

**Citations of Foreign Decisions in Australian State Supreme Courts Over the
Course of the Twentieth Century: An Empirical Analysis**

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ABSTRACT

Following the United States Supreme Court decisions in *Atkins v Virginia*, 536 U.S. 304 (2002), *Lawrence v Texas*, 539 U.S. 558 (2003) and *Roper v Simmons*, 543 U.S. 551 (2005) there has been much discussion about whether, and to what extent, courts in the United States should, and do, cite foreign law. While there has also been some empirical research on this topic for United States courts using citation analysis, there has been little comparative perspective. This study offers a comparative perspective by providing a citation analysis of foreign law cited by the six Australian State Supreme Courts at decade intervals over the period 1905 to 2005. The main findings are that over this period there has been a significant fall in the proportion of English cases cited; however, the proportion of citations of foreign precedent from countries other than England has remained consistently low. The study examines which specific English courts have been cited and which countries other than England get cited. The study also considers which State Supreme Courts cite the most foreign precedent and the areas of the law in which foreign precedent is most often cited. The study concludes by briefly considering the implications of citing little foreign precedent for the role of the State courts in the development of the common law in Australia.

1. INTRODUCTION

We live in a globalized world. The information technology revolution has put foreign precedents at the fingertips of judges and their associates. There is evidence of increased willingness to cite foreign precedents in a range of common law jurisdictions. This is particularly true in areas of the law such as human rights. As Claire L'Huereux-Dubé put it: 'The development of human rights jurisprudence, in particular, is increasingly becoming a dialogue. Judges look to a broad spectrum of sources in the law of human rights when deciding how to interpret their constitutions and deal with new problems. To a greater and greater extent, they are mutually reading and discussing each others jurisprudence'.¹ Recent use of foreign precedent by the United States Supreme Court in three high profile constitutional cases has put the merits of the use of foreign law at the forefront of the academic and broader public debate. In a series of decisions, the United States Supreme Court referenced foreign and international law in invalidating the death penalty for the mentally retarded,² striking down laws prohibiting same-sex sodomy³ and declaring the juvenile death penalty unconstitutional.⁴ The use of foreign law in these cases has divided the Court with Justice Kennedy being a strong proponent and Justice Scalia opposed to using foreign law. Some of the media reaction that these cases has spawned has been extreme. For example, the *New Yorker* featured an article declaring that Justice Kennedy is 'the most dangerous man in America' because of his use of foreign law.⁵ While academic reaction has been more measured, the pros and cons of citing foreign precedent in United States Supreme Court decisions has still been hotly contested.⁶

The debate surrounding the use of foreign precedent in the United States Supreme Court has parallels in other common law countries. Adam Smith notes, for example, that the Irish have been concerned about the encroachment of English law into their

jurisprudence since at least the fourteenth century.⁷ The highest courts in several countries including the Judicial Committee of the Privy Council (hereafter the Privy Council), Indonesia, Italy and Switzerland have expressed concern about the ‘imperialistic’ offshore expansion of United States precedent.⁸ The difference of opinion concerning the use of foreign precedent in the United States Supreme Court cases referred to above between Justices Kennedy and Scalia is evident in the High Court of Australia (hereafter High Court) case of *Al-Kateb v Godwin*.⁹ This case concerned whether the Australian Constitution could be (re)interpreted in light of foreign and international law. Justice McHugh, who was part of the majority, expressed similar views to the dissenting opinions of Justice Scalia in *Atkins v Virginia*¹⁰ and *Lawrence v Texas*,¹¹ opposing the (re)interpretation of the Constitution in light of international precedent. On the other hand, Justice Kirby, who was in the minority, explicitly adopted the views of Justice Kennedy, speaking for the majority in *Lawrence v Texas*.¹² Justice Kirby stated: ‘[W]ith every respect to those of a contrary view, opinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail’.¹³ Writing with specific reference to the ‘expansive approach’ of the United States Supreme Court in *Atkins v Virginia*¹⁴ and *Lawrence v Texas*,¹⁵ his Honour stated: ‘When such a court, in a legal culture traditionally less open to outside legal ideas than ours has been, accepts the relevance for its reasoning of the jurisprudence emerging from a “wider civilization”, it is time for this Court to do likewise’.¹⁶

Academic discussion has pinpointed Australia as being at the forefront of expanding international perspectives on the common law.¹⁷ An important difference between Australia and the United States is that 50 years ago United States courts cited very little foreign cases and their propensity to cite foreign cases has increased over time.

In Australia, in the early twentieth century, the Courts mainly cited foreign cases, in the form of English decisions, and citation to foreign cases has decreased over time. In Australia the debate over which, and how many, foreign cases to cite, has centred on the emergence of what former Chief Justice of the High Court, Sir Anthony Mason, has termed, ‘development of a distinct Australian law’¹⁸ and increasing judicial independence from the United Kingdom over the twentieth century. In 1986 the *Australia Acts*¹⁹ severed the residual constitutional links between Australia and the United Kingdom and abolished the final vestiges of appeal from Australian courts to the Privy Council. Following the commencement of the *Australia Acts*, in *Cook v Cook*²⁰ Justices Mason Wilson, Deane and Dawson observed:

‘The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning’.²¹

Writing extra-curially, Michael Kirby states: ‘Increasingly, since *Cook v Cook*,²² the Australian courts look on English court decisions as nothing more than a source of comparative law. None of them is now binding on any court in Australia. The gradual realisation of this fact releases the mind of Australian lawyers to ravel in the treasures of the common law as it flourishes in Canada, New Zealand, the United States, India and elsewhere’.²³ However, hard evidence on whether Australian courts are turning to a range of common law jurisdictions for inspiration and the changing citation patterns

to foreign law in Australian courts is generally lacking. While it has its quirks, citation analyses are accepted tools of legal scholarship.²⁴ Empirical studies of citations of comparative law exist for the United States federal courts²⁵ and United States State Supreme Courts.²⁶ Outside the United States there is little comparative perspective on this issue drawing on the experience of specific countries. One such study exists of citation of foreign law in the Supreme Court of India.²⁷ Another study examines citation of foreign law in rights litigation in New Zealand.²⁸ There are a series of studies of citation of United States cases in the Supreme Court of Canada.²⁹ There are some studies of the general citation practice of Australian courts;³⁰ however, the only empirical studies which focus specifically on Australian courts' citations of foreign precedent examine the High Court's citation of United States cases.³¹

This study offers empirical evidence on the use of foreign law by the Australian State Supreme Courts at decade intervals over the period 1905-2005. We examine the validity of Michael Kirby's conjecture that the *Australia Acts* have truly changed the mindset of Australian courts and that Australian courts are drawing on comparative law from a range of common law jurisdictions. We focus on the State Supreme Courts, rather than the High Court, for a couple of reasons. First, the State Supreme Courts are important legal institutions in their own right and their importance has increased over time. Since 1984, litigants have not had an automatic right of appeal from the State Supreme Courts to the High Court.³² Thus, except in the limited number of cases where the High Court grants special leave to appeal, the State Supreme Courts are the final court of appeal for parties to causes brought within their jurisdiction.³³ Second, cases before the State Supreme Courts are not as visible as those heard by the High Court and thus citation patterns on the State Supreme Courts allows us to examine whether comparative law has permeated into the Australian

courts beyond the High Court which sits at the apex of the Australian court hierarchy.³⁴ Foreshadowing our main results, we find that citation of foreign cases on the State Supreme Courts has decreased over time. This reflects a decrease in citations of English cases, while citations of courts in other countries have not increased. We conclude by speculating what this changing citation pattern suggests for the evolution of a uniquely Australian common law at the level of the State Supreme Courts.

II. THE AUSTRALIAN CONTEXT

At the time of Federation in 1901 each of the six Australian states had a superior court of record known as the Supreme Court. Prior to the establishment of the High Court the only appeal from a decision of a State Supreme Court was to the Privy Council in London which sat at the top of the Australian court hierarchy. Due to the time and expense involved in travelling to England, this right of appeal was infrequently exercised prior to the jet age.³⁵ The High Court was established in 1903. Prior to 1984, unsuccessful litigants in civil matters had an automatic right to appeal to the High Court from the Full Court or Court of Appeal of any state, subject to a monetary qualification. As discussed above, since 1984 amendments to the *Judiciary Act 1903 (Cth)*, prospective appellants have to obtain special leave to appeal to the High Court. Appeals from the High Court to the Privy Council were abolished successively by legislation introduced by the Gorton government in 1968 (abolishing appeals in federal and constitutional matters) and the Whitlam government in 1975 (abolishing all remaining appeals).³⁶ Until the *Australia Acts* were passed in 1986 unsuccessful litigants in the State Supreme Courts could choose to appeal to either the High Court or the Privy Council, each of which functioned as an ultimate court of appeal. This created ‘a bizarre situation of dualism – and potential conflict – at the apex of the Australian hierarchy of courts’.³⁷ The problem was that in different cases both

ultimate courts might decide the same issue differently, giving rise to delicate issues of judicial comity and precedent.³⁸ It also led to strategic game playing by the parties to litigation. As the current Chief Justice of the High Court notes, direct appeal to the Privy Council from a State Supreme Court 'was a method of by-passing the High Court in cases where the prospects of success in that court were considered unfavourable'.³⁹ The potential for conflict between the courts was resolved when appeals from the State Supreme Courts to the Privy Council were abolished by the *Australia Acts*, making the High Court the final court of appeal in Australia.

