

## MAXIMISING SPECIAL LEAVE PERFORMANCE IN THE HIGH COURT OF AUSTRALIA

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### I NATURE AND NURTURE

Some attributes of successful advocates are probably genetic. Intelligence, verbal dexterity, appearance, height and ability to perform under stressful pressure are all written in the genes. No matter how clever and experienced, none of us can alter these basic building blocks of our natures. Any 'rules' can only be useful as they help us make the most of our genetics.<sup>1</sup> Nature itself does not observe the principle of equal opportunity.

I will not pretend that the process of judging special leave applications is wholly logical or scientific. An inescapable element of intuition, wrapped in experience, within an exercise of judgment produces the outcomes. As lawyers and judges, we may strive to minimise the human elements, with their risks of personal attitudes and values. Yet we deceive ourselves if we think that we can eliminate them altogether from the equation.

Relatively little has been written about the neurobiology of judicial decision-making. Until recently, most judges reassuringly pretended that the entire process was objective and mechanical, producing inevitable outcomes. Inspired by a recent decision of the High Court of Australia,<sup>2</sup> two neurologists (one of whom has now ventured into law) lately analysed the process of judicial decision-making in sentencing decisions from the standpoint of the debate as to whether it involves an 'instinctive synthesis' or a 'staged approach' that maximises consistency and transparency. In the end, the neurologists endorsed a comment of my own, written extra-judicially in 1998, about 'the moment of decision':<sup>3</sup>

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\* Justice of the High Court of Australia, 1996-present; President of the Court of Appeal of the Supreme Court of New South Wales, 1984-96. Text of an address delivered at the University of New South Wales Faculty of Law on 13 August 2007, based on earlier lectures by the author.

1 Michael D Kirby, 'Ten Rules of Appellate Advocacy' (1995) 69 *Australian Law Journal* 964.

2 *Markarian v The Queen* (2005) 215 ALR 213; 79 ALJR 1048.

3 Michael D Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 18(1) *Australian Bar Review* 4.

Decision-making in any circumstances is a complex function combining logic and emotion, rational application of intelligence and reason, intuitive responses to experience, as well as physiological and psychological forces of which the decision-maker may be only partly aware.<sup>4</sup>

The neurologists observed that ‘without the need to invoke the glamour of neuroscience or pay homage to the wonders of the human brain’, these remarks crystallised their own findings and conclusions.<sup>5</sup> This opinion may be discouraging, even depressing, for those who hope for completely predictable outcomes in special leave applications (and anything else). Yet honesty obliges us to acknowledge at the outset the part that individual impression plays in such matters. The aim of judicial institutions and of settled procedures should be to reduce the idiosyncratic elements and to maximise the considerations of objectivity and predictability. However, this hope is sometimes dashed on the rocks of our human nature.

Having started in this candid way, it is perhaps as well, before going further, to report a feature of experience after more than ten years on the High Court. Although, as will be apparent, significant differences can exist amongst the Justices (evident in the publication of dissenting reasons),<sup>6</sup> in the selection of matters for the grant or refusal of special leave to appeal disagreement is comparatively rare. Differences exist. Sometimes they are signified by a simple statement that one of the participating Justices would have granted or refused special leave, when the majority favours the opposite order.<sup>7</sup> In other instances, deemed more significant, the Justice in dissent on the disposition may provide more extensive reasons (falling short of a full opinion) as to why special leave should have been granted.<sup>8</sup> Similar differences can exist in the decisions of a Full Court to which a special leave application has been reserved, to be heard as on the return of an appeal. Occasionally special leave is then refused, for reasons stated briefly.<sup>9</sup> Sometimes, rarely, special leave, having been granted, is revoked after full argument, occasionally over the objections of minority opinions that favour resolution of the appeal on the merits.<sup>10</sup>

The important point to be made is that special leave stands at the gateway. All of the High Court Justices have a stake, and a part to play, in control of the gateway and in the choice of the matters that will form the appellate business of the entire Court. Each of them has experience, and an interest, in ensuring that

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4 Ibid 21.

5 Hayley Bennett and GA (Tony) Broe, ‘Judicial Neurobiology, Markarian Synthesis and Emotion: How Can the Human Brain Make Sentencing Decisions?’ (2007) 31(2) *Criminal Law Journal* 75, 90; cf Richard Posner, ‘The Role of the Judge in the Twenty-First Century’ (2006) 86(5) *Boston University Law Review* 1049, 1061-3.

6 Andrew Lynch and George Williams, ‘The High Court of Australia: Some Statistics’ (2007) 16 *The Commonwealth Lawyer* 30.

7 See, eg, Transcript of Proceedings, *Commissioner of Taxation v Cajkusic* [2007] HCATrans 157 (High Court of Australia, Kirby, Hayne and Crennan JJ, 24 April 2007).

8 See, eg, *Muir v The Queen* (2004) 206 ALR 189, 191-195; 78 ALJR 780 at 782-784 [12]-[28]. See also note at (2004) 78 ALJ 448-449.

9 *South-West Forest Defence Foundation Inc v Executive Director of the Department of Conservation and Land Management (No 1)* (1998) 154 ALR 405, 407-10 (Kirby J); 72 ALJR 837 at 838-840 [11]-[23].

10 *Klein v Minister for Education* (2007) 232 ALR 306; 81 ALJR 582.

the Court selects its business wisely and deploys the relatively scarce judicial resources appropriately for the performance of the functions of the nation's final appellate and constitutional tribunal.

These are reasons why there is comparatively little disagreement within the Court in the selection of the cases for special leave. We may disagree in the outcomes. But ordinarily, we can agree in identifying the cases that test the boundaries of law and justice amongst the many proceedings that the parties urge upon us for this purpose.

Selecting a good mix of 'test cases', distributing the mixture in an appropriate way and across the nation as a whole, responding wisely to the important priorities of constitutional and public law, reacting vigilantly to complaints about miscarriages of justice and all the while deploying the available time of the seven Justices appropriately gives rise to occasional differences of opinion. But, on the whole, such differences are rare. This fact also helps to explain why excessive attention should not be paid to the levels of dissent that exist in the Court concerning final dispositions of appeals and the fact that they fluctuate from time to time. The very process of selection of appeals for hearing by a Full Court of the High Court tends to single out those proceedings in which important and novel issues of law and justice are presented. The emerging case load is comparatively small. Yet it is precisely upon cases such as those selected, that judges, particularly in the final court, will sometimes legitimately differ.

Straight-forward cases that call for little more than the application of settled law to decided facts are less likely to engender judicial dissent. They are also less likely to be selected for a grant of special leave. In this sense, the universal special leave system that has operated in the High Court of Australia since 1976<sup>11</sup> filters out the appeals that are more routine, with outcomes more predictable and with legal or factual contests less likely to produce reasonable differences of opinion. Given the new universal system, the surprise may not be in the high number of dissents but the fact that there are not more of them, more evenly spread.

