A CENTURY OF CITATION PRACTICE ON THE SUPREME COURT OF VICTORIA

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[Examination of citations contained in the written record of judicial decisions provides useful insights into the evolution of the jurisprudence and policy of particular courts, and of the judges who make significant contributions to those courts. This article examines the citation practice of the Supreme Court of Victoria over the century 1905–2005 at 10-year intervals. It employs the McCormick taxonomy of citations, which distinguishes between consistency, hierarchical, coordinate and deference citations and also tracks citations to secondary authorities. The major findings of the study are that the length of judgments and the number of authorities cited by the Court have increased over time, and that consistency and hierarchical citations have been the dominant form of allusion to prior authority.]

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I INTRODUCTION

A defining feature of judicial power in Australia, as throughout most of the common law world, is that appeal court judges are required to give written reasons for their decisions.[1] Lord Denning has stated that giving written reasons is 'the whole difference between a judicial decision and an arbitrary one'.[2] These written reasons are typically supported by citation to previous authorities. Citation to previous authorities provides a means for judges to relate their reasons back to their previous decisions and the decisions of other courts. This practice provides protection against arbitrary decision making. As Lawrence Friedman and his colleagues put it, judges are expected to decide 'according to the law', which means 'they are not free to decide cases as they please, [but instead] are expected to invoke appropriate legal authority for their decisions'.[3] Citations to previous authorities are therefore one way for judges to give their decisions legitimacy.[4] This is important because legitimacy is seen by some as affecting the reactions of the other branches of government to judicial policies.[5]

Judicial citation practice provides a window into the courts — and even the judges — which are making the most important contributions to the evolution of the judicial branch's jurisprudence and policy.[6] In this respect, William M Landes and Richard A Posner postulated that the number and average age of citations are important indicators of a court's use of precedent.[7] Citations have been used to show how judges make law through tracing judicial innovation[8] and

[1] See Michael Kirby, '*Ex Tempore* Reasons' (1992) 9 *Australian Bar Review* 93; Michael Kirby, 'Reasons for Judgment: "Always Permissible, Usually Desirable and Often Obligatory"' (1994) 12 *Australian Bar Review* 121. For judicial statements to this effect: see *Pettit v Dunkley* [1971] 1 NSWLR 376, 381–2 (Asprey JA); *Public Service Board v Osmond* (1985) 159 CLR 656, 666–7 (Gibbs CJ). Cf *Watson v Anderson* (1976) 13 SASR 329, 332 (Bray CJ), 341 (Walters J). For a more general discussion of the requirement of judges to give written reasons: see Judge Richard A Posner, *The Problems of Jurisprudence* (1990); Martin Shapiro, 'The Giving Reasons Requirement' [1992] *University of Chicago Legal Forum* 179.

[2] Lord Denning, *Freedom under the Law* (1949) 91.

[3] Lawrence M Friedman et al, 'State Supreme Courts: A Century of Style and Citation' (1981) 33 *Stanford Law Review* 773, 793.

[4] Charles A Johnson, 'Citations to Authority in Supreme Court Opinions' (1985) 7 *Law & Policy* 509, 510–11. See also Jeffery J Mondak, 'Perceived Legitimacy of Supreme Court Decisions: Three Functions of Source Credibility' (1990) 12 *Political Behavior* 363; Ronen Shamir, '"Landmark" Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice' (1990) 24 *Law & Society Review* 781; Mel Topf, 'Communicating Legitimacy in US Supreme Court Opinions' (1992) 12 *Language and Communication* 17.

[5] See Charles A Johnson and Bradley C Canon, *Judicial Policies: Implementation and Impact* (1984).

[6] Peter McCormick, 'The Supreme Court of Canada and American Citations 1945–1994: A Statistical Overview' (1997) 8 *Supreme Court Law Review* 527, 527–9.

[7] William M Landes and Richard A Posner, 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) 19 *Journal of Law and Economics* 249, 250–4.

[8] See Bradley C Canon and Lawrence Baum, 'Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines' (1981) 75 *American Political Science Review* 975; Rorie Solberg, Jolly Emrey and Susan Haire, 'Inter-Court Dynamics and the Development of Legal Policy: Citation Patterns in the Decisions of the US Courts of Appeals' (2006) 34 *Policy Studies Journal* 277. For a more general discussion of the diffusion of policy innovations: see Jean-Robert Tyran and Rupert Sausgruber, 'The Diffusion of Policy Innovations — An Experimental Investigation' (2005) 15 *Journal of Evolutionary Economics* 423.

communication between courts.[9] An examination of citation practice may also reveal where judges find their cues and what values they seek to promote.[10] 'Citation patterns ... reflect conceptions of role. ... These patterns may be clues, too, to the role of courts in society'.[11]

The study of judicial citation practice has gained considerable momentum during the last two decades, particularly in North America. There are studies of citation practice for the Supreme Court of the United States,[12] the US courts of appeals,[13] US state Supreme Courts,[14] the Supreme Court of Canada[15] and the

[9] See Gregory A Caldeira, 'On the Reputation of State Supreme Courts' (1983) 5 *Political Behavior* 83; Gregory A Caldeira, 'The Transmission of Legal Precedent: A Study of State Supreme Courts' (1985) 79 *American Political Science Review* 178; Gregory A Caldeira, 'Legal Precedent: Structures of Communication between State Supreme Courts' (1988) 10 *Social Networks* 29; Peter Harris, 'Ecology and Culture in the Communication of Precedent among State Supreme Courts, 1870–1970' (1985) 19 *Law & Society Review* 449.

[10] 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, 455.

[11] Friedman et al, above n 3, 794.

[12] See, eg, James R Acker, 'Thirty Years of Social Science in Supreme Court Criminal Cases' (1990) 12 *Law & Policy* 1; James R Acker, 'Social Science in Supreme Court Death Penalty Cases: Citation Practices and Their Implications' (1991) 8 *Justice Quarterly* 421; Neil N Bernstein, 'The Supreme Court and Secondary Source Material: 1965 Term' (1968) 57 *Georgetown Law Journal* 55; Frank B Cross, Thomas A Smith and Antonio Tomarchio, 'Determinants of Cohesion in the Supreme Court's Network of Precedents' (San Diego Legal Studies Paper No 07-67, University of San Diego School of Law, 2006); Joseph A Custer, 'Citation Practices of the Kansas Supreme Court and Kansas Court of Appeals' (1999) 8 *Kansas Journal of Law & 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; James H Fowler and Sangick Jeon, 'The Authority of Supreme Court Precedent' (2007) 29 *Social Networks* (forthcoming); James H Fowler et al, 'Network Analysis and the Law: Measuring the Legal Importance of Precedents at the US Supreme Court' (2007) 15 *Political Analysis* 324; 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 US Supreme Court Opinions' (2002) 94 *Law Library Journal* 427; Johnson, 'Citations to Authority in Supreme Court Opinions', above n 4; 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; Louis J Sirico Jr and Jeffrey B Margulies, 'The Citing of Law Reviews by the Supreme Court: An Empirical Study' (1986) 34 *UCLA Law Review* 131; Louis J Sirico Jr, 'The Citing of Law Reviews by the Supreme Court: 1971–1999' (2000) 75 *Indiana Law Journal* 1009; Samuel A Thumma and Jeffrey L Kirchmeier, 'The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries' (1999) 47 *Buffalo Law Review* 227; David Zaring, 'The Use of Foreign Decisions by Federal Courts: An Empirical Analysis' (2006) 3 *Journal of Empirical Legal Studies* 297.

[13] See, eg, Robert Schriek, 'Most-Cited US Courts of Appeals Cases from 1932 until the Late 1980s' (1991) 83 *Law Library Journal* 317; Louis J Sirico Jr and Beth A Drew, 'The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis' (1991) 45 *University of Miami Law Review* 1051.

[14] See, eg, Robert D Archibald, 'Stare Decisis and the Ohio Supreme Court' (1957) 9 *Western Reserve Law Review* 23; A Michael Beaird, 'Citation to Authorities by the Arkansas Appellate Courts, 1950–2000' (2003) 25 *University of Arkansas at Little Rock Law Review* 301; Mary Anne Bobinski, 'Citation Sources and the New York Court of Appeals' (1985) 34 *Buffalo Law Review* 965; Dragomir Cosanici and Chris Evin Long, 'Recent Citation Practices of the Indiana Supreme Court and the Indiana Court of Appeals' (2005) 24 *Legal Reference Services Quarterly* 103; Richard G Kopf, 'Do Judges Read the Review?: A Citation-Counting Study of the *Nebraska Law Review* and the Nebraska Supreme Court, 1972–1996' (1997) 76 *Nebraska Law Review* 708; Friedman et al, above n 3, 774; James Leonard, 'An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990' (1994) 86 *Law Library Journal* 129; Richard A Mann, 'The North Carolina Supreme Court 1977: A Statistical Analysis' (1979) 15 *Wake Forest Law Review* 39; William H Manz, 'The Citation Practices of the New York Court of

Canadian provincial courts of appeal.[16] A smaller number of studies have considered the citation practice of courts in Australasia. There are, however, studies for the High Court of Australia,[17] Federal Court of Australia,[18] the Australian state Supreme Courts[19] and the New Zealand Court of Appeal.[20] Because of the financial cost of collecting large datasets, most studies have focused on citation practice within a single year or a few select years. There are few studies for North America that examine citation practice over an extended period of time[21] and no such studies for Australasian courts.[22]

Appeals, 1850–1993' (1995) 43 *Buffalo Law Review* 121; William H Manz, 'The Citation Practices of the New York Court of Appeals: A Millennium Update' (2001) 49 *Buffalo Law Review* 1273; John Henry Merryman, 'The Authority of Authority: What the California Supreme Court Cited in 1950' (1954) 6 *Stanford Law Review* 613; John Henry Merryman, 'Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970' (1977) 50 *Southern California Law Review* 381; Fritz Snyder, 'The Citation Practices of the Montana Supreme Court' (1996) 57 *Montana Law Review* 453.

15 See, eg, Vaughan Black and Nicholas Richter, 'Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985–1990' (1993) 16 *Dalhousie Law Journal* 377; Peter J McCormick, 'Judicial Citation, the Supreme Court of Canada, and the Lower Courts: The Case of Alberta' (1996) 34 *Alberta Law Review* 870; Peter McCormick, 'Do Judges Read Books Too?: Academic Citations by the Lamer Court 1991–96' (1998) 9 *Supreme Court Law Review* 463; McCormick, 'The Supreme Court of Canada and American Citations', above n 6; McCormick, 'The Supreme Court Cites the Supreme Court', above n 10; Peter McCormick, 'Second Thoughts: Supreme Court Citation of Dissents and Separate Concurrences, 1949–1996' (2002) 81 *Canadian Bar Review* 369.

16 See, eg, 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, 1922–92' (1994) 32 *Osgoode Hall Law Journal* 271.

17 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 of the Impact of Economics on Australian Courts' (2000) 28 *Australian Business Law Review* 5; Paul Von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901–1987' (1992) 14 *Adelaide Law Review* 181; Paul Von Nessen, 'Is There Anything to Fear in the Transnationalist Development of Law? The Australian Experience' (2006) 33 *Pepperdine Law Review* 883.

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

19 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.

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

21 Exceptions are: McCormick, 'The Evolution of Coordinate Precedential Authority in Canada', above n 16 (analysing citation practice of the Canadian provincial Courts of Appeal from 1922–92); Friedman et al, above n 3 (analysing citation practice of 16 US state supreme courts using

This article examines the citation practice of the Supreme Court of Victoria in decisions published in the Victorian Reports at 10-year intervals between 1905 and 2005.[23] The citation practice of an intermediate appellate court such as the Supreme Court of Victoria is instructive for several reasons.[24] First, the Supreme Court of Victoria is an important legal institution. As the highest court in the state, its decisions shape how the law develops in Victoria. Secondly, although the empirical results reported in this article are for one state only, the implications of the analysis extend beyond Victoria. The Supreme Courts of other Australian states and territories — and indeed, intermediate appellate courts in other common law jurisdictions — share many of the same characteristics as the Supreme Court of Victoria, including the requirement to give reasons and justify their decisions through the citation of authority. Thirdly, from a practical perspective, the data should provide useful information to practitioners who wish to know which authorities the Supreme Court considers important, and to libraries — particularly the libraries of the state Supreme Courts — which could fruitfully use the tabulated data as a basis for discussion about which authorities to make available.

There is one existing study of citation practice in the Supreme Court of Victoria, which analyses citation practice in reported decisions published in the Victorian Reports in 1970, 1980 and 1990.[25] Compared with that study, this study examines citation practice over a much longer period. The additional seven decades analysed in this study permit greater richness of interpretation that was not possible in the earlier study.[26] For instance, the longer time span should make it easier to detect temporal trends in citation practice as well as ascertain the ease and extent to which the Court has adopted new and novel types of authority. If citation patterns reflect a court's conception of its role in society, as suggested by Friedman et al,[27] the current study will allow for the detection of changes in the

a sample of cases at five-year intervals between 1870 and 1970); Manz, 'The Citation Practice of the New York Court of Appeals, 1850–1993', above n 14 (analysing citation practice of the New York Court of Appeals at 10-year intervals between 1850 and 1990 plus 1993).

22 However, for a study that examines changes in judicial style, such as patterns of judgment writing and case length, on the High Court of Australia over a period of almost a century: 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.

23 Since 1995, the Supreme Court of Victoria has consisted of a separate Trial Division and Court of Appeal. The Court of Appeal comprises the Chief Justice, the President and currently nine Judges of Appeal, plus any additional Judges of Appeal appointed or acting under s 80B of the *Constitution Act 1975* (Vic). The Trial Division currently consists of the Chief Justice and 24 other judges. Prior to 1995, the Supreme Court of Victoria did not have a separately constituted Court of Appeal. For discussion of the merits of permanent courts of appeal at the state level: see President Michael Kirby, 'Permanent Appellate Courts — The Debate Continues' (1988) 4 *Australian Bar Review* 51; President Michael Kirby, 'Permanent Courts of Appeal — The NSW Court of Appeal' (1987) 69 *Australian Law Journal* 391. For discussions of the merits of permanent courts of appeal in other countries: see Susan Denham, 'Proposal for a Court of Appeal' (2006) 6 *Judicial Studies Institute Journal* 1; Office of the Attorney–General, *Replacing the Privy Council: A New Supreme Court* (Report of the Advisory Group, 2002).

24 See Smyth, 'What Do Judges Cite?', above n 19, 29–30.

25 Ibid. While there are many studies of judicial citation practice, few examine citation practice over a long period of time: see above n 21.

26 Cf Merryman, 'Toward a Theory of Citations', above n 14, 382.

27 Friedman et al, above n 3, 794.

Court's conception of its role in society over a century spanning from the early Edwardian period to the 21st century.

II Rationale for Citing Authorities

A *Consistency Citations*

Peter McCormick suggests that there are several categories of judicial citation.[28] Consistency citations are those referring to previous decisions of the citing court. McCormick suggests that 'the general principles of continuity and consistency and the legal value of predictability in the law require that [previous decisions] carry considerable weight'.[29] John Merryman echoes these sentiments, stating: 'Where the court has spoken the strongest case for *stare decisis* is presented'.[30] In *Nguyen v Nguyen*, Dawson, Toohey and McHugh JJ (Brennan and Deane JJ agreeing) stated that, in general, the extent to which a full court of a state supreme court regards itself at liberty to depart from its own previous decisions is for the court itself to determine.[31] In Victoria, the Full Court of the Supreme Court of Victoria reserves to itself the freedom to reverse its own previous decisions. Beginning with *Forster v Forster*,[32] the usual practice has been for a Full Court of five or more judges to be convened if an earlier decision of a Full Court of three judges is to be reviewed.[33] There have, however, been some exceptional circumstances where an earlier Full Court decision has been reconsidered without a Full Court of five or more judges being convened. In *Avco Financial Services Ltd v Abschinski* a Full Court of three judges decided not to follow an earlier Full Court decision.[34] In *R v Tait*, sitting in the Victorian Court of Appeal, Callaway JA (Winneke P and Crockett AJA agreeing) stated: 'It may be that in future we would extend those exceptional circumstances to enable a greater number of Full Court, and in due course some of our own, previous decisions to be reviewed by a court of three.'[35]

A decision of the Full Court or Court of Appeal binds a single judge sitting alone. In *Engebretson v Bartlett* it was decided that a decision of the Full Court in banc has the same precedential value as a decision of the appellate Full Court.[36] In the absence of a binding decision of a higher court, the practice in state and territory Supreme Courts in Australia is that a judge sitting alone will normally follow the earlier decision of a single judge of the same court sitting

[28] See McCormick, 'The Evolution of Coordinate Precedential Citation in Canada', above n 16, 271–4; McCormick, 'Judicial Citation, the Supreme Court of Canada and the Lower Courts', above n 15.

[29] McCormick, 'The Evolution of Coordinate Precedential Citation in Canada', above n 16, 273–4.

[30] Merryman, 'The Authority of Authority', above n 14, 654.

[31] (1990) 169 CLR 245, 268.

[32] [1907] VLR 159.

[33] C J F Kidd, '*Stare Decisis* in Intermediate Appellate Court 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, 277–8. See also *R v Yates* [1985] VR 41; *R v Tait* [1996] 1 VR 662, 666 (Callaway JA) (Winneke P and Crockett AJA agreeing).

[34] [1994] 2 VR 659, 663 (Fullagar J), 669 (Southwell J), 712 (Ormiston J).

[35] [1996] 1 VR 662, 666 (Callaway JA).

