

## ONE HUNDRED YEARS OF CITATION OF AUTHORITY ON THE SUPREME COURT OF NEW SOUTH WALES

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### I INTRODUCTION

Most judgments in common law countries contain citations to authority. At first blush, such citations may appear to depend largely on the specific issues in the case. However, on closer inspection, such citations form an interrelated pattern that position the reasoning in a case in the context of the existing body of common law through the doctrine of precedent. Citation to authority not only links the decision in a specific case to the existing law, but also speaks to the future. This occurs because citation to an existing case establishes its precedent value and, hence, its influence on the future evolution of the common law. At the same time, citation of a secondary authority, such as a journal article or learned text, enhances its persuasiveness and increases the likelihood that it will find future favour with the courts. Utilisation of a novel source of authority may legitimise its use in future judgments and appellate briefs.<sup>1</sup>

Since John H Merryman's seminal study of what the Supreme Court of California cited in 1950,<sup>2</sup> several studies have examined the citation practices of

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1 William Manz, 'The Citation Practices of the New York Court of Appeals, 1850-1993' (1995) 43(1) *Buffalo Law Review* 121, 121.

2 John H Merryman, 'The Authority of Authority: What the California Supreme Court Cited in 1950' (1954) 6 *Stanford Law Review* 613.

courts in Australia,<sup>3</sup> Canada,<sup>4</sup> New Zealand<sup>5</sup> and the United States.<sup>6</sup> Among the published studies for Australian courts, the citation practices of the Supreme

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- 3 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 Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 98; 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 into the Influence of Economics on Australian Precedents' (2000) 28 *Australian Business Law Review* 5; Paul E Von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901-1987' (1992) 14 *Adelaide Law Review* 181; Paul E Von Nessen, 'Is There Anything to Fear in Transnationalist Development of Law? The Australian Experience' (2006) 33 *Pepperdine Law Review* 883; Russell Smyth, 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9 *Griffith Law Review* 25; 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; Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practice on the Supreme Court of Victoria' (2007) 31 *Melbourne University Law Review* 733.
- 4 See, eg, Vaughn 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? Academic Citations by the Lamer Court 1992-1996' (1998) 9 *Supreme Court Law Review* 463; Peter McCormick 'The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview' (1997) 8 *Supreme Court Law Review* 527; 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, 1949-1999' (2002) 81 *Canadian Bar Review* 369; Peter McCormick, 'Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices' (1994) 22 *Manitoba Law Journal* 286; Peter McCormick, 'The Evolution of Coordinate Precedential Authority in Canada: Interprovincial Citations of Judicial Authority, 1922-1992' (1994) 32 *Osgoode Hall Law Journal* 271.
- 5 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 of Secondary Authority and Legal Method in the New Zealand Court of Appeal' in Rick Bigwood (ed), *Legal Method in New Zealand: Essays and Commentaries* (2001) 101; Sir Ivor Richardson, 'Trends in Judgment Writing in the New Zealand Court of Appeal' in Bigwood, above in note, 261.

Court of Victoria<sup>7</sup> and Supreme Court of Western Australia<sup>8</sup> have been examined. There is also one comparative study of the citation practice of the six State Supreme Courts based on the 50 most recent reported cases as of June 1999.<sup>9</sup> This study adds to the existing literature on the citation practice of State Supreme Courts in Australia through an examination of citation practice in reported decisions of the Supreme Court of New South Wales.

To this point, only one attempt has been made to examine citation practice of a State Supreme Court in Australia over a long period of time. This was a study of the citation practice of the Supreme Court of Victoria over the same time frame as this study.<sup>10</sup> Similarly, few studies concerning courts in Canada and the United States have adopted such an extensive time horizon.<sup>11</sup> Examining changes in citation practice over a long time frame, however, has several advantages over shorter periods such as a single year or a few recent years.<sup>12</sup> First, a long time period permits examination of the extent to which citation patterns are stable or change over time. Second, a long-term study can reveal how quickly, and to what extent, a court has adopted new or novel types of authority. Third, a long time frame allows examination of the effects of institutional changes on the citation practices of the courts. An obvious example of such institutional change is the effect of the enactment of the *Australia Act 1986 (Cth)* and the *Australia Act 1986 (UK)* ('*Australia Acts*') on the citation practice of Australian courts and the associated development of a uniquely Australian jurisprudence. Fourth, long-term investigations are interesting because citation patterns are barometers of

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6 See, eg. Neil Bernstein, 'The Supreme Court and Secondary Source Material: 1965 Term' (1968-1969) 57 *Georgetown Law Journal* 55; Joseph A Custer, 'Citation Practices of the Kansas Supreme Court and Kansas Courts of Appeals' (1998-1999) 8 *Kansas Journal of Law and Public Policy* 126; Wes Daniels, "'Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions, October Terms 1900, 1940 and 1978' (1983) 76 *Law Library Journal* 1; Jules 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 J Hasko 'Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions' (2002) 94 *Law Library Journal* 427; William H Manz, 'Citations in Supreme Court Opinions and Briefs: A Comparative Study' (2002) 94 *Law Library Journal* 267; Chester A Newland, 'Legal Periodicals and the United States Supreme Court' (1959) 7 *University of Kansas Law Review* 477; David Zaring, 'The Use of Foreign Decisions by Federal Courts: An Empirical Analysis' (2006) 3 *Journal of Empirical Legal Studies* 297; Bliss Cartwright, Lawrence M Friedman, Robert A Kagan and Stanton Wheeler, '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; John H 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.

7 Smyth, 'What do Judges Cite?', above n 3; Fausten, Nielsen and Smyth, above n 3.

8 Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia', above n 3.

9 Smyth, 'What do Intermediate Appellate Courts Cite?', above n 3.

10 Fausten, Nielsen and Smyth, above n 3.

11 North American exceptions are McCormick, 'The Evolution of Coordinate Precedential Authority in Canada', above n 4; Cartwright, Friedman, Kagan and Wheeler, above n 6, analyses citation practice of sixteen United States State Supreme Courts using a sample of cases at five year intervals between 1870 and 1970; Manz, above n 1, analyses citation practice of the New York Court of Appeals at 10 year intervals between 1850 and 1990 and in 1993.

12 See Manz, above n 1, 122; Merryman, above n 6, 382.

how judges perceive their roles as well as the sources and limits of their powers. As such, changes in judicial citation practice can reflect changes in a court's conception of its role in society.<sup>13</sup>

While this study focuses on the citation practice of a single State Supreme Court, the Supreme Court of New South Wales is likely Australia's most important intermediate appellate court. The Supreme Court of New South Wales is cited more by the other State Supreme Courts than any other intermediate appellate court.<sup>14</sup> This fact is partly a reflection of the volume of cases heard in the Supreme Court of New South Wales. New South Wales has the largest economy of any State in Australia and, as such, about two-thirds of commercial litigation in Australia is commenced in New South Wales. It also reflects the reputation of the Supreme Court of New South Wales for judicial innovation. Peter McCormick has described the Supreme Court of New South Wales as a 'mini High Court'.<sup>15</sup> New South Wales has provided a disproportionate number of High Court judges and Herbert Vere Evatt was Chief Justice of the Supreme Court of New South Wales following his retirement from the High Court. This aside, the Supreme Court of New South Wales shares many characteristics with other multi-judge intermediate appellate tribunals. In particular, for the purposes of this study, most decisions are provided in written reasons with citations to authorities. As such, the findings of a study such as this are of relevance to those interested in the decision-making processes of other State Supreme Courts and intermediate appellate courts.

## II WHY DO JUDGES CITE AUTHORITIES?

In Anglo-American courts, the overarching reason courts cite previous cases is that judges are required to show how their decision relates to previous decisions of the same court and courts higher in the judicial hierarchy. When judges follow the doctrine of stare decisis they locate the reasons for decision within what Timothy P Terrell has described as a multidimensional grid which constitutes the common law.<sup>16</sup> Citation to the Court's own previous decisions and the binding decisions of courts above it in the court hierarchy, serve to locate the decision within this multidimensional grid.

