

# THE ACADEMY AND THE COURTS: CITATION PRACTICES

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*Chief Justice Susan Kiefel's vision, shared in a 2020 article, involves a mutually beneficial relationship where judges and the academy work together towards developing law in an ever-changing and complex landscape. The academy writes material that is useful for the courts and, in turn, this material is cited, which is beneficial to the academy. This vision of an interdependent, mutually enriching relationship between the courts and the academy has inspired this article to examine what academic publications judges cite. The literature review reveals that, whereas the High Court of Australia regularly cites academic material, state Supreme Courts rarely do. This article aims to fill a gap in the existing literature on Supreme Courts by examining citation practices in two Australian territories: the Northern Territory and the Australian Capital Territory. Using the law-as-data and citation-counting method, the article examines data published from 2010–20 by the Supreme Courts of the two territories. It compares this data to the existing research of the state Supreme Courts. It finds that the citation patterns of the Supreme Courts in the territories are consistent with those in the existing literature: in brief, the judiciary cites few academic publications. This trend is alarmingly problematic for the academy writing for the judiciary, and its flow-on effects can potentially diminish the symbiotic relationship envisioned by Chief Justice Kiefel.*

## I INTRODUCTION

In 2020, Chief Justice Susan Kiefel shared her vision of a mutually beneficial relationship where judges and the academy work together towards developing law in an ever-changing and complex landscape. She explains that judges' use of academic work 'confirms our shared concern with the correct and coherent development of the law'.<sup>1</sup> The relationship is symbiotic in that judges appreciate valuable and relevant academic commentary, and the academy rely on their research being published and cited to contribute to the knowledge and development of law. This relationship has been a long-standing practice between the courts and the academy. In 1956, Sir Owen Dixon noted that there is 'nothing

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<sup>1</sup> Chief Justice Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (2020) 44(1) *Melbourne University Law Review* 447, 448.

strange in a reference from ... learned journals'.<sup>2</sup> Academic writing directed to judges can be a valuable resource, and Chief Justice Kiefel notes that the relationship between the academy and the judiciary should be maintained and improved if possible.<sup>3</sup>

Inspired by Chief Justice Kiefel's paper and the comprehensive corpus of research conducted by Smyth and others on rates of judicial citation of the academy, this article reports the findings of a study on the nature of judicial citation practice of secondary sources by the Supreme Courts of the Northern Territory ('NT') and the Australian Capital Territory ('ACT') during the decade 2010–20. Smyth and others' research volume encompasses federal and state jurisdictions and longitudinal studies of collective jurisdictions and specific areas of jurisprudence. However, absent from Smyth's studies is an examination of judicial citation practices in the NT and ACT Supreme Courts. The study reported in this article seeks to address this lack of research and continue the discussion on the relationship between the academy and the courts.

Citation data gathered in this paper does not reflect a mutually beneficial relationship in practice whereby the academy write for a judicial audience and are cited in return. Academic work is rarely cited in Australian courts, except for the High Court. This paper aims to continue the discussion on the role of the academy and the courts by examining the literature on the topic and expanding knowledge on the citation practice of the ACT and NT Supreme Courts. It is vital to keep the relationship between the academy and the courts thriving. Without a healthy relationship, courts may lack access to quality and relevant academic writing, and members of the academy may be vulnerable if they cannot show the 'citation impact' of their writing. For example, decreased citations can lead to the further decline of the already low funding available for legal research, the perceived low social utility of research through traditional doctrinal methods and, in turn, the lack of academic content published for the benefit of the judiciary. The academy and the courts will need to work together to ensure their relationship stays strong.

## II FACTORS IN CITATION OF ACADEMIC WORK BY THE JUDICIARY

The judiciary use academic writing when examining aspects of the law and preparing written judgments. Many challenges affect the judiciary in their citation practices. For example, judges may be hesitant to cite authors that are not deceased because of the so-called 'living author rule', 'licensed plagiarism', lack of citation of articles from counsel, and the nature of judgment writing.<sup>4</sup> Although there are mixed academic views on whether it is appropriate for the judiciary to

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<sup>2</sup> Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29(9) *Australian Law Journal* 468, 470.

<sup>3</sup> Kiefel (n 1) 448.

<sup>4</sup> Kiefel (n 1) outlines the major issues in judicial citation.

cite secondary sources, it is generally accepted as a positive practice.<sup>5</sup> However, many factors may limit how the judiciary relies on and cites academic work.

There are several different reasons why the judiciary cites academic material. Smyth summarises the main reasons:

One reason is convenience. The author of a journal article or legal text may summarise the law, particularly the law in another jurisdiction, together with citation to the relevant case law, and it is convenient for the judge to adopt it as a correct statement of the law. A second reason for citing secondary sources is to examine academic opinion on the development of the law or for statements about what directions future developments in the law should take. A third reason is to refer to the views of well-respected academics in deciding what earlier cases decided. A fourth reason is to draw on the opinion of other judges, writing extra-judicially. Fifth, some secondary sources are cited because previous cases have stated that they correctly represent the law. A sixth reason for citing secondary sources, particularly non-legal sources, is to examine the scientific or social science underpinnings of legal rules or examine the basis of expert evidence.<sup>6</sup>

As Justice Michael Kirby has explained, articles may succinctly state the position of the law, and they can also provide the judiciary with the depth of research that they cannot cover in their writing.<sup>7</sup>

Chief Justice Kiefel notes several factors that may affect the judiciary's citation of academic work, including the 'living author rule'.<sup>8</sup> In the past, Australian courts have self-imposed a system of voluntary restraint on using academic writings in the form of the 'living author' rule, whereby authors who are not deceased are not cited as an authority.<sup>9</sup> The risk of using this rule is that the judiciary will not be able to rely on recent or relevant articles and the elimination of the chance for living authors to be cited. However, Smyth noted that in 20<sup>th</sup> century England, this rule was 'regarded as no more than a polite fiction',<sup>10</sup> although the practice may have continued to be used in Australia with some exceptions.<sup>11</sup> Lord Denning was also cautious of the 'living author rule'. For example, his Lordship noted that waiting for an author to die would eliminate

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<sup>5</sup> Russell Smyth, 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9(1) *Griffith Law Review* 25, 30 ('The Authority of Secondary Authority').

<sup>6</sup> Russell Smyth, 'What do Trial Judges Cite? Evidence from the New South Wales District Court' (2018) 41(1) *University of New South Wales Law Journal* 211, 220–1 ('What Do Trial Judges Cite?').

<sup>7</sup> Justice Michael Kirby, 'Welcome to Law Reviews' 26(1) (2002) *Melbourne University Law Review* 1, 6–8.

<sup>8</sup> Kiefel (n 1) 451–2.

<sup>9</sup> See a more detailed discussion of this rule of citing living authors in GVV Nicholls, 'Legal Periodicals and the Supreme Court of Canada' (1950) 28(4) *Canadian Bar Review* 422, 425–40.

<sup>10</sup> Russell Smyth, 'Citing Outside the Law Reports: Citing of Secondary Authorities on the Australian State Supreme Courts Over the Twentieth Century' (2009) 18(3) *Griffith Law Review* 692, 699 ('Citing Outside the Law Reports').

<sup>11</sup> *Ibid.*

work examining recent law development.<sup>12</sup> Smyth and Nielsen's study of the citation practices of the High Court found that the Court has been willing to cite authors, whether deceased or living.<sup>13</sup> If the 'living author rule' is no longer in use, it is, therefore, important to examine the citation trends of the courts to ensure that the living academy can assist the judiciary with published work.

Another factor in this paucity of academic citation by the courts, as explained by Chief Justice Kiefel, is a sensitivity to the accusation of 'licensed plagiarism',<sup>14</sup> where the work may be used to summarise an area of law but is used without acknowledgement.<sup>15</sup> Lord Burrows explained that 'some judges appear reluctant to cite academic work even if they have relied on it or found it useful'.<sup>16</sup> However, as Chief Justice Kiefel explained, this reluctance is no longer widespread in Australian courts and 'these days acknowledgment is given where it is due'.<sup>17</sup> Therefore, it could be concluded that 'licensed plagiarism' is not a major factor in the lack of judicial citation.

