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Australasian Legal Information Institute

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AustLII ARC Industry Linkage Research Project

'Authority and integrity of primary legal sources'

Project Summary

Introduction

In 2013 researchers associated with AustLII were successful in receiving an Australian Research Council (ARC) funded Industry Linkage grant¹ to reconsider and aim to improve the authority and integrity of primary legal materials (cases, legislation and treaties) in the light of technological changes. This project is investigating and aiming to develop new best practices (policy, standards, and technical) suited to the online environment, from both national and international perspectives.

AustLII's industry partners in this project include:

- The High Court of Australia
- Family Court of Australia
- Federal Circuit Court
- Victorian Supreme Court Library
- Department of Foreign Affairs and Trade
- Office of the Queensland Parliamentary Counsel
- Office of the Chief Parliamentary Counsel of Victoria

The Chief Investigators are drawn from AustLII's Co-Directors, the Industry Partners and academic experts including Professor Jill Hunter (UNSW Australia), Professor Anita Stuhmcke (University of Technology Sydney) and Professor Dan Svantesson (Bond University).

Background

All users of the legal system need to be able to obtain copies of primary legal materials (decisions, legislation and treaties) that are 'reliable' in two senses: the copy is authoritative (designated as a version acceptable for many purposes including admissibility in court); and the copy has authenticity and integrity (can be demonstrated to be unchanged from the version provided by the official source of such copies).

¹ The project's formal title is "Re-inventing authority and integrity of primary legal sources for the online world, using free-access to make the legal system more accessible, efficient and just."

Legislation, rules of particular courts and the practices of courts and tribunals affect these issues, usually by legal presumptions concerning when copies are authoritative or authentic. The two issues intersect: provisions and procedures which make copies authoritative also provide means of demonstrating that they are authentic.

The previous methods of providing authority and authenticity of all categories of primary legal materials have become inadequate to the needs of the legal system over the last 20 years, primarily due to three related developments:

- (i) the need for official sources to provide legal materials via the Internet;
- (ii) the availability of almost all such materials for free access; and
- (iii) the reliance by many users on online legal information provided by free access re-publishers such as AustLII.

The availability of primary legal materials through the Internet over the last 20 years has caused previous systems of authority and integrity to show increasing strain or even to break down. They need to be reconsidered and may need to be re-invented.

Aims

The principal aims of this research are:

- (i) To determine how the advantages of the historical system of authorised reports of case-law can best be:
 - a. recovered in the radically different environment of ubiquitous Internet availability of all case-law; and
 - b. reconciled with the advantages of free-access Internet availability.
- (ii) To determine how courts and tribunals outside the existing system of authorised reports can best ensure that their decisions published via the Internet have authority and integrity, including when republished under appropriate conditions.
- (iii) To test and validate with one or more of these courts and tribunals the most appropriate means of achieving these aims.
- (iv) In all of the above, the development of best practices is a combination of policy research and development of standards, and development of the best technical means (digital signatures, watermarks etc.) most suited to the particular requirements of legal authority and the legal environment in which the documents are used.

‘Unreported’ judgments – the 95%+ of case-law available

Australia has 120 Courts and Tribunals which publish their decisions via the Internet, including via AustLII. In 2013, there were 35,469 new decisions published via AustLII.

The decisions of only ten Courts or Tribunals are published systematically in printed series of law reports dedicated to the court or tribunal. Less than 5% of all decisions provided to AustLII are included in such reports. For those superior Courts which have authorised reports, those reports include (on average) less than 10% of the decisions published by the Court via the Internet, and as few as 2%.

Copies of decisions of Australian Courts and Tribunals that are published solely via the Internet (the 95%+ of all decisions), and particularly those published via AustLII, are

routinely provided to Courts and Tribunals during litigation. Those decisions are cited constantly by the Courts and Tribunals that publish them, and by other Courts and Tribunals. They constitute by far the majority of all decisions cited by Australian Courts and Tribunals.

It is, therefore, in the interests of all parties concerned that the format of decisions provided to Courts and Tribunals should be as consistent and reliable as possible. This will serve the interests of the Courts and Tribunals publishing the decisions, the other Courts and Tribunals that receive copies of such decisions during litigation, the counsel and other lawyers involved in litigation, and the clients and self-represented litigants who need guidance concerning which copies of decisions are acceptable.

Progress to date: ‘Signed by AustLII’ decisions

AustLII has released a digitally signed and watermarked (“signed by AustLII”) version of most of the judgments that it holds (around 600,000 cases, most of which do not appear in any reported series).

This additional format for downloading Court and Tribunal decisions is intended to further strengthen the confidence which users and Courts and Tribunals can have in decisions obtained from AustLII. AustLII is encouraging Courts and Tribunals to formally “accept” this version of a decision as being able to be handed up in court.