A number of excellent essays have been written concerning special leave hearings: how to prepare for them, and how to cope with the stresses that they impose on the advocate.<sup>12</sup> It is not my purpose to repeat any of the advice contained in these well considered examinations of the topic. Instead, I will describe, from the inside as it were, how a Justice of the High Court normally prepares for a special leave hearing. If the advocate understands what the decision-maker is likely to have in his or her mind, the advocacy may be better targeted, and may be more likely to hit its mark.

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11 *Judiciary Act 1903* (Cth), amended by *Judiciary Amendment Act 1976* (Cth).

12 See, eg, Kenneth Hayne, *Advocacy and Special Leave Applications in the High Court of Australia*, (2004) High Court of Australia <[http://www.hcourt.gov.au/speeches/haynej/haynej\\_22nov04.html](http://www.hcourt.gov.au/speeches/haynej/haynej_22nov04.html)> at 9 September 2007; Kenneth Hayne, 'Persuasion with Style' (April 2007) *Lawyers Weekly* 19; David F Jackson, 'Practice in the High Court of Australia' (1996-97) 15(3) *Australian Bar Review* 187. See also David F Jackson, 'Appellate Advocacy' (1991-92) 8 *Australian Bar Review* 245; Ronald Sackville, 'Appellate Advocacy' (1996-97) 15(2) *Australian Bar Review* 99; David O'Brien, *Special Leave to Appeal* (2<sup>nd</sup> ed, 2007).

Of course, each Justice will have his or her own techniques of preparation. Nevertheless, some basic features of the present arrangements may be revealed. I will explain a number of the considerations which, in my experience, have tended to favour, or to diminish, the prospects of a grant of special leave to appeal to the High Court. I will then conclude with another perspective from the inside. It is important for the advocate to appreciate the seriousness with which the Justices approach their special leave decisions; their understanding that generally it represents the end of the litigious line for the individuals concerned; the alertness which the Justices must exhibit to new points that may not earlier have been considered, including by the advocate; the ever-present concern that they may themselves work an injustice by missing a point of fact or law crucial to an informed decision in the case; and, the institutional arrangements put in place to maximise the judicial as well as the advocate's performance.

## II BEHIND THE CURTAIN

In countless decisions in the past decade, the High Court has unanimously endeavoured to instruct the Australian judiciary, legal profession and community at large about the proper starting point for analysis of most legal problems in the current age.<sup>13</sup> So far, the attempt has enjoyed only partial success.

The lesson is rudimentary; but it is hard to change the advocacy habits of a lifetime. Where written law is relevant to a decision on a legal point, so long as that law is constitutionally valid, it must be given effect. This is so for the fundamental reason that the common law accords priority (in effect greater legitimacy) to the written law (the *Constitution*, statutes, regulations, rules and other subordinate laws made under power) than to the declarations of the common law made by judges.

We have passed the time when the written law was regarded as an unfortunate intrusion upon the coherent body of common law doctrine and equitable principles expressed by the judges, to be circumscribed for that reason. Slowly, we are coming to a realisation of the paramountcy of the written law. This is emerging even in legal education. The Harvard Law School, which introduced the case book teaching method in the nineteenth century, with its instruction in law by analysis of judicial decisions, has recently revised its curriculum. Now, the course begins with compulsory instruction about statutes and statutory interpretation. This has been done out of recognition of the primacy of written law in the contemporary statement of the law. It would be a good thing if the same reality could be taught in all Australian law schools and in Bar reading courses.

The common law revolves in an orbit of constitutional and statutory law. Where relevant, this primary rule of approach must be observed in special leave applications as in full hearings in the High Court. Analysis of the written law, rather than reliance on the words of judges, is usually the correct place to start.

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13 Many of the cases are collected in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 197-8 [81]-[84] (Kirby J).

Justice Hayne has remarked on the paramountcy of two other principles in special leave applications before the High Court. These are first, to '[r]emember what court you are in' and secondly to '[t]hink about the case'.<sup>14</sup> Thinking about the High Court inevitably takes the advocate to the *Constitution* and to the Court's primary constitutional and judicial functions. The Justices will always have those functions in their minds, even if they are not made explicit. The Court is the 'Federal Supreme Court'.<sup>15</sup> It is the highest repository of the judicial power of the Commonwealth. Its creation was envisaged by, and necessary to the operation of, the federal *Constitution*. Its appellate jurisdiction is provided for in section 73 of the *Constitution*:

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences:

- (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
  - (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council
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and the judgment of the High Court in all such cases shall be final and conclusive.

The validity under the *Constitution* of the universal requirement of special leave to appeal to the High Court depends on the opening words of section 73. These permit the Federal Parliament to prescribe exceptions and regulations. In the case of appeals from the Federal Court the validity of the universal system of special leave was upheld in *Smith Kline and French Laboratories Aust Ltd v The Commonwealth*.<sup>16</sup> In the case of the Supreme Courts of the States the system was upheld at the same time in *Carson v John Fairfax and Sons Ltd*.<sup>17</sup> The result was to effect an important change in the power of the High Court to select its own business. That brought about a change in the type of cases generally heard by the Court. Previously, criminal appeals universally required special leave and were comparatively rare. However, civil appeals could be brought to the Court in some cases simply because of the amount at stake in the appeal.<sup>18</sup>

The result of the earlier statutory 'regulations' was to reduce the discretionary element in the civil cases heard by the Court; to impose an effective pecuniary

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14 Hayne, *Advocacy and Special Leave Applications in the High Court of Australia*, above n 12, 3.

15 *Constitution* s 71.

16 (1991) 173 CLR 194, 201 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) concerning *Federal Court of Australia Act 1976* (Cth) s 33(3).

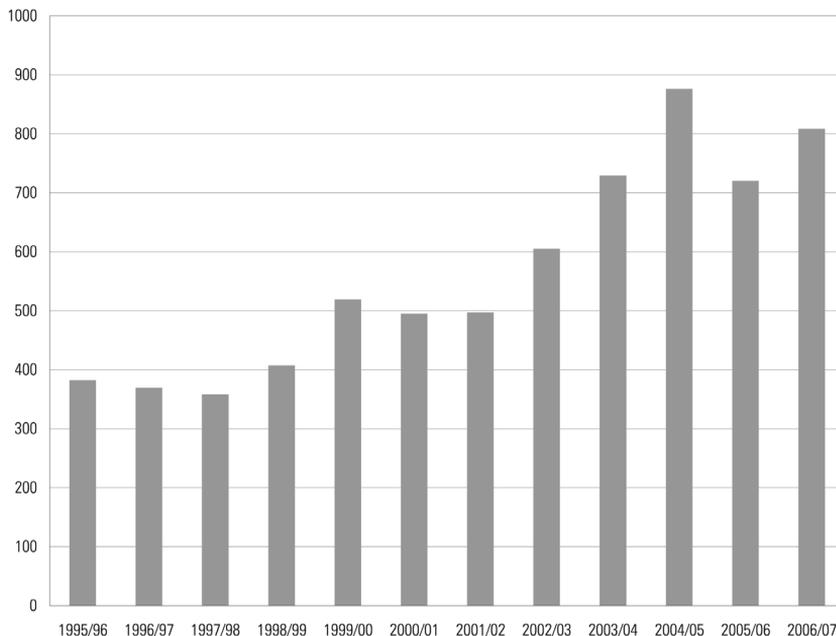
17 *Ibid* 203, concerning *Judiciary Act 1903* (Cth) s 35(2).

