text of each judgment, and an edited text.
16. Each of these “value-added” factors is important because each costs money, and some means needs to be found to fund those costs.

#### **PARAMETERS OF CURRENT DEBATE ABOUT “AUTHORISED” LAW REPORTS**

17. There appear to be five factors that serve as parameters for current debate about the present state, and future prospects, of Australian law reporting.
18. First, there is general recognition of the shift in information technology from the age of print to an electronic age, and recognition that we have yet to reach a consensus about a settled, stable pattern of service delivery.
19. Secondly, the whole debate is affected (albeit at times invisibly) by profoundly important questions about the economics of law reporting in circumstances in which:
  - (a) there is a large, insatiable appetite amongst consumers of legal services for “free-to-air” services.
  - (b) the availability of popular free-to-air services has a corrosive effect on legal publications that depend on subscription income, or sales, to fund their production.
  - (c) all publishers (whether they offer free-to-air services or fee based services) need to find a viable funding model able to sustain business in the longer term.

20. Thirdly, allowance needs to be made for structural changes in the legal profession, especially since enactment of the *Australia Acts* of 1986, which have seen development of a national legal profession (qualified by recurrent bouts of ambivalence borne of federalism) in which the High Court of Australia has asserted its authority, as the ultimate court of appeal, in a judicial hierarchy that channels legal proceedings to the Court at its apex.
21. Fourthly, there is a continuing need of courts generally to have, conveniently to hand, authoritative statements of the principles of law and practice to be applied in the ordinary conduct of their business.
22. Fifthly, there is a need (not always fully appreciated in the marketplace) to view the law publishing industry as a whole, rather than in a fragmented perspective.

### **AGENTS FOR CONTINUITY AND CHANGE**

23. The idea that “authorised” law reports are reports authorised, or approved, by judges underscores the interest that courts are bound to have in such reports. Authorised reports serve the law by the *authority attributed to them by the courts* in the service of their official conduct of business.
24. Although the concept of an “authorised” law report is being radically challenged by free-to-air reports of judgments (themselves published by judges and, to that extent, authorised by the judges), the idea that there *should* be specially designated “authorised” reports is likely to survive, in some form or another, while ever courts (with the support of executive government) insist that they do, and participants in the litigation process appreciate the importance of them doing so.
25. There is a need to adapt our notions of an “authorised” law report, how such reports are published, and how such reports are funded.
26. All publishers have a continuing interest in a reliable text of judgments, bearing in mind that a feature of “authorised” reports is that they are the subject of a greater degree of editorial review, and correction, than “unauthorised” reports published at less cost and greater speed.
27. This is where large questions lurk in shadows little explored in public: Who is to pay for the extra care taken in the production of authorised reports? What (if any) access should be given (to the edited text of a judgment) to free-to-air law publishers, in particular?

28. The widespread availability of a reliable, if not perfect text of judgments may focus attention on:
  - (a) value added features of law reports, such as headnotes, commentaries and analytical frameworks in the presentation of the text of judgments; and
  - (b) new forms of legal literature, such as an adaptation of the *US Restatements of the Law* series.
29. Optimally, there may need to be an integration of free-to-air judgments and fee-based “authorised” reports to facilitate deployment of authoritative law reports in the conduct of curial proceedings *and* the analysis of Australian law.
30. There may also need to be a strengthening, within the court system and beyond it, of protocols for the citation of judgments by reference to an “authorised” version of a law report wherever such a version exists. Courts can, and do endeavour to address this by the publication of *Practice Notes*. However, particularly in very busy courts at the lower end of the judicial hierarchy, there is not always an ability to regiment litigants or lawyers in the form of reports utilised in the conduct of litigation.
31. Universities, and other bodies, responsible for the provision of legal education also need to address the importance of teaching students of the law about the importance of law reporting and distinctions between different forms of reports available for utilisation.
32. Part of the problem for all educators charged with a need to address these issues is that the economics of maintaining libraries have tended to compel institutions, as well as individuals, to turn away from high-cost subscription services; and towards the free-to-air services which have, as an unintended consequence of their public dissemination, a tendency to undermine the viability of legal literature at one level or another.
33. In delineating the concept of an “authorised” law report, it is important to keep in mind that the publication of the reasons for judgment of a judicial officer necessarily entails an expenditure of resources, the nature and quantum of which are related to the audience to whom the judgment is published, and the purpose sought to be served by publication.
34. Insofar as a judgment is intended to speak only to parties immediately bound by it, nothing more might be called for than an oral delivery of reasons. Insofar as a judgment is intended to speak to a broader community (whether as an incident of “open justice” or as a means of exposition of “law”), more is required. In former

