

Citation of Judicial and Academic Authority in the Supreme Court of Western Australia



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There are a number of studies that examine the judicial citation practices of courts in Australia, New Zealand and North America. This paper contributes to this literature by examining the citation practices of the Full Court of the Supreme Court of Western Australia during the 1990s. The paper discusses (i) the different types of judicial authority cited by the Full Court, (ii) the use of academic authority — textbooks and law review articles — by that Court, and (iii) the citation practices of individual judges of the Supreme Court.

THERE are several studies of the citation practices of courts in North America. There are studies for the Supreme Court of Canada,¹ the provincial courts of appeal in Canada,² the US Supreme Court,³ the US courts of

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1. V Black & N Richter 'Did She Mention My Name?: Citation to Academic Authority by the Supreme Court of Canada, 1985-1990' (1993) 16 Dalhousie LJ 377; P McCormick 'Judicial Citation, The Supreme Court of Canada and the Lower Courts: The Case of Alberta' (1996) 34 Alb L Rev 870; P McCormick 'Do Judges Read Books Too?: Academic Citations by the Lamer Court, 1992-96' (1998) 9 Sup Ct L Rev (Annual) 463; P McCormick 'The Supreme Court Cites the Supreme Court: Follow-Up Citations on the Supreme Court of Canada, 1989-1993' (1995) 33 Osgoode Hall LJ 453.
2. Eg P McCormick, 'Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices' (1993) 22 Manitoba LJ 286; P McCormick 'The Evolution of Co-ordinate Precedential Authority in Canada: Inter-provincial Citations of Judicial Authority, 1922-1992' (1994) 32 Osgoode Hall LJ 271.
3. J Ackers 'Thirty Years of Social Science in Supreme Court Criminal Cases' (1990) 12 Law & Policy 1; J Ackers 'Social Science in Supreme Court Death Penalty Cases: Citation

appeal⁴ and the US State supreme courts.⁵ There is also a burgeoning literature which considers the citation practices of appellate courts in Australia and New Zealand. There are studies for the High Court of Australia,⁶ the Federal Court of Australia,⁷ the State supreme courts⁸ and the New Zealand Court of Appeal.⁹ This

Practices and Their Implications' (1991) 8 Justice Quarterly 421; N Bernstein 'The Supreme Court and Secondary Source Material: 1965 Term' (1968) 57 Geo LJ 55; W Daniels "'Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions, October Terms 1900, 1940, and 1978' (1983) 76 Law Lib J 1; C Johnson 'Citations to Authority in Supreme Court Opinions' (1985) 7 Law & Policy 509; M Kosma 'Measuring the Influence of Supreme Court Justices' (1998) 27 Journ Leg Stud 333; C Newland 'Legal Periodicals and the United States Supreme Court' (1959) 7 UK L Rev 477; L Sirico & J Margulies 'The Citing of Law Reviews by the Supreme Court: An Empirical Study' (1986) 34 UCLA L Rev 131.

4. Eg W Landes & R Posner 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) 19 Journ L & Econ 249; W Landes & R Posner 'Legal Change, Judicial Behaviour and the Diversity Jurisdiction' (1980) 9 Journ Leg Stud 367; W Landes, L Lessig & M Solmine 'Judicial Influence, A Citation Analysis of Federal Courts of Appeals Judges' (1998) 27 Journ Leg Stud 271; L Sirico & B Drew 'The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis' (1991) 45 U Miami L Rev 1051.
5. Eg JH Merryman 'The Authority of Authority: What the California Supreme Court Cited in 1950' (1954) 6 Stanford L Rev 613; JH Merryman 'Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970' (1977) 50 SC L Rev 381 (California); R Archibald 'Stare Decisis and the Ohio Supreme Court' (1957) 9 West Res L Rev 23; J Leonard 'An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990' (1994) 86 Law Lib J 129 (Ohio); R Mann 'The North Carolina Supreme Court 1977: A Statistical Analysis' (1979) 15 Wake Forest L Rev 39 (North Carolina); W Manz 'The Citation Practices of the New York Court of Appeals, 1850-1993' (1995) 43 Buffalo L Rev 121; M Bobinski 'Citation Sources and the New York Court of Appeals' (1985) 34 Buffalo L Rev 965 (New York); W Turner 'Comment, Legal Periodicals: Their Use in Kansas' (1959) 7 Kansas City L Rev (Kansas); F Snyder 'The Citation Practices of the Montana Supreme Court' (1996) 57 Montana L Rev 453 (Montana); L Friedman, R Kagan, B Cartwright & S Wheeler 'State Supreme Courts: A Century of Style and Citation' (1981) 33 Stanford L Rev 773 (16 State supreme courts, 1870-1970).
6. P von Nessen 'The Use of American Precedents by the High Court of Australia, 1901-1987' (1992) 14 Adel L Rev 181; R Smyth 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court' (1998) 17 U Tas L Rev 164; R Smyth "'Other Than Accepted Sources of Law?": A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22 UNSW LJ 19; R Smyth 'Law or Economics? An Empirical Investigation into the Impact of Economics on Australian Courts' (2000) 28 Aust Bus L Rev 5; R Smyth 'Citations by Court' in T Blackshield, M Coper & G Williams (eds) *The Oxford Companion to the High Court of Australia* (Melbourne: OUP, forthcoming); R Smyth 'Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21 UQ LJ 7-22.
7. R Smyth 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9 Griffith L Rev 25.
8. R Smyth 'What do Judges Cite?: An Empirical Study of the "Authority of Authority" in the Supreme Court of Victoria' (1999) 25 Mon UL Rev 29; R Smyth 'What Do Intermediate Appellate Courts Cite?: A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21 Adel L Rev 51.
9. R Smyth 'Judicial Citations – An Empirical Study of Citation Practice in the New Zealand Court of Appeal' (2000) 31 Vict U Well L Rev 847; R Smyth 'Judicial Robes or Academic

article adds to this literature by empirically analysing citations to case-law and academic authority in the reported judgments of the Full Court of the Supreme Court of Western Australia from 1990 to 1999 inclusive.¹⁰

The study reveals (i) that the Full Court of the Supreme Court cites the High Court more than its own previous decisions; and (ii) that apart from the High Court, the Full Court cites its own decisions more than those of any other single court. These results are generally consistent with the findings for other Australian appellate courts, although certain differences emerge, as discussed in the conclusion.

Part I of the study considers the main reasons why judges cite case-law and academic authority. Part II discusses the methodology used in the study and reviews the major citation patterns in the sample cases. Part III examines which authorities have been cited in the sample cases, including decisions of the High Court, the Full Court's own previous decisions, decisions of appellate courts in other States and Territories, decisions of English courts and the courts of other countries, and academic authorities. Part IV reviews the citation practice of individual judges in the Supreme Court. Part V summarises the main patterns that emerge and considers the study's findings and limitations.

I. WHY DO JUDGES CITE AUTHORITY?

1. Hierarchical citations

McCormick suggests that there are several categories of judicial citation.¹¹ The most obvious is a 'hierarchical citation', meaning a citation to a decision of a court above the citing court in the judicial hierarchy. The Full Court of the Supreme Court of Western Australia is bound by the ratio of a decision of the High Court; but even when a decision of the High Court is not binding on the Full Court, that court may nevertheless cite the decision as highly persuasive. Before the commencement of the Australia Acts 1986 (UK & Cth), the Judicial Committee of the Privy Council also stood above the Full Court, meaning that the rationes of its decisions were binding on it. Since the Australia Acts 1986 it is clear that the State appellate courts are no longer bound to follow decisions of the Privy Council given *after* the commencement of those Acts.¹² It is less clear, however, what the situation is with

Gowns? Citations to Secondary Authority and Legal Method in the Court of Appeal' in R Bigwood (ed) *Legal Method and Principles in New Zealand* (Auckland: Butterworths, forthcoming).

10. In this article the term 'academic authority' refers to citations to legal texts, journal articles and legal encyclopaedias such as *Halsbury's Laws of Australia* and *Halsbury's Laws of England*.