Prior to the commencement of the *Australia Acts* in 1986, the State Supreme Courts was bound by the *ratio decidendi* of relevant decisions of the Privy Council.⁴⁰ In State Supreme Court cases decided since 1986 decisions of the Privy Council are not binding.⁴¹ Whether the State Supreme Courts in decisions handed down since the *Australia Acts* are still required to follow decisions of the Privy Council made prior to the *Australia Acts* is not settled. Anthony Blackshield⁴² has expressed the view that decisions of the Privy Council decided prior to 1986 continue to bind the State Supreme Courts until the High Court decides otherwise. However, the contrary view was expressed in the New South Wales Supreme Court in *Hawkins v Clayton*⁴³ by Justice McHugh⁴⁴ and in *Alamdo Holdings v Bankstown City Council*⁴⁵ by Justice Gzell⁴⁶ that the State Supreme Courts are not bound by decisions of the Privy Council made prior to 1986. The same view as Justices Gzell and McHugh has been expressed in the Supreme Court of Victoria by Justice Nathan in *R v Judge Bland; Ex parte Director of Public Prosecutions*⁴⁷ and *Shelmerdine v Ringen Pty. Ltd.*⁴⁸

While decisions of English courts such as the House of Lords and English Court of Appeal are not binding on the State Supreme Courts, they have always been regarded

as highly persuasive.⁴⁹ Until the 1960s there was High Court authority that the State Supreme Courts should follow the House of Lords and the English Court of Appeal even when faced with a conflicting High Court decision⁵⁰ and at least until the mid-1970s it was expected that the State Supreme Courts would follow relevant decisions of the House of Lords and English Court of Appeal in the absence of High Court authority.⁵¹ As Murray Gleeson puts it: ‘In terms of judicial authority and leadership, the distinction between the House of Lords and Privy Council was largely technical. They were the same judges and they declared the law for all those courts from whom appeals might come’.⁵² This situation was similar to that in Canada prior to Canada abolishing appeals to the Privy Council in 1949. As one Canadian commentator put it: ‘THE LAW OF CANADA = THE LAW OF ENGLAND’.⁵³ This equation encouraged Canadian judges to consider ‘the House of Lords the ultimate court, even though it did not entertain Canadian cases’.⁵⁴ However, the status of English case law in Australia has diminished since the commencement of the *Australia Acts*. As the High Court made clear in the passage from *Cook v Cook*,⁵⁵ cited above, since 1986 while decisions of the House of Lords and English Court of Appeal continue to be given respect, Australian courts are less likely to follow them than was once the case. Decisions of courts in other countries such as Canada, New Zealand and the United States have always just been a source of comparative law for Australian courts.

III. STATE SUPREME COURTS’ CITATION OF FOREIGN LAW

A. DATASET

The database consists of all reported decisions in the official state reports of each of the six State Supreme Courts at decade intervals between 1905 and 2005. Covering one year in each decade, rather than all ten, is a straightforward and legitimate method of compiling a large random sample from a broader universe.⁵⁶ A similar approach

has been adopted in previous studies of the citation practice of courts in Canada and the United States that have covered large time spans.⁵⁷ We restrict the sample to decisions reported in the official state reports for two reasons. One is to ensure the data is comparable across states because unreported decisions for some of the State Supreme Courts are not readily accessible for the early decades of the twentieth century. Second, from a pragmatic perspective, it ensures that the cost of compiling such a large dataset is manageable. Even restricting the sample to decisions reported in the official state reports, we ended up with a rather large sample. Overall, our sample contains 3863 cases, in which there over 64,500 citations to authority.

For each decade, for each State Supreme Court, research assistants read every reported case for the six State Supreme Courts and calculated a figure for citations to foreign precedent as well as a figure for total citations. There is an immediate definitional issue as to what constitutes foreign precedent. One might argue that as for a large part of the twentieth century the Privy Council formed part of the Australian court hierarchy, decisions of the Privy Council are not foreign precedent.⁵⁸ It might also be argued that although technically not binding, as the State Supreme Courts were required to follow decisions of the House of Lords and English Court of Appeal until the mid-1970s, cases of these courts should also not be regarded as foreign precedent. As Ostberg and his colleagues note in the Canadian context ‘British citations carry a relevance that [supersedes] citations from other countries’.⁵⁹ However, we treat citations to English courts, including the Privy Council, as foreign precedent to facilitate comparison with citations of courts in other countries. In this respect the Australian situation is analogous with Canada and India, both of which are countries with strong ties to British legal traditions and for which the Privy Council

was once the final court of appeal. The approach here of treating English cases, including decisions of the Privy Council as foreign precedent, is consistent with the approach adopted by Smith in his study of citation of foreign precedent by the Supreme Court of India⁶⁰ and Ostberg and his colleagues in their study of citation of foreign precedent by the Supreme Court of Canada.⁶¹ Total citations were defined as the sum of citations to case law⁶² and citations to secondary authorities. Secondary authorities refer to journal articles, learned texts, legal encyclopaedias, law reform reports, dictionaries and the like.⁶³ In calculating total citations, citations to administrative regulations, constitutions, court rules, executive orders, parliamentary committee reports, parliamentary debates and statutes were not included.⁶⁴

When deciding how to count the citations several 'rules of thumb' were employed that are consistent with previous studies of citation practice of courts in Australia, Canada and the United States.⁶⁵ These rules can be briefly summarized as follows. First, in the event that a case or secondary authority was cited twice in the same paragraph it was counted only once on the assumption that if cited more than once in the same paragraph, it was being cited for the same proposition. Second, citations in joint judgments were attributed to each judge who participated in the judgment, but not to a judge who wrote a separate concurring judgment agreeing with the reasons.⁶⁶ Third, citations in the text and in footnotes were counted equally as the use of footnotes has varied across state reports and across time. Fourth, no distinction was made between positive and negative citations. This follows the approach adopted in previous studies of the citation practice of Australian courts such as Paul von Nessen's studies of citation to United States cases in the High Court.⁶⁷ This approach seems reasonable since few judges cite other judges in a negative fashion.⁶⁸ For

example, Peter McCormick reports that in the Supreme Court of Canada fewer than 1 per cent of citations are negative,⁶⁹ while Stephen Choi and Mitu Gulati report that in the United States federal courts, less than 10 per cent of citations are negative.⁷⁰

B. OVERALL TRENDS

Figure 1 shows citations of foreign decisions in the State Supreme Courts as a proportion of total citations at decade intervals from 1905 to 2005. For the first three decades of the twentieth century (1905-1925) citations of foreign decisions hovered around 70 per cent of total citations. Since 1935 when citations of foreign decisions, as a proportion of total citations, fell to 66.8 per cent, citations of foreign decisions as a proportion of total citations have been on a downward trend. By 1965, citations of foreign decisions as a proportion of total citations had fallen below 50 per cent. In 1995 citations of foreign decisions as a proportion of total citations had declined to 25.7 per cent and by 2005 at 17.5 per cent, less than one in five citations were to foreign decisions. Figure 1 masks considerable variation between citation of English cases (including Privy Council cases) and cases decided by courts in other countries.

Figure 2 distinguishes between citations of English cases and citations of non-English foreign precedent. From Figure 2, it is clear that the downward trend in citation of foreign precedent, observable in Figure 1, is due to a decline in citation of English cases. The decline in the proportion of English cases cited in Figure 2 tracks quite closely the decline in the proportion of foreign precedent cited more generally. Citation of English cases as a proportion of total cases declines from a high of 68.5 per cent in 1915 to 15.3 per cent in 2005. Based on their study of citation patterns on 16 U.S. State Supreme Courts over the period 1870 to 1970, Lawrence Friedman and his colleagues conclude that 'England and the United States are linked by jet and

satellite; but in terms of court citations, the two countries have drifted apart.’⁷¹ The results reported here suggest that while Australia and England continue to share many common values and institutions, court citations in the two countries are drifting apart and drifting apart at an increased rate. Meanwhile, citation of other foreign precedent has been consistently low over the twentieth century, generally hovering between 2 and 4 per cent of total citations with no observable upward or downward trends.

