

**Citing Outside the Law Reports: Citations of Secondary Authorities on the  
Australian State Supreme Courts Over the Twentieth Century**

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**ABSTRACT**

The purpose of this study is to examine trends in citations of secondary authorities in the six Australian State Supreme Courts based on decisions reported in the official state reports at decade intervals between 1905 and 2005. The main conclusions from the study are that citations of secondary authorities have increased over time; the State Supreme Courts cite fewer secondary authorities than the High Court; most citations of secondary authorities are to legal sources; and of the legal secondary authorities cited, the State Supreme Courts cite far fewer journal articles than legal texts. The study considers the implications of these findings for decision making on the State Supreme Courts. Citations of secondary authorities, and law review articles in particular, can serve as an indicator of the extent to which the courts take account of the policy implications of their decisions. The study concludes that although there is some evidence that the State Supreme Courts have adopted more of a policy role over the last two decades, the State Supreme Courts should be more attuned to the policy implications of their decisions, given that they are now effectively final courts of appeal in most matters with only a small number of cases reaching the High Court.

## **Introduction**

Secondary authorities include dictionaries, encyclopaedias, periodicals, textbooks, law reform reports, conference papers, discussion papers, government reports and unpublished manuscripts. Secondary authorities do not include sources traditionally considered primary, such as administrative regulations, executive orders, prior judicial decisions, statutes and primary legislative history materials such as Hansard.<sup>1</sup> Since Merryman's seminal study of the citation practice of the California Supreme Court in 1950 made legal scholars aware of the value of considering the citation practice of courts,<sup>2</sup> there have been a number of studies which have focused specifically on judicial citation of secondary authorities in Canada and the United States.

Some studies have measured judicial citation of all forms of secondary authority.<sup>3</sup> Other studies have focused on the extent to which the courts have cited scholarship in specific areas of the law such as statutory interpretation,<sup>4</sup> contract law<sup>5</sup> or outsider scholarship,<sup>6</sup> or scholarship on topics outside the law such as the history of the philosophy of science.<sup>7</sup> There are studies which analyse citations of social science research, concentrating on its use (and misuse) in specific sorts of cases such as death penalty cases.<sup>8</sup> As a subset of the literature examining judicial citation of secondary authorities, many studies focus exclusively on judicial citation of law reviews.<sup>9</sup> Sub-subsets of this literature have attempted to measure the extent to which judges cite student notes in law reviews<sup>10</sup> or judicial citation of specific law reviews.<sup>11</sup> Other studies have focused on judicial citations of other specific types of secondary authorities, such as dictionaries,<sup>12</sup> the Bible<sup>13</sup> or classical literature.<sup>14</sup>

Compared with the large number of studies of judicial citation of secondary authorities in Canada and the United States, there are few studies for Australian and

New Zealand courts. There is one study which analyses citations of secondary authorities in High Court cases decided in 1960, 1970, 1980, 1990 and 1996.<sup>15</sup> A second study examines citations of law reviews in High Court cases decided between 1990 and 1997.<sup>16</sup> A third study analyses secondary source citations in Federal Court cases decided over the period 1996 to 1998.<sup>17</sup> A fourth study analyses citations of the law and economics literature in the Federal Court and High Court in the last quarter of the twentieth century.<sup>18</sup> The only study for New Zealand is a study of citation of secondary authority on the New Zealand Court of Appeal between 1995 and 2000.<sup>19</sup>

The purpose of this study is to examine trends in citations of secondary authorities in the six Australian State Supreme Courts based on decisions reported in the official state reports at decade intervals between 1905 and 2005. The results reported in this study are part of a broader project examining the citation practice of the State Supreme Courts over the course of the twentieth century.<sup>20</sup> Compared with previous studies of citations of secondary authorities in Australian and New Zealand courts, this study adopts a much longer timeframe – a century of data. It takes a similar long term perspective to Daniels study of citations of secondary authorities on the United States Supreme Court,<sup>21</sup> but is more comprehensive. While Daniels surveys cases decided in three years (1900, 1940, 1978), this study utilises data from cases decided at decade intervals. Manz points out the advantages of adopting such a long time frame as a century to analyse trends in judicial citations of secondary authorities, noting: “Such long-term investigations are particularly interesting because changes in citation patterns can reflect a court’s conception of its role in society. They also may indicate the effect of changes in judicial workload or the nature of claims a court is called on to adjudicate. Finally, a long-term study can reveal how quickly and the extent to which a court has adopted a new or novel type of authority”.<sup>22</sup>

At a base level, one rationale for examining trends in citations of secondary authorities on the State Supreme Courts over the twentieth century is, as Fred Shapiro, one of the founding fathers of counting legal citations, has noted, “sheer curiosity”.<sup>23</sup> However, beyond mere curiosity, the State Supreme Courts represent significant legal institutions in the Australian court hierarchy 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.<sup>24</sup> 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.<sup>25</sup> As Merryman has pointed out with respect to the California Supreme Court: “The examination of data on the citation practice of the Court turns out to be a distinct and valuable way of approaching the study of that institution, providing insights into matters untouched or only partially illuminated by other modes of inquiry”.<sup>26</sup>

One matter on which a study of the citation of secondary authorities can shed light is the importance of policy considerations in decision-making. The role of the State Supreme Courts in the United States as policy-making institutions has been studied extensively.<sup>27</sup> Given the finality of many decisions of the State Supreme Courts since the mid-1980s, it might be argued that the State Supreme Courts would (or should) be more attuned to the policy implications of their decisions. Good academic research will often place the issue for determination by the Court in its wider economic and social context. Thus, the extent to which the courts cite secondary authorities and particular sorts of secondary authorities such as law reviews is a good indicator of the extent to which courts take account of the social context of their decisions.<sup>28</sup>

Friedman and his colleagues, in their study of the citation practice of sixteen State Supreme Courts in the United States over the period 1870-1970, found that more innovative and policy-oriented courts such as the California Supreme Court and New Jersey Supreme Court were more likely to cite law reviews.<sup>29</sup> These authors suggest citations of law reviews, especially contemporary ones with their bias towards law reform, serve as a rough index of a court's orientation towards an overt policy-making role.<sup>30</sup> Previous studies have suggested that the Supreme Court of New South Wales and, to a lesser extent, the Supreme Court of Victoria are the judicial innovators among the Australian State Supreme Courts.<sup>31</sup> Both of these courts are large suppliers of coordinate citations to the other State Supreme Courts while being small consumers of coordinate citations.<sup>32</sup> A study such as this allows us to ascertain whether these judicial innovators also cite a disproportionate amount of secondary authorities.

The results from a study such as this also have practical implications for different groups of people. The results provide those appearing before the State Supreme Courts with an insight into what secondary authorities the Justices consider legitimate to cite in argument and whether learned treatises or journal articles will be more persuasive. The results are helpful for law librarians, particularly librarians at the State Supreme Courts, who want to make available to their patrons the sorts of authorities shown to be considered by the Court.<sup>33</sup> The results should also be relevant to law review editors. In the United States there has been a long-standing debate about the proper role of the law review dating back at least to Rodell's famous denunciation of legal writing in "Goodbye to Law Reviews".<sup>34</sup> More recently, the debate about the proper role of law reviews has surfaced in Australia between Justice Michael Kirby and John Gava, with the latter arguing that too much law review content is directed at influencing judges and that judges make too much use of law review articles in their

reasons for decision.<sup>35</sup> Nevertheless, in spite of Gava's views, in the United States several judges have expressed dissatisfaction with the content of law reviews because they do not contain enough material that is relevant to the practical legal issues they confront in their courtroom.<sup>36</sup> This has created a disjoint between the academy and the courts, such that the proportion of secondary authorities cited in the United States courts has actually decreased since the 1980s.<sup>37</sup> Notwithstanding Gava's views that law review writing should not be directed at the courts, surveys of law review editors in the United States suggest that the potential to influence judges is one important factor in selecting manuscripts for publication.<sup>38</sup> If the results of a study such as this suggest that the courts cite few law reviews or there is an actual decline in citations of law reviews, law review editors might reconsider the amount of doctrinal scholarship they publish if they want to see the contents of their reviews cited more by the courts.

### **Why Do Judges Cite Secondary Authorities?**

Secondary authorities are not binding on any court, hence there must be other reasons why judges cite this material. Previous studies have discussed several reasons for citing secondary authorities.<sup>39</sup> One issue is whether judges cite law reviews and learned treatises to develop new ideas or to buttress conclusions which they already hold.<sup>40</sup> Justice Michel Bastarache of the Supreme Court of Canada sums up the issue in these terms: "Is the proper use of academic writings in the development of jurisprudence? Should we, as judges, be cognizant only of the strict legal issue before us and the incremental evolution of the common law through precedent, or should we be open to new approaches and commentary by academics who monitor the law in a given area and reconcile it with broader social and legal issues?"<sup>41</sup> Justice R.P. Austin of the Supreme Court of New South Wales has commented that academic research which he finds particularly useful draws out the broader economic and social

implications of the decision.<sup>42</sup> Justice Michael Kirby makes a similar observation, complaining that when referring to the social implications of a decision, counsel do not cite enough secondary authorities.<sup>43</sup> He states, “often, and especially in a final court, it is necessary to view the [legal] problem in a wider context. This may require reflection on matters of history, economics, human rights principles or other considerations. A writer in a law journal is more likely to have insights into such subjects than the average advocate”.<sup>44</sup> However, there is evidence that more often than not, judges cite academic authorities which reinforce existing views. For example, Newland argues that in antitrust cases in the United States Supreme Court, Justices cited law review articles “to support a view they had arrived at more or less independently of the reasoning in the sources referred to”.<sup>45</sup> Consistent with their view that citation of law review articles is an indicator of overt policy making, Friedman and his colleagues speculate that judges cite law review articles to buttress doctrinal change, but otherwise prefer cases as being more authoritative.<sup>46</sup>

Citations of secondary authorities are sometimes perfunctory. Law review articles and textbooks are often cited as handy compilations of the cases contained therein.<sup>47</sup> Merryman describes this form of citation as ‘baseline’ or ‘convenience’ citations.<sup>48</sup>

“[A] treatise is both easier to cite [than the original cases] and puts the state of the settled law in fuller, richer perspective. If one wants to go to the primary authorities, the treatise cites them. Treatises are organized to make research quick and easy – usually quicker and easier than case research”.<sup>49</sup>

Secondary authorities are also cited as representing succinct summaries of the state of the settled law. Justice Frank Richardson of the Supreme Court of California suggests that in the United States, the proliferation of appellate litigation and rapid changes in the law have made judicial reliance on compilations in secondary authorities,

including law reviews, a virtual necessity.<sup>50</sup> In Australia, Justice Michael Kirby has expressed a similar sentiment, stating with respect to law review articles: “Such an article may succinctly state the position that the law has reached. This is a role that law reform reports also now fill. They are increasingly referred to for that purpose”.<sup>51</sup>

