

# PATTERNS OF USE: FOREIGN CASES IN HIGH COURT JUDICIAL REVIEW JUDGMENTS FROM 1980 TO 2018

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*Judicial review judgments of the High Court of Australia have made frequent use of foreign cases. Looking at 246 of those judgments since 1980 reveals that four in every ten have used a foreign case. Looking more closely, three patterns are identifiable. The first pattern is the frequent use of a foreign case without providing a reason. The second pattern is the common use of certain foreign courts, most notably from the United Kingdom. The third pattern is the increased use of foreign cases when the disposition is against the governor. Broad structures and underlying approaches in judicial review and Australian law explain these patterns. These include a High Court statement on the use of foreign cases, the openness of Australian law, the normative foundations of judicial review, the quilt of legalities and legitimising judicial review.*

## I INTRODUCTION

Since the early days of the High Court of Australia ('High Court'), judgments of the Court have cited foreign cases.<sup>1</sup> This paper samples 246 High Court judicial review judgments since late 1980 and finds that 40.2% have used a foreign case. Whilst studies have looked at the practice of citing foreign cases, they have generally not sought to understand and explain their use.<sup>2</sup> This article presents an empirically based understanding of the use of foreign cases by the High Court in judicial review judgments. To develop that understanding, quantitative and qualitative content analysis is used, from which three patterns emerge. The explanation for those patterns is found in the broader structures and underlying

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1 Bruce Topperwien, 'Foreign Precedents' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 280. See, eg, *D'Emden v Pedder* (1904) 1 CLR 91, 112 (Griffiths CJ for the Court), citing *McCulloch v Maryland*, 17 US 316 (1819).

2 See, eg, Russell Smyth, 'Citations of Foreign Decisions in Australian State Supreme Courts over the Course of the Twentieth Century: An Empirical Analysis' (2008) 22(2) *Temple International and Comparative Law Journal* 409. Cf Sarah Spottiswood, 'The Use of Foreign Law by the High Court of Australia' (2018) 46(2) *Federal Law Review* 161, 180–2, focusing on a few decisions in 2015 and 2016.

approaches of judicial review and Australian law.

The focus of this article is on judicial review judgments, foreign cases and the High Court. Judicial review judgments are chosen because there are features of judicial review that distinguish it from other areas of law,<sup>3</sup> such as contract. One of those features is what has been termed exceptionalism in Australian judicial review as compared to the United States, the United Kingdom, New Zealand and Canada.<sup>4</sup> The features said to be exceptional include maintaining jurisdictional error and the requirement for a matter under s 75(v) of the *Australian Constitution*.<sup>5</sup> Further, judicial review has ‘occupied much’ of the High Court’s time.<sup>6</sup> While the definition of judicial review is contested,<sup>7</sup> for this article a judicial review judgment is defined as a recorded written explanation of whether ‘the exercise of power by governors over the governed’<sup>8</sup> was made ‘according to law’,<sup>9</sup> and if not the legal consequences. This definition includes cases arising in the original<sup>10</sup> and appellate jurisdiction<sup>11</sup> of the High Court.

To understand the use of foreign cases, the use of individual foreign cases is considered.<sup>12</sup> Foreign cases are considered instead of foreign statutes or international law. Statutes are different from judicial decisions;<sup>13</sup> they normally apply to ‘all situations’ falling within their scope and lay ‘down a *prima facie* solution to all of those situations’.<sup>14</sup> Where legislation is not general, but specific to a particular person, that can tend to indicate an interference with judicial power.<sup>15</sup> More significantly, foreign statutes generally do not bind Australian

3 See generally Chief Justice Robert French, ‘The Globalisation of Public Law: A Quilting of Legalities’ (Speech, Cambridge Public Law Conference, 12 September 2016) 2; *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 540 [10] (French CJ). See also *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, 641–2 (Lord Morris for the Court). Cf *Spottiswood* (n 2) 165, 173–4, 186–7, where it is argued that the area of law has no impact on the use of foreign cases.

4 Michael Taggart, ‘“Australian Exceptionalism” in Judicial Review’ (2008) 36(1) *Federal Law Review* 1.

5 *Ibid* 8–9, 19–20.

6 Sir Anthony Mason, ‘The High Court of Australia: Reflections on Judges and Judgments’ (2013) 16 *Southern Cross University Law Review* 3, 17 (‘The High Court of Australia’).

7 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5<sup>th</sup> ed, 2013) 1 [1.10].

8 Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 5.

9 Chief Justice Murray Gleeson, ‘Courts and the Rule of Law’ (Rule of Law Series, University of Melbourne, 7 November 2001).

10 *Australian Constitution* s 75(v), noting that s 75(iii) can also have a role.

11 See, eg, *ibid* s 73. Appeals from the Supreme Court of Nauru are excluded: see, eg, *BRF038 v Nauru* (2017) 349 ALR 67.

12 I do not consider foreign legal doctrines and their influence.

13 Ronald Dworkin, *Law’s Empire* (Hart Publishing, 1986) 337.

14 Grant Lamond, ‘Do Precedents Create Rules?’ (2005) 11(1) *Legal Theory* 1, 18 (emphasis in original). Cf *Knight v Victoria* (2017) 261 CLR 306, 323–4 [29] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) (‘*Knight*’).

15 *Knight* (n 14) 323 [26] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See also *Kable v DPP (NSW)* (1996) 189 CLR 51, 107 (Gaudron J).

courts.<sup>16</sup> International law is not considered because it can be incorporated into Australian law,<sup>17</sup> used to develop the common law,<sup>18</sup> and poses unique issues.<sup>19</sup>

The focus is on the High Court, as it sits ‘at the apex of’ the Australian ‘judicial hierarchy’.<sup>20</sup> The High Court ‘is responsible for the development of . . . non-statute law, for Australia, and is thus better placed than other courts to consider the perspectives of other legal systems’.<sup>21</sup> The High Court first sat in 1903,<sup>22</sup> but for this article, the relevant starting point is 1 October 1980, when a new federal statutory judicial review system commenced, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*).<sup>23</sup> Of interest here is the ‘use’ of foreign cases with respect to their citation and use in the reasoning of the judgment, as explained in Part III(D).

Before turning to the uses of foreign cases, Part II provides context, including matters of historical significance and judicial statements about the way foreign cases are to be used. Part III describes the methods used to identify and evaluate the use of foreign cases. Part IV shows how foreign cases are used and presents three patterns of use. Explanations for the patterns of using foreign cases are offered in Part V.

## II CONTEXT FOR USING FOREIGN CASES

To avoid looking at the use of foreign cases in historical isolation, it is important to consider the period prior to 1980. No detailed empirical analysis concerning the use of foreign cases in judicial review judgments prior to 1980 was identified, therefore the focus is on statements from the judiciary and examples.

From colonisation until the mid-20<sup>th</sup> century, it was largely assumed that there

16 A significant exception is the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12.

17 See, eg, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 365 [1] (Kiefel CJ, Nettle and Gordon JJ).

18 *Dietrich v The Queen* (1992) 177 CLR 292, 306 (Mason CJ and McHugh J), citing *Jago v District Court of New South Wales* (1988) 12 NSWLR 558, 569 (Kirby P).

19 See, eg, Sir Anthony Mason, ‘The Relationship between International Law and National Law, and Its Application in National Courts’ (1992) 18(2) *Commonwealth Law Bulletin* 750 (‘The Relationship between International Law and National Law’).

20 *Lipohar v The Queen* (1999) 200 CLR 485, 505 [45] (Gaudron, Gummow and Hayne JJ).

21 Justice Susan Kiefel, ‘Comparative Analysis in Judicial Decision-Making: The Australian Experience’ (2011) 75(2) *Rabel Journal of Comparative and International Private Law* 354, 355 (‘Comparative Analysis in Judicial Decision-Making’). See also Justice Virginia Bell, ‘Judicial Activists or Champions of Self-Restraint: What Counts for Leadership in the Judiciary?’ (General Sir John Monash Leadership Oration, Sydney, 4 August 2016) 4 (‘Judicial Activists or Champions of Self-Restraint’); Justice Stephen Gageler, ‘What Is Information Technology Doing to the Common Law?’ (2014) 39(2) *Australian Bar Review* 146, 149.

22 Elisa Harris, ‘Sittings of Court’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 624.

23 Commonwealth, *Gazette: Special*, No S 210, 18 September 1980, 1.

was no ‘cognisable indigenous law’.<sup>24</sup> Whilst considering the role of and for Indigenous law and customs may be much needed, such consideration is beyond the scope of this article.

Australia was colonised by the British in 1788,<sup>25</sup> at which point ‘the English common law and the rules of equity were received in the colonies to provide a basis for order and government’.<sup>26</sup> At least as early as 1809 the Privy Council heard appeals from Australian colonies.<sup>27</sup> The last appeal to the Privy Council from the High Court was in 1980.<sup>28</sup>

High Court judges have identified a highly deferential practice of Australian courts to case law from the United Kingdom and the Privy Council prior to the 1980s. In the period between colonisation and 1986, Australian courts were ‘obliged ... to depend upon the decisions of English courts for guidance’.<sup>29</sup> The English common law was ‘the dominant influence on the Australian common law’,<sup>30</sup> such that ‘the English approach to judicial review’ was adopted.<sup>31</sup> Decisions of the House of Lords were followed in cases of conflict between the High Court and the House of Lords.<sup>32</sup> This is, perhaps, unsurprising given that ‘[t]he very existence of ... the Privy Council induced colonial judges to follow English judicial decisions’.<sup>33</sup> Decisions of United Kingdom courts were also highly persuasive, if not binding, because the Privy Council had declared ‘that colonial courts were bound to follow the House of Lords, although the House of Lords stood outside the hierarchy of appeal from Australian courts’.<sup>34</sup> Dixon J adopted this view, having considered ‘[d]iversity in the development of the common law’, such as by diverging from

- 24 Justice Robert French and Patricia Lane, ‘The Common Law of Native Title in Australia’ (2002) 2(1) *Oxford University Commonwealth Law Journal* 15, 17, citing *Cooper v Stuart* (1889) 14 App Cas 286. Cf *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267–8 (Blackburn J). The risks of making these statements are acknowledged: Allan Ardill, ‘Non-Indigenous Lawyers Writing about Indigenous People: Colonisation in Practice’ (2012) 37(2) *Alternative Law Journal* 107.
- 25 Lisa Ford, ‘Thinking Big about New South Wales History: Colonial Law in Global Perspective’ (2011) 34(2) *Australian Bar Review* 204, 204.
- 26 Justice Kiefel, ‘Comparative Analysis in Judicial Decision-Making’ (n 21) 355.
- 27 Bruce Kercher, ‘Unreported Privy Council Appeals from the Australian Colonies before 1850’ (2003) 77(5) *Australian Law Journal* 309, 309.
- 28 *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* (1980) 144 CLR 300 (Privy Council); Chief Justice Murray Gleeson, ‘The Privy Council: An Australian Perspective’ (Speech, London, 18 June 2008) 21–2. The final appeal from a state Supreme Court was heard in 1987: *Austin v Keele* (1987) 10 NSWLR 283; Cheryl Saunders and Adrienne Stone, ‘Reference to Foreign Precedents by the Australian High Court: A Matter of Method’ in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing, 2013) 13, 17.
- 29 Justice Kiefel, ‘Comparative Analysis in Judicial Decision-Making’ (n 21) 370.
- 30 Justice Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2004) 10(4) *Otago Law Review* 493, 499.
- 31 Sir Anthony Mason, ‘The Break with the Privy Council and the Internationalisation of the Common Law’ in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 66, 77 (‘The Break with the Privy Council’).
- 32 Justice Kiefel, ‘Comparative Analysis in Judicial Decision-Making’ (n 21) 355–6, citing *Piro v W Foster & Co Ltd* (1943) 68 CLR 313, 320.
- 33 Sir Anthony Mason, ‘The Break with the Privy Council’ (n 31) 68.
- 34 *Ibid* 68–9.