 Insert Figs. 1-2

The Australian State Supreme Courts cited a high proportion of English cases for at least the first half of the twentieth century because not only were decisions of the Privy Council binding on Australian courts, but, as discussed above, decisions of the House of Lords and English Court of Appeal were treated as if they were binding on the State Supreme Courts. Moreover, during this period, the law of Australia and England was largely comparable, there were many useful precedents available in English cases, there was often not comparable Australian authority and, where there was such authority, that was itself largely informed by the English cases. The situation confronting the Australian State Supreme Courts in the first half of the twentieth century was similar to that confronting the State Supreme Courts in the United States during the nineteenth century. As William Manz notes: ‘For a long time during the nineteenth century, New York judges, like many of their American counterparts, cited heavily to English cases. Great Britain provided a large stock of opinions involving common law issues. Absent much American precedent, the Courts of Appeal naturally chose to rely on these decisions’.⁷²

Prior to the 1960s major developments in English law, such as the House of Lords decisions in *Donoghue v Stevenson*⁷³ in 1932 and *Woolmington v D.P.P.*⁷⁴ in 1935

were immediately adopted in Australian law.⁷⁵ This started to change in the 1960s. Citations of English cases fell below 50 per cent of total citations for the first time in 1965. The emergence of an Australian jurisprudence separate from that in England dates from what Sir Anthony Mason has described as ‘Sir Owen Dixon’s historic refusal’⁷⁶ in *Parker v The Queen*,⁷⁷ in 1963 to follow the objective test of murder stated in the House of Lords in *D.P.P. v Smith*.⁷⁸ While the English courts clearly remained near the apex of the court hierarchy for the State Supreme Courts in the mid-1960s, the High Court’s decision in *Parker* may have had a subtle signalling effect on the State courts as marking the beginning of an Australian case law that is distinct from English case law and, as such, started citing fewer English cases.

While citations of English cases fell below 50 per cent from the mid-1960s, the big decline in citations of English cases has occurred over the last two decades. The enactment of the *Australia Acts* was a major turning point. As Sir Anthony Mason described it, echoing the High Court in *Cook v Cook*,⁷⁹ the *Australia Acts* made Australia ‘the masters of our own legal destiny where we should derive such assistance as we can from English authorities. But this does not mean that we should account for every English judicial decision as if it were a decision of an Australian court’.⁸⁰ Legal independence from the United Kingdom has been accompanied by an increased sense of nationhood in Australia and has fuelled a perception that Australia should be seen as an independent nation that is not tied to the United Kingdom or the Queen of England.⁸¹ This broader sense of nationhood has been the catalyst for a rigorous debate that has centred on whether Australia should become a Republic.⁸²

England’s membership of the European Union has also made English case law less relevant to Australia. As the Chief Justice of the High Court describes it:

‘Developments in the UK’s role in Europe, including constitutional and other legal developments, have brought their own pressures for conformity; pressures to which Australia is not subject. This may explain some more recent examples of divergence between our two legal systems. Europe’s influence on the law of England is not (or not yet) directly comparable to the UK’s influence on the law of Australia, but it is perhaps not entirely different. One hundred years ago, Canadians and Australians complained that English lawyers were not familiar with federalism. Thirty years from now, or even sooner, English lawyers may be immersed in federalism and their legal system may be subject to civilian influences that remain foreign to us’.⁸³

Specifically, one important development that has diminished the relevance of recent English decisions to Australian courts is the increasing influence on English cases of the European Convention on Human Rights and Fundamental Freedoms since the Human Rights Act 1998 (UK) was passed in 2000.⁸⁴ As Michael Kirby puts it, the enactment of the Human Rights Act 1998 (UK) ‘makes the invocation of English judicial case law more problematic [in Australia], because of the new and different starting points now provided by this important legal development’.⁸⁵

A final reason for the decline in citation of English cases is the localisation of statute law and growth of local cases. Similar to what has occurred in the State Supreme Courts in the United States,⁸⁶ Australian State Supreme Courts are increasingly confronted with statute law in areas such as commercial law, sale of goods, landlord and tenant, trade practices law, criminal law and tort law.⁸⁷ Manz argues that one of the major reasons for the decline in citations of English cases in the New York Court of Appeals after the nineteenth century was that such cases ‘would be of little use in

an increasing number of cases dealing with constitutional, statutory and regulatory issues'.⁸⁸ Sir Ivor Richardson, Past President of the New Zealand Court of Appeal, makes a similar point with respect to the fall in citations of English cases in New Zealand courts. He states, 'New Zealand has enacted new statutes that have partially codified and reformed parts of the common law. In many cases in which these statutes are invoked, reference to English common law is ordinarily unnecessary. New Zealand cases interpreting the legislation and the common law are more important'.⁸⁹

There are five main reasons for the low rate of citation of foreign cases from countries other than England prior to the enactment of the *Australia Acts*.⁹⁰ The first reason was the pervasive influence of English law. The doctrine of precedent and Australia's close links with England meant then when Australian judges turned to foreign case law they turned to English decisions. The second reason was the declaratory theory of the common law and the influence of 'strict legalism'⁹¹ on Australian judges. The principle of 'strict legalism' shielded judges from articulating the real reasons for their decisions including policy choices by permitting them to present the outcome as the logically inevitable result of the application of legal principle. Thus, there was no need to look to other legal systems for guidance in formulating their reasons for decision.⁹² Third, prior to the digital age it was difficult for lawyers and judges to locate foreign precedent from a range of countries. It is now recognised that the authorities judges cite in their judgments is influenced by the authorities counsel cite in oral argument or written submissions.⁹³ For most of the twentieth century, counsel cited little foreign precedent, other than English cases, to the courts.⁹⁴ Fourth, when judges turn to case law from a country of which they only have cursory awareness, there is the inevitable problem of ascertaining what the law is on an issue. Sir Anthony Mason has famously warned that American case law is 'a trackless jungle in

which only the most intrepid and discerning Australian lawyer should venture' and that in American law support can be found for almost any conceivable proposition.⁹⁵

A final reason for low rates of citation of foreign cases, other than English cases, is the different economic and social contexts in which other legal systems are situated. Take the United States for example. While Australia has much in common with the United States and the influence of United States culture is expanding on the Australian social fabric, the legal systems differ in some important ways. In the United States decisions are much more likely to be influenced by constitutional law given the broader scope of protection afforded by the United States Constitution to fundamental rights than in Australia, which does not have a Bill of Rights. In the United States, much of contract law derives from the uniform commercial code, a state civil code, the Restatement or some combination of these, none of which are relevant in Australia. Even where Australian statutory provisions are derived from equivalents in the United States, American case law might be of limited assistance. One such instance is in the antitrust area where provisions pertaining to the scope of the market in the *Trade Practices Act 1974* (Cth) are derived from the *Sherman Act* (1890) and *Clayton Act* (1914) in the United States. In *News Ltd. v Australian Rugby Football League*⁹⁶ in the Federal Court, Justice Burchett found little assistance from the United States cases defining the scope of sports markets because the size of the United States economy and, hence range of sporting and entertainment options available in the United States, was far in excess of that available in Australia.⁹⁷

Figure 2 suggests that citations of foreign cases, other than cases from England, as a proportion of total citations has not increased since the *Australia Acts* has passed. This stands in contrast to the High Court, which the limited empirical studies,⁹⁸ and

certainly anecdotal evidence, suggests has cited much more foreign precedent from courts in countries other than England since its decision in *Cook v Cook*.⁹⁹ This raises the question: Why has citation of foreign cases from a range of common law jurisdictions increased in the High Court since the mid-1980s, but not in the State Supreme Courts when measured as a proportion of total citations? The main reason for the increase in citation of foreign precedent from myriad jurisdictions in the High Court since the mid-1980s is search for guidance in the development of a uniquely Australian common law. The move away from literalism on the High Court in the 1980s and 1990s encouraged the High Court to look for fresh approaches. This trend was associated with recognition of the need to make overt policy choices and a more 'activist role' for the High Court under Sir Anthony Mason (1987-1995).¹⁰⁰

In contrast, the State Supreme Courts, as intermediate appellate courts, are more likely to see their function as resolving specific disputes rather than making policy. The State Supreme Courts are more likely to feel constrained by traditional precedent than the High Court. In this context, Australian case law and, in particular pronouncements from the High Court, are likely to be of more assistance than foreign precedent from diverse jurisdictions. The same general conclusion is reflected in other indicators such as citation of law reviews. Friedman and his colleagues argue that law review citation rates, 'especially contemporary [law reviews] with their bias towards law reform' represent a rough indicator of a Court's orientation towards an overt policy-making role'.¹⁰¹ Previous studies suggest that Australian State Supreme Courts cite far fewer secondary authorities than the High Court and when they do cite secondary authorities they mainly cite textbooks for statements as to what the law is, rather than law review articles for statements as to what the law should be.¹⁰²

C. WHICH COURTS GET CITED?

Table 1 shows which English courts and which countries other than England have been cited in each decade from 1905 to 2005. For the English courts up to and including 1975 citations reflected an inverse pyramid with the courts lower on the English court hierarchy receiving the more citations. The lower English courts were cited the most followed by the English Court of Appeal, followed by the House of Lords and the Privy Council. Thus, the only ‘English court’ whose decisions were technically binding on the State Supreme Courts, was cited the least. Since 1985 citations of decisions of the English Court of Appeal have been higher than the lower English courts, although the Privy Council continues to be cited the least.