18 *Judiciary Act 1903* (Cth) s 35. The history of the provisions of that Act and of the requirements for an appeal as of right is explained in *Smith Kline and French Laboratories Aust Ltd v The Commonwealth* (1991) 173 CLR 194, 205-6 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). When the *Judiciary Act* was first enacted in 1903, provision was made similar to that then applicable to appeals to the Privy Council. This meant that the sum or matter in issue had to amount to or '[be] of the value of £300 or involving directly or indirectly any claim, demand or question to or respecting any property or any civil right amounting to or of the value of £300 or affecting the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy or insolvency'. The monetary sum was altered in 1955 to substitute £1,500 for £300. In 1966 \$3,000 was substituted.

criterion for admission to the Court; and thereby to ensure that a broader range of appeals in non-criminal matters would generally come to the Court as of right. The applicable law in such matters (as in the law of contracts, torts and wills) was often the common law. The previous criteria for appeal ensured that the High Court of Australia quickly won a reputation as one of the great common law courts of the world.

With the changes to the appellate provisions effected by amendment to the *Judiciary Act* 1903 (Cth) in 1976<sup>19</sup> came several alterations relevant to the business of the Court. First, the Court was given respite from the number of appeals which had gradually increased and threatened to swamp the Court with contests whose only real importance concerned the pecuniary sum at stake. Secondly, the facility of selection led to a shift away from common law cases towards cases involving statutes of frequent application, particularly federal statutes. Thirdly, the burden of special leave applications for the Justices became commensurately larger, reaching their highest levels at the beginning of the twenty-first century with a flood of appeals in migration cases.<sup>20</sup> The latter, in turn, stimulated still further thinking about the special leave system.

**Figure 1: Applications for Special Leave to Appeal**



Source: *Annual Reports of the High Court of Australia*

<sup>19</sup> *Judiciary Amendment Act* 1976 (Cth) s 6, inserting a new s 35 in the principal Act. Amendments were later made concerning appeals from Territory courts. See *Judiciary Act* 1903 (Cth) s 35AA.

<sup>20</sup> See Figure 1.

By 2001, the High Court of Australia was one of the few final national courts of appeal to persist with an entitlement to an oral hearing in virtually all applications to appeal to the court. The result of the fresh thinking was the adoption of the *High Court Rules 2004* ('*High Court Rules*').<sup>21</sup> These rules, particularly as amended by the *High Court Amendment Rules 2006 (No 2)*,<sup>22</sup> now constitute the rules governing the conduct of applications for special leave to appeal to the Court.

There were merits in the universal facility for an oral hearing of special leave applications. Anyone raised in the oral traditions of the Australian legal profession, and familiar with the former system of appeals as of right, knows that confronting judges with an obligation to sit and listen to the exposition of argument (however briefly) diminishes the risk that key contentions may not have been appreciated, adequately or at all, on the basis of written submissions. There was something rather admirable in the residual entitlement of any litigant (citizen or not) to address the High Court of Australia for twenty minutes, in person or by a legal representative, to attempt to persuade the Court to entertain the full appeal. I have no doubt that this facility (including in the cases of self-represented litigants) sometimes meant that appeals were accepted that otherwise might not have been.

On the other hand, the flood of cases (particularly in refugee matters), the large increase in the number of self-represented litigants, the opportunities that some of them took to waste the time of the Court and the marginal utility of the procedure judged against the marginal cost, all led the Justices to conclude unanimously that a filter for consideration of special leave applications on the papers was required so as to distinguish those applications that should, in the first instance, be considered on the papers<sup>23</sup> from those to be heard orally.<sup>24</sup> Only if the application passed through this filter was the applicant thereafter afforded the chance of a twenty minute oral opportunity to persuade a Full Court, comprising two or sometimes three Justices<sup>25</sup>

The result of the change brought about by the new *High Court Rules* is that now, for the first time, not only is the exercise of the appellate jurisdiction of the Court universally subject to a special leave requirement<sup>26</sup> but the decision on whether or not to hear oral argument is also assigned to the Justices themselves. Thus, Rule 41.11.1 of the new Rules states:

Any two Justices may determine an application without listing it for hearing and direct the Registrar to draw up, sign and seal an order determining the application.

In the case of self-represented litigants, such applications will, unless the Court or a Justice otherwise directs, not be served on any other person who is a

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21 *Statutory Rules 2004* (Cth) No 304.

22 *Select Legislative Instrument 2006* (Cth) No 218.

23 *High Court Rules*, Rule 41.10.5.

24 *High Court Rules*, Rule 41.11.3.

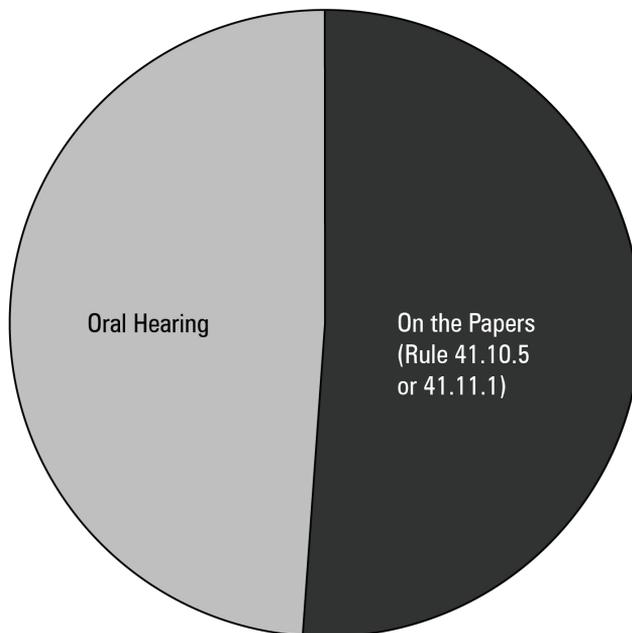
25 The Full Court of the High Court consists of two or more Justices: *Judiciary Act 1903* (Cth) s 19.

