A Century of Citation: Case-Law and Secondary Authority in the Supreme Court of Western Australia

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This paper examines changing patterns in citations of judicial and secondary authority in reported decisions of the Supreme Court of Western Australia at decade intervals over the period 1905 to 2005. The main findings are that while the Court has cited a high proportion of English authorities throughout most of the twentieth century, citation of the Court's own previous decisions and decisions of the High Court have increased in recent decades. As a proportion of total citations, the Court's citation of secondary authorities remained low throughout the 20th century.

'JUDGES have an obligation to publish full reasons for their decision, which are then subject to appeal as well as criticism'.[1] When judges provide written reasons, most cite previous cases to locate the decision in what Terrell has referred to as a multidimensional grid of binding and persuasive precedent that constitutes the common law.[2] Some judges also cite so-called 'secondary authority' – journal articles, legal encyclopedias, textbooks and the like – to further justify their decisions.[3] Scholars interested in judicial reasoning have found judgments

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1. D Malcolm, 'Role of the Chief Justice' (Paper presented at Law Week hosted by the Law Society of WA, Perth, 5 May 2004) 6.
2. TP Terrell, 'Flatlaw: An Essay on the Dimensions of Legal Reasoning' (1984) 72 California L Rev 288.
3. There are several studies examining courts' citation of secondary authorities in Australia, Canada, New Zealand and the United States. See eg W 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 J 1; J Hasko 'Persuasion in the Court: Non-legal Materials in US Supreme Court Opinions' (2002) 94 Law Library J 427; C Newland, 'Legal Periodicals and the United States Supreme Court' (1959) 7 Uni Kansas L Rev 477; L Sirico & J Marguiles, 'The Citing of Law Reviews by the Supreme Court: An Empirical Study' (1986) 34 UCLA L Rev 131; L Sirico. 'The Citing of Law Reviews by the Supreme Court 1971–1999' (2000) 75 Indiana LJ 1009; P McCormick, 'Do Judges Read Books Too? Academic Citations by the Lamer Court 1992-1996' (1998) 9 Supreme Court L Rev 463; R Smyth, 'Other than 'Accepted Sources of

collected in law reports a valuable source to examine how the common law has evolved, how perceptions of precedent have changed over time and how courts communicate with each other.[4] As Lawrence Friedman and his colleagues put it: 'Everybody knows – at least since the realists hammered home the point – that a judicial opinion does *not* tell us what went on in judges' minds. It may be mere rationalization. But we can say, with some certainty, that the opinion and its reasoning show what judges *think* is legitimate argument and legitimate authority, justifying their behaviour'.[5]

John Merryman's study of the citation practice of the California Supreme Court in 1950, which was the first serious study of this sort, was published more than five decades ago.[6] Since the publication of Merryman's seminal study, a voluminous literature has evolved examining the citation practice of State supreme courts in the United States.[7] Most of these studies look at the 'recent citation practice' of a specific court – such as citations in a select year or few select years in the period immediately prior to the publication of the study. Beginning in the late 1990s a few studies of the 'recent citation practice' of State supreme courts in Australia were published.[8] One such study examined the citation practice of the Supreme Court of Western Australia in decisions reported in the *Western Australian Reports* throughout the 1990s.[9] Another study examined the citation practice of the Supreme Court of Western Australia based on its 50 most recent reported decisions in the official reports as of June 1999, as part of a broader study of the citation practice of the State supreme courts.[10] The advantage of studies that focus on the recent citation practice of a specific court are that they provide

Law? A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22 UNSW LJ 19; 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 Uni Tas L Rev 164; R Smyth, 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9 Griffith L Rev 25; R Smyth, 'Judicial Robes or Academic Gowns? – Citations to Secondary Authority and Legal Method in the New Zealand Court of Appeal' in R Bigwood (ed), *Legal Method in New Zealand* (Auckland: Butterworths, 2001).

4. See D Walsh, 'On the Meaning and Pattern of Legal Citations: Evidence From State Wrongful Discharge Precedent Cases' (1997) 31 Law & Society Rev 337, 338.
5. L Friedman, R Kagan, B Cartwright & S Wheeler, 'State Supreme Courts: A Century of Style and Citation' (1981) 33 Stanford L Rev 773, 794 (emphasis in original).
6. J Merryman 'The Authority of Authority: What the California Supreme Court Cited in 1950' (1954) 6 Stanford L Rev 613.
7. For some relatively recent examples, see W Manz, 'The Citation Practices of the New York Courts of Appeals: A Millennium Update' (2001) 49 Buffalo L Rev 1273; AM Beaird, 'Citation to Authorities by the Arkansas Appellate Courts, 1950–2000' (2003) 25 Uni Arkansas Little Rock L Rev 301; D Cosanici & CE Long, 'Recent Citation Practices of the Indiana Supreme Court' (2005) 24 Legal Reference Services Quarterly 103.
8. See R Smyth, 'What do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21 Adelaide L Rev 51; 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, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia' (2001) 30 UWA L Rev 1.
9. Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of WA', ibid.
10. Smyth, 'What do Intermediate Appellate Courts Cite?', above n 8.

valuable information to practicing barristers and solicitors who want to know which authorities impress the highest court in the state as well as law libraries who want to know which authorities the current court considers most relevant in order to make these available to interested parties.[11] The Supreme Court of Queensland library surveyed the citation of authority in Queensland Court of Appeal judgments in 1997 and 1998, precisely for this purpose.[12] The disadvantage of focusing on recent citation practice, however, is that it is not possible to examine changes in the citation practice of the Court, and the associated issue of what judges perceive to be legitimate argument, over a reasonably long period of time.

Recognising the disadvantages of focusing on a narrow, recent timeframe, a small number of studies of the citation practice of State supreme courts in the United States have adopted longer time horizons. The study by Friedman and his colleagues of the citation practice of selected decisions of sixteen State supreme courts sampled at five-year intervals over the period 1870 to 1970 was the first study to adopt a long time frame.[13] More recently, William Manz examined the citation practice of the New York Courts of Appeal over the period 1850 to 1993.[14] A long time-span allows one to examine temporal changes in citation practice, the changing importance of alternative courts as 'suppliers of precedent' and how this changing importance interacts with changes in institutional rules and external factors. To give a concrete example, one issue that will be explored in this study is how the Court's citation of English case law has changed over time. Changes in institutional rules that can be expected to impact on the Court's citation to English cases are the enactment of the Australia Acts 1986 (UK & Cth) and, more recently, the Human Rights Act 1998 (UK), which has increased the influence of European law on English cases in the form of the European Convention of Human Rights and Fundamental Freedoms.

Inspired by the United States studies that have considered citation practice over a long time span, recently five studies have examined the citation practice of each of the Australian State supreme courts (other than the Supreme Court of Western Australia) using data from reported decisions sampled at decade intervals between 1905 and 2005.[15] These studies have the advantage that the data in each case

11. Smyth, 'What do Judges Cite?', above n 8, 30.
12. This survey is mentioned in P de Jersey, 'The Role of the Supreme Court of Queensland in the Convergence of Legal Systems' (Paper presented at the 16th Congress of the International Academy of Comparative Law, Brisbane, 19 July 2002) 18.
13. Friedman, Kagan, Cartwright & Wheeler, above n 5.
14. Manz, above n 7.
15. See D Fausten, I Nielsen & R Smyth, 'A Century of Citation Practice on the Supreme Court of Victoria' (2007) 31 MULR 733; I Nielsen & R Smyth, 'One Hundred Years of Citation of Authority on the Supreme Court of New South Wales' (2008) 31 UNSW LJ 189; R Smyth, 'Citation to Authority on the Supreme Court of South Australia: Evidence From a Hundred Years of Data' (2008) Adel L Rev (in press); R Smyth, 'The Citation Practices of the Supreme Court of Tasmania, 1905-2005' (2007) 26 Tas L Rev 34; R Smyth, 'Trends in the Citation Practice of the Supreme Court of Queensland Over the Course of the Twentieth Century' (2008) U Qld LJ (in press).

has been collected in a consistent manner, making comparison across the courts possible. The purpose of this paper is to present the results of a study of the citation practice of the Supreme Court of Western Australia, based on data collected from published decisions at decade intervals between 1905 and 2005. In addition to presenting and discussing the results, comparisons will be made between the results presented here and (a) trends observed for other Australian State supreme courts reported in recent studies; and (b) the results from previous studies of the citation practice of the Supreme Court of Western Australia based on published decisions from the 1990s. Comparison with the latter will provide a robust check for the findings in this study for 1995 and 2005. Given the time periods are close, one would expect the results reported in this study for these two decades to be similar to the results reported in those previous studies.

TAXONOMY OF CITATIONS

Previous decisions of the Court

One form of citations is to previous decisions of the Court. The rationale for such citations is to ensure consistency with the Court's previous decisions. In *Transport Trading & Agency Co of WA Ltd v Smith,*[16] Parker CJ, with McMillan and Burnside JJ concurring, suggested that the Full Court is bound by its previous decisions:

> I think the object …. is to make the law certain, and that 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. If parties are dissatisfied with the judgment of this Court, they may appeal to the High Court …; and if this Court wrongly decides any matter the proper course is to have the matter set right by … [the High Court].[17]

This is no longer the position in the Supreme Court of Western Australia. In *Nguyen v Nguyen*[18] Dawson, Toohey and McHugh JJ stated that the extent to which the Full Court of a Supreme Court regards itself as free to depart from its own previous decisions is a matter of practice for the Court to determine for itself. Writing extra-curially, Michael Kirby leaves open the question of whether Parker CJ's observations in *Transport Trading & Agency Co of WA Ltd v Smith* mean that the Full Court is still bound by its previous decisions following *Nguyen v Nguyen.*[19] But in *Re The Full Board of the Guardianship and Administration Board*[20] Heenan J., with the concurrence of Anderson, Steytler, Miller and McLure JJ, stated the following in relation to *Transport Trading & Agency Co of WA Ltd v Smith*:

> [M]uch has changed since these words were written at a time near the apogee of Edwardian confidence in the Imperial legal system. The world and this State have

16. (1906) 8 WALR 33.
17. Ibid 33.
18. (1990) 169 CLR 245.
19. M Kirby, 'Precedent, Law, Practice and Trends in Australia' (2007) 28 Aust Bar Rev 243, 244.
20. [2003] WASCA 268.

> learned through the experiences of war, depression and scientific discovery that there are few advantages in dogmatism and that principle is a surer guide. Further, litigants no longer have a right of appeal from this Court to the High Court of Australia so, except in the limited number of cases where the High Court grants special to appeal, this Court is generally the final court of appeal for parties to causes brought within its jurisdiction. This brings an increased responsibility on the Court to determine the law in all cases before it, even if this requires the re-examination or rejection of earlier decisions.[21]

The accepted view now is that the Full Court of the Supreme Court is free to depart from its previous decisions, but will only do so in circumstances in which it is convinced that the earlier decision is wrong.[22] A single judge of the Supreme Court of Western Australia is not as a matter of precedent bound by the decision of another single judge of the Supreme Court of Western Australia. However, as a matter of judicial comity, a single judge will follow the decision of another single judge in the interests of consistency, unless convinced that the earlier decision is wrong.[23]

Previous decisions of the High Court

A second form of citation is hierarchical citations to previous decisions of the High Court which stands above the Supreme Court in the court hierarchy. The rationale for hierarchical citations, similar to consistency citations, is to ensure the judicial process has a certain degree of consistency, predictability and coherence. In *Garcia v National Australia Bank Ltd.*[24] the High Court stated that the 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. While not binding, *obiter* of the High Court will be cited as being highly persuasive.[25] However, a decision of a single justice of the High Court, 'while deserving of the closest and respectful consideration' is not binding on a State supreme court or Federal Court.[26]

Previous decisions of other State supreme courts

Citations in decisions of the Supreme Court of Western Australia to decisions of other State supreme courts represent coordinate citations. While the Full Court of the Supreme Court of Western Australia is not bound by decisions of the Full

21. Ibid [33].
22. *Archer v Howell* (1992) 7 WAR 33; *Tragear v Pirs de Albuquerque* (1997) 18 WAR 432, 446–47; *Craig v Troy* (1997) 16 WAR 96, 162; *Re Calder; Ex parte Cable Sands (WA) Pty Ltd* (1998) 20 WAR 343, 354; *Kuligowski v Metrobus* [2002] WASCA 170, [195]–[197].
23. *Arthurs v Western Australia* [2007] WASC 182, [61] (Martin CJ); *Cohen v Curchin* [2008] WASC 8, [30] (Martin CJ).
24. (1998) 194 CLR 395.
25. Ibid.
26. *Businessworld Computers v Australian Telecommunications Commission* (1988) 82 ALR 499, 504; *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201, 204.

Court of other State supreme courts, as a matter of judicial comity, the Full Court will follow such decisions unless convinced those decisions are 'plainly wrong'.[27] There are two rationales for coordinate citations. First, uniform national legislation or similar legislation in different states of Australia should be interpreted in a similar manner.[28] Second, there is one common law operating throughout Australia and not seven different systems of common law reflecting each of the States and the Northern Territory.[29] As such, the common law should evolve in a consistent manner.[30] In the United States context, Friedman and his colleagues wrote in terms of the 'State supreme courts [regarding] themselves as siblings of a single legal family, speaking dialects of a common law language'.[31] In the Australian context, we can go further than this – there is a single common law language with no separate dialects.

There is authority that a single judge of the Supreme Court of Western Australia should follow a single judge sitting in another State supreme court unless convinced the decision is wrong.[32] However, there is contrary authority that a single judge of the Supreme Court of Western Australia need not follow a single judge of another State Court because further appeal to the Court of Appeal is possible.[33] As Simmonds J. put it in *Australian Securities Investment Commission v Emu Brewery Mezzanine*:[34]

> I must give 'due respect' to the Queensland judgment, particularly as it is in the area of national legislation. However, in the end, 'I must apply the law as [I] believe it to be'. The possibility of an appeal from my view 'provides a mechanism by which the

27. *Australian Securities Commission v Marlborough Gold Mines* (1993) 177 CLR 485, 492. For similar statements in the Full Court of the Supreme Court of Western Australia see *Australian Securities Commission v MacLeod* [2000] WASCA 101, [94]; *Mustac v Medical Board of Western Australia* [2007] WASCA 128, [37]–[46]
28. *Australian Securities Commission v Marlborough Gold Mines* (1993) 177 CLR 485, 492. For Western Australian decisions recognizing this rationale for following a decision of another State supreme court, see *Australian Securities Commission v MacLeod* [2000] WASCA 101, [94]; *Walker v Midlink Nominees Pty Ltd (Provisional Liquidator Appointed)* [2000] WASC 112, [23]; *Kimberley Stuart Wallman as Liquidator of Graffiti Holdings Pty Ltd (In Liq) v Milestone Enterprises Pty Ltd* [2006] WASC 260; *Mustac,* ibid [37]–[46]; *Deepsilver Pty Ltd v Aquatherm Australia Pty Ltd* [2007] WASCA 171, [7] (Buss JA); *Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd [No. 2]* [2008] WASC 10.
29. See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Hendika Misiani v Welshpool Engineering* [2003] WASC 263.
30. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [135] the High Court stated that given the existence of a unified Australian common law, Australian intermediate courts must follow common law principles expounded in other jurisdictions unless they are plainly wrong.
31. Friedman, Kagan, Cartwright & Wheeler, above n 5, 801.
32. See *Deepsilver Pty Ltd v Aquatherm Australia Pty Ltd* [2007] WASCA 171, [7] (Buss JA); *Areva* above n 28, [8] (Martin CJ).
33. *Walker v Midlink Nominees Pty Ltd (Provisional Liquidator Appointed)* [2000] WASC 112, [23] (Owen J); *Australian Securities Investment Commission v Emu Brewery Mezzanine* [2004] WASC 241, [49]–[51] (Simmonds J).
34. [2004] WASC 241.

> point can be resolved at a higher level', a matter that, 'itself, promotes the proper and orderly development of the common law'.[35]

In *Anderton & Anor v Enterprising Global Group*[36] Hasluck J. considered that a single judge of the Supreme Court of Western Australia should follow the approach in Western Australia, even if that approach was out of line with the rest of Australia. The rationale was that it is a matter for the Court of Appeal, rather than a single judge, to decide whether a line of authority in Western Australia should be overruled to bring the law into line with the rest of Australia. In *Kimberley Stuart Wallman v Milestone Enterprises,*[37] Master Newnes, who was confronted with conflicting decisions in point in the New South Wales Court of Appeal and Queensland Court of Appeal, felt at liberty to weigh up the merits of the alternative views in the two cases.[38]

Previous decisions of courts in other countries

Citations to English courts are of two forms. Prior to the commencement of the Australia Acts 1986 (UK & Cth), the Judicial Committee of the Privy Council stood at the apex of the Australian courts hierarchy. Hence, decisions of the Judicial Committee were binding on the Full Court of the Supreme Court of Western Australia. As such, citations to the Judicial Committee prior to 1986 were hierarchical citations. At no stage have decisions of other English courts, such as the House of Lords, English Court of Appeal or English High Court, been binding on the Supreme Court of Western Australia.[39] The least that can be said is that the decisions of these English courts, particularly prior to 1986, have been regarded as highly persuasive.

Citations to the House of Lords, English Court of Appeal and English High Court, which are not in the Australian court hierarchy, strictly speaking, represent deference citations. However, prior to 1986, the House of Lords, and even the English Court of Appeal, were treated as being *de facto* in the Australian court hierarchy. Thus, citations to the House of Lords and English Court of Appeal were really *de facto* hierarchical citations. As noted by Murray Gleeson, 'for a substantial part of the twentieth century, Australia saw itself as part of the British Empire, and the idea that the common law might vary throughout the Empire was barely contemplated. In terms of judicial authority and leadership, the distinction between the House of Lords and Privy Council was largely technical. They were the same judges, and they declared the law for all those courts from whom appeals might come to them'.[40]

35. Ibid [51].
36. [2003] WASC 67.
37. [2006] WASC 260.
38. Ibid [42]–[43].
39. *Dobree v Hoffman* (1996) 18 WAR 36, 43–4.
40. M Gleeson, 'The Influence of the Privy Council on Australia' (2007) 29 Aust Bar Rev 123, 129.

There is High Court authority as recent as the mid-1970s, stating that it was expected that the State supreme courts would follow relevant decisions of the House of Lords and English Court of Appeal in the absence of High Court authority.[41] However, in *Cook v Cook*[42] Mason, Wilson, Deane and Dawson JJ 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'.[43] In light of the decision in *Cook v Cook,* the Full Court of the Supreme Court of Western Australia in *Dobree v Hoffman*[44] considered it was appropriate not to follow the English Court of Appeal decision in *Chorley's* case,[45] (establishing the *Chorley* exception in favour of legal practitioners acting in their own litigation) in order to establish a rule of practice 'which best suits the circumstances of this Court and practice within [Western Australia]'.[46]

Since the commencement of the Australia Acts 1986 (UK & Cth), the High Court has cited more cases decided in countries other than Australia and England.[47] Citations to courts in countries other than Australia and England are deference citations. Whether such cases are cited depend on the persuasive reasoning in the judgment. The increasing use of foreign precedent from a range of jurisdictions is a trend that has also been observed in the United States Supreme Court[48] and the New Zealand Court of Appeal.[49] This trend is at least partly a reflection of the increasing availability of legal databases that have made access to foreign decisions from a range of jurisdictions more accessible. [50] In Australia and New Zealand it is also a reflection of judicial willingness to draw on cases from a range of jurisdictions in order to fashion a common law that is best suited to the conditions in each country.[51]

41. In *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336, 341 (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. Gibbs J (at 349) went further and stated that the New South Wales Court of Appeal should have regarded itself as being bound by a decision of the English Court of Appeal.
42. (1986) 162 CLR 376.
43. Ibid 390.
44. (1996) 18 WAR 36.
45. *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872.
46. Above n 44, 44.
47. See Kirby, above n 19.
48. See B Malkani 'The Judicial Use of International and Foreign Law in Death Penalty Cases: A Poisoned Chalice' (2007) 42 Studies in Law, Politics & Society 161.
49. I Richardson, 'Trends in Judgment Writing in the New Zealand Court of Appeal' in R Bigwood, above n 3, 261.
50. See Kirby, above n 19; R Posner, 'Could I Interest You in Some Foreign Law? No Thanks, We Already Have Our Own Laws' [2004] Legal Affairs 40.
51. For Australia, see A Mason, 'Future Directions in Australian Law' (1987) 13 Mon ULR 149, 154. For New Zealand, see Richardson, above n 49, 264–5.