A second reason why courts cite previous authority in written reasons is to ascertain what the existing law actually is on a specific point. If there is a decision of a court higher in the judicial hierarchy in point, the applicable law still need not be clear. For example, the proliferation of separate judgments in the High Court sometimes makes it difficult for the State Supreme Courts to

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13 Cartwright, Friedman, Kagan and Wheeler, above n 6, 784.

14 See, eg, Smyth, 'What do Intermediate Appellate Courts Cite?', above n 3.

15 See McCormick, 'The Evolution of Coordinate Precedential Authority in Canada', above n 4, 291.

16 Timothy P Terrell, 'Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles' (1984) 72 *California Law Review* 288.

ascertain the ratio decidendi of a case.<sup>17</sup> If there is no High Court decision in point, a State Supreme Court may be faced with conflicting authorities from other State Supreme Courts or conflicting authority from English courts. In deciding which case to follow, in addition to citing a range of relevant cases, judges will often consult the views of academics on the 'correctness' of a decision espoused in journal articles or texts.

A third reason for citing authorities is to explore the evolution of legal principles. In the High Court, Sir Victor Windeyer, who was a notable legal historian, and the biggest citer of academic authorities on the Dixon Court, often cited authorities as part of a discussion of the development of legal principles.<sup>18</sup>

A fourth reason for citing authority, and in particular secondary authority, is to criticise the development of the law or make recommendations to parliament for law reform.

A fifth reason for citing authority is to increase the persuasive force of the judge's reasoning. If one was writing an academic article on the debates surrounding the conventions of the 1890s leading up to Federation one would probably cite the writings of the founding fathers such as Barton, Deakin, Griffith, Inglis Clark, Parkes, Quick and Garran and Spence to increase the persuasive force of one's argument. Judges invoke the names of well-respected academic authors and judges and the judgments of courts with reputations for judicial innovation in much the same manner to support their interpretation of existing case law. Previous studies suggest that academic authorities such as Wade (on Administrative Law), Fleming (on Torts) and Cross and Wigmore (on Evidence) are frequently cited in cases dealing with their specific subject matter.<sup>19</sup> Commentaries by the stature of these sorts of authors which have been cited over a long period of time have assumed the status of de facto primary authorities. As Merryman describes it, 'the fact of citation gives a work *authority* to some degree and thus it will exert some influence on the way the law grows'.<sup>20</sup>

### III WHAT CAN WE LEARN FROM EXAMINING CITATIONS?

David Walsh states:

While it is widely acknowledged that courts may not be entirely forthcoming as to the reasons for their decisions and that not all citations are equally informative, the belief that citations convey some degree of substantive influence on decision-making offers perhaps the most compelling rationale for research on citations.<sup>21</sup>

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17 For empirical evidence on the proliferation of joint judgments on the High Court over time, see Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001' (2004) 32 *Federal Law Review* 255. For the difficulties generated by the proliferation of joint judgments on the High Court, see Enid Campbell, 'Reasons for Judgment: Some Consumer Perspectives' (2003) 77 *Australian Law Journal* 62.

18 See Russell Smyth, 'Other than "Accepted Sources of Law"?' (1999) 22 *University of New South Wales Law Journal* 19.

19 See, eg, Smyth, 'The Authority of Secondary Authority', above n 3, 43.

20 Merryman, above n 2, 413 (emphasis in original).

21 David Walsh, 'On the Meaning and Pattern of Legal Citations: Evidence From State Wrongful Discharge Precedent Cases' (1997) 31 *Law and Society Review* 337, 339.

Lawrence M Friedman and his colleagues have argued that studying appellate judgments provides insights into judicial culture. As these authors describe it: ‘The style of opinions is as good an indicator as we have of what counts as sound legal reasoning for any given era’.<sup>22</sup> Trends in citation practice also provide a window into changes in what constitutes sound legal reasoning over time. From an examination of trends in the number and type of authorities that a court cites, one can potentially ascertain the courts and individuals who have had the most influence on the evolution of the common law and examine how this influence has changed over time.

It may be possible to link changes in the types of authorities cited to external institutional changes. As discussed earlier an example of such an institutional change would be the effect of the enactment of the *Australia Acts* on the citation to English authorities in Australian courts. Changes in citation practice may also reflect changes in internal court norms as to what constitutes sound legal reasoning. For example, on the High Court, one would expect the Mason Court to cite more academic authorities, given its recognition of the inevitability of policy choices in decision-making and the need to explore what those policy choices entail, than the Dixon Court which was heavily influenced by Dixon CJ’s espousal of ‘strict and complete legalism’.<sup>23</sup> Previous research suggests that, on average, members of the Mason Court did cite considerably more academic authorities than the justices on the Dixon Court.<sup>24</sup>

Citations provide a basis for legitimisation. Trends in citation practice provide insights into the extent to which judges feel the need to cite authority to justify their decision. At a more abstract level changes in citation practice over time reflect changes in judicial perceptions of the role of courts in society. Specifically, this is manifest in terms of how judges exercise power and the extent to which they perceive that their reasons must be acceptable to external audiences.<sup>25</sup> Friedman and his colleagues point out:

Everybody knows – at least since the realists hammered home the point – that a judicial opinion does *not* tell us what went on in judges’ minds. It may be mere rationalization. But we can say, with some certainty, that the opinion and its reasoning show what judges *think* is legitimate argument and legitimate authority, justifying their behavior.<sup>26</sup>

However, legitimising a decision to an external audience need not entail increased citation to authority. On the contrary, legitimisation in large part may be a function of effectively communicating with a wider audience the reasons for decision, which entails making those decisions more accessible. For example, 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

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22 Cartwright, Friedman, Kagan and Wheeler, above n 6, 773.

23 Stephen Gageler, ‘Legalism’ in Blackshield, Coper and Williams, above n 3, 429.

24 Smyth, ‘The Authority of Secondary Authority’, above n 3.

25 Walsh, above n 21, 339.

26 Cartwright, Friedman, Kagan and Wheeler, above n 6, 794 (emphasis in original).

to increase public understanding of the role of courts.<sup>27</sup> Legitimation is also linked to public confidence in the dispensation of justice. If the public loses confidence in the courts, the legitimacy of the courts as an institution will be undermined.<sup>28</sup> In this respect, 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.<sup>29</sup>

#### IV DATA COLLECTION AND METHODOLOGY

This study examines citations in all decisions of the Supreme Court of New South Wales (including decisions of the Court of Appeal and Court of Criminal Appeal) reported in the New South Wales Law Reports at decade intervals beginning in 1905 and finishing in 2005. Overall, citations in 1018 cases were examined. Consistent with previous studies of citation practice in courts in Australasia and North America, the study does not consider unreported judgments nor consider cases reported in specialised reports. That we do not consider unreported judgments is a limitation in the sense that only a fraction of all cases are reported. Given that reported cases generally deal with more complicated legal issues than unreported cases, the number of citations to previous authorities can be expected to be higher in reported cases than unreported cases. Thus, the results from this study can be seen as representing an ‘upper bound’ on the number of authorities that the Court cites.

That we only examine cases reported in the New South Wales Law Reports is limiting in that some important cases reported in the specialised reports may be neglected. The reason for restricting the sample to cases reported in the New South Wales Law Reports is that it ensures the data collection is manageable. Furthermore, to include some unreported decisions and not others or some specialised law reports and not others would involve subjective judgments, which would potentially introduce bias. As it stands, data has been gathered on more than 1000 cases that have been reported in the authorised reports of the Court over the course of a century. This sample should be sufficiently large, and the time period sufficiently long, to make informed observations on trends in the citation practice of the Court over time.

All citations to case law and secondary authorities in the sample cases were counted. Secondary authorities were defined as references other than citations to sources traditionally considered as being primary. Hence, consistent with previous studies, citations to constitutions, regulations and statutes were excluded

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27 Sir Anthony Mason (Opening address delivered at the Supreme Court of New South Wales Annual Conference, 30 April 1993) in Mark Duckworth, ‘Clarity and the Rule of Law: The Role of Plain Judicial Language’ (1994) 2 *Judicial Review* 69, 73.

28 See Gregory A Caldeira and James L Gibson, ‘The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support’ (1995) 89 *American Political Science Review* 356; James Gibson, ‘The Legitimacy of the US Supreme Court in a Polarized Polity’ (2007) 4 *Journal of Empirical Legal Studies* 507.

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

on the basis that the subject matter of the case dictates the citation of these sources and, as such, it is not an exercise of judicial discretion.<sup>30</sup> 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 each time on the basis that the source was being cited for a different proposition and hence had separate significance.<sup>31</sup> The citation counts are weighted in the sense that the number of citations in each joint judgment was multiplied by the number of participating judges when calculating the total 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.<sup>32</sup>

Citations to judgments in lower courts in the same case were not counted. If a judgment was quoted from another case that contained citations, the quoted case was counted as a citation but not the cases cited in the quoted judgment. No distinction was made between positive and negative citations. One reason for adopting this approach is that when considering what cases influenced the reasoning of the judge, the distinction between positive and negative citations is not important. Since citation (at least citation to authority that is not binding) is an act of judicial discretion, the judge is free to not cite an authority at all if it has no influence on his or her thinking.<sup>33</sup> Second, unlike academic citations, few judicial citations are negative.<sup>34</sup> For example, McCormick reports that in the Supreme Court of Canada less than one per cent of judicial citations are negative.<sup>35</sup> Stephen J Choi and Mitu G Gulati report that in the United States Courts of Appeal, less than 10 per cent of all citations are negative.<sup>36</sup>

## V GENERAL CITATION PATTERNS

Figure 1 shows average citations per judgment and average citations per case at 10 year intervals from 1905 to 2005. Average citations per case increased from 4.95 in 1905 to 42.43 in 2005, representing a 760 per cent increase. Average

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30 Merryman, above n 2, 652.

31 This is consistent with the approach adopted in the previous studies of the citation practice of Australian courts and most studies of the citation practice of courts in North America. For a clear statement of this rationale, see Daniels, above n 6, 3–4.

32 This practice is consistent with the existing studies for Australia and New Zealand. See, eg, Smyth, ‘What Do Intermediate Appellate Courts Cite?’, above n 3, 58.

33 See Richard A Posner, ‘An Economic Analysis of the Use of Citations in the Law’ (2000) 2 *American Law and Economics Review* 381; William M Landes and Richard A Posner, ‘The Influence of Economics on Law: A Quantitative Study’ (1993) 36 *The Journal of Law and Economics* 385, 390; William M Landes, Lawrence Lessig and Michael E Solimine, ‘Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges’ (1998) 27 *The Journal of Legal Studies* 333.

34 See Gregory A Caldeira, ‘On the Reputation of State Supreme Courts’ (1983) 5 *Political Behaviour* 83 (asserting there is no need to ‘differentiate between positive and negative citations’); Landes, Lessig and Solimine, above n 33, 273 (questioning the need to differentiate ‘between favourable, critical or distinguishing citations’ and declining to do so). For a contrary perspective see Jake Dear and Edward Jessen, ‘Followed Rates and Leading State Cases, 1940-2005’ forthcoming in *UC Davis Law Review* <<http://ssrn.com/abstract=978041>> at 15 September 2007.

35 McCormick, ‘The Supreme Court Cites the Supreme Court’, above n 4, 462.

36 Stephen J Choi and Mitu G Gulati, ‘Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance’ (2004) 78 *Southern California Law Review* 23, 56–7.



citations per judgment increased from 2.58 in 1905 to 17.79 in 2005, representing a 590 per cent increase. Both average citations per case and average citations per judgment display an upward trend over the course of the 20<sup>th</sup> century. There is a dip in average citations per case in 1975, although average citations per judgment continued to increase in this decade. Average citations on both a per case and per judgment basis were slightly lower in 2005 compared with 1995, although citation rates in 2005 were still higher than in 1985. This decline in citations in 2005 appears to derive from an increase in the proportion of concurring judgments, which is a similar phenomenon to what occurred on the Supreme Court of Victoria.<sup>37</sup>

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37 See Fausten, Nielsen and Smyth, above n 3.

Figure 1

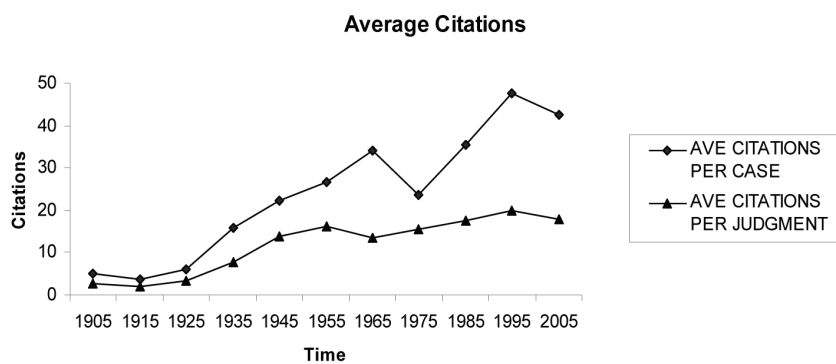


Figure 2

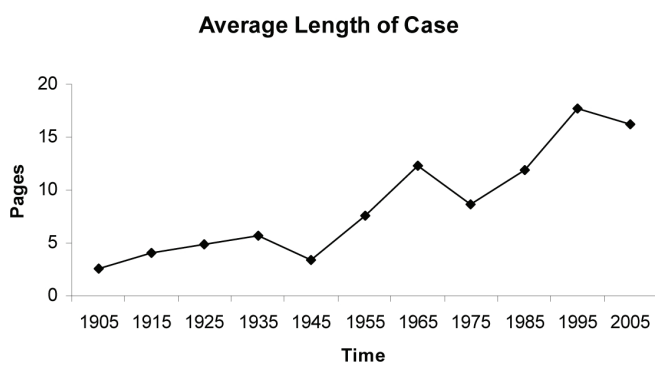
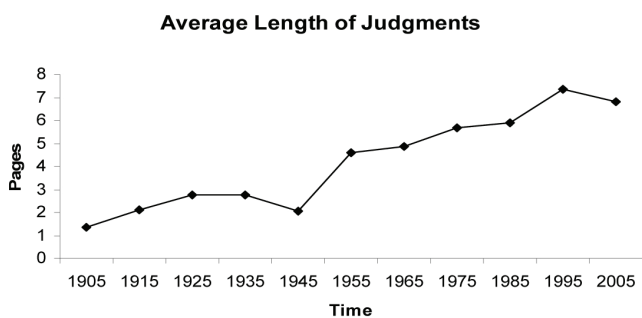


Figure 3



The average length of cases and judgments are plotted in Figures 2 and 3. The average case length shows an upward trend with dips in 1945 and 1975. The average judgment length shows an upward trend with a single dip in 1945. A similar upward trend in average case and judgment length has been observed in decisions of the High Court,<sup>38</sup> Supreme Court of Victoria,<sup>39</sup> the English Court of Appeal,<sup>40</sup> and the United States State Supreme Courts.<sup>41</sup> Jean L Goutal argues that one of the main reasons for longer judgments in the English Court of Appeal throughout the 20<sup>th</sup> century has been that judges have laboured to adapt earlier precedents to changed economic and political conditions.<sup>42</sup> From a policy perspective, it is likely that the acceleration in social change has intensified the struggle between competing interest groups and increased demands on the courts to be seen to be administering due process.<sup>43</sup> This has resulted in a commensurate increase in the length of written reasons and citation to authorities as judges have sought legitimisation in the eyes of competing interests. Supporting this conclusion, seen together, Figures 1 to 3 suggest a reasonably close relationship between average citations per case and per judgment and the average length of cases and judgments over the course of the century, although there is no one-off decrease in average citations per case or per judgment in the mid-1940s.