In the same vein, learned treatises and law review articles are cited as convenient summaries of the law in other jurisdictions. Friedman and his colleagues refer to a 1970 New Jersey case<sup>52</sup> where the Court cited an article in the *Nebraska Law Review*, “Worker’s Compensation: Half Century of Legal Developments”<sup>53</sup> which discussed the relevant law in several countries including Australia, France, Germany and Israel. Friedman and his colleagues note: “Neither the court nor the lawyers had the time or the know-how, we presume, to examine the experience of the world’s legal systems on this issue. The *Nebraska Law Review* conveniently filled them in; it made inaccessible information accessible. It also legitimized the foreign sources. Citing law reviews is common and acceptable. Citing foreign sources is rarer and more dubious”.<sup>54</sup> Justice R.P. Austin also highlights the benefits of academic writing for remaining up-to-date with developments in foreign law. He writes, ‘I value academic writing that brings into focus legal developments in other countries, particularly, the United Kingdom, Canada, New Zealand and the United States, countries whose judicial experience is most likely to be helpful to judges [in Australia]. The pressure of judicial work is such that we cannot keep abreast of overseas academic developments in all of the areas in which we are required to make decisions’.<sup>55</sup>

Another reason for citing secondary authority is to explore the evolution of the common law. Justice Windeyer’s decisions in the High Court stand out in this regard. Justice Windeyer, who had a keen sense of legal history, often explored the origins of

legal principles, drawing on opinions expressed in law reviews and learned treatises.<sup>56</sup> Many of his citations to scholarly texts were peripheral to the main legal issue in point. As a result, Justice Windeyer was responsible for half of the citations of secondary authorities on the Dixon Court.<sup>57</sup> A related reason for citing secondary authorities is to draw on the opinion of academic authors to assist in determining what earlier cases decided. The result is often an extended discussion of controversies in the law where the views of a range of authors are canvassed.<sup>58</sup> This is particularly common when passages, such as in well-known texts, have been judicially approved in previous cases as correctly stating the law. As a result, “the fact of citation gives a work *authority* to some degree and it will thus exert some influence on the way the law grows”.<sup>59</sup> These academic works are cited as *de facto* primary authorities.<sup>60</sup>

### **Academic and Judicial Attitudes Towards Citing Secondary Authorities**

In the nineteenth century the convention in England was that counsel could not quote from the writings of an author who was still alive.<sup>61</sup> However, this rule was at best spasmodically enforced and by the middle of the twentieth century in England was regarded as no more than a polite fiction. According to Allen, writing at the end of World War II: “By a well-known professional convention living authors are not cited as authority, but Bench and Bar may ‘adopt’ their statements as correct expositions of the law”.<sup>62</sup> The Supreme Court of Canada infamously refused to accept the *Canadian Bar Review* as ‘an authority in [the] Court’ as recently as 1950.<sup>63</sup> However, in the aftermath of the decision there was an extended criticism of the Court’s refusal to accept a journal article as authority, published in the *Canadian Bar Review* itself.<sup>64</sup> The result was that the Supreme Court of Canada relented and since that time has accepted journal articles as authority.<sup>65</sup> In Australia, the High Court has long cited

living and dead authors, dating back at least to Dixon and Evatt JJ's judgments in *Cowell v Rosehill Racecourse Co. Ltd*<sup>66</sup> and *Mills v Mills*<sup>67</sup> in the late 1930s.<sup>68</sup>

Thus, it is clearly acceptable for judges to cite academic authors and it is irrelevant whether the authors are living or dead. One issue is to what extent do judges find academic authorities useful? A second issue is even if judges find academic authorities useful, to what extent should judges actually cite them in their reasons for decision? There are many judges in Australia,<sup>69</sup> Canada,<sup>70</sup> New Zealand<sup>71</sup> and the United States<sup>72</sup> who have stated that they find academic authorities useful when deciding cases. Some of the excessive praise by judges for the value of law reviews expressed at law review dinners and the like can be discounted. For example, in a forward to the *Yale Law Journal* in 1941, Charles Hughes stated “[i]t is not too much to say that in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analysed, in a good legal periodical”.<sup>73</sup> However, in the United States Supreme Court October 1940 term Hughes CJ cited legal periodicals on just three occasions.<sup>74</sup>

In the United States, particularly over the last two decades, judges have been more critical of law reviews for not containing enough doctrinal research, which is of practical use to them.<sup>75</sup> This concern reflects the increasing propensity of law reviews in the United States to publish modern interdisciplinary scholarship, in the form of “law and .....”, that looks at the law from the outside, using social science tools to advocate law reform.<sup>76</sup> The same dissatisfaction has not been expressed by Australian judges with respect to Australian law reviews which publish primarily traditional doctrinal legal research. In Australia and England, however, judges have emphasised the need for academic authors to analyse the law and not merely express opinions. In

the House of Lords decision in *Hunter v Canary Wharf*,<sup>77</sup> in discussing the policy issues in the case, Lord Cooke cited a series of academic writers, which he considered useful to “expose the alternatives”.<sup>78</sup> Lord Goff, however, was critical of Lord Cooke’s use of academic writings, drawing a distinction between “analysis” and “opinion” and finding little “analysis” in the academic writings he had consulted.<sup>79</sup> In a case note, Cane argues that if academic commentators wanted to be taken seriously by judges they cannot merely express opinions unsupported by analysis.<sup>80</sup> Sir Gerard Brennan has expressed a similar view with respect to the role of law reviews in Australia, suggesting that if law review contributors “subject their material to the rigour of the judicial method, their influence of Australian law will be substantial”.<sup>81</sup>

Extensive citation of academic authorities invariably adds to the length of the decision. Some judges, such as Michael Kirby, see this as a necessary evil to fully flesh out the policy implications of the decision.<sup>82</sup> Citing secondary authorities to either explore the evolution of legal principle or as part of extended discourse on controversies in the law when such discussion is not absolutely central to the case has been implicitly criticised by several Australian judges who have advocated the need for shorter reasons for decision. Sir Garfield Barwick was of the view that excessive citation to authority undermined respect for the judgment. His position was that “to bolster the judge’s conclusions formed [after the necessary research was complete] by citation of the views of others, however eminent and authoritative, may reduce the authority of the judge and present him as no more than a research student recording by citation his researched material”.<sup>83</sup> Bryan Beaumont, formerly of the Federal Court, has stated: “Length per se, let alone prolixity, is neither essential nor desirable, and may disguise the real basis for a conclusion. The essential quality of a judgment is

clarity, with as much brevity as the subject will permit".<sup>84</sup> Similarly, Sir Gregory Gowans, a former judge of the Supreme Court of Victoria, has observed:

'The elaboration [by way of the historical narrative] of the research undertaken and of the process of reasoning adopted can sometimes only be explained on the basis of a narcissistic interest on the part of the author of the judgment in the extent of [the judge's] own industry and eradication. It is not part of the function entrusted to [the judge] to do that'.<sup>85</sup>

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

'I believe our judgments are getting longer and more complex. .... I think that we are tending to over-elaborate in our dealing with authority and learned writers. I think that we are probably too willing to deal with arguments that are not essential to the issue. In short, I think we are, perhaps, thinking too much of our judgments as an enduring legacy, and as a contribution to the development of the law, and not enough of the desirability of a judgment expeditiously delivered which meets the essentials .... but does no more".<sup>86</sup>

The trend towards citing large numbers of academic authorities in the High Court of Australia and Supreme Court of Canada as part of longer reasons for decision has been criticised by academic commentators. Cane suggest that excessive citation of secondary authorities makes judgments appear as law review articles and "[j]udgments are not and should not be law review articles".<sup>87</sup> Gava argues that the High Court's propensity to cite law reviews signifies a judiciary that is forsaking the common law tradition in favour of an openly instrumentalist style of judging.<sup>88</sup> J.E. Cote, a judge of the Court of Appeal for Alberta, criticises the Supreme Court of Canada for not being sufficiently discriminate in weighing up which academic

authorities to cite.<sup>89</sup> This criticism echoes earlier an earlier point made by Wigmore who chastised the American courts for indiscriminate citation of authority, irrespective of the reputation of the author. He stated: “Almost any printed pages bound in law-buckram and well advertised or gratuitously presented constitutes authority fit to guide the courts”.<sup>90</sup> In the United States concern has been expressed that contributors to law reviews might be pushing a particular line and that when the reputation of the author is not given due consideration, such people have excessive influence. Justice William Douglas who himself was a big citer of law reviews on the United States Supreme Court<sup>91</sup> has asked rhetorically whether in law reviews the “views presented are those of special pleaders who fail to disclose they are not scholars, but rather people with axes to grind”.<sup>92</sup> Justice Cote has expressed the same concern with respect to the position in Canada.<sup>93</sup> Justice Douglas suggested that in all cases the authors of law review articles should be required to disclose all affiliations, whether a fee had been paid to write the article, the identity of the author’s client and disclose whether the author had a professional interest in certain sorts of litigation.<sup>94</sup>

Citing secondary authorities as neat summaries of the law has been criticised by academic commentators for reflecting a lack of thorough research. This is particularly true of citations of legal encyclopedias such as *Halsbury’s Laws of England*. Merryman suggests citation of legal encyclopedias “assumes a mechanical jurisprudence”.<sup>95</sup> George Smith, who was later a judge on the Arkansas Supreme Court, criticised that Court for giving greater weight to legal encyclopedias than its own cases in the 1940s.<sup>96</sup> Smith suggests: “This practice gives an impression of superficial research .... that invariably mars even an otherwise fine opinion”.<sup>97</sup> To be fair, however, the criticism of superficial research has to be weighed against the

constraints on the courts' time.<sup>98</sup> The practice of citing secondary authorities as a shorthand depiction of the settled law has to be seen in the context of the time pressures resulting from large caseloads. Justice Thomas Ambrose, who is a Judge on the United States Court of Appeals, states that time constraint mean that rarely does he have time to read academic authorities beyond what is occasionally cited by counsel.<sup>99</sup> While being a relatively big citer of secondary authority on the High Court,<sup>100</sup> Justice Michael Kirby has stressed that when writing judgments: "The time for reflection ...[and]... thoughtful research ..... is strictly limited".<sup>101</sup>

Commentators have also criticised judicial citation of academic authorities for distorting priorities in academia. Hutchinson is critical of the view that academic work should serve judicial needs and that its value be measured in the number of judicial citations. He suggests academics owe their allegiance to academia, not the courts, and should do research that has critical bite.<sup>102</sup> Cane suggests the practice in reporting decisions of the Supreme Court of Canada where not only cases, but also academic authorities cited in the case are listed after the head note "risks generating in academics the feeling that such citation is the ultimate mark of success. This may distort academic priorities – academics have various social responsibilities (notably to educate the young) and some of these may not be well served if the academy is seen as a sort of adjunct to the judicial process".<sup>103</sup> Gava makes a similar point to Cane in a more far ranging critique of the role of law reviews, arguing that the push in academia to publish more articles in law reviews with the ultimate reward being judicial recognition in the form of citation diverts resources from teaching, undermines collegiality and reduces the time for reflection needed for good legal writing.<sup>104</sup>

### **Data Set, Methodology and Limitations**

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.<sup>105</sup> 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.<sup>106</sup> 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 of secondary authority as well as a figure for total citations. Total citations were defined as the sum of citations of case law and citations of secondary authorities.<sup>107</sup> 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.<sup>108</sup> 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. 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 and Canadian courts.<sup>109</sup> This approach seems reasonable since few judges cite other judges in a negative fashion.<sup>110</sup> For example, McCormick reports that in the Supreme Court of Canada judicial politeness dictates that less than 1 per cent of citations are negative,<sup>111</sup> while Choi and Gulati report that in the United States federal courts, less than 10 per cent of citations are negative.<sup>112</sup>

While counting citations to measure influence has a long pedigree in empirical legal scholarship, it has limitations.<sup>113</sup> One limitation is that judges might be influenced by an argument in an article or text, but not cite it in their judgment.<sup>114</sup> Justice Frank Richardson has stated that on the California Supreme Court he would regularly consult academic sources, but not necessarily cite them in his reasons.<sup>115</sup> Justice Harry Edwards states “citation studies invariably underestimate utility” noting that he often uses legal scholarship without citing it in his judgments.<sup>116</sup> Justice Susan Kenny of the Federal Court states, “there is much more to influence than calculating the number of times [law reviews are] mentioned in a judgment. .... Apart from articles which are cited in published reasons, judges regularly read and learn from review articles and other academic articles”.<sup>117</sup> Lord Goff has stated that he consults “the relevant academic authorities” as “usual practice”, but his “practice [is] to refer to those which [he] has found to be of assistance”.<sup>118</sup> This suggests that citation counts should be seen as a lower bound on the influence of secondary authorities on judicial reasoning.

A second limitation is that there is no way to accurately ascertain to what extent a secondary authority influenced the outcome of the decision. However, the bulk of evidence suggests that secondary authorities have little influence on actual outcomes. In concluding his study of citation of student notes in law reviews in the United States Federal Courts, Sloan states: “The study results strongly suggest that student works, even if authoritative, .... [have] little effect on a court’s holding”.<sup>119</sup> Manz observes “one should not conclude that “law review authors greatly influence the court’s opinions, since many of the citations are perfunctory”.<sup>120</sup> This is not surprising since for judges “cases and statutes are more authoritative than other legal and non-legal writing”.<sup>121</sup> A third limitation on a judicial citation study is that it says nothing of the influence and value of academic writings in forums outside the courtroom. For example, law reviews provide educational opportunities for law students to hone their research skills, give law professors a “valuable means of disseminating their ideas”<sup>122</sup> to other academics and brings prestige to the sponsoring law school.<sup>123</sup> None of these contributions are dependent upon whether or not judges cite law reviews.<sup>124</sup>

### **Trends in Citations of Secondary Authorities on the State Supreme Courts**

Table 1 shows the frequency of citations of secondary sources on the State Supreme Courts over the period 1905 to 2005. Over the course of the century the proportion of cases citing secondary authority was 0.35 and the number of secondary sources cited per case was 1.38. These figures mask rapid growth in citation of secondary sources over time. The proportion of cases citing secondary sources increased from 0.11 in 1905 to 0.63 in 2005. The average number of secondary sources cited per case increased from 0.21 in 1905 to 2.15 in 2005. The State Supreme Courts cite more legal secondary sources than non-legal secondary sources. The proportion of cases citing legal secondary sources is six times higher than that citing non-legal secondary

sources and the number of legal secondary sources cited per case is 12.8 times higher than the number of non-legal secondary sources cited per case. The number of legal and non-legal secondary sources cited has increased; the number of legal secondary sources cited per case increased 935 per cent and the number of non-legal secondary sources cited per case increased 2800 per cent between 1905 and 2005.

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The finding that citation of secondary sources on a per case basis has increased over time is similar to the findings for the High Court,<sup>125</sup> New Zealand Court of Appeal,<sup>126</sup> the United States Supreme Court<sup>127</sup> and the State Supreme Courts in the United States.<sup>128</sup> The two United States studies on which this conclusion is based, however, are now somewhat dated and there is some evidence that the proportion of secondary sources cited by courts in the United States has declined since the 1980s because judges do not find law reviews relevant to the legal issues they face.<sup>129</sup> The findings, suggest that the State Supreme Courts cite fewer secondary authorities than the High Court, United States Supreme Court and, to a lesser extent, the New Zealand Court of Appeal, but cite a similar proportion of secondary sources to the Federal Court in Australia and the State Supreme Courts in the United States. In 1995 the State Supreme Courts cited 1.65 secondary sources per case. In 1996, the High Court cited 22 secondary authorities per case,<sup>130</sup> while over the period 1996 to 1998 the Federal Court cited 1.84 secondary sources per case.<sup>131</sup> The New Zealand Court of Appeal cited 3.32 secondary sources per case over the period 1995 to 2005.<sup>132</sup> Studies for the United States Supreme Court are more dated. In 1965 the State Supreme Courts cited 1.15 secondary sources per case and in 1975 this increased to 1.46 secondary sources per case. This is similar to the California Supreme Court which cited 1.24 secondary sources per case in 1970.<sup>133</sup> By contrast, in 1978, the most recent year of Daniels'

study, the United States Supreme Court cited 7.1 secondary authorities per case. One of the most comprehensive studies for the United States State Supreme Courts is Manz's study for the New York Court of Appeals.<sup>134</sup> In 1993, the most recent year of that study, the New York Court of Appeals cited secondary authorities in 64.2 per cent of cases, which was slightly higher than the comparable figure for the State Supreme Courts in Australia for 1995, but on a par with the figure for 2005. In 1993 the New York Court of Appeals cited 2.68 secondary sources per case.<sup>135</sup>

Table 1 suggests that over the course of the century, 85.7 per cent of citations of secondary authorities were to legal sources. This result is similar to findings for other courts in Australia and New Zealand. In the Federal Court and New Zealand Court of Appeal slightly more than 80 per cent of secondary source citations are to legal sources, while in the High Court 86 per cent of citations of secondary source citations are to legal sources.<sup>136</sup> The comparable figure for the United States Supreme Court, based on Daniels' study, is just over 70 per cent.<sup>137</sup> In 1995 the State Supreme Courts cited non-legal secondary sources in 9 per cent of cases. In 1993, the United States Supreme Court cited non-legal secondary sources in 49 per cent of cases.<sup>138</sup> One reason why the United States Supreme Court cites a higher proportion of non-legal secondary sources is its propensity to cite social science evidence, in particular in capital punishment cases.<sup>139</sup> A second reason is that the large amount of public interest litigation and amicus involvement in United States Supreme Court cases changes the material placed before the Court. Each kind of litigation almost inevitably involves either parties or issues that mean more secondary material, and often non-legal sources, are placed before the Court. Third, the increasing complexity of litigation in the United States Supreme Court underpins a growing tendency by the Court to rely on scientific and technical information to make their decisions.<sup>140</sup>

To summarize, Table 1 identifies two aspects of the citation practice of the State Supreme Courts that deserve comment. The first is that the State Supreme Courts do not cite as many secondary source authorities as the High Court. The second is that citation of secondary authorities on the State Supreme Courts has increased over time. While it is difficult to provide definitive explanations for these phenomena, we offer some tentative reasons. One reason was raised in the introduction. Previous studies suggest that secondary authorities, and law reviews in particular, are cited more in policy-oriented cases.<sup>141</sup> The High Court, as the final court of appeal in Australia, deals with difficult issues of law and policy, which is the subject of most academic comment. In the State Supreme Courts, the issues are not as difficult and do not have the same law reform or policy component. Michael Kirby has stated: “In the last year of my service as President of the Court of Appeal I wrote 389 opinions. In the High Court of Australia last year I wrote, I think, about 60 opinions. So the workload changes. It’s not as much so far as quantity is concerned. But everything is hard. In the High Court of Australia, with very few exceptions, all of the cases are difficult”.<sup>142</sup> Sirico and Drew, in their study of the United States Courts of Appeal, found that the Federal Circuit Court judges cited few law review articles.<sup>143</sup> Their explanation for this finding was that policy considerations were much less important in the United States Courts of Appeal than the United States Supreme Court.

Their reasoning is apposite to the distinction between the State Supreme Courts and High Court. According to Sirico and Drew: “Circuit judges may see their functions not as making policy, but as deciding specific disputes. In contrast, the Supreme Court not only resolves disputes, but consciously makes policy. Therefore, a circuit judge may find it inappropriate to cite policy-oriented articles or even articles with themes

more general than the precise dispute at the bar”.<sup>144</sup> Having said this, the State Supreme Courts have cited more secondary authorities over time. In particular, there has been a marked increase in the propensity of the State Supreme Courts to cite secondary authorities since the mid-1980s when the State Supreme Courts have effectively been courts of last resort in most matters. In her study of the citation practice of the New York Court of Appeals, Bobinsky found that the Court cited proportionally more law review articles over time.<sup>145</sup> She attributed this finding, at least in part, to the Court becoming more aware of its policy-making function. The same could be said for the Australian State Supreme Courts over the last two decades.

A second explanation for the low citation rate of secondary authorities in the State Supreme Courts compared with the High Court is that the State Supreme Court Justices do not find secondary authorities as helpful given the composition of their workload. Reference has already been made above to the fact that judges sitting in lower courts in the United States have expressed dissatisfaction with the content of law reviews because they do not contain material pertinent to the issues they confront in their courtroom.<sup>146</sup> Even in Australia most comment in law reviews is directed at matters heard in the High Court. Some, such as that appearing in “Before the High Court” in the *Sydney Law Review* and *Amicus Curiae*, published by Bond Law School, has been focused on issues to be heard in the High Court with the objective of assisting the judges in their deliberations. While these initiatives have received encouragement from some High Court judges,<sup>147</sup> they are of no assistance to the State Supreme Courts. Table 2 shows citations of secondary authority in the State Supreme Courts according to subject. The most number of cases containing citation of secondary authorities were in criminal law, evidence and procedure, commercial law, property, torts and wills and probate; however, in each of these areas 30 per cent or

less of the reported cases cited secondary authorities. The State Supreme Courts heard few constitutional cases in which there are often competing policy interests on which academic commentary can be useful to examine the alternatives. Previous studies suggest that the High Court, Supreme Court of Canada and the United States Supreme Court cite the most secondary authorities in constitutional cases.<sup>148</sup>

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Insert Table 2  
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A possible explanation for the increase in the proportion of secondary sources cited over time is that this trend reflects a greater judicial willingness to engage with academia. Increasingly, State Supreme Court judges give addresses to academic audiences and publish in law reviews.<sup>149</sup> McCormick has observed a similar phenomenon in Canada, arguing that judges are increasingly exercising academic leadership in legal scholarship.<sup>150</sup> Judges also have more eclectic academic backgrounds and attend more conferences overseas where they are exposed to judicial reasoning in other courts. For example, Sir Ivor Richardson, Past President of the New Zealand Court of Appeal, attributes an increasing propensity of that Court to cite secondary authorities in the second half of the 1990s to the fact that at that time several sitting judges attended graduate school in the United States.<sup>151</sup>

Another explanation for the increase in the proportion of secondary sources cited over time is that there are simply more academic authorities published. The last two decades has seen an explosion in legal publishing. As Sir Anthony Mason has put it: “We now have a comprehensive array of textbooks on all legal topics, often competing for primacy in a particular field. In addition, there is a wide range of monographs, while there has been an explosion in the number of academic and specialist law journals”.<sup>152</sup> There has also been rapid growth in the number of

university law reviews, reflecting the growth in the number of law schools.<sup>153</sup> This suggests there is academic commentary on subjects that have not been the traditional domain of the law reviews, including issues that have been the staple of the caseload of the State Supreme Courts. Moreover, over time, the number of secondary authorities that have been judicially approved as correctly stating the law has expanded and these authorities have attained *de facto* primary status.<sup>154</sup> The establishment of permanent State Courts of Appeal have increased the research assistance available to the Court of Appeal Justices. The Courts of Appeal have dedicated researchers, while the Supreme Courts have a few, but not as many. Changes in information technology which have reduced the search costs of finding academic authorities has worked in conjunction with the courts' increased ability to call upon those changes, to generate a greater citation of secondary authorities.

### **What Types of Secondary Authorities are Cited?**

Table 3 provides a breakdown of the types of secondary authorities cited over the period 1905 to 2005 for all the State Supreme Courts combined. Some general patterns are observable. First, the State Supreme Courts have consistently cited legal texts more often than legal periodicals over the century. In 2005 the State Supreme Courts cited legal texts about five times as often as legal periodicals. By contrast, the High Court cites legal texts to legal periodicals in a ratio of 1.5:1, while the United States Supreme Court cites more legal periodicals than legal texts.<sup>155</sup> The reason for the finding in this study is that in contrast to the High Court and United States Supreme Court where policy considerations are more important, the State Supreme Courts most likely cite academic authorities for statements of what the law is, rather than what it should be. Legal texts are more useful than legal periodicals in providing positive statements of the law. As Black and Richter note: "it might be said that

articles often advance cutting edge normative arguments while books tend to contain positive statements of the way the law is".<sup>156</sup> J.E. Cote of the Court of Appeal for Alberta makes a similar point with respect to Canada. He states: "Canadian textbooks appear to be more objective and practical than many articles in legal journals".<sup>157</sup>

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Insert Table 3  
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A second feature of Table 3 is that the State Supreme Courts cited very few law reform reports until the mid-1980s; however, from the mid-1980s law reform reports were in a clear third place after legal texts and legal periodicals. While the State Supreme Courts do not cite as many law reform reports as the High Court,<sup>158</sup> the increased propensity of the State Supreme Courts to cite law reform reports from the mid-1980s is consistent with those courts adopting more of a policy-oriented role. A third feature of Table 3 is that the State Supreme Courts cited few legal encyclopedias from 1905 to 1955. However, there was a positive trend from 1965 to 1985 then a downward trend thereafter. Previous studies have found that over time in proportionate terms courts have cited fewer legal encyclopedias and more legal texts.<sup>159</sup> The results in Table 3 suggest that after 1985 the State Supreme Courts cited legal periodicals and law reform reports at the expense of legal encyclopedias. Given the criticism discussed above that citing legal encyclopedias amounts to a mechanical jurisprudence<sup>160</sup> this suggests that the State Supreme Courts have become more sophisticated in their citation patterns over the last two decades. Fourth, most citations of non-legal sources have been citations of dictionaries. This result is similar to the findings from previous studies for Australasian and United States courts.<sup>161</sup>

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Insert Table 4  
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Table 4 breaks down the types of secondary authorities cited according to state. The striking feature of Table 4 is that the Supreme Court of New South Wales and, to a lesser extent, the Supreme Court of Victoria, cited the highest proportion of secondary authorities, including law reviews. As noted in the introduction, in the United States it has been argued that more innovative and policy-oriented courts cite a higher proportion of secondary authorities, particularly law reviews.<sup>162</sup> Moreover, previous studies have suggested that the Supreme Court of New South Wales and, to a lesser extent, the Supreme Court of Victoria, are the leaders among the State Supreme Courts. Both have a positive ‘balance of trade’ in citations, meaning the other State Supreme Courts cite a high proportion of their judgments, while they infrequently cite the other State Supreme Courts.<sup>163</sup> The results in Table 4 are consistent with the State Supreme Courts of New South Wales and Victoria being judicial innovators.

Both these courts have outstanding reputations. McCormick suggests that the reputation of the Ontario Court of Appeal in Canada for judicial innovation reflects its “longstanding reputation as a powerful court drawn from a very strong bar”.<sup>164</sup> He notes that in the early decades of the twentieth century the reputation of the Ontario Court of Appeal rivalled (and for some periods may have exceeded) the Supreme Court of Canada itself.<sup>165</sup> Without meaning to suggest that the reputation of the New South Wales Court of Appeal exceeds that of the High Court, the Supreme Court of New South Wales is an Australian equivalent of the Ontario Court of Appeal. Both the State Supreme Courts of New South Wales and Victoria have always had well-respected benches drawn from a strong bar. Moreover, 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, although by all accounts his intellectual capacity had been much reduced.<sup>166</sup>

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 Insert Table 5  
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Table 5 shows all books cited ten or more times in the State Supreme Courts between 1905 and 2005. The books that the Court cited were predominantly the standard classics and professional texts, reflecting the case load of the Court. Thus, there was a disproportionate number of texts cited on criminal law, evidence, torts, wills and statutory interpretation. Archbold, Cross, Phipson and Wigmore were the preferred texts on evidence; Kenny, Russell and Williams were the preferred texts on criminal law; Fleming, Salmond, Clerk & Lindsell and Pollock were well cited on torts and Jarman and Theobald were the preferred texts on wills and probate. Several of the texts that are heavily cited on the State Supreme Courts, such as Archbold, Holdsworth, Blackstone and Kenny have been cited in courts in commonwealth countries for decades and have the status of *de facto* primary authorities.

Of the ten most cited texts on the State Supreme Courts between 1905 and 2005, four were also among the ten most cited texts on the High Court in reported decisions in the Commonwealth Law Reports in 1960, 1970, 1980, 1990 and 1996. These texts were Fleming, *Law of Torts*, Holdsworth, *A History of English Law*, Wigmore, *Evidence* and Archbold, *Criminal Pleading, Evidence and Practice*.<sup>167</sup> Archbold, and Fleming are also among the most cited texts on the New Zealand Court of Appeal.<sup>168</sup> There is little overlap between the texts heavily cited by the Australian State Supreme Courts and the United States Supreme Court or United States State Supreme Courts, although Blackstone was heavily cited in the United States State Supreme Courts in the early part of the twentieth century and Wigmore is one of the most heavily cited treatises in both the United States Supreme Court and State Supreme Courts.<sup>169</sup>

Merryman discusses the tendency of the California Supreme Court to cite ‘local works’ which are state specific and ‘organized to make research .... quick and easy’.<sup>170</sup> Manz observes a similar phenomenon on the New York Court of Appeals.<sup>171</sup> Similarly, in Australia, each of the State Supreme Courts had their local favourites, which are regularly cited in only one state. For example, the Supreme Court of Victoria was fond of citing O’Dowd and Menzies, *Victorian Company Law and Practice* and Fox, *Victorian Criminal Procedure*, while the Supreme Court of New South Wales has cited books such as Baalman, *The Torrens System in New South Wales* and Hogg, *Conveyancing and Property Law in New South Wales*.

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 Insert Table 6  
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Table 6 shows legal periodicals cited five or more times on the State Supreme Courts between 1905 and 2005. Previous studies in both Australia and the United States have found that a core of elite journals constitute a high proportion of total journals cited.<sup>172</sup> For example, in the High Court, the ten most cited periodicals are responsible for 54 per cent of citations of legal journals<sup>173</sup> and in the Federal Court, the corresponding figure is 58 per cent.<sup>174</sup> The position in the State Supreme Courts is similar. The results in this study suggest that on the State Supreme Courts, the ten most cited journals were responsible for 54 per cent of citations to law journals.

The *Australian Law Journal* and the *Law Quarterly Review* were the most cited legal periodicals, which is also the case in the High Court<sup>175</sup> and Federal Court.<sup>176</sup> Four of the five most cited journals are leading English law journals, reflecting the strong influence of English law on Australian jurisprudence over most of the twentieth century. The New Zealand Court of Appeal also exhibits this English influence with three of the six most cited periodicals on that court being the same English journals

(*Law Quarterly Review*, *Cambridge Law Journal* and *Modern Law Review*). Previous studies have found that the United States Supreme Court and United States Courts of Appeal cite a high proportion of law reviews from elite law schools.<sup>177</sup> The results here suggest this is generally not true, at least for Australian university law reviews.

The only Australian university law reviews to be cited five or more times were the *Sydney Law Review* and *Monash University Law Review*. In the United States high rates of citations to law reviews of elite law schools reflect the preferences of associates, who are typically graduates of the elite law schools and, most often, write the opinions.<sup>178</sup> In contrast, in Australia most judges write their own judgments. Hence, the influence of associates is much reduced.<sup>179</sup> The law reviews of the leading United States law schools – Harvard, Columbia and Yale – were also cited at least five times, although not as often as these journals are cited in the United States Courts. The *Harvard Law Review*, *Columbia Law Review* and *Yale Law Journal* are the three most cited law journals in the world based on citations in Shepard's Law Review Citations as well as the most cited law journals in United States courts.<sup>180</sup> Daniels found these three journals were responsible for over 50 per cent of citations to law journals in the United States Supreme Court in 1900, 1940 and 1978.<sup>181</sup>

## **Conclusion**

This study has examined citations of secondary authorities in the State Supreme Courts in the authorised state reports at decade intervals between 1905 and 2005. Several broad-brushed conclusions are possible. First, citations of secondary authorities, in both an absolute sense and on a per case basis, have increased over time. Second, the State Supreme Courts cite fewer secondary authorities than the High

Court. Third, most citations of secondary authorities are to legal sources. Fourth, the State Supreme Courts cite far fewer journal articles than legal texts.

What are the implications for decision-making on the State Supreme Courts? In the introduction it was suggested that citations of secondary authorities, and law review articles in particular, can serve as an indicator of the extent to which the courts take account of the policy implications of their decisions. In particular, there is much evidence from the United States that more innovative and policy-oriented courts cite a higher proportion of secondary authorities, especially law reviews. The findings in this study suggest that the two State Supreme Courts which have a reputation for judicial leadership among the State courts – Victoria and New South Wales – cite the highest proportion of secondary authorities, including law review articles. Considering the overall picture, there is some evidence that the State Supreme Courts as a whole have adopted more of a policy role over the last two decades. Nevertheless, the State Supreme Courts, taken as whole, still cite only a fraction of the law review articles cited by the High Court. Somewhat provocatively, it might be suggested that the State Supreme Courts should be more attuned to the policy implications of their decisions, given that they are now effectively final courts of appeal in most matters with only a small number of cases reaching the High Court.

