

Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court

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Over the last decade there has been a significant increase in the number of legal periodicals published in both Australia and overseas. There are at least two reasons for this phenomenon. First, during this period in Australia a number of new law schools have been established which are publishing law reviews. Second, both in Australia and overseas there has been an increase in the number of periodicals specialising in particular areas of the law. This places libraries in a difficult position. On the one hand, serials departments are faced with a plethora of new titles and, on the other, they often have to make do with declining budgets. If it is possible to measure the influence of different titles, one avenue forward is for libraries to build a core collection of influential journals. In the United States a number of studies have attempted to measure the influence of legal periodicals using citation practice. One strand of the literature counts the number of cites periodicals receive in a 'source' journal in a specified publication period.¹ A second strand of the literature counts the number of times judges cite periodicals in their opinions.²

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- 1 For example see: Maru O, 'Measuring the Impact of Legal Periodicals' [1976] *American Bar Research Foundation Journal* 227; Mann R, 'The Use of Periodicals and Journals by Courts' (1986) 26 *Jurimetrics* 400; Finett S, 'The Most Frequently Cited Law Reviews and Legal Periodicals' (1990) 9 *Legal Reference Services Quarterly* 227; Leonard J, 'Seein' the Cities: A Guided Tour of Citation Patterns in Recent American Law Review Articles' (1990) 34 *St Louis University Law Journal* 181; Cullen C and Kalberg R, 'Faculty Scholarship Survey - Chicago Kent Law Review' (1995) 70 *Chicago-Kent Law Review* 1445.
- 2 For example see: Newland C, 'Legal Periodicals and the United States Supreme Court' (1959) 7 *Kansas Law Review* 477; Sirico L and Margulies J, 'The Citing of Law Reviews by the Supreme Court: An Empirical Study' (1986) 34 *UCLA Law Review* 131; Sirico L and Drew B, 'The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis' (1991) 41 *University of Miami Law Review* 1051. Other studies have considered the courts' citation of secondary authority more generally, including legal periodicals. For instance, see: Bernstein N, 'The Supreme Court and Secondary Source Material: 1965 Term' (1968) 57 *Georgetown Law Journal* 57; Daniels W "'Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions, October Terms, 1900, 1940 and 1978' (1983)

However, there is a dearth of studies of this sort attempting to measure the influence of Australian legal periodicals. There are two studies using legal periodicals as the source material. Warren counted all citations to periodicals in the 1995 issues of 32 Australian legal periodicals and listed the 100 most frequently cited titles.³ Ramsay and Stapleton counted citations to periodicals in the 1994 and 1995 issues of 14 Australian legal periodicals and listed the 20 most cited periodicals.⁴ To this point, though, there are no Australian studies which rank periodicals according to the number of times judges cite them and hence measure their influence on the courts. This is surprising given that most articles in legal periodicals address the development of broad legal principles and as such are often couched in terms of advice or exhortation to appellate judges.⁵ The objective of this paper is to take some first steps toward filling this gap in the literature through considering the extent to which the High Court cited legal (and non-legal) periodicals in decisions published in the Commonwealth Law Reports decided between 1990 and 1997.

In addition to being of interest to law libraries the citation practice of the High Court should be of interest to certain groups of people. First, it is of practical relevance to counsel to know which periodicals have the most influence on the High Court and which Justices cite the most articles. Second, it is of interest to prospective authors to know which periodicals have the most influence in the High Court, given that when writing an article for publication presumably he/she wants to get his/her message across to the most influential audience as possible. Third, the citation practice of the High Court should be of general interest to legal scholars given that it is the most important legal institution in Australia. This

76 *Law Library Journal* 1; Black V and Richter N, 'Did She Mention My Name? Citation of Academic Authority in the Supreme Court of Canada, 1985-90' (1993) 16 *Dalhousie Law Journal* 377.

- 3 Warren D, 'Australian Law Journals: An Analysis of Citation Patterns' (1996) 27 *Australian Academic and Research Libraries* 261.
- 4 Ramsay I and Stapleton G, 'A Citation Analysis of Australian Law Journals' (1997) 21 *Melbourne University Law Review* 676. A third study is Ramsay I and Stapleton G, 'The Influence of Commercial Law Journals: Citation Analysis' (1988) 26 *Australian Business Law Review* 298. This article reports some additional results – ranking commercial law periodicals – from the same data set.
- 5 Black and Richter, note 2 above, point out that to some extent the practice of 'talking to appellate courts' when writing an academic article could simply be a stylistic device and that the true audience might really be other academics or no-one in particular. However, as Black and Richter also note, presumably at least some portion of the writing that authors ostensibly direct to judges is actually intended to be read by them and influence the decisions they make. For a discussion of the intended audience for articles in legal periodicals also see: Levinson S, 'The Audience for Constitutional Metatheory (Or Why and to Whom Do I Write the Things I Do?)' (1992) 63 *University of Colorado Law Review* 333.

makes the legal reasoning which the court adopts, in itself, an important issue for investigation, however at this stage there has been little systematic empirical research investigating the authorities which the High Court uses to support its reasoning.⁶

The paper is set out as follows. The next section considers some of the reasons why judges might cite academic articles in periodicals and examines different academic and judicial attitudes towards courts citing legal periodicals. It also discusses the advantages and disadvantages of using citation practice to measure influence. Section 3 sets out the methodology and presents the results from the study. A number of issues are investigated including: Which legal periodicals had the most influence on the High Court? To what extent did the High Court cite specialised legal periodicals and to what extent did it cite legal periodicals from other common law jurisdictions? What use did the High Court make of non-legal periodicals? Following this, the citation practice of individual Justices is considered in section 4. The last section contains some concluding comments.