 Insert Table 1

One explanation for the finding that the State Supreme Courts cite few decisions of the Privy Council is simply that there are relatively few decisions of the Privy Council to cite. Even when the Privy Council 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, India and New Zealand, relatively few cases made it to the Privy Council.¹⁰³ Following abolition of appeals to the Privy Council from Australian State Supreme Courts in 1986, New Zealand was the only significant Commonwealth country to retain appeals. In 2003 New Zealand abolished appeals to the Privy Council, meaning there are currently only 11 mainly Caribbean and small island states that actually retain final appeal to the Privy Council.¹⁰⁴

Another explanation for the low number of citations of Privy Council cases is that it has sometimes been regarded as producing decisions of dubious quality¹⁰⁵ The Privy Council has been painted as the poor cousin of the House of Lords.¹⁰⁶ Decisions of the

Privy Council have been criticized in Australia for failing to appreciate the subtleties of federalism since at least the beginning of the twentieth century.¹⁰⁷ As early as the 1911 Imperial Conference, the Australian and New Zealand Prime Ministers called for a new 'Supreme Court of Australasia' consisting of Australian and New Zealand judges to hear cases from the two countries in response to widespread dissatisfaction with decisions of the Privy Council.¹⁰⁸ A prominent critic of the Privy Council (albeit largely in private) was Australia's greatest ever judge Sir Owen Dixon. Sir Owen Dixon was scathing in his diaries and in private correspondence to contemporaries such as Felix Frankfurter of 'the lack of understanding' exhibited by the English Law Lords sitting on the Privy Council in the disposition of Commonwealth cases.¹⁰⁹

The reduced stock of cases to cite as one moves up the court hierarchy also explains why the State Supreme Courts cite 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 Privy Council in preference to the Queens Bench or Chancery Division if one was in point, but often there is not. The English High Court and English Court of Appeal have traditionally heard most probate and trust matters, which almost never get to the House of Lords. The English Court of Appeal has effectively acted as a final Court of Appeal in criminal cases for most of the twentieth century with few criminal cases reaching the House of Lord in any significant way until the 1970s.¹¹⁰ Probate and trusts as well as criminal matters are the areas of the law that occupied a large part of the jurisdiction of Australian State Supreme Courts.

Table 1 also shows countries other than England whose courts were cited by the State Supreme Courts over the course of the twentieth century. Most of the countries are British Commonwealth, or former British Commonwealth, countries. The major exception is the United States. The European Court of Human Rights was also cited in 1995 and 2005. Thus, citation to the European Court of Human Rights is a recent phenomenon, as it is in the United States federal courts.¹¹¹ The three countries that have been cited in sizeable numbers (in excess of 100 citations per annum), in recent decades are Canada, New Zealand and the United States. To put things in perspective, though, we are still talking about small numbers. While New Zealand cases were cited 202 times in 1995 and United States cases were cited 208 times in the same year, this represented just 1.3 per cent to 1.4 per cent of the courts' citations that year.

Bearing this point in mind, what explains the popularity of American, Canadian and New Zealand precedent, relative to other foreign precedent? David Zaring suggests 'judges may follow economic relationships and traditional ties when searching for authority abroad'.¹¹² He suggests the United States federal courts' propensity to cite Canadian and French cases reflects the importance of those two countries as United States trading partners.¹¹³ In 2007 the United States was Australia's third largest trading partner and New Zealand was Australia's seventh largest trading partner.¹¹⁴ Australia has traditional ties with both Canada and New Zealand as members of the British Commonwealth. Since World War II, the focus of Australia's defence and foreign policy has shifted from the United Kingdom to the United States.¹¹⁵ Strong defence ties between Australia and the United States were most recently reinforced by the Howard government's decision to commit troops to Afghanistan and Iraq as part of the US-led 'war against terror'.¹¹⁶ The increased propensity to cite United States

precedent in the Australian State Supreme Courts also reflects the fact that the United States has become a major supplier of precedent to the world emerging out of its status as a global economic and political super power. Bushnell attributes increased propensity of judges in Canada to cite United States cases to the fact that more judges are being educated at law schools in the United States.¹¹⁷ The same can be said for judges sitting on the Australian State Supreme Courts. While the traditional approach in Australia was to do postgraduate studies in England, completing postgraduate studies in the United States has become more common. Manz speculated that the New York Court of Appeals might cite more Canadian cases because of its geographic proximity to Canada.¹¹⁸ Together with strong economic ties and a shared cultural and historical heritage manifest in the ANZAC tradition,¹¹⁹ geographical proximity between Australia and New Zealand helps explain the popularity of New Zealand precedent. That courts in New Zealand and the United States are relatively well-cited suggests being either a close neighbour or economic superpower are important factors explaining who gets cited on the Australian State Supreme Courts.¹²⁰

D. WHICH COURTS CITE FOREIGN PRECEDENT?

Table 2 shows types of foreign decisions cited on the State Supreme Courts according to state. In absolute terms, and as a proportion of total citations, Victoria and New South Wales, the two largest states, cited the most foreign precedent. There are three possible explanations for the propensity of the State Supreme Courts of Victoria and New South Wales to cite more foreign precedent than other State Supreme Courts. First, Zaring found that the New York District courts cited foreign precedent more than other federal courts in the United States.¹²¹ He suggests that one explanation for this phenomenon is that New York is more cosmopolitan than many other cities in the United States.¹²² Victoria and New South Wales are the most cosmopolitan of the

Australian states with not only the largest population bases, but also the largest migrant populations.¹²³ Second, Zaring notes that New York's position as a commercial hub makes it the ideal location to conduct international litigation. The same is true for Victoria and New South Wales which contain Australia's two largest state economies and manufacturing bases. In 2005, New South Wales contributed 32.9 per cent of Australia's Gross Domestic Product, while Victoria was responsible for 24.5 per cent of Australia's Gross Domestic Product.¹²⁴ In 2005-06 New South Wales accounted for 30.1 per cent of Australia's manufacturing employment, while the comparable figure for Victoria was 29.9 per cent.¹²⁵ The relatively large size of the economies translates into commercial litigation with about two-thirds of all commercial litigation in Australia commencing in New South Wales.¹²⁶

Insert Table 2

Third, to the extent that propensity to cite foreign precedent, other than English cases, is an indicator of policy activism, the State Supreme Courts of Victoria and New South Wales, in particular, cite the highest proportion of such precedent. This is not surprising as both State Supreme Courts have a reputation for doctrinal leadership among the Australian State Supreme courts. Both State Supreme Courts are large 'suppliers' of coordinate citations to other State Supreme Courts in Australia while being small 'consumers'.¹²⁷ Both State supreme courts have always had well-respected benches drawn from a strong bar. New South Wales and Victoria have supplied a disproportionate number of High Court judges. H.V. Evatt served as Chief Justice of New South Wales following his retirement from the High Court.

E. CITATIONS OF FOREIGN DECISIONS BY SUBJECT MATTER

Table 3 shows citation of foreign decisions (excluding English decisions) by subject matter. Von Nessen notes that citation to foreign precedent is influenced by the case load of the Court.¹²⁸ This study also found this to be the case. In the High Court foreign cases are most often cited in human rights cases, constitutional law and foreign public and private law,¹²⁹ which to a large extent reflects the case load of the Court. In Table 3 foreign cases were most often cited in criminal law, evidence, property, torts and wills and probate, which are staple areas on the State Supreme Courts. Table 4 shows the same information specifically for citations of United States decisions. This facilitates comparison with the Bushnell and McCormick studies that considered citations of United States cases in Canadian courts¹³⁰ and von Nessen's studies of citations of United States cases in the High Court.¹³¹ The top four subject areas in which United States decisions were cited were the same as for foreign decisions more generally. Von Nessen found that in the High Court, United States decisions were most cited in constitutional and public law, although United States decisions were also heavily cited in criminal matters in a clear third place.¹³² In Canada, not surprisingly giving United States Bill of Rights jurisprudence, United States decisions were cited most frequently in cases concerning the *Canadian Charter of Rights and Freedoms*. However, similar to the situation in Australia, in Canada United States decisions were also heavily cited in criminal law matters.¹³³

 Insert Tables 3 & 4

IV. CONCLUSION

This study has examined citation of foreign precedent in the Australian State Supreme Courts at decade intervals over the period 1905 to 2005. The first major conclusion is that citation of English cases, including Privy Council decisions, have decreased over

time. While this downward trend is not a new phenomenon, the commencement of the *Australia Acts* in 1986 and growing influence of European law on English case law since the turn of the twenty-first century have served as catalysts for accelerating this trend. Ostberg and his colleagues argue that the growing influence of United States decisions on Canadian case law has resulted in policy convergence in the jurisprudence of the two countries, particularly in interpretation of the *Canadian Charter of Rights and Freedoms*.¹³⁴ The decline in citation of English cases in the Australian State Supreme Courts that we observe in this study is evidence of policy divergence between the laws of Australia and England, particularly as Australian courts attempt to develop an Australian common law after *Cook v Cook*.¹³⁵

The introduction quoted Michael Kirby's conjecture that following *Cook v Cook*¹³⁶ Australian lawyers will be more likely 'to ravel in the treasures of the common law as it flourishes in Canada, New Zealand, the United States, India and elsewhere'.¹³⁷ While there is some hard evidence and much anecdotal evidence that this is occurring in the High Court, the results of this study suggest that, as a proportion of total citations, the State Supreme Courts have not cited more foreign precedent from countries other than England since the mid-1980s. Instead, the findings from other studies suggest that on the State courts citation of English case law is being replaced by citation of High Court decisions and the citing Court's own previous decisions.¹³⁸

What does this mean for the evolution of Australian jurisprudence at the state level? It is only natural that over time, and particularly with the growth of statute law, that the State Supreme Courts will cite more Australian law. The main reason the State Supreme Courts cite little foreign precedent from jurisdictions other than England, seems to be that the State Supreme Courts see their role, as intermediate appellate

courts, in terms of resolving disputes rather than extending the boundaries of the common law as it exists in Australia. Of course, to the extent the State Supreme Courts were to perform such a role, it would be subject to the supervision of the High Court. However, what is often forgotten is that since the introduction of special leave to appeal to the High Court in 1984,¹³⁹ the State Supreme Courts for most matters serve as a final court of appeal. This suggests that these State Supreme Courts should consider the policy implications of their decisions more given most litigants never make it to the High Court. If this proposition is accepted there should be a greater role for foreign precedent at the State Supreme Court level as part of the process of fashioning a common law that is best suited to Australia's conditions.¹⁴⁰

FIGURE ONE:
Citations of Foreign Decision as a Proportion of Total Citations in the State Supreme Courts

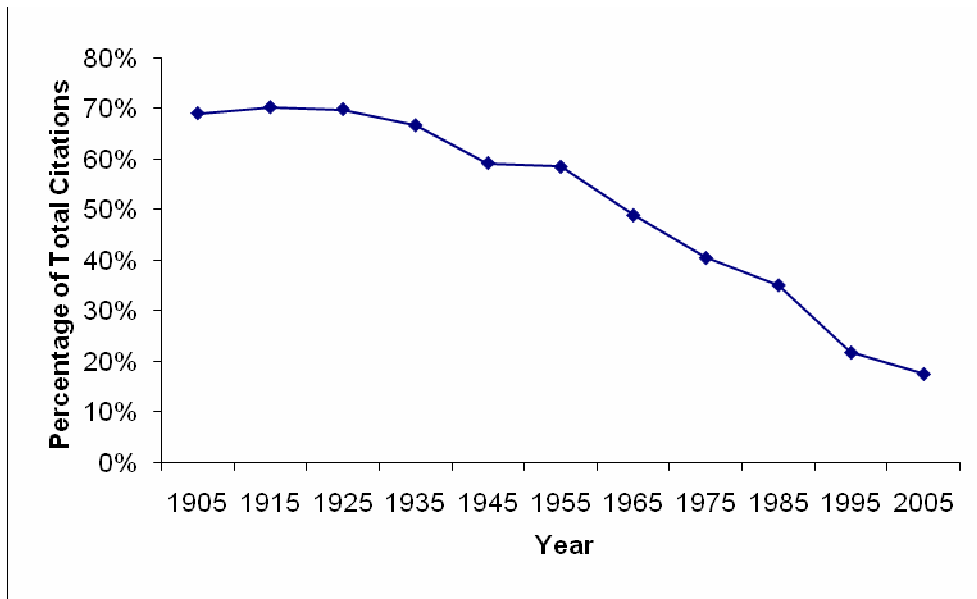


FIGURE TWO:
Citations of English Decisions versus Decisions of Other Countries as a Percentage of Total Citations in the State Supreme Courts

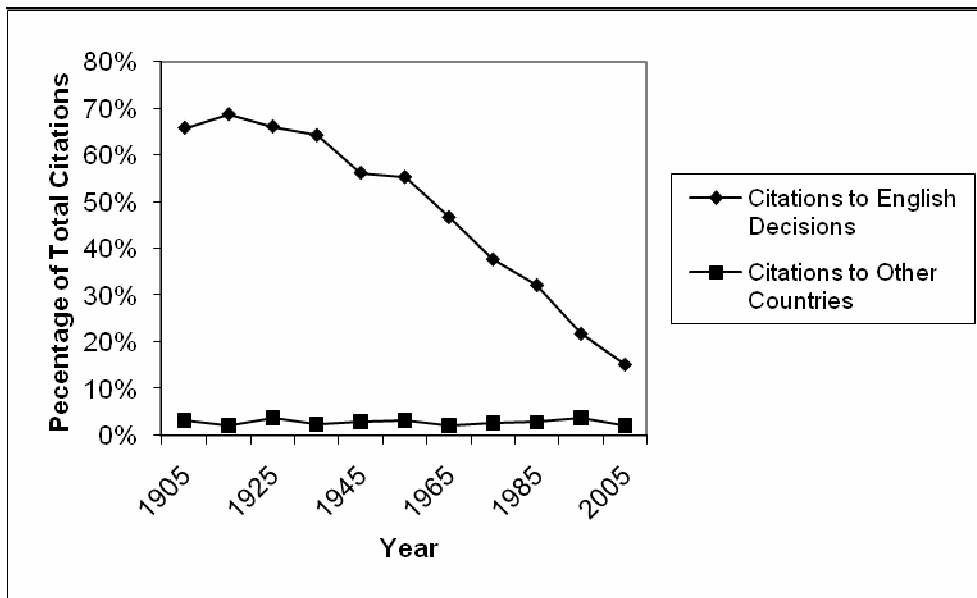


Table ONE: Types of Foreign Decisions Cited in the State Supreme Courts 1905-2005

	<u>1905</u>		<u>1915</u>		<u>1925</u>		<u>1935</u>		<u>1945</u>		<u>1955</u>	
	<i>Number</i>	<i>% of total</i>	<i>Number</i>	<i>% of total</i>	<i>Number</i>	<i>% of total</i>	<i>Number</i>	<i>% of total</i>	<i>Number</i>	<i>% of total</i>	<i>Number</i>	<i>% of total</i>
<i>English Courts</i>												
House of Lords	102	7.46	84	7.92	127	7.77	183	7.52	249	9.87	363	9.74
Judicial Committee	55	4.02	47	4.43	76	4.65	102	4.19	159	6.30	171	4.59
English Court of Appeal	215	15.71	227	21.41	338	20.67	492	20.23	423	16.77	774	20.77
Lower English Court	529	38.66	368	34.72	531	32.48	786	32.32	598	23.71	784	21.04
Subtotal	901	65.86	726	68.48	1072	65.56	1563	64.27	1429	56.66	2092	56.14
<i>Other Countries</i>												
Canada	2	0.29			2	0.12	7	0.29	12	0.48	11	0.30
European Court of Human Rights												
Guyana												
Hong Kong												
India					8	0.49	2	0.08				
Ireland	5	0.72	13	1.23	14	0.86	13	0.53	18	0.71	16	0.43
Jamaica												
New Zealand	1	0.14	6	0.57	21	1.28	22	0.90	26	0.10	43	1.15
Nigeria												
Papua New Guinea												
Scotland	2	0.20	2	0.19	11	0.67	12	0.49	9	0.36	18	0.48
South Africa							1	0.04				
United States	13	1.86	5	0.47	16	0.98	4	0.16	1	0.04	1	0.03
Subtotal	23	3.29	26	2.45	72	4.40	61	2.51	66	2.61	89	2.39
TOTAL	924	69.15	752	70.93	1144	69.96	1624	66.78	1495	59.28	2181	58.54

TABLE ONE Continued: Types of Foreign Decisions Cited in the State Supreme Courts 1905-2005

