What do Judges Cite? An Empirical Study of the 'Authority of Authority' in the Supreme Court of Victoria

RUSSELL SMYTH*

1 INTRODUCTION

A number of studies have considered citation practices in the United States. The best known are Merryman's seminal studies looking at citation practice in the California Supreme Court.[1] But there are also citation practice studies for the United States Supreme Court,[2] the state courts of Florida,[3] Kansas,[4] Maryland,[5] North Carolina,[6] Ohio,[7] as well as various combinations of different state courts.[8] There have also been attempts to draw comparisons between citation practice in England, France and the United States.[9] However, to this point there have been no empirical studies investigating the citation practices of Australian courts. The objective of this article is to take some first steps towards changing this situation through considering citation practices in decisions of the Supreme Court of Victoria reported in the 1970, 1980 and 1990 Victoria Reports.

There are three main reasons for undertaking a study of this sort. First, the Supreme Court of Victoria is a significant legal institution. As the highest court in the state it makes decisions which have important implications for how the law

* BEc(Hons) LLB(Hons) MEc (Mon) PhD(Lond), Lecturer David Syme School of Business, Faculty of Business and Economics, Monash University.

1 J Merryman 'The Authority of Authority: What the California Supreme Court Cited in 1950' (1954) 6 *Stan L Rev* 613; J 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 *S Cal L Rev* 381.

2 J Ackers 'Thirty Years of Social Science in Supreme Court Criminal Cases' (1990) 12 *Law and Policy* 1; J Ackers 'Social Science in Supreme Court Death Penalty Cases: Citation Practices and Their Implications' (1991) 8 *Justice Quarterly* 421; N Bernstein 'The Supreme Court and Secondary Source Material: 1965 Term' (1968) 57 *Geo L J* 55; W Daniels '"Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940 and 1978' (1983) 76 *Law Library J* 1; T Hafemeister 'The Impact of Social Science Research on the Judiciary' in G Melton (ed) *Reforming the Law: Impact of Child Development Research* (1987); C Newland 'Legal Periodicals and the United States Supreme Court' (1959) 7 Kan L R 477; C Newland 'Innovation in Judicial Technique: The Brandeis Opinion' (1961) 42 *Southwestern Social Science Quarterly* 22; Scurlock 'Scholarship and the Courts' (1964) 32 *UMKC L Rev* 228.

3 P Brown and W Haddad 'Judicial Decision-Making on the Florida Supreme Court: An Introductory Behavioural Study' (1967) 19 *U Fla L Rev* 566.

4 Comment 'Legal Periodicals: Their Use in Kansas' (1959) 7 *Kan L Rev* 490.

5 W Reynolds 'The Court of Appeals of Maryland: Roles, Work and Performance - Part II: Craftmanship and Decision Making' (1978) 38 *Md L Rev* 148.

6 R Mann 'The North Carolina Supreme Court 1977: A Statistical Analysis' (1979) 15 *Wake Forest L Rev* 39.

7 R Archibald '*Stare Decisis* and the Ohio Supreme Court' (1957) 9 *W Reserve L Rev* 23.

8 L Friedman, R Kagan, B Cartwright and S Wheeler 'State Supreme Courts: A Century of Style and Citation' (1981) 33 *Stan L Rev* 773; R Kagan, B Cartwright, L Friedman and S Wheeler 'The Evolution of State Supreme Courts'(1984) 76 *Mich L Rev* 961.

9 C Goutal 'Characteristics of Judicial Style in France, Britain and the USA' (1976) 24 *Am J Comp L* 43.

develops in Victoria. This makes the legal reasoning which the court adopts an important issue for investigation. The citation practice of the court (and broader style of opinion) is a good indicator of what counts as sound legal reasoning over time. As Merryman put it, in his study of the Californian Supreme Court: 'The examination of data on the citation practice of the Court turns out to be a distinct and valuable way of approaching the study of that institution, providing insight into matters untouched or only partially illuminated by other modes of inquiry'.[10] Second, while this study is restricted to the supreme court of a single state, the discussion and issues raised are of more far reaching significance. This is because the supreme courts in other states as well as the High Court have most of the same characteristics as the Supreme Court of Victoria, including the fact that decisions are given in written judgments documented with citations to authorities. Hence, although there might be some small differences, the citation practice of other Australian courts will tend to be similar to the pattern revealed in the data for the Supreme Court of Victoria. Third, the citation practice of the Supreme Court should be of interest to four main sets of people:

(i) It is relevant to academics who want to compare different theories for why judges cite authorities with what the courts actually do in practice.

(ii) It should be of interest to practicing solicitors and barristers to know which authorities impress the highest court in the state. For example, in preparing a brief, in some circumstances, it might be useful to know to what extent the court is prepared to consider authorities from other jurisdictions and/or secondary authorities and how the court's attitude to these authorities has changed over time. The best indicator of this would appear to be the citation practice of the court.

(iii) Law libraries should be aware of which material the court considers to be most relevant in order to make these items available to interested parties.

(iv) The citation practices of the court might also be of interest to the judges themselves 'who may enjoy the self-examination that such a study provides'.[11]

The article is set out as follows. The next section has a discussion about the theoretical reasons judges cite authorities. Section three provides an overview of the sample. Information is given about the cases and individual judgments in the sample. Section four considers the number of citations in 1970, 1980 and 1990. It sets out data on the average citation rate per case and per judgment. It also considers differences in citation practice between dissenting and other judgments and the frequency of citation to different courts over time. Section five looks at which authorities have been cited in more detail. In particular, it considers the extent to which the court cites its own decisions; decisions of the High Court and other Australian courts; decisions of English courts; decisions of courts in other countries and secondary authorities. Section six reviews the citation practice of individual judges. The last section contains some concluding comments.

[10] Merryman 'Towards a Theory of Citations' op cit (n 1) 428.
[11] Merryman 'Authority of Authority' op cit (n 1) 613.

2 THEORETICAL REASONS FOR CITING AUTHORITIES

A number of reasons have been offered for why judges cite case law.[12] First, citing case law provides a justification or rationale for the judge's decision. This is because:

> Judges, generally speaking, have derivative, rather than primary authority. Even though they have great power, they are *not* supposed to act free and unfettered. A judicial decision does not stand on its own. According to our legal theory, judges decide "according to the law". They are not free to decide cases as they please.[13]

This means that judges have to make decisions in accordance with the controlling rules of precedent. Thus, judges, in providing a rationale for their decision, have to cite certain previous case law because it is binding on the Court, while other case law has to be considered because it is of persuasive authority. Before the commencement of the *Australia Acts*, decisions of the High Court and Privy Council were binding on the Supreme Court of Victoria. While decisions of other English courts were not binding on the Supreme Court as such, if there was no High Court decision on the issue, the Supreme Court at first instance, and on appeal, in effect treated decisions of the House of Lords and English Court of Appeal as binding.[14] Following the *Australia Acts* the Supreme Court of Victoria (and other state courts) are no longer bound to follow Privy Council decisions given after the commencement of the Act.[15] Nor is the Supreme Court bound to follow other English decisions, although it has made it clear that it will follow decisions of the House of Lords unless there is a Full Court or High Court decision which is inconsistent.[16] Sir Anthony Mason sums up the implications of the *Australia Acts*:

> Because our legal separation from the United Kingdom was so harmonious and so recent we have no reason to distance ourselves from the continuing evolution of the law in that country. It would be a denial of our legal heritage if we were to do so. There is, however, every reason why we should fashion a common law for Australia that is best suited to our conditions and circumstances. In deciding what is the law in Australia 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. The value of English

[12] For an elaboration of the arguments in this section see Merryman 'Authority of Authority' op cit (n1) 614-650.

[13] Friedman et al op cit (n 8) 793.

[14] This approach was reinforced by statements in the High Court. For example, in *Public Transport Commission (NSW)* v *J. Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336, 341 Barwick CJ suggested that if there was no High Court decision in point, the Supreme Court of New South Wales at first instance and on appeal should, as a general rule, have followed a decision of the English Court of Appeal. Gibbs J (at p.349) went even further than this and suggested that the Supreme Court of New South Wales should have treated a decision of the English Court of Appeal as binding.

[15] McHugh JA in *Hawkins* v *Clayton and ors* (1986) 5 NSWLR 109, 136-137 expressed the view that following the *Australia Acts* state courts are also not required to follow Privy Council decisions given before the commencement of the Act. In *R* v *Judge Bland* [1987] VR 225, 231 Nathan J took the view that since the *Australia Acts* a single judge should prefer a decision of the Full Court to a decision of the Privy Council irrespective of when the latter was given. See also the discussion about the implications of the *Australia Acts* in Sir Anthony Mason 'Future Directions in Australian Law' (1987) 13 Mon L R 149, 149-151.