[36] [2007] VSC 163 (Unreported, Bell J, 25 May 2007) [232].

alone.[37] This practice is followed in the Supreme Court of Victoria.[38] As Bell J put it in *Shaw v Yarranova Pty Ltd*, judicial responsibility

> is not performed where [a] judge fails to determine the matter personally, preferring instead simply to follow an earlier decision on point of another member of the court.
>
> On the other hand, where there is such a decision on point, the judge does not start writing on a blank page. Proper regard must be given to the previous judgment. Considerations of comity require the previous decision to be followed unless the judge attains a higher than usual standard of conviction that his or her contrary conclusion is correct. The interests of justice are not served where different judges come to different conclusions on the same question according to reasoning that appears to be entirely subjective.[39]

B *Hierarchical Citations*

Hierarchical citations are citations to a court situated above the citing court in the judicial hierarchy. The Full Court of the Supreme Court of Victoria is bound by the ratio decidendi of decisions of the High Court of Australia, while obiter dicta of the High Court will be cited as being highly persuasive.[40] Prior to the enactment of the *Australia Act*s in 1986,[41] decisions of the Judicial Committee of the Privy Council were also binding upon the Full Court. Since the commencement of the *Australia Act*s, the state appellate courts are no longer bound to follow decisions of the Judicial Committee.[42]

The position is less clear with respect to decisions of the Judicial Committee made prior to the enactment of the *Australia Act*s. In *Hawkins v Clayton*, McHugh JA expressed the view that state Supreme Courts are no longer bound to follow decisions of the Judicial Committee given either before or after the commencement of the Acts.[43] This conclusion relied upon an extrapolation of the High Court's decision in *Viro v The Queen*.[44] However, academic commentators have questioned this view. Tony Blackshield suggests that the preferable interpretation of *Viro v The Queen* is that decisions of the Judicial Committee decided prior to 1986 continue to bind the state Supreme Courts until the High Court decides otherwise.[45] In *R v Judge Bland; Ex parte Director of Public Prosecutions (Vic)* a single judge of the Supreme Court of Victoria followed a decision of the Full Court that had been overruled by a decision of the Judicial

[37] See *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201, 204 (Burchett J).

[38] See *Shaw v Yarranova* [2006] VSC 45 (Unreported, Bell J, 23 February 2006) [66]–[69]; *Engebretson v Bartlett* [2007] VSC 163 (Unreported, Bell J, 25 May 2007), [63].

[39] [2006] VSC 45 (Unreported, Bell J, 23 February 2006) [66]–[67].

[40] See *Garcia v National Australia Bank* (1998) 194 CLR 395, 418 (Kirby J).

[41] See, eg, *Australia Act 1986* (Cth); *Australia Act 1986* (Imp); *Australia Acts (Request) Act 1985* (Vic) and equivalent instruments ('*Australia Acts*').

[42] *Cook v Cook* (1986) 162 CLR 376, 390 (Mason, Wilson, Deane and Dawson JJ). See also *Engebretson v Bartlett* [2007] VSC 163 (Unreported, Bell J, 25 May 2007) [61].

[43] (1986) 5 NSWLR 109, 136–7.

[44] (1976) 141 CLR 88.

[45] Tony Blackshield, 'Precedent' in Tony Blackshield, Michael Coper and George Williams (eds) *Oxford Companion to the High Court of Australia* (2001) 550, 551.

Committee decided prior to 1986.[46] The judge considered that the authority of the Full Court decision had been 'revived' by the *Australia Acts*.[47]

C *Coordinate Citations*

Coordinate citations are citations to other courts on the same tier in the court hierarchy. These citations are persuasive rather than binding sources of precedent. In the Supreme Court of Victoria, coordinate citations comprise citations to other intermediate appellate courts, such as the Supreme Courts of other Australian states and territories. The accepted position in Australia is that an intermediate appellate court is not bound by the decision of another intermediate appellate court, but will follow the decision of another intermediate appellate court unless convinced the decision is wrong.[48] Two related considerations underpin this principle.[49] First, there is a need for a consistent approach across Australia when decisions concern the effect of a Commonwealth Act or uniform legislation. Secondly, there should be consistency in the development of the common law throughout Australia.

D *Deference Citations*

Deference citations are citations to decisions of courts that are not part of the immediate judicial hierarchy, but still have persuasive value. Citations to decisions of English courts, including the House of Lords, English Court of Appeal and Judicial Committee after 1986, as well as decisions of courts in other common law jurisdictions such as New Zealand and the US, are examples. For a long time, English decisions were followed as a matter of course by state Supreme Courts. As recently as the mid-1970s, Justices of the High Court asserted that in the absence of High Court authority, the state Supreme Courts should follow decisions of the English Court of Appeal and House of Lords.[50] This situation has since changed; the *Australia Act*s were the catalysts of efforts to develop an Australian common law that is suited to Australian conditions and circumstances. The relevance of English case law to Australia has been eroded, initially by the United Kingdom's membership of the Council of Europe and European Union, and more recently by the increasing influence of European law on UK cases, in the form of instruments such as the *Convention for the Protection of Human Rights and Fundamental Freedoms*[51] and its adoption in the *Human Rights Act 1998* (UK) c 42.[52] In *Cook v Cook*, the High Court stated that

46 [1987] VR 225.

47 Ibid 230–2 (Nathan J).

48 *R v Morrison* [1999] 1 Qd R 397, 401 (Fitzgerald P).

49 Ibid.

50 See *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336, 341, where 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. Gibbs J went further and stated that the NSW Court of Appeal should have regarded itself as being bound by a decision of the English Court of Appeal: at 349.

51 Opened for signature 4 November 1950, 1 ETS 5 (entered into force 3 September 1953).

52 See Justice Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 244. See also Chief Justice Murray Gleeson, 'The Influence of the

while 'courts [in Australia] will continue to obtain assistance and guidance from the learning and reasoning of the United Kingdom courts', those decisions 'are useful only to the degree of the persuasiveness of their reasoning'.[53] Writing extra-curially in the wake of the commencement of the *Australia Acts*, Sir Anthony Mason stated:

> There is ... every reason why we should fashion a common law for Australia that is best suited to our conditions and circumstances. In deciding what is law in Australia we should derive such assistance as we can from English authorities. But this does not mean we should account for every English decision as if it were a decision of an Australian court. The value of English judgments, like Canadian, New Zealand and, for that matter, United States judgments, depends on the persuasive force of their reasoning.[54]

This statement reflects the practice in the Supreme Court of Victoria, which regards decisions of courts in the UK as persuasive, but is prepared to depart from them.[55] As Winneke ACJ put it in *R v Parsons*:

> A decision of the House of Lords, although not binding on this court, has none the less always been regarded as highly persuasive. However, unless the court is persuaded they are clearly wrong, it should be prepared to follow its own established authorities and practices even if, by doing so, it might result in a departure from a contrary opinion of the House of Lords.[56]

E *Secondary Authorities*

Secondary authorities are not binding on any court, but previous studies have identified several reasons why judges refer to them in their written reasons.[57] One reason is convenience. Secondary authorities often contain lists of cases that judges find convenient to adopt. In this manner, journal articles and textbooks act as de facto digests of case law, and citing the secondary authority provides a convenient shorthand alternative to listing the cases. A second reason for citing secondary authorities is to draw on academic opinion expressed in journal articles and learned texts to explore the origins of legal principles. A third reason is to draw on the opinion of academic writers to assist judges in ascertaining what earlier cases decided. A fourth reason is that citing secondary authorities may allow a judge to refer to the views of particularly well-respected academics

Privy Council on Australia' (Paper presented at the Anglo-Australian Lawyers Society, Sydney, 31 May 2007) <http://www.hcourt.gov.au/speeches/cj/cj_31may07.pdf>.

53 (1986) 162 CLR 376, 390 (Mason, Wilson, Deane and Dawson JJ).

54 Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 154. See also Gleeson, 'The Influence of the Privy Council on Australia', above n 52, 19, where the current Chief Justice of the High Court states that:

> the end of appeals to the Privy Council opened Australia to a wider range of international influences. The High Court now regularly consults the jurisprudence of Canada, New Zealand, the United States, and other common law countries, and, although not nearly as frequently, the jurisprudence of civil law countries.

55 *Britten v Alpogut* [1987] VR 929, 939 (Fullagar J); *R v Parsons* [1998] 2 VR 478, 485 (Winneke ACJ).

56 [1998] 2 VR 478, 485 (Winneke ACJ).

57 See Smyth, 'The Authority of Secondary Authority', above n 18, 28; Smyth, 'Other than "Accepted Sources of Law"?', above n 17.

or even judges writing extra-curially to provide corroborating opinion for the position he or she has reached. Judges will be more likely to adopt this course if there is only scant case law on point. Fifthly, secondary authorities are sometimes cited because they have been approved in previous cases as correctly stating the law. In such cases, 'the fact of citation gives a work *authority* to some degree and it will thus exert some influence on the way the law grows'.[58] Sixthly, secondary authorities are cited to examine the 'legislative facts' or 'policy rationale' that underpin legal rules. Much citation of social science and other non-legal secondary authorities falls into this category.

Judges differ on how appropriate it is to cite secondary authorities in written reasons. In the US, where citation to secondary authorities in the Courts of Appeal and Supreme Court is prevalent, judges of the stature of Benjamin Cardozo, Charles Hughes and Earl Warren have spoken in glowing terms of the value of legal periodicals and their willingness to draw on them in formulating their opinions.[59] Cardozo J pioneered the citation of law reviews in the US. In the 1920s and 1930s, Cardozo J had over three times as many citations to secondary authorities as his contemporaries on the New York Court of Appeals and his propensity to cite law reviews in his opinions was not rivalled until the 1980s and 1990s.[60]

In the UK, Lord Denning commented favourably six decades ago upon the value of citing academic authorities in written reasons.[61] More recently in the House of Lords in *Hunter v Canary Wharf Ltd*,[62] Lords Cooke and Goff expressed divergent views on the value of citing secondary authorities. Lord Cooke considered citation to secondary authorities to be useful when the law was unsettled, while Lord Goff found the relevant secondary authorities to be of little or no value.[63]

In Canada, debate on the value of citing legal periodicals was sparked by an article written by G V V Nicholls in 1950 in response to Rinfret CJ's refusal to recognise the *Canadian Bar Review* as an authority in a hearing in the Supreme Court of Canada.[64] The position of that Court has long since changed and it now readily cites secondary authorities.[65] Canadian judges, such as Justice Michael Bastarache of the Supreme Court of Canada, have argued that widespread

58 Merryman, 'The Authority of Authority', above n 14, 413 (emphasis in original).

59 See Judge Benjamin N Cardozo, 'Introduction' in Committee of the Association of American Law Schools (ed), *Selected Readings on the Law of Contracts from American and English Legal Periodicals* (1931) viii; Charles E Hughes, 'Foreword' (1941) 50 *Yale Law Journal* 737, 737; Chief Justice Earl Warren, 'The Northwestern University Law Review Begins Its Fifty-First Year of Publication' (1956) 51 *Northwestern University Law Review* 1, 1.

60 Manz, 'The Citation Practices of the New York Court of Appeals, 1850–1993', above n 14, 147–8.

61 See Lord Denning, 'Reviews and Notices: *A Textbook of the Law of Tort*' (1947) 63 *Law Quarterly Review* 516.

62 [1997] AC 655.

63 Ibid 697.

64 G V V Nicholls, 'Legal Periodicals and the Supreme Court of Canada' (1950) 28 *Canadian Bar Review* 422.

65 See Black and Richter, 'Citation of Academic Authority by the Supreme Court of Canada', above n 15, 377; McCormick, 'Academic Citations by the Lamer Court', above n 15.

citation of academic authorities in judgments is a positive development.[66] However, in a critique of Nicholls' 1950 article, J E Cote, a Judge of the Alberta Court of Appeal, has argued that the Supreme Court of Canada has gone too far in citing academic authority, and that it is not sufficiently selective in weighing up which academic authorities contain analysis worth citing.[67]

Most Australian judges who have expressed a view on citing academic authorities in reasons for decision have been in favour of the practice or at least accepting of it. Several High Court justices have expressed the view that judicial recourse to journal articles and other academic writings is a useful practice, including Sir Owen Dixon,[68] Sir Frank Kitto,[69] Sir Gerard Brennan,[70] Sir Anthony Mason[71] and Michael Kirby.[72] Others, such as Sir Victor Windeyer, while not directly and explicitly commenting on the merits of citing secondary authority, have given the practice their de facto approval by virtue of extensive citation to secondary authorities in their judgments.[73] One 'dissenting' Australian judicial voice is Sir Garfield Barwick, who expressed the extra-curial view that citing academic authors lessened the authority of the judgment and, as such, is a practice to be avoided as much as possible. His Honour's view is that

> citation of [academic writers], however eminent and authoritative, might reduce the authority of the judge and present him as a research student recording by citation his research material. ... [In these circumstances, written reasons] become an exercise in essay writing rather than the statement of reason for an authoritative judgment.[74]

III DATA COLLECTION AND METHODOLOGY

The cases considered by this article's study are decisions of the Supreme Court of Victoria reported in the Victorian Reports sampled at 10-year intervals from 1905 to 2005. This sample comprises 856 cases. The study does not consider unreported cases. This is consistent with previous studies of the citation practice of courts in Australia, Canada, NZ and the US. In recent years about one-fifth of all Full Court decisions have been reported.[75] Thus, only a relatively small number of cases are actually reported in the Victorian Reports. In Canada, the comparable figure for the provincial courts of appeal is one-sixth.[76] One reason not all cases have been reported in the authorised reports in recent times is the

[66] See Justice Michel Bastarache, 'The Role of Academics and Legal Theory in Judicial Decision-Making' (1999) 37 *Alberta Law Review* 739.
[67] Justice J E Cote, 'Far-Cited' (2001) 39 *Alberta Law Review* 640.
[68] Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (1965) 156.
[69] Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787, 797.
[70] Sir Gerard Brennan, 'A Critique of Criticism' (1993) 19 *Monash University Law Review* 213, 215.
[71] Mason, 'Future Directions in Australian Law', above n 54, 154.
[72] Justice Michael Kirby, 'Foreword: Welcome to Law Reviews' (2002) 26 *Melbourne University Law Review* 1.
[73] See Smyth, 'Other than "Accepted Sources of Law"?', above n 17, 36.
[74] Sir Garfield Barwick, *A Radical Tory* (1995) 224.
[75] See the figures reported in Smyth, 'What Do Judges Cite?', above n 19, 34.
[76] McCormick, 'The Evolution of Coordinate Precedential Citation in Canada', above n 16, 277.

proliferation of specialist report series, which can be more suitable for many cases. One example is the Victorian Administrative Reports. These contain many notable administrative law cases that do not make it into the Victorian Reports. One suspects that the decision to include an administrative law case in the Victorian Reports is influenced by the knowledge that, if it is not, it will certainly be published in the Victorian Administrative Reports. The Australian Criminal Reports serve a similar function for criminal cases.

The main justification for restricting the sample to cases reported in the Victorian Reports is pragmatic in that it ensures the data collection is manageable. Nevertheless, the Council of Law Reporting in Victoria selects cases for inclusion in the Victorian Reports on the basis of their precedential value. Thus, there is also an argument that, subject to the point above about the proliferation of specialist reports, these 'cases probably include a high proportion of all the decisions sufficiently important to call for reasoned judgment based on authority'.[77] Failure to consider unreported cases and cases reported in specialist reports, however, is a limitation. We might miss some important cases reported in the specialist reports and we cannot compare citation practice between reported and unreported cases.

All citations to case law and secondary authorities in the sample cases were counted. Citations to constitutions, regulations and statutes were excluded 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.[78] 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.[79] 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.[80]

Citations to judgments of 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 citations in the text of a judgment and citations in footnotes to a judgment because this is a matter of reporting convention which has varied over time. No distinction was made between positive and negative citations. One reason for this is that irrespective of whether an authority is cited with approval or disapproval, it is still considered sufficiently important for the judge to cite it. Since citation is an act of judicial discretion, the judge is free not

77 Ibid.

78 Merryman, 'The Authority of Authority', above n 14, 652.

79 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 12, 3–4.

80 This practice is consistent with the existing studies for Australia and NZ: see, eg, Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 19, 58.

to cite it at all if the authority has no influence on the judge's thinking.[81] Secondly, unlike academic citations, few judicial citations are critical.[82] For example, McCormick found that in the Supreme Court of Canada less than one per cent of judicial citations are negative.[83]

IV OUTPUT OF THE SUPREME COURT OF VICTORIA

Figure 1 shows the number of cases reported in the Victorian Reports at 10-year intervals between 1905 and 2005. In most of the sample years the reports covered between 70 and 100 cases. The largest number of cases were reported in 1905 (104) and 1965 (101) and the smallest number of cases were reported in 1945 (52). Figure 2 shows that the number of judgments traces a scalloped pattern, with the largest numbers of judgments reported at opposite ends of the time spectrum: 1905 (145), 1915 (13), 1995 (144) and 2005 (192). A spike with 136 reports occurred in 1965. The number of single-authored judgments remained fairly steady over the period, in the range of 70–80 per cent of judgments delivered. There has, however, been a sharp increase in the number of short concurring judgments (less than a quarter of a page in length) over the last three decades of the sample period. The proportion of short concurring judgments declined from 7.6 per cent in 1905 to less than 5 per cent in 1935, 1945 and 1955. However, in 1985 that proportion had risen to 12.1 per cent of judgments, and continued to increase sharply to 18.8 per cent in 1995 and further to 31.7 per cent in 2005. The recent increase in concurring judgments has been at the expense of a decline in joint judgments. In 1975, 18.1 per cent of judgments were joint judgments, but three decades later this figure had fallen to 5.7 per cent in 2005.

[81] See Judge 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 Judge Richard A Posner, 'The Influence of Economics on Law: A Quantitative Study' (1993) 36 *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 *Journal of Legal Studies* 271.

[82] Reluctance to give negative citations on the bench is a manifestation of politeness in the manner in which judges communicate through written reasons. This politeness is not exhibited by academics. For a discussion of 'judicial politeness' in written reasons: see Dennis Kurzon, 'The Politeness of Judges: American and English Judicial Behaviour' (2001) 33 *Pragmatics* 61.

[83] McCormick, 'The Supreme Court Cites the Supreme Court', above n 10, 462.