Some Preliminary Theoretical Issues

Why do Judges Cite Periodicals in their Reasons?

The views of academic authors expressed in periodicals are not binding on the High Court; hence there must be other reasons motivating Justices to cite periodicals in their judgments. One reason for citing periodicals is convenience. For instance articles in periodicals often refer to cases or summarise the law in other jurisdictions which judges find convenient to adopt. A second reason for citing legal periodicals is to draw on opinions expressed in academic articles to explore the development of legal principle. A third reason is to draw on the opinion of academic writers to assist in determining what earlier cases decided. Fourth, in some cases Justices turn to well respected academic authors in particular areas of the law (or other Justices speaking extra-judicially) to provide further justification for

6 As far as I am aware, there are just three previous studies investigating the citation practice of Australian courts: Von Nessen P, 'The Use of American Precedents by the High Court of Australia' (1992) 14 *Adelaide Law Review* 181 (citation to United States cases in the High Court 1901-1987); Smyth R, 'What do Judges Cite? – An Empirical Study of the "Authority of Authority" in the Supreme Court of Victoria' (1999) 25 *Monash Law Review* (forthcoming) (citation to case law and secondary authority in the Supreme Court of Victoria in 1970, 1980, and 1990); Smyth R, "'Other than Accepted Sources of Law": Secondary Source Citations in the High Court', unpublished paper, Monash University (citation to secondary authorities in the High Court 1960, 1970, 1980, 1990 and 1996).

their interpretation of previous authorities. Fifth, some academic articles are cited because they have been approved in previous cases as correctly stating the law. A sixth reason for citing periodicals (in particular non-legal periodicals) is to use social science evidence to examine the 'legislative fact' that underpins legal rules.

Is it Appropriate for Judges to Cite Periodicals in their Reasons?

Academic and judicial opinion about whether it is appropriate to cite academic articles from periodicals has changed over time. In the past a convention existed in England that authors could only be cited after they had died. This reflected a view that some contributors to periodicals write with the express purpose of influencing the outcome of a case. For instance, William Douglas, a former Justice of the United States Supreme Court suggests that too often the 'views presented [in periodicals] are those of special pleaders who fail to disclose that they are not scholars, but rather people with axes to grind'.⁷ This convention, however, no longer exists in England and the view that academic authors are not detached has received stringent criticism. For example Nicholls writes:

'It is said that the reason a living writer, particularly in a periodical, cannot be cited may be because of the suspicion that he has written for the express purpose of influencing the decision in a pending case. If the suggestion here is that it is improper for a disinterested and unselfish scholar to attempt to assist the court to reach what he believes is a correct interpretation of the law, one can only disagree. And if the suggestion is that one of the parties may instigate an article for the express purpose of bolstering a weak case, the answer is that it can be safely left to the judges to distinguish between the scholar and the hack.'⁸

Lord Denning was one of the biggest supporters of citing academic articles in reasons for judgment. He, among others, has argued that one of the main advantages of consulting academic writings is that the authors have time for considered reflection:

'[Articles in periodicals] are written by men who have studied the law as a science with more detachment than is possible to men engaged in busy practice. The influence of the academic lawyers is greater now than it has ever been and is greater than they themselves realise. Their influence is largely through their writings. The notion that their works are not of authority except after the author's death has long been exploded. Indeed the more

7 Douglas W, 'Law Reviews and Full Disclosure' (1965) 40 *Washington Law Review* 227, pp 228-9.

8 Nicholls G, 'Legal Periodicals and the Supreme Court of Canada' (1950) 28 *Canadian Bar Review* 422, p 430.

recent the work the more persuasive ... because it takes into account modern developments in case law.'⁹

A number of judges in the United States have written about legal periodicals in positive terms. Former Chief Justice of the United States Supreme Court, Charles Hughes, states:

'it is not too much to say that in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analysed, in a good legal periodical'.¹⁰

Judges from lower courts in the United States have echoed these comments. For instance Frederick Crane, former Chief Judge of the New York Court of Appeals, writes that:

'in difficult cases dealing with intricate subjects of law ... I eagerly turn to [the] college reviews [and] scan the index to see if college professors have written a paper upon the subject'.¹¹

Julius Hoffman, a former judge of the United States District Court, suggests:

'the publication of articles by recognised authorities and the unmistakable care with which the notes and comments have been prepared have caused the bench to become an attentive listener to the law review'.¹²

In Australia, there has been little judicial comment about whether it is appropriate to cite legal periodicals in reasons for judgment, but the issue seems to be a matter of judicial preference. On the one hand Sir Garfield Barwick is critical of citing academic opinion on the basis that referring to the views of others lessens the authority of the judgment. He states that:

'to bolster the judge's conclusions ... by citation of the views of others, however eminent and authoritative, may reduce the authority of the judge and present him as a research student recording by citation his researched material ... if citation is necessary ... then of course it must be made. But otherwise it can become an exercise in essay-writing rather than the statement of reason for an authoritative judgment'.¹³

- 9 Lord Denning, 'Review of P H Winfield, *A Textbook of the Law of Torts*' (1947) 63 *Law Quarterly Review* 516.
- 10 Hughes C, 'Forward' (1941) 50 *Yale Law Journal* 737, p 737.
- 11 Crane F, 'Law Reviews and the Courts' (1935) 4 *Fordham Law Review* 1 p 2.
- 12 Hoffman J, 'Law Review and the Bench' (1956) 51 *Northwestern University Law Review* 17, p 18.
- 13 Sir Garfield Barwick, *A Radical Tory*, 1995, pp 223-4.