26 Exceptional provision is made for leave (as distinct from special leave) from the Industrial Relations Court of Australia (whose jurisdiction is now exercised by the Federal Court of Australia): *Industrial Relations Act 1988* (Cth) s 57(2). Appeals lie to a Full Court from a single Justice of the High Court by leave: *Judiciary Act 1903* (Cth) s 34(2).

party to the proceedings in the Court below in the first instance.<sup>27</sup> In such cases, a Full Court may, without requiring such a response, determine that the application should be dismissed, that is, without argument from the other side or any oral hearing. If two or more Justices, who have examined the papers, decide that such an application should proceed to further hearing, that is what occurs. In the High Court of Australia, such decisions are made by the Justices themselves. They are not made by officers of the Court or clerks to the Justices.<sup>28</sup>

This, then, is the constitutional and statutory context in which applications for special leave now come before a Full Court, normally comprised of two or three Justices. If the application is listed for oral hearing, it means that it has already passed through the internal filter established by the Justices for deciding whether or not an oral hearing should be conducted. In that sense, the listing of a special leave application for an oral hearing where an advocate meets the Court means that the Court has determined that the matter is one proper for oral argument.<sup>29</sup>

**Figure 2: Mode of Disposition of Special Leave Applications - 2005/06**



*Source: Annual Reports of the High Court of Australia*

<sup>27</sup> *High Court Rules*, Rule 41.10.1.

<sup>28</sup> See, eg, Artemus Ward and David L Weiden, *Sorcerers' Apprentices* (2006) 109-149. See also, Bob Woodward and Scott Armstrong, *The Brethren*, (1979) 272-3.

<sup>29</sup> See Figure 2.

It follows that, by the very fact of listing, an advocate now appearing for a party in the special leave list of the High Court may know that the application has passed the first filter. It has not been regarded as devoid of arguable merit. To this extent, the newly instituted procedures, as envisaged by the *High Court Rules*, mean that by getting a case into the list for oral hearing the enterprise is rarely, if ever, futile.

This fact, and the new procedures, have at least two consequences. The first is a consequence for the advocate. Since the universal system was introduced in 1976, written submissions have been of growing importance in special leave applications. Because of the concentration of time required by the limitation on oral argument of twenty minutes, the written submissions constitute the opportunity of the advocate to put the case in some detail, yet not so much as to destroy the persuasive character of the principal lines of submission.

Written submissions are comparatively new in the High Court. For a long time, they were discouraged by judges who had refined their legal skills in the tradition of oral advocacy. Even at that time, at the risk of irritating those Justices who were committed to oral argument (the greatest exemplar being Chief Justice Barwick), some intrepid advocates tendered written notes of argument at the end of their oral submissions. Dennis Mahoney QC, who led me in the *Mikasa* case,<sup>30</sup> handed up written submissions at the close of his argument in the face of dismissive comments by Chief Justice Barwick. He told me later that 'they will forget what I said to them and may not read the transcript. But they are likely to read my brief summary of argument and it may do some good'. In the result, we lost. But the point was valid.

The shift from oral to written argument has become a feature of appellate advocacy in recent decades. On average, written argument can be read four times more quickly than the same words can be spoken. Originally, the writings of the monks, confined to holy texts, were intended for oral renditions of the written words. It was with the printing press that ideas, captured in words, were released from oral sound. It has taken a long time in the oral tradition of the common law for the growing significance of written argument to be acknowledged. Skills in oral and written argumentation are not always concordant. I have known some great jury advocates to suffer writer's block when committing their arguments to paper. But at least in appellate courts, and under severe time constraints in the High Court of Australia, written argument has grown to enjoy enormous significance. This is particularly important for special leave advocacy because there the writer cannot so easily fudge the issues. Precision is inescapable. Flaws of logic and defects of argument may be missed in a mesmerising oral presentation. Commonly they will leap from the page to the experienced, discerning eye focussed on the special leave written case.

The second consequence of the new arrangement is one affecting the Justices themselves. In one sense, the burden of special leave hearings is now lighter for

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30 *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617. The changing role of written submissions in appellate courts is explained in Michael Kirby, 'The Future of Appellate Advocacy', (2006) 27(2) *Australian Bar Review* 141, 144-6.

them. The number of days in the Court sitting year dedicated to special leave hearings has been halved. The difficulty of explaining rudimentary (and complex) requirements to self-represented litigants, many of whom do not have English as a first language, has been eased. On the other hand, the Justices are now additionally deployed in panels to consider applications on the papers, to decide whether those applications should be dismissed without an oral hearing, and to prepare and deliver short reasons for such dispositions. With the continuing high level of applications for special leave filed in the Court, particularly in migration cases,<sup>31</sup> the result is that special leave dispositions continue to be a time consuming obligation of office. Moreover, the special leave list, committed to oral hearings, is now, typically, more intensive and difficult. In the resulting list, there are few, if any, easy cases in which rejection is inevitable. This is a predictable outcome of the new filter. It has added to the intellectual demands imposed on the Justices on a typical special leave day.

The internal arrangements of the High Court for the disposal of special leave applications committed to oral hearing differ somewhat as between the chambers of different Justices. In the majority of chambers, the Justices have their associates prepare memoranda to assist them in their consideration of the issues and clarification of the application. I have not taken that course, and I am not alone. After more than a decade's experience in the New South Wales Court of Appeal, where there was a large leave jurisdiction, before my appointment to the High Court, I was accustomed to determining such issues without such memoranda. My associates are always busy with other duties. I see no escape from reading the special leave books myself. I am not convinced that adding the reading of an associate's memorandum enjoys marginal utility.

In my own case, in the week before a special leave hearing day, the entire Monday at least is devoted in Canberra to considering the special leave application books. Sometimes the consideration of the material extends into a second day. It is a gruelling and arduous burden. It does not become easier with the years.

The special leave application books are presented to me with a brief summary, prepared in the Registry or Library of the High Court and later published on the internet. This document states succinctly, in one or two pages, the general factual and dispositional background of the case and the main grounds of the application. Other internal documents are sometimes available to assist in the consideration of the application book. Occasionally, the Justices exchange relevant references to cases, articles or other materials. They will sometimes perceive and identify a new point. By agreement, they may then arrange for the Registry to bring this point to the attention of the parties so that argument may be addressed to it. Because the Justices are more aware than the profession usually is of the pending cases in the Court, it is not infrequently relevant to draw to notice issues that have recently been argued before the Court and cases relevant to questions that are pending argument or disposition or that have recently been decided. In this

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31 See Figure 1.

way, the Justices themselves keep an eye on the consistent development of the law within the Court.

The assignment of Justices to special leave panels is proposed by the Chief Justice. Care has always been taken in the High Court to treat such assignments as ‘proposals’. All of the Justices enjoy a constitutional commission for the performance of their duties. Famously, Justice Starke not infrequently obliged his tipstaff to ‘pull up [his] chair’ in appeals for which he had not been rostered to sit.

Details of pending special leave hearings, in the form of the list for hearing and the Court summaries just described, are circulated in advance to all chambers. This permits a Justice to consider any significance of an application for which he or she has not been rostered to sit. On the other hand, all of us appreciate the need for an efficient sharing of the special leave burden and the necessity that this creates for a panel system, as constituted by the Chief Justice. I have always assumed that the circulation of the details of matters listed for oral hearing before other panels is done so as to permit a Justice, who considers it proper and desirable to do so, to signify an interest in a point of law raised by the short facts and grounds of appeal in a matter assigned to a different panel. So far, I have not done this myself. Only once did I contemplate ‘pulling up my chair’. In the end, I thought the better of it, but have regretted my failure to do so when I look back.

