OTHER THAN "ACCEPTED SOURCES OF LAW"?: A QUANTITATIVE STUDY OF SECONDARY SOURCE CITATIONS IN THE HIGH COURT

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I. INTRODUCTION

The citation practice of courts is a neglected issue in Australian legal literature. More than 20 years ago, Merryman asked: "What do appellate courts cite in their opinions?", and went on to state: "[a]lthough the question has great practical and theoretical importance, surprisingly little has been done to answer it".[1] In the United States, largely as a flow-on from Merryman's seminal contributions, there are now a growing number of studies looking at the citation practice of appellate courts[2] and a smaller sub-literature focusing specifically on the citation of

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1 J 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 *Southern California Law Review* 381 at 381.

2 See J Merryman, "The Authority of Authority: What the California Supreme Court Cited in 1950" (1954) 6 *Stan L Rev* 613; J Merryman, note 1 *supra*; R Archibald, "*Stare Decisis* and the Ohio Supreme Court" (1957) 9 *Western Reserve Law Review* 23; P Brown and W Haddad, "Judicial Decision-Making on the Florida Supreme Court: An Introductory Behavioural Study" (1967) 19 *University of Florida Law Review* 566; W Reynolds, "The Court of Appeals of Maryland: Roles, Work and Performance - Part II: Craftmanship and Decision Making" (1978) 38 *Maryland Law Review* 148; R Mann, "The North Carolina Supreme Court 1977: A Statistical Analysis" (1979) 15 *Wake Forest Law Review* 39; L Friedman, R Kagan, B Cartwright and S Wheeler, "State Supreme Courts: A Century of Style and Citation" (1981) 33 *Stan L Rev* 773; and R Kagan, B Cartwright, L Friedman and S Wheeler, "The Evolution of State Supreme Courts" (1984) 76 *Mich L Rev* 961.

secondary authorities.[3] However, in Australia there are few studies considering citation practice in general[4] and none which focus exclusively on the citation of secondary authorities.[5] The objective of this paper is partly to fill this gap through analysing citations to secondary authorities in High Court cases decided in 1960, 1970, 1980, 1990 and 1996; the latter being the most recent year for which there was a complete set of Commonwealth Law Reports when the study was started.

What points of significance might emerge from analysing citations to secondary authorities in the High Court? The High Court is the most important legal institution in Australia and in recent years, in addition to its legal role as a final court of appeal, it appears to be taking on a more wide reaching social and, while debatable, even political function, as witnessed in the debate over implied rights in the Constitution.[6] Some commentators have suggested that, given the policy considerations involved, judges who more openly recognise their social role are also more likely to make greater use of secondary authority.[7] However, with the exception of von Nessen's study,[8] there is no systematic empirical research investigating the authorities used by the High Court to support its reasoning.

A study such as this should also be of interest to certain groups of people. First, it is of practical relevance to solicitors and barristers to know which periodicals and texts the High Court is willing to consider and which authorities it finds most impressive. Secondly, law libraries should be aware of the material considered by the Court to be most relevant in order to make these items available

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3 See D Maggs, "Concerning the Extent to Which the Law Review Contributes to the Development of the Law" (1930) 3 *Southern California Law Review* 181; C Newland, "Legal Periodicals and the United States Supreme Court" (1959) 7 *Kansas Law Review* 477; W Turner, "Legal Periodicals: Their Use in Kansas" (1959) 7 *University of Kansas Law Review* 490; R Scurlock, "Scholarship and the Courts" (1964) 32 *University of Missouri at Kansas City Law Review* 228; N Bernstein, "The Supreme Court and Secondary Source Material: 1965 Term" (1968) 57 *Georgetown Law Journal* 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 Library Journal* 1; J Ackers, "Thirty Years of Social Science in Supreme Court Criminal Cases" (1990) 12 *Law and Policy* 1; and J Ackers, "Social Science in Supreme Court Death Penalty Cases: Citation Practices and Their Implications" (1991) 8 *Justice Quarterly* 421.

4 As far as I am aware, there are two previous studies of citation practice in Australian courts: P von Nessen, "The Use of American Precedents by the High Court of Australia" (1992) 14 *Adel LR* 181 (citation to United States cases in the High Court 1901-87); R Smyth, "What do Judges Cite? – An Empirical Study of the 'Authority of Authority' in the Supreme Court of Victoria" (1999) 25 *Mon LR* (forthcoming) (citation to case law and secondary authority in the Supreme Court of Victoria in 1970, 1980 and 1990).

5 For the purpose of this paper, secondary authorities include all references other than citations to those sources traditionally considered to be primary. Hence, excluded are citations to constitutions, statutes, case law, court rules, administrative regulations, executive orders, parliamentary debates and parliamentary committee reports. This definition is consistent with previous studies, see N Bernstein, note 3 *supra* at 56; and W Daniels, note 3 *supra* at 3.

6 The judges, themselves, have also been much more ready to recognise their role in making the law. See Sir D Dawson, "Do Judges Make Law? Too Much?" (1996) 3 *Judicial Review* 1; Sir A Mason, "The Judge as Lawmaker" (1996) 3 *James Cook University Law Review* 1; M Kirby, "Judicial Activism" (1997) 27 *UWALR* 1.

7 G Nicholls, "Legal Periodicals and the Supreme Court of Canada" (1950) 28 *Canadian Bar Review* 422 at 445 states: "law cannot be divorced from its social context, and especially where the court has a choice, where it is playing a creative role, it must turn wherever it can for assistance and by the discriminating use of aids supplementary to precedent and statute – one of which is the legal periodical – strive to make the law meet social ends".

8 Von Nessen, note 4 *supra*.

to interested parties. Thirdly, it is of interest to academics (and others) to know which periodicals have the most influence in the High Court, given that when writing an article for publication, presumably the author believes he or she has something to contribute to the scholarly development of the law and wants to get the message across to the most influential audience possible.[9]

The decision about which years to sample in this study raises two issues. First, there were two possibilities in terms of the time frame. One was to look at recent citation practice such as the last five years and the other was to look at five randomly chosen years over several decades. There are benefits and costs with both approaches. Focusing on recent citation practice may have enhanced the relevance of the results for libraries, potential authors and practitioners. Taking a broad trend-based perspective, however, provides an indication of changes in judicial reasoning or philosophies over time. This provides insights into different judicial styles under successive Chief Justices, which is important because judicial style (represented in part through citation practice) is the best indicator we have of sound legal reasoning.

The choice of years for this study provide a relatively long time period to investigate a range of issues which would not be possible if only the most recent years were focused on. First, to what extent has the Court's citation of secondary authority changed over time and did it show any marked increase under the 'Mason Court'?[10] Secondly, are trends discernible in the relative use of particular secondary sources such as encyclopedias, periodicals and legal texts? Thirdly, how have the citation practices of individual judges differed over time?

A second issue involved in taking a broad historical perspective is that the choice of years is somewhat arbitrary.[11] In the absence of a complete survey covering several decades, it is impossible to be certain whether the chosen years are representative of successive High Courts. The most that can be said is that there is no reason to think that the selected years are not representative of their periods.

The article is set out as follows. The next Part discusses reasons for citing secondary authorities. Part III examines different academic and judicial attitudes towards courts citing secondary authorities. Part IV provides an overview of the sample and, at a macro level, looks at changes in the citation practice of the High Court over time. Part V looks at which specific secondary authorities have been cited in more detail. It gives information on which annotations, finding aids (such

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9 On the last point see C Weiss, "The Diffusion of Social Science Research to Policymakers: An Overview" in G Melton (ed), *Reforming the Law: Impact of Child Development Research*, Guilford Press (1987).

10 The term the 'Mason Court' is used in this paper only as a useful shorthand. C Saunders, "The Mason Court in Context" in C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia*, Federation Press (1996) 2 at 4 states: "References to the 'Mason Court' are of course a convenience rather than an attempt to overstate the influence which a single Justice may have had on a court of seven in which the responsibility to give 'individual expression to the law' clearly is taken very seriously". See also the comments by Sir G Brennan, "A Tribute to Sir Anthony Mason" 10 at 10-11; and Sir A Mason, "A Reply" 113 in the same volume.

11 Compare with Merryman's justification for using 1950 as a reference year in his original study: note 2 *supra* at 651. He states: "That year was chosen more for the fact that it is a nice round number than for any other reason".

as encyclopedias), periodicals, textbooks and non-legal references the Court has cited in given years and the frequency with which it has cited particular authorities. The citation practice of individual Justices is considered in Part VI. The last Part contains some concluding comments.

II. REASONS FOR CITING SECONDARY AUTHORITIES

Secondary authorities are not binding on the Court, so why are they cited? Is it for their persuasive value? There seem to be at least six different reasons why judges cite secondary authorities. There is some overlap at the edges and some of the reasons are more common than others. The first reason is convenience. In most cases, textbooks or articles in periodicals refer to cases which judges find convenient to adopt. For example, in *Australian Conservation Foundation v The Commonwealth*,[12] in examining the issue of standing, Gibbs J stated:

> The question of whether a private person has standing in particular circumstances has been considered in many cases, which will be found discussed by Professor Heydon in Stein, *Locus Standi* and in Whitmore and Aronson, *Review of Administrative Action*.[13]

A second example is Justice Toohey's judgment in *Concrete Constructions (NSW) Pty Ltd v Nelson*.[14] In discussing s 52 of the *Trade Practices Act* 1974 (Cth), Toohey J stated:

> a glance at the reports of the Australian trade practices cases soon discloses the volume of litigation spawned from this provision. Reference in summary form to many of the decisions may be found in Miller, *Annotated Trade Practices Act*.[15]

In these cases, textbooks act as digests of case law and provide a shorthand method of citation as an alternative to listing out the authorities.[16]

It is also convenient for judges to cite secondary authorities when considering the law in other jurisdictions. Journal articles and textbooks often provide a quick and readily accessible summary of the law in, for example, the United States which saves time ploughing through case law; particularly if the judge is only

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12 (1980) 146 CLR 493.

13 *Ibid* at 528.

14 (1990) 169 CLR 594.

15 *Ibid* at 607.