[16] *Park Street Properties Pty Ltd* v *City of South Melbourne* [1990] VR 545 (FC) 553.

judgments, like Canadian, New Zealand and for that matter United States judgments, depends on the persuasive force of their reasoning.[17]

A second related reason for citing case law is that it ensures that the judicial process is injected with a certain degree of consistency, predicability and coherence. It is desirable from a social policy point of view that people should be able to predict with some certainty the legal consequences of their actions. The citation of previous authorities ensures that the parties to an action are able to see that the decision in a particular case is based on pre-existing rules. It also provides a basis for review if the judges err in the application of pre-existing principles which makes 'the law' consistent and impartial.[18] As a fetter on the need to be predictable, of course the law also has to be adaptable to current economic and social circumstances. This involves a certain amount of subjectiveness because judges are interpreting the law in light of fundamental social values. Judges, however, do not fulfil their responsibilities to adapt the law to current conditions in a vacuum. Apart from influencing what authorities courts cite — for instance more recent decisions might be considered to have more social relevance than older cases — judges need to be able to communicate to other judges and members of the legal profession their reasons for 'updating' the law based on previous authorities and current social circumstances. This ensures that the entire process is open and transparent.[19]

A third reason for citing case law is that it provides a starting point to determine the law on a specific issue. The first two reasons for citing previous authorities suggest that there is something called 'the law' which is waiting to be applied. In practice most of the decision making process consists of determining what the facts and law are in a particular case. Hence, an important reason for citing previous cases is to consider conflicting statements on the law together with the facts in specific cases in order to decide what the law is on the given facts before the court. This is also one rationale for citing secondary authorities. Sometimes, it is difficult to determine exactly what principle a case stands for or what a previous judge meant in making a particular observation. Hence, in some cases judges might turn to well respected academic authors in particular areas of the law to shed light on an issue or provide further justification for their interpretation of previous authorities. There is an added reason for doing this if, as in the case of the best-known textbooks, the author's writings have been cited and discussed in previous cases.

Another reason judges cite secondary authorities such as journal articles and textbooks is for convenience. Often journal articles and textbooks provide a readily accessible and quick summary of the law on particular issues — in some instances as an interesting aside to the case — when the judge is unable to explore the issues in depth because of pressure on his or her time. This is perhaps even more apposite in Australia than in the United States because, while the trend in the United States is

[17] Sir Anthony Mason op cit (fn 15) 154.

[18] M. Kirby 'Reasons for Judgment: "Always Permissible, Usually Desirable and Often Obligatory"' (1994) 12 *Australian Bar Review* 121; M. Kirby 'On the Writing of Judgments' (1990) 64 ALJ 691, 694.

[19] Lord Reid 'The Judge as Lawmaker' (1972) 12 JPTL 22; Sir Darryl Dawson 'Do Judges Make Law? Too Much?' (1996) 3 TJR 1; Sir Anthony Mason 'The Judge as Lawmaker' (1996) 3 JCULR 1.

for the judge's clerk to write judgments, 'most Australian judges write their own decisions'.[20] This said, however, the readiness of particular judges to cite secondary authorities varies according to their particular view of what constitutes the most appropriate method of delivering reasons for a decision. For example, while it is common for courts to cite legal encyclopedias such as *Halsburys Laws of England*, some judges such as Peters J, a former member of the California Supreme Court, have been critical of their widespread use. His Honour's view is: "They are guides to the law, not embodiments of it. The statement of the law is no sounder than the cases that are cited to support the text. You should always go to the primary rather than secondary authority'.[21] Peters' J attitude to citing textbooks, though, is more equivocal:

> The same generally applies to textbooks. A textbook should be used primarily as a sourcebook of authorities and of ideas. A brief showing too much familiarity with textbooks, at the expense of cases, is very likely from that same very fact to be considered superficial. However, this does not apply to certain textbooks that are frequently cited and relied on in the courts. Books such as Wigmore's *Evidence*, Williston's *Contracts*, Tiffany's *Property*, Freeman's *Judgments* and a few others, are treated almost as if they were primary authorities. [22]

Most judges in the United States who have made extrajudicial announcements seem to view the citation of law reviews as acceptable.[23] Hughes CJ, of the United States Supreme Court, went as far as to suggest that law reviews should be regarded as the 'fourth estate' of the law. His Honour said: 'It is not too much to say that, in confronting any serious problem, a wide awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated or analysed, in a good legal periodical.'[24] In Australia judges who have offered an opinion have, in general, tended to support the use and citation of law reviews and other secondary authorities. For instance, Sir Frank Kitto has expressed the view that it is the obligation of the judge to seek out secondary authorities in pursuit of a just result.[25] Sir Anthony Mason has also expressed the view that judicial recourse to academic writings from '[Australia] and overseas'[26] is acceptable and helpful.

[20] P.W. Young 'Judgment Writing' (1996) 70 ALJ 513, 514.

[21] Peters 'Introduction: A Judge's View of Appellate Advocacy' in State Bar of California Committee on Continuing Education of the Bar *California Civil Appellate Practice* (1966) xviii-xviv.

[22] Id.

[23] For example, see Warren 'Comment on the 50th Anniversary of the Northwestern University Law Review' (1956) 51 *NW U L Rev* 1; Fuld 'Judge Looks at the Law Review' (1953) 28 *NYUL Rev* 915.

[24] 'Foreword' (1941) 50 *Yale L J* 737 cited in Newland op cit (fn 2) 477-478.

[25] Sir Frank Kitto 'Why Write Judgments?' (1992) 66 *ALJ* 787, 793;
'It is always possible that helpful authorities or other aids to decision have been missed in the argument through accident, laziness or inefficient research ... [The possibility this might occur] is enough to impose an imperative obligation on the judge to do all he can to guard against it, even if that means he must plod once more his weary way through the digests and their supplements, including the lists of cases judicially considered, and sometimes the law periodicals, English, American, Australian . . .'

[26] Sir Anthony Mason op cit (fn 15) 154.

3 JUDGMENTS PUBLISHED

The sample in this study covers all decisions which were published in the Victoria Reports in 1970, 1980 and 1990. There were 263 reported cases in the sample altogether. There were 112 reported cases in 1970, 62 in 1980 and 89 in 1990. Most of the decisions in the sample were handed down in either the year in which they were reported or the previous year. For example, in 1970 93.8% of reported cases were decided in either 1969 or 1970. In 1980 90.3% of reported cases were decided in either 1979 or 1980 and in 1990 87.6% of reported cases were decided in either 1989 or 1990. To give some indication of the Supreme Court's case load, in 1969 there were 1815 cases heard at first instance and the Full Court heard 234 appeals.[27] There were 1880 cases heard at first instance and 201 appeals heard in the Full Court in 1979[28] and in 1990 there were 1641 cases at first instance and 534 appeals to the Full Court.[29] Hence, reported cases constitute just a small proportion of the total number of cases decided. It is left to the Council of Law Reporting in Victoria to determine which cases are reported. The individual judges indicate on their judgment whether they want it to be considered for inclusion in the Victoria Reports. If so, it is passed on to the Council of Law Reporting. The Council of Law Reporting makes the final decision based on the importance of the case (ie its possible precedent value).

One of the main reasons for the difference in the number of cases reported in each volume concerns disparities in the average length of cases. In 1970 the average length of reported cases was 6.8 pages. This increased to 9.4 pages in 1980 and 9.5 pages in 1990. On the basis of differences in output over time previous studies in the United States have drawn conclusions about how productive courts have been in different periods. Attempts have also been made to draw links between case loads and different judicial styles. The conclusion most authors have reached is that there is an inverse relationship between case load and opinion length.[30] For example, Goutal observed that judgments in England were longer than in the United States. He explained this on the basis of the heavier case loads confronting judges in the United States.[31] At first glance the data in our sample appears inconsistent with this argument. The lightest case load was in 1969 and, of the three years, reported judgments were shortest in the 1970 Victoria Reports. However, it is not possible to draw detailed conclusions on this issue here given that the sample is for *reported* decisions rather than total (reported and unreported) cases. First, it is important to remember

27 *Supreme Court Annual Report* 1970. All statistics are for Melbourne sittings. The break down is as follows: At first instance - civil trial by judge and jury 1224; civil trial by judge alone 532; land valuation appeals 17 and criminal trials 42. In the Full Court there were 61 civil appeals and 173 criminal appeals.

