The Citation Practices of the Supreme Court of Tasmania, 1905-2005

RUSSELL SMYTH*

1. Introduction

When judges provide written reasons for decision, their judgments are invariably interspersed with citations to previous cases and academic writings to differing degrees. Such citations are not random, but are designed to place the judge's reasons in the context of existing authorities. Examining which authorities judges cite provides insights into the judicial reasoning process and the factors influencing the incremental evolution of the common law. Interest in these issues has spawned a cottage industry analysing judicial citations. Beginning with Merryman's seminal study of the citation practice of the Supreme Court of California in 1950,[1] there is now a sizeable literature on the citation practice of courts in North America. In the United States there are numerous studies of various aspects of the citation practice of the Supreme Court,[2] the courts of appeals[3] and State supreme courts.[4]

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* BEc(Hons) LLB(Hons) MEc (Monash) Ph.D (London). Professor, Department of Economics, Monash University. This article forms part of a broader project on the citation practice of the State supreme courts over the twentieth century. Funding for this project was provided by a grant from the Department of Economics, Monash University. I thank Amy Henderson and Xiaolei Qian for research assistance and an anonymous referee for helpful suggestions on an earlier version of this article.

1 John Merryman 'The Authority of Authority: What the California Supreme Court Cited in 1950' (1954) 6 *Stanford Law Review* 613.

2 For example, see James Ackers, 'Thirty Years of Social Science in Supreme Court Criminal Cases' (1990) 12 *Law and Policy* 1; James Ackers, 'Social Science in Supreme Court Death Penalty Cases: Citation Practices and their Implications' (1991) 8 *Justice Quarterly* 421; Neil Bernstein, 'The Supreme Court and Secondary Source Material: 1965 Term', (1968) 57 *Georgetown Law Journal* 55; Frank Cross, Thomas Smith and Antonio Tomarchio, 'Determinants of Cohesion in the Supreme Court's Network Precedents' (August 2006) San Diego Legal Studies Paper No. 07-67 Available at SSRN http://ssrn.com/abstract=924110; Joseph Custer, 'Citation Practices of the Kansas Supreme Court and Kansas Courts of Appeals' (1999) 8 *Kansas Journal of Law and Public Policy* 126; Wes Daniels, 'Far Beyond the Law Reports: Secondary Source Citations in United States Supreme Court Decisions, October Terms 1900, 1948 and 1978' (1983) 76 *Law Library Journal* 1; James Fowler and Sangick Jeon, 'The Authority of Supreme Court Precedent' (2007) *Social Networks* (forthcoming); James Fowler, Timothy Johnson, James Spriggs, Sangick Jeon and Paul Wahlbeck, 'Network Analysis and the Law: Measuring the Legal Importance of Precedent at the U.S. Supreme Court' (2007) *Political Analysis* (forthcoming); James Gleicher, 'The Bard at the Bar: Some Citations of Shakespeare by the United States Supreme Court' (2001) 26 *Oklahoma City University Law Review* 327; John Hasko 'Persuasion in the Court: Non-legal Materials in U.S. Supreme Court Opinions' (2002) 94 *Law Library Journal* 427; Johnson, Johnson, 'Citations to Authority in Supreme Court Opinions';

In Canada, there are multiple studies of the citation practice of the Supreme Court[5] and the provincial courts of appeal.[6] There is a burgeoning literature on the citation practice of courts in Australasia.

William Manz, 'Citations in Supreme Court Opinions and Briefs: A Comparative Study' (2002) 94 *Law Library Journal* 267; Chester Newland, 'Legal Periodicals and the United States Supreme Court' (1959) 7 *University of Kansas Law Review* 477; Louis Sirico and Jeffrey Marguiles, 'The Citing of Law Reviews by the Supreme Court: An Empirical Study' (1986) 34 *UCLA Law Review;* Louis Sirico. 'The Citing of Law Reviews by the Supreme Court 1971-1999' (2000) 75 *Indiana Law Journal* 1009; Samuel Thumma and Jeffrey Kirchmeier, 'The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries' (1999) 47 *Buffalo Law Review* 227; David Zaring, 'The Use of Foreign Decisions by Federal Courts: An Empirical Analysis' (2006) 3 *Journal of Empirical Legal Studies* 297 (citations in federal courts).

3 For example see Robert Schriek, 'Most Cited U.S. Courts of Appeals Cases From 1932 Until the Late 1980s' (1991) 83 *Law Library Journal* 317; Louis Sirico and Beth Drew, 'The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis' (1991) 45 *University of Miami Law Review* 1051.

4 For example see Robert Archibald, '*Stare Decisis* and the Ohio Supreme Court' (1957) 9 *Western Reserve Law Review* 23; A. Michael Beaird, 'Citation to Authorities by the Arkansas Appellate Courts, 1950-2000' (2003) 25 *University of Arkansas Little Rock Law Review* 301; Mary Bobinski, 'Citation Sources and the New York Courts of Appeals' (1985) 34 *Buffalo Law Review* 965; Dragomir Cosanici and Chris Evin Long, 'Recent Citation Practices of the Indiana Supreme Court' (2005) 24 *Legal Reference Services Quarterly* 103; Richard Kopf, 'Do Judges Read the Review? A Citation Counting Study of the Nebraska Law Review and the Nebraska Supreme Court' (1997) 76 *Nebraska Law Review* 708; Lawrence Friedman et al, 'State Supreme Courts: A Century of Style and Citation', (1981) 33 *Stanford Law Review* 773; James Leonard, 'An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990' (1994) 86 *Law Library Journal* 129; Richard Mann, 'The North Carolina Supreme Court 1977: A Statistical Analysis', (1979) 15 *Wake Forest Law Review* 39; William Manz, 'The Citation Practices of the New York Courts of Appeals: 1850-1993' (1995) 43 *Buffalo Law Review* 121; William Manz, 'The Citation Practices of the New York Courts of Appeals: A Millennium Update' (2001) 49 *Buffalo Law Review* 1273; John Merryman, 'Towards a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970 (1977) 50 *Southern California Law Review* 381; Fritz Snyder, 'The Citation Practice of the Montana Supreme Court' (1996) 57 *Montana Law Review* 453.

5 For example, see Vaughn Black and Nicholas Richter, 'Did She Mention My Name? Citation of Academic Authority by the Supreme Court of Canada 1985-1990' (1993) 16 *Dalhousie Law Journal* 377; Peter: The Case of Alberta' (1996) 34 *Alberta Law Review* 870; Peter McCormick, 'Do Judges Read Books Too? Academic Citations by the Lamer Court 1992-1996' (1998) 9 *Supreme Court Law Review* 463; Peter McCormick 'The Supreme Court of Canada and American Citations'; Peter McCormick, 'The Supreme Court Cites the Supreme Court: Follow-up Citation on the Supreme Court of Canada'; Peter McCormick, 'Second Thoughts: Supreme Court Citation of Dissents and Separate Concurrences' (2002) 81 *Canadian Bar Review* 369.

6 For example, see Peter McCormick, 'Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices', (1993) 22 *Manitoba Law Journal* 286; Peter McCormick, 'The Evolution of Coordinate Precedential Citation in Canada: Interprovincial Citations of Judicial Authority, 1922-1992' (1994) 32 *Osgoode Hall Law Journal* 271.

There are studies for the High Court of Australia,[7] Federal Court of Australia,[8] the Australian State supreme courts[9] and the New Zealand Court of Appeal.[10] This study adds to this literature by analysing citations to case law and secondary authority in reported judgments of the Supreme Court of Tasmania at ten year intervals between 1905 and 2005. The study is unique among existing studies of the citation practice of Australasian courts in using data over the course of a century. Few North American studies, and no existing studies for Australia or New Zealand, have adopted such a long time horizon.[11] The advantages of analysing

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7 See Rebecca Lefler, 'A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada and the High Court of Australia' (2001) 11 *Southern California Interdisciplinary Law Journal* 165; Russell Smyth, 'Citations by Court' in Tony Blackshield, Michael Coper and George Williams (eds) *Oxford Companion to the High Court of Australia* (Melbourne: Oxford University Press, 2001); Russell Smyth, 'Other than Accepted Sources of Law? A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22 *University of New South Wales Law Journal* 19; Russell Smyth, 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court' (1998) 17 *University of Tasmania Law Review* 164; Russell Smyth, 'Law or Economics? An Empirical Investigation of the Impact of Economics on Australian Courts' (2000) 28 *Australian Business Law Review* 5; Paul Von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901-1987' (1992) 14 *Adelaide Law Review* 181; Paul Von Nessen, 'Is There Anything to Fear in the Transnationalist Development of Law? The Australian Experience' (2006) 33 *Pepperdine Law Review* 883.

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

9 Russell Smyth, 'What do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21 Adelaide Law Review 51; Russell Smyth, 'What do Judges Cite? An Empirical Study of the 'Authority of Authority' in the Supreme Court of Victoria' (1999) 25 Monash University Law Review 29; Russell Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia' (2001) 30 University of Western Australia Law Review 1.