Studies of this sort have well-known limitations. These were discussed earlier in the text, but are worth repeating because the results should be viewed subject to these limitations. The main limitation is that counting citations is an inexact measure of the influence of secondary authorities on a judge's reasoning. A judge might read a secondary authority and be influenced by it, but not cite it, while some citations of

secondary authorities are merely perfunctory. 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.<sup>182</sup> In response, Friedman and his colleagues have stressed, citation practice does “show what judges *think* is legitimate argument and legitimate authority, justifying their behaviour. And such thoughts are important”.<sup>183</sup> While some Australian judges have expressed views on how they cite and use secondary authorities in their judgments, through their extra-curial writings, there is a lack of systematic evidence on this issue as there is on broader issues of approaches to judicial style. One useful avenue for future research might be to interview the judges themselves about attitudes to citing and using secondary authorities, broader issues of approach to judgment writing and policy choices in an attempt to realize the impossible and get inside a judge's mind. While one might think that judges would be reticent to comment on such matters, it is worth remembering that Jason Pierce was remarkably successful in getting a sizeable number of Australian judges at all levels to speak candidly about more far more controversial issues relating to judicial activism for his book on the Mason Court.<sup>184</sup>

**TABLE 1**  
**Citations of Secondary Authority on the State Supreme Courts According to Case**

	Total Number of Cases	Number of Cases with Secondary Source Citations			Proportion of Cases with Secondary Source Citations			Number of Secondary Sources Cited per Case		
		Legal	Non-Legal	Total	Legal	Non-Legal	Total	Legal	Non-Legal	Total
1905	361	39	2	41	0.11	0.01	0.11	0.20	0.01	0.21
1915	295	51	4	55	0.17	0.01	0.19	0.31	0.02	0.32
1925	280	53	4	57	0.19	0.01	0.20	0.40	0.03	0.43
1935	290	75	3	78	0.26	0.01	0.27	0.64	0.01	0.66
1945	189	33	6	39	0.17	0.03	0.21	0.52	0.08	0.60
1955	239	77	3	80	0.32	0.01	0.33	0.95	0.07	1.02
1965	311	114	14	128	0.37	0.05	0.41	1.10	0.05	1.15
1975	375	151	18	169	0.40	0.05	0.45	1.39	0.07	1.46
1985	600	146	38	184	0.24	0.06	0.31	1.84	0.06	1.90
1995	511	210	44	254	0.41	0.09	0.50	1.50	0.14	1.65
2005	414	205	57	262	0.50	0.14	0.63	1.87	0.28	2.15
Total	3865	1154	193	1347	0.30	0.05	0.35	1.28	0.10	1.38

**TABLE 2**  
**Citations of Secondary Authority on the State Supreme Courts According to Subject**

Subject	Number of cases with citations	Percentage of cases containing citations
ADMINISTRATIVE LAW	108	57.45
COMMERCIAL	161	29.54
CONSTITUTIONAL	35	32.71
CONTRACT	79	23.80
COSTS	12	33.33
CRIMINAL	264	24.54
DEFAMATION	13	17.11
EMPLOYMENT	36	29.27
ENVIRONMENTAL	5	100.00
EVIDENCE&PROCEDURE	129	28.17
FAMILY LAW	36	31.86
IMMIGRATION	1	100.00
INDUSTRIAL LAW	2	40.00
INSURANCE	24	27.91
INTELLECTUAL PROPERTY	3	37.50
INTERNATIONAL	3	20.00
JURISDICTION	3	25.00
OTHER	11	34.38
POWERS OF COURT	1	25.00
PROPERTY	127	26.96
PRVILIEGE	1	50.00
SHIPPING	4	66.67
STATUTORY INTERPRETATION	55	28.80
TAXATION	21	20.19
TORTS	116	25.11
TRAFFIC	1	7.14
TRIAL PRACTICE	3	13.64
TRUSTS/EQUITY	31	26.05
WILLS&PROBATE	110	31.43

**TABLE 3**  
**Types of Secondary Authorities Cited on the State Supreme Courts**

	<b>1905</b>		<b>1915</b>		<b>1925</b>		<b>1935</b>		<b>1945</b>		<b>1955</b>		<b>1965</b>		<b>1975</b>		<b>1985</b>		<b>1995</b>		<b>2005</b>	
	No.	% of total	No.	% of total	No.	% of total	No.	% of total	No.	% of total	No.	% of total	No.	% of total	No.	% of total	No.	% of total	No.	% of total	No.	% of total
<b>LEGAL</b>																						
Books	77	1.52	66	1.30	72	1.42	162	3.19	92	1.81	186	3.66	250	4.92	491	9.67	741	14.59	527	10.37	525	10.33
Periodicals	1	0.02	7	0.14	5	0.10	16	0.31	20	0.39	44	0.87	49	0.96	56	1.10	144	2.83	59	1.16	103	2.03
Encyclopedias	0	0.00	9	0.18	16	0.31	31	0.61	5	0.10	19	0.37	35	0.69	54	1.06	81	1.59	32	0.63	16	0.31
Law Reform Reports	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	3	0.06	7	0.14	65	1.28	62	1.22	46	0.91
Dictionaries	0	0.00	1	0.02	0	0.00	0	0.00	2	0.04	1	0.02	7	0.14	13	0.26	12	0.24	12	0.24	11	0.22
Other	0	0.00	1	0.02	2	0.04	3	0.06	6	0.12	9	0.18	14	0.28	23	0.45	72	1.42	199	3.92	132	2.60
<b>Subtotal</b>	<b>78</b>	<b>1.54</b>	<b>84</b>	<b>1.65</b>	<b>95</b>	<b>1.87</b>	<b>212</b>	<b>4.17</b>	<b>125</b>	<b>2.46</b>	<b>259</b>	<b>5.10</b>	<b>358</b>	<b>7.05</b>	<b>644</b>	<b>12.68</b>	<b>1115</b>	<b>21.95</b>	<b>891</b>	<b>17.54</b>	<b>833</b>	<b>16.40</b>
<b>NON-LEGAL</b>																						
Books	0	0.00	2	0.04	3	0.06	0	0.00	5	0.10	5	0.10	2	0.04	1	0.02	10	0.20	6	0.12	2	0.04
Periodicals	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	3	0.06	0	0.00	0	0.00	1	0.02	1	0.02	3	0.06
Dictionaries	2	0.04	2	0.04	6	0.12	2	0.04	10	0.20	8	0.16	19	0.37	33	0.65	66	1.30	60	1.18	95	1.87
Other	0	0.00	0	0.00	0	0.00	2	0.04	0	0.00	0	0.00	0	0.00	0	0.00	7	0.14	2	0.04	28	0.55
<b>Subtotal</b>	<b>2</b>	<b>0.04</b>	<b>4</b>	<b>0.08</b>	<b>9</b>	<b>0.18</b>	<b>4</b>	<b>0.08</b>	<b>15</b>	<b>0.30</b>	<b>16</b>	<b>0.31</b>	<b>21</b>	<b>0.41</b>	<b>34</b>	<b>0.67</b>	<b>84</b>	<b>1.65</b>	<b>69</b>	<b>1.36</b>	<b>128</b>	<b>2.52</b>
<b>TOTAL</b>	<b>80</b>	<b>1.57</b>	<b>88</b>	<b>1.73</b>	<b>104</b>	<b>2.05</b>	<b>216</b>	<b>4.25</b>	<b>140</b>	<b>2.76</b>	<b>275</b>	<b>5.41</b>	<b>379</b>	<b>7.46</b>	<b>678</b>	<b>13.35</b>	<b>1199</b>	<b>23.60</b>	<b>960</b>	<b>18.90</b>	<b>961</b>	<b>18.92</b>

**TABLE 4**  
**Types of Secondary Authorities Cited According to State Supreme Court**

	TAS		VIC		NSW		QLD		WA		SA		TOTAL
	No.	% of total	No.	% of total	No.	% of total	No.	% of total	No.	% of total	No.	% of total	
<b>LEGAL</b>													
Books	216	4.25	971	19.11	1111	21.87	239	4.70	286	5.63	365	7.19	3188
Periodicals	28	0.55	129	2.54	205	4.04	34	0.67	61	1.20	47	0.93	504
Encyclopedias	30	0.59	4	0.08	115	2.26	51	1.00	54	1.06	44	0.87	298
Law Reform Reports	4	0.08	51	1.00	100	1.97	2	0.04	19	0.37	7	0.14	183
Dictionaries	8	0.16	18	0.35	8	0.16	4	0.08	14	0.28	7	0.14	59
Other	0	0.00	230	4.53	164	3.23	14	0.28	24	0.47	29	0.57	461
<b>Subtotal</b>	<b>286</b>	<b>5.63</b>	<b>1403</b>	<b>27.62</b>	<b>1703</b>	<b>33.52</b>	<b>344</b>	<b>6.77</b>	<b>458</b>	<b>9.02</b>	<b>499</b>	<b>9.82</b>	<b>4693</b>
<b>NON-LEGAL</b>													
Books	2	0.04	5	0.10	16	0.31	10	0.20	3	0.06	0	0.00	36
Periodicals	0	0.00	0	0.00	0	0.00	4	0.08	4	0.08	0	0.00	8
Dictionaries	9	0.18	69	1.36	89	1.75	27	0.53	50	0.98	60	1.18	304
Other	0	0.00	1	0.02	29	0.57	0	0.00	5	0.10	4	0.08	39
<b>Subtotal</b>	<b>11</b>	<b>0.22</b>	<b>75</b>	<b>1.48</b>	<b>134</b>	<b>2.64</b>	<b>41</b>	<b>0.81</b>	<b>62</b>	<b>1.22</b>	<b>64</b>	<b>1.26</b>	<b>387</b>
<b>TOTAL</b>	<b>297</b>	<b>5.85</b>	<b>1478</b>	<b>29.09</b>	<b>1837</b>	<b>36.16</b>	<b>385</b>	<b>7.58</b>	<b>520</b>	<b>10.24</b>	<b>563</b>	<b>11.08</b>	<b>5080</b>

**TABLE 5**  
**Books Cited Ten or More Times on the State Supreme Courts from 1905-2005**

<b>Book Cited</b>	<b>Number</b>
Cross on Evidence	48
Jarman on Wills	41
Fleming, Law of Torts	37
Holdsworth, A History of English Law	28
Wigmore on Evidence	25
Archbold, Criminal Pleading Evidence and Practice	24
Meagher Gummow and Lehane, Equity Doctrines and Remedies	24
Pearce, Statutory Interpretation in Australia	24
Theobald on Wills	24
East, Pleas of the Crown	23
Williams, Criminal Law	22
Maxwell on Interpretation of Statutes	21
Daniell's Chancery Practice	20
Craies on Statute Law	19
Cheshire and Fifoot, Law of Contract	19
Phipson on Evidence	19
Gately on Libel and Slander	18
Fry on Specific Performance	15
Kenny, Outlines of Criminal Law	15
Chitty on Contracts	14
McGregor on Damages	14
Wade, Administrative Law	13
Jacob's Law of Trusts in Australia	13
Luntz, Assessment of Damages	12
Buckley on Companies Act	12
Blackstone, Commentaries on the Laws of England	12
Ford and Lee, Principles of the Law of Trusts	12
Salmond on Torts	12
Clerk and Lindsell on Torts	11
Hawkins on Wills	11
Lewin on Trusts	11
Maxwell on Statutes	10
Palmer's Company Law	10
Palmer's Company Precedents	10
Pollock on Torts	10
Bullen and Leake, Principles of Pleadings	10
Russell on Crime	10
Voumand's Sale of Land	10