English decisions, ‘to be an evil’.<sup>35</sup> Although in that case, Dixon J followed an Australian case over one from the United Kingdom.<sup>36</sup>

Deference to United Kingdom law was not unchallenged. In 1904 the High Court reprimanded the Supreme Court of Victoria for supposing that there was an indication of ‘any disregard for British decisions’.<sup>37</sup> Notwithstanding that reprimand, three years later the High Court in *Baxter v Commissioners of Taxation (NSW)*<sup>38</sup> showed disregard for the Privy Council decision in *Webb v Outrim*.<sup>39</sup> The High Court refused to follow that Privy Council decision, considering that deference ‘would be an unworthy abandonment of the great trust reposed in [the High Court] by the Constitution’.<sup>40</sup> Decisions like this led the Hon Keith Mason to suggest there was ‘much tension between the High Court and the Privy Council’.<sup>41</sup>

From the 1960s onwards, the High Court stated its favour for a less deferential approach to United Kingdom and Privy Council case law. In 1966 Kitto J observed that decisions of the House of Lords were not binding.<sup>42</sup> The *Privy Council (Limitation of Appeals) Act 1968* (Cth) had the effect of removing appeals to the Privy Council for matters in ‘federal jurisdiction’.<sup>43</sup> After appeals to the Privy Council from the High Court were largely abolished by the *Privy Council (Appeals from the High Court) Act 1975* (Cth), the High Court held that it was no longer bound by Privy Council decisions.<sup>44</sup> From 1984 appeals to both the Privy Council and the High Court from a state Supreme Court were possible.<sup>45</sup> That problem was resolved when appeals from state Supreme Courts to the Privy Council were abolished in 1986 by the *Australia Act 1986* (Cth) and *Australia Act 1986* (UK) (the ‘*Australia Acts*’).<sup>46</sup> Later that year, a plurality of the High Court in *Cook v Cook* (‘*Cook*’) observed (‘the *Cook* principle’):

35 *Wright v Wright* (1948) 77 CLR 191, 210.

36 *Ibid* 211.

37 *Deakin v Commissioner of Taxes* (1904) 1 CLR 585, 605 (Griffith CJ).

38 (1907) 4 CLR 1087 (‘*Baxter*’).

39 [1907] AC 81.

40 *Baxter* (n 38) 1117 (Griffith CJ, Barton and O’Connor JJ).

41 Keith Mason, *Old Law, New Law: A Second Australian Legal Miscellany* (Federation Press, 2014) 119.

42 *Skelton v Collins* (1966) 115 CLR 94, 104.

43 Anne Twomey, *The Australia Acts 1986: Australia’s Statutes of Independence* (Federation Press, 2010) 299.

44 *Viro v The Queen* (1978) 141 CLR 88, 93 (Barwick CJ), 120 (Gibbs J), 129–30 (Stephen J), 135 (Mason J), 150–1 (Jacobs J), 166 (Murphy J), 174 (Aikin J); Sir Garfield Barwick, ‘The State of the Australian Judicature’ (1979) 53(8) *Australian Law Journal* 487, 493. See also Leslie Zines, ‘The Common Law in Australia: Its Nature and Constitutional Significance’ (2004) 32(3) *Federal Law Review* 337, 344.

45 *Caltex Oil (Australia) Pty Ltd v XL Petroleum (NSW) Pty Ltd* (1984) 155 CLR 72, 78, 80 (Gibbs CJ, Mason, Wilson and Dawson JJ).

46 *Saunders and Stone* (n 28) 17; *Twomey* (n 43) 305–6.

Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, *the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.*<sup>47</sup>

The *Cook* principle contains two branches. The first branch is that the High Court ‘is free to reach its own conclusions’ because United Kingdom and Privy Council case law is not binding.<sup>48</sup> Disclaiming the binding nature of such decisions was significant to the resolution of an issue in *Cook*, the standard of care for negligence arising from a motor vehicle accident. The lower court had followed an English decision.<sup>49</sup> In finding that the English position was not to be followed in Australia, the plurality stated the *Cook* principle. The Australian judicial independence implied by the first branch of the *Cook* principle accords with the effect of s 11 of the *Australia Acts*. Section 11 abolished appeals from ‘any decision of an Australian court’ to ‘Her Majesty in Council’. Once the judicial hierarchy was altered so that the Privy Council did not sit above courts located in Australia, Privy Council decisions and by extension those of the United Kingdom courts no longer bound Australian courts. Echoing the Minister’s second reading speech,<sup>50</sup> Sir Anthony Mason has observed that the significance of the *Australia Acts* is that ‘the High Court is the final court of appeal for Australia’.<sup>51</sup> Whilst s 74 of the *Australian Constitution* formally facilitates appeals to the Privy Council upon approval from the High Court, it is ‘obsolete’.<sup>52</sup>

The second branch of the *Cook* principle is that a foreign case is only useful to the extent it has persuasive reasoning. Relative to the first branch, there has been little judicial or scholarly consideration of the meaning and requirements of the second branch.<sup>53</sup> It has been suggested that rather than the reasoning, the persuasiveness of a decision is a function of ‘the rank of the [foreign] court, the number of judges, whether the decision was unanimous, the margin of the majority or whether it was in dissent’.<sup>54</sup> That may be the case, but given the clear statement from the *Cook* principle and its subsequent endorsement by judges, the reasoning is the focus in this article.

47 (1986) 162 CLR 376, 390 (Mason, Wilson, Deane and Dawson JJ) (emphasis added) (*‘Cook’*).

48 *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168, 204–5 [107] (Kirby J).

49 *Cook v Cook* (1986) 41 SASR 1, 8 (King CJ), 19 (Matheson J, Johnston J agreeing at 23), following *Nettlehip v Weston* [1971] 2 QB 691.

50 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 November 1985, 2685–7 (Lionel Bowen, Attorney-General).

51 Sir Anthony Mason, ‘The High Court of Australia’ (n 6) 18.

52 *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461, 465 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ). See also Justice Bell, ‘Judicial Activists or Champions of Self-Restraint’ (n 21) 8.

53 See below Part III(D) for a discussion of the second branch.

54 Spottiswood (n 2) 171, citing Terence Ingman, *The English Legal Process* (Oxford University Press, 13<sup>th</sup> ed, 2011) 215 and Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 62.

Subsequent High Court cases and extrajudicial writing from Australian High Court judges suggest a general acceptance of the *Cook* principle; aside from disagreement about the role of Privy Council decisions in the period when decisions of that Board were binding. In 1987, Sir Anthony Mason suggested that Australian judges ‘should derive such assistance as we can from English authorities’ but the value of foreign judgments ‘depends on the persuasive force of their reasoning’.<sup>55</sup> In 2003, Gummow and Kirby JJ observed that ‘precedents of other legal systems ... are not binding’.<sup>56</sup> Their Honours also observed that whilst ‘great assistance continues to be derived ... from the learning and reasoning of United Kingdom courts’, that assistance was confined ‘to the degree of the persuasiveness of their reasoning’.<sup>57</sup> In 2008, Hayne, Heydon and Crennan JJ endorsed the view that United Kingdom decisions were not ‘binding on Australian courts’, but decisions of a United Kingdom court ‘can be persuasive for Australian courts’.<sup>58</sup> In 2016, Chief Justice Robert French considered that a judge ‘considering foreign law materials can take them or leave them in the same way as he or she might take or leave academic writings’.<sup>59</sup> These statements affirm the continued relevance of the *Cook* principle and suggest how a foreign case is to be used. The *Cook* principle and the approaches leading up to it provide context for the understanding of and explanation for the use of foreign cases developed in Parts IV and V, and for the methodological choices outlined in the next Part.

### III METHODS

To understand how foreign cases are used in High Court judicial review judgments empirical legal research methods have been used. These methods draw on previous studies, with modifications to suit the scope and purpose of this article. After identifying the relevant case, a content analysis was undertaken, which is where a researcher ‘systematically reads ... consistent features of each’ case and draws ‘inferences about their use and meaning’.<sup>60</sup> Content analysis was chosen because it ‘allows the researcher to deal with larger numbers of cases, which provides a truer measure of broad patterns in the case law’.<sup>61</sup> Further, content analysis allows ‘a researcher to sort out the interaction of multiple factors that

55 Sir Anthony Mason, ‘Future Directions in Australian Law’ (1987) 13(3) *Monash University Law Review* 149, 154.

56 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 299 [82].

57 *Ibid.* See also *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52, 84–5 [96] (Kirby J); *Barns v Barns* (2003) 214 CLR 169, 210 [123] (Kirby J); Michael Kirby, ‘Citation of Foreign Decisions in Constitutional Adjudication: The Relevance of the Democratic Deficit’ (2009) 43(1) *Suffolk University Law Review* 117, 130.

58 *Hearne v Street* (2008) 235 CLR 125, 166 [125].

59 Chief Justice French (n 3) 6.

60 Mark A Hall and Ronald F Wright, ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96(1) *California Law Review* 63, 64.

61 *Ibid.* 65.

bear on an outcome in the legal system'.<sup>62</sup>

As part of the content analysis, quantitative and qualitative methods have been used. By combining these methods, a stronger understanding and analysis of the use of foreign cases can be presented.<sup>63</sup> For example, the number of foreign cases used was quantitatively counted. The benefits of quantitative analysis are three-fold. Firstly, a '[q]uantitative description can tell us the *what* of case law'.<sup>64</sup> Secondly, quantitative 'data analysis can demonstrate patterns and correlations and give a starting point for challenging or confirming anecdotal impressions'.<sup>65</sup> Thirdly, practices over time can be identified, from which patterns can be identified.

However, 'statistics cannot always reveal the motivations for particular decisions or choices, or give answers to every question asked about judgments'.<sup>66</sup> Qualitative analysis can 'be better suited to understanding the *why* and *wherefore*'.<sup>67</sup> For example, the use of a foreign case was counted as being used more than once when it was qualitatively determined to be used for different legal issues.<sup>68</sup> If a foreign case was used for two legal issues it was counted twice, or more as the case may be. Whether a foreign case was determinative of the outcome of a case was not considered, only whether it was part of the reasoning and whether the foreign case was persuasive or unpersuasive. The influence of foreign cases on the development of Australian law on certain judicial review issues has also not been considered.<sup>69</sup>

## **A Relevant Time Period**

In this article, the relevant time period is from 1980 to 2018. The starting point for this article is 1 October 1980. The *ADJR Act* received Royal Assent on 16 June 1977 but was not to commence until proclamation,<sup>70</sup> fixed as 1 October 1980.<sup>71</sup> The first judicial review case handed down after the commencement of the *ADJR*

62 Ibid. See Part IV(D).

63 Hall and Wright (n 60) 83.

64 Ibid (emphasis in original).

65 Elisa Arcioni and Andrew McLeod, 'Cautious but Engaged: An Empirical Study of the Australian High Court's Use of Foreign and International Materials in Constitutional Cases' (2014) 42(3) *International Journal of Legal Information* 437, 439.

