THE HON T F BATHURST

CHIEF JUSTICE OF NEW SOUTH WALES

OPENING ADDRESS

THE FUTURE OF LAW REPORTING IN AUSTRALIA FORUM 2016

FRIDAY 3 JUNE 2016[*]

1. Good morning everyone. It is a pleasure to give some opening remarks on the future of law reporting in Australia. I must admit I was somewhat nervous to speak in front of a gathering of legal editors and publishers – my main experience with the editors of law reports is when I receive that inevitable letter gently informing me that once again my judgment is littered with grammatical mistakes and syntactical nonsense. Sir Frederick Pollock, one of the most influential editors of the English Law Reports, is claimed to have told his reporters "laying down the law is in the hands of the King's judges … but it is our business to see that their decisions … are presented to the profession in clear and intelligible form and in good English".[1] So it seems I must thank you for cutting through the inscrutability of judges, but kindly ask that you have mercy on my grammar today.

2. The focus of this forum is forward-looking: to pre-empt the challenges that legal reporting will face and promote discussion on the most appropriate solutions for tackling them. One of the central challenges facing the future of law reporting is how best to reconcile the rise of 'free-to-air' databases with fee-based, value-added reports. But in dealing with this question, it is important that we see free-to-air databases and authorised law reports not in competition, but as complementary and mutually dependent services.

3. Lord Denning recalled in his memoir an experience he had as a junior at the bar, long before the widespread availability of medium neutral decisions. In it he recorded his admittedly undeserved success in the case

---

[*] I express thanks to my Judicial Clerk, Ms Bronte Lambourne, for her assistance in the preparation of this address.

[1] See Michael Bryan, "The modern history of law reporting" (2012) (11) *University of Melbourne Collections* 32, 35.

of *L'Estrange v Graucob*,[2] where he managed to convince the Court to save an insurance company from liability on the basis of a readily used but somewhat underhand exclusion clause. Not letting his unmerited victory go to waste, he wrote: "…the reporter was wise. He didn't think much of it. He didn't record it in the Law Reports. But my Company had it privately printed: and I went round the County Courts of England winning case after case most unrighteously for this Company".[3]

4. Unfortunately for anyone attempting to employ Lord Denning's tactics these days, the job of providing access to judgments is no longer reserved to law reports and legal publishers. And for good reason, free public access to the decisions of the courts is vital for holding the judiciary to account and ensuring that the law is not curtained-off from those outside the profession. Databases like Austlii and those run through court websites are also valuable for plugging the time gap that inevitably occurs between delivery of judgment and reporting, and for ensuring that any cases that fall through the cracks or have a latent significance are not lost to history.

5. But just as 'access' should not be the domain of the law reports nor should 'selection' be left to individual judges – one can only imagine the number of "important" decisions we would have if judges were left to decide the significance of their own cases.

6. The careful selection of judgments predicted to hold important precedential value is one of the crucial roles of the authorised law reports and a reason why they remain the preferred judgments for citation in court. Not every decision is worthy of being cited before the court, indeed if our system is working properly, the majority of cases will simply and mundanely apply the law, rather than modifying or extending it. In the course of lobbying for the introduction of authorised law reports in England, Nathaniel Lindley QC famously proposed four principles of reportability, stating that the only decisions which should be reported are those "which introduce or appear to introduce a new principle or rule; or which materially modify an existing

[2] [1934] 2 KB 394.
[3] Rt Hon Lord Denning, *The Family Story* (Butterworths, 1981) 99.

principle or rule; or which settle or tend to settle a question on which the law is doubtful; or which for any other reason are peculiarly instructive."[4] While of course I think that every decision I write is "peculiarly instructive", I'm willing to defer to the editors in this respect.

7. As our body of case law grows exponentially, many have warned of a "crisis of volume" where too much information proves just as paralysing as too little.[5] The editorial teams of the various authorised law reports strike a delicate balance as they curate and preserve the leading decisions of Australia's superior courts, rescuing them from being drowned out in a sea of trivial authority.

8. But the evolution of case law from the finite volumes of hardcopy editions to the limitless expanses of the internet has also brought many wonderful benefits. For one, the chances of me – or more accurately my tipstaff – sustaining a fatal injury from a tumble down the book ladders in my chambers have greatly diminished. For another, her dry cleaners no longer have to deal with the stubborn stains of disintegrating leather that powder her jacket whenever she has to dislodge an early 20th century law report.

9. But in all seriousness, online databases have radically enhanced lawyers' interaction with legal sources. Gone are the days where we would rely on intricate paper-based systems of cross-referencing, where tables were blanketed with books open to cases each referring to one another and where the printers could hardly keep up with the rate of repealed legislation. The logistics of locating legal materials and establishing the internal relationships between them has been greatly improved thanks to the technological advances of legal databases.

10. It is the rapid and unrelenting rise in technology that prompts legal publishers to continuously grow and adapt. In this spirit, today we are set

---

[4] Nathaniel Lindley, 'The history of the law reports' (1885) 1 *Law Quarterly Review* 137, 143.
[5] See eg, Joshua R Mandell, "Trees that Fall in the Forest: The Precedential Effect of Unpublished Opinions" (2001) 34 *Loyola of Los Angeles Law Review* 1255, 1261; Robin Widdison, "New Perspectives in Legal Information Retrieval" (2002) 10(1) *International Journal of Law and Information Technology* 41, 48.

to hear some ideas on new publishing and funding models which seek to strike that elusive balance between ease of access and economic viability.

11. While economic viability is always a necessary consideration, the more we see integration between publishers and between free and fee-based services, the more rich our legal reporting landscape will become. I'm heartened to see that this morning's discussion comprises topics on interlinking between databases and the use of parallel citations – measures which are sure to enhance interaction with case law for both the public and the profession.

12. I thank you for inviting me to speak at this event and look forward to what promises to be an engaging and fruitful discussion.