11. McCormick 'Judicial Citation' supra n 1; McCormick 'The Evolution' supra n 2.

12. The Privy Council has not been completely removed from the Australian judicial system by the Australia Acts 1986. Provision still exists under s 74 of the Constitution for the High

respect to decisions of the Privy Council given *before* the Australia Acts 1986 came into force. There do not seem to be any apposite statements on this point in the Full Court of the Supreme Court of Western Australia. However, in the New South Wales Court of Appeal, McHugh JA has suggested that, in light of the Australia Acts 1986, State supreme courts are no longer bound to follow Privy Council decisions given either *before* or *after* the commencement of the Acts.¹³

2. Consistency citations

‘Consistency citations’ are citations to previous decisions of the citing court. 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’.¹⁴

In *Nguyen v Nguyen*,¹⁵ Dawson, Toohey and McHugh JJ suggested that, in general, the extent to which a Full Court of a State supreme court regards itself as free to depart from its own previous decisions is a matter for that court to determine for itself. How does this apply to Western Australia? In 1906, in *Transport Trading & Agency Co (WA) Ltd v Smith*¹⁶ Parker CJ, with the concurrence of McMillan and Burnside JJ, took the view that as the Full Court of the Supreme Court of Western Australia is an intermediate appellate court, it should be bound by its decisions. Parker CJ based that view on the need for certainty:

I think the object we should seek to attain is to make the law certain, and when once this Court has declared that a statute or a section of a statute is to bear a certain meaning, I think it would be very unwise for the Court on a subsequent occasion to alter the decision.¹⁷

However, in *Archer v Howell*,¹⁸ decided after the High Court’s ruling in *Nguyen v Nguyen*, Malcolm CJ stated: ‘Whether the view [in *Transport Trading* is still] binding on this Court is at least doubtful’.¹⁹ Rowland and Franklyn JJ concurred

Court to grant a certificate permitting the Privy Council to hear an inter se matter that originated in a State court. Any such decision of the Privy Council would be binding on a WA court. However, only one such certificate has ever been granted: *Colonial Sugar Refining Co v A-G (Cth)* (1912) 15 CLR 182. The High Court has made it clear in *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461 that the s 74 jurisdiction is practically obsolete.

13. *Hawkins v Clayton* (1986) 5 NSWLR 109, 136-137.

14. McCormick ‘The Evolution’ *supra* n 2, 273-274.

15. (1990) 169 CLR 245, 268.

16. (1906) 8 WALR 33.

17. *Ibid.*, 35.

18. (1992) 7 WAR 33.

19. *Ibid.*, 45.

with Malcolm CJ's judgment, and Rowland J expressly endorsed the Chief Justice's observations regarding *Transport Trading*. It seems, therefore, that whilst the Full Court will pay close attention to its previous decisions it no longer regards itself as absolutely bound by them.

As early as 1907 Parker CJ had opined in *Kavanagh v Claudius*²⁰ that the Full Court could overrule one of its earlier decisions taken by a smaller number of judges. As a result, the Full Court, sitting as the Court of Criminal Appeal, now follows the practice of sitting as a bench of five judges whenever a previous decision of that court taken by three judges has to be reconsidered.²¹

In *Re Warden Calder; Ex Parte Cable Sands (WA)*,²² Steytler J added a proviso to the earlier observations of Malcolm CJ in *Archer v Howell* regarding the readiness with which the Full Court will depart from its earlier decisions. His aim was to reassert the value of consistency and predictability emphasised in Parker CJ's judgment in *Transport Trading*. After reviewing the earlier cases, Steytler J said:

A Full Court of this Court, even if comprised of five judges, will not lightly depart from one of its decisions, more particularly when that decision has since been applied by another Full Court. It should, I think, only do so in circumstances in which it is convinced that the earlier decision was wrong ... or when there is some other compelling reason why the previous decision should no longer be followed.²³

This dictum reflects the current practice of the Full Court. For example, in *Craig v Troy*²⁴ the appellants claimed damages for negligent advice provided by their accountants. Malcolm CJ declined to follow the majority decision of the Full Court in *Arthur Young v WA Chip & Pulp Co*,²⁵ preferring instead the dissenting judgment of Burt CJ. However, on this occasion, Malcolm CJ was 'convinced' that the majority's 'decision was wrong and that the dissenting judgment of Burt CJ was right'.²⁶ In *Traegar v Pires de Albuquerque*,²⁷ the Full Court had to consider the jurisdiction and procedure of the Court of Petty Sessions. In this case the Full Court declined to follow its earlier decision in *Fletcher v Fowler*.²⁸ Steytler J framed the relevant question as 'whether ... *Fletcher v Fowler* can be said to be *clearly wrong*'.²⁹

20. (1907) 9 WALR 55, 58.

21. *Archer v Howell* supra n 18, 45, citing *R v Turan* (1989) 2 WAR 140, 144.

22. (1998) 20 WAR 343.

23. *Ibid*, 354. Kennedy, White and Wheeler JJ agreed.

24. (1997) 16 WAR 96.

25. [1989] WAR 100.

26. *Craig v Troy* supra n 24, 162. See A Freilich 'Contributory Negligence and Breach of Contract: The Implications of *Astley v Austrust Ltd*' (2000) 29 UWAL Rev 18, 29-34.

27. (1997) 18 WAR 432.

28. (Unreported) WA Sup Ct 25 Sep 1985, Library No. 6010.

29. *Traegar v Pires de Albuquerque* supra n 27, 447 (emphasis added).

3. Deference citations

McCormick refers to citations to courts whose decisions are not binding, but which are of persuasive value, as ‘deference citations’.³⁰ Citations in the Full Court to decisions of English courts including the House of Lords, the Court of Appeal and the Judicial Committee of the Privy Council made after 1986 are deference citations. In *Cook v Cook*,³¹ the High Court stated that while ‘courts [in Australia] will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts’, those decisions ‘are useful only to the degree of the persuasiveness of their reasoning’.³²

In *Dobree v Hoffman*,³³ the Full Court had occasion to consider the precedential value of English decisions in light of *Cook v Cook*. The issue was whether the Full Court should follow the decision of the English Court of Appeal in *Chorley’s* case.³⁴ Parker J started with a general proposition:

Viewed as a matter of precedent, decisions of the English Court of Appeal, which decided *Chorley’s* case, have never been formally binding on the Supreme Court of this State.³⁵

His Honour went on to note that, until the High Court’s ruling in *Cook v Cook*, the common view in Australia was that ‘in the absence of controlling authority, a State supreme court, including “a supreme court on appeal” should, as a general rule, follow decisions of the English Court of Appeal’.³⁶ In light of *Cook v Cook*, however, Parker J concluded that it would now be appropriate for the Full Court to depart from a decision of the English Court of Appeal in order to establish a rule of practice suited to local conditions in Western Australia. His Honour said:

Despite the relevance and persuasiveness of [English decisions] and of the rules of practice they establish, and despite our historical inclination to follow readily rules of practice established in England, it appears to me that there should remain scope for this Court ... to establish from time to time rules of practice which best suit the circumstances of this Court and practice within its jurisdiction.³⁷

30. McCormick ‘Judicial Citation’ supra note 1.

31. (1986) 162 CLR 376.

32. Ibid.

33. (1996) 18 WAR 36.

34. *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872.

35. *Dobree v Hoffman* supra n 33, 43-44.

36. *Cook v Cook* supra n 31, 390.

37. *Dobree v Hoffman* supra n 33, 44. Rowland and Steytler JJ concurred. Significantly, the case departed from the English position only on a point of practice and not on a rule of common law.

4. Co-ordinate citations

‘Co-ordinate citations’ are citations to other courts at the same tier in the courts’ hierarchy.³⁸ In the Full Court of the Supreme Court of Western Australia, citations to appellate courts in other States and Territories in this country are co-ordinate citations. As a matter of precedent, the Court of Appeal of each State supreme court is not bound by the decisions of Courts of Appeal in other States, but their decisions are highly persuasive authority. Thus in *R v Lorkin*,³⁹ the Full Court was asked to decide whether the trial judge should have refused to accept the tender of a nolle prosequi to avoid injustice to the accused. Malcolm CJ noted that although this issue had never previously arisen in Western Australia, it had twice arisen in Queensland. On each occasion the Queensland Court of Appeal had held that the trial judge did have jurisdiction to refuse to accept a nolle prosequi in order to prevent an abuse of process. The Full Court considered it was appropriate to follow the Queensland decisions. Malcolm CJ stated: ‘The decisions of the Queensland Court of Criminal Appeal on identical legislation, while not binding on this Court, are of persuasive authority’.⁴⁰

There are two principles underpinning the need for co-ordinate citations. The first is that a consistent approach is required when decisions concern the effect of a Commonwealth Act or uniform or similar legislation. The second is the need for consistency in the development of the common law of Australia.⁴¹ There are obiter dicta in the Supreme Court of Western Australia which recognise both principles. In the Full Court, Parker J has recognised the need to maintain uniform rules of practice in Australian jurisdictions.⁴² Likewise, in the first instance decision in *Temsign v Biscen*,⁴³ which involved the interpretation of Commonwealth legislation, Wheeler J stated:

It is undesirable that there should be conflicting decisions relating to the meaning of a Commonwealth statute, and I accept that it is desirable for a court or a judge to follow the decisions of other courts or judges of comparable standing in respect of such legislation.⁴⁴

These statements of principle also extend to interpreting uniform national legislation following the High Court’s decision in *Australian Securities Commission v Marlborough Gold Mines Ltd*,⁴⁵ an appeal from a decision of the Full Court of the

38. McCormick ‘Judicial Citation’ supra n 1.

39. (1995) 15 WAR 499.

