

Citation as a measure of ‘impact’: female academics in the law at a disadvantage?

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The famous philosophical thought experiment asks: “If a tree falls in a forest and no one is around to hear it, does it make a sound?” The question highlights the problem of unperceived existence. If no one is there to perceive the tree, who is to say it exists? Whose testimony can prove it? Existential crises of this kind are familiar for any academic, particularly those of us who have had to apply for grants or for promotion.

Much has been written recently on the disadvantages female academics generally face in terms of anonymous student feedback. A series of studies have shown that a female lecturer can present identical content to a male lecturer and be judged much more harshly by both male and female students.¹ However, nothing has been written on whether female legal academics are at a disadvantage when it comes to measures of ‘impact’ in the context of citations by a superior court.

My preliminary results of a survey of all cases from the High Court of Australia from 2015 to 2017 indicate that female legal academics are much less likely to be cited by a superior court than male academics. This is despite the fact that, for most of that three-year period surveyed, of the seven justices of the High Court, three were female and four were male.² It is suggested that the reasons for this are complex, and relate to intrinsic biases in the Australian legal system (inherited from English law) as to what opinions are regarded as authoritative. In compiling this data, I created a list of who was cited, taking account of gender, educational background and country in which the academic is domiciled. The admittedly small set of data indicate that it is much more likely for a deceased, English male Professor from Oxbridge to be cited by the High Court than for a living, Australian female academic of lower rank with no association with a prestigious overseas or local university.

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¹ Kristina MW Mitchell and Jonathan Martin, ‘Gender Bias in Student Evaluations’ (2018) 51(3) *PS: Political Science & Politics* 643; Lillian MacNell, Adam Driscoll, and Andrea N Hunt, ‘What’s in a Name: Exposing Gender Bias in Student Ratings of Teaching’ (2015) *Journal of Collective Bargaining in the Academy* Article 53; Anne Boring, ‘Gender Biases in Student Evaluations of Teaching’ (2017) 145 *Journal of Public Economics* 27; Lisa Martin, ‘Gender, Teaching Evaluations, and Professional Success in Political Science’ (2016) 49(2) *PS: Political Science & Politics* 313; Andrew S Rosen, ‘Correlations, Trends, and Potential Biases among Publicly Accessible Web-Based Student Evaluations of Teaching’ (2017) *Assessment & Evaluation in Higher Education* January 1.

² Crennan J handed down her last judgment on 28 January 2015 and Gordon J handed down her first judgment on 5 August 2015. Thus, there were only two female judges for six months.

While I have used the High Court of Australia as my vehicle for analysis here, I do not mean to single out that court for particular criticism. I chose it because it has a comparatively small number of cases per year, and because citation by it is regarded as particularly prestigious. However, I suspect that these biases are systemic and pervasive, and are perpetuated by a complex network of factors, including the historical and conservative nature of the law itself, as well as unconscious biases which affect the courts, barristers, solicitors and other academics. Moreover, it must be squarely faced that the purpose of a court is not to recognise academic work, but to fairly resolve the dispute before it. Consequently, recognition of academic work is not at the forefront of the judicial mind, nor is it necessary for an authoritative judgment to refer to academic work.

It should be emphasised that this is a work in progress, and I intend to broaden my research to other courts, other years and to consult academic citations and citations by counsel in cases to see how much influence this has upon the court's choices.

A 'Impact' as a measure of academic worth

The notion of 'impact' as a measure of academic worth is derived from STEM disciplines. In such disciplines, an academic may develop a life-saving vaccine or a practical technique of computer programming. It is easy to see how these innovations have an impact on everyday life, but less easy for the public, the government and universities to see how legal academic work is worthwhile. Citation by superior courts offers legal academics something concrete – a means by which they can say that their work makes a difference in the real world. However, it is suggested here that such measures should be treated with extreme care, and that certain biases in the law should be understood if these measures are used.

In *Jurists and Judges: An Essay on Influence*, Neil Duxbury says:

The basic premise of citation analysis is that documents cited frequently are more likely to be influential than those which are cited less frequently, and therefore the impact of a particular document can be estimated by counting the number of occasions on which it has been cited. Citation, in short, might be treated as a proxy for influence.³

However, this supposition may be questioned. First, not all citations are the same. Ronald Coase produced the 'most cited' law review ever published.⁴ However, Coase himself observed, 'Many of the citations in the economics literature are in fact articles attacking my views'.⁵

Secondly, an academic who is not cited may still have influence. And those who are cited may be cited for reasons other than influence, including because it is regularly cited by others. Duxbury explains:

³ Neil Duxbury, *Jurists and Judges: An Essay on Influence* (2001, Hart Publishing, Oxford) 8–9.

⁴ Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1. I have cited it at least twice.

⁵ Ronald Coase, 'The Problem of Social Cost: The Citations' (1996) 71 *Chicago-Kent Law Review* 809, 810, cited in Duxbury, above n 3, 9 fn 18.

To be popular is not necessarily and to be influential is not necessarily to be popular. Documents might sometimes be cited almost reflexively because they have acquired an iconic status; many of the citations to these documents will mirror not so much what the documents say as what they have come to represent.⁶

Consequently, any focus on citations as the be-all-and-end-all of academic influence is misguided. Moreover, it reflects an unduly mechanistic measure of worth proliferated by a worldwide boom in university administration and an obsession with ‘measurable outcomes’.⁷

Nonetheless, while such managerialist ideologies prevail, it is important to be aware of disadvantages which may be faced by female legal academics who may be less likely to be cited, and therefore less likely to receive grants, prizes, promotions and other coveted positions.