I will not recount at length the arrangements in place for disposing of special leave applications on the papers. In the nature of things, such matters do not engage the further skills of advocates. Presently, three panels exist in the High Court. I previously served with Justice Gummow. More recently, until his retirement, I served with Justice Callinan, and now with Justice Heydon. In any of the cases that we consider for papers disposition, if there is the slightest possibility that oral argument could change our inclination, or that a point might have been missed in the courts or tribunals below or by the applicant, we will arrange for the application to be removed from the list for disposition on the papers. We will direct that it be listed for oral hearing. Sometimes such directions are accompanied by reference of the Registrar to a point of law or fact that has troubled the panel. If the applicant is not legally represented, the panel might suggest that the Registry explore the availability of *pro bono* assistance from the relevant Bar Association. This will sometimes also happen in an oral hearing.<sup>32</sup> All Justices regularly do this.

So far as the applications listed for oral hearing are concerned, the application books are actually distributed to the Justices’ chambers about a fortnight before the hearing. A proposed hearing list, prepared according to the different venues and the seniority of the parties’ legal representatives, is distributed to the presiding Justice a little more than a week before the hearing. This is settled and any late applications for removal from the list are considered by all of the Justices rostered for the special leave hearing day. It then falls to the presiding Justice in the panel (in recent years, this has increasingly been myself) to make a

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32 Cf *Cameron v The Queen* (2002) 209 CLR 339, 369-70 (Kirby J).

recommendation to the panel members as to whether two or three Justices should participate in particular applications. This is done by reference to a preliminary study of the subject matter raised by the applications. The norm is now two.

Two Justices will often be sufficient because of a tentative opinion that special leave should be granted or refused or because the case is comparatively straight forward and does not present a risk of differences of opinion as to the disposition arising at the hearing. If there is any such risk, or if otherwise it seems suitable or useful, the presiding Justice will suggest that all three members of the panel participate. Of course, these arrangements are subject to agreement amongst the members of the panel. If any member expresses an interest to participate in a particular application, the list is invariably adjusted accordingly. For oral hearings there are no fixed panels. The combinations are constantly changed.

At least a week before the hearing date, the presiding Justice nominates a time for a conference of the Justices to discuss the applications. The meeting is entirely tentative, informal and business-like. Ordinarily, it takes place in the Canberra chambers of the presiding Justice. Very occasionally, it is conducted by video link.

Having come from the pressured list of the New South Wales Court of Appeal, I was surprised, on my arrival in the High Court, to observe the much more structured and formal way in which tentative views on special leave applications were then considered. At that time, a Justice, assigned special responsibility, would normally proceed to outline the points in issue, the arguments for and against the grant of special leave and a tentative conclusion. In the decade and more since my appointment, it is fair to say that there is probably now less formality. However, discussion is still careful, insightful and mutually respectful, recognising the different perspectives that each Justice brings to the task. Sometimes, where the original assignments suggest the possibility of disagreement, or where one or two Justices assigned request the third to participate, this will be done. On many occasions, I have witnessed a change of position from the view tentatively expressed in the preliminary meeting.

On the special leave day itself, further reading and reflection may have suggested the need to alter the composition of the Court. A Justice may discover a late reason for recusal or some other feature of the case that requires reconstitution of the Court for the hearing of the application. The day is invariably stressful for the advocates, particularly because of the time limits to which they are subjected. But it is also stressful for the Court because of the number and variety of the issues of law and justice presented for decision; the detail of the several cases; and the awareness of the importance of the decision for the parties, their lawyers and often for the community and the state of the law. As the advocate approaches the podium, conscious of the responsibilities and opportunities that are then presented, he or she may be comforted to know that a similar sense of pressure and obligation is shared by the decision-makers themselves.

### III SOME GENERAL RULES

#### A Features Tending to Attract a Grant

The foregoing remarks demonstrate that the considerations that influence a grant of special leave to the High Court are multiple, complex, peculiar to the case, influenced by the interests of particular Justices and informed by the types of considerations mentioned in the non-exclusive statutory statement of criteria set out by the Parliament.

The following considerations, if they appear to emerge as live issues in the case, may tend to favour a grant of special leave.

##### 1 *Federal Issues*

The existence of a constitutional or federal law question, perhaps one that has not previously been noticed (such as the fact that the court below was exercising federal, not State or Territory, jurisdiction is often deemed significant).<sup>33</sup> Obviously, the High Court is very experienced in constitutional and federal questions and may perceive aspects of those questions in a case that were missed in earlier dispositions.<sup>34</sup>

##### 2 *Widespread Application*

Given the limited number of cases that the Court decides in a typical year (usually now between 70 or 80)<sup>35</sup> considerations of ‘public importance, whether because of ... general application or otherwise’<sup>36</sup> are more likely to appear clearly in a contest about a statutory provision applicable throughout the nation (that is, a federal law) than in one where the relevant provision exists in a single State or Territory alone.

##### 3 *Diversity of Decisions*

The existence of a diversity of opinions in the intermediate appellate courts of Australia is always an important consideration. Unless one such court gives way on the issue<sup>37</sup> or Parliament intervenes, the only way in which such differences can be resolved is by a decision of the High Court. The postulate of uniformity in the application of the law throughout Australia is an important national objective. It is bound up in the purpose and provisions of the *Constitution* itself. Under the influence of Justice Callinan, the Court is now less inclined than it once was to dismiss special leave applications on the given basis that the point raised

33 See, eg, *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 50 (McHugh, Gummow and Hayne JJ); 69-70 (Kirby J); *Cameron v The Queen* (2002) 209 CLR 339, 367 (Kirby J).

34 See, eg, *Forsyth v Deputy Commissioner of Taxation* (2007) 233 ALR 254, 270 (Kirby J); 81 ALJR 662 at 676[67].

35 An international trend of final courts to admit fewer proceedings to a hearing may be noted: Stephen G Breyer, ‘Reflections on the Role of Appellate Courts: A view from the Supreme Court’ (2006) 8 *Journal of Appellate Practice and Process* 91, 96.

36 *Judiciary Act 1903* (Cth) s 35A(a)(i).

37 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

concerns only a single State. For that State, the High Court is the ultimate court of appeal and the issue may be of importance there. Nevertheless, the importance and general application of the point being a criterion for special leave dispositions, federal or trans-border legal questions are still usually more likely to attract a grant of special leave than purely local ones.