40. Ibid, 516.

41. See *R v Morrison* [1999] 1 Qd R 397, 401, and the cases cited therein.

42. *Dobree v Hoffman* supra n 33, 44.

43. (1998) 20 WAR 47.

44. Ibid, 56.

45. (1993) 177 CLR 485.

Supreme Court of Western Australia. Marlborough Gold Mines had applied to the Supreme Court for an order under section 411 of the Corporations Law that a meeting of its members be convened to consider a scheme of arrangement converting it from a limited liability to a no liability company. Following the hearing at first instance before Commissioner Ng, the Full Court of the Federal Court held in *Windsor v National Mutual Life Association of Australasia*⁴⁶ that section 411 could *not* be used to get approval for this sort of scheme. In contrast, Commissioner Ng, and the Full Court of the Supreme Court of Western Australia on appeal, approved the scheme, thus placing a different interpretation on section 411 than that of the Federal Court in *Windsor*.⁴⁷ The High Court reversed the decision of the Full Court of the Supreme Court of Western Australia. It held that the Corporations Law does not permit the conversion of a limited liability company into a no liability company, and that section 411 does not authorise approval of an arrangement that effects such a conversion. The High Court was critical of the Full Court's decision not to follow the Full Court of the Federal Court in *Windsor*. In a joint judgment Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ stated:

It is somewhat surprising that the Full Court of the Supreme Court of Western Australia, and more particularly that Mr Commissioner Ng, declined to follow what was said by the Full Court of the Federal Court in *Windsor*. Although the considerations applying are somewhat different from those applying in the case of Commonwealth legislation, uniformity of decision in the interpretation of uniform national legislation such as the [Corporations] Law is a sufficiently important consideration to require that an intermediate appellate court – and all the more a single judge – should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that the interpretation is plainly wrong.⁴⁸

5. Academic authority

Academic authorities are not binding on any court, but previous studies have identified several related reasons why they are cited in judgments.⁴⁹ One reason why an academic authority may be referred to is to assist in determining what an earlier case decided. For example, in *Beverley v Tyndall Life Insurance Co Ltd*⁵⁰

46. (1992) 106 ALR 282.

47. The decision of Commissioner Ng is reported in *Re Marlborough Mines* (1992) 10 ACLC 1, 529. The decision of the Full Court of the WA Supreme Court is reported in *Australian Securities Commission v Marlborough Gold Mines* (1993) 11 ACLC 101.

48. *Marlborough Gold Mines* supra n 45, 492.

49. Smyth 'Academic Writing' supra n 6; 'Other Than Accepted Sources' supra n 6; 'The Authority of Secondary Authority' supra n 7.

50. (1999) 21 WAR 327, 332.

Malcolm CJ referred to *Allis-Chalmers v Maryland Fidelity & Deposit Co*,⁵¹ where the House of Lords had held that full disclosure must be made of all material facts prior to entering into a contract of insurance. The Chief Justice noted:

The recognition of a material duty of disclosure in relation to all matters relevant to the entitlement of an insured to recover under the [insurance] policy would be an obvious extension of the duty of good faith. There seems to be a question whether this is what Lord Bridge intended.⁵²

Malcolm CJ then referred to a discussion in *MacGillvray on Insurance Law* on the scope of the House of Lords' decision in *Allis-Chalmers* to assist him in resolving the uncertainty.

A second reason for citing academic authority is convenience. This occurs where the law is neatly summarised in an authoritative text, particularly one that has been accepted in previous cases as generally stating the law correctly. For example, in *Walsh v Tattersall*⁵³ Dawson and Toohey JJ considered that the law against duplicity was 'succinctly stated' in *Archbold's Criminal Pleading and Practice* and set out the relevant passage. Subsequently, in *R v Kailis*⁵⁴ Malcolm CJ also relied on *Archbold's* observations on duplicity, noting that they had been approved by the High Court.

Thirdly, judges may draw on the opinion of academic commentators to provide support for their interpretation of a particular case. Numerous examples of academic authorities being used in this way can be found. A related practice is to cite the extra-curial observations of a notable judge to support a particular interpretation of the law. An example is to be found in the judgment of Malcolm CJ in *Re Real Estate & Business Agents Supervisory Board; Ex parte Cohen*, where his Honour referred to an essay by Lord Bingham, Lord Chief Justice of England, in support of the principle that an applicant for judicial review must be denied relief if he or she has not exhausted all other remedies, including the right of appeal.⁵⁵

How appropriate is it to cite academic authority?⁵⁶ In England and North America most judicial opinion is favourable. One of the most recent extra-judicial pronouncements on this point is by Michel Bastarache, a Justice of the Supreme Court of Canada:

51. (1916) 114 LT 433.

52. *Beverley v Tyndall Life Insurance* supra n 50, 332.

53. (1996) 188 CLR 77, 84.

54. (1999) 21 WAR 100, 110.

55. (1999) 21 WAR 158, 186. See Lord Bingham 'Should Public Law Remedies be Discretionary?' [1991] Pub LJ 64, 71-73.

56. For a more detailed discussion of this issue in an Australian context: see Smyth 'Academic Writing' supra n 6; 'Other Than Accepted Sources' supra n 6; 'The Authority of Secondary Authority' supra n 7.

The contribution of academics to the development of legal principles and coherent judicial decisions is invaluable. The nature of the law itself is being transformed. The work of academics serves to provide a contextual social background for legal disputes, helps to make judges aware of the underlying reasons for the decisions that they make and offers useful suggestions for reform. No principled approach to decision-making can ignore the role of academics.⁵⁷

The appropriate use of academic texts has also been discussed by the House of Lords in *Hunter v Canary Wharf Ltd*.⁵⁸ In that case Lord Cooke referred to several academic authorities on the ground that where the law is unsettled, it may be valuable to consider the general trend of scholarly opinion. Lord Goff, however, offered a veiled criticism of Lord Cooke's use of academic authority. His Lordship said that his own practice was to cite such authority sparingly:

In the present circumstances ... I feel driven to say that I found in the academic works which I consulted little more than an assertion of the desirability of extending the right of recovery in the manner favoured by the Court of Appeal.... I have to say ... that I have found no analysis of the problem; and, in circumstances such as this, a crumb of analysis is worth a loaf of opinion.⁵⁹

Professor Peter Cane has taken a middle course between the views of these two Law Lords:

Most academics cannot expect to be taken seriously by judges if they merely express opinions unsupported by analysis. On the other hand, careful rehearsal of arguments for and against particular rules can only take us so far: it can, in Lord Cooke's words, 'expose the alternatives'.... But having stated the pros and cons, deciding on which side the balance of arguments falls is, in the absence of an agreed and precise form of measurement, inevitably a matter of personal opinion, preference and conviction. At this level, the opinions of academics are not inherently less valuable than those of judges, despite lacking constitutional weight.⁶⁰

In Australia there have been few statements by judges on the persuasive value of academic authority, and there do not seem to have been any such statements by the judges of Western Australia. Nevertheless, the few comments that have been made by judges of the High Court give at least qualified support for the use of academic authority. For example, Sir Gerard Brennan has argued that law reviews can play a crucial role in shaping the opinions of appellate court judges:

It is the function of the academic profession and, in particular, of university law reviews to supervise the modern development of Australian law. But that must be

57. M Bastarache 'The Role of Academics and Legal Theory in Judicial Decision-Making' (1999) 37 *Alberta L Rev* 739, 746.

58. [1997] AC 655.

59. *Ibid*, Lord Goff 697.

60. P Cane 'What a Nuisance' (1997) 113 *LQR* 515, 519.

done with an understanding of what is involved in judicial development of the law.⁶¹

II. DATA COLLECTION AND GENERAL CITATION PATTERNS

1. Approach and limitations of the study

The sample cases in this study are the decisions of the Full Court reached in the 1990s and reported before 30 June 2000. In total this amounted to 408 cases, which were reported in volumes 1 to 21 inclusive of the *Western Australian Reports*. To keep the sample to a manageable size, unreported decisions were not included. This is consistent with previous studies of courts in Australia, New Zealand and North America. However, it limits the value of the study because it precludes an examination of whether there are differences in citation patterns between reported and unreported cases. There is an argument that as reported cases generally deal with the more difficult legal issues, the number of citations to previous authorities in them can be expected to be higher than in unreported cases.