Secondary authorities

Secondary authorities, which include dictionaries, journal articles, law reform reports, learned texts and legal encyclopaedias, are not binding on the Court. Several rationales have been offered for why judges cite secondary authorities.[52] First, it is convenient where a journal article or text refer to a series of cases that the judge can 'adopt' as stating the law. Second, where a journal article or text summarizes the law in a foreign jurisdiction, it is easier for a judge to cite such a source than trawl through foreign law reports. Third, judges cite academic authors to explore the evolution of specific legal principles, to assist in deciding what previous cases decided or further buttress their interpretation of previous authorities. Fourth, the works of well-known authors have often been cited in previous cases as correctly stating the law and have acquired the status of *de facto* primary authorities. Fifth, some secondary authorities such as law reports or critical comment in law journals are cited to criticize the existing law or as a pointer to Parliament, suggesting the need for legislative intervention. Several Australian, Canadian and United States judges have expressed opinions on the merits of citing secondary authorities.[53] While not unanimous, most comment by Australian judges has been positive, although some of the positive comment might be discounted because it tends to occur at law review dinners and the like where one expects judges to speak highly of the value of law reviews.[54]

DATA AND METHOD

The cases sampled for the study constitute all cases reported in the official State Reports, sampled at decade intervals between 1905 and 2005. Overall, there are 429 cases in the sample and some 6700 citations of cases and secondary authorities. The subject matter of cases in the sample for each decade considered in the study are reported in Table 1. Cases concerning criminal law or evidence and procedure constitute 36 per cent of sampled cases; company law cases constitute 12 per cent of sampled cases and administrative law and industrial law each constitute just under 10 per cent of sampled cases. The average length of cases and the average length of judgments in the sample are shown in Figures 1 and 2 respectively. Both exhibit a similar pattern. The average length of cases and judgments is fairly constant up to 1975 and then displays an upward trend thereafter. In 1905 the

52. See Smyth, 'The Authority of Secondary Authority', above n 3, 28–30.
53. See the sources cited in Fausten, Nielsen & Smyth, above n 15, 742–3.
54. For positive comment, see O Dixon, *Jesting Pilate* (Sydney: WS Hein, 2nd edn, 1997) 156; F Kitto, 'Why Write Judgments?' (1992) 66 Aust LJ 787, 797; G Brennan, 'A Critique of Criticism' (1993) 19 Mon ULR 213, 215; A Mason, 'Legal Research: Its Function and its Importance' in G Lindell (ed.) *The Mason Papers* (Sydney: Federation Press, 2007); Mason, above n 51, 154; M Kirby, 'Welcome to Law Reviews' (2002) 26 *MULR* 1; M Kirby, 'Not Another Law Journal?' (Address to the launch of the Northern Territory Law Journal, Darwin, August 2007); S Kenny, 'The Melbourne University Law Review: 45 Years On' ('Address to the 2001 Annual Dinner of the Melbourne University Law Review' (2201) 1 MULR Alumni Association Newsletter 3. For critical comment, see G Barwick, *A Radical Tory* (Sydney: Federation Press, 1996) 223–4.

Table 1: Subject matter of reported cases of the Supreme Court of Western Australia

Subject Matter	1905	1915	1925	1935	1945	1955	1965	1975	1985	1995	2005	Total
Administrative Law	3	1	3	6	3	2	6	2	2	8	4	40
Company Law	5	3	5	9	1	1	12	2	6	7	-	51
Constitutional Law	-	-	-	1	-	1	-	-	-	3	2	7
Contracts	4	7	6	2	-	-	2	2	2	3	2	30
Criminal Law	9	4	1	3	1	2	2	13	7	27	20	89
Damages	1	-	-	-	-	-	-	-	-	1	-	2
Evidence & Procedure	8	12	5	1		2	5	7	9	12	4	65
Family Law	1	-	3	4	3	1	-	-	-	-	1	13
Immigration	1	-	-	-	-	-	-	-	-	-	-	1
Industrial Law	6	3	6	7	1	2	3	1	5	4	-	38
Insurance	-	-	-	-	-	-	-	-	-	-	1	1
Intellectual Property	-	-	-	1	-	-	-	-	-	-	1	2
Jurisdiction	-	-	-	-	-	-	-	-	-	1	-	1
Libel/ Defamation	-	-	1	-	-	-	-	-	-	3	1	5
Property	9	6	1	1	2	2	4	2	3	4	2	36
Taxation	-	-	1	2	1	-	-	1	-	1	-	6
Torts	5	3	1	2	-	1	7	1	3	-	1	24
Trusts	-	-	-	-	-	-	-	-	-	2	-	2
Wills and Probate	1	3	2	1	1	1	4	1	-	1	1	16
Total No of Cases	**53**	**42**	**35**	**40**	**13**	**15**	**45**	**32**	**37**	**77**	**40**	**429**

Figure 1: Average length of cases

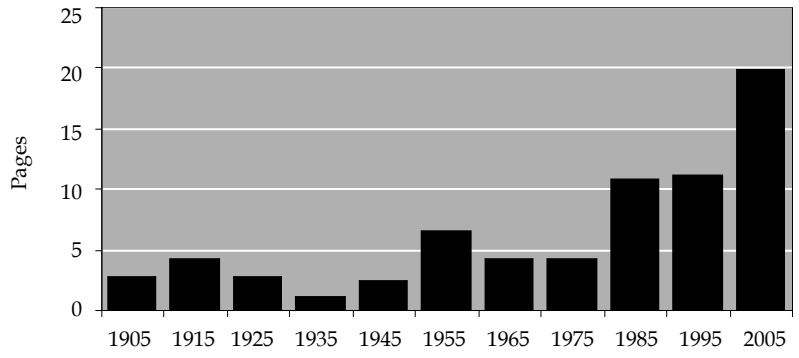
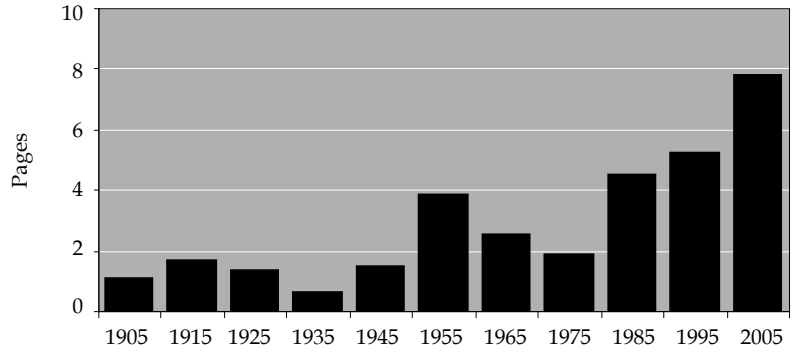


Figure 2: Average length of judgments



average length of each case was 2.87 pages and in 1975 the comparable figure was 4.2 pages; however, in 1985 this number increased to 10.86 pages, in 1995 it was 11.16 pages and in 2005 it was 19.95 pages. In 1905 the average length of each judgment was 1.15 pages and in 1975 it was 1.92 pages. This figure increased to 4.51 pages in 1985, 5.24 pages in 1995 and 7.82 pages in 2005. Previous studies of judicial style have also observed an increase in the length of judicial decisions over time. [55] Several reasons have been offered for the increase in length of

55. Eg see M Groves & R Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001' (2004) 32 Federal LR 255 (High Court of Australia);

judicial decisions including the increase in stock of cases over time, the increasing complexity of cases which require greater discussion of competing policy choices and the information technology revolution which has made it much easier to prepare judgments.[56]

The rules followed when collecting data on citations can be briefly summarized as follows. First, all citations to case-law and secondary authorities were counted. Citations to constitutions, regulations and statutes were not included. Second, in the event that a case or secondary authority was cited twice in the same paragraph it was counted only once on the assumption that if cited more than once in the same paragraph, it was being cited for the same proposition. Third, citations in joint judgments were attributed to each judge who participated in the judgment, but not to a judge who wrote a separate concurring judgment agreeing with the reasons. Fourth, citations in the text and in footnotes were counted equally. Fifth, no distinction was made between positive and negative citations. The 'rules of thumb' that were followed when collecting data on citations were consistent with previous studies that have examined citation practice of the other State supreme courts over the same timeframe.[57] The 'rules of thumb' were also the same as those used in the previous study examining the citation practice of the Supreme Court of Western Australia throughout the 1990s with one notable exception.[58] In the previous study of the citation practice of the Supreme Court of Western Australia data were collected on citations to 'academic authorities', meaning journal articles and textbooks, rather than the broader category, 'secondary authorities' which includes law reform reports, legal encyclopedias and dictionaries in addition to 'academic authorities'. This broader approach is more consistent with the bulk of previous studies of citation practice of courts and does not impair comparison with the previous study for the Supreme Court of Western Australia unduly because citations to secondary authorities other than 'academic authorities' only constitute a relatively small proportion of total citations.