B High Court citations from 2015 to 2017: the preliminary results

1 Methodology

I went through the footnotes of all High Court of Australia decisions from 2015 to 2017, using the online versions of the cases on Austlii. For each year, I noted the name of the cases, the nature of the matters considered, the number of female and male judges sitting on the bench for each case, the number of academic pieces cited, the numbers of male and female authors cited and finally, the nationality of authors. Some academics were cited in several cases, so I kept a second table for each year in which I noted the author’s full name, the title of the work, the case name and the pinpoint footnotes in which the works were cited, the profession of the author, the form of the work, the university at which the author had studied his or her undergraduate degrees and postgraduate degrees, the number of footnotes in total in which that author was cited, the number of cases in total in which that author was cited, and the gender of the author. I consulted web profiles, online CVs, biographies, frontispages in books and obituaries to obtain this information.

The gender of most authors was evident from the given name (there were 16 ‘Johns’ cited in 2016, for example, but only one ‘Lancelot’). However, where I could not ascertain the gender of an author by looking them up on Google, I categorised them as ‘unclear’. In one instance an author had a given name which is typically male, but she was female. I ascertained this from checking her work and online presence comprehensively.

It was hard to categorise authors as ‘Australian’ or ‘from the UK’. Many Australians began their lives in the UK, but settled in Australia. Conversely, some people were born in Australia or other countries, but ended up settling in the United Kingdom. I ultimately categorised people as ‘Australian’ if they lived out the majority of their adult lives in Australia and

⁶ Duxbury, above n 3, 14.

⁷ For a trenchant criticism of the burgeoning ‘managerialist ideology’ infecting universities worldwide, see David Graeber, ‘Are You in a BS Job? In Academe, You’re Hardly Alone?’ (2018) 64(33) *The Chronicle of Higher Education*, 6 May 2018, accessed 1 June 2019 at <<https://www.chronicle.com/article/Are-You-in-a-BS-Job-In/243318>>.

settled here, and vice versa. A few people had moved all over the world. They were placed in the ‘Other’ category.

I could not find details for every individual, particularly in relation to what universities they attended (if any). Thus, the figures with respect to association with particular groups of universities are preliminary, but nonetheless clear trends can be drawn.

2 Results

I defined ‘academic works’ as journal articles, textbooks, dictionaries, legal encyclopaedias and histories.⁸ I included citations to holy books, plays and collections of letters. I did not include Law Reform Commission Reports.

There were far more cases with no citations of academic works than I was expecting.

Table 1

Year	No citations	Between 1 and 9 citations	Between 10 and 19 citations	20+ citations
2015	25	23	5	0
2016	25	20	7	1
2017	26	21	6	3

From a statistical perspective, the numbers of citations are very low. They indicate is that it is very hard for *any* legal academic to have an impact via citation by the High Court of Australia.

I developed six categories: “Criminal law and evidence”, “Public law”, “Private law”, “Migration”, “Taxation” and “Other”. Some cases arguably fit into two categories (for example, *Alqudsi* had a constitutional and a criminal aspect) so I chose what I thought was the dominant aspect of the case. “Private law” was a ‘broad church’ including cases involving accident compensation legislation and trade practices. The “Other” category was populated by cases primarily involving civil procedure, family law, statutory interpretation and industrial relations. I counted up the number of footnotes with academic citations in each category.

Table 2

	Criminal law and evidence	Public law	Private law	Migration	Taxation	Other
2015	15 fns in 8 cases	43 fns in 9 cases	60 fns in 15 cases	30 fns in 7 cases	2 fns in 3 cases	23 fns in 11 cases

⁸ Cf Russell Smyth, ‘Citation of Judicial and Academic Authority in the Supreme Court of Western Australia’ (2001) 30 *Western Australian Law Review* 1 who takes a narrower view and excludes dictionaries. He also excludes Law Reform Reports.

2016	40 fns in 14 cases	69 fns in 8 cases	51 fns in 17 cases	0 fns in 2 cases	23 fns in 3 cases	9 fns in 9 cases
2017	75 fns in 17 cases	99 fns in 17 cases	30 fns in 8 cases	14 fns in 5 cases	0 fns in 2 cases	5 fns in 7 cases
Average fns	3 per case over 3 yrs	6 per case over 3 yrs	3.5 per case over 3 yrs	3 per case over 3 yrs	3 per case over 3 yrs	1 per case over 3 yrs

There were more citations of academic work in public law cases than in any other category.

The received popular wisdom is that diversity in the make-up of organisations trickles down into openness to diverse opinions. Moreover, empirical research indicates that female barristers are more favourably received when there are female judges on the bench of the High Court.⁹ I considered whether the participation of at least one female judge in a judgment led to a more favourable reception of academic work by female authors. I assessed how many times a female judge sat on the bench in High Court cases. In a large majority of cases from 2015 to 2017, at least one female judge was sitting on the bench. In 2016 and 2017, in approximately half of the cases, three female judges were sitting on the bench.

Table 3

Year	Total number of cases	0 female judges	1 female judge	2 female judges	3 female judges
2015	53	4	12	26	11
2016	53	4	6	18	25
2017	56	6	7	16	27

Because of the prevalence of joint judgments, it was difficult to disaggregate the data to discern whether female High Court justices were more likely to cite female academics than male High Court justices.

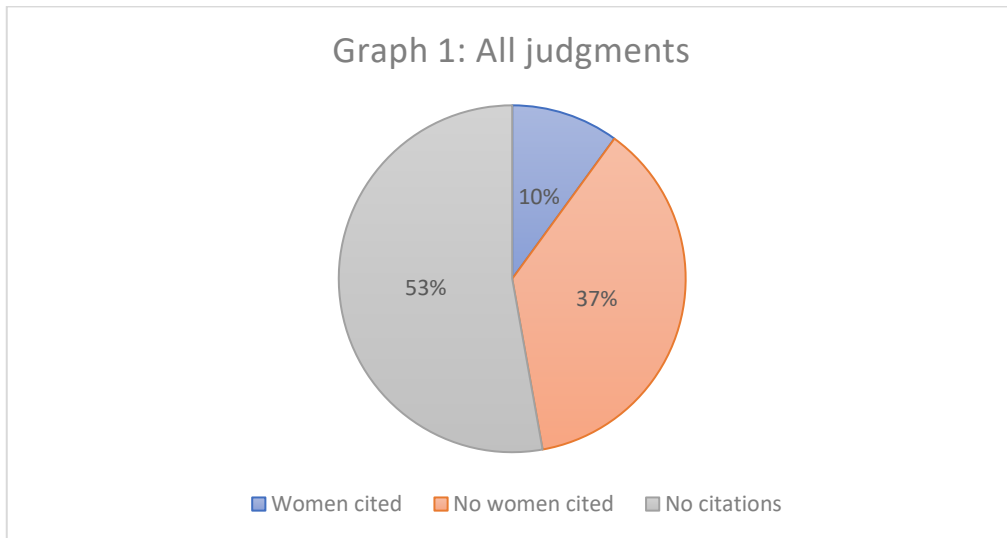
Accordingly, I sorted the judgments according to whether they were written jointly with at least one female judge participating, whether they were written jointly with at least one male judge participating, whether they were written solely by a female judge and finally, whether they were written solely by a male judge.