#### **4 History and Doctrine**

If the point raised in the application is an interesting one, from the perspective of legal doctrine or history, it may be more likely to attract a grant than a routine point where the governing legal principle is relatively clear or settled by earlier decisions of the Court. Advocates should not underestimate the ongoing interest of many of the Justices in scholarly controversies within the law. This is why, if the point in issue has been the subject of academic comment or criticism, some Justices, including myself, will welcome references to such controversies and writings about them so they can consider that aspect of the matter in advance, for themselves.<sup>38</sup>

#### **5 Injustice and Disharmony**

Similarly, the advocates may bring attention to a point if they are able to show that an injustice has occurred, that the result is counter-intuitive, or that the legal principles applied appear disharmonious when compared with other recent legal developments or social realities. It is in cases of this kind that the Court is directed by the Parliament to ‘whether the interests of the administration of justice, either generally or in the particular case, require consideration ... of the judgment to which the application relates’.<sup>39</sup> This is sometimes called the ‘visitation’ jurisdiction. I know from my own experience in the New South Wales Court of Appeal and Court of Criminal Appeal that the pressure of work in Australia's intermediate courts, including in criminal appeals, can sometimes lead to slips and errors, oversights and even mistakes causing injustice. Appeal to the High Court provides a useful encouragement to very high standards of substantive and procedural justice in intermediate courts. Occasional ‘visitations’ can help to uphold such standards as well as to prevent individual injustices.

#### **6 Short and Clear Points**

If the point propounded in an application is a comparatively neat one, singular, separate and important, it may be more likely to attract a grant of special leave than points of law that are complex, obscure, arcane or inextricably buried under detailed facts. Sometimes there is no escaping such facts either because mistakes of fact have resulted in a perceived injustice or because the applicable law only emerges from a thorough examination of the facts. I am not saying that the High Court will run away from complex facts. Yet it is true that a short issue of law

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38 *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 600 (Kirby J) [227] citing Barbara McDonald, ‘Immunities Under Attack: The Tort Liability of Highway Authorities and Their Immunity from Liability for Non-Feasance’ (2000) 22 *Sydney Law Review* 411.

39 *Judiciary Act 1903* (Cth) s 35A(b).

and justice will sometimes emerge with greater clarity and with its importance recognised in the comparatively brief time frame, than where the case appears to swamp the High Court in detailed factual assessments. All this is to say no more than the *role* of High Court appeals is not merely to perform, for a second time, the general appellate functions carried out by intermediate courts. Engaging the High Court requires something special, not simply another appellate hearing on the merits. The advocate who can conceptualise the case and, out of its inevitable detail, present a few sharp and neat points of importance and interest will have a much better chance of securing special leave than one who cannot. This is a difficult challenge because the important case is often a big case. It may present many issues in need of detailed elaboration. The skilful advocate in the High Court will aim to make the propounded points simple. This will often require judgment and selectivity.

### 7 *Existence of Dissent and Error*

Obviously, if one of the judges in the intermediate court has dissented, either generally or on a particular point, this will attract immediate attention in the High Court. The dissent may state succinctly the point which the applicant wishes to advance. Absence of dissent is not necessarily an assurance of correctness. Another consideration can sometimes be the suggested error of the intermediate court in over-ruling a decision of the primary judge without paying proper regard to the advantages which that judge enjoyed.<sup>40</sup> There is a greater appreciation now of the substantial role and function of the intermediate courts in correcting factual, as well as legal, mistakes occurring at trial.<sup>41</sup> Nevertheless, the key that unlocks the appellate door in the High Court is the demonstration of error on the part of the intermediate court. Concurrent findings of fact in the trial and intermediate court will rarely be reversed on a final court. Yet if error has happened in the approach, procedures or conclusion of the intermediate court, it needs to be hammered home. It may not be sufficient to secure a grant of special leave. But without arguable error, such a grant is unlikely to occur.

### 8 *Amount at Stake*

Views differ as to whether the amount at stake in an application is still a relevant or important consideration for the grant of special leave. With the abolition of the former pecuniary precondition, the stake is obviously not determinative. However, where (as quite frequently happens) millions of dollars of shareholder funds, or taxpayer monies and of economic consequences flow from the result that is challenged, that, so far as I am concerned, is a relevant consideration favouring a grant of special leave. It tends to lend strength to the submission that the decision *a quo* is one of ‘public importance’.<sup>42</sup> Although, according to the current doctrine of the Court, evidence may not be received in

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40 *Fox v Percy* (2003) 214 CLR 118, 129-133 (Gleeson CJ, Gummow and Kirby JJ).

41 See, eg, *CSR Ltd v Della Maddalena* (2006) 224 ALR 1, 20 (Kirby J); 80 ALJR 458 at 475 [76].

42 *Judiciary Act 1903* (Cth) s 35A(a)(i).

an appeal<sup>43</sup> (that process in the High Court of Australia being a ‘strict appeal’ in accordance with the *Constitution*), evidence may be received on the special leave application. Such evidence may, for example, be relevant to the significance of the case. Thus, it is not uncommon for legal representatives to provide affidavits calling attention to the economic consequences of a decision; the number of cases dependent on the challenge; or the suggested significance of the case for employees, shareholders, taxpayers, consumers, insureds and so on. Such affidavits are read by the Justices in advance of the hearing. They can sometimes help to demonstrate, more effectively than advocates’ arguments, the significance of the case beyond the parties and issues immediately involved.

## 9 Sample Cases

It is fair to say that some areas of the law are not now the subject of as many grants of special leave as was formerly the case. For example, the High Court appears to have adopted a general approach that taxation appeals should normally conclude in the Full Court of the Federal Court.<sup>44</sup> In part, this approach derives from the change that has occurred from the time when the High Court itself was the general appellate court in federal tax cases. In part, it may derive from the respect earned by the Federal Court: the high particularity of much taxation law as a species of statutory law; and the impossibility of the High Court’s reassuming functions as a general court of taxation appeals. Every year there are a couple of tax appeals. However, effectively, the applicant must first establish a reason why the point should not be left at the decision of the Federal Court. The same appears to have emerged in matters involving native title claims. After a series of proceedings in which the general principles applicable to such claims under the common law of Australia and under the *Native Title Act 1993 (Cth)*<sup>45</sup> were elaborated, the High Court seems lately disposed to leave such matters to the Federal Court, unless some special feature can be discerned.

There is also a comparative dearth of family law appeals, possibly because of the high discretionary features of many, perhaps most, decisions in that field of law.

On the other hand, the Court quite frequently grants special leave in trade practices cases.<sup>46</sup> In its present composition, it has been more willing than in the past to grant special leave in appeals against criminal convictions and in

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43 *Eastman v The Queen* (2000) 203 CLR 1 applying *Mickelberg v The Queen* (1989) 167 CLR 259.

