

## Medium and Vendor Neutral: A Comparison of Unreported Decisions From AustLII, Butterworths Online, LBC Online and SCALEplus

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As courts impose heavier burdens of up to dateness and comprehensiveness upon lawyers, so that they are required to keep abreast of the law (and not to ride through life forever on their law school notes) it is just as well that AustLII is there. Any lawyer today who works with textbooks that may be two, three or more years out of date does so at a great professional peril. The most efficient way to guard against this is available at the lawyer's fingertips with AustLII. Lawyers – even older lawyers – must learn to use the facility if only out of self-protection.<sup>1</sup>

Online access to unreported judgments from Australian courts has come a long way in a short time. With the launch of LBC Online in July 1999 there are now four comprehensive collections of unreported decisions available to the legal community via the Internet.<sup>2</sup> The AustLII and SCALEplus collections are free while the Butterworths and LBC services are subscription services. How do the services differ? And what exactly are users getting from their Butterworths and LBC subscriptions that they could not get from AustLII or SCALEplus?

Of late, and with some regularity, law students have presented at the reference desk with puzzled expressions asking for little known law reports. Where do I find a case cited as HCA? And what does the abbreviation VSCA stand for? My colleagues have searched in vain in Colin Fong's *Australian and New Zealand Legal Abbreviations* for guidance, but without success. (To be fair to my colleagues, the librarians rostered at the reference desk have specialisations in areas other than law, and have only a passing interest in matters legal.)

In these days of medium-neutral citations, what looks very much like a reported decision may, in fact, be an unreported decision. Gone are the vital clues in a citation pointing clearly to an unreported decision, and it has all happened so rapidly. Nemes and Coss, in their book *Effective Legal Research* included the following advice for student authors, in relation to unreported cases:

Always include the word 'unreported' in the reference, as well as names of parties, name of judge and/or court, date of judgment [and] the court number (if available).<sup>3</sup>

<sup>1</sup> Hon Justice Michael Kirby "Free The Law – Beyond The Dark Chaos" Opening address to the AustLII Law Via The Internet '99 Conference Law School, UTS, Sydney, 22 July 1999 [www.austlii.edu.au/au/other/col/1999/4/05.html](http://www.austlii.edu.au/au/other/col/1999/4/05.html)

<sup>2</sup> AustLII ([www.austlii.edu.au](http://www.austlii.edu.au)); SCALEplus ([scaleplus.law.gov.au](http://scaleplus.law.gov.au)); Butterworths Online ([online.butterworths.com.au](http://online.butterworths.com.au)); LBC Online ([www.online.lbc.com.au](http://www.online.lbc.com.au))

<sup>3</sup> Nemes, I and Coss, G *Effective Legal Research* Sydney: Butterworths. 1998 at p 22

Rapidly, however, the distinction in citing current cases (between reported and unreported decisions) is disappearing. And there seems to be less emphasis in some quarters on establishing if and when a decision was reported.

Reproduced in Table 1 are some of the most commonly cited 'new' abbreviations; this is an extract from a more complete table found in Olsson's recently published *Guide to Uniform Production of Judgments*<sup>4</sup> ('the Guide'). Table 1 also includes some abbreviations not listed in the Guide but which appear to have been adopted taking the structure proposed in the Guide as a model. The practice of separating supreme court decisions from court of appeal decisions seems to have been widely adopted.

<i>Abbreviation</i>	<i>Court</i>
ACTSC	Supreme Court of the ACT
FamCA	Family Court of Australia
FCA	Federal Court of Australia
HCA	High Court of Australia
NSWCA	Supreme Court of New South Wales Court of Appeal
NSWCCA	NSW Court of Criminal Appeal
NSWSC	Supreme Court of New South Wales
NISC	Supreme Court of the Northern Territory
QCA	Supreme Court of Queensland Court of Appeal
QSC	Supreme Court of Queensland
SASC	Supreme Court of South Australia
TASSC	Supreme Court of Tasmania
VSC	Supreme Court of Victoria
VSCA	Supreme Court of Victoria Court of Appeal
WASC	Supreme Court of Western Australia
WASCA	Supreme Court of Western Australia Court of Appeal

**Table 1: New Abbreviations**

## ***HOW DO THE FOUR UNREPORTED JUDGMENTS SERVICES COMPARE?***

### ***Coverage***

It is necessary to look at both the coverage and then at the information included in each database. Is there evidence of *value adding* by the commercial publishers? Table 2 indicates the starting year for comprehensive coverage of selected courts, by supplier/vendor. It must be noted that each service provider covers more courts and tribunals than those listed in Table 2 and that it is possible to find decisions from earlier years but the dates given here indicate when coverage became *comprehensive*. LBC Online claims to provide decisions handed down from October 1995.