Figure 1 — Number of Cases

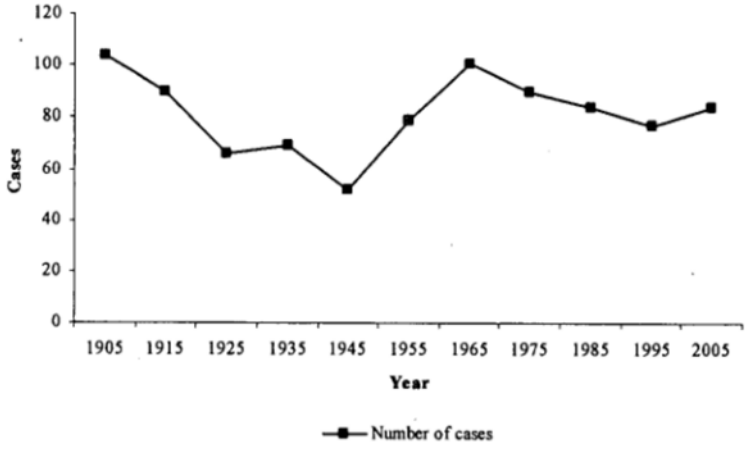


Figure 2 — Number of Judgments

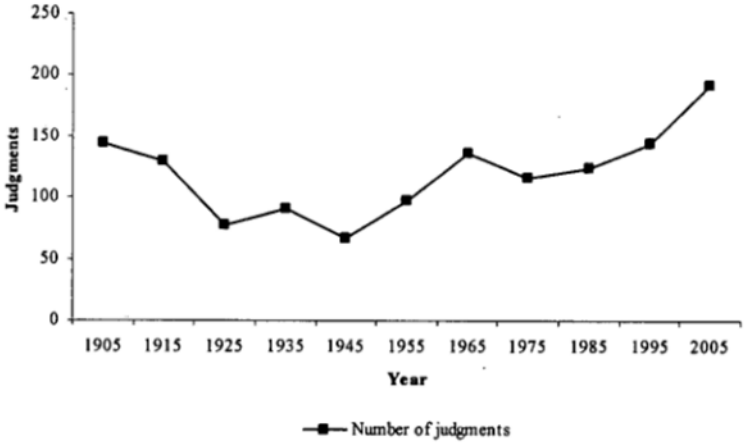


Table 1 shows the case load of the Court over time. The highest proportion of cases heard by the Court dealt with criminal law, evidence and procedure, property law, statutory interpretation and wills and probate. These five areas of law constituted a clear majority of the sampled cases heard by the Supreme Court. Robert Kagan and his colleagues found that the case load of state Supreme Courts in the US changed over the century 1870–1970.[84] In particular, their study observed a substantial increase in administrative, criminal and tort law cases and a decline in commercial and property law cases.[85] Their explanation for this secular change in the composition of the courts' workloads is that the resolution of commercial law matters has shifted from 'the upper reaches of the court system to other branches and levels of government' while there has been an increase in 'the confrontation between citizen and state'.[86] The present data also reveal a sustained increase over the observation period in criminal law matters in the Supreme Court of Victoria, though there is no upward trend in administrative and tort law cases.

[84] Robert A Kagan et al, 'The Business of State Supreme Courts, 1870–1970' (1977) 30 *Stanford Law Review* 121.
[85] Ibid 133.
[86] Ibid.

Table 1 — Subject Matter of Reported Cases in the Supreme Court of Victoria

Area of law	1905	1915	1925	1935	1945	1955	1965	1975	1985	1995	2005	Total
Wills/probate	18	14	10	9	10	10	12	7	1	5	3	99
Criminal	1	7	4	6	7	11	17	20	13	17	37	140
Constitutional	0	0	0	0	0	0	1	0	0	3	1	5
Property	7	12	13	8	11	19	9	11	8	10	5	113
Contracts	1	5	7	2	3	5	7	6	6	1	2	45
Procedure	29	18	6	2	4	5	8	14	15	15	7	123
Torts	2	3	2	2	1	3	5	5	2	3	5	33
Taxation	11	8	0	3	0	0	2	3	2	0	1	30
Statute	10	7	9	22	8	6	7	4	12	15	9	109
Insurance	1	0	0	0	0	1	0	2	4	0	2	10
Administrative	2	0	1	1	0	2	8	4	8	1	4	31
Industrial	3	1	1	1	1	1	1	2	2	0	1	14
Family	6	7	7	9	4	7	9	4	0	0	0	53
Trusts	2	4	1	1	0	5	2	0	2	1	1	19
Jurisdiction	3	1	0	0	0	1	0	1	0	0	2	8
Customs	0	1	0	0	0	0	0	0	0	0	0	1
International	0	1	0	0	0	1	0	0	1	0	1	4
Company	8	1	5	3	3	2	13	6	8	4	3	56
Damages	0	0	0	0	0	0	0	0	0	2	0	2
Total	104	90	66	69	52	79	101	89	84	77	84	895

The confrontation between citizen and state of which Kagan and his colleagues wrote has not played out in the Supreme Court of Victoria. There has been no increase in administrative law matters for three reasons. First, many such matters come through the Victorian Civil and Administrative Tribunal ('VCAT'), the President of which is a Supreme Court judge. Many decisions of importance in VCAT are decided by the President. They are, therefore, likely to be heard originally by a Supreme Court judge (albeit as President of VCAT). The status of the President may influence the lack of appeals to the Court of Appeal. Secondly, the *Administrative Law Act 1978* (Vic) has not proven an attractive vehicle to encourage judicial review. It has many procedural limits, notably an inflexible time limit that cannot be extended by the Court.[87] Thirdly, the early creation of the Administrative Appeals Tribunal ('AAT'), which later became the VCAT, introduced a wide right of merits review in Victoria from 1984. This probably precluded many applications for judicial review that would otherwise have been made. In effect, this mechanism for administrative review has directed most administrative law challenges away from the Supreme Court.

[87] *Administrative Law Act 1978* (Vic) s 4(1).

Figures 3 and 4 show the average length of cases and the average length of individual judgments (both measured in numbers of pages) for reported cases and judgments in each of the sampled years. The average length of both reported cases and judgments displays a sustained upward trend over the course of the century but falls off in the last decade of the observation period. The pronounced dip in the average length of judgments in 2005 reflects the sharp increase in the proportion of short concurring judgments in that year. Notwithstanding the 20 per cent drop in the last decade, the average length of judgments has increased by 141 per cent over the entire sample period. The average length of reported judgments in 1905 was 2.7 pages and by 1995 this had increased to 8.1 pages; even in 2005 it was still 6.5 pages. The average length of reported cases increased almost threefold over the century, by 280 per cent, from 3.9 pages in 1905 to 14.8 pages in 2005. An increase in the average length of cases and judgments has also been observed in decisions of the High Court of Australia,[88] the English Court of Appeal,[89] and the US state Supreme Courts.[90]

Friedman and his colleagues suggest some explanations for the increase in the length of opinions in the US state Supreme Courts, which are also applicable to the Supreme Court of Victoria.[91] First, with each passing year the Court has more of its own law to discuss and be cited. Secondly, from a broader policy perspective, 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. Jean Louis Goutal argues that one of the major drivers of longer judgments in the English Court of Appeal throughout the 20th century is that judges have laboured to adapt earlier precedents to changed economic and political conditions.[92] Thirdly, over the last two decades or so the information technology revolution has made it much easier to prepare judgments. Changes in information technology have altered the mechanical aspects of the preparation of judgments and the ease of accessing authorities that can be cited in them. For example, free online services such as AustLii and various subscription-based online services, such as LexisNexis and Westlaw, provide wider access to case histories and authorities.[93] Fourthly, it is likely that the creation of a permanent Court of Appeal in 1995 contributed to longer judgments. The Court of Appeal has dedicated researchers (the Supreme Court has a few, but not as many). The changes in information technology have worked in conjunction with the Court's increased ability to call upon these added resources, to generate greater citation of authorities and longer judgments.

88 Groves and Smyth, above n 22, 258–66.
89 Jean Louis Goutal, 'Characteristics of Judicial Style in France, Britain and the USA' (1976) 24 *American Journal of Comparative Law* 43, 56.
90 Friedman et al, above n 3, 779.
91 Ibid 777–8.
92 Goutal, above n 89, 61–4.
93 Groves and Smyth, above n 22, 265–6.

Figure 3 — Average Length of Cases

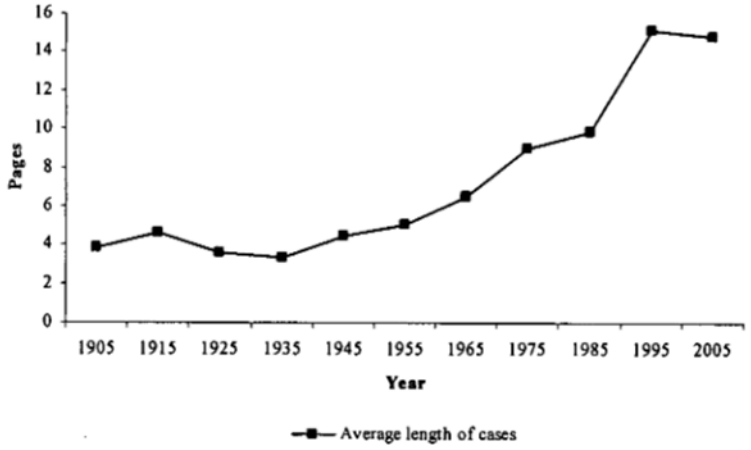
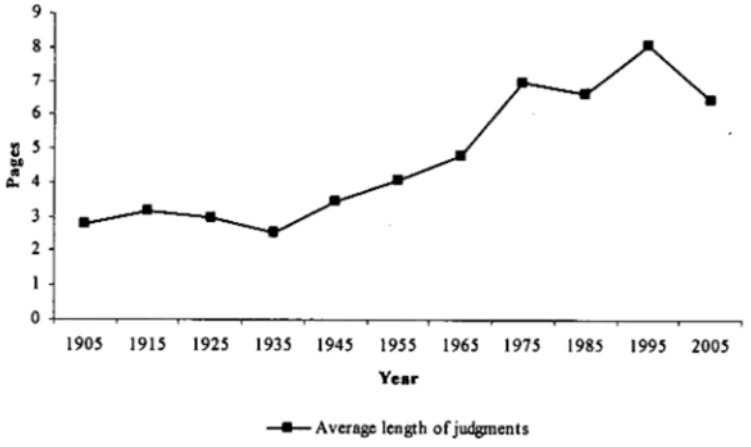


Figure 4 — Average Length of Judgments

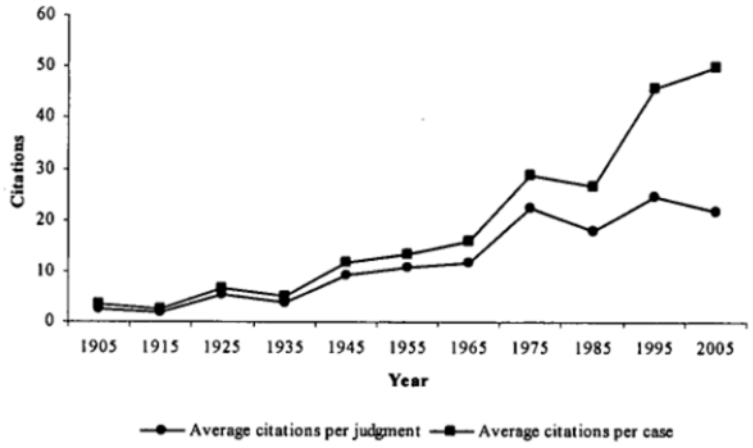


V TRENDS IN THE CITATION PRACTICE OF THE SUPREME COURT OF VICTORIA

Figure 5 provides an overview of citation patterns on the Supreme Court of Victoria over the course of the last century, sampled at 10-year intervals. There has been a positive trend in both the average number of citations per judgment and the average number of citations per case. In 1905, the average number of citations per judgment was 2.50[94] and the average number of citations per case was 3.49. In 2005, the average number of citations per judgment was 21.96 and the average number of citations per case was 50.20. The cumulative increase in the average number of citations amounts to 780 per cent with respect to judgments and 1340 per cent with respect to cases.

This tendency for courts to cite more authorities over time has also been observed in the few studies of citation practice of courts in the US that have adopted a long time horizon. For example, William Manz found that average citations in majority opinions on the New York Court of Appeals increased from 5.4 to 12.4 between 1850 and 1980.[95] Friedman and his colleagues found that average citations in 'routine opinions' in US state Supreme Courts increased from 3.2 in 1870–80 to 9.4 in 1960–70.[96]

Figure 5 — Average Number of Citations



[94] According to Table 2, in 1905, total citations numbered 363 and the total number of judgments was 145. Therefore, 363 divided by 145 equals 2.5.

[95] Manz, 'The Citation Practices of the New York Court of Appeals, 1850–1993', above n 14, 124–6.

[96] Friedman et al, above n 3, 795–6.

Table 2 shows the types of authorities the Supreme Court of Victoria has cited during the sample years. The following discussion examines general trends in the citation practice of the Court over time in more detail in terms of the taxonomy of citations identified above; namely, consistency citations, hierarchical citations, coordinate citations, deference citations and citations to secondary authorities.

Table 2 — Citations in Reported Cases in the Supreme Court of Victoria

	1905	**1915**	**1925**	**1935**	**1945**	**1955**	**1965**	**1975**	**1985**	**1995**	**2005**
Total cases	104	90	66	69	52	79	101	90	84	77	84
Total judgments	145	130	78	91	67	97	136	116	124	144	192
High Court											
1903–19	3	29	21	10	7	11	18	76	33	27	38
1920–39	–	–	13	13	25	35	53	77	41	42	83
1940–59	–	–	–	–	7	53	195	159	92	103	74
1960–79	–	–	–	–	–	–	39	206	156	212	140
1980–99	–	–	–	–	–	–	–	–	101	714	759
2000–	–	–	–	–	–	–	–	–	–	–	222
Subtotal	3	29	34	23	39	99	305	518	423	1098	1316
Average per case	0.03	0.32	0.52	0.33	0.75	1.25	3.02	5.76	5.04	14.26	15.67
Average per judgment	0.02	0.22	0.44	0.25	0.58	1.02	2.24	4.47	3.41	7.63	6.85
Federal Court	–	–	–	–	–	–	–	3	25	79	77
Supreme Court of Victoria											
Total citations	132	38	67	41	94	173	336	556	433	738	1184
Average per case	1.27	0.42	1.02	0.59	1.81	2.19	3.33	6.18	5.15	9.58	14.10
Average per judgment	0.91	0.29	0.86	0.45	1.40	1.78	2.47	4.79	3.49	5.13	6.17
Supreme Courts of other states and territories											
Tasmania	0	1	0	0	3	4	3	9	4	12	5
NSW	1	4	3	5	18	47	53	113	126	237	416
Queensland	0	0	0	0	3	6	10	41	27	92	95
WA	0	0	0	0	0	1	3	4	5	26	53
SA	0	0	0	0	3	11	11	18	16	38	70
Northern Territory	–	–	–	–	–	–	–	–	1	10	5
ACT	–	–	–	–	–	–	–	–	4	4	14
Subtotal	1	5	3	5	27	69	80	185	183	419	658
Other courts	–	–	–	–	–	9	15	11	7	8	108

English courts											
House of Lords	30	11	21	16	65	46	128	143	169	244	92
Judicial Committee	15	7	13	14	77	29	44	77	62	71	29
Court of Appeal	41	39	97	94	99	208	231	305	286	281	220
Lower courts	104	86	139	114	120	266	319	444	313	183	190
Subtotal	190	143	270	238	361	549	722	969	830	779	531
Average per case	1.83	1.59	4.09	3.45	6.94	6.95	7.15	10.77	9.88	10.12	6.32
Average per judgment	1.31	1.10	3.46	2.62	5.39	5.66	5.31	8.35	6.69	5.41	2.77
Other countries	6	2	22	7	39	64	30	82	69	180	56
Secondary sources — legal											
Books	30	19	33	33	45	78	91	201	173	93	175
Periodicals	0	4	4	12	9	16	17	28	29	4	6
Encyclopaedias	0	0	0	0	0	1	1	0	1	1	0
Law reform reports	0	0	0	0	0	0	0	0	15	21	15
Dictionaries	0	1	0	0	2	0	0	4	3	7	1
Other	0	0	1	0	2	6	12	18	30	95	66
Subtotal	30	24	38	45	58	101	121	251	251	221	263
Secondary sources — non-legal											
Books	0	0	3	0	2	0	0	0	0	0	0
Periodicals	0	0	0	0	0	0	0	0	0	0	0
Dictionaries	1	1	0	1	4	5	2	13	6	13	23
Other	0	0	0	0	0	0	0	0	0	0	1
Subtotal	1	1	3	1	6	5	2	13	6	13	24
Total	**363**	**242**	**437**	**360**	**624**	**1069**	**1611**	**2588**	**2227**	**3535**	**4217**
Average citations per judgment	2.50	1.86	5.60	3.96	9.31	11.02	11.85	22.31	17.96	24.55	21.96
Average citations per case	3.49	2.69	6.62	5.22	12.00	13.53	15.95	28.76	26.51	45.91	50.20

A *Consistency and Hierarchical Citations*

Studies of courts in Australia, Canada and NZ have found that hierarchical citations form the highest proportion of judicial citations, followed by consistency citations.[97] Studies for the US have found that consistency citations form the largest share of total citations, followed by hierarchical citations.[98] Consistency and hierarchical citations are the two most important forms of citation in the Supreme Court of Victoria. There has been a general upward trend in the average number of both types of citation. In 1905, the average numbers of citations per judgment and per case to previous decisions of the Supreme Court of Victoria were 0.91 and 1.27, respectively. There was a slight dip in the following decades (1915–35), but they have followed a positive trajectory ever since. In 2005, the average numbers of citations per judgment and per case to previous decisions of the Supreme Court of Victoria had increased to 6.17 and 14.10, respectively. In 1905, the average numbers of citations on a per judgment and per case basis to the High Court were just 0.02 and 0.03, but by 2005, the comparable figures were 6.85 and 15.67.

While the average number of consistency and hierarchical citations on a per case and per judgment basis have increased over time, hierarchical citations to the High Court have become more important than consistency citations to the Supreme Court's own previous decisions. In 1905, the highest proportion of the Supreme Court's citations were consistency citations, but by 2005 the highest proportion of the Court's citations were hierarchical citations. In 1905, 36.4 per cent of the Court's citations were to its own previous decisions, but by 2005 this figure had fallen to 28.1 per cent.

In 1905, just 0.8 per cent of the Court's citations were to decisions of the High Court, less than the Judicial Committee (4.1 per cent), the House of Lords (8.3 per cent) and the English Court of Appeal (11.3 per cent). Of course, it may reasonably be argued that we do not learn much from examining the Court's citations to decisions of the High Court in 1905 given that 1904 was the High Court's first full year of operation and, as a consequence, there were few High Court cases to cite. Thus, if we take 1915 as a starting point, after a decade of High Court jurisprudence the High Court accounted for 12 per cent of the Court's citations, which was more than either the Judicial Committee or the House of Lords, but still less than citations to the English Court of Appeal. In fact, it was not until 1965 that the Supreme Court of Victoria cited the High Court more than the English Court of Appeal. There are at least two reasons for this phenomenon. The first is that there is a large stock of English Court of Appeal cases to cite, while it has taken time for the body of High Court cases to develop. The other reason is the important place that decisions of English courts have occupied as sources of authority in the Australian court structure for most

[97] For Canada: see McCormick, 'Judicial Citation, the Supreme Court of Canada and the Lower Courts', above n 15; McCormick, 'Judicial Authority and the Provincial Courts of Appeal', above n 16. For Australia: see Smyth, 'What Do Judges Cite?', above n 19, 43–9; Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 19, 59; Smyth, 'Citation of Judicial and Academic Authority', above n 19, 3. For NZ: see Smyth, 'Judicial Citations', above n 20, 863.

