The Business of the Australian State Supreme Courts Over the Course of the 20th Century

Russell Smyth*

This study examines the changing patterns in the appellate caseload of the six Australian state supreme courts over the course of the 20th century, based on cases contained in the official state reports at decade intervals between 1905 and 2005. The main findings include a decrease in the importance of family and estates and real property since the 1970s and a corresponding increase in the importance of criminal cases. The proportion of cases concerned with public law, torts, contract and debt, and corporations and partnerships have all been relatively low over the 20th century. Explanations are provided for the observed trends and comparisons drawn with the findings of extant studies for the supreme courts in the United States.

I. Introduction

Previous studies have examined the business of the U.S. state supreme courts since 1870.1 Robert Kagan and his colleagues examined the changing dockets of a sample of 16 states over

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the period 1870 to 1970. They took samples of 18 cases decided by each of the 16 courts every fifth year. Their study pointed to a sharp decline in the proportion of cases involving business issues (contracts, debt, corporations, and partnerships) and real property and increases in cases concerned with criminal, family, public, and tort law.\(^2\) Kritzer and his colleagues update the evolution of state supreme court dockets into the 1990s for the original 16 states considered by Kagan and his colleagues, as well as for all 50 states. The latter study found a continued increase in the proportion of criminal cases as well as an increase in nondebt contract cases, but no increase in tort cases on the docket of state supreme courts.\(^3\)

These two studies together provide a comprehensive picture of changing patterns in the dockets of the state supreme courts in the United States over a 150-year period, but there are no studies examining the business of the state supreme courts in other countries, including Australia. The purpose of this article is to provide a comparative perspective on the U.S. studies that have examined the business of the state supreme courts through tracing trends in the business of the Australian state supreme courts over the course of the 20th century. Specifically, we seek to (1) document changing patterns in the business of the Australian state supreme courts over the course of the 20th century; (2) point to similarities and differences with what extant studies have found for the U.S. state supreme courts; and (3) offer explanations for the observed trends based on changes in legal institutional arrangements, the rise and decline of precedents in particular areas of the law generating legal certainty or uncertainty, and broader socioeconomic changes.

In addition to offering a comparative perspective on the findings from existing U.S. studies, another reason for studying the business of the Australian state supreme courts is that they are important legal institutions in their own right and their importance has increased over time. Since 1984, litigants have not had an automatic right of appeal from the state supreme courts to the High Court of Australia.\(^4\) Thus, except in the limited number of cases where the High Court of Australia grants special leave to appeal, the state supreme courts are the final court of appeal for parties to causes brought within their jurisdiction.\(^5\) However, there has been little study of either the dockets of the state supreme courts or decision making on the courts. The only related empirical studies examine the citation practice of the state supreme courts.\(^6\)

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\(^3\)Kritzer, Brace, Hall & Boyea, supra note 1.

\(^4\)Section 35(2) Judiciary Amendment Act (No. 2) 1984 (Cth.).

\(^5\)About 80 percent of applications for special leave to the High Court are refused. See David Malcolm, State Supreme Courts, in Oxford Companion to the High Court of Australia (Anthony Blackshield, Michael Coper & George Williams, eds., Oxford University Press, 2001).

\(^6\)For example, see Dietrich Fausten, Ingrid Nielsen & Russell Smyth, A Century of Citation Practice on the Supreme Court of Victoria, 31 Melbourne Univ. L. Rev. 733; Ingrid Nielsen & Russell Smyth, One Hundred Years of Citation
The rest of the article is set out as follows. The next section provides an overview of the Australian state supreme courts. This is followed by a discussion of the research method and the study’s findings. Foreshadowing the major results, we find some similarities and some differences with the findings for the state supreme courts in the United States. The main similarities are that the proportion of criminal cases has increased over time; the importance of family and estates and real property has declined since the 1970s; and the importance of cases involving corporations has been low in Australia and the United States despite a high rate of economic growth and increase in gross domestic product (GDP) per capita over time. The main differences are that contracts, public law, and tort law are less important in the caseload of the Australian state supreme courts than in their U.S. counterparts.

II. Overview of the Australian State Supreme Courts

The Commonwealth of Australia consists of six states (New South Wales, Victoria, Tasmania, Queensland, South Australia, and Western Australia) and two territories (Australian Capital Territory and Northern Territory). Prior to federation in 1901, the six states were self-governing colonies within the British Empire, with the two territories not being created until after federation. The six state supreme courts predate federation. The Supreme Court of New South Wales was established in 1814; the Supreme Court of Tasmania was established in 1824; the Supreme Court of South Australia was established in 1837; the Supreme Court of Victoria was established in 1852; the Supreme Court of Western Australia was established in 1861; and the Supreme Court of Queensland was established in 1863. While not considered as part of this study, the Northern Territory and the Australian Capital Territory have their own supreme courts, which were established in 1931 and 1934, respectively, and sit at the same level as the state supreme courts in the Australian court hierarchy.

The state supreme courts consist of both trial and appellate divisions. Four of the six states now have a permanent court of appeal, which is a division of the supreme court. These states are New South Wales, in which a permanent court of appeal was established in 1966; Queensland, in which a permanent court of appeal was established in 1991; Victoria, in which a permanent court of appeal was established in 1995; and Western Australia, which has had a permanent court of appeal since 2005. The other states—South Australia and Tasmania—do not have permanent courts of appeals, but members of the supreme court hear appeals in panels of two or more in rotation. This was also the case in the other states prior to the establishment of permanent courts of appeal. The states do not use uniform terminology when referring to the appellate jurisdiction of their state supreme courts and

of Authority on the Supreme Court of New South Wales, 31 Univ. of New S. Wales L. J. 189; Russell Smyth & Dietrich Fausten, Coordinate Citations Between Australian State Supreme Courts Over the Twentieth Century, 34 Monash Univ. L. Rev. 53.
this needs to be borne in mind if comparing the results reported in this study with data in recent annual reports of the respective state supreme courts. For example, in Western Australia, the court of appeal hears civil and criminal appeals, while in New South Wales there is a court of appeal (which hears civil appeals) and a court of criminal appeal (which hears criminal appeals). Meanwhile, in the Supreme Court of Tasmania, which does not have a permanent court of appeal, civil appeals are heard by the full court of the supreme court, which consists of a panel of two or more rotating judges, while criminal appeals are heard in the court of criminal appeal, which is similarly a panel of two or more rotating judges. This study examines the business of the state supreme courts in their appellate jurisdiction, whether that be called the court of appeal, court of criminal appeal, or full court of the supreme court.