16 There are many other examples of this form of citation. See *Thatcher v Charles* (1960) 104 CLR 57 at 71, per Windeyer J; *Scoles v Commissioner for Government Transport* (1960) 104 CLR 339 at 344, per Windeyer J; *Esmonds Motors v The Commonwealth* (1970) 120 CLR 463 at 476, per Menzies J; *Lutheran Church of Australia v Farmers' Co-operative Executors and Trustees* (1970) 121 CLR 628 at 654, per Windeyer J; *Love v Attorney General (NSW)* (1990) 169 CLR 307 at 322, per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ; and *Kars v Kars* (1996) 187 CLR 354 at 375, per Toohey, McHugh, Gummow and Kirby JJ.

mentioning equivalent foreign law in passing.[17] However, there is also another reason for citing secondary authorities when examining the law in other jurisdictions. While it is now much more common for the High Court to cite foreign primary authorities, and particularly decisions of the United States Supreme Court, in the past this practice was generally frowned upon.[18] Hence, when examining the law in other jurisdictions, citing secondary authorities which summarised the law was a more acceptable practice than citing foreign precedent.

A second reason for citing secondary authority is to explore the development of legal principle. Of the cases in the sample, Justice Windeyer's judgments stand out in this regard. His Honour often explored the origins of legal principles drawing on opinions expressed in journal articles and legal texts.[19] A third reason for citing secondary authority is to draw on the opinion of academic writers to assist in determining what earlier cases decided. In some instances, this results in an extended discussion of controversies in the law where the views of a range of authors are canvassed. In other cases, instead of undertaking an extended discussion, judges cite authorities as 'recommended reading' if the reader wishes to explore certain issues in more depth. Again, this was a feature of many of Justice Windeyer's judgments. One example is *Smith v Jenkins*[20] where, in the course of discussing whether the maxim *ex turpi causa non oritur actio* is part of the law of torts, Windeyer J stated: "I shall not attempt to look at this topic in great depth. ... Those who are interested to go deeply into the matter will find good starting points in ...".[21] His Honour then proceeds to list a number of journal articles and various textbooks on the topic.

Fourthly, in some cases judges turn to well respected academic authors in particular areas of the law to provide further justification for their interpretation of previous authorities. For instance, in *Betts v Conolly*,[22] Barwick CJ cited a passage from *Halsbury's Laws of England* to support his interpretation of previous cases, pointing out that it had "remained unaltered since the first edition

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17 For examples where the High Court has cited secondary authorities as convenient summaries of the law in other jurisdictions, usually the United States, see *Clark v Ryan* (1960) 103 CLR 486 at 592, per Menzies J; *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186 at 203, per Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ; *Hall v Busst* (1960) 104 CLR 206 at 244, per Windeyer J; *Gaio v The Queen* (1960) 104 CLR 419 at 436, per Menzies J; *The Nominal Defendant v Clements* (1960) 104 CLR 476 at 493, per Windeyer J; *The National Insurance Co of New Zealand v Espagne* (1960) 105 CLR 569 at 599, per Windeyer J; *R v Trade Practices Tribunal: Ex parte Tasmanian Breweries* (1970) 123 CLR 361 at 402, per Windeyer J; *Mount Isa Mines v Pusey* (1970) 125 CLR 383 at 407, per Windeyer J; *Transfield v Arlo International* (1980) 144 CLR 83 at 103, per Mason J; *R v O'Connor* (1980) 146 CLR 64 at 107, per Mason J; *Maxwell v The Queen* (1996) 184 CLR 501 at 524, per Toohey J; and *Breen v Williams* (1996) 186 CLR 71 at 112-13 per Gaudron J, at 117 per McHugh J, at 125 per Gummow J.

18 Amongst others, L Campbell, "Lionel Murphy and the Jurisprudence of the High Court Ten Years On" (1996) 15 *Univ Tas LR* 22 emphasises this point. She argues that one of the reasons Justice Murphy's judicial technique was not readily accepted was that he made frequent citations to case law in the United States, sometimes in preference to Australian cases.

19 Some of the best examples are *Thomas v The Queen* (1960) 102 CLR 584 at 603; *Hall v Busst* (1960) 104 CLR 206 at 240-1; *Dennis Hotels v State of Victoria* (1960) 104 CLR 529 at 593-608; and *Pacific Film Laboratories v Federal Commissioner of Taxation* (1970) 121 CLR 154 at 166.

20 (1970) 119 CLR 397.

21 *Ibid* at 410-11.

22 (1970) 120 CLR 417.

... and [that] distinguished lawyers have participated in both the second and third editions".[23] Fifthly, some secondary authorities are cited because they have been approved in previous cases as correctly stating the law. As a result, "the fact of citation gives a work *authority* to some degree and it will thus exert some influence on the way the law grows".[24] Hence, when secondary authorities have been approved in previous cases over a long period, judges often treat them as de facto primary authorities.

A sixth reason for referring to academic commentators is to use social science and other non-legal authorities to examine the 'legislative fact' that underpins legal rules. While the High Court does refer to social science and other non-legal authorities, it has not, or at least in the past has not, done so as often as the United States Supreme Court. One reason for this is the existence of a Bill of Rights in the United States which we do not have in Australia. A second reason is the willingness of the United States Supreme Court to consider social science evidence in a string of capital punishment cases.[25] While the Supreme Court's readiness to examine and cite social science evidence is controversial, a number of commentators such as Levine and Howe argue that this "reflects an increasing depth of penetration of social science into legal culture"[26] in the United States.

III. ACADEMIC AND JUDICIAL ATTITUDES TO COURTS CITING SECONDARY AUTHORITIES

A. Legal Periodicals

There has been some criticism of courts citing periodicals, but most academic and judicial comment has been favourable. The main criticism, particularly in the United States, is that contributors to periodicals write with the express purpose of influencing the outcome of a case. For instance, William Douglas, a former Justice of the United States Supreme Court suggests that too often the "views presented [in periodicals] are those of special pleaders who fail to disclose that they are not scholars, but rather people with axes to grind".[27] This appears to be the main reason why in the past a convention existed in England that authors could only be cited after they had died.[28] That this convention no longer exists reflects

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23 *Ibid* at 425

24 Merryman, note 1 *supra* at 413 (emphasis in original).

25 See S Daniels, "Social Science and Death Penalty Cases – Reflections on Change and the Empirical Justification of Constitutional Policy" (1979) 1 *Law and Policy Quarterly* 336; and S Diamond and J Casper, "Empirical Evidence and the Death Penalty: Past and Future" (1994) 50 *Journal of Social Issues* 177.

26 M Levine and B Howe, "The Penetration of Social Science into Legal Culture" (1985) 7 *Law and Policy* 173 at 173.

27 W Douglas, "Law Reviews and Full Disclosure" (1965) 40 *Washington Law Review* 227 at 228-9.

28 See *Union Bank v Munster* (1887) 37 Ch D 51 at 54, per Kekewich J.

strong criticism of the Douglas view that academic authors are not detached.[29] Lord Denning, among others, has argued that one of the main advantages of consulting academic writings is that the authors have time for considered reflection:

> [Articles and textbooks] are written by men who have studied the law as a science with more detachment than is possible to men engaged in busy practice. The influence of the academic lawyers is greater now than it has ever been and is greater than they themselves realise. Their influence is largely through their writings. The notion that their works are not of authority except after the author's death has long been exploded. Indeed the more recent the work the more persuasive ... because it takes into account modern developments in case law.[30]

A number of judges in the United States have spoken in glowing terms about the value of legal periodicals and/or their growing importance. Benjamin Cardozo wrote that:

> Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of universities. ... This change of leadership has stimulated a willingness to cite the law review essays in briefs and in opinions in order to buttress a conclusion.[31]

Charles Hughes suggested that:

> it is not too much to say that in confronting any serious problem, a wide awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analysed, in a good legal periodical.[32]

Earl Warren has written in similar terms, stating that:

> law reviews perform the indispensable function of criticism for an important institution ... [and] help make the future path of the law. Much of the finest legal thinking has been made available to us through leading law review articles.[33]

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29 Nicholls, note 7 *supra* at 430 writes: "It is said that the reason a living writer, particularly in a periodical, cannot be cited may be because of the suspicion that he has written for the express purpose of influencing the decision in a pending case. If the suggestion here is that it is improper for a disinterested and unselfish scholar to attempt to assist the court to reach what he believes is a correct interpretation of the law, one can only disagree. And if the suggestion is that one of the parties may instigate an article for the express purpose of bolstering a weak case, the answer is that it can be safely left to the judges to distinguish between the scholar and the hack".

30 AT Denning, "Review of PH Winfield *A Textbook of the Law of Torts*" (1947) 63 *LQR* 516.

31 B Cardozo, "Introduction" to *Selected Readings on the Law of Contracts From American and English Legal Periodicals* (1931) p viii.

32 C Hughes, "Forward" (1941) 50 *Yale LJ* 737 at 737.

In Australia, there is little judicial comment about legal periodicals, but that which exists is generally favourable. Sir Frank Kitto argues that it is the obligation of the judge to seek out periodicals and other secondary authorities in pursuit of a just result.[34] Sir Anthony Mason has also expressed the view that judicial recourse to periodical articles and other writings is a useful practice.[35]

B. Textbooks

Academic commentators seem to agree that it is an acceptable and useful practice for courts to cite well-known and respected legal treatises. Merryman points out that:

> there are many treatises which are prepared by competent scholars after careful and exhaustive research among the authorities and in related fields. A court which cites and relies on them knows it is consulting a work of quality.[36]

However, others have pointed out that the courts need to be alert to the existence of conflicting positions. For example, Reynolds notes:

> While 'the treatises of learned men' – of authors such as Wigmore or Corbin or Prosser – are analytic enough to satisfy any standard of scholarship, they nevertheless must be handled with care, for they represent, after all, only the views of the author.[37]

Wigmore, himself, is highly damning of what he saw as the indiscriminate citation of textbooks regardless of the scholarship of the author: "Almost any printed page, bound in law-buckram and well advertised or gratuitously presented, constitute authority fit to guide the courts".[38] In Australia, judges have expressed different views about the desirability of citing textbooks. Writing about the practice in the High Court while he was Chief Justice, Sir Owen Dixon stated:

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33 E Warren, "Comment on the 50th Anniversary of the Northwestern University Law Review" (1956) 51 *Northwestern University Law Review* 1 at 1. Other judges in the United States that have spoken favourably about law reviews are F Crane, "Law Reviews and the Courts" (1935) 4 *Fordham Law Review* 1 (Chief Judge, New York Court of Appeals); S Fuld, "Judge Looks at the Law Review" (1953) 28 *New York University Law Review* 915 (Associate Judge, New York Court of Appeals); and J Hoffman, "Law Reviews and the Bench" (1956) 51 *Northwestern University Law Review* 17 (Judge, United States District Court).