There are, however, limits to the value of academic writing for the courts. In particular, academic writing has no precedential value. Although academic material can summarise the law and provide academic perspectives, it is not a source of the law itself.<sup>18</sup> Similarly, judges are limited to the issues for determination. Material beyond a specific issue, such as reform or theoretical exploration, would not be needed or cited.<sup>19</sup> This would exclude articles that explore a range of topics that would not apply to matters currently before the court. Equally, legal practitioners prepare and deliver their arguments on specific legal issues, and academic material that does not advance their argument, or is additional to the primary sources of law, would be superfluous and not presented. When writing curially, the judiciary is mainly limited to the primary sources that are the sources of the law, and the use of academic material is limited to the topics specific to each case.

Additionally, judges must work within the constraints of the judicial system with the pressures of brevity and clarity of judgments to avoid the expanded discourse. As stressed by Chief Justice John Doyle:

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<sup>12</sup> AT Denning, 'Review of PH Winfield, A Textbook of the Law of Torts' (1947) 63 *Law Quarterly Reports* 516, as cited in Smyth (n 5) 32.

<sup>13</sup> See Russell Smyth and Ingrid Nielsen, 'The Citation Practices of the High Court of Australia, 1905–2015' (2019) 47(4) *Federal Law Review* 655, 660 ('The Citation Practices') citing *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, 637–8, 650, 652 and *Mills v Mills* (1938) 60 CLR 150, 181–2 as examples of citing both living and dead authors.

<sup>14</sup> Kiefel (n 1) 452.

<sup>15</sup> Ibid.

<sup>16</sup> Lord Burrows, 'Judges and Academics, and the Endless Road to Unattainable Perfection' (2022) 55(1) *Israel Law Review* 50, 58.

<sup>17</sup> Kiefel (n 1) 451–2.

<sup>18</sup> Russel Smyth, 'Who gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21(1) *University of Queensland Law Journal* 7 ('Who gets Cited?').

<sup>19</sup> Chief Justice Murray Gleeson, 'Performing the Role of the Judge' (1998) 10(8) *Judicial Officers Bulletin* 57.

I believe our judgments are getting longer and more complex ... I think that we are tending to over-elaborate in our dealing with authority and learned writers. I think that we are probably too willing to deal with arguments that are not essential to the issue. In short, I think we are, perhaps, thinking too much of our judgments as an enduring legacy, and as a contribution to the development of the law, and not enough of the desirability of a judgment expeditiously delivered which meets the essentials ... but does no more.<sup>20</sup>

Indeed, with these pressures, the judgments must include a discussion of points that are necessarily central to the issue of the case and avoid superfluous discussions of the historical points of the evolution of law. A summary of law from an academic source can be viewed as lacking research rigour from the bench, and with pressure to be succinct, a long academic discussion may be omitted from a judgment, therefore defeating the purpose of an academic citation.<sup>21</sup> Undeniably, courts are not immune to public service pressures of efficiency in administering justice, and this places a limit on time for research and lengthy written decisions where it is not essential.<sup>22</sup> This may also be true of counsel assisting who have a limited time to research and present succinct arguments and therefore lack the opportunity to present academic material to the court. The topic of the separate roles of the legal profession and the academy would require further exploration beyond this paper. As the literature demonstrates, many different pressures affect the citation of academic work. By examining the limitations to citing academic sources, we can gain a deeper understanding of the relationship between academics and the courts.

### III WHY ARE JUDICIAL CITATIONS IMPORTANT TO THE ACADEMY?

The legal academy is faced with competing challenges created by the imposition of citation metrics as a measure of research output and quality.<sup>23</sup> For this article, the academy includes members of Australian law schools with the acknowledgement that members of the judiciary, when writing extra-curially, are also important contributors to academic writing.<sup>24</sup> The lack of citation by

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<sup>20</sup> John Doyle, 'Judgment Writing: Are There Needs for Change?' (1999) 73(10) *Australian Law Journal* 737, 740.

<sup>21</sup> Smyth, 'Citing Outside the Law Reports' (n 10) 700–1.

<sup>22</sup> Wayne Martin, 'Court Administrators and the Judiciary: Partners in the Delivery of Justice' (2014) 6(2) *International Journal for Court Administration* 3; Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Springer, 2017); John Lowndes, 'Delivering Justice in the Lower Courts on the Sniff of an Oily Rag' (Conference Paper, Criminal Lawyers Association Northern Territory, Bali Conference, June 2017).

<sup>23</sup> See the discussion in K G Weatherall and Rebecca Giblin, 'Inoculating Law Schools Against Bad Metrics' (Research Paper No 940, University of Melbourne Legal Studies, 21 June 2021). In Australia, legal scholars are increasingly using quantitative metrics for grant and research income.

<sup>24</sup> See the discussion of the role and attitude to judges publishing in Russell Smyth 'Judges and Academic Scholarship: An Empirical Study of the Academic Publication Patterns of Federal Court and High Court Judges' (2002) 2(2) *Queensland University of Technology Law and Justice Journal* 198.

judges creates a dual problem for the academy: first, the contemporary funding of academic research has little regard for writing for judges; and second, with little evidence of citation, funding may be diverted away from this type of research.<sup>25</sup> For example, there is an increasing focus on demonstrating the benefits of research and its impact on reporting and promotion.<sup>26</sup> If the judiciary cites an academic article, the author could build a valid argument that one of the research impacts of their work was the benefit to society through assisting the judiciary.<sup>27</sup> Without the evidence of writing material that is used for and cited by the judiciary, it can be difficult to show and assess the benefits of such research.

Members of the academy must establish the impact of their work, which becomes a complex and even contentious topic for legal researchers when traditional citation and impact metrics are used. The law discipline in Australia's Excellence in Research Assessment ('ERA') exercise is assessed by peer review, and peer assessors utilise expert opinions in the field to inform their evaluation.<sup>28</sup> However, metrics used for STEM (science, technology, engineering, and mathematics) and national and global education policies and practices are also in play in the higher education sector.<sup>29</sup> This practice creates a 'Catch-22' situation, since journals included in the Australian Research Council's ERA listings that suffer from low citation rates (including law journals) often appear among the lower ranks on the listings.<sup>30</sup> Due to the paucity of citations, these journals often drop even lower in the rankings over time with the application of standard journal ranking tools.<sup>31</sup> As Sheehy and Dumay have observed, 'law is not a citation-based discipline ... [in relation] to scholarly citations ... [It] is better assessed by evaluation of specific uses, such as a court's use'.<sup>32</sup> Therefore, the legal academy is particularly vulnerable to traditional research metrics, a situation compounded by the lack of citations by the courts. Traditionally, the Australian Law Reform Commission has been a leader in the citation of doctrinal legal research. However, as funding for the Commission has declined over the years,<sup>33</sup> so the academy had to rely more on the judiciary to support the development of law.

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<sup>25</sup> For a discussion on the doctrinal method and funding, see Terry Hutchinson, 'Legal Research in the Fourth Industrial Revolution' (2017) 43(2) *Monash University Law Review* 567.

<sup>26</sup> 'Research Impact Principles and Framework', *Australian Research Council* (Web Page, 27 March 2019) <<https://www.arc.gov.au/policies-strategies/strategy/research-impact-principles-framework>> ('Research Impact Principles and Framework').

<sup>27</sup> 'Research Impact Pathway Table', *Australian Research Council* (Online Document) <[https://www.arc.gov.au/file/611/download?token=6psGpzS\\_>](https://www.arc.gov.au/file/611/download?token=6psGpzS_>).

<sup>28</sup> Australian Research Council, *ERA 2018 Evaluation Handbook* (Commonwealth of Australia, 2018).

<sup>29</sup> See, eg, 'Research Impact Principles and Framework' (n 26).

<sup>30</sup> Smyth, 'Citing Outside the Law Reports' (n 10) 719.

<sup>31</sup> Scimago Journal and Country Rank, *Scimago Institutions Ranking* (Web Page, 2022) <<https://www.scimagojr.com/>>.

<sup>32</sup> Benedict Sheehy and John Dumay, 'Examining Legal Scholarship in Australia: A Case Study' (2021) 49(1) *International Journal of Legal Information* 32, 36.

<sup>33</sup> Guzyal Hill and John Garrick, 'Architecture for Developing National Uniform Legislation: Reinvent, Create, or Strengthen?' (2022) 96(3) *Australian Law Journal* 256 ('Architecture for Developing National Uniform Legislation').