## VI SOURCES OF CITATIONS

Table 1 presents an overview of the types of authorities cited by the Supreme Court of New South Wales over the course of the 20<sup>th</sup> century. The main categories are (a) the Court's own previous decisions; (b) decisions of the High Court; (c) decisions of other State Supreme Courts; (d) decisions of English courts; (e) decisions of courts in countries other than Australia and England; and (f) secondary authorities. This section examines trends in the Court's citations in each of these six major categories.

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38 Groves and Smyth, above n 17.

39 Fausten, Nielsen and Smyth, above n 3.

40 Jean L Goutal, 'Characteristics of Judicial Style in France, Britain and the U.S.A.' (1976) 24 *American Journal of Comparative Law* 43.

41 Cartwright, Friedman, Kagan and Wheeler, above n 6.

42 Goutal, above n 40, 61–4.

43 Cartwright, Friedman, Kaga and Wheeler, above n 6, 777–8.

Table 1 – Citations in Reported Cases in the Supreme Court of New South Wales

	1905	1915	1925	1935	1945	1955	1965	1975	1985	1995	2005
Total No. of Cases	119	65	76	66	48	54	33	152	187	101	117
Total No. of Judgments	228	122	136	136	78	89	83	233	377	243	279
<b>HIGH COURT</b>											
1903-1919	4	20	25	52	65	33	20	63	86	45	34
1920-1939	-	-	11	66	67	65	76	148	134	78	129
1940-1959	-	-	-	-	44	142	69	239	260	104	137
1960-1979	-	-	-	-	-	-	78	446	670	230	153
1980-1999	-	-	-	-	-	-	-	-	510	849	599
2000-	-	-	-	-	-	-	-	-	-	-	330
<b>Subtotal</b>	<b>4</b>	<b>20</b>	<b>36</b>	<b>118</b>	<b>176</b>	<b>240</b>	<b>243</b>	<b>896</b>	<b>1660</b>	<b>1306</b>	<b>1382</b>
Ave. per case	0.03	0.31	0.47	1.79	3.67	4.44	7.36	5.89	8.88	12.93	11.81
Ave. per judgment	0.02	0.16	0.26	0.87	2.26	2.70	2.93	3.85	4.40	5.37	4.95
<b>FEDERAL/FAMILY COURT</b>											
<b>NSW SC</b>	<b>127</b>	<b>26</b>	<b>60</b>	<b>149</b>	<b>162</b>	<b>167</b>	<b>289</b>	<b>731</b>	<b>1704</b>	<b>1327</b>	<b>1543</b>
Ave. per case	1.07	0.40	0.79	2.26	3.38	3.09	8.76	4.81	9.11	13.14	13.19
Ave. per judgment	0.56	0.21	0.44	1.10	2.08	1.88	3.48	3.14	4.52	5.46	5.53
VIC SC	9	2	2	19	32	44	23	98	121	181	195
QLD SC	9	1	0	4	4	7	3	28	60	62	100
SA SC	3	0	0	4	2	1	2	18	55	64	52
WA SC	0	0	0	1	3	1	0	7	25	50	48
TAS SC	0	0	0	1	0	0	12	1	15	11	14
ACT SC	-	-	-	-	-	-	-	0	12	8	6
NT SC	-	-	-	-	-	-	-	1	6	16	2
<b>Subtotal</b>	<b>21</b>	<b>3</b>	<b>2</b>	<b>29</b>	<b>41</b>	<b>53</b>	<b>40</b>	<b>153</b>	<b>294</b>	<b>392</b>	<b>417</b>
<b>OTHER AUSTRALIAN COURTS</b>											
	<b>0</b>	<b>1</b>	<b>0</b>	<b>3</b>	<b>0</b>	<b>17</b>	<b>4</b>	<b>53</b>	<b>64</b>	<b>60</b>	<b>116</b>

Table 1 – Citations in Reported Cases in the Supreme Court of New South Wales (cont.)

	1905	1915	1925	1935	1945	1955	1965	1975	1985	1995	2005
<b>ENGLISH COURTS</b>											
House of Lords	28	24	30	70	116	213	130	403	433	343	248
Judicial Committee	29	23	15	52	50	101	62	146	255	71	70
English CA	90	53	109	216	216	320	163	421	725	325	317
Lower English Courts	234	80	158	316	249	218	130	428	575	281	203
<b>Subtotal</b>	<b>381</b>	<b>180</b>	<b>312</b>	<b>654</b>	<b>631</b>	<b>852</b>	<b>485</b>	<b>1398</b>	<b>1988</b>	<b>1020</b>	<b>838</b>
Ave. per case	3.20	2.77	4.11	9.91	13.15	15.78	14.70	9.20	10.63	10.10	7.16
Ave per judgment	1.67	1.48	2.29	4.81	8.09	9.57	5.84	6.00	5.27	4.20	3.00
<b>OTHER COUNTRIES</b>											
United States	6	3	5	1	0	0	3	4	71	114	46
Canada	5	0	0	6	0	7	1	20	41	23	43
European Court of Human Rights	0	0	0	0	0	0	0	0	0	4	0
Hong Kong	0	0	0	0	0	0	0	0	0	0	3
India	0	0	3	0	0	0	0	2	1	0	1
Ireland	6	0	3	9	2	8	1	10	13	4	4
Jamaica	0	0	0	0	0	0	0	6	0	0	0
New Zealand	2	0	1	11	17	9	4	23	70	83	61
Northern Ireland	0	0	0	0	0	0	0	5	0	0	0
Scotland	2	1	5	5	1	8	0	14	7	3	15
South Africa	0	0	0	1	0	0	0	1	4	0	3
Papua New Guinea	0	0	0	0	0	0	0	0	1	0	0
<b>Subtotal</b>	<b>21</b>	<b>4</b>	<b>17</b>	<b>33</b>	<b>20</b>	<b>32</b>	<b>9</b>	<b>85</b>	<b>208</b>	<b>231</b>	<b>176</b>
<b>SECONDARY AUTHORITIES</b>											
<b>LEGAL</b>											
Books	34	14	18	46	29	43	35	211	330	191	160
Periodicals	0	0	1	1	10	24	8	17	81	12	51
Encyclopedias	0	0	4	16	1	6	9	30	35	10	4

Table 1 – Citations in Reported Cases in the Supreme Court of New South Wales (cont.)

	1905	1915	1925	1935	1945	1955	1965	1975	1985	1995	2005
Law Reform Reports	0	0	0	0	0	0	0	6	48	35	11
Dictionaries	0	0	0	0	0	0	0	3	2	0	3
Other	0	0	0	3	4	1	0	4	37	87	28
<b>Subtotal</b>	<b>34</b>	<b>14</b>	<b>23</b>	<b>66</b>	<b>44</b>	<b>74</b>	<b>52</b>	<b>271</b>	<b>533</b>	<b>335</b>	<b>257</b>
NON-LEGAL											
Books	0	0	0	0	3	0	0	1	10	0	2
Periodicals	0	0	0	0	0	0	0	0	0	0	0
Dictionaries	1	0	0	0	0	0	1	12	43	7	25
Other	0	0	0	0	0	0	0	0	7	1	21
<b>Subtotal</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>3</b>	<b>0</b>	<b>1</b>	<b>13</b>	<b>60</b>	<b>8</b>	<b>48</b>
<b>TOTAL</b>	<b>589</b>	<b>248</b>	<b>450</b>	<b>1052</b>	<b>1077</b>	<b>1435</b>	<b>1123</b>	<b>3600</b>	<b>6613</b>	<b>4809</b>	<b>4964</b>
AVE CITATIONS PER CASE	4.95	3.82	5.92	15.94	22.44	26.57	34.03	23.68	35.36	47.61	42.43
AVE CITATIONS PER JUDGMENT	2.58	2.03	3.31	7.74	13.81	16.12	13.53	15.45	17.54	19.79	17.79