Table 4

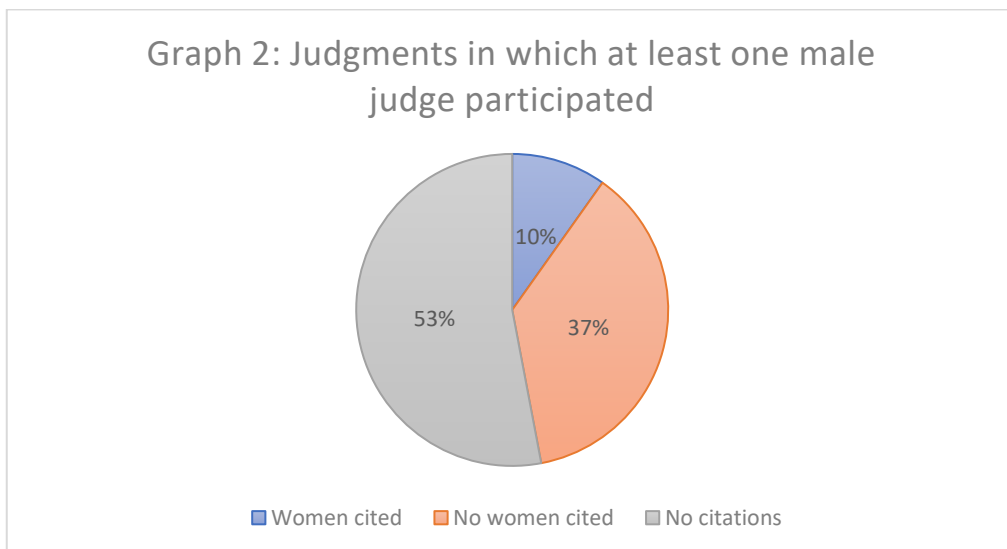
	2015	2016	2017	Total
Joint judgments in which at least one female judge participated	52	55	53	160
Joint judgments in which at least one male judge participated	59	55	51	165
Solo judgments by female judges	9	18	13	40
Solo judgments by male judges	43	44	43	130

⁹ Russell Smyth and Vinod Mishra, 'Barrister gender and litigant success in the High Court of Australia' (2014) 49(1) *Australian Journal of Political Science* 1.

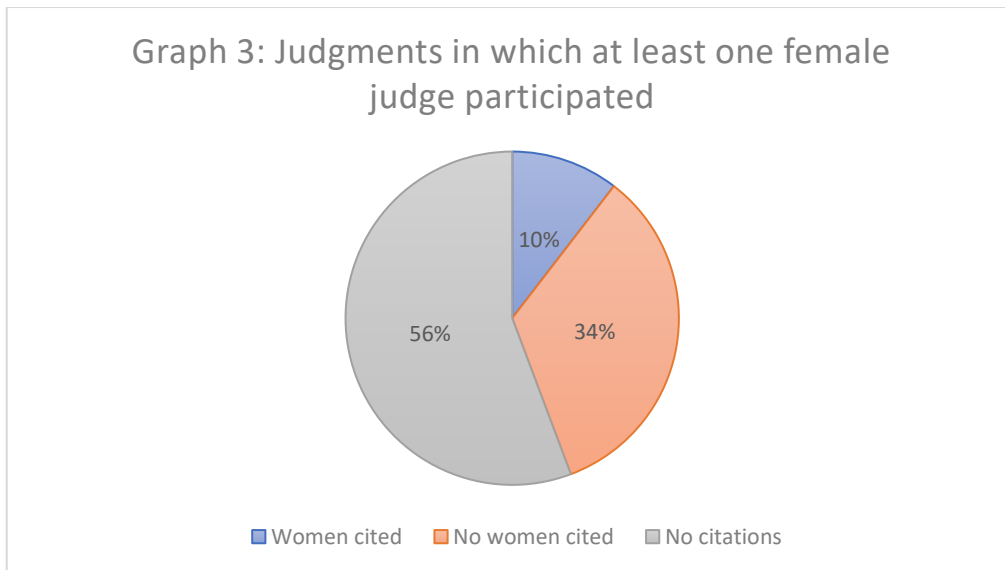
Over the three-year period, there were 340 separate judgments.¹⁰ I sorted the data according to whether at least one woman was cited in a judgment, no women were cited, or no citations were present, and calculated the proportions.



I then separated out judgments according to whether at least one male judge participated in the judgment, and whether at least one female judge participated in the judgment.



¹⁰ I have not counted judgments where a judge is giving judgment for the first time, and the other judges say, "I agree". This has been counted as a single judgment *unless* a different judge says something substantive.



From these graphs, it can be seen that participation of a female judge in a judgment does not lead to a greater or a lesser tendency to cite female academics. The most likely outcome is that no academic work of any kind will be cited at all, regardless of the gender of the judges.

Other than this, several other characteristics of those who are cited can be gleaned. First, many of the people cited were deceased. I measured whether a person was deceased according to the individual’s status as at October 2018. The author with the earliest birth date (excepting the Apostle Matthew) was Henry De Bracton, born around 1210.