[98] See, eg, Merryman, 'The Authority of Authority', above n 14, 652.

of the century under consideration. Four decades after the High Court first overtook the English Court of Appeal as a source of authority for the Supreme Court of Victoria, the High Court's position at the apex of the court hierarchy in Australia was firmly entrenched. By 2005, hierarchical citations to the High Court were almost one-third of total citations, clearly higher than any other single court.

The other noticeable feature of Table 2 with respect to hierarchical citations is that the Supreme Court favours more recent High Court cases. In 2005, the Court cited 759 High Court cases decided between 1980 and 1999; 140 High Court cases decided between 1960 and 1979; 74 High Court cases decided between 1940 and 1959, and so on. The same decline in citation to earlier High Court cases is observed in the other sample years, at least back to 1955. Previous studies have observed that precedent has a citation half-life. Put formally, the citation half-life is the probability that citation of a case by the Court is reduced by 50 per cent every x years.[99] The practical implication of a case having a citation half-life is that the probability that it will be cited declines as it gets older. There are several reasons for the decline in the citation power of precedent over time.[100] First, later cases may be more relevant on the facts because the social context of earlier cases has changed. Secondly, the stock of older precedent will be reduced over time as earlier cases are overruled by later cases or statutes. Thirdly, legal opinion may have changed so that even if the earlier cases are not overruled, their reasoning may be regarded as less persuasive.

B *Coordinate Citations*

There has been an increase in the proportion of coordinate citations over the last two decades, after having very low citation rates for most of the last century. For the first four decades of the study (1905–35) coordinate citations formed a miniscule proportion of the Supreme Court's citations and most coordinate citations were to the Supreme Court of New South Wales. Between 1945 and 1985, coordinate citations hovered around 5–6 per cent of the Court's citations in most sample years and did not rise above 10 per cent. In 1995, coordinate citations exceeded 10 per cent of citations (11.9 per cent) for the first time and by 2005, coordinate citations represented 15.6 per cent of the Court's citations. The figure for 1995 is similar to the finding from the previous study of the Court's citation practice that coordinate citations accounted for 13.3 per cent of the Court's total citations in 1990.[101] The 2005 figure is very close to the estimate that coordinate citations in the Supreme Court of Victoria constitute 15.9 per cent of citations, based on the 50 most recent reported cases as at June 1999.[102]

[99] See Merryman, 'Toward a Theory of Citations', above n 14, 395; Landes and Posner, 'Legal Precedent', above n 7, 259.

[100] Merryman, 'Toward a Theory of Citations', above n 14, 398.

[101] Smyth, 'What Do Judges Cite?', above n 19 (calculated from tables 5 and 8).

[102] Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 19, 72 (calculated from table 2).

The NSW Supreme Court is the source of the overwhelming majority of coordinate citations. From 1905 to 1935 all but one coordinate citation was to that Court. Since 1945, citations to that Court 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. One explanation for the dominance of NSW is that, once cited, there is a flow-on effect. Peter Harris has argued that once a case from one state court is cited by another state court, it becomes 'part of the common law of the [citing state]' and the probability that an out-of-state court would cite it again increases accordingly.[103] Another explanation for the prevalence of citations to the NSW Supreme Court is the social proximity of the states. Merryman argued that the Supreme Court of California cited the Supreme Courts of some states more than others because the social context of litigation in some states was closest to California.[104] Because Victoria and NSW are geographically proximate and have a similar industrial base, it might be argued that Victoria has more in common with NSW than, say, Western Australia, which is on the other side of the country and heavily reliant on agricultural and mining industries.[105] South Australia is geographically proximate to Victoria, but is much less industrial than Victoria or NSW. NSW and Victoria have also experienced quite different immigration patterns from SA and WA.

Previous studies have also found that the NSW Supreme Court is cited more than the other state or territory Supreme Courts.[106] For example, the Supreme Court of WA cites the NSW Supreme Court far more frequently than it cites the Supreme Court of SA.[107] Thus, there seem to be other considerations at play, apart from the geographical and economic proximity of the states. Another reason for the high proportion of coordinate citations to the NSW Supreme Court is the prestige of that Court relative to other state Supreme Courts. NSW has the largest population of any state in Australia. Friedman and his colleagues found that the Supreme Court of California was cited much more often than the Supreme Courts of states such as Alaska and Hawaii. Their explanation was that California had a much larger population than these states; therefore, the decisions of the Supreme Court of California carried more weight.[108] NSW also has the biggest economy of any state in Australia.[109] Reflecting the importance of its economy, more commercial cases are commenced in NSW than all other Supreme Courts combined. Overall, about two-thirds of commercial litigation in Australia is commenced in NSW. There are also parallels here with California, which has the eighth largest economy in the world, about three-fifths the size of

[103] Peter Harris, 'The Communication of Precedent among State Supreme Courts' (Thesis, Yale Law School) cited in Friedman et al, above n 3, 804–5.
[104] Merryman, 'Toward a Theory of Citations', above n 14, 403.
[105] Smyth, 'What Do Judges Cite?', above n 19, 46.
[106] Ibid; Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 19, 64; Smyth, 'Citation of Judicial and Academic Authority', above n 19, 17.
[107] Smyth, 'Citation of Judicial and Academic Authority', above n 19, 17.
[108] Friedman et al, above n 3, 804–7.
[109] Australian Bureau of Statistics, *2006–07: Australian National Accounts: State Accounts*, ABS Catalogue No 5220.0 (2007).

China's, and larger than the economies of Brazil and Canada.[110] Thus, the economic impact of decisions in both states is likely to be considerable, with spillover effects to other states.

The NSW Bar has produced the highest number of appointments to the High Court[111] and Bert Evatt became Chief Justice of the NSW Supreme Court following his Honour's retirement from the High Court. The NSW Supreme Court, along with the Supreme Court of Victoria, has a reputation for innovation among the state Supreme Courts. This is consistent with US evidence that the state Supreme Courts which have reputations for doctrinal leadership, such as California, Massachusetts, New York and Washington state, receive more out of court citations than other state Supreme Courts, holding sociocultural factors constant.[112] In Canada, the Ontario Court of Appeal is the equivalent of the NSW Supreme Court in Australia. Such has been the dominance of the Ontario Court of Appeal in receiving coordinate citations from the other provincial courts of appeal in Canada that McCormick has dubbed it a junior Supreme Court of Canada.[113]

C *Deference Citations*

A noticeable feature of Table 2 is the importance of deference citations to decisions of the English courts for most of the century. Citations to decisions of English courts only begin to fall following the commencement of the *Australia Act*s and subsequent calls for building an Australian common law. On an average per judgment and average per case basis, citations to English courts as a whole were higher than citations to the High Court up to and including 1985, and citations to English courts as a whole were higher than citations to the Court's own previous decisions for all years except 2005. In 1985, citations to English cases accounted for 37 per cent of all citations; following the commencement of the *Australia Act*s this fell to 22 per cent of all citations in 1995 and 13 per cent in 2005. The decline in the proportion of English cases cited by the Supreme Court of Victoria is similar to what has occurred in the provincial courts of appeal in Canada. McCormick found that English courts account for about 15 per cent of citations in the provincial courts of appeal in Canada.[114] By contrast, the state Supreme Courts in the US hardly cite any English cases at all.[115]

110 See generally Department of Finance, California, *2006 California Statistical Abstract* (2007).

111 See Daryl Williams, 'Judicial Independence and the High Court' (1998) 27 *University of Western Australia Law Review* 140, 144.

112 See Friedman et al, above n 3; Caldeira, 'On the Reputation of State Supreme Courts', above n 9, 801–8; Caldeira, 'The Transmission of Legal Precedent', above n 9; Manz, 'The Citation Practices of the New York Court of Appeals, 1850–1993', above n 14; Jake Dear and Edward W Jessen, '"Followed Rates" and Leading State Cases, 1940–2005' (2007) 41 *UC Davis Law Review* 683.

113 McCormick, 'The Evolution of Coordinate Precedential Citation in Canada', above n 16, 291.

114 McCormick, 'Judicial Authority and the Provincial Courts of Appeal', above n 16.

115 For example, Merryman, 'Toward a Theory of Citations', above n 14, found that in 1950, of 4917 citations by the Supreme Court of California, only seven were to English cases. The picture was similar for 1960 and 1970. Mann, 'The North Carolina Supreme Court', above n 14, found that of 2522 cases cited by the North Carolina Supreme Court in 1977, only three were English cases. Beaird, 'Citation to Authorities by the Arkansas Appellate Courts', above n 14, 317, found that of over 20 000 citations to cases on the Arkansas Supreme Court between 1950

The House of Lords, English Court of Appeal and lower English courts were cited more than the Judicial Committee, though the Judicial Committee sat at the apex of the Australian court hierarchy for much of the period of the study. Previous studies have also found that state and territory Supreme Courts in Australia cite the Judicial Committee less than other English courts.[116] This finding is replicated for the High Court,[117] the NZ Court of Appeal[118] and the provincial courts of appeal in Canada.[119] One explanation for this finding is that there are relatively few decisions of the Judicial Committee to cite. Even when the Judicial Committee was in its heyday prior to abolition of appeals from the Supreme Court of Canada in 1949, when it sat at the pinnacle of the judicial hierarchy in Australia, Canada and NZ, relatively few cases made it to the Judicial Committee.[120] Following the abolition of appeals to the Judicial Committee from Australia, NZ was the only significant Commonwealth country to retain appeals. In 2003, NZ abolished appeals to the Judicial Committee, leaving only 11 mainly Caribbean and small island states that retain final appeal to the Judicial Committee.[121]

Another possible explanation for the small number of citations to the Judicial Committee relative to the House of Lords is that the Judicial Committee has sometimes been regarded as producing decisions of dubious quality.[122] It has been suggested that the Judicial Committee is the poor cousin of the House of Lords.[123] A prominent critic of the Judicial Committee (albeit largely in private) was Sir Owen Dixon, who was scathing in his Honour's diaries and private

and 2000, only nine were to foreign cases. Leonard, 'An Analysis of Citations to Authority in Ohio Appellate Decisions', above n 14, 139, found that in 1990, the Ohio Supreme Court cited only three English cases. Manz, 'The Citation Practices of the New York Court of Appeals, 1850–1993', above n 14, 132 found that the New York Court of Appeals did not cite a single English case in 1993.

116 Smyth, 'What Do Judges Cite?', above n 19, 44; Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 19, 66; Smyth, 'Citation of Judicial and Academic Authority', above n 19.

117 Smyth, 'Citations by Court', above n 17.

118 Smyth, 'Judicial Citations', above n 20, 865.

119 McCormick, 'Judicial Authority and the Provincial Courts of Appeal', above n 16.

120 Between 1900 and 1999, the Judicial Committee handed down 6 157 decisions. Australian cases accounted for 444 of these decisions; of these, 37 were appeals from the Supreme Court of Victoria: see Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006) 232–3.

121 The countries that retain appeal to the Judicial Committee are: Antigua and Barbuda; Bahamas; Barbados; Belize; Cook Islands and Niue; Grenada; Jamaica; Saint Christopher and Nevis; Saint Lucia; Saint Vincent (and the Associated States of New Grenadines Zealand); and Tuvalu.

122 See Smyth, 'Citation of Judicial and Academic Authority', above n 19, 19. Similar sentiments have been expressed in NZ and Canada. For a review of historical criticism of the Judicial Committee in NZ: see Judge K J Keith, 'The Unity of the Common Law and the Ending of Appeals to the Privy Council' (2005) 54 *International and Comparative Law Quarterly* 197. For the position in Canada: see Enid Campbell, 'The Decline of the Jurisdiction of the Judicial Committee of the Privy Council' (1959) 33 *Australian Law Journal* 196, 200–2; Anne Roland, 'Appeals to the Judicial Committee of the Privy Council: A Canadian Perspective' (2006) 32 *Commonwealth Law Bulletin* 569.

123 John Goldring, *The Privy Council and the* Australian Constitution (1996) 51. See also Geoffrey Sawer, 'Appeals to the Privy Council — Australia' (1970) 2 *Otago Law Review* 138, 145. For extensive discussion of the influence of the Judicial Committee on the development of Australian law: see Chief Justice Murray Gleeson, 'The Birth, Life and Death of Section 74' (Speech delivered at the Samuel Griffith Society, Sydney, 14 June 2002); Gleeson, 'The Influence of the Privy Council on Australia', above n 52, 2–4.

correspondence to contemporaries such as Chief Justice John Latham of the lack of understanding exhibited by the English Law Lords in the disposition of British Commonwealth cases.[124]

The reduced stock of cases to cite as one moves up the court hierarchy also explains why the Supreme Court of Victoria cites more lower court English decisions than decisions of the English Court of Appeal and more decisions of the English Court of Appeal than the House of Lords for much of the period. The Court would presumably cite a decision of the House of Lords or Judicial Committee in preference to that of the Queen's Bench or Chancery Division if one was on point, but often there is no such decision. The English High Court and Court of Appeal have traditionally heard most probate and trust matters (which rarely reach the House of Lords) and many criminal law cases (which did not appear in the House of Lords in great numbers until the 1970s). These are two areas that occupied a large part of the jurisdiction of Australian state courts.

To summarise, for a large part of the 20th century, Australian state courts cited English cases because:

1 the law of Australia and England was largely comparable;
2 there were many useful precedents available in English cases; and
3 there was often not comparable Australian authority and, where there was, it was largely informed by the English cases.

Deference citations to courts in countries other than England have increased in absolute number over time, peaking in 1995, before falling in 2005. However, in proportional terms deference citations to courts in countries other than England remain largely inconsequential. In those years when there was a relatively high proportion of citations to courts in countries other than England, these citations accounted for at most 5–6 per cent of deference citations. In most years this sort of deference citation was responsible for 1–2 per cent of total citations. For most of the period being considered, courts in countries other than Australia and England would have been regarded as having little persuasive value. Such decisions may also have been difficult to locate.[125] The problem of easily locating such decisions has only changed relatively recently with the advent of online database services such as Westlaw. The recent increase in the propensity of the High Court to cite cases from a range of countries as part of the process of fashioning a common law suited to the needs of Australia has not had much of a 'trickle down' effect to the state and territory Supreme Courts.[126] In this respect, the findings in this study are consistent with previous studies for state Supreme Courts in Australia, which have found that deference citations to courts in countries other than England make up 2–3 per cent of citations.[127] Most of these deference citations were to courts in Canada, NZ and the US. Citations to courts

[124] See Philip Ayres, *Owen Dixon* (2003) 41–2, 79–82, 246.
[125] Smyth, 'What Do Judges Cite?', above n 19, 47.
[126] For a discussion of the preparedness of the High Court to cite cases from a range of countries: see Lefler, 'A Comparison of Comparison', above n 17, 174, 190.
[127] See Smyth, 'What Do Judges Cite?', above n 19; Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 19.

in NZ can be explained by its geographical proximity to Australia, while Canada and the US are both common law countries with federal structures. This finding is also consistent with previous studies for the state Supreme Courts.[128]

D *Secondary Authorities*

Citations to secondary authorities have increased over time, but in 2005 they still only accounted for a relatively small proportion of the Court's overall citations. At the end of the sample period, 6.8 per cent of the Court's total citations were to secondary authorities, consistent with findings from previous Australian studies. The previous study of the citation practice of the six state Supreme Courts using the 50 most recent reported cases decided as of June 1999 found that 6–7 per cent of total citations were to secondary authorities.[129] This is also generally consistent with findings for the state Supreme Courts in the US. For example, Merryman, in his study of the citation practice of the Supreme Court of California in 1950, 1960 and 1970, found that secondary authorities were responsible for 7.5 per cent of total citations in 1970.[130]

Among the particular categories of secondary authorities cited, legal textbooks received the most citations, consistent with the previous study of the six Australian state Supreme Courts.[131] Legal periodicals were a clear second in most years, but were still cited relatively infrequently. Friedman and his colleagues have postulated that: 'By citing law reviews, a court can perhaps bootleg "nonlegal" premises into its decisions, or deal with "legal" considerations broader than those usually dealt with.'[132] The High Court's propensity to cite law reviews has increased over the last two decades.[133] It is reasonable to link this change in practice to the High Court's adoption of a more activist stance under the leadership of Sir Anthony Mason. Certainly studies for the courts in the US have regarded propensity to cite law reviews as a barometer of judicial activism.[134] The results here suggest that the Supreme Court of Victoria is not as policy-oriented as the High Court. This is a reflection of the status of the Supreme Court of Victoria as an intermediate appellate court. However, given that the overwhelming majority of Victorian cases end in the Supreme Court of Victoria, it is, in some senses, a final court for the great majority of Victorian cases. Thus, it is suggested that through downplaying the policy dimension of its decisions, the Court is not as mindful as it could be of this aspect of finality in many of its decisions.

In Table 2 secondary authorities are classified as 'legal' or 'non-legal'. The Court cited very few non-legal sources. In 2005, which is the year in which the Court cited the largest number of non-legal secondary authorities, these authori-

128 See, eg, Smyth, 'Citation of Judicial and Academic Authority', above n 19, 19–20.
129 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 19.
130 Merryman, 'Toward a Theory of Citations', above n 14, 405.
131 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 19.
132 Friedman et al, above n 3, 814.
133 See Smyth, 'Other than "Accepted Sources of Law"?', above n 17, 29; Smyth, 'Academic Writing and the Courts', above n 17, 171.
134 Bobinski, above n 14, 998–1000.

ties still accounted for just 8 per cent of secondary authorities cited and 0.5 per cent of total citations. In 2005, as in most years, the bulk of citations to non-legal secondary authorities were citations to dictionaries. The propensity of Australian courts to cite few non-legal secondary authorities has been observed in previous studies for the High Court[135] and the Australian state and territory Supreme Courts.[136] This practice has also been observed in studies for the state Supreme Courts in the US. Friedman et al found that 'social science, economic or technical studies' were cited in just 0.6 per cent of the 1940–70 cases in their sample, representing the last four decades of their study.[137] Their explanation for this result is: 'Old habits of citation persist, no doubt because judges feel that only "legal" authorities are legitimate'.[138] In contrast, the US Supreme Court cites a much higher proportion of non-legal secondary authorities.[139] One reason is that the Court cites a lot of social science literature in death penalty cases and in cases relating to the Bill of Rights.[140] A second reason is that the large amount of public interest litigation and amicus curiae involvement in US cases changes the nature of the material placed before the courts. Each kind of litigation almost inevitably involves either parties or issues (or both) that are much more likely to place secondary material before the courts.