The lack of citation can also be understood as a failure of law as a discipline to adjust to the new reality of publishing and scholarly work. Sheehy and Dumay have argued that, currently, 'we live in an era where law's authority in the academy and the prowess of its methods of argumentation are on the wane'.<sup>34</sup> While the authors of this study do not share this view, it is, nevertheless, a perception that can be imposed on the academy. Moreover, the courts in the United States and Australia have expressed concerns about the insufficient volume of doctrinal research by modern legal scholars and the predominance of interdisciplinary scholarly work.<sup>35</sup> Legal scholars might publish their work as interdisciplinary to ensure it is cited, at least through other disciplines.

#### IV LAW-AS-DATA METHODS

In 1897, eminent American jurist Oliver Wendell Holmes predicted that 'for the rational study of the law the blackletter man may be the man of the present, but a man of the future is the man of statistics and the master of economics'.<sup>36</sup> Yet, the academy in Australia has largely ignored the intersection of law and statistics even as technological changes have 'invigorated the formerly dormant field'.<sup>37</sup> The 'law-as-data' movement<sup>38</sup> offers an alternative to the doctrinal and case study methods. Viewing cases as data or text rather than rules allows important empirical data to be introduced and statistical methods to be used to analyse the data collected. Rather than examining the substance of the cases being studied, a 'law-as-data' approach allows for analysing the factors affecting court decisions.

Citation analysis allows conclusions to be drawn from a solid empirical foundation. It allows for further insight into what has sometimes been anecdotal evidence or merely some expert intuition. The strategic goal of this article is 'to extract meaningful content from an entire corpus of text in a systematic way'.<sup>39</sup> Theoretically, content analysis is 'a method for systematically describing the meaning of qualitative data' by 'assigning successive parts of the material to the categories of a coding frame'.<sup>40</sup> Like other methods, content analysis can follow a

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<sup>34</sup> Sheehy and Dumay (n 32) 48.

<sup>35</sup> Smyth, 'Citing Outside the Law Reports' (n 10) 700.

<sup>36</sup> Oliver Wendell Holmes, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 457, 467–8.

<sup>37</sup> Daniel Martin Katz, 'Quantitative Legal Prediction —or —How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry' (2012) 62(4) *Emory Law Journal* 909, 936.

<sup>38</sup> Dru Stevenson and Nicholas J Wagoner, 'Bargaining in the Shadow of Big Data' (2015) 67(4) *Florida Law Review* 1337, 1352.

<sup>39</sup> Jonathan B Slapin and Sven-Oliver Proksch, 'Words as Data: Content Analysis in Legislative Studies' in Shane Martin, Thomas Saalfeld and Kaare W Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press, 2014) 126, 127.

<sup>40</sup> Margrit Schreier, 'What is Qualitative Content Analysis?' in Uwe Flick (ed), *The SAGE Handbook of Qualitative Data Analysis* (SAGE, 2013) 170.

quantitative or qualitative design or a combination of both.<sup>41</sup> This article relies on both designs to achieve its aim, emphasising quantitative analysis. However, it should be noted that content analysis is also used to examine the themes and patterns (both implicit and explicit) found across the data. The overall method goes beyond merely counting the number of certain occurrences within the data.<sup>42</sup> Therefore, this article adopts a mixed-methods approach. The first part of the article relies on literature to establish the conceptual underpinnings and review the previous research in the field. The second part examines the judgments of full courts of two territories to give full coverage to research that has been done so far.

## V CITATION ANALYSIS IN THE EXISTING LITERATURE

Prior studies have demonstrated the importance of examining the citation of secondary sources by courts and have done so using various methodologies.<sup>43</sup> Earlier research has been undertaken in the United States and Canada; however, citation analysis as a methodology has been used relatively recently to examine citations in Australian courts.<sup>44</sup> Studies have had various scopes, including a focus on specific areas of law or specific topics, and a subset of studies have examined law reviews or the citation of specific types of resources such as dictionaries.<sup>45</sup> As demonstrated in Table 1 below, a significant and detailed body of research has been developed by Smyth and other authors, who have focused on citation analysis of Australian courts, which has encompassed the citation practices of the High Court of Australia,<sup>46</sup> the Federal Court of Australia<sup>47</sup> and the State Supreme

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<sup>41</sup> John Brewer, 'Content Analysis' in Robert Lee Miller and John D Brewer (eds), *The A-Z of Social Research: A Dictionary of Key Social Science Research Concepts* (SAGE, 2003) 44.

<sup>42</sup> Greg Guest, Kathleen M MacQueen and Emily E Namey, *Applied Thematic Analysis* (SAGE, 2011) 11.

<sup>43</sup> For example, Smyth explained that citation analysis is of practical relevance to solicitors and barristers about which periodical and texts a court will consider. It informs law libraries about important material that should be made available. For the main purposes of this article, it informs the academy about which periodical or resource a court may use, Smyth, 'The Authority of Secondary Authority' (n 5) 25–7.

<sup>44</sup> See, eg, the discussion on citation analysis in Smyth, 'Citing Outside the Law Reports' (n 10) 692–3.

<sup>45</sup> Ibid. Smyth provides a summary of literature from 1969 to 2006 on the different purposes of academic literature in relation to citation analysis.

<sup>46</sup> Smyth, 'Who gets Cited?' (n 18); Russell Smyth 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court' (1998) 17(2) *University of Tasmania Law Review* 164 ('Academic Writing and the Courts').

<sup>47</sup> Smyth, 'The Authority of Secondary Authority' (n 5).

courts.<sup>48</sup> Table 1 represents a summary in chronological order of leading research on citation practice in Australian courts.

The data show that the literature on citation counting in Australia has primarily focused on the state Supreme Courts (55 per cent of papers), followed by the High Court (35 per cent of papers) and the Federal Court (10 per cent of papers). Of this literature, a set focused on examining both primary and secondary source citations (52 per cent of papers), some examined purely secondary source citations (26 per cent of papers), others examined primary source citations (11 per cent of papers), and other citations explore which High Court judges have been cited (11 per cent of papers).<sup>49</sup> The literature has concluded that secondary citations have steadily increased over time in the High Court.<sup>50</sup> However, this increase in the use of secondary citations has not been reflected in the state Supreme Courts, for which secondary citations have remained low<sup>51</sup> or even decreased over time.<sup>52</sup>

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<sup>48</sup> Russell Smyth and Dietrich Fausten, 'Coordinate Citations between Australian State Supreme Courts over the 20th Century' (2008) 34(1) *Monash University Law Review* 53; Russell Smyth, 'A Century of Citation: Case-Law and Secondary Authority in the Supreme Court of Western Australia' (2008) 34(1) *University of Western Australia Law Review* 145 ('A Century of Citation'); Russell Smyth, 'What Do Judges Cite?—An Empirical Study of the "Authority of Authority" in the Supreme Court of Victoria' (1999) 25(1) *Monash Law Review* 29 ('What Do Judges Cite'); Russell Smyth, 'Citation to Authority on the Supreme Court of South Australia: Evidence from a Hundred Years of Data' (2008) 29(1) *Adelaide Law Review* 113 ('Citation to Authority'); Russell Smyth, 'Trends in the Citation Practice of the Supreme Court of Queensland over the Course of the Twentieth Century' (2009) 28(1) *University of Queensland Law Journal* 39 ('Trends').

<sup>49</sup> Russell Smyth, 'Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21(1) *University of Queensland Law Journal* 7.

<sup>50</sup> Smyth, 'Academic Writing and the Courts' (n 46); Russell Smyth, 'Other than "Accepted Sources of Law"? A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22(1) *University of New South Wales Law Journal* 19 ('Accepted Sources of Law'); Smith and Nielsen, 'The Citation Practices' (n 13).

<sup>51</sup> Russell Smyth, 'What Do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21(1) *Adelaide Law Review* 51 ('What do Intermediate Appellate Courts Cite?'); Smyth, 'What Do Judges Cite?' (n 48); Smyth, 'A Century of Citation' (n 48).

<sup>52</sup> Russell Smyth, 'The Citation Practices of the Supreme Court of Tasmania, 1905–2005' (2007) 26(1) *University of Tasmania Law Review* 34; Smyth, 'Citation to Authority' (n 48); Smyth, 'Trends' (n 48). The only exception to this decreased use of secondary citations in state supreme courts was reported in Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practices on the Supreme Court of Victoria' (2007) 31(3) *Melbourne University Law Review* 733 ('A Century of Citation Practices'), where a slight increase in the use of secondary sources was reported.