44 Jackson, above n 12, 192.

45 See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1; *Fejo v Northern Territory* (1998) 195 CLR 96; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Risk v Northern Territory* (2002) 210 CLR 392; *Western Australia v Ward* (2002) 213 CLR 1; *Wilson v Anderson* (2002) 213 CLR 401; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

46 See, eg, *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; *Henville v Walker* (2001) 206 CLR 459; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592.

sentencing appeals.<sup>47</sup> Time was when the criminal law and questions of sentencing were regarded as beneath the dignity of the High Court. However, in a typical special leave list now coming before the Court, three and sometimes four of the twelve cases for hearing will concern issues of criminal law and sentencing.

## 10 Costs

In some (rare) cases where an applicant represents a large group interest, it might offer to pay the respondent's costs (perhaps on an indemnity basis) of the special leave application and any subsequent appeal and not to disturb costs orders below, as a sweetener to signify the importance of the case to attract a grant of special leave in a matter where the successful party below is of modest means with no desire to become party to a test case.<sup>48</sup>

The foregoing indications do not exhaust the relevant considerations. As David Jackson has pointed out, in a general way, the Court endeavours to maintain an appropriate 'mix' of cases.<sup>49</sup> This is the product of the aggregate decisions rather than of a preconception to which the Justices give conscious effect. A further consideration, sometimes relevant, is the proximity of a circuit hearing in a particular city of Australia. The convention of sitting in appeals in designated weeks in Adelaide, Brisbane, Hobart and Perth can sometimes (even unconsciously) influence the provision of special leave. This is not essential because, where a list is light, it can be cancelled or cases can be brought to the circuit from other parts of Australia.

Particular Justices are reputed to be more amenable to granting special leave than others. My own generosity of spirit is legendary. Nevertheless, all Justices are generally aware of the state of the list and of the feasible caseload that the Court can bear. This works out in practice without any imposition of quotas. When the list awaiting hearing is light, this may have a subconscious liberating effect on the grants of special leave. But it would be erroneous to infer that the Justices approach any list with a preconception of the number of grants that they should make. On days where I have presided, the Court has sometimes granted no applications and sometimes, five or six. It all depends on the merits of the applications and the skills of the advocates in demonstrating those merits or resisting them, as the case may be.

## B Considerations Against a Grant

The considerations that favour the refusal of special leave are, Janus-like, the opposite of those that I have listed. They include:

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47 Michael Kirby, 'Why has the High Court Become More Involved in Criminal Appeals?' (2002) 23(1) *Australian Bar Review* 4.

48 See, eg, Transcript of Proceedings, *Freidin v St Laurent* [2007] HCA Trans 251 (High Court of Australia, Gummow, Kirby and Hayne JJ, 25 May 2007). A special leave hearing on 25 May 2007 where the applicant, a medical practitioner (inferentially represented by the Medical Defence Union (insurer)) sought special leave in a case concerning the correct legal test for the proof of causation in medical negligence. Special leave was refused.

49 Jackson, above n 12, 192.

### 1 *No Clear Point*

Where there is no apparent important, interesting or arguable point in the application nor error on the part of the court below it is unlikely that special leave will be forthcoming.

### 2 *Avalanche of Facts*

Where any point that does exist is lost under an avalanche of facts, the sifting of which would take too much time and draw the High Court into a function that is not truly the role contemplated for it under the *Constitution*, enthusiasm to take the case on may be found wanting.<sup>50</sup>

### 3 *Orders not Reasons*

Where the decision below is plainly right and for the reasons advanced by the intermediate court, the High Court will often say so. It may do so to lend its endorsement to the authority of the decision and reasons. This may be especially so where the intermediate court has tackled convincingly a novel question, such as one of international concern or one of high public interest. Sometimes, whilst not necessarily adopting all of the reasons of the intermediate or trial court, the High Court will endorse the conclusion, given effect in the court's judgment and orders. Under the *Constitution*, the appeal lies to the High Court not from the reasons of the intermediate court but from the 'judgments, decrees, orders and sentences'.<sup>51</sup> Whilst the appellate process can only be effective by submitting judicial reasons to scrutiny, the ultimate business of courts lies in reviewing their dispositions. It is not uncommon for the High Court, in a special leave application, to have a clear view that the orders below are correct, even where there may be reservations about some or all of the reasons advanced to support those orders.

### 4 *Interlocutory Stage*

Where the application for special leave challenges a decision in an interlocutory appeal, this will often form an unpromising foundation for a grant of special leave. In such a case, the Court may prefer that the matter first proceed to trial, saving up for any final appeal challenges to interlocutory orders made on the way. This is a self-protective mechanism for a final court. Experience teaches that many appeal points disappear in the regular conclusion of a trial and intermediate hearing. Cases are settled. Points go away. Generally speaking, the High Court conserves its functions to cases where intervention is timely, useful and necessary.

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50 The High Court has repeatedly insisted that it is not simply a second level count of criminal appeal: *Gillard v The Queen* (2003) 219 CLR 1, 31 (Kirby J). The same is true of civil appeals.

51 *Constitution* s 73; cf Michael Kirby, 'The Mysterious Word 'Sentences' in s 73 of the Constitution' (2002) 76(2) *Australian Law Journal* 97.

## 5 *Interrupting Criminal Trials*

Interference in the criminal process is another matter upon which the Court has spoken often and consistently.<sup>52</sup> Generally speaking, it will not entertain appeals in criminal matters that would have the result of interrupting a criminal trial. Such interruptions have a tendency to advantage wealthy litigants, to prolong litigation needlessly and to delay trials unfairly. No absolute rule can be adopted. But there is a very strong inclination against interlocutory criminal appeals.

## 6 *Repealed Laws*

Where a point has arisen in legislation that has been repealed, and is thus no longer of continuing general application, special leave may be refused on that ground. This may not deny the merit of the arguments pressed by the applicant but simply recognise that the High Court's function requires it to consider the general significance of the issue tendered as well as its significance for the parties concerned.

## 7 *Statutory Meaning*

Furthermore, in most contests over statutory interpretation, it is possible, by the time a case reaches the High Court, to present sound arguments in support of each construction.<sup>53</sup> This will sometimes render pure questions of statutory construction unsuitable for a grant of special leave.

## 8 *Confined Points*

Where a small amount is involved in the application; comparatively trivial considerations are raised; or where, on analysis, the issues of suggested injustice are of limited moment, confined in their application and spent in point of time, it will often be more difficult for the applicant to make out a persuasive case.

## 9 *Innominate Refusals*

Beyond the foregoing considerations, I reach the innominate categories where the High Court concludes that the case is not one suitable for the grant of special leave. A panel may so conclude on one or more of the familiar bases, that:

- The matter is not one where the decision below is 'attended with sufficient doubt'.<sup>54</sup> This was the traditional formulation of the Privy Council. It is not particularly edifying. It implies a possible apprehension of doubt but not of 'sufficient doubt' to warrant a grant of leave. It is an explanation for the refusal of special leave that I myself attempt to avoid;
- The matter may not be a 'suitable vehicle' for a grant of special leave.<sup>55</sup> This is also a somewhat unsatisfactory phrase, mocked by counsel who

52 See, eg, *R v Elliott* (1996) 185 CLR 250, 257 (Brennan J).

53 *News Limited v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 580 (McHugh J).