FINDINGS

Figure 3 plots average citations per case and average citations per judgment in reported decisions of the Supreme Court of Western Australia at decade intervals between 1905 and 2005. Until the completion of World War II, average citations

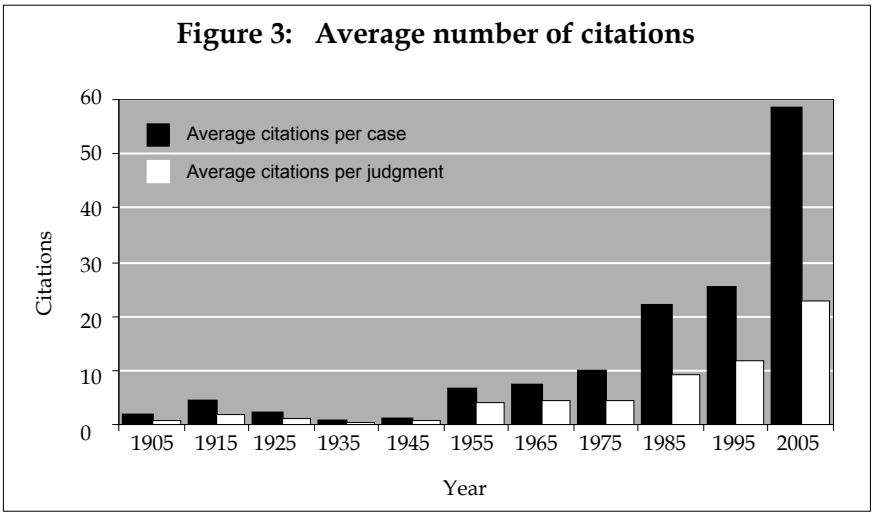
Fausten, Nielsen & Smyth, above n 15 (Supreme Court of Victoria); Nielsen & Smyth, above n 15 (Supreme Court of New South Wales); C Goutal, 'Characteristics of Judicial Style in France, Britain and the USA' (1976) 24 American J Comparative Law 43 (English Court of Appeal); Friedman, Kagan, Cartwright & Wheeler, above n 5 (US State Supreme Courts); Richardson, above n 49 (New Zealand Court of Appeal).

56. See Friedman, Kagan, Cartwright & Wheeler, ibid; Goutal, ibid; Groves & Smyth, above n 55.

57. See Fausten, Nielsen & Smyth, above n 15; Nielsen & Smyth, above n 15; Smyth, 'Citation to Authority on the Supreme Court of South Australia', above n 15; Smyth, 'The Citation Practices of the Supreme Court of Tasmania', above n 15; Smyth, 'Trends in the Citation Practice of the Supreme Court of Queensland', above n 15.

58. Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of WA', above n 8.

Figure 3: Average number of citations



per case and average citations per judgment were uniformly low. In 1905 average citations per case were 1.96, while in 1945 average citations per case were just 1.08. In 1905 average citations per judgment were 0.78 and by 1945 this figure had fallen to 0.67. However, from the low water mark in terms of citation to authority in 1945, there has been a positive trend in average citations per case and per judgment since World War II. In 2005 average citations per case were 58.65 and average citations per judgment were 23. There has been a marked increase in citation to authority over the last three decades of the study, which corresponds to the increase in the average page length of decisions. The reasons for the increase in citation to authority over the last three decades are similar to those which explain longer judgments. In addition, over the last decade or so there have been two further developments that have potentially contributed to the citation rate. First, not only has the mechanical preparation of judgments become easier with the widespread use of computers, but there has been a surge in the number of electronic databases, which has made it easier for judges, or their associates, to access reported and unreported judgments from a host of jurisdictions. For example, the unreported decisions of the High Court and each of the State supreme courts are available almost immediately on each court's respective webpage or through the Austlii database.[59] Second, there has been a substantial increase in the number of academic articles and law reform reports on myriad topics in recent decades that are available for judges to draw on and cite if they so choose.[60]

59. <http://www.austlii.edu.au>.

60. Sir Ivor Richardson suggests the increased availability of academic writings and law reform reports in New Zealand in recent decades is a major factor explaining why the New Zealand Court of Appeal has cited more secondary authorities over time: see Richardson, above n 49, 265. For a discussion of the increase in the number law reviews over the last decade in Australia and different views on whether this is a positive development, see Kirby, 'Welcome to Law

Table 2: Citations in reported cases in the Supreme Court of Western Australia

	1905	1915	1925	1935	1945	1955	1965	1975	1985	1995	2005
Total No of Cases	53	42	35	40	13	15	45	32	37	77	40
Total No of Judgments	133	104	70	66	21	25	75	70	89	164	102
High Court:											
1903-1919	4	9	2	-	-	4	6	5	18	29	18
1920-1939	-	-	1	1	-	5	19	5	33	30	35
1940-1959	-	-	-	-	1	3	24	10	21	53	36
1960-1979	-	-	-	-	-	-	17	30	67	96	69
1980-1999	-	-	-	-	-	-	-	-	28	328	432
2000-	-	-	-	-	-	-	-	-	-	-	127
Subtotal	**4**	**9**	**3**	**1**	**1**	**12**	**66**	**50**	**167**	**536**	**717**
Ave per case	0.07	0.21	0.09	0.025	0.08	0.80	1.47	1.56	4.51	6.96	17.92
Ave Per Judgement	0.03	0.09	0.04	0.015	0.05	0.48	0.88	0.71	1.88	3.27	7.03
Federal/Family Court	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**3**	**38**	**60**
Western Australia SC	**5**	**11**	**3**	**3**	**1**	**11**	**24**	**18**	**68**	**283**	**561**
Ave per case	0.09	0.26	0.09	0.075	0.08	0.73	0.53	0.56	1.84	3.67	14.02
Ave Per Judgement	0.04	0.11	0.04	0.045	0.05	0.44	0.32	0.26	0.76	1.73	5.50
NSW SC	2	-	1	-	1	3	6	16	39	183	182
Queensland SC	-	1	-	-	1	-	2	15	18	83	46
South Australia SC	-	-	-	-	-	3	1	17	15	66	58
Tasmania SC	-	-	-	-	-	-	1	4	4	6	4
Victoria SC	3	1	-	-	-	2	10	24	51	65	93
Subtotal	**5**	**2**	**1**	**0**	**2**	**8**	**20**	**76**	**123**	**403**	**383**
Other Australian Courts	**-**	**1**	**-**	**-**	**-**	**-**	**-**	**3**	**2**	**18**	**37**