Table 5

Year	Total number of people cited	Total number of living people cited	Total number of deceased people cited	People whose status was unclear
2015	162	94	62	6
2016	188	107	75	6
2017	205	100	101	2

Secondly, a far greater proportion of authors were permanently domiciled in the United Kingdom than I was expecting.

Table 6

Year	Australian authors	UK authors	USA authors	Other authors
2015	68	74	22	24
2016	54	57	21	30
2017	69	72	42	20

Thirdly, I expected a high correlation between GO8 universities and academics cited, and this was confirmed. However, academics cited by the Court had a much greater association

with Oxbridge and Ivy League universities than I had expected.¹¹ “Association” means that the person studied an undergraduate or postgraduate degree, or taught at, one of the stipulated universities. I could not ascertain the association of all authors, so the numbers may be greater than this.

Table 7

Year	GO8	Oxbridge	Ivy League	GO8 and Oxbridge	GO8 and Ivy League	Oxbridge and Ivy League	Unknown or Other
2015	24	56	24	14	6	5	43
2016	30	60	22	6	4	6	69
2017	41	61	28	15	6	1	47

Very few authors were cited in multiple cases. In 2015, the late Professor Harrison Moore, a former Dean and Professor of Melbourne Law School, who specialised in Constitutional law, was cited in four cases. The following authors were cited in three cases: the late Professor Leslie Zines (an Australian Constitutional law academic), the late HWR Wade (an English public law academic), the late Sir Frederick Pollock (on private law), the former Justice Dyson Heydon (on trusts and evidence law), Professor Dennis Pearce and Robert Geddes (Australian academics writing on statutory interpretation), Mrs Lesley Brown (an English lexicographer) and the late Sir William Blackstone (on various matters).

In 2016, the late Sir John Quick and Sir Robert Garran, were cited in four cases, as they produced the annotated Constitution. The following authors were cited in three cases each: Professor George Williams (an Australian Constitutional law academic), the late Professor Glanville Williams (an English criminal law academic), the former Justice Dyson Heydon (on trusts and evidence law), Justice Mark Leeming (on trusts and questions of jurisdiction), the late Sir William Blackstone (on various matters) and the former Justice and Professor Paul Finn (on legal history and the common law).

In 2017, the late Courtney Stanhope Kenny (an English criminal law academic) and the late Sir Robert Garran were cited in five cases. The late Sir John Quick, Professor James Stellios (an Australian Constitutional law academic) and Professor Dennis Pearce and Robert Geddes were cited in four cases each.

My preliminary conclusion from this small dataset is that public law analysis is more likely to be used in more than one case. This relates to the data presented in Table 2: in the period surveyed, public law cases have almost twice as many academic citations as other kinds of cases, and there may be more openness to academic opinion in this area.

¹¹ “Oxbridge”: Oxford or Cambridge University. “Ivy League”: Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, University of Pennsylvania, Princeton or Yale University. “GO8”: Monash University, Australian National University, University of Adelaide, University of Melbourne, University of Queensland, University of Sydney, University of Western Australia and UNSW Sydney. See <https://go8.edu.au/page/member-information> (accessed 30 November 2018).

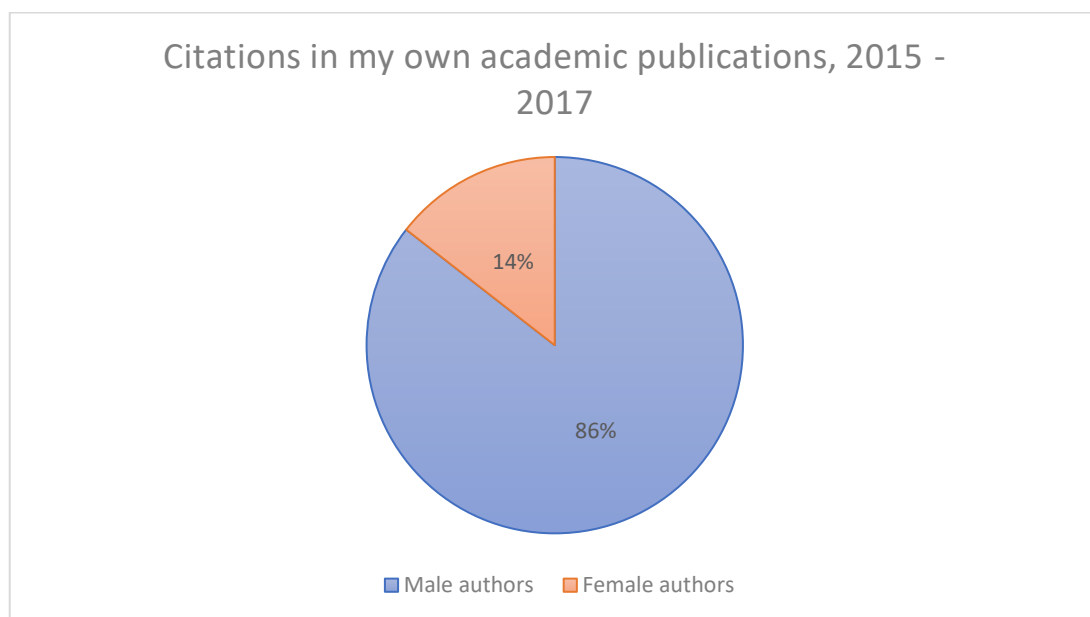
Finally, the High Court cited textbooks and dictionaries more frequently than I was expecting. Where multiple editions of the same text have been cited, I have counted them as one textbook. “Other” included dictionaries, style guides, planning documents, digests, a holy book, a play and a collection of letters.

Table 8

Year	Textbooks	Journal articles & book chapters	Books and monographs	Other
2015	45	65	20	8
2016	50	45	48	4
2017	53	69	45	15

3 Casting out the beam in my own eye: considering my own biases

I was shocked by the low level of citations of female academics. However, I then subjected my own citations in my academic work from 2015 to 2017 to the same analysis as the High Court. The results gave me pause for thought. Although I never failed to cite at least one female author in any piece, the results were not as different from High Court judgments as I would have wished. I had cited 130 male authors and 22 female authors in five pieces.



This was despite the fact that I have always made a positive effort to cite a diverse range of authors from different jurisdictions. However, there are fewer women than men who write in private law, and the disproportion is higher if one takes into account seniority. I had cited every senior female academic I knew. Thus, there are broader systemic issues affecting the citation of women. And, ironically, few women have written on the present issue, with the notable exception of Professor Alexandra Braun.¹²

¹² Alexandra Braun, 'Judges and Academics: Features of a Partnership' in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, Oxford, 2011) 227; Alexandra

C Tentative explanations for the results

- 1 The history of the law and the historically uncomfortable relationship between the academy and the courts

Because the common law is a system of law by judicial decision-making with a doctrine of *stare decisis*, it follows that the longer a principle has been accepted, the more authoritative it is, and the more ingrained it becomes. Authority is conferred by time and place. Old English writing gathers the accreted authority of centuries. Blackstone, Coke and Hale are still cited repeatedly by the High Court of Australia.¹³

Moreover, the common law has traditionally been averse to considering academic opinions and theories. In *Roxborough v Rothmans of Pall Mall Australia Ltd*, Gummow J explained the Australian position as follows:

To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.

In *McGinty v Western Australia*, McHugh J referred to Judge Posner's description of "top-down reasoning" by which a theory about an area of law is invented or adopted and then applied to existing decisions to make them conform to the theory and to dictate the outcome in new cases. Judge Posner spoke of the use of the theory by its adherents: "to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the canonical cases, that is, the cases accepted as authoritative within the theory".

As it happens, Lord Mansfield favoured the development of legal principle by a journey in the opposite direction. In *Ringsted v Lady Lanesborough*, his Lordship said:

Braun, 'Burying the living? The citation of legal writings in English' (2010) 58 *American Journal of Comparative Law* 27.

¹³ **Blackstone:** *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 1, (2015) 256 CLR 171, at fn 64; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41, (2015) 256 CLR 569, at fns 111 and 112; *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, (2015) 258 CLR 482, at fn 137; *Plaintiff M68-2015 v Minister for Immigration and Border Protection* [2016] HCA 1, (2016) 257 CLR 42 at fn 101; *Alqudsi v The Queen* [2016] HCA 24, (2016) 258 CLR 203, at fns 28, 29, 30 and 82; *Lyons v Queensland* [2016] HCA 38, (2016) 259 CLR 518, at fn 43; *Palmer v Ayres* [2017] HCA 5, (2017) 259 CLR 478, at fn 112; and *Brown v Tasmania* [2017] HCA 43, (2017) 261 CLR 328, at fns 544 and 545. **Hale:** *RP v The Queen* [2016] HCA 53, (2016) 259 CLR 641, at fn 3; *IL v The Queen* [2017] HCA 27, (2017) 345 ALR 375, at fns 8, 9, 150, 185, 188; and *Chiro v The Queen* [2017] HCA 37, (2017) 260 CLR 425, at fn 33. **Coke:** *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2, (2015) 254 CLR 425, at fn 49; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11, (2015) 256 CLR 171, at fns 17 and 64 and in *IL v The Queen* [2017] HCA 27, (2017) 345 ALR 375, at fns 10 and 214.

“General rules are, however, varied by change of circumstances. Cases arise within the letter, yet not within the reason, of the rule; and exceptions are introduced, which, grafted upon the rule, form a system of law.”¹⁴

The two main sources of law in Australia are statute enacted by Parliaments and case law decided by judges (but the two are often intertwined). These are the primary materials cited by the High Court of Australia. Moreover, as Gummow J notes, the opinions of academics are not authoritative. A judgment will be accepted as convincing by the ‘legal interpretive community’¹⁵ even if it makes no mention of academic opinion whatsoever.

To understand this, the history of the relationship between common law judges and academics must also be understood. Unlike in continental Europe, academic scholarship was not taken seriously or used by English judges until the second half of the 20th Century.¹⁶ First, there was an apparent convention in English courts, lasting into the 20th Century, according to which academic work could not be cited unless the author was deceased.¹⁷ Braun theorises that this originated from uncertainty over what constituted legal authority, coupled with an explosion in legal textbook publishing, and anxiety about academic changes of mind.¹⁸ Moreover, the legal academy was not perceived in a positive light by the judiciary: legal academics were thought to lack pragmatism and practical experience.¹⁹ Work written by practising lawyers was preferred.²⁰ I suspect that similar conventions and traditions were inherited by and entrenched within the Australian system, even if not explicitly followed. In any event, traces of this attitude linger in the law we inherited.

For the most part, Australia inherited English law *holus bolus*, with all its feudal quirks and history. English decisions of the House of Lords were binding on Australian courts until 1967, when the Privy Council decided in *Australian Consolidated Press v Uren*²¹ that it was permissible for the Australian High Court to depart from English decisions. The right to appeal to the Privy Council was gradually abolished in the years that followed.²² Finally, in 1986, the *Australia Acts* essentially established Australian legal independence from England.²³ Brennan J in *Mabo v Queensland (No. 2)* described the process as follows:

Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its

¹⁴ *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516 [72]–[74].

¹⁵ See Stanley Fish, *Is there a text in this class? The authority of interpretive communities* (Harvard University Press, 1982).

¹⁶ See Braun, ‘Judges and Academics’, above n 13.

¹⁷ See Braun, ‘Burying the living?’, above n 13; Duxbury, above n 3, 62 – 72.

¹⁸ Braun, *ibid*, 42–45.’

¹⁹ Duxbury, above n 3, 72–77, Braun, *ibid*, 40.

²⁰ Duxbury, *ibid*.

²¹ See *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221, 238, 241; (1969) AC 590, 641, 644. The High Court of Australia had declined to follow *Rookes v Barnard* [1964] AC 1129 in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

²² *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth); *Australia Act 1986* (Cth).

²³ *Australia Act 1986* (Cth); *Australia Act 1986* (UK). See *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72, (2003) 218 CLR 28.

colonies. It is not immaterial to the resolution of the present problem that, since the *Australia Act 1986* (Cth) came into operation, the law of this country is entirely free of Imperial control. The law which governs Australia is Australian law. The Privy Council itself held that the common law of this country might legitimately develop independently of English precedent. Increasingly since 1968 the common law of Australia has been substantially in the hands of this Court. Here rests the ultimate responsibility of declaring the law of the nation. Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country, it cannot do so where the departure would fracture what I have called the skeleton of principle. The Court is even more reluctant to depart from earlier decisions of its own. The peace and order of Australian society is built on the legal system. ...²⁴

Although Australian law is legally separate from English law, it is profoundly and fundamentally influenced by it, because English law was authoritative and binding upon Australian courts for such a long time. There remain significant overlaps between the two bodies of law, and Australian and English courts refer to decisions from the other jurisdiction often. This is despite the different statutory contexts of the two jurisdictions, and despite the United Kingdom's (erstwhile?) membership of the European Union.

It follows from this that the history of English legal training and universities affects the profile of those whom the court cites. Sugarman has outlined how lawyers originally learned to practice by way of apprenticeship, and from the late seventeenth to mid-nineteenth century, opportunities for formal professional and university legal education were limited.²⁵ This may account for the traditional suspicion towards academic legal writings.

In 2016, the United Kingdom Department of Education categorised universities in the United Kingdom as 'ancient' (pre-1800), 'red-brick' (1800–1960), 'plate glass' (1960–1992) and 'new' (post-1992).²⁶ Prior to 1800, the only universities in the United Kingdom were Oxford, Cambridge, St Andrews, Glasgow, Aberdeen and Edinburgh. Ireland (then still part of the United Kingdom) had the University of Dublin. Consequently, if authors from an earlier time attended university, they are likely to have attended Oxford or Cambridge in particular, which may explain the predominance of an association with these universities. Scholars with associations with 'red-brick' universities are also reasonably regularly cited, particularly if the university is London-based.

There is a similar trend in relation to Australian universities. The 'sandstone' universities were founded earlier in the nineteenth century to early twentieth century (prior to World War I), and a disproportionate number of cited Australian authors have associations with a

²⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29 (emphasis added).

²⁵ David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common Law* (Oxford, Basil Blackwell Ltd, 1986) 26, 29.

²⁶ Peter Blyth and Arran Cleminson, "Teaching Excellence Framework: analysis of highly skilled employment outcomes" Department for Education (September 2016) pg 18.
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/557107/Teaching-Excellence-Framework-highly-skilled-employment..pdf> (accessed 29 October 2018)

‘sandstone university’ or, even more particularly, as Table 7 shows, with a ‘Group of Eight’ university.²⁷

This may also explain the results with regard to gender and whether the author is living or dead as well. The historical focus of the common law means that women do not tend to be a source of authority, simply because there were no female authors, judges or academics until relatively recently.²⁸ A lot of the citations deal with the historical background of the law, and the only authors available to describe the law for the early periods will necessarily be male, English and deceased.

2 Why cite academic works at all?

If there is little historical precedent for citing academics, and no requirement to do so, it may be queried why judges cite academic works at all. I selected two or three High Court judgments from each year I was considering with the highest number of citations, and assessed how citations were used within these cases:

- *CPCF v Minister for Immigration and Border Protection*;²⁹
- *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail*;³⁰
- *Alqudsi v The Queen*;³¹
- *Miller v The Queen*;³²
- *IL v The Queen*;³³
- *SZTAL v Minister for Immigration*;³⁴ and
- *Brown v Tasmania*.³⁵

Scholars have identified a variety of reasons as to why courts cite academic literature.

First, scholarly opinions assist in ascertaining what an earlier case decided or summarise the history of the law.³⁶ Many of the academic citations in the seven cases I chose to consider in

²⁷ Note that ‘sandstone university’ is not synonymous with the ‘Group of Eight’ universities, the largest and most highly ranked universities, which also includes ANU, UNSW, Monash University, but not the University of Tasmania.

²⁸ The first Australian to graduate with an LLB was Ada Evans, in 1902. She was not allowed to practice at first. Eventually in 1921, she was admitted to the New South Wales Bar, but she declined to practice as she had family commitments by that point. My home State of Victoria passed the *Women’s Disabilities Removal Act 1903* (Vic) to allow Grata Flos Grieg to practice after she graduated with an LLB in March 1903. The first woman to be appointed to a Professorial Chair in law in Australasia was Enid Campbell, in 1967. Her writings were cited by the High Court of Australia in *Wilkie v The Commonwealth* [2017] HCA 40, (2017) 349 ALR 1, at fn 72.

²⁹ [2015] HCA 1, (2015) 255 CLR 514.

³⁰ [2015] HCA 11, (2015) 256 CLR 171.

³¹ [2016] HCA 24, (2016) 258 CLR 203.

³² [2016] HCA 30, (2016) 259 CLR 380.

³³ [2017] HCA 27, (2017) 345 ALR 375.

³⁴ [2017] HCA 34, (2017) 347 ALR 405.

³⁵ [2017] HCA 43, (2017) 261 CLR 328.