VI Citation Practice of Individual Judges

Tables 3A–K present detailed information about the citation practice of individual judges in each of the sampled years. Taking a minimum of 10 judgments in any given year as a cut-off, in the period prior to World War II the biggest citers on the Court were Madden CJ (1893–1918), Cussen J (1906–33), McArthur J (1920–34) and Martin J (1934–57). In 1905, Madden CJ cited, on average, 3.3 authorities per judgment, compared with the 1905 mean of 2.5 authorities per judgment, and was responsible for one-third of the citations of the Court. In 1915, Madden CJ cited 2.7 authorities per judgment and Cussen J cited 2.71 authorities per judgment, compared with a 1915 average of 1.86 authorities per judgment.[141] Together Madden CJ and Cussen J were responsible for 57 per cent of the Court's citations in 1915. In 1925, Cussen J cited 8.33 authorities per judgment, followed by McArthur J who cited 5.09 authorities per judgment. In 1925, Cussen and McArthur JJ delivered fewer than 30 per cent of the reported judgments, but were responsible for more than half of the Court's citations. In 1935, Martin J cited 8.45 authorities per judgment. Of those judges who delivered at least 10 judgments in that year, this represents double the number of citations by the next biggest citer, Gavan Duffy J (1933–61) with 4.26 citations per judgment. In 1945, Gavan Duffy and Martin JJ were again the biggest citers

135 Smyth, 'Other than "Accepted Sources of Law"?', above n 17, 29.
136 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 19.
137 Friedman et al, above n 3, 817.
138 Ibid.
139 Daniels, above n 12, 6. See generally Hasko, above n 12.
140 Smyth, 'Other than "Accepted Sources of Law"?', above n 17, 28.
141 In 1915, total citations numbered 242 (according to Table 3B) and the total number of judgments (according to Table 2) was 130. Therefore, 242 divided by 140 equals 1.86.

on the Court, each citing over 13 authorities per judgment and together accounting for more than 50 per cent of the Court's overall citations.

Table 3A — Citation Practice of Justices of the Supreme Court of Victoria in 1905

	a'Beckett J	Hodges J	Hood J	Holroyd J	Madden J	Total
Total judgments	38	39	49	26	37	189
High Court						
1903–19	–	3	–	–	–	3
1920–39	–	–	–	–	–	–
1940–59	–	–	–	–	–	–
1960–79	–	–	–	–	–	–
1980–99	–	–	–	–	–	–
2000–	–	–	–	–	–	–
Subtotal	0	3	0	0	0	3
Average[142]	–	0.08	–	–	–	–
Supreme Court of Victoria						
Subtotal	16	11	21	5	79	132
Average	0.42	0.28	0.43	0.19	2.14	
Other state and territory Supreme Courts						
NSW	–	–	–	–	1	1
Tasmania	–	–	–	–	–	0
Queensland	–	–	–	–	–	0
WA	–	–	–	–	–	0
SA	–	–	–	–	–	0
Subtotal	0	0	0	0	1	1

[142] Unless otherwise stated, this figure refers to the mean number of citations per judgment.

English courts						
House of Lords	9	8	10	–	3	30
Judicial Committee	4	2	6	1	2	15
Court of Appeal	10	9	12	5	5	41
Lower courts	22	23	25	7	27	104
Subtotal	45	42	53	13	37	190
Average	1.18	1.08	1.08	0.5	1	–
Other countries	1	0	2	1	2	6
Average	0.03	–	0.04	0.04	0.05	–
Secondary sources — legal						
Books	11	9	8	–	2	30
Periodicals	–	–	–	–	–	0
Encyclopaedias	–	–	–	–	–	0
Law reform reports	–	–	–	–	–	0
Dictionaries	–	–	–	–	–	0
Other	–	–	–	–	–	0
Subtotal	11	9	8	0	2	30
Average	0.29	0.23	0.16	–	0.05	–
Secondary sources — non-legal						
Books	–	–	–	–	–	0
Periodicals	–	–	–	–	–	0
Dictionaries	–	–	–	–	1	1
Other	–	–	–	–	–	0
Subtotal	0	0	0	0	1	1
Average	–	–	–	–	0.03	–
Total	**73**	**65**	**84**	**19**	**122**	**363**
Average	1.92	1.67	1.71	0.73	3.30	–

Table 3B — Citation Practice of the Supreme Court of Victoria in 1915

	a'Beckett J	Hodges J	Hood J	Madden J	Cussen J	Total
Total judgments	36	25	34	27	24	146
High Court						
1903–19	1	–	8	13	7	29
1920–39	–	–	–	–	–	–
1940–59	–	–	–	–	–	–
1960–79	–	–	–	–	–	–
1980–99	–	–	–	–	–	–
2000–	–	–	–	–	–	–
Subtotal	1	0	8	13	7	29
Average	0.03	–	0.24	0.48	0.29	–
Supreme Court of Victoria						
Subtotal	6	1	9	9	13	38
Average	0.17	0.04	0.26	0.33	0.54	–
Other state and territory Supreme Courts						
Tasmania	–	–	–	1	–	1
NSW	–	1	1	1	1	4
Queensland	–	–	–	–	–	0
WA	–	–	–	–	–	0
SA	–	–	–	–	–	0
Subtotal	0	1	1	2	1	5
English courts						
House of Lords	–	–	4	6	1	11
Judicial Committee	1	–	1	2	3	7
Court of Appeal	9	3	6	19	2	39
Lower courts	8	9	22	16	31	86
Subtotal	18	12	33	43	37	143
Average	0.50	0.48	0.97	1.59	1.54	–
Other countries	0	0	1	1	0	2
Average	–	–	0.03	0.04	–	–

Secondary sources — legal						
Books	3	4	4	2	6	19
Periodicals	–	–	1	2	1	4
Encyclopaedias	–	–	–	–	–	0
Law reform reports	–	–	–	–	–	0
Dictionaries	1	–	–	–	–	1
Other	–	–	–	–	–	0
Subtotal	4	4	5	4	7	24
Average	0.11	0.16	0.15	0.15	0.29	–
Secondary sources — non-legal						
Books	–	–	–	–	–	0
Periodicals	–	–	–	–	–	0
Encyclopaedias	–	–	–	–	–	0
Law reform reports	–	–	–	–	–	0
Dictionaries	–	–	–	1	–	1
Other	–	–	–	–	–	0
Subtotal	0	0	0	1	0	1
Average	–	–	–	0.04	–	–
Total	**29**	**18**	**57**	**73**	**65**	**242**
Average	0.81	0.72	1.68	2.70	2.71	–

Table 3C — Citation Practice of the Supreme Court of Victoria in 1925

	Cussen J	Irvine J	Macfarlan J	Mann J	McArthur J	Schutt J	Weigall J	Total
Total judgments	21	24	12	21	11	7	15	111
High Court								
1903–19	5	5	–	4	3	–	4	21
1920–39	4	4	–	2	1	–	2	13
1940–59	–	–	–	–	–	–	–	–
1960–79	–	–	–	–	–	–	–	–
1980–99	–	–	–	–	–	–	–	–
2000–	–	–	–	–	–	–	–	–
Subtotal	9	9	0	6	4	0	6	34
Average	0.43	0.38	–	0.29	0.36	–	0.40	–
Supreme Court of Victoria								
Subtotal	18	7	4	10	14	1	13	67
Average	0.86	0.29	0.33	0.48	1.27	0.14	0.87	–
Other state and territory Supreme Courts								
Tasmania	–	–	–	–	–	–	–	0
NSW	1	–	–	1	–	–	1	3
Queensland	–	–	–	–	–	–	–	0
WA	–	–	–	–	–	–	–	0
SA	–	–	–	–	–	–	–	0
Subtotal	1	0	0	1	0	0	1	3
English Courts								
House of Lords	6	14	–	–	–	–	1	21
Judicial Committee	7	2	1	1	–	2	–	13
Court of Appeal	49	24		4	9	1	10	97
Lower courts	56	35	3	8	24	–	13	139
Subtotal	118	75	4	13	33	3	24	270
Average	5.62	3.13	0.33	0.62	3.00	0.43	1.60	–
Other countries	10	2	0	4	1	0	5	22
Average	0.48	0.08	0.00	0.19	0.09	0.00	0.33	–

Secondary sources — legal								
Books	14	5	–	3	4	–	7	33
Periodicals	3	1	–	–	–	–	–	4
Encyclopaedias	–	–	–	–	–	–	–	0
Law reform reports	–	–	–	–	–	–	–	0
Dictionaries	–	–	–	–	–	–	–	0
Other	1	–	–	–	–	–	–	1
Subtotal	18	6	0	3	4	0	7	38
Average	0.86	0.25	–	0.14	0.36		0.47	–
Secondary sources — non-legal								
Books	1	–	–	1	–	–	1	3
Periodicals	–	–	–	–	–	–	–	0
Encyclopaedias	–	–	–	–	–	–	–	0
Law reform reports	–	–	–	–	–	–	–	0
Dictionaries	–	–	–	–	–	–	–	0
Other	–	–	–	–	–	–	–	0
Subtotal	1	0	0	1	0	0	1	3
Average	0.05	–	–	0.05	–	–	0.07	–
Total	**175**	**99**	**8**	**38**	**56**	**4**	**57**	**437**
Average	8.33	4.13	0.67	1.81	5.09	0.57	3.80	3.94

Table 3D — Citation Practice of the Supreme Court of Victoria in 1935

	Gavan Duffy J	Irvine J	Macfarlan J	Mann J	Martin J	Lowe J	Total
Total judgments	19	22	20	39	11	4	115
High Court							
1903–19	–	3	1	3	2	1	10
1920–39	2	1	–	4	3	3	13
1940–59	–	–	–	–	–	–	–
1960–79	–	–	–	–	–	–	–
1980–99	–	–	–	–	–	–	–
2000–	–	–	–	–	–	–	–
Subtotal	2	4	1	7	5	4	23
Average	0.11	0.18	0.05	0.18	0.45	1.00	–
Supreme Court of Victoria							
Subtotal	5	2	7	13	6	8	41
Average	0.26	0.09	0.35	0.33	0.55	2.00	–
Other state and territory Supreme Courts							
Tasmania	–	–	–	–	–	–	0
NSW	–	–	1	1	3	–	5
Queensland	–	–	–	–	–	–	0
WA	–	–	–	–	–	–	0
SA	–	–	–	–	–	–	0
Subtotal	0	0	1	1	3	0	5
English Courts							
House of Lords	2	1	–	2	9	2	16
Judicial Committee	2	1	1	2	5	3	14
Court of Appeal	24	17	1	27	22	3	94
Lower courts	29	10	7	33	32	3	114
Subtotal	57	29	9	64	68	11	238
Average	3.00	1.32	0.45	1.64	6.18	2.75	–
Other countries	1	0	0	3	2	1	7
Average	0.05	–	–	0.08	0.18	0.25	–

Secondary sources — legal							
Books	11	4	4	8	5	1	33
Periodicals	4	–	–	4	4	–	12
Encyclopaedias	–	–	–	–	–	–	0
Law reform reports	–	–	–	–	–	–	0
Dictionaries	–	–	–	–	–	–	0
Other	–	–	–	–	–	–	0
Subtotal	15	4	4	12	9	1	45
Average	0.79	0.18	0.20	0.31	0.82	0.25	–
Secondary sources — non-legal							
Books	–	–	–	–	–	–	0
Periodicals	–	–	–	–	–	–	0
Encyclopaedias	–	–	–	–	–	–	0
Law reform reports	–	–	–	–	–	–	0
Dictionaries	1	–	–	–	–	–	1
Other	–	–	–	–	–	–	0
Subtotal	1	0	0	0	0	0	1
Average	0.05	–	–	–	–	–	–
Total	**81**	**39**	**22**	**100**	**93**	**25**	**360**
Average	4.26	1.77	1.10	2.56	8.45	6.25	–

Table 3E — Citation Practice of the Supreme Court of Victoria in 1945

	Gavan Duffy J	Herring CJ	Macfarlan J	Martin J	Lowe J	O'Bryan J	Total
Total judgments	13	13	12	10	12	14	74
High Court							
1903–19	2	2	–	2	1	–	7
1920–39	7	5	–	4	4	5	25
1940–59	2	1	1	–	3	–	7
1960–79	–	–	–	–	–	–	–
1980–99	–	–	–	–	–	–	–
2000–	–	–	–	–	–	–	–
Subtotal	11	8	1	6	8	5	39
Average	0.85	0.62	0.08	0.60	0.67	0.36	–
Supreme Court of Victoria							
Subtotal	26	13	11	13	14	17	94
Average	2.00	1.00	0.92	1.30	1.17	1.21	–
Other state and territory Supreme Courts							
Tasmania	3	–	–	–	–	–	3
NSW	2	3	3	2	4	4	18
Queensland	–	–	1	1	–	1	3
WA	–	–	–	–	–	–	0
SA	–	–	–	1	–	2	3
Subtotal	5	3	4	4	4	7	27
English Courts							
House of Lords	15	11	11	11	9	8	65
Judicial Committee	29	3	–	30	1	14	77
Court of Appeal	46	10	3	18	6	16	99
Lower courts	28	13	2	25	4	48	120
Subtotal	118	37	16	84	20	86	361
Average	9.08	2.85	1.33	8.40	1.67	6.14	–
Other countries	10	2	2	12	7	6	39
Average	0.77	0.15	0.17	1.20	0.58	0.43	–

Secondary sources — legal							
Books	8	2	2	13	2	18	45
Periodicals	2	–	1	1	2	3	9
Encyclopaedias	–	–	–	–	–	–	0
Law reform reports	–	–	–	–	–	–	0
Dictionaries	–	–	1	–	1	–	2
Other	1	–	–	1	–	–	2
Subtotal	11	2	4	15	5	21	58
Average	0.85	0.15	0.33	1.50	0.42	1.50	–
Secondary sources — non-legal							
Books	–	–	–	–	–	2	2
Periodicals	–	–	–	–	–	–	0
Dictionaries	–	–	–	–	–	4	4
Other	–	–	–	–	–	–	0
Subtotal	0	0	0	0	0	6	6
Average	–	–	–	–	–	0.429	–
Total	**181**	**65**	**38**	**134**	**58**	**148**	**624**
Average	13.92	5.00	3.17	13.40	4.83	10.57	–

Table 3F — Citation Practice of the Supreme Court of Victoria in 1955 (Part I)

	Barry J	Dean J	Gavan Duffy J	Harris J	Herring CJ	Hudson J
Total judgments	2	13	10	1	19	1
High Court						
1903–19	–	6	–	–	5	–
1920–39	–	8	1	–	10	1
1940–59	–	7	7	–	9	–
1960–79	–	–	–	–	–	–
1980–99	–	–	–	–	–	–
2000–	–	–	–	–	–	–
Subtotal	0	21	8	0	24	1
Average	–	1.62	0.80	–	1.26	1.00
Supreme Court of Victoria						
Subtotal	0	25	21	0	19	0
Average	–	1.92	2.10	–	1.00	–
Other state and territory Supreme Courts						
Tasmania	–	–	1	–	–	–
NSW	1	2	7	–	7	–
Queensland	–	–	–	–	–	–
WA	–	–	–	–	–	–
SA	–	1	–	–	–	–
Subtotal	1	3	8	0	7	0
Other courts	–	–	–	–	–	1
English Courts						
House of Lords	–	8	1	1	4	2
Judicial Committee	–	3	1	–	6	2
Court of Appeal	–	28	24	–	45	6
Lower courts	–	32	48	1	28	9
Subtotal	0	71	74	2	83	19
Average	–	5.46	7.40	2.00	4.37	19.00
Other countries	0	6	3	0	6	0
Average	–	0.46	0.30	0.00	0.32	0.00

Secondary sources — legal						
Books	–	20	7	3	7	–
Periodicals	–	2	–	–	1	–
Encyclopaedias	–	1	–	–	–	–
Law reform reports	–	–	–	–	–	–
Dictionaries	–	–	–	–	–	–
Other	–	–	–	–	6	–
Subtotal	0	23	7	3	14	0
Average	–	1.77	0.70	3.00	0.74	–
Secondary sources — non-legal						
Books	–	–	–	–	–	–
Periodicals	–	–	–	–	–	–
Encyclopaedias	–	–	–	–	–	–
Law reform reports	–	–	–	–	–	–
Dictionaries	–	–	–	–	–	–
Other	–	–	–	–	–	–
Subtotal	0	0	0	0	0	0
Average	–	–	–	–	–	–
Total	**1**	**149**	**121**	**5**	**153**	**21**
Average	0.50	11.46	12.10	5.00	8.05	21.00

Table 3F — Citation Practice of the Supreme Court of Victoria in 1955 (Part II)

	Martin J	Lowe J	O'Bryan J	Sholl J	Smith J	Total
Total judgments	12	14	13	17	10	112
High Court						
1903–19	–	–	–	–	–	11
1920–39	1	3	7	3	1	35
1940–59	5	4	4	13	4	53
1960–79	–	–	–	–	–	–
1980–99	–	–	–	–	–	–
2000–	–	–	–	–	–	–
Subtotal	6	7	11	16	5	99
Average	0.50	0.50	0.85	0.94	0.50	–
Supreme Court of Victoria						
Subtotal	15	20	12	41	20	173
Average	1.25	1.43	0.92	2.41	2.00	–
Other state and territory Supreme Courts						
Tasmania	–	1	–	–	2	4
NSW	3	5	2	13	7	47
Queensland	–	–	–	5	1	6
WA	–	–	–	1	–	1
SA	–	–	1	4	5	11
Subtotal	3	6	3	23	15	69
Other courts	–	–	–	8	–	9
English Courts						
House of Lords	7	9	7	7	–	46
Judicial Committee	1	1	3	11	1	29
Court of Appeal	14	35	19	17	20	208
Lower courts	19	38	17	23	51	266
Subtotal	41	83	46	58	72	549
Average	3.42	5.93	3.54	3.41	7.20	–
Other countries	4	2	0	24	19	64
Average	0.33	0.14	0.00	1.41	1.90	–