28 *Supreme Court Annual Report* 1980. All statistics are for Melbourne sittings. At first instance, the break down is civil trial by judge and jury 647; civil trial by judge alone 739; miscellaneous civil proceedings 420; land valuation appeals 9 and criminal trials 65. In the Full Court there were 53 civil appeals and 148 criminal appeals.

29 *Supreme Court Annual Report* 1990. All statistics are for Melbourne sittings. The following cases were heard - 340 cases on the commercial list; 485 cases on the jury and personal injury list; 699 cases on the causes list; 83 on 'other' lists. (The figure for 'other' lists is for 1989) and 34 criminal trials. There were 277 criminal appeals and 277 civil appeals heard in the Full Court.

30 For example see Merryman 'Towards a Theory of Citations' op cit (n 1); Friedman *et al* op cit (n 8); Kagan *et al* op cit (fn 8).

31 Goutal op cit (fn 9).

that the proportion of reported cases is small, in particular when compared with courts in the United States. Second, given the selection process for inclusion in the Victoria Reports, if a judge considers a case to be important enough in terms of potential precedent value to put it forward for consideration he might spend more time explaining his reasons; hence the judgment ends up being longer. For purposes of making comparisons between opinion length and case loads this would bias the sample.

Table 1 gives statistics on reported judgments of individual judges. In cases reported in 1970 17 different judges delivered opinions sitting either as a single judge or as a member of the Full Court. In 1980 this figure increased to 21 and in 1990 it was 22. One judge (Crockett J) has reported judgments in each of the three years and 18 judges have reported decisions in two of the years. Of these, six judges (Starke, McInerney, Lush, Menhennitt, Newton and Anderson JJ) have decisions reported in 1970 and 1980 and 12 judges (Young CJ, Kaye, Murphy, Fullagar, McGarvie, O'Bryan, Brooking, Marks, Gray, King, Beach and Southwell JJ) have decisions reported in 1980 and 1990. In 1970 there were 173 separate judgments or occasions in which judges participated in joint opinions. The comparable figure for 1990 was not far behind (161), but the amount in 1980 was lower (118). The difference in disparities between the number of cases and the number of judgments in 1970 and 1990 reflects the larger number of Full Court decisions which were reported in 1990. This, in turn, is indicative of the larger number of appeals which the Full Court heard in 1990 compared to the other two years in the sample. In 1970 just 31.1% of reported cases were decisions of the Full Court, but in 1980 and 1990 the proportion of reported cases which were Full Court decisions were higher at 48.4% and 44.9%.

TABLE 1: JUDGMENTS PUBLISHED IN THE VICTORIAN REPORTS — 1970, 1980 AND 1990

	Sitting as a Single Judge	**As a Member of the Full Court**				
		Single	Joint	Con-curring	Dis-senting	Total
1970						
Winneke CJ		2	20	2		24
Smith	3	9	4	1		17
Pape	2		5	2		9
Adam	2	2	2	1		7
Little	3	1	7	2		13
Gowans	12		8	3		23
Gillard	7	1	4	1		13
Starke	4		5			9
Barber	3		1			4
McInerney	9		2	1		12
Lush	9		3			12
Menhennitt	7		1			8
Newton	6		2			8
Barry			1			1
Anderson	9					9
Crockett	3					3
Norris (AJ)	1					1
	80	15	65	13		173

TABLE 1: continued

	Sitting as a Single Judge	As a Member of the Full Court				
		Single	Joint	Con-curring	Dis-senting	Total
1980						
Young CJ		4	12	1		17
Starke		3	3	2		8
McInerney		1	5		1	7
Lush	5	1	5			11
Menhennitt	1	1	2			4
Newton			1			1
Anderson	2	2	1			5
Crockett	5		2		2	9
Kaye	3	1	2			6
Murphy		3	5	1		9
Murray	2					2
Fullagar	2	1	2			5
Jenkinson	3	3	2			8
McGarvie	1	1				2
O'Bryan	2	1	1			4
Brooking	2		4	1	1	8
Marks[a]	3		1			4
Gray		1				1
King			1			1
Beach			2	1		3
Southwell	1	1	1			3
	32	24	52	6	4	118
1990						
Young CJ	3	2	6			11
Crockett	1		7	3		11
Kaye	1		6	2		9
Murphy	1	7	4	2		14
Fullagar	1	3	4			8
McGarvie	4	3	6		1	14
O'Bryan		2	1	1		4
Brooking	6					6
Marks		5	3	1		9
Gray	1	2	3			6
King		1	2			3
Beach	4		6	1		11
Gobbo	2	1	3	3		9
Southwell	1			1		2
Tadgell	10					10
Hampel	2	1	3			6
Ormiston	9		4		2	15
Nathan	1		5		1	7
J.H Phillips		1				1
Vincent	3					3
Teague	1					1
McDonald			1			1
	51	28	64	14	4	161

NOTES: (a) Includes *Talbot* v *General TV Corp. Pty. Ltd* [1980] VR 224. Harris J heard the first part of the case and delivered a judgment. However, Harris J died in the interim and Marks J delivered judgment as to damages.

We might expect, all things being equal, that the decisions of the most senior judges would be reported more often than their less senior colleagues. The reasoning here is that we might expect more senior judges to sit on cases which are of more importance in terms of the development of the law given their experience. The data gives some weak support for this view. The largest number of reported judgments by a single judge in one year is 24, by Winneke CJ in 1970 followed by Gowans J with 23 and Smith J with 17 also in 1970. Each of these were among the six most senior judges that year. In 1980 Young CJ had the most decisions reported (17) and Lush J, the fourth most senior member of the court, was next with 11. However, in 1990 two judges (Murphy and McGarvie JJ) with 14 each and Ormiston J with 15 reported judgments were of differing levels of seniority.

Gowans J had the largest number of reported decisions in one year sitting as a single judge (12) and Tadgell J is next with 10 in 1990, while Ormiston J had 9 also in 1990. For much the same reason as postulated above we might expect senior judges to sit more often as members of the Full Court. While the data is mixed, again there is at least some support for this argument. Winneke CJ has the largest number of reported decisions in a single year as a member of the Full Court (each of Winneke CJ's judgments in 1970 were as a member of the Full Court) and Young CJ is a clear second with 17 in 1980. Of the cases in the sample, Winneke CJ also delivered the largest number of joint judgments (20) while Smith J was the most individualistic, delivering the largest number of single judgments while sitting as a member of the Full Court (9). Murphy J was a close second with 7 in 1990. In the United States Supreme Court there has been a long tradition of writing a single joint opinion. The rationale for this is the argument that multiple opinions lessen the persuasive force of the judgment. Benjamin Cordoza writes in this regard:

> Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in anyway but one. The law and its application alike are plain. Such cases are predestined, so to speak, to affirmance without opinion [That is, via memorandum opinion or single unanimous judgment].[32]

The statistics on the number of single judgments in the Full Court in Table 1, however, reflects the fact that in Australia multiple opinions are more common than in the United States. A number of Australian judges have expressed support for writing multiple opinions in appeal cases. Sir Harry Gibbs has suggested 'that it is not wise to have only one judgment in an appellate court dealing with an important question of law'. One reason for this 'is that sometimes a joint judgment may lead to compromise, or to the omission of something that might have been useful to state, but that does not command general agreement'.[33] Sir Frank Kitto has written that it would be 'helpful ... if the concurring Judge wrote his own judgment, not necessarily a completely self-contained judgment but at least one that made it clear how far his concurrence was intended to go'.[34] Michael Kirby's views are similar. His Honour states that the diversity reflected in multiple opinions 'actually symbolises

[32] B. Cordoza *The Nature of the Judicial Process* (1921), 164 cited in Friedman et al op cit (n 8) 777.

[33] Sir Harry Gibbs 'Judgment Writing' (1993) 67 ALJ 494, 501-502.