Prior to federation, the only appeal from the state supreme courts was to the Judicial Committee of the Privy Council, which sat in London. However, because of the cost and time involved in travel to England, prior to the jet age this right of appeal was infrequently used. Following federation, the High Court of Australia was established in 1903, offering an alternative local avenue for appeal from decisions of the state supreme courts. Prior to 1984, unsuccessful litigants in civil matters had an automatic right to appeal to the High Court from the full court or court of appeal of any state, subject to a monetary qualification. However, since 1984 amendments to the Judiciary Act 1903 (Cth.), prospective appellants have to obtain special leave to appeal to the High Court of Australia. As discussed in the introduction, special leave is granted infrequently. Until the Australia Acts were passed in 1986, unsuccessful litigants in the state supreme courts could choose to appeal to either the High Court of Australia or the Privy Council, each of which functioned as an ultimate court of appeal. This created “a bizarre situation of dualism—and potential conflict—at the apex of the Australian hierarchy of courts.” The problem was that in different cases both ultimate courts might decide the same issue differently, giving rise to delicate issues of judicial comity and precedent. It also led to strategic game playing, in which direct appeal to the Privy Council from a state supreme court “was a method of by-passing the High Court in cases where the prospects of success in that court were considered unfavourable.” This problem was resolved when appeals from the state supreme courts to the Privy Council were abolished by the Australia Acts, making the High Court of Australia the final court of appeal in Australia.

7Malcolm, supra note 5.

8Australia (Request and Consent) Act 1985 (Cth.); the Australia Acts (Request) Act passed by the Parliament of each State; and Australia Act 1986 (U.K.).


10Id.

III. RESEARCH METHOD

The database consists of all reported decisions in the official state reports of each of the six state supreme courts at decade intervals between 1905 and 2005. The official state reports contain decisions of the supreme courts in their appellate jurisdiction. Similar to Kagan and his colleagues, the objective in this study was to have a long time series to get a sense of how the caseload of the state supreme courts has responded to economic and social change and, at the same time, not spread the sampled cases too thin. Compiling a database of reported decisions at decade intervals provided a means to realize these aims. Covering one year in each decade, rather than all 10, is a straightforward method of generating a long time series. From a pragmatic perspective, restricting the sample to reported decisions ensures that the cost of compiling such a large data set is manageable and avoids arbitrarily deciding which unreported decisions to include. This approach generated 3,863 cases overall. This figure is less than the 5,904 cases in the Kagan et al. study and considerably less than the 30,000 cases employed in the National Science Foundation funded Kritzer et al. study in which financial constraints were less binding.

For each decade, for each state supreme court, research assistants read every reported case for the six state supreme courts and coded the case. The initial objective was to code the cases in the same manner as used in the Kagan et al. and Kritzer et al. studies to facilitate comparison with those studies. Thus, cases were classified into one of either corporations and partnerships, criminal, debt and contract, family and estates, public law, real property, or torts. Once the data-collection process commenced, it became obvious that there were two further areas in which reasonably large numbers of cases were falling that had no obvious equivalent in the Kagan et al. and Kritzer et al. schema. These categories were evidence and procedure and statutory interpretation—dealing with a multitude of different types of statutes that in themselves did not readily fall into one of the above categories. Thus, it was decided to add these two categories to the schema used by Kagan et al. and Kritzer et al. Note that when a case dealt with interpretation of a statute that was readily covered under one of the Kagan et al. or Kritzer et al. categories it was classified into that category. Thus, for example, a case dealing with interpretation of the Corporations Act was classified as a corporations and partnerships case, rather than interpretation of statute. Thus, the interpretation of statute category represents a residual grouping.

Including only cases reported in the official reports has some limitations, stemming from the fact that not all appellate decisions of the state supreme courts are contained in the official state reports, particularly in more recent years. Thus, the database is not the universe of appellate decisions of the state supreme courts at decade intervals. A sense of the fraction of actual disposition being picked up in recent decades can be gleaned by comparing the database employed here with the statistics on dispositions reported in the annual reports of the state supreme courts.

Table 1 shows state supreme court cases reported in the official state reports at decade intervals between 1905 and 2005. Data are available on actual appeals heard in

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Table 1: State Supreme Court Cases Reported in Official State Reports 1905–2005

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<td>15</td>
<td>(77)</td>
</tr>
<tr>
<td>TOTAL</td>
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<td>290</td>
<td>189</td>
<td>239</td>
<td>311</td>
<td>374</td>
<td>600</td>
<td>510</td>
<td>414</td>
<td>3863</td>
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*Figure for South Australia for 2005 is for civil appeals only—data on criminal appeals are not available.

**Note**: Figures in parentheses are actual appeals heard (excluding applications for leave).

**Source**: Data on actual appeals are from the state supreme courts’ annual reports where available.
each of the state supreme courts in 2005 as reported in the annual reports of the state supreme courts. These figures are reported in parentheses for each state under the column for 2005 in Table 1. The proportion of actual appeals heard that appear in the official state reports varied between 9.1 percent in Queensland and 19.5 percent in Tasmania. Thus, in 2005, between one in five and one in 10 appeal cases were reported. Data for earlier years are patchy with some of the state supreme courts only providing annual reports since the late 1990s. Figures on actual appeals heard in the Supreme Court of Victoria for 1985 and 1995 from earlier issues of annual reports are reported in Table 1. In 1995, 19.8 percent of appeals were reported and in 1985 36 percent of appeals were reported. It should be noted that these figures are only appeals heard and do not include applications for leave to appeal, on which some state supreme courts have data in their annual reports. For example, in the Supreme Court of New South Wales, according to the 2005 annual report, in addition to the 992 appeals heard in 2005, there were also 320 applications for leave.

It is difficult to ascertain whether there is a shift in the case makeup that corresponds to the decline in the fraction of reported cases because information on case composition of appeals heard in the state supreme courts is not readily available from their annual reports or other sources. The only information that is available is on the proportion of criminal cases (including evidence and procedure) heard in 2005, which suggests that across the state supreme courts, appeals concerning criminal law and evidence and procedure constituted just over 50 percent of all appeals. By way of comparison, criminal law and evidence and procedure constituted 35.5 percent of reported cases in 2005 (see Table 3). This likely reflects the fact that the law considered in some criminal appeals in recent decades has not been considered to have sufficient precedent value to report the case. More generally, it might be reasonably assumed that in recent decades areas of the law that are considered “run of the mill” and therefore having less precedent value will be underrepresented in reported cases. But, while it is important to be aware of this limitation, without concrete data it is difficult to identify the areas of law that would be underrepresented in the reported cases. Nonetheless, this implies that results for the last couple of decades of the study can be reliably considered to reflect the mix of cases in which the courts chose to make precedent, but perhaps not much more.

In spite of these limitations, it has to be remembered that Australia has a much smaller population base than the United States and in contrast to the U.S. 50 states, Australia has just six states and considerably less appellate litigation. Hence, on a per-state basis, the sample is larger than the sample employed by Kagan and his colleagues and the

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13Based on calculations from the annual reports of the state supreme courts in 2005.

14In 2007, the population of the United States was 301.6 million people, while the population of Australia was just 21.2 million people. See ABS Cat. no. 3105.0.65.001 Australian Historical Population Statistics: Table 2. Population by sex, states and territories, 30 June, 1901 onwards; Table 1 (Australia): Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2007 (NST-EST2007-01), Population Division, U.S. Census Bureau, Release Date: December 27, 2007 (United States).
time period covered is longer than that covered by Krizter and his colleagues. In this sense, this study combines the advantages of both the U.S. studies; it covers a long timespan and is reasonably up to date, ending in 2005.

IV. The Results

Table 1 indicates that in 1905 there were 361 cases reported in the official state reports. For each year prior to 1985, there were between 200 and 400 reported cases at decade intervals with the exception of 1945, in which the number fell to 189, reflecting lower levels of litigation during World War II. The number of reported cases exceeded 400 in each of 1985, 1995, and 2005, with a peak of 600 in 1985. Kagan and his colleagues noted that states with larger population bases issued more opinions over the period 1870 to 1970 in the United States. This observation is also true for the Australian state supreme courts. Table 2 shows population estimates for the six Australian states at decade intervals between 1905 and 2005. Throughout the 20th century, Victoria and New South Wales have been the most populous states, with Queensland in third place, while Tasmania has been the least populous state. Until 1975, Western Australia was the second least populous state, but spurred on by the mining boom, its population has moved ahead of South Australia over the last three decades. At one end of the spectrum, the Supreme Court of New South Wales and Supreme Court of Victoria together account for 50 percent of the reported cases, while at the other end of the spectrum the Supreme Court of Tasmania and Supreme Court of Western Australia produced just 17 percent of the cases.

Kagan and his colleagues emphasized that in many states in the United States, once the population reached a certain level, intermediate courts were established to ease the workload pressures on the state supreme courts. With the exception of Tasmania, the other states have intermediate general trial courts with civil and criminal jurisdiction, which sit below the state supreme courts and reduce the workload of the state supreme courts. These intermediate trial courts are known as district courts in New South Wales, Queensland, Western Australia, and South Australia and as the county court in Victoria. The county court/district courts in their current form date from 1967 (Queensland), 1968 (Victoria), 1969 (South Australia and Western Australia), and 1973 (New South Wales). However, most of the states had intermediate trial courts of some form, dating from the 19th century, which in Victoria and Queensland were established around the same time as their state supreme courts, and in New South Wales was established prior to significant growth in the

15Kagan and his colleagues sample approximately 10 percent of reported decisions in the 16 states they consider (Kagan, Cartwright, Friedman & Wheeler, supra note 1, at 126), whereas, as noted in the text, this study contains all reported decisions in the official reports of each of the six Australian states.

16Kagan, Cartwright, Friedman & Wheeler, supra note 1, at 129.

Thus, in contrast to the United States, in Australia, the intermediate general trial courts in the most populous states were not a response to population pressure. The reason Tasmania does not have an intermediate court is that being the smallest state it has not generated the litigation necessitating an intermediate court. Since the 1970s, the states have set up a range of specialist courts or tribunals over which the state supreme courts exercise appellate or supervisory jurisdiction and these can be seen as a response to population pressure. One example is the administrative appeals tribunals established in several states, which, as discussed further below, helps explain why there has not been an increase in public law cases in the caseload of the Australian state supreme courts since the 1970s.

Table 3 shows the percentage of state supreme court cases by area of law for the six states combined in total and for each decade between 1905 and 2005. Overall, criminal cases, representing just under one-fifth of the courts’ docket, formed the largest share of the courts’ caseload. Family and estates and evidence and procedure each constituted 13–14 percent of the courts’ caseload, while real property constituted just under 11 percent of the caseload over the 20th century. Debt and contract, corporations and partnerships, public law, statutory interpretation, and torts each represented less than 10 percent of the caseload over the entire period studied.