Secondary sources — legal						
Books	2	5	9	9	16	78
Periodicals	–	–	5	8	–	16
Encyclopaedias	–	–	–	–	–	1
Law reform reports	–	–	–	–	–	0
Dictionaries	–	–	–	–	–	0
Other	–	–	–	–	–	6
Subtotal	2	5	14	17	16	101
Average	0.17	0.36	1.08	1.00	1.60	–
Secondary sources — non-legal						
Books	–	–	–	–	–	0
Periodicals	–	–	–	–	–	0
Encyclopaedias	–	–	–	–	–	0
Law reform reports	–	–	–	–	–	0
Dictionaries	–	–	–	–	5	5
Other	–	–	–	–	–	0
Subtotal	0	0	0	0	5	5
Average	–	–	–	–	0.5	–
Total	**71**	**123**	**86**	**187**	**152**	**1069**
Average	5.92	8.79	6.62	11.00	15.20	–

Table 3G — Citation Practice of the Supreme Court of Victoria in 1965 (Part I)

	Adam J	Barber J	Barry J	Dean J	Gillard J	Gowans J	Herring CJ	Hudson J	Little J
Total judgments	12	1	9	9	5	24	4	15	6
High Court									
1903–19	–	–	2	–	–	3	1	1	–
1920–39	2	–	–	4	4	11	1	2	2
1940–59	10	–	5	8	–	50	8	23	30
1960–79	–	–	6	2	2	9	–	1	4
1980–99	–	–	–	–	–	–	–	–	–
2000–	–	–	–	–	–	–	–	–	–
Subtotal	12	0	13	14	6	73	10	27	36
Average	1.00	–	1.44	1.56	1.20	3.04	2.50	1.80	6.00
Supreme Court of Victoria									
Subtotal	35	0	13	16	7	63	1	20	15
Average	2.92	0.00	1.44	1.78	1.40	2.63	0.25	1.33	2.50
Other state and territory Supreme Courts									
Tasmania	–	–	–	–	1	–	–	1	–
NSW	4	–	12	–	–	6	–	–	–
Queensland	–	–	2	–	–	2	–	–	–
WA	1	–	1	–	–	–	–	–	–
SA	1	–	1	1	1	2	–	–	–
Subtotal	6	0	16	1	2	10	0	1	0
Other courts	–	–	–	–	3	–	–	–	–
English Courts									
House of Lords	8	–	4	4	2	33	6	7	15
Judicial Committee	2	–	–	4	1	13	–	–	4
Court of Appeal	12	–	4	11	9	43	7	20	11
Lower courts	20	–	7	13	17	48	0	26	26
Subtotal	42	0	15	32	29	137	13	53	56
Average	3.50	–	1.67	3.56	5.80	5.71	3.25	3.53	9.33
Other countries	1	0	2	0	1	11	1	1	1
Average	0.08	–	0.22	–	0.20	0.46	0.25	0.07	0.17

Secondary sources — legal									
Books	3	–	4	4	0	11	2	4	2
Periodicals	4	–	–	1	–	–	1	–	2
Encyclopaedias	–	–	–	–	–	–	–	–	–
Law reform reports	–	–	–	–	–	–	–	–	–
Dictionaries	–	–	–	–	–	–	–	–	–
Other	1	–	2	–	–	3	–	2	3
Subtotal	8	0	6	5	0	14	3	6	7
Average	0.67	–	0.67	0.56	–	0.58	0.75	0.40	1.17
Secondary sources — non-legal									
Books	–	–	–	–	–	–	–	–	–
Periodicals	–	–	–	–	–	–	–	–	–
Dictionaries	–	–	–	–	–	–	–	–	1
Other	–	–	–	–	–	–	–	–	–
Subtotal	0	0	0	0	0	0	0	0	1
Average	–	–	–	–	–	–	–	–	0.1667
Total	**104**	**0**	**65**	**68**	**48**	**308**	**28**	**108**	**116**
Average	8.67	–	7.22	7.56	9.60	12.83	7.00	7.20	19.33

Table 3G — Citation Practice of the Supreme Court of Victoria in 1965 (Part II)

	Monahan J	O'Bryan J	Pape J	Sholl J	Starke J	Smith J	Wineke CJ	Total
Total judgments	1	13	7	10	6	15	23	160
High Court								
1903–19	–	–	2	2	–	3	4	18
1920–39	–	4	8	2	3	9	1	53
1940–59	–	5	2	11	2	13	28	195
1960–79	–	1	2	3	3	2	4	39
1980–99	–	–	–	–	–	–	–	–
2000–	–	–	–	–	–	–	–	–
Subtotal	0	10	14	18	8	27	37	305
Average		0.77	2.00	1.80	1.33	1.80	1.61	
Supreme Court of Victoria								
Subtotal	0	18	27	60	11	24	26	336
Average	–	1.38	3.86	6.00	1.83	1.60	1.13	–
Other state and territory Supreme Courts								
Tasmania	–	–	–	–	1	–	–	3
NSW	–	1	–	22	2	5	1	53
Queensland	–	–	–	3	–	3	–	10
WA	–	–	–	1	–	–	–	3
SA	–	–	–	3	–	–	2	11
Subtotal	0	1	0	29	3	8	3	80
Other courts	–	3	–	–	–	9	–	15
English Courts								
House of Lords	–	4	4	11	8	9	13	128
Judicial Committee	–	2	4	3	1	9	1	44
Court of Appeal	1	13	8	42	13	23	14	231
Lower courts	1	7	12	55	11	68	8	319
Subtotal	2	26	28	111	33	109	36	722
Average	2.00	2.00	4.00	11.10	5.50	7.27	1.57	–
Other countries	0	0	0	5	1	4	2	30
Average	–	–	–	0.50	0.17	0.27	0.09	–

Secondary sources — legal								
Books	1	0	9	26	4	16	5	91
Periodicals	–	–	1	3	1	2	2	17
Encyclopaedias	–	1	–	–	–	–	–	1
Law reform reports	–	–	–	–	–	–	–	0
Dictionaries	–	–	–	–	–	–	–	0
Other	–	–	–	–	–	1	–	12
Subtotal	1	1	10	29	5	19	7	121
Average	1.00	0.08	1.43	2.90	0.83	1.27	0.30	–
Secondary sources — non-legal								
Books	–	–	–	–	–	–	–	0
Periodicals	–	–	–	–	–	–	–	0
Encyclopaedias	–	–	–	–	–	–	–	0
Law reform reports	–	–	–	–	–	–	–	0
Dictionaries	–	–	1	–	–	–	–	2
Other	–	–	–	–	–	–	–	0
Subtotal	0	0	1	0	0	0	0	2
Average	–	–	0.1429	–	–	–	–	–
Total	**3**	**59**	**80**	**252**	**61**	**200**	**111**	**1611**
Average	3.00	4.54	11.43	25.20	10.17	13.33	4.83	–

Table 3H — Citation Practice of the Supreme Court of Victoria in 1975 (Part I)

	Adam J	Anderson J	Barber J	Crockett J	Dunn J	Gillard J	Gowans J	Harris J	Kaye J	Lush J
Total judgments	5	2	2	7	6	18	12	10	3	9
High Court										
1903–19	–	5	–	–	6	13	6	5	2	3
1920–39	2	1	–	2	1	15	4	1	–	–
1940–59	3	4	–	4	19	34	11	5	4	1
1960–79	7	–	1	9	14	28	6	29	4	4
1980–99	–	–	–	–	–	–	–	–	–	–
2000–	–	–	–	–	–	–	–	–	–	–
Subtotal	12	10	1	15	40	90	27	40	10	8
Average	2.40	5.00	0.50	2.14	6.67	5.00	2.25	4.00	3.33	0.89
Supreme Court of Victoria										
Subtotal	17	10	5	24	26	67	30	52	17	25
Average	3.40	5.00	2.50	3.43	4.33	3.72	2.50	5.20	5.67	2.78
Other state and territory Supreme Courts										
Tasmania	1	–	1	1	–	–	2	–	1	–
NSW	8	–	6	6	2	6	3	12	3	2
Queensland	–	–	2	–	–	2	–	–	6	–
WA	1	–	–	1	–	–	–	1	–	–
SA	1	–	–	–	–	3	–	–	4	–
Subtotal	11	0	9	8	2	11	5	13	14	2
Other courts	2	–	–	1	2	2	–	–	1	–
English Courts										
House of Lords	7	3	–	7	–	21	9	8	3	–
Judicial Committee	5	–	–	3	1	11	1	7	4	–
Court of Appeal	12	1	3	8	7	67	17	33	5	4
Lower courts	12	2	3	11	2	94	9	22	29	7
Subtotal	36	6	6	29	10	193	36	70	41	11
Average	7.20	3.00	3.00	4.14	1.67	10.72	3.00	7.00	13.67	1.22
Other countries	5	1	0	1	0	7	3	0	3	1
Average	1.00	0.50	–	0.14	–	0.39	0.25	–	1.00	0.11

Secondary sources — legal										
Books	8	–	2	9	3	13	4	10	13	1
Periodicals	1	–	–	–	2	2	2	2	3	–
Encyclopaedias	–	–	–	–	–	–	–	–	–	–
Law reform reports	–	–	–	–	–	–	–	–	–	–
Dictionaries	–	–	–	–	–	2	–	–	–	–
Other	5	–	–	4	–	1	4	–	–	–
Subtotal	14	0	2	13	5	18	10	12	16	1
Average	2.80	–	1.00	1.86	0.83	1.00	0.83	1.20	5.33	0.11
Secondary sources — non-legal										
Books	–	–	–	–	–	–	–	–	–	–
Periodicals	–	–	–	–	–	–	–	–	–	–
Dictionaries	–	–	–	–	1	–	1	–	–	–
Other	–	–	–	–	–	–	–	–	–	–
Subtotal	0	0	0	0	1	0	1	0	0	0
Average	–	–	–	–	0.17	–	0.08	–	–	–
Total	**97**	**27**	**23**	**91**	**86**	**388**	**112**	**187**	**102**	**48**
Average	19.40	13.50	11.50	13.00	14.33	21.56	9.33	18.70	34.00	5.33

Table 3H — Citation Practice of the Supreme Court of Victoria in 1975 (Part II)

	McInerney J	Menhennitt J	Murphy J	Nelson J	Newton J	Norris J	Pape J	Starke J	Young CJ	Total
Total judgments	4	22	2	8	10	12	7	8	9	156
High Court										
1903–19	–	8	–	5	3	6	6	3	5	76
1920–39	1	20	–	5	6	12	6	1	–	77
1940–59	1	23	–	4	8	4	28	3	3	159
1960–79	–	36	–	2	11	10	27	6	12	206
1980–99	–	–	–	–	–	–	–	–	–	–
2000–	–	–	–	–	–	–	–	–	–	–
Subtotal	2	87	0	16	28	32	67	13	20	518
Average	0.50	3.95	–	2.00	2.80	2.67	9.57	1.63	2.22	57.52161
Supreme Court of Victoria										
Subtotal	20	94	0	15	34	24	39	13	44	556
Average	5.00	4.27	–	1.88	3.40	2.00	5.57	1.63	4.89	–
Other state and territory Supreme Courts										
Tasmania	–	1	–	–	1	–	–	–	1	9
NSW	8	16	–	3	14	11	6	1	6	113
Queensland	–	9	–	–	10	3	2	–	7	41
WA	–	–	–	1	–	–	–	–	–	4
SA	–	2	–	–	4	–	–	–	4	18
Subtotal	8	28	0	4	29	14	8	1	18	185
Other courts	–	–	–	–	2	–	3	–	1	14
English Courts										
House of Lords	–	28	–	8	9	11	18	8	3	143
Judicial Committee	1	10	–	1	7	3	7	10	6	77
Court of Appeal	–	57	–	6	15	28	29	6	7	305
Lower courts	–	78	–	9	48	27	36	10	45	444
Subtotal	1	173	0	24	79	69	90	34	61	969
Average	0.25	7.86	–	3.00	7.90	5.75	12.86	4.25	6.78	–
Other countries	0	16	0	2	6	6	19	5	7	82
Average	–	0.73	–	0.25	0.60	0.50	2.71	0.63	0.78	–

Secondary sources — legal										
Books	5	36	–	8	30	12	23	7	17	201
Periodicals	–	9	–	1	–	3	3	–	–	28
Encyclopaedias	–	–	–	–	–	–	–	–	–	0
Law reform reports	–	–	–	–	–	–	–	–	–	0
Dictionaries	–	1	–	–	–	1	–	–	–	4
Other	–	1	–	–	–	1	2	–	–	18
Subtotal	5	47	0	9	30	17	28	7	17	251
Average	1.25	2.14	–	1.13	3.00	1.42	4.00	0.88	1.89	–
Secondary sources — non-legal										
Books	–	–	–	–	–	–	–	–	–	0
Periodicals	–	–	–	–	–	–	–	–	–	0
Dictionaries	–	1	–	1	–	–	8	–	1	13
Other	–	–	–	–	–	–	–	–	–	0
Subtotal	0	1	0	1	0	0	8	0	1	13
Average	–	0.05	–	0.13	–	–	1.14	–	0.11	–
Total	**36**	**446**	**0**	**71**	**208**	**162**	**262**	**73**	**169**	**2588**
Average	9.00	20.27	0.00	8.88	20.80	13.50	37.43	9.13	18.78	–

Table 3I — Citation Practice of the Supreme Court of Victoria in 1985 (Part I)

	Anderson J	Beach J	Brooking J	Crockett J	Fullagar J	Gobbo J	Gray J	Hampel J	Kaye J	King J	Marks J	McGarvie J
Total judgments	1	12	9	7	8	5	3	4	11	5	8	8
High Court												
1903–19	–	–	–	3	–	1	1	–	1	–	3	3
1920–39	–	1	3	–	3	3	–	–	1	–	1	11
1940–59	–	11	6	2	5	1	1	–	13	–	9	12
1960–79	10	14	8	2	3	1	–	1	22	–	16	18
1980–99	–	12	1	8	2	2	–	1	15	–	18	2
2000–	–	–	–	–	–	–	–	–	–	–	–	–
Subtotal	10	38	18	15	13	8	2	2	52	0	47	46
Average	10.00	3.17	2.00	2.14	1.63	1.60	0.67	0.50	4.73	–	5.88	5.75
Federal Court of Australia/Family Court												
Subtotal	–	6	3	1	–	–	1	–	3	–	5	–
Supreme Court of Victoria												
Subtotal	0	22	24	23	18	11	10	17	30	3	24	19
Average	–	1.83	2.67	3.29	2.25	2.20	3.33	4.25	2.73	0.60	3.00	2.38
Other state and territory Supreme Courts												
Tasmania	–	1	–	–	–	1	–	–	–	–	–	–
NSW	1	4	5	3	2	3	–	3	8	5	14	8
Queensland	–	4	3	2	3	–	–	–	–	–	–	–
WA	–	–	–	–	–	–	–	–	–	–	1	2
SA	–	3	3	–	–	–	–	–	–	–	–	2
NT	–	1	–	–	–	–	–	–	–	–	–	–
ACT	–	–	–	–	–	–	–	–	1	–	1	–
Subtotal	1	13	11	5	5	4	0	3	9	5	16	12
Other courts	–	–	–	2	–	–	–	–	1	–	1	1

English Courts												
House of Lords	–	6	20	19	2	7	2	8	8	–	11	4
Judicial Committee	1	1	6	–	3	–	–	5	5	–	5	22
Court of Appeal	1	4	39	14	5	5	–	2	22	–	31	26
Lower courts	–	11	27	15	19	3	2	1	20	–	29	40
Subtotal	2	22	92	48	29	15	4	16	55	0	76	92
Average	2.00	1.83	10.22	6.86	3.63	3.00	1.33	4.00	5.00	–	9.50	11.50
Other countries	2	2	17	1	4	0	0	0	8	0	5	6
Average	2.00	0.17	1.89	0.14	0.50	–	–	–	0.73	0.00	0.63	0.75
Secondary sources — legal												
Books	3	4	22	5	–	–	–	–	6	1	5	20
Periodicals	1	–	2	1	3	–	–	–	3	–	1	5
Encyclopaedias	–	–	–	–	–	–	–	–	–	–	–	–
Law reform reports	–	1	–	–	1	1	–	–	–	–	–	1
Dictionaries	–	–	1	–	–	–	–	–	–	–	–	–
Other	–	3	6	–	1	–	1	–	5	–	1	3
Subtotal	4	8	31	6	5	1	1	0	14	1	7	29
Average	4.00	0.67	3.44	0.86	0.63	0.20	0.33	–	1.27	0.20	0.88	3.63
Secondary sources — non-legal												
Books	–	–	–	–	–	–	–	–	–	–	–	–
Periodicals	–	–	–	–	–	–	–	–	–	–	–	–
Dictionaries	–	–	–	1	–	–	–	–	–	1	–	–
Other	–	–	–	–	–	–	–	–	–	–	–	–
Subtotal	0	0	0	1	0	0	0	0	0	1	0	0
Average	–	–	–	0.14	–	–	–		–	0.20	–	–
Total	**19**	**111**	**196**	**102**	**74**	**39**	**18**	**38**	**172**	**10**	**181**	**205**
Average	19.00	9.25	21.78	14.57	9.25	7.80	6.00	9.50	15.64	2.00	22.63	25.63

Table 31 — Citation Practice of the Supreme Court of Victoria in 1985 (Part II)

	Murphy J	Murray J	Nathan J	Nicholson J	O'Bryan J	Ormiston J	Southwell J	Starke J	Tadgell J	Young CJ	Total
Total judgments	7	10	2	2	6	5	4	11	9	11	148
High Court											
1903–19	–	2	–	1		11	–	3	2	2	33
1920–39	1	–	–	–	1	11	–	–	3	2	41
1940–59	7	3	–	–	11	3	–	–	3	5	92
1960–79	8	7	–	–	9	20	3	11	2	1	156
1980–99	13	4	–	–	8	11	1	1	2	–	101
2000–	–	–	–	–	–	–	–	–	–	–	–
Subtotal	29	16	0	1	29	56	4	15	12	10	423
Average	4.14	1.60	–	0.50	4.83	11.20	1.00	1.36	1.33	0.91	–
Federal Court of Australia/Family Court											
Subtotal	1	–	–	–	2	3	–	–	–	–	25
Supreme Court of Victoria											
Subtotal	25	17	1	8	19	73	0	25	34	30	433
Average	3.57	1.70	0.50	4.00	3.17	14.60	–	2.27	3.78	2.73	64
Other state and territory Supreme Courts											
Tasmania	1	1	–	–	–	–	–	–	–	–	4
NSW	11	5	1	4	10	15	2	13	3	6	126
Queensland	3	4	–	–	1	7	–	–	–	–	27
WA	–	1	–	–	–	1	–	–	–	–	5
SA	4	–	–	–	2	1	–	1	–	–	16
NT	–	–	–	–	–	–	–	–	–	–	1
ACT	–	–	–	–	1	–	–	1	–	–	4
Subtotal	19	11	1	4	14	24	2	15	3	6	183
Other courts	–	–	–	–	–	–	–	2	–	–	7

