

THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

LAUNCH OF THE ELECTRONIC STATE REPORTS (NEW SOUTH WALES)

28 JUNE 2017*

1. Good evening everyone, it is a great pleasure to be here tonight to mark an important milestone in law reporting in this State and in the publication and dissemination of judgments of this Court. May I offer my congratulations to everyone who has contributed to this worthwhile project.
2. The State Reports are the longest continuous series of authorised reports to publish judgments of the New South Wales Supreme Court, representing the period from 1900 to 1970. The digitisation of the State Reports, realised by the collaborative efforts of Thomson Reuters and the Council of Law Reporting for NSW, represents the very first time that the full series, including those volumes from 1951-1970, will be available to the public and profession online.
3. As the digital natives become the next generation of legal researchers, we see print subscriptions decline, firm libraries diminish in size and the old leather volumes of law reports regrettably left to disintegrate on dusty shelves. In such an environment, the notion of “access” to legal materials has taken on a new meaning; while the physical records may survive, much of their content is lost to the newest waves of lawyers. So long as the State Reports exist only in hardcopy, 70 years’ worth of thoughtful judgment writing emanating from our superior courts and delivered through a process of careful curation and editing remains untapped. For this reason, the project being launched today is an incredibly valuable one.
4. But access to legal materials is only the beginning of a series of changes that were effected by the transition to the digital environment. Gone are the days when cross-referencing between cases involved gluing tiny stickers on the pages of our law reports. Now, finding relevant cases is a question of being literate in “Boolean”, something I am told is a search technique but sounds suspiciously like a Star Trek dialect. The fact that the complete text of the State Reports will now be fully searchable enables researchers to mine those resources for

* I express thanks to my Research Director, Ms Bronte Lambourne, for her assistance in the preparation of this address.

valuable nuggets of authority, bringing the reports into line with our latest methods of legal research. Equally, as we strive towards a paperless courtroom, the demand for softcopy reports, viewable on iPads and laptops, will rise. We cannot let valuable historical resources be left behind in the wake of technological change.

5. In bringing the decisions of the State Reports into greater circulation, this project has the real capacity to influence and enhance our common law. The doctrine of precedent that characterises the common law relies on knowledge of, and access to, those precedents. This project has the important role of bringing forgotten judgments back into the light. One judge who was particularly influential in the development of jurisprudence in this State was Chief Justice Frederick Jordan. As the holder of that office from 1934 to 1949, his surviving judgments are contained almost exclusively in the State Reports and Weekly Notes. To indicate the esteem in which Chief Justice Jordan's judgments were held, his successor, Sir Kenneth Street, described how "his capacity to perceive the essential and discard the irrelevant, his talent for luminous exposition, his ability to clothe his thoughts in apt and felicitous language and to express himself with clarity and precision, have enabled him to make a contribution of inestimable value to the legal fabric of this State".¹ The electronic publication of his selected judgments will ensure that this contribution will not soon be forgotten.
6. To provide just a few examples, in *Ex parte Patience*,² in volume 40 of the reports, Chief Justice Jordan expounded the authoritative basis upon which, at common law, a solicitor is entitled to costs and disbursements from money recovered from a client; in *Ex Parte Mullen*,³ in volume 35, he contributed significantly to administrative law jurisprudence on jurisdictional facts and the prerogative writs; in *Page v Commonwealth Life Assurance*,⁴ in volume 36, Chief Justice Jordan traced the development of insolvency law since the Statute of Elizabeth, elucidating the interaction between policy, statute and judicial rules in insolvency law; and in *R v Ward*,⁵ in volume 38, he clarified the elements of the common law crime of larceny.
7. In *R v Geddes*,⁶ Chief Justice Jordan famously described the reality of the sentencing process, a description which Justice McHugh in

¹ J M Bennett, *Portraits of the Chief Justices of New South Wales 1824-1977* (John Ferguson Pty Ltd, 1977) 45.

² (1940) 40 SR (NSW) 96.

³ (1935) 35 SR (NSW) 289.

⁴ (1935) 36 SR (NSW) 85.

⁵ (1938) 38 SR (NSW) 308.

⁶ (1936) 36 SR (NSW) 554.

Markarian v The Queen claimed “has never been bettered and probably never been equalled”.⁷ He continued by noting: “with the passage of time, it is no longer cited as frequently as it once was. But the whole judgment repays careful study”. The same may be said of his masterful analysis of the question of whether a term in a contract is an essential or non-essential term in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*,⁸ of the rights and obligations of parties subject to a subpoena to produce documents in *Commissioner for Railways v Small*⁹ and his analysis of the rights of parties arising out of a contract supported by consideration which is partly legal and partly illegal in *McFarlane v Daniell*,¹⁰ all of which are to be found in volume 38 of the State Reports. These cases also are not given the attention they deserve. No doubt one of the reasons for this growing neglect is that the judgments have not been readily accessible or brought to the attention of legal researchers in database searches, a state of affairs that is thankfully about to change.

8. Finally, our system of precedent necessitates an overlap between the lawyer, the historian and the archivist. The digitisation of the State Reports represents not only a boon to legal research and scholarship but also the preservation of an important historical resource. The years represented in the State Reports encompass two world wars, they reveal the challenges faced by a Supreme Court in times of national crisis when the institution was forced to scale back and emergency legislation and regulations had to be interpreted and enforced under great pressures. The beginning of the period also documents an interesting and formative time for this State after federation as it settled into its new place in the legal and federal hierarchy.
9. A project like this does not get realised without a lot of work from a lot of people. To all the individuals who have spent weeks verifying and cross-checking digital and hardcopy versions of the reports, reformatting judgments and linking these cases to existing materials on the database – thank you. You have done a great service to legal research in this State and country and to the administration of justice generally.
10. It is with great pleasure that I officially launch the electronic versions of all 70 volumes of the New South Wales State Reports.

⁷ (2005) 228 CLR 357, 383 [65].

⁸ (1938) 38 SR (NSW) 632.

⁹ (1938) 38 SR (NSW) 564.

¹⁰ (1938) 38 SR (NSW) 337.