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THE UNFOLDING FUTURE OF AUTHORISED LAW REPORTING IN AUSTRALIA

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INTRODUCTION

1. This paper supplements an earlier paper, entitled “The Future of Authorised Law Reporting in Australia”, delivered to a lunch time meeting of the Australian Law Librarians Association, held in the common room of the NSW Bar Association on 11 June 2013, and since published in a revised format (dated 24 June 2013) on the website of the Supreme Court of NSW.
2. Discussion of the future of authorised law reporting in Australia very quickly engages questions of broader significance, including:
 - (a) the role of courts, and the nature of “judge made” law, in the administration of justice in Australia;
 - (b) the development of law in a national (federal) legal system;
 - (c) the role of technology in the administration of law, legal education and access to justice;
 - (d) the need to foster strength and diversity in Australian legal literature; and
 - (e) the economics of legal literature.
3. We live in a dynamic environment in which, even if our aspiration were to “stay the same”, “change” must be accommodated.
4. This paper, in the broader context of the earlier one, focuses on three particular topics worthy of debate:
 - (a) First, whether (and, if so, in what form) there should be a “national website” for authorised law reports along the lines of the website of the Incorporated Council of Law Reporting for England and Wales.

- (b) Secondly, whether there would be utility in developing an Australian “Restatement of the Law” project similar to the United States model.
- (c) Thirdly, whether Australian newspapers can, and should, be encouraged to publish “law reports” incorporating case summaries with links to full reports of judgments.

THE CONCEPT OF AN “AUTHORISED” LAW REPORT

- 5. The widespread availability, free to air, of “judgments” of Australian courts and tribunals challenges any earlier, settled understanding of the concept of an “authorised” law report.
- 6. If the concept of an authorised law report has meant anything to Australian lawyers in the past it has, one suspects, meant reports of judgments (incorporating a headnote) approved by judges.
- 7. That idea is under challenge because Australia’s judges (and others) commonly publish their own “Reasons for Decision” on one website or another. Not uncommonly, such Reasons incorporate some form of summary of the decision that might, in another age, have been characterised as a headnote.
- 8. If the concept of an authorised law report is to retain some meaning, it must involve something more than simply approval by judges. That “something” is, generally, to be found in two features: first, an authoritative selection of cases by an editor of acknowledged expertise; and, secondly, the presence of a value-added feature such as an informative headnote, coupled with an authoritative, edited text. The idea of an authoritative publication is central.
- 9. Each of these suggested features can make an important contribution to the accuracy, and authority, of any report of the law; but each costs money to produce and, that being so, fundamental questions arise about how (and by whom) law reports are to be funded.

PARAMETERS OF CURRENT DEBATE ABOUT “AUTHORISED” LAW REPORTS

- 10. There appear to be five factors that serve as parameters for current debate about the present state, and future prospects, of Australian law reporting.
- 11. First, there is a general recognition of a shift in information technology from the age of print to an electronic age without, as yet, a settled, stable pattern of service delivery having been established.

12. Secondly, there are profoundly important, but often invisible, questions about the economics of law reporting in circumstances in which:
 - 12.1 there is a large, insatiable appetite amongst consumers of legal services for free-to-air services.
 - 12.2 the availability of popular free-to-air services has a corrosive effect on legal publishers who depend on subscription income, or sales, to fund their production.
 - 12.3 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.
13. Thirdly, structural changes in the legal profession, especially since enactment of the *Australia Acts* of 1986, have seen development of a national legal profession (qualified by our federal system of government) in which the High Court of Australia has asserted its authority as the ultimate court of appeal in a judicial hierarchy in which all lines of authority lead to it.
14. Fourthly, courts and tribunals generally have a continuing need to have, conveniently to hand, authoritative statements of the principles of law and practice to be applied in the ordinary conduct of their business.
15. Fifthly, there is a need to recognise the law publishing industry as a whole, rather than treatment of it in too narrow a perspective.
16. 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 courts in the service of an efficient conduct of business. The availability of law reports that can be taken to be authoritative reduces the “transaction costs” of legal research about particular problems.
17. Although the concept of authorised reports has been, and is being, radically challenged by free-to-air reports of judgments (themselves published by judges, and to that extent, “authorised”) across a broad spectrum, 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.
18. There is a need to adapt our notions of “authorised” law reports, how they are published, and how they are funded.