All citations to case-law and academic authorities in the sample were counted. Academic authorities were counted only if the judge(s) quoted material from or discussed the authority. Because judges are under no obligation to bow to academic authority, one problem that arises is to distinguish between a judge who simply mentions such an authority and a judge who actually relies on that authority in reaching his or her decision. The narrow approach employed here with respect to academic authorities focuses attention on those references where it is clear that the author of the article or textbook has had an impact on the judge's reasoning.⁶² This is important because, in the fallout from the debate over Lord Cooke's speech in *Hunter v Canary Wharf Ltd*,⁶³ it is necessary to be clear that the judge actually relied on the academic source.

If an authority received more than one citation in the same paragraph of a judgment it was counted only once. If there were further citations to that authority in subsequent paragraphs these were counted again. The reason for doing this is that it was assumed the authority was being cited for a different proposition and therefore had separate significance.⁶⁴

61. G Brennan 'A Critique of Criticism' (1993) 19 Mon UL Rev 213, 215.

62. Some previous studies have used a broader approach with respect to counting academic authorities and some have used the narrow approach employed here. A notable example of the use of the narrow approach is Black & Richter supra n 1, 380-381.

63. Supra n 58, and accompanying text.

64. This is consistent with all the previous studies in Australia and New Zealand. Each of the studies in supra nn 5-9 use this approach. This is also the approach used in several of the US studies: see eg Daniels supra n 3.

2. General citation patterns

An overview of citation patterns in the Full Court is given in Table 1. There were a total of 10 252 citations (judicial and academic). On average, 25.1 authorities were cited per case; 8.5 authorities were cited per judgment; and 1.3 authorities were cited per page.

Using the terminology in Part I, most citations were hierarchical: citations to previous decisions of the High Court constituted 28.37 per cent of total citations. Consistency citations to previous decisions of the Full Court of the Supreme Court of Western Australia made up 17.88 per cent of citations. Co-ordinate citations to decisions of other State and Territory supreme courts were responsible for 20.71 per cent of citations. Altogether a total of 70.14 per cent of citations were to decisions of Australian courts. Deference citations to English courts, and to courts in countries other than Australia and England, were responsible for 25.49 per cent and 1.38 per cent of citations respectively. Citations to academic authorities made up only 2.99 per cent of the total citations.

3. What influences citation patterns?

Studies in the United States have stressed the influence of judges' associates on citation patterns in reported cases. Professor Landes makes the following observation:

Law clerks, not judges, are often the authors of opinions.... To be sure, some judges still write their own opinions, others do extensive editing, and others write first drafts. But some judges delegate the entire task of opinion writing to law clerks with minimal supervision and editing.⁶⁵

In Australia it is most unlikely that the influence of judges' associates on citation patterns is nearly as significant as it is in the United States.⁶⁶ Western Australian judges have not disclosed whether they write their own judgments, but there is evidence that Australian judges almost always do so, at least after the first draft.⁶⁷

65. Landes et al 'Judicial Influence' supra n 4, 273-274.

66. Anecdotal evidence based on the observations of former High Court associates and former law clerks in the US Supreme Court suggests that the influence of judges' associates in Australia is much less than that of judges' clerks in the United States. Compare the observations of A Leigh 'Behind the Bench: Associates in the High Court of Australia' (2000) 25 Alternative LJ 295 with E Lazarus *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (New York: Time Books, 1998).

67. Eg PW Young 'Judgment Writing' (1996) 70 ALJ 513, 514. Young, a justice of the NSW Supreme Court, suggests: 'Most Australian judges write their own decisions. Most probably at some stage or other they ask a legally-trained member of their staff to do a first draft ... when a case has been poorly argued and it is necessary for someone to do the proper research. However, it is rare for the draft to be recognisable when the final judgment is

Table 1: Overview of citation patterns in the Full Court, 1990–1999

Court cited	Date of case cited	Number of citations	Percentage
High Court	pre-1920	126	1.23
	1920-29	64	0.62
	1930-39	162	1.58
	1940-49	105	1.02
	1950-59	198	1.93
	1960-69	203	1.98
	1970-79	424	4.14
	1980-89	1048	10.22
	1990-99	579	5.65
Total		2909	28.37
WA Supreme Court	pre-1920	29	0.28
	1920-29	3	0.03
	1930-39	7	0.07
	1940-49	7	0.07
	1950-59	19	0.18
	1960-69	69	0.67
	1970-79	239	2.34
	1980-89	718	7.00
	1990-99	742	7.24
Total		1833	17.88
Other State/Territory supreme courts		2123	20.71
Lower WA courts		68	0.66
Federal Court		239	2.33
Other Australian courts/tribunals		19	0.19
Total Australian		7191	70.14
House of Lords		744	7.26
Privy Council		52	0.51
Court of Appeal		1185	11.56
Other English courts		632	6.16
Total English		2613	25.49
Other countries		141	1.38
Academic authorities		307	2.99
Grand Total		10252	100.0

NB: Cases dealing with criminal law and procedure were responsible for one-third of the sample. Cases concerned with civil procedure, corporations law and contract were also prominent, with each accounting for 4 per cent or more of the sample.

The authorities cited by counsel in argument may also have an important influence on what the judges themselves cite. It was not possible to quantify the influence of counsel in this study because the *Western Australian Reports* do not publish a comprehensive list of all authorities cited by counsel in argument. In this respect, this study is no different from most of the previous Australian studies. However, some observations can still be made about the extent to which judges depend on the authorities cited to them by counsel. A contentious area is where counsel cites an academic authority on a non-legal matter, in which the judge is not an expert. In *R v GP*,⁶⁸ Malcolm CJ stated:

At common law a judge is entitled to refer to learned works of authority on a particular subject of history, literature, science or art. By section 72 of the Evidence Act 1906 (WA) in matters of public history, literature, science, or art, a court is entitled to refer to 'such published books, maps or charts as the court considers to be of authority on the subjects to which they respectively relate'.⁶⁹

His Honour also cited some prominent instances where this had occurred in the High Court. For example, in *Timbury v Coffee*⁷⁰ Dixon J relied on a medical textbook on the subject of alcoholism to reach conclusions on the impact of acute intoxication on the mental processes of a testator. Likewise, in *R v Alexander*,⁷¹ Stephen J relied on published material on psychology in reaching conclusions about the reliability of identification evidence.

The adversarial nature of judicial proceedings, however, means that whenever a judge consults case-law or an academic authority (except where it has been cited in argument) counsel must be given the opportunity to comment on it in a written submission. This is illustrated by *R v GP*, a case where the defendant was convicted of a sexual assault on a child. The trial judge imposed a relatively light sentence, in part because 'the literature on child sexual abuse is by no means of one mind as to the inevitability of harm'.⁷² The Crown appealed on the basis that the trial judge had reached this conclusion based of his own interpretation of published material on paedophilia, on which there had been no opportunity for submissions to be made. Malcolm CJ ordered that the trial judge make the relevant literature available to the parties so that submissions could be made. His Honour said:

Where a judge undertakes such a reference to works of authority, either pursuant to the statutory provisions or at common law, he is not entitled to inform himself

produced'. See also M Kirby 'What Is It Really Like to Be a Justice of the High Court of Australia?' (1997) 19 Syd L Rev 514, 520. Kirby writes: 'My associates don't write my judgments. I have never had my staff write my judgments'.

68. (1997) 18 WAR 196.

69. *Ibid*, 212.

70. (1941) 66 CLR 277, 283-284. The text was Stoddart *The Mind and Its Disorders* 5th edn (1926) 415.

71. (1981) 145 CLR 395, 409, referring to the so-called displacement effect.

72. *R v GP* supra n 68, 210.

on any contentious matter without giving the parties an opportunity to controvert or comment upon the work to which reference has been made.⁷³

III. WHICH AUTHORITIES DOES THE FULL COURT CITE?

1. Consistency citations

Most studies in the United States have found that courts cite their own previous decisions more than the decisions of other courts. Studies in Canada suggest that their provincial courts cite the Supreme Court of Canada slightly more than their own previous decisions.⁷⁴ This is also the case in Australia where previous studies of citation practice in State and Territory supreme courts indicate that these courts cite decisions of the High Court slightly more often than their own decisions. A study of the Supreme Court of Victoria found that it cited its own decisions most in 1970 and 1980, and that in 1990 citations to its own decisions came second to citations to the High Court.⁷⁵ In the study of the six State supreme courts combined, 24.2 per cent of citations were to each court's own decisions and 25.2 per cent of citations were to the High Court. Three States – Victoria, New South Wales and South Australia – cited their own decisions more than the High Court, while the other three did not. For two States – Tasmania and Western Australia – combined citations to other State supreme courts were more than citations to either their own decisions or previous decisions of the High Court.⁷⁶

In the present study, the Full Court of the Supreme Court of Western Australia cited its own previous decisions in just under 18 per cent of the sample cases. This was less than two-thirds of the total number of citations to decisions of the High Court, but was more than the citations to any other single court.