[34] Sir Frank Kitto op cit (fn 25) 797-798.

the independence of the judiciary ... It permits the light and shade of reasoning, even where a common conclusion is achieved'.[35]

Another indicator of independent opinion is the dissent rate. There were just eight dissenting judgments in the reported cases over the three years. This means there were dissents in 8% of reported Full Court cases. There were no dissenting judgments in 1970, four in 1980 and four in 1990. Crockett and Ormiston JJ with two dissenting judgments each were responsible for a half of these. The proportion of cases in which there were dissenting judgments is somewhat lower than similar studies suggest for the United States, although there is considerable variation across states.[36] While some eminent jurists such as Lord Reid have suggested that dissenting judgments be restricted to important principles of law,[37] amongst judges there nevertheless appears to be widespread recognition of the importance of having dissenting opinion. In the United States, Supreme Court judges such as Cordoza and Douglas have applauded dissenting judgments for exercising independence of mind, pointing out that dissent often underpins the long-term development of the law.[38] And in the Australian setting Michael Kirby has stated: 'A dissent expressed within the institutions of the law provides a legitimate means of protest against opinions which are, at the moment, in the majority. It helps to reflect the diversity of contemporary society, of which a diverse judiciary is but a muted reflection'.[39]

4 NUMBER OF CITATIONS

Tables 2 to 5 set out data on citation practice in 1970, 1980 and 1990. Tables 2, 3 and 4 break the data down according to citations of individual judges. Table 5 summarises the information, providing a basis for comparison over time. Case law, as opposed to secondary authorities, accounted for most of the citations.[40] In 1970 97.3% of cases contained at least one citation. In 1980 95.2% of cases cited at least once and in 1990 95.5% of cases contained one or more citations. A feature of the data is that in absolute terms the total number of citations is fairly constant in each of the three years. There were 1597 citations in 1970. This amount increased to 1664 in 1980 and 1751 in 1990. However, given the smaller number of reported cases and, at the same time, the greater proportion of Full Court decisions in the latter two years, average citations per case were higher in 1980 and 1990 than 1970. In 1970, average citations per case were 14.3. In 1980 the comparable figure was 26.8 and in 1990 it was 19.6. Average citations per judgment were also higher in 1980 and 1990

35 M. Kirby 'On the Writing of Judgments' op cit (fn 18) 706.

36 In Friedman *et al*'s op cit (n 8) study of 16 state supreme courts between 1870 and 1970 dissent rates varied between 5.9% and 12.8%. This is comparable to Mann's op cit (n 6) study of the North Carolina Supreme Court in 1977 where the dissent rate was 13.5% and to Archibald's op cit (n 7) study of the Ohio Supreme Court between 1951 and 1955 where the dissent rate was 14%. However, other studies suggest in some courts the dissent rate is much higher. For example, the dissent rate in the Michigan Supreme Court was 47.1% in 1967-68 — see Note 'The Work of The Michigan Supreme Court and Court of Appeals During the Survey Period: A Statistical Analysis' (1968) 15 *Wake Forest L Rev* 69.

37 Lord Reid op cit (fn 19).

38 See, in general, J. Campbell 'The Spirit of Dissent' (1983) 66 *Judicature* 305.

39 M. Kirby 'On the Writing of Judgments' op cit (fn 18) 707.

40 Consistent with previous overseas studies citations to legislation were not recorded.

compared to 1970. In 1970 average citations per judgment were 9.2. In 1980 this increased to 14.1 and in 1990 it was 10.9. In terms of both average citations per case and average citations per judgment 1980 stands out. The figures for 1980 are inflated to some extent as one case where Marks J sat as a single judge runs to 108 pages and has 88 citations.[41] But even excluding this case the average citation rate in 1980 was still higher than either 1970 or 1990. The average number of citations per case was still 25.8 and average citations per judgment was 13.5.

Some studies in the United States have drawn detailed conclusions about differences in citation practice between majority and dissenting judgments. At a conceptual level the issues are not clear cut. There are some reasons to think that dissenting judgments should contain more citations than other sorts of judgments, but there are others suggesting the opposite conclusion. One reason to think that dissenting judgments might contain more citations is that the judge is differing from the majority, therefore we would expect him or her to provide full documentation for his or her reasons. On the other hand, commentators have observed that stylistically, often dissents tend to be looser and more flamboyant than majority judgments.[42] This is reflected in the finding in previous studies that dissenting judgments tend to contain

TABLE 2: *CITATIONS BY THE SUPREME COURT OF VICTORIA 1970*

		Winneke	Smith	Pape	Adam	Little	Gowans	Gillard	Starke	Barber	McInerney	Lush	Menhennitt	Newton	Barry	Anderson	Crockett	Norris
Sup. Crt Vic	pre 1900	2	3	1		2		7	2		9	2	1	4		2	1	
	1900-19	6	3	3		7	6		5		5	4	3	5		3	1	
	1920-39	3	6	1		2	2	3	4		7	5	2	4		2		
	1940-59	5	5	2	1	6	9	6	2	1	5	3	2	8	1	9	1	
	1960-70	18	14	8	4	4	34	9	2	3	17	8	13	13		12		
Total		34	31	15	5	21	51	25	15	4	43	22	21	34	1	28	3	
High Court	1903-19	1	2	2		3	2	2	1		1			4	1	1		
	1920-39	6	4	4	3	4	11	3	1		4	1	1	3	1	2		
	1940-59	14	13	2	3	7	18	13	3		6	2	7	2	2	1		
	1960-70	5	4	4	2	8	14	5		1	6	3	11	9	1	2		2
Total		26	23	12	8	22	45	23	5	1	17	6	19	18	5	6		2
Other Australian Courts		17	13	4	1	4	26	6	7	5	23	3	12	15		8	1	
House of Lords		13	5	12	5	7	8	9	3		16	2	3	9	1	11		
Court of Appeal (Eng.)		18	10	9	4	6	27	35	7	6	43	3	4	15	3	11	4	1
Privy Council		7	5	6	1	2	10	4	3	2	5	1	1	2	1	2		
Lower Eng. Crts.		13	25	28	15	8	41	36	2		64	2	14	27		17	2	
Other Countries		2	13	3	1	1		2	2		6		1	14	1	8		
Secondary Authorities.		12	4	13	2	6	22	9	6	3	36	2	5	20	3	2	3	3
TOTAL		142	129	102	42	77	230	149	50	21	253	41	80	154	15	93	13	6

41 *Commissioner for Corporate Affairs* v *Peter William Harvey* [1990] VR 669.

42 For example see Friedman *et al* op cit (fn 8) 785.

TABLE 3: CITATIONS BY THE SUPREME COURT OF VICTORIA 1980

		Young	Starke	McInerney	Lush	Manhennitt	Anderson	Crockett	Kaye	Murphy	Murray	Fullagar	Jenkinson	McGarvie	O'Bryan	Brooking	Marks	Gray	King	Beech	Southwell	Newton
Sup. Crt Victoria	pre 1900	5	2	1	4		1		1	3			1		2	10	1			4		
	1900-19	1	1	2			1		1	5			1	2		3						
	1920-39	3	1	4	5		2	1	1					1	2	5	1					2
	1940-59	10	2	7	9	1	3	1	3	3	2	1	3	3	2	8	1			3	2	1
	1960-80	39	12	32	15	9	14	11	2	15	11	5	10	5	6	24	18	1	2	3	9	6
Total		58	18	46	33	10	21	13	8	26	13	6	15	11	12	50	21	1	2	10	11	9
High Court	1903-19	2	2	3			2	1		3		1		1	1	5	1					
	1920-39	4		4	1		2	2		3		3	1	5	1	4	4					
	1940-59	10	2	7	2	1	1	2	3	2			1	3	3	2				2	1	4
	1960-80	12	4	8	12	3	5	14	5	10	1	3	2	5	4	7	1	2		2	4	
Total		28	8	22	15	4	10	19	8	18	1	7	4	14	9	18	6	2		4	5	4
Other Australian Courts		20	8	12	7	8	2	5	4	17	3	2	8	4	10	10	19			2		9
House of Lords		12	4	10	3		5		3	6	2	3	2	4	3	7	11	2		1		3
Court of Appeal (Eng.).		37	14	31	6	5	8	4	9	26	7	5	10	12	14	24	24	2		1	2	6
Privy Council		6	4	8	2	1	6	6	1	7	1	3	5	7	2	5	2					2
Lower Eng. Crts.		32	12	12	23	14	2	9	13	15	6	9	19	16	8	37	25			2		2
Other Countries.			2	8	5		5	1	1	3	1	1	1			6						
Secondary Authorities		30	4	35	3	13	13	2	8	12	3	21	20	4	13	25	17	1				4
TOTAL		223	74	184	97	55	72	59	55	130	37	57	84	72	71	182	1250	8	2	20	18	39

TABLE 4: CITATIONS BY THE SUPREME COURT OF VICTORIA 1990

		Young	Crockett	Kaye	Murphy	Fullagar	McGarvie	O'Bryan	Brooking	Marks	Gray	King	Beech	Gobbo	Southwell	Tadgell	Hampel	Ormiston	Nathan	McDonald	Vincent	Teague
Sup. Crt Victoria	pre 1900	1		4			2	1	2			3	1	4		3		4				
	1900-19		4		1	4	1		1		1			1				1	4			
	1920-39	3	3	1		2	2		1			1		2		1			3		1	
	1940-59		1	2	2	1	4	1		2	2		2	1		3		3	1		1	
	1960-79	12	11	6	13	2	10	6	6	14	3	2	1	6	1	3		9	11		1	
	1980-90	2	9	11	15	9	19	4	6	10	4	2	14	7	2	6	15	13	4		1	4
Total		18	28	24	31	18	38	12	16	26	10	8	18	21	3	16	15	30	23		4	4
High Court	1903-19		3	1	1	2	3	1	1	1		1	1	4		1		3	3			
	1920-39		7		1	2	4		3	2	1	4	4	9		3	2	7	3	1		
	1940-59	1	4	1	4	1	6	3	1	5	6		3	4		4		7	1	2		
	1960-79	1	5	12	7	3	18	7		10	7	1	8	2	1	5	5	26	4	1		1
	1980-90	4	5	12	10	3	24	4	2	8	2	1	6	3	2	16	7	18	2		1	
Total		6	24	26	23	11	55	15	7	26	16	7	22	22	3	29	14	61	13	4	1	1
Other Australian Courts		14	8	15	14	8	24	5	16	8	4	5	21	12	4	16	7	41	7	1	3	
House of Lords		1	4	9	15	3	16	4	2	3	8	1	20	6	2	14	4	13	2		2	
Court of Appeal (Eng.).		4	7	17	24	4	24	8	12	11	10	10	16	12	1	13	2	20		2	5	
Privy Council			1	3	6	1	7		1	2		1	7	2		1	1	8				
Lower Eng. Crts.		7	7	22	14	2	19	1	27	1	6	7	14	12	1	15	3	28		6	7	
Other Countries.					1		5	2	5	4		1	4	1	1	1	1	10				
Secondary Authorities		4	4	7	15	3	12	3	18	6	4	3	8	8	1	10	2	47	4	1	2	
TOTAL		54	83	123	143	50	200	50	104	87	58	43	130	96	16	115	49	258	49	14	24	5

TABLE 5: CITATIONS BY THE SUPREME COURT OF VICTORIA 1970, 1980 AND 1990

	1970		1980		1990	
Sup. Crt Victoria	353	(22.1)	394	(23.7)	363	(20.7)
High Court	238	(14.9)	206	(12.4)	386	(22.0)
Other Australian Courts	145	(9.1)	150	(9.0)	233	(13.3)
Total Australian	736	(46.1)	750	(45.1)	982	(56.1)
House of Lords	104	(6.5)	81	(4.9)	129	(7.4)
Court of Appeal (Eng.).	206	(12.9)	247	(14.8)	202	(11.5)
Privy Council	52	(3.3)	68	(4.1)	41	(2.3)
Lower Eng. Crts.	294	(18.4)	256	(15.4)	199	(11.4)
Total English	656	(41.1)	652	(39.2)	571	(32.6)
Other Countries.	54	(3.4)	34	(2.0)	36	(2.1)
Secondary Authorities	151	(9.6)	228	(13.7)	162	(9.3)
TOTAL	1597		1664		1751	

NOTES: Figures in brackets are percentages. These might not add to 100 because of rounding

a lot fewer citations than other sorts of judgments.[43] The small number of dissents in this sample mean that we have to be cautious in what conclusions we can draw. However, having said this, citation practice in dissenting judgments in this sample are not consistent with the findings of earlier overseas studies. In 1980 the average citations in dissenting judgments was 19.8 and in 1990 the average number of citations in dissenting judgments increased to 27. In both instances this was higher than the average number of citations for judgments as a whole. In 1990 one dissenting judgment contained 47 citations and another had 50 citations.[44] This does not sit well with the perception that dissenting judgments tend to be loosely reasoned.

Table 5 allows us to compare which authorities have been cited most often over time. As far as the frequency of citation to different authorities, citation practice in 1970 and 1980 was remarkably similar. In 1970 22.1% of citations were to previous decisions of the Supreme Court of Victoria. In 1980 this figure was 23.7%. In 1970 46.1% of citations were to Australian courts. In 1980 45.1% of citations were to Australian courts. The proportion of citations to English decisions was also almost the same in the two years. However, in 1990 there is an observable change in the extent to which the court cited Australian and English decisions. The extent to which the court cited its own previous decisions fell (in percentage terms), but the proportion of citations to Australian decisions showed a significant increase. At the same time the Supreme Court cited much fewer English decisions. The extent to which the Supreme Court cited courts in countries other than England and Australia was constant at around 2-3% in each of the three years while citations to secondary authorities were similar in 1970 and 1990, but were higher in 1980.

It is obvious that the authorities which counsel cite in argument influence the citation practice of courts. One just has to compare the authorities cited in judgments

[43] For example see Merryman 'Towards a Theory of Citations' op cit (n 1) 392-394; Mann op cit (fn 6) 44.

[44] *Australian Dairy Corporation* v *Murray Goulburn Co-operative Co Ltd* [1990] VR 355 (McGarvie J 47 citations); *Little* v *Law Institute of Victoria and Others (No 3)* [1990] VR 257 (Ormiston J 50 citations).

with the authorities which are cited in argument in law reports such as the Commonwealth Law Reports for confirmation. The pressure which is placed on the judge's time in terms of increasing case loads tends to reinforce this conclusion. It is not possible to compare the cases cited in argument with the authorities cited in the judgments in our sample given that the Victoria Reports do not list the cases cited in argument. However, one might expect that the practice directions to counsel appearing before the Supreme Court could offer some insights. Over the sample period there have been various practice directions in relation to listing authorities in written submissions.[45] There has been some variation, but on the whole these have been restricted to practical matters such as how long before the hearing the list has to be lodged with the court, the appropriate use of authorised and unauthorised reports and how authorities are to be organised.[46] There has been little restriction on which authorities counsel can cite. An exception concerns the citation of unreported judgments. In order to cite an unreported judgment, counsel must obtain leave to do so and 'give an assurance that the unreported judgment contains some statement of principle that is either binding on the Court ... or entitled to special consideration'.[47]

5 TYPES OF AUTHORITIES CITED

Supreme Court of Victoria

The court cited its own decisions more often than decisions of other courts in 1970 and 1980. In 1990 citations to its own decisions came second to citations to the High Court. In each of the years citations to its own decisions was relatively constant at just over one fifth of the Supreme Court's total citations. There was little fluctuation. While the Supreme Court cited the High Court more frequently than its own previous decisions in 1990, as discussed above, the tendency to cite the High Court more often was at the expense of the English courts rather than the Supreme Court. This is consistent with overseas studies which have also found that courts tend to cite their own decisions more often than other courts.[48] There are at least a couple of reasons for this. The first is precedent. 'Where the court has spoken the strongest case for *stare decisis* is presented'.[49] The second is that Supreme Court decisions often involve interpretation of statute. In these cases, the court looks to its own decisions because those of other courts render little assistance unless the wording of equivalent

[45] The current practice directions for the Court of Appeal regarding listing authorities are listed at [1996] 1 VR 220 (for civil appeals) and [1997] 2 VR 57 (for appeals against sentence). Apart from differences in detail, such as when to lodge lists, previous practice directions are to the same general effect.

[46] For example, the current practice direction for civil appeals states that the list should be divided into Parts A, B and C. Part A should contain cases from which counsel intends to read. Part B should contain cases to which counsel intends to refer which might be called for during the hearing. Part C should contain textbooks and learned articles which counsel considers to be of substantial assistance to the court.

[47] Practice Note No. 4 of 1986 reported at [1986] VR 742.

[48] For example see Merryman 'Towards a Theory of Citations' op cit (fn 1) (California Supreme Court); Friedman *et al* op cit (fn 8) (16 United States state supreme courts); Mann op cit (fn 6) (North Carolina Supreme Court); Archibald op cit (fn 7) (Ohio Supreme Court).

[49] Merryman 'The Authority of Authority' op cit (fn 1) 654.

TABLE 6: SELF CITATIONS BY THE SUPREME COURT OF VICTORIA 1970, 1980 AND 1990

	1970	1980	1990	Diagonal Total	Horizontal Total
Pre–1900	36	35	25	—	96
1900–19	51	17	18	—	86
1920–39	41	28	20	73	89
1940–59	66	65	26	105	157
1960–79	159[a]	249	117	223	525
1980–90	—	—	153	468	153

NOTES: (a) citations in 1970 are for 1960-70

statutes in their jurisdiction is the same. As a result, over time a court builds up its own case law interpreting legislation.