It should also be noted that decisions are not usually removed once a case is reported. Both SCALEplus and AustLII indicate if a judgment has been reported and give the citation to the authorised and other report series; LBC Online and Butterworths appear not to do this. The AustLII collections come with the following statement of completeness (or a variation thereof): "The decisions in this database are all those that have been selected and provided by the Court." The decision by LBC to rename its CD-ROM Current Judgments service as the Unreported Judgments service with the release of LBC Online is a curious one given that the database clearly includes both reported

<sup>4</sup> Olsson, *LI Guide to the Uniform Production of Judgments*, 2nd ed. Australian Institute of Judicial Administration, 1999 at pp 27-28. Also available at: [www.aija.org.au/](http://www.aija.org.au/)

and unreported decisions. It needs to be stressed to users of either of the commercial services that it is necessary to check, using a case citator, to see if a decision has subsequently been reported.

	<i>AustLII</i>	<i>Butterworths</i>	<i>LBC Online</i>	<i>SCALEplus</i>
Family Court of Australia	1988+	N/A	1995+	1988+
Federal Court of Australia	1977+	1994+	1995+	1977+
High Court of Australia	1984+*	1989+	1995+	1984+*
Supreme Court of New South Wales	1995+	1984+	1995+	1995+
Supreme Court of Queensland	1998+	1990+	1995+	1993-94, 1997+
Supreme Court of South Australia	1989+	1987+	1995+	1989+
Supreme Court of Tasmania	1987+	1985+	1995+	1987+
Supreme Court of the ACT	1986+	1994+	1995+	1987+
Supreme Court of the Northern Territory	1986+	1996+	1995+	1987+
Supreme Court of Victoria	1997+	1984+	1995+	1995+
Supreme Court of Western Australia	1999+	1987+	1995+	N/A

\* Also includes full text of reported decision from CLRs vol 74(1947)-vol 172 (1991)

**Table 2: Comprehensive Coverage Start Date**

As the results in Table 2 show, there is considerable difference in the size of databases available between vendors. For example, at the time of writing, Butterworths Online provided access to 19,774 NSW Supreme Court decisions and SCALEplus provided access to 1136 NSW Supreme Court decisions. Butterworths had 6592 Victorian decisions; SCALEplus had 1158 decisions. On the other hand, Butterworths contained 5653 Federal Court decisions whereas SCALEplus contained 12,617 decisions.

How frequently are judges referring to unreported decisions? Of the 31 unreported High Court of Australia decisions in the Butterworths file for 1999 (as at 23 July 1999), 13 contain at least one reference to an unreported decision. Of the 293 decisions (again using Butterworths file as a source) for the Victorian Supreme Court for 1999, 94 contain references to unreported decisions.

There are, of course, no guarantees that a required decision will be available online even if it is within the time period of comprehensive coverage. A recent request for *Typing Centre of New South Wales v Toose*, (Supreme Court of New South Wales, Mathews J, 15 December 1988) was not available via Butterworths Online.

To further explore this issue of comprehensiveness, a small random sample (ten) of recently cited decisions was used to ascertain to what extent unreported judgments are in fact being 'collected' by the various services. Did the coverage claimed for each service match the actual coverage when specific decisions were sought? Which service provider was the most comprehensive, based on this sample? Table 3 gives the results.