34 Sir F Kitto, "Why Write Judgments?" (1992) 66 *ALJ* 787 at 793: "It is always possible that helpful authorities or other aids to decision have been missed in the argument through accident, laziness or inefficient research .... [The possibility that this might occur] is enough to impose an imperative obligation on the judge to do all he can to guard against it, even if that means he must plod once more his weary way through the digests and their supplements, including the lists of cases judicially considered, and sometimes the law periodicals, English, American, Australian ...".

35 Sir A Mason, "Future Directions in Australian Law" (1987) 13 *Mon LR* 149 at 154.

36 Merryman (1954), note 2 *supra* at 647-8.

37 Reynolds, note 2 *supra* at 154.

38 H Wigmore, *A Treatise on Evidence*, Little, Brown and Co (3rd ed, 1940) vol 1 p 243.

> Textbooks and other works of authority are used. ... The pre-supposition is that there exists a definite system of knowledge or thought and that judgments and other legal writings are evidence of its contents.[39]

On the other hand, Sir Garfield Barwick was critical of citing textbooks on the basis that reference to the opinions of others might lessen the authority of the judgment:

> Of course all the relevant books must be read and reread as part of the judicial process. ... But to bolster the judge's conclusions formed after this process has been followed by citation of the views of others, however eminent and authoritative, may reduce the authority of the judge and present him as a research student recording by citation his researched material ... if citation is necessary to complete the logical process then of course it must be made. But otherwise it can become an exercise in essay-writing rather than the statement of reason for an authoritative judgment. I did try to follow this belief in writing my own judgments.[40]

C. Legal Encyclopedias

While encyclopedias, and particularly *Halsbury's Laws of England*, are often cited in judgments, most commentators, and some judges, have been critical of their use. The main point critics make is that because legal encyclopedias collect rather than analyse, they give the impression that what is desirable is 'discovery of the law'. Hence, if a court relies on encyclopedias it is less likely to understand the reasons behind the development of the case law.[41] For example, Smith, who was later an Arkansas Supreme Court judge, criticises encyclopedias for "merely parroting the law as stated in original sources".[42] Peters J, a former member of the California Supreme Court, points out that encyclopedias "are guides to the law, not embodiments of it. The statement of the law is no sounder than the cases that are cited to support the text".[43] In Australia, however, judges have not made the same criticisms, emphasising instead that encyclopedias make it easier to track the law given time constraints. Michael Kirby, for instance, while not commenting on the use of encyclopedias as such, has stressed that when writing judgments: "[t]he time for reflection, for careful planning, thoughtful research and for prose is strictly limited".[44] It is in these circumstances that judges tend to refer to, and cite in their judgments, legal encyclopedias.

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39 Sir O Dixon, *Jesting Pilate*, WS Hein (2nd ed, 1997) p 156.

40 Sir G Barwick, *A Radical Tory*, Federation Press (1995) pp 223-4.

41 See Reynolds, note 2 *supra* at 153; Archibald, note 2 *supra* at 33; and Merryman (1954), note 2 *supra* at 634-6.

42 G Smith, "The Current Opinions of the Supreme Court of Arkansas – A Study in Craftmanship" (1947) 1 *Arkansas Law Review* 193 at 194.

43 R Peters, "Introduction: A Judge's View of Appellate Advocacy" in State Bar of California Committee on Continuing Education of the Bar, *California Civil Appellate Practice*, (1966) pp xviii-xviv cited in Reynolds, note 2 *supra* at 153-4.

44 M Kirby, "On the Writing of Judgments" (1990) 64 *ALJ* 691 at 691.

D. Social Science and Other Non-legal Authorities

There is a large body of literature on the use of non-legal materials in courts and much is critical of the use of social science evidence in the United States Supreme Court.[45] Two problems stand out with respect to citing social science authorities. First, when judges do refer to and cite non-legal materials they often do so incompetently, because they do not have the expertise to analyse social science evidence. Secondly, judges are often (unwittingly) selective in citing non-legal sources, referring to certain evidence, but ignoring contrary evidence because they do not have the time or perhaps inclination to research a social science issue in depth. In these cases, judicial treatment of social science authorities are often superficial. This problem is compounded when, as in the case of the literature on capital punishment in the United States, the social science literature contains a range of methodologies which in many instances have strong ideological undertones.

IV. PATTERNS OF SECONDARY SOURCE CITATION IN THE HIGH COURT

The sample in this study covers all cases published in the Commonwealth Law Reports, decided in 1960, 1970, 1980, 1990 and 1996. There were 288 reported cases in the sample altogether. There were 90 reported cases in 1960, 53 in 1970, 51 in 1980, 53 in 1990 and 41 in 1996. There are two observable trends. First, the number of reported cases has fallen. Secondly, the average length of reported cases has increased.[46] In 1960, the average length of reported cases was 12.4 pages. This increased to 16 pages in 1970, 19.8 pages in 1980, 24.4 pages in 1990 and 38.1 pages in 1996. The fact that the sample only covers reported decisions is a limitation given that this is less than the actual number of cases decided.[47] However, cases are selected for inclusion in the Commonwealth Law Reports on the basis of their perceived precedent value and relevance to the profession.

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45 See D O'Brien, "The Seduction of the Judiciary: Social Science and Courts" (1980) 64 *Judicature* 9; P Sperlich, "Social Science Evidence and the Courts: Reaching Beyond the Adversary Process" (1980) 63 *Judicature* 280; and J Monahan and L Walker, "Social Authority: Obtaining, Evaluating and Establishing Social Science in Law" (1986) 134 *University of Pennsylvania Law Review* 477. For examples where judges have spoken on the use of social science evidence in courts see J McMillan, "Social Science and the District Court: The Observations of a Journeyman Trial Judge" (1975) 39 *Law and Contemporary Problems* 157; J Craven, "The Impact of Social Science Evidence on the Judge: A Personal Comment" (1975) 39 *Law and Contemporary Problems* 150; and J Wisdom, "Random Remarks on the Role of Social Sciences in the Judicial Decision Making Process in School Desegregation Cases" (1975) 39 *Law and Contemporary Problems* 134.

46 Von Nessen, note 4 *supra* observes a similar trend over the period 1901-87.

47 To give some indication of case load, in 1980, 184 matters were heard and 72 judgments delivered (65 reserved and 7 unreserved): *High Court Annual Report* 1984-85. In 1990, 261 matters were heard and 84 judgments delivered (67 reserved and 17 unreserved): *High Court Annual Report* 1990-91. In 1995-96, 310 matters were heard and 61 cases decided (36 civil appeals, 11 criminal appeals, 5 constitutional cases and 9 applications for order nisi). In 1996-97, 349 matters were heard and 56 cases decided (29 civil appeals, 14 criminal appeals and 13 constitutional cases): *High Court Annual Report* 1996-97. Annual reports for earlier years in the sample do not contain statistics on judicial case loads.

Hence, while it is important to recognise that the sample need not be representative, it does cover the most important cases the High Court decided over the period.

All citations to secondary authorities in the sample cases were counted. A citation was counted only once if repeated in the same paragraph or same footnote. If there were repeated citations to the same source in subsequent paragraphs or footnotes these were counted again on the basis that the source was being cited for a different proposition and therefore had separate significance.[48] In order to give proper weight to citations in joint judgments, the number of citations in joint judgments were multiplied by the number of participating Justices when calculating the total figure.[49] Some previous studies have attempted to catalogue the reason why the authority was cited: for example, how many lines the judge devoted to discussing, or quoting from, authorities. However, no attempt was made in this study to take account of the reasons for citing authority in order to minimise any discretionary bias in the observations. This approach might be criticised for lacking sophistication, but the fact that judges have no obligation to cite secondary authority (and often do not) means that the study still provides useful insights through counting the number of times that secondary authorities were considered worth citing at all.[50]

Tables 1A and 1B give information on the number of secondary source citations per judgment and case over the sample period. With the exception of 1970,[51] it shows a steady rise in the Court's use of secondary authority between 1960 and 1990, and then a significant increase between 1990 and 1996. Between 1960 and 1996, the total number of secondary sources cited increased over 350 per cent (from 255 in 1960 to 904 in 1996). The number of secondary sources cited per case increased almost 800 per cent over the same period (from 2.8 in 1960 to 22 in 1996). The statistics in terms of citation per judgment are similar. There were 372 separate judgments or occasions in which Justices participated in joint judgments in 1960. This figure fell to 226 in 1996 which is consistent with the decrease in the number of reported cases. The number of citations per judgment increased from 0.7 in 1960 to 1.0 in 1990 and then showed a rapid rise to 4.0 in 1996.

The increase in the total number of citations reflects an increase in both the number of legal and non-legal secondary sources cited. In absolute terms there was a larger increase in the number of legal secondary sources cited, but in percentage terms there was a sharper rise in the number of non-legal sources cited. The number of legal (non-legal) sources cited increased from 2.6 (0.3) per case in

48 This is consistent with the method adopted in Daniels, note 3 *supra* at 3-4.

49 This is consistent with the two previous citation practices for Australian courts. See von Nessen, note 4 *supra* at 188; and Smyth, note 4 *supra*.

50 Compare with von Nessen, note 4 *supra* at 188 who provides a similar justification.

51 The figures for 1970 appear atypical. The reason for this could be that the membership of the court was unstable. This was the only year for which there are reported judgments of eight Justices. Sir Frank Kitto resigned from the High Court on 1 August 1970. Sir Harry Gibbs was appointed to the High Court on 4 August 1970. For an indication that shifting membership of the California Supreme Court in 1960 might have skewed the results of a study of that court's citations see Merryman, note 1 *supra* at 382-4. See also Daniels, note 3 *supra* at 3.

1960 to 19 (3.0) per case in 1996. The figures in terms of citations per judgment paint a similar picture. The number of legal (non-legal) sources cited increased from 0.6 (0.1) per judgment in 1960 to 3.4 (0.6) per judgment in 1996. An interesting observation is that the number of *legal* sources cited per judgment in 1960 is the same as the number of *non-legal* sources cited per judgment in 1996, which indicates the extent to which the High Court now cites secondary authority.