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

11 North American exceptions are Peter McCormick, 'The Evolution of Coordinate Precedential Authority in Canada', below n 21 (analyses citation practice of the Canadian provincial courts of appeal from 1922-1992); Lawrence Friedman et al, 'State Supreme Courts: A Century of Style and Citation', (1981) 33 *Stanford Law Review* 773 (analyses citation practice of sixteen U.S. state supreme courts using a sample of cases at five year intervals between 1870 and 1970); William Manz, 'The Citation Practices of the New York Courts of Appeals: 1850-1993' (1995) 43 *Buffalo Law Review* 121 (analyses citation practice of the New York Court of Appeals at ten year intervals between 1850 and 1990 plus 1993).

judicial citation patterns over a long time period were described by Manz in his study of the citation practice of the New York Court of Appeals:

> '[L]ong-term investigations are particularly interesting because changes in citation patterns can reflect a court's conception of its role in society. They also may indicate the effect of changes in judicial workload or the nature of claims a court is called on to adjudicate. ... [A] long-term study can reveal how quickly and the extent to which a court has adopted .. new authority'.[12]

Foreshadowing the main findings, several interesting conclusions emerge from the study. Among these, (i) prior to World War II the Court mainly cited English decisions, but since World War II citations to English decisions have been replaced with citations to the High Court; (ii) in most years the Court cited decisions of the other State supreme courts more often than its own previous decisions; and (iii) for most years secondary authorities have represented only a small fraction of the Court's total citations and most citations to secondary authorities have been to legal texts. The similarities and differences between these results and the findings for other State supreme courts will be discussed in the body of the article. The remainder of the article is set out as follows. The next section discusses the rationale for judicial citation of authority. Section 3 considers academic and judicial attitudes towards judges citing authority. The dataset and methodology employed in the empirical study is set out in Section 4. Section 5 presents findings on trends in the composition of case load and case and judgment length. Section 6 contains the findings on trends in citation patterns and changes in the types of citations over time. The citation patterns of individual judges are reported in Section 7. The final section is the conclusion.

2. Rationale for Judicial Citation of Authority

One reason for citing authorities is the doctrine of *stare decisis*. As described by Gummow J in *Businessworld Computers Pty Ltd v Australian Telecommunications Commission*[13]: '*Stare decisis* involves courts being bound by appellate decisions of courts standing above them and in the same hierarchy'.[14] For this reason, judges have derivative, rather than primary authority. As such, they are not free to decide cases as they please, but need to locate their decision within a system of precedent.[15] Citation patterns set forth the authority on which a case rests.[16] In this respect, Terrell suggests that we can think of each decision

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12 William Manz, 'The Citation Practices of the New York Courts of Appeals: 1850-1993' (1995) 43 *Buffalo Law Review* 121.

13 (1988) 82 ALR 499.

14 (1988) 82 ALR 499 at 504.

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

16 Ibid.

as being located on a multidimensional grid.[17] Citation to the Court's own previous decisions and the binding decisions of courts above it in the court hierarchy locate the decision within this multidimensional grid. The act of citing previous authorities serves two purposes.[18] First, it ensures certainty and predictability in the application of the law by linking the decision to a previous line of authority. Second, it highlights errors or innovations by making it easy to identify when there has been a departure from existing lines of authority.

A second reason judges cite previous cases is to increase the persuasive force of their reasoning. McCormick argues that judges add weight to their reasons by citing well-respected courts.[19] Previous studies of the citation practice of State supreme courts in Australia and the United States and the provincial courts of appeal in Canada have found that some courts are cited more often than others after controlling for factors such as population size and volume of judgments. This indicates some courts are more prestigious than others. In Australia, the State supreme courts cite the Supreme Court of New South Wales, and to a lesser extent, the Supreme Court of Victoria, more than any other State supreme court.[20] In Canada, the equivalent to the Supreme Court of New South Wales is the Ontario Court of Appeal, which McCormick has described as a junior Supreme Court of Canada.[21] In the United States, studies show that the State supreme courts which have reputations for doctrinal leadership, such as California, Massachusetts, New York and Washington consistently receive more out of court citations than other State supreme courts, holding socio-cultural factors constant.[22]

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17 Timothy P. Terrell, 'Flatlaw: An Essay on the Dimensions of Legal Reasoning' (1984) 72 *California Law Review* 288.

18 Martin Shapiro, 'Toward a Theory of *Stare Decisis*' (1972) 1 *Journal of Legal Studies* 125. See also Merryman, above n 1, 621-626.

19 Peter McCormick, 'The Supreme Court of Canada and American Citations', 530.

20 Russell Smyth, 'What do Intermediate Appellate Courts Cite?' above n 9; Smyth, 'What do Judges Cite?, above n 9; Smyth, 'Citation of Judicial and Academic Authority', above n 9.

21 Peter McCormick, 'The Evolution of Coordinate Precedential Citation in Canada: Interprovincial Citations of Judicial Authority, 1922-1992' (1994) 32 *Osgoode Hall Law Journal* 271, 291.

22 See Gregory Caldeira, 'On the Reputation of State Supreme Courts' (1983) 5 *Political Behavior* 83; Gregory Caldeira, 'The Transmission of Legal Precedent: A Study of State Supreme Courts' (1985) 79 *American Political Science Review* 178; Gregory Caldeira, 'Legal Precedent: Structures of Communication Between State Courts' (1988) 10 *Social Networks* 29; Peter Harris, 'Ecology and Culture in the Communication of Precedent Among State Supreme Courts 1870-1970' (1985) 19 *Law and Society Review* 449; Jake Dear and Edward Jessen, 'Followed Rates and Leading State Cases, 1940-2005', *UC Davis Law Review*. Forthcoming December, 2007. Available at SSRN http://ssrn.com/abstract=978041.

To increase the persuasive force of their reasoning, judges may also cite the judgments of other well-respected judges. In these circumstances, a judge will typically invoke the name of a well-respected judge and sometimes refer explicitly to his or her reputation as an act of discretion designed to give added force to the invoker's reasoning.[23] Sir Owen Dixon is widely regarded as Australia's greatest ever judge.[24] A study of who gets cited on the High Court found that Sir Owen Dixon receives more adjusted citation counts than any other High Court Justice in the history of the Court.[25] Similar studies for the United States have found that the names of judicial giants such as Benjamin Cardozo and Learned Hand are invoked in judicial opinions far more than lesser judges.[26] Richard Posner of the United States Court of Appeals for the Seventh Circuit is the most cited of the current members of the United States Courts of Appeals.[27] That these judges are cited often reflects the fact that when giving reasons, judges draw on the stature of individuals such as Benjamin Cardozo Learned Hand and Richard Posner to make their argument more persuasive.

A third reason to cite authorities is to ascertain the law that applies to the facts. This process may entail wading through competing *obiter*, exploring the origins of particular rules or establishing the proposition for which previous authorities in fact stand. Judges often cite academic opinion to explore the evolution of specific laws and assist in determining what previous cases decided. Textbooks by well-known authors such as Archbold, Jarman and Theobald as well as extra-judicial pronouncements in volumes such as Dixon's *Jesting Pilate* are treated as *de facto* primary authorities. The weight given to journal articles and textbooks by well-known authors is often enhanced because they have been cited in previous cases as correctly stating the law. In these cases 'the fact of

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23 For example, in *Thompson v Australian Capital Television Pty. Ltd.* (1996) 186 CLR 574, 605 Gummow J cited a decision of Gray J mentioning him by name and adding a footnote: 'Justice of the United States Supreme Court (1882-1902), described by Williston as the most learned American judge of his generation in his essay.'

24 For example, see JJ Spigelman, 'Australia's Greatest Jurist' (2003) 47 *Quadrant* (July) 44.

25 Russell Smyth, 'Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21 *University of Queensland Law Journal* 7.

26 Richard Posner, 'The Learned Hand Biography and the Question of Judicial Greatness' (1994) 104 *Yale Law Journal* 511 at 534-540; Richard Posner, *Cardozo: A Study in Reputation* (Chicago, University of Chicago Press, 1990) 74-91.

27 Stephen Choi and Mitu Gulati, 'Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance' (2004) 78 *Southern California Law Review* 23.

citation gives a work *authority* to some degree, and it will thus exert some influence on the way the law grows'.[28]

3. Attitudes to Judges Citing Authority

How Much is Too Much?

Several judges have written extra-judicially expressing a preference for a minimalist approach to citing authorities. Lord MacMillan suggested six decades ago:

> 'The best judgements are those which clearly state the legal principle on which they are based. I dislike the method sometimes adopted of assembling an array of previous cases, like an excerpt from a Digest, and after painstakingly examining their points of resemblance to or distinction from the case in hand, deciding according to the precedent most nearly in point. In the process of reaching a decision precedents are very properly read and studied as evidence of the law, but they should be used for the purpose of extracting the law from them. It is undesirable to cumber a judgment with all the apparatus of research which Bench and Bar have utilised in ascertaining the principle of law'.[29]

Marshall McComb of the California Supreme Court echoed Lord MacMillan's view:

> 'In citing authorities it is unnecessary to cite more than one or two cases which are directly in point. If the authority is in point under the doctrine of *stare decisis* it is controlling; nothing is added to the opinion by having a legal secretary, in support of the declared proposition, copy a long list of authorities from some treatise or law journal. Such procedure simply clutters up the opinion and adds to the possibility of error creeping into the citations'.[30]

In Australia Sir Garfield Barwick,[31] Sir Harry Gibbs,[32] Sir Anthony Mason,[33] Sir Gregory Gowans,[34] Bryan Beaumont[35] and John Doyle[36]

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28 John Merryman, 'Towards a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970 (1977) 50 *Southern California Law Review* 381, 413 (emphasis in original).