The courts of appeal or full court of the state supreme courts do have some discretion to decline to hear cases. The state courts of criminal appeal have statutory

<table>
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<tr>
<th>Year</th>
<th>VIC</th>
<th>NSW</th>
<th>QLD</th>
<th>WA</th>
<th>SA</th>
<th>TAS</th>
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<td>1905</td>
<td>1.205</td>
<td>1.470</td>
<td>0.529</td>
<td>0.247</td>
<td>0.359</td>
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<td>1915</td>
<td>1.432</td>
<td>1.889</td>
<td>0.696</td>
<td>0.321</td>
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<tr>
<td>1925</td>
<td>1.671</td>
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<td>0.968</td>
<td>0.447</td>
<td>0.588</td>
<td>0.229</td>
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<td>1945</td>
<td>2.007</td>
<td>2.918</td>
<td>1.077</td>
<td>0.488</td>
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<tr>
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<td>2.010</td>
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Source: ABS Cat. no. 3105.0.65.001 Australian Historical Population Statistics: Table 2. Population by sex, states, and territories, 30 June, 1901 onwards.
Table 3: Percentage of State Supreme Court Cases by Area of Law, All States 1905–2005

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<td>Other</td>
<td>7.89</td>
<td>2.77</td>
<td>—</td>
<td>3.80</td>
<td>1.06</td>
<td>5.56</td>
<td>0.32</td>
<td>3.48</td>
<td>12.10</td>
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</tr>
<tr>
<td>N</td>
<td>361</td>
<td>295</td>
<td>280</td>
<td>290</td>
<td>189</td>
<td>239</td>
<td>311</td>
<td>374</td>
<td>600</td>
<td>510</td>
<td>414</td>
<td>3,863</td>
</tr>
</tbody>
</table>
powers to hear appeals from lower and superior courts (magistrates/local courts, county/district court, and supreme court at first instance). The Australian statutes in each state are based on the English Criminal Appeal Act 1907 (U.K.) (since replaced by the Criminal Appeal Act 1968 (U.K.) and further revised in 1988 and 1995). However, there is no automatic right to appeal in all cases. The position in New South Wales Section 5 of the Criminal Appeal Act 1912 (NSW), which states that a convicted person may appeal against sentence or conviction on a question of law, but only with leave to appeal against conviction on a question of fact or mixed question of law and fact, is typical of that in the other states. In Victoria, a convicted individual can appeal against sentence, but since 1998, a single judge has heard applications for leave to appeal against sentence pursuant to Section 528 of the Crimes Act 1958 (Vic). The existing arrangement in Victoria is that where leave to appeal against sentence is granted by a single judge, Victoria Legal Aid grants assistance for the appeal. Should leave to appeal be refused by a single judge, the applicant retains the right to have the application determined in the court of criminal appeal, but without legal aid.

The state supreme courts, in their appellate civil jurisdiction, hear appeals from the supreme court at first instance, the district or county court (in all states except Tasmania), and most tribunals. The scope of appellate jurisdiction may be limited, for example, as to questions of law or subject, in certain cases to the grant of leave to appeal. It is difficult to provide a more comprehensive indication of the situation because the circumstances under which leave to appeal is required differ across tribunals within the same state and between inferior courts and tribunals across states. Ideally, the cases should be coded for whether jurisdiction was mandatory or discretionary. This would make it possible to assess whether the nature of the jurisdiction influenced caseload in the state supreme courts. This coding, however, was not done, which is a limitation of the results that are presented in Table 3.

There are some similarities between the results reported here and the findings from the Kagan et al. and Kritzer et al. studies for the United States. First, the proportion of criminal cases in the caseload of the state supreme courts in Australia and the United States has increased over time. The proportion of the state supreme courts’ load spent hearing criminal appeals in the 1990s in Australia was similar to that in the United States (around 30 percent of the caseload). Second, the proportion of cases concerning family and estates has declined in the state supreme courts of both countries since the 1970s. In the Australian state supreme courts, family and estates represented about one-fifth of the courts’ caseload in most decades prior to 1975, peaking at 26.46 percent in 1945, but had fallen to 8.69 percent in 2005. In the United States, family and estates declined from 12 percent to 6 percent between 1940–1970 and the 1990s. Third, the proportion of real property cases has

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20See Criminal Appeal Act 1912 (NSW); Crimes Act 1958 (Vic); Criminal Law Consolidation Act 1935 (SA); Criminal Code Act Compilation Act 1913 (WA); Criminal Code Act 1899 (Qld); Criminal Code Act 1924 (Tas).


fallen in the state supreme courts of both countries since the 1970s. In the United States, real property declined from 11 percent to 2 percent between 1940–1970 and the 1990s, while in Australia, real property declined from 12.57 percent in 1975 to 5.8 percent in 2005. Thus, overall, similar to the United States, disputes between private parties that were important up until the 1970s have been replaced by a rapid growth in the proportion of criminal cases. Fourth, the proportion of cases concerned with corporations has been low in Australia and the United States despite both countries experiencing an increase in GDP per capita over time. The proviso is that Kritzer and his colleagues did observe a big increase in the proportion of contract cases between 1940–1970 and the 1990s, which is not evident in the Australian data in Table 3.

There are four main differences between the findings reported here and those reported in the Kagan et al. and Kritzer et al. studies. First, debt and contract has been much less important in Australia than in the United States over the 20th century. Although the importance of debt and contract declined between 1870 and 1970 in the United States, before nondebt contracts again increased in the 1990s, it has been fairly uniform in Australia at around 10 percent of cases. Second, the importance of torts in the United States has increased over time from 10 percent in the 1870–1900 period to over 20 percent in the second half of the 20th century. In Australia, torts have formed less than 10 percent of the caseload for most of the 20th century. Third, Kagan and his colleagues observed an increase in the importance of public law between 1870 and 1970, although it declined in the 1990s. In Australia, public law has never been more than about 10 percent of the courts’ caseload. Fourth, evidence and procedure has been important in the caseload of the Australian state supreme courts.

V. Discussion of Results

In this section, explanations are provided for six of the main findings from Table 3, focusing on differences and similarities with the United States where appropriate. The six trends we seek to explain are (1) the rise in the proportion of criminal cases over time; (2) the decline in the importance of family and estates over time; (3) the decline in the importance of real property over time; (4) that the proportion of cases involving businesses has remained low over time, despite growth in the size of the economy; (5) that tort cases form a lower proportion of the Australian state supreme courts’ caseload than in the United States; and (6) that public law forms a lower proportion of the Australian state supreme courts’ caseload than it does in the United States.