How can the increase in citation to secondary authorities over time be explained? We can speculate about some of the factors in terms of the rationales discussed in Part II. The first is convenience. Over time, the number of previous cases which judges have to consider has increased. In these circumstances, up-to-date texts and journal articles have become more important as finding aids and for providing recent summaries of the law. Secondly, the pool of secondary authorities which have been approved as correctly stating the law has become bigger. This generates a multiplier effect where the number of secondary authorities which are treated as de facto primary authorities is increased. Thirdly, while the number of potential cases has increased over time, the inception of the Federal Court has freed the High Court to select for review the most important cases in terms of the development of the law. This has allowed the High Court to concentrate more on issues at the 'cutting edge' of the law which are often of great social importance, particularly in the constitutional area. These are the sorts of cases where the opinion of contributors to journals and textbook writers are most valuable. These cases also tend to be more complex and often involve difficult issues of law. In situations like these, judges tend to turn more to the views of academic commentators to help decide what earlier cases decided and to support their own interpretation of previous authorities.

Fourthly, the historical increase in citations to secondary authorities could reflect organisational and technical changes in the court system. One change is that the number and breadth of secondary materials available to Justices through the High Court's own library has increased over time, particularly while Sir Anthony Mason was Chief Justice. For instance, Sir Gerard Brennan points out that during this period "the research capacity of the [High Court] library was strengthened and more importantly utilised".[52] This suggests that in the earlier years in the sample, the Justices might have been much more dependent on the secondary authorities which counsel cited in argument.

To get some indication of whether the Court's reliance on counsel to cite secondary authorities has changed over time, all secondary source citations which were cited in the reported parts of the argument appearing at the start of each case

52 Brennan, note 10 *supra* at 13.

were noted.[53] In 1960, 17 per cent of secondary source citations by the Court were cited by counsel in the reported sections of argument. In the other years the figures were: 1970, 14 per cent; 1980, 5 per cent; 1990, 28 per cent and 1996, 17 per cent. The obvious point is that these amounts are less than one would expect, but have to be viewed with caution. The problem is that they almost certainly underestimate the significance of whether a secondary source was cited in argument because, for most cases, argument is not fully reported and in some instances is not reported at all. Hence, it is impossible to know which secondary authorities were cited by counsel with any certainty. Having said this, for many of the cases decided in 1990 and 1996 there is extensive documentation of counsel's argument, meaning that the figures for these years are likely to be more reliable. The fact that the percentages are fairly low for 1990 and 1996 indicates that the judges, in these years at least, tended to consult secondary sources which were not cited in court.

With respect to the type of judgment, two points stand out in Table 1A. First, the relatively low number of joint judgments while Sir Garfield Barwick was Chief Justice, particularly in 1970. Secondly, the high proportion of joint judgments when Sir Anthony Mason and later Sir Gerard Brennan were Chief Justice. Both of these points have been observed and commented on previously. For instance, Marr, writing about the lack of consensus in the Barwick Court, suggests that Barwick's inflexibility was the main reason for so few joint judgments.[54] McGinley argues that it was not Barwick's unwillingness to compromise as much as general inflexibility amongst the judges.[55] This contrasts with Sir Anthony Mason's period as Chief Justice. Sir Gerard Brennan writes: "His relationship with the other members of the Court fostered its collegiate spirit. Suggestions for change in a draft judgment were freely given or received with full recognition of the independence and intellectual integrity of the other Justices".[56] With the exception of 1980, the citation rate to secondary authorities was higher in single judgments than joint judgments. One possible reason for this could be the fact that joint judgments represent a compromise: if just one judge objects to a particular citation, it might end up being omitted.

Previous studies in the United States have found that secondary source citations occur more frequently in dissenting judgments than in majority judgments.[57] The

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53 There are no practice directions in the High Court regarding which secondary authorities can and cannot be cited. Even casual inspection of the reported argument at the start of most cases in the Commonwealth Law Reports suggests that counsel cite a wide range of secondary authority in argument. John Doyle, Chief Justice of the Supreme Court of South Australia, writes of his experience appearing as counsel before the High Court: "When cases are argued before the Court it is a common practice for materials to be handed to the Court and accepted by the Court at the hearing of the appeal. Frequent sources for such materials are Law Reform Reports, published expert reports on a topic, material culled from other academic and authoritative sources, government reports and so on": J Doyle, "Implications of Judicial Law Making" in C Saunders (ed), note 10 *supra* 84 at 98.

54 D Marr, *Barwick*, George, Allen and Unwin (1980) p 223.

55 G McGinley, "The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate Courts" (1987) 11 *Adel LR* 203 at 209. Sir Garfield Barwick's own observations on his period as Chief Justice seem to confirm this explanation: see note 40 *supra*, p 223.

56 Brennan, note 10 *supra* at 13.

57 See Mann, note 2 *supra* at 45; Bernstein, note 3 *supra* at 78; and Daniels, note 3 *supra* at 12.

rationale for this is that dissenting judgments often reflect novel legal doctrine, therefore, we might expect them to make greater use of non-traditional sources. With the exception of the last two years, the results here tend to confirm previous findings. The reason why the citation rate per judgment is not larger in dissenting judgments in 1990 and 1996 seems to reflect the relatively steady dissent rate over the sample period coupled with a significant increase in the absolute number of citations to secondary sources in those years. The aggregate figures, however, tend to mask noticeable differences between individual judges. For example, in 1980, Murphy J was the biggest citer of secondary authority on the Court and also wrote the largest number of dissenting judgments (see Part VI below). Most of these were entirely consistent with the argument that dissenting judgments reflect novel legal doctrine and are therefore more likely to draw on non-traditional sources.[58]

Table 2 breaks secondary authorities cited by the Court down into various types of legal and non-legal sources. A number of points of significance emerge from Table 2. First, most citations in each of the years studied were to legal, rather than non-legal secondary sources. In each year, except 1980 when the figure was 78.8 per cent, legal sources made up over 80 per cent of secondary authorities cited. This finding contrasts with studies for the United States which have found that courts there cite a higher proportion of non-legal sources.[59] Secondly, over the five years, legal treatises and legal periodicals made up the bulk of the Court's citation to secondary authorities: legal treatises were cited the most often (857 citations), followed by legal periodicals (373 citations). Legal encyclopedias (71 citations) and annotations (37 citations) were cited relatively few times. These results are consistent with previous studies in the United States.[60] However, a previous study for the Supreme Court of Victoria for the years 1970, 1980 and 1990,[61] found that in percentage terms it cited legal encyclopedias more frequently and, at the same time, periodicals less frequently than this study suggests is true for the High Court. This indicates that the High Court is prepared to cite a wider range of secondary source material, rather than just 'traditional' secondary sources such as *Halsbury's Laws of England*. This could also reflect differences in case load between the High Court and Supreme Courts and particularly the High Court's willingness to cite legal periodicals in constitutional cases.

Looking at variations over the five years, some trends are discernible. First, while still easily accounting for the biggest share of citations to secondary authorities as a whole, citations to legal treatises declined in percentage terms. In 1960, legal treatises accounted for 65.5 per cent of citations to secondary authorities. In 1996 this fell to 41.6 per cent. Secondly, legal periodicals were cited more often in 1996, than in the other four years. In 1990, legal periodicals accounted for 14.4 per cent of citations to secondary authorities. In 1996, this

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58 For discussion of Justice Murphy's judgments and judicial technique see J Scutt (ed), *Lionel Murphy: A Radical Judge*, Macmillan (1987); Campbell, note 18 *supra*; and M Kirby, "Lionel Murphy and the Power of Ideas" (1993) 18 *Alt LJ* 253.

59 Daniels, note 3 *supra* at 6-7.

60 *Ibid.*

61 Smyth, note 4 *supra*.

figure almost doubled to 28.1 per cent. This is consistent with previous studies for the United States and the Supreme Court of Victoria which have found that legal periodicals have been cited more often over time.[62] Thirdly, there is an increase in 'legal other' in 1990 and 1996, and in 1996 the figure for 'legal other' (96 citations) was more than twice as large as 1990 (43 citations) in absolute terms. One of the main reasons for this was the decision in *Cole v Whitfield*[63] that it is legitimate to refer to the Constitutional Convention Debates when interpreting the Commonwealth Constitution.[64]

In a number of cases in 1990 and 1996, the High Court referred to the Convention Debates. While not necessarily agreeing that the Convention Debates can provide useful insights in all circumstances, most judges seem to see the right to refer to the Debates as a logical and progressive step. For example, Sir Anthony Mason is "inclined to treat the Convention Debates with some reserve [because] they rarely reveal the extent to which the expressed views of a speaker were shared by other delegates". However, he endorses the right to refer to the Convention Debates. In this respect, his Honour writes:

> [Prior to *Cole v Whitfield*] the Debates had been regarded as forbidden fruit. Why, it is hard to understand when Justices of the Court had frequently relied on references in Quick and Garran[65] which were clearly based on the Convention Debates. The legitimacy of referring to the Debates was an almost inevitable consequence of prior acceptance by the High Court of referring to Hansard ....[66]

Table 3 gives some indication of the type of cases where secondary authorities are currently being cited. In 1996, constitutional law cases accounted for 44 per cent of secondary source citations. This was followed by tort law (14 per cent of secondary source citations) and the *Native Title Act* 1993 (Cth) (13 per cent of secondary source citations). This is consistent with studies by Bernstein[67] and Daniels[68] which found that most citations to secondary authorities by the United States Supreme Court also occurred in constitutional law cases. This is also consistent with von Nessen's previous study of the High Court which found, not surprisingly, that the majority of citations to United States case law occurred in constitutional cases.[69] This partly reflects the fact that constitutional cases involve difficult issues of interpretation on which secondary authorities can be helpful and partly the predominance of constitutional cases in the caseload of the Court.