	1965		1975		1985		1995		2005	
	<i>Number</i>	<i>% of total</i>	<i>Number</i>	<i>% of total</i>	<i>Number</i>	<i>% of total</i>	<i>Number</i>	<i>% of total</i>	<i>Number</i>	<i>% of total</i>
<i>English Courts</i>										
House of Lords	437	8.75	628	8.41	1019	7.25	915	6.01	550	3.61
Judicial Committee	207	4.15	257	3.44	452	3.22	317	2.08	154	1.01
English Court of Appeal	728	14.58	937	12.56	1698	12.08	1226	8.06	941	6.17
Lower English Court	953	19.09	1015	13.60	1381	9.82	889	5.84	694	4.55
Subtotal	2325	46.57	2837	38.01	4550	32.28	3347	21.99	2339	15.34
<i>Other Countries</i>										
Canada	22	0.44	37	0.50	85	0.60	101	0.66	101	0.66
European Court of Human Rights							11	0.07	1	0.01
Guyana					1	0.01				
Hong Kong									3	0.02
India			4	0.05	2	0.01				
Ireland	26	0.52	22	0.29	25	0.18	16	0.11	13	0.09
Jamaica			6	0.08					1	0.01
New Zealand	49	0.98	79	1.06	144	1.02	202	1.32	108	0.71
Nigeria							1	0.01		
Papua New Guinea					1	0.01				
Scotland	9	0.18	24	0.32	11	0.08	13	0.09	21	0.14
South Africa			1	0.01	7	0.05	3	0.02	5	0.03
United States	12	0.24	12	0.16	105	0.75	208	1.37	72	0.47
Subtotal	118	2.36	185	2.48	381	2.71	555	3.65	325	2.14
TOTAL	2443	48.92	3022	40.49	4931	35.08	3902	25.64	2664	17.48

TABLE TWO: Types of Foreign Decisions Cited in the State Supreme Court According to State

	VIC		NSW		QLD		TAS		WA		SA	
	Number	% of total	Number	% of total	Number	% of total	Number	% of total	Number	% of total	Number	% of total
<i>English Courts</i>												
House of Lords	965	3.85	2038	8.13	387	1.54	214	0.85	408	1.63	645	2.57
Judicial Committee	438	1.75	874	3.48	204	0.81	80	0.32	155	0.62	246	0.98
English Court of Appeal	1901	7.58	2955	11.78	917	3.66	374	1.49	721	2.87	1131	4.51
Lower English Court	2278	9.08	2872	11.45	826	3.29	663	2.64	592	2.36	1297	5.17
Subtotal	5582	22.26	8739	34.84	2334	9.31	1331	5.31	1876	7.48	3319	13.23
<i>Other Countries</i>												
Canada	107	0.43	126	0.50	52	0.21	13	0.05	28	0.11	54	0.22
ECHR			11	0.04							1	0.00
Guyana											1	0.00
Hong Kong			3	0.01								
India	9	0.04	4	0.02	1	0.00			1	0.00	1	0.00
Ireland	47	0.19	60	0.24	20	0.08	5	0.02	20	0.08	29	0.12
Jamaica	1	0.00	6	0.02								
New Zealand	151	0.60	257	1.02	80	0.32	58	0.23	57	0.23	98	0.39
Nigeria							1	0.00				
Papua New Guinea			1	0.00								
Scotland	31	0.12	56	0.22	11	0.04	8	0.03	4	0.02	22	0.09
South Africa	5	0.02	8	0.03					2	0.01	2	0.01
United States	109	0.43	231	0.92	30	0.12	18	0.07	14	0.06	47	0.19
Subtotal	460	1.83	763	3.04	194	0.77	103	0.41	126	0.50	255	1.02
TOTAL	6042	24.09	9502	37.88	2528	10.08	1434	5.72	2002	7.98	3574	14.25

TABLE 3: Citations of Foreign Decisions (other than decision of English Courts) in the State Supreme Courts by Subject Matter

Subject Matter	Number
Criminal Law	529
Property	263
Torts	215
Evidence & Procedure	148
Wills & Probate	108
Company Law	93
Insurance	88
Contracts	55
Constitutional Law	51
Worker's Compensation	47
Family Law	39
Administrative Law	35
Taxation	33
Local Government	30
Libel/ Defamation	27
Professional Liability	25
Employment	24
Legal Practice Act	24
Trusts	22
Trial Practice	11
The Police Acts	9
Damages	8
Jurisdiction	6
Industrial Law	4
International Law	4
Statutory Interpretation	4
Costs	3
Bankruptcy	2
Intellectual Property	2
Customs	1
Contempt of Court	1
Insolvency	1

TABLE 4: Citations of United States Courts in the State Supreme Courts by Subject Matter

Subject Matter	US
Criminal Law	165
Torts	83
Property	30
Evidence & Procedure	29
Insurance	28
Constitutional Law	22
Company Law	13
Libel/ Defamation	11
Trusts	7
Taxation	6
Wills & Probate	6
Administrative Law	6
Contracts	5
Employment	5
Worker's Compensation	5
Family Law	4
Legal Practice Act	4
International Law	3
Trial Practice	3
Intellectual Property	2
Industrial Law	2
Local Government	2
Bankruptcy	1
Customs	1
Jurisdiction	1
Professional Liability	1
Statutory Interpretation	1

ENDNOTES

¹ Claire L'Huereux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 15 *Tulsa Law Journal* 18 at 21.

² *Atkins v Virginia*, 536 U.S. 304 (2002).

³ *Lawrence v Texas*, 539 U.S. 558 (2003).

⁴ *Roper v Simmons*, 543 U.S. 551 (2005).

⁵ Jeffrey Toobin. 'Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court', *New Yorker* September 12, 2005, 42.

⁶ There is a voluminous literature discussing the merits of citation of foreign precedent by the United States Supreme Court. Amongst others see Osmar Benvenuto, 'Re-evaluating the Debate Surrounding the Supreme Court Use of Foreign Precedent' (2006) 74 *Fordham Law Review* 2695; Mark Tushnet, 'When is Knowing Less Better than Knowing More? Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law' (2006) 90 *Minnesota Law Review* 1275; Diane Marie Amann, 'International Law and Rehnquist-Era Reversals' (2006) 94 *Georgetown Law Journal* 1319; David Hutt and Lisa Parshall, 'Divergent Views on the Use of International and Foreign Law: Congress and the Executive versus the Court' (2007) 33 *Ohio Northern University Law Review* 113; Daniel Farber, 'The Supreme Court, the Law of Nations and Citations of Foreign Law: The Lessons of History' (2007) 95 *California Law Review* 1335.

⁷ Adam Smith, 'Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence – the Indian Case' (2006) 24 *Berkeley Journal of International Law* 218 at 219.

⁸ See references cited in Smith *ibid* at 219.

⁹ 219 CLR 562

¹⁰ 536 U.S. 304 (2002).

¹¹ 539 U.S. 558 (2003).

¹² *Ibid*.

¹³ *Al-Kateb v Godwin* 219 CLR 562 at [190].

¹⁴ 536 U.S. 304 (2002).

¹⁵ 539 U.S. 558 (2003).

¹⁶ *Al-Kateb v Godwin* 219 CLR 562 at [188].

¹⁷ See Paul von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901-1987' (1992) 14 *Adelaide Law Review* 181 at 217-218.

¹⁸ Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149 at 149. See also Sir Anthony Mason, 'Jurisdictional and Procedural Constraints on the Evolution of Australian Law' (1984) 10 *Sydney Law Review* 253 at 256; Sir Anthony Mason, 'Australian Contract Law' (1988) 1 *Journal of Contract Law* 1 at 1; John Toohey, 'Towards an Australian Common Law' (1999) 6 *Australian Bar Review* 155.

¹⁹ *Australia (Request and Consent) Act* 1985 (Cth.); the *Australia Acts (Request) Act* passed by the Parliament of each State and *Australia Act* 1986 (U.K.).

²⁰ (1986) 162 CLR 376

²¹ *Ibid* at 390.

²² (1986) 162 CLR 376.

²³ Michael Kirby, 'In Praise of Common Law Review: A Commentary on P.S. Atiyah's "Justice and Predictability in the Common Law"' (1992) 15 *University of New South Wales Law Journal* 462 at 464.

²⁴ There is a vast literature on different aspects of the citation practice of courts including three symposiums - see *University of Chicago-Kent Law Review* (1996)71 (Trends in Legal Citations and Scholarship); *Journal of Legal Studies* (2000) 29(1) (Interpreting Legal Citations); *Florida State University Law Review* (2005) 32 (4) (Empirical Measures of Judicial Performance).

²⁵ David Zaring, 'The Use of Foreign Decisions by Federal Courts: An Empirical Analysis' (2006) 3 *Journal of Empirical Legal Studies* 297.

²⁶ For example, see William Manz, 'The Citation Practices of the New York Court of Appeals, 1850-1993' (1995) 43 *Buffalo Law Review* 121.

²⁷ Smith, 'Making Itself at Home'.

