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WHAT DO INTERMEDIATE APPELLATE COURTS CITE? A QUANTITATIVE STUDY OF THE CITATION PRACTICE OF AUSTRALIAN STATE SUPREME COURTS

I INTRODUCTION

APPEAL court judges in Australia are expected to give reasons for their decisions.[1] Most judgments also cite authorities in support of these reasons. Citations to authorities serve an important function in the judicial decision-making process. Manz makes the point:

> Citations may appear to be an almost random selection of sources drawn upon in response to the issue at hand, but actually they form an interrelated pattern that impacts future legal developments. The application of an opinion to a legal issue establishes its precedential value and, therefore, its influence on future decisions. Citation of a treatise or an article, in turn, enhances its persuasiveness and increases the possibility that it will find future favour in the courts. Utilization of a novel source of authority may legitimize its use in future opinions and appellate briefs.[2]

Various studies have considered different aspects of the citation practice of courts in North America. There are citation practice studies for the United States Supreme Court,[3] the

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1 See Michael Kirby, '*Ex Tempore* Reasons' (1992) 9 *Australian Bar Review* 93; Michael Kirby, 'Reasons for Judgment: "Always Permissible, Usually Desirable and Often Obligatory"' (1994) 12 *Australian Bar Review* 121. For judicial statements to this effect see *Pettit v Dunkley* [1971] 1 NSWLR 376, 381–2 (Asprey JA); *Watson v Anderson* (1976) 13 SASR 329; *Public Service Board v Osmond* (1986) 159 CLR 656, 666–7 (Gibbs CJ).

2 William Manz, 'The Citation Practices of the New York Court of Appeals, 1850–1993' (1995) 43 *Buffalo Law Review* 121, 121.

3 For example, see James Ackers, 'Thirty Years of Social Science in Supreme Court Criminal Cases' (1990) 12 *Law and Policy* 1; James Ackers, 'Social Science in Supreme Court Death Penalty Cases: Citation Practices and Their Implications' (1991) 8 *Justice Quarterly* 421; Neil Bernstein, 'The Supreme Court and Secondary Source Material: 1965 Term' (1968) 57 *Georgetown Law Journal* 55; Wes Daniels, '"Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940 and 1978' (1983) 76 *Law Library Journal* 1; Charles Johnson, 'Citations to Authority in Supreme Court Opinions' (1985) 7 *Law and Policy* 509; Montgomery Kosma, 'Measuring the Influence of Supreme Court Justices' (1998) 27 *Journal of Legal Studies* 333; Chester Newland, 'Legal Periodicals and the United States Supreme Court' (1959) 7 *University of Kansas Law Review* 477; Louis Sirico and Jeffrey

Supreme Court of Canada,[4] the United States courts of appeals,[5] state supreme courts in the United States[6] and provincial courts of appeal in Canada.[7] However, to this point, there have been few studies investigating the citation practice of Australian courts; of those which do examine this issue, most focus on the High Court, meaning that there has been little consideration of the citation practice of state supreme courts.[8] This paper aims to

Margulies, 'The Citing of Law Reviews by the Supreme Court: An Empirical Study' (1986) 34 *UCLA Law Review* 131; Bart Sloan, 'What are we Writing For?: Students' Works as Authority and their Citations by the Federal Bench, 1986–1990' (1992) 61 *George Washington University Law Review* 221 (citations to student-authored articles in the United States Supreme Court and United States courts of appeals).

4 For example, see Vaughan Black and Nicholas Richter, 'Did She Mention My Name? Citation of Academic Authority by the Supreme Court of Canada, 1985–1990' (1993) 16 *Dalhousie Law Journal* 377; Peter McCormick, 'Judicial Citation, the Supreme Court of Canada, and the Lower Courts: The Case of Alberta' (1996) 34 *Alberta Law Review* 870; Peter McCormick, 'Do Judges Read Books too?: Academic Citations by the Lamer Court 1992–96' (1998) 9 *Supreme Court Law Review (Annual)* 463; Peter McCormick, 'The Supreme Court Cites the Supreme Court: Follow-Up Citation on the Supreme Court of Canada, 1989–1993' (1995) 33 *Osgoode Hall Law Journal* 453.

5 For example, see William Landes and Richard Posner, 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) 19 *Journal of Law and Economics* 249; William Landes and Richard Posner, 'Legal Change, Judicial Behaviour, and the Diversity Jurisdiction' (1980) 9 *Journal of Legal Studies* 367; William Landes, Lawrence Lessig and Michael Solimine, 'Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges' (1998) 27 *Journal of Legal Studies* 271; Louis Sirico and Beth Drew, 'The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis' (1991) 45 *University of Miami Law Review* 1051.

6 For example, see John Merryman, 'The Authority of Authority: What the California Supreme Court Cited in 1950' (1954) 6 *Stanford Law Review* 613; John Merryman, 'Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970' (1977) 50 *Southern California Law Review* 381; Robert Archibald, '*Stare Decisis* and the Ohio Supreme Court' (1957) 9 *Western Reserve Law Review* 23; James Leonard, 'An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990' (1994) 86 *Law Library Journal* 129; Richard Mann, 'The North Carolina Supreme Court 1977: A Statistical Analysis' (1979) 15 *Wake Forest Law Review* 39; Manz, above n 2; Mary Bobinski, 'Citation Sources and the New York Court of Appeals' (1985) 34 *Buffalo Law Review* 965; William Turner, 'Comments: Legal Periodicals: Their Use in Kansas' (1959) 7 *University of Kansas Law Review* 490; Fritz Snyder, 'The Citation Practice of the Montana Supreme Court' (1996) 57 *Montana Law Review* 453; Lawrence Friedman, Robert Kagan, Bliss Cartwright and Stanton Wheeler, 'State Supreme Courts: A Century of Style and Citation' (1981) 33 *Stanford Law Review* 773 (covering 16 state supreme courts in the period 1870–1970).

7 For example, see Peter McCormick, 'Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices' (1993) 22 *Manitoba Law Journal* 286; Peter McCormick, 'The Evolution of Coordinate Precedential Citation in Canada: Interprovincial Citations of Judicial Authority, 1922–1992' (1994) 32 *Osgoode Hall Law Journal* 271.

8 For previous studies of the citation practice of Australian courts see Paul Von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901–1987' (1992) 14 *Adelaide Law Review* 181 (citations to United States precedent in the High Court 1901–

contribute to the literature on citation practice through examining citations to case law and secondary authorities in a sample of 300 court of appeal and full court decisions of the six state supreme courts decided in the period 1996 to 1999.[9]

A study of the citation practice of state supreme courts is of value for three reasons. First, state supreme courts are important legal institutions. This makes the reasoning which these courts adopt and, thus, the authorities which these courts cite, issues which deserve investigation. Second, several scholars have argued that citations represent a meaningful form of inter-court communication.[10] If this is the case, it is important to understand the 'language' which judges use. Examination of the citation practice of Australian state supreme courts adds to existing knowledge about the citation practice of courts and provides opportunities for comparisons with previous Australian and overseas studies. In particular, previous research for the Supreme Court of Victoria drew some suggestive conclusions about the citation practice of intermediate appellate courts based on the citation practice of a single state supreme court.[11] An examination of the citation practice of the six state supreme courts provides a broader sample for investigating the issues raised in that article. Third, information about the citation practice of state supreme courts should be of value to various sets of people. These include academics interested in citation practice, law libraries and barristers appearing in the state supreme courts.

This paper is set out as follows. The next section provides a discussion of some of the reasons judges cite authorities. Academic and judicial views about desirable styles of writing reasons and the extent to which judgments should be documented with authorities are examined in section three. Section four gives an overview of the sample and

1987); Russell Smyth, 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court' (1998) 17 *University of Tasmania Law Review* 164 (citations to periodicals in the High Court 1990–1997); Russell Smyth, '"Other than Accepted Sources of Law"?: A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22 *University of New South Wales Law Journal* 19 (citations to secondary authorities in the High Court in 1960, 1970, 1980, 1990 and 1996); Russell Smyth, 'What do Judges Cite? An Empirical Study of the "Authority of Authority" in the Supreme Court of Victoria' (1999) 25 *Monash Law Review* 23 (citations to authorities in the Supreme Court of Victoria in 1970, 1980 and 1990).