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62 Merryman, note 1 *supra*; Daniels, note 3 *supra*; Newland, note 3 *supra*; and Smyth, *ibid.*

63 (1988) 165 CLR 360

64 *Ibid* at 385-93

65 J Quick and R Garran, *Annotated Constitution of the Australian Commonwealth*, Angus and Robertson (1901).

66 Sir A Mason, "Trends in Constitutional Interpretation" (1995) 18 *UNSWLJ* 237 at 245.

67 Bernstein, note 3 *supra*.

68 Daniels, note 3 *supra*.

69 Von Nessen, note 4 *supra*.

V. TYPES OF SECONDARY SOURCES CITED

A. Legal Periodicals

Table 4 sets out all legal periodicals cited in each of the five years. Two journals (*Australian Law Journal* and *Law Quarterly Review*) were cited in each of the five years. These two journals, with 50 citations each, were also the most heavily cited periodicals.

The *Melbourne University Law Review* was cited in four of the five years and three further journals (*Sydney Law Review*, *Harvard Law Review* and the *Modern Law Review*) were cited in three of the five years. Overall, the Court cited 62 journals in one or more of the years over the sample period. Of these, 24 are published in North America, 22 are published in Australia, 14 are published in Britain and two are published elsewhere. These figures suggest that the High Court is receptive to overseas academic opinion.

An interesting issue concerns the role of associates. The authors of similar studies as this for courts in the United States have argued that associates have had an important influence on which periodicals are cited and that citations to certain university law reviews and not others can be explained on the basis of which universities associates attended. For instance, in explaining the fact that the United States Supreme Court cites the *Harvard Law Review* more than any other periodical, Bernstein goes as far as to suggest: "The only plausible explanation for this overwhelming preference for Harvard is a conspiracy of restraint of trade among the Justices' law clerks".[70] However, it is unlikely that associates to High Court Justices have the same influence. The reason is that in the United States associates often write the judgments. This does not happen in Australia.[71] Having said this, some Australian university law reviews have increased in importance over time. Examples are the *Sydney Law Review*, *University of New South Wales Law Journal* and *University of Western Australia Law Review*. The absolute number of Australian university law reviews cited has also increased. In 1996 the High Court cited six different Australian university law reviews, where in 1980 it cited only two. The main reason for this seems to be the increasing number of such publications in recent years.

B. Legal Treatises

Tables 5A and 5B contain information on which legal texts the High Court has cited. Table 5A lists texts which were cited four or more times in one year. One feature of Table 5A is the tendency for the High Court in more recent years, particularly in 1996, to make greater use of modern commentators or what Merryman terms "local works"[72] in addition to the classics. For instance, of the books by modern commentators such as Luntz, O'Connell, Pearce and Youdan

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70 Bernstein, note 3 *supra* at 67.

71 PW Young, "Judgment Writing" (1996) 70 *ALJ* 513 at 514 writes that: "most Australian judges write their own judgments". Michael Kirby has publicly stated that he writes his own judgments: see M Kirby, "What is it Really Like to be a Justice of the High Court of Australia" (1997) 19 *Syd LR* 514 at 520.

72 Merryman, note 1 *supra* at 413.

that were heavily cited in 1996, only one (Pearce *Delegated Legislation in Australia and New Zealand*) received any citations in the earlier years covered by the study. These are often 'baseline' citations which provide starting points for further discussion. Table 5B lists all legal treatises cited in two or more years. In addition to Quick and Garran, *Annotated Constitution of the Australian Commonwealth* which is not strictly a legal text, two treatises (Blackstone's *Commentaries* and Holdsworth *History of English Law*) were cited in each of the five years and Fleming *Law of Torts* was cited in four of the five years. A further nine legal textbooks were cited at least once in three of the years. All of these publications can be regarded as long lasting given the time span involved. Again putting Quick and Garran's *Annotated Constitution of the Australian Commonwealth* to one side the five most heavily cited texts over the five years were Blackstone's *Commentaries*, Holdsworth *History of English Law*, Fleming *Law of Torts*, Wigmore's *Evidence* and Archbold's *Pleadings*.

A previous study for the Supreme Court of Victoria found that some authors received multiple citations to different writings over time. In particular it pointed out that various journal articles and texts by Glanville Williams had been cited in each of the three years of that study.[73] The results for this study suggest that Glanville Williams' writings are also popular in the High Court. It cited both *Joint Torts and Contributory Negligence* and his *Textbook on Criminal Law* in three of the five years. In addition, in 1960 it cited two articles he wrote in the *Law Quarterly Review* and in 1980 it cited a third article he wrote in the same journal. In 1996 the High Court cited articles Williams wrote in the *Criminal Law Review* and *New Law Journal*. Some of the other scholars who received citations to more than one work were Cowen, Cross, Garran, Pollock, Maitland, Salmond and Zines. Works by these authors are often cited because they have been approved in previous cases; hence, consistent with the fifth rationale for citing secondary authority (discussed in Part II), texts by these authors are often treated as de facto primary authorities.

C. Other Legal Sources

The most popular legal encyclopedia was *Halsbury's Laws of England* accounting for most of the citations to legal encyclopedias. It was cited 16 times in 1960, seven times in 1970, eight times in 1980, eight times in 1990 and on 19 occasions in 1996. This makes it the single most cited reference over the entire sample period. Similarly, Quick and Garran's *Annotated Constitution* was responsible for most of the citations to annotations. It was cited once in 1960, six times in 1970, once in 1980, seven times in 1990 and 15 times in 1996. The decision in *Cole v Whitfield* that it is legitimate to look at the Convention Debates directly does not appear to have reduced the extent to which the High Court consults Quick and Garran; in fact, the opposite is true. As one might expect, courts in the United States make extensive use of restatements. While somewhat controversial this has often been subject to stringent criticism.[74] The High Court's

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73 Smyth, note 4 *supra*.

74 See Merryman (1954), note 2 *supra* at 629-34.

citation to restatements, however, has been negligible with a total of 12 citations over the whole five years.

D. Non-legal Sources

A total of 16 non-legal periodicals were cited over the five year period. Most of these were economics, history or politics journals. Altogether, 63 non-legal treatises were cited over the sample period. Most of these, however, were cited only once or twice and tended to be case specific. One case that did make quite extensive use of non-legal periodicals and treatises was *McGinty v Western Australia*.[75] This case concerned the electoral laws in Western Australia and the Court drew on the political science literature to discuss the meaning of representative government. Two articles in the *Australian Journal of Political Science* and one article in *Parliamentary Affairs* were cited. In addition, there were a total of 25 citations to non-legal treatises; the most heavily cited being Brugger and Jaensch[76] and Reid and Forrest[77] (both five citations each).

The other non-legal source to be heavily cited was the *Oxford English Dictionary*. Most of the non-legal reference citations were to the *Oxford English Dictionary*. It was cited seven times in 1960, three times in 1970, seven times in 1980 and seven times in 1990. Other dictionaries to be cited included the *Websters New International Dictionary* and *Collins Shorter Contemporary Dictionary*. This is consistent with previous studies which have also found that most citations to non-legal reference sources are to dictionaries.[78]

VI. CITATION PRACTICES OF INDIVIDUAL JUSTICES

Tables 6A to 6E set out information on the citation practices of individual Justices. The biggest citer of secondary authority on both a per page and per judgment basis in 1960 and 1970 was Justice Windeyer. In 1960, he had 2.2 citations per judgment (0.44 per page) and in 1970 this increased to 2.6 citations per judgment (0.52 per page). In 1980, the biggest citers were Stephen J with 1.3 citations per judgment (0.23 per page) and Murphy J also with 1.3 citations per judgment (0.38 per page). In 1990, the biggest citer of secondary authority was Toohey J with 1.4 citations per judgment (0.15 per page). The biggest citers of secondary authorities in 1996 were Kirby J with 8.2 citations per judgment (0.45 per page) and Gummow J with 6.3 citations per judgment (0.37 per page).

One feature of Tables 6A to 6E is that in later years over the sample period, particularly 1996, more Justices were citing secondary authority. In 1960 and 1970, Windeyer J accounted for 50 per cent and 56 per cent of all secondary authorities cited respectively. In 1990 and 1996, citations to secondary authorities were much more evenly distributed across all of the Justices suggesting more

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75 (1996) 186 CLR 140

76 B Brugger and D Jaensch, *Australian Politics: Theory and Practice*, George, Allen and Unwin (1985).

77 G Reid and M Forest, *Australia's Commonwealth Parliament 1901-1988*, Melbourne University Press (1989).

78 Daniels, note 3 *supra* at 19; Smyth, note 4 *supra*.

general acceptance of citing secondary authorities. In 1996, five Justices (Kirby, Gummow, McHugh, Gaudron and Toohey JJ) were the biggest citers in any one year on a per judgment basis. Of course this is not surprising given the much larger number of secondary authorities cited in 1996 compared to earlier years. At the other end of the scale, the lowest citer on the court over the sample period was Justice McTiernan. In 1960, he cited 11 secondary authorities in 42 judgments and in 1970 he cited no secondary authorities in 30 judgments. Other low citers of secondary authority were Owen J in 1970 and Barwick CJ in 1980.

Daniels suggests that citations to secondary authorities is correlated with the political philosophies of the judges. He argues that 'liberal' judges tend to cite the most secondary authorities and that 'conservative' judges cite few secondary authorities.[79] It is difficult to be sure about how true this is for the High Court. While labelling judges is an inexact (and in some sense unfair) practice,[80] Kirby and Murphy JJ, two of the biggest citers, could probably rightly be considered as 'liberal'. However, judges such as Gummow J, who was a big citer of secondary authority in 1996, hardly fits this category. As for the small citers, Barwick CJ and Owen J could be regarded as 'conservative', but McTiernan J was appointed by the Scullin Labor government and fits better into the 'liberal' category. An alternative and probably better explanation is that citations to secondary authorities is simply a matter of judicial technique. For instance, while some judges such as Barwick CJ consider that citing the views of others reduces the authority of the judgment, others such as Gummow and Windeyer JJ have strong interests in legal history and their judgments draw on a range of sources to place the law in its historical context.