²⁸ James Allan, Grant Huscroft and Nessa Lynch, 'The Citation of Overseas Authority in Rights Litigation in New Zealand' (2007) 11 *Otago Law Review*.

²⁹ C.L. Ostberg, Matthew Wetstein and Craig Ducat, 'Attitudes, Precedents and Cultural Change: Explaining the Citation of Foreign Precedents by the Supreme Court of Canada' (2001) 34 *Canadian Journal of Political Science* 377; Peter McCormick, 'The Supreme Court of Canada and American

Citations 1945-1994: A Statistical Overview' (1997) 8 *Supreme Court Law Review* 527; S. I. Bushnell, 'The Use of American Cases' (1986) 35 *University of New Brunswick Law Journal* 157.

³⁰ For example, see Russell Smyth, 'Citations by Court' in Anthony Blackshield, Michael Coper and George Williams (eds) *Oxford Companion to the High Court of Australia* (Melbourne: Oxford University Press, 2001); Russell Smyth, 'Other than 'Accepted Sources of Law? A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22 *University of New South Wales Law Journal* 19; Russell Smyth, 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court' (1998) 17 *University of Tasmania Law Review* 164; Russell Smyth, 'Law or Economics? An Empirical Investigation of the Impact of Economics on Australian Courts' (2000) 28 *Australian Business Law Review* 5;

³¹ See von Nessen, 'The Use of American Precedents by the High Court of Australia; Paul von Nessen, 'Is There Anything to Fear in the Transnationalist Development of the Law? The Australian Experience' (2006) 33 *Pepperdine Law Review* 883.

³² Section 35(2) *Judiciary Amendment Act (No. 2)* 1984 (Cth.).

³³ About 80 per cent of applications for special leave to the High Court are refused – see David Malcolm, 'State Supreme Courts' in Anthony Blackshield, Michael Coper and George Williams (eds) *Oxford Companion to the High Court of Australia* (Melbourne: Oxford University Press, 2001).

³⁴ Compare with the rationale offered by Zaring, 'The Use of Foreign Decisions by Federal Courts' for considering citation of foreign precedent in United States federal courts beyond the United States Supreme Court. Zaring states (at 305) 'a broader survey nonetheless offers a fuller picture of how foreign authority is actually used in the federal system. The chance that any case will end up in the Supreme Court has been tiny since 1945 and is today infinitesimal. The use of foreign authority by the lower federal courts, from the perspective of most litigants, and most litigators, is the only kind of use that matters'.

³⁵ *Ibid.*

³⁶ *Privy Council (Limitation of Appeals) Act 1968 (Cth); Privy Council (Appeals from the High Court) Act 1975 (Cth).*

³⁷ Anthony Blackshield, Michael Coper and John Goldring, 'Privy Council' in Anthony Blackshield, Michael Coper and George Williams (eds) *Oxford Companion to the High Court of Australia* (Melbourne: Oxford University Press, 2001).

³⁸ *Ibid.*

³⁹ Murray Gleeson, 'The Influence of the Privy Council on Australia' (2007) 29 *Australian Bar Review* 123 at 123-124.

⁴⁰ See *Skelton v Collins* (1966) 115 CLR 94 at 104 per Kitto J; *Viro v R* (1978) 141 CLR 88 at 118 per Gibbs J.

⁴¹ *Cook v Cook* (1986) 162 CLR 376 at 390.

⁴² Anthony Blackshield, 'Precedent' in Anthony Blackshield, Michael Coper and George Williams (eds) *Oxford Companion to the High Court of Australia* (Melbourne: Oxford University Press, 2001)

⁴³ (1986) 5 NSWLR 109.

⁴⁴ *Ibid* at 136-137.

⁴⁵ [2003] NSWSC 1074 (2 December 2003).

⁴⁶ *Ibid* at [48].

⁴⁷ [1987] VR 225 at 230-233.

⁴⁸ (1990) V ConvR 54-375.

⁴⁹ *Viro v R* (1978) 141 CLR 88; *Cook v Cook* (1986) 162 CLR 376.

⁵⁰ *Piro v W. Foster & Co. Ltd.* (1943) 68 CLR 313 at 325-326. See also *R v Yuille* [1948] VLR 1 per Gavan Duffy J; *Scott v Willmore & Randell* [1949] 113 per O'Bryan J.

⁵¹ In *Public Transport Commission (NSW) v J. Murray-More (NSW) Pty. Ltd.* (1975) 132 CLR 336 Chief Justice Barwick stated that if there was no High Court decision, a State supreme court should, as a general rule, follow a decision of the English Court of Appeal at first instance and on appeal. Justice Gibbs went further and stated that the New South Wales Court of Appeal should have regarded itself as being bound by a decision of the English Court of Appeal.

⁵² Gleeson, 'The Influence of the Privy Council on Australia' at 129.

⁵³ Bushnell, 'The Use of American Cases' at 164 (emphasis in original).

⁵⁴ *Ibid* at 165.

⁵⁵ (1986) 162 CLR 376.

⁵⁶ Peter McCormick, 'The Evolution of Coordinate Precedential Citation in Canada: Interprovincial Citations of Judicial Authority, 1922-1992' (1994) 32 *Osgoode Hall Law Journal* 271 at 277.

- ⁵⁷ For example, see Manz, 'The Citation Practices of the New York Court of Appeals'; McCormick, 'The Evolution of Coordinate Precedential Citation in Canada'; Lawrence Friedman, Robert Kagan, Bliss Cartwright and Stanton Wheeler, 'State Supreme Courts: A Century of Style and Citation', (1981) 33 *Stanford Law Review* 773.
- ⁵⁸ Bruce Topperwien 'Foreign Precedent' in in Anthony Blackshield, Michael Coper and George Williams (eds) *Oxford Companion to the High Court of Australia* (Melbourne: Oxford University Press, 2001).
- ⁵⁹ Ostberg, Wetstein and Ducat, 'Attitudes, Precedents and Cultural Change' at 386.
- ⁶⁰ Smith, 'Making Itself at Home'.
- ⁶¹ Ostberg, Wetstein and Ducat, 'Attitudes, Precedents and Cultural Change'.
- ⁶² Citations to case law consisted of citations to previous decisions of the citing court, previous decisions of other Australian courts and previous decisions of courts in other countries.
- ⁶³ Wes Daniels, 'Far Beyond the Law Reports: Secondary Source Citations in United States Supreme Court Decisions, October Terms 1900, 1948 and 1978' (1983) 76 *Law Library Journal* 1.
- ⁶⁴ This is consistent with the approach in previous studies – see Daniels, 'Far Beyond the Law Reports: Secondary Source Citations in United States Supreme Court'.
- ⁶⁵ See the references cited in notes 1 and 2 above.
- ⁶⁶ Australian courts follow the British practice of seriatim judgment writing, as opposed to the United States practice of a single opinion of the Court. Sometimes one judge will deliver a single judge or two or more judges will join to deliver a joint judgment.
- ⁶⁷ von Nessen, 'The Use of American Precedents by the High Court of Australia'; von Nessen, 'Is There Anything to Fear in the Transnationalist Development of the Law?'.
- ⁶⁸ See Richard Posner, 'An Economic Analysis of the Use of Citations in the Law' (2000) 2 *American Law and Economics Review* 381; William Landes and Richard Posner, 'The Influence of Economics on the Law: A Quantitative Study' (1993) 36 *Journal of Law and Economics* 385; William Landes, Lawrence Lessig and Michael Solimine, 'Judicial Influence: A Citation Analysis of Federal Courts of Appeal Judges' (1998) 27 *Journal of Legal Studies* 333.
- ⁶⁹ 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 at 462.
- ⁷⁰ Stephen Choi and Mitu Gulati, 'Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance' (2004) 78 *Southern California Law Review* 23 at pp. 56-57.
- ⁷¹ Friedman, Kagan, Cartwright and Wheeler, 'State Supreme Courts: A Century of Style and Citation' at 799.
- ⁷² Manz, 'The Citation Practices of the New York Court of Appeals' at 132.
- ⁷³ [1932] AC 562.
- ⁷⁴ [1935] AC 462.
- ⁷⁵ Gleeson, 'The Influence of the Privy Council on Australia' at 130.
- ⁷⁶ Mason, 'Future Directions in Australian Law' at p. 152.
- ⁷⁷ (1963) 111 CLR 610.
- ⁷⁸ [1961] A.C. 290.
- ⁷⁹ (1986) 162 CLR 376 at 390.
- ⁸⁰ Mason Mason, 'Future Directions in Australian Law' at p. 152.
- ⁸¹ G.L. Davies and M.P. Cowen, 'The Persuasive Force of the Decisions of United States Courts in Australia' (1997) 15 *Australian Bar Review* 51 at 53.
- ⁸² See Mark McKenna, 'Symbolism and the Question of an Australian Republic: The Nation Reviewed' *Monthly* (Melbourne, Vic.) March 2008, 10.
- ⁸³ Gleeson, 'The Influence of the Privy Council on Australia' at 133-134.
- ⁸⁴ Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243 at p.244.
- ⁸⁵ *Ibid.*
- ⁸⁶ See Robert Kagan, Bliss Cartwright, Lawrence Friedman and Stanton Wheeler, 'The Business of State Supreme Courts 1870-1970' (1977) 30 *Stanford Law Review* 121; Herbet Kritzer, Paul Brace, Melinda Gann Hall and Brent Boyea, 'The Business of State Supreme Courts Revisited' (2007) 4 *Journal of Empirical Legal Studies* 427.
- ⁸⁷ Gleeson, 'The Influence of the Privy Council on Australia' at 134.
- ⁸⁸ Manz, 'The Citation Practices of the New York Court of Appeals' at 133.
- ⁸⁹ Sir Ivor Richardson, 'Trends in Judgment Writing in the New Zealand Court of Appeal' in Rick Bigwood (Ed), *Legal Method in New Zealand* (Auckland: Butterworths, 2001), 261 at 264.