**Table 1: Selection of Significant Literature on Australian Courts and Citation Counting**

Citation	Jurisdiction/ Years	Source Type	Main Findings
Paul E von Nessen, 'The Use of American Precedents by the High Court of Australia' (1992) 14(2) <i>Adelaide Law Review</i> 181.	High Court 1901–87	Primary	Cases related to constitutional law and theory had the largest representation; American cases were most cited by the High Court in its first decade and during 1971–87.
Russell Smyth, 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court' (1998) 17(2) <i>University of Tasmania Law Review</i> 164.	High Court 1990–97	Secondary	A total of 41% of cases contained citations to periodicals, with an average of 3.70 periodicals cited per case. There was a steady increase in citations over time.
Russell Smyth, 'Other than "Accepted Sources of Law"?: A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22(1) <i>University of New South Wales Law Journal</i> 19.	High Court at intervals of 1960, 1970, 1980, 1990 and 1996	Secondary	Over time, the number of reported cases decreased, and the length of the reports increased. Reference to secondary sources increased.
Russell Smyth, 'What Do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21(1) <i>Adelaide Law Review</i> 51.	Six state Supreme Courts selected between 1996–99	Primary and secondary	An average of 27.6 authorities were cited per case. There was no correlation between subject matter and citation count. Legal texts accounted for 61.2% of citations to secondary sources, legal periodicals for 17.3% and legal encyclopedias for 5.4% of citations to secondary sources. State Supreme Courts cited far fewer periodicals than the High

Citation	Jurisdiction/ Years	Source Type	Main Findings
			Court, which cited 11 times the number of citations.
Russell Smyth, 'What do Judges Cite?—An Empirical Study of the "Authority of Authority" in the Supreme Court of Victoria' (1999) 25(1) <i>Monash Law Review</i> 29.	Supreme Court of Victoria – intervals at 1970, 1980 and 1990	Primary and secondary	The total number of citations was somewhat consistent across the three years for primary and secondary sources. Of the secondary sources, textbooks and treatises were cited six times more than journal articles, followed by legal encyclopedias and dictionaries.
Russell Smyth, 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9(1) <i>Griffith Law Review</i> 25.	Federal Court 1996–98	Secondary	On average, there were 1.8 secondary authorities cited per case.
Russell Smyth, 'Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21(1) <i>University of Queensland Law Journal</i> 7.	High Court 1995–99	High Court Judges'	Four of the most often cited justices by name were Mason, Dean, Dixon and Brennan.
Mita Bhattacharya and Russell Smyth, 'Aging and Productivity among Judges: Some Empirical Evidence from the High Court of Australia' (2001) 40(2) <i>Australian Economic Papers</i> 199.	High Court 1995–99	High Court Judges'	The findings support a life-cycle hypothesis suggesting a Judge's citation profile increases, reaches a peak and then declines.
Russell Smyth, 'Judges and Academic Scholarship: An Empirical Study of the Academic Publication Patterns of Federal Court and High Court Judges' (2002) 2(2) <i>Queensland</i>	High Court and Federal Court 1970–2001	Secondary	A total of 80% of Federal Court judges published one or more articles; 88% of High Court judges published at least one article.

Citation	Jurisdiction/ Years	Source Type	Main Findings
University of Technology Law and Justice Journal 198.			
Russell Smyth, 'The Citation Practices of the Supreme Court of Tasmania, 1905–2005' (2007) 26(1) University of Tasmania Law Review 34.	Supreme Court of Tasmania 1905–2005 at 10-year intervals	Primary and secondary	There is an upward trend in the length of the reports and the use of citations in cases. Secondary sources accounted for 30% of citations, in 1995 18%, and in 1965 at 14%; in 1995 and 2005, they represented less than 5% of the Court's citations.
Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practices on the Supreme Court of Victoria' (2007) 31(3) Melbourne University Law Review 733.	Supreme Court of Victoria 1905–2005 at 10-year intervals	Primary and secondary	The length of judgments and number of authorities cited have increased over time, including those from secondary sources.
Russell Smyth and Dietrich Fausten, 'Coordinate Citations between Australian State Supreme Courts over the 20th Century' (2008) 34(1) Monash University Law Review 53.	State supreme courts 1905–2005 at 10-year intervals	Primary	The frequency of coordinate citations increased over time.
Russell Smyth, 'A Century of Citation: Case-Law and Secondary Authority in the Supreme Court of Western Australia' (2008) 34(1) University of Western Australia Law Review 145.	Supreme Court of Western Australia 1905–2005 at 10-year intervals	Primary and secondary	A higher proportion of English cases were cited throughout the twentieth century; the Court's citation to its own decisions and the High Court's decisions increased in recent decades; the Court's citation to secondary sources remained low.

Citation	Jurisdiction/ Years	Source Type	Main Findings
Russell Smyth, 'Citation to Authority on the Supreme Court of South Australia: Evidence from a Hundred Years of Data' (2008) 29(1) <i>Adelaide Law Review</i> 113.	Supreme Court of South Australia 1905–2005 at 10-year intervals	Primary and secondary	The citation rate has increased since the end of WWII. Citation of English cases has declined, being replaced by citations of the Court's own decisions and the High Court. Citations to other courts in Australia have increased. Secondary sources comprise less than 10% of total citations, peaking in 1935 with 9.7% but decreasing in the following years to less than 5% in the 2005 decade.
Ingrid Nielsen and Russell Smyth, 'One Hundred Years of Citation of Authority on the Supreme Court of New South Wales' (2008) 31(1) <i>University of New South Wales Law Journal</i> 189.	Supreme Court of New South Wales 1905–2005 at 10-year intervals	Primary and secondary	Average citations per case increased 760% from 1905 to 2005. Secondary citations were 5–6% total of citations and peaked in years between 1975 and 1995 at 7–8% of total citations. The most cited legal secondary sources were books followed by periodicals.
Russell Smyth, 'Trends in the Citation Practice of the Supreme Court of Queensland over the Course of the Twentieth Century' (2009) 28(1) <i>University of Queensland Law Journal</i> 39.	Supreme Court of Queensland 1905–2005 at 10-year intervals	Primary and secondary	There was an upward trend in average citations per case. In 1905, the Court cited 2.8 authorities per case, and in 2005 the Court cited 16.2 authorities per case. There was a decline in secondary source citations.
Russell Smyth, 'Citing Outside the Law Reports: Citing of Secondary	State supreme courts	Secondary	Citations to secondary sources increased over time; the state Supreme

Citation	Jurisdiction/ Years	Source Type	Main Findings
Authorities on the Australian State Supreme Courts Over the Twentieth Century' (2009) 18(3) Griffith Law Review 629.	1905–2005 at 10-year intervals		Courts cited fewer secondary citations than the High Court.
Russell Smyth, 'What do Trial Judges Cite? Evidence from the New South Wales District Court' (2018) 41(1) University of New South Wales Law Journal 211.	New South Wales District Court 2005–2016	Primary and secondary	Secondary citations are low, discussion on the nature of legal publishing not being well suited to the District Court, judges often cite journals other than those highly ranked.
Russell Smyth and Ingrid Nielsen, 'The Citation Practices of the High Court of Australia, 1905–2015' (2019) 47(4) Federal Law Review 655.	High Court 1905–2015 at 10-year intervals	Primary and secondary	From 1905 to 1975, the Court cited relatively few sources; during the last four sample years, the Court cited more sources, including secondary sources. In 1905, the percentage of secondary sources consisted of .09%, with slight variation until 1975 when the rate increased to 5.5% and then in 2015 8.7%.

Source: compiled by the authors

Early Australian work using the citation-counting method started in the 1990s and has continued through to recent times. The use and depth of the citation-counting methodology has changed over time. The work of von Nessen explored the use of American cases in Australia,<sup>53</sup> which was then followed by Smyth, who examined citation practices of academic articles in the High Court.<sup>54</sup> Smyth's research highlights the importance of using citation analysis to gain a deeper understanding of what the courts cite. This type of analysis can be useful for various reasons; in this research, it was useful for ensuring that the academy appreciates the type and scope of secondary citations made by the courts.<sup>55</sup> Smyth

<sup>53</sup> Paul E von Nessen, 'The Use of American Precedents by the High Court of Australia' (1992) 14(2) *Adelaide Law Review* 181.

<sup>54</sup> Smyth, 'Academic Writing and the Courts' (n 46); Smyth, 'Accepted Sources of Law' (n 50).