**TABLE 6:**  
**Legal Periodicals Cited Five or More Times in the State Supreme Courts 1905-2005**

<b>Periodical Cited</b>	<b>Number</b>
Australian Law Journal	86
Law Quarterly Review	68
Modern Law Review	29
Cambridge Law Journal	18
Criminal Law Review	18
Criminal Law Journal	16
Monash University Law Review	12
Sydney Law Review	12
Canadian Bar Review	7
Harvard Law Review	7
Columbia Law Review	5
Yale Law Journal	5

## ENDNOTES

- <sup>1</sup> 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 at p.3.
- <sup>2</sup> John Merryman, "The Authority of Authority: What the California Supreme Court Cited in 1950" (1954) 6 *Stanford Law Review* 613.
- <sup>3</sup> See Neil Bernstein, "The Supreme Court and Secondary Source Material: 1965 Term" (1968) 57 *Georgetown Law Journal* 57; Daniels, "Far Beyond the Law Reports" above note 1; John Hasko, "Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions" (2002) 94 *Law Library Journal* 427; Vaughan Black and Nicholas Richter, "Did She Mention My Name? Citation of Secondary Authority by the Supreme Court of Canada" (1993) 16 *Dalhousie Law Journal* 377; Peter McCormick, "Do Judges Read Books Too? Academic Citations by the Lamer Court 1991-96" (1998) 9 *Supreme Court Law Review* 463.
- <sup>4</sup> Gregory Crespi, "The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis" (2000) 53 *Southern Methodist University Law Review* 9.
- <sup>5</sup> Gregory Crespi, "The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis" 2004 57 *Southern Methodist University Law Review* 105.
- <sup>6</sup> Larry Backer, "Measuring the Penetration of Outsider Scholarship into the Courts: Indifference, Hostility, Engagement" (2000) 33 *UC Davis Law Review* 1173.
- <sup>7</sup> Gary Edmond and David Mercer, "Conjectures and Exhumations: Citations of History, Philosophy and Sociology of Science in US Federal Courts" (2002) 14 *Law and Literature* 309.
- <sup>8</sup> James Acker, "Social Science in Supreme Court Death Penalty Cases: Citation Practices and their Implications" (1991) 8 *Justice Quarterly* 21; James Acker, "Research on the Death Penalty – Different Agenda: Empirical Research Evidence and Capital Punishment Decisions 1986-1989" (1993) 7 *Law and Society Review* 65.
- <sup>9</sup> Douglas Maggs, "Concerning the Extent to which the Law Review Contributes to the Development of the Law" (1930) 3 *Southern California Law Review* 181; Chester Newland, "Legal Periodicals and the United States Supreme Court" (1959) 7 *Kansas Law Review* 477; Louis Sirico and John Margulies, "The Citing of Law Reviews by the Supreme Court: An Empirical Study" (1986) 34 *UCLA Law Review* 131; Louis Sirico and Beth Drew, "The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis" (1991) 41 *University of Miami Law Review* 1051; Richard Mann, "The Use of Legal Periodicals by Courts and Journals" (1986) 26 *Jurimetrics Journal* 400; Deborah Merritt and Melanie Putnam, "Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles" (1996) 71 *Chicago-Kent Law Review* 871; Michael McClintock, "The Declining Use of Legal Scholarship by Courts: An Empirical Study" (1998) 51 *Oklahoma Law Review* 659; Gregory Crespi, "Judicial and Law Review Citation Frequencies for Articles Published in Different Tiers of Journals: An Empirical Analysis" (2004) 44 *Santa Clara Law Review* 897; Alfred Brophy, "The Relationship Between Law Review Citations and Law School Rankings" (2006) 39 *Connecticut Law Review* 45.
- <sup>10</sup> Bart Sloan, "What are We Writing For? Student Works as Authority and their Citation by the Federal Bench, 1986-1990" (1992) 61 *George Washington Law Review* 221; Blake Rohrbacher, "Decline: Twenty-Five Years of Student Scholarship in Judicial Opinions" (2006) 80 *American Bankruptcy Law Journal* 553.
- <sup>11</sup> Richard 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; Patricia McMahon, "Canadian Judicial Citations of Articles Published in the University of Toronto Faculty of Law Review" (2001) 59 *University of Toronto Faculty of Law Review* 367.
- <sup>12</sup> Ellen Aprill, "The Law of the Word: Dictionary Shopping in the Supreme Court" (1998) 30 *Arizona State Law Journal* 277; Joseph Miller and James Hilsengter, "The Proven Key: Roles and Rules for Dictionaries at the Patent Office and the Courts" (2005) 54 *American University Law Review* 815.
- <sup>13</sup> Sanja Zgonjanin, "Quoting the Bible: The Use of Religious References in Judicial Decision-Making" (2005) 9 *New York City Law Review* 31.
- <sup>14</sup> Todd Henderson, "Citing Fiction" (2008) 11 *The Green Bag: An Entertaining Journal of Law* 171.
- <sup>15</sup> 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.
- <sup>16</sup> 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* 168.
- <sup>17</sup> Russell Smyth, "The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court" (2000) 9 *Griffith Law Review* 25.

<sup>18</sup> Russell Smyth, “Law or Economics? An Empirical Investigation of the Impact of Economics on Australian Courts” (2000) 28 *Australian Business Law Review* 5.

<sup>19</sup> 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* (Auckland: Butterworths, 2001), 101.

<sup>20</sup> For published or forthcoming studies from the project 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; Ingrid Nielsen and Russell Smyth, “One Hundred Years of Citation of Authority on the Supreme Court of New South Wales” (2008) 31, *University of New South Wales Law Journal* 189; Russell Smyth and Dietrich Fausten, “Coordinate Citations Between Australian State Supreme Courts Over the Twentieth Century” (2008) 34 *Monash University Law Review* 53; Russell Smyth, “Citations of Foreign Decisions in Australian State Supreme Courts Over the Course of the Twentieth Century: An Empirical Analysis”, *Temple International & Comparative Law Journal* (in press); Russell Smyth, “The Citation Practices of the Supreme Court of Tasmania, 1905-2005” (2007) 26 *University of Tasmania Law Review* 34; Russell Smyth, “Citation to Authority on the Supreme Court of South Australia: Evidence From a Hundred Years of Data” (2009) 29 *Adelaide Law Review* 113.

<sup>21</sup> Daniels, “Far Beyond the Law Reports” above note 1

<sup>22</sup> William Manz, “The Citation Practices of the New York Court of Appeals, 1850-1993” (1995) 43 *Buffalo Law Review* 121 at p. 122.

<sup>23</sup> Fred Shapiro, “The Most Cited Articles from the Yale Law Journal” (1991) 100 *Yale Law Journal* 1449 at p. 1449.

<sup>24</sup> Section 35(2) *Judiciary Amendment Act (No. 2)* 1984 (Cth.).

<sup>25</sup> 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).

<sup>26</sup> John Merryman, “Towards a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970” (1977) 50 *California Law Review* 381 at p.428.

<sup>27</sup> See Martin Shapiro ‘Decentralized Decision-Making in the Law of Torts’ in Sydney Ulmer (Ed.) *Political Decision-Making* (New York: Van Nostrand Reinhold, 1970); Jack Walker, ‘The Diffusion of Innovations Among the American States’ (1969) 63 *American Political Science Review* 880; Lawrence Baum and Bradley Canon, ‘State Supreme Courts as Activists: New Doctrines in the Law of Torts’ in Mary Cornelia Porter and G. Alan Tarr (Eds.) *State Supreme Courts: Policymakers in the Federal System* (Westport: Greenwood Press, 1982), pp. 83-108; John Hagan, ‘Patterns of Activism on State Supreme Courts’ (1988) 18 *Publius* 97; Henry Glick, *Supreme Courts in State Politics: An Investigation of the Judicial Role* (New York: Basic Books, 1971); Mary Cornelia Porter, ‘State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation’ in Mary Cornelia Porter and G. Alan Tarr (Eds.) *State Supreme Courts: Policymakers in the Federal System* (Westport: Greenwood Press, 1982), pp. 3-21.

<sup>28</sup> G. Nicholls, “Legal Periodicals and the Supreme Court of Canada” (1950) 28 *Canadian Bar Review* 422 at p. 425.

<sup>29</sup> Lawrence Friedman, Robert Kagan, Bliss Cartwright and Stanton Wheeler, “State Supreme Courts: A Century of Style and Citation” (1981) 33 *Stanford Law Review* 773 at p.815.

<sup>30</sup> *Ibid.*

<sup>31</sup> Fausten, Nielsen and Smyth, “A Century of Citation Practice on the Supreme Court of Victoria”, above note 20; Nielsen and Smyth, “One Hundred Years of Citation of Authority on the Supreme Court of New South Wales”, above note 20.

<sup>32</sup> Smyth and Fausten, “Coordinate Citations Between Australian State Supreme Courts”, above note 20.

<sup>33</sup> The State Supreme Court libraries have from time to time undertaken their own studies of the citation practices of the judges with a view to identifying materials which receive the most citations. For example the Supreme Court of Queensland library has undertaken such a study. The results of the study are discussed in the Hon. P. de Jersey, ‘The Role of the Supreme Court of Queensland in the Convergence of Legal Systems’, Sixteenth Congress of the International Academy of Comparative Law, University of Queensland, July 2002.

<sup>34</sup> Fred Rodell, “Goodbye to Law Reviews” (1936) 23 *Virginia Law Review* 38.

<sup>35</sup> Michael Kirby, “Welcome to Law Reviews” (2002) 26 *Melbourne University Law Review* 1; John Gava, “Law Reviews, Good for Judges, Bad for Law Schools?” (2002) 26 *Melbourne University Law Review* 560.

<sup>36</sup> Judith S. Kaye “One Judge’s View of Academic Writing” (1989) 39 *Journal of Legal Education* 313 at p. 320 (“I am disappointed not to find more in the law reviews that is of value and pertinence to our cases”); Richard Posner, “The Present Situation in Legal Scholarship” (1981) 90 *Yale Law Journal* 1113 at p.1113 (“Doctrinal analysis which is and should remain at the core of legal scholarship, is currently endangered at the leading law schools”); *U.S. v Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars in U.S Currency*, 955 F.2d 712 at 722 (D.C. Circuit, 1992) (“Many of our law reviews are dominated by the rather exotic offerings of increasingly out-of-touch faculty members”); Harry Edwards, “The Growing Disjunction Between Legal Education and the Legal Profession” (1992) 91 *Michigan Law Review* 34 at pp. 35-38 (discussing “practical” versus “impractical” scholarship).

<sup>37</sup> For example, see William Manz, “The Citation Practices of the New York Court of Appeals: A Millennium Update” (2001) 43 *Buffalo Law Review* 1273; Rohrbacher, “Decline: Twenty-Five Years of Student Scholarship in Judicial Opinions” above note 10.

<sup>38</sup> Jordan H. Liebman and James P. White, “How the Student-Edited Law Reviews Make Their Publication Decisions” (1989) 39 *Journal of Legal Education* 387.

<sup>39</sup> See Smyth, “Other than Accepted Sources of Law?” above note 15 at pp. 22-24; Smyth, “The Authority of Secondary Authority” above note 17 at pp. 28-30; Smyth, “Judicial Robes or Academic Gowns?” above note 19 at pp. 102-104. See also the discussion in J.E. Cote, “Far Cited” (2001) 39 *Alberta Law Review* 640 at p. 644 ff.

<sup>40</sup> Michel Bastarache, “The Role of Academics and Legal Theory in Judicial Decision-Making” (1999) 37 *Alberta Law Review* 739 at p. 741.

<sup>41</sup> *Ibid* at pp. 741-742.

<sup>42</sup> R.P. Austin, “Academics, Practitioners and Judges” (2004) 26 *Sydney Law Review* 463 at p. 471.

<sup>43</sup> Kirby, “Welcome to Law Reviews”, above note 35 at p. 8.

<sup>44</sup> *Ibid*.

<sup>45</sup> Newland, “Legal Periodicals and the United States Supreme Court”, above note 9 at p.142.

<sup>46</sup> Friedman, Kagan, Cartwright and Wheeler, “State Supreme Courts: A Century of Style and Citation”, above note 29 at pp. 814-817.

<sup>47</sup> Sloan, “What are We Writing For?” above note 10 at p.226; Friedman, Kagan, Cartwright and Wheeler, “State Supreme Courts: A Century of Style and Citation”, above note 29 at p. 814.

<sup>48</sup> Merryman, “Towards a Theory of Citations:” above note 26 at p. 813.

<sup>49</sup> *Ibid*.

<sup>50</sup> Frank K. Richardson, “Law Reviews and the Courts” (1983) 5 *Whittier Law Review* 385 at p.388.

<sup>51</sup> Kirby, “Welcome to Law Reviews”, above note 35 at p. 8.

<sup>52</sup> *Hammond v Great Atlantic & Pacific Tea Co.* 56 N.J. 7, 264 A.2d. 204 (1970).

<sup>53</sup> (1961) 41 *Nebraska Law Review* 1.

<sup>54</sup> Friedman, Kagan, Cartwright and Wheeler, “State Supreme Courts: A Century of Style and Citation”, above note 29 at p. 814. Citation of foreign precedent by United States courts, particularly the United States Supreme Court, continues to be controversial. There is a voluminous literature on 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.

<sup>55</sup> Austin, “Academics, Practitioners and Judges”, above note 42 at p. 472.

<sup>56</sup> For further discussion of Sir Victor Windeyer’s interest in legal history and how this manifest itself in his judgments see Bruce DeBelle, “Victor Windeyer” in in Anthony Blackshield, Michael Coper and George Williams (eds) *Oxford Companion to the High Court of Australia* (Melbourne: Oxford University Press, 2001) 716.

<sup>57</sup> See Smyth, “Other than Accepted Sources of Law?” above note 15.

<sup>58</sup> *Ibid* at p.23.

<sup>59</sup> Merryman, “Towards a Theory of Citations” above note 26 at p. 413 (emphasis in original).

<sup>60</sup> Merryman, “The Authority of Authority” above note 2 at p. 627; Sloan, “What are We Writing For?” above note 10 at p.226.

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- <sup>61</sup> For a detailed discussion of the rule against citing living authors in Canada and England see Nicholls, 'Legal Periodicals and the Supreme Court of Canada' above note 28.
- <sup>62</sup> C.K. Allen *Law in the Making* (4<sup>th</sup> Ed., 1945) at p. 241, footnote 1.
- <sup>63</sup> *Reference re Validity of the Wartime Leasehold Regulations* [1950] 2 DLR 1.
- <sup>64</sup> Nicholls, 'Legal Periodicals and the Supreme Court of Canada' above note 28.
- <sup>65</sup> See Cote, 'Far Cited' above note 39 for a contemporary discussion of the debate in Canada.
- <sup>66</sup> (1937) 56 CLR 605 at 637-638, 650, 652.
- <sup>67</sup> (1938) 60 CLR 150 at 181-182.
- <sup>68</sup> Michael Kirby, 'Change and Decay or Change and Renewal?' (1998) 7 *Journal of Judicial Administration* 189 at p. 194.
- <sup>69</sup> Sir Owen Dixon, *Jesting Pilate* (Sydney, WS Hein, 2<sup>nd</sup> Edition, 1997) at p. 156; Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787 at p. 797; Austin, "Academics, Practitioners and Judges", above note 42; Kirby, "Welcome to Law Reviews", above note 35; Michael Kirby, "Not Another Law Journal?" Address to the Launch of the Northern Territory Law Journal, August 2007; Sir Anthony Mason, "Legal Research: Its Function and Importance: in Geoffrey Lindell (Ed.) *The Mason Papers* (Sydney: Federation Press, 2007) at pp.349-350; Susan Kenny, "The Melbourne University Law Review: 45 Years On", Melbourne University Law Review Alumni Association Newsletter No. 1, November 2001.
- <sup>70</sup> Bastarache, "The Role of Academics and Legal Theory in Judicial Decision-Making" above note 40.
- <sup>71</sup> Robert Chambers, "Current Sources of Law: A Commentary" in Rick Bigwood (Ed), *Legal Method in New Zealand* (Auckland: Butterworths, 2001) p.131; Robert Fisher, "New Zealand Legal Method: Influences and Consequences" in Rick Bigwood (Ed), *Legal Method in New Zealand* (Auckland: Butterworths, 2001), p.25.
- <sup>72</sup> Frederick Crane, "Law School Reviews and the Courts" (1935) 4 *Fordham Law Review* 1; Stanley H. Fuld, "A Judge Looks at the Law Review" (1953) 28 *New York University Law Review* 915; Earl Warren, "Messages of Greetings to the UCLA Law Review" (1953) 1 *UCLA Law Review* 1; Earl Warren, "Comment on the Fiftieth Anniversary of the Review" (1956) 51 *Northwestern University Law Review* 1; Charles Hughes, "Forward" (1941) 50 *Yale Law Journal* 737.
- <sup>73</sup> Hughes *ibid* at p. 737.
- <sup>74</sup> Daniels, "Far Beyond the Law Reports", above note 1 (Table 5).
- <sup>75</sup> See references cited above note 36.
- <sup>76</sup> McClintock, "The Declining Use of Legal Scholarship by Courts" above note 9 at p.668 Richard Posner, who is one of the founding fathers of the law and economics movement makes the point: "The doctrinalists – the traditionalists in academic law – thus are being crowded by economic analysts of law, by other social scientists of law, by Bayesians, by philosophers of law, by critical legal scholars, by feminists and by gay legal scholars, by the law and literature crowd and by critical race theorists, all deploying the tools of non-legal disciplines". Richard Posner, "Legal Scholarship Today" (1993) 45 *Stanford Law Review* 1647 at p. 1651.
- <sup>77</sup> [1997] AC 655.
- <sup>78</sup> *Ibid*, 719.
- <sup>79</sup> *Ibid*, 697.
- <sup>80</sup> Peter Cane, 'What a Nuisance' (1997) 113 *Law Quarterly Review* 515 at pp. 518-519.
- <sup>81</sup> Sir Gerard Brennan, 'A Critique of Criticism' (1993) 19 *Monash University Law Review* 213 at p. 216.
- <sup>82</sup> For example, see Michael Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691; Michael Kirby, 'Change and Decay or Change and Renewal?' above note 58; Michael Kirby, 'Reasons for Judgment: "Always Permissible, Usually Desirable and Often Obligatory"' (1994) 12 *Australian Bar Review* 121.
- <sup>83</sup> Sir Garfield Barwick, *A Radical Tory* (Sydney, Federation Press, 1995) at 224.
- <sup>84</sup> Bryan Beaumont, 'Contemporary Judgment Writing: The Problem Restated' (1999) 73 *Australian Law Journal* 743 at p.744.
- <sup>85</sup> Sir Gregory Gowans, 'Reflections on the Role of a Judge' (1980) *Summons* (annual magazine of the law students society, University of Melbourne) 66.
- <sup>86</sup> John Doyle, 'Judgment Writing: Are There Needs for Change?' (1999) 73 *Australian Law Journal* 737 at pp. 739-740.
- <sup>87</sup> Cane, 'What a Nuisance' above note 80 at p.519.
- <sup>88</sup> Gava, "Law Reviews, Good for Judges, Bad for Law Schools?" above note 35.
- <sup>89</sup> Cote 'Far-Cited' above note 39.

- <sup>90</sup> J.H. Wigmore *A Treatise on the Anglo-American System of Evidence in Trials at the Common Law* (Little Brown & Co., 1940 3<sup>rd</sup> edition, vol. 1) at p. 243.
- <sup>91</sup> See Daniels “Far Beyond the Law Reports”, above note 1 at p.16.
- <sup>92</sup> William Douglas, “Law Reviews and Full Disclosures” (1965) 40 *Washington Law Review* 227 at pp. 228-229. See also the concerns expressed by Chambers J. in *G.T.E. Sylvania v Continental T.V.* 537 F.2d 980 at 1018 (9<sup>th</sup> Cir. 1976).
- <sup>93</sup> Cote ‘Far-Cited’ above note 39 at p.653. See also “Correspondence” (1951) 29 *Canadian Bar Review* 572.
- <sup>94</sup> *Ibid* at p.232.
- <sup>95</sup> Merryman, “The Authority of Authority” above note 2 at p.646.
- <sup>96</sup> George Smith, “The Current Opinions of the Supreme Court of Arkansas: A Study of Craftmanship” (1947) 1 *Arkansas Law Review* 89 at p.89.
- <sup>97</sup> *Ibid* at pp. 91-92.
- <sup>98</sup> Smyth, “The Authority of Secondary Authority” above note 17 at p.31.
- <sup>99</sup> Thomas Ambro, “Citing Legal Articles in Judicial Opinions: A Sympathetic Antipathy” (2006) 80 *American Bankruptcy Law Journal* 547 at pp. 548-549.
- <sup>100</sup> See Smyth, “Other than Accepted Sources of Law?”
- <sup>101</sup> Kirby, “On the Writing of Judgments”, above note 32 at p.691.
- <sup>102</sup> Allan Hutchison, “The Role of Judges in Legal Theory and the Role of Legal Theorists in Judging” (2001) 39 *Atlanta Law Review* 657 at p.667.
- <sup>103</sup> Cane, “What a Nuisance” above note 80 at p. 519.
- <sup>104</sup> Gava, ‘Law Reviews: Good for Judges, Bad for Law Reviews?’ above note 35.
- <sup>105</sup> 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 p. 277.
- <sup>106</sup> For example, see Manz, ‘The Citation Practices of the New York Court of Appeals’ above note 22; McCormick, ‘The Evolution of Coordinate Precedential Citation in Canada’ *ibid*; Friedman, Kagan, Cartwright and Wheeler, “State Supreme Courts: A Century of Style and Citation”, above note 29.
- <sup>107</sup> Citations of 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.
- <sup>108</sup> For example, see Daniels, “Far Beyond the Law Reports”, above note 1; McCormick, ‘The Evolution of Coordinate Precedential Citation in Canada’, above note 104; Fausten, Nielsen and Smyth, “A Century of Citation Practice on the Supreme Court of Victoria”, above note 20; Nielsen and Smyth, “One Hundred Years of Citation of Authority on the Supreme Court of New South Wales”, above note 20.
- <sup>109</sup> For example, see Smyth, “Other than Accepted Sources of Law?” above note 15; McCormick, “Do Judges Read Books Too? above note 3.
- <sup>110</sup> 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.
- <sup>111</sup> 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 p. 462.
- <sup>112</sup> 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.
- <sup>113</sup> For a discussion of some of the limitations and counterarguments see 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; Posner, “An Economic Analysis of the Use of Citations in the Law”, above note 110; Landes and Posner, “The Influence of Economics on the Law”, above note 110.
- <sup>114</sup> Merritt and Putnam, “Judges and Scholars” above note 9 at p.878; Kopf, “Do Judges Read the Review?” above note 11 at pp. 713-714; John Scurlock, “Scholarship and the Courts” (1964) 32 *UKMC Law Review* 228 at p.230.
- <sup>115</sup> Richardson, “Law Reviews and the Courts”, above note 50 at p.388.
- <sup>116</sup> Edwards, “The Growing Disjunction Between Legal Education and the Legal Profession”, above note 36 at p.45.
- <sup>117</sup> Kenny, “The Melbourne University Law Review: 45 Years On”, above note 69 at p.4.
- <sup>118</sup> *Hunter v Canary Wharf* [1997] AC 655 at p.697.
- <sup>119</sup> Sloan, “What are We Writing For? above note 10 at p. 251.
- <sup>120</sup> Manz, ‘The Citation Practices of the New York Court of Appeals’ above note 22 at p. 141, n.94.
- <sup>121</sup> Merryman, “The Authority of Authority” above note 2 at p. 621.