A. Increase in the Proportion of Criminal Cases

One possible explanation for the increase in the proportion of criminal cases in the caseload of the Australian state supreme courts is that the crime rate has increased over time. Kagan and his colleagues showed that the rise in the proportion of criminal cases heard by the state supreme courts in the United States between 1870 and 1970 reflected an
increase in reported crime. Figure 1 shows changes in serious crime per 10,000 people in the two most populous states—New South Wales and Victoria—and the other four states combined between 1965 and 1995. Figure 1 highlights that there was a large increase in the rate of serious crime in New South Wales between 1965 and 1985, which was a driver for an increase in the rate of serious crime for Australia as a whole over this period. However, between 1965 and 1985, there was little change in the proportion of criminal cases in the state supreme courts. The big increase in the proportion of criminal cases occurs in 1995 and 2005 and the rate of serious crime for Australia as a whole actually declined between 1985 and 1995. Thus, changes in the rate of serious crime per se do not seem to provide an explanation for the increase in the proportion of criminal cases in the state courts.

Kagan and his colleagues found considerable variation in the proportion of criminal cases across states. Table 4 shows the percentage of state supreme court cases dealing with crime and evidence and procedure, many of which were concerned with evidence in criminal cases, by state over the 20th century. There is some variation, ranging from South Australia at the high end to New South Wales at the low end. In the South Australian Supreme Court, 29 percent of the court’s caseload consisted of crime over the course of the 20th century, while in New South Wales, the corresponding figure was just 13.3 percent.

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Figure 1: Serious crime per 10,000 people in Victoria, New South Wales, and “other states” in Australia, 1965–1995.

Notes: Serious crime refers to homicide, rape, serious assault, and robbery; 1965 was the first year for which data on serious crime were available for all states. Separate data on serious assault are not reported for 2005, making the 2005 data not comparable with earlier decades. “Other states” are Queensland, Western Australia, South Australia, and Tasmania.

Source: Satyanshu Mukherjee, Anita Scandia, Dianne Dagger, and Wendy Matthews, Source Book of Australian Criminal and Social Statistics 1804–1988 (Australian Institute of Criminology, 1988); ABS Cat. no. 4510 Recorded Crime Victims, 1995; ABS Cat. no. 3105.0.65.001 Australian Historical Population Statistics: Table 2. Population by sex, states and territories, 30 June, 1901 onwards.

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23Kagan, Cartwright, Friedman & Wheeler, supra note 1, at 147.

241965 was the first year for which data on serious crime were available for all states. Separate data on serious assault are not reported for 2005, making the 2005 data not comparable with earlier decades.

But, as Kagan and his colleagues noted with respect to the United States, the precise cause of these interstate differences is unclear.\(^{26}\) New South Wales, which has the highest population, the largest cities, and the highest crime rate over the last three decades had the lowest proportion of criminal cases. This result reinforces the observation that variations in the crime rate per se cannot explain the courts’ criminal load. The presence or absence of an intermediate general trial court also cannot explain the variation in criminal caseload. Tasmania, the one state without any form of intermediate trial court over the course of the 20th century, had the second lowest proportion of criminal cases following New South Wales. Nor can population explain variation in the proportion of criminal cases, with the two most populous states—Victoria and New South Wales—and the least populous state—Tasmania—having the lowest number of criminal cases as a proportion of the courts’ total caseload.

Other factors are responsible for the increase in the proportion of criminal cases over the last few decades. Kagan and his colleagues noted that in the United States, the Warren Court’s extension of criminal defendants’ constitutional rights—including the right to free counsel—encouraged criminal appeals.\(^{27}\) There was a similar legal aid revolution in Australia in the late 1970s and 1980s that extended the right to free counsel to economically disadvantaged criminal defendants. In 1977, the Australian government passed the Commonwealth Legal Aid Commission Act (1977), which provided for independent state legal aid commissions to be established under state legislation. The state legal aid commissions were progressively established over the next 13 years, with the last being the Legal Aid Commission of Tasmania in 1990. Legal aid has encouraged criminal appeals from cases heard by a judge and jury in the district/county courts and from cases heard by a single judge and jury in the state supreme courts to the criminal court of appeal in each state.\(^{28}\)

The increased availability of legal aid was accompanied by growth in the volume and complexity of criminal law jurisprudence in the High Court of Australia and a shift toward policy considerations under Chief Justice Sir Anthony Mason (Chief Justice from 1987 to 1995). As one commentator has noted: “In the 1980s the [High Court of Australia] became generally more active in criminal law, grappling with difficult issues considered as

\(\text{Table 4: Percentage of State Supreme Court Cases Concerning Crime and Evidence and Procedure by State 1905–2005} \)

<table>
<thead>
<tr>
<th></th>
<th>VIC</th>
<th>NSW</th>
<th>QLD</th>
<th>WA</th>
<th>SA</th>
<th>TAS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal</td>
<td>15.64</td>
<td>13.26</td>
<td>21.4</td>
<td>20.74</td>
<td>29.01</td>
<td>14.52</td>
</tr>
<tr>
<td>Evidence and procedure</td>
<td>13.74</td>
<td>12.67</td>
<td>14.55</td>
<td>15.15</td>
<td>9.18</td>
<td>13.69</td>
</tr>
<tr>
<td>TOTAL</td>
<td>29.38</td>
<td>25.93</td>
<td>35.95</td>
<td>35.89</td>
<td>38.19</td>
<td>28.21</td>
</tr>
</tbody>
</table>

\(^{26}\)Id. at 147.

\(^{27}\)Id.

\(^{28}\)See Legal Aid Celebrates its Twentieth Anniversary, 25 Brief 34; Legal and Constitutional References Committee, Legal Aid and Access to Justice (Australian Government Publishing Service, 2004).
technical ‘lawyers’ law’, but heavily influenced by policy considerations.’ In this period, a strong emphasis was placed on ensuring the criminal defendant received a “fair trial.” This period also saw the emergence of the appeal ground that a jury verdict was “unsafe and unsatisfactory,” as one aspect of the High Court of Australia’s concern to ensure a fair trial. These developments had a flow-through effect to the state supreme courts and intermediate trial courts, creating a state of uncertainty in criminal law and evidence and encouraged criminal appeals.