Other Australian judges, however, have expressed different views about the value of periodicals. While Chief Justice, Sir Owen Dixon encouraged counsel to cite periodicals and other academic authorities and was prepared to cite these in his own reasons, he took the view that 'there exists a definite system of knowledge or thought and that judgments and other legal writings are evidence of its contents'.¹⁴ Sir Frank Kitto's view was that it is the obligation of the judge to seek out periodicals and other legal writings in pursuit of a just result.¹⁵ In more recent times Sir Anthony Mason has also expressed the opinion that judicial recourse to articles in periodicals and other writings is a helpful practice.¹⁶

The Pros and Cons of Using Citation Analysis to Measure Influence

A recent government report suggests that there are three main methods for measuring the influence of periodicals. First, influence can be assessed based on the use of journals in libraries. Second, experts can be surveyed using either interviews or questionnaires. Third, the number of citations to articles published in a periodical can be counted.¹⁷ There are both advantages and disadvantages to adopting the third approach.¹⁸ The main advantage of using citation practice is that it provides a quantitative indicator of influence. As such, it is less subjective than the first two approaches. One possible limitation is that influence might reflect, rather than be measured by the number of citations a periodical receives. An influential periodical develops a 'brand name' which reflects prestige and the brand name reduces the cost of searching for high-quality articles to cite. This factor, however, does not invalidate the use of citation practice to measure influence, but tends to augment the relationship between the two variables.¹⁹

A second limitation is that it assumes that the citing Justice values the article he/she cites as a useful source of information. A possible problem with this assumption arises where a Justice cites an article in order to

14 Sir Owen Dixon, *Jesting Pilate*, 2nd ed., 1997, p 156.

15 Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787, p 793.

16 Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, p 154.

17 Murphy P, *Determining Measures of the Quality and Impact of Journals*, Commissioned Report No. 49, National Board of Employment, Education and Training, 1996, p 4.

18 The pros and cons of using citation analysis are discussed more fully in Shapiro F, 'The Most Cited Law Review Articles' (1985) 73 *California Law Review* 1540.

19 Landes W, Lessig L and Solimine M, 'Judicial Influence: A Citation Analysis of Federal Courts of Appeal Judges' (1998) 27 *Journal of Legal Studies* 271, p 272.

criticise or disagree with the author. Where a judge follows this practice, it is conceivable that an article which is of poor standard might receive many citations because of widespread criticism of its contents.²⁰ However, the issue is not clear-cut because, at the same time, a substantial number of negative citations might reflect the fact that an article is both controversial and influential.²¹ A judge is under no obligation to refer to a given article; hence if he/she considers an author's argument to have no merit, it is unlikely he/she will cite it. Overall, using citation practice to measure influence is not a perfect measure, but in previous research it has been used to rank periodicals in both law and in a range of other disciplines²² and the fact remains that a large number of citations is one of the most objective indicators of influence available.

Methodology and Results

Data and Methodology

The sample in this study covers all cases published in the Commonwealth Law Reports, which were decided between 1990 and 1997.²³ There were 316 reported cases in the sample altogether. The fact that the sample only covers reported decisions is a limitation given that this is less than the actual number of cases decided.²⁴ However, cases are selected for inclusion in the Commonwealth Law Reports on the basis of their perceived precedent value and relevance to the profession. Hence, while it is im-

20 Leonard J, note 1 above, p 191.

21 Ibid.

22 For example see: Diamond A, 'The Core Journals of Economics' (1989) 2 *Current Contents* 4 (Economics); White M, and White K, 'Citation and Analysis of Psychology Journals' (1977) 32 *American Psychologist* (Psychology); Stack S, 'Measuring the Relative Impact of Criminology and Criminal Justice Journals' (1987) 4 *Justice Quarterly* 475 (Criminology). For other examples in disciplines, such as accounting and political science, see Ramsay and Stapleton, note 4 above, pp 677-8.

23 Not all cases decided in 1997 were included. At the time of commencing the study the most recent Law Report available was Vol 190, Parts 1 and 2.

24 To give some indication of case load: in 1990, 261 matters were heard and 84 judgments delivered. In 1991, 306 matters were heard and 66 judgments delivered. In 1992, 298 matters were heard and 64 judgments delivered. In 1993-4, 406 judgments were heard and 86 cases decided (39 civil appeals, 16 criminal appeals, 15 constitutional cases and 16 applications for order nisi). In 1994-5, 335 matters were heard and 75 cases decided (29 civil appeals, 14 criminal appeals, 11 constitutional cases and 21 applications for order nisi). In 1995-6, 310 matters were heard and 61 cases decided (36 civil appeals, 11 criminal appeals, 5 constitutional cases and 9 applications for order nisi). In 1996-7, 349 matters were heard and 56 cases decided (29 civil appeals, 14 criminal appeals and 13 constitutional cases). Source *High Court Annual Report* (various issues).

portant to recognise that the sample need not be representative, it does cover the most important cases the High Court decided over the period. All citations to legal and non-legal periodicals in the sample cases were counted. If a periodical received repeat citations in the same footnote or paragraph it was counted only once. However, if there were repeated citations to the same source in subsequent paragraphs or footnotes these were counted again on the basis that the source was being cited for a different proposition and therefore had separate significance.²⁵ In order to give proper weight to citations in joint judgments, the number of citations in these judgments were multiplied by the number of participating Justices when calculating the total figure.²⁶ In cases, though, where Justice A concurred with Justice B and Justice B cited periodicals, Justice A was not attributed with having cited those periodicals. In addition information was compiled on the type of judgment (single, joint and dissenting) and the subject matter of the case in which periodicals were cited.

Overview of the Results

Table 1 gives information on the number of cases citing periodicals and the number of periodicals cited over the sample period. There were 1168 citations altogether (1,132 legal and 36 non-legal). Of the 316 cases in the sample, 130 (or 41 per cent) contained citations to periodicals. On average, there were 3.70 periodicals cited per case. This suggests that those cases which did cite periodicals often contained multiple citations. On the whole, there was a steady increase over the sample period in both the proportion of cases citing periodicals and the number of periodicals cited per case.²⁷ These aggregate figures suggest that the proportion of cases where the High Court cites periodicals is similar to the Supreme Court of Canada, but less than the United States Supreme Court.²⁸ One reason for this might be the existence of a Bill of Rights in the United States, which gives the United States Supreme Court a more important political role than the High Court. Some commentators have suggested that, given the policy considerations which are involved, judges which have a greater socio-political function are also more likely to make greater use of second-

25 This is consistent with the method adopted in most previous citation practice studies in the United States. For example, see Daniels W, note 2 above, pp 3-4.

26 This is consistent with previous citation practices for Australian courts. See Von Nessen P, note 6 above, p 188; Smyth R, 'What Do Judges Cite?', note 6 above.

27 An exception is 1992, but it appears to be an aberration. In 1992 there were relatively few cases reported (27) and the average page length was much higher.

28 For previous studies, see Black and Richter, note 2 above (Supreme Court of Canada); Newland C, note 2 above; Sirico and Margulies, note 2 above; Bernstein N, note 2 above; and Daniels W, note 2 above (United States Supreme Court).

dary authority such as periodicals.²⁹ While the High Court appears to be taking on a more important socio-political role than in the past since finding implied rights in the Constitution, in support of this view the United States Supreme Court in particular makes much greater use of non-legal periodicals than the High Court.³⁰

Table 2 lists 'raw' data on each periodical cited and gives the number of citations each received. Altogether there were 116 legal and 11 non-legal periodicals cited. In previous Australian research Warren also lists unadjusted figures for each periodical cited and total citations received similar to table 2.³¹ However, Ramsay and Stapleton criticise this practice on two grounds.³² First, the unadjusted figures do not allow for differences in the number of published pages between journals; hence, it discriminates against journals that publish fewer pages. Second, it does not take into account when the cited article was published. Thus, it contains an inherent bias against newer journals. To take account of this criticism a separate data set was compiled which only included articles published in 1990 or after. In order to adjust for differences in the number of published pages the total number of citations in the second data set was standardised to 1,000 pages of text.³³ Altogether there were 348 citations to articles published in 1990 or after (29.8 per cent of total citations) from 72 different periodicals. Table 3 gives the 'impact factor' (citations per 1,000 pages of text) for the 10 most cited periodicals when this approach is used.

29 For example, see Nicholls G, note 8 above, p 445.

30 In particular the United States Supreme Court makes greater use of social science periodicals than the High Court. See Ackers J, 'Thirty Years of Social Science in Supreme Court Criminal Cases' (1990) 12 *Law and Policy* 1; 'Social Science in Supreme Court Death Penalty Cases: Citation Practices and Their Implications' (1991) 8 *Justice Quarterly* 421; Daniels S, 'Social Science and Death Penalty Cases – Reflections on Change and the Empirical Justification of Constitutional Policy' (1979) 1 *Law and Police Quarterly* 336; Diamond S and Casper J, 'Empirical Evidence and the Death Penalty: Past and Future' (1994) 50 *Journal of Social Issues* 177; Levine M and Howe B, 'The Penetration of Social Science into Legal Culture' (1985) *Law and Policy* 173.

31 Warren D, note 3 above.

32 Ramsay and Stapleton, note 4 above.

33 The total number of citations to a particular journal were divided by the total number of published pages in that journal between 1990 and 1997. The quotient was then multiplied by 1,000 to get the impact factor. If the journal commenced publication after 1990, citations received were divided by the number of published pages since publication commenced. This is consistent with the approach adopted in most recent studies such as Ramsay and Stapleton (*ibid.*) and Mann R (note 1 above).

Discussion of the Results

The five most cited journals in table 2 are the *Australian Law Journal*, *Law Quarterly Review*, *Modern Law Review*, *Sydney Law Review* and the *Federal Law Review*. When adjustments are made to take account of differences in page length and when the article was published each of these five journals are still in the top 10, but their relative rankings change. The five journals with the biggest impact factor in table 3 are the *Tort Law Review*, *Torts Law Journal*, *Sydney Law Review*, *Law Quarterly Review* and the *Federal Law Review*. The *Australian Law Journal* and *Modern Law Review*, which publish around 1,000 pages per volume as well as being two of the oldest periodicals, drop to eighth and ninth while the *Law Quarterly Review*, *Sydney Law Review* and *Federal Law Review* have similar rankings in both tables. When the adjustments in table 3 are made, however, the big winners are three of the newer specialist journals - the *Tort Law Review*, *Torts Law Journal* and *Journal of Contract Law* which were ranked as low as 24 and 28 in table 2.

How do these results compare with previous Australian studies which have used periodicals as the source material? The raw figures in table 2 are comparable with Warren's findings. Of the top 10 most cited periodicals in table 2, Warren also has six in his list of most cited journals. The six are the *Australian Law Journal*, *Law Quarterly Review*, *Modern Law Review*, *Sydney Law Review*, *Federal Law Review* and the *Harvard Law Review*. The other four periodicals in Warren's top 10 are the *Melbourne University Law Review*, *Company and Securities Law Journal*, *University of New South Wales Law Journal* and the *Journal of Contract Law*. The adjusted results in table 3 can be compared with Ramsay and Stapleton's rankings. Only three of the 10 most cited periodicals in table 3 appear in their top 10; the *Australian Law Journal*, *Federal Law Review* and *Sydney Law Review*. However, the *University of West Australia Law Review* which is ranked tenth in table 3 is ranked eleventh by Ramsay and Stapleton and the *University of Tasmania Law Review* which Ramsay and Stapleton rank eighth just missed out on being included in table 3. It had the eleventh largest impact factor in the High Court over the sample period. This suggests that at the least there are a few core journals which are influential with both academic commentators and in the High Court.

Previous studies both in Australia and the United States have emphasised that a small number of elite legal periodicals exert a significant influence.³⁴ The results in tables 2 and 3 are consistent with this finding. In ta-

34 For example see Maru O, note 1 above, p 33; Warren D, note 3 above p 267; Sirico and Margulies, note 2 above pp 132-3; Sirico and Drew, note 2 above pp 1054-5.

ble 2 the five most cited periodicals account for 39 per cent of citations to legal periodicals and the 10 most cited periodicals account for 54 per cent of citations to legal periodicals. The five periodicals with the biggest impact factors in table 3 account for 28 per cent of all citations to articles published in 1990 or after and the 10 periodicals with the biggest impact factors make up 51 per cent of citations to articles published in 1990 or after. Sirico and Margulies offer a couple of reasons for the observation that judges tend to cite a core of elite journals.³⁵ First, Justices tend to cite journal articles that counsel bring to their attention and that counsel cite articles in elite journals in the hope that a journal's name will increase an article's persuasive power. Second, writing about the United States Supreme Court, Sirico and Margulies suggest that judge's associates often write the Justice's opinion and because associates often come from elite law schools they tend to cite the publications of their respective alma maters. This is a point which a number of other commentators have also observed in the United States. For instance, in explaining the fact that the United States Supreme Court cites the *Harvard Law Review* more than any other periodical, Bernstein goes as far to suggest:

'The only plausible explanation for this overwhelming preference for Harvard is a conspiracy of restraint of trade among the Justices' law clerks.'³⁶

In order to get some idea about the influence of counsel on citation practice in the High Court, all periodicals which were cited in the reported parts of the argument appearing at the start of each case were noted and compared with what the Justices cited in their judgments. There are no practice directions regarding which periodicals counsel can and cannot cite in argument and even the most casual inspection of the Commonwealth Law Reports suggests that counsel often cite periodicals. However, in each year less than 10 per cent of the articles which were cited in reasons for judgment were cited in the reported part of argument. This is a surprising result because it suggests that Justices (or their associates) do a significant amount of independent research and that at least when it comes to citing periodicals the role of counsel in referring the court to specific articles is of marginal importance. This interpretation, however, has to be viewed with some caution. The problem is that in most cases argument is not fully reported and in some instances it is not reported at all. Hence, on the basis of the reported argument in the Commonwealth Law Reports it is impossible to be sure about which periodicals counsel in fact cited.

35 Sirico and Margulies, note 2 above, pp 132-3.

36 Bernstein N, note 2 above, p 67.

Concerning the role of judges' associates, it is unlikely that associates to High Court Justices have the same influence as their counterparts in the United States. The main reason for this is that while judges' associates in the United States often write the judgments, this does not happen in Australia. This is reflected in the sort of periodicals which the High Court cites. Previous studies suggest that the periodicals which the United States Supreme Court cite the most often are all associated with elite law schools such as Columbia, Harvard and Yale.³⁷ However, with the exception of the *Federal Law Review* and the *Sydney Law Review* the most influential periodicals in the High Court are not affiliated with Australian universities. Related to this point, previous studies have also found that the courts and legal scholarship in the United States cite few periodicals from countries other than the United States.³⁸ In contrast, the High Court cites periodicals from a range of jurisdictions. Of the 20 periodicals which received the most (unadjusted) citations in table 1, seven are published in Australia, seven are published in North America and six are published in the United Kingdom. Out of the 10 periodicals with the biggest impact factor, seven are published in Australia and three in the United Kingdom. The finding that the most influential journals in the High Court come from a range of jurisdictions is consistent with previous findings for Australian legal scholarship.³⁹

Both Warren and Ramsey & Stapleton emphasise the growing importance of specialist legal periodicals in Australia. The results from this study also suggest that specialist law journals were influential in the High Court over the sample period, in particular when adjustments were made for page length and when the article was published. Three specialist journals are ranked in the top 10 in table 3 and the two specialist torts periodicals had the largest impact factors. This is remarkable given that both periodicals only commenced publication in 1993. How can we explain this? Ramsay and Stapleton suggest a number of reasons for the growing importance of specialist journals in the academic literature including the fact that they offer prospective authors a broader readership which includes both academics and specialist practitioners in particular fields.⁴⁰

We can also get some insights through looking at the type of case where the High Court cited periodicals. Some statistics are presented in table 4.

37 See Sirico and Margulies, note 2 above; Sirico and Drew, note 2 above.

38 For instance, see Maru O, note 1 above; Mann R, note 1 above; Leonard J, note 1 above; Sirico and Margulies, note 2 above; Sirico and Drew, note 2 above.

39 See Warren D, note 3 above; Ramsay and Stapleton, note 4 above.

40 Ramsay and Stapleton, note 4 above, pp 688-90.

The High Court cited periodicals in 35 constitutional cases (26.9 per cent of cases), 15 torts cases (11.5 per cent of cases) and 14 criminal cases (10.8 per cent of cases). This, at least in part, explains the high impact factor for the *Tort Law Review* and *Torts Law Journal*. It also explains the high impact factor for journals like the *Federal Law Review* which publishes a high proportion of constitutional law articles and, to a lesser extent, periodicals such as the *Criminal Law Quarterly*, *Criminal Law Review* and the *Journal of Criminal Law*. The finding that the High Court cites periodicals the most in constitutional cases is consistent with previous studies which have found that the Supreme Court of the United States also cite periodicals more in constitutional matters.⁴¹ This reflects the fact that constitutional cases involve difficult issues of interpretation on which academic opinion can be helpful as well as the large number of constitutional cases in the caseload of the court.

A final issue which needs to be highlighted is that the High Court cited few non-legal periodicals. As indicated above, previous studies have found that courts in the United States tend to cite a relatively high proportion of non-legal periodicals.⁴² The United States Supreme Court, in particular, often cites social science periodicals in capital punishment cases. However, over the sample period, the High Court cited just 11 non-legal periodicals (8 per cent of total periodicals) and these accounted for 36 cites (3 per cent of total citations). What use did the High Court make of non-legal periodicals? Most of these citations were to legal articles in non-legal periodicals. In fact, it is debatable whether some of the periodicals classified as 'non-legal' such as *Australian Tax Forum* and *Taxation in Australia* should be described as non-legal at all because they often publish articles which are legal in nature. In the end, nevertheless, it was decided to count them as non-legal given that both also publish social science articles. Of the other non-legal periodicals there were one or more economic, historical, politics or medical journals. Most of these, though received just a few citations and tended to be case-specific.

41 For example see Bernetein N, note 2 above; Daniels W, note 2 above.

42 Ackers J, 'Thirty Years of Social Science in Supreme Court Criminal Cases' (1990) 12 *Law and Policy* 1; 'Social Science in Supreme Court Death Penalty Cases: Citation Practices and Their Implications' (1991) 8 *Justice Quarterly* 421; Daniels S, 'Social Science and Death Penalty Cases – Reflections on Change and the Empirical Justification of Constitutional Policy' (1979) 1 *Law and Police Quarterly* 336; Diamond S and Casper J, 'Empirical Evidence and the Death Penalty: Past and Future' (1994) 50 *Journal of Social Issues* 177; Levine M and Howe B, 'The Penetration of Social Science into Legal Culture' (1985) 7 *Law and Policy* 173.

Citation Practice of Individual Judges

Table 5 sets out information on the citation practices of individual Justices. The biggest citers of periodicals on both a per page and per judgment basis were Gummow and Kirby JJ. The lowest citers of periodicals were Brennan CJ and Dawson J. Daniels suggests that citations to academic writings are correlated with the political philosophies of the judges. He argues that 'liberal' judges tend to cite more academic authorities and that 'conservative' judges cite few academic authorities.⁴³ One immediate problem with testing this view is that labelling judges as 'liberal' or 'conservative' is an inexact (and in some sense unfair) practice. However, even putting this objection to one side, it is still not clear that Daniels' view is apposite to the High Court. For instance, of the heavier citers, Kirby J might be considered 'liberal', but this label does not readily describe Gummow J. The fact that Gummow J cites more periodicals than most other members of the High Court possibly better reflects his strong interests in legal history given that his judgments draw on a range of academic sources to place the law in its historical context.

Previous studies in the United States have also found that dissenting judgments cite more academic authorities than majority judgments.⁴⁴ The rationale for this is that dissenting judgments often reflect novel legal doctrine, therefore we might expect them to make greater use of articles in legal periodicals which criticise the existing law. The results in table 5 tend to confirm previous findings. While dissenting judgments accounted for just 10.3 per cent of total judgments, those judgments accounted for 16.5 per cent of citations to periodicals. If we look at individual Justices a possible explanation emerges. Kirby J, who is clearly the heaviest citer of periodicals on the High Court, wrote the largest number of dissenting judgments in percentage terms. Just over one-fifth (20.5 per cent) of Kirby's J judgments were dissenting and when dissenting Kirby J cited eight periodicals per judgment compared with 3.77 citations per judgment when a member of the majority.

Conclusion

In concluding it is appropriate to stress some of the limitations of this study. First, the study only covers a limited time period and is restricted to cases reported in the Commonwealth Law Reports. Second, no attempt

43 Daniels W, note 2 above, p 10

44 See Bernstein N, note 2 above, p 78; Daniels W, note 2 above, p 12; Mann R 'the North Carolina Supreme Court 1977: A Statistical Analysis' (1979) 15*Wake Forest Law Review* 39, p 45.

has been made to quantify all the influences on High Court Justices; for instance the study does not consider the influence of other academic authorities such as books and law reform reports or previous cases from either Australia or overseas. Third, we have used citation practice to measure influence. While it has been argued that citation practice is the most objective measure of influence, it has some limitations. These were discussed earlier in the paper. Fourth, because judges have no obligation to cite periodicals, the data in some places is quite thin. For instance, the data set is much smaller than that used in the studies by Warren and Ramsay & Stapleton which used periodicals rather than judgments as the source material. This means that we have to be cautious about the conclusions we can draw. However, having said this, previous studies which have measured the influence of periodicals in courts in the United States have faced similar problems relating to thin data and have still drawn strong conclusions, often on the basis of smaller data sets than that employed in this study.⁴⁵

The objective of this paper was to provide a measure of the influence of periodicals in the High Court which complements previous studies which have looked at the influence of periodicals in Australian legal scholarship. The results here, read together with those earlier studies, suggest that there are a few core legal periodicals which have significant influence in both the High Court and amongst Australian scholars. This paper has commented on a number of issues. First, the dominance of a core of elite journals. Second, the relative influence of specialised legal periodicals. Third, the relative influence of periodicals published in Australia and overseas. This information should be of value to a range of people including counsel appearing before the High Court, law librarians responsible for periodical subscriptions and legal academics interested in citation practice.

45 For example see Sirico and Drew, note 2 above, p 12 (1,200 opinions, 221 citations); Sirico and Margulies, note 2 above (551 opinions, 760 citations).

Tables of Results

Table 1: Periodicals Cited in the High Court

Year	No. of cases	Cases citing periodicals	Periodicals cited		% cases citing periodicals	Periodicals cited per case
			Legal	Non-legal		
1990	53	11	41	5	21%	0.87
1991	33	10	102	-	30%	3.09
1992	27	16	122	17	59%	5.15
1993	42	12	108	-	29%	2.57
1994	46	14	107	2	30%	2.37
1995	47	27	161	-	57%	3.43
1996	41	23	254	6	56%	6.43
1997	27	17	237	6	63%	9.00
Total:	316	130	1132	36	41%	3.70

Table 2: Unadjusted Rankings for Periodicals Cited in the High Court

Rank	Legal Periodical	No. of cites
1	Australian Law Journal	154
2	Law Quarterly Review	136
3	Modern Law Review	58
4	Sydney Law Review	49
5	Federal Law Review	42
6	Harvard Law Review	37
7	Cambridge Law Journal	32
8	Yale Law Journal	28
9	Oxford Journal of Legal Studies	26
=10	International and Comparative Law Quarterly	24

(Table 2 continued)

=10	Res Judicatae	24
=12	Australia and New Zealand Journal of Criminology	18
=12	Michigan Law Review	18
=14	Criminal Law Review	17
=14	Stanford Law Review	17
16	Melbourne University Law Review	16
17	American Journal of International Law	15
=18	Cornell International Law Journal	15
=18	University of Toronto Law Journal	15
20	University of Western Australia Law Review	14
21	University of New South Wales Law Journal	13
=22	Journal of Criminal Law	12
=22	Southwestern Law Journal	12
=24	Canadian Bar Review	11
=24	Journal of Contract Law	11
=24	New Law Journal	11
=24	Torts Law Journal	11
=28	Tort Law Review	10
=28	Monash University Law Review	10
=28	Washington Law Review	10
=31	Brigham Young University Law Review	9
=31	Columbia Law Review	9
=33	Criminal Law Quarterly	7
=33	Georgetown Law Journal	7
=33	Journal of Criminal Law, Criminology and Police Science	7
=33	Journal of Legal History	7

(Table 2 continued)

=37	American Journal of Comparative Law	6
=37	Australian Law News	6
=37	Columbia Human Rights Law Journal	6
=37	Fordham Law Review	6
=37	Lloyds Maritime and Commercial Law Quarterly	6
=37	Netherlands International Law Review	6
=37	UCLA Law Review	6
=37	University of Pennsylvania Law Review	6
=45	Adelaide Law Review	5
=45	Cornell Law Review	5
=45	Cardoza Law Review	5
=45	Civil Justice Quarterly	5
=45	Commonwealth Law Review	5
=45	Denver Journal of International Law and Policy	5
=45	Loyola University Law Journal	5
=45	Osgoode Hall Law Journal	5
=45	Queensland Law Society Journal	5
=45	Singapore Journal of Legal Studies	5
=45	University of Tasmania Law Review	5
=56	Anglo-American Law Review	4
=56	Australian Bar Review	4
=56	Australian Journal of Family Law	4
=56	Canadian Business Law Journal	4
=56	Journal of Maritime Law and Commerce	4
=56	Law and Psychology Review	4
=56	Texas Law Review	4
=56	Virginia Journal of International Law	4

(Table 2 continued)

=64	Aboriginal Law Bulletin	3
=64	California Law Review	3
=64	Illinois Law Review	3
=64	Journal of Business Law	3
=64	Legal Studies	3
=64	Public Law	3
=64	Recueil des Cours	3
=71	Canterbury Law Review	2
=71	Company and Securities Law Journal	2
=71	Current Legal Problems	2
=71	Environmental and Planning Law Journal	2
=71	Hastings Constitutional Law Quarterly	2
=71	High Court Review	2
=71	Indiana Law Journal	2
=71	Insolvency Law Journal	2
=71	International Journal of Refugee Law	2
=71	Journal of Law and Policy	2
=71	New Zealand Law Journal	2
=71	Northern Ireland Law Quarterly	2
=71	Public Law Review	2
=71	Rugters Law Review	2
=71	San Diego Law Review	2
=71	South Carolina Law Review	2
=71	Tulane Law Review	2
=71	University of Chicago Law Review	2
=89	Auckland University Law Review	1
=89	Australian Business Law Review	1

(Table 2 continued)

=89	Australian Property Law Journal	1
=89	Australian Tax Review	1
=89	Bond Law Review	1
=89	Boston College Int. and Comparative Law Review	1
=89	Catholic University of America Law Review	1
=89	Commercial Law Quarterly	1
=89	European Law Review	1
=89	International Journal of Children’s Rights	1
=89	Iowa Law Review	1
=89	Law and Contemporary Problems	1
=89	Legal Services Bulletin	1
=89	Maine Law Review	1
=89	Manitoba Law Journal	1
=89	McGill Law Journal	1
=89	Medicine, Science and the Law	1
=89	Newcastle Law Review	1
=89	New York University Law Review	1
=89	Otago Law Review	1
=89	Ohio State Law Journal	1
=89	Queens Law Journal	1
=89	Solicitors Journal	1
=89	Supreme Court Review	1
=89	University of Queensland Law Journal	1
=89	Victoria University Wellington Law Review	1
=89	Virginia Law Review	1
=89	Wayne Law Review	1

Table 3: 'Impact Factor' for Periodicals Cited in the High Court Containing Articles Published in 1990 or After

Rank	Periodical	Impact Factor	No. of Cites
1	Tort Law Review*	10.39	10
2	Torts Law Journal*	7.44	11
3	Sydney Law Review	6.28	28
4	Law Quarterly Review	5.93	33
5	Federal Law Review	5.44	15
6	Journal of Contract Law	4.01	9
7	Oxford Journal of Legal Studies	3.75	19
8	Australian Law Journal	3.68	27
9	Modern Law Review	2.73	20
10	University of Western Australia Law Review	2.46	8

Table 4: Types of Case where Periodicals were Cited

Type of Case	Percentage	Number
Constitutional	26.9%	35
Tort	11.5%	15
Criminal	10.8%	14
Evidence	7.6%	10
Administrative	4.6%	6
Company	4.6%	6
Practice	4.6%	6
Property	4.6%	6
Taxation	4.6%	6
Contract	3.1%	4
Trusts	3.1%	4
Other	14.0%	18

* Only published since 1993.

Table 5: Periodicals Cited According to Justice

	Joint	Single	Dissent	Total	Cites per judgment	Cites per page
Mason	78 (146)*	17 (26)	5 (10)	100 (184)	0.54	0.04 [2,239]
Brennan	45 (137)	28 (97)	6 (35)	79 (273)	0.29	0.03 [3,000]
Deane	70 (151)	20 (36)	5 (23)	95 (213)	0.45	0.04 [2,225]
Dawson	71 (184)	16 (58)	11 (26)	98 (273)	0.36	0.03 [2,906]
Toohey	94 (178)	73 (60)	10 (28)	177 (273)	0.65	0.05 [3,257]
Gaudron	95 (193)	15 (44)	10 (27)	120 (273)	0.44	0.04 [2,972]
McHugh	100 (152)	47 (77)	19 (34)	166 (270)	0.62	0.05 [3,146]
Gummow	51 (50)	98 (18)	3 (2)	152 (70)	2.17	0.13 [1,213]
Kirby	21 (12)	96 (19)	64 (8)	181 (39)	4.64	0.25 [716]
Total	625 (1203)	410 (435)	133 (193)	1168 (1868)	0.63	0.05 [21,674]

* The figures in round brackets are the numbers of judgments. The figure in the total judgment column includes concurring judgments which cited no periodicals. The figures in square brackets in the final column are total pages of judgments.