English Courts											
House of Lords	7	13	–	2	15	20	–	8	6	11	169
Judicial Committee	3	4	–	–	–	3	–	1	3	–	62
Court of Appeal	15	25	1	1	8	61	1	1	20	4	286
Lower courts	29	14	–	10	15	50	6	4	15	3	313
Subtotal	54	56	1	13	38	134	7	14	44	18	830
Average	7.71	5.60	0.50	6.50	6.33	26.80	1.75	1.27	4.89	1.64	–
Other countries	1	4	1	0	1	12	1	3	1	0	69
Average	0.14	0.40	0.50	–	0.17	2.40	0.25	0.27	0.11	–	–
Secondary sources — legal											
Books	16	9	–	2	3	61	4	2	7	3	173
Periodicals	1	1	–	1	–	9	–	–	–	1	29
Encyclopaedias	–	–	–	–	–	1	–	–	–	–	1
Law reform reports	–	–	–	–	–	11	–	–	–	–	15
Dictionaries	–	–	–	–	–	2	–	–	–	–	3
Other	–	–	–	–	2	4	–	1	2	1	30
Subtotal	17	10	0	3	5	88	4	3	9	5	251
Average	2.43	1.00	–	1.50	0.83	17.60	1.00	0.27	1.00	0.45	–
Secondary sources — non-legal											
Books	–	–	–	–	–	–	–	–	–	–	0
Periodicals	–	–	–	–	–	–	–	–	–	–	0
Dictionaries	1	1	–	–	1	1	–	–	–	–	6
Other	–	–	–	–	–	–	–	–	–	–	0
Subtotal	1	1	0	0	1	1	0	0	0	0	6
Average	0.14	0.10	–	–	0.17	0.20	–	–	–	–	–
Total	**147**	**115**	**4**	**29**	**109**	**391**	**18**	**77**	**103**	**69**	**2227**
Average	21.00	11.50	2.00	14.50	18.17	78.20	4.50	7.00	11.44	6.27	–

Table 3J — Citation Practice of the Supreme Court of Victoria in 1995 (Part I)

	Ashley J	Batt J	Beach J	Brooking J	Byrne J	Callaway J	Charles J	Coldrey J	Crockett J	Cummins J
Total judgments	7	3	4	20	2	2	3	6	5	3
High Court										
1903–19	–	3	1	9	–	–	–	–	1	–
1920–39	3	3	–	4	1	1	–	1	1	–
1940–59	4	13	–	24	1	–	–	6	1	–
1960–79	8	18	–	21	2	2	–	10	9	–
1980–99	44	32	1	91	14	2	–	68	10	–
2000–	–	–	–	–	–	–	–	–	–	–
Subtotal	59	69	2	149	18	5	0	85	22	0
Average	8.43	23.00	0.50	7.45	9.00	2.50	–	14.17	4.40	–
Federal Court of Australia/Family Court										
Subtotal	–	12	–	3	7	1	–	2	1	–
Supreme Court of Victoria										
Subtotal	33	61	9	103	8	10	0	59	12	–
Average	4.71	20.33	2.25	5.15	4.00	5.00	–	9.83	2.40	–
Other state and territory Supreme Courts										
Tasmania	1	–	–	–	1	–	–	–	1	–
NSW	1	10	–	51	10	1	–	12	–	–
Queensland	–	2	–	34	–	–	–	1	–	–
WA	–	–	–	2	1	–	–	–	–	–
SA	1	–	–	8	2	–	–	2	1	–
NT	–	–	–	5	–	–	–	–	–	–
ACT	–	1	–	1	–	–	–	–	–	–
Subtotal	3	13	0	101	14	1	0	15	2	0
Other courts	–	–	–	1	1	–	–	–	1	–

English Courts										
House of Lords	3	2	–	35	5	–	–	7	1	–
Judicial Committee	–	6	–	5	–	1	–	14	1	–
Court of Appeal	–	7	5	47	4	2	–	7	13	–
Lower courts	1	10	6	15	1	–	–	1	4	–
Subtotal	4	25	11	102	10	3	0	29	19	0
Average	0.57	8.33	2.75	5.10	5.00	1.50	–	4.83	3.80	–
Other countries	0	0	0	80	4	0	0	1	2	0
Average	–	–	–	4	2	–	–	0.17	0.4	–
Secondary sources — legal										
Books	3	4	–	12	3	–	–	6	1	–
Periodicals	–	1	1	–	–	–	–	–	–	–
Encyclopaedias	–	–	–	–	–	–	–	–	–	–
Law reform reports	–	–	–	6	–	–	–	2	–	–
Dictionaries	–	–	2	–	–	–	–	–	–	–
Other	6	–	2	25	–	–	–	15	–	–
Subtotal	9	5	5	43	3	0	0	23	1	0
Average	1.29	1.67	1.25	2.15	1.5	–	–	3.83	0.2	–
Secondary sources — non-legal										
Books	–	–	–	–	–	–	–	–	–	–
Periodicals	–	–	–	–	–	–	–	–	–	–
Dictionaries	1	–	–	–	–	–	–	1	–	–
Other	–	–	–	–	–	–	–	–	–	–
Subtotal	1	0	0	0	0	0	0	1	0	0
Average	0.14	–	–	–	–	–	–	0.17	–	–
Total	**109**	**185**	**27**	**582**	**65**	**20**	**0**	**215**	**60**	**0**
Average	15.57	61.67	6.75	29.1	32.5	10	–	35.83	12	–

Table 3J — Citation Practice of the Supreme Court of Victoria in 1995 (Part II)

	Eames J	Fullagar J	Hampel J	Hansen J	Hayne J	Hedigan J	Phillips J	Mandie J	Marks J	McDonald J
Total judgments	5	5	2	6	6	3	14	11	1	4
High Court										
1903–19	2	–	–	–	1	–	2	1	1	–
1920–39	2	–	1	1	4	–	11	1	–	–
1940–59	6	–	–	3	1	1	22	–	2	4
1960–79	23	2	2	15	9	16	15	2	17	1
1980–99	88	6	20	48	18	5	28	1	28	13
2000–	–	–	–	–	–	–	–	–	–	–
Subtotal	121	8	23	67	33	22	78	5	48	18
Average	24.20	1.60	11.50	11.17	5.50	7.33	5.57	0.45	48.00	4.50
Federal Court of Australia/Family Court										
Subtotal	12	–	–	1	8	3	5	1	3	1
Supreme Court of Victoria										
Subtotal	60	5	8	17	5	35	99	10	4	19
Average	12.00	1.00	4.00	2.83	0.83	11.67	7.07	0.91	4.00	4.75
Other state and territory Supreme Courts										
Tasmania	–	–	–	–	–	–	–	–	–	–
NSW	7	3	1	19	9	17	36	1	2	26
Queensland	–	–	–	14	4	1	13	–	–	14
WA	1	–	–	–	3	1	10	2	–	–
SA	4	–	1	1	1	3	5	–	–	3
NT	–	–	–	1	–	1	1	–	–	1
ACT	–	–	–	1	–	–	1	–	–	–
Subtotal	12	3	2	36	17	23	66	3	2	44
Other courts	–	–	–	1	–	–	1	2	–	–

English Courts										
House of Lords	34	2	4	13	5	17	26	1	–	10
Judicial Committee	1	–	–	5	–	–	11	1	–	5
Court of Appeal	13	–	4	28	21	7	20	3	–	29
Lower courts	5	–	–	9	24	2	36	4	–	5
Subtotal	53	2	8	55	50	26	93	9	0	49
Average	10.60	0.40	4.00	9.17	8.33	8.67	6.64	0.82	–	12.25
Other countries	7	0	0	13	3	0	20	11	0	13
Average	1.4	–	–	2.17	0.5	–	1.67	1	–	3.25
Secondary sources — legal										
Books	3	–	–	6	7	–	14	–	4	6
Periodicals	–	–	–	–	–	–	1	–	–	–
Encyclopaedias	–	–	–	–	–	–	–	–	–	–
Law reform reports	2	–	–	–	5	–	2	–	–	–
Dictionaries	–	–	–	–	–	–	–	–	–	–
Other	14	–	1	1	3	–	6	1	–	–
Subtotal	19	0	1	7	15	0	23	1	4	6
Average	3.8	–	0.5	1.17	2.5	–	1.64	0.09	4	1.5
Secondary sources — non-legal										
Books	–	–	–	–	–	–	–	–	–	–
Periodicals	–	–	–	–	–	–	–	–	–	–
Dictionaries	1	1	–	–	–	–	–	–	–	–
Other	–	–	–	–	–	–	–	–	–	–
Subtotal	1	1	0	0	0	0	0	0	0	0
Average	0.2	0.2	–	–	–	–	–	–	–	–
Total	**285**	**19**	**42**	**197**	**131**	**109**	**386**	**40**	**61**	**150**
Average	57	3.8	21	32.83	21.83	36.33	27.57	3.64	61	37.5

Table 3J — Citation Practice of the Supreme Court of Victoria in 1995 (Part III)

	Nathan J	O'Bryan J	Ormiston J	Phillips CJ	Smith J	Southwell J	Tadgell J	Teague J	Vincent J	Total
Total judgments	5	3	18	5	7	7	17	2	4	180
High Court										
1903–19	–	–	1	1	–	1	3	–	–	27
1920–39	–	–	2	2	1	2	1	–	–	42
1940–59	–	3	3	2	–	1	6	–	–	103
1960–79	–	3	6	10	2	8	11	–	–	212
1980–99	–	30	55	37	3	12	56	4	–	714
2000–	–	–	–	–	–	–	–	–	–	–
Subtotal	0	36	67	52	6	24	77	4	0	1098
Average	–	12.00	3.72	10.40	0.86	3.43	4.53	2.00	–	–
Federal Court of Australia/Family Court										
Subtotal	–	1	4	1	1	1	8	2	–	79
Supreme Court of Victoria										
Subtotal	9	5	18	33	28	16	49	19	4	738
Average	1.80	1.67	1.00	6.60	4.00	2.29	2.88	9.50	1.00	–
Other state and territory Supreme Courts										
Tasmania	2	–	2	1	–	–	1	3	–	12
NSW	1	2	4	1	8	–	6	9	–	237
Queensland	–	–	1	–	6	–	–	2	–	92
WA	1	–	–	–	1	1	3	–	–	26
SA	–	–	–	2	–	–	1	3	–	38
NT	–	–	–	–	–	–	–	1	–	10
ACT	–	–	–	–	–	–	–	–	–	4
Subtotal	4	2	7	4	15	1	11	18	0	419
Other courts	–	–	–	2	1	1	–	–	–	8

English Courts										
House of Lords	2	–	21	5	2	–	37	12	–	244
Judicial Committee	–	6	7	1	–	–	7	–	–	71
Court of Appeal	–	1	8	11	7	6	33	5	–	281
Lower courts	–	–	7	2	5	2	43	1	–	183
Subtotal	2	7	43	19	14	8	120	18	0	779
Average	0.40	2.33	2.39	3.80	2.00	1.14	7.06	9.00	–	–
Other countries	0	0	7	0	3	2	12	2	0	180
Average	–	–	0.39	–	0.43	0.29	0.71	1	–	–
Secondary sources — legal										
Books	–	1	15	1	3	–	4	–	–	93
Periodicals	–	–	–	–	–	–	1	–	–	4
Encyclopaedias	–	–	1	–	–	–	–	–	–	1
Law reform reports	–	–	–	2	–	–	1	1	–	21
Dictionaries	–	–	5	–	–	–	–	–	–	7
Other	1	–	1	14	–	–	4	1	–	95
Subtotal	1	1	22	17	3	0	10	2	0	221
Average	0.2	0.33	1.22	3.40	0.43	–	0.59	1	–	–
Secondary sources — non-legal										
Books	–	–	–	–	–	–	–	–	–	0
Periodicals	–	–	–	–	–	–	–	–	–	0
Dictionaries	–	1	5	–	3	–	–	–	–	13
Other	–	–	–	–	–	–	–	–	–	0
Subtotal	0	1	5	0	3	0	0	0	0	13
Average	–	0.33	0.28	–	0.43	–	–	–	–	–
Total	**16**	**53**	**173**	**127**	**74**	**53**	**287**	**65**	**4**	**3535**
Average	3.2	17.67	9.61	25.40	10.57	7.57	16.88	32.5	1	–

Table 3K — Citation Practice of the Supreme Court of Victoria in 2005 (Part I)

	Ashley JA	Batt J	Bongiorno J	Buchanan JA	Byrne J	Callaway J	Charles J	Chernov JA	Coldrey J	Cummins J
Total judgments	5	11	2	20	4	20	20	10	2	3
High Court										
1903–19	–	1	2	–	–	–	2	–	–	–
1920–39	1	–	4	2	1	5	5	–	–	–
1940–59	1	2	3	1	–	2	3	–	–	–
1960–79	6	5	1	7	–	12	3	–	–	–
1980–99	7	10	10	18	14	21	35	11	9	–
2000–	4	1	–	2	4	8	14	7	–	–
Subtotal	19	19	20	30	19	48	62	18	9	0
Average	3.8	1.73	10	1.5	4.75	2.4	3.1	1.8	4.5	0
Federal Court of Australia/Family Court										
Subtotal	10	–	–	1	–	1	1	–	–	–
Supreme Court of Victoria										
Subtotal	32	54	18	40	50	127	83	58	25	2
Average	6.4	4.91	9	2	12.5	6.35	4.15	5.8	12.5	0.67
Other state and territory Supreme Courts										
Tasmania	–	–	–	–	–	–	1	–	–	–
NSW	20	3	11	13	8	9	20	2	1	–
Queensland	6	–	1	16	–	2	13	–	–	–
WA	9	–	–	4	–	8	1	–	3	–
SA	–	–	3	–	5	9	1	–	–	–
NT	–	–	–	–	–	–	–	–	–	–
ACT	1	–	–	–	–	1	–	–	–	–
Subtotal	36	3	15	33	13	29	36	2	4	0
Other courts	–	9	–	11	–	–	4	–	–	–

English Courts										
House of Lords	2	1	1	10	2	8	7	–	–	–
Judicial Committee	–	–	–	1	–	1	1	–	–	–
Court of Appeal	10	8	1	4	–	3	7	1	–	–
Lower courts	2	1	–	2	–	1	1	–	–	2
Subtotal	14	10	2	17	2	13	16	1	0	2
Average	2.8	0.91	1	0.85	0.5	0.65	0.8	0.1	–	0.67
Other countries	0	1	0	8	0	1	18	–	0	0
Average	–	0.09	–	0.4	–	0.05	0.9	–	–	–
Secondary sources — legal										
Books	1	2	–	1	–	8	2	–	–	1
Periodicals	–	–	–	–	–	–	–	–	–	–
Encyclopaedias	–	–	–	–	–	–	–	–	–	–
Law reform reports	–	–	–	1	–	1	–	2	–	–
Dictionaries	–	–	–	–	–	–	–	–	–	–
Other	–	1	–	–	–	5	1	–	–	1
Subtotal	1	3	0	2	0	14	3	2	0	2
Average	0.2	0.27	–	0.1	–	0.7	0.15	0.2	–	0.67
Secondary sources — non-legal										
Books	–	–	–	–	–	–	–	–	–	–
Periodicals	–	–	–	–	–	–	–	–	–	–
Dictionaries	–	–	2	–	–	–	–	–	–	–
Other	–	–	–	–	–	–	–	–	–	–
Subtotal	0	0	2	0	0	0	0	0	0	0
Average	–	–	1	–	–	–	–	–	–	–
Total	**112**	**99**	**57**	**142**	**84**	**233**	**223**	**81**	**38**	**6**
Average	22.4	9	28.5	7.1	21	11.65	11.15	8.1	19	2

Table 3K — Citation Practice of the Supreme Court of Victoria in 2005 (Part II)

	Dodds-Streeton JA	Eames J	Gillard J	Habersberger J	Hansen J	Hargrave J	Harper J	Hollingworth J	Mandie J	Maxwell P
Total judgments	2	14	3	1	4	1	5	3	1	7
High Court										
1903–19	–	1	3	1	–	2	–	1	–	1
1920–39	–	5	1	–	1	–	6	–	–	7
1940–59	–	5	2	–	–	1	3	2	3	3
1960–79	2	11	1	–	–	–	1	1	–	16
1980–99	42	88	2	4	3	12	7	–	–	36
2000–	24	27	–	–	–	–	1	–	–	8
Subtotal	68	137	9	5	4	15	18	4	3	71
Average	34	9.79	3	5	1	15	3.6	1.33	3	10.14
Federal Court of Australia/Family Court										
Subtotal	–	6	–	1	1	7	4	1	–	4
Supreme Court of Victoria										
Subtotal	24	81	15	5	11	4	29	9	4	96
Average	12	5.79	5	5	2.75	4	5.8	3	4	13.71
Other state and territory Supreme Courts										
Tasmania	–	–	–	–	–	–	–	–	–	–
NSW	23	44	1	4	4	4	5	–	6	18
Queensland	8	11	–	11	–	16	–	1	–	–
WA	–	3	1	–	–	–	–	–	–	–
SA	1	7	1	–	1	–	–	–	–	7
NT	–	–	–	–	–	–	–	–	–	–
ACT	1	1	–	–	–	–	–	1	–	–
Subtotal	33	66	3	15	5	20	5	2	6	25
Other courts	–	–	–	–	19	–	–	4	–	–

English Courts										
House of Lords	4	8	9	–	–	3	1	–	–	4
Judicial Committee	12	3	1	–	1	–	–	–	–	–
Court of Appeal	1	10	25	2	2	2	16	3	–	12
Lower courts	–	1	7	1	2	2	6	1	2	2
Subtotal	17	22	42	3	5	7	23	4	2	18
Average	8.5	1.57	14	3	1.25	7	4.6	1.33	2	2.57
Other countries	0	0	0	0	0	1	0	0	1	1
Average	–	–	–	–	–	1	–	–	1	0.14
Secondary sources — legal										
Books	3	3	7	–	1	–	2	–	–	6
Periodicals	–	–	–	–	–	–	1	–	–	–
Encyclopaedias	–	–	–	–	–	–	–	–	–	–
Law reform reports	–	–	–	–	–	–	–	–	–	2
Dictionaries	–	–	–	–	–	–	–	–	–	–
Other	3	3	–	2	–	1	–	–	–	7
Subtotal	6	6	7	2	1	1	3	0	0	15
Average	3	0.43	2.33	2	0.25	1	0.6	–	–	2.14
Secondary sources — non-legal										
Books	–	–	–	–	–	–	–	–	–	–
Periodicals	–	–	–	–	–	–	–	–	–	–
Dictionaries	1	–	–	1	–	3	–	–	–	5
Other	–	–	–	–	–	–	–	–	–	–
Subtotal	1	0	0	1	0	3	0	0	0	5
Average	0.5	–	–	1	–	3	–	–	–	0.71
Total	**149**	**318**	**76**	**32**	**46**	**58**	**82**	**24**	**16**	**235**
Average	74.5	22.71	25.33	32	11.5	58	16.4	8	16	33.57