Table 1 suggests that the Full Court cites its recent decisions more frequently than older decisions. There were 742 citations to Supreme Court cases decided between 1990 and 1999; this fell to 718 citations to Supreme Court cases decided between 1980 and 1989 and so on. There is a clear pattern stretching back to the 1920s showing that citations to cases decided in previous decades decline over time.

This phenomenon has been observed in other citation studies with such regularity that it has given rise to the notion of a 'half-life' for a decision.⁷⁷ There are

73. Ibid, 212.

74. Eg McCormick 'Judicial Citation' supra n 1, 878; 'Judicial Authority' supra n 2, 287.

75. Smyth 'What do Judges Cite?' supra n 8.

76. Smyth 'What do Intermediate Appellate Courts Cite?' supra n 8.

77. The most extensive discussion of this phenomenon is in Landes & Posner 'Legal Precedent' supra n 4 and Merryman 'Toward a Theory of Citations' supra n 5.

several reasons that explain why judges tend to cite recent decisions more frequently than older decisions. These are well-documented in the literature on the citation practices of courts. One obvious factor is that the stock of older decisions is reduced over time as cases are overruled either by later decisions or by statute. Another consideration is that legal opinion evolves so that even if earlier decisions are not overruled, their reasoning becomes less persuasive or relevant. A third factor is that later cases are often more relevant on the facts because the social context in which earlier decisions were made has changed.⁷⁸

2. Hierarchical and co-ordinate citations

As indicated above,⁷⁹ the High Court was cited in 28.37 per cent of cases, making it the single most influential court in the sample. The Full Court appears to rely on the High Court more heavily than do other Australian State supreme courts. For example, in 1970, 1980 and 1990 the Supreme Court of Victoria cited the High Court in only 14.9 per cent, 12.4 per cent and 22 per cent of cases respectively.⁸⁰

Table 1 indicates that co-ordinate citations to other State and Territory supreme courts accounted for 20.71 per cent of total citations. This is considerably higher than State supreme courts in the United States, where interstate citations make up 7-8 per cent of total citations.⁸¹ The explanation for this disparity is that there is greater scope for co-ordinate citations within the integrated Australian legal system. Unlike Australia, the United States has multiple common laws. Each State has its own common law and there is also a federal common law. In contrast, there is only one common law in Australia. Thus, if the courts of States A and B disagree about the common law, one or both must be wrong. Related to this, there is also a greater need for hierarchical citations to the High Court in Australia than to the federal Supreme Court in the United States. This is because the US Supreme Court does not have a general supervisory appellate jurisdiction equivalent to that of the High Court under section 73 of the Constitution.

Co-ordinate citations in the Full Court are also higher than the average for other State supreme courts in Australia, as reported in the previous study of all six State supreme courts. That study found that out-of-State citations were responsible for 17.8 per cent of all citations on average.⁸² The Tasmanian Court of Appeal (25.2 per cent) and the Full Court of the Supreme Court of Western Australia (23.4 per

78. Merryman 'Towards a Theory of Citations' *supra* n 5, 395.

79. *Supra* p 13.

80. Smyth 'What do Judges Cite?' *supra* n 8.

81. For evidence from the US: see Merryman 'Toward a Theory of Citations' *supra* n 5, 401-404; Friedman *et al supra* n 5, 801-804.

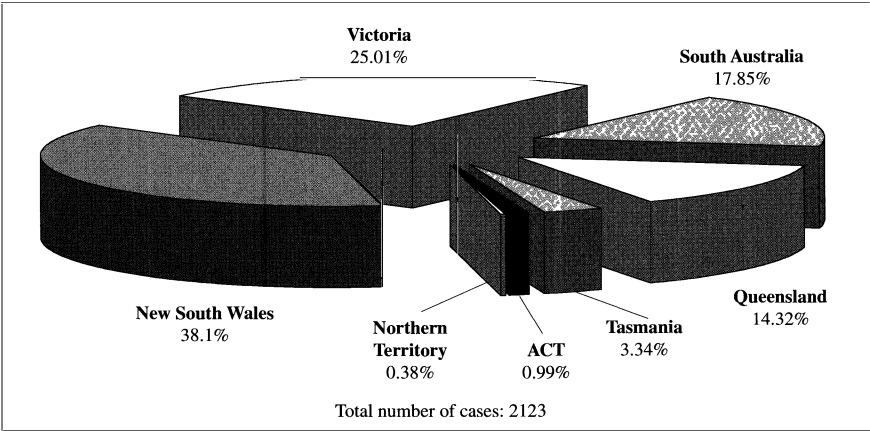
82. Smyth 'What do Intermediate Appellate Courts Cite?' *supra* n 8.

cent) had the highest proportion of out-of-State citations.⁸³ This suggests that the Full Court is a big ‘consumer’ of co-ordinate citations, relative to States such as New South Wales and Victoria. This reflects the smaller population base in Western Australia relative to the eastern States. There is a smaller stock of cases on which to draw and thus a greater need to rely on case-law from co-ordinate jurisdictions.

Figure 1, below, breaks down citations by the Full Court of the Supreme Court of Western Australia to other State and Territory supreme courts. It shows that citations to those other supreme courts were not uniform. New South Wales and Victoria together supplied almost 65 per cent of co-ordinate citations by the Full Court, while at the other end of the spectrum the Australian Capital Territory and the Northern Territory each provided less than one per cent of co-ordinate citations.

There are several factors that could potentially explain why the Victorian and New South Wales supreme courts were cited more than courts of the other States and Territories. One reason is that citations to another State supreme court depend on the relative prestige of that court, and the prestige of the Victorian and New South Wales supreme courts exceeds that of other intermediate appellate courts in Australia. This is consistent with the fact that a disproportionate number of High Court judges have been members of the Supreme Court of Victoria or New South Wales or have come from their respective Bars. Of the 43 appointments to the High Court, 23 (53.5 per cent) have come from New South Wales and 12 (27.9 per cent) from Victoria.⁸⁴ This finding is also consistent with studies in North America, which

Figure 1: Co-ordinate citations to decisions of other Australian supreme courts



83. Ibid.

84. D Williams ‘Judicial Independence and the High Court’ (1998) 27 UWAL Rev 140, 144.

have found that State and provincial supreme courts which have reputations for doctrinal leadership (eg, New York, California, Massachusetts and Ontario) receive more out-of-State citations than other State or provincial supreme courts, holding socio-cultural factors constant.⁸⁵

3. Deference citations

Table 1⁸⁶ shows that deference citations to English courts accounted for 25.49 per cent of all citations. This result suggests that, irrespective of the observations of Parker J in *Dobree v Hoffman*,⁸⁷ which stressed the need for a uniquely Western Australian law, English courts are still an important source of authority. The English Court of Appeal received 11.56 per cent of citations; the House of Lords received 7.26 per cent of citations; lower English courts received 6.16 per cent of citations; and the Privy Council received 0.51 per cent of citations. The total figure (25.49 per cent) is slightly higher than the figure for the other six Australian State supreme courts, in which English courts provided on average about 20 per cent of citations.⁸⁸ It is also higher than for most other courts, with the exception of the New Zealand Court of Appeal. English authorities provide 27 per cent of citations in the New Zealand Court of Appeal;⁸⁹ 17.6 per cent of citations in the High Court of Australia;⁹⁰ 15 per cent of citations in the Supreme Court of Canada;⁹¹ 12 per cent of citations in the provincial courts of Canada;⁹² and less than 1 per cent of citations in the State supreme courts of the United States.⁹³

There are also clear differences in terms of the frequency with which specific English courts were cited. In particular, the Court of Appeal, House of Lords and lower English courts were all cited with much greater frequency than the Privy Council. The small number of citations to the Privy Council replicates the findings of previous studies for Australian State supreme courts, the High Court of Australia, Canadian courts and the New Zealand Court of Appeal.⁹⁴ One explanation for this is

85. See eg Friedman et al supra n 5; Manz supra n 5.

86. Supra p 13.

87. Supra n 33.

88. Smyth 'What do Intermediate Appellate Courts Cite?' supra n 8.

89. Smyth 'Judicial Citations' supra n 9.

90. Smyth 'Citations by Court' supra n 6.

91. McCormick 'Judicial Citation' supra n 1.

92. McCormick 'Judicial Authority' supra n 2.

93. Eg Manz supra n 5, 132 found that the New York Court of Appeals cited no English cases in 1993. Mann supra n 5, 58 found that of the 2 522 cases cited by the North Carolina Supreme Court in 1977, only six were English. Leonard supra n 5, 139 found that the Ohio Supreme Court only cited three English decisions in 1990.