<i>Unreported Decisions</i>	<i>AustLII</i>	<i>Butterworths</i>	<i>SCALEplus</i>	<i>LBC Online</i>
<i>City of Melbourne v Southern Cross Properties Pty Ltd &amp; Ors</i> (unreported, Supreme Court of Victoria, 5 December 1991)	✗	✓	✗	✗
<i>Dennett v Slater</i> (unreported, Supreme Court of New South Wales, 4 March 1988)	✗	✓	✗	✗
<i>Hamilton Island Enterprises Ltd v Croycom Pty Ltd</i> (unreported, Supreme Court of Queensland, 24 April 1998)	✓	✓	✗	✓
<i>R v Rich (No 1)</i> (unreported, Supreme Court of Victoria Court of Appeal, 17 December 1997)	✓	✓	✗	✓

<i>Unreported Decisions</i>	<i>AustLII</i>	<i>Butterworths</i>	<i>SCALEplus</i>	<i>LBC Online</i>
<i>State Rail Authority of New South Wales v Earthline Constructions Pty Ltd &amp; Ors</i> (unreported, New South Wales Court of Appeal, 20 December 1996)	✓	✓	✗	✓
<i>R v PJE</i> (unreported, New South Wales Court of Criminal Appeal, 9 October 1995)	✓	✗	✓	✗
<i>Bowden v Lo</i> (unreported, New South Wales Supreme Court, 19 May 1998)	✓	✓	✗	✓
<i>Wattyl Australia Pty Ltd v Gilder Holdings Pty Ltd</i> (unreported, Victorian Supreme Court, 24 February 1989)	✗	✓	✗	✗
<i>Tomlinson v Cut Price Deli Pty Ltd</i> (unreported, Federal Court of Australia, 23 June 1995)	✓	✗	✓	✗
<i>Sun Zhan Qui v Minister for Immigration and Ethnic Affairs</i> (unreported, Federal Court of Australia 6 May 1997)	✓	✓	✓	✓
TOTALS	7	8	3	5

**Table 3: A Sample Survey**

Based on this very small sample, Butterworths Online appears to be the most useful source (with 8 out of 10), followed closely by AustLII (with 7 out of 10). The widespread view that SCALEplus and AustLII can be used interchangeably was not supported in this case.

The cases that could not be located via Butterworths Online (*R v PJE* and *Tomlinson v Cut Price Deli*) are clearly within the date covered by Butterworths but appear to have been missed. Interestingly, both of these decisions were available via AustLII and SCALEplus.

A word of caution is obviously due here. The sample is small and there is room for a more thorough exploration of the extent to which requested decisions can be supplied directly from existing online sources.

### **Content**

For the purposes of comparison the same decision, namely *AMS v. AIF; AIF v. AMS* [1999] HCA 26, was located via the four different services. The advantage of vendor neutral citation becomes immediately apparent. Via AustLII, the decision is 59 pages in length, via SCALEplus the decision is 64 pages, via Butterworths the decision is 64 pages long and via LBC Online the decision is 73 pages long. The differences are largely but not completely due to differences in the ways the decision has been marked up. The use of bolding and differences in style largely account for the differences in page length. The use of paragraph numbers in medium neutral reporting means that a reader can easily locate the cited paragraph no matter which source is used.

### **AustLII**

The decision from AustLII is clearly laid out. Headings such as matter number, order and catchwords are bolded. There are copious catchwords (reproduced in Figure 1), reference to defined words (in this example, the phrase “compelling reasons”) and references to six statutes. There are numerous references to specific sections of these six statutes, and links to these specific sections. References to both Western Australian and Commonwealth legislation are linked. For example, references to the *Family Law Act 1975* (Cth) s 63F(1) are hypertext linked to the specific section of the act.

## CATCHWORDS

*AMS v AIF AIF v AMS*

Constitutional law – Inconsistency between Commonwealth and State laws – Family law – Guardianship and custody of child – Whether *Family Law Act 1975* (Cth), s 63F(1) inconsistent with *Family Court Act 1975* (WA), s 35.

Constitutional law – Powers of the Commonwealth Parliament – Territories – Whether sufficient nexus with Commonwealth law concerning guardianship and custody of children born in Territory to parents then residing there.

Constitutional law – Interpretation – Whether implications arise from international law.