29 Lord MacMillan, 'The Writing of Judgments' (1948) 26 *Canadian Bar Review* 491, 498.

30 Marshall McComb, 'A Mandate From The Bar: Shorter and More Lucid Opinions' (1949) 35 A.B.A.J. 382, 383.

31 Sir Garfield Barwick, *A Radical Tory* (Sydney, Federation Press, 1995), 223-224.

32 Sir Harry Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494, 499.

33 Sir Anthony Mason, Opening Address to the Supreme Court of New South Wales Annual Conference, April 30 1993, cited in Mark Duckworth, 'Clarity and the Rule of Law: The Role of Plain Judicial Language' (1994) 2 *Judicial Review* 69, 73.

34 Sir Gregory Gowans, 'Reflections on the Role of a Judge' (1980) *Summons* (annual magazine of the law students society, University of Melbourne), 66.

35 Bryan Beaumont, 'Contemporary Judgment Writing: The Problem Restated' (1999) 73 *Australian Law Journal* 743, 744.

have all argued that judges should only cite the most relevant authorities in their written reasons. These judges offer various rationales for citing fewer authorities in written reasons. Among these is to ensure that that the principle of law is clear and free from the clutter of redundant authorities, to reduce the length of the judgment, and to ensure the judgment is as accessible to the widest possible audience as a vehicle to increase public understanding of the role of courts. The English Court of Appeal in *Goose v Wilson Sanford*[37] honed in on the last of these reasons, suggesting that longer judgments encrusted with authority has contributed to delays in providing written reasons, 'increased the stress and anxiety inevitably caused by litigation, and weakened public confidence in the whole judicial process'.[38] The Court of Appeal went as far as to say: 'Left unchecked [this] would be ultimately subversive to the rule of law'.[39]

Judicial calls for more economical use of language and citation to authorities are supported by academics who criticise the use of string citations as a means of padding out judgments and deplore the ever increasing length of judgments.[40] However, other judges have argued that while an economical use of language is desirable where possible, the complexities of the case mean that longer judgments and more extensive citation of authorities is often inevitable. For example, Michael Kirby sees longer judgments and more extensive citation of authorities, including secondary authorities, as 'a candid acknowledgment of policy choices which must be made'.[41]

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36 John Doyle, 'Judgment Writing: Are There Needs for Change?' (1999) 73 *Australian Law Journal* 737, 739-740.

37 Court of Appeal, UK, *Times Law Reports* 19 February, 1998.

38 Ibid, 3.

39 Ibid.

40 For criticisms of judges using string citations see George Smith, 'The Current Opinions of the Supreme Court of Arkansas: A Study in Craftmanship' (1947) 1 *Arkansas Law Review* 89, 90-93; William Reynolds, 'The Court of Appeals of Maryland: Roles, Work and Performance' (1978) 38 *Maryland Law Review* 148, 155-156. For dissatisfaction with the increasing length of judgments on the High Court see Enid Campbell, 'Reasons for Judgment: Some Consumer Perspectives' (2003) 77 *Australian Law Journal* 62; Graeme Orr, 'Verbosity and Richness: Current Trends in the Craft of the High Court' (1998) 6 *Torts Law Journal* 291; Jason Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Durham: Carolina Academic Press, 2006) 92.

41 Michael Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691, 708.

Is it Appropriate to Cite Academic Commentaries?

In the nineteenth century there was a rule in England that counsel could not quote from the writings of an author who was still alive.[42] This rule appears to have been spasmodically enforced. In *Union Bank v Munster,*[43] Kekewich J, after referring to the fact that counsel had relied on *Fry on Specific Performance,* stated: 'It is to my mind much to be regretted, and it is a regret which I believe every judge on the bench shares, that textbook are more often quoted in Court – I mean of course textbooks by living authors – and some judges have gone so far as to say that they shall not be quoted.[44] The convention withered through the first part of the twentieth century in England. In 1945 Allen expressed the rule this way: 'By a well-known professional convention living authors are not cited as authority, but Bench and Bar may "adopt" their statements as correct expositions of the law. This is little more than a polite fiction'.[45] In Canada, the Supreme Court infamously refused to accept the *Canadian Bar Review* as 'an authority in [the] Court' as recently as 1950.[46] In the aftermath of the decision there was much academic criticism of the refusal to accept a journal article as authority, spearheaded by an article by Nicholls in the *Canadian Bar Review.*[47] The result was that the Supreme Court relented and since that case has accepted journal articles as authority. In Australia, the High Court has cited living and dead authors for at least the last 70 years, beginning with Dixon and Evatt JJ in *Cowell v Rosehill Racecourse Co. Ltd*[48] and *Mills v Mills*[49] in the late 1930s.[50] However, the Latham and Dixon Courts cited relatively few academic authorities and it was not until the Mason Court that the High Court cited sizeable numbers of academic authorities.[51]

Thus, it is clearly permissible for judges to cite both living and dead authors. The real issue is the extent to which judges should cite academic authorities and what weight should be attached to the views expressed in academic authorities. Judges such as Michel Bastarache of the Supreme

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42 For a detailed discussion of the rule against citing living authors in Canada and England see G.V.V. Nicholls, 'Legal Periodicals and the Supreme Court of Canada' (1950) 28 *Canadian Bar Review* 422.

43 (1887) 37 Ch. D. 51.

44 Ibid, 54.

45 C.K. Allen *Law in the Making* (4th Ed., 1945) 241, footnote 1.

46 *Reference re Validity of the Wartime Leasehold Regulations* [1950] 2 DLR 1.

47 Nicholls, above n 42.

48 (1937) 56 CLR 605 at 637-638, 650, 652.

49 (1938) 60 CLR 150, 181-182.

50 Michael Kirby, 'Change and Decay or Change and Renewal?' (1998) 7 *Journal of Judicial Administration* 189, 194.

51 See Smyth, 'Other Than Accepted Sources of Law' above n 7.

Court of Canada[52] and Michael Kirby[53] of the High Court have stated extra-judicially that they regard academic authorities as a useful tool to tease out the policy considerations underpinning the decision-making process. In the House of Lords decision in *Hunter v Canary Wharf,*[54] in discussing the policy issues in the case, Lord Cooke cited a series of academic writers, which he considered useful to 'expose the alternatives'.[55] Lord Goff, however, was critical of Lord Cooke's use of academic writings, drawing a distinction between 'analysis' and 'opinion' and finding little 'analysis' in the academic writings he had consulted.[56] In a case note, Cane argues that if academic commentators wanted to be taken seriously by judges they cannot merely express opinions unsupported by analysis.[57] Sir Gerard Brennan has expressed a similar view with respect to the role of law reviews in Australia, suggesting that if law review contributors 'subject their material to the rigour of the judicial method, their influence of Australian law will be substantial'.[58]

The recent trend to cite increasing numbers of academic authorities in the High Court of Australia and Supreme Court of Canada has been criticised by academic commentators. Gava argues that the High Court's propensity to cite law reviews signifies a judiciary that is forsaking the common law tradition in favour of an openly instrumentalist style of judging.[59] J.E. Cote, a judge of the Court of Appeal for Alberta, criticises the Supreme Court of Canada for not being sufficiently discriminate in weighing up which academic authorities to cite.[60] Cane suggests the practice in reporting decisions of the Supreme Court of Canada where not only cases, but also academic authorities cited in the case are listed after the head note 'risks generating in academics the feeling that such citation is the ultimate mark of success. This may distort academic priorities – academics have various social responsibilities (notably to educate the young) and some of these may not be well served if the academy is seen as a sort of adjunct to the judicial process'.[61] The effect that judicial preoccupation with citing academic authorities potentially has on

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52 Michael Bastarache, 'The Role of Academics and Legal Theory in Judicial Decision-Making' (1999) 37 *Alberta Law Review* 739, 739.

53 Kirby, above n 50, 194.

54 [1997] AC 655.