English Courts:											
House of Lords	10	16	16	3	-	5	44	13	88	122	91
Judicial Committee	4	8	1	-	-	3	13	6	27	70	23
English CA	38	54	16	11	2	20	75	29	131	203	142
Lower English Courts	38	60	35	8	7	32	51	50	72	131	108
Subtotal	**90**	**138**	**68**	**22**	**9**	**60**	**183**	**98**	**318**	**526**	**364**
Ave per case	1.69	3.29	1.94	0.55	0.69	4.00	4.07	3.06	8.59	6.83	9.10
Ave per judgement	0.68	1.33	0.97	0.33	0.43	2.40	2.44	1.40	3.57	3.21	3.57
Other Countries	**-**	**10**	**1**	**0**	**1**	**4**	**6**	**10**	**40**	**35**	**43**
Secondary Authorities:											
Legal –											
Books	-	6	1	-	-	6	16	44	58	69	86
Periodicals	-	1	-	-	-	1	2	3	11	14	29
Encyclopaedias	-	5	3	-	-	-	7	15	11	11	2
Law Reform Reports	-	-	-	-	-	-	-	-	1	4	14
Dictionaries	-	-	-	-	-	-	-	-	7	5	2
Other	-	-	-	-	-	-	-	-	2	4	18
Subtotal	**0**	**12**	**4**	**0**	**0**	**7**	**25**	**62**	**90**	**107**	**151**
Non-Legal –											
Books	-	-	-	-	-	-	1	-	-	2	-
Periodicals	-	-	-	-	-	-	-	-	1	-	3
Dictionaries	-	-	-	-	-	-	11	3	2	12	22
Other	-	-	-	-	-	-	-	-	-	-	5
Subtotal	**0**	**0**	**0**	**0**	**0**	**0**	**12**	**3**	**3**	**14**	**30**
Total	**104**	**183**	**80**	**26**	**14**	**102**	**336**	**320**	**814**	**1960**	**2346**
Average citations per case	1.96	4.36	2.29	0.65	1.08	6.80	7.47	10.00	22.00	25.45	58.65
Average citations per judgment	0.78	1.76	1.14	0.39	0.67	4.08	4.48	4.57	9.15	11.95	23.00

Table 2 shows all citations in reported decisions of the Supreme Court of Western Australia at decade intervals between 1905 and 2005. Several features are discernable over the course of the century. The first is that the Court cited English authorities more than the High Court, the Court's own previous decisions or decisions of other State supreme courts throughout most of the twentieth century. In the early decades of the twentieth century, the vast majority of citations were to English cases. In each of 1905, 1915, 1925 and 1935, three quarters or more of the Court's citations were to English cases. After 1935, there is a gradual decline in the proportion of English cases cited, although as late as 1965 more than half of the Court's citations were to English case-law and as late as 1995 the Court cited almost as many English cases (27 per cent of the total) as High Court cases (27.3 per cent of total). It is only in 2005, that the Court clearly cited more High Court cases and its own previous cases than previous decisions of English cases. The results suggest that there was a substantial decline in citation to English authorities as a proportion of total citations following the commencement of the Australia Acts 1986 (UK & Cth). However, the Human Rights Act 1998 (UK), which has increased the influence of the European Convention of Human Rights and Fundamental Freedoms on English law and made it less relevant to Australia, appears to have had an even larger impact on reducing citation to English case-law. This is reflected in the fact that citation to English case-law as a proportion of total citations declined 45 per cent between 1995 and 2005.

A second feature of Table 2 is that in each decade the Court cited the lower English courts and the English Court of Appeal more than the House of Lords and judicial Committee, although for most of the twentieth century the Judicial Committee sat at the top of the Australian court hierarchy and the House of Lords had *de facto* equal status to the Judicial Committee. The explanation for this phenomenon most likely lies with the caseload of the Supreme Court of Western Australia. As indicated above, criminal law, evidence and procedure constitute 36 per cent of reported cases in the sample. The English High Court and Court of Appeal have traditionally heard most criminal law cases. The English Court of Appeal has effectively acted as a final Court of Appeal in criminal cases for most of the twentieth century with few criminal cases reaching the House of Lord in any significant way until the 1970s.[61] This meant there were many useful precedents decided by the English High Court and Court of Appeal, which were particularly useful in the first six or seven decades of the twentieth century while the law in Australia and England was largely the same and the stock of Australian cases was still developing. It was only following the High Court of Australia decision

Reviews', above n 54; Kirby, 'Not Another Law Journal?', above n 54 (arguing the increasing prevalence of law reviews is a positive development); J Gava, 'Law Reviews: Good for Judges, Bad for Law Reviews?' (2002) 26 MULR 560 (arguing the increasing prevalence of law reviews is a negative development).

61. According to the official UK government website of the judiciary of England and Wales: 'In some cases a further appeal lies, with leave, to the House of Lords, but in practice the Court of Appeal is the final court of appeal for the great majority of cases'. <http://www.judiciary.gov.uk/about_judiciary/roles_types_jurisdiction/judicial_profiles/salaried/court_appeal_judges.htm> .

in *Parker v The Queen,*[62] not to follow the objective test of murder stated in the House of Lords in *D.P.P. v Smith*,[63] that a separate embryonic Australian criminal law (and indeed common law more generally) started to emerge.

A third feature of Table 2, which follows directly from the first point, is that hierarchical citations to the High Court have been relatively low throughout most of the twentieth century. Prior to 1955, hierarchical citations to the High Court amounted to less than 10 per cent of total citations in each year. And, as late as 1965 the Court cited the English Court of Appeal more than the High Court. However, by 1975 the High Court was cited more than any other single court and citations to the High Court as a proportion of total citations has increased in the three decades since, such that in 2005 citations to the High Court alone constituted almost one-third of the Court's total citations. This reflects the fact that over the last three decades the proportion of Australian cases as a whole which the Court has cited has increased at the expense of English cases and that since the commencement of the Australia Acts 1986 (UK & Cth), the High Court is entrenched at the apex of the Australian court hierarchy.

A fourth aspect of Table 2 is that consistency citations to the Court's own previous decisions have also been low throughout most of the twentieth century. For each decade from 1905 to 1985, consistency citations were less than 10 per cent of total citations with the single exception of 1955 when they were 10.8 per cent of total citations. In 1985, the Court was still citing each of the House of Lords and English Court of Appeal more than its own previous decisions. Consistency citations as a proportion of total citations have only started to increase over the last two decades and, as such, are a relatively recent phenomenon. In 1995 consistency citations were 14.4 per cent of total citations and in 2005 this figure increased to 23.9 per cent. In both these decades the Court cited its own previous decisions more than any other single court, with the exception of the High Court. The increase in the importance of consistency citations in recent decades is likely to partly reflect what Murray Gleeson has described as the 'localisation of statute law'.[64] With the growth in state legislation English precedent becomes less relevant and Western Australian decisions, while decisions of other Australian State supreme courts interpreting legislation with similar provisions to Western Australia statute increase in importance. It is also likely to reflect the equivalent at the state-level of what Sir Anthony Mason has described as 'an emerging Australian common law'.[65] As the Full Court of the Supreme Court of Western Australia emphasised in *Dobree v Hoffman,*[66] following the High Court decision in *Cook v Cook,*[67] the Full Court conceives that its role is to fashion a law that is suited to the conditions in Western Australia. In fashioning a law that is suited to Western Australia, while

62. (1963) 111 CLR 610.
63. [1961] AC 290.
64. Gleeson, above n 40, 134.
65. Mason, above n 51, 151.
66. (1996) 18 WAR 36.
67. (1986) 162 CLR 376.

the Court can be expected to continue to draw on cases in other jurisdictions, there will be increased reliance on the Court's previous decisions.

A fifth point worth noting about Table 2 is that for the first seven decades of the study coordinate citations were generally less than 10 per cent of total citations. In 1975 coordinate citations jumped to just under one quarter of the Court's total citations, before settling in the 15-20 per cent range over the last three decades. The Supreme Courts of New South Wales and Victoria receive the bulk of coordinate citations. The fact that the Supreme Courts of New South Wales and Victoria receive the majority of coordinate citations reflects the prestige of the two courts among intermediate appellate courts in Australia, the size of the Bars in both states and the disproportionate amount of litigation that both courts hear and consequent disproportionate stock of citable cases that both states produce.[68] After New South Wales and Victoria, Queensland receives the next biggest share of coordinate citations. That Queensland is relatively well-cited is a reflection that Western Australia's criminal code is largely based on the Queensland criminal code. Thus, decisions in Queensland criminal cases are of specific relevance to Western Australia.

A final point worth noting about Table 2 is that citations to secondary authorities as a proportion of total citations have been generally low through the timeframe of the study. With the exception of the decades 1965 to 1985, secondary authorities have represented less than 10 per cent of total citations. Citations to secondary authorities in 1965 and 1985 were slightly above 10 per cent of total citations; however in 1975 secondary authorities were responsible for a fifth of the Court's citations and, in that year, outnumbered citations to the High Court or the Court's own previous decisions. In most decades citations to 'legal sources' constituted in excess of 80 per cent of citations to secondary authorities. In fact, for the first six decades of the study, the Court did not cite any non-legal secondary authorities at all. Citations to legal texts constitute the majority of citations to legal secondary authorities. For the first eight decades of the study, the Court cited legal periodicals on just seven occasions in the surveyed cases. While there has been a tendency to cite more legal periodicals over the last three decades, such citations remain small relative to citations to legal texts.

HOW DO THE FINDINGS COMPARE WITH THOSE OF PREVIOUS STUDIES?

Other studies of the recent citation practice of the Court

Table 3 compares the results for this study with the findings from two other studies of the recent citation practice of the Court. One of the comparators examined the citation practice of the Court based on reported cases throughout the 1990s.[69] The other comparator is the Western Australian component of a broader study of the

68. For a fuller discussion of these points, see Fausten, Nielsen & Smyth, above n 15, 755–7.
69. Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of WA', above n 8.

Table 3: Results for 1995 and 2005 compared with findings of other studies of the recent citation practice of the Supreme Court of Western Australia

Court / Authority	Percentage of total citations			
	Results for this study		Reported WA decisions	50 most recent reported WA decisions
	1995	2005	1990s[a]	At June 1999[b]
High Court	27.3	30.5	28.4	21.2
WA Supreme Court	14.4	23.9	17.9	19.7
Other State Supreme Courts	20.6	16.3	20.7	23.4
Other Australian Courts	2.9	4.3	3.2	6.6
English Courts	26.8	15.5	25.5	19.1
Other Countries	1.8	1.8	1.4	1.0
Secondary Authorities	6.2	7.7	3.0[c]	9.0

Notes:

(a) Based on R Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia' (2001) 30 UWA L Rev 1, 13 (Table 1).

(b) Based on 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, 72 (Table 2).

(c) This figure refers to 'academic authority', rather than 'secondary authority'.

citation practice of the State supreme courts based on the 50 most recent reported decisions in each State as of June 1999.[70] In general, the dedicated study of the citation practice of the Supreme Court of Western Australia is a more reliable comparator as it is based on more cases. The one proviso, as discussed above, is that that study counted 'academic authority' and not 'secondary authority'. Thus, the figure for academic authority in that study will be lower than the results for secondary authority in this study while the findings for the other forms of citation will be slightly inflated, relative to the results in this study. The results for the dedicated study of the citation practice of the Supreme Court of Western Australia in Table 3 are very much in line with the results in this study for 1995 and 2005 for all categories of citation, except academic authorities/secondary authorities. The proportion of hierarchical citations to the High Court and consistency citations to the Court's own previous decisions suggested by the study based on reported decisions throughout the 1990s forms a mid-point between the results in this study for 1995 and 2005. While the proportion of academic authorities cited suggested by the dedicated study are lower than the proportion of secondary authorities cited suggested by this study, the results for secondary authorities based on the 50 most recent reported decisions as of June 1999 are only slightly higher than the figure from this study for 2005. Overall, the proportion of citations according to type in this study for 1995 and 2005 are similar to those in these other two studies, suggesting that the findings in this study are reasonably robust, at least for the two decades for which there are comparators.

Other State supreme courts over the course of the 20th century

The results reported in this study are mostly consistent with the findings for the citation practice of the other State supreme courts over the course of the twentieth century.[71] Where differences in the citation practice of the State supreme courts are observable over the course of the twentieth century, the Supreme Court of Western Australia generally comes closest to the Supreme Court of Queensland and the Supreme Court of South Australia. In terms of several trends in citation practice, the State supreme courts of Victoria and New South Wales often form a second grouping with the Supreme Court of Tasmania out on its own in some respects.

In each of the State supreme courts the proportion of citations to English decisions was very high in the first decades of the twentieth century. Moreover, in each of the State supreme courts there is a gradual decline in citation to English cases beginning in one of the three decades from 1935 to 1955. In the State supreme courts of Victoria, South Australia and Tasmania, the decline in citation to English

70. Smyth, 'What do Intermediate Appellate Courts Cite?', above n 8.

71. The discussion of the findings for the other State supreme courts in this section are based on See Fausten, Nielsen & Smyth, above n 15; Nielsen & Smyth, above n 15; Smyth, 'Citation to Authority on the Supreme Court of South Australia', above n 15; Smyth, 'The Citation Practices of the Supreme Court of Tasmania', above n 15; Smyth, 'Trends in the Citation Practice of the Supreme Court of Queensland', above n 15.

cases accelerates after either the Australia Acts 1986 (UK & Cth) or the Human Rights Act 1998 (UK), which is similar to what occurred in the Supreme Court of Western Australia. However, in the State supreme courts of New South Wales and Queensland, the decline in citation to English authorities accelerates in the 1960s and 1970s and can be dated to the High Court decision in *Parker v The Queen,*[72] which signalled the emergence of a common law in Australia separate from England.

In each of the State supreme courts consistency citations to the Court's own previous decisions and hierarchical decisions to the High Court were low for the first six to seven decades of the twentieth century. In the State supreme courts of Queensland and South Australia, consistency citations to each court's previous decisions only became prominent in 1995 and 2005. This pattern is similar to what occurred in the Supreme Court of Western Australia. However, in the State supreme courts of New South Wales and Victoria, consistency citations became prominent more earlier; either in 1975 or 1985. By contrast, in the Supreme Court of Tasmania, consistency citations have been lower than coordinate citations to the decisions of other State supreme courts in all but three decades – 1915, 1975 and 1985. And in four decades of the twentieth century – 1905, 1935, 1945 and 1965 – the Supreme Court of Tasmania cited both the Supreme Court of Victoria and the Supreme Court of New South Wales more than it cited its own previous decisions. In the State supreme courts of Queensland, South Australia and Tasmania, citations to the High Court as a proportion of total citations increased in the 1970s or 1980s, similar to the Supreme Court of Western Australia. In the State supreme courts of New South Wales and Victoria, hierarchical citations to the High Court increased substantially from the mid-1960s.

Trends in coordinate citations to other State supreme courts in the State supreme courts of Queensland and South Australia have been similar to Western Australia – less than 10 per cent of total citations up to 1965 or 1975, which then increased to the 15-20 per cent range. Coordinate citations in the Supreme Court of Tasmania have been much higher than in the Supreme Court of Western Australia and were still just under 30 per cent of total citations in 2005. However, the proportion of coordinate citations in the State supreme courts of New South Wales and Victoria did not increase until 1995 and 2005 and even then were still lower than the other states. In the Supreme Court of New South Wales coordinate citations in 1995 and 2005 were in the 5-10 per cent range and in the Supreme Court of Victoria coordinate citations were in the 10-15 per cent range compared with 15-20 per cent in Western Australia.

In each of the State supreme courts, citations to secondary authorities have generally been less than 10 per cent of total citations between 1905 and 2005. Eighty per cent of citations to secondary authorities have been citations to legal

72. (1963) 111 CLR 610.

sources. Citations to legal texts are the most common, with relatively few citations to legal periodicals. It has been suggested that citations to legal periodicals is an indicator of the degree to which courts are policy-oriented with more policy-oriented courts citing more legal periodicals.[73] That the State supreme courts have cited relatively few legal periodicals suggests that while, for most matters, the State supreme courts are final courts of appeal in their respective jurisdictions, they are not as policy-oriented as the High Court which cites more journal articles as a proportion of total citations.[74]

Friedman and his colleagues explained citation practices across State supreme courts in the United States in terms of population base, amount of litigation in each state and the relative prestige of each of the State supreme courts.[75] Their findings suggested these factors were inter-related with the State supreme courts of the large states, such as California and New York, which had the biggest volume of litigation also having reputations for judicial innovation.[76] At the risk of over generalization, the results of this study together with the findings of the studies for the other State supreme courts suggest that the Supreme Court of Western Australia is in a middle group of states together with the Supreme Courts of Queensland and South Australia. These States have had to be receptive to the evolution of the common law in the bigger states and have 'borrowed' from the bigger states in formulating their own jurisprudence, but over the last couple of decades have become increasingly more confident in citing their own previous decisions. At one end of the spectrum are the State supreme courts of New South Wales and Victoria, which were the first of the State supreme courts to cite a high proportion of their own decisions and decisions of the High Court. These Courts are small consumers of coordinate citations, while being the largest suppliers of coordinate citations to other State supreme courts. Both states have the largest population bases in Australia,[77] have the biggest share of commercial litigation in Australia and have reputations among the other State courts for judicial innovation. At the other end of the spectrum is the Supreme Court of Tasmania, which cites few of its own decisions and, at the same time, cites a disproportionate number of decisions of the other State supreme courts. It has the smallest population of any of the six Australian states and a relatively small number of its own decisions to cite.

CONCLUSIONS

This paper has examined the citation practice of the Supreme Court of Western Australia over the period 1905 to 2005. The main findings of the study are that the Court cited predominantly English cases in the early decades of the twentieth

73. See eg Daniels, above n 3.
74. See Smyth, 'Other than Accepted Sources of Law?', above n 3; Smyth, 'Academic Writing and the Courts', above n 3.
75. See Friedman, Kagan, Cartwright & Wheeler, above n 5.
76. Ibid 804.
77. Australian Bureau of Statistics, *Australian Demographic Statistics*, Catalogue No. 3101.0 (December 2007).

century. Citation to English cases started to gradually decline from the mid-1930s. Since the Australia Acts 1986 (UK & Cth) and the Human Rights Act (1998), citation to English authorities has gone into rapid decline and has been replaced by citations to the Court's own previous decisions, citations to the High Court and citations to the other State supreme courts. Similar patterns with respect to the decline in citation to English authority for the last few decades of the twentieth century have found in studies for the other State courts. This is consistent with the emergence of an Australian common law that is increasingly distinct from its English origins.

We conclude with suggestions for future research. An obvious direction for future research on the citation practice of the State supreme courts in Australia would be to focus more on the comparative dimension. One such avenue would be to examine the determinants of coordinate citations across the six states using some sort of appropriate statistical method, such as multiple regression, to isolate the importance of reputation from related factors such as a state's population size and share of litigation.[78] A second avenue for future research would be to use data on all the six State supreme courts to examine how citation to secondary authorities have evolved at the state level and, in particular, which specific secondary authorities the courts have cited in more detail.[79] To some extent, conclusions about citation to secondary authority at the state level are impeded when using data for a single court, even when it spans a century, because secondary authorities only form a small part of total citations. Another related direction for future research would be to examine in more detail changes in judicial style in the State supreme courts, including changes in dissent rates over time and how these changes relate to variations in case load.[80] Alternatively, future research could consider how the caseload of the State supreme courts has changed over time and examine the extent to which broader institutional and socio-economic changes can explain changes in the courts' caseload.[81]

78. For studies for the United States State supreme courts along these lines, see GA Caldeira, 'On the Reputation of State Supreme Courts' (1983) 5 Political Behavior 83; GA Caldeira, 'The Transmission of Legal Precedent: A Study of State Supreme Courts' (1985) 79 American Political Sci Rev 178; G Caldeira, 'Legal Precedent: Structures of Communication Between State Courts' (1988) 10 Social Networks 29; P Harris, 'Ecology and Culture in the Communication of Precedent Among State Supreme Courts 1870–1970' (1985) 19 Law & Society Rev 449.

79. Such a study would be analogous in timeframe to Daniels' study of citation to secondary authority on the United States Supreme Court: see Daniels, above n 3.

80. Friedman and his colleagues examine changes in judicial style on the State supreme courts in the United States over the period 1870–1970: see Friedman, Kagan, Cartwright & Wheeler, above n 5. For a study of changes in judicial style in the High Court over the course of the twentieth century, see Groves & Smyth, above n 55.

81. For studies of United States supreme courts along these lines, see R Kagan, B Cartwright, L Friedman & S Wheeler, 'The Business of State Supreme Courts 1870–1970' (1977) 30 Stanford L Rev 121; H Kritzer, P Brace, M Gann Hall & B Boyea, 'The Business of State Supreme Courts Revisited' (2007) 4 J Empirical Legal Studies 427.