Constitutional law – Freedom of interstate intercourse – Movement of persons – Whether *Northern Territory (Self- Government) Act 1978* (Cth), s 49 inconsistent with exercise of judicial discretion under *Family Court Act 1975* (WA), s 36A – Guardianship and custody orders – Whether necessary to determine whether requirement of orders that parent not change child's principal place of residence greater than reasonably required to achieve legislative object

Federal jurisdiction – Family law – Guardianship and custody application – Parents resident in the Northern Territory at birth of ex-nuptial child – Whether Family Court of Western Australia exercising federal jurisdiction under *Family Law Act 1975* (Cth), s 63F(1).

Federal jurisdiction – Inconsistency between Commonwealth and State laws – Matter arising under s 76(i) of the *Constitution* – Whether jurisdiction invested by *Judiciary Act 1903* (Cth), s 39(2).

Federal jurisdiction – Appeals – Family law – Whether appeal to Supreme Court of Western Australia an exercise of federal jurisdiction.

Family law – Guardianship and custody orders – Variation – Exercise of discretion by trial judge – Best interests of child – Whether requirement that custodial parent provide "compelling reasons" to justify relocation within Australia an error of law – Whether order that custodial parent may relocate is an order "with respect to" welfare or custody.

### Figure 1: Catchwords Supplied by Court

The complete case citation appears on each page in the header, as does the unique URL where the document can be located. A unique URL for a specific case would probably be considered redundant by most editors but it is useful to have a specific site for the document.

### SCALEplus

In the SCALEplus version the same catchwords, defined term and statutory annotations appear. As with AustLII, there are links to the full text of the statutes being judicially

considered (although there are not links to the specific sections of these statutes). The Western Australian statutes cited are not linked as WA legislation is not available at the SCALEplus site. Most (but not all) headings have been bolded. SCALEplus also includes hypertext links to cited decisions available in full text at SCALEplus.

### **Butterworths Online**

The decision from Butterworths Online is five pages longer. Large bold headings appear in the text whereas in AustLII these headings are present but they have not been distinguished from the surrounding text by bolding or an increase in font size. This probably accounts for the additional pages when printed. Paragraph numbers are bolded and appear in square brackets, whereas in AustLII hung paragraphs are used to ensure the paragraph numbers are clear. At the top of each page are the names of the parties and the URL for the document being printed. Catchwords appear exactly as they appear in the AustLII version. References to defined words and statutes judicially considered are also exactly the same, with the exception that Butterworths consistently uses the format s28 rather than s 28 to refer to sections of an act judicially considered. The differences between the AustLII version or SCALEplus version and the Butterworths version are essentially cosmetic – they relate to formatting rather than content. There is no evidence of significant intellectual effort in the preparation of the decision for the Butterworths database.

### **LBC Online**

If we turn to the LBC Online version, there is evidence of additional 'editorial' work being applied. In the case used in this example, the additional material amounts to 16 lines of text, as reproduced in Figure 2. All judgments have a summary that contains catchwords, but significant judgments (such as this one) contain a summary of issues, facts and holding. There is use of the *Australian Digest* topics (Family law and child welfare) and *Australian Digest* key numbers (known affectionately as square bracket numbers) and additional catchwords. The catchwords as they appear in the AustLII, SCALEplus and Butterworths versions are also reproduced in the LBC version, as part of the full text of the judgment. In the text of the judgment, there is no evidence of additional formatting; there is no use of bolding in the actual judgment.

**Family law and child welfare[19]** – Children – Custody – Guardianship – Relocation.

**Issues:** Whether *Family Court Act 1975* (WA), s 35, or *Family Law Act 1975* (Cth) applied to guardianship of child – Whether mother could relocate child out of State.

**Facts:** Joint guardianship of ex-nuptial child granted to mother and father – Injunction granted to prevent mother from removing child from Perth – On appeal, Full Court of Family Court granted sole guardianship to mother by relying upon s 35 of Western Australian Act

**Held:** Status quo of guardianship upon which Full Court based its reasoning incorrect – Status quo not provided by s 35 but by *Family Law Act 1975* (Cth), as parents resident in Northern Territory at time of child's birth – To extent of inconsistency between Western Australian Act and Commonwealth Act, *Constitution* (Cth), s 109 applied – Consideration of whether injunction infringed freedom of movement provision of *Constitution*, s 92 – Custodial parent not required to show compelling reasons to justify relocation – Welfare of child paramount consideration but not sole consideration – Appeal by father against loss of joint guardianship allowed – Appeal by mother against continuation of injunction allowed

**Constitutional law[243]** – Commonwealth Constitution – Inconsistency of laws – Family law matters – Guardianship of children

LBC Ref No 55240

**Figure 2: Catchwords From Case as it Appears in LBC Online**

For some reason, LBC Online has chosen to cite the case used in this example as: *S v F*, [1999] HCA 26 – 17 June 1999 Attempts to ascertain from LBC why the medium neutral citation recommended by the court (*AMS v AIF*; *AIF v AMS*) had been changed (to *S v F*) had not been successful, at the time of writing

### Catchwords

The *Guide to Uniform Production of Judgments* contains recommendations for the inclusion of catchwords as part of the judgment, to 'indicate (however shortly) any matter of legal principle for which the case is creative legal authority in respect of its content'.<sup>5</sup> What this, in effect, means is that decisions are coming from the court with catchwords included and, as noted above, all four services reproduce these court supplied catchwords. The first edition of the Guide recommended the inclusion of expanded catchwords to facilitate topic searches and spelled out how catchwords would be constructed from the subject headings used in the *Australian Digest*. The second edition of the Guide more clearly outlines how catchwords are to be constructed and gives examples to assist in this process. The Guide includes a full list of the *Australian Digest* titles and subtitles in Annexure F.<sup>6</sup> In the example above, it would appear the court has applied a modified version of the *Australian Digest* heading (Family law) rather than the version recommended by Ollson (Family Law and Child Welfare) and used in the LBC catchwords.

The second edition also recommends that statutes, regulations and by laws discussed or applied be set out at the end of the catchwords,<sup>7</sup> and that prior authorities considered, applied, distinguished, not followed and/or discussed be listed.<sup>8</sup> There appears to have been widespread adoption of these recommendations by various courts.

<sup>5</sup> Id at p 6

<sup>6</sup> Id at pp 35–66

<sup>7</sup> Id at p 6

<sup>8</sup> Id at p 7

A catchword search in LBC online for the words “best interests of child” fails to locate the above case. The phrase appears in the court supplied catchwords but has not been reproduced in the LBC catchwords. To retrieve words in the court provided catchwords, using LBC Online, it is necessary to search the full text of the judgment

## Search Engines

As well as the coverage issues discussed above it is also important to look at the various providers with regard to search options. In these days of sophisticated search engines what search options are supported by the various vendors?

## AustLII

In July 1999, AustLII released for beta testing a new version of the SINO search engine. There are two versions – a brief form and a full search form. With the full search form version it is possible to limit a search to a specific database (for example, High Court decisions), search more than one database (for example, Victorian and New South Wales Court Supreme Court decisions) or search all case law databases. Phrase searching and the use of the boolean operators (and, or, not) are supported. Sophisticated proximity searching features are available and it is possible to limit by date. At the moment, the only field searching permitted is title searching but AustLII plans to allow additional field searches as data feeds improve. The ‘help on searching’ document<sup>9</sup> includes examples of all of the types of searching permitted. Figure 3 illustrates a search using the SINO search engine and the Full Search Form. In the example, the word “reason” is ignored as a stop word even though the request was for a phrase search. AustLII suggests that searches for specific cases, where the names of the parties are known, should be via the table of contents rather than the search screen.

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**Figure 3: AustLII Full Search Form**

<sup>9</sup> beta.austlii.edu.au/help/search.shtml

## SCALEplus

SCALEplus divides decisions into databases by court, and then further subdivides the decisions by year. From the advanced search screen (reproduced in Figure 4) it is possible to specify which database or databases are to be used for the search. A number of field searches are permitted; it is possible to limit a search to words appearing in the case name and order fields and to limit by date. It is not possible to search the catchwords field only. The boolean operators (and, or, not) are available and proximity searching using the near operator is permitted. Results are ranked by relevance.