66 Ibid.

67 Hall and Wright (n 60) 83 (emphasis in original).

68 See, eg, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 ('*Peko-Wallsend*') where Mason J referred to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 with respect to the ground of review of failing to take into account a relevant consideration: *Peko-Wallsend* (n 68) 39; and the limited role of a court reviewing a discretion: at 40–1.

69 See instead, eg, Graeme Johnson, 'Natural Justice and Legitimate Expectations in Australia' (1985) 15(1) *Federal Law Review* 39.

70 *Administrative Decision (Judicial Review) Act 1977* (Cth) s 2 ('*ADJR Act*').

71 Commonwealth, *Gazette: Special*, No S 210, 18 September 1980.



*Act* was in 1981.<sup>72</sup> It could be argued that the starting point should be the first judicial review case before the High Court, *Clancy v Butchers' Shop Employees Union*.<sup>73</sup> However, returning to 1904 would be a much larger project than could be accommodated in the space of this article. Furthermore, the *ADJR Act* is of particular significance, having 'radically altered' the 'conceptual framework' of Australian judicial review.<sup>74</sup> Prior to the *ADJR Act* judicial review was remedial in orientation, but the *ADJR Act* 'decisively shifted the focus of judicial review from procedure to substance, and from remedies to grounds of review'.<sup>75</sup> Sir Anthony Mason considered the *ADJR Act* to have achieved its objectives of simplifying and clarifying the grounds and remedies of judicial review.<sup>76</sup> More recently it has been observed that the normative foundations of judicial review are no longer the grounds of review, but rather a statutory approach.<sup>77</sup> Nonetheless, at the time of the commencement of the *ADJR Act*, it was considered to bring about a significant change.

It could also be argued that the earliest commencing state or territory judicial review statute is the appropriate starting point. The only state or territory judicial review statute to commence before the *ADJR Act* was the *Administrative Law Act 1978 (Vic)* ('*AL Act (Vic)*') on 1 May 1979.<sup>78</sup> However, the *AL Act (Vic)* is not a useful starting point for two reasons. Firstly, from 1 May 1979 to 30 September 1980 there were no judicial review cases arising under the *AL Act (Vic)* or from Victoria decided by the High Court. Thus, starting on 1 May 1979 would shed little light, if any, on the assessment of the impact of the *AL Act (Vic)* on the use of foreign cases by the High Court. Secondly, the *AL Act (Vic)* as enacted did not reorient judicial review in the same way as the *ADJR Act*. The *AL Act (Vic)* required reasons to be given but did not enumerate the grounds of review and did not provide relief in a different way to the prerogative writs.

This article finishes its analysis at the end of 2018, at the time of writing that was the last complete year for which data was available.

72 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

73 (1904) 1 CLR 181.

74 Peter Cane, 'The Making of Australian Administrative Law' (2003) 24(2) *Australian Bar Review* 114, 124.

75 *Ibid* 116.

76 Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18(3) *Federal Law Review* 122, 123.

77 See generally Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(2) *Federal Law Review* 153.

78 Attorney-General (Vic), 'Administrative Law Act 1978 (No 9234): Date of Coming into Operation' in Victoria, *Victoria Government Gazette*, No 19, 7 March 1979, 617. The other judicial review statutes in the states and territories are the *Administrative Decisions (Judicial Review) Act 1989 (ACT)*, *Judicial Review Act 1991 (Qld)* and *Judicial Review Act 2000 (Tas)*.

## B Identifying the Relevant Cases

Initially over 270 High Court cases were identified as provisionally relevant. This was narrowed down to 246 cases containing judicial review judgments.<sup>79</sup> Searches were undertaken in Westlaw AU and LexisNexis with search terms related to judicial review.<sup>80</sup> The aim of this stage was to include as many judicial review judgments as possible. Some High Court cases could not be reviewed; three cases were identified as provisionally relevant, but the judgments were not available.<sup>81</sup> These three cases are not of particular significance for three reasons. Firstly, the purpose of this article can be fulfilled without reviewing all the cases; the number of cases is sufficient to understand the use made of foreign cases. Secondly, even if these cases were included there would still be years where no foreign cases were used in High Court judicial review judgments, being 1980 (after the *ADJR Act* commenced), 1988, 1994 and 2006.<sup>82</sup> Thirdly, this study is more comprehensive than other studies that have looked at, for example, only the first five reported cases of each year.<sup>83</sup>

Incomplete and special leave decisions have been excluded. Consistent with other studies,<sup>84</sup> special leave decisions, where the High Court decides whether to allow a full hearing of a case, have not been considered. Special leave decisions are less likely to consider the legal issues in depth in their disposition and reasoning.<sup>85</sup> In one case a member of the bench passed away before judgment could be given, requiring further consideration of issues by the full bench.<sup>86</sup> Given the unique nature of this case it has been excluded.

## C What Is a Foreign Case?

For the purpose of this article, a foreign case is any case that was not decided by

79 The following issues are excluded: freedom of information (including cases of judicial review of freedom of information), privacy, statutory interpretation, delegated legislation, and merits review.

80 The search terms used in the Westlaw AU 'Case Summary/Digest' field and the Lexis Advance AU 'Catchwords/Summary' field were 'judicial review', 'merits review', 'administrative law', 'ADJR Act', 'administrative decisions', '75(v)', 'constitutional writ' and 'prerogative writ'. In the 'Catchwords' field of Westlaw AU two searches were run independently with the following terms: 'administrative law > judicial review' and 'citizenship and migration > migration > review of decisions'.

81 *Re Australian Securities Commission; Ex parte Aboriginal Legal Service Ltd* (1996) 17 Leg Rep 6; *Re Owen* (1996) 11 Leg Rep 21; *Australian Building Construction Employees' and Builders Labourers' Federation v Victoria* (High Court of Australia, Stephen J, 17 November 1981).

82 See below Appendix.

83 See, eg, Brian Opeskin, 'Australian Constitutional Law in a Global Era' in Justice Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 171.

84 See, eg, Saunders and Stone (n 28) 29.

85 See, eg, Justice Michael Kirby, 'Maximising Special Leave Performance in the High Court of Australia' (2007) 30(3) *University of New South Wales Law Journal* 731, 740.

86 *O'Reilly v Commissioners of the State Bank of Victoria* (1982) 153 CLR 1.

a court within the Australian judicial hierarchy at any point in time.<sup>87</sup> Appeals from Australia to the Privy Council are not considered foreign, because '[a]s long as appeals still lay to the Privy Council, it was part of the Australian judicial hierarchy, and its decisions necessarily were not only cited but followed'.<sup>88</sup> This view persisted, at least amongst some High Court judges, after the abolition of appeals to the Privy Council. Gleeson CJ, Gummow and Hayne JJ observed that the Privy Council was not an institution of the United Kingdom, as it was 'settled doctrine that the Privy Council was part of the judicial system of the country whence appeals came'.<sup>89</sup>

All non-Australian Privy Council decisions have been considered foreign. At one point the Privy Council considered that it 'represent[ed] the Empire, and not any particular part of it'.<sup>90</sup> Later, the Board decided that 'in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling'.<sup>91</sup> Given the more recent acknowledgment that there can be divergence amongst Privy Council jurisdictions, appeals from outside of Australia to the Privy Council are considered foreign.

For the purposes of identifying whether the High Court judgment used a foreign case, second order references were excluded. Where a High Court judgment quotes from either an Australian or foreign case and within that quote there is reference to a foreign case, the foreign case within the quote is not considered used.<sup>92</sup> This distinction is consistent with another study<sup>93</sup> and is drawn for two reasons. Firstly, the foreign case was used as part of the previous judgment, not the High Court judicial review judgment in issue. Secondly, footnotes from a quoted judgment may sometimes be omitted.<sup>94</sup> The understanding of and explanations for the use of foreign cases developed in Parts IV and V would therefore be dependent on the citation practices adopted in a judgment, which distracts from the purpose of this article.

A foreign case was not counted as being used each time it was cited in a judgment. Rather, a foreign case was counted each time it was used for a specific legal issue

87 Cf Spottiswood (n 2) 165.

88 Saunders and Stone (n 28) 17. See also *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246, 259 (Gibbs J) ('*Southern Centre of Theosophy*').

89 *Sue v Hill* (1999) 199 CLR 462, 493 [66], citing *Ibralebbe v The Queen* [1964] AC 900, 921–2 and *Southern Centre of Theosophy* (n 88) 258–9.

90 *Alexander E Hull & Co v M'Kenna* [1923] IR 402, 404 (Viscount Haldane).

91 *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221, 238 (Lord Morris).

92 See, eg, *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 390 (Wilson J), quoting *Salemi v MacKellar [No 2]* (1977) 137 CLR 396, 419–20 (Gibbs J).

93 Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practice on the Supreme Court of Victoria' (2007) 31(3) *Melbourne University Law Review* 733, 744. See also Spottiswood (n 2) 175.

94 See, eg, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 29 [87] (McHugh and Gummow JJ) ('*Lam*'), quoting *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J) ('*Teoh*').

in a judgment. For example, a foreign case could be used with respect to the procedural fairness ground of review and for a remedy.<sup>95</sup> This is different to a previous study where the authors considered that if ‘the same precedent was cited more than once in a judgment’, the subsequent reference was disregarded ‘to avoid an artificial inflation of the citation count’.<sup>96</sup> This article necessitated a different approach. The focus is on judicial review judgments, and it is possible that a foreign case will consider multiple issues. As noted above, the use of the foreign case can vary depending on the legal issue in respect of which the foreign case is considered. If two separate High Court judgments referred to the same case, the use of that foreign case in each judgment was considered independently.<sup>97</sup>

Where a High Court judgment referred to a foreign case in both its lower court decision and appellate decision, generally only the appellate case is considered used. This is consistent with a previous study.<sup>98</sup> Where this article differs is that, if the High Court judgment gave consideration to the lower court decision, rather than just noting its existence, it was considered used. If the lower court decision was merely noted it could be assumed that the case was unpersuasive, but the assumption adopted was that the High Court judgment was noting what the lower court did or that there was a lower court decision.

The use of foreign cases was only considered relevant to this article where it related to judicial review, due to the focus of this article. There are High Court cases where a judgment deals with judicial review and non-judicial review issues. For example, public interest immunity<sup>99</sup> is not a judicial review issue but arose in a case with judicial review issues, such as mandamus.<sup>100</sup> The use of the foreign case for mandamus was considered, but not for public interest immunity.