VII. CONCLUSION

This paper has examined High Court cases decided in 1960, 1970, 1980, 1990 and 1996 which are reported in the Commonwealth Law Reports. Its objective was to provide systematic empirical evidence of the extent to which the High Court relies on secondary source materials when determining cases[81] and how citation practice has changed over time. It has also reviewed the citation practice of individual Justices and, where appropriate, comparisons have been made with previous studies for the United States and Supreme Court of Victoria. Sir Gerard Brennan has stated that while he was a member of the High Court, with Mason as Chief Justice, the Court made increasing use of academic authorities and overseas cases:

> For the first time, academic writing was encouraged on cases *pending* in the High Court .... In *Walton Stores*,[82] for example, within four printed pages you will find

79 Daniels, note 3 *supra* at 10.

80 See the comments of Kirby, note 71 *supra* at 527.

81 Of course, the fact that the court cites a secondary source does not necessarily mean that the source influenced its thinking, but citation is still a reasonable proxy for influence.

82 *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 399-402.

> references not only to the usual sources, but also to cases in Massachusetts and Malaysia, New York and New Zealand as well as a number of academic texts.[83]

This article provides quantitative support for the observation in this passage that the Court is now making more use of academic writings. The results support the conclusion that reference to secondary source material must now be considered to be an acceptable practice in the High Court. The fact that in 1996 *each* Justice made extensive reference to secondary source material, while in the past often only one or two Justices did, underpins this conclusion. When read with von Nessen's study of the use of American precedent in the High Court,[84] this article also supports Sir Gerard Brennan's more general point that the High Court now, more than ever, is open to outside influences and opinion.

What is the significance of this for the High Court's role? In the introduction it was pointed out that some commentators have postulated that judges who are more open in recognising their social role make greater use of academic authorities. For example, Friedman et al suggest that modern academic authorities, and in particular law reviews, have a bias towards 'law reform'. Hence, citation to law reviews represents a rough index of the court's orientation toward an overt policy-making role.[85] Sir Anthony Mason has stated that, in his view, "in an era of rapid social change" there has been a distinct shift away from strict legal formalism in the High Court's method of legal reasoning.[86] If citation to academic authorities can be considered a reasonable index of the extent to which courts are prepared to consider broader issues of judicial policy the findings in this article are consistent with the casual observation that the High Court adopted a more 'activist' role under Mason and Brennan CJJ compared with earlier Chief Justices.

Taking this one step further, some might interpret the results as providing substantive evidence for the view that over time there has been a change in the attitude of the High Court to its role in the proper development of the common law. Whether it is appropriate for the High Court to adopt a more proactive role in 'making the law' involves difficult issues concerning the proper relationship between the courts and the legislature which lies outside the scope of this article. However, in concluding, it is important to emphasise one point which was made earlier. While it is almost certain that, at least to some extent, changing citation patterns over time reflect different philosophies under successive Chief Justices, this is not the complete picture. In addition, historical changes in citation patterns also reflect changes in the High Court's organisational and technical arrangements. It is important that these are also taken into account when drawing broader conclusions on the evidence presented here about the Court's changing social role.

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83 Note 10 *supra* at 13 (emphasis in original).
84 Von Nessen, note 4 *supra*.
85 Friedman et al, note 2 *supra* at 815.
86 Note 35 *supra* at 155-63.

TABLE 1A

CITATIONS TO SECONDARY AUTHORITIES IN THE HIGH COURT* BY JUDGMENT

Type/ Year	Number of judgments	Number of judgments with secondary source citations			Percentage of judgments with secondary source citations			Number of secondary source citations			Number of secondary source citations per judgment		
		L[a]	NL	T	L	NL	T	L	NL	T	L	NL	T
1960													
single[b]	154	26	10	33	16.9	6.5	21.4	117	16	133	0.8	0.1	0.9
joint	136	18	0	18	13.2	0.0	13.2	73	0	73	0.5	0.0	0.5
dissenting	28	6	3	9	21.4	10.7	32.1	40	9	49	1.4	0.3	1.8
Total	372[c]	50	13	60	13.4	3.5	16.1	230	25	255	0.6	0.1	0.7
1970													
single	125	27	4	27	21.6	3.2	21.6	94	6	100	0.8	0.05	0.8
dissenting	23	6	0	6	26.1	0.0	26.1	14	0	14	0.0	0.6	0.6
Total	219[d]	33	4	33	15.1	1.8	15.1	108	6	114	0.5	0.03	0.5
1980													
single	95	23	5	25	24.2	5.3	26.3	58	21	79	0.6	0.2	0.8
joint	79	26	2	28	32.9	2.5	35.4	78	4	82	1.0	.05	1.0
dissenting	32	6	4	10	18.8	12.5	31.3	16	16	32	0.5	0.5	1.0
Total	265[e]	55	11	63	20.8	4.2	23.8	152	41	193	0.6	0.2	0.7
1990													
single	59	30	4	32	50.8	6.7	54.2	75	5	80	1.3	0.1	1.4
joint	183	65	14	73	35.5	7.7	39.9	137	38	175	0.7	0.2	1.0
dissenting	23	11	1	11	47.8	4.3	47.8	22	1	23	1.0	.04	1.0
Total	284[f]	106	19	116	37.3	6.7	40.8	234	44	278	0.8	0.1	1.0
1996													
single	48	30	11	30	62.5	22.9	62.5	297	84	381	6.2	1.8	7.9
joint	144	71	13	76	49.3	9.0	52.8	430	36	466	3.0	0.3	3.2
dissenting	29	13	4	15	44.8	13.8	51.7	52	5	57	1.8	0.2	2.0
Total	226[g]	114	28	121	50.4	12.4	53.5	779	125	904	3.4	0.6	4.0

Notes to Table 1A:

* Figures are rounded to one decimal place except when less than 0.1.

a L = legal secondary sources, NL = non-legal secondary sources, T = total secondary sources. If L + NL is greater than T, this indicates that some judgments or cases contain both legal and non-legal secondary authorities.

b single and joint refer to majority judgments.

c includes 54 concurring judgments with no secondary source citations.

d includes 52 concurring judgments and 19 joint judgments with no secondary source citations.

e includes 59 concurring judgments with no secondary source citations.

f includes 19 concurring judgments with no secondary source citations.

g includes 5 concurring judgments with no secondary source citations.

TABLE 1B

CITATIONS TO SECONDARY AUTHORITIES IN THE HIGH COURT BY CASE

Year	Number of cases	Number of cases with secondary source citations			Percentage of cases with secondary source citations			Number of secondary source citations per case		
		L	NL	T	L	NL	T	L	NL	T
1960	90	30	10	33	33.3	11.1	36.7	2.6	0.3	2.8
1970	53	17	4	19	32.1	7.5	35.8	2.0	0.1	2.2
1980	51	24	9	28	47.1	17.6	54.9	3.0	0.8	3.8
1990	53	30	6	31	56.6	11.3	58.5	4.4	0.9	5.2
1996	41	26	13	28	63.4	31.7	68.3	19	3.0	22.0

TABLE 2

TYPES OF SECONDARY AUTHORITIES CITED

Publications	1960		1970		1980		1990		1996	
Legal										
Periodicals	33	12.9%	15	13.2%	31	16.1%	40	14.4%	254	28.1%
Treatises	167	65.5%	77	67.5%	102	52.8%	135	48.6%	376	41.6%
Encyclopedias	20	7.8%	8	7.0%	8	4.1%	8	2.9%	27	3.0%
Restatements	2	0.8%	0	0.0%	1	0.5%	0	0.0%	9	1.0%
Annotations	4	1.6%	6	5.3%	2	1.0%	8	2.9%	17	1.9%
Other	4	1.6%	2	1.8%	8	4.1%	43	15.5%	96	10.6%
Total	230	90.2%	108	94.7%	152	78.8%	234	84.2%	779	86.2%
Non-Legal										
Periodicals	2	0.8%	0	0.0%	2	1.0%	6	2.2%	6	0.7%
Treatises	8	3.1%	0	0.0%	15	7.8%	10	3.6%	30	3.3%
References	15	5.9%	5	4.4%	15	7.8%	11	4.0%	9	1.0%
Government Reports	0	0.0%	1	0.9%	6	3.1%	0	0.0%	14	1.5%
Other	0	0.0%	0	0.0%	3	1.6%	17	6.1%	66	7.3%
Total	25	9.8%	6	5.3%	41	21.2%	44	15.8%	125	13.8%
Grand Total	**255**		**114**		**193**		**278**		**904**	

TABLE 3

TYPES OF SECONDARY AUTHORITIES CITED BY SUBJECT – 1996

Subject		
Constitutional Law	399	(8)[a]
Tort Law	128	(4)
Native Title Act 1993 (Cth)	115	(1)
Insurance Law	55	(1)
Patients Right to Access Medical Records	54	(1)
Administrative Law	52	(3)
Family Law	36	(1)
Criminal Law	34	(5)
Company Law	10	(1)
Immigration Law	10	(1)
Limitation of Actions	9	(1)
Workers Compensation	2	(1)
Total	904	(28)

Notes to Table 3:

a Figures in brackets are the number of cases with secondary source citations

TABLE 4

LEGAL PERIODICALS CITED BY THE HIGH COURT – 1960, 1970, 1980, 1990 and 1996

Publications	1960	1970	1980	1990	1996	Total
Australian Law Journal	4	1	3	18	24	50
Law Quarterly Review	21	5	6	1	17	50
Res Judicatae		1			23	24
Federal Law Review					23	23
Int and Comp Law Quarterly			3		14	17
Sydney Law Review			1	1	14	16
University of Toronto Law Journal				7	6	13
Melbourne University Law Review		1	5	2	4	12
University of NSW Law Journal					10	10
Harvard Law Review	4		1		4	9
Modern Law Review	1			1	6	8
University of WA Law Review					8	8
Torts Law Journal					8	8
Yale Law Journal	1	2			4	7
Fordham Law Review		1			5	6
Criminal Law Quarterly			3		3	6
American Jnl Int Law			1		5	6
Netherlands Int Law Review					6	6
British Tax Review		4		1		5
Columbia Law Review	1				4	5
Commonwealth Law Review					5	5
Denver Jnl Int Law and Policy					5	5
New Law Journal					5	5
Canadian Bar Review					5	5
California Law Review			2		2	4
Anglo-American Law Review					4	4
Torts Law Review					4	4
Monash University Law Review				1	2	3
Aboriginal Law Bulletin					3	3
Criminal Law Review					3	3

(Continued over page)