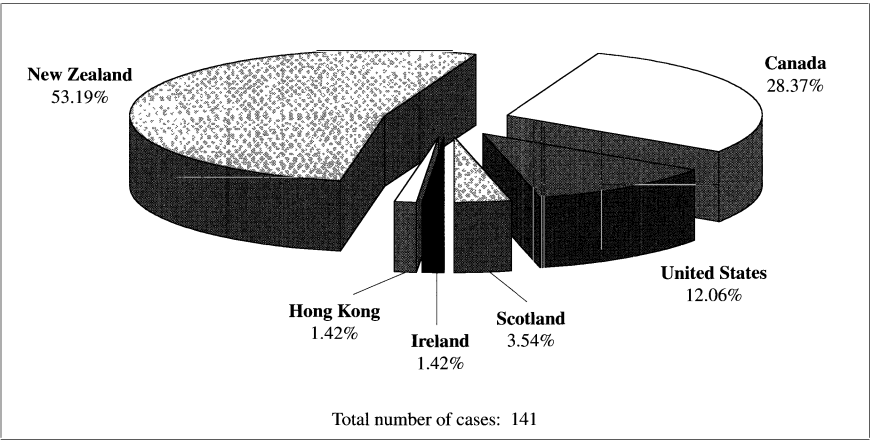
94. See Smyth 'What do Judges Cite?' supra n 8; 'What do Intermediate Appellate Courts Cite?' supra n 8 (Australian State supreme courts); 'Citations by Court' supra n 6 (High Court); McCormick 'Judicial Citation' supra n 1; 'Judicial Authority' supra n 2 (Canadian courts); Smyth 'Judicial Citations' supra n 9 (New Zealand Court of Appeal).

that there are less Privy Council decisions to cite than decisions of other English courts. This is a trend which has become more pronounced over time as all the major Commonwealth countries, with the exception of New Zealand, have removed the right of appeal to the Privy Council. Another reason for the small number of citations to the Privy Council could be that it has a reputation for producing decisions of doubtful quality. For this reason, in Australia the Privy Council has often been viewed as the ‘poor cousin’ of the House of Lords.⁹⁵

Deference citations to courts in foreign countries other than England were responsible for 1.38 per cent of citations. This figure is slightly lower than for other State supreme courts, according to the results of previous studies. Research on the Supreme Court of Victoria found that in 1970, 1980 and 1990, 2-3 per cent of citations were to courts in countries other than Australia and England.⁹⁶ In the study of the six Australian State supreme courts, citations to courts in countries other than Australia and England accounted for 2.3 per cent of total citations on average, although in Queensland the number was as high as 4.8 per cent.⁹⁷

Figure 2, below, provides a breakdown of citations to courts in countries other than Australia and England. Courts in New Zealand received 53.19 per cent of these citations; courts in Canada received 28.37 per cent; and courts in the United States received 12.06 per cent. Courts in Scotland were cited five times, while courts in Hong Kong and Ireland were cited twice each. The pre-eminence of New Zealand, Canada

Figure 2: Deference citations to decisions of foreign courts (excepting England)



95. J Goldring *The Privy Council and the Australian Constitution* (Hobart: Tas UP, 1996).
96. Smyth ‘What do Judges Cite?’ supra n 8.
97. Smyth ‘What do Intermediate Appellate Courts Cite?’ supra n 8.

and the United States replicates the results of previous Australian studies.⁹⁸ The reason for the predominance of these countries is that Canada and the United States both have federal common law systems similar to Australia, whilst New Zealand is nearby geographically and has close historical ties with this country.

4. Academic authority

Academic authorities were responsible for 2.99 per cent of total citations. This result is not directly comparable to previous Australian studies for two reasons. First, for the reasons outlined above,⁹⁹ a more restrictive view of citations to academic authorities was adopted than in previous Australian studies. In this study the citation was only counted if the judge *quoted* or *discussed* the authority. Secondly, information was only collected on citations to academic authorities, defined as textbooks, periodicals and legal encyclopedias (eg, *Halsbury's Laws of England* or *Halsbury's Laws of Australia*). Information was not collected on other secondary authorities such as dictionaries and law reform commission reports. The previous study of the six State supreme courts, using broader criteria, found that secondary authorities accounted for 6–7 per cent of total citations and that a high proportion of these were citations to academic authorities as defined in this study.¹⁰⁰ The results of the current study suggest that the number of occasions when Western Australian judges actually rely on academic authorities – meaning that they quote or discuss them in their judgments – as opposed to merely mentioning them in passing is relatively small.

The texts that were most often quoted and/or discussed in the sample cases are listed in Table 2. Altogether 98 different texts were cited a total of 236 times. Of these, 44 texts received multiple citations, with 15 texts receiving four or more citations and 28 texts (listed in Table 2) receiving three or more citations.

The most heavily cited texts reflect the workload of the Full Court – criminal law and evidence texts such as *Cross on Evidence*, *Archbold*, and *Stephen's Digest of Criminal Law* feature prominently. The Full Court cites a mixture of modern commentators (eg, O'Donovan and Gillies) and classic commentators (eg, Chitty, Blackstone, Phipson, Roscoe and Wigmore). Several writers had more than one of their works cited. These include both classic commentators (Chitty, Cross and Wigmore)¹⁰¹ and modern authors (Devlin, Gillies and Williams).¹⁰²

98. Smyth 'What do Judges Cite?' supra n 8; 'What do Intermediate Appellate Courts Cite?' supra n 8.

99. Supra p 11.

100. Smyth 'What do Intermediate Appellate Courts Cite?' supra n 8.

101. J Chitty *Contracts* (3), *Supreme Court Practice* (2), *King's Bench Forms* (1); R Cross *Evidence* (24), *The English Sentencing System* (1); JH Wigmore *Evidence* (3), *The Science of Judicial Proof* (1). Numbers in parentheses refer to number of citations.

102. PD Devlin *Trial by Jury* (1), *The Judge* (1); P Gillies *Law of Evidence* (4), *Criminal*

Table 2: Textbooks frequently quoted and/or discussed

Text	Citations
R Cross <i>Evidence</i>	24
JF Archbold <i>Criminal Pleading, Evidence & Practice</i>	20
JF Stephen <i>Digest of the Criminal Law</i>	10
EJ MacGillivray <i>Insurance Law</i>	7
J O'Donovan <i>Company Receivers and Managers</i>	7
HWR Wade <i>Administrative Law</i>	7
JF Odgers <i>High Court Pleading and Practice</i>	5
DC Pearce & RS Geddes <i>Statutory Interpretation in Australia</i>	5
JG Fleming <i>Law of Torts</i>	4
P Gillies <i>Law of Evidence in Australia</i>	4
KS Jacobs <i>Law of Trusts in Australia</i>	4
SL Phipson <i>Law of Evidence</i>	4
P Seaman <i>Civil Procedure in Western Australia</i>	4
ICF Spry <i>Principles of Equitable Remedies</i>	4
DA Thomas <i>Principles of Sentencing</i>	4
W Blackstone <i>Commentaries on the Laws of England</i>	3
RA Brown <i>Documentary Evidence in Australia</i>	3
GC Cheshire & CHS Fifoot <i>Law of Contract</i>	3
J Chitty <i>Contracts</i>	3
A Friendly & RL Goldfarb <i>Crime and Publicity</i>	3
A Gardner (ed) <i>The Challenge of Resource Security: Law and Policy</i>	3
R Goff & GH Jones <i>Law of Restitution</i>	3
PW Hogg <i>Liability of the Crown</i>	3
RP Meagher, WMC Gummow & JRF Leane <i>Equity: Doctrine and Remedies</i>	3
MJ Mustill & SC Boyd <i>Law and Practice of Commercial Arbitration</i>	3
H Roscoe <i>Digest of the Law of Evidence in Criminal Cases</i>	3
JP Taylor <i>Treatise on the Law of Evidence</i>	3
JH Wigmore <i>Evidence in Trials at Common Law</i>	3
Total number of textbooks with 3 or more citations	28

NB: Total number of textbooks cited in sample cases: 236.

Merryman has discussed the tendency of the Supreme Court of California to cite 'local works'. These are works specifically relevant to the citing court, which are 'organized to make research ... quick and easy'.¹⁰³ The Full Court of the Supreme Court of Western Australia has its own local favorite: P Seaman *Civil Procedure in Western Australia*,¹⁰⁴ which was cited four times in the sample cases.