## **D Developing the Understanding of the Use of Foreign Cases**

To understand the use of foreign cases, consideration was given to indicators of their use. Those indicators are whether a foreign case was persuasive or unpersuasive, whether a reason was identified for the persuasiveness, the reason for the persuasiveness of the foreign case, the foreign jurisdiction used, and the final disposition and other factors associated with the case. All of these factors

95 See, eg, *Ridge v Baldwin* [1964] AC 40, cited in *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 51 [9] (procedural fairness), 57 [30] (remedies) (Gleeson CJ).

96 Arcioni and McLeod (n 65) 445.

97 See, eg, *Griffith University v Tang* (2005) 221 CLR 99, 121 [58] (Gummow, Callinan and Heydon JJ), 156 [165] (Kirby J).

98 Fausten, Nielsen and Smyth (n 93) 744. See also Spottiswood (n 2) 183.

99 *Graham v Minister for Immigration and Border Protection* (2017) 347 ALR 350, 386–7 (Edelman J) (*‘Graham’*), citing *Beatson v Skene* (1860) 5 H & N 838; 157 ER 1415.

100 *Graham* (n 99) 382 [121] (Edelman J), citing *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214.

have been chosen because they help to develop an understanding of the way foreign cases are used. Analysing the citations practices alone does not help to understand how a judgment uses a foreign case. Looking at the persuasiveness, the reasons (if any), jurisdictions, correlation to final disposition and the legal issues can inform whether and how foreign cases are used and where they are likely to form part of the reasoning of the judgment.

For two further reasons, the persuasiveness of and reason for using a foreign case are evaluated. Firstly, the second branch of the *Cook* principle is that foreign cases are useful to the extent their reasoning is persuasive. This branch can be interpreted as meaning that the reader should be able to identify whether the judgment considers a foreign case persuasive and the reason for its persuasiveness. Secondly, it has been suggested that judges are less likely to cite a foreign case when it is unpersuasive as it would be impolite,<sup>101</sup> which could imply that a foreign case is more likely to be used when persuasive. This can be tested.

A foreign case was considered persuasive in three situations.<sup>102</sup> Firstly, if the High Court judgment explicitly stated that the foreign case was persuasive. Secondly, if the High Court judgment quoted or appeared to quote a foreign case and did not dispute the statement. Thirdly, if there was a citation of the foreign case, and a negative treatment marker was absent. Negative treatment markers, like ‘cf’ or ‘contra’,<sup>103</sup> suggest a case was unpersuasive and have been used in High Court judgments.<sup>104</sup>

A foreign case was considered unpersuasive if the High Court judgment explicitly stated it was unpersuasive or it could be inferred, by the use of negative treatment markers, that the judgment considered the foreign case to be unpersuasive.

Some foreign cases were not persuasive or unpersuasive. For example, in one judgment a foreign case related to an issue not requiring a decision.<sup>105</sup> Foreign cases like this were counted as being used, and a reason for its use identified. Whether the foreign case was persuasive or unpersuasive was not considered, as the Court did not decide the issue.

The reasons for using a foreign case can be explicitly or implicitly identified.

101 Fausten, Nielsen and Smyth (n 93) 745 n 82.

102 Cf Spottiswood (n 2) 166.

103 See, eg, Melbourne University Law Review Association and Melbourne Journal of International Law, *Australian Guide to Legal Citation* (3<sup>rd</sup> ed, 2011) 5–6 [1.2].

104 See, eg, *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 279 (Wilson J) (*‘Toohey’*), citing *Hodge v The Queen* (1883) 9 App Cas 117; *A-G (NSW) v Quin* (1990) 170 CLR 1, 17 (Mason CJ) (*‘Quin’*), citing *A-G (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, 39 [48] (Nettle J), citing *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353.

105 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 363 [113] (Hayne J), citing *R v Commissioners of Inland Revenue; Re Nathan* (1884) 12 QBD 461, *R v Bank of England* (1780) 2 Doug KB 524; 99 ER 334 and *R v Lambourn Valley Railway Co* (1888) 22 QBD 463.

If a reason for using a foreign case was explicitly identified, that reason was categorised against a list of reasons that evolved over the course of reviewing High Court judgments. Where a reason was not explicitly identified, a reason could sometimes be inferred and categorised. For example in *Public Service Board (NSW) v Osmond* ('*Osmond*'),<sup>106</sup> Gibbs CJ cited *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw*.<sup>107</sup> No reason was provided for the citation, but it can be inferred that the English case was used for historical context because preceding its citation was a statement that a particular rule was 'well established at common law'.<sup>108</sup> On occasion, two reasons could be identified for using a foreign case. For example, in *Australian Broadcasting Tribunal v Bond*, Deane J referred to a number of United Kingdom cases and noted that doubts had been expressed in that jurisdiction about those cases and, secondly, that the Australian constitutional structure provided a further reason for not following those cases.<sup>109</sup> Based on these methods, an understanding of the use of foreign cases is presented in the next Part.

To present a manageable scope, excluded from the understanding presented here is a consideration of the accuracy of the foreign case and how individual judges use foreign cases. Consistent with another study, 'assertions made regarding history, development of doctrine in another jurisdiction or articulation of foreign law' were not evaluated for their accuracy.<sup>110</sup>

How individual judges used foreign cases was excluded from the scope. This is for two reasons. Firstly, some judges will offer a judgment that merely states their concurrence with another judge.<sup>111</sup> Other studies have taken the approach that 'if Justice A concurred with Justice B and Justice B cited authorities, Justice A was not attributed with having cited those authorities'.<sup>112</sup> This raises broader issues about the way judges do and should provide their reasons,<sup>113</sup> which are beyond the scope of this article. Secondly, a 'basal assumption' of the Australian legal system is that 'the reasons' from a judgment 'may be assessed according to an external standard — a standard that is not personal to the judges themselves'.<sup>114</sup> Looking

106 (1986) 159 CLR 656 ('*Osmond*').

107 [1952] 1 KB 338, cited in *ibid* 667.

108 *Osmond* (n 106) 667.

109 (1990) 170 CLR 321, 365, citing *Board of Education v Rice* [1911] AC 179, *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 and *Local Government Board v Arlidge* [1915] AC 120.

110 Arcioni and McLeod (n 65) 460. To do so would serve different purposes than that pursued by this article.

111 See, eg, *Hockey v Yelland* (1984) 157 CLR 124, 147 (Brennan J).

112 Russell Smyth, 'Trends in the Citation Practice of the Supreme Court of Queensland over the Course of the Twentieth Century' (2009) 28(1) *University of Queensland Law Journal* 39, 50; Fausten, Nielsen and Smyth (n 93) 744.

113 See, eg, JD Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 (April) *Law Quarterly Review* 205 ('Threats to Judicial Independence'); Sir Anthony Mason, 'The High Court of Australia' (n 6) 4.

114 Justice Kenneth Hayne, 'Concerning Judicial Method: Fifty Years On' (2006) 32(2) *Monash University Law Review* 223, 236.

at individual judges would imply questioning that assumption, which is beyond the scope of this article.

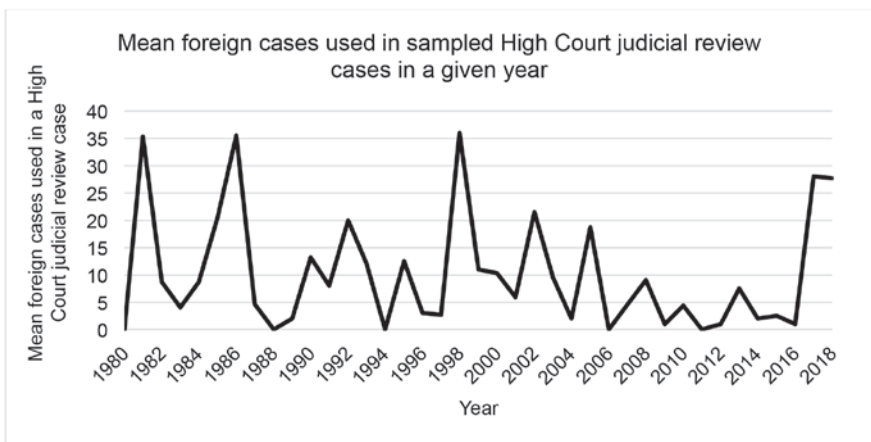
## IV UNDERSTANDING THE USE OF FOREIGN CASES

To understand how foreign cases are used in High Court judicial review judgments, the use of foreign cases is shown in six ways. The first two are contextual: the number of foreign cases used and the persuasiveness of those foreign cases. The third is whether reasons were provided for the use of a foreign case. The fourth is the foreign courts from which the cases are drawn. The fifth is the use of foreign cases considered in light of the final disposition and other factors of the High Court case. Finally, a further contextual use of foreign cases is considered, the five most common reasons identified or inferred for using a foreign case.

Of the 246 High Court cases that were relevant and reviewed, 99 used foreign cases. Averages are sometimes used to allow comparisons across time, as the number of High Court cases in a year can differ.

### A Initial Context for the Patterns

To understand the patterns identified below, it is helpful to first contextualise the use of foreign cases. The first contextual reference point is the number of foreign cases used. In the 38-year period from 1980 to 2018 across all sampled High Court judgments, 1,110 foreign cases were used. The mean of foreign cases used in a High Court case in a given year is shown in Figure 1.



**Figure 1:** Across the 38-year study period, there is variation in the mean foreign cases used in a given year in the sampled High Court judicial review cases. In 1980, 1988, 1994, 2006 and 2011 no foreign cases were used.