⁹⁰ See, in general, Davies and Cowen, 'The Persuasive Force of the Decisions of United States Courts in Australia' at 51, 56-59.

⁹¹ Sir Owen Dixon 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468.

⁹² Davies and Cowen, 'The Persuasive Force of the Decisions of United States Courts in Australia' at 53.

⁹³ William Manz, 'Citations in Supreme Court Opinions and Briefs: A Comparative Study' (2002) 94 *Law Library Journal* 267.

⁹⁴ Davies and Cowen, 'The Persuasive Force of the Decisions of United States Courts in Australia'.

⁹⁵ Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93 at 108.

⁹⁶ (1996) 135 ALR 33

⁹⁷ (1996) 135 ALR 33 at 61-62.

⁹⁸ See von Nessen, 'Is There Anything to Fear in the Transnationalist Development of the Law? Smyth, 'Citations by Court'.

⁹⁹ (1986) 162 CLR 376.

¹⁰⁰ See Cheryl Saunders (Ed.) *Courts of Final Jurisdiction – The Mason Court in Australia* (Sydney, Federation Press, 1996); Michael Kirby, 'A.F. Mason: From Trigwell to Teoh' (1997) 20 *Melbourne University Law Review* 1087; Michelle Dillon and John Doyle 'Mason Court' in in Anthony Blackshield, Michael Coper and George Williams (eds) *Oxford Companion to the High Court of Australia* (Melbourne: Oxford University Press, 2001).

¹⁰¹ Friedman, Kagan, Cartwright and Wheeler, 'State Supreme Courts: A Century of Style and Citation' at 815.

¹⁰² See Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practice on the Supreme Court of Victoria' (2007) 31 *Melbourne University Law Review* 733. See also Vaughn Black and Nicholas Richter, 'Did She Mention My Name? Citation of Academic Authority by the Supreme Court of Canada 1985-1990' (1993) 16 *Dalhousie Law Journal* 377.

¹⁰³ Between 1900 and 1999 the Judicial Committee handed down 6,157 decisions. Australian cases accounted for 444 of these decisions; of which, 37 were appeals from the Supreme Court of Victoria – see Jason Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Durham: Carolina Academic Press, 2006) at pp. 232-233.

¹⁰⁴ The countries that retain appeal to the Judicial Committee are Antigua and Barbuda, Grenada, Bahamas, Jamaica, Barbados, St. Christopher and Nevis, Belize, Saint Lucia, Cook Islands and Niue, Saint Vincent and the (Associated States of New Grenadines Zealand) and Tuvalu.

¹⁰⁵ See discussion in Anthony Blackshield, *The Abolition of Privy Council Appeals: Judicial Responsibility and 'The Law for Australia* (Adelaide, Adelaide Law Review Association, 1978); John Goldring, *The Privy Council and the Australian Constitution* (Hobart, Tasmania University Press, 1996); Geoffrey Sawer, 'Appeals to the Privy Council – Australia' (1970) 2 *Otago Law Review* 138.

¹⁰⁶ Goldring, *The Privy Council and the Australian Constitution* *ibid*.

¹⁰⁷ For example the Judicial Committee opinion in *Webb v Outrim* [1907] AC 81 delivered by the Earl of Halsbury was criticised for failing to come to grips with the notion of the legislative power of the state being limited by a federal structure – see Sir Kenneth Keith 'The Unity of the Common Law and the Ending of Appeals to the Privy Council' (2005) 54 *International Comparative Law Quarterly* 197 at 202.

¹⁰⁸ According to Sir Kenneth Keith the Australian and New Zealand calls were 'met with quite amusement' in London, *ibid*, 203.

¹⁰⁹ See Philip Ayres, *Owen Dixon* (Melbourne, Melbourne University Press, 2003) at pp.41-42, 79-82.

¹¹⁰ According to the official UK government website of the judiciary of England and Wales: 'In some cases a further appeal lies, with leave, to the House of Lords, but in practice the Court of Appeal is the final court of appeal for the great majority of cases'.

http://www.judiciary.gov.uk/about_judiciary/roles_types_jurisdiction/judicial_profiles/salaried/court_appeal_judges.htm (accessed January 15, 2008).

¹¹¹ Zaring, 'The Use of Foreign Decisions by Federal Courts' at 325.

¹¹² *Ibid*.

¹¹³ *Ibid*

¹¹⁴ <http://www.dfat.gov.au/trade/tag/index.html> (last accessed 15 June 2008).

¹¹⁵ See W. Tow and H. Abinski, 'ANZUS – Alive and Well After 50 Years' (2002) 48(2) *Australian Journal of Politics and History* 153.

¹¹⁶ See W. Tow. 'Deputy Sherriff or Independent Ally? Evolving Australian-American Ties in an Ambiguous World Order' (2004) 2 *Pacific Review* 271.

¹¹⁷ Bushnell, 'The Use of American Cases' at 158.

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- ¹¹⁸ Manz, 'The Citation Practices of the New York Court of Appeals' at 134.
- ¹¹⁹ See Joan Beaumont, 'Gallipoli and Australian National Identity' in Neil Garnham and Keith Jeffrey (Eds.) *Culture, Place and Identity* (Dublin, University College Dublin Press, 2005) 138.
- ¹²⁰ See, in a different context, Heng Cheng, Russell Smyth and Wing-Keung Wong "Is Being a Super-Power More Important Than Being Your Close Neighbor? A Study of What Moves the Australian Stock Market" (2008) 18 *Applied Financial Economics* (2008) 1.
- ¹²¹ Zaring, 'The Use of Foreign Decisions by Federal Courts' at 320.
- ¹²² *Ibid* at 321.
- ¹²³ See Simone Battiston and Bruno Mascitelli, 'Migration, Ethnic Concentration and International Trade Growth: The Case of Italians in Australia' (2007) 15 *People & Place* 20.
- ¹²⁴ ABS Cat. no. 5220.0 Australian National Accounts State Accounts
- ¹²⁵ ABS Cat. no. 8221.0 Manufacturing Industry
- ¹²⁶ Fausten, Nielsen and Smyth, 'A Century of Citation Practice on the Supreme Court of Victoria' at 756.
- ¹²⁷ Russell Smyth and Dietrich Fausten 'Coordinate Citations Between Australian State Supreme Courts Over the Twentieth Century', Mimeo, Monash University, Australia.
- ¹²⁸ von Nessen, 'Is There Anything to Fear in the Transnationalist Development of the Law?' at 901.
- ¹²⁹ See Topperwien 'Foreign Precedent'; Davies and Cowen, 'The Persuasive Force of the Decisions of United States Courts in Australia' at 53; Sir Anthony Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7 *Public Law Review* 20.
- ¹³⁰ Bushnell, 'The Use of American Cases'; McCormick, 'The Supreme Court of Canada and American Citations.
- ¹³¹ von Nessen, 'The Use of American Precedents by the High Court of Australia'; von Nessen, 'Is There Anything to Fear in the Transnationalist Development of the Law?'.
- ¹³² *Ibid*.
- ¹³³ McCormick, 'The Supreme Court of Canada and American Citations' at 539.
- ¹³⁴ Ostberg, Wetstein and Ducat, 'Attitudes, Precedents and Cultural Change'.
- ¹³⁵ 1986) 162 CLR 376.
- ¹³⁶ 1986) 162 CLR 376.
- ¹³⁷ Kirby, 'In Praise of Common Law Review' at 464.
- ¹³⁸ For example, see Fausten, Nielsen and Smyth, 'A Century of Citation Practice on the Supreme Court of Victoria'.
- ¹³⁹ Section 35(2) *Judiciary Amendment Act (No. 2)* 1984 (Cth.).
- ¹⁴⁰ Compare with Mason, 'Future Directions in Australian Law' at 154.