55 Ibid, 719.

56 Ibid, 697.

57 Peter Cane, 'What a Nuisance' (1997) 113 *Law Quarterly Review* 515, 518-519.

58 Sir Gerard Brennan, 'A Critique of Criticism' (1993) 19 *Monash University Law Review* 213, 216.

59 John Gava, 'Law Reviews: Good for Judges, Bad for Law Reviews?' (2002) 26 *Melbourne University Law Review* 560.

60 JE Cote 'The Canadian Law Review Experience: Far-Cited' (2001) 39 *Alberta Law Review* 640.

61 Cane, above note 57, 519.

distorting academic incentives is the flip side of the debate. Gava makes a similar point to Cane in a more far ranging critique of the role of law reviews, arguing that the push in academia to publish more and more articles in law reviews diverts resources from teaching, undermines collegiality and reduces the time for reflection needed for good legal writing.[62]

4. Data Collection and Methodology

The cases employed in this study are decisions of the Supreme Court of Tasmania, reported in the Tasmania Reports, sampled at ten year intervals from 1905 to 2005. This sample comprises 241 cases. The study does not consider unreported cases. This is consistent with previous studies of the citation practice of courts in Australia, Canada, New Zealand and the United States. The justification for restricting the sample to reported cases only is twofold. First, it is very difficult to obtain the Court's unreported judgments from the early part of the twentieth century.[63] Thus, from a practical perspective, restricting the sample to reported cases ensures that the data collection is manageable. Second, focusing on reported cases is likely to provide a good overview of the citation practices of the Court with respect to most of the important cases and facilitate comparison with previous studies for other courts. As McCormick notes, 'reported cases probably include a high proportion of all the decisions sufficiently important to call for reasoned judgment based on authority'.[64]

The methodology adopted in deciding what citations to count is consistent with previous studies of the citation practice of courts in Australia.[65] Specifically, all citations to case law and secondary authorities in the sample cases, including citations in footnotes, were counted. If a case or secondary authority received repeat citations in the same paragraph it was counted only once, but if it was cited again in a subsequent paragraph it was counted again on the basis that the source was being cited for a different proposition and hence had separate significance. The citation counts are weighted in the sense that the number of citations in each joint judgment was multiplied by the number of participating judges when calculating the overall citation count. However, if Justice A concurred with Justice B and Justice B cited authorities, Justice A was not attributed with having cited those authorities.

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62 Gava, above n 59.

63 The Supreme Court of Tasmania Library has individual unreported judgments from 1929 that are available on request.

64 Peter McCormick, above n 21, 277.

65 For example, see Smyth, 'What do Intermediate Appellate Courts Cite?' above n 9; Smyth, 'What do Judges Cite?', above n 9; Smyth, 'Citation of Judicial and Academic Authority', above n 9.

No distinction was made between positive and negative citations. One reason for adopting this approach is that when considering what cases influenced the reasoning of the judge, the distinction between positive and negative citations is not important; Since citation (at least citation to non-binding authority) is an act of judicial discretion, the judge is free to not cite an authority at all if it has no influence on the judge's thinking.[66] Second, unlike academic citations, few judicial citations are negative.[67] For example, McCormick reports that in the Supreme Court of Canada less than 1 per cent of judicial citations are negative.[68] Choi and Gulati report that on the United States Courts of Appeal, less than 10 per cent of all citations are negative.[69]

5. Trends in Caseload and Citations and Changing Judicial Style

Figures 1 and 2 show the average length of each case and each judgment (both measured in number of pages) in each of the sample years between 1905 and 2005. There has been a general upward trend in the length of both cases and judgments. In 1905 the average length of each case was 2.42 pages, but by 2005 this had increased to 11.30 pages, representing an increase of over 460 per cent. The average length of each judgment increased from 1.77 pages in 1905 to 6.05 pages in 2005, an increase of 340 per cent. A similar increase in the average length of cases and judgments has also been observed for reported decisions of the High Court of Australia,[70] the English Court of Appeal,[71] and the United States State supreme courts.[72]

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66 See Richard Posner, 'An Economic Analysis of the Use of Citations in the Law' (2000) 2 *American Law and Economics Review* 381; William Landes and Richard Posner, 'The Influence of Economics on the Law: A Quantitative Study' (1993) 36 *Journal of Law and Economics* 385, 390; William Landes, Lawrence Lessig and Michael Solimine, 'Judicial Influence: A Citation Analysis of Federal Courts of Appeal Judges' (1998) 27 *Journal of Legal Studies* 333.

67 See Caldeira, 'On the Reputation of State Supreme Courts', above n 22, 88 (asserting there is no need to 'differentiate between positive and negative citations'); Landes, Lessig and Solimine, above n 66, 273 (questioning the need to differentiate 'between favourable, critical or distinguishing citations' and declining to do so). For a contrary perspective see Dear and Jessen, 'Followed Rates and Leading State Cases', above n 22.

68 Peter McCormick, 'The Supreme Court Cites the Supreme Court', above n 5, 462.

69 Choi and Gulati, 'Choosing the Next Supreme Court Justice', above n 27, 56-57.

70 Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001' (2004) 32 *Federal Law Review* 255.

71 Charles Goutal, 'Characteristics of Judicial Style in France, Britain and the USA', (1976) 24 *American Journal of Comparative Law* 43.

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

Figure 1: Average Length of Case

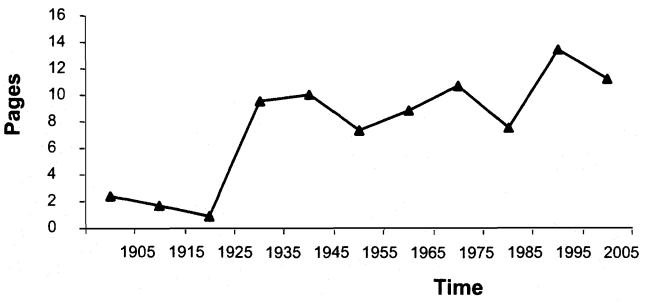


Figure 2: Average Length of Judgment

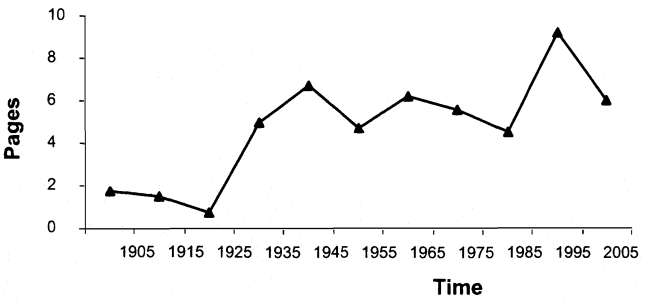
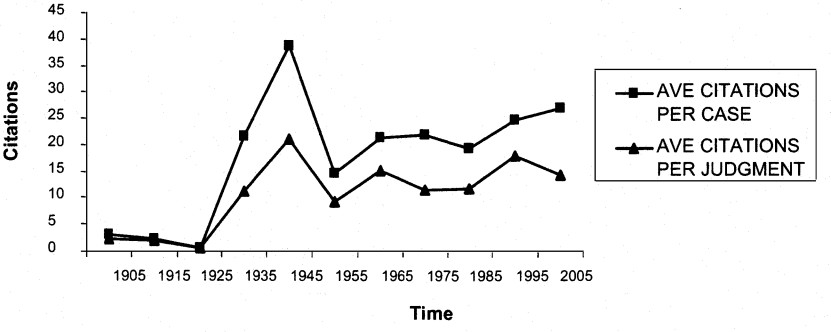


Figure 3 (below) shows average citations to authority on a per case and per judgment basis. The average citations per case increased from 3.22 in 1905 to 26.87 in 2005, representing over an 800 per cent increase. Average citations per judgment increased from 2.36 in 1905 to 14.31 in 2005, which is over a 600 per cent increase. However, the propensity to cite more authority is not a recent phenomenon. The Court cited few authorities for the first three decades of the study, but there was a big increase in citation to authority in 1935 and 1945. It dipped in 1955 and has been steadily increasing since. There are few previous studies of citation practice that have adopted such a long time horizon that can be used to compare with the results presented here. But, of those studies for courts in the United States that have been conducted over a long time frame, the results are similar. Manz found that citations in majority opinions on the New York Court of Appeals increased from 5.4 to 12.4 between 1850 and 1980.[73] Friedman and his colleagues found that average citations in 'routine opinions' in State supreme courts increased

[73] William Manz, 'The Citation Practices of the New York Courts of Appeals: 1850-1993' (1995) 43 *Buffalo Law Review* 121, 124-126.

from 3.2 in 1870-1880 to 9.4 in 1960-1970, while citations in 'important opinions' increased from 9.4 to 30.8.[74]

Figure 3: Average Citations



There are several factors that explain the trend to longer written reasons and the increase in the citation to case law and secondary authorities. The first factor is a greater appreciation of the political and social context of the decision-making process. The acceleration of political and social change has intensified the struggle between competing interest groups and increased demands on the courts to be seen to be administering due process. Goutal argues that this is one of the major drivers of longer judgments in the English Court of Appeal throughout the twentieth century as judges have laboured to adopt earlier precedents to changed economic and political conditions.[75] The second related factor is improved sensitivity to the rights of litigants and greater attention to the problems of communication. As O'Meara puts it: 'It is important not only to do justice but to *seem* to do justice.'[76] This has resulted in what White describes as a rise in emphasis on 'reasoned elaboration' of decisions as judges provide more policy-oriented justifications for their decisions.[77] The third factor is technological developments that have expanded the range of materials presented to decision-makers in general.[78] The fourth factor is that the number of difficult cases requiring longer reasons and

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74 Lawrence Friedman et al, 'State Supreme Courts: A Century of Style and Citation', (1981) 33 *Stanford Law Review* 773, 795-796.

75 Goutal, above n 71, 61-64.

76 O'Meara, 'Report of the Cincinnati Conference on the Status of the Rule of Judicial Precedent' (1940) 14 *University of Cincinnati Law Review* 203, 303.