### A Court's Previous Decisions

Citations to the Court's own previous decisions constitute consistency citations.<sup>44</sup> The doctrine of precedent means that in most circumstances the Court of Appeal will follow its earlier decisions. The rationale is that this ensures certainty and predictability in the law. However, in *Bridges v Bridges*<sup>45</sup> the New South Wales Full Court, the predecessor to the New South Wales Court of Appeal, stated that, provided that it was satisfied its earlier decision was wrong, it was at liberty to not follow it. This position was qualified in *Richardson v Mayer*<sup>46</sup> where it was emphasised that the freedom to reconsider an earlier decision of the Court should be exercised with caution, and that the Court would follow an earlier decision of its own unless convinced it was manifestly wrong. Subsequent to the decision in *Richardson v Mayer*, in *Bennet & Wood Ltd v Orange City Council*<sup>47</sup> Wallace P (with the concurrence of Holmes JA) expressed a broader view that the Court of Appeal was free to depart from one of its earlier decisions 'where justice seems to require' it to so do.<sup>48</sup> The third judge in *Bennet & Wood v Orange*, Walsh JA, disagreed with the expansive position of Wallace P, suggesting that such a broad approach would introduce confusion and uncertainty into the law.<sup>49</sup> The broader approach of Wallace P and Holmes JA in *Bennet & Wood v Orange* appears to have not found favour in later cases. Hence, the accepted view in the Court of Appeal is that it can reconsider one of its earlier decisions provided it gives leave to consider a submission to that effect and that it is convinced that the earlier decision is either 'clearly wrong' or 'manifestly wrong' and should not be followed.<sup>50</sup>

Table 1 shows that on a per case and per judgment basis as well as a percentage of total citations, the Court's citations to its own previous decisions have increased since World War I. This upward trend was preceded by a fall between 1905 and 1915. Up to and including 1955, for most of the sampled years, the Court cited the English Court of Appeal more than its own previous decisions. In 1955 and 1975 the Court cited the High Court more than its own decisions. However, since 1985 the Court has cited its own decisions more than any other single court. Whilst previous studies for the United States have found that citations to a court's own previous decisions form the largest share of total citations followed by citations to the Supreme Court of the United States,<sup>51</sup>

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44 McCormick, 'The Evolution of Coordinate Precedential Authority in Canada', above n 4; Peter McCormick, 'Judicial Citation, the Supreme Court of Canada and the Lower Courts' (1996) 34 *Alberta Law Review* 870.

45 (1944) 45 SR (NSW) 164.

46 [1964–5] NSWLR 105.

47 [1967] 1 NSWLR 502 ('*Bennet & Wood v Orange*').

48 *Ibid* 504.

49 *Ibid* 509.

50 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, 277; *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166, 171; *Clutha Developments Pty Ltd v Barry* (1989) 18 NSWLR 86, 99–101; *Ebb v Fast Fix Steel Fixing Pty Ltd* [2007] NSWCA 236, [4]–[5].

51 See, eg, Merryman, above n 2.

studies for intermediate appellate courts in Australia, Canada and New Zealand have found that citations to courts higher in the judicial pyramid form the highest proportion of citations followed by citations to a court's own previous decisions.<sup>52</sup>

Thus, the results presented here for the Supreme Court of New South Wales for the last three decades of the study differ from previous studies for intermediate appellate courts in British Commonwealth countries. One possible explanation could be that the volume of its own case law that the Supreme Court of New South Wales has to cite is far greater than other intermediate appellate courts have, at least in Australia. Another explanation is that given the Supreme Court of New South Wales is recognised as the judicial leader among the State Supreme Courts in Australia, it has the maturity and authority to cite its own decisions more than any other Court. Supporting this interpretation, the Supreme Court of Victoria also cites a high proportion of its own decisions. In 2005 citations to the Supreme Court of New South Wales' own earlier decisions were 32.8 per cent of total citations. In the Supreme Court of Victoria the comparable figure in 2005 was 28.1 per cent.<sup>53</sup> The Supreme Court of South Australia also cites a high proportion of its own decisions. Based on a study of the 50 most recent reported decisions as of June 1999, 30.2 per cent of the Supreme Court of South Australia's citations were to its own decisions.<sup>54</sup> In contrast the smaller State Supreme Courts cite a much lower proportion of their own decisions. The same study of the 50 most reported decisions since June 1999 found that the comparable figures for the other State Supreme Courts were Tasmania (17.2 per cent), Queensland (18.6 per cent) and Western Australia (19.7 per cent).<sup>55</sup> The State supreme courts in these smaller States tend to be big consumers of citations from the other State Supreme Courts and, in particular, the State Supreme Courts of Victoria and New South Wales.<sup>56</sup>

## B High Court Decisions

Citations by the Court to the decisions of the High Court represent hierarchical citations.<sup>57</sup> The Supreme Court of New South Wales at first instance and on appeal is bound by the ratio decidendi of relevant decisions of the High Court.<sup>58</sup> Table 1 shows that the Court's citations to the High Court increased each decade

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52 For Canada, see McCormick, 'Judicial Citation, the Supreme Court of Canada and the Lower Courts' above n 44; McCormick, 'Judicial Authority and the Provincial Courts of Appeal', above n 4. For Australia, see Smyth, 'What Do Judges Cite?', above n 3; Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 3; Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia', above n 3; Fausten, Nielsen and Smyth, above n 3. For New Zealand, see Smyth, 'Judicial Citations – An Empirical Study of Citation Practice in the New Zealand Court of Appeal', above n 5.

53 Fausten, Nielsen and Smyth, above n 3.

54 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 3.

55 Ibid.

56 Ibid.

57 McCormick, 'The Evolution of Coordinate Precedential Authority in Canada', above n 4; McCormick, 'Judicial Citation, the Supreme Court of Canada and the Lower Courts', above n 44.

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



from 1905 to 1995 in absolute numbers and on a per case and per judgment basis. The Court's citation to the High Court has also increased each decade as a proportion of total citations with a decline in 1985. For the first three decades of the study citations to the High Court constituted less than 10 per cent of the Court's total citations. While the Court's citations to the High Court gathered momentum after 1925, until 1965 the Court's citations to the English Court of Appeal exceeded those to the High Court.

That the Court cited the English Court of Appeal more than the High Court for the first six decades of the 20<sup>th</sup> century reflects the fact that until the mid-1960s the High Court followed decisions of the House of Lords and, usually, the English Court of Appeal, in preference to its own decisions. The State Supreme Courts were instructed to do likewise, even in the face of an earlier inconsistent High Court decision.<sup>59</sup> The first time the High Court refused to follow a decision of the House of Lords was *Parker v The Queen*,<sup>60</sup> decided in 1963.<sup>61</sup> As recently as the mid-1970s there is High Court authority that in the absence of decisions of the High Court, State Supreme Courts should follow both the House of Lords and English Court of Appeal.<sup>62</sup> Since 1975 the Court has cited the High Court more than the English Court of Appeal or the House of Lords. In the three most recent decades of the study, the Court cited the High Court more than any other single court with the exception of its own previous decisions. The increasing propensity for the Court to cite its own decisions and decisions of the High Court in preference to English authorities, particularly since the mid-1980s, is evidence of what Sir Anthony Mason has described as '[a]n emerging Australian common law'<sup>63</sup> where the High Court has sought to 'fashion a common law for Australia that is best suited to our conditions and circumstances'.<sup>64</sup>

A feature of Table 1 is that the Court cites more recent decisions of the High Court in preference to older decisions. For example, in 2005 the Court cited 599 High Court cases decided between 1980 and 1999, 153 High Court cases cited between 1960 and 1979, 137 High Court cases cited between 1940 and 1959, 129 High Court cases cited between 1920 and 1939 and 34 High Court cases decided between 1903 and 1919. The same tendency for courts to cite more recent decisions in preference to earlier decisions has been observed in previous studies.<sup>65</sup>

Merryman, who was the first to point out this phenomenon in the context of a court's citations, has suggested three possible explanations for why courts cite

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59 See *Piro v W Foster & Co Ltd* (1943) 68 CLR 313; *Waghorn v Waghorn* (1942) 65 CLR 289.