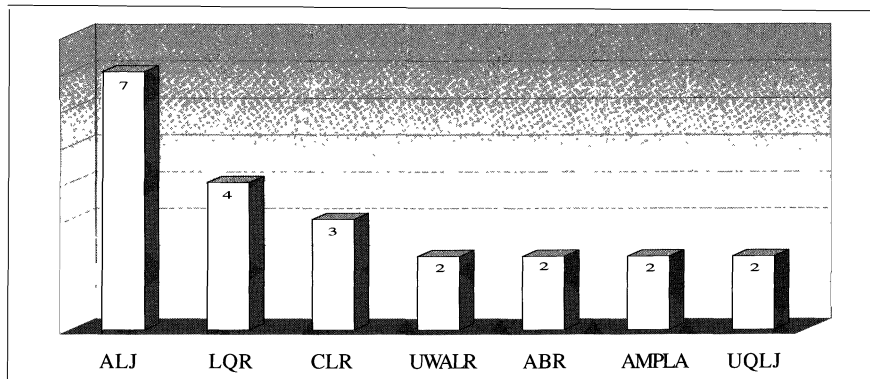
The legal periodicals which were most frequently quoted and/or discussed in the sample cases are shown in Figure 3.¹⁰⁵ In Part I of this paper it was suggested that one reason judges cite periodical literature is to draw on the extra-judicial observations of other judges to decide what the law is or to buttress a conclusion

Law (1); G Williams *Joint Torts* (1), *Criminal Law: The General Part* (1).

103. Merryman 'Toward a Theory of Citations' *supra* n 5, 413.

104. Sydney: Butterworths.

105. Altogether 18 different periodicals were cited on 33 occasions, with seven periodicals (shown in Figure 3) receiving multiple citations.

Figure 3: Legal periodicals receiving two or more citations

ALJ – Australian Law Journal; LQR – Law Quarterly Review; CLR – Criminal Law Review (UK); UWALR – University of Western Australia Law Review; ABR – Australian Bar Review; AMPLA – Australian Mining & Petroleum Law Association Bulletin; UQLJ – University of Queensland Law Journal. Figures show total number of citations.

on a particular point. On six of the occasions when journal articles were cited (18.2 per cent of the time), the reference was to an extra-judicial observation by a judge. On two occasions citations were to articles by judges of the Supreme Court of Western Australia and on three occasions citations were to articles by judges of the High Court. The Full Court cited articles by Lord Bingham (the only English judge to be quoted), Sir Gerard Brennan, Sir Anthony Mason, Sir Douglas Menzies, Chief Justice David Malcolm and Justice David Ipp.

From a Western Australian perspective, Figure 3 shows that articles in law reviews of Western Australian universities have had little impact on decision-making in the Full Court. This is in spite of initiatives such as the ‘Western Australian Forum’ in the *University of Western Australia Law Review*, which is specifically devoted to Western Australian issues. The *University of Western Australia Law Review* is the only law review of a Western Australian university to be quoted and/or discussed in the cases considered for the study and it was cited in only two reported cases over 10 years.¹⁰⁶

106. Nevertheless, recent surveys have shown the *UWA Law Review* to be one of the most quoted Australian university law journals. A citation analysis published in 1997 (I Ramsay & P Stapleton ‘A Citation Analysis of Australian Law Journals’ (1997) 21 Melb ULR 676, 692, Table 2) rated the *UWA Law Review* as the sixth most cited law journal out of 48 surveyed, whilst a survey published in 1999 showed that the *UWA Law Review* was the third most cited Australian university law journal in judgments of the High Court handed down in 1996 (R Smyth ‘A Quantitative Study of Secondary Source Citations in the High Court’ (1999) 22 UNSW LJ 19, 43, Table 4). This survey specifically singled out the *UWA Law Review* as one of three Australian university law journals which have ‘increased in importance over time,’ the other two journals being the *Sydney Law Review* and the *University of New*

It is clear that the Full Court cites considerably fewer journal articles than textbooks. This result is consistent with the findings of previous studies of State supreme courts in Australia.¹⁰⁷ Black & Richter offer one possible explanation. In their view:

As an over-generalisation, it might be said that articles often advance cutting edge normative arguments while books tend to contain positive statements of the way the law is.... [I]n many cases the [appellate courts] cite scholarship simply as an authoritative statement of the way the law presently is, not as an instance of an argument for how the law should be changed.¹⁰⁸

This is reflected in the fact that in Table 2 many of the most heavily cited texts are the 'standard' professional works.

IV. VARIATIONS IN THE CITATION PATTERNS OF INDIVIDUAL JUDGES

Tables 3A-C, below, present details of the citation practice of individual judges. Malcolm CJ¹⁰⁹ had the largest number of citations in an absolute sense (3 366) and the largest number of citations on a per judgment basis (17.4). In fact, Malcolm CJ was responsible for 32.8 per cent of all citations by the Full Court.

The following analysis only considers judges who delivered at least 20 judgments in the sample in order to ensure that the results provide a reasonably accurate picture of each judge's actual citation practice. Taking 20 judgments as the minimum benchmark, on a citations per judgment basis the other big 'citors' of authority in the Full Court were Owen J (10.8), Steytler J (9.6), Nicholson J (9.0)¹¹⁰ and Ipp J (9.0). At the other end of the spectrum the smallest number of citations, on a per judgment basis, were found in the judgments of Franklyn J (3.7).¹¹¹

To some extent these figures reflect the length of each judge's judgments. Malcolm CJ cited the most authorities, but this reflects the fact that in most of the cases in which he sat he delivered the leading and longest judgment. The other judges who sat with him often delivered relatively short concurring opinions.

South Wales Law Journal. The 'Western Australian Forum', referred to in the text, commenced in 1995 and is not concerned exclusively with the kind of 'black-letter' law issues which might interest a court.

107. Smyth 'What do Judges Cite?' *supra* n 8; 'What do Intermediate Appellate Courts Cite?' *supra* n 8.

108. Black & Richter *supra* n 1, 391.

109. Chief Justice of Western Australia since 1988.

110. Now a judge of the Federal Court of Australia, since 1995.

111. Other small 'citors' who delivered less than 20 judgments in the sample were Scott J (2.3 citations per judgment in 12 judgments) and Heenan J (2.6 citations per judgment in 7 judgments).

Table 3A: Citation practice of individual judges — Australian case-law

Judge	WA Supreme Court										High Court										Other courts*				TOTAL
	<20s	'20s	'30s	'40s	'50s	'60s	'70s	'80s	'90s	Total	<20s	'20s	'30s	'40s	'50s	'60s	'70s	'80s	'90s	Total	Sup	Fed	Low	Oth	
Malcolm	12	2	2	-	12	22	79	228	193	550	42	31	50	38	59	78	129	327	114	868	680	74	6	7	2185
Wallace	-	-	-	-	-	1	6	36	6	49	2	-	5	3	6	5	8	29	-	58	62	11	-	-	180
Brinsden	-	-	-	-	-	1	12	14	1	28	2	1	2	2	2	1	1	19	-	30	20	-	-	-	78
Kennedy	-	-	-	1	-	4	15	33	43	96	5	1	21	9	15	14	32	70	33	200	145	22	7	-	470
Olney	-	-	-	-	-	-	-	1	-	1	-	-	-	-	-	-	-	1	-	1	2	-	-	-	4
Pidgeon	2	-	-	-	2	10	25	57	70	166	8	4	6	1	9	8	26	59	70	191	171	14	13	2	557
Rowland	2	1	-	-	2	8	16	62	45	136	8	1	11	8	15	8	42	86	52	231	128	16	4	-	515
Franklyn	1	-	-	-	1	2	5	12	22	43	6	-	4	7	7	7	11	27	22	91	50	6	2	2	194
Seaman	-	-	-	-	-	-	6	31	13	50	3	2	3	2	8	5	12	35	12	82	40	6	2	-	180
Nicholson	1	-	-	-	-	-	6	11	9	27	2	-	8	3	8	4	12	31	10	78	86	10	8	-	209
Walsh	1	-	-	-	-	3	6	20	22	52	5	-	5	4	5	7	8	37	17	88	56	14	1	1	212
Ipp	-	-	-	-	-	4	18	54	72	148	10	6	17	12	16	19	46	98	63	287	188	20	3	2	648
Wallwork	-	-	-	1	1	1	9	24	16	52	1	5	5	2	8	9	7	20	24	81	48	4	7	-	192
Murray	-	-	1	-	-	4	23	61	84	173	5	3	6	2	9	10	25	71	35	166	124	12	1	-	476
Anderson	1	-	1	1	-	3	2	11	40	59	5	1	6	1	8	8	16	41	29	115	76	5	3	2	260
Owen	1	-	2	2	-	3	3	32	54	97	12	3	7	5	7	10	26	41	36	147	88	16	9	3	360
White	-	-	1	-	-	-	1	9	11	22	3	3	1	-	1	3	6	10	8	35	17	-	-	-	74
Scott	-	-	-	-	-	-	1	1	3	5	1	-	-	-	-	-	1	5	1	8	8	1	-	-	22
Steytler	8	-	-	1	1	1	6	14	25	56	6	2	3	5	10	4	13	29	32	104	93	-	1	-	254
Parker	-	-	-	1	-	2	-	3	10	16	-	1	2	1	3	3	1	8	14	33	29	5	-	-	83
Heenan	-	-	-	-	-	-	-	1	2	3	-	-	-	-	2	-	-	2	1	5	5	-	1	-	14
Templeman	-	-	-	-	-	-	-	3	-	3	-	-	-	-	-	-	1	2	2	5	5	3	-	-	16
Wheeler	-	-	-	-	-	-	-	-	1	1	-	-	-	-	-	-	1	-	4	5	2	-	-	-	8