times, and in a smaller community than that which presently resides in Australia, a greater degree of informality could satisfy the needs of the due administration of justice than is the case now. Australian judges, and many administrative officials required to act judicially, are required to invest considerable time (and, at least by implication, resources) in the preparation of formal reasons for decision that are, then, routinely published on websites such as Caselaw.

35. This truth needs to be appreciated because it is central to the economics and operation of the industry of law publishers upon whose operations we depend for the dissemination of law reports. This is true no less for “free-to-air” publishers of website based reports (including Austlii, BarNet and Caselaw) than it is for “commercial” law publishers (including LBC Thomson Reuters, LexisNexis Butterworths, CCH and Federation Press).
36. If we are to maintain the quality and diversity of our legal literature in Australia, we need to ensure that all players, across the spectrum of law publishers, have a viable funding model capable of sustaining their operations over the long term.
37. In our transition to the electronic age, the significance of the concept of an “authorised” law report may have been diminished by the widespread availability of alternative sources of information and the near-extinction of the concept of an “unreported judgment”.
38. However, the function of “authorised” law reports has never been limited solely to publication of the words spoken, or written, by a judge. It has extended, rather, to an *authoritative* statement of the law, or a restatement of the law that requires serious consideration, designed to facilitate the conduct of litigation, and the making of decisions dependent upon an appreciation of legal orthodoxy.
39. Viewed in this light, there is both utility and purpose in a reaffirmation of the role of “authorised” reports in the Australian legal system.
40. The Council of Australian Chief Justices, and the Consultative Council of Australian Law Reporting have both, for their part, recently reaffirmed the importance of “authorised” law reports.
41. The future of “authorised” law reporting in Australia depends upon the extent to which the institutional imperatives of interested parties (including the courts, the legal profession in all its manifestations, law publishers and executive government) can be accommodated. An accommodation is required so as to enable their resources to be marshalled in the service of a vibrant, viable environment for the publication of legal literature generally.

42. Over the past two years or so the Consultative Council of Australian Law Reporting has been engaged in a debate about whether (and, if so, how) this can be brought about. Within this context, and independently, the Council of Law Reporting for New South Wales has invited the profession to make submissions about the future of law reporting.
43. This paper may provide a contribution to that debate, principally by encouraging law librarians to maintain their involvement in the debate.
44. Without pretending to offer predictions about the future of “authorised” law reporting in Australia, but in the hope of encouraging the debate we all have to have, I make the following observations about factors affecting the future of law reporting.

### **AUTHORISED REPORTS**

45. Authorised reports, such as those presently published in the *Commonwealth Law Reports* and the *New South Wales Law Reports*, are likely to remain in the market place for the foreseeable future; but, in common with other publishers of printed material, their publishers are probably suffering a loss of subscription income (and, in the longer term, a loss of capacity to maintain services at the same level and quality) on account of the drift of their audience to free-to-air services. This has necessitated, and will continue to demand, reappraisal of both product and funding models.

### **The Special Place of the CLRs**

46. The *Commonwealth Law Reports* are probably in a special category because they are the authorised reports of the High Court of Australia and, accordingly, the *alpha* and *omega* of Australian case law authority. Whatever might happen to “authorised” reports of the judgments of other Australian courts, a case can be made for publication of the CLRs as a freely accessible service. As it happens, a subscription to the CLRs is expensive to maintain, thereby driving users to reports available (with medium neutral citations) free-to-air.

### **Subscription Income = Product x Price**

47. The economics of producing printed volumes of “authorised reports” are likely, over time and in the face of falling subscription income, to force up the price of each printed volume. This, over time, is likely to drive their audience to the internet.

### **Loose Parts**

48. In an effort to contain costs, publishers might be driven to abandon the system whereby reports are printed, initially, in loose parts and, then, in bound volumes. Subscribers might be limited to bound volumes. Loose parts might become a thing of the past.