B. Decline in the Proportion of Family and Estate Cases

Family and estate cases were a staple of the caseload of the state supreme courts until the mid-1960s. When Australia’s most celebrated judge, Sir Owen Dixon, who sat on the High Court of Australia from 1929 to 1964, became an Acting Justice of the Supreme Court of Victoria in 1926 prior to joining the High Court, Sir Hayden Starke, High Court Justice from 1920 to 1950, is reputed to have written to Dixon stating: “Don’t peg out a claim on the Supreme Court for crime and divorce are not worthy of your talents.” Kagan and his colleagues show that the proportion of divorce cases in the state supreme courts in the United States over the period 1870 to 1970 closely tracked the divorce rate. Figure 2 shows the number of divorces per 100,000 people at decade intervals between 1905 and 2005. Figure 2 makes clear that the proportion of divorce cases in the Australian state supreme courts does not track the divorce rate, with the divorce rate on a continual upward trend until the mid-1990s.

A more accurate indicator of whether divorce results in litigation might be the number of divorces involving children, which could give rise to custodial disputes. These data are only available since 1977. Figure 3 shows the number of divorces involving children per 100,000 people in Australia between 1977 and 2006. There has been a decrease in the rate of such divorces, which could partly explain the decline in family cases since the 1970s. However, the main reason for the decline in the importance of family and estate cases since the mid-1970s was the establishment of the Family Court of Australia in 1976. While the state supreme courts still hear some family law matters, the Family Court of Australia assumed jurisdiction for most matrimonial causes, including proceedings for divorce, many children’s matters, and some previously state matters under cross-vesting and corporations legislation.

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30Id. at 176.


32Kagan, Cartwright, Friedman & Wheeler, supra note 1, at 151.

Real property cases were important until the mid-1970s, but declined thereafter. The decline in the importance of real property cases in the state supreme courts in the United States has been attributed to the widespread adoption of title insurance.\(^{34}\) This is not the explanation in Australia where title insurance is a relatively new phenomenon and is not widely used. The first company to issue title insurance in Australia was set up in 1996 and,  

\(^{34}\)See Kagan, Cartwright, Friedman & Wheeler, supra note 1, at 140; Kritzer, Brace, Hall & Boyea, supra note 1, at 432. According to the latter study (at 432–33) in 2006, title insurance in the United States was issued in two-thirds to three-quarters of residential transactions.
as of 2002, its business was restricted to issuing 2,500–3,000 policies per month to lenders and it did not issue owners’ policies.\textsuperscript{35}

It is difficult to be precise, but the explanation for the decline in real property cases in the Australian state supreme courts likely reflects the resolution of many of the issues that were important in the first seven decades of the 20th century. The same explanation has been offered for the decline in real property cases on the dockets of U.S. courts with a drop in disputes over occupancy and ownership issues.\textsuperscript{36} In Australia, this development has been reinforced by a series of reforms in some states designed to simplify their property laws beginning in the late 1960s. Most prominent has been Queensland, in which the establishment of the Queensland Law Reform Commission in 1968 generated a series of working papers and reports on property law reform. These law reform reports were relatively quickly transformed into a series of major legislative reforms designed to reduce uncertainties in property law, including the Property Law Act (1974) and the Land Title Act (1994).\textsuperscript{37}

D. Proportion of Cases Involving Business Has Been Low

One explanation for the low proportion of cases involving business is that business avoids litigation in favor of informal negotiation whenever possible.\textsuperscript{38} Business is concerned with risks to reputation from appearing in court, the high monetary costs of litigation, and impatience with delays in obtaining a hearing and receiving judgment.\textsuperscript{39} Kritzer and his colleagues explain the growth in contract cases in the state supreme courts in the United States between 1940–1970 and the 1990s in terms of the expansion in the size of the U.S. economy.\textsuperscript{40} The logic is that increased economic activity results in greater business complexity and more disputes for litigation. The U.S. economy is just under 20 times larger than the Australian economy.\textsuperscript{41} The stock market in the United States is considerably larger than in Australia. In 2006, in terms of total value traded, the United States had the largest stock market in the world ($US 33,267,643 million), while the Australian stock market ranked 16th ($US 826,285 million).\textsuperscript{42} Consistent with the Kritzer et al. argument, the fact that the Australian economy is much smaller than the U.S. economy helps explain why corporations

\begin{itemize}
  \item Friedman & Percival, supra note 1, at 296.
  \item Alan Preece, Late Twentieth Century Property Law Reform in Queensland, paper delivered at the 2001 Real Property Law Teachers Conference, Melbourne, Australia, Feb. 2001.
  \item Stewart McCauley, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 59.
  \item Cheit & Gersen, supra note 1, at 789–90.
  \item Kritzer, Brace, Hall & Boyea, supra note 1, at 434.

In 2005, GDP in Australia was $US 673,197 million and GDP in the United States was $US 12,912,889 million (Standard & Poors, Emerging Markets Factbook (IFC, 2007)).

Standard & Poors, supra note 41.
and partnerships and debt and contracts form a smaller proportion of the caseload in the Australian state supreme courts.

Having said this, Australia has had one of the best performing economies among Organisation for Economic Cooperation and Development countries over the last two decades, with uninterrupted growth on the back of positive movement in commodity prices. While the proportion of business cases in Australia can be expected to be lower than in the United States, given rapid economic growth one would expected some increase in the proportion of cases involving businesses in the state supreme courts, but this has not happened. The main reason this has not occurred is the establishment of the Federal Court of Australia in 1977. The Federal Court of Australia exercises concurrent jurisdiction with the state supreme courts under the Corporations Act, which covers a host of issues relevant to business, from the winding up of companies through to orders available in relation to fundraising, corporate management, and misconduct of company officers. Anecdotal evidence suggests that much of the corporate litigation is now channeled through the Federal Court of Australia because of dissatisfaction with waiting times and list management in the state supreme courts. Thus, any growth in corporate litigation that has occurred over the last few decades is simply not showing up on state supreme court dockets.

These overall figures mask differences in corporate caseloads across states. Table 5 presents data on the size of the state economies at five-year intervals between 1990 and 2005. Table 6 presents data on the contribution of each state to total manufacturing in 2005–2006. New South Wales and Victoria have the largest economies and the largest manufacturing bases. As an extension of the Kritzer et al. argument that an expansion in economic activity results in a higher proportion of cases involving businesses, the state supreme courts of New South Wales and Victoria should have the highest proportion of debt and contract and corporations and partnership cases. The percentage of state supreme court cases containing debt and contract and corporations and partnership issues is shown in Table 7. The state supreme courts of New South Wales and Victoria have a higher proportion of such cases than the other states, which have smaller economies and manufacturing bases.