The Supreme Court also favours its most recent decisions. Previous studies have observed that the 'citation power' of a decision declines over time.[50] Table 6 suggests that that this is also the case in the Supreme Court. The diagonal totals show this most clearly. These show the sum of citations to previous Supreme Court of Victoria decisions according to age at the time of citation. Thus taking 1970, 1980 and 1990 as a whole, the court had 468 self-citations to the previous period (which was a decade in 1970 and 1990 and two decades in 1980). This declined to 223 citations in the two decades prior to this. Going back another two decades, citations fell to 105 and so on. There are several possible reasons for this phenonemon.[51] First, latter cases might be more relevant on the facts perhaps because the social context of earlier decisions is no longer relevant. Second, the stock of older decisions will be reduced over time as cases are overruled either by later decisions or statute. Third, in some areas legal opinion might have changed so that even if earlier decisions are not overruled, their reasoning does not seem as persuasive.

High Court and other Australian courts

Table 7 shows that the Supreme Court's practice in citing High Court decisions is similar to its practice in citing its own decisions. It favours the most recent decisions over older ones. As noted above, Table 5 shows that citations to the High Court showed a marked increase in 1990. At the same time, while citations to decisions of the House of Lords showed a slight increase in 1990, citations to the Privy Council,

TABLE 7: CITATIONS TO THE HIGH COURT 1970, 1980 AND 1990

	1970	1980	1990	Diagonal Total	Horizontal Total
1903–19	20	22	26	—	68
1920–39	48	34	53	—	135
1940–59	93	46	53	107	192
1960–79	77[a]	104	123	217	304
1980–90	—	—	130	327	130

NOTES: (a) citations in 1970 are for 1960-70

[50] For example see Merryman 'Towards a Theory of Citations' op cit (fn 1); W Landes and R Posner 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) 19 *J L & Econ* 249.

[51] Merryman 'Towards a Theory of Citations' op cit (fn 1) 398.

the English Court of Appeal and, in particular, the lower English courts all decreased. This seems to reflect the commencement of the *Australia Act* 1986 (Cth) and the changing precedent value of English decisions as discussed in Section 2. In 1990 the *Australia Acts* had not been in place long, but this provides some evidence at a state level to support the view that since their commencement a new Australian jurisprudence seems to be emerging in which the role of the High Court, as a court of final appeal from the states, is more important than ever.

Table 5 shows that citations to other Australian courts were constant in 1970 and 1980 but increased in 1990. Table 8 breaks these citations down according to court. The Supreme Court of New South Wales was cited the most often with a total of 306 citations over the three years. The Supreme Court of South Australia was next with 66 citations and the Supreme Court of Queensland was third with 47 citations. There were few citations to the Supreme Courts of Tasmania or Western Australia. The 'other' row encompasses the Federal Court, Supreme Court of the Northern Territory and various lower courts and tribunals. It shows a large increase in 1990 reflecting a significant rise in citations to the Federal Court. While the decisions of other state supreme courts, and courts such as the Federal Court, are not binding on the Supreme Court of Victoria, the court tends to follow decisions of these courts when there is no conflicting authorities from the High Court. But why did the Supreme Court cite some state courts more than others? Why did the Supreme Court of Victoria cite the Supreme Courts of New South Wales, South Australia and Queensland more than Tasmania and Western Australia?

TABLE 8: CITATIONS TO OTHER AUSTRALIAN COURTS

	1970	1980	1990	Total
Supreme Court NSW	89	91	126	306
Supreme Court South. Aust.	18	24	24	66
Supreme Court West Aust.	6	10	8	24
Supreme Court Tasmania	6	3	1	10
Supreme Court Queensland	11	10	26	47
Other	15	12	48	75
Total	145	150	233	528

One possibility might relate to the stock of cases. There are more reported cases from New South Wales, South Australia and Queensland than there are from Tasmania and Western Australia.[52] However, this is not really a satisfactory response because it cannot explain the sheer difference in citation power between the courts. In particular, it does not explain why the court cited New South Wales decisions almost five times more often than any other state supreme court. A second explanation might relate to the different social contexts of decisions. In Merryman's study of the citation practice of the California Supreme Court[53] he found that the Court cited some states (such as New York and Massachusetts) more often than others. One of

[52] The Law Reports for New South Wales and South Australia extend well back into the nineteenth century. The Law Reports for Queensland, Tasmania and West Australia start at, or about, the turn of the century.

[53] Merryman 'Towards a Theory of Citations' op cit (fn 1) 398.

the reasons that he postulates for this is 'that the social context of litigation in some states is more like California'.[54] New South Wales and South Australia are more geographically proximate to Victoria than the other states and therefore it might be argued that Victoria has more in common with these states than, for example, Western Australia, but it is difficult to be certain of this.

A third reason could be that in cases involving interpretation of legislation, there might be a greater number of counterpart provisions in New South Wales, South Australia and Queensland than in the other states. The proportion of reported cases involving some interpretation of legislation increased over the sample period. In 1970 there were 59 reported cases (52.7% of the total) where the court had to interpret legislation. In 1980 it considered legislation in 40 of the reported cases (64.5% of the total) and in 1990 this figure increased to 75 cases (84.3% of the total). However, the number of cases where the court specifically referred to equivalent legislation in other jurisdictions and the case law interpreting the corresponding legislation was much lower. There were 17 cases in 1970, 11 cases in 1980 and 18 cases in 1990. In addition, when the court did refer to corresponding legislation in other jurisdictions, most of the time it was to corresponding legislation in the United Kingdom rather than legislation in other Australian states. It referred to equivalent legislation and related case law in the United Kingdom in 22 cases. It also considered similar legislative provisions in New Zealand on three occasions. When the court did look to similar legislation in other Australian states, however, it turned to New South Wales more than the other states. The court considered similar legislation in New South Wales in 12 cases. This was more than South Australia (3 cases) and both Queensland and Tasmania (2 cases each). The court cited the Federal Court's interpretation of equivalent Commonwealth legislation on two occasions.

A fourth possible explanation relates to the reputation of different state courts. Friedman *et al* examined citation practice in 16 state supreme courts in the United States over the period 1870 to 1970.[55] Their finding was that New York, Massachusetts and California were cited more than other state supreme courts. Their explanation was that some sort of prestige factor is responsible for different citation rates. For example California is a big state in terms of population relative to states like Alaska and Hawaii. Therefore decisions of its supreme court will have more weight. This also seems a reasonable explanation for differences in citation rates in our sample if we compare the population of New South Wales with Tasmania or Western Australia. The Supreme Court of California has a reputation for being innovative which attracts discussion in other courts. The same could be said for the New South Wales Supreme Court. Related to this is the reputations of the judges themselves. A disproportionate number of High Court judges have been members of the New South Wales Supreme Court before elevation,[56] and Evatt CJ became a member of the New South Wales Supreme Court after retiring from the High Court.

[54] Ibid 403.
[55] Friedman *et al* op cit (fn 8).
[56] Examples are Rich, Williams, Taylor, Owen, Walsh, McHugh and Kirby JJ.

English Courts and Courts in Countries other than Australia and England

It was pointed out above that citations to English courts fell in 1990 and a possible explanation was offered — ie the enactment of the *Australia Acts*. Turning to the relative citations to each of the English courts, the order of preference was the lower English courts, Court of Appeal, House of Lords then Privy Council (see Table 5). This might seem surprising because it reverses the courts importance in terms of precedent value. One simple reason could be that there are a lot more lower court decisions to draw on, taking into account the different divisions (Queen's Bench, Chancery etc), than there are decisions of the higher courts. If there were a decision of the House of Lords or Privy Council that was in point, there is no doubt that the court would cite it in preference to a decision of the Queen's Bench, but there often is not. And in some subject areas, in particular like probate and trusts, there are a lot of old lower court English decisions on which the law builds and these are often cited when discussing how the law has developed.

One of the things that comes through strongest in the previous studies for the United States is that the courts there are very inward looking when it comes to authorities from other countries. In the late nineteenth and early twentieth centuries state supreme courts in the United States cited some English decisions, but this practice has been on a downward trend. At the same time the United States state supreme courts cite hardly any authorities at all from foreign countries other than England, including Canada.[57] When we take account of English cases, the Supreme Court of Victoria is nowhere near as isolated from legal opinion outside Australia than its counterparts are in the United States of legal developments in other countries. However, citations in the Supreme Court of Victoria to courts in countries other than England are still marginal at 2-3% (see Table 5). An obvious explanation for this, at least in the past, is that cases from other common law jurisdictions are considered to have little persuasive value or perhaps were difficult to locate. It seems fair to suggest that in most instances counsel appearing before the court would only cite decisions from jurisdictions other than Australia or England if there was no other relevant authorities. Table 9 breaks down citations to courts in countries other than Australia and England according to country. The court most often cited was the New

TABLE 9: CITATIONS TO COURTS IN COUNTRIES OTHER THAN ENGLAND AND AUSTRALIA

	1970	1980	1990	Total
Canada	12	8	5	25
United States	1	18	9	28
New Zealand	26	6	20	52
South Africa	4			4
Papua New Guinea			1	1
Northern Ireland	1			1
Republic of Ireland	7	1	1	9
Scotland	3	1		4
Total	54	34	36	124

[57] For example see Friedman *et al* op cit (fn 8).

Zealand Supreme Court which probably reflects the combined effect of its geographical proximity and similar legal institutions. Courts in the United States combined (the United States Supreme Court and various state supreme courts) were a distant second and Canadian courts were third. Decisions from courts in Northern Ireland, Papua New Guinea, the Republic of Ireland, Scotland and South Africa also received one or more citations.

Secondary Authorities

Citations to secondary authorities were broken down into textbooks or treatises, legal encyclopedias, journal articles, practice manuals, dictionaries and 'other' which includes items like Hansard, reports of parliament and non-legal references. Table 10 shows citations to each of these in 1970, 1980 and 1990. Taking the three years as a whole, textbooks/treatises were cited the most often with 352 citations. This was almost six times more than journal articles, which were cited 59 times. Legal encyclopedias were cited 55 times, then 'other' was next with 34 citations, dictionaries followed with 29 citations and practice manuals were cited 12 times. Turning to variations over the three years some trends are discernible. First, although still easily accounting for the biggest share of citations to secondary authorities as a whole, citations to textbooks and treatises declined in percentage terms. In 1970 textbooks/treatises accounted for 76.8% of citations to secondary authorities. In 1980 this fell to 64.5% and in 1990 it fell again to 54.9%. Second, journal articles were cited more often in 1980 and 1990 than in 1970. In 1970 journal articles accounted for 3.3% of citations to secondary authorities. In 1980 the comparable figure was 16.7% and in 1990 it was 9.9%. This is consistent with previous studies for the United States which have found that over time journal articles have been cited more often.[58] However, most studies in the United States have found that journals have been cited at the expense of encyclopedias.[59] On the whole, this is not true for the Supreme Court. There was a slight decline in the use of legal encyclopedias as a whole, but *Halsbury's Laws Of England* was still the most cited single reference over the time period. Third, citations to 'other' secondary authorities showed a significant rise in

TABLE 10: CITATIONS TO SECONDARY AUTHORITIES

	1970		1980		1990		Total
Textbooks/Treatises	116	(76.8)	147	(64.5)	89	(54.9)	352
Encyclopedias	18	(11.9)	23	(10.1)	14	(8.6)	55
Journals	5	(3.3)	38	(16.7)	16	(9.9)	59
Practice Manuals	2	(1.3)	3	(1.3)	7	(4.3)	12
Dictionaries	7	(4.6)	10	(4.4)	12	(7.4)	29
Other	3	(2.0)	7	(3.1)	24	(14.8)	34
Total	151		228		162		541

NOTES: Figures in brackets are percentages. These might not add to 100 because of rounding

[58] For example Merryman 'Towards a Theory of Citations' op cit (fn 1) 398; Daniels op cit (fn 2); Newland op cit (fn 8).

[59] For example Merryman 'Towards a Theory of Citations' op cit (fn 1) 398.

1990 compared to earlier years. The main reason for this is that in 1990 the court cited quite a few different reports of Parliament. It also referred to the Victorian Hansard 12 times.

Looking at individual authorities, seven references were cited in each of the three years. There were two criminal law texts (Smith and Hogan *Criminal Law, Russell on Crime*), two evidence texts (*Cross on Evidence* and *Wigmore on Evidence*), two legal encyclopedias (*American Jurisprudence* and *Halsbury's*) and the *Shorter Oxford Dictionary.* Each of these references can be considered 'long lasting' given that the time period spans three decades. In addition several other references such as *Archibold's Criminal Pleadings*, Howard *Criminal Law*, *McCormick on Evidence* and *Phipson on Evidence* were cited quite heavily in either one or two of the years. While most multiple citations are to the one work, some authors have received citations to different writings over time. For example, the court cited Glanville Williams *Joint Torts and Contributory Negligence* in 1970. In 1980 and 1990 it cited his textbook on *Criminal Law* and in 1990 it also cited an article he wrote in the *Criminal Law Review.* In general there appears to be a disproportionate number of criminal law and evidence texts amongst the most heavily cited references. To some extent this reflects the court's caseload and the tendency for the Full Court to make reference to one or more of the 'standard texts' in the criminal law and evidence areas.

In 1970 the Court referred to three different journals (the *Australian Law Journal, International and Comparative Law Quarterly* and the *Law Quarterly Review*). In 1980 it cited 11 different journals; five published in Australia, three published in England and three published in the United States. In 1990 it referred to nine separate journals; three of these were Australian and six were English. Two journals (the *Australian Law Journal* and the *Law Quarterly Review*) were cited in each of the three years. A further four journals (the *Cambridge Law Journal*, the *Melbourne University Law Review*, the *Modern Law Review* and the *Monash University Law Review*) were cited in 1980 and 1990, but not in 1970.

6 CITATION PRACTICES OF INDIVIDUAL JUDGES

Table 11 gives average citations per judgment for each judge in 1970, 1980 and 1990. Newton J had the largest average number of citations per judgment in one year (39 in one judgment in 1980) and Phillips J the least (one judgment with no citations in 1990). However, it is dangerous to draw any conclusions at all on such a small number of reported judgments. Where a judge has only one or two reported judgments the citation rate is especially susceptible to various abnormalities like the type of case and how many authorities were cited in argument. If we take McGarvie J for instance, in 1980 his average citation rate per judgment was 36 in two judgments, but in 1990 his average citation rate was 14.3 over 14 judgments. As he had a larger number of reported judgments in 1990, this is likely to be more indicative of his citation practice. Hence, it is safer if we just look at judges with at least four judgments in a given year. This is an arbitrarily chosen amount, but it ensures that to some extent the citation practice of a judge in the reported cases is representative of their citation practice in general.

TABLE 11: AVERAGE CITATIONS PER JUDGMENT 1970, 1980 AND 1990

1970		1980		1990	
Winneke CJ	5.9 (24)	Young CJ	13.1 (17)	Young CJ	4.9 (11)
Smith	7.6 (17)	Starke	9.3 (8)	Crockett	7.5 (11)
Pape	11.3 (9)	McInerney	26.3 (7)	Kaye	13.7 (9)
Adam	6.0 (7)	Lush	8.8 (11)	Murphy	10.2 (14)
Little	5.9 (13)	Menhennitt	13.8 (4)	Fullagar	6.3 (8)
Gowans	10.0 (23)	Newton	39 (1)	McGarvie	14.3 (14)
Gillard	11.5 (13)	Anderson	14.4 (5)	O'Bryan	12.5 (4)
Starke	5.6 (9)	Crockett	6.6 (9)	Brooking	17.3 (6)
Barber	5.3 (4)	Kaye	9.2 (6)	Marks	9.7 (9)
McInerney	21.1 (12)	Murphy	14.5 (9)	Gray	9.7 (6)
Lush	3.4 (12)	Murray	18.5 (2)	King	14.3 (3)
Menhennitt	10.0 (8)	Fullagar	11.4 (5)	Beach	11.8 (11)
Newton	19.3 (8)	Jenkinson	10.5 (8)	Gobbo	10.7 (9)
Barry	15.0 (1)	McGarvie	36 (2)	Southwell	8.0 (10)
Anderson	10.3 (9)	O'Bryan	17.8 (4)	Tadgell	11.5 (2)
Crockett	4.3 (3)	Brooking	22.8 (8)	Hampel	8.2 (6)
Norris (AJ)	6.0 (1)	Marks	31.3 (4)	Ormiston	17.2 (15)
		Gray	8.0 (1)	Nathan	7.0 (7)
		King	2.0 (1)	J.H Phillips	— (1)
		Beach	6.7 (3)	Vincent	8.0 (3)
		Southwell	6.0 (3)	Teague	5.0 (1)
				McDonald	14.0 (1)
Weighted Average	9.2		14.1		10.9