Table 3K — Citation Practice of the Supreme Court of Victoria in 2005 (Part III)

	Morris J	Nettle J	Ormiston J	Osborn J	Phillips(J) J	Redlich J	Vincent J	Warren CJ	Williams J	Winneke J	Total
Total judgments	2	21	12	5	2	1	9	12	5	10	217
High Court											
1903–19	–	10	8	–	1	1	1	2	1	–	38
1920–39	–	17	8	1	–	1	3	6	4	5	83
1940–59	1	16	10	–	–	2	2	4	5	3	74
1960–79	1	30	6	4	–	9	4	9	5	6	140
1980–99	10	153	101	20	5	18	32	33	52	6	759
2000–	10	56	25	6	–	5	1	4	10	5	222
Subtotal	22	282	158	31	6	36	43	58	77	25	1316
Average	11	13.43	13.17	6.2	3	36	4.78	4.83	15.4	2.5	–
Federal Court of Australia/Family Court											
	3	12	9	–	3	–	3	3	5	2	77
Supreme Court of Victoria											
Subtotal	40	133	29	36	10	22	10	82	34	21	1184
Average	20	6.33	2.42	7.2	5	22	1.11	6.83	6.8	2.1	–
Other state and territory Supreme Courts											
Tasmania	–	2	–	–	–	–	1	1	–	–	5
NSW	3	78	41	7	9	4	25	10	30	13	416
Queensland	–	2	1	2	1	–	3	–	–	1	95
WA	–	9	6	–	2	–	2	–	4	1	53
SA	–	9	2	6	2	5	2	–	9	–	70
NT	–	4	–	–	–	–	–	–	1	–	5
ACT	–	5	–	–	–	–	–	–	4	–	14
Subtotal	3	109	50	15	14	9	33	11	48	15	658
Other courts	5	5	27	11	–	–	–	11	2	–	108

English Courts											
House of Lords	1	8	3	–	–	3	–	8	7	2	92
Judicial Committee	2	4	1	–	–	–	–	1	1	–	29
Court of Appeal	11	36	33	–	–	–	4	15	13	1	220
Lower courts	7	33	102	1	2	2	2	2	3	3	190
Subtotal	21	81	139	1	2	5	6	26	24	6	531
Average	10.5	3.86	11.58	0.2	1	5	0.67	2.17	4.8	0.6	–
Other countries	1	6	6	5	3	0	0	1	3	0	56
Average	0.5	0.29	0.5	1	1.5	–	–	0.08	0.6	–	–
Secondary sources — legal											
Books	2	24	88	1	–	5	1	3	11	3	175
Periodicals	–	2	2	–	–	–	1	–	–	–	6
Encyclopaedias	–	–	–	–	–	–	–	–	–	–	0
Law reform reports	1	4	2	–	–	–	–	2	–	–	15
Dictionaries	–	–	1	–	–	–	–	–	–	–	1
Other	6	13	12	–	–	–	1	2	5	3	66
Subtotal	9	43	105	1	0	5	3	7	16	6	263
Average	4.5	2.05	8.75	0.2	–	5	0.33	0.58	3.2	0.6	–
Secondary sources — non-legal											
Books	–	–	–	–	–	–	–	–	–	–	–
Periodicals	–	–	–	–	–	–	–	–	–	–	–
Dictionaries	3	3	–	–	–	–	–	3	2	–	23
Other	–	–	–	–	–	–	–	–	1	–	1
Subtotal	3	3	0	0	0	0	0	3	3	0	24
Average	1.5	0.14	–	–	–	–	–	0.25	0.60	–	–
Total	**107**	**674**	**523**	**100**	**38**	**77**	**98**	**202**	**212**	**75**	**4217**
Average	53.5	32.10	43.58	20	19	77	10.89	16.83	42.4	7.5	–

In 1955, Gavan Duffy J was again one of the biggest citers on the Court with 12.1 authorities per judgment, but his Honour was surpassed by Smith J (1950–73) who cited 15.2 authorities per judgment. In 1965, Smith J again figures prominently with 13.33 authorities per judgment, but the biggest citer was Sholl J (1950–66) with 25.20 authorities per judgment. Sholl J was also a reasonably prolific citer in 1955, but in 1965 Sholl J more than doubled his Honour's average citations per judgment compared with 1955. In 1965, Sholl J

was the largest supplier of consistency, coordinate and deference citations.[143] In 1975, the most extensive citers on the Court (with at least 10 reported judgments) were Gillard J (1962–78) with 21.56 citations per judgment; Newton J (1967–77) with 20.80 citations per judgment; and Menhennitt J (1966–79) with 20.27 citations per judgment.

In 1985, 1995 and 2005, it is difficult to draw firm conclusions because there are a large number of judges with fewer than 10 reported judgments. Of those judges with more than 10 reported judgments, in 1985 the biggest citer was Kaye J (1972–91) with 15.64 authorities per judgment, although Brooking J (1977–2002) with nine reported judgments cited 21.78 authorities per judgment and McGarvie J (1976–92) with eight reported judgments cited 25.63 authorities per judgment. Ormiston J (1983–2006) only has five reported judgments in 1985, but his Honour stands out with 78.20 authorities per judgment. In five judgments, or 3 per cent of the reported judgments, Ormiston J was responsible for 17.6 per cent of citations on the Court in 1985. Of those judges who had at least 10 reported judgments, in 1995 Brooking J with 20 reported judgments cited 29.1 authorities per judgment and in 2005 Nettle JA (2004–) with 21 reported judgments cited 32.1 authorities per judgment.

Merryman conjectures that the frugal citer will only cite the most relevant authorities while the big citer will include 'references to work of dubious authority'.[144] Merryman, however, found this was not true of his sample and that the biggest citers also had the highest proportion of consistency and hierarchical citations, which Merryman regarded as the most relevant citations.[145] This is also true for this sample. The prolific citers in most years — Madden CJ in 1905; Cussen J in 1915 and 1925; Martin J in 1935; Gavan Duffy J in 1945; Sholl J in 1965; Kaye J in 1985; and Brooking J in 1995 — also had the highest proportion of consistency and hierarchical citations in the relevant years.[146] In the other years, the biggest citers — Smith J in 1955; Gillard J in 1975; and Nettle JA in 2005 — were among the highest citers of previous decisions of the Supreme Court and High Court on a per judgment basis.

Two features of the citation practice of individual judges are noticeable throughout the century. The first is that the most prolific citers on the Court are those who have served over the last three decades. This is the direct corollary of the fact that citation to authority on the Court has increased over time. Judges such as Madden CJ, Cussen and McArthur JJ, who were the biggest citers on the Court in the first three decades of the sample period, would be regarded as relatively restrained citers on the current Court. The second is that over time

[143] See Troy Simpson, 'Appointments That Might Have Been' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 23, 26, who states that the Menzies government was considering Sir Reginald Sholl as a possible appointment to the High Court on the retirement of Latham CJ in 1952. In a conversation between Sir Robert Menzies and Sir Owen Dixon recorded in the Dixon Diaries, Sir Robert Menzies is reported to have said Sholl 'overlaid a simple case with authorities': at 26. Sir Owen Dixon stated: 'He seemed like a doctor so interested in the disease ... he was indifferent to the fate of the patient': at 26.

[144] Merryman, 'Toward a Theory of Citations', above n 14, 422.

[145] Ibid.

[146] This is based on only those judges with at least 10 reported judgments in a given year.

there has been convergence between the judges who cite the most and least authority. The situation in the early decades of the period under observation where one or two judges were responsible for a disproportionate share of the Court's total citations is not replicated in the later decades. This is a trend that was also observed by Manz in his study of the New York Court of Appeals.[147] In the Supreme Court of Victoria this partly reflects the fact that, compared with the earlier decades, in recent times there have been a greater number of judges on the Court who each have handed down fewer reported judgments.

VII CONCLUSION

This article has examined citation practice on the Supreme Court of Victoria by analysing cases sampled at 10-year intervals over the course of a century. The use of data over such a long timeframe has allowed us to map trends in citation practice on the Court, which was not possible in previous studies of Australian courts that were based on shorter time spans and considered fewer cases. While the findings in this study relate to a single court, that Court is an important intermediate appellate court within the Australian court hierarchy and, as such, the results are of relevance to those interested in the workings of other Australian state Supreme Courts and, indeed, intermediate appellate courts in general.

The overriding conclusion is that the length of judgments has increased over time and that the number of authorities that the Court cites has also increased. This robust secular change in citation practice reflects several factors. First, over time there has been an increase in the stock of precedents to cite. Secondly, there has emerged a struggle to adapt existing precedent to changing political and social contexts and, at the same time, be seen to be doing justice between the litigants. Thirdly, the rapid development of information technology has revolutionised the process of writing judgments, contributing to their progressive lengthening. Whereas in the past, judges would labour with pen and paper and, later, typewriters, computers with word processing facilities now make it easier to insert changes in drafts. At the same time, the emergence of electronic databases with search engines containing reported and unreported cases has reduced the search costs of finding relevant precedent to cite.

With respect to the type of authorities that the Court cites, consistency citations to the Court's own previous decisions and hierarchical citations to decisions of the High Court are the most common form of citation on the Court. For most of the Court's history, deference citations to decisions of English courts have also been important, although there was a reduction in the number of such citations in 1995 and 2005, reflecting the impact of the *Australia Acts*. Coordinate citations have not been as prominent as consistency citations, hierarchical citations and deference citations to English courts; however, coordinate citations have increased over time. Throughout the Court's history, most coordinate citations have been to decisions of the NSW Supreme Court, reflecting its position as probably Australia's premier intermediate appellate court and just below the High Court in terms of status. Finally, citation to secondary authority also

[147] Manz, 'The Citation Practices of the New York Court of Appeals, 1850–1993', above n 14, 146.

increased over the course of the century, although secondary authorities still form only a relatively small fraction of the authorities cited. The secondary authorities that the Court does cite are dominated by books with few citations to law reviews. This finding likely reflects the fact that as an intermediate appellate court, the Supreme Court of Victoria is not as policy-focused as a final court of appeal such as the High Court. Thus, the judges of the Supreme Court of Victoria do not find much of relevance to their workload in law reviews.

In concluding, it is important to reiterate the limitations of the study and also to consider the possibilities for future research on this topic. One potential limitation is that the sample is limited to reported cases, though we have argued that reported cases contain the most important cases that are likely to cite authority. Another limitation is that as a means of better understanding the reasoning process that judges go through, citations are at best a rough guide. The legal realist school stresses that it is impossible to get inside a judge's mind and that citation patterns are, at best, ex post rationalisations of the decision making process.[148] However, as Friedman et al have stressed, citation practice does 'show what judges *think* is legitimate argument and legitimate authority, justifying their behaviour. And such thoughts are important'.[149] The use of citations has other quirks that are well-documented in the literature that potentially impinge on the value of citations as a measure of influence, reputation or quality.[150] This is a limitation in a study such as this to the extent that, for example, we are arguing that if the Court cites the NSW Supreme Court more than the Supreme Court of Tasmania, we can conclude that the reputation of the former is higher than that of the latter or that the former has been more influential in the development of the common law in Victoria. One particular problem germane to a study such as this is string citations, where the judge cites one influential decision and nine decorative decisions that say essentially the same thing. There is, however, a lot of evidence that in spite of the limitations of using citation counts, there is a positive correlation between the quality of output and citations received.[151]

There are several further possibilities to use citation counts with Australian data to better understand the nature of courts and judicial behaviour. We have speculated in passing about the effect of the creation of a permanent Victorian

148 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 19, 70.

149 Friedman et al, above n 3, 794 (emphasis in original).

150 See Arthur Austin, 'The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status' (1993) 35 *Arizona Law Review* 829; J M Balkin and Sanford Levinson, 'How to Win Cites and Influence People' (1996) 71 *Chicago-Kent Law Review* 843; Deborah Jones Merritt, 'Scholarly Influence in a Diverse Legal Academy: Race, Sex and Citation Counts' (2000) 29 *Journal of Legal Studies* 345. For a discussion of some of the limitations and counter-arguments in the context of counting citations in judgments: see Landes and Posner, 'Legal Precedent', above n 7, 271–5; Posner, 'An Economic Analysis of the Use of Citations in the Law', above n 81; Chief Judge Richard A Posner, 'The Learned Hand Biography and the Question of Judicial Greatness' (1994) 104 *Yale Law Journal* 511, 534–40; Chief Judge Richard A Posner, *Cardozo: A Study in Reputation* (1990) 74–91.

151 See Stephen J Choi and G Mitu Gulati, 'Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance' (2004) 78 *Southern California Law Review* 23, 48 fn 38, citing a multitude of studies 'that either suggest or assume a relationship between citation counts and quality'.

Court of Appeal on the citation practice of the Supreme Court of Victoria. Future research could examine directly the effect of the creation of a permanent Court of Appeal on citation practice and judgment length. Such a study could use data from decisions of the Supreme Court over several individual years immediately before and after the establishment of the Court of Appeal. Another avenue for future research is to examine the role of the litigants in putting material before the Court on the citation practice of the Court. Such a study could compare the correlation between the authorities cited in the written materials handed up to the Court and what the judges cite in their written reasons.[152] This could test the hypothesis that the citation practice of judges have changed over time because the authorities cited to the Court by counsel have correspondingly changed over time.

The first systematic study of the sort reported in this article for courts in the US was Merryman's study of the citation practice of the Supreme Court of California, published more than 50 years ago.[153] Over the course of the last 50 years, scholarship in the US employing judicial citations has come a long way. In addition to the multitude of studies that have examined what various courts cite, in the US judicial citations have been used to examine a range of other phenomena. These include measuring the influence and prestige of individual judges,[154] determining the suitability of judges for promotion,[155] measuring the performance of courts,[156] examining the relationship between judicial aging and productivity[157] and even examining judicial bias.[158] In just the last decade, three major law journals in the US have published symposia on interpreting judicial citations and using judicial citations to examine judicial behaviour.[159]

Australian scholarship employing judicial citations has a long way to catch up. At one level we need more conventional citation practice studies of the sort reported in this article to improve our understanding of how courts relate to each other and how judges reason. At another level, there is considerable potential for

[152] For a US study along these lines: see Manz, 'Citations in Supreme Court Opinions and Briefs: A Comparative Study', above n 12.

[153] Merryman, 'The Authority of Authority', above n 14.

[154] See Landes and Posner, 'Legal Precedent', above n 7; Posner, 'The Learned Hand Biography', above n 150, 534–40; Posner, *Cardozo: A Study in Reputation*, above n 150, ch 5; Montgomery N Kosma, 'Measuring the Influence of Supreme Court Justices' (1998) 27 *Journal of Legal Studies* 333; David Klein and Darby Morrisroe, 'The Prestige and Influence of Individual Judges on the US Courts of Appeals' (1999) 28 *Journal of Legal Studies* 271.

[155] See Stephen Choi and Mitu Gulati, 'A Tournament of Judges?' (2004) 92 *California Law Review* 299; Choi and Gulati, 'Choosing the Next Supreme Court Justice', above n 152; Daniel A Farber, 'Supreme Court Selection and Measures of Past Judicial Performance' (2005) 32 *Florida State University Law Review* 1175.

[156] See Chief Judge Richard A Posner, 'Is the Ninth Circuit Too Large?: A Statistical Study of Judicial Quality' (2000) 29 *Journal of Legal Studies* 711.

[157] See Chief Judge Richard A Posner, *Aging and Old Age* (1995) ch 8; Joshua C Teitelbaum, 'Age, Tenure and Productivity of the US Supreme Court: Are Term Limits Necessary?' (2006) 34 *Florida State University Law Review* 161.

[158] See Stephen Choi and Mitu Gulati, 'Ranking Judges According to Citation Bias (As a Means to Reduce Bias)' (2007) 82 *Notre Dame Law Review* 1279.

[159] See 'Symposium: Trends in Legal Citations and Scholarship' (1996) 71 *Chicago-Kent Law Review* 743; 'Symposium: Interpreting Legal Citations' (2000) 29 *Journal of Legal Studies* 317; 'Symposium: Empirical Measures of Judicial Performance' (2005) 32 *Florida State University Law Review* 1001.

more sophisticated employment of judicial citations using Australian data.[160] Used appropriately and with a proper awareness of its limitations, analysis of judicial citations can improve our understanding of otherwise elusive notions such as the performance and reputation of individual courts and judges and the factors that explain performance and reputation. This is likely to be the next frontier for social scientists and empirically-minded legal scholars working with Australian court data over the coming decade.

[160] There are some studies that have employed judicial citations to examine aspects of judicial behaviour and judicial performance in Australia: see Mita Bhattacharya and Russell Smyth, 'The Determinants of Judicial Prestige and Influence: Some Empirical Evidence from the High Court of Australia' (2001) 30 *Journal of Legal Studies* 223; Mita Bhattacharya and Russell Smyth, 'Aging and Productivity among Judges: Some Empirical Evidence from the High Court of Australia' (2001) 40 *Australian Economic Papers* 199; Russell Smyth and Mita Bhattacharya, 'How Fast Do Old Judges Slow Down? A Life Cycle Study of Aging and Productivity in the Federal Court of Australia' (2003) 23 *International Review of Law and Economics* 141; Russell Smyth and Mita Bhattacharya, 'What Determines Judicial Prestige? An Empirical Analysis for Judges of the Federal Court of Australia' (2003) 5 *American Law and Economics Review* 233. For a discussion of how citations can be used to examine judicial behaviour and make the judicial appointment process more transparent in Australia and NZ: see Russell Smyth, 'Do Judges Behave as *Homo Economicus*, and if so, Can We Measure Their Performance? An Antipodean Perspective on a Tournament of Judges' (2005) 32 *Florida State University Law Review* 1299.