60 (1963) 111 CLR 610 ('*Parker*').

61 Leslie Zines, 'Dixon Court' in Blackshield, Coper and Williams, above n 3, 222.

62 In *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 Barwick CJ stated that if there was 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 and on appeal. Justice Gibbs 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 Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 150.

63 Mason, above n 62, 151.

64 *Ibid* 154.

65 See, eg, Merryman, above n 6.

recent decisions more relative to older decisions.<sup>66</sup> First, the stock of older precedent will tend to decline over time as earlier cases are overruled by latter cases or statute. Second, the body 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, latter cases may be more relevant to the facts simply because the social context of earlier cases has changed.

### C Decisions of other State Supreme Courts

Citations to the decisions of other State Supreme Courts are coordinate citations.<sup>67</sup> The accepted position in the Supreme Court of New South Wales is that it is not bound by the decision of another State Supreme Court, but will follow such a decision, as a matter of judicial comity, unless convinced the decision is wrong.<sup>68</sup> The following rationales have been offered by the Court for following a relevant decision of another State Supreme Court. First, as noted by the Court (Herron CJ, Sugerman and Jacobs JJA) in *Camden Park Estate Pty Ltd v O'Toole*:<sup>69</sup> 'It is highly desirable that there be conformity of decision between States where legislative provisions are identical'.<sup>70</sup> Second, in *Fernando v Commissioner of Police*<sup>71</sup> Clarke JA considered 'that similar considerations apply to the interpretation of substantially similar provisions in different States'.<sup>72</sup> The rationale is that it would be unsatisfactory if identical or similar statutory provisions had different meanings in different States.<sup>73</sup> In *Regina v NZ*<sup>74</sup> Howie and Johnson JJ added a qualification which is that the *Fernando* rule of comity will not apply 'where it is not the proper construction of legislation that is under consideration, but rather issues of practice and procedure involving the operation of the relevant statutory provisions in their local context'.<sup>75</sup> Third, the rule of comity has been extended to apply to common law principles as well as construction of statutes.<sup>76</sup> The reason for extending the rule of comity to the application of common law principles is that Australia has a unified common law<sup>77</sup> and, as such, there is a need to promote consistency across the States.<sup>78</sup>

Table 1 shows the Court's citations to other State Supreme Courts. Until 1985 the Court's citations to other State Supreme Courts were less than five per cent in each of the years examined in the study. In 1995 and 2005 coordinate citations

66 Ibid 398.

67 McCormick, 'The Evolution of Coordinate Precedential Authority in Canada', above n 4; McCormick, 'Judicial Citation, the Supreme Court of Canada and the Lower Courts', above n 44.

68 *R v NZ* [2005] NSWCCA 278, [157]–[162]; *Attorney General for the State of New South Wales v Quinn* [2007] NSWSC 873, [66]–[67].

69 (1969) 72 SR (NSW) 188.

70 Ibid 190.

71 (1995) 36 NSWLR 567 ('*Fernando*').

72 Ibid 587.

73 Ibid 589.

74 [2005] NSWCCA 278.

75 Ibid [166].

76 Ibid [165].

77 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562–3; *Kable v Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51, 112.

78 *S v Boulton* [2005] FCA 821 [(2005) 155 A Crim R 152], [30]–[31].

increased to 8.2 per cent and 8.5 per cent respectively. These findings suggest that relative to other State Supreme Courts, the Supreme Court of New South Wales is a small consumer of coordinate citations. By way of comparison in the Supreme Court of Victoria coordinate citations constituted around five to six per cent of the Court's citations for most of the 20<sup>th</sup> century, then increased to 11.9 per cent in 1995 and 15.6 per cent in 2005.<sup>79</sup> In the study of citations in the State supreme courts based on the 50 most recent reported cases as of June 1999, across all the State Supreme Courts coordinate citations constituted 17.8 per cent of total citations.<sup>80</sup> Simultaneously, previous studies suggest that the Supreme Court of New South Wales is a large supplier of coordinate citations to other State Supreme Courts.<sup>81</sup> The fact that the Supreme Court of New South Wales is a small consumer of coordinate citations while being a large supplier of coordinate citations to other State Supreme Courts reflects its strength combined with reputation for judicial leadership among the State Supreme Courts.

Among the other State Supreme Courts which were cited by the Court, the Supreme Court of Victoria received most citations. In each of the years the Supreme Court of Victoria received in excess of 40 per cent of the Court's coordinate citations and in seven of the 11 years the Supreme Court of Victoria received more than half of the Court's coordinate citations. While the Supreme Court of New South Wales turns most often to the Supreme Court of Victoria when it cites another State supreme court, the Supreme Court of Victoria looks to the Supreme Court of New South Wales for most of its coordinate citations. In reported decisions of the Supreme Court of Victoria in 1905, 1915, 1925 and 1935 all but one coordinate citation was to the Supreme Court of New South Wales. In reported judgments of the Supreme Court of Victoria at 10 year intervals between 1945 and 2005, citations to the Supreme Court of New South Wales have consistently accounted for approximately two-thirds of coordinate citations, with a slight dip in 1995 when they accounted for 56 per cent of coordinate citations.<sup>82</sup> The propensity of the Supreme Court of Victoria and Supreme Court of New South Wales to cite each other may partly reflect geographical and socioeconomic proximity, with both States having the biggest economies and populations in Australia. However, there is also likely to be a prestige factor with the Supreme Court of Victoria having the strongest reputation after the Supreme Court of New South Wales. Both Courts are cited the most by the other State courts.<sup>83</sup>

#### D Decisions of English Courts

Table 1 exhibits the Court's citations to the Judicial Committee of the Privy Council ('Judicial Committee'), House of Lords, English Court of Appeal and lower English courts. Prior to the *Australia Acts*, the Supreme Court of New South Wales was bound by the ratio decidendi of relevant decisions of the

79 Fausten, Nielsen and Smyth, above n 3.

80 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 3, 63.

81 Ibid.

82 Fausten, Nielsen and Smyth, above n 3.

83 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 3.

Judicial Committee.<sup>84</sup> Thus, in cases decided in the Supreme Court of New South Wales prior to the *Australia Acts*, citations to decisions of the Judicial Committee constituted hierarchical citations. In cases decided in the Supreme Court of New South Wales Supreme Court since the *Australia Acts*, decisions of the Judicial Committee since 1986 are not binding.<sup>85</sup>

Whether the Supreme Court of New South Wales in decisions handed down since the *Australia Acts* is still required to follow decisions of the Judicial Committee made prior to the *Australia Acts* is not settled. Blackshield has expressed the view that decisions of the Judicial Committee decided prior to 1986 continue to bind the State Supreme Courts until the High Court decides otherwise.<sup>86</sup> MacAdam and Pyke<sup>87</sup> suggest that, while single judges of a State supreme court should follow Judicial Committee precedents decided prior to 1986 in the absence of a contrary High Court ruling, full courts or appeal divisions, being in many instances courts of last resort, should be free to depart from such precedents. In the Supreme Court of New South Wales, in *Hawkins v Clayton and Others Trading as Clayton Utz & Co*,<sup>88</sup> McHugh JA,<sup>89</sup> and in *Alamdo Holdings Pty Ltd v Bankstown City Council*<sup>90</sup> Gzell J<sup>91</sup> expressed the view that the State Supreme Courts are no longer bound by decisions of the Judicial Committee made prior to the commencement of the *Australia Acts*. In the Supreme Court of Victoria, Nathan J has shared the view of McHugh JA and Gzell J in *R v Judge Bland; Ex parte Director of Public Prosecutions*<sup>92</sup> and *Shelmerdine v Ringen Pty Ltd*.<sup>93</sup>

While decisions of the House of Lords and English Court of Appeal are not binding on the State Supreme Courts, they have always been regarded as highly persuasive.<sup>94</sup> As discussed above, until the 1960s there was High Court authority that the State Supreme Courts should follow the House of Lords and probably the English Court of Appeal even when faced with a conflicting High Court decision and at least until the mid-1970s it was expected that the State Supreme Courts would follow relevant decisions of the House of Lords and English Court of Appeal in the absence of High Court authority. Thus, until the 1970s citations to the House of Lords and English Court of Appeal were de facto hierarchical citations. However, 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 much less likely to follow them than was once the case. As Kirby P

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

85 *Cook v Cook* (1986) 162 CLR 376, 385.