The second contextual reference point is the persuasiveness of foreign cases. Generally, a foreign case is used more frequently when persuasive than when it is unpersuasive, as shown in Figure 2. Excluding the five years when no foreign cases were used, foreign cases were more frequently used when persuasive in 31 out of the 34 years of this study. 736 foreign cases have been persuasive and 286 have been unpersuasive. These results are consistent with a previous observation that a foreign case is more likely to be cited if persuasive.<sup>115</sup>

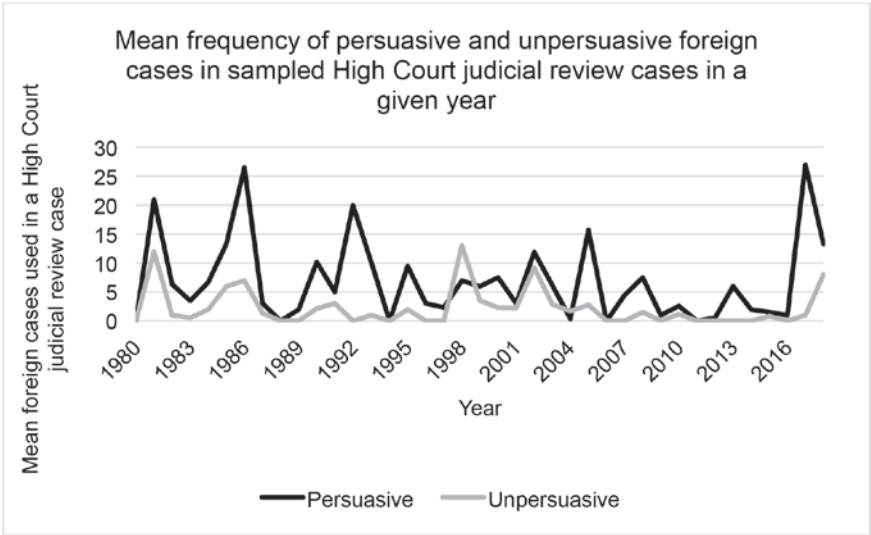


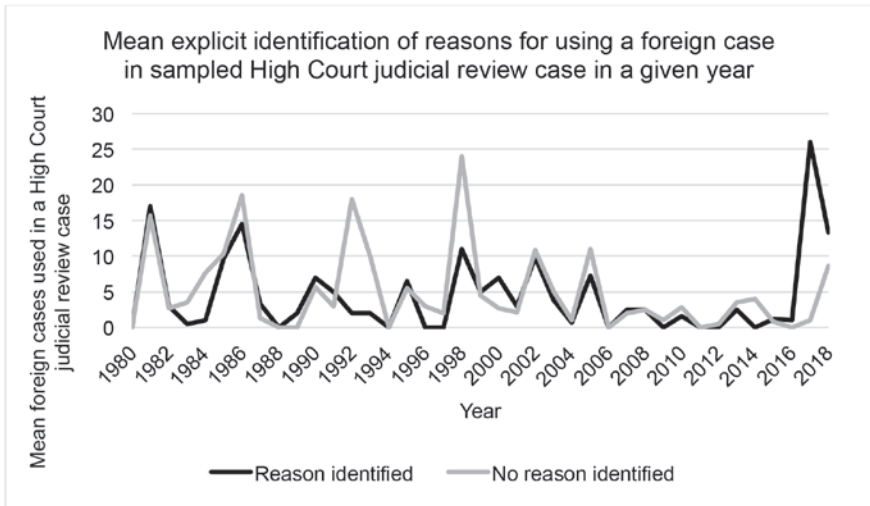
Figure 2: Generally, foreign cases are more frequently used when persuasive than when unpersuasive.

### B Explicit Identification of Reasons

It is common for High Court judgments to not explicitly identify a reason for using a foreign case, as shown in Figure 3. Of the 34 years where foreign cases were used, in 21 of those years foreign cases were more frequently used without a reason. 544 foreign cases have been used without explicitly identifying a reason, while 500 have been used with an explicitly identified reason. From this the first pattern is observable; frequent use is made of foreign cases without a reason for their use.

115 Fausten, Nielsen and Smyth (n 93) 745.





**Figure 3: Reasons for using foreign cases in High Court judgments are not frequently identified.**

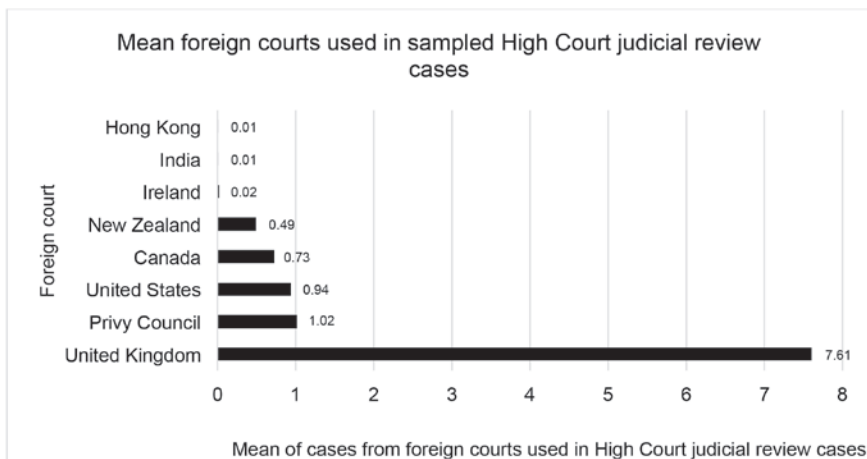
### C Foreign Courts

Before stating the *Cook* principle the plurality observed that decisions from the United Kingdom and ‘other great common law courts’ would inevitably be of assistance.<sup>116</sup> The use of foreign cases in High Court judgments suggests the High Court has predominantly found assistance from United Kingdom courts, as shown in Figure 4. To a lesser extent, assistance has been derived from the Privy Council.<sup>117</sup> It can be inferred that the High Court considers the ‘other great common law courts’ to be those in the United States, Canada and New Zealand; and to a much lesser extent Ireland, Hong Kong and India. This is the second pattern; the foreign courts used are predominantly the Privy Council and courts of the United Kingdom, United States, Canada and New Zealand. This pattern is consistent with a study looking at 2015 and 2016 High Court cases.<sup>118</sup>

<sup>116</sup> *Cook* (n 47) 390 (Mason, Wilson, Deane and Dawson JJ).

<sup>117</sup> That is Privy Council decisions that were on appeal from somewhere other than Australia.

<sup>118</sup> Spottiswood (n 2) 180.



**Figure 4: High Court judicial review judgments predominantly use cases from the United Kingdom.**

Two cases from Ireland, one from Hong Kong and one from India were used. The two Irish cases were used persuasively with respect to standing associated with an Attorney-General<sup>119</sup> and certiorari for an Attorney-General's relator action.<sup>120</sup> The case from Hong Kong was persuasively used to reject any association between the notion of legitimate expectations in administrative law and estoppel in private law.<sup>121</sup> In *Osmond* Gibbs CJ considered an Indian case offered little assistance 'without a detailed knowledge of the course of decisions in that country' and the influence, if any, of 'the *Constitution of India* or ... Indian statutes'.<sup>122</sup> Gibbs CJ did not seek to develop a detailed knowledge of Indian decisions, and made a similar remark about American cases.<sup>123</sup> Gibbs CJ considered that where rules were 'clear and settled they ought not to be disturbed because the common law of other countries may have developed differently in a different context'.<sup>124</sup> Gibbs CJ's remarks were made 10 months before *Cook* and the Chief Justice did not sit on the bench in that case.

#### **D Final Disposition and Other Factors of the Case**

The final disposition of the case against the governor and in favour of the person

119 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 434 [155] (Kirby J) ('*McBain*'), citing *A-G (Ireland) v Governors of Schools Founded by Erasmus Smith* [1910] 1 IR 325.

120 *McBain* (n 119) 428 [128] (McHugh J), quoting *Re Lord Listowel's Fishery at Beale* (1875) 9 IR 46.

121 *Lam* (n 94) 22–3 [70] (McHugh and Gummow JJ), citing *Ng Siu Tung v Director of Immigration* [2002] 1 HKLRD 561.

122 *Osmond* (n 106) 668, citing *The Siemens Engineering and Manufacturing Co of India Ltd v India* (1976) 63 AIR 1785 (Supreme Court of India).

123 *Osmond* (n 106) 668.

124 *Ibid.*

bringing the case correlates with an increased use of foreign cases in the sample of High Court judicial review cases. When the final disposition is against the governor ('governor loss') foreign cases are more frequently used than when the final disposition is in favour of the governor ('governor win'), as shown in Table 1. More foreign cases were used when the governor loses. This is the third pattern; a greater use of foreign cases when the governor loses than when the governor wins.

There are other correlations between factors of the case and the use of foreign cases, also shown in Table 1. The first factor is whether the person bringing the case ('claimant') was successful. More foreign cases were used when the claimant won. The second factor is whether the case was an appeal. More foreign cases were used when the case was an appeal. The third factor is whether the underlying subject matter relates to migration, a highly litigated underlying subject matter before the High Court.<sup>125</sup> More foreign cases were used when the underlying subject matter of the case did not relate to migration. These preliminary conclusions provide a basis to consider whether the use of foreign cases could be related to other factors of the case.

**Table 1: There is a correlation between the use of foreign cases on the one hand, and on the other, the outcome of the case, whether it is an appeal and the underlying subject matter.**

Factor	Average number of foreign cases used
Governor	
If governor wins	4.5
If governor loses	5.6
Claimant	
If claimant win	6.7
If claimant loses	4.5
Appeal	
If appeal	7.7
If not appeal	3.5
Migration	
If migration	4.2
If not migration	7.0

<sup>125</sup> Of the 246 High Court judicial review cases, the underlying subject matter for 105 concerned migration. Of the 99 High Court judicial review judgments that used a foreign case, the underlying subject matter for 47 concerned migration.

The claimant, appeal and migration factors may offer insights into the use of foreign cases by the High Court in judicial review judgments, but considering their explanations is beyond the scope of this article. To understand the correlation between the frequency of claimant wins and appeals, and the use of foreign cases, the submissions of the parties may be instructive.<sup>126</sup> For example, the number of foreign cases used in a claimant's submissions, as compared to a respondent's submissions. There may also be characteristics of migration cases that explain the decreased use of foreign cases for such a subject matter. However, considering the explanations for those features is beyond the scope of this paper. That said, considering the pattern of increased use of foreign cases when the governor loses may, indirectly, shed light on the explanation for the increased use of foreign cases when the claimant wins. Of the cases where the claimant wins (n=106), the claimant is the governed about two-thirds of the time (n=72). This suggests a correlation between the claimant winning and the governor losing. Therefore, looking at the governor losing could partly explain the correlation between claimant outcomes and the use of foreign cases.

## **E Further Context for the Use of Foreign Cases: Most Common Reasons**

To understand the patterns in greater detail, and to explain their use, regard can be had to the reasons for using foreign cases. This is the final contextual reference point. The five most common reasons for using a foreign case persuasively and unpersuasively are presented in Table 2.

**Table 2: Five most common reasons for a High Court judicial review judgment finding a foreign case persuasive and unpersuasive.**

Reason foreign case is persuasive	Frequency	Reason foreign case is unpersuasive	Frequency
The foreign case provides historical context <sup>127</sup>	142	Australian law has taken a different path <sup>128</sup>	36
The foreign case provides an example <sup>129</sup>	55	The <i>Australian Constitution</i> , including its text and structure <sup>130</sup>	36

<sup>126</sup> See, eg, Spottiswood (n 2) 183.

<sup>127</sup> See, eg, *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 665 [36] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ), citing *Farquharson v Morgan* [1894] 1 QB 552.

<sup>128</sup> See, eg, *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 569–73 [60]–[70] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *R v Bolton* (1841) 1 QB 66; 113 ER 1054.

<sup>129</sup> See, eg, *Toohy* (n 104) 223 (Mason J), citing *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

<sup>130</sup> See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 103–4 [45] (Gaudron and Gummow JJ), citing *City of London v Cox* (1867) LR 2 HL 239.