Publications	1960	1970	1980	1990	1996	Total
(Continued from previous page)						
Legal Studies				2		2
UCLA Law Review				2		2
New York University Law Review	1				1	2
Stanford Law Review			1		1	2
Cambridge Law Journal				1	1	2
Environment Law Review			2			2
University of Chicago Law Review			1		1	2
Rutgers Law Review					2	2
Australian Bar Review					2	2
Journal of Contract Law					2	2
Environ & Plann Law Journal					2	2
Public Law				1		1
Medicine, Science & The Law				1		1
University of BC Law Review			1			1
Villanova Law Review			1			1
Oxford Journal of Legal Studies				1		1
Cambrian Law Review					1	1
South Carolina Law Review					1	1
Australian Business Law Review					1	1
Illinios Law Review					1	1
Criminal Law Journal					1	1
Public Law Review					1	1
Osgoode Hall Law Journal					1	1
Univ of Pittsburgh Law Review					1	1
Journal of Business Law					1	1
Wayne Law Review					1	1
Queens Law Journal					1	1
Univ of Tasmania Law Review					1	1
Australian Property Law Journal					1	1
Int Jnl Children's Rights					1	1
Australian Tax Review					1	1
Australian Law News					1	1
Total	**33**	**15**	**31**	**40**	**254**	**373**

TABLE 5A

LEGAL TREATISES CITED BY THE HIGH COURT – 1960, 1970, 1980, 1990 and 1996*

LEGAL TEXTS CITED FOUR OR MORE TIMES IN ONE YEAR

	1960
Fleming, Law of Torts	12
Blackstone, Commentaries on the Laws of England	7
Bacon's Abridgment	6
Holdsworth, A History of English Law	6
Chitty's Prerogatives of the Crown	5
Hawkins on Crime	5
Russell on Crime	5
Wigmore on Evidence	5
	1970
Quick and Garran, Annotated Constitution of the Commonwealth of Australia[a]	6
Cowen, Sir John Latham and Other Papers	5
Moore, The Constitution of the Commonwealth of Australia	4
	1980
Archbold, Pleading, Evidence and Practice in Criminal Cases	10
Meagher, Gummow and Lehane, Equity, Doctrine and Remedies	8
Stephen, History of the Criminal Law of England	6
Stephen, Digest of Criminal Law	6
Maxwell, Interpretation of Statutes	5
Russell on Crime	5
Blackstone, Commentaries on the Laws of England	4
Holdsworth, A History of English Law	4
	1990
Feldman, Law Relating to Entry, Search and Seizure	12
Wigmore on Evidence	9
Holdsworth, A History of English Law	8
Spencer, Bower and Turner, The Law Relating to Estoppel	8
Quick and Garran, Annotated Constitution of the Commonwealth of Australia[a]	7
Stephen, History of the Criminal Law of England	7

(Continued over page)

(Continued from previous page)	1990
Stephen, Digest of Criminal Law	7
Hogg, Liability of the Crown	6
Hallam, Constitutional History of England	5
Starkie on Evidence	5
Taswell-Langmead, English Constitutional History	5
Ewart, Waiver Distributed	4
Lahore, Copyright Law	4
Ricketson, The Law of Intellectual Property	4
	1996
Oppenheim, International Law	15
Quick and Garran, Annotated Constitution of the Commonwealth of Australia[a]	15
Blackstone, Commentaries on the Laws of England	11
Youdan (ed), Equity, Fiduciaries and Trusts	11
Bennion, Statutory Interpretation	10
Cross, Statutory Interpretation	10
Pearce, Delegated Legislation in Australia	10
O'Connell (ed), International Law in Australia	10
Cheshire and North, Private International Law	9
Cowen, Sir John Latham and Other Papers	9
Luntz, Assessment of Damages for Personal Injury and Death	9
Underhill and Hayton, Law Relating to Trusts and Trustees	8
Gatley on Libel and Slander	7
Odgers on Libel and Slander	7
Archbold, Pleading, Evidence and Practice in Criminal Cases	6
Dixon, Jesting Pilate	6
Williams, Joint Torts and Contributory Negligence	6
Moore, The Constitution of the Commonwealth of Australia	6
Zines, Commentaries on the Australian Constitution	6
Brierly, The Law of Nations	5
Brownlie, Principles of Public International Law	5
Coke's Abridgment	5
Dicey, Conflict of Laws	5
Dicey, Introduction to the Study of the Law of the Constitution	5
Else-Mitchell (ed), Essays on the Australian Constitution	5
Fleming, Law of Torts	5
(Continued over page)	

(Continued from previous page)	1996
Pollock, The Law of Torts	5
Stone, Legal Controls of International Conflict	5
Vile, Constitutionalism and the Separation of Powers	5
Wigmore on Evidence	5
Zines, The High Court and the Constitution	5
Nygh, Conflict of Laws in Australia	4
Pollock and Maitland, History of English Law	4
Prosser and Keeton, The Law of Torts	4
Simpson, A History of land Law	4

Notes to Table 5A:

* With the exception of Quick and Garran, Annotated Constitution of the Commonwealth of Australia, these tables exclude annotations, encyclopedias and non-legal secondary authority.

a Quick and Garran is included for comparative purposes. While strictly an annotation its role is broader than this and it is often used in the High Court in a similar fashion to a legal text. Note that in Table 2 Quick and Garran is counted as an annotation rather than a legal text.

TABLE 5B

LEGAL TREATISES CITED BY THE HIGH COURT – 1960, 1970, 1980, 1990 and 1996*

LEGAL TEXTS CITED IN TWO OR MORE YEARS

Legal Texts	1960	1970	1980	1990	1996	Total
Quick and Garran, Annotated Constitution of the Commonwealth of Australia[a]	1	6	1	7	15	30
Blackstone, Commentaries on the Laws of England	7	1	4	1	11	24
Holdsworth, History of English Law	6	3	4	8	1	22
Fleming, Law of Torts	12	1		1	5	19
Wigmore on Evidence	5			9	5	19
Archbold, Pleading Evidence and Practice in Criminal Cases		1	10		6	17
Cowen, Sir John Latham and Other Papers	5				9	14
Stephen, History of the Criminal Law of England			6	7		13
Stephen, Digest of the Criminal Law			6	7		13
Moore, The Constitution of the Commonwealth of Australia	4			2	6	12
Pearce, Delegated Legislation in Australia and New Zealand			1		10	11
Russell on Crime	5		5			10
Meagher, Gummow and Lehane, Equity, Doctrine and Remedies			8		2	10
Williams, Joint Torts and Contributory Negligence	3	1			6	10
Coke's Abridgment	2	1			5	8
Odgers on Libel and Slander	1				7	8
Dicey, Conflict of Laws	2				5	7
Bacon's Abridgment	6				1	7
Chitty, Prerogatives of the Crown	5				2	7
Pollock, The Law of Torts	2				5	7
Starkie on Evidence	2			5		7
Williams, Textbook of Criminal Law		2	2	2		6
Gower, Modern Company Law	1	2	3			6
Westlake, Private International Law	2				3	5
(Continued over page)						

Legal Texts	1960	1970	1980	1990	1996	Total
(Continued from previous page)						
Salmond on Torts	2	3				5
Prosser (and Keeton), The Law of Torts	1				4	5
Hale, Pleas of the Crown	2			3		5
Pollock and Maitland, History of English Law			1		4	5
Jarman on Wills	1	3				4
Kerly, Law of Trade Marks and Trade Names	3	1				4
Copinger and Skone James, Law of Copyright		3	1			4
Sykes and Pryles, Australian Private International Law				1	3	4
Cross on Evidence	1				2	3
Phipson on Evidence	2	1				3
Norton on Deeds	1			1	1	3
Spence, Equitable Jurisdiction and The Court of Chancery	1			1	1	3
Howard, Criminal Law			1	2		3
deSmith, Judicial Review of Administrative Action	1			1		2
Hart and Honore, Causation in the Law	1				1	2
Holmes/Pollock, Letters	1			1		2
Donald and Heydon, Trade Practices Law			1	1		2
Cardozo, The Nature of the Judicial Process			1	1		2
Stone, Legal System and Lawyers Reasoning			1		1	2
Story, Commentaries on Equity Jurisprudence				1	1	2
Wade (and Forsyth), Administrative Law				1	1	2

Notes to Table 5B:

* With the exception of Quick and Garran, Annotated Constitution of the Commonwealth of Australia, these tables excludes annotations, encyclopedias and non-legal secondary authority.

a Quick and Garran is included for comparative purposes. While strictly an annotation its role is broader than this and it is often used in the High Court in a similar fashion to a legal text. Note that in Table 2 Quick and Garran is counted as an annotation rather than a legal text.

TABLE 6A(i)

SECONDARY SOURCE CITATIONS BY JUDGE* 1960 – ACCORDING TO TYPE OF JUDGMENT

Judges	Single		Joint		Concurring	Dissenting		Total		Citations per Judgment	Citations per Page	
Dixon CJ	24	(29)	17	(28)	(8)	0	(2)	41	(67)	0.6	0.13	[306]
McTiernan	0	(8)	11	(15)	(11)	0	(8)	11	(42)	0.3	0.08	[139]
Fullagar	15	(26)	9	(21)	(10)	0	(3)	24	(60)	0.4	0.09	[273]
Kitto	9	(25)	7	(20)	(8)	4	(2)	20	(55)	0.4	0.09	[215]
Windeyer	67	(27)	17	(18)	(8)	44	(5)	128	(58)	2.2	0.44	[282]
Menzies	18	(29)	8	(26)	(5)	1	(7)	27	(67)	0.4	0.09	[306]
Taylor	0	(10)	4	(8)	(4)	0	(1)	4	(23)	0.2	0.03	[128]
Total	**133**	**(154)**	**73**	**(136)**	**(54)**	**49**	**(28)**	**255**	**(372)**	**0.7**	**0.15**	**[1649]**

Notes to Table 6A(i):

* Figures in round brackets are the number of judgments. Figures in square brackets are the number of pages.