9 In this paper the term 'secondary authorities' refers to all citations other than citations to sources traditionally considered to be primary. Hence, it refers to citations other than citations to administrative regulations, constitutions, case law, court rules, executive orders, parliamentary debates, parliamentary committee reports and statutes. This is consistent with the definition in previous studies: for example, see Bernstein, above n 3, 56; Daniels, above, n 3, 3.

10 For example, see Gregory Caldeira, 'The Transmission of Legal Precedent: A Study of State Supreme Courts' (1985) 79 *American Political Science Review* 179; Gregory Caldeira, 'Legal Precedent: Structures of Communication Between State Supreme Courts' (1988) 10 *Social Networks* 29; Peter Harris, 'Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1870–1970' (1985) 19 *Law and Society Review* 449.

11 Smyth, 'What do Judges Cite?', above n 8.

methodology used in this study and reviews the major citation patterns in the sample cases. Section five looks at which authorities have been cited in more detail. In particular it considers the extent to which each of the state courts cite their own decisions, cases decided in the High Court, cases decided in other state supreme courts, decisions of English courts, decisions of courts in countries other than Australia or England and secondary authorities. The last section contains some concluding comments.

II WHY DO JUDGES CITE AUTHORITIES?

Various rationales have been offered for judges citing authorities.[12] First, judges have to make decisions in accordance with controlling rules of precedent. Citing authorities locates the decision in the context of established principles and standards which gives the judicial decision-making process a certain degree of coherence. The citation of previous authorities is desirable because it ensures that the parties to an action are able to see that the decision in a particular case is based on pre-existing rules. Archibald makes the point:

> All courts to a greater or lesser extent pay tribute to the doctrine of *stare decisis*. ... If judges are to function properly, goes the theory, they must be limited in some way; they must be prevented from being arbitrary and capricious. Stare decisis is thought to provide the limit, but not only do we want our judges to be 'fair', we want also to know what our judges are going to do, before they do it. We want predicability. Again stare decisis seems to satisfy this longing.[13]

Second, judges cite authorities to increase the persuasive force of their argument. McCormick argues that judges enhance the persuasiveness of their reasons through citing the decisions of respected courts and distinguished jurists.[14] Even casual inspection of the law reports suggests that some judges are cited more than others because their reputation 'adds value' to the citing judge's view (eg Sir Owen Dixon of the High Court, Benjamin Cardozo of the New York Court of Appeals and United States Supreme Court, Lord Denning of the English Court of Appeal). This is also true for particular courts. For example, studies in the United States have shown that state supreme courts such as California, Massachusetts and New York receive more out-of-state citations than other state supreme courts, controlling for factors such as population size and volume of judgments.[15] Friedman et al examined the citation practice of sixteen state supreme courts

12 For more detailed treatment of the reasons judges cite authorities see Merryman, 'The Authority of Authority', above n 6, 614–50; McCormick, 'Judicial Citation', above n 4, 872–3; Friedman et al, above n 6, 792–5. For extensive discussion of the reasons judges cite secondary authorities, which are not explored here, see Smyth, 'Other than Accepted Sources of Law', above n 8, 22–4.

13 Archibald, above n 6, 29.

14 McCormick, 'Judicial Citation', above n 4, 873.

15 For example see Gregory Caldeira, 'On the Reputation of State Supreme Courts' (1983) 5 *Political Behaviour* 83; Harris, above n 10.

in the United States over the period 1870 to 1970. These authors argue that one of the reasons the California Supreme Court received the most out-of-state citations over that period is its reputation for judicial innovation. Their main conclusion on this point was: 'Some sort of "prestige" factor, independent of population, must be involved'.[16]

Third, judges cite previous decisions in order to determine the law which applies to the facts before the court. Secondary authorities also have an important role here. In some instances it is hard to determine the principle a case stands for or what a previous judge meant in making a particular observation. When this is the case, judges often turn to academic commentators to help determine what previous cases decided, or to provide further justification for their own interpretation of previous authorities. The authors of well-known textbooks such as Archbold, Cross, Phipson and Wigmore have been cited and discussed in previous decisions. Where passages in texts such as these have been approved as correctly stating the law in previous cases, judges often treat these as de facto primary authorities. In these cases 'the fact of citation gives a work *authority* to some degree, and it will thus exert some influence on the way the law grows'.[17]

III IS IT APPROPRIATE TO DOCUMENT REASONS WITH AUTHORITIES?

There is considerable debate amongst judges as to the extent to which reasons should be documented with authorities. One view is that it is preferable to cite fewer authorities whenever possible in order to make judgments shorter and hence easier to read. Sir Anthony Mason is one of the most prominent advocates of this viewpoint. He ties a call for writing simpler judgments with a plea to enhance public understanding of the courts:

> Unfortunately judgments do not speak in a language or style that people readily understand. ... The judgment is so encrusted with discussion of precedent that it tends to be forbidding. ... [I]f we want people to understand what we are doing, then we should write in a way that may make it more possible for them to do so.[18]

Sir Harry Gibbs adopts a similar view. He suggests:

> What gives the judgment style is the lucidity, accuracy and economy of the language used. ... [A] fault is to discuss at length a series of cases when the effect of all of them has already been stated in an authoritative

16 Friedman et al, above n 6, 806.

17 Merryman, 'Toward a Theory of Citations', above n 6, 413 (emphasis original).

18 Sir Anthony Mason, opening address to the New South Wales Supreme Court Annual Conference, 30 April 1993, cited in Mark Duckworth, 'Clarity and the Rule of Law: The Role of Plain Judicial Language' (1994) 2 *Judicial Review* 69, 73.

> decision, and mention of that final authority alone would have been sufficient.[19]

This approach has support from several academic commentators who have criticised the use of 'string citations'.[20] For example, Wigmore argues that these 'opinions often give the strong impression of being discoveries by the judges ... the lengthy opinions redundantly quote well-settled platitudes ... reproving old truths which are apparently new and interesting to the writer'.[21] However, other judges, point out that while efficient use of language is desirable, sometimes the circumstances of the case make fuller reasons, including extended citations to authorities, essential. Michael Kirby has cautioned that

> brevity at the price of a return to a mechanistic view of the law would be unacceptable to many judges today. The use of extrinsic aids to construction and the candid acknowledgment of policy choices which must be made tend to add to the length of judicial reasons.[22]

A different aspect of the debate concerns the impact of citations on the persuasiveness of the argument. It was suggested above that judges often cite authorities to strengthen their conclusions. However, Sir Garfield Barwick criticises this perspective, arguing that citation to the views of others makes the judgment less authoritative. He states that 'to bolster the judge's conclusions ... by citation of the views of others, however eminent and authoritative, may reduce the authority of the judge and present him as no more than a research student recording by citation his researched material'.[23] But, as a general principle, this position seems to have little support amongst Australian judges. For instance, Sir Owen Dixon considered that citing the views of others, including academic commentators, was an acceptable practice on the basis that 'there exists a definite system of accepted knowledge or thought and that judgments and other legal writings are evidence of its contents'.[24]

Judicial views about the value of citing academic authorities have been mixed.[25] Most judges who have commented on this issue have restricted their remarks to the merits of

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19 Sir Harry Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494, 499.

20 For criticisms of courts using string citations see George Smith, 'The Current Opinions of the Supreme Court of Arkansas: A Study in Craftmanship' (1947) 1 *Arkansas Law Review* 89, 90–3; William Reynolds, 'The Court of Appeals of Maryland: Roles, Work and Performance' (1978) 38 *Maryland Law Review* 148, 155–6.

21 John Wigmore, *A Treatise on Evidence* (3rd ed, 1940) 244.

22 Michael Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691, 708.

23 Sir Garfield Barwick, *A Radical Tory* (1995) 224.

24 Sir Owen Dixon, *Jesting Pilate* (2nd ed, 1997) 156.

25 For an extended discussion of different views about the desirability of citing secondary authorities in reasons see Smyth, 'Academic Writing and the Courts' above n 8; Smyth, 'Other than Accepted Sources of Law' above n 8, 24–8.

citing legal periodicals and texts. In England and the United States a number of judges have commented on the value of legal periodicals.[26] In the 1800s there was some judicial criticism of citing academic authorities in court and in reasons in England, reflecting a convention that no living author could be cited in court.[27] In one case, Kekewich J stated: 'It is to my mind much to be regretted, and it is a regret that I believe every Judge on the bench shares, that text-books are more and more quoted in Court'.[28] However, this convention no longer exists and most modern extra-judicial comment has been favourable. The views of former Chief Justice of the United States Supreme Court, Charles Hughes are illustrative. He states that 'it is not too much to say that, in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law periodical'.[29]

IV METHODOLOGY AND RESULTS

Data and Methodology

The sample cases in this study were the 50 most recent court of appeal or full court decisions of each state supreme court reported in the authorised reports as of June 1999. This gave a total of 300 cases.[30] The Council of Law Reporting in each state selects cases for inclusion in the authorised reports on the basis of its possible precedent value. Thus, while the sample does not include unreported decisions, which is a limitation, it does cover the most important 300 recent state cases as of June 1999.[31] In terms of time frame there are two possibilities. One is to select cases spaced over an extended period. The advantage of this approach is that it would provide a perspective on long-term trends in the citation practice of the state supreme courts. A second alternative is to sample the most

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26 For example see Frederick Crane, 'Law School Reviews and the Courts' (1935) 4 *Fordham Law Review* 1; Charles Hughes, 'Foreword' (1941) 50 *Yale Law Journal* 737; Stanley Fuld, 'A Judge Looks at the Law Review' (1953) 28 *New York University Law Review* 915; Earl Warren, 'Comment' (1956) 51 *Northwestern University Law Review* 1; Julius Hoffman, 'Law Reviews and the Bench' (1956) 51 *Northwestern University Law Review* 17; Patricia Wald, 'Teaching the Trade: An Appellate Judge's View of Practice-Oriented Legal Education' (1986) 36 *Journal of Legal Education* 35; Alfred Denning, 'Book Review of Winfield, *A Textbook of the Law of Tort*' (1947) 63 *Law Quarterly Review* 516.

27 For an extended discussion of this convention see G Nicholls, 'Legal Periodicals and the Supreme Court of Canada' (1950) 28 *Canadian Bar Review* 422.

28 *Union Bank v Munster* (1888) 37 Ch D 51, 54.

29 Hughes, above n 26, 737.

30 The sample size is similar to other recent Australian citation practice studies. For example see Smyth, 'What do Judges Cite', above n 8 (263 cases), Smyth, 'Other Than Accepted Sources of Law', above n 8 (288 cases) and Smyth, 'Academic Writing and the Courts', above n 8 (316 cases).

31 As McCormick puts it: 'Reported cases probably include a very high proportion of all the decisions sufficiently important to call for reasoned judgment based on authority': McCormick, 'The Evolution of Coordinate Precedential Authority' above n 7, 277.

recent cases. The benefit of the second approach is that the results might be more relevant to libraries and practicing barristers. As one of the main objectives was to provide information that these groups could use, the second approach was followed.

All citations to case law and secondary authorities in the sample cases were counted. Citations to constitutions, regulations and statutes were excluded.[32] This is because the subject matter of the case dictates citations to these sources, hence, it is not an exercise of judicial discretion.[33] If a case or secondary authority received repeat citations in the same paragraph it was counted only once, but if there were repeat citations to the same source in subsequent paragraphs these were counted again on the basis that the source was being cited for a different proposition and therefore had separate significance.[34] In order to give proper weight to citations in joint judgments, the number of citations in these judgments were multiplied by the number of participating judges when calculating the total figure. However, in cases where Judge A concurred with Judge B and Judge B cited authorities, Judge A was not attributed with having cited that material.[35]

Several methodological issues deserve specific mention. First, to be counted, there had to be a reference to a case rather than a rule. For example a reference to 'the *Bunning v Cross* discretion' was not counted as a citation to *Bunning v Cross*.[36] Second, no distinction was made between citations in the text and citations in footnotes, because this depends on the style law reports adopt. In some cases even the same law reports are not consistent in the style they adopt. For instance, in some judgments in the South Australian State Reports cases are cited in the text, and in others they are cited in footnotes. Third, references to judgments in lower courts in the same case and cases cited in lower courts in the same case were not counted. Fourth, if a judgment was quoted from another case, that case was counted, but cases cited in the quoted section of the case were not. Fifth, no distinction was made between positive and negative citations. At first glance, this might appear to be a significant shortcoming, but previous studies in North America have found that (unlike academic citations) few judicial citations are negative or positive.[37]

Overview of the Results

Table 1 gives information on the average length of each case, number of citations and dissenting judgments. The average length of cases in the sample was 17.1 pages. Altogether 297 cases (or 99%) contained at least one citation. There were 8283 citations in total. On average, 27.6 authorities were cited per case, 9.1 authorities were cited per

32 This is consistent with previous studies. For example, see Manz, above n 2, 123 and Merryman, 'The Authority of Authority', above n 6, 652.
33 Merryman, 'The Authority of Authority', above n 6, 652 fn 131.
34 This is consistent with previous studies. For example, see Daniels, above n 3, 3–4.
35 This is consistent with all previous Australian studies. See references in n 8 above.
36 (1978) 141 CLR 54.
37 See the discussion in McCormick, 'The Supreme Court Cites the Supreme Court', above n 4, 459.

judgment and 1.66 authorities cited per page. However, these aggregate figures mask significant differences between states. In absolute terms, the biggest citing states were Tasmania and Victoria, while South Australia and Queensland cited the least number of authorities. When we consider citations per page, the picture that emerges is different. On a citation per page basis, the biggest citing states were Queensland and Victoria, while South Australia and Tasmania were the smallest citing states. The dramatic change in the relative positions of Queensland and Tasmania reflects the fact that Queensland published the smallest number of pages per case while Tasmania published the largest.

Altogether, 42 cases or 14% of the sample contained dissenting judgments. This figure is similar to that found for state supreme courts in the United States by most previous studies.[38] However, again, the average figure masks considerable variation between states. In Western Australia just 6% of cases contained dissenting judgments, while in Tasmania 22% of cases contained dissenting judgments. Previous studies in the United States have studied differences in citation patterns between majority and dissenting judgments. There are two competing views ex ante. One view is that dissenting judgments should contain more citations than majority judgments, because the judge is differing from the other members of the court, therefore we would expect him/her to provide full documentation for his/her reasons.[39] A different view is that dissenting judgments should contain fewer citations than other sorts of judgments because it has been argued that, stylistically, dissents are often looser than majority judgments.[40] Most findings in previous studies support the second view,[41] but the results from this study are more consistent with the first view. In four of the six states citations per dissenting judgment were greater than the citations per judgment figure. Overall, there were 13.8 citations per dissenting judgment compared to 9.1 citations per judgment. This result is similar to previous findings for the Supreme Court of Victoria in 1970, 1980 and 1990, although the proportion of dissenting judgments in that sample was low.[42]

Table 2 provides a general overview of which authorities have been cited the most in each state supreme court. While there is variation between states, some general patterns are discernible. First, most citations in each state supreme court were to either its own previous decisions or decisions of the High Court. On average, these accounted for about 50% of citations. Second, on average 20% of citations were to English courts. Third, 2–3% of citations were to courts in countries other than Australia and England. Fourth, 6–7% of citations were to secondary authorities. Most of these patterns are similar in broad

38 For example, Archibald, above n 6, found the dissent rate on the Ohio Supreme Court between 1951 and 1955 was 14%. Mann, above n 6, found the dissent rate on the North Carolina Supreme Court in 1977 was 13.5%.

39 See Mann, above n 6, 44.

40 See Friedman et al, above n 6, 785.

41 For example see Merryman, 'Towards a Theory of Citations', above n 6, 392–4; Mann, above n 6.

42 Smyth, 'What do Judges Cite?', above n 8.

terms to previous findings for the Supreme Court of Victoria, although the proportion of English cases cited in this study is lower. For instance, in 1990 the Supreme Court of Victoria's own previous decisions accounted for 20.7% of citations, High Court cases made up 22% of citations and English cases 32.6% of total citations. Courts in other countries made up 2.1% of citations and secondary authorities 9.3% of citations.[43]

What determines these patterns? There are at least two possible influences. First, the authorities cited by counsel in argument could have an important influence on what judges cite. Merryman suggests that 'a judge with limited time and a busy schedule is entitled to rely to some extent on briefs of counsel for the relevant authorities'.[44] However, it is difficult to know how important this is in practice. One American study found that less than half of the legal authorities cited in a sample of United States appeal decisions were taken from the argument of counsel.[45] Appeal judges in Canada have said that they are quite willing to cite cases in their judgments that were not cited in argument.[46] Sporadic statements from appeal judges in Australia also suggest this is the case here. For instance, Sir Frank Kitto preferred to do his own research because he thought: 'It is always possible that helpful authorities or other aids to decision have been missed in the argument through accident, laziness or inefficient research'.[47] It was not possible to quantify the influence of counsel on which authorities were cited in this study, because most of the state supreme court reports do not publish a list of the authorities which counsel cites in argument.

Second, previous studies in the United States have stressed the role of associates in writing the opinion. The role of associates is often emphasised when explaining the observation that the United States Supreme Court cites a high proportion of legal periodicals from elite law schools. For instance, in explaining the fact that the United States Supreme Court cites the *Harvard Law Review* more than other periodicals, Bernstein suggests: 'The only plausible explanation for this overwhelming preference for Harvard is a conspiracy of restraint of trade among the Justices' law clerks'.[48] However, in Australia, the influence of associates on citation patterns is much less because most judges write their own judgments and therefore exercise more control over what is cited.

A further possible factor is the subject matter of the case. Landes and Posner argue that the total number of citations varies from one area of the law to another. Their finding was that judges cite the smallest number of authorities in criminal cases and the largest number

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43 Ibid.

44 Merryman, 'The Authority of Authority', above n 6, 651.

45 T B Marvell, *Appellate Courts and Lawyers, Information Gathering in the Adversary System* (1978) 29.

46 Peter McCormick and Ian Greene, *Judges and Judging: Inside the Canadian Judicial System* (1990); McCormick, 'The Supreme Court Cites the Supreme Court', above n 4, 460.

47 Sir Frank Kitto, 'Why Write Judgments' (1992) 66 *Australian Law Journal* 787, 793.

48 Bernstein, above n 3, 67.

of authorities in land condemnation cases.[49] Table 3 breaks the sample cases down according to subject matter. Over one-third of the sample were criminal cases. If we consider tables 1 and 3 together, it is possible to get a rough indication of whether less authorities were cited in criminal cases. Victoria (62%) and South Australia (44%) had the highest proportion of criminal cases in the sample while New South Wales (18%) and Queensland (24%) had the lowest. In terms of absolute numbers of citations Victoria ranks second, South Australia sixth, New South Wales third and Queensland fifth. In addition, no clear picture emerges if we look at citations per page. This suggests that there is no correlation between citation rates and whether the case involved crime.

V TYPES OF AUTHORITIES CITED

The Court's Own Previous Decisions

Almost all studies in the United States have found that courts cite their own previous decisions more than the decisions of other courts. The one exception to this is the supreme courts of Idaho and Nevada in the period 1940 to 1970, which cited the California Supreme Court more than their own previous cases. However, both of these are small states within California's judicial sphere of influence.[50] In Canada studies have found that provincial courts cite the Supreme Court of Canada slightly more than their own previous decisions.[51] The one previous study for the Supreme Court of Victoria found that it cited its own decisions most in 1970 and 1980 and that in 1990 citations to its own decisions came second to the High Court.[52] In this study 24.2% of citations were to each court's own decisions and 25.2% of citations were to the High Court (see table 2) which is similar to the Canadian result. Three states (Victoria, New South Wales and South Australia) cited their own decisions more than the High Court, while the other three did not. Two states (Tasmania and Western Australia) cited other state and territory supreme courts more than either their own decisions or previous cases of the High Court.

There are two main reasons why state supreme courts cite a high proportion of their own decisions. The first is consistency or precedent. 'Where [the court] has spoken the strongest case for stare decisis is presented'.[53] In Australia there is some debate about the extent to which intermediate appellate courts are bound by their own previous decisions. More than 20 years ago, Kidd suggested: 'Practice relating to precedent in the Full Courts does not appear to be uniform throughout all six states'.[54] In some states there is little or

49 Landes and Posner, 'Legal Precedent', above n 5, 268–9.
50 See Friedman et al, above n 6, 802.
51 For example, see McCormick, 'Judicial Citation', above n 4, 878; McCormick, 'Judicial Authority', above n 7, 287.
52 Smyth, 'What do Judges Cite?', above n 8.
53 Merryman, 'The Authority of Authority', above n 6, 654.
54 C J F Kidd, 'Stare Decisis in Intermediate Appellate Courts — Practice in the English Court of Appeal, the Australian State Full Courts, and the New Zealand Court of Appeal' (1978) 52 *Australian Law Journal* 274, 276.

no authority on the matter, but it seems clear that at least the courts of appeal of Victoria and New South Wales do not regard themselves bound by their own previous decisions.[55] In New South Wales, the rule is that 'the Court of Criminal Appeal is not bound to follow an earlier decision if it is satisfied that the decision is wrong'.[56] If a previous decision of the Court of Appeal or Full Court is to be considered the usual practice is to convene a full bench of five or more judges, but there is no rule to this effect.[57] In the Court of Appeal of Victoria in *R v Tait*[58] Callaway JA suggested that there were 'exceptional circumstances in which the Full Court constituted by three judges was at liberty not to follow a prior decision'. He went on to state: 'It may be that in the future we would extend those exceptional circumstances to enable a greater number of Full Court and, in due course some of our own, previous decisions to be reviewed by a court of three'.[59]

A second reason state supreme courts cite a high proportion of their own decisions is that cases before these courts often involve interpretation of statutes. In these cases the court looks to its own decisions because those of other courts are of little assistance unless those jurisdictions have equivalent legislation. In explaining the fact that state supreme courts in the United States have tended to cite more in-state than out-of-state cases over time, Friedman et al suggest this 'might reflect the relative decline of common law cases on [state supreme court] dockets and the growth of statutes as a source of law'.[60] These observations are also apposite for state courts in Australia. Over time a 'multiplier effect' develops where the courts build up their own case law interpreting specific statutes.

A final point that deserves mention is that there is a tendency for each of the courts to prefer their more recent decisions to older cases (see table 2). A number of previous studies have also observed that the 'citation power' of previous cases decline over time.[61] For instance, Merryman's figures on citations by the California Supreme Court suggest a 'citation half-life' of about seven years. That is, 'the probability that any decision of the California Supreme Court will be cited by that court as an authority is reduced by one-half every seven years or so'.[62] In the Supreme Court of Canada, the citation half-life is just under four years.[63] There are several possible reasons for this phenomenon. First, it is possible that the judges have a preference for citing judgments which they wrote, but this

55 For example see *R v Johns* [1978] 2 NSWLR 259, 262; *R v Moran* (1991) 52 A Crim R 440, 442; *R v Mai* (1992) 26 NSWLR 371, 380–1; *R v Jurisic* (1998) 45 NSWLR 209, 214; *R v Tait* [1996] 1 VR 662, 666.

56 *R v Johns* [1978] 2 NSWLR 259, 264

57 *R v Jurisic* (1998) 45 NSWLR 209, 214.

58 [1996] 1 VR 662.

59 Ibid 666. The other members of the Court of Appeal (Winneke P and Crockett JA) expressed agreement with these comments.

60 Friedman et al, above n 6, 797.

61 For example, see Landes and Posner, 'Legal Precedent', above n 5; Merryman 'Towards a Theory of Citations', above n 6; Smyth, 'What do Judges Cite?', above n 8.

62 Merryman, 'Towards a Theory of Citations', above n 6, 395.

63 McCormick, 'The Supreme Court Cites the Supreme Court', above n 4, 470.

is not a complete explanation. This might explain the high proportion of cited cases which were decided in the 1990s, but does not readily explain why judges would cite a higher proportion of cases decided in the 1970s than cases decided in the 1950s. Hence, there must be other reasons. A more general explanation is that the stock of older decisions will be reduced over time as cases are overruled either by later decisions or statutes. Third, legal opinion changes over time so that even if earlier decisions are not overruled, their reasoning might not seem as persuasive. Fourth, later cases tend to be more relevant on the facts because the social context of earlier decisions have changed.[64]

High Court and Other State and Territory Supreme Courts

The High Court was the single most cited court in the sample cases accounting for over one quarter of total citations. This reflects judicial precedent or what McCormick terms the hierarchy principle of judicial citation.[65] Since the commencement of the *Australia Acts 1986* (Cth and UK), the High Court is the final court of appeal in Australia. The courts of appeal and full courts in each state are bound by the ratio decidendi of previous decisions of the High Court. Even if there are no High Court decisions on the issue the obiter dicta of justices of the High Court has strong persuasive value. Consistent with their own previous decisions, the state courts cited recent decisions of the High Court much more than older cases (see table 2) for similar reasons to those considered above.

The court of appeal of each state supreme court is not strictly bound by the decisions of courts of appeal in other states. However, a series of cases suggest that intermediate appellate courts in Australia should follow the decisions of other intermediate appellate courts unless convinced that the decision is wrong.[66] Other state and territory supreme courts accounted for 17.77% of total citations. These represent what Flowers calls 'coordinate citations'.[67] This amount is larger than state supreme courts in the United States where interstate citations make up 7–8% of total citations, but similar to Canada where interprovincial citations are responsible for 15% of total citations.[68] Table 2 shows that citations to other supreme courts were not uniform across courts. New South Wales was a small 'consumer' of coordinate citations, citing other supreme courts in just 6.19% of cases, while at the other end of the spectrum Tasmania cited other supreme courts in 25.2% of cases. As indicated above, Tasmania and Western Australia cited other supreme courts more than either their own decisions or decisions of the High Court.

64 See Merryman, 'Toward a Theory of Citations', above n 6, 394–9; Smyth, 'What do Judges Cite?', above n 8.

65 McCormick, 'Judicial Citation', above n 4, 876; McCormick, 'The Evolution of Coordinate Precedential Citation', above n 7, 273.

66 See the cases collected in *R v Morrison* [1999] 1 Qd R 397, 400–1.

67 Ross Flowers, 'Stare Decisis in Courts of Co-ordinate Jurisdiction' (1985) 5 *Advocates Quarterly* 464. See also McCormick, 'The Evolution of Coordinate Precedential Citation', above n 7.

68 Merryman, 'Toward a Theory of Citations', above n 6, 401–4; Friedman et al, above n 6, 801–4 (United States); McCormick, ibid 284 (table 4) (Canada).

Differences also emerge when we look at which courts received the most out-of-state citations. Table 4 presents statistics on this issue. New South Wales, Victoria and South Australia received the most out-of-state citations while, of the state supreme courts, Tasmania and Western Australia received the least; in fact New South Wales received more than 12 times the number of out-of-state citations that Tasmania received. What explains this citation pattern? Why did New South Wales, Victoria and South Australia receive more out-of-state citations than Queensland, Western Australia and Tasmania? One possible explanation is that there are more reported cases from New South Wales, Victoria and South Australia than from Tasmania and Western Australia. The law reports of New South Wales, Victoria and South Australia extend back into the 1800s. However, on its own, this cannot explain the sheer difference in citation power between the courts. This is particularly true given that most out-of-state citations are to recent decisions. A second, related explanation could be that it is harder to get access to the unreported judgments of some states. This is reflected in Lord Devlin's observation that 'an unreported judge makes no law'.[69] This might have been true in the past, but is not the case now with most unreported judgments available on CD-ROM and the internet.

When interpreting legislation with uniform or similar provisions in other states, the High Court has stressed the need for consistent interpretation across intermediate appellate courts.[70] Hence, a third reason could be that, in cases involving interpretation of legislation, judges refer more to counterpart provisions in New South Wales, Victoria and South Australia than in the other states. Table 5 lists the number of times cases referred to similar or uniform legislation or rules in other jurisdictions. It provides some weak support for this explanation. Judges referred to similar legislation in New South Wales in 38 cases, to similar legislation in Victoria in 24 cases and similar legislation in South Australia in 16 cases, which was more than the other states. However, these figures are not large enough to provide a complete explanation for differences in out-of-state citations.

Fourth, a number of studies in the United States suggest that out-of-state citations depend on a range of socio-cultural factors including migration flows, geographical proximity and population size. For instance, Harris argues that supreme courts tend to cite the courts of the states from which their own state received its population.[71] Caldeira found that supreme courts in adjacent states cited each other's cases more often, holding other factors constant. He reasoned that this was because the social context of litigation in neighbouring states was similar.[72] Friedman et al suggest that states with large populations are cited more than states with small populations.[73] In explaining the fact that the Supreme Court of California receives much more out-of-state citations than the Supreme Court of South Dakota in the United States, Friedman et al state: 'California Supreme Court decisions

69 Lord Devlin, *The Judge* (1979) 180.
70 *Australian Securities Commission v Marlborough Gold Mines* (1993) 177 CLR 485, 492.
71 Harris, above n 10.
72 Caldeira, 'The Transmission of Legal Precedent', above n 10, 182–3.
73 Friedman et al, above n 6, 807.

establish the law for an empire of over 20,000,000 people; for that reason alone, California decisions may be regarded as more significant than the decisions of the Supreme Court of South Dakota, a state with a population of about 4% of California'.[74] Of these factors, population size seems to be the most important in explaining out-of-state citations in this study. This might explain in part why Victoria and New South Wales received more out-of-state citations than Tasmania.

Fifth, the relative prestige of particular supreme courts might make judges of other courts inclined to cite their decisions more often. As indicated earlier, studies in the United States have found that the Supreme Courts of California, Massachusetts and New York receive more out-of-state citations than other state supreme courts, holding socio-cultural factors constant.[75] In Canada, McCormick found that the Ontario Court of Appeal and, to a lesser extent, the British Columbia Court of Appeal are cited much more than other provincial courts of appeal.[76] McCormick goes as far as to suggest: 'To the extent that citation patterns imply doctrinal leadership, [it is appropriate] to think of the Ontario Court of Appeal as a "junior Supreme Court [of Canada]"'.[77] These courts have reputations for judicial innovation which attract comment in other courts. This is also true for the Victorian and New South Wales supreme courts. The reputation of the judges is also relevant. A disproportionate number of High Court judges have been members of the Supreme Court of New South Wales or come from the New South Wales Bar.[78]

English Courts and Courts in Other Countries

Before the commencement of the *Australia Acts 1986*, decisions of the Privy Council were binding on the court of appeal and full court of each state supreme court. The decisions of other English courts were not binding on the court of appeal and full court in each state, but if there were no High Court decision on the issue, the supreme courts in effect treated decisions of the House of Lords and English Court of Appeal as binding.[79] Since the *Australia Acts* 1986 state supreme courts are no longer bound to follow Privy Council

74 Ibid.

75 See the references above n 15.

76 McCormick, 'The Evolution of Coordinate Precedential Citation', above n 7.

77 Ibid 291.

78 Brian Galligan, *The Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987).

79 Until *Cook v Cook* (1986) 162 CLR 376, 390, 'in the absence of controlling authority a State Supreme Court, including a "Supreme Court on Appeal" should as a general rule, [have] follow[ed] decisions of the English Court of Appeal'. In *Public Transport Commission (NSW) v J Murray-More (NSW)* (1975) 132 CLR 336, 341 Barwick CJ suggested that if there were no relevant High Court decision the Supreme Court of New South Wales at first instance and in the Court of Appeal should, as a general rule, have followed a decision of the English Court of Appeal. Gibbs J (at 349) suggested that the Supreme Court of New South Wales should have treated a decision of the English Court of Appeal as binding.

decisions or other English decisions given after the commencement of the Acts.[80] In *Cook v Cook*[81] the High Court stated that 'courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts', but those decisions are not binding precedents and 'are useful only to the degree of persuasiveness of their reasoning'.[82] While decisions of the House of Lords remain highly persuasive, there are several decisions in different state courts which suggest that the court of appeal and full court should follow their own established authorities and practices even if these represent a departure from opinion in the House of Lords.[83]

Table 2 suggests that in the sample cases English courts accounted for just under 20% of total citations. How does this compare with findings in previous studies? Similar studies suggest that English authorities account for one-eighth or about 12% of total citations in the provincial courts in Canada, while in the Supreme Court of Canada the figure is about 15%.[84] In the previous study for the Supreme Court of Victoria English authorities accounted for 32% of total citations in 1990.[85] A couple of points deserve specific mention. First, the House of Lords, English Court of Appeal and lower English courts were all cited more than the Privy Council. This is a finding which replicates previous studies for Canadian courts and the Supreme Court of Victoria. One explanation would appear to be that there are less Privy Council decisions to cite than decisions of other English courts. This is a trend which has become more pronounced over time as more countries have stopped appeals to the Privy Council. Second, previous studies have found that the proportion of English authorities cited in Canadian courts and the Supreme Court of Victoria have declined over time relative to decisions of local courts. This study confirms this trend at least for the Supreme Court of Victoria. This supports the view of Sir Anthony Mason and others that there is an emerging 'Australian common law'.[86]

The decisions of foreign jurisdictions are not binding but, like English decisions following *Cook v Cook*, their value depends on the persuasive force of their reasoning. However, while decisions of countries such as Canada, United States and New Zealand are now

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80 In *Hawkins v Clayton* (1986) 5 NSWLR 109, 136–7 McHugh JA went further and suggested that, following the *Australia Acts 1986*, state supreme courts do not have to follow Privy Council decisions given before the commencement of the Acts. In *R v Judge Bland* [1987] VR 225, 231 Nathan J stated that since the *Australia Acts 1986* a single judge should prefer a decision of a full court to a decision of the Privy Council, irrespective of when the latter was given.

81 (1986) 162 CLR 376.

82 Ibid 390.

83 For example, see *Britten v Alpogut* [1987] VR 929, 938 (Murphy J); *R v Liberti* (1991) 55 A Crim R 120, 122 (Kirby P); *R v Parsons* [1998] 2 VR 478, 485 (Winneke ACJ); *Dobree v Hoffman* (1996) 18 WAR 36, 43–4 (Parker J).

84 See McCormick, 'Judicial Citation', above n 4; McCormick, 'Judicial Authority', above n 7; McCormick, 'The Evolution of Coordinate Precedential Citation', above n 7.

85 Smyth, 'What do Judges Cite?', above n 8.

86 Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash Law Review* 149, 151–5.

considered to have the same precedential value as English authorities,[87] table 2 suggests that courts in these and other foreign jurisdictions are cited far less than English cases. Citations to courts in countries other than Australia and England accounted for 2.27% of total citations on average, although in Queensland the number was as high as 4.77%. Previous research for the Supreme Court of Victoria found that 2–3% of its citations were to courts in countries other than Australia and England in 1970, 1980 and 1990.[88] The comparable figure for the Supreme Court of Canada was 4.9% in decisions reported between 1984 and 1994.[89] In contrast studies have found that courts in the United States cite few foreign cases at all, including Canadian and English authorities.[90]

Table 6 breaks down citations to courts in countries other than Australia and England. There was considerable divergence across states, with South Australia and Western Australia citing few foreign authorities, while Queensland and Tasmania cited a lot in relative terms. Overall, Canadian courts (Supreme Court of Canada and provincial courts) received the most citations. New Zealand courts (the Court of Appeal and Supreme Court of New Zealand) received the second largest number of citations, while courts in the United States were a distant third. These three countries also received the largest number of citations in the Supreme Court of Victoria in 1970, 1980 and 1990.[91] New Zealand is geographically proximate to Australia and has similar cultural and legal traditions as well as close historical ties. Canada and the United States are the two countries in the world with federal common law systems similar to Australia. Courts in Ireland, Scotland, Hong Kong, Pakistan, South Africa and Zimbabwe also received one or more citations.

Secondary Authorities

Secondary authorities are divided into 'legal' and 'non-legal' sources in table 7. A couple of points come through in this table. First, most citations were to legal rather than non-legal sources. This is similar to the High Court in 1960, 1970, 1980 and 1996, where at least 85% of citations to secondary authorities were to legal sources in each of these years,[92] but contrasts with the United States Supreme Court which cites a higher proportion of non-legal academic authorities.[93] One reason for this is the propensity for the United States Supreme Court to cite social science evidence in capital punishment cases and cases relating to the Bill of Rights.[94] Second, there was a clear pecking order in

87 Mason, ibid 154 states: 'The value of English judgments, like Canadian, New Zealand and for that matter United States judgments, depends on the persuasive force of their reasoning'.
88 Smyth, 'What do Judges Cite?', above n 8.
89 McCormick, 'Judicial Citation', above n 4, 876 (table 1).
90 See Manz, above n 2, 134; Friedman et al, above n 6, 799; Merryman, 'Toward a Theory of Citations', above n 6, 400.
91 Smyth, 'What do Judges Cite?', above n 8.
92 Smyth, 'Other than Accepted Sources of Law?', above n 8.
93 Daniels, above n 3.
94 Smyth, 'Other than Accepted Sources of Law?', above n 8, 24.

terms of the type of legal authority cited. On average, legal texts accounted for 61.23% of total citations, legal periodicals accounted for 17.3% of total citations and legal encyclopedias for just over 5.38% of total citations to secondary authorities. This finding replicates rankings in previous studies for the Supreme Court of Victoria and High Court, but differs from the United States Supreme Court which cites legal periodicals more than legal texts.[95] Dictionaries were the most cited non-legal secondary authority. This is consistent with studies for the High Court and United States Supreme Court.[96]

Table 8 lists all legal texts which received two or more citations. The five most cited texts were *Cross on Evidence*; Archbold, *Pleadings*; *Phipson on Evidence*; Mustill and Boyd, *Commercial Arbitration*; and Meagher, Gummow and Lehane, *Equity, Doctrine and Remedies*. Table 8 suggests that the state courts cite a mixture of modern commentators (such as Meagher, Gummow and Lehane) and classic commentators (such as Archbold, Phipson and Wigmore). Merryman terms the former 'local works'.[97] He points out:

> [Local works] are often 'convenience' or 'baseline' citations. They are an expression of the view that on some questions legal development is cumulative, that progress up to a certain point can be drawn from the decisions, statutes and administrative practice and be accurately restated in summary form.[98]

Manz found that the New York Court of Appeals had several 'local favourites'.[99] These included works such as Weinstein, Korn and Miller's *New York Civil Practice* and Siegal's *New York Practice*.[100] These are true 'local works' in the sense in which Merryman uses the term. The state supreme courts in Australia also have their favourites such as Seaman, *Civil Procedure in Western Australia* in Western Australia and Warner, *Sentencing in Tasmania* in Tasmania. Is a high proportion of citations to 'local works' or 'local favourites' a positive or negative phenomenon? Merryman suggests that the purist would argue that the baseline function could be served by citing the 'controlling decision' or other 'primary authority'. However, at the same time, he acknowledges that often a text 'is easier to cite and puts the state of the settled law in fuller, richer perspective'.[101]

Table 9 lists all legal periodicals cited in the sample cases. Altogether 35 different periodicals were cited a total of 98 times. The five most cited periodicals were the *Law Quarterly Review, Criminal Law Review, Australian Law Journal, Modern Law Review* and the *Criminal Law Journal*. The two journals on criminal law reflect the subject matter

95 Smyth, ibid (High Court); Smyth, 'What do Judges Cite?', above n 8 (Supreme Court of Victoria); Daniels, above n 3 (United States Supreme Court).
96 Smyth, 'Other than Accepted Sources of Law', ibid; Daniels, ibid.
97 Merryman, 'Toward a Theory of Citations', above n 6, 413.
98 Ibid.
99 Manz, above n 2, 138.
100 Ibid.
101 Merryman, 'Toward a Theory of Citations', above n 6, 413.

of the sample cases. The other periodicals were also the most cited journals in the High Court between 1990 and 1997[102] and are amongst the most cited journals in Australian legal scholarship.[103] Victoria and New South Wales were responsible for over 50% of citations to legal periodicals. Some of the authors of similar studies to this in the United States have argued that citations to legal periodicals reflect a propensity for greater judicial activism or more innovative judicial attitudes.[104] If this is the case, it supports the argument made above that Victoria and New South Wales receive a high proportion of out-of-state citations because of their reputation for judicial innovation.

A final point which deserves mentioning is that the state supreme courts cite far fewer periodicals than the High Court. In a sample of 316 cases decided between 1990 and 1997 there were 1132 citations to legal periodicals in the High Court, which is more than 11 times the number of citations in the sample cases in this study.[105] What explains the relatively low level of citations in state supreme courts? One factor could be that the subject matter of periodicals is too theoretical and not relevant to the case load of state courts. There is some anecdotal evidence to support this conjecture based on the observations of state judges in the United States. For example Judith Kaye, a judge of the New York Court of Appeals complains: 'Prominent law reviews are increasingly dedicated to abstract, theoretical subjects, to federal constitutional law, and to federal law generally, and less and less to practice and professional issues, and to the grist of state court dockets'.[106] Ellen Peters, a judge of the Connecticut Supreme Court makes a similar observation. She states that 'there is an increasing divergence between the theoretical interests of the aspiring academic lawyer and the pragmatic interests of the successful practitioner'.[107] These comments are applicable to law review writing in Australia, with most commentaries on, or directed to, the High Court rather than state supreme courts.

VI CONCLUSION

This paper has considered citation practice in a sample of 300 court of appeal and full court cases spread over the six state supreme courts. It has documented and discussed citations to both case law and secondary authorities and, whenever possible, comparisons have been made with previous studies. In particular, repeated reference has been made to the one previous study for the Supreme Court of Victoria;[108] the results of which this paper

102 Smyth, 'Academic Writing and the Courts', above n 8.

103 See Dennis Warren, 'Australian Law Journals: An Analysis of Citation Patterns' (1996) 27 *Australian Academic Research Libraries* 261; Ian Ramsay and G P Stapledon, 'A Citation Analysis of Australian Law Journals' (1997) 21 *Melbourne University Law Review* 676.

104 Bobinski, above n 6, 986, Friedman et al, above n 6, 815.

105 Smyth, 'Academic Writing and the Courts', above n 8.

106 Judith Kaye, 'One Judge's View of Academic Law Review Writing' (1989) 39 *Journal of Legal Education* 313, 319.

107 Ellen Peters, 'Reality and the Language of the Law' (1981) 90 *Yale Law Journal* 1193, 1193.

108 Smyth, 'What do Judges Cite?', above n 8.

has sought to update and consider in the broader context of the citation practice of each of the state supreme courts. Most of the findings in this study are consistent with the results of previous research. The main findings are that most of the supreme courts cite their own decisions and decisions of the High Court more than other authorities and that the state courts cite more Australian authorities than English authorities, confirming the historical trends identified in the earlier article looking at the Supreme Court of Victoria.

Another finding in the study that comes through strongly concerns the doctrinal leadership of the New South Wales Court of Appeal and, to a lesser extent, the Victorian Court of Appeal in coordinate citations. Various reasons have been offered for this in the text but, like the Ontario Court of Appeal in Canada, one of the most obvious is the size of the Bars in each state and, as a result, the depth of legal talent that these courts have to draw on.

This study has some limitations. First, it is restricted to a sample of published decisions, although it was argued above that the sample covers the most important decisions in the relevant period. Second, it is impossible to be certain whether the cases in the sample are representative, although at the same time there is no reason to believe they are not and the sample size is similar to previous Australian studies. Third, the results of counting citations need to be viewed with caution.[109] As Friedman et al note 'sheer *numbers* of citations are only the roughest indicator of legal style or breadth of research. A judge who cites many cases has not necessarily done more research than a judge who cites only a few. Many decisions "string" out long lists of cases'.[110] The legal realist school stresses that it is impossible to get inside the judge's mind and that citations are, at best, ex post rationalisations of decision making. Having said this, at the least citation practice does 'show what judges *think* is legitimate argument and legitimate authority, justifying their behaviour. And such thoughts are important'.[111] For this reason, the findings in the tables and related discussion in the text should be of interest to various groups including libraries, barristers and academics interested in the citation practice of the courts.

109 For an extended discussion of the advantages and disadvantages of citation practice studies in a legal context see Fred Shapiro, 'The Most-Cited Law Review Articles' (1985) 73 *California Law Review* 1540.

110 Friedman et al, above n 6, 804 (emphasis original).

111 Ibid 794 (emphasis original).

TABLE 1

Citation Rates in State Supreme Court Cases

	Vic	NSW	Qld	WA	SA	Tas	Total
Average length of case (pages)	16.9	17.4	9.9	18.4	17.6	22.3	17.1
Number of citations in sample cases	1598	1503	1069	1496	820	1797	8283
Number of citations per case	32.0	30.1	21.4	29.9	16.4	35.9	27.6
Number of citations per judgment	10.7	9.6 [a]	7.1	10.0	5.3 [b]	11.8 [c]	9.1
Number of citations per page	1.9	1.7	2.17	1.63	0.93	1.61	1.66
Proportion of cases with dissenting judgments	0.16	0.10	0.18	0.06	0.12	0.22	0.14
Number of citations per dissenting judgment	9.4	26.0	7.0	14.0	10.6	15.7	13.8

(a) Three cases had five judges

(b) Two cases had five judges

(c) One case had five judges

TABLE 2

Citations According to Authority Type

	Vic	NSW	Qld	WA	SA	Tas	Total
Own court pre-1900	1	2	4	–	–	–	7
1900–09	3		3	2	–	2	10
1910–19	4	1	4	–	–	2	11
1920–29	3	6	1	–	2	–	12
1930–39	1	6	–	1	–	–	8
1940–49	4	7	3	1	–	–	15
1950–59	12	4	1	–	2	3	22
1960–69	25	16	12	10	4	48	115
1970–79	40	34	14	12	41	53	194
1980–89	90	109	56	76	92	81	504
1990–99	329	217	100	193	107	162	1108
Total	512	402	198	295	248	351	2006
High Court 1900–09	3	5	6	2	3	5	24
1910–19	8	12	2	9	2	9	42
1920–29	–	2	5	4	2	6	19
1930–39	18	20	9	13	14	27	101
1940–49	9	4	20	10	3	9	55
1950–59	39	12	15	13	10	28	117
1960–69	18	33	20	19	10	30	130
1970–79	62	50	42	43	34	46	277
1980–89	97	98	105	99	89	182	670
1990–99	166	120	94	105	72	95	652
Total	420	356	318	317	239	437	2087
Other state and territory supreme courts	254	93	203	350	120	452	1472
Federal Court	32	51	19	93	30	49	274
Lower Australian courts and tribunals	5	10	5	5	15	10	50
Total Australian	**1223**	**912**	**743**	**1060**	**652**	**1299**	**5889**
House of Lords	69	138	55	79	43	123	507
Court of Appeal (Eng)	92	146	75	133	43	176	665
Privy Council	23	18	10	17	14	18	100
Lower English courts	49	110	61	57	18	57	352
Total English	**233**	**412**	**201**	**286**	**118**	**374**	**1624**
Other countries	25	41	51	15	18	55	205
Secondary authorities	117	138	74	135	32	69	565
GRAND TOTAL	**1598**	**1503**	**1069**	**1496**	**820**	**1797**	**8283**

TABLE 3

Main Subject Matter of Sample Cases

	Vic	NSW	Qld	WA	SA	Tas	Total
Administrative		1	5	5	5	3	19
Arbitration				2	1		3
Associations and clubs	1						1
Building					1		1
Companies	2	4	1	3	1		11
Constitutional				2			2
Contract	3	1	4	2	1	3	14
Costs		3		1			4
Courts and judges		1		1			2
Criminal	31	9	12	16	22	17	107
Damages	1	1		4			6
Discrimination	1						1
Evidence		2				3	5
Equity		1		1	1		3
Family			1				1
Industrial	1	2				2	5
Insurance		2	2		2		6
International		1					1
Limitation of actions		1		1			2
Local government			2		1	1	4
Mining			1				1
Motor vehicle	1						1
Practice and procedure	2	2	7	8	2	7	28
Professions and trades		2	3	1			6
Property	1	3	1	1	1	2	9
Restrictive trade practices		1				1	2
Sentencing				1			1
Shipping		1	1				2
Statute		1	2		1		4
Taxes and duties			5				5
Torts	2	5	1		7	2	17
Wills and probate	1	2					3
Workers compensation	3	4	2	1	4	9	23

TABLE 4

'Out-of-State' Citations

Cited Court	Citing Court						
	Vic	NSW	Qld	WA	SA	Tas	Total
Vic	-	45	49	79	27	141	341
NSW	167	-	100	124	66	108	565
Qld	21	18	-	42	9	59	149
WA	15	7	23	-	10	55	110
SA	29	17	15	75	-	70	206
Tas	14		10	19	3	-	46
ACT	1	3	1	4	3	10	22
NT	7	3	5	7	2	9	33
Total	254	93	203	350	120	452	1472

TABLE 5

Cases Referring to Similar or Uniform Legislation or Rules in Other Jurisdictions

	Referring Court						
	Vic	NSW	Qld	WA	SA	Tas	Total
Vic	-	5	3	7	2	7	24
NSW	8	-	5	11	8	6	38
Qld	4	2	-	5	1	3	15
WA	3	1	1	-	1	5	11
SA	4	1	1	5	-	5	16
Tas	2				2	-	4
ACT	1			2			3
NT	1			1			2
England	9	6	2	18	5	6	46
Canada	1					1	2
NZ	1	1		1	1		4
Malaysia		1					1
USA						1	1
Total	34	17	12	50	20	34	167

TABLE 6

Citations to Courts in Countries Other than Australia and England

	Citing Court						
	Vic	NSW	Qld	WA	SA	Tas	Total
Canada	14	8	22	6	6	20	76
New Zealand	7	13	10	4	6	26	66
United States	1	17	15	4		9	46
Ireland		2	4		1		7
Scotland	3				3		6
Hong Kong					1		1
Pakistan		1					1
South Africa				1			1
Zimbabwe					1		1
Total	25	41	51	15	18	55	205

TABLE 7

Citations to Secondary Authorities According to Type

	Vic	NSW	Qld	WA	SA	Tas
Legal						
Legal Periodicals	23	33	15	9	5	13
Legal Texts	74	76	35	101	18	42
Legal Encyclopedias	1	4	10	6	3	9
Legal Dictionaries	2		2	3		1
Law Reform Reports		7			1	1
Restatement			2			1
Sub-Total	100	120	64	119	27	67
Non-Legal						
Dictionaries	17	17	8	10	5	2
Texts		1		6		
Periodicals			2			
Sub-Total	17	18	10	16	5	2
GRAND TOTAL	117	138	74	135	32	69

TABLE 8

Legal Texts Cited Two or More Times

	Vic	NSW	Qld	WA	SA	Tas	Total
Cross on Evidence (Australian Edition)*	8	1		20	1	1	31
Archbold, *Pleading, Evidence and Practice in Criminal Cases**	3			9		3	15
*Phipson on Evidence**	4	3		7		1	15
Mustill and Boyd, *Commercial Arbitration*				10			10
Meagher, Gummow and Lehane, *Equity, Doctrine and Remedies**	1	4		3			8
Seaman, *Civil Procedure in Western Australia*				7			7
Jacobs, *Commercial Arbitration, Law and Practice*				6			6
*Wigmore on Evidence**	3	2		1			6
Fleming, *Law of Torts**		3		1	1		5
Luntz, *Assessment of Damages for Personal Injury and Death**		3	1	1			5
Pearce and Geddes, *Statutory Interpretation in Australia**	1			2		2	5
Spencer, Bower, Turner and Handley, *The Doctrine of Res Judicatae**	2	2			1		5
Spry, *Equitable Remedies**	1			3		1	5
Arnould, *Law of Marine Insurance and Average*			4				4
*Best on Evidence**				2		2	4
Chitty on Contracts				4			4
Dicey and Morris, *The Conflict of Laws*		4					4
Fox and Frieberg, *Sentencing in Victoria**	2			1		1	4
Hawkins, *Pleas of the Crown**	3					1	4
Pattendon, *English Criminal Appeals 1844–1994: Appeals Against Conviction and Sentence*	4						4
*Roscoe's Criminal Evidence**	1			3			4
*Russell on Crime**	1		1		1	1	4
Aranson and Dyer, *Judicial Review of Administrative Action*		3					3
Blackstone, *Commentaries on the Laws of England**					1	2	3
Campbell and Waller (eds), *Well and Truly Tried: Essays in Honour of Sir Richard Eggleston*		3					3
Carter, *Breach of Contract*		3					3
Forbes, *Disciplinary Tribunals*	3						3
Gillies, *Law of Evidence in Australia*				3			3

Table 8 continued

	Vic	NSW	Qld	WA	SA	Tas	Total
Hale's *Pleas of the Crown*	3						3
Holdsworth, *History of English Law**					1	2	3
Kenny, *Outline of Criminal Law**	2		1				3
McGregor on Damages		3					3
Russell on Arbitration				3			3
Sutton, *Insurance Law in Australia**			1		2		3
Sykes and Walker, *The Law of Securities*						3	3
Taylor on Evidence				3			3
Warner, *Sentencing in Tasmania*						3	3
Williams, *Civil Procedure-Victoria*			3				3
Williams, *Textbook of Criminal Law**	2				1		3
Youdan (ed), *Equity, Fiduciaries and Trusts*		3					3
Bradbrook, *Australian Real Property Law*					2		2
Cooke, *Voyage Charters*		2					2
Craies, *Statute Law**	1					1	2
Croft, *The Mortgagee's Power of Sale*						2	2
Finn, *Essays on Torts*		2					2
Ford, *Principles of Company Law*	2						2
Ford and Lee, *Principles of the Law of Trusts*			2				2
Hudson on Building and Engineering Contracts	2						2
Ivamy, *Marine Insurance*			2				2
Lane, *An Introduction to Australian Constitutions*				2			2
Ligertwood, *Australian Evidence**		1				1	2
Meagher and Gummow, *Jacobs Law of Trusts in Australia**		1			1		2
Parkinson (ed), *The Principles of Equity*		2					2
Pearce, *Delegated Legislation in Australia and New Zealand**		1		1			2
Quick and Garran, *Annotated Constitution of the Commonwealth of Australia**			1			1	2
Ross, *The Court of Criminal Appeal*	2						2
Scrutton on Charter Parties and Bills of Lading		2					2
Stephen, *History of the Criminal Law of England**					1	1	2
Tetley, *Marine Cargo Claims*		2					2

* denotes cited in more than one court

TABLE 9

Citations to Legal Periodicals

Periodical	Vic	NSW	Qld	WA	SA	Tas	Total
LQR	6	5			2	3	16
Crim Law Rev	6	4					10
ALJ		3	1	2	1	2	9
Mod LR	2	4					6
Crim LJ	2		1		2		5
Fed LR		4		1			5
L Inst J		3	1				4
Current Legal Prob						3	3
Mon LR	1	1	1				3
Sol J				3			3
ABLR		2					2
ANZ J Crim	1		1				2
BCL						2	2
Duquesne L Rev						2	2
J Judicial Admin		1	1				2
MULR		1				1	2
NZ U L Rev		2					2
PLR	1		1				2
UNSW LJ			2				2
Aust J Fam Law			1				1
Behav Science & Law			1				1
Denning LJ		1					1
Howard J Crim Justice			1				1
J Bus Law	1						1
JCL	1						1
Lloyds Maritime & Comm Law Qrtly	1						1
New Law J			1				1
Northern Ireland LQ		1					1
Queensland Lawyer		1					1
South Carolina L Rev			1				1
Syd L Rev	1						1
Torts LJ				1			1
TPLJ				1			1
U Penn LR			1				1
UWA LR				1			1
Total	23	33	15	9	5	13	98