<sup>55</sup> Smyth, 'Accepted Sources of Law' (n 50) 20–1.

found that, overall, the number of cases reported by the High Court fell over the last half of the twentieth century, even though the High Court increased its use of secondary source citations.<sup>56</sup>

## VI DATA AND SCOPE

This study presents empirical data gathered from the ACT and the NT law reports.<sup>57</sup> Cases were selected following a similar methodology to that utilised by Smyth, who, in some studies, limited cases to authorised law reports, enabling the selection of cases that have ‘perceived precedent value and relevance to the profession’.<sup>58</sup> This approach is also pragmatic in that it limits the pool of cases and, therefore, the time needed to analyse and compile the data.<sup>59</sup> One limitation of this is that ‘some important cases reported in the specialised reports may be neglected’.<sup>60</sup> For example, the NT and the ACT may have cases reported in the *Australian Law Reports*, *Motor Vehicle Reports*, *Federal Law Reports* and other specialist reports. There may also be cases that were unreported. However, limiting the study to the authorised reports creates a smaller data set that can be analysed in a shorter time frame. The cases selected for analysis were handed down between 2010 and 2020, being the latest cases available for the selected years in January 2023.

Data was collected from each case to determine the number and trends in secondary sources over time. One of the challenges of this study is the nature of law reporting and publishing. It can take some time for cases to appear in the law reports.<sup>61</sup> As of January 2023, cases are only available up to 2020 in the reports for the NT and the ACT Supreme Courts. Further study is needed to determine whether the trends observed in this study have changed over the decades, such as in Smyth’s later studies.<sup>62</sup> However, general trends can be established using the available data; for example, Smyth used a smaller dataset from 1996–99 to establish the citation trends of the Australian state Supreme Courts.<sup>63</sup>

Data collected included the total number of pages per case, and the number of primary and secondary source citations were tallied. For each case, each

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<sup>56</sup> Ibid 29.

<sup>57</sup> The *Northern Territory Law Reports* and the *Australian Capital Territory Law Reports* were used to compile the data.

<sup>58</sup> Smyth, ‘The Authority of Secondary Authority’ (n 5) 28.

<sup>59</sup> See, eg, Smyth’s work that required analysis of 64,500 citations: Smyth, ‘Citing Outside the Law Reports’ (n 10) 703.

<sup>60</sup> Ingrid Nielsen and Russell Smyth, ‘One Hundred Years of Citation of Authority on the Supreme Court of New South Wales’ (2008) 31(1) *University of New South Wales Law Journal* 189, 195 (‘One Hundred Years of Citation’).

<sup>61</sup> For example, editing and selecting reports can take up to 18 months for Commonwealth Law Reports, Sue Milne and Kay Tucker, *A Practical Guide to Legal Research* (Thomson Lawbook, 2008) 94.

<sup>62</sup> See, eg, the High Court data analysed over a century in Russell Smyth and Ingrid Nielsen, ‘The Citation Practices of the High Court of Australia, 1905–2015’ (2019) 47(4) *Federal Law Review* 655.

<sup>63</sup> Smyth, ‘What Do Intermediate Appellate Courts Cite?’ (n 51).

citation was counted once, with duplicates discarded. This approach differs from Smyth's methodology, where repeated citations to the same source in subsequent paragraphs or footnotes were tallied.<sup>64</sup> The rationale for the approach used here was that deleting duplicates would demonstrate the number of unique citations, rather than the number of times a specific source was cited. Secondary sources were those sources defined in Smyth's 2009 article to include legal periodicals, textbooks, legal encyclopedias and other social science and non-legal authorities.<sup>65</sup> As this study concentrates on the role of the academy, citation counts for bench handbooks, law reform and other reports, and unpublished conference papers were excluded. Primary sources analysed in the citation count included cases and legislation. While citation counting and analysis have been used in many papers, as outlined in the existing literature, this methodology has several limitations. For example, citation analysis can be a time-intensive and manual process of selection and organisation. Although text analysis software is available, it is unsuitable for differentiating between primary and secondary sources and cannot identify duplicates where the citation practices vary. A judge may use the author's full name and title in one citation and just the author's name in another. Although manual data analysis assists with the quirks of referencing, there is also a risk that a manual search could miss some sources. Similarly, citation counting contains no detailed analysis of the context or topic of the secondary citations. This decision was made to limit the scope of the data collected.<sup>66</sup> A limited date range of just one decade is also a limitation in establishing strong trends in data. For example, some studies have examined citations over a longer time and at decade intervals.<sup>67</sup> That, of course, opens opportunities for further research. However, for this study, the number of primary and secondary citations within the criteria produced sufficient data for analysis, as outlined in the findings below.

## VII FINDINGS IN THE TERRITORIES

The trend in the data from the Supreme Courts of the NT and ACT largely paralleled the trend identified in the literature for the Supreme Courts in other jurisdictions, namely, that the courts cited relatively few secondary sources across the number of cases considered.<sup>68</sup> A total of 339 cases across both jurisdictions were analysed (169 from the NT and 170 from the ACT), and 7,849 citations were tallied (3,112 from the NT and 4,737 from the ACT). Of these

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<sup>64</sup> Smyth, 'Accepted Sources' (n 50) 29.

<sup>65</sup> Smyth, 'Citation to Authority' (n 48).

<sup>66</sup> *Ibid.* Smyth followed a similar methodology.

<sup>67</sup> Smyth, 'Citing Outside the Law Reports' (n 10); Smyth and Nielsen, 'The Citation Practices' (n 13).

<sup>68</sup> See Smyth, 'Citing Outside the Law Reports' (n 10) for an example of trends from other Supreme Courts in Australia.

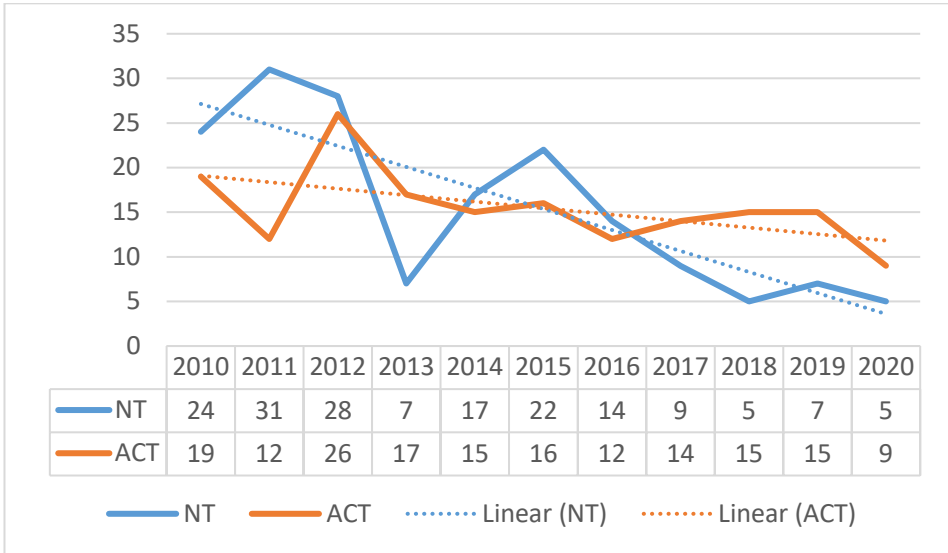
citations, only 200 were from secondary sources, constituting only 2.5 per cent of the total citations.

*Table 2: Summary of collected citation data*

Year	Reported Cases		Total Citations		Secondary Source Citations		Total Case Pages		Percentage of Secondary Citations per Page	
	NT	ACT	NT	ACT	NT	ACT	NT	ACT	NT	ACT
2010	24	19	416	601	11	19	481	407	2.28%	4.66%
2011	31	12	548	379	32	14	562	217	5.59%	6.45%
2012	28	26	437	611	21	11	448	459	4.68%	2.39%
2013	7	17	121	399	5	4	117	374	4.27%	1.06%
2014	17	15	215	672	5	6	266	774	1.87%	0.77%
2015	22	16	408	327	7	6	429	281	1.63%	2.13%
2016	14	12	373	321	14	6	388	233	3.60%	2.57%
2017	9	14	286	420	5	7	257	335	1.94%	2.08%
2018	5	15	96	359	2	4	43	312	4.65%	1.28%
2019	7	15	133	384	0	8	79	235	0.00%	3.40%
2020	5	9	79	265	4	9	78	317	5.12%	2.83%
<b>Total</b>	169	170	3,112	4,737	106	94	3,168	3,944		

A linear trend line was used to best-fit data points to indicate whether the number of cases (see Figure 1) and citations (see Figure 2) increased or decreased over time. Overall, the number of cases reported gradually decreased (see Figure 1).

**Figure 1: The number of reported cases from 2010–20**



Following the trend in the decrease of published decisions, the total number of citations per year also decreased (see Figure 2).

**Figure 2: Total citations per year**

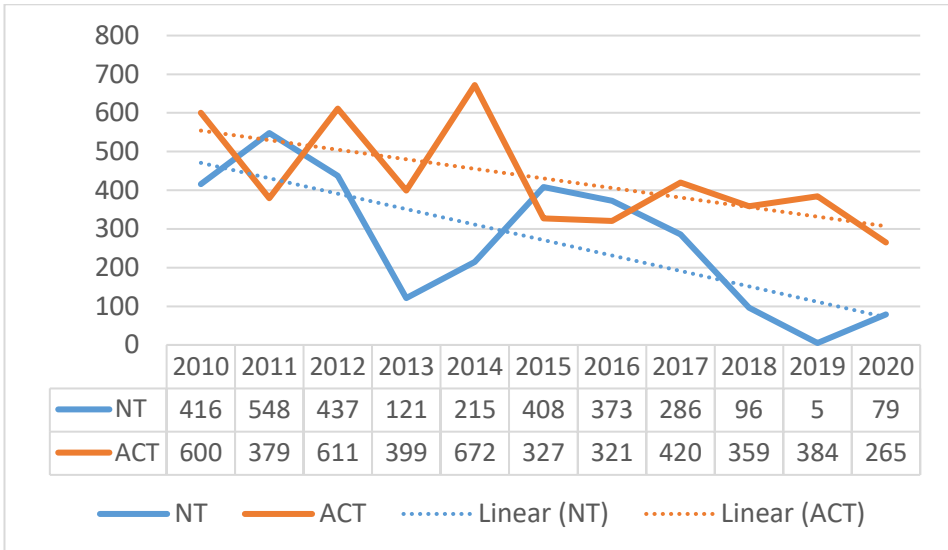
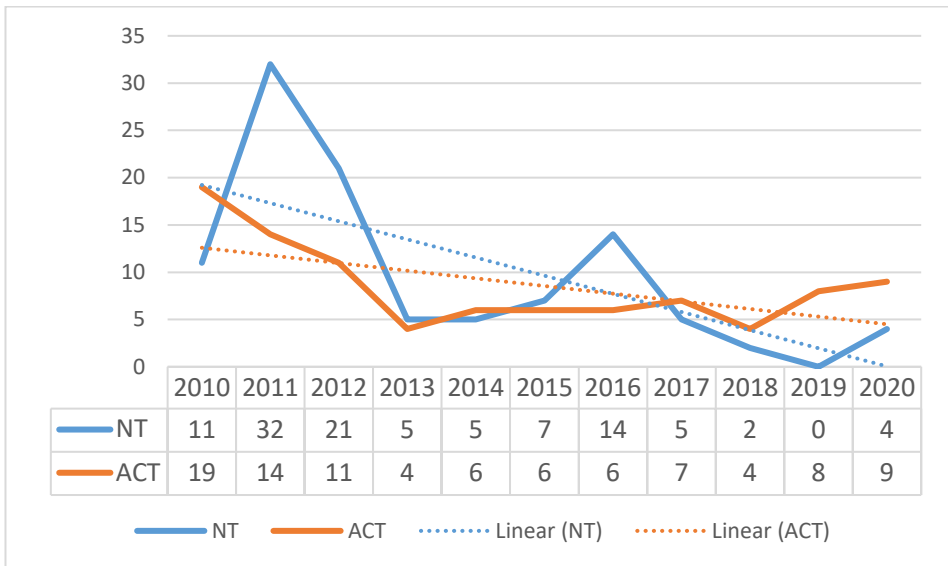


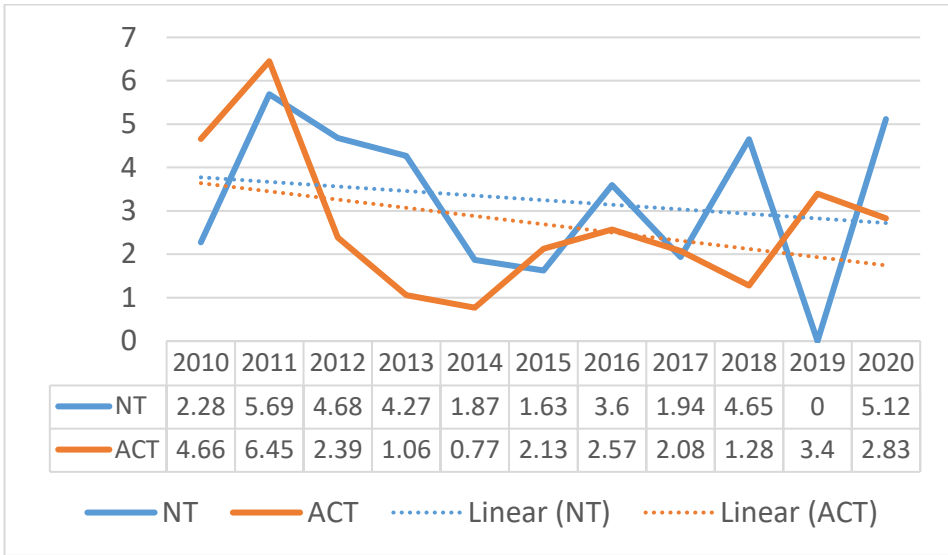
Figure 3 demonstrates that the number of secondary citations for both jurisdictions decreased at comparable rates over the decade. The graph reveals that for the NT Supreme Court, the number of secondary citations decreased each year at a steady rate throughout the decade with the years 2010–12 having the largest amounts of citation. The ACT Supreme Court followed a similar pattern for 2010–12 but remained steady with lower citations from 2013–20.



To establish whether secondary citations decreased overall, rather than due to the decrease in the total number of cases reported, this study divided the number of citations per case for each year. This approach varies from Smyth’s methodology, which used the number of citations per judgment.<sup>69</sup> This method was used in the current study as it is possible that as the length of a decision grows, so does the opportunity to cite secondary sources; therefore, counting citations per page was used to establish whether the use of secondary citations varied over the decade. The trend line in Figure 4 demonstrates that, based on the decade of data, there was no increase in the citation of secondary sources for the NT and or ACT Supreme Courts. Instead, the data indicated that citing secondary sources for both the ACT and the NT Supreme Courts remained steady.

<sup>69</sup> Smyth, ‘What do Trial Judges Cite?’ (n 6) 211, 247–8.

**Figure 4: The number of secondary citations divided by total pages published per year**



Books were the most cited secondary source (see Table 3). In the NT court, the most cited books were D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, with 10 citations, and R G Fox and A Freiberg, *Sentencing State and Federal Law in Victoria*, with eight citations. Various editions of these textbooks were cited. The most cited was the *Macquarie Dictionary*. The ACT followed a similar pattern, with 5 citations to D C Pearce and R S Geddes, *Statutory Interpretation in Australia*. The ACT court had no established preference over the listed textbooks. Interestingly, the court did not cite any websites.<sup>70</sup> Eight different texts were cited; however, none were cited more than once.

<sup>70</sup> See, eg, the discussion of citing Wikipedia in other Australian Courts in Smyth, ‘What do Trial Judges Cite?’ (n 6) 211, 250.

**Table 3: Secondary source citation by source type**

	NT	ACT
<b>Books</b>	67	60
<b>Journals</b>	15	18
<b>Encyclopedia/ looseleaf</b>	6	5
<b>Dictionaries</b>	14	11
<b>Total</b>	102	95

The journals cited differed for each jurisdiction. The most popular journals cited in the NT reports were the *Northern Territory Law Journal*, with five citations, followed by the *Australian Law Journal*, with four citations. There were a handful of other journals with one citation each. The ACT had 4 citations to the *Criminal Law Journal*, with other articles appearing in various journals.

## VIII DISCUSSION

A comparison of the citation practices for the NT and ACT Supreme Courts reveals similar citation practices, although the sources they cite are different. Both courts have unlimited jurisdiction within each territory in civil matters and hear the most serious criminal matters. They also have similar numbers of permanent judges, with the ACT court having five permanent judges,<sup>71</sup> and the NT court having seven,<sup>72</sup> with additional and acting judges used occasionally. The NT has a population of 232,605 people, while the ACT has 454,499 people.<sup>73</sup>

The rate of secondary source citation for the ACT and NT over the decade examined remained low and, it is suggested, is likely to remain low or decline. This trend raises the issue of the relationship between the academy and the courts in the NT and the ACT concerning citations. Chief Justice Kiefel is not in favour of a German-style approach to citation use, which is extensive.<sup>74</sup> Similarly, Sir Garfield Barwick noted that excessive citation might undermine a judgment.<sup>75</sup> Cane echoes this point and adds that excessive citation of secondary sources might make judgments look more like journal articles, which would not be desirable.<sup>76</sup> Based on the above findings, it is unlikely that the superior courts of

<sup>71</sup> The five judges in the ACT court comprise the Chief Justice, three resident judges and an Associate Judge. See 'Judiciary', *Australian Capital Territory Government* (Web Page) <<https://www.courts.act.gov.au/supreme/about-the-courts/judiciary>>.

<sup>72</sup> The seven judges in the NT Court comprise the Chief Justice, five resident judges and an Associate Judge.

<sup>73</sup> 'Population: Census', *Australian Bureau of Statistics* (Web Page, 2022) <<https://www.abs.gov.au/statistics/people/population/population-census/latest-release>>.

<sup>74</sup> Kiefel (n 1) 252.

<sup>75</sup> Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (Federation Press, 1995) 224.

<sup>76</sup> Peter Cane, 'What a Nuisance' (1997) 113 (October) *Law Quarterly Review* 515, 519.

the NT and the ACT would be at risk of over-citation. The results of our study do raise the question, however, of how the academy and the courts might best go about developing a mutually beneficial relationship whereby the court is serviced with quality secondary sources, and the academy are supported through acknowledgement that can lead to further funding and research opportunities.

Both the NT and the ACT are distinctive jurisdictions that provide significant opportunities for academic research. If there is a low possibility of academic work being cited, this raises the question of the continuing relationship between writing and research on topics that may be useful to the judiciary. This article does not seek to answer this question but seeks to raise the issue for discussion. For example, content in 'law reviews is traditionally directed at matters heard in the High Court',<sup>77</sup> which raises the question of the academy writing for a more local judicial audience. Smyth also suggests that further research is needed as to why Courts cite books more often than journals. He offers several possible explanations:

The first could be that the law reviews publish few articles that are relevant to the case load of the State supreme courts. The second is that legal periodicals typically contain articles advancing cutting edge normative statements, which are perhaps better suited to the case load of the High Court as a final court of appeal while books tend to contain positive statements of the law, better suited to the case load of an intermediate appellate court.<sup>78</sup>

Similarly, the content of law reviews has substantially changed with the diversification to specialty areas, increasing numbers of law units, and specialised law journals that offer a place to publish on key social issues as well as legal issues.<sup>79</sup> Due to the low citation of academic work, it may be wiser for the academy to aim their research at a new and diverse area of law.

As Chief Justice Kiefel notes, the 'living author rule' should not be applied today.<sup>80</sup> This article reveals a similar finding to that of Smyth and Nielsen for the High Court in that the NT and the ACT Supreme Courts are willing to cite authors who are living or deceased, demonstrating that this rule is not a limitation in these jurisdictions.<sup>81</sup> For example, the ACT Supreme Court cites living or deceased

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<sup>77</sup> Smyth, 'Citing Outside the Law Reports' (n 10) 708.

<sup>78</sup> Nielsen and Smyth, 'One Hundred Years of Citation' (n 60) 189, 212.

<sup>79</sup> Smyth, 'Citing Outside the Law Reports' (n 10) 709.

<sup>80</sup> Kiefel (n 1) 451–2.

<sup>81</sup> See Smyth and Nielsen, 'The Citation Practices' (n 13).

authors.<sup>82</sup> The NT Supreme Court follows a similar practice with a willingness to cite authors deceased and authors still living.<sup>83</sup>

The data from this study may also be limited in that while it indicates low secondary-source citations in the ACT and NT courts, it is a problem that may require deeper research. For example, further research may be needed to understand the nature of the relationship between the academy and the courts to establish the drivers and significance of this trend. Qualitative research could be undertaken by interviewing the judiciary on the prospective useful research directions. Additionally, quantitative research could be conducted on the topics of journal articles to understand how many articles are relevant to the main topics adjudicated in the two territory jurisdictions — for instance, criminal law and human rights law.

Further research may also reveal whether the low citations are due to the nature of judicial writing in the territories or whether the academy can assist in producing material in preferred subject areas. Research may discover that legal scholars are not interested in the development of the common law in the longer term and prefer to focus on short-term goals due to the demands of academic metrics. On the other hand, perhaps little research has been published that suits the needs of the courts in the NT and the ACT. As noted by Sir Gerard Brennan, law reviews published in Australia are subject to rigour and must contain material that assists in judicial analysis, not mere opinion.<sup>84</sup> However, Smyth found that, at least for the New South Wales Supreme Court, most journals cited multiple times were not ranked in the Excellence in Research Australia ('ERA') or the Australian Business Dean's Council ('ABDC') ranking of periodicals.<sup>85</sup> It may be that the type of analysis needed for the territories is not being produced.

Smyth proposed some theories as to why, over time, the High Court has increased its use of secondary citations.<sup>86</sup> First, the number of cases judges must consider has increased over time; hence, the imperative to quickly access large amounts of information has increased. Second, the opportunity and capacity to find these resources have improved with time, making secondary sources more accessible.<sup>87</sup> These observations go some way to explaining the increase in citations by the High Court and may also explain the absence of increasing citation

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<sup>82</sup> See, eg, the case of *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd* (2010) 173 ACTR 33, which cites Sir Jacob as a prominent author; Cyril Glasser, 'Sir Jack Jacob', *The Guardian* (online, 1 January 2001) <<https://www.theguardian.com/news/2001/jan/01/guardianobituaries1>>. See also *R v Muller* (2013) 178 ACTR 1, citing Steven Odgers, still alive at the writing of this article, 'Stephen Odgers SC', *Forbes Chambers* (Web Page) <<https://www.forbeschambers.com.au/stephen-odgers-sc.html>>.

<sup>83</sup> See, eg, *Re Registrar General's Stated Case* (2011) 30 NTLR 83, which cited J Baalman, presumed to have died due to the date of publication in 1948, and *R v GP* (2015) 35 NTLR 117, which cited Les McCrimmon, currently alive, 'Member Profiles', *Northern Territory Bar Association* (Web Page, 2022) <<https://ntbar.asn.au/member-profiles/professor-les-mccrimmon/>>.

<sup>84</sup> Gerard Brennan, 'A Critique of Criticism' (1993) 19(2) *Monash University Law Review* 213, 216.

<sup>85</sup> Smyth, 'What Do Trial Judges Cite?' (n 6) 248.

<sup>86</sup> Smyth, 'Accepted Sources of Law' (n 50) 30.

<sup>87</sup> *Ibid.*

rates for the NT and the ACT courts. Examining just a single decade may be insufficient to demonstrate a significant increase in the need to rely on increasingly complex areas of law. However, searching and retrieving information significantly changed during those years, compared to the arrival of online and accessible databases covered in earlier research. Smyth's early work on the unique context of the High Court was confined to a seven-year period, and Smyth established a trend within the data.<sup>88</sup> A wider sample of cases from, say, 1960 to the present may reveal a different trend for the NT and the ACT Supreme Courts.

There are alternatives to the above-mentioned theories as to the continually low citation rate of the academy in the NT and ACT courts. As outlined in the citation analysis of the existing literature, the jurisdiction of the court may have a significant impact on the need for the court to summarise common law or comparative law issues. The nature of matters that come before the Supreme Courts of the ACT and the NT are also significantly different from those that typically come before the High Court. As the final court of appeal in Australia, the High Court more regularly deals with highly complex and difficult areas of law, and is thus more likely to rely on the academy to assist in its analysis. Smyth made a similar conclusion when examining the use of secondary citations in the High Court.<sup>89</sup> In addition, some 'studies have suggested that the Supreme Court of New South Wales and ... the Supreme Court of Victoria are judicial innovators' compared to other states' Supreme Courts, leading to more citations in New South Wales and Victorian courts.<sup>90</sup> Therefore, the likelihood of the NT and ACT Supreme Courts using secondary citations could be influenced by the judge's view as an innovator or traditionalist and by the nature of the matters that come before the court.

Other factors may also be relevant when considering whether to cite secondary sources in judicial writing. For example, Smyth pointed out that dissenting judgments often contain more citations and that judges' personal preferences and attitudes towards secondary citations may influence the overall citation rate.<sup>91</sup> Smyth examined the number of citations per judge, which is outside the scope of this study, so a comparison of citations per judge cannot be ascertained for the NT and ACT Supreme Courts.

In addition to the challenges of examining the rationale behind judicial citation practices is the challenge of understanding the publishing patterns of the academy writing for the courts. If there is little chance of being cited by the judiciary, this in turn leads the academic to write less for that audience. The expectation of being cited by the law reform commissions is decreasing due to the

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<sup>88</sup> Smyth, 'The Authority of Secondary Authority' (n 54) 170.

<sup>89</sup> Smyth, 'Accepted Sources of Law' (n 50) 30.

<sup>90</sup> Fausten, Nielsen and Smyth, 'A Century of Citation Practices' (n 52); Nielsen and Smyth (2008), as cited in Smyth, 'Citing Outside the Law Reports' (n 10) 695.

<sup>91</sup> Smyth, 'Accepted Sources of Law' (n 50) 32, 36–7.

diminishing funding and resourcing of law reform commissions.<sup>92</sup> Legal academics experience the same pressures as other academics working in higher education, as they ‘are often under pressure to publish papers and source grant funding’.<sup>93</sup> This pressure leads to a precarious position where legal academics are not benefiting from the system that favours STEM practices of citation in addition to not being cited by non-traditional citation systems. While legal academics argue that the approach to law research needs to change, John Gava urges that the whole approach of Australian law schools must be different.<sup>94</sup> In particular, Gava states that the ‘law reviews take on a sinister aspect when the use of law review writing signifies a judiciary that has forsaken the common law tradition in favour of an openly instrumentalist form of judicial decision-making’.<sup>95</sup> Gava goes on to explain that the ‘publish or perish’ mentality stands in the way of good teaching in a system where law reviews

not only represent a symptom of malaise amongst judges; they also work to threaten law schools. Law reviews have become the public face of an unpleasant and inappropriate form of academic life that degrades scholars, wastes valuable time and money, and devalues the importance of good teaching and collegiality in law schools.<sup>96</sup>

There is a danger, however, that a focus on teaching alone can force law schools into becoming legal trade schools taught by faculty disengaged from legal scholarship, which would be a slippery slope towards an even more stratified legal academy.<sup>97</sup> This article does not have an answer to balance the interest of research or education but endeavours to highlight some of the challenges.

In his analysis of the work of United States scholarship, Mark Tushnet explained that:

many think that their articles will directly influence judges and policy-makers, failing to take account of much that external scholarship about the law reveals: Judges’ ideologies, predispositions, and attitudes are important and perhaps nearly exclusive determinants of what they view to be the ‘right’ legal result; policy-makers are influenced by ideology, politics, and the general cultural atmosphere; and much more. With so much space occupied by things other than the ideas offered by legal academics, legal scholarship aimed at influencing the development of the law might seem the product of peculiarly inflated egos.<sup>98</sup>

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<sup>92</sup> Hill and Garrick, ‘Architecture for Developing National Uniform Legislation’ (n 33).

<sup>93</sup> Hannah Chan, Trevor G Mazzucchelli and Clare S Rees, ‘The Battle-Hardened Academic: An Exploration of the Resilience of University Academics in the Face of Ongoing Criticism and Rejection of Their Research’ (2021) 40(3) *Higher Education Research and Development* 446.

<sup>94</sup> John Gava, ‘Law Reviews: Good for Judges, Bad for Law Schools?’ (2002) 26(3) *Melbourne University Law Review* 560.

<sup>95</sup> *Ibid* 575.

<sup>96</sup> *Ibid* 575–6.

<sup>97</sup> Jay S Silver, ‘Responsible Solutions: Reply to Tamanaha and Campos’ (2014) 2(2) *Texas A&M Law Review* 215.

<sup>98</sup> Mark Tushnet, ‘Academics as Law-Makers?’ (2010) 29(1) *University of Queensland Law Journal* 19, 28.

This pessimistic appraisal of the value of legal scholarship is not novel, and legal scholarship, of course, is not directed at only developing law. As Piety observes, ‘we engage in the production of legal scholarship for all sorts of reasons — the search for the truth, professional distinction, sheer pleasure, or compulsion’.<sup>99</sup> Piety has developed a convincing counter-argument to Tushnet, building on Redish’s seminal 1971 article,<sup>100</sup> to illustrate why many of the conventional methods for assessing scholarship’s value to the profession and the development of the law are inadequate and the reasons ‘why the claims of legal scholarship’s irrelevance are overblown’.<sup>101</sup> Piety’s argues that citations are not the only way to measure non-academic impact of legal scholarship: the ‘number of citations is the tool frequently used, but it is a crude and imperfect measure of’ research impact. Furthermore, ‘Redish’s article is instructive: even though the court appeared to be adopting his argument,’ ironically, the court did not cite Professor Redish’s seminal 1971 article.<sup>102</sup> In addition, the development of law lags and will always lag; it may take several decades before courts fully embrace an argument.<sup>103</sup> For the academy, the reality is that their research may be of use to the court, but they may not be cited, and nor should it be their main motivation for publishing.

Webber states that ‘the law faculties have a responsibility to bring the kind of investigation to law that other disciplines bring to their areas of study’.<sup>104</sup> In investigating the nature of research that is expected of legal academics in delivering on this responsibility, Webber reviewed the criticism of legal academics and concluded that

a few clearly think the law schools are wasting their time on the wrong things; many others — I believe most — simply wish that law schools would do more. But the fact remains that many judges and barristers wish that academics would offer more guidance on matters of professional concern.<sup>105</sup>

In discussing the citation analysis between the ACT and NT Supreme Courts, it can be seen that it is only a preliminary analysis that is based on limited available data — the deeper rationale between the sources the judiciary cite and the pressures and choices of the academy are topics that require further exploration.

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<sup>99</sup> Tamara R Piety, ‘In Praise of Legal Scholarship’ (2017) 25(3) *William & Mary Bill of Rights Journal* 801.  
<sup>100</sup> Martin H Redish, ‘The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression’ (1971) 39(3) *George Washington Law Review* 429.

<sup>101</sup> Piety (n 99) 806.

<sup>102</sup> *Ibid* 808.

<sup>103</sup> *Ibid*.

<sup>104</sup> Jeremy Webber, ‘Legal Research, the Law Schools and the Profession’ (2004) 26(4) *Sydney Law Review* 565, 567.

<sup>105</sup> *Ibid* 571.

## IX CONCLUSION

An aspirational goal for the academy in Australia might be to achieve the status of legal academics in Germany, where, as Chief Justice Kiefel observes, ‘it has been German law professors who, over many centuries, have shaped the ideas behind German law and [have been] responsible for drafting the civil codes’.<sup>106</sup> However, an aspirational goal of this nature is unlikely to come to fruition due to differences between common law and civil law systems and due to the differences in the role of precedent and the role of the judge within each system. What would be more achievable is a respectful relationship between the academy and the judiciary. As Smyth noted, there is a ‘greater judicial willingness on the part of judges to engage with academia’,<sup>107</sup> which is supported by Kiefel’s CJ paper.<sup>108</sup> Understanding what judges cite is key to understanding the practice and continuing this relationship. There are several limitations to using citation analysis methodology to draw conclusions about the citation practices of the Supreme Courts of the states and the Supreme Courts of the NT and ACT. As this study demonstrates, there has not been an increase in secondary citations in the NT and ACT courts in the decade 2010 to 2020. The state Supreme Courts, in general, cite less secondary material than the High Court, and this has been confirmed to be the same in the ACT and NT courts. The reasons why academic work is not cited in judgments are complex. However, the lack of secondary citations has put the academy in the vulnerable position of being unable to demonstrate research impact, if the criteria for measuring the impact remain the same, particularly when this is aimed at a state or territory level and written to assist the judiciary. This practice can potentially reduce funding for valuable legal research and, as a consequence, the coherent development of law. The academy and the judiciary should continue to develop their relationship to ensure future engagement and benefit, as envisaged by Chief Justice Kiefel.

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<sup>106</sup> Kiefel (n 1) 449, citing William Twining et al, ‘The Role of Academics in the Legal System’ in Mark Tushnet and Peter Cane (eds), *Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 920, 936, 939.

<sup>107</sup> Smyth, ‘Citing Outside the Law Reports’ (n 10) 712.

<sup>108</sup> Kiefel (n 1).