19. All publishers, and consumers, of law reports have a continuing interest in the availability of a reliable text of judgments, bearing in mind that a feature of “authorised” reports has long been that they are the subject of a greater degree of editorial review, and correction, than “unauthorised” reports published at less cost and with greater speed.
20. The widespread availability of a reliable, if not perfect, text of judgments may focus attention on: first, value added features such as headnotes, commentaries and analytical frameworks in the presentation of texts; and, secondly, new forms of texts, such as a non-legislative form of a Restatement of the Law.
21. Optimally, there may need to be an integration of free-to-air judgments and fee-based reports of judgments to facilitate deployment of authorised reports.

A NATIONAL WEBSITE FOR AUTHORISED REPORTS?

22. The Consultative Council of Australian Law Reporting (under the chairmanship of Justice Stephen Rares of the Federal Court of Australia) has taken a lead in inviting comments on the idea that there should be a “national” system of publishing law reports, at least to the extent of co-operation in the establishment, and maintenance, of a single website (similar to that maintained by the Incorporated Council of Law Reporting for England and Wales) through which all state and federal “authorised” reports can be accessed.
23. If there is to be such a website it needs to accommodate a full measure of autonomy in each Australian jurisdiction’s administration of law reporting. Modern technology, in which each jurisdiction’s reports can be made available in website “links”, may facilitate this in ways not possible in the age of print.
24. If it is ultimately to be successful, any proposal brought forward for the development of a national website probably needs take into account: (a) the need, now or in the future, to include all law publishers; (b) a strong belief within the legal profession that any national website should be under public control, ultimately overseen by a representative body such as the Council of Australian Chief Justices; (c) the profession’s strong apprehension that the commercial publishers tend to use their position to take monopoly profits; (d) the need to have a reasonable pricing regime for access to law reports that accommodates both access to justice considerations and the need for stable, long term funding of a viable law publishing industry; and (e) the possibility of establishing a public fund to assist the publication of important, but (in a market the size of Australia) uncommercial legal literature.

AN AUSTRALIAN “RESTATEMENT OF THE LAW” PROJECT?

25. In an electronic age, in which the administration of “law” depends upon engagement of a wide range of participants (not limited to parliaments, courts or executive government), and in which there is an abundance of published “Reasons for Decision” in particular cases, there may be utility in the development of an authoritative, non-legislative statement of the law, in propositional form, with the means of accessing a range of diverse commentaries on the law.
26. The availability of a text incorporating summaries of the law, in propositional form, could (with the benefit of web based systems of publication) reconcile: (a) the competing predispositions of those with a Benthamite urge for codification (on the one hand) and (on the other hand) those with a Blackstonian preference for development of the law by an accretion of judicial decision making; and (b) the need, in solving most legal problems, to take into account an ever changing mix of legislation and case law.
27. If any proposal for such a project were to be viable, it would need to be a collaborative effort between all branches of the legal profession (including the judiciary, executive government, the practising profession and university-based academics).

CAN NEWSPAPER “LAW REPORTS” BE REVITALISED?

28. Lawyers in colonial Australia were probably better served by “law reports” in newspapers than we are now.
29. In those days, newspaper reports of decisions were sometimes the best, or only, available reports of judgments.
30. With the development of systematically published law reports, lawyers became less dependent upon newspaper reports of judgments and, at about the same time, fewer practising lawyers moonlighted as journalists.
31. In common experience, today, members of the public who consult lawyers about private problems not uncommonly have undertaken their own research of the law, often *via* Austlii.
32. The general population appears to have an appetite for reading the Reasons for Judgment, of courts and tribunals across the spectrum, for interest, edification or the conduct of business generally.
33. Nevertheless, Australian newspapers appear to have no interest in cross-referencing published articles to electronically available law reports or in the publication of case summaries linked to full reports of particular cases. Their readership is less informed for that.

34. This is an idea that should, perhaps, be taken up by our newspaper editors, but which can probably only be encouraged, and not in any way mandated, by the legal community.

CONCLUSION

35. The topics canvassed in this paper, and the earlier one delivered to the ALLA, are ripe for debate.
36. Minds may differ about the questions to be asked, and available answers, but the need for both questions and answers is a function of changes forced upon us by technological change.

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