### **Bound Volumes**

49. Bound volumes, themselves, might cease to be routinely available. It might be that they are published “on demand”, rather than held available in stocks that need to be maintained.

### **Appellate v First Instance Judgments**

50. Publishers of “authorised” reports might also be driven, by constraints on funding and by the High Court’s current appreciation of the “doctrine of precedent”, to limit their content to pronouncements of the High Court itself, and the judgments of intermediate appellate courts.
51. The High Court has in recent years said that Australian courts are bound to apply considered statements of that Court, whether those statements might be described as *ratio* or “seriously considered” *obiter*. Furthermore, by a direction of the High Court, an earlier judgment of an intermediate court of appeal must be followed by Australian judges, whether or not within that appellate court’s hierarchy, unless that judgment is deemed to be obviously wrong: *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89 at 151-152 [134]-[135]; *Bofinger v Kingsway Group Limited* (2009) 239 CLR 269 at 299 [86]. As has been confirmed by *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, all lines of judicial authority now lead, unequivocally, to the High Court.
52. If I am not mistaken, the editors of the *Queensland Reports* have decided, and the editor of the *New South Wales Law Reports* appears to have decided, to confine their respective series of “authorised” reports substantially to the judgments of local intermediate appellate courts. After all, the High Court has mandated that all judges should attribute “binding” precedential value to the judgments of intermediate appellate courts and, in order to do that, we all need to have a greater appreciation, than we often have had in the past, of what has been decided by appellate courts outside our own state or territory.
53. If the scope of “authorised” reports is increasingly limited to appellate judgments, the effect of that might be to provide opportunities for commercial publishers to develop, even more than they have already, niche markets for specialist reports that include material, first instance judgments.



54. Appellate judgments must, ultimately, provide the more “authoritative” statements of legal principle. However, the day-to-day operation of the law in first instance courts (supplemented by reference to appellate judgments as they become available) might have particular importance for the practising legal profession and individual litigants.

### **“Catch-up” Volumes**

55. Editors of all law reports, not merely those of “authorised” reports, may need, in the current climate, periodically, to review their editorial choices. The “important case” worthy of publication now includes a range of cases that might have been overlooked by an editor exercising prospective judgement and might, in retrospect, be seen to have been “self-selected” by the reliance placed on them by judges, litigation lawyers and litigants in subsequent cases. If “authorised” reports are to maintain their aspiration as authoritative sources of case law they are likely to be required, increasingly, to publish “catch up” volumes from time to time.

### **Fee-for-Case Subscription Models**

56. Falling subscription income for print services may force law publishers generally, and publishers of “authorised” reports specifically, to explore the viability of allowing public access to reports of individual cases, on a fee-for-case basis (and the viability of providing “authorised” case summaries, whether on a free or a fee basis) by adopting a model similar to that of the Incorporated Council of Law Reporting for England and Wales on display on its website ([www.lawreports.co.uk](http://www.lawreports.co.uk)).

### **A National System of Web-based (Authorised) Reports**

57. All these developments, taken jointly and severally, might (and, perhaps, should) compel the development of a “national” system of publishing authorised law reports, at least to the extent of cooperation in the establishment, and maintenance of a single website through which all state and federal “authorised” reports can be accessed.
58. While allowing a full measure of autonomy to each jurisdiction’s administration of law reporting, if the concept of “authorised” reports is to be given full play in Australia’s emergent “national” system of law, a “national” website needs to be seriously considered by everybody.

## **NEW FORMS OF “AUTHORISED” REPORTS**

59. In a world in which a substantially accurate text of most reasons for judgment can be accessed on the web free-to-air, publishers may need to focus increasing attention on the value they add to publicly available information in their reports. This may mean that the concept of a “law report” needs to broaden its horizons beyond the idea of a headnote.
60. Three possibilities come to mind. None of them is without precedent.
61. The first is a form of “case summary” that might be made available to the legal profession, with a reference to a free-to-air version of the text; something in the nature of a headnote published independently of the judgment text.
62. The second is the adoption, in Australia, of a new form of legal treatise, in the form of the United States *Restatement of the Law* series, compiled by editorial teams drawing on all branches of the legal profession, under the supervision of nominees of courts responsible for articulation of case law. The electronic age, may permit an informal system of non-binding “codification” of Australian legal principles (for those who favour codification) able to accommodate a multitude of illustrations of the law by reference to judgments available free-to-air.
63. The third, is a form of popular case summary, with a reference to a publicly available free-to-air text of a judgment, able to be syndicated to newspapers.