The ‘Signed by AustLII’ format:

- is a PDF/A document which is an ISO-standardised version of the Portable Document Format (PDF) specialized for the digital preservation of electronic documents;
- is available as a download option for all decisions of Courts and Tribunals available from AustLII which are based on a Word or RTF document that has been provided by the Court or Tribunal to AustLII;
- has been digitally signed by AustLII (includes a digital certificate that can be independently verified);
- has an AustLII watermark background to make it more visually obvious that it is complete and unaltered;
- is date-stamped as to when it was obtained from AustLII;
- has a link which downloads a new copy of the decision from AustLII, to enable verification that it is the current copy of the decision, [may also be referred to as an ‘updating’ facility]; and
- where a Court or Tribunal has advised AustLII that the ‘Signed by AustLII’ format of their decisions is acceptable to be presented in their Court or Tribunal, the decision will also state that in its header, with a link to a Practice Direction or similar source.

AustLII has also drafted suggested clauses for practice directions concerning decision citations and formats, for consideration by Courts and Tribunals that wish to accept copies of decisions in the ‘Signed by AustLII’ format (whether of their own Court or Tribunal, or of others).

Ongoing discussions: 'Authorised' Reports

The utility of authorised reports in Australia is declining. The selectivity of cases appearing in the authorised reports has reducing alignment with the cases that are being used and cited. For some courts with authorised series, less than 10% of the most 50 cited cases from recent years appear in the authorised series.

From AustLII's perspective, the fact that authorised reports are commercial products presents a problem for free access to law. The reason is that when a judgment is first released, it is freely available and the goal of free access has been achieved. This is subsequently undone when the authorised version is made available, because the most authoritative and final version of the decision then becomes a commercial product. The final versions of the text of many of the most important decisions of our most important courts are therefore not available for free access.

AustLII, along with other legal publishers, has been involved in a series of meetings with the Consultative Council of Australian Law Reporting. AustLII's position is that the final version of decisions in authorised reports should be made available to the Court for that Court to then make available as it sees fit to other publishers such as AustLII. This does not include headnotes. This would ensure that the most-accessed versions of these important decisions are also the corrected final versions.

Some Councils of Law Reporting would like AustLII to link to the authorised report versions of their decisions. AustLII's position is that, provided that the Courts receive the final versions of their judgments (as above), it will negotiate with the Councils to achieve this (on a commercial basis). Discussions on these matters are continuing.

Conclusion

AustLII believes and hopes that the provision of the new 'Signed by AustLII' format, and the eventual provision of the final text of decisions in authorised reports to the public for free access, will further enhance free access to case law in Australia.

Dr Philip Chung, Executive Director
Professor Andrew Mowbray, Co-Director
Professor Graham Greenleaf, Co-Director

2 March 2015

Appendix

Example of the features of the 'Signed by AustLII' format

Certified by AustLII <ccdsadmin@austlii.edu.au>, AustLII, certificate issued by Entrust CA for Adobe. Signature Panel

This shows that the document has been digitally signed by AustLII.

This digital certificate appears when the document is opened in Adobe Acrobat.

if accepted by the court this links to the Practice Direction or other documentation from the court.

Signed by AustLII

Accepted by the Court

Woolworths Limited v Smithfield Hotel Pty Ltd [2012] SALC 57

LICENSING COURT OF SOUTH AUSTRALIA

WOOLWORTHS LIMITED

v

SMITHFIELD HOTEL PTY LTD

JURISDICTION:

FILE NO: 4958 of 2011

HEARING DATE: 22, 23, 24 February and 23 March 2012

JUDGMENT OF: His Honour Judge B P Gilchrist

DELIVERED ON: 15 May 2012

Application for a retail liquor merchant's licence - Whether the licensed premises that already exist in the vicinity of the proposed facility are adequately catering for the public demand for take away liquor - Whether in the exercise of the court's discretion the application should be refused - Held that the applicant has satisfied the prerequisites for the grant of a retail liquor licence for the proposed facility - Held that the public interest does not require the refusal of the application in the exercise of the court's discretion - Ss 53 and 58 Liquor Licensing Act 1997

Nepeor v Liquor Licensing Commission [1987] 46 SASR 205
Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern (2000) 76 SASR 290
Cufone v Harvey (1986) 40 SASR 261
Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd and anor (2002) 81 SASR 337

REPRESENTATION:

Counsel:
 Applicant: Mr S Walsh QC
 Respondent: Mr J Firth and Mr J Ryan

Solicitors:
 Applicant: Clelands
 Respondent: Talbot Olivier Lawyers

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