*KEY – Sup: Other State and Territory supreme courts; Fed: Federal Court; Low: Lower Western Australian courts; Oth: Other courts and tribunals.

Note: DK Malcolm was appointed Chief Justice of the Supreme Court in 1988. Other justices from Wallace J downwards are ranked by date of appointment.

Table 3B: Citation practice of individual judges — overseas case-law/academic authority

Judge	English courts						Other Overseas courts	Academic authority	Grand Total*
	House Lords	Privy Cndl	Appeal Court	Lower courts	Total				
Malcolm	267	24	420	307	1018		54	109	3366
Wallace	12	3	23	7	45		8	5	238
Brinsden	4	2	11	3	20		3	4	105
Kennedy	72	4	74	44	194		12	11	687
Olney	-	-	-	-	-		-	-	4
Pidgeon	63	1	110	40	214		3	41	815
Rowland	33	3	52	30	118		7	12	652
Franklyn	23	-	52	23	98		1	4	297
Seaman	10	2	41	22	75		4	2	261
Nicholson	13	3	24	20	60		7	20	296
Walsh	20	-	32	6	58		-	22	292
Ipp	91	5	121	54	271		17	21	957
Wallwork	20	1	41	22	84		7	15	298
Murray	15	-	29	3	47		5	2	530
Anderson	18	2	32	6	58		5	6	329
Owen	36	1	63	18	118		2	6	486
White	10	1	13	7	31		1	7	113
Scott	2	-	1	-	3		1	1	27
Steytler	15	-	26	6	47		1	16	318
Parker	17	-	15	13	45		2	1	131
Heenan	1	-	2	-	3		-	1	18
Templeman	1	-	-	-	1		-	-	17
Wheeler	1	-	3	1	5		1	1	15

* Grand total = total of all authorities (Tables 3A and 3B).

Table 3C: Citation practice of individual judges — further breakdown

Total number			Total citations		Citations per judgment	
Judgments	Pages		Per judgment	Per page	High Ct & WA Sup Ct	Academic authority
194	2128		17.4	1.6	7.3	0.56
39	212		6.1	1.1	2.7	0.13
10	76		10.5	1.4	5.8	0.40
90	400		7.6	1.7	3.3	0.12
2	7		2.0	0.6	1.0	0.0
143	717		5.7	1.1	2.5	0.29
120	525		5.4	1.2	3.1	0.10
80	330		3.7	0.9	1.7	0.05
37	192		7.1	1.4	3.6	0.05
33	170		9.0	1.7	3.2	0.61
39	122		7.5	2.4	3.6	0.56
106	739		9.0	1.3	4.1	0.20
57	279		5.2	1.1	2.3	0.26
66	482		8.0	1.1	5.1	0.03
45	287		7.3	1.1	3.9	0.13
45	368		10.8	1.3	5.4	0.13
22	108		5.1	1.1	2.6	0.32
12	26		2.3	1.0	1.1	0.05
33	216		9.6	1.5	4.8	0.48
17	131		7.7	1.0	2.9	0.06
7	21		2.6	0.9	1.1	0.14
4	39		4.3	0.4	2.0	0.0
3	20		5.0	0.8	2.0	0.33

A different indicator of citation practice is citations per page. On a citation per page basis Walsh J (2.4), Kennedy J (1.7), Nicholson J (1.7), Malcolm CJ (1.6) and Steytler J (1.5) cited the most authorities. Taking 20 judgments as the minimum benchmark, the smallest ‘citer’ on a per page basis was again Franklyn J (0.9).

Can we group big and small ‘citors’ of authority according to distinguishing characteristics? While there are some exceptions, many of the most frugal ‘citors’ appear to have been appointed prior to the mid-1980s or to have served on the District Court prior to elevation to the Supreme Court. Franklyn J, who is the most frugal ‘citer’ in the study, was appointed to the Supreme Court in 1983. Heenan J, who also appears to cite few authorities,¹¹² albeit on a limited number of sample judgments, was appointed to the Supreme Court in 1995, but prior to that was a District Court judge from 1970 (and the Chief Judge of the District Court from 1982). On the other hand, most of the more prolific ‘citors’ were appointed to the Supreme Court from the late 1980s onwards. Of the five biggest ‘citors’ in the Full Court on a per judgment basis, Malcolm CJ and Nicholson J¹¹³ were appointed in 1988, Ipp J was appointed in 1989, Owen J was appointed in 1991, and Steytler J in 1994. It seems therefore that there may be a correlation between date of appointment and citation practice, the newer appointees generally, though not always, being heavier ‘citors’ of authority than earlier appointees.

V. CONCLUSION

This paper has examined citation practices in reported cases of the Full Court decided during the 1990s. Before commenting on some general patterns evident in the findings, it is important to recall the limitations of the study. One limitation, mentioned earlier, is that it is restricted to reported decisions. It is impossible to be certain whether the cases in the sample are representative of all decisions — reported *and* unreported. Previous studies, though, have also been restricted to reported judgments and the sample of reported cases in this study is larger than in most previous Australian studies. Secondly, it must be borne in mind that the results of citation studies need to be viewed with caution. Counting citations provides one method of understanding the thought processes involved in judicial reasoning. But judges may read cases and academic authorities that influence their thinking without ever citing them in their judgments. A survey such as this takes no account of such unrecorded influences.

Bearing in mind these limitations, which affect all citation practice studies, certain conclusions can be drawn from the study. These conclusions complement

112. See *supra* n 111.

113. *Supra* n 110.

those of earlier studies by adding to existing knowledge about citation practices in Australian courts, and by offering some insights into the characteristics of the law-making processes in the Full Court. The first finding, which is different from those for other Australian State courts of appeal, is that the Full Court cites a relatively high proportion of decisions from other State and Territory supreme courts. The Full Court has more co-ordinate citations than any other Australian State appellate court, with the exception of the Tasmanian Court of Appeal.¹¹⁴ The second finding, which is unusual for an Australian State court, is that the combined co-ordinate citations in the Full Court to other State and Territory supreme courts outweigh consistency citations to its own decisions. Previous research suggests that the Tasmanian Court of Appeal is the only other State supreme court in Australia which has more co-ordinate citations than consistency citations.¹¹⁵

In terms of judicial method, these findings indicate that the Full Court relies upon the case-law of co-ordinate jurisdictions in Australia more than most of the other State appellate courts. At the same time, previous research indicates that the Full Court is a relatively small supplier of co-ordinate citations to the courts of other Australian jurisdictions. In the study of all six State supreme courts, the Full Court ranked fifth as a supplier of co-ordinate citations after the appellate courts of New South Wales, Victoria, Queensland and South Australia.¹¹⁶ This suggests that the Full Court is a judicial 'follower' rather than a 'leader'. In part this may be explained by the fact that Western Australia is a small jurisdiction compared to States such as New South Wales and Victoria: its population, legal profession and stock of cases is small. By the same token the Full Court has had to be receptive to evolving interpretations of the common law and statute law in these larger jurisdictions, which hear more cases and are faced with a broader range of issues than the courts of Western Australia. It must be remembered, however, that whilst the Full Court may look to the law in other jurisdictions, as was emphasised in *Dobree v Hoffman*¹¹⁷ it must fashion a law suited to the conditions of this State.

114. Smyth 'What do Intermediate Appellate Courts Cite?' supra n 8.

115. Ibid.

116. Ibid, 74.

117. Supra n 33.