- <sup>122</sup> Sloan, “What are We Writing For?” above note 10 at p. 222, n.10.
- <sup>123</sup> Arthur S. Miller, “A Modest Proposal for Changing Law Review Formats” (1955) 8 *Journal of Legal Education* 89 at pp.90-92. For empirical evidence consistent with this position gleaned from surveys of law review usage in the United States see Max Stier, Kelly Klaus, Dan Bagatell and Jeffrey Rachlinski, “Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors and Judges” (1992) 44 *Stanford Law Review* 1467. Kirby, “Welcome to Law Reviews”, above note 35 at p.10 expresses a similar view in the Australian context. For a contrary position in the Australian context see Gava, “Law Reviews, Good for Judges, Bad for Law Schools?” above note 35.
- <sup>124</sup> Kopf, “Do Judges Read the *Review*?” above note 11 at p.714.
- <sup>125</sup> Smyth, “Other than Accepted Sources of Law?” above note 15.
- <sup>126</sup> Smyth, “Judicial Robes or Academic Gowns?” above note 19.
- <sup>127</sup> Daniels, “Far Beyond the Law Reports” above note 1.
- <sup>128</sup> Friedman, Kagan, Cartwright and Wheeler, “State Supreme Courts: A Century of Style and Citation”, above note 29.
- <sup>129</sup> See references cited above note 37.
- <sup>130</sup> Smyth, “Other than Accepted Sources of Law?” above note 15.
- <sup>131</sup> Smyth, “The Authority of Secondary Authority”, above note 17.
- <sup>132</sup> Smyth, “Judicial Robes or Academic Gowns?” above note 19.
- <sup>133</sup> Merryman, “Towards a Theory of Citations”, above note 26.
- <sup>134</sup> Manz, “The Citation Practices of the New York Court of Appeals”, above note 22.
- <sup>135</sup> Manz, “The Citation Practices of the New York Court of Appeals”, above note 22 at pp.158-159..
- <sup>136</sup> Smyth, “The Authority of Secondary Authority”, above note 17 (Federal Court); Smyth, “Judicial Robes or Academic Gowns?” above note 19 (New Zealand Court of Appeal); Smyth, “The Authority of Secondary Authority”, above note 17 (High Court).
- <sup>137</sup> Daniels, “Far Beyond the Law Reports” above note 1.
- <sup>138</sup> Hasko, “Persuasion in the Court” above note 3.
- <sup>139</sup> See Acker, “Social Science in Supreme Court Death Penalty Cases”, above note 8.
- <sup>140</sup> Hasko, “Persuasion in the Court” above note 3.
- <sup>141</sup> See Daniels, “Far Beyond the Law Reports”, above note 1 at p. 10; Friedman, Kagan, Cartwright and Wheeler, “State Supreme Courts: A Century of Style and Citation”, above note 29 at p. 814; Manz, “The Citation Practices of the New York Court of Appeals” above note 22 at p.140; Smyth, “Judicial Robes or Academic Gowns?” above note 19 at pp. 110-113.
- <sup>142</sup> Michael Kirby, “What is it Really Like to be a Justice of the High Court of Australia?” (1997) 19 *Sydney Law Review* 514 at p.518.
- <sup>143</sup> Sirico and Drew, “The Citing of Law Reviews by the United States Courts of Appeals”, above note 9.
- <sup>144</sup> *Ibid* at p. 1053.
- <sup>145</sup> Mary Bobinsky, “Comment: Citation Sources and the New York Court of Appeals” (1985) 34 *Buffalo Law Review* 965.
- <sup>146</sup> See references cited in above note 36.
- <sup>147</sup> Mason, “Legal Research: Its Function and Importance”, above note 69 at p.350.
- <sup>148</sup> See Smyth, “Other than Accepted Sources of Law?” above note 15 (High Court); Black and Richter, “Did She Mention My Name?” (Supreme Court of Canada); Bernstein, “The Supreme Court and Secondary Source Material”, above note 3; Daniels, “Far Beyond the Law Reports”, above note 1 (United States Supreme Court).
- <sup>149</sup> For empirical studies of the academic publishing patterns of judges in Australia and the United States see Scott Gaille “Publishing by United States Court of Appeals Judges: Before and After the Bork Hearings” (1997) 26 *Journal of Legal Studies* 371; Russell Smyth, “Judges and Academic Scholarship: An Empirical Study of the Academic Publication Patterns of Federal Court and High Court Judges” (2002) 2 *QUT Law and Justice Journal*, 198.
- <sup>150</sup> Peter McCormick, “Judges, Journals and Exegesis: Judicial Leadership and Academic Scholarship” (1996) 45 *University of New Brunswick Law Journal* 139.
- <sup>151</sup> 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 p.265.
- <sup>152</sup> Mason, “Legal Research: Its Function and Importance”, above note 69 at p.348.
- <sup>153</sup> See Kirby, “Welcome to Law Reviews”, above note 35 at pp. 12-14. See also Kirby, “Not Another Law Journal?” above note 59.
- <sup>154</sup> Smyth, “Other than Accepted Sources of Law?” above note 15 at p.30.

- <sup>155</sup> See Smyth, “Other than Accepted Sources of Law?” above note 15 (High Court); Daniels, “Far Beyond the Law Reports”, above note 1 (United States Supreme Court).
- <sup>156</sup> Black and Richter, “Did She Mention My Name?” at p. 391.
- <sup>157</sup> Cote, “Far Cited” above note 39 at p.651.
- <sup>158</sup> See Smyth, “Other than Accepted Sources of Law?” above note 15.
- <sup>159</sup> See Merryman, “Towards a Theory of Citations:” above note 26 (California Supreme Court); Smyth, “Other than Accepted Sources of Law?” (High Court).
- <sup>160</sup> See above note 95.
- <sup>161</sup> See Smyth, “The Authority of Secondary Authority” (Federal Court); Smyth, “Other than Accepted Sources of Law?” above note 15 (High Court); Smyth, “Judicial Robes or Academic Gowns?” above note 19 (New Zealand Court of Appeal); Daniels, “Far Beyond the Law Reports”, above note 1 (United States Supreme Court).
- <sup>162</sup> See text accompanying above note 29.
- <sup>163</sup> Smyth and Fausten, “Coordinate Citations Between Australian State Supreme Courts Over the Twentieth Century”, above note 20.
- <sup>164</sup> McCormick, “The Evolution of Coordinate Precedential Citation in Canada”, above note 105 at p. 291.
- <sup>165</sup> Ibid, citing Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen’s University Press, 1992) at pp. 93, 164, 181.
- <sup>166</sup> T.E.F. Hughes, “High Court Recollections” (2003) 77 *Australian Law Journal* 661 at p.664.
- <sup>167</sup> Smyth, “Other than Accepted Sources of Law? above note 15 at p. 48 (Table 5B).
- <sup>168</sup> Smyth, “Judicial Robes or Academic Gowns? above note 19 at pp. 107-110.
- <sup>169</sup> Manz, “The Citation Practices of the New York Court of Appeals”, above note 22 at p. 138.
- <sup>170</sup> Merryman, “Toward a Theory of Citations”, above note 26 at p. 413.
- <sup>171</sup> Manz, “The Citation Practices of the New York Court of Appeals”, above note 22 at p. 138.
- <sup>172</sup> See Sirico and Margulies. “The Citing of Law Reviews by the Supreme Court”, above note 9; Sirico and Drew, “The Citing of Law Reviews by the United States Courts of Appeals”, above note 9; Smyth, “Other than Accepted Sources of Law? above note 15; Smyth, “The Authority of Secondary Authority”, above note 19; Smyth, “Academic Writing and the Courts”, above note 16.
- <sup>173</sup> Smyth, “Academic Writing and the Courts”, above note 16.
- <sup>174</sup> Smyth, “The Authority of Secondary Authority”, above note 19.
- <sup>175</sup> Smyth, “Other than Accepted Sources of Law? above note 15 at p. 43 (Table 4); Smyth, “Academic Writing and the Courts”, above note 16..
- <sup>176</sup> Smyth, “The Authority of Secondary Authority”, above note 19 at p.44 (Table 6).
- <sup>177</sup> See Sirico and Margulies. “The Citing of Law Reviews by the Supreme Court”, above note 9; Sirico and Drew, “The Citing of Law Reviews by the United States Courts of Appeals”, above note 9.
- <sup>178</sup> See Daniels, “Far Beyond the Law Reports” above note 1 at p. 16; Sirico and Drew, “The Citing of Law Reviews by the United States Courts of Appeals”, above note 9 at p. 1055. On the extent to which associates write the opinions in the United States see Stephen Choi. and Mitu Gulati, “Which Judges Write Their Opinions (And Should We Care)?” (2005) 32 *Florida State University Law Review*, 1077.
- <sup>179</sup> For example, see P.W. Young “Judgment Writing” (1996) 70 *Australian Law Journal* 513.
- <sup>180</sup> See Daniels, “Far Beyond the Law Reports” above note 1; Mann, “The Use of Legal Periodicals by Courts and Journals”, above note 9.
- <sup>181</sup> Daniels, “Far Beyond the Law Reports” above note 1 at p.15.
- <sup>182</sup> 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 at p. 70.
- <sup>183</sup> Friedman, Kagan, Cartwright and Wheeler, “State Supreme Courts: A Century of Style and Citation”, above note 29 at p. 794 (emphasis in original).
- <sup>184</sup> Jason Pierce, *Inside the Mason Court Revolution* (Durham: Carolina Academic Press, 2006).