Table 5: Gross State Product ($Millions) (Figures in Parentheses are as a Percentage of Australian Gross Domestic Product)

<table>
<thead>
<tr>
<th>Year</th>
<th>VIC</th>
<th>NSW</th>
<th>QLD</th>
<th>WA</th>
<th>SA</th>
<th>TAS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>150,360</td>
<td>200,925</td>
<td>89,636</td>
<td>61,831</td>
<td>44,753</td>
<td>12,928</td>
</tr>
<tr>
<td></td>
<td>(25.89)</td>
<td>(34.60)</td>
<td>(15.44)</td>
<td>(10.65)</td>
<td>(7.71)</td>
<td>(2.23)</td>
</tr>
<tr>
<td>1995</td>
<td>160,979</td>
<td>221,331</td>
<td>108,514</td>
<td>75,909</td>
<td>46,784</td>
<td>14,112</td>
</tr>
<tr>
<td></td>
<td>(24.73)</td>
<td>(34.00)</td>
<td>(16.67)</td>
<td>(11.66)</td>
<td>(7.19)</td>
<td>(2.17)</td>
</tr>
<tr>
<td>2000</td>
<td>200,123</td>
<td>276,161</td>
<td>137,121</td>
<td>93,231</td>
<td>55,039</td>
<td>16,000</td>
</tr>
<tr>
<td></td>
<td>(24.86)</td>
<td>(34.31)</td>
<td>(17.03)</td>
<td>(11.58)</td>
<td>(6.84)</td>
<td>(1.99)</td>
</tr>
<tr>
<td>2005</td>
<td>230,516</td>
<td>309,117</td>
<td>172,294</td>
<td>114,754</td>
<td>63,640</td>
<td>18,322</td>
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<tr>
<td></td>
<td>(24.53)</td>
<td>(32.90)</td>
<td>(18.34)</td>
<td>(12.21)</td>
<td>(6.77)</td>
<td>(1.95)</td>
</tr>
</tbody>
</table>

Source: ABS Cat. no. 5220.0 Australian National Accounts State Accounts.

and partnerships and debt and contracts form a smaller proportion of the caseload in the Australian state supreme courts.

Having said this, Australia has had one of the best performing economies among Organisation for Economic Cooperation and Development countries over the last two decades, with uninterrupted growth on the back of positive movement in commodity prices. While the proportion of business cases in Australia can be expected to be lower than in the United States, given rapid economic growth one would expected some increase in the proportion of cases involving businesses in the state supreme courts, but this has not happened. The main reason this has not occurred is the establishment of the Federal Court of Australia in 1977. The Federal Court of Australia exercises concurrent jurisdiction with the state supreme courts under the Corporations Act, which covers a host of issues relevant to business, from the winding up of companies through to orders available in relation to fundraising, corporate management, and misconduct of company officers. Anecdotal evidence suggests that much of the corporate litigation is now channeled through the Federal Court of Australia because of dissatisfaction with waiting times and list management in the state supreme courts. Thus, any growth in corporate litigation that has occurred over the last few decades is simply not showing up on state supreme court dockets.

These overall figures mask differences in corporate caseloads across states. Table 5 presents data on the size of the state economies at five-year intervals between 1990 and 2005. Table 6 presents data on the contribution of each state to total manufacturing in 2005–2006. New South Wales and Victoria have the largest economies and the largest manufacturing bases. As an extension of the Kritzer et al. argument that an expansion in economic activity results in a higher proportion of cases involving businesses, the state supreme courts of New South Wales and Victoria should have the highest proportion of debt and contract and corporations and partnership cases. The percentage of state supreme court cases containing debt and contract and corporations and partnership issues is shown in Table 7. The state supreme courts of New South Wales and Victoria have a higher proportion of such cases than the other states, which have smaller economies and manufacturing bases.
Table 6: Contribution of States to Total Manufacturing 2005–2006

<table>
<thead>
<tr>
<th></th>
<th>VIC</th>
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<th>QLD</th>
</tr>
</thead>
<tbody>
<tr>
<td>EMP</td>
<td>W&amp;S</td>
<td>SSI</td>
<td>IVA</td>
</tr>
<tr>
<td>29.9</td>
<td>31.6</td>
<td>29.0</td>
<td>30.3</td>
</tr>
<tr>
<td>WA</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9.0</td>
<td>8.5</td>
<td>11.9</td>
<td>10.0</td>
</tr>
</tbody>
</table>

EMP = Employment in manufacturing as of June 2006 (% of national total)
W&S = Manufacturing wages and salaries (% of national total)
SSI = Sales and service income (% of national total)
IVA = Manufacturing value added (% of national total)

Source: ABS Cat. no. 8221.0 Manufacturing Industry.

Table 7: Percentage of State Supreme Court Cases Centering on Economic Activity by State 1905–2005

<table>
<thead>
<tr>
<th></th>
<th>VIC</th>
<th>NSW</th>
<th>QLD</th>
<th>WA</th>
<th>SA</th>
<th>TAS</th>
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</thead>
<tbody>
<tr>
<td>Debt and contracts</td>
<td>7.37</td>
<td>11.69</td>
<td>8.56</td>
<td>7.23</td>
<td>4.37</td>
<td>7.05</td>
</tr>
<tr>
<td>Corporations and partnerships</td>
<td>12.62</td>
<td>8.74</td>
<td>6.51</td>
<td>6.99</td>
<td>9.33</td>
<td>7.05</td>
</tr>
<tr>
<td>TOTAL</td>
<td>19.99</td>
<td>20.43</td>
<td>15.07</td>
<td>14.22</td>
<td>14.06</td>
<td>14.10</td>
</tr>
</tbody>
</table>

E. Proportion of Torts Cases Has Been Lower than in the United States

Kagan and his colleagues show that the growth in personal injury claims in the United States over the period 1870–1970 first closely tracked railroad injuries and later closely tracked traffic deaths and auto accidents. Figure 4 shows road fatality rates in Australia between 1926 and 2006 per 100,000 registered vehicles and 100,000 persons. In terms of registered vehicles, road fatality rates have been on a constant downward trend. In terms of number of people, road fatalities increased from the 1950s to the 1970s, which was reflected in an increase in the proportion of torts in the caseload of the state supreme courts in this period, but fell thereafter. Australia’s road fatality rate relative to its population is lower than that of the United States. In 2004, Australia had 7.9 road deaths per 100,000 people, while the comparable figure in the United States was 14.5. The Australian rate overstates the effect on torts cases in the state supreme courts because it is inflated by relatively high road fatality rates in the Northern Territory, which are unrelated to cases heard in the state.

43Kagan, Cartwright, Friedman & Wheeler, supra note 1, at 145–44.

44ABS Cat. no. 1301.0 Yearbook of Australia, 2008.
supreme courts. In 2005, road deaths per 100,000 persons in the Northern Territory was 27.1, significantly higher than the national rate of 8 road deaths per 100,000 people.\textsuperscript{45} This reflects relatively poor roads and the absence of speed limits in the Northern Territory. The marked difference in road fatality rates between Australia and the United States has contributed to the lower proportion of tort cases in the Australian state supreme courts relative to their counterparts in the United States.

Workplace accidents have also been an important component of state supreme court cases in the United States.\textsuperscript{46} A long time series of workplace injuries and workplace fatalities is not available for Australia. The data that are available on workplace injuries and fatalities since 1992–1993, presented in Figures 5 and 6, show a downward trend across all states and for Australia as a whole. This pattern reflects a mixture of more stringent occupational health and safety laws and campaigns to increase awareness of unsafe work practices since the 1990s.\textsuperscript{47} This trend is inconsistent with the slight increase in the proportion of torts cases between 1995 and 2005, but the timeframe is too short to draw any firm conclusions on this point.

F. Proportion of Public Law Cases Has Been Lower than in the United States

There are several possible explanations for the smaller proportion of public interest cases in the caseloads of the Australian state supreme courts relative to their counterparts in the United States. The first reason is the emergence of a number of merit-based tribunals that

\textsuperscript{45}Id.

\textsuperscript{46}Kagan, Cartwright, Friedman & Wheeler, supra note 1, at 144.

Figure 5: Workplace injuries in Australia, 1992–1993 to 2001–2002.


Figure 6: Workplace fatalities in Australia, 1992–1993 to 2001–2002.

offer an alternative to litigants seeking redress in administrative matters. The first such tribunal was the Victorian Administrative Appeals Tribunal (AAT), which was established in 1984. In 1998, the Victorian AAT was renamed the Victorian Civil and Administrative Tribunal (VCAT). The name change was part of the general overhaul with the introduction of VCAT, which was designed to collapse most of the Victorian tribunals into a single tribunal, though with differing jurisdictions. Many administrative law matters are heard in VCAT, the president of which is a supreme court judge. Many decisions of importance in VCAT are decided by the president and are thus heard originally by a supreme court judge, albeit sitting as president of VCAT. The status of the president may influence the lack of appeals to the Victorian Court of Appeal. There are equivalents to VCAT in New South Wales (the Administrative Decisions Tribunal, established in 1997) and in Western Australia (the State Administrative Tribunal, established in 2004). The other jurisdictions retain a number of specialist tribunals, which essentially spread merits review cases over several tribunals, rather than collapses them into one. New South Wales and Western Australia retain some specialist tribunals.

A second reason there is less public interest litigation in the Australian state supreme courts concerns costs. In the United States, costs are not generally awarded against the loser in such cases, whereas in most Australian cases costs are awarded against the loser, which represents a large barrier to bringing such litigation. Third, many U.S. public law claims are related to the Bill of Rights, in which claimants seek to vindicate rights-based claims. Many U.S. cases are run either as class actions or test cases. There is no equivalent avenue in Australia. Fourth, the United States has developed a tolerance or acceptance of public interest litigation over at least the last few decades that has not occurred in Australia. In this respect, the different legal cultures have greatly influenced the different habits of each jurisdiction.

VI. Conclusion

The purpose of this study has been to examine the changing patterns in the appellate caseload of the Australian state supreme courts over the course of the 20th century, offer explanations for the observed trends, and draw comparisons with the findings of extant studies for the supreme courts in the United States. There are some similarities in the workload patterns observed on the state supreme courts in the two countries, such as the increasing prominence of criminal cases and the declining importance of real property and family and estates. There are also differences, such as less litigation involving businesses in

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49On appeals from VCAT to the Supreme Court of Victoria, see Jason Pizer, Appeals from the VCAT, 29 Austl. Bar Rev. 252.

50See Kellee Edwards, Costs and Public Interest Litigation After Oshlack v Richmond River Council, 21 Sydney L. Rev. 680.
Australia and the reduced role of public interest litigation in Australia compared with the United States. These differences reflect differences in the size of the economies of the two countries, differences in legal culture between the two countries, and the establishment of new courts in Australia, such as the Family Court of Australia and Federal Court of Australia, and tribunals, such as VCAT and its equivalents in other states, from the 1970s that took over jurisdiction that was previously exercised by the state supreme courts.

Kritzer and his colleagues conclude by arguing that there is still scope for further research on the composition of dockets on the state supreme courts in the United States and that one promising line of research would be to examine how the shrinking docket of the U.S. Supreme Court will likely impact on the business of the states’ highest courts.\footnote{Kritzer, Brace, Hall & Boyea, supra note 1, at 437.} There is certainly plenty of scope for further research on the composition of dockets in courts outside the United States. This research need not be restricted to superior courts, but could be extended to lower trial courts. Future research that considered the case category makeup of the dockets of the states’ trial-level courts could be compared with the results of the current study to give some sense of the relation between trial court and appellate court dockets in Australia. Much research of this sort in the United States has provided interesting insights into how the courts respond to changing socioeconomic conditions. In addition to being of interest to scholars in the countries concerned, such studies would enrich the U.S. literature by providing useful comparative perspectives.