³⁶ Russell Smyth, ‘Academic Writing and Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court’ (1998) 17 *University of Tasmania Law Review* 12, 16; Keith Stanton, ‘Use of

detail fell into this category. The citations in *Alqudsi v The Queen* primarily deal with the history of s 80 of the Australian Constitution and the history of the jury in England and Australia.³⁷ The citations in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* primarily deal with the history of the legal concept of the corporation.³⁸ Finally, in *IL v The Queen*, the citations primarily deal with the history of criminal treatment of self-harm and joint enterprise liability.³⁹ French CJ's judgment in *CPCF v Minister for Immigration and Border Protection* also uses textbooks to discuss the history of the law of the sea.⁴⁰

Secondly, sometimes academic work summarises the law in another jurisdiction in a convenient manner.⁴¹ Examples of this can be seen in the judgments of Gordon J and Edelman J in *Brown v Tasmania*,⁴² and in the judgment of French CJ in *Alqudsi v The Queen*.⁴³ It is also worth noting that Gordon J, Edelman J and French CJ are dissenting in those cases.

This relates to a third reason for citing academics: judges may turn to highly respected academic authors or former judges to justify an opinion,⁴⁴ or to provide food for thought.⁴⁵ I suspect judges are more likely to do this when they are dissenting or seeking to overturn well-established doctrine, but I will need to conduct more research to establish this. My instinct is that if courts are reiterating that a previous case or cases represent the law, then it will only be necessary to refer to that case or cases, but if a judge is overruling a previous holding, it likely to be necessary to refer to authority beyond the court as to the reasons for doing so. The dissenting judgment of Hayne and Bell JJ in *CPCF v Minister for Immigration and Border Protection* cites academics to back up an opinion,⁴⁶ as does the dissenting judgment of Gageler J in *SZTAL v Minister for Immigration*.⁴⁷ The majority judgment of Edelman J in *SZTAL v Minister for Immigration* also uses academic authors to justify an opinion, as well as seeking to provide food for thought.⁴⁸

Scholarship by the House of Lords in Tort Cases' in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, Oxford, 2011) 201, 210.

³⁷ [2016] HCA 24, (2016) 258 CLR 203 [13]–[24], [37]–[45] (French CJ, dissenting); [98]–[100], [108] (Kiefel, Bell and Keane JJ); [129]–[134] (Gageler J); [176], [190] (Gordon and Nettle JJ).

³⁸ [2015] HCA 11, (2015) 256 CLR 171 [15]–[18] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ); [52]–[59] (Gageler J)

³⁹ [2017] HCA 27, (2017) 345 ALR 375, [7]–[21], [34]–[35] (Kiefel CJ, Keane and Edelman JJ); [79], [82] (Bell and Nettle JJ); [94] – [95], [111] – [120], [127] (Gageler J, dissenting); [130] (Gordon J, dissenting).

⁴⁰ [2015] HCA 1, (2015) 255 CLR 514, [18] (French CJ).

⁴¹ Smyth, 'Academic Writing and the Courts', above n 36, 16; Stanton, above n 36, 211.

⁴² [2017] HCA 43, (2017) 261 CLR 328. Gordon J uses academic work to discuss German and US Constitutional law: see fn 473, fns 494–497, fns 499–505, and fns 507–513. Edelman J uses academic work to discuss US Constitutional law: see fns 554–557.

⁴³ [2016] HCA 24, (2016) 258 CLR 203. French CJ uses academic work to discuss English and US traditions of waiver of trial by jury: see fns 97–98, fns 103–108, and fn 112.

⁴⁴ Smyth, 'Academic Writing and the Courts', above n 36; Duxbury, above n 3, 9; Stanton, above n 36, 213–15.

⁴⁵ Stanton, *ibid*, 213–15.

⁴⁶ [2015] HCA 1, (2015) 255 CLR 514, [78]–[79], [143]–[146], [155] (Hayne and Bell JJ, dissenting).

⁴⁷ [2017] HCA 34, (2017) 347 ALR 405, [44] (Gageler J, dissenting).

⁴⁸ [2017] HCA 34, (2017) 347 ALR 405, [61], [92]–[98] (Edelman J).

Fourthly, some scholarly opinions have been accepted in prior cases as accurately representing the law.⁴⁹ *Miller v The Queen* is a complicated instance of this. The High Court was invited to follow the lead of the UK Supreme Court in *R v Jogee* to restrict the doctrine of “extended common purpose” in criminal law.⁵⁰ The court had to trace the line of English scholarly opinion which led to that decision.⁵¹ As Gageler J noted in his dissent, an academic article by Professor JC Smith had changed the understanding of the previous English authority,⁵² and in *R v Jogee*, the Supreme Court decided this operated too harshly, a conclusion Gageler J also endorsed. Ultimately, however, the majority retained the doctrine of extended common purpose. The academic work in this case had a sustained impact on the development of the law in the United Kingdom, and it had flow-on effects for Australian law.

Finally, judges cite non-legal sources to back up the justifications for certain decisions.⁵³ For example, in *Miller v The Queen*, Gageler J refers to social science research to justify his rejection of the prosecution case.⁵⁴

There are also several external factors which may affect the choice of a court to cite a particular scholar. First, there is the question of how many other scholars in the field cite that scholar. Duxbury has noted that once one is cited, one becomes respected and will be cited more frequently in future.⁵⁵ This has been dubbed ‘the Matthew effect’ and plays into the heuristic biases noted above.⁵⁶ A related question is who writes in a particular field: as noted earlier, there may not be as many senior female academics as male academics in a field.

Secondly, the citation practices of courts may be affected by the submissions of counsel, and whether scholars were cited by counsel. I am yet to compare the High Court’s citations for 2015 to 2017 with the materials cited by counsel, but I suspect counsel has considerable influence on what material the court considers unless a judge has a particular interest in an area, and that counsel do not tend to cite academic works. This reflects the fact that the role of the judge is to consider the material produced by each side and to adjudicate the dispute before them, and it is not permissible to go beyond that unless the point is put to the parties.

Finally, the personal enthusiasms of the judge and his or her attitude to academic work must come into play.

⁴⁹ Smyth, ‘Academic Writing and the Courts’, above n 36, 167; Stanton, above n 36, 212–13.

⁵⁰ [2016] UKSC 8, [2017] AC 387 overturning the previous authority of *Chan Wing-Siu v The Queen* [1985] AC 168.