## **THE ELECTRONIC AGE**

64. It is, perhaps, a sign of the times that the current generation of Australian lawyers emerging from law school is more familiar with judgments published by *Austlii*, electronically, than with *The Authorised Reports*.
65. The Australasian Legal Information Institute (universally known as “Austlii”) has revolutionised our approach to law reporting. The range of its coverage (Australian and international legislation, caselaw and literature, including historical materials) has made its website a first port of call for many lawyers: [www.austlii.edu.au](http://www.austlii.edu.au).
66. It is, as a first port of call, more famous than the electronic services of government (including Caselaw) upon which it is dependent for its material. The fact that it is available, free-to-air, to anybody with access to the web, anywhere in the world, has endeared it to lawyers and non-lawyers alike.

67. Anecdotal evidence about the extent of its reach can be found, I am sure, in the personal experience of most practising lawyers. It is not uncommon for ordinary citizens – mums and dads rather than corporations staffed by professional administrators – to do their own research these days. “Austlii” rivals “Google” in this world. Professional opinions can be anticipated or second-guessed. The success or otherwise of litigation lawyers can be measured against judgments published on the web. The track record of judges is exposed for critical examination.
68. Austlii is not the only free-to-air service provider of judgments. BarNet is another. Its system of judgment “Alerts”, distributed through the trade name “Jade”, is particularly useful: see [Jade.barnet.com.au](http://Jade.barnet.com.au).
69. The availability of these services, free-to-air, is naturally regarded by consumers of legal services as an unqualified boon.
70. We should pause here long enough to notice the importance of ensuring healthy competition, even in such market as may exist for the provision of free-to-air legal information. On the whole, the community benefits from ensuring that nobody is held captive to one source of information.
71. We need to be conscious not to be so beguiled by short term “access to justice” arguments in favour of free-to-air services that we allow ourselves, in the longer term, to become dependent on such services, centrally controlled, unsupported by a diversity of law publishers, local and international. Access to justice has need of a long term perspective.
72. The “elephant in the room” in discussions about law reporting is, I suspect, the **economics** of law publishing.
73. As far as I am aware, the funding models of both Austlii and BarNet depend, ultimately, on donations and grants. By definition, they do not generate revenue in return for commercial services.
74. It used to be popular to say “there is no such thing as a free lunch”. Nevertheless, we like to imagine that there is such a thing as “free” legal publications. A free-to-air service has to be paid for by somebody. It cannot be viable, in the long term, without a sustainable funding model.
75. Within their own frames of reference, publishers of free-to-air legal information must, inevitably, raise questions about the availability of guarantees of funding. Policy questions probably need, here, to be noticed.

76. Austlii is quite strident in its advocacy for a funding model based upon recurrent government grants designed to cover most, if not all, its costs; that perspective is probably a reflection, in part, of its close association with the university sector. It may prove to be resistant to the idea of a fee-for-service model of service delivery being integrated with its own.
77. Commercial publishers, wholly dependent on a fee-for-service funding models, have a more guarded view of the merits of free-to-air publishers than consumers, from whose view the costs of free-to-air services are hidden.

### **PERSPECTIVES ON THE FUTURE OF AUTHORISED LAW REPORTS**

78. Recognition of that reality brings us back to a closer consideration of the future of “authorised law reports” in Australia. At least three different perspectives need be noticed.
79. First, there is *an economic perspective*. The law reports which are commonly thought in Australia to be our “authorised reports” (including the *Commonwealth Law Reports* and the *New South Wales Law Reports*) are not, and have never been, distributed free of charge at the time of their first publication. Their publication is generally dependent upon the availability of subscription revenue.
80. The common experience of legal publishers, however much they may need to be circumspect about disclosure of their financial models, is that the availability of free-to-air law reports undercuts their subscription base as increasing numbers of their audience turn away from “user pays” to use of free-to-air services.
81. Unless some viable means of funding other than subscriptions is found for financing authorised reports on an ongoing basis, or unless “government” resigns itself to picking up the tab from consolidated revenue, authorised reports as hitherto known may in the long term suffer existential challenges from free-to-air publishers of law reports.
82. Secondly, there is *the perspective of jurisprudence*. The widespread availability of free-to-air judgments has unintended consequences associated with “information overload”. There is no necessary identity between the content of free-to-air judgments and the content of “authorised reports”. Considerable resources (and, by necessary implication, money) are invested in the process of editing judgments selected for publication in “authorised” law reports. Quality control is important, and desirable, if such reports are to be accorded a degree of precedential value not attributed to run-of-the-mill judgments.