NOTES: Figures in brackets are number of judgments

Taking four judgments per year as a minimum benchmark, there were, on average, more than 20 citations per judgment in four instances — McInerney J in 1970 and 1980 and Brooking and Marks JJ also in 1980. The fact that three out of the four times occurred in 1980 is not surprising given that the average citation rate per judgment in 1980 was much higher than the other two years. Among those judges with at least four reported judgments in a year, there were, on average, six or less citations per judgment on six occasions. Five of these were in 1970 (Winneke CJ, Adam, Starke, Barber and Lush JJ) and one (Young CJ) was in 1990. Lush J had the lowest citation rate per judgment in a single year (3.4 in 1970). Again, this is to be expected given that the lowest citation rate per judgment for the court as a whole was also in 1970. Without looking at the data, one might think that one possible explanation for this pattern is that the court had judges who were big citers in 1980 that were not on the court in the other two years. Yet, apart from Jenkinson and Murray JJ, every judge who had a reported judgment in 1980 also had a reported judgment in either 1970 or 1990. An interesting feature of the data is that each of the judges with reported judgments in 1970 and 1980 on average cited more per judgment in 1980 than 1970. However, of the judges with judgments reported in 1980 and 1990, just five (Kaye, Gray, King, Beach and Southwell JJ) cited more per judgment in the latter year and all of these, except Kaye J, had fewer than four judgments in 1980.

There is some debate amongst judges as to the extent to which judgments should be documented with authorities. Some have spoken out supporting the idea that it is

better to cite fewer authorities in order to make judgments shorter and easier to read. Sir Anthony Mason is a supporter of cutting out excessive citation to previous authorities. He has stated that 'unfortunately judgments do not speak in a language or style that people readily understand ... The judgment is so encrusted with discussion of precedent that it tends to be forbidding. The lesson to be learned is that, if we want people to understand what we are doing, then we should write in a way that may make it more possible for them to do so'.[60] Sir Harry Gibbs has also written in support of shorter and clearer judgments. He suggests: 'What gives the judgment style is the lucidity, accuracy and economy of the language used ... [A] fault is to discuss at length a series of cases when the effect of all of them has already been stated in an authoritative decision, and mention of that final authority alone would have been sufficient'.[61] The logical conclusion of the minimalist argument is that, in some circumstances, a short opinion with as few as possible, or in some instances no citations at all, is the best form of judgment. For example, in a 1989 case Gray J (who on the basis of the sample is a middle range citer) suggested that: 'The simplicity of the context of the case or the evidence may be such that a mere statement of the judge's conclusion will sufficiently indicate the basis of a decision'.[62]

Other judges have criticised this view. Among Australian judges perhaps the most vociferous supporter of expanded reasons for decisions (and hence fuller documentation) is Kirby J. His Honour has cautioned that while 'brevity, simplicity and clarity are the watchwords for effective judicial writing ... a number of constraints on brevity [exist]. Brevity at the price of a mechanic view of the law would be unacceptable to many judges today. The use of extrinsic aids to construction and the candid acknowledgment of policy choices which must be made tend to add length to judicial reasons'.[63] His Honour also points out that long judgments are often broken into sections making them easier to read, therefore long judgments in themselves need not be inaccessible. Lord Denning was a strong advocate of breaking judgments down into sections to make them more readable:

> At one time judges used to deliver a long judgment covering many pages without a break ... I divided each judgment into separate parts: first the facts; second the law. I divided each of those parts into separate headings. I gave each heading a separate title. By doing so, the reader was able to go at once to the heading in which he was interested: and then to the passage material to him.[64]

This is a practice which most judges in the Supreme Court of Victoria follow when writing long opinions. In the sample the judges who tended to write the longest opinions, and hence cite the most authorities, often broke their judgments into sections and sub-sections and sometimes used indexes. McGarvie and Marks JJ are two notable examples.

[60] Sir Anthony Mason Opening address to the New South Wales Supreme Court Annual Conference April 30 1993 cited in M. Duckworth 'Clarity and the Rule of Law: The Role of Plain Judicial Language' (1994) 2 TJR 69, 73-74.

[61] Sir Harry Gibbs op cit (fn 33) 499.

[62] *Sun Alliance Insurance Ltd* v *Massoud* [1989] VR 8, 19.

[63] M Kirby 'On the Writing of Judgments' op cit (n 18) 708. See also M Kirby 'Reasons for Judgment' op cit (n 18) 133-134.

[64] Lord Denning *The Closing Chapter* (1983) 64 cited in Duckworth op cit (fn 60), 83.

Tables 2 to 4 give an indication of what sort of authorities different judges cited. Merryman speculated that one possible reason for differences in citation rates is that the most frugal citers refer to just the most relevant authorities while more generous citers include 'references to works of dubious authority'.[65] Merryman, however, found that this was not true for his sample. Rather, the judges who cited the most overall were also the biggest citers of the California Supreme Court and the United States Supreme Court, which he used as rough proxies for the most relevant authorities. The results here are similar to Merryman's findings. In 1970 McInerney J (253) and Gowans J (230) cited the most authorities. These judges also cited the most decisions of the Supreme Court and High Court — McInerney J had 60 citations and Gowans J had 96 citations. The same thing occurred in 1980 and 1990. In 1980, Young CJ, McInerney and Brooking JJ had the most citations overall and also the greatest number of citations to the Supreme Court and High Court. The same pattern was true for McGarvie and Ormiston JJ in 1990.

However, it should be pointed out that at the same time, these judges were also the biggest citers of secondary authorities. In 1970 and 1980, McInerney J cited the most secondary authorities (36 in 1970 and 35 in 1980). In 1990 Ormiston J was the biggest citer of secondary authorities with 47. It was noted above that Table 5 shows that there was a higher proportion of secondary authorities cited in 1980 than in the other two years. The reason for this is the greater number of judges who cited secondary authorities in large amounts. For example, in 1970 three judges (McInerney, Gowans and Newton JJ) had 20 or more citations to secondary authorities. In 1990, Ormiston J was the only judge with more than 20 citations. But in 1980 there were five judges (Young CJ, McInerney, Fullagar, Jenkinson and Brooking JJ) who cited secondary authorities 20 or more times.

In Section two it was suggested that two reasons judges cite articles and textbooks is for convenience and to provide further justification for their decisions. Both of these rationales are apparent in the judgments of McInerney and Ormiston JJ — the two biggest citers of secondary authorities in the sample. Both, at times, cited textbooks for convenience. For example in *Calzaturificio (in liq)* v *NSW Leather*[66] McInerney J found it convenient to 'refer to and adopt' cases cited in a footnote to *McDonalds, Henry and Meek* which he proceeded to list.[67] Both also used the opinions of textbook writers to provide a further justification for their conclusions. Hence, in *R* v *Harris (No. 2)*[68] Ormiston J concludes: 'there is no general principle preventing the laying of a second indictment' in a criminal prosecution and to reinforce this conclusion refers to Starkie *Criminal Pleadings*.[69] However in addition it was common for both judges to also use articles and textbooks to examine the evolution of the law and look at the law in other jurisdictions. In part this falls under the convenience rationale. For instance in *R* v *Harris (No. 3)*[70] Ormiston J cites the second edition of *American Jurisprudence* to summarise the relevant law in the United States. Presumably this is because his Honour did not have the time or inclination to

65 Merryman 'Towards a Theory of Citations' op cit (fn 1) 422.
66 [1970] VR 605.
67 Ibid 618.
68 [1990] VR 305.
69 Ibid 306-307.
70 [1990] VR 310.

look at the relevant case law in the United States in detail. However, when examining the evolution of the law and comparing it with the position in other jurisdictions both judges also used articles and textbooks to provide a critical review often comparing and contrasting the opinions of different authors with the case law.

7 CONCLUSION

This article has considered citation practice in Supreme Court judgments published in the 1970, 1980 and 1990 Victoria Reports. The article has examined both differences in types of authorities which the court has cited in a given year and how citation practice has changed over time. It has also reviewed the citation practice of the judges which offers some insights into different judicial styles. Where appropriate, comparisons have been made with previous studies done in the United States. While the sample spans three decades, it is restricted to published decisions. For this reason it should be taken as giving an indication of citation practice rather than being authoritative. It is hoped that in the future similar studies might be done, perhaps for other state supreme courts or the High Court which would help to clarify issues raised where the data in this sample is too thin to draw firm conclusions (such as citations in dissenting judgments). Nevertheless, the findings in the tables and the related discussion should be of interest to both practitioners and scholars wanting to know more about the citation practices of the Supreme Court.