⁵¹ Including JC Smith, ‘R v Wakely’ [1990] *Criminal Law Review* 119; JC Smith, ‘Criminal Liability of Accessories: Law and Law Reform’ (1997) 113 *Law Quarterly Review* 453; Keith JM Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991); Andrew Simester and GR Sullivan, *Criminal Law: Theory and Doctrine*, 3rd ed (2007); Andrew Simester, ‘The Mental Element in Complicity’ (2006) 122 *Law Quarterly Review* 578.

⁵² [2016] HCA 30, (2016) 259 CLR 380 [93]–[101] (Gageler J, dissenting).

⁵³ Smyth, ‘Academic Writing and the Courts’, above n 36, 167; Stanton, above n 36, 210.

⁵⁴ [2016] HCA 30, (2016) 259 CLR 380, [121] at fn 157, [125] at fn 160 (Gageler J, dissenting).

⁵⁵ Duxbury, above n 3, 11.

⁵⁶ Duxbury, above n 3, 11. The reference is to Matthew 13:12: ‘For whosoever hath, to him shall be given, and he shall have more abundance: but whosoever hath not, from him shall be taken away even that he hath.’

3 The exponential body of material and heuristic biases

Almost twenty years ago, Russell Smyth discussed academic citations by the High Court of Australia, and noted that the number of legal journals in Australia had increased hugely.⁵⁷ He argued that this was because more law schools had been founded in Australia which published their own law journals, and that there had also been an increase in legal journals specialising in particular areas of the law.⁵⁸ Smyth's point is even more pertinent now. There are even more law schools and journals than twenty years ago,⁵⁹ but secondly, the availability of information has been vastly increased by online facilities. Thus, there is an *enormous* array of material available to judges. On the other hand, only some journal articles are publicly available, and many journals require subscription, which may lessen the impact of certain journal articles if the journal is difficult to access.

In my own specialist field, I sometimes have difficulty keeping up with all the new work and cases on topics of interest to me. High Court judges deal with a much broader array of law, and thus it is impossible to keep in touch with the latest academic developments, or to know which authors write articles which are worth reading.

It is suggested that the choices of articles and authors to cite reflect certain unconscious heuristic biases, or tricks which our brain uses to save time when making complex choices.⁶⁰ The two biases which I hypothesise are operative here are the 'availability heuristic' and the 'representativeness heuristic', although there may be others. The 'availability heuristic' is a mental shortcut which means that people are likely to rely on what immediately comes to their mind. Consequently, if certain academic pieces are cited repeatedly by judges, these pieces will come to mind more easily than less cited pieces. The same pieces will be cited over and over, because others will see the citations and pick them up. I also suspect that this bias frequently occurs in academic writing, including my own. Academics find it easier to cite academics whom they know well and who went to the same institution as they did, or the work of people whom they have already read, because these come to mind more easily. I found that I had cited the same people repeatedly in several of my own articles from 2015 to 2017.

The choice of academic pieces may also represent an instance of the 'representativeness heuristic' (again, I am not sure who is displaying this bias: judges, researchers, counsel, or the common law generally, or a mix of all four). My hypothesis is that authoritativeness is conferred in the common law by maleness, oldness and Englishness. Therefore, an unconscious conjunction fallacy may operate: if a work is written by someone who is old, English and male, it is likely to be regarded as authoritative. Moreover, Oxford, Cambridge,

⁵⁷ Smyth, 'Academic Writing and the Courts', above n 36, 164.

⁵⁸ Ibid.

⁵⁹ There are currently at least 41 law schools in Australia: see <https://cald.asn.au/slia/australias-law-schools/> (accessed 26 October 2018). See David Barker, 'An Avalanche of Law Schools, 1989–2013' (2013) 6 *Journal of the Australasian Law Teachers Association* 177.

⁶⁰ See Daniel Kahneman, *Thinking Fast and Slow* (2011). Tversky and Kahneman's work on bias has been cited by Gageler J in *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, (2016) 258 CLR 525, at fn 216.

Yale and Harvard are all considered to be excellent, highly selective law schools with a long-standing history. The same is true for GO8 universities in Australia. Therefore, if a judge, counsel or researcher is trying to assess whether something is a quality piece of academic research, a quick way of assessing that is to assume that if it is written by someone from a prestigious university and published in a prestigious journal, then it must be a good quality piece. There may be other pieces which are just as good, written by academics from less prestigious institutions in less prestigious journals, but they may sometimes be overlooked. I suspect some pieces may effectively 'disappear', *not* because they are not worthwhile, but because they are not cited by academics, counsel or courts, simply because of the unconscious biases at work.

D Conclusion

At least on the basis of my preliminary research, it has been shown that for the given period, the High Court of Australia is more likely than not to not cite any academic work. And, when academic work is cited, it is more likely to be academic work by a deceased, English male Professor from Oxbridge to be cited by the High Court than for a living, Australian female academic of lower rank with no association with a prestigious overseas or prestigious local university.

This has certain ramifications for female legal academics of lower rank if citations are used as a gauge of 'impact'. It is suggested that young female legal academics face an uphill battle: the unconscious bias permeating the legal system means that they are perceived as less authoritative, particularly if they do not have an association with a prestigious university. Of course, some female academics have been highly influential, and at times junior female academics from non-GO8 law schools *have* been cited by the High Court of Australia, but it is suggested that it will be harder for them.

It is also suggested that it is dangerous to use citation by superior courts as an indicator of quality of work. First, the data in this paper shows on a preliminary basis that the level of citation is so low that nothing of statistical significance can be gleaned from it, but also, citation may be a reflection of habit and unconscious bias rather than quality.

Consequently, my preliminary thought is that Law Schools should push back against the use of citations as a necessary indicator of 'impact' for the purposes of grant applications and promotion. While frequent citation may show impact, it does not follow that a person who has not been cited has not had impact, nor does it mean that their work is not valuable. It may simply show that intrinsic legal bias is in operation. However, there is much more work to be done on this issue.