77 Edward White, 'The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change' (1973) 59 *Virginia Law Review* 279.

78 See Michael Kirby, 'Reasons for Judgment: "Always Permissible, Usually Desirable and Often Obligatory"' (1994) 12 *Australian Bar Review* 121, 132.

increased citation of authority has increased over time.[79] There is some evidence in support of this proposition from the United States. Harris shows that in the United States between 1870 and 1970, the number of State supreme court cases with multiple litigants and with *amicus* briefs increased and this has been associated with both longer opinions and increased citation to authority.[80]

Table 1 (below) shows the subject matter of reported cases of the Court over time. The highest proportion of reported cases heard by the Court dealt with criminal law, evidence and procedure, statutory interpretation and wills and probate. These four areas of law constituted 56 per cent of the sampled cases heard by the Supreme Court. Kagan and his colleagues observed a substantial increase in administrative law, criminal law and tort law cases and a decline in commercial law and property law cases in the case load of the State supreme courts in the United States over the century 1870 to 1970.[81] Their explanation for this change was that the resolution of commercial law matters has shifted from 'the upper reaches of the court system to other branches and levels of government' while there has been an increase in 'the confrontation between citizen and state'.[82] There are no obvious temporal changes in the reported decisions dealing with administrative law, commercial law, criminal law or tort law in our sample. The one noticeable feature of Table 1 is that there has been an increase in the number of cases dealing with statutory interpretation. This is also a trend observed by Kagan and his colleagues as statute law has gradually encroached into areas that were previously governed by the operation of the common law.[83] However, conclusions about changing case load based on the data presented here are necessarily tentative given that we are examining reported cases only and not the total case load of the Court.[84]

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79 Lawrence Friedman et al, 'State Supreme Courts: A Century of Style and Citation', (1981) 33 *Stanford Law Review* 773, 777-778.

80 Peter Harris, 'Difficult Cases and the Display of Authority' (1986) 1 *Journal of Law, Economics and Organization* 209.

81 Robert Kagan et al, 'The Business of State Supreme Courts 1870-1970' (1977) 30 *Stanford Law Review* 121, 133.

82 Ibid.

83 Ibid.

84 Table 1 shows the cases that the Editor of the Law Reports chose to report. For many years the Editor considered that he should report only cases that contributed to the common law. Hence, by way of example, in the 1970s and the 1980s much of the civil case load concerned the assessment of damages. Little authority was cited in those judgments and few were reported.

Table 1: Subject matter of reported cases in the Tasmanian Supreme Court over time

	1905	1915	1925	1935	1945	1955	1965	1975	1985	1995	2005	TOTAL
CRIMINAL	2			1		5	4	4	8	6	5	**35**
CONSTITUTIONAL		2			1							**3**
COMMECIAL	3	5	1				1		1	3	1	**15**
PROPERTY	3	9	1	1	1		1	1				**17**
CONTRACT	3	8		2	1			1		2		**17**
WILLS & PROBATE	13	11	7	6	1	1		1				**40**
EVIDENCE & PROCEDURE	7	9	1			1	6	3	2	3	1	**33**
TORTS	2	2				1	3			1	1	**10**
TAXATION	4	3	1	2						1	1	**12**
STATUTORY INTERPRETATION		2		1		3	5	1	3	8	4	**27**
INSURANCE	1	1					1			1	1	**5**
ADMINISTRATIVE LAW			1			4	1			2		**8**
INDUSTRIAL LAW			2			1	1		1	2		**7**
FAMILY LAW	2	1			2							**5**
TRUSTS										2	1	**3**
JURISDICTION		1					1					**2**
CUSTOMS												**0**
INTERNATIONAL LAW												**0**
COMPANY LAW	1		1									**2**
DAMAGES												**0**
Total No of Cases	41	54	15	13	6	16	24	11	15	31	15	**241**

6. Which Authorities Does the Court Cite?

McCormick classifies judicial citations into four categories; namely, consistency citations, hierarchical citations, coordinate citations and deference citations.[85] Consistency citations are citations to the previous decisions of the citing court. Hierarchical citations are citations to a court above the citing court in the judicial hierarchy. Coordinate citations are citations to other courts at the same tier in the court's hierarchy. Deference citations are citations to decisions of courts which are not part of the immediate judicial hierarchy, but still have persuasive value. To these four categories can be added citation to secondary authorities. This section examines the Court's citation practice using this taxonomy of citations as a guide.

Consistency Citations

McCormick suggests that 'the general principles of continuity and consistency and the legal value of predictability in the law require that [previous decisions] carry considerable weight'.[86] The doctrine of *stare decisis* underpins consistency citations. As Sir Anthony Mason puts it: '*stare decisis* promotes consistency, coherence and predictability. Without these qualities the law would cease to command public respect'.[87] In *Nguyen v Nguyen,*[88] Dawson, Toohey and McHugh JJ (with

85 PeterMcCormick, above n 21; Peter McCormick, 'Judicial Citation, the Supreme Court of Canada and the Lower Courts' (1996) 34 Alberta Law Review 870.

86 Peter McCormick, above n 21, 273-274.

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

88 (1990) 169 CLR 245.

the agreement of Brennan and Deane JJ) stated that the extent to which a Full Court of a State supreme court regards itself at liberty to depart from its own previous decisions is for the court itself to determine and that a Full Court will depart from a previous decision if convinced it is manifestly wrong.[89] The Court of Appeal in Tasmania has the power to review its own decisions, but sound reasons must be demonstrated before the Court will embark upon such a review.[90] In *Arnol v R*[91] Green CJ said:

> 'I do not propose attempting to exhaustively state the circumstances under which it might be appropriate for this Court to review its own decisions, but I think that the Court would be justified in doing so when the earlier decision is shown to have been arrived at without regard to an applicable statutory provision or binding authority, when the chain of reasoning employed in the earlier decision contains a manifest -- as opposed to a merely arguable -- contradiction or flaw which vitiates the conclusion reached, or when in the meantime legislation, case law, or other material circumstances have undergone changes which have had the effect of altering the basis upon which the earlier decision was reached. However, it would be wrong for this Court to review an earlier authority merely because it preferred a different view of the law than that which was taken in the earlier case'.

A decision of the Full Court binds a single judge sitting alone. In the absence of a binding decision of a higher court, the practice in State supreme courts in Australia is that a judge sitting alone will normally follow the earlier decision of a single judge of the same court sitting alone, unless convinced it was plainly erroneous or proceeded on an invalid premise.[92] This practice is adopted in the Supreme Court of Tasmania.[93]

Table 2 (below) presents data on the Court's citation practice including citations to its own previous decisions. There are a few noticeable features of Table 2 with respect to the Court's consistency citations. First, there is a temporal increase in consistency citations, particularly since 1965. In 1905 the Court cited its own previous decisions on average just 0.07 times per case and 0.05 times per judgment. In 1955 the comparable figures were 0.69 times per case and 0.44 times per judgment. By 2005

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89 (1990) 169 CLR 245 at 268-269 per Dawson, Toohey and McHugh JJ; at 250 per Brennan J; at 251 per Deane J.

90 *Arnol v R* [1981] Tas R 157; *Gardenal-Williams v R* [1989] Tas R 62; *Colin John Sparkes v R* [1997] TASSC 100 (26 August 1997).

91 [1981] Tas R 157.

92 See *La Macchia v Minister for Primary Industries and Energy* (1992) 10 ALR 201 at 204 per Burchett J.

93 See *Goss v Mount Lyell Mining and Railway Company Ltd.* Supreme Court of Tasmania, 5 November 1991 BC9100036 at 12 per Zeeman J; *Barrett v State of Tasmania,* Supreme Court of Tasmania 27 November 1997, BC9707320 at 4 per Wright J.

the Court cited on average 4.60 of its own decisions per case and 2.46 of its own decisions per judgment. As a fraction of total citations, consistency citations increased from 2.27 per cent in 1905 to 4.7 per cent in 1955 and 17.12 per cent in 2005. The result that consistency citations formed 17.2 per cent of the Court's citations in 2005 is similar to the finding that consistency citations constituted 19.5 per cent of the Court's total citations based on the 50 most recent reported judgments as of June 1999.[94] This finding suggests that the proportion of consistency citations in the Supreme Court of Tasmania is similar to the Supreme Court of Queensland (18.6 per cent) and the Supreme Court of Western Australia (19.7 per cent), but less than the Supreme Court of Victoria (32 per cent), Supreme Court of South Australia (30.2 per cent) and the Supreme Court of New South Wales (26.7 per cent).[95]

94 Smyth, 'What Do Intermediate Appellate Courts Cite?' above n 9 (calculated from Table 2).

95 Ibid (figures are for the 50 most recent reported cases in each state as at June 1999).

Table 2: Citations in Reported Cases (Supreme Court of Tasmania)

	1905	1915	1925	1935	1945	1955	1965	1975	1985	1995	2005
Total No. of Cases	41	54	15	13	6	16	24	11	15	32	15
Total No. of Judgments	56	62	18	25	11	25	34	21	25	44	28
HIGH COURT											
1903-1919	3	3	0	1	7	16	7	2	2	7	2
1920-1939	-	-	0	0	18	9	27	5	6	15	5
1940-1959	-	-	-	-	0	19	30	23	9	25	11
1960-1979	-	-	-	-	-	-	22	24	44	47	7
1980-1999	-	-	-	-	-	-	-	-	16	101	65
2000-	-	-	-	-	-	-	-	-	-	-	18
Subtotal	**3**	**3**	**0**	**1**	**25**	**44**	**86**	**54**	**77**	**195**	**108**
Ave. per case	0.07	0.06	0.00	0.08	4.17	2.75	3.58	4.91	5.13	6.09	7.20
Ave. per judgement	0.05	0.05	0.00	0.04	2.27	1.76	2.53	2.57	3.08	4.43	3.86
FEDERAL/FAMILY COURT	-	-	-	-	-	-	-	-	**1**	**14**	**11**
TASMANIA SC	**3**	**9**	**0**	**1**	**8**	**11**	**57**	**47**	**39**	**133**	**69**
Ave. per case	0.07	0.17	0.00	0.08	1.33	0.69	2.38	4.27	2.60	4.16	4.60
Ave. per judgement	0.05	0.15	0.00	0.04	0.73	0.44	1.68	2.24	1.56	3.02	2.46
VIC SC	11	3	0	3	17	9	24	13	7	48	27
NSW SC	5	0	0	5	26	8	23	15	7	56	39
Queensland SC	0	1	0	0	1	0	23	5	16	23	10
WA SC	0	0	0	0	1	0	3	0	1	2	12
SA SC	0	0	0	1	3	6	2	1	7	48	28
NT SC	-	-	-	-	-	-	-	-	0	3	0
ACT SC	-	-	-	-	-	-	-	-	0	6	0
Subtotal	**16**	**4**	**0**	**9**	**48**	**23**	**75**	**34**	**38**	**186**	**116**
OTHER AUST. COURTS	-	-	-	-	-	**0**	**2**	**0**	**0**	**22**	**6**
ENGLISH COURTS											
House of Lords	5	4	0	36	27	17	36	21	41	16	11
Judicial Committee	4	0	0	2	8	3	32	10	3	12	6
English CA	13	27	3	50	19	42	77	34	18	68	23
Lower English Courts	71	46	5	144	90	43	122	16	24	74	28
Subtotal	**93**	**77**	**8**	**232**	**144**	**105**	**267**	**81**	**86**	**170**	**68**
Ave. per case	2.27	1.43	0.53	17.85	24.00	6.56	11.13	7.36	5.73	5.31	4.53
Ave. per judgement	1.66	1.24	0.44	9.28	13.09	4.20	7.85	3.86	3.44	3.86	2.43
OTHER COUNTRIES	**9**	**1**	**2**	**0**	**0**	**9**	**28**	**3**	**14**	**38**	**5**
SECONDARY AUTHORITIES LEGAL											
Books	7	15	0	33	7	31	47	9	29	22	16
Periodicals	1	2	0	3	0	2	9	3	4	3	1
Encyclopaedias	0	1	0	1	1	7	11	6	2	1	0
Law Reform Reports	0	0	0	0	0	0	3	0	0	1	0
Dictionaries	0	0	0	0	0	1	4	3	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0
Subtotal	**8**	**18**	**0**	**37**	**8**	**41**	**74**	**21**	**35**	**27**	**17**
NON-LEGAL											
Books	0	2	0	0	0	0	0	0	0	0	0
Periodicals	0	0	0	0	0	0	0	0	0	0	0
Dictionaries	0	0	0	0	0	0	0	2	0	4	3
Other	0	0	0	0	0	0	0	0	0	0	0
Subtotal	**0**	**2**	**0**	**0**	**0**	**0**	**0**	**2**	**0**	**4**	**3**
TOTAL	**132**	**114**	**10**	**280**	**233**	**233**	**514**	**242**	**290**	**789**	**403**
AVE CITATIONS PER CASE	3.22	2.11	0.67	21.54	38.83	14.56	21.42	22.00	19.33	24.66	26.87
AVE CITATIONS PER JUDGMENT	2.36	1.84	0.56	11.20	21.18	9.32	15.12	11.52	11.60	17.93	14.39

A second noticeable feature of Table 2 is that the increase in the proportion of consistency citations in the Court has been a relatively recent phenomenon. For the first six decades of the study, up to and including 1955, the Court cited very few of its own decisions. In fact for the first six decades of the study combined the Court cited only 32 of its own decisions, representing about 3 per cent of total citations in the sample cases.[96] Third, in all years except 1915, 1975 and 1985, coordinate citations are higher than consistency citations. In four years (1905, 1935, 1945 and 1965) the Court actually cited both the Supreme Court of Victoria and the Supreme Court of New South Wales more than its own decisions. The result that the Supreme Court of Tasmania cites a higher proportion of coordinate citations than consistency citations is consistent with the findings from the previous study of the citation practice of the six State supreme courts based on the 50 most recent reported decisions as of June 1999.[97] That study found that the Supreme Court of Tasmania was the only state that had a higher proportion of coordinate citations than consistency citations, suggesting Tasmania is a big 'consumer' of coordinate citations. At the same time, that study also found that Tasmania received far less 'out of state' citations than other State supreme courts, suggesting it is a small 'supplier' of coordinate citations.[98]

Hierarchical Citations

In the Supreme Court of Tasmania hierarchical citations consist of citations to the High Court and, prior to the enactment of the Australia Acts 1986 (UK & Cth), decisions of the Judicial Committee of the Privy Council. In *Garcia v National Australia Bank Ltd.*[99] the High Court stated that State supreme courts at first instance and on appeal are bound by the *ratio decidendi* of decisions of the High Court and are not free to ignore, doubt or qualify the rule. Until the enactment of the Australia Acts, decisions of the Judicial Committee were also binding on the State supreme courts.[100] Since the commencement of the Australia Acts, the State supreme courts are not required to follow decisions of the Judicial Committee.[101] The position is less clear with respect to decisions of the Judicial Committee made prior to the enactment of the Australia Acts. In

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96 One possible explanation for the small number of consistency citations is that prior to the early 1990s, the method of indexing judgments of the Tasmanian Supreme Court was somewhat haphazard and the published law reports were up to five years behind at times.

97 Smyth, 'What Do Intermediate Appellate Courts Cite?', above n 9 (calculated from Table 2).

98 Ibid (see Table 4).

99 (1998) 194 CLR 395.

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

101 *Cook v Cook* (1986) 68 ALR 353, 362-363.

the New South Wales Court of Appeal in *Clayton v Hawkins*[102] McHugh JA expressed the view that the effect of the Australia Acts is that State supreme courts are no longer bound to follow decisions of the Judicial Committee given either before or after the commencement of the Acts. This position, however, was criticised by Blackshield who expressed the view that decisions of the Judicial Committee decided prior to 1986 continue to bind the State supreme courts until the High Court decides otherwise.[103] In *R v Judge Bland; ex parte Director of Public Prosecutions*[104] a single judge of the Supreme Court of Victoria followed a decision of the Full Court of the Supreme Court of Victoria that had been overruled by a decision of the Judicial Committee decided prior to 1986. The judge considered that the authority of the Full Court decision had been 'revived' by the Australia Acts.[105]

Previous studies for Australia, Canada and New Zealand have found that hierarchical citations form the highest proportion of judicial citations.[106] The Court's citations to the Judicial Committee have been a miniscule proportion of the Court's total citations. In most years citations to the Judicial Committee have been less than 5 per cent of total citations and even in 1965 when there is a spike in the Court's citation to the Judicial Committee, such citations still only represented 6 per cent of total citations in the sample cases. Moreover, in each year the Court's citations to the Judicial Committee were less than citations to the House of Lords. One possible explanation for the Court's low number of citations to the Judicial Committee is that the Judicial Committee has sometimes been regarded as producing decisions of dubious quality[107] Decisions of the Judicial Committee have been criticized in Australia for failing to appreciate the subtleties of federalism since at least the beginning of the twentieth century.[108] As early as the 1911 Imperial Conference, the

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[102] *Hawkins v Clayton* (1986) 5 NSWLR 109, 136-137.

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

[104] (1987) VR 225.

[105] (1987) VR 225, 230-232.

[106] For Canada see Peter McCormick, 'Judicial Citation, the Supreme Court of Canada and the Lower Courts' and Peter McCormick, 'Judicial Authority and the Provincial Courts of Appeal'. For Australia see Smyth, 'What Do Judges Cite?', above n 9; Smyth, 'What Do Intermediate Appellate Courts Cite?' above n 9; Smyth, 'Citation of Judicial and Academic Authority', above n 9. For New Zealand, see Smyth, 'Judicial Citations', above n 10.

[107] See discussion in Anthony Blackshield, *The Abolition of Privy Council Appeals: Judicial Responsibility and 'The Law for Australia* (Adelaide, Adelaide Law Review Association, 1978); John Goldring, *The Privy Council and the Australian Constitution* (Hobart, Tasmania University Press, 1996).

[108] For example the Judicial Committee opinion in *Webb v Outrim* [1907] AC 81 delivered by the Earl of Halsbury was criticised for failing to come to grips with the notion of the legislative power of the state being limited by a federal structure – see Sir

Australian and New Zealand Prime Ministers called for a new 'Supreme Court of Australasia' consisting of Australian and New Zealand judges to hear cases from the two countries in response to widespread dissatisfaction with decisions of the Judicial Committee.[109] Sir Owen Dixon was often privately critical of the Judicial Committee's interpretation of the Australian Constitution and lack of understanding of federalism.[110] In *O'Sullivan v Noarlunga Meat Ltd. (No.2)*[111] he gave public voice to his previously private criticisms stating that Section 74 of the Constitution recognised that:

> 'federalism is a form of government the nature of which is seldom understood in all its bearings by those whose fortune it is to live under a unitary system. .... It is .... doubtless true that those responsible for the provision which took the shape of s.74 hoped that an Australian court might find it possible to work out by judicial decision in the course of interpreting the Constitution a body of constitutional law which would give strength and stability to the system'.[112]

Table 2 shows that for the first four decades of the study the Court cited hardly any High Court decisions at all. Between 1905 and 1945, the Court cited the High Court a total of seven times representing just over 1 per cent of citations in the sample cases. In 1945 the Court's citation to the High Court increased to 10 per cent of total citations and increased again to 18 per cent in 1955 and 22 per cent in 1975. Since 1945 there has also been a steady upward trend in the Court's citation to the High Court on a per case and per judgment basis. Since 1985, the Court's citation to the High Court has hovered around 25 per cent of total citations, more than any other single court. This result underpins the fact that since the enactment of the *Australia Acts*, the 'High Court [has been] the uncontested apex of the nation's judicial system and hence ... the primary source of binding legal principle throughout [Australia]'.[113]

Coordinate Citations

In the Supreme Court of Tasmania, coordinate citations comprise citations to the other Australian State and Territory supreme courts. In Australia an appellate court in one State is not bound by the decision of an appellate court in another State, but will follow it unless convinced the

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Kenneth Keith 'The Unity of the Common Law and the Ending of Appeals to the Privy Council' (2005) 54 *International Comparative Law Quarterly* 197, 202.

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

110 See Philip Ayres, *Owen Dixon* (Melbourne, Melbourne University Press, 2003) 41-42, 79-82, 245-246.

111 (1956) 94 CLR 367.

112 Ibid at 375-376.

113 Michael Kirby, Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243.

decision is wrong.[114] Similarly, a judge sitting alone is expected to follow the Full Court of the Supreme Court of another State unless persuaded it is clearly wrong.[115] As outlined by the Queensland Court of Appeal in *R v Morrison*,[116] there are two considerations that underpin this principle. The first consideration is the need for a consistent approach across Australian states and territories when decisions concern the effect of a Commonwealth Act or uniform legislation. The second consideration is that there should be consistency in the development of the common law throughout the Australian states and territories.

As discussed above, the Supreme Court of Tasmania has more coordinate citations than consistency citations which is unusual for an Australian State supreme court. Table 2 shows that the two State supreme courts which have received the highest proportion of coordinate citations by the Court over the century are the Supreme Courts of Victoria and New South Wales, with the Supreme Court of South Australia increasing its share of coordinate citations in the last two decades. The fact that the State Supreme Courts of Victoria and New South Wales have the largest share of coordinate citations likely reflects the reputation of those courts for doctrinal leadership, the strength of the Victorian and New South Wales Bar and the fact that these two states have provided the biggest share of appointments to the High Court.[117]

Deference Citations

The highest proportion of deference citations are to the English courts, including the Judicial Committee following the commencement of the Australia Acts. Other deference citations are to courts in other countries such as New Zealand and the United States. Prior to the commencement of the Australia Acts, decisions of the House of Lords and English Court of Appeal were accorded *de facto* hierarchical status in the State supreme courts. In *Public Transport Commission (NSW) v J. Murray-More (NSW) Pty. Ltd.*[118] Barwick CJ stated that if there was no High Court decision, a State supreme court should, as a general rule, follow a decision of the English Court of Appeal at first instance and on appeal.[119] Gibbs J went further and stated that the New South Wales Court of Appeal should have

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[114] *Swetnan Brothers Pty. Ltd. v Grundy,* Supreme Court of Tasmania 5 March 1997 BC9701286 at 5 per Wright J. There are, however, cases where this principle has not been followed in the Supreme Court of Tasmania.; for example, see *Lazenby v Zammit* (1987) Tas R 54.

[115] *Jomann Enterprises Pty. Ltd. v Sagasco Resources Ltd. (No.2),* Supreme Court of Tasmania, 27 May 1993 BC9300055 at 2 per Zeeman J.

[116] [1999] 1 Qd R 397, 401.

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

[118] (1975) 132 CLR 336.

[119] (1975) 132 CLR 336, 341.

regarded itself as being bound by a decision of the English Court of Appeal.[120] In the Supreme Court of Tasmania in *Swetnam Brothers v Grundy*[121] Wright J. stated that 'until modified by the High Court in *Cook v Cook,*[122] it was a general rule that a State supreme court would follow the decisions of the English Court of Appeal'.[123] The rationale for the authoritative status of decisions of the House of Lords and English Court of Appeal prior to the commencement of the Australia Acts has been summed up by Sir Anthony Mason: 'Although Australian courts were not formally bound by decisions of English courts other than the Privy Council, Australian judge-made law has certainly until very recent times been largely derived from English judicial precedent'.[124]

The status of English case law has changed since the Australia Acts, although decisions of the House of Lords delivered prior to the commencement of the Australia Acts continue to be accorded great respect in recognition of their influence on the development of the common law in Australia.[125] Over the last decade, the increasing influence on English cases of the European Convention on Human Rights and Fundamental Freedoms has reduced the relevance of recent English decisions to Australian case law. [126] At the same, the evolution of the internet and development of databases such as Westlaw over the last decade have made it easier to access and cite precedent from countries other than Australia and England. As Michael Kirby colourfully put it: 'Millions of judicial precedents are now available at the touch of a keyboard'.[127] The vast numbers of precents available from a range of foreign jurisdictions has resulted in judicial calls to avoid 'cherry picking' and ensure that only those authorities that truly have persuasive authority are cited.[128]

According to Table 2, as a proportion of the overall total, citations to English cases have declined over time. From 1905 to 1935 citations to English decisions accounted for 70-80 per cent of total citations. In 1945 this figure dropped to 61 per cent and further dropped to 45-50 per cent in 1955 and 1965. In 1975 and 1985 citations to English decisions were about 30 per cent; in 1995, the proportion was 21 per cent and in 2005 the proportion was 16 per cent. Over time, deference citations to English

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120 (1975) 132 CLR 336, 349.

121 5 March 1997 BC9701286.

122 (1986) 68 ALR 353.

123 5 March 1997 BC9701286, 5.

124 Mason, above n 87, 150.

125 Ibid.

126 Michael Kirby, above n 113, 244.

127 Ibid, 250.

128 Ibid, 250. See also Richard Posner, 'Could I Interest You in Some Foreign Law? No Thanks, We Already Have Our Own Laws' (2004) August *Legal Affairs* 40.

cases have been replaced by consistency citations, coordinate citations and hierarchical citations to the High Court. Apart from spikes in 1965 and 1995 there have been few deference citations to courts in countries other than England. Most of these deference citations are to courts in New Zealand and the United States.

Secondary Authorities

The Court's citation to secondary authority has varied greatly over the course of the century. In 1915, the Court's citation to secondary authority was as high as 30 per cent of total citations and in 1955 they again spiked at 18 per cent of total citations and in 1965 at 14 per cent of total citations. However, in 1995 and 2005 secondary authorities represented less than 5 per cent of the Court's citations. The result for 1995 and 2005 are consistent with the finding from the study of the 50 most recent reported decisions as at June 1999 that secondary authorities constitute 3.8 per cent of citations in the Supreme Court of Tasmania.[129] That study found that for the six State supreme courts citation to secondary authorities was 6.8 per cent of total citations, suggesting that over the last decade or so, the Supreme Court of Tasmania has been one of the smallest citers of secondary authorities among the State supreme courts.[130]

Among the particular categories of secondary authorities cited, legal textbooks and legal encyclopaedias received the most citations, consistent with the previous study of the six Australian State supreme courts.[131] There were very few citations to other secondary authorities including law reviews. Judicial biographies and extra-judicial musings suggest that judges care about 'reaching decisions through what feel to them like professionally legitimate methods'.[132] For most judges, an important aspect of the process is citation to previous authority.[133] The fact there are few citations to secondary authorities in general and that when secondary authorities are cited it is usually either *Halsbury* or one of the 'learned

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[129] Smyth, 'What Do Intermediate Appellate Courts Cite?' above n 9 (calculated from Table 2).

[130] Ibid.

[131] Smyth, 'What Do Intermediate Appellate Courts Cite?' above n 9.

[132] Stephanie Lindquist and David Klein, 'The Influence of Jurisprudential Considerations on Supreme Court Decision Making: A Study of Conflict Cases' (2006) 40 *Law and Society Review* 135, 137.

[133] Lionel Murphy would appear to be an exception, going so far as to suggest that over rigid adherence to precedent was 'eminently suitable for a nation overwhelmingly populated by sheep' – see Lionel Murphy, 'The Responsibility of Judges', opening address for the First National Conference of Labor Lawyers, 29 June 1979 in Gareth Evans (ed) *Law, Politics and the Labor Movement* (Clayton, Legal Services Bulletin, 1980).

treatises' suggests 'old habits of citation persist, no doubt because judges feel that only "legal" authorities are legitimate'.[134]

Table 3: Legal Texts Cited in Two or More of the Sample Years in Reported Cases of the Supreme Court of Tasmania

Legal Text	*Number of Years Cited*
Jarman on Wills	***6***
Theobald on Wills	***4***
Winfield on Torts	***4***
Hale, Pleas of the Crown	***3***
Warner, Sentencing in Tasmania	***3***
Hawkins on Wills	***3***
Maxwell on Statutes	***3***
Austin Jurisprudence	***2***
Blackstone, Commentaries on the Laws of England	***2***
Broom's Legal Maxims	***2***
Hawkins, Pleas of the Crown	***2***
Jacob's Law of Trusts in Australia	***2***
Jervis, Archbold's Pleading and Evidence in Criminal Cases	***2***
Kenny, Outlines of Criminal Law	***2***
Maxwell, Interpretation of Statutes	***2***
Pearce, Statutory Interpretation in Australia	***2***
Pollock on Torts	***2***
Salmond on Torts	***2***
Street, Principles of the Laws of Damages	***2***
Thomas, Principles of Sentencing	***2***
Wigmore on Evidence	***2***
Williams and Guthrie-Smith, Daniell's Chancery Practice	***2***

The reason the Court cites mainly treatises and few law reviews is a reflection that law reviews typically contain articles advancing cutting edge normative statements, while textbooks tend to contain positive statements of the law. And, as intermediate appellate courts, the State supreme courts cite academic authorities for statements of what the law is, rather than how it should be changed.[135] The treatises that the Court cited were predominantly the standard classics and professional texts, reflecting the case load of the Court. Table 3 lists legal texts that were cited in two or more years. There were 22 titles that were cited in at least two of the sample years. *Jarman on Wills* was cited in six years and *Theobald on Wills* and *Winfield on Torts* were cited in four years. The treatises that received the most citations were on wills and probate, torts, criminal law and evidence and procedure, reflecting the Court's caseload. The Court's preferred texts for aiding in the interpretation of statutes have been Maxwell, *Interpretation of Statutes* and Pearce, *Statutory Interpretation in Australia*. Merryman discusses the tendency of the California Supreme Court to cite 'local works' which are state specific

[134] Lawrence Friedman et al, 'State Supreme Courts: A Century of Style and Citation', (1981) 33 *Stanford Law Review* 773, 817.

[135] Black and Richter, above n 5, 391.

and 'organized to make research .... quick and easy'.[136] In the Supreme Court of Western Australia the local favourite is Seaman, *Civil Procedure in Western Australia.*[137] The Supreme Court of Tasmania has its own favourite which is *Warner, Sentencing in Tasmania,* which was cited in three of the sample years.

7. Citation Patterns of the Judges

In this section the citation practices of individual judges are considered.[138] In the first few decades of the study Harold Crisp J (puisne judge 1914-1937, Chief Justice 1937-1940) was the biggest citer of authority on the Court with, on average, 2.88 citations per judgment in 1915; 0.63 citations per judgment in 1925 and 3.38 citations per judgment in 1935. In the 1930s and 1940s Inglis Clark J (1928-1952) was the biggest citer of authority, citing on average 26.56 authorities per judgment in 1935 and 23.75 authorities per judgment in 1945. Malcolm Crisp J (1952-1971) cited the most authorities on the Court in the 1950s and 1960s with 12.09 authorities per judgment in 1955 and 27 authorities per judgment in 1965. Nettlefold J (1971-1990) was the biggest citer on the Court in the 1970s and 1980s with 13.6 authorities per judgment in 1975 and 22.67 authorities per judgment in 1985. In 1995 Zeeman J (1990-1998) cited the most authorities and in 2005 Evans J (1998-) cited the most authorities.

One needs to be careful in reading too much into the citation patterns for individual judges in a study such as this because of the small number of reported judgments for each year. However, with this caveat in mind, there are a few noticeable features when comparing the citation practices of individual judges over the twentieth century. First, the biggest citers of authority in 1905, 1915 and 1925, Crisp and McIntyre JJ, would be the smallest citers of authority on the current Court. For example, the 2.88 authorities per judgment cited by Crisp J in 1915 would make him the smallest citer of authority in 2005. Second, the first really big citer of authority on the Court was Inglis Clark J in the 1930s and 1940s. The spike in citations to authority in 1935 and 1945 evident in Figure 3 is due primarily to Inglis Clark J. In 1935 Inglis Clark J was responsible for 85 per cent of the Court's total citations. While this dropped to 40 per cent in 1945 with Morris CJ (1940-1956) contributing 50 per cent of the Court's citation, Morris CJ had almost double the number of reported judgments of Inglis Clark J. Third, compared to the four decades from 1935-1965 when a few judges (Morris CJ, Inglis Clark and Crisp JJ) provided the bulk of the Court's citations in most years, in recent years there has been

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136 Merryman, above n 28, 413.

137 See Smyth, 'Citation of Judicial and Academic Authority', above n 9, 21.

138 Tables containing detailed information on the citation practices of individual judges for each year of the study are available from the author on request.

convergence between the judges who cite the most and least authority with a much more even spread across judges.

Merryman hypothesises that the smallest citers will only cite the most relevant authorities, consistency and hierarchical citations, while the big citers will include 'references to work of dubious authority'.[139] Merryman, however, found this hypothesis was not supported for the California Supreme Court in 1950, 1960 and 1970. There is mixed support for this hypothesis on the Supreme Court of Tasmania. In 1935 and 1945 Inglis Clark J cited a disproportionate number of English cases and textbooks. The same is true for Crisp J in 1955 and 1965. In citing a high proportion of English cases both judges were products of their times. One factor suggesting both judges tended to cite authorities that were not 'the most relevant' is that the bulk of their citations to English decisions were to lower court English decisions, rather than the Court of Appeal, House of Lords or Judicial Committee. This could reflect the fact that there were no decisions of the Court of Appeal, House of Lords or Judicial Committee that were on point. However, it also points to a tendency to discuss the origin of legal principles. Reinforcing this perspective, both judges cited a number of 'learned treatises', which often forms part of a discussion of the history of specific rules. In recent decades, though, the biggest citers on the Court have generally also contributed the highest proportion of consistency and hierarchical citations and not cited disproportionate amounts of English cases or secondary authorities.

8. Conclusion

This article has examined the citation practices of the Supreme Court of Tasmania over the course of the twentieth century through sampling reported decisions at ten-year intervals. The following conclusions emerge. First, there has been a temporal increase in the average length of cases and judgments. Second, there has been a temporal increase in the citation to authority with a big jump in 1935 and 1945. Third, the jump in citation to authority in 1935 and 1945 was primarily due to the citation habits of Inglis Clark J who was a big citer of authority, even by modern day standards. Fourth, coordinate citations have been higher than consistency citations in most years, which is unusual for a State supreme court in Australia. This result suggests that the Supreme Court of Tasmania draws heavily on the law in other states and particularly the big states of New South Wales and Victoria. Fifth, prior to World War II, the Court cited few High Court cases, citing instead a high proportion of English cases. Since World War II, however, citation to the High Court has increased and the High Court is now cited more than any other single court. At the same time, deference citations to English decisions have

[139] Merryman, above n 28, 422.

been falling since World War II, and particularly since the commencement of the Australia Acts in 1986. Finally, secondary authorities make up only a small proportion of the Court's citations and when the Court does cite secondary authorities it is mainly standard references.

The first serious study of the citation practice of courts in the United States was published more than 50 years ago.[140] The study of judicial citation practices in the United States and, to a lesser extent, Canada primarily through the work of Peter McCormick, has come a long way in the last five decades.[141] In Australasia, there are now a few studies of judicial citation practice, but there is much that could be done. One direction for future research could be to examine the citation patterns of other State supreme courts over a similar extended period or examine the citation practice of the High Court over a long period. It would be useful to build a database on the citation practice of all the State supreme courts over an extended period that would facilitate comparative analysis across the State supreme courts.[142] This would allow one to compare coordinate citations across the states over an extended period to see which intermediate appellate courts are the big consumers and big suppliers of coordinate citations.[143] The use of an extended period would allow the researcher to detect any temporal changes in the relative influence of courts on each other, controlling for factors such as population size, migration flows and urbanisation.[144]

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[140] Merryman, above n 1.

[141] Some of Peter McCormick's work is cited in notes 5 and 6 above.

[142] The author is in the process of building such a database.

[143] For a Canadian study along these lines also over an extended period see Peter McCormick, above n 21.

[144] For US studies along these lines see Caldeira, 'On the Reputation of State Supreme Courts' above n 22; Caldeira, 'The Transmission of Legal Precedent', above n 22.