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**Figure 4: SCALEplus Advanced Search Screen**

## Butterworths Online

Butterworths Online uses folio software. Like AustLII and SCALEplus, it is possible to search a single database, several databases or all databases. It is possible to search for a specific case using a name. Field searches are possible and searches of the following specific fields are permitted: case name, court, citation, catchwords, judge(s), judgment date, file number, library number (WA) and representation. Whilst this is an impressive list, the substantial advantage of the Butterworths search engine over the AustLII search engine is the facility to search the catchwords section of the records. Figure 5 illustrates a search for the words "best interests" in the catchwords field, using the High Court database.

At the bottom of the search screen (not reproduced in Figure 5) there are useful search tips given to illustrate how the Boolean operators (and, or, not) can be used and the way phrase searching, single character, multiple character and unlimited truncation work. The proximity-searching operators 'preceding' and 'within/near' are permitted.

**Figure 5: Butterworths Search Screen**

22 ▢ HIGH COURT OF AUSTRALIA — UNREPORTED JUDGMENTS  
 2 ♣ 1990  
 2 ♣ 1992  
 1 ♣ 1996  
 3 ♣ 1998  
 14 ▢ 1999  
 14 ♣ AMS v AIF; AIF v AMS — BC9903190 — 17 June 1999

**Figure 6: Results Display from Butterworths Online**

LBC Online also relies on folio software. Figure 7 reproduces the search screen and illustrates the range of search options available. In the example illustrated, the phrase “compelling reasons” was used as the search term.

**Searching Within LBC Unreported Judgments**

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► ☒ Search through all judgments  
☐ Only search judgments added to the online infobase since the last CD release (currency)

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► **Fielded search**  
Enter information into one or more of the following fields to find judgments which match the search criteria

Party Name(s)

Court:

<input type="checkbox"/> All Courts	<input type="checkbox"/> ACT	<input type="checkbox"/> SA	<input type="checkbox"/> Industrial Relations Court
<input checked="" type="checkbox"/> High Court	<input type="checkbox"/> NSW	<input type="checkbox"/> IAS	<input type="checkbox"/> NSW Land & Env Court
<input type="checkbox"/> Federal Court	<input type="checkbox"/> NT	<input type="checkbox"/> VIC	
<input type="checkbox"/> Family Court	<input type="checkbox"/> QLD	<input type="checkbox"/> WA	

Judgment Date day:  Any Day month:  Any Month year:  Any Year

Judge(s)

Catchwords

Direct Digest Reference:

Subject Title:  Digest Key Number:

None Selected

Search within a judgment summary

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► **Search full text of judgment**  compelling reasons

☐ return records that have all words  
☐ return records that have any of the words  
☒ return records that have the exact phrase

**Figure 7: LBC Online Search Screen**

The results display illustrated in Figure 8 illustrates the different approach taken in LBC Online. A result of five means there are five decisions where the search phrase occurs

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5 ▢ LBC Unreported Judgments
  5 ▢ HIGH COURT
    1 ▢ 1999
    3 ▢ 1998
      1 ▢ Phonographic Performance Company of Australia Ltd v Federation
      1 ▢ Kendra v Melsom, [1998] HCA 13 - 25 February 1998
      1 ▢ Palmer v The Queen [1998] HCA 2 - 20 January 1998
    1 ▢ 1996
  
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**Figure 8: Results Display from LBC Online**

## **CONCLUSIONS**

It is perhaps premature to claim, as Justice Michael Kirby suggested at the launch of AustLII's National Law Collection, that AustLII is a one-stop shop for all legal research. The progress made by AustLII in a short space of time is remarkable and to be applauded, and the collections of statutory material available at the AustLII site are most impressive. However, based on this small exploration, the unreported judgments service from Butterworths Online has a slight advantage and generally provides larger collections of decisions.

Of the ten recently cited unreported decisions, all were available from at least one of the four suppliers. All suppliers offer sophisticated searching options and it is unlikely that most users will fully explore or use all of the options offered. For just a while longer there seems to be a niche for law librarians familiar with the various online services and their strengths and weaknesses and able to obtain those hard to find decisions that are not available in electronic format from any source. And, for just a while longer, while the courts refer to unreported decisions from the late eighties, the Butterworths service has an edge over the free services.