86 Anthony Blackshield, 'Precedent' in Blackshield, Coper and Williams, above n 3, 550.

87 Al MacAdam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998) 113–9.

88 (1986) 5 NSWLR 109.

89 *Ibid* 136–7.

90 [2003] NSWSC 1074.

91 *Ibid* [48].

92 [1987] VR 225, 230–3.

93 (1990) V ConvR 54–375.

94 *Viro v R* (1978) 141 CLR 88; *Cook v Cook* (1986) 162 CLR 376.

described in *Liberti v R*,<sup>95</sup> the accepted position in the New South Wales Court of Appeal since the *Australia Acts* is that the Court should be prepared to follow its own previous decisions and established practices even, if by so doing, it results in a departure from a contrary decision of the House of Lords.

Table 1 suggests that until 1955 citations to English authorities were fairly constant at 60 per cent or more of total citations. Since 1965 citations to English authorities as a proportion of total citations have been on a downward spiral. In 1965 citations to English authorities as a percentage of the total fell to 43 per cent; in 1975 the figure was 38 per cent; in 1985 it was 30 per cent; in 1995 it was 21 per cent; and in 2005 it was 16 per cent. The decline in the importance of English cases as sources of authority dates back to what Sir Anthony Mason has described as ‘Sir Owen Dixon’s historic refusal’<sup>96</sup> in *Parker* to follow the objective test of murder stated in the House of Lords in *Director of Public Prosecutions v Smith*.<sup>97</sup> While the English courts clearly remained near the apex of the court hierarchy for the State Supreme Courts in the mid-1960s, the High Court’s decision in *Parker* may have had a subtle signalling effect on the State courts as marking the beginning of an Australian jurisprudence that is distinct from English case law. This could explain why the State courts started citing the High Court more in preference to the English courts from the mid-1960s.

The commencement of the *Australia Acts* is a reason for the reduced citation to English authority over the last two decades. 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’.<sup>98</sup> A further development that has diminished the relevance of recent English decisions to Australian courts is the increasing influence on English cases of the *European Convention on Human Rights and Fundamental Freedoms*<sup>99</sup> since the commencement of the *Human Rights Act 1998* (UK) in 2000.<sup>100</sup>

For most of the 20<sup>th</sup> century the Court cited the lower English courts and English Court of Appeal more than the House of Lords and Judicial Committee. This same tendency has also been observed for the citation practice of the Supreme Court of Victoria.<sup>101</sup> While the Court would presumably cite a decision of the House of Lords or Judicial Committee in preference to a decision of the English Court of Appeal, Queens Bench or Chancery Division, an important explanation why it has cited decisions of the lower courts more is simply that as one moves up the court hierarchy, the stock of cases available to the Court to cite declines given its case load. The English High Court and English Court of

95 (1991) 55 A Crim R 120, 122.

96 Mason, above n 62, 152.

97 [1961] AC 290.

98 Mason, above n 62, 152.

99 *Convention for Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS No. 005 (entered into force 3 September 1953).

100 Michael Kirby, ‘Precedent Law, Practice and Trends in Australia’ (2007) 28 *Australian Bar Review* 243, 244.

101 Fausten, Nielsen and Smyth, above n 3.

Appeal have traditionally heard most probate, trust matters and criminal law cases. These are the areas that have occupied the largest share of the case load of Australia's State courts.<sup>102</sup>

Another feature of Table 1 is that throughout the period of the study, the Court cited the House of Lords more than the Judicial Committee, although until the *Australia Acts* the Judicial Committee stood at the apex of the Australian court hierarchy. Previous studies have also found that the State Supreme Courts,<sup>103</sup> High Court,<sup>104</sup> New Zealand Court of Appeal<sup>105</sup> and the Provincial courts of appeal in Canada<sup>106</sup> all cite the Judicial Committee less than the House of Lords. One explanation for the small proportion of citations to the Judicial Committee is that it hears relatively few cases and that the number of cases it hears has declined over time following the abolition of appeals from all the major Commonwealth countries. Another possible reason for the Judicial Committee being cited less than the House of Lords is that the quality of decisions of the Judicial Committee has sometimes been questioned.<sup>107</sup>

### E Decisions of Courts in Countries other than in Australia and England

Casual inspection of the Commonwealth Law Reports suggests that, to some extent, in the High Court citations to English cases are being replaced with citations to courts in other countries.<sup>108</sup> To the extent this is occurring this trend reflects two developments.

First, senior Australian judges such as Sir Anthony Mason have been explicit in stating that since the *Australia Acts* Australian courts should be willing to draw on foreign precedent wherever such cases are decided, and that the crucial factor in deciding whether to rely on a foreign case is the persuasive force of the reasoning.<sup>109</sup> Secondly, the proliferation of legal databases has made it far easier for judges, and their associates, to access foreign cases from a range of jurisdictions.<sup>110</sup>

Table 1 shows that the Court cited courts in 11 countries other than England and Australia as well as the European Court of Human Rights. Most of these citations were to courts in British Commonwealth countries. The countries containing courts that received the most citations were New Zealand, United States and Canada. Table 1 demonstrates that citations to courts in countries

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102 Ibid.

103 Smyth, 'What Do Judges Cite? An Empirical Study of the "Authority of Authority"', above n 3; Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 3; Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia', above n 3; Fausten, Nielsen and Smyth, above n 3.

104 Smyth, 'Citations by Court', above n 3.

105 Smyth, 'Judicial Citations – An Empirical Study of Citation Practice in the New Zealand Court of Appeal', above n 5.

106 McCormick, 'Judicial Authority and the Provincial Courts of Appeal', above n 4.

107 John Goldring, *The Privy Council and the Australian Constitution* (1996) 73–80. See also Geoffrey Sawyer, 'Appeals to the Privy Council – Australia' (1970) 2 *Otago Law Review* 138, 145.

108 See Kirby, above n 100.

109 Mason, above n 62, 154.

110 See Kirby, above n 100; Richard Posner, 'Could I Interest You in Some Foreign Law? No Thanks, We Already Have Our Own Laws' (2004) August *Legal Affairs* 40.

other than Australia and England were minimal in absolute numbers until 1965, but have started to increase since 1975. However, as a proportion of total citations, citations to courts in countries other than Australia and England remain small, being less than five per cent of total citations. Thus, while there may be a sizeable increase in citations to cases from countries other than Australia and England in the High Court, this trend is not apparent in the Supreme Court of New South Wales. This finding replicates the results of the study of the citation practice of the Supreme Court of Victoria from 1905 to 2005.<sup>111</sup>

There are two possible explanations for this finding. The first is that ‘Australian judge-made law has, certainly until very recent times, been largely derived from English precedent’.<sup>112</sup> This implies that Australia does not share the same shared legal heritage with other foreign jurisdictions as it does with England. Thus, when State courts do cite foreign jurisdictions they are far more likely to cite English cases than cases from Canada, New Zealand, the United States or other countries. The High Court may also cite courts from other countries more often than State Supreme Courts because, on average, the cases that come before the High Court are more difficult to decide than the cases before the State courts. Justice Kirby has stated that when he joined the High Court after being President of the New South Wales Court of Appeal he was struck by the complexity of the cases in the High Court.<sup>113</sup> Given that cases that come before the High Court tend to be more complex to resolve, a reasonable expectation is that the High Court justices will be more likely to seek assistance from whatever sources they can find including decisions from a more diverse range of foreign jurisdictions.

## F Secondary Authorities

Citations to legal secondary authorities constituted five to six per cent of total citations for most of the years with a peak in the period between 1975 and 1995 at seven to eight per cent of total citations. The most cited legal secondary authorities were books followed by legal periodicals. These findings are generally consistent with the results of previous studies for Australian courts which suggest that the State supreme courts cite a much lower proportion of secondary authorities than the High Court.<sup>114</sup> Citations to non-legal secondary authorities on the Court have constituted a miniscule proportion of total citations throughout the 20<sup>th</sup> century, peaking in 1985 at less than one per cent of total citations. This finding is again consistent with previous studies for the High Court<sup>115</sup> and State Supreme Courts<sup>116</sup> in Australia as well as the State supreme

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111 Fausten, Nielsen and Smyth, above n 3.

112 Mason, above n 62, 154.

113 Michael Kirby, ‘What is it Really Like to be a Justice of the High Court? – A Conversation between Law Students and Justice Kirby’ (1997) 19 *Sydney Law Review* 514, 518.

114 For studies of State Supreme Courts, see Smyth, ‘What Do Intermediate Appellate Courts Cite?’, above n 3; Fausten, Nielsen and Smyth, above n 3. For evidence for the High Court see Smyth, ‘Other than “Accepted Sources of Law”?’’, above n 18.

115 Smyth, ‘Other than “Accepted Sources of Law”?’’, above n 18.

116 Smyth, ‘What Do Intermediate Appellate Courts Cite?’, above n 3; Fausten, Nielsen and Smyth, above n 3.

courts in the United States.<sup>117</sup> Friedman and his colleagues have suggested that a likely explanation for this result is: ‘Old habits of citation persist, no doubt because judges feel that only “legal” authorities are legitimate’.<sup>118</sup>

In the Supreme Court of the United States, however, the Court cites a much higher proportion of non-legal secondary authorities; in particular it cites a lot of social science literature to examine the ‘legislative fact’ that underpins legal rules or further explore expert evidence in death penalty cases and in cases involving interpretation of the Bill of Rights.<sup>119</sup>

Of all the State Supreme Courts, one might have expected the Supreme Court of New South Wales to cite a higher proportion of secondary authorities, and particularly legal periodicals, given its reputation for doctrinal leadership and previous research suggesting that more policy oriented courts tend to cite more legal periodicals. For example, in the United States State supreme courts, the propensity to cite more law reviews over time has been attributed to the State supreme courts becoming more policy oriented.<sup>120</sup> There could be two explanations as to why the Court cites books much more often than periodicals. The first could be that the law reviews publish few articles that are relevant to the case load of the State supreme courts. The second is that legal periodicals typically contain articles advancing cutting edge normative statements, which are perhaps better suited to the case load of the High Court as a final court of appeal while books tend to contain positive statements of the law, better suited to the case load of an intermediate appellate court. Our results suggest that as an intermediate appellate court, the Court is likely to seek guidance from academic authorities for statements of what the law is, rather than how it should be changed.<sup>121</sup>

## VIII CONCLUSION

Several conclusions emerge from a study of the citation practice of the Supreme Court of New South Wales over the course of the 20<sup>th</sup> century. The first is that over time there has been an increase in the average length of cases and judgments and a commensurate increase in average citations on a per case and per judgment basis. This development likely reflects the increasing socioeconomic complexity of the Court’s case load and the increased demands on the Court to be seen to be administering due process. It is likely that it is also a reflection over the last two decades or so of changes in information technology, which have altered the mechanical aspects of the preparation of judgments and the ease of accessing authorities that can be cited in judgments through services such as LexisNexis.<sup>122</sup>

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117 Cartwright, Friedman, Kagan and Wheeler, above n 6, 817.

118 Ibid.

119 Smyth, ‘Other than “Accepted Sources of Law”?’ , above n 18; Bill of Rights, *United States Constitution*, amendment I–X.

120 Cartwright, Friedman, Kagan and Wheeler, above n 6, 815.

121 See Black and Richter, above n 4, 391.

122 Groves and Smyth, above n 17, 265–6.



Second, since the mid-1960s citations to English authorities have been replaced with citations to the Court's own previous decisions and citations to the High Court. This development reflects the evolution of an Australian jurisprudence where Australian courts, following the lead of the High Court, have sought to forge an Australian national legal identity that is distinct from that of the United Kingdom.

A third conclusion from the study is that relative to other State Supreme Courts, the Court is a small consumer of coordinate citations from the other State supreme courts. At the same time, previous studies have found that the Supreme Court of New South Wales is the largest supplier of coordinate citations to the other State Supreme Courts. This imbalance between consuming and supplying citations to other State courts reflects the Court's position as the highest court in Australia's most populous State with the largest case load and a reputation for doctrinal leadership among intermediate appellate courts in Australia. When the Court does cite other State Supreme Courts, our findings suggest that the Supreme Court of Victoria, the other major State Supreme Court through most of the 20<sup>th</sup> century, received most citations.

A fourth conclusion from the study is that the Court cites relatively few secondary authorities and when it does cite secondary authorities, it is primarily legal books. One might have expected that given the Court's reputation for doctrinal leadership among the State Supreme Courts, it might have cited a higher proportion of law review articles in recent years, consistent with trends in the High Court. The fact this has not proved to be the case underpins the often repeated position that the contents of law review articles are not suited to the case load of intermediate appellate courts, even for a court that is an innovator – reflected in it being a large supplier of coordinate citations.

Limitations of the study are that it is restricted to citation patterns in reported judgments of a single court. Future research could examine whether citation patterns in the Supreme Court of New South Wales differ between reported and unreported judgments. For such a study to be manageable, however, it would need to focus on a much shorter time frame. There is already a published study of the same time frame as this study of citation practice in reported decisions of the Supreme Court of Victoria.<sup>123</sup> Future studies could examine the citation patterns of other State Supreme Courts either individually or collectively based on reported judgments over a similar time frame.<sup>124</sup> Future research could extend studies of the citation practice of the State Supreme Courts to examine changes in judicial style over the course of the 20<sup>th</sup> century along the lines of the study by Friedman and his colleagues for the United States State Supreme Courts<sup>125</sup> or Groves and Smyth for the High Court.<sup>126</sup> Another direction for future research could be to examine changing patterns in the case load of the State Supreme Courts – what Kagan and his colleagues have called the business of the State

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123 Fausten, Nielsen and Smyth, above n 3.

124 The second author of this study is working on such comparative studies as part of an ongoing project examining the citation practices of the State Supreme Courts over the 20<sup>th</sup> century.

125 Cartwright, Friedman, Kagan and Wheeler, above n 6.

126 Groves and Smyth, above n 17.

Supreme Courts – over time in response to changing economic and social conditions.<sup>127</sup>

Much progress has been made in the empirical study of citation practice and other aspects of judicial reasoning and decision-making on Australian courts over the last decade. The first studies of this sort for United States courts, however, are more than five decades old and the techniques used to better understand judicial reasoning in the United States have become increasingly sophisticated. Some will object to transplanting methodologies developed to understand United States courts to the Australian setting. Such objections are well-founded to the extent that we need to be cautious in modifying hypotheses and the methodologies developed to test those hypotheses in the United States context to suit the institutional arrangements of Australian courts. This said, provided that it is done judiciously, there remains a lot of scope to borrow from the ideas and techniques in the literature on United States courts to better understand judicial behaviour and reasoning in Australia. This is sure to be an exciting research agenda for empirically minded legal scholars working on Australian courts for some time into the future.

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127 Bliss Cartwright, Lawrence M Friedman, Robert A Kagan and Stanton Wheeler, 'The Business of State Supreme Courts 1870-1970' (1977) 30 *Stanford Law Review* 121. See also Brent Boyea, Paul Brace, Melinda G Hall and Herbert M Kritzer, 'The Business of State Supreme Courts Revisited' (2007) 4 *Journal of Empirical Legal Studies* 427.