*Russell Smyth**

CITATION TO AUTHORITY ON THE SUPREME COURT OF SOUTH AUSTRALIA: EVIDENCE FROM A HUNDRED YEARS OF DATA

ABSTRACT

This article examines the citation practice of the Supreme Court of South Australia using data collected from the official state reports at decade intervals over the period 1905 to 2005. The main findings of the article are fourfold. First, on a per case and a per judgment basis, the citation rate has increased since the Second World War. Second, over the course of the 20th century, the proportion of citations of English authorities has declined and this decline was been hastened by the severance of constitutional links between Australia and the United Kingdom that occurred following the commencement of the *Australia Acts*. Third, citation of English authorities has been replaced by citations of the Court's own previous decisions and citations of decisions of the High Court. Fourth, citations of the decisions of the other state Supreme Courts have increased over time, although such citations are not as frequent as either citations of the Court's own decisions or decisions of the High Court.

I INTRODUCTION

Appellate courts in common law countries are often required to give written reasons for their decisions.[1] In Australia, judges are under an obligation to ensure that their 'critical or crucial reasoning' is conveyed and what is regarded as sufficient to convey 'critical or crucial reasoning' will depend on the circumstances of the case.[2] A further feature of appellate decision-making in common law countries is that written reasons are typically organised around citation to previous authorities. At the most basic level, citations to previous authorities locate the decision within the system of precedent and provide protection against arbitrary decision-making. Studying the citation practice of specific courts provides insights into how decisions

* BEc(Hons) LLB(Hons) MEc (Monash) PhD (London). Professor, Department of Economics, Monash University. Funding for this project was provided by grants from the Department of Economics and the Faculty of Business and Economics, Monash University. I thank Adel Mohammad and Xiaolei Qian for research assistance on this project.

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; Martin Shapiro, 'The Giving Reasons Requirement' (1992) *University of Chicago Legal Forum* 179.

2 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278 (McHugh JA); *Mifsud v Campbell* (1991) 21 NSWLR 725, 728 (Samuels JA).

are reasoned. Peter McCormick has described the rationale for examining judicial citations as follows:

> If we accept that we need to take judges' reasons seriously, then it follows that we should also take their citations seriously. At one rather obvious level, these direct us to the specific decisions of their own and other courts which contribute to the legal doctrine the court is applying, developing or modifying. However, at another level, they direct us to the specific courts, and even to the specific judges, who are making the most significant contributions to the court's jurisprudence. To discover these general [citation] patterns for any given period and then to trace the way patterns change over time is, therefore, to uncover an important dimension of judicial decision-making.[3]

There is a large number of studies documenting the citation practice of courts in Australia, Canada, New Zealand and the United States. For Australian courts, there are studies of the citation practice of the High Court of Australia,[4] Federal Court of Australia[5] and the Australian state Supreme Courts.[6] For Canadian courts, there are studies for the Supreme Court of Canada[7] and the Canadian Provincial courts of

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3 Peter McCormick, 'The Supreme Court of Canada and American Citations 1945–1994: A Statistical Overview' (1997) 8 *Supreme Court Law Review* 527, 528.

4 See Rebecca Lefler, 'A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada and the High Court of Australia' (2001) 11 *Southern California Interdisciplinary Law Journal* 165; Russell Smyth, 'Citations by Court' in Anthony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001); 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; 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; Russell Smyth, 'Law or Economics? An Empirical Investigation of the Impact of Economics on Australian Courts' (2000) 28 *Australian Business Law Review* 5; Paul von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901–1987' (1992) 14 *Adelaide Law Review* 181; Paul von Nessen, 'Is There Anything to Fear in the Transnationalist Development of Law? The Australian Experience' (2006) 33 *Pepperdine Law Review* 883.

5 Russell Smyth, 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9 *Griffith Law Review* 25.

6 Russell Smyth, 'What do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21 *Adelaide Law Review* 51; Russell Smyth, 'What do Judges Cite? An Empirical Study of the "Authority of Authority" in the Supreme Court of Victoria' (1999) 25 *Monash University Law Review* 29; Russell Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia' (2001) 30 *University of Western Australia Law Review* 1.

7 See, eg, 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, 'Do Judges Read Books Too?

appeal.[8] For New Zealand there are studies for the New Zealand Court of Appeal.[9] In the United States there are a myriad of studies of citation practice for the United States Supreme Court,[10] the United States courts of appeals[11] and the United States

Academic Citations by the Lamer Court 1992–1996' (1998) 9 *Supreme Court Law Review* 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; Peter McCormick, 'Second Thoughts: Supreme Court Citation of Dissents and Separate Concurrences' (2002) 81 *Canadian Bar Review* 369; McCormick, above n 3.

8 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.

9 Russell Smyth, 'Judicial Citations — An Empirical Study of Citation Practice in the New Zealand Court of Appeal' (2000) 31 *Victoria University of Wellington Law Review* 847; Russell Smyth, 'Judicial Robes or Academic Gowns? — Citations to Secondary Authority and Legal Method in the New Zealand Court of Appeal' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 101; Sir Ivor Richardson, 'Trends in Judgment Writing in the New Zealand Court of Appeal' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 261.

10 See, eg, 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; Frank Cross, Thomas Smith and Antonio Tomarchio, 'Determinants of Cohesion in the Supreme Court's Network Precedents' (2006) San Diego Legal Studies Paper No. 07-67 <http://ssrn.com/abstract=924110> at 2 June 2008; Joseph Custer, 'Citation Practices of the Kansas Supreme Court and Kansas Courts of Appeals' (1999) 8 *Kansas Journal of Law and Public Policy* 126; Wes Daniels, 'Far Beyond the Law Reports: Secondary Source Citations in United States Supreme Court Decisions, October Terms 1900, 1948 and 1978' (1983) 76 *Law Library Journal* 1; James Fowler and Sangick Jeon, 'The Authority of Supreme Court Precedent' (2007) *Social Networks* <http://ssrn.com/abstract=1008032> at 2 June 2008; James Fowler et al, 'Network Analysis and the Law: Measuring the Legal Importance of Precedent of Supreme Court Precedents' (2007) *Political Analysis* <http://ssrn.com/abstract=906827> at 2 June 2008 ; James Gleicher, 'The Bard at the Bar: Some Citations of Shakespeare by the United States Supreme Court' (2001) 26 *Oklahoma City University Law Review* 327; John Hasko 'Persuasion in the Court: Non-legal Materials in US Supreme Court Opinions' (2002) 94 *Law Library Journal* 427; William Manz, 'Citations in Supreme Court Opinions and Briefs: A Comparative Study' (2002) 94 *Law Library Journal* 267; Chester Newland, 'Legal Periodicals and the United States Supreme Court' (1959) 7 *University of Kansas Law Review* 477; Louis Sirico and Jeffrey Marguiles, 'The Citing of Law Reviews by the Supreme Court: An Empirical Study' (1986) 34 *University of California, Los Angeles Law Review;* Louis Sirico, 'The Citing of Law Reviews by the Supreme Court 1971-1999' (2000) 75 *Indiana Law Journal* 1009; Samuel Thumma and Jeffrey Kirchmeier, 'The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries' (1999) 47 *Buffalo Law Review*

state Supreme Courts.[12] This study adds to the literature by analysing citations to authority in reported decisions of the Supreme Court of South Australia at ten year intervals between 1905 and 2005. Most extant studies focus on the citation practice of a specific court for a single year or a few select years. There are few studies that track citation practice over an extended period of time primarily because of the financial cost of constructing large datasets.[13] However, if we are to uncover changes in the decision-making process over time from judicial citation practice, it follows that a long time-span should make it easier to ascertain discernable trends.

The remainder of the article is set out as follows. Part II examines the reasons why judges cite previous authority. The attitude of Australian judges towards citing authority is discussed in Part III. Part IV describes the dataset and outlines the methodology employed in the empirical study. Trends in citation practice and

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227; David Zaring, 'The Use of Foreign Decisions by Federal Courts: An Empirical Analysis' (2006) 3 *Journal of Empirical Legal Studies* 297.

11 See, eg, Robert Schriek, 'Most-Cited U.S. Courts of Appeals Cases From 1932 Until the Late 1980s' (1991) 83 *Law Library Journal* 317; 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.

12 See, eg, Robert Archibald, '*Stare Decisis* and the Ohio Supreme Court' (1957) 9 *Western Reserve Law Review* 23; A Michael Beaird, 'Citation to Authorities by the Arkansas Appellate Courts, 1950–2000' (2003) 25 *University of Arkansas Little Rock Law Review* 301; Mary Bobinski, 'Citation Sources and the New York Courts of Appeals' (1985) 34 *Buffalo Law Review* 965; Dragomir Cosanici and Chris Evin Long, 'Recent Citation Practices of the Indiana Supreme Court' (2005) 24 *Legal Reference Services Quarterly* 103; Richard Kopf, 'Do Judges Read the Review? A Citation Counting Study of the Nebraska Law Review and the Nebraska Supreme Court' (1997) 76 *Nebraska Law Review* 708; Lawrence Friedman et al, 'State Supreme Courts: A Century of Style and Citation' (1981) 33 *Stanford Law Review* 773; 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; William Manz, 'The Citation Practices of the New York Courts of Appeals: 1850–1993' (1995) 43 *Buffalo Law Review* 121; William Manz, 'The Citation Practices of the New York Courts of Appeals: A Millennium Update' (2001) 49 *Buffalo Law Review* 1273; 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; Fritz Snyder, 'The Citation Practice of the Montana Supreme Court' (1996) 57 *Montana Law Review* 453.

13 Exceptions are McCormick, 'The Evolution of Coordinate Precedential Authority in Canada', above n 8 (analyses citation practice of the Canadian provincial courts of appeal from 1922–1992); Friedman et al (analyses citation practice of 16 US State supreme courts using a sample of cases at five year intervals between 1870 and 1970); Manz, 'The Citation Practice of the New York Court of Appeals, 1850–1993' (analyses citation practice of the New York Court of Appeals at ten year intervals between 1850 and 1990 plus 1993).

changes in the types of authorities cited over the 20th century are presented in Part V. The citation patterns of individual judges are examined in Part VI.

II RATIONALE FOR CITING AUTHORITIES IN REASONS FOR DECISION

There are at least three reasons for citing authority. The first, and most obvious, reason is the doctrine of precedent. Judges cite existing authority to locate their reasons for decision within the body of existing case law. Timothy Terrell speaks in terms of each decision being located within a multidimensional grid.[14] Citation to the Court's own previous decisions and the binding decisions of courts above it in the court hierarchy locate the decision within this multidimensional grid. The whole rationale for having a system of precedent is that it is desirable for people to be able to predict, with some degree of certainty, the legal consequences of their actions.[15] The act of citing case law ensures that there is some predictability in the law by linking the reasoning in the case to an existing line of authority. Citation to authority also serves the related purpose of making it easier for those hearing any appeal from the decision to identify any error in reasoning or departure from existing lines of authority.

A second reason for citing case law and secondary authority is to ascertain the law that is applicable to the facts. Even where there is a decision of a court higher in the judicial hierarchy on point, the applicable law need not be clear. For example, Justice Michael Kirby has acknowledged that the proliferation of separate judgments in the High Court sometimes makes it difficult for the lower courts to determine the ratio decidendi of a case.[16] In the absence of binding authority from a superior court, there may be conflicting persuasive authority in courts at the same tier on the judicial hierarchy. For example, a state Supreme Court might be confronted with conflicting authority in two or more of the other state Supreme Courts. In the event of conflicting authorities, courts will often trace the evolution of the case law that led to the apparent conflict or seek assistance from the case law of other jurisdictions to ascertain the applicable law. In deciding what earlier cases in fact decided, in addition to referring to the case law itself, judges will often consult the views of academics espoused in law review articles and learned texts. In examining the law in other jurisdictions, judges will frequently cite law review articles that compile the relevant cases as a convenient shorthand means of discussing the foreign law.

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14 Timothy P Terrell, 'Flatlaw: An Essay on the Dimensions of Legal Reasoning' (1984) 72 *California Law Review* 288.

15 A L Goodhart, 'Precedent in English and Continental Law' (1934) 50 *Law Quarterly Review* 40, 58–60.

16 Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 245.

A third reason for citing existing authority is to increase the persuasive force of the judge's reasoning. When academics write a journal article on a particular topic they will cite the works of distinguished contributors and previous articles published in leading journals on that topic to increase the persuasive force of their argument. Similarly, judges seek to increase the persuasive force of their reasoning by citing well-respected courts and judges in support of that reasoning. In Australia, Canada and the United States, previous studies suggest that the decisions of some intermediate appellate courts are regarded as more prestigious than others, even after allowing for controlling factors such as population size and volume of litigation. In Australia, the most cited state Supreme Courts are the Supreme Court of New South Wales and the Supreme Court of Victoria;[17] in Canada, the most cited Provincial Court of Appeal is the Ontario Court of Appeal;[18] while in the United States the most cited state Supreme Courts are those of California, Massachusetts, New York and Washington.[19]

In addition to specific courts, there are some judges who are particularly well cited. Previous studies suggest that in Australia the judgments of Sir Owen Dixon and, in the United States, Justices Benjamin Cardozo and Learned Hand are cited more than those of other judges.[20] There is a clear positive association between reputation and quality of these 'big name' judges, although we cannot say anything about causation. Citing judicial giants such as Cardozo, Dixon and Hand bolster the judge's argument because of their reputation. At the same time, of course, judges such as Cardozo and Dixon are cited more because these judges are generally considered to be especially competent.

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17 Smyth, 'What do Intermediate Appellate Courts Cite?', above n 6; Smyth, 'What do Judges Cite?', above n 6; Smyth, 'Citation of Judicial and Academic Authority', above n 6.

18 McCormick, 'The Evolution of Coordinate Precedential Citation in Canada', above n 8, 291.

19 See Gregory Caldeira, 'On the Reputation of State Supreme Courts' (1983) 5 *Political Behavior* 83; Gregory Caldeira, 'The Transmission of Legal Precedent: A Study of State Supreme Courts' (1985) 79 *American Political Science Review* 178; Gregory Caldeira, 'Legal Precedent: Structures of Communication Between State 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. Jake Dear and Edward Jessen, 'Followed Rates and Leading State Cases, 1940-2005' (2007) 41 *UC Davis Law Review* 683.

20 See Russell Smyth, 'Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21 *University of Queensland Law Journal* 7; Richard Posner, 'The Learned Hand Biography and the Question of Judicial Greatness' (1994) 104 *Yale Law Journal* 511, 534–40; Richard Posner, *Cardozo: A Study in Reputation* (1990), 74–91.

III ATTITUDES OF AUSTRALIAN JUDGES TOWARD CITING AUTHORITIES

In Australia, judges have expressed differing views about the number of authorities that it is appropriate to cite in written reasons. Justice Kirby is the major advocate among Australian judges of more expansive reasons. He argues that, while an economical use of language is desirable where possible, the complexities of cases mean that longer judgments and more extensive citation of authorities are often inevitable.[21] He cites four reasons for this. First, greater citation to authority reflects a candid acknowledgment by the judges that policy choices must be made.[22] Second, increased citation to authority reflects technological developments that have expanded the range of materials available to decision-makers. Third, greater citation to authority reflects institutional developments that have produced greater candour in decision-making. And fourth, increased citation reflects greater sensitivity to the rights of litigants and more attention to problems of communication.[23]

Several judges have suggested that there is a need for more economical use of language and the citation to authorities. Sir Harry Gibbs stated that 'a common fault ... is to discuss at length a series of cases when the effect of all of them has already been stated in an authoritative decision and mention of that final authority alone would have been sufficient'. [24] Justice Bryan Beaumont, formerly of the Federal Court, has stated: 'Length per se, let alone prolixity, is neither essential nor desirable, and may disguise the real basis for a conclusion. The essential quality of a judgment is clarity, with as much brevity as the subject will permit'.[25] To the same effect, Sir Gregory Gowans, a former judge of the Supreme Court of Victoria, has observed:

> The elaboration [by way of the historical narrative] of the research undertaken and of the process of reasoning adopted can sometimes only be explained on the basis of a narcissistic interest on the part of the author of the judgment in the extent of [the judge's] own industry and erudition. It is not part of the function entrusted to [the judge] to display proof of that. [26]

The current Chief Justice of South Australia, Chief Justice John Doyle, has echoed these remarks:

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21 See, eg, Michael Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691; Michael Kirby, 'Change and Decay or Change and Renewal?' (1998) 7 *Journal of Judicial Administration* 189; Kirby, 'Reasons for Judgment', above n 1.

22 Kirby, 'On the Writing of Judgments', above n 22, 708.

23 Kirby, 'Reasons for Judgment', above n 22, 132.

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

25 Bryan Beaumont, 'Contemporary Judgment Writing: The Problem Restated' (1999) 73 *Australian Law Journal* 743, 744.

26 Sir Gregory Gowans, 'Reflections on the Role of a Judge' in the University of Melbourne Law Students Society (ed), *Summons* (1980) 66.

> I believe our judgments are getting longer and more complex … I think that we are tending to over-elaborate in our dealing with authority and learned writers. I think that we are probably too willing to deal with arguments that are not essential to the issue. In short, I think we are, perhaps, thinking too much of our judgments as an enduring legacy, and as a contribution to the development of the law, and not enough of the desirability of a judgment expeditiously delivered which nevertheless meets the essentials ... but does no more than that. [27]

Australian judges who have advocated shorter reasons and a minimalist approach to citing authority have offered three different rationales for this view. First, Sir Garfield Barwick, who advocated citing fewer authorities, was of the view that excessive citation to authority undermined respect for the judgment. His position was that:

> ... to bolster the judge's conclusions formed [after the necessary research was complete] 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.[28]

Second, Bryan Beaumont has argued that excessive citation to authority and a commensurate expansion in the length of reasons results in longer delays in giving judgment and an associated weakening of public confidence.[29] Third, Sir Anthony Mason has advocated shorter reasons, free of redundant authority, in order to ensure the judgment is as accessible to the widest possible audience and to increase public understanding of the role of courts.[30] In making this statement it is unlikely that Sir Anthony was proposing that the general public actually read case law, but simply that the litigants in the case (the public users of the courts) would get a better understanding of the reasons for the decision.

IV DATA COLLECTION AND METHODOLOGY

The cases employed in this study are decisions of the Supreme Court of South Australia, reported in the South Australian State Reports and its predecessors,[31] sampled at ten year intervals from 1905 to 2005. There are 686 cases in total. Consistent with previous studies of the citation practice of courts, the study does not consider unreported cases. Considering only reported cases can be justified on the basis that reported decisions provide a good overview of the citation practices of the

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27 John Doyle, 'Judgment Writing: Are There Needs for Change?' (1999) 73 *Australian Law Journal* 737, 739–40.

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

29 Beaumont, 'Contemporary Judgment Writing', above n 25, 744.

30 Sir Anthony Mason, 'Opening Address' (Speech delivered at the Supreme Court of New South Wales Annual Conference, Sydney, 20 April 1993).

31 South Australian Law Reports (1867-1920), State Reports (South Australia) (1921-1970), South Australian State Reports (1971-present).

Court with respect to most important cases and facilitate comparison with previous studies for other courts. McCormick is the author of several citation studies of Canadian courts. As he has argued, '[r]eported cases probably include a very high proportion of all the decisions sufficiently important to call for reasoned judgment based on authority'.[32]

In deciding which citations to count, the approach followed here is consistent with previous studies of the citation practice of courts in Australia.[33] All citations to case law and secondary authorities in the sample cases, including citations in footnotes, were counted. If a case or secondary authority received repeat citations in the same paragraph it was counted only once, but if it was cited again in a subsequent paragraph it was counted again on the basis that the source was being cited for a different proposition and hence had separate significance. The citation counts are weighted in the sense that the number of citations in each joint judgment was multiplied by the number of judges who co-authored that judgment when calculating the overall citation count. However, if Justice A concurred with Justice B and Justice B cited authorities, Justice A was not attributed with having cited those authorities.

Finally, no distinction was made between positive and negative citations. At one level, in contrast to citations in law review articles, few judicial citations are negative. McCormick reports that in the Supreme Court of Canada less than one per cent of judicial citations are negative.[34] Stephen Choi and Gurang Gulati report that on the United States Courts of Appeal, less than 10 per cent of all citations are negative.[35] However, putting aside the issue of whether negative citations are sufficiently large enough to matter, at least as far as non-binding authority is concerned, it can be argued that when considering the influence of a case on a judge's reasoning process, the distinction between positive and negative citations is not important; the reason is that since citation to non-binding authority is an act of judicial discretion, the judge is free not to cite an authority at all if it has no influence on the judge's thinking.[36]

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32 McCormick, 'The Evolution of Coordinate Precedential Citation in Canada', above n 8, 277.

33 See, eg, Smyth, 'What do Intermediate Appellate Courts Cite?' above n 6; Smyth, 'What do Judges Cite?', above n 6; Smyth, 'Citation of Judicial and Academic Authority', above n 6.

34 McCormick, 'The Supreme Court Cites the Supreme Court', above n 7, 462.

35 Stephen Choi and Gurang Gulati, 'Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance' (2004) 78 *Southern California Law Review* 23.

36 See Richard Posner, 'An Economic Analysis of the Use of Citations in the Law' (2000) 2 *American Law and Economics Review* 381; William Landes and Richard Posner, 'The Influence of Economics on the Law: A Quantitative Study' (1993) 36 *Journal of Law and Economics* 385, 390; William Landes, Lawrence Lessig and

V How Many and Which Authorities Does the Court Cite?

Figure 1 shows average citations per individual judgment and average citations per case for each of the years included in the study. Average citations per case increased from 7.88 in 1905 to 24.68 in 2005, representing an increase of over 300 per cent. Average citations per judgment increased from 4.59 in 1905 to 11.52 in 2005, representing a 250 per cent increase. Both average citations per case and average citations per individual judgment exhibit a positive trend since 1945, preceded by a small spike in 1915 and a dip in 1925 and 1935. Average citations on a per case and a per judgment basis reached its lowest point in 1935 at 5.56 and 3.92 respectively. The biggest increase in citations on a per case and per judgment basis has occurred since the mid-1980s. Over the last three decades, the Court has cited the largest number of authorities on a per case and per judgment basis for the entire period. In 1985, 1995 and 2005, average citations per case were 15.26, 19.69 and 24.68 respectively, whilst average citations per judgment were 7.08, 8.12 and 11.52 respectively. There is a close correlation between the average citations per judgment and per case and the average length of judgments and cases.

The average length of cases and individual judgments is plotted in Figure 2 and Figure 3. The average length of cases and judgments show a spike in 1915 at 13.06 pages and 7.07 pages, respectively. The average case and judgment length were at their lowest in 1925 and 1935, before displaying an upward trend from 1945. In the last year of the study in 2005 the average judgment and case length was 6.05 pages and 13.94 pages respectively, which were similar in magnitude to the early peak in 1915.

Michael Solimine, 'Judicial Influence: A Citation Analysis of Federal Courts of Appeal Judges' (1998) 27 *Journal of Legal Studies* 333.

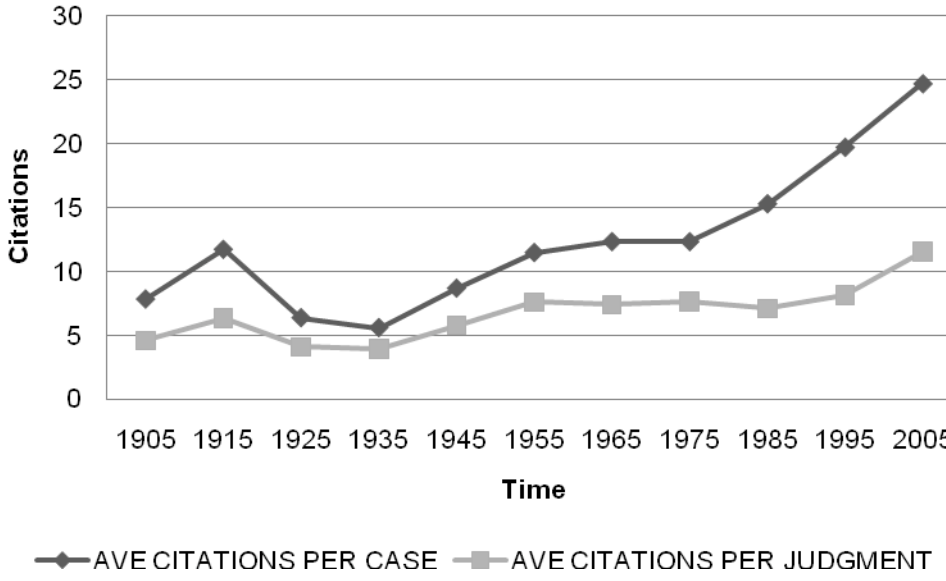

Figure 1: Average citations per case and per judgment (1905–2005)

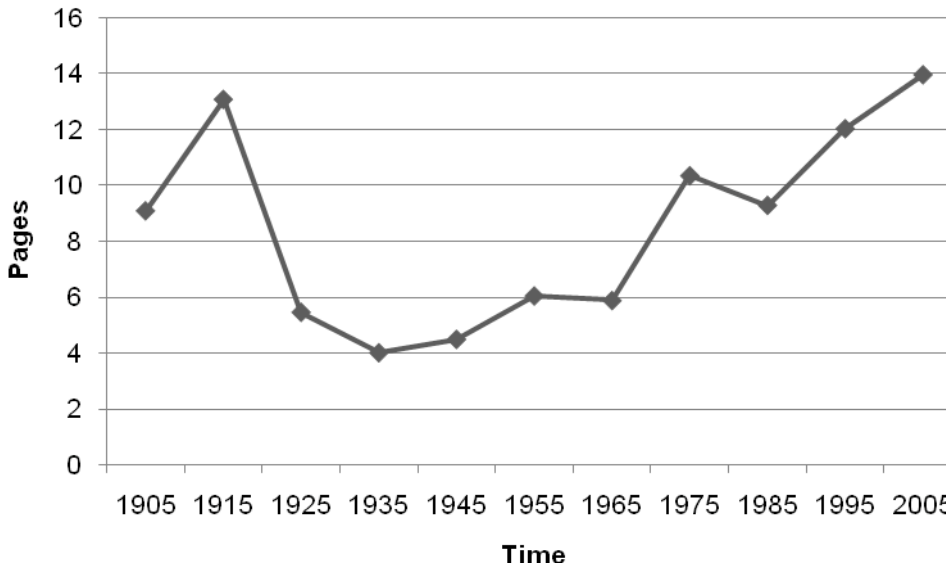

Figure 2: Average length of cases (1905–2005)

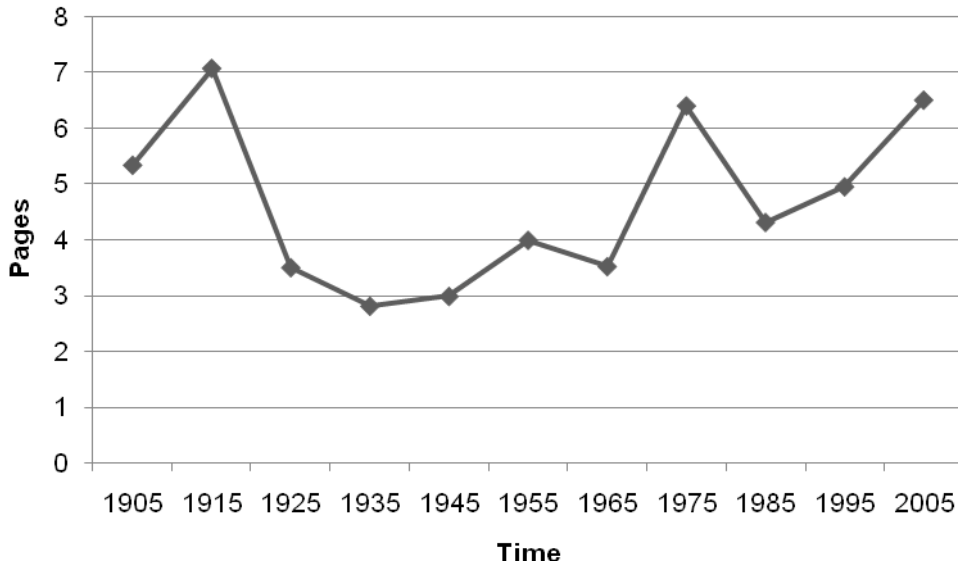

Figure 3: Average length of judgments (1905–2005)

McCormick classifies judicial citations into consistency citations, hierarchical citations, coordinate citations and deference citations.[37] To these four categories can be added citation to secondary authorities. Consistency citations are citations to the previous decisions of the citing court. Hierarchical citations are citations to a court above the citing court in the judicial hierarchy. Coordinate citations are citations to other courts at the same tier in the court's hierarchy. Deference citations are citations to decisions of courts which are not part of the immediate judicial hierarchy, but still have persuasive value. Citations to secondary authorities include citations to books, dictionaries, journal articles, legal encyclopaedias and law reform reports. Table 1 gives an overview of the authorities cited by the Court over the course of the 20th century. The remainder of this section examines trends in the Court's citations using the classification of citations proposed by McCormick as a guide.

37 Peter McCormick and Tammy Praskach, 'Judicial Citation, the Supreme Court of Canada, and the Lower Courts: A Statistical Overview and the Influence of Manitoba' (1996) 24 *Manitoba Law Journal* 335; McCormick, 'The Evolution of Coordinate Precedential Citation in Canada', above n 8.

Table 1
Citation to Authority in the Supreme Court of South Australia 1905-2005

	1905	**1915**	**1925**	**1935**	**1945**	**1955**	**1965**	**1975**	**1985**	**1995**	**2005**
Total No. of Cases	10	13	54	79	40	45	57	44	155	94	105
Total No. of Judgments	17	24	84	112	60	68	95	71	334	228	225
HIGH COURT											
1903-1919	0	10	17	17	13	8	9	2	31	19	29
1920-1939	-	-	7	12	17	18	23	14	43	12	36
1940-1959	-	-	-	-	5	52	46	28	95	43	45
1960-1979	-	-	-	-	-	-	13	37	186	122	82
1980-1999	-	-	-	-	-	-	-	-	112	303	443
2000-	-	-	-	-	-	-	-	-	-	-	125
Subtotal	**0**	**10**	**24**	**29**	**35**	**78**	**91**	**81**	**467**	**499**	**760**
Ave. per case	0	0.77	0.44	0.37	0.88	1.73	1.60	1.84	3.01	5.31	7.24
Ave per judgment	0	0.42	0.29	0.26	0.58	1.15	0.96	1.14	1.40	2.19	3.38
FEDERAL/FAMILY COURT	-	-	-	-	-	-	-	-	**20**	**37**	**111**
SA SC	**2**	**0**	**16**	**72**	**69**	**94**	**130**	**95**	**707**	**388**	**746**
Ave. per case	0.20	0.00	0.30	0.91	1.73	2.09	2.28	2.16	4.56	4.13	7.10
Ave per judgment	0.12	0.00	0.19	0.64	1.15	1.38	1.37	1.34	2.12	1.70	3.32
VIC SC	1	0	7	15	10	11	22	24	88	55	85
NSW SC	0	0	9	9	12	13	28	26	106	158	199
QLD SC	0	0	1	3	1	2	5	9	20	33	32
WA SC	0	0	0	0	5	4	1	1	10	13	28
TAS SC	0	0	0	0	0	1	3	0	10	8	4

ACT SC	-	-	-	-	-	0	1	0	1	5	2
NT SC	-	-	-	-	-	0	1	0	10	5	4
Subtotal	**1**	**0**	**17**	**27**	**28**	**31**	**61**	**60**	**245**	**277**	**354**
OTHER AUST. COURTS	**0**	**0**	**1**	**0**	**1**	**7**	**0**	**54**	**29**	**7**	**26**
ENGLISH COURTS											
House of Lords	22	19	32	34	28	40	40	36	199	133	62
Judicial Committee	1	6	20	16	15	22	27	12	65	40	22
English CA	5	42	64	82	51	83	105	115	244	168	172
Lower English Courts	45	60	134	136	90	129	173	48	231	106	145
Subtotal	**73**	**127**	**250**	**268**	**184**	**274**	**345**	**211**	**739**	**447**	**401**
Ave. per case	7.30	9.77	4.63	3.39	4.60	6.09	6.05	4.80	4.77	4.76	3.82
Ave per judgment	4.29	5.29	2.98	2.39	3.07	4.03	3.63	2.97	2.21	1.96	1.78
OTHER COUNTRIES											
USA	0	1	1	2	0	0	3	0	9	25	6
Canada	0	0	0	0	2	1	4	3	25	12	7
Guyana	0	0	0	0	0	0	0	0	1	0	0
India	0	0	0	0	0	0	0	1	0	0	0
Ireland	0	2	5	1	1	3	4	2	0	4	4
New Zealand	0	0	2	3	9	3	10	12	26	10	22
North Ireland	0	0	0	0	0	0	0	0	1	1	0
Scotland	0	0	0	3	1	2	2	3	2	3	6
South Africa	0	0	0	0	0	0	0	0	0	2	0
European Court of Human Rights	0	0	0	0	0	0	0	0	0	0	1
Subtotal	**0**	**3**	**8**	**9**	**13**	**9**	**23**	**21**	**64**	**57**	**46**
SECONDARY AUTHORITIES											
LEGAL											

Books	2	8	15	27	9	15	32	10	64	99	84
Periodicals	0	0		0	1	0	7	4	13	10	12
Encyclopaedias	0	2	4	4	0	2	5	1	11	6	9
Law Reform Reports	0	0	0	0	0	0	0	1	1	1	4
Dictionaries	0	0	0	0	0	0	3	0	0	0	4
Other	0	1	1	0	0	2	1	1	1	7	15
Subtotal	**2**	**11**	**20**	**31**	**10**	**19**	**48**	**17**	**90**	**123**	**128**
NON-LEGAL											
Books	0	0	0	0	0	0	0	0	0	0	0
Periodicals	0	0	0	0	0	0	0	0	0	0	0
Dictionaries	0	1	6	1	6	3	3	2	5	15	18
Other	0	0	0	2	0	0	0	0	0	1	1
Subtotal	**0**	**1**	**6**	**3**	**6**	**3**	**3**	**2**	**5**	**16**	**19**
TOTAL	**78**	**152**	**342**	**439**	**346**	**515**	**701**	**541**	**2366**	**1851**	**2591**
AVE CITATIONS PER CASE	7.80	11.69	6.33	5.56	8.65	11.44	12.30	12.30	15.26	19.69	24.68
AVE CITATIONS PER JUDGMENT	4.59	6.33	4.07	3.92	5.77	7.57	7.38	7.62	7.08	8.12	11.52

A *Consistency Citations*

Consistency citations made by the Supreme Court of South Australia are citations to the previous decisions of that court. While different views have been expressed in relation to the extent that the state Supreme Courts are bound by their own previous decisions,[38] general principles of continuity and consistency, and the value of having predictability in the law, require that such decisions carry considerable weight.[39] With the possible exception of Western Australia,[40] the accepted view is that the state Supreme Courts reserve the right to reconsider their own previous decisions, but will not normally do so unless satisfied that the earlier decision was manifestly wrong.[41] This view reflects the position in the Supreme Court of South Australia.[42] One specific instance in which the Full Court of the Supreme Court of South Australia may reconsider one of its previous decisions is where it appears the decision is in conflict with a decision of the Full Court of another state Supreme Court.[43] However, for this to occur it is unclear whether the conflicting decision from the Full Court of another state needs to have been overlooked in the previous South Australian decision.[44]

Table 1 shows that for the first three decades of the study there were only 18 consistency citations in total and 16 of these were in 1925. From 1925 to 1935 the number of consistency citations increased more than four-fold. From 1935 to 1975 consistency citations were fairly constant in absolute terms. The citations then increased more than seven-fold from 1975 to 1985, dipped in 1995 and then increased again in 2005. On a per case and a per judgment basis, consistency citations have increased steadily over time from 0.91 per case and 0.64 per

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38 Kirby, 'Precedent Law, Practice and Trends in Australia', above n 16, 50.

39 McCormick, 'The Evolution of Coordinate Precedential Authority in Canada', above n 8, 273–274.

40 Western Australia's uniqueness stems from the old case of *Transport Trading & Agency Co of WA Ltd v Smith* (1906) 8 WALR 33 where Parker CJ, with McMillan and Burnside JJ concurring, suggested that the Full Court of the Supereme Court of Western Australia is bound by its previous decisions. The authority of this case has been weakend by further Western Australian cases, and Justice Kirby in his article 'Precedent Law, Practice and Trends in Australia' claims that the law remains uncertain.

41 *Nguyen v Nguyen* (1990) 169 CLR 245, 268–269 (Dawson, Toohey and McHugh JJ); Kirby, 'Precedent Law, Practice and Trends in Australia', above n 16, 50.

42 *R v White* [1967] SASR 184; *Jenerce Pty Ltd v Pope* (1971) 1 SASR 204; *Raynal v Samuels* (1974) 9 SASR 264; *Devlin v Collins* (1984) 37 SASR 98; *Pooraka Holdings Pty Ltd v Participation Nominees Pty Ltd* (1989) 52 SASR 148; *Pashalis v WorkCover Corporation* (1994) 63 SASR 71.

43 *R v White* [1967] SASR 184; *Jenerce Pty. Ltd. v Pope* (1971) 1 SASR 204 (Wells J); *Price Waterhouse v Beneficial Finance Corporation* (1996) 68 SASR 19 (Cox J).

44 See 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, 278–279.

judgment in 1935 to 7.10 per case and 3.32 per judgment in 2005. The Court's increasing propensity to cite its own decisions partly reflects an increase in the stock of its own citable cases, particularly cases dealing with South Australian legislation, but also it is likely to be indicative of the Court maturing and possessing a growing confidence within the Court in its own jurisprudence over time.

Reflecting this growing confidence, consistency citations as a proportion of total citations have also increased over time. In 1925, consistency citations represented less than five per cent of total citations; however, this figure increased to 16.4 per cent in 1935 and it remained fairly constant over the next four decades, such that in 1975, consistency citations constituted 17.6 per cent of total citations. In 1985, consistency citations as a proportion of total citations increased to 29.8 per cent; in 1995 they dropped to 20.96 per cent and in 2005 rebounded to 28.7 per cent. The finding for 2005 that consistency citations accounted for 28.7 per cent of citations is similar to the result of a previous study for the six state Supreme Courts that consistency citations constituted 30.2 per cent of the Courts total citations based on the 50 most recent reported judgments as of June 1999.[45] The proportion of consistency citations cited in recent years in the Supreme Court of South Australia is among the highest of the Australian state Supreme Courts. It is similar to the Supreme Court of Victoria (32 per cent) and the Supreme Court of New South Wales (26.7 per cent) and higher than the Supreme Court of Tasmania (17.2 per cent), the Supreme Court of Queensland (18.6 per cent) and the Supreme Court of Western Australia (19.7 per cent).[46]

B *Hierarchical Citations*

Hierarchical citations in the Supreme Court of South Australia consist of citations to the High Court and, prior to the enactment of the *Australia Acts 1986* (UK & Cth), decisions of the Judicial Committee of the Privy Council. The state Supreme Courts at first instance and on appeal are bound by the ratio decidendi of relevant decisions of the High Court.[47] Prior to the Australia Acts, the state Supreme Courts were also bound by the ratio decidendi of relevant decisions of the Judicial Committee.[48] While the state Supreme Courts are not required to follow decisions of the Judicial Committee handed down since 1986,[49] there is some lingering uncertainty as to whether since 1986 the state Supreme Courts are still required to

45 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 6 (calculated from Table 2).

46 Ibid (figures are for the 50 most recent reported cases in each state as at June 1999).

47 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

48 See *Skelton v Collins* (1966) 115 CLR 94, 104 (Kitto J); *Viro v The Queen* (1978) 141 CLR 88, 118 (Gibbs J).

49 *Cook v Cook* (1986) 162 CLR 376, 389-90.

follow decisions of the Judicial Committee handed down prior to the enactment of the *Australia Acts*.[50]

Examining Table 1, there are three distinct periods of citation to High Court authority. From 1905 to 1945 citation to High Court cases accounted for less than 10 per cent of total citations. In this period the Court's citations were predominantly to decisions of English courts. Between 1955 and 1975 High Court cases accounted for 12-15 per cent of total citations. From 1985 to 2005 citations to High Court cases have increased from 19.7 per cent to 29.33 per cent of total citations. In 1995 and 2005 citations to decisions of the High Court in the Supreme Court of South Australia were higher than citations to any other single court. Citations of decisions of the High Court were also higher than citations of the Supreme Court of South Australia's own previous decisions. This finding is consistent with the results from previous studies for courts in Australia, Canada and New Zealand which have consistently found that, in the past few recent decades, hierarchical citations form the highest proportion of judicial citations.[51]

The Court also cites more recent decisions of the High Court in preference to older decisions. For example, in 2005 the Court cited 443 cases decided between 1980 and 1999, 82 cases cited between 1960 and 1979, 45 cases cited between 1940 and 1959, 36 cases cited between 1920 and 1939 and 29 cases decided between 1903 and 1919.[52] A tendency for courts to cite more recent decisions in preference to earlier decisions has been observed in several previous studies.[53] John Merryman has suggested three possible explanations for why courts cite recent decisions more frequently than older decisions.[54] First, the stock of older precedents will tend to decline over time as earlier cases are overruled by later cases or statute. Second, the thrust of legal opinion may have changed so that even if the earlier cases are not overruled, their reasoning may be regarded as less persuasive. Finally, later cases may be more relevant on the facts simply because the social context of earlier cases has changed.

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50 *Hawkins v Clayton* (1986) 5 NSWLR 109, 136-7; *R v (Judge) Bland ex parte Director of Public Prosecutions* (1987) VR 225, 230-2; Anthony Blackshield, 'Precedent' in Anthony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001).

51 For Canada see McCormick, 'Judicial Citation, the Supreme Court of Canada and the Lower Courts', above n 37; McCormick, 'Judicial Authority and the Provincial Courts of Appeal', above n 8. For Australia see Smyth, 'What Do Judges Cite?', above n 6; Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 6; Smyth, 'Citation of Judicial and Academic Authority', above n 6. For New Zealand, see Smyth, 'Judicial Citations', above n 9.

52 The Court's citations to High Court cases decided since 2000 are fewer, but this reflects the fact that these decisions are relatively recent and there is only a five year window.

53 See, eg, Merryman, 'Toward a Theory of Citations', above n 12.

54 Merryman, 'Toward a Theory of Citations', above n 12, 398.

Citations to the Judicial Committee have represented less than 5 per cent of the Court's total citations in each of the sample years over the course of the 20th century. In each year the Court's citations to the Judicial Committee are fewer than citations to the House of Lords, English Court of Appeal and the lower English courts. Previous studies have also found that state Supreme Courts in Australia cite the Judicial Committee less than other English courts.[55] This finding is replicated for the High Court,[56] the New Zealand Court of Appeal[57] and the Provincial courts of appeal in Canada.[58] There are various possible explanations for the Judicial Committee receiving fewer citations than the House of Lords, English Court of Appeal and lower English courts. An explanation for the House of Lords being cited more than the Judicial Committee is that while the same Law Lords who sit in the House of Lords tend to sit on the Judicial Committee, the House of Lords is often regarded as a stronger court. This view is reflected in the common perception that the Judicial Committee is the poor cousin of the House of Lords.[59] An explanation for the English Court of Appeal and lower English courts being cited more than the Judicial Committee is that the English High Court and English Court of Appeal have traditionally heard most probate, trust and criminal law cases and it is these areas of law that occupied a large part of the caseload of the Australian State courts. Decisions of the English Court of Appeal and lower English courts form what Sir Anthony Mason has described as 'the vast body of common law rules and principles'[60] lying beneath the surface of the Judicial Committee tip of the common law iceberg.

C *Coordinate citations*

Coordinate citations in the Supreme Court of South Australia are to the decisions of other Australian state and territory Supreme Courts. The Supreme Court of South Australia is not bound by decisions of such courts; however, 'a decision of the Full Court of another state is a persuasive precedent of great authority'.[61] In *Bassell* v *McGuiness,*[62] King CJ stated that when the Full Court of the Supreme Court of South Australia is confronted with conflict between the decisions of other state and territory Full Courts in Australia and decisions of the English Court of Appeal, the greater persuasive weight will be attached to the coordinate jurisdictions in Australia.

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55 Smyth, 'What Do Judges Cite?', above n 6; Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 6; Smyth, 'Citation of Judicial and Academic Authority', above n 6.

56 Smyth, 'Citations by Court', above n 4.

57 Smyth, 'Judicial Citations', above n 9.

58 McCormick, 'Judicial Authority and the Provincial Courts of Appeal', above n 8.

59 John Goldring, *The Privy Council and the Australian Constitution* (1996).

60 Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 150.

61 *R v Winfield* (1995) 65 SASR 121; *Bassell v McGuiness* (1981) 29 SASR 508.

62 (1981) 29 SASR 508, 510–11.

Table 1 shows that coordinate citations are smaller than both consistency citations and hierarchical citations in each of the sampled years. For the first two decades of the study there was only one coordinate citation, which was to the Supreme Court of Victoria in 1905. From 1925 to 1965, coordinate citations represented between 5 per cent and 10 per cent of total citations. In 1975 coordinate citations were 11.1 per cent; in 1985 10.36 per cent; in 1995 15 per cent and in 2005 13.7 per cent. These findings are consistent with the results of the previous study of the citation practice of the six state Supreme Courts based on the 50 most recent reported decisions as of June 1999, which found that coordinate citations represented 14.6 per cent of the Court's citations. [63]

The two state Supreme Courts which receive the highest number of coordinate citations are the Supreme Court of New South Wales and Supreme Court of Victoria. Previous studies of the citation practice of state Supreme Courts in Australia have also found that the Supreme Courts of New South Wales and Victoria are cited more frequently than the other state Supreme Courts.[64] Table 1 indicates that the Supreme Court of Queensland and Supreme Court of Western Australia have increased their share of coordinate citations in recent decades, but still trail Victoria and New South Wales significantly. The dominance of New South Wales and Victoria in coordinate citations reflects several factors. One reason for the large number of citations that the Supreme Court of New South Wales receives is the number of cases heard in that jurisdiction, with New South Wales accounting for approximately two thirds of all commercial litigation in Australia. The other explanations are related to the strength of the two courts; the Bars in both states are very strong, both states have provided the highest proportion of appointments to the High Court and both Supreme Courts have a reputation for providing doctrinal leadership along the same lines as the Ontario Court of Appeal in Canada and the Supreme Court of California in the United States.

D *Deference Citations*

Deference citations are citations to decisions of English courts, including the Judicial Committee, following the commencement of the *Australia Acts*, and courts of other countries. While decisions of the House of Lords and English Court of Appeal are not binding on the Full Court of any Australian state Supreme Court, they have always been regarded as highly persuasive.[65] As recently as the mid-1970s there is High Court authority that in the absence of decisions of the High Court, Australian state Supreme Courts should follow both the House of Lords and

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63 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 6 (figure calculated from Table 2).

64 Smyth, 'What Do Judges Cite?', above n 6; Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 6; Smyth, 'Citation of Judicial and Academic Authority', above n 6.

65 *Viro v R* (1978) 141 CLR 88; *Cook v Cook* (1986) 162 CLR 376; *R v Parsons* [1998] 2 VR 478; *R v Winfield* (1995) 65 SASR 121.

English Court of Appeal.[66] However, unless the Full Court is persuaded that it is clearly wrong, the accepted position is that it should be prepared to follow its own previous decisions, even if by doing so it departs from a contrary decision of the House of Lords.[67]

The status of English case law in Australia has diminished since the commencement of the *Australia Acts*. While decisions of the House of Lords and English Court of Appeal continue to be given great respect, Australian courts are less likely to follow them than once was the case for two reasons. First, the enactment of the *Australia Acts* ushered in the 'development of a distinct Australian law'[68] where we have fashioned 'a common law for Australia that is best suited to our conditions and circumstances.'[69] As Sir Anthony Mason described it, the *Australia Acts* made us 'the masters of our own legal destiny ... [where] we should derive such assistance as we can from English authorities. But this does not mean that we should account for every English judicial decision as if it were a decision of an Australian court.'[70] The second development is that over time English decisions have diminished in relevance to the future development of Australian law, reflecting the increasing influence on English cases of the *European Convention on Human Rights and Fundamental Freedoms*.[71]

There is anecdotal evidence that, to some extent, in the High Court, deference citations to English cases have been replaced with citations to courts in other countries.[72] This development reflects the emerging view that since the introduction of the *Australia Acts*, the value of all case law from jurisdictions outside Australia — whether it be England, Canada, New Zealand, the United States or some other country — depends on the persuasive force of the reasoning.[73] Thus, theoretically at least, decisions from courts in other countries can compete on a level footing with English cases for deference citations, although in reality English cases will continue

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66 In *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 Barwick CJ stated that if there were no High Court decision, a state supreme court should, as a general rule, follow a decision of the English Court of Appeal at first instance. On appeal, Gibbs J went further and stated that the New South Wales Court of Appeal should have regarded itself as being bound by a decision of the English Court of Appeal. See Mason, 'Future Directions in Australian Law', above n 60, 150.

67 *Cook v Cook* (1986) 162 CLR 376; *Britten v Alpogut* [1987] VR 929; *R v Liberti* (1991) 55 A Crim R 120 (New South Wales Court of Appeal); *R v Parsons* [1998] 2 VR 478.

68 Mason 'Future Directions in Australian Law', above n 60, 149.

69 Ibid 154.

70 Ibid 149, 154.

71 Kirby, 'Precedent Law, Practice and Trends in Australia', above n 16, 244.

72 For anecdotal evidence that the High Court has cited more foreign case law from countries other than England in recent years see Kirby, 'Precedent Law, Practice and Trends in Australia', above n 16.

73 Mason 'Future Directions in Australian Law', above n 60, 154.

to be more influential because of their impact on the evolution of the common law in Australia. Increasing deference citations to courts in countries other than England also reflect the development of databases such as Westlaw which have made it easier to access cases from a range of jurisdictions.

Table 1 shows that, as a percentage of total citations, citations to English authorities have declined each decade of the study from a high of 93.6 per cent in 1905 to 15.4 per cent in 2005. As recently as 1965, citations to English authorities constituted 50 per cent of total citations, although following the *Australia Acts* this fell to 24.2 per cent in 1995. There have been relatively few deference citations to courts in countries other than England. The decline in the proportion of English cases cited by the Supreme Court of South Australia is consistent with what has happened in the provincial courts of appeal in Canada, in which English courts were responsible for about 15 per cent of total citations in the 1990s.[74] Deference citations to courts in countries other than England amount to 2−3 per cent of total citations at most. This result is consistent with previous studies of state Supreme Courts in Australia which have also found that deference citations to courts in countries other than England generally make up 2−3 per cent of citations.[75] Overall, these findings suggest that the propensity to cite more cases from foreign jurisdictions other than England that has developed in the High Court since the 1990s has not flowed down to the state Supreme Courts. Of those courts in countries other than England that are cited, in recent decades most citations have been to courts in Canada, New Zealand and the United States.

E *Secondary Authorities*

The High Court in recent decades have tended to cite a higher proportion of secondary authorities.[76] No such trend is discernable in the Supreme Court of South Australia. In each of the sample years, secondary authorities have represented less than 10 per cent of the Court's total citations. The Court's citations to secondary authorities peaked in 1935 at 9.7 per cent of total citations. In 1915, 1925, 1965 and 1995 secondary authorities were responsible for 7−8 per cent of the Court's total citations. Finally, in the remaining years, citations to secondary authorities made up less than five per cent of total citations. The findings for this study suggest that in recent decades the Court has cited a higher proportion of secondary authorities than suggested by the results from the study of the citation practice of the six state Supreme Courts based on their 50 most recent reported decisions as at 30 June 1999. That study found that in the Supreme Court of South Australia secondary authorities accounted for 3.9 per cent of total citations compared with a figure of

74 McCormick, 'Judicial Authority and the Provincial Courts of Appeal', above n 8.

75 See Smyth, 'What Do Judges Cite?', above n 6; Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 6.

76 Smyth, 'Other than "Accepted Sources of Law?"', above n 4.

6.8 per cent for the six state Supreme Courts as a whole.[77] The results in this study are likely to be more accurate because they are based on a larger number of cases. Moreover, in some years the Court cites as many secondary authorities as the United States state Supreme Courts, where secondary authorities account for up to 10 per cent of total citations.[78]

Table 1 divides citations to secondary authorities into legal and non-legal sources. In each of the sample years 80, per cent or more of citations to secondary authorities have been to legal rather than non-legal sources. This result is consistent with the previous study of the six state Supreme Courts based on the 50 most recent reported decisions as at 30 June 1999 and a study of the High Court based on reported decisions in 1960, 1970, 1980, 1990 and 1996.[79] However, this contrasts with findings for the United States Supreme Court, which cites a much higher proportion of non-legal academic authorities.[80] A prominent instance is citations in death penalty cases to writers on both sides of the debate as to whether capital punishment has a deterrent effect.[81] The United States Supreme Court also cites a high proportion of social science writings in cases dealing with competing rights under the United States Bill of Rights.

In the Supreme Court of South Australia, the overwhelming majority of citations to legal secondary authorities in each of the sample years are to textbooks and learned treatises. There were very few citations to other secondary authorities, including legal periodicals. This result is consistent with previous studies for the Australian state Supreme Courts and High Court.[82] However, it differs from the United States Supreme Court which cites legal periodicals more than books,[83] and the United States state Supreme Courts which, initially cited few law reviews, but have increased the proportion of their citations to law reviews over time.[84] In the United States state Supreme Courts, the propensity to cite more law reviews over time has been attributed variously to the state Supreme Courts becoming more policy-oriented,[85] the increase in the sheer number of law reviews,[86] and the role of clerks

77 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 6 (calculated from Table 2).

78 Merryman, 'Toward a Theory of Citations', above n 12.

79 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 6; Smyth, 'Other than "Accepted Sources of Law?"', above n 4.

80 See Daniels, 'Far Beyond the Law Reports', above n 10.

81 See Ackers, 'Social Science in Supreme Court Death Penalty Cases', above n 10.

82 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 6; Smyth, 'Other than "Accepted Sources of Law?"', above n 4; Smyth, 'What Do Judges Cite?', above n 6.

83 Daniels, 'Far Beyond the Law Reports', above n 10.

84 See Friedman et al, 'State Supreme Courts', above n 12; Manz, 'The Citation Practices of the New York Courts of Appeals: 1850–1993', above n 12; Merryman, 'Toward a Theory of Citations', above n 12.

85 Friedman et al, 'State Supreme Courts', above n 12, 815.

86 Ibid 812.

in ghostwriting opinions.[87] In contrast to Australia, where the limited anecdotal evidence that is available suggests that most, if not all, judges write their own judgments, in the United States it is common for the clerks to write a judge's opinion.[88] Many clerks in the United States are former law review editors who tend to be familiar with, and cite, law review articles.[89]

One reason why the Supreme Court of South Australia cites mainly books and few legal periodicals could be that the law reviews publish few articles that are relevant to the caseload of the state Supreme Courts. This conjecture has some support from the observations of intermediate appellate court judges in the United States. Justice Judith Kaye of the New York Court of Appeals has stated:

> 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 gist of state court dockets.[90]

This statement is probably truer for law reviews in the United States than Australian law reviews, although a case could be easily made that Australian law reviews are moving in the direction of the United States law reviews with a lag.[91] More generally, it is fair to say that legal periodicals typically contain articles advancing cutting edge normative statements, while textbooks tend to contain positive statements of the law. As an intermediate appellate court, the Supreme Court of South Australia is likely to seek guidance from academic authorities for statements of what the law is, rather than how it should be changed.[92]

VI CITATION PATTERNS OF THE JUDGES

The citation practices of individual judges for each of the sampled years are shown in Tables 2A–2K. Given that the number of authorities cited has increased over time, it makes sense to compare the citation patterns of judges with their contemporaries, rather than over time. Of those judges who had at least five reported judgments in any given year, over the first four decades of the study the judges with the most citations of authority on the Court in a single year on a per

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87 Ibid.

88 Compare the observations of Andrew Leigh, 'Behind the Bench: Associates in the High Court of Australia' (2000) 25 *Alternative Law Review* 295 with Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (1998).

89 Daniels, 'Far Beyond the Law Reports', above n 10.

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

91 See generally John Gava, 'Law Reviews: Good for Judges, Bad for Law Reviews?' (2002) 26 *Melbourne University Law Review* 560.

92 See Black and Richter, 'Did She Mention My Name?', above n 7, 391.

judgment basis were Way CJ (1876−1916) and Gordon J (1903−1923) in 1905 and Murray CJ (1916−1942) in 1915. Citation rates for individual judges in 1925 and 1935 were lower than those in 1905 and 1915, reflecting the lower citation rates for the Court evident in Figure 1. An exception is Poole J (1919−1927) who, in 1925, cited 69.5 authorities per judgment, the highest for any judge in a single year sample, but this was based on just two reported judgments and therefore may not be representative. In 1945, Mayo J (1942−1966) cited the greatest number of authorities (10.14 per judgment) and in 1955 Ross J (1952−1963) cited the greatest number authorities (14.54 per judgment). In 1965 several judges; namely, Bright J (1963−1978), Mayo J, Mitchell J (1965−1983) and Napier CJ (puisne justice 1924−1942; Chief Justice 1942−1967) cited, on average, 10 authorities per judgment. In 1975 Wells J (1970−1984) cited 14.92 authorities per judgment, fewer than Matheson J (1979−1998) who in 1995 cited 18.6 authorities per judgment in 17 reported judgments and Gray J (2000−) who in 2005 cited 23.2 authorities per judgment in 27 reported judgments. Earlier Doyle CJ's view was quoted that judges should cite less authority. In 1995 Doyle CJ was among the judges who cited the most on the Court on a per judgment basis, although in 2005 he was in the middle range of citers on the Court.

There are a few features of Tables 2A−2K that are worth noting. The first is that Way and Murray CJJ and Gordon J, judges who were prolific citers in the first four decades of the 20th century, would have been average or below average citers of authority on the Court in 1995 or 2005. The second is that in the period prior to the Second World War, only one or two prolific citers were responsible for the majority of the Court's citations in a given year. This was the case for Way CJ in 1905 (53 per cent of the Court's citations), Murray CJ in 1915 (75 per cent of the Court's citations), Poole J in 1925 (41 per cent of the Court's citations in only two judgments) and Napier CJ and Richards J in 1935 (53 per cent of the Court's citations). However, in more recent years there has been convergence between the judges who cite the most and least authority, with a much more even spread across judges. Third, when examining the type of authorities that individual judges cited, one has to bear in mind the period in history in which they were on the Bench. The judges who sat on the Bench in the first few decades of the 20th century predominantly cited English cases. Thus, while the judges who sat on the Court in the period 1905−1935 generally cited far fewer authorities than judges who have sat on the Court in recent decades, on a per judgment basis they tend to cite as many or more English cases than judges who have been on the Court since the *Australia Acts* were passed.

Table 2A - Citations of Judges in the Supreme Court of South Australia in 1905

	Gordon	Homburg	Russell	Way	**Total**
No of Judgment	5	5	1	6	**17**
HIGH COURT					
1903-1919	0	0	0	0	**0**
1920-1939	-	-	-	-	-
1940-1959	-	-	-	-	-
1960-1979	-	-	-	-	-
1980-1999	-	-	-	-	-
2000-	-	-	-	-	-
Subtotal	0	0	0	0	**0**
Ave per judgment					
SA SC	0	0	0	2	**2**
Ave per judgment				0.33	
VIC SC				1	**1**
NSW SC					**0**
QLD SC					**0**
WA SC					**0**
TAS SC					**0**
ACT SC	-	-	-	-	-
NT SC	-	-	-	-	-
Subtotal	0	0	0	1	**1**
OTHER AUST. COURTS	0	0	0	0	**0**
ENGLISH COURTS					
House of Lords	8			14	**22**
Judicial Committee				1	**1**
English CA	4			1	**5**
Lower English Courts	14	9	1	21	**45**
Subtotal	26	9	1	37	**73**
Ave per judgment	5.20	1.80	1.00	6.17	
OTHER COUNTRIES	0	0	0	0	**0**
Ave per judgment					

SECONDARY AUTHORITIES					
LEGAL					
Books				2	**2**
Periodicals					**0**
Encyclopaedias					**0**
Law Reform Reports					**0**
Dictionaries					**0**
Other					**0**
Subtotal	0	0	0	2	**2**
Ave per judgment				0.33	
NON-LEGAL					
Books					**0**
Periodicals					**0**
Dictionaries					**0**
Other					**0**
Subtotal	0	0	0	0	**0**
Ave per judgment					
TOTAL	**26**	**9**	**1**	**42**	**78**
AVE PER JUDGMENT	5.20	1.80	1.00	7.00	

Table 2B - Citations of Judges in the Supreme Court of South Australia in 1915

	Buchanan	Gordon	Murray	Way	**Total**
No of Judgment	5	6	12	1	**24**
HIGH COURT					
1903-1919	1	6	3		**10**
1920-1939	-	-	-	-	-
1940-1959	-	-	-	-	-
1960-1979	-	-	-	-	-
1980-1999	-	-	-	-	-
2000-	-	-	-	-	-
Subtotal	1	6	3	0	**10**
Ave per judgment	0.2	1	0.25		
SA SC	0	0	0	0	**0**
Ave per judgment					
VIC SC					**0**
NSW SC					**0**
QLD SC					**0**
WA SC					**0**
TAS SC					**0**
ACT SC	-	-	-	-	-
NT SC	-	-	-	-	-
Subtotal	0	0	0	0	**0**
OTHER AUST. COURTS	0	0	0	0	**0**
ENGLISH COURTS					
House of Lords	1		18		**19**
Judicial Committee		1	5		**6**
English CA	5	2	35		**42**
Lower English Courts	5	6	49		**60**
Subtotal	11	9	107	0	**127**
Ave per judgment	2.2	1.5	8.92		
OTHER COUNTRIES					
USA		1			**1**
Ireland			2		**2**
Subtotal	0	1	2	0	**3**
Ave per judgment		0.17	0.17		

SECONDARY AUTHORITIES					
LEGAL					
Books		5	3		**8**
Periodicals			0		**0**
Encyclopaedias		2			**2**
Law Reform Reports					**0**
Dictionaries					**0**
Other		1			**1**
Subtotal	0	8	3	0	**11**
Ave per judgment		1.33	0.25		
NON-LEGAL					
Books					**0**
Periodicals					**0**
Dictionaries				1	**1**
Other					**0**
Subtotal	0	0	0	1	**1**
Ave per judgment				1	
TOTAL	**12**	**24**	**115**	**1**	**152**
AVE PER JUDGMENT	2.4	4	9.58	1	

Table 2C - Citations of Judges in the Supreme Court of South Australia in 1925

	Parsons	Napier	Poole	Richards	**Total**
No of Judgment	16	26	2	17	**61**
HIGH COURT					
1903-1919	4		11	2	**17**
1920-1939	1	1	5		**7**
1940-1959	-	-	-	-	-
1960-1979	-	-	-	-	-
1980-1999	-	-	-	-	-
2000-	-	-	-	-	-
Subtotal	5	1	16	2	**24**
Ave per judgment	0.31	0.04	8.00	0.12	
SA SC	5	5	2	4	**16**
Ave per judgment	0.31	0.19	1.00	0.24	
VIC SC	5	1	1		**7**
NSW SC	6	1	2		**9**
QLD SC		1			**1**
WA SC					**0**
TAS SC					**0**
ACT SC	-	-	-	-	-
NT SC	-	-	-	-	-
Subtotal	11	3	3	0	**17**
OTHER AUST. COURTS		1			**1**
ENGLISH COURTS					
House of Lords	3	4	14	11	**32**
Judicial Committee	2	5	10	3	**20**
English CA	9	12	26	17	**64**
Lower English Courts	27	17	54	36	**134**
Subtotal	41	38	104	67	**250**
Ave per judgment	2.56	1.46	52.00	3.94	
OTHER COUNTRIES					
USA			1		**1**
Ireland			4	1	**5**
New Zealand		2			**2**
Subtotal	0	2	5	1	**8**
Ave per judgment		0.08	2.50	0.06	

SECONDARY AUTHORITIES					
LEGAL					
Books	1	2	5	7	**15**
Periodicals					**0**
Encyclopaedias	1		1	2	**4**
Law Reform Reports					**0**
Dictionaries					**0**
Other			1		**1**
Subtotal	2	2	7	9	**20**
Ave per judgment	0.13	0.08	3.50	0.53	
NON-LEGAL					
Books					**0**
Periodicals					**0**
Dictionaries	4		2		**6**
Other					**0**
Subtotal	4	0	2	0	**6**
Ave per judgment	0.25		1		
TOTAL	**68**	**52**	**139**	**83**	**342**
AVE PER JUDGMENT	4.25	2	69.5	4.88	

Table 2D – Citations of Judges in the Supreme Court of South Australia in 1935

	Parsons	Murray	Napier	Piper	Reed	Richards	**Total**
No of Judgment	15	4	31	17	23	22	**112**
HIGH COURT							
1903-1919	4		7	1	1	4	**17**
1920-1939	3	1	3		3	2	**12**
1940-1959	-	-	-	-	-	-	-
1960-1979	-	-	-	-	-	-	-
1980-1999	-	-	-	-	-	-	-
2000-	-	-	-	-	-	-	-
Subtotal	7	1	10	1	4	6	**29**
Ave per judgment	0.47	0.25	0.32	0.06	0.17	0.27	
SA SC	3	2	16	12	17	22	**72**
Ave per judgment	0.2	0.5	0.52	0.71	0.74	1	
VIC SC	3		2	1	1	8	**15**
NSW SC	3		1	1	3	1	**9**
QLD SC	2					1	**3**
WA SC							**0**
TAS SC							**0**
ACT SC	-	-	-	-	-	-	-
NT SC	-	-	-	-	-	-	-
Subtotal	8	0	3	2	4	10	**27**
OTHER AUST. COURTS	0	0	0	0	0	0	**0**
ENGLISH COURTS							
House of Lords	8	3	11	3	4	5	**34**
Judicial Committee	9		3	1		3	**16**
English CA	21	3	17	12	3	26	**82**
Lower English Courts	21	3	40	16	18	38	**136**
Subtotal	59	9	71	32	25	72	**268**

Ave per judgment	3.93	2.25	2.29	1.88	1.09	3.27	
OTHER COUNTRIES							
USA			2				**2**
Ireland					1		**1**
New Zealand					1	2	**3**
Scotland			1			2	**3**
Subtotal	0	0	3	0	2	4	**9**
Ave per judgment			0.10	0.00	0.09	0.18	
SECONDARY AUTHORITIES							
LEGAL							
Books	7	3	3	1	5	8	**27**
Periodicals							**0**
Encyclopaedias					2	2	**4**
Law Reform Reports							**0**
Dictionaries							**0**
Other							**0**
Subtotal	7	3	3	1	7	10	**31**
Ave per judgment	0.47	0.75	0.10	0.06	0.30	0.45	
NON-LEGAL							
Books							**0**
Periodicals							**0**
Dictionaries			1				**1**
Other		1	1				**2**
Subtotal	0	1	2	0	0	0	**3**
Ave per judgment		0.25	0.06				
TOTAL	**84**	**16**	**108**	**48**	**59**	**124**	**439**
AVE PER JUDGMENT	5.6	4	3.48	2.82	2.57	5.64	

Table 2E – Citations of Judges in the Supreme Court of South Australia in 1945

	Parsons	Ligertwood	Mayo	Napier	Reed	Richards	**Total**
No of Judgment	1	4	14	16	13	12	**60**
HIGH COURT							
1903-1919		1	5	1	4	2	**13**
1920-1939		1	7	1	8		**17**
1940-1959		1	2		1	1	**5**
1960-1979	-	-	-	-	-	-	-
1980-1999	-	-	-	-	-	-	-
2000-	-	-	-	-	-	-	-
Subtotal	0	3	14	2	13	3	**35**
Ave per judgment		0.75	1	0.125	1	0.25	
SA SC	0	1	32	12	11	13	**69**
Ave per judgment		0.25	2.29	0.75	0.85	1.08	
VIC SC			1	2	2	5	**10**
NSW SC			7		4	1	**12**
QLD SC				1			**1**
WA SC			3			2	**5**
TAS SC							**0**
ACT SC	-	-	-	-	-	-	-
NT SC	-	-	-	-	-	-	-
Subtotal	0	0	11	3	6	8	**28**
OTHER AUST. COURTS			1				**1**
ENGLISH COURTS							
House of Lords	2	3	10	5	3	5	**28**
Judicial Committee		1	5	6	1	2	**15**
English CA	1	3	20	23	4		**51**
Lower English Courts		4	48	21	13	4	**90**
Subtotal	3	11	83	55	21	11	**184**

Ave per judgment	3	2.75	5.93	3.44	1.62	0.92	
OTHER COUNTRIES							
USA							**0**
Canada				2			**2**
Ireland		1					**1**
New Zealand		4			1	4	**9**
Scotland	1						**1**
Subtotal	1	5	0	2	1	4	**13**
Ave per judgment	1	1.25		0.125	0.08	0.33	
SECONDARY AUTHORITIES							
LEGAL							
Books	1		1			7	**9**
Periodicals	1						**1**
Encyclopaedias							**0**
Law Reform Reports							**0**
Dictionaries							**0**
Other							**0**
Subtotal	2	0	1	0	0	7	**10**
Ave per judgment	2	0	0.07			0.58	
NON-LEGAL							
Books							**0**
Periodicals							**0**
Dictionaries		3		2		1	**6**
Other							**0**
Subtotal	0	3	0	2	0	1	**6**
Ave per judgment	0			0.125		0.08	
TOTAL	**6**	**23**	**142**	**76**	**52**	**47**	**346**
AVE PER JUDGMENT	6	5.75	10.14	4.75	4	3.92	

Table 2F – Citations of Judges in the Supreme Court of South Australia in 1955

	Abbott	Hannan	Ligertwood	Mayo	Napier	Reed	Ross	**Total**
No of Judgment	10	9	1	7	14	14	13	**68**
HIGH COURT								
1903-1919	3	1	2			1	1	**8**
1920-1939	1			1	6	6	4	**18**
1940-1959	9		1		10	9	23	**52**
1960-1979	-	-	-	-	-	-	-	-
1980-1999	-	-	-	-	-	-	-	-
2000-	-	-	-	-	-	-	-	-
Subtotal	13	1	3	1	16	16	28	**78**
Ave per judgment	1.3	0.11	3	0.14	1.14	1.14	2.15	
SA SC	19	19	2	3	17	9	25	**94**
Ave per judgment	1.9	2.11	2	0.43	1.21	0.64	1.92	
VIC SC	2	2	1		1	4	1	**11**
NSW SC	3	5		3			2	**13**
QLD SC	2							**2**
WA SC				1			3	**4**
TAS SC	1							**1**
ACT SC	-	-	-	-	-	-	-	**0**
NT SC	-	-	-	-	-	-	-	**0**
Subtotal	8	7	1	4	1	4	6	**31**
OTHER AUST. COURTS						7		**7**
ENGLISH COURTS								
House of Lords	11	2		1	9	7	10	**40**
Judicial Committee		2			8	2	10	**22**
English CA	5	7		1	16	15	39	**83**
Lower English Courts	21	5		15	11	26	51	**129**
Subtotal	37	16	0	17	44	50	110	**274**
Ave per judgment	3.7	1.78		2.43	3.14	3.57	8.46	

OTHER COUNTRIES								
USA								**0**
Canada						1		**1**
Ireland							3	**3**
New Zealand		1		1			1	**3**
Scotland						1	1	**2**
Subtotal	0	1	0	1	0	2	5	**9**
Ave per judgment		0.11		0.14		0.14	0.38	
SECONDARY AUTHORITIES								
LEGAL								
Books		3			1	2	9	**15**
Periodicals								**0**
Encyclopedias		1					1	**2**
Law Reform Reports								**0**
Dictionaries								**0**
Other							2	**2**
Subtotal	0	4	0	0	1	2	12	**19**
Ave per judgment		0.44			0.07	0.14	0.92	
NON-LEGAL								
Books								**0**
Periodicals								**0**
Dictionaries							3	**3**
Other								**0**
Subtotal	0	0	0	0	0	0	3	**3**
Ave per judgment							0.23	
TOTAL	**77**	**48**	**6**	**26**	**79**	**90**	**189**	**515**
AVE PER JUDGMENT	7.7	5.33	6	3.71	5.64	6.43	14.54	

Table 2G – Citations of Judges in the Supreme Court of South Australia in 1965

	Bright	Chamberlain	Hogarth	Mayo	Mitchell	Napier	Travers	**Total**
No of Judgment	17	17	17	8	1	21	14	**95**
HIGH COURT								**0**
1903-1919	5		1			3		**9**
1920-1939	11	2		3		5	2	**23**
1940-1959	17	7	8	2	2	8	2	**46**
1960-1979	2	4	5	1		1		**13**
1980-1999	-	-	-	-	-	-	-	-
2000-	-	-	-	-	-	-	-	-
Subtotal	35	13	14	6	2	17	4	**91**
Ave per judgment	2.06	0.76	0.82	0.75	2.00	0.81	0.29	
SA SC	31	22	13	5		44	15	**130**
Ave per judgment	1.82	1.29	0.76	0.63	0.00	2.10	1.07	
VIC SC	6	3	1	5		1	6	**22**
NSW SC	13	1	3	4		4	3	**28**
QLD SC	4			1				**5**
WA SC		1						**1**
TAS SC	3							**3**
ACT SC	1		0					**1**
NT SC	0		1					**1**
Subtotal	27	5	5	10	0	5	9	**61**
OTHER AUST. COURTS	0	0	0	0	0	0	0	**0**
ENGLISH COURTS								
House of Lords	3	6	4	4	1	18	4	**40**
Judicial Committee	7	1	2	4		11	2	**27**
English CA	21	10	11	10	1	51	1	**105**
Lower English Courts	30	24	5	31	5	71	7	**173**
Subtotal	61	41	22	49	7	151	14	**345**
Ave per judgment	3.59	2.41	1.29	6.13	7.00	7.19	1.00	

OTHER COUNTRIES								
USA		3						**3**
Canada	1		1	1		1		**4**
Ireland				2			2	**4**
New Zealand	6	1	1	1			1	**10**
Scotland						2		**2**
Subtotal	7	4	2	4	0	3	3	**23**
Ave per judgment	0.41	0.24	0.12	0.50	0.00	0.14	0.21	
SECONDARY AUTHORITIES								
LEGAL								
Books	8	3	4	3	1	7	6	**32**
Periodicals	3	2	1				1	**7**
Encyclopaedias		1		2		1	1	**5**
Law Reform Reports								**0**
Dictionaries			1			2		**3**
Other				1				**1**
Subtotal	11	6	6	6	1	10	8	**48**
Ave per judgment	0.65	0.35	0.35	0.75	1.00	0.48	0.57	
NON-LEGAL								
Books								**0**
Periodicals								**0**
Dictionaries		1	2					**3**
Other								**0**
Subtotal	0	1	2	0	0	0	0	**3**
Ave per judgment		0.06	0.12					
TOTAL	**172**	**92**	**64**	**80**	**10**	**230**	**53**	**701**
AVE PER JUDGMENT	10.12	5.41	3.76	10.00	10.00	10.95	3.79	

Table 2H – Citations of Judges in the Supreme Court of South Australia in 1975

	Bray	Bright	Hogarth	Jacobs	Mitchell	Sangster	Walters	Wells	Zelling	**Total**
No of Judgment	17	4	7	10	4	9	4	12	4	**71**
HIGH COURT										
1903-1919				1	1					**2**
1920-1939	4			4	2			4		**14**
1940-1959	11	2		3	3	5	1	3		**28**
1960-1979	7	3		9		7	2	5	4	**37**
1980-1999	-	-	-	-	-	-	-	-	-	
2000-	-	-	-	-	-	-	-	-	-	
Subtotal	22	5	0	17	6	12	3	12	4	**81**
Ave per judgment	1.29	1.25		1.70	1.50	1.33	0.75	1.00	1.00	
SA SC	31	6	1	13	6	7	10	18	3	**95**
Ave per judgment	1.82	1.50	0.14	1.30	1.50	0.78	2.50	1.50	0.75	
VIC SC	5	3		1	5	1	1	7	1	**24**
NSW SC	12	2			2	5	1	2	2	**26**
QLD SC	4			3		2				**9**
WA SC	1									**1**
TAS SC										**0**
ACT SC										**0**
NT SC										**0**
Subtotal	22	5	0	4	7	8	2	9	3	**60**
OTHER AUST. COURTS	4			2		1	1	46		**54**
ENGLISH COURTS										
House of Lords	4	1		4	2	1		24		**36**

Judicial Committee	4	1		3	1		1	2		**12**
English CA	31	6		17	3	15	2	39	2	**115**
Lower English Courts	12	1		4		10		21		**48**
Subtotal	51	9	0	28	6	26	3	86	2	**211**
Ave per judgment	3	2.25		2.8	1.5	2.89	0.75	7.17	0.5	
OTHER COUNTRIES LIST										
USA										**0**
Canada	2			1						**3**
India								1		**1**
Ireland				1		1				**2**
New Zealand	4	1				6			1	**12**
Scotland	3									**3**
Subtotal	9	1	0	2	0	7	0	1	1	**21**
Ave per judgment	0.53	0.25		0.20		0.78		0.08	0.25	
SECONDARY AUTHORITIES										
LEGAL										
Books	4					2		4		**10**
Periodicals					1	1		2		**4**
Encyclopaedias				1						**1**
Law Reform Reports					1					**1**
Dictionaries										**0**
Other						1				**1**
Subtotal	4	0	0	1	2	4	0	6	0	**17**
Ave per judgment	0.24			0.10	0.50	0.44		0.50		
NON-LEGAL										
Books										**0**
Periodicals										**0**

Dictionaries								1	1	**2**
Other										**0**
Subtotal	0	0	0	0	0	0	0	1	1	**2**
Ave per judgment								0.08	0.25	
TOTAL	**143**	**26**	**1**	**67**	**27**	**65**	**19**	**179**	**14**	**541**
AVE PER JUDGMENT	8.41	6.50	0.14	6.70	6.75	7.22	4.75	14.92	3.50	

Table 2I – Citations of Judges in the Supreme Court of South Australia in 1985

	Bollen	Cox	Jacobs	Johnston	King	Legoe	Lunn	Matheson	Mill-house	Mohr	O'Loughlin	Olsson	Prior	White	Zelling	**Total**
No of Judgment	33	16	32	12	72	7	5	22	20	15	24	18	17	24	16	**333**
HIGH COURT																
1903-1919	3	4			7		3	4	5					3	2	**31**
1920-1939	8		1		12			10	5	1	1	1		2	2	**43**
1940-1959	14	5	5		17	5		1	2		1	7	11	9	18	**95**
1960-1979	12	10	21	1	45		2	11	3	5	12	17	17	24	6	**186**
1980-1999	9	9	20	8	31	5		8	1		2	4	8	3	4	**112**
2000-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	
Subtotal	46	28	47	9	112	10	5	34	16	6	16	29	36	41	32	**467**
Ave per judgment	1.39	1.75	1.47	0.75	1.56	1.43	1.00	1.55	0.80	0.40	0.67	1.61	2.12	1.71	2.00	
FEDERAL/ FAMILY COURT	0	0	0	0	2	0	0	9	0	0	0	5	0	0	4	**20**
SA SC	44	74	70	40	101	37	18	56	5	11	52	63	28	78	30	**707**
Ave per judgment	1.33	4.63	2.19	3.33	1.40	5.29	3.60	2.55	0.25	0.73	2.17	3.50	1.65	3.25	1.88	
VIC SC	3	3		2	15	2	9	18			2	3	3	23	5	**88**
NSW SC	9	7	1	11	14	2	12	11		1	4	2	5	20	7	**106**
QLD SC	1	2			5	2	4			2	1				3	**20**
WA SC		1			1		4				3				1	**10**

TAS SC			1		4			2		1		2				**10**
ACT SC					1											**1**
NT SC					3		6				1					**10**
Subtotal	13	13	2	13	43	6	35	31	0	4	11	7	8	43	16	**245**
OTHER AUST. COURTS	0	0	1	11	8	0	0	1	1	0	6	0	0	1	0	**29**
ENGLISH COURTS																
House of Lords	9	36	7	4	37	4	4	25	5	1	11	12	6	26	12	**199**
Judicial Committee	19	5	1	3	7			8				5	3	11	3	**65**
English CA	26	17	5		49	10	13	26		4	13	7	12	32	30	**244**
Lower English Courts	44	21	5	2	33	15	9	16	10	2	23	5	5	8	33	**231**
Subtotal	98	79	18	9	126	29	26	75	15	7	47	29	26	77	78	**739**
Ave per judgment	2.97	4.94	0.56	0.75	1.75	4.14	5.20	3.41	0.75	0.47	1.96	1.61	1.53	3.21	4.88	
OTHER COUNTRIES LIST																
USA		2			1		2				3				1	**9**
Canada		8	1		6			3						3	4	**25**
Guyana															1	**1**
India																**0**
Ireland																**0**
New Zealand		3			4			8						1	10	**26**
North Ireland		1														**1**

Scotland		1			1										**2**
Subtotal	0	15	1	0	12	0	2	11	0	0	3	0	0	4	16	**64**
Ave per judgment		0.94	0.03		0.17		0.40	0.50			0.13			0.17	1.00	
SECONDARY AUTHORITIES																
LEGAL																
Books	18	2			4	6	1	12	2	1	1	1	1	5	10	**64**
Periodicals					3	3			1					1	5	**13**
Encyclopaedias	1	2			3		1					1		1	2	**11**
Law Reform Reports								1								**1**
Dictionaries																**0**
Other															1	**1**
Subtotal	19	4	0	0	10	9	2	13	3	1	1	2	1	7	18	**90**
Ave per judgment	0.58	0.25			0.14	1.29	0.40	0.59	0.15	0.07	0.04	0.11	0.06	0.29	1.13	
NON-LEGAL																
Books																**0**
Periodicals																**0**
Dictionaries						2					1	2				**5**
Other																**0**
Subtotal	0	0	0	0	0	2	0	0	0	0	1	2	0	0	0	**5**
Ave per judgment						0.29					0.04	0.11				
TOTAL	**220**	**213**	**139**	**82**	**414**	**93**	**88**	**230**	**40**	**29**	**137**	**137**	**99**	**251**	**194**	**2366**
AVE PER JUDGMENT	6.67	13.31	4.34	6.83	5.75	13.29	17.60	10.45	2.00	1.93	5.71	7.61	5.82	10.46	12.13	

Table 2J – Citations of Judges in the Supreme Court of South Australia in 1995

	Bollen	Cox	Debelle	Doyle	Duggan	King	Lander	Matheson	Millhouse	Mohr	Mulligan	Nyland	Olsson	Perry	Piror	Williams	**Total**
No of Judgment	15	24	15	21	15	12	18	11	4	8	11	17	21	16	10	10	**228**
HIGH COURT																	
1903-1919		1	2	1		1	6	4			1		2			1	**19**
1920-1939			1	2	2	1	5					1					**12**
1940-1959	2	1	3	7	3		8	3			4		8	4			**43**
1960-1979	11	12	9	24	3	5	14	21			7	1	14	1			**122**
1980-1999	12	31	10	40	5	29	39	18	1		32	2	69	11		4	**303**
2000-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Subtotal	25	45	25	74	13	36	72	46	1	0	44	4	93	16	0	5	**499**
Ave per judgment	1.67	1.88	1.67	3.52	0.87	3.00	4.00	4.18	0.25		4.00	0.24	4.43	1.00		0.50	
FEDERAL/FAMILY COURT		1	7	4	2	5	1	7			2		7		1		**37**
SA SC	17	59	24	32	6	12	82	39	0	0	30	0	47	32	6	2	**388**
Ave per judgment	1.13	2.46	1.60	1.52	0.40	1.00	4.56	3.55			2.73		2.24	2.00	0.60	0.20	
VIC SC	4		3	10	2	5	6	8			5		4	8			**55**
NSW SC	8	7	11	30	3	8	6	17			12		32	23	1		**158**
QLD SC	3	1	4	11		6		3			1		3	1			**33**
WA SC		2	1	2		2		1			1		2	2			**13**
TAS SC			1	3			1	2					1				**8**
ACT SC				3								1		1			**5**

NT SC			1	1				3								**5**
Subtotal	15	10	21	60	5	21	13	34	0	0	19	1	42	35	1	0	**277**
OTHER AUST. COURTS	1		5		1												**7**
ENGLISH COURTS																	
House of Lords	10	6	17	2	1	6	30	19			13	1	15	11		2	**133**
Judicial Committee	2		4	3			13	8			4	1	5				**40**
English CA	4	5	41	11	5	19	10	22	1		2		22	26			**168**
Lower English Courts	10	6	19	12	1	11	4	9			5		11	17		1	**106**
Subtotal	26	17	81	28	7	36	57	58	1	0	24	2	53	54	0	3	**447**
Ave per judgment	1.73	0.71	5.40	1.33	0.47	3.00	3.17	5.27	0.25		2.18	0.12	2.52	3.38		0.30	
OTHER COUNTRIES LIST																	
USA	4		6			3					5		7				**25**
Canada	2	3	1			3	2	1									**12**
Guyana																	**0**
India																	**0**
Ireland	1	2											1				**4**
New Zealand				4	2	1					1		2				**10**
North Ireland						1											**1**
Scotland		1		1		1											**3**
South Africa				1									1				**2**
Subtotal	7	6	7	6	2	9	2	1	0	0	6	0	11	0	0	0	**57**
Ave per judgment	0.47	0.25	0.47	0.29	0.13	0.75	0.11	0.09			0.55		0.52				

SECONDARY AUTHORITIES																
LEGAL																
Books	15	4	7	21	1	5	2	12			2		12	13		5	**99**
Periodicals			1	4	2		1	1					1				**10**
Encyclopaedias				1			1	4									**6**
Law Reform Reports																	**1**
Dictionaries																	**0**
Other	3			1		1	1						1				**7**
Subtotal	18	4	8	27	4	6	5	17	0	0	2	0	14	13	0	5	**123**
Ave per judgment	1.20	0.17	0.53	1.29	0.27	0.50	0.28	1.55			0.18		0.67	0.81		0.50	
NON-LEGAL																	
Books																	**0**
Periodicals																	**0**
Dictionaries		5					4	2					1	3			**15**
Other													1				**1**
Subtotal	0	5	0	0	0	0	4	2	0	0	0	0	2	3	0	0	**16**
Ave per judgment		0.21					0.22	0.18					0.10	0.19			
TOTAL	**109**	**147**	**178**	**231**	**40**	**125**	**236**	**204**	**2**	**0**	**127**	**7**	**269**	**153**	**8**	**15**	**1851**
AVE PER JUDGMENT	7.27	6.13	11.87	11.00	2.67	10.42	13.11	18.55	0.50		11.55	0.41	12.81	9.56	0.80	1.50	

Table 2K – Citations of Judges in the Supreme Court of South Australia in 2005

	Anderson	Besanko	Bleby	Debelle	Doyle	Duggan	Gray	Layton	Nyland	Perry	Sulan	Vanstone	White	**Total**
No of Judgment	9	21	16	18	30	18	27	13	1	15	20	16	21	**225**
HIGH COURT														
1903-1919	5	5		3	1		5		1	1	2	2	4	**29**
1920-1939		7	1	4		1	12	1	1			2	7	**36**
1940-1959	2	3	7	5	2	5	5		7	2	1		6	**45**
1960-1979	6	7	6	9	6	8	15	4	1	4	2	3	11	**82**
1980-1999	28	29	7	44	54	20	129	9	8	28	5	10	72	**443**
2000-	23	6		10	18	4	26	8		8	2	7	13	**125**
Subtotal	64	57	21	75	81	38	192	22	18	43	12	24	113	**760**
Ave per judgment	7.11	2.71	1.31	4.17	2.70	2.11	7.11	1.69	18.00	2.87	0.60	1.50	5.38	
FEDERAL/ FAMILY COURT	5	18	4	10	13	1	13	22		10	4		11	**111**
SA SC	36	52	46	63	76	34	215	36	19	5	28	23	113	**746**
Ave per judgment	4	2.48	2.875	3.5	2.53	1.89	7.96	2.77	19	0.33	1.4	1.44	5.38	
VIC SC		1	15	14	10	13	17	8	1	1			5	**85**
NSW SC	9	18	10	20	11	19	45	5	4	15	10		33	**199**
QLD SC		2	3	6	4	2	4	3			3		5	**32**
WA SC	1	5	3	3	4	1	4			3	1		3	**28**
TAS SC	3	1												**4**

ACT SC													2	**2**
NT SC			1	1						2				**4**
Subtotal	13	27	32	44	29	35	70	16	5	21	14	0	48	**354**
OTHER AUST. COURTS	3	1	5	2	2		5			1			7	**26**
ENGLISH COURTS														
House of Lords	10	4	9	6	1	5	19	1		2		2	3	**62**
Judicial Committee			5	1		2	11		1	1	1			**22**
English CA	3	30	26	18	17	11	25	7		9	2	4	20	**172**
Lower English Courts	1	27	10	22	2	22	39	19	1	1	1			**145**
Subtotal	14	61	50	47	20	40	94	27	2	13	4	6	23	**401**
Ave per judgment	1.56	2.90	3.13	2.61	0.67	2.22	3.48	2.08	2.00	0.87	0.20	0.38	1.10	
OTHER COUNTRIES LIST														
USA	2	1	3											**6**
Canada					2	1	3		1					**7**
Guyana														**0**
India														**0**
Ireland	1								1				2	**4**
New Zealand				1	2	5	11	1					2	**22**
North Ireland														**0**
Scotland			4			2								**6**
South Africa														**0**

European Court of Human Rights							1							**1**
Subtotal	3	1	7	1	4	8	15	1	2	0	0	0	4	**46**
Ave per judgment	0.33	0.05	0.44	0.06	0.13	0.44	0.56	0.08	2.00				0.19	
SECONDARY AUTHORITIES														
LEGAL														
Books	4	18	17	7	12	2	8	5		8	2	1		**84**
Periodicals		1		1	1	1	2	3		1	1		1	**12**
Encyclopaedias	1	5		1			1			1				**9**
Law Reform Reports		1					2						1	**4**
Dictionaries		2											2	**4**
Other			5				9						1	**15**
Subtotal	5	27	22	9	13	3	22	8	0	10	3	1	5	**128**
Ave per judgment	0.56	1.29	1.38	0.50	0.43	0.17	0.81	0.62		0.67	0.15	0.06	0.24	
NON-LEGAL														
Books														**0**
Periodicals														**0**
Dictionaries		1		7	2					3	2		3	**18**
Other					1									**1**
Subtotal	0	1	0	7	3	0	0	0	0	3	2	0	3	**19**
Ave per judgment		0.05		0.39	0.10					0.20	0.10		0.14	
TOTAL	**143**	**245**	**187**	**258**	**241**	**159**	**626**	**132**	**46**	**106**	**67**	**54**	**327**	**2591**
AVE PER JUDGMENT	15.89	11.67	11.69	14.33	8.03	8.83	23.19	10.15	46.00	7.07	3.35	3.38	15.57	

Merryman hypothesises that the least prolific citers will cite only the most relevant authorities — consistency and hierarchical citations — while the big citers will include 'references to work of dubious authority.'[93] Merryman, however, found this hypothesis was not supported by the California Supreme Court in 1950, 1960 and 1970. There is no support for this hypothesis in this study either. In the early part of the 20th century the biggest citers of authority had few consistency and hierarchical citations, but had a high proportion of deference citations to decisions of English courts. These citations, though, could hardly be regarded as being of dubious authority, given that at this time decisions of the House of Lords and English Court of Appeal had de facto hierarchical status. As the 20th century progressed and it became more common to cite the Court's own decisions and decisions of the High Court instead of English decisions, generally the judges who cited the most authorities overall also had the highest proportion of consistency and hierarchical citations.

VII CONCLUSIONS

Several conclusions emerge from this study with respect to the changing patterns in the citation practice of the Supreme Court of South Australia over the course of the 20th century. The first conclusion is that, on a per case and per judgment basis, the citation rate has increased since the Second World War and, in particular, there has been a large increase in citation to authority since the 1980s. The second conclusion is that in the early decades of the 20th century, the Court's citations were dominated by citations to the decisions of English courts. Over the course of the 20th century the proportion of citations to English authorities declined, and this decline was hastened by the severance of constitutional links between Australia and the United Kingdom that occurred when the *Australia Acts* were passed. Third, citations to English authorities have been replaced with citations to the Court's own previous decisions and citations to decisions of the High Court, such that consistency and hierarchical citations are the two major forms of citations on the Court. Fourth, coordinate citations to the decisions of the other state Supreme Courts have increased over time, although coordinate citations are not as frequent as either consistency citations or hierarchical citations. The two state Supreme Courts that receive the highest proportion of coordinate citations from the Supreme Court of South Australia are the Supreme Court of New South Wales and Supreme Court of Victoria. Fifth, citations to secondary authorities form a relatively small proportion of total citations and have not clearly increased over time. When the Court does cite secondary authorities, most citations are to legal sources, rather than non-legal sources and within the categories of legal sources, most citations are to textbooks or learned treatises.

Future research on the citation practice of the courts is needed in several directions. While there are now a reasonably large number of studies of the citation practice of

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93 Merryman, 'Toward a Theory of Citations', above n 12, 422.

Australian courts, most studies focus on the recent citation practice of courts. This makes sense in that academics, librarians and practitioners may be more interested in the recent citation practice of courts, but it makes it difficult to discern long-term trends. One avenue for future research is to undertake further studies of the citation practice of the other state Supreme Courts and the High Court over a long period of time. Having said this, the cost of employing research assistants to collect data over such a long period as a century is large. Thus, another option would be to focus on a court with a shorter history such as the Federal Court or the Federal Magistrates Court. There is only one study of the citation practice of the Federal Court and that is restricted to focusing on citations to secondary authorities.[94] There are no studies of the Federal Magistrates Court. A study of the citation practice of the Federal Magistrates Court has several attractive features. It is a new court, established in 1999; there are only approximately 6000 decisions on the AustLII database,[95] meaning that it may be possible to examine the universe, or near universe, of reported cases, rather than a sample; and there are no studies in other countries for similar courts.

Another direction for future research would be to compare the citation practices of the judges with the list of authorities cited in argument.[96] Such a study could test the hypothesis that the citation practices of judges have changed over time because the authorities cited to the Court by counsel have changed over time. Going beyond conventional citation practice studies such as the one in this article, there are a limited number of Australian studies that use citations to measure the influence and prestige of judges,[97] which build on a burgeoning literature of this sort in the United States.[98] Future studies could use citation counts to examine the reputation of state Supreme Court judges across states and over time. *The Oxford Companion to the High Court* has an interesting entry on 'Appointments That Might Have Been'.[99] Such a study could be in effect a retrospective 'tournament of judges'[100] comparing the adjusted citation counts of state Supreme Court judges who were elevated to the High Court with those appointments that were never made. These are but a few of

94 Smyth, 'The Authority of Secondary Authority', above n 5.

95 The Australasian Legal Information Institute (AustLII) database can be accessed at <http://www.austlii.edu.au> .

96 For a United States study along these lines see Manz, 'Citations in Supreme Court Opinions and Briefs: A Comparative Study', above n 10.

97 Russell Smyth, 'Who Gets Cited?', above n 20; Russell Smyth, 'Judicial Prestige: A Citation Analysis of Federal Court Judges' (2001) 6 *Deakin Law Review* 120–148.

98 See, eg, Montgomery Kosma, 'Measuring the Influence of Supreme Court Justices' (1998) 27 *Journal of Legal Studies* 333; David Klein and Darby Morrisroe, 'The Prestige and Influence of Individual Judges on the US Courts of Appeals' (1998) 27 *Journal of Legal Studies* 371; Stephen Choi and Mitu Gulati, 'A Tournament of Judges?' (2004) 92 *California Law Review* 299.

99 Troy Simpson, 'Appointments That Might Have Been' in Anthony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001).

100 I borrow the term from Choi and Gulati, 'A Tournament of Judges?', above n 98.

several possible avenues that research using judicial citations to authority could take. In Australia, there is still mileage in doing further conventional citation practice studies of the sort in this article. The United States, by contrast, had published the first studies of this sort more than five decades ago.[101] Much progress has since been made in using citation practice to examine elusive notions such as the reputation of courts and judges as well as different aspects of judicial behaviour. Some will object to using empirical measures such as recording citation counts to examine judicial behaviour or measure judicial performance in an Australian setting, and particularly to some of the more extreme claims that have been made for its potential uses.[102] However, provided we are aware of the limitations of the analysis, there is much that citation practice can teach us about how judges decide cases through providing insights into the reasoning process.

101 Merryman, 'The Authority of Authority' is the seminal article, published in 1954, above n 12.

102 For some deliberately provocative claims for the potential to examine judicial behaviour using quantitative tools in an Australian setting see Russell Smyth, 'Do Judges Behave as *Homo economicus* and, if so, Can We Measure Their Performance? An Antipodean Perspective on a Tournament of Judges' (2005) 32 *Florida State University Law Review* 1299.