83. There is, at least, a perception that the apparently unlimited availability of judgments free-to-air produces hidden costs in the provision of legal services, the conduct of litigation and the writing of judgments. More “information” has to be reviewed (eg, to ensure, in the name of procedural fairness, that all parties’ arguments are duly considered) with decreasing marginal utility attaching to cumulative references to authority . The availability of “authorised reports” selected by an editor of established reputation and disseminated as worthy of precedential value, is an investment of resources likely to produce substantial benefits, albeit not readily identifiable.
84. Thirdly, there is *the related perspective of legal literature*. The introduction of printed law reports in the 15<sup>th</sup> and 16<sup>th</sup> centuries affected the development of English law in ways not readily perceptible to us, here in Australia, today; for example, systemised principles of equity began to emerge from the availability of better information about judicial decision making. The increasingly widespread availability of legal texts in the 19<sup>th</sup> century contributed to a change in legal thinking from action-based practice models to academic models articulated in terms of abstract principles.
85. Some seismic shift can be expected, if not predicted, as a consequence of the electronic age. My guess is that it will reinforce the tendency to think about dispute resolution in terms of “case management” rather than an adversarial trial.
86. For my part, I suspect that we may move, not necessarily away from “authorised reports”, but towards the idea that principles of law might be publicly disseminated in an “authorised” publication representing a cross between a legislative code and a judgment.
87. A year or so ago the then Commonwealth Attorney-General, Nicola Roxon, set hares running by suggesting that the Australian law of contract should be “codified”. Insofar as she may have intended codification in the form of in legislation, the proposal was bound to attract opposition. A more viable, less confronting alternative outcome, may be the introduction into the Australian legal system of something similar to the American volumes of “Restatements” of the law on particular topics. That form of publication might be a means of adding certainty to the law whilst at the same time accommodating the widespread availability of judgments.
88. It could be published by a public authority (such as, or along organisation lines similar to those of, the Council of Law Reporting for New South Wales) with participation of all branches of the legal profession and under the supervision, ultimately, of an editor or editors approved by the Council of Australian Chief Justices or another custodian of the law.

## **CONCLUSION**

89. Major determinants in the future of law reporting include our need to live with, if not harness, the internet culture of modern times, based upon assumptions about freedom of information without unnecessary exposure to the costs of collating, storing and presenting that information. Viable funding models, for a diversity of publishers, need to be developed for long term sustainability.
90. That requires compromises and cooperation, between the public and private sectors, and between champions of free-to-air services and exponents of user-pays services. The internet provides opportunities for different types of services to be integrated, for example, by the use of links and the provision of “base information” free-to-air, with directions for access to “value added”, user pays services.
91. There are signs that a level of cooperation already exists between different types of service providers utilising the internet. Some of that cooperation is, however, more apparent than real because it is based upon the expiry of copyright in printed law reports.
92. Nevertheless, there are positive signs of potential for cooperation.
93. Ultimately, I suspect, it make take the encouragement of executive government to bring greater levels of cooperation to the fore.
94. Could it not be possible, for example, to have a single website through which access might be had to a full range of legal information, some free-to-air, some not; the full range of “reported” Australian case law, including “authorised” reports, current and historical?
95. By means such as these, it might be possible to reap the benefits of free-to-air legal publishing while at the same time minimising the corrosive effect of that form of publishing on the work of those (such as publishers of authorised reports) who depend upon subscription income to sustain their operations, and courts, the work of which can be rendered less efficient by the unfocussed, information overload that not uncommonly attends citation of authority beyond authorised reports.

**Geoff Lindsay**

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