TABLE 6A(ii)

SECONDARY SOURCE CITATIONS BY JUDGE 1960 – ACCORDING TO TYPE OF SECONDARY AUTHORITY

Authority Type	Dixon CJ	McTiernan	Fullagar	Kitto	Windeyer	Menzies	Taylor	Total
Legal								
Periodicals	9	2	4	2	13	3	0	33
Treatises	26	9	14	10	84	20	4	167
Encyclopedias	5	0	1	4	9	1	0	20
Restatements	0	0	1	0	0	1	0	2
Annotations	0	0	1	0	3	0	0	4
Other	0	0	0	0	4	0	0	4
Total	40	11	21	16	113	25	4	230
Non-Legal								
Periodicals	0	0	1	0	1	0	0	2
Treatises	0	0	1	0	7	0	0	8
References	1	0	1	4	7	2	0	15
Government Reports	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0
Total	1	0	3	4	15	2	0	25
Grand Total	**41**	**11**	**24**	**20**	**128**	**27**	**4**	**255**

TABLE 6B(i)

SECONDARY SOURCE CITATIONS BY JUDGE* 1970 – ACCORDING TO TYPE OF JUDGMENT

Judges	Single		Joint	Concurring	Dissenting		Total		Citations per Judgment	Citations per Page	
Barwick CJ	7	(27)	(3)	(6)	4	(4)	11	(40)	0.3	0.05	[228]
McTiernan	0	(14)	(4)	(8)	0	(4)	0	(30)	0.0	0.00	[77]
Kitto	1	(7)	(1)	(1)	2	(2)	3	(11)	0.3	0.08	[39]
Menzies	15	(19)	(5)	(8)	2	(4)	17	(36)	0.5	0.11	[157]
Windeyer	61	(14)	(0)	(10)	3	(1)	64	(25)	2.6	0.52	[123]
Owen	3	(16)	(4)	(10)	0	(3)	3	(33)	0.1	0.05	[64]
Walsh	9	(22)	(2)	(5)	0	(4)	9	(33)	0.3	0.06	[163]
Gibbs	4	(6)	(0)	(4)	3	(1)	7	(11)	0.6	0.11	[65]
Total	**100**	**(125)**	**(19)**	**(52)**	**14**	**(23)**	**114**	**(219)**	**0.5**	**0.12**	**[916]**

Notes to Table 6B(i):

* Figures in round brackets are the number of judgments. Figures in square brackets are the number of pages.

TABLE 6B(ii)

SECONDARY SOURCE CITATIONS BY JUDGE 1970 – ACCORDING TO TYPE OF SECONDARY AUTHORITY

Publications	Barwick CJ	McTiernan	Kitto	Menzies	Windeyer	Owen	Walsh	Gibbs	Total
Legal									
Periodicals	0	0	0	6	8	0	1	0	15
Treatises	8	0	2	9	45	2	8	3	77
Encyclopedias	3	0	0	1	3	1	0	0	8
Restatements	0	0	0	0	0	0	0	0	0
Annotations	0	0	1	1	2	0	0	2	6
Other	0	0	0	0	2	0	0	0	2
Total	11	0	3	17	60	3	9	5	108
Non-Legal									
Periodicals	0	0	0	0	0	0	0	0	0
Treatises	0	0	0	0	0	0	0	0	0
References	0	0	0	0	3	0	0	2	5
Government Reports	0	0	0	0	1	0	0	0	1
Other	0	0	0	0	0	0	0	0	0
Total	0	0	0	0	4	0	0	2	6
Grand Total	**11**	**0**	**3**	**17**	**64**	**3**	**9**	**7**	**114**

TABLE 6C(i)

SECONDARY SOURCE CITATIONS BY JUDGE* 1980 – ACCORDING TO TYPE OF JUDGMENT

Judges	Single		Joint		Concurring	Dissenting		Total		Citations per Judgment	Citations per Page	
Barwick CJ	0	(14)	2	(1)	(5)	0	(4)	2	(24)	0.1	0.02	[105]
Gibbs	5	(15)	16	(7)	(4)	0	(3)	21	(29)	0.7	0.10	[218]
Stephen	44	(16)	13	(15)	(12)	1	(2)	58	(45)	1.3	0.23	[249]
Mason	6	(15)	26	(21)	(9)	2	(4)	34	(49)	0.7	0.11	[302]
Aickin	6	(10)	1	(7)	(13)	1	(5)	8	(35)	0.2	0.04	[204]
Wilson	1	(10)	15	(20)	(10)	1	(3)	17	(43)	0.4	0.06	[269]
Murphy	17	(15)	9	(8)	(6)	27	(11)	53	(40)	1.3	0.38	[141]
Total	**79**	**(95)**	**82**	**(79)**	**(59)**	**32**	**32**	**193**	**(265)**	**0.7**	**0.13**	**[1488]**

Notes to Table 6C(i):

* Figures in round brackets are the number of judgments. Figures in square brackets are the number of pages.

TABLE 6C(ii)

SECONDARY SOURCE CITATIONS BY JUDGE
1980 – ACCORDING TO TYPE OF SECONDARY AUTHORITY

Authority Type	Barwick CJ	Gibbs	Stephen	Mason	Aickin	Wilson	Murphy	Total
Legal								
Periodicals	0	2	10	2	2	1	14	31
Treatises	2	16	24	23	1	14	22	102
Encyclopedias	0	3	1	3	0	1	0	8
Restatements	0	0	0	1	0	0	0	1
Annotations	0	0	1	1	0	0	0	2
Other	0	0	4	1	1	1	1	8
Total	2	21	40	31	4	17	37	152
Non-Legal								
Periodicals	0	0	2	0	0	0	0	2
Treatises	0	0	8	0	0	0	7	15
References	0	0	5	3	4	0	3	15
Government Reports	0	0	0	0	0	0	6	6
Other	0	0	3	0	0	0	0	3
Total	0	0	18	3	4	0	16	41
Grand Total	**2**	**21**	**58**	**34**	**8**	**17**	**53**	**193**

TABLE 6D(i)

SECONDARY SOURCE CITATIONS BY JUDGE* 1990 – ACCORDING TO TYPE OF JUDGMENT

Judges	Single		Joint		Concurring	Dissenting		Total		Citations per Judgment	Citations per Page	
Mason CJ	5	(6)	33	(28)	(2)	3	(3)	41	(39)	1.1	0.09	[469]
Brennan	11	(11)	21	(20)	(2)	2	(8)	34	(41)	0.8	0.09	[378]
Dean	14	(7)	20	(23)	(2)	8	(2)	42	(34)	1.2	0.13	[320]
Dawson	13	(10)	25	(28)	(4)	2	(2)	40	(44)	0.9	0.09	[436]
Toohey	27	(13)	30	(24)	(3)	2	(2)	59	(42)	1.4	0.15	[403]
Gaudron	7	(4)	21	(34)	(4)	1	(2)	29	(44)	0.7	0.07	[387]
McHugh	3	(8)	25	(26)	(2)	5	(4)	33	(40)	0.8	0.09	[383]
Total	**80**	**(59)**	**175**	**(183)**	**(19)**	**23**	**(23)**	**278**	**(284)**	**1.0**	**0.10**	**[2776]**

Notes to Table 6D(i):

* Figures in round brackets are the number of judgments. Figures in square brackets are the number of pages.

TABLE 6D(ii)

SECONDARY SOURCE CITATIONS BY JUDGE 1990 – ACCORDING TO TYPE OF SECONDARY AUTHORITY

Authority Type	Mason CJ	Brennan	Dean	Dawson	Toohey	Gaudron	McHugh	Total
Legal								
Periodicals	5	5	3	7	9	4	7	40
Treatises	17	13	28	19	27	16	15	135
Encyclopedias	0	3	1	0	3	1	0	8
Restatements	0	0	0	0	0	0	0	0
Annotations	1	1	1	1	2	1	1	8
Other	8	6	4	6	7	7	5	43
Total	31	28	37	33	48	29	28	234
Non-Legal								
Periodicals	1	1	1	1	1	0	1	6
Treatises	2	2	2	2	2	0	0	10
References	1	2	1	1	3	0	3	11
Government Reports	0	0	0	0	0	0	0	0
Other	6	1	1	3	5	0	1	17
Total	10	6	5	7	11	0	5	44
Grand Total	**41**	**34**	**42**	**40**	**59**	**29**	**33**	**278**

TABLE 6E(i)

SECONDARY SOURCE CITATIONS BY JUDGE* 1996 – ACCORDING TO TYPE OF JUDGMENT

Judges	Single		Joint		Concurring	Dissenting		Total		Citations per Judgment	Citations per Page	
Brennan CJ	6	(9)	55	(18)	(0)	14	(5)	75	(32)	2.3	0.16	[443]
Dawson	9	(6)	42	(20)	(1)	15	(9)	66	(36)	1.8	0.19	[352]
Toohey	47	(5)	90	(26)	(0)	9	(5)	146	(36)	4.1	0.29	[511]
Gaudron	23	(6)	76	(24)	(2)	0	(3)	99	(35)	2.8	0.21	[476]
McHugh	60	(6)	90	(23)	(2)	2	(3)	152	(34)	4.5	0.34	[445]
Gummow	134	(9)	92	(27)	(0)	0	(0)	226	(36)	6.3	0.37	[611]
Kirby	102	(7)	21	(6)	(0)	17	(4)	140	(17)	8.2	0.45	[313]
Total	**381**	**(48)**	**466**	**(144)**	**(5)**	**57**	**(29)**	**904**	**(226)**	**4.0**	**0.29**	**[3151]**

Notes to Table 6E(i):

* Figures in round brackets are the number of judgments. Figures in square brackets are the number of pages.

TABLE 6E(ii)

SECONDARY SOURCE CITATIONS BY JUDGE
1996 – ACCORDING TO TYPE OF SECONDARY AUTHORITY

Authority Type	Brennan CJ	Dawson	Toohey	Gaudron	McHugh	Gummow	Kirby	Total
Legal								
Periodicals	13	12	43	17	38	56	75	254
Treatises	43	33	58	54	65	96	27	376
Encyclopedias	4	3	3	3	4	10	0	27
Restatements	2	2	2	2	0	1	0	9
Annotations	0	1	3	0	4	6	3	17
Other	7	6	14	12	15	24	18	96
Total	69	57	123	88	126	193	123	779
Non-Legal								
Periodicals	0	0	1	1	1	3	0	6
Treatises	0	5	0	0	11	12	2	30
References	0	2	0	3	3	0	1	9
Government Reports	0	1	0	0	1	0	12	14
Other	6	1	22	7	10	18	2	66
Total	6	9	23	11	26	33	17	125
Grand Total	**75**	**66**	**146**	**99**	**152**	**226**	**140**	**904**