The foreign case has persuasive reasoning <sup>131</sup>	46	The focus needs to be on construing the statute <sup>132</sup>	22
The foreign case has been accepted by an Australian court <sup>133</sup>	43	The foreign case is distinguished on its facts <sup>134</sup>	15
The foreign case is consistent with Australian law <sup>135</sup>	23	The foreign case was overruled by a subsequent foreign case <sup>136</sup>	15

These reasons show that foreign cases may be used for different purposes. One of those purposes could be to consider and develop principles of judicial review. This can be seen in reasons for using foreign cases such as having regard to the historical context, where the foreign case provides an example for the proposition stated, the persuasive reasoning of the foreign case, the *Australian Constitution*, and the path taken by Australian law. Another purpose could be to use the foreign case to resolve an issue before the Court. This can be seen in using a foreign case to describe an example, and where the foreign case has distinguishing facts. Finally, the reasons for finding a foreign case persuasive or unpersuasive could be considered to reflect its acceptance within a common law system. For example, where a foreign case has been accepted by an Australian court or has been overruled by a subsequent foreign case, the High Court appears to be considering the persuasiveness of the case based on the acceptance of that case. Notably, a foreign case has not been found persuasive because the Court was bound to follow it.

In 2013 Cheryl Saunders and Adrienne Stone suggested there was ‘a growing willingness on the part of at least some Justices to distinguish foreign precedents by reference to what they claim to be relevant points of contextual difference’.<sup>137</sup> The context of the foreign legal system or case does not explicitly feature as a reason for finding a foreign case unpersuasive. The contextual differences can, however, be inferred from the different path taken by Australian law (n=36). For the purposes of analysing the data, let us assume that the willingness referred to by Saunders and Stone begun on 1 January 2007. That reference point aligns

131 See, eg, *Lam* (n 94) 25 [78] (McHugh and Gummow JJ), citing *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641.

132 See, eg, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72, 79–80 [14]–[17], citing *Lane v Esdaile* [1891] AC 210.

133 See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 75 [67] (McHugh and Gummow JJ) (*Applicant S20/2002*), citing *Sharp v Wakefield* [1891] AC 173.

134 See, eg, *O'Rourke v Miller* (1985) 156 CLR 342, 353 (Gibbs CJ), citing *R v Hull Prison Board of Visitors; Ex parte St Germain [No 2]* [1979] 3 All ER 545.

135 See, eg, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225, 248 [85] (Edelman J), citing *R v Jukes* (1800) 8 Term R 542; 101 ER 1536.

136 See, eg, *Toohey* (n 104) 235 (Aickin J), citing *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395.

137 Saunders and Stone (n 28) 26.

with Justin Gleeson's observation in 2017 that 'the last 10 years or so has seen a resurgent judicial interest in drawing upon foreign, [and] comparative ... sources where they can assist in the proper disposition of the dispute at hand'.<sup>138</sup> Since 1 January 2007 the different path taken by Australian law has been a frequently (n=14 of which n=8 were in 2018) identified reason for finding a foreign case unpersuasive. This tends to confirm the suggestion of Saunders and Stone.

Absent from the most common reasons is a consideration of the impact of a rights instrument on a foreign case and consequently the relationship to Australian law. Australia is 'a legal system marked by the absence of a bill of rights',<sup>139</sup> possibly because of 'the complex interrelationship of institutions of government that are associated with the British constitutional tradition'.<sup>140</sup> In 2011 Justice Kiefel described '[r]ecent discussions in Australia about the adoption of a Charter of Rights' as 'unproductive'.<sup>141</sup> The extent to which rights instruments have influenced judicial review in foreign jurisdictions is beyond the scope of this article, and may be contested,<sup>142</sup> but it is possible that the rights instruments have had an effect. As Sir Anthony Mason observed: 'Australia is to be distinguished from the United States and Canada in that it has no entrenched Bill of Rights. Unlike England and New Zealand, Australia does not even have a statutory Bill of Rights.'<sup>143</sup> Sir Anthony has suggested that the absence of a rights instrument may have influenced judicial methodology, having considered English courts to be 'moulding the common law in light of the ... *European Convention on Human Rights*, [and] the *Human Rights Act 1998*'.<sup>144</sup> Sir Anthony has also noted that the High Court's judgments in the 1980s and 1990s can 'be contrasted with that of other jurisdictions whose jurisprudence is influenced by the interpretation of entrenched or statutory bills of rights'.<sup>145</sup>

Given that Australia's legal system is marked by the absence of a rights instrument, it might be expected that the persuasiveness of a foreign case would be influenced by a rights instrument. However, of the 99 cases reviewed, there is only one instance where the persuasiveness of a foreign case was considered in light of a rights instrument. With respect to the issue of bias in procedural fairness, Kirby J in *Hot Holdings Pty Ltd v Creasy* implied that English decisions were unpersuasive because of a rights instrument: 'In England, recent decisions

138 Justin Gleeson, 'The Increasing Internationalisation of Australian Law' (2017) 28(1) *Public Law Review* 25, 33.

139 Margaret Allars, 'Of Cocoons and Small "c" Constitutionalism: The Principle of Legality and an Australian Perspective on *Baker*' in David Dyzenhaus (ed), *The Unity of Public Law* (Hart Publishing, 2004) 307, 307.

140 Cheryl Saunders, 'Constitutional Structure and Australian Federalism' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 174, 195.

141 Justice Kiefel, 'Comparative Analysis in Judicial Decision-Making' (n 21) 357 n 14.

142 See, eg, 'Case Comment: Human Rights' (2000) 3(2) *Journal of Local Government Law* D15.

143 Sir Anthony Mason, 'The Break with the Privy Council' (n 31) 77.

144 *Ibid* 80.

145 Sir Anthony Mason, 'The High Court of Australia' (n 6) 21.

have been influenced by the European Convention on Human Rights. There is no precisely equivalent consideration at work in Australian law.<sup>146</sup>

There have been other instances where judgments have noted the impact of a rights instrument.<sup>147</sup> However, that consideration occurs without indicating whether the rights instrument influences the persuasiveness of the foreign case. The absence of deeper consideration of the effect of a rights instrument may be due to the obvious differences from a system with such an instrument.

## F Summary

It is clear that High Court judicial review judgments use foreign cases. Sir Anthony has observed that it was possible for Australian law to ‘exhibit a parochial and chauvinistic attitude to overseas legal developments’ because Australia is ‘an island continent separated by geography from the centres of world population and commercial activity’.<sup>148</sup> Irrespective of whether ‘openness’ to foreign cases is a universal ‘virtue’,<sup>149</sup> foreign cases are used in judicial review judgments.

From the uses of foreign cases, three patterns are identifiable. The first is that foreign cases are frequently used without a reason. The second is the preference for certain foreign courts: the Privy Council and courts of the United Kingdom, United States, Canada and New Zealand. The third is the increased use of foreign cases when the final disposition is against the governor. Explanations for these patterns are offered in the next Part.

## V IN SEARCH OF EXPLANATIONS FOR THE PATTERNS

Justice Kenneth Hayne has observed that the results of a case are important, but ‘cannot be and must not be divorced from the reasons given for it’.<sup>150</sup> In a similar vein, the patterns of using foreign cases are important, but cannot be divorced from the explanations for their existence. This Part explains the patterns identified in the previous Part. The *Cook* principle offers a partial explanation. Other explanations are the normative foundations of judicial review, an openness to foreign cases in part due to the Washminster foundations of the *Australian Constitution*, considering the way common problems have been solved by foreign courts, the quilt of legalities, and attempts to increase the legitimacy of a decision.

146 (2002) 210 CLR 438, 477 [123] (citations omitted), citing *Human Rights Act 1998* (UK) sch 1 and *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.

147 See, eg, *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 478–9 [20] (Gummow J) (‘NAIS’).

148 Sir Anthony Mason, ‘The Relationship between International Law and National Law’ (n 19) 753.

149 Justice Susan Kiefel, ‘Legal Influences: Across Centuries and Borders’ (Freeleagus Oration, Brisbane, 26 August 2016) 6.

150 Justice Hayne (n 114) 236.

These explanations bear a close correlation to the patterns of using foreign cases. Explanations that did not appear to align with the data presented in Part IV have not been considered. Other explanations may exist; it is hoped that this article may encourage consideration of them.

It is widely accepted that High Court decisions should be accompanied by reasons.<sup>151</sup> Two rationales for that view are equally applicable to the importance of searching for explanations for the patterns. One rationale for providing reasons is that it allows future litigants to know what the law is and indicates the disposition of a future case.<sup>152</sup> Where a judgment uses a foreign case in a particular way, it follows that an explanation for the use could assist litigants by suggesting how it will be used in the future.<sup>153</sup> Another rationale for judges providing reasons is that it allows the losing party to understand why they lost.<sup>154</sup> Given the correlation between the use of foreign cases and the governor losing, governors may be interested in understanding why more foreign cases are used when the final disposition is against them.

I do not seek to construct a methodology for using foreign cases in High Court judicial review judgments. As the explanations discussed below show, there are conceptual and practical issues to be considered. Further, as Chief Justice French observed, the constraints on comparative public law include the ‘constitutional arrangements, the presence or absence of Bills of Rights, the general legal system, and the political and legal cultures of the day’.<sup>155</sup>

### **A First Pattern: Use without a Reason**

There is a pattern of using foreign cases without offering a reason for their use. There is no explicit obligation on a High Court judge to identify the reasons for the use of a foreign case in their judgment. It could be inferred from the *Cook* principle that to demonstrate the usefulness of a foreign case, based on the persuasiveness of its reasoning, the judgment should identify why the foreign case is persuasive. Identifying a reason would allow a consideration of the strength of the argument for using that foreign case. It would also be consistent with the view in Australian law that judicial decisions should state their reasons.

Absent a specific reason, the openness to foreign law explains the pattern of using

151 Sir Frank Kitto, ‘Why Write Judgments?’ (1992) 66(12) *Australian Law Journal* 787, 790; Sir Harry Gibbs, ‘Judgment Writing’ (1993) 67(7) *Australian Law Journal* 494, 494, 499; *Osmond* (n 106) 666–7 (Gibbs CJ); Keith Mason (n 41) 95; Justice Susan Kiefel, ‘Reasons for Judgment: Objects and Observations’ (Speech, Sir Harry Gibbs Law Dinner, University of Queensland, 18 May 2012) 1; Justice Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (n 30) 504.

152 Justice Virginia Bell, ‘Examining the Judge’ (Speech, 29 May 2017) 2.

153 Spottiswood (n 2) 163.

154 See, eg, Justice Virginia Bell, ‘Examining the Judge’ (n 152) 3.

155 Chief Justice French (n 3) 3.



foreign cases without a reason. On this basis, there is no need to identify a reason for using each foreign case. The openness explanation is particularly strong for United Kingdom and United States cases, given that these jurisdictions formed the foundations for the *Australian Constitution*. The Australian federal government was intentionally founded on a hybrid of Washington and Westminster systems of government,<sup>156</sup> hence the term ‘Washminster’. For instance, the *Australian Constitution* has been interpreted as embodying a separation of powers,<sup>157</sup> combining British and American conceptualisations.<sup>158</sup> The separation of powers is one of the underpinnings of judicial review in Australia and has influenced judicial review.<sup>159</sup> Further, judicial review can arise under the High Court’s original jurisdiction in s 75(v) of the *Constitution*. That section was drafted in light of English and American law,<sup>160</sup> for example, as John Quick and Robert Garran observed:

The principle, which is laid down clearly in English, Colonial, and American cases, is this: that a mandamus will lie against an officer of the Crown to compel him to perform an act which he is under a statutory or other legal duty to perform; but not to compel him to perform an act in which he has any discretion, or in which he is subject to the commands of the Crown.<sup>161</sup>

The Washminster foundations of Australian law are reflected in one of the most common reasons for finding a foreign case persuasive, that is the historical context the foreign case provides (n=142). In a statement immediately preceding the *Cook* principle, the plurality implicitly accepted the Washminster foundations as providing a basis for using foreign cases, stating that ‘[t]he history of this country and of the common law makes it inevitable and desirable’ that the High Court would find decisions from United Kingdom and ‘other great common law courts’ useful.<sup>162</sup> Therefore, the openness of Australian judges to foreign influences, particularly from the United Kingdom and the United States, explains the use of foreign cases without a reason for each specific instance.

156 Justin Gleeson (n 138) 26. See also Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) 13 (‘Controlling Administrative Power’).

157 See, eg, *R v Kirby: Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 275–6 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). The separation of powers has arguably had a stronger influence in Australian judicial review than in England, Canada and New Zealand: Sir Anthony Mason, ‘The Break with the Privy Council’ (n 31) 77. On the importance of the separation of powers, see also Justice Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (n 30) 515.

158 Peter Cane, ‘Understanding Administrative Adjudication’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 273, 293–4.

159 Cane and McDonald (n 8) 33. See, eg, *Quin* (n 104) 36 (Brennan J).

160 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 778–84.

161 *Ibid* 781 (emphasis omitted).

162 *Cook* (n 47) 390 (Mason, Wilson, Deane and Dawson JJ).

## B Second Pattern: Common Foreign Courts

Immediately preceding the *Cook* principle, the plurality observed that the High Court would ‘obtain assistance and guidance from the learning and reasoning of’ United Kingdom and ‘other great common law courts’.<sup>163</sup> The pattern of predominantly using the Privy Council and courts of the United Kingdom, United States, Canada and New Zealand, suggests that the *Cook* principle has been followed as these are common law courts. One explanation for the use of these courts is where a foreign case has been incorporated into an Australian statute.<sup>164</sup> Beyond such highly specific instances, three further explanations for the predominant use of these foreign courts can be identified. Firstly, the Washminster constitutional foundations explain the use of United Kingdom and United States cases. Secondly, the foreign courts faced similar legal problems to the High Court. Finally, the quilt of legalities explains the use of these foreign courts.

### 1 Washminster

The Washminster foundations of Australian law explain the use of United Kingdom and United States cases. These jurisdictions influenced the *Australian Constitution* and their continued relevance arises where judicial review is related to the *Australian Constitution*. Judicial review is provided for in the *Constitution*, which can explain the frequent use of judgments of these courts. It could be countered that there are particular features of the *Australian Constitution* that distinguish Australian judicial review. Section 75(v) of the *Australian Constitution* provides a constitutionally ‘entrenched minimum provision of judicial review’<sup>165</sup> that is unique amongst the foreign courts commonly used by the High Court.<sup>166</sup> Nonetheless, foreign jurisdictions without an equivalent to s 75(v) can provide a comparison to the Australian situation; the difference may give pause for reflection.<sup>167</sup> This could be partly reflected in the most common reason for finding a foreign case unpersuasive: the *Australian Constitution* (n=33). Another potential argument against the Washminster explanation is that the constitutional relationship between the three branches of government has influenced the development of judicial review,<sup>168</sup> which is unique as compared to England.<sup>169</sup>

163 Ibid.

164 See, eg, *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222, 250 [97] (Kirby J); *Applicant S20/2002* (n 133) 74 [66] (McHugh and Gummow JJ).

165 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

166 In respect of the United States and Canada, see *ibid* 511–12 [98]; Susan Crennan, ‘Magna Carta, Common Law Values and the Constitution’ (2015) 39(1) *Melbourne University Law Review* 331, 340–1.

167 Justice Kiefel, ‘Comparative Analysis in Judicial Decision-Making’ (n 21) 367.

168 Cane and McDonald (n 8) 30.

169 See, eg, Aronson and Groves (n 7) 428 [7.150].

However, High Court judgments have pointed out that the Australian separation of powers provides a reason for finding an English decision unpersuasive. For example, the English substantive legitimate expectation doctrine<sup>170</sup> has been rejected as it tends to infringe the separation of powers.<sup>171</sup> Whilst Westminster-related cases were not followed in this instance, based on the Washminster foundations, decisions of United Kingdom courts would still be relevant to consider. A foreign case may be used to reach a different conclusion.

Another objection to the Washminster explanation could be that using a foreign case lacks democratic legitimacy. In a different jurisdiction, Judge Richard Posner has argued that ‘the undemocratic character of citing foreign decisions’ is problematic: ‘the judges of foreign countries, however democratic those countries may be, have no democratic legitimacy’ in the United States.<sup>172</sup> A similar argument could be made in Australia. However, the democratic deficit argument is less convincing in the Australian context. High Court judges do not face a democratic deficit because they are appointed by representatives of the people and ‘the High Court owes its origin to that very *Constitution* which is the basis of our democratic system’.<sup>173</sup> When High Court judges use cases from jurisdictions that framed the *Australian Constitution*, a similar argument can be made. That is, the Australian system of government, including the democratic system, is at least influenced by a foreign jurisdiction and thus to understand the *Australian Constitution*, it is permissible to use foreign cases. Given the limited appetite for an originalist interpretation of the *Australian Constitution*,<sup>174</sup> it follows that the High Court should not be limited to those foreign cases before federation.<sup>175</sup> The democratic legitimacy critique could still apply to foreign cases from jurisdictions outside the United Kingdom and the United States. However, where a foreign jurisdiction was also founded on Washington or Westminster constitutional principles, it is useful from a comparative Washminster perspective. The Washminster foundations of the *Australian Constitution* thus offer an explanation for the use of cases from United Kingdom and United States courts and possibly other foreign courts.

170 See, eg, *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.

171 *Quin* (n 104) 17 (Mason CJ); *Lam* (n 94) 10 [28] (Gleeson CJ).

172 Richard Posner, ‘No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Decision as a Precedent in Any Way’ [2004] (July–August) *Legal Affairs* 40, 42.

173 John Doyle, ‘Implications of Judicial Law-Making’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 84, 86.

174 See, eg, Justice Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24(1) *Melbourne University Law Review* 1, 12, quoting *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 599–600 [186] (Kirby J).

175 See, eg, *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 335 [30] (Kiefel, Bell and Keane JJ) (*‘WZARH’*), citing *R v Secretary of State for the Home Department; Ex parte Ruddock* [1987] 1 WLR 1482.

## 2 Similar Legal Problems

It can be inferred that frequent use is made of certain foreign courts because they help resolve commonly faced legal problems through a process of cross-fertilisation. Sir Anthony Mason has suggested that considering the approach of a non-common law legal system to a ‘particular legal problem’ may be ‘desirable’, because legal problems ‘often reflect human problems, [which] are not unique to any one system of law’.<sup>176</sup> Where the reasoning of a foreign common law court offers a way to solve a legal problem it can be worth considering. This may particularly be the case when ‘a final court of appeal is confronted by a novel question ... which the court has not previously considered and to which the existing body of jurisprudence in the jurisdiction has not evolved an answer’.<sup>177</sup> Alternatively, where ‘national law is dated, unclear, or contradictory’, a foreign case can be ‘a source of inspiration’.<sup>178</sup> Such circumstances are ripe for the ‘dissemination of ideas from one national legal system to another’ through cross-fertilisation.<sup>179</sup>

Using foreign cases to help solve legal problems common across jurisdictions can be inferred where a foreign case is used because it provides an example (n=50). For instance, Mason J observed in *Kioa v West*, with references to English and New Zealand cases, that ‘recent decisions illustrate the importance’ of bringing ‘to a person’s attention the critical issue or factor on which the administrative decision is likely to turn’ so they may deal with it.<sup>180</sup> English and New Zealand cases were used to support Mason J’s conclusion on how the legal problem of ensuring procedural fairness should be resolved. The foreign courts chosen may thus assist in solving common or similar legal issues. What is less clear is why the problems faced by other foreign common law courts are not explicitly considered, as they presumably face the same human problems.<sup>181</sup>

## 3 Quilt of Legalities

Judicial oversight of decisions made by governors is not, as a concept, unique to Australia.<sup>182</sup> Other jurisdictions with similar political ideals can also undertake

176 Sir Anthony Mason, ‘The Relationship between International Law and National Law’ (n 19) 753. See also John Bell, ‘The Relevance of Foreign Examples to Legal Development’ (2011) 21(2) *Duke Journal of Comparative and International Law* 431, 433; Justice Nye Perram, ‘General Principles of Law in Civilian Legal Systems: What Lessons for Australian Administrative Law?’ (Speech, AGS Administrative Law Symposium, 21 June 2013) 2.

177 Sir Anthony Mason, ‘The Break with the Privy Council’ (n 31) 76.

178 Sir Basil Markesinis and Jörg Fedtke, ‘The Judge as Comparatist’ (2005) 80(1) *Tulane Law Review* 11, 17 (emphasis omitted).

179 Anne-Marie Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29(1) *University of Richmond Law Review* 99, 117.

180 (1985) 159 CLR 550, 587, citing *R v Gaming Board for Great Britain; Ex parte Benaim* [1970] 2 QB 417 and *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130.

181 Cf *Osmond* (n 106) 668 (Gibbs CJ).

182 Cane, *Controlling Administrative Power* (n 156) 157–62, 178–82.

a similar process to Australian judicial review. In 2016 Chief Justice French endorsed the view that there is a quilt of legalities across national boundaries.<sup>183</sup> Chief Justice French drew on Thomas Poole's argument that '[a]dministrative law is entwined with constitutional law ... and everywhere dependent on *local conditions*, particularly the structure of politics and public administration'.<sup>184</sup> These characteristics, Poole argued, 'militate against the realisation of a normatively unified common law of judicial review'.<sup>185</sup> Poole concluded that instead of a 'common law of administrative law', we should think of a "'quilt of legalities"' in which functionally independent common law jurisdictions interact within a partly-shared language and normative framework'.<sup>186</sup>

The process of interaction amongst jurisdictions explains the use of certain foreign courts. The jurisdictions frequently used have a partly-shared language and normative framework. At the most basic level, the foreign jurisdictions chosen have English as one of their official languages. More significantly, there can be similarities in language used in judicial review, such as procedural fairness, natural justice or due process.<sup>187</sup> The normative framework is also similar, as the most prominent jurisdictions are premised on 'administrative power' being 'limited by law'.<sup>188</sup> Further, judicial review is available in all of the most prominent jurisdictions.<sup>189</sup> Based on the shared language and normative framework, the quilt of legalities across these jurisdictions provides an explanation for using judgments of their courts.<sup>190</sup>

The feasibility of the quilt of legalities explanation is demonstrated by two of the common reasons for finding a foreign case persuasive: the foreign case has persuasive reasoning (n=46), and the foreign case is consistent with Australian law (n=23). For a foreign case to have persuasive reasoning, there would, presumably,

183 Chief Justice French (n 3) 7, citing Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Butterworths LexisNexis, 2<sup>nd</sup> ed, 2002) 163.

184 Thomas Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 15, 22 (emphasis added).

185 *Ibid.*

186 *Ibid.*, quoting de Sousa Santos (n 183) 163.

187 See, eg, *WZARH* (n 175) 335 [30] (Kiefel, Bell and Keane JJ); *NAIS* (n 147) 478 [19] (Gummow J); *O'Reilly v Mackman* [1983] 2 AC 237, 263 (Ackner LJ); Cane, *Controlling Administrative Power* (n 156) 350–6.

188 Justice Stephen Gageler, 'Controlling Administrative Power: An Historical Comparison by Peter Cane' (2017) 76(2) *Cambridge Law Journal* 430, 430.

189 See generally Cane, *Controlling Administrative Power* (n 156); Graham Taylor, *Judicial Review: A New Zealand Perspective* (LexisNexis, 3<sup>rd</sup> ed, 2014); Chief Justice Beverley McLachlin, 'Administrative Tribunals and the Courts: An Evolutionary Relationship' (Speech, Annual Conference of the Council of Canadian Administrative Tribunals, 27 May 2013).

190 To confirm the quilt of legalities as an explanation, it may be necessary to consider whether jurisdictions foreign to Australia engage in cross-jurisdictional dialogue, but that is beyond the scope of this paper. For example, Singh J of the High Court of Judicature at Allahabad in *Kesar Enterprises Ltd v Uttar Pradesh* (2001) 88 All AIR 209 with respect to the ground of review of taking into account an irrelevant factor observed that Indian 'law is the same [as Australian law]; [Indian] Courts have been striking down administrative decisions on similar grounds' to Australian courts: at 215 [15]. However, in the period under consideration, only one use was made of an Indian case.

need to be a common understanding about the underlying precepts for judicial review. It can be inferred that foreign legal systems are consistent with Australian cases because of a similar normative framework. These reasons tend to confirm the quilt of legalities.

The strength of similarity across jurisdictions has arguably been suggested to a greater degree by the unity of public law thesis. The thesis is that judicial review is part of the constitutional law and that beneath ‘various constitutional enactments ... lies ... a set of ideas and assumptions about the nature and conditions of legality, which, in turn, define the character of legitimate government’.<sup>191</sup> In the context of the use of foreign cases, the unity of public law thesis implies that jurisdictions with similar ideas and assumptions can be relevant. It could therefore be inferred that the most commonly used foreign courts have similar ideas and assumptions. Whilst the unity of public law thesis may seem appealing, it overlooks the importance of local values and conditions in formulating judge-made law in Australia, which is accommodated by the quilt of legalities as espoused by Poole.

Judges in Australia seek to make law that reflects local values, conditions and constitutional structures.<sup>192</sup> Australian judges have endorsed the view that judge-made law should reflect societal values and conditions. Those judges include Justice Susan Kiefel, Sir Anthony Mason, Sir William Deane, Justice Mary Gaudron, Justice Virginia Bell, Justice Stephen Gageler, Susan Crennan, Justice Michael Kirby, Sir Samuel Griffith, Sir Edmund Barton and Justice Richard O’Connor.<sup>193</sup> It could be argued that judges do not make law, but ‘[n]o seasoned observer of judicial review would deny that judicial creativity is intrinsic to its application’.<sup>194</sup> In a similar way, there can be an element of judicial creativity in the development of the law of judicial review, such as when the High Court ‘reformulated’ the reasonableness ground of review in 2013.<sup>195</sup>

Outside of Australia it has been acknowledged that foreign cases may arise from different values and conditions. Judge Richard Posner has argued that it is problematic to use foreign cases in United States courts because ‘they emerge from a complex socio-historico-politico-institutional background of which our judges, I respectfully suggest, are almost entirely ignorant’.<sup>196</sup> Similarly, in the

191 TRS Allan, ‘The Moral Unity of Public Law’ (2017) 67(1) *University of Toronto Law Journal* 1, 1.

192 Cf Justice Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (n 30) 513.

193 Justice Susan Kiefel, ‘On Being a Judge’ (Speech, The Chinese University of Hong Kong, 15 January 2013) 3; *Bryan v Maloney* (1995) 182 CLR 609, 618 (Mason CJ, Deane and Gaudron JJ); Justice Virginia Bell, ‘Judicial Activists or Champions of Self-Restraint’ (n 21) 15; Justice Stephen Gageler, ‘Legislative Intention’ (2015) 41(1) *Monash University Law Review* 1, 16; Crennan (n 166); *NAIS* (n 147) 501 [101] (Kirby J); *Baxter* (n 38) 1111–12 (Griffith CJ for Griffith CJ, Barton and O’Connor JJ).

194 Bateman and McDonald (n 77) 179.

195 Leighton McDonald, ‘Rethinking Unreasonableness Review’ (2014) 25(2) *Public Law Review* 117, discussing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

196 Posner (n 172) 42.

English context, John Bell has argued that '[i]f one is going to cite foreign law, then one needs to be aware of the context in which the rules you are citing operate in their foreign system, so that a genuine comparability can be established'.<sup>197</sup> Given the importance of local values and conditions to judge-made law, the quilt of legalities is a more plausible explanation for the use of certain foreign courts because it explicitly accommodates the importance of those values and conditions when judges formulate law.

### **C Third Pattern: Disposition against the Governor**

When the disposition of the case is against the governor there is a greater use of foreign cases. An explanation for this pattern is an attempt to legitimise the decision. It has been suggested that the statutory approach to judicial review is based on avoiding 'usurp[ing] democratically authorised administrative action',<sup>198</sup> implying that there may be some concerns about the legitimacy of courts reviewing decisions of governors. For instance, Justice Kiefel considers that 'similar approaches of foreign jurisdictions can be used to confirm the common law judge's decision as correct'.<sup>199</sup> Foreign cases can increase the strength of the arguments and may legitimise the decision by showing that similar approaches have been adopted elsewhere.

In other jurisdictions it has been suggested that foreign cases can be used to legitimise a decision. A leading United States academic has observed that one possible reason for using foreign cases is that the persuasiveness of that court's decision 'may be enhanced by a simple demonstration that others have trodden a similar path'.<sup>200</sup> In the English context, a similar observation has been made: '[f]oreign law is not a completely new argument, but provides additional support to the arguments already available in the host domestic legal system'.<sup>201</sup> United States Supreme Court Chief Justice John Roberts has more sceptically argued that relying on foreign cases allows a judge 'to incorporate his or her own personal preferences, [and] cloak them with the authority of precedent'.<sup>202</sup> In Australia, Justice Gageler has argued that 'citation or quotation' can be selective of 'foreign cases seen to contain reasoning in support of the reasoning adopted by the appellate court',<sup>203</sup> although Justice Bell has cautioned against concluding

197 John Bell (n 176) 459.

198 Bateman and McDonald (n 77) 173.

199 Justice Kiefel, 'Comparative Analysis in Judicial Decision-Making' (n 21) 366.

200 Slaughter (n 179) 119. In the Australian context, see, eg, Spottiswood (n 2) 168–9.

201 John Bell (n 176) 460.

202 *Confirmation Hearing on the Nomination of John G Roberts, Jr to be Chief Justice of the United States: Hearing before the Senate Committee on the Judiciary*, 109<sup>th</sup> Cong 201 (2005).

203 Justice Gageler, 'What Is Information Technology Doing to the Common Law?' (n 21) 155.

that a judge would pursue ‘some personal agenda’.<sup>204</sup> Where the decision may be criticised for interfering with the governor, as evidenced by a disposition against the governor, foreign cases may increase the legitimacy of that interference.

It could be argued that there is no need to increase the legitimacy of a High Court decision by using foreign cases, because the normative underpinnings of judicial review already provide sufficient legitimacy. The statutory approach is said to be based on the High Court’s concern for ensuring a strict separation of powers and to avoid the usurpation of gubernatorial actions.<sup>205</sup> It does not necessarily follow that the statutory approach has a monopoly on legitimising judicial review. Foreign cases can provide an additional source when the final disposition is against the governor.

## D Summary

The *Cook* principle, normative foundations of judicial review, the quilt of legalities, an openness to foreign cases, and attempts to increase the legitimacy of a judicial review decision explain the three identified patterns of using foreign cases. The openness of Australian law to foreign influences, including the Washminster foundations, explains the use of foreign cases without a reason for each individual use. The openness of Australian law to foreign legal influences, the assistance foreign cases provide in resolving common legal problems and the quilt of legalities explains the common use of certain foreign court decisions. The perceived legitimisation that comes from using a foreign case explains their increased use when the disposition of a case is against the governor.

## VI CONCLUSION

Foreign cases have been, and continue to be, used in judicial review judgments of the High Court. This article has presented an understanding of the use of foreign cases that looks beyond the citation practices and seeks to understand how foreign cases are used, and how their use has changed over time.

There are clear patterns in the use of foreign cases by the High Court. From the sampled High Court judicial review cases it was found that 40.2% used a foreign case. Three patterns of use are identifiable. The first pattern is the frequent use of foreign cases without a reason. The second pattern is the frequent use of foreign cases from the United Kingdom, Privy Council, the United States, Canada and New Zealand. The third pattern is an increased use of foreign cases when the disposition is against the governor.

204 Justice Virginia Bell, ‘Judicial Activists or Champions of Self-Restraint’ (n 21) 17.

205 Bateman and McDonald (n 77) 173.



Found in the underlying approaches in judicial review and Australian law are explanations for these patterns. In seeking explanations, an obvious starting point is the decision in *Cook*, because it is a judicial statement on how foreign cases should be used. However, the *Cook* principle by itself does not provide an explanation for the patterns. Other explanations are the openness of Australian law to foreign influences, the normative foundations of judicial review, the quilt of legalities, and attempts to increase the legitimacy of judicial review.

## APPENDIX – HIGH COURT JUDICIAL REVIEW CASES USING FOREIGN CASES

Year	Number of High Court judicial review cases identified	Number of High Court judicial review cases using a foreign case	Percentage of High Court judicial review cases using a foreign case
1980	0	0	—
1981	3	3	100.0%
1982	9	3	33.3%
1983	5	2	40.0%
1984	6	3	50.0%
1985	7	3	42.9%
1986	6	2	33.3%
1987	4	3	75.0%
1988	4	0	0.0%
1989	6	1	16.7%
1990	8	6	75.0%
1991	4	1	25.0%
1992	4	1	25.0%
1993	3	1	33.3%
1994	2	0	0.0%
1995	6	2	33.3%
1996	4	1	25.0%
1997	7	3	42.9%
1998	4	1	25.0%
1999	5	2	40.0%
2000	14	6	42.9%
2001	16	8	50.0%
2002	9	6	66.7%
2003	12	7	58.3%
2004	4	3	75.0%
2005	8	4	50.0%
2006	6	0	0.0%
2007	5	2	40.0%

2008	8	2	25.0%
2009	7	1	14.3%
2010	6	5	83.3%
2011	7	1	14.3%
2012	6	2	33.3%
2013	9	2	22.2%
2014	7	1	14.3%
2015	10	6	60.0%
2016	2	1	50.0%
2017	6	1	16.7%
2018	7	3	42.9%
Total	246	99	40.2%