54 See, eg, *Norton v Taylor* (1905) 2 CLR 291, 293-4 (Griffith CJ).

55 Jackson, above n 12, 196.

suggest that they will turn up at the High Court with a Cadillac next time. Nevertheless, the idea behind the formulation is clearly valid. The facts of the case may be unduly complex. It may lack clear findings that tender the proffered legal point for decision. The issue may be premature. Discretionary considerations may exist to deny appellate intervention. The relief the applicant seeks may be unlikely on the basis of contentions relied on by their opponents. In such circumstances, the High Court is entitled to ask why it should engage in a close study of the matter in a case where the time would probably be wasted and any observations on the suggested issue reduced to proliferating obiter dicta; and

- A very common ground for refusing special leave is that the Court concludes that there are ‘insufficient prospects of success’. This involves an assessment by the experienced Justices expressing the opinion that the application is not wholly without merit. It would rarely get so far today if it were so. But the Justices will have concluded, from their experience, that the more intensive examination of the issues, on an appeal, would not ultimately achieve an outcome favourable to the applicant. Despite the relatively short time available to hear, decide and explain reasons for rejecting applications, the High Court has recently endeavoured to be less Delphic and more transparent in the reasons it provides for refusing special leave. However, in the end, judgment and collective assessment of the prognosis play an inescapable function in many such determinations.<sup>56</sup>

## 10 References and Conditions

Sometimes the special leave panel may be persuaded to refer a case on the borderline into the Full Court, reserving the ultimate grant or refusal of special leave to that Court.<sup>57</sup> Where that possibility arises, an applicant will normally be well advised to encourage it. Similarly, if the Court voices concern that any grant of leave should be subject to requirements that cost orders already made should not be disturbed and that the applicant should bear the respondent’s costs in the High Court, such conditions should ordinarily be accepted as the price of having a test case of importance to the applicant heard, without burdening other parties swept along in expensive litigation. Generally, however, special leave is either simply granted or refused. If it is granted, every word expended by the advocate is important beyond the special leave hearing. Like a number of the Justices, the first document I read in preparing for the hearing of an appeal is the transcript of

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56 Cf *Forsyth v Deputy Commissioner of Taxation* (2007) 233 ALR 254, 265 (Kirby J); 81 ALJR 661, 673 [48]: ‘Intuitive judgments [are] often difficult to explain in words’. Richard Posner defends the inescapable role that emotion, hunch and intuition play in the decisions and reasoning of appellate judges: ‘Intuition, exploiting the fact that the unconscious mind has greater capacity than the conscious mind, frequently encapsulates highly relevant experience. It thus produces tacit knowledge that may be a more accurate and speedier alternative ... to analytical reasoning, even though, being tacit, it is inarticulate.’ Posner, above n 5, 1063-5.

57 See, eg, *South-West Forest Defence Foundation Inc v Executive Director of the Department of Conservation and Land Management (No 1)* (1998) 154 ALR 405; 72 ALJR 817.

the special leave hearing. Usually it identifies the bottom line. For that reason it is ordinarily very helpful.

At the end of an arduous day of special leave applications, the advocates and judges depart. Inevitably, they look back on the dispositions and their performance. Then new cases supervene to banish excessive introspection.

#### IV A SIGNIFICANT MOMENT OF DECISION

Nothing is preordained when a special leave list commences. Accordingly, heavy obligations descend on the advocate and judge alike. I have so far addressed the burdens on the advocate, in the hope of suggesting ways in which those burdens might sometimes be lightened. I reserve my last comments to the burdens on the Justices. Those burdens are inescapable. They are personal. They cannot be shared, except with a participating Justice or Justices.

In taking part in special leave hearings, a Justice of the High Court is not wholly a captive to the arguments of the advocates or the reasons of the courts below. Thus, in *Fingleton v R*,<sup>58</sup> it was only in the special leave hearing that the point was raised by the High Court, for the first time, which ultimately proved decisive in the appeal. That point concerned the common assumption that had existed at trial and in the Queensland Court of Appeal about the liability of the Chief Magistrate to criminal conviction in the circumstances of the case. No one had questioned the possible inapplicability of the statute to such a decision made by a chief magistrate. That is one illustration of the way in which entirely new points can arise from new perspectives and fresh insights. The Justices themselves have to be alert to such points. From their experience, reading, discussion and contemplation, they are obliged to bring such points to notice of the parties so that they can be rejected or reserved for consideration by the Full Court.

Recently, I participated in an appeal to the Full High Court in *Mallard v The Queen*.<sup>59</sup> It was an appeal against a conviction of the accused following a jury verdict of guilty in the Supreme Court of Western Australia more than a decade earlier. The appeal came to the High Court on a second application for special leave. That application followed rejection by the intermediate court of a petition for the exercise of the royal prerogative of mercy, referred to the intermediate court by the State Attorney-General.

In the event, the High Court unanimously allowed the appeal. Mr Mallard had always protested his innocence. His struggle for vindication was a long and painful one. In it he had the admirable support of *pro bono* lawyers and other supporters. In the course of preparing for the hearing of the appeal, I noticed that Mr Mallard had previously applied to the High Court for special leave. Such special leave had been refused at a sitting in Perth in 1996. I turned to the notes about such dispositions in the *Commonwealth Law Reports* to find who had refused the earlier application. I discovered that the participating Justices on that

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58 (2005) 216 ALR 474; (2005) 79 ALJR 1250.

59 (2005) 224 CLR 125.

occasion were Justices Toohey, McHugh and myself.<sup>60</sup> This fact was called to the attention of the parties. No objection was raised to my participation in the appeal. Justices Toohey and McHugh had meanwhile retired. I alone was a survivor from the earlier refusal of leave.

Examination of the transcript of the first special leave hearing indicated that different issues were then presented. The challenge to the safety of the jury's verdict and to consistency of the facts with that verdict and objections to the conduct of the prosecution and of police before and at the trial, presented new and distinct questions on the appeal. However, it was natural that I should ask myself whether any more detailed consideration by me of Mr Mallard's case on the first application for special leave might have saved the prolonged miscarriage of justice that is now accepted as having happened.<sup>61</sup>

There have been other instances where miscarriages of justice have been alleged.<sup>62</sup> There are many more, no doubt, in civil as well as criminal cases, where the parties and advocates feel that they should have had an opportunity to ventilate their arguments on appeal but were refused. The case of *Mallard* demonstrates, as other cases may also, that not every special leave determination will be objectively right. The most that advocate and judge can do, as participants in a human system of justice, is to strive conscientiously for correct outcomes, lawful determinations in accordance with the record and a proper deployment of the judicial consideration that is then engaged.

Special leave decisions are particularly burdensome for all who are engaged in them. They place great stress on the parties and their advocates. They also apply pressure to the Justices who must make the final decisions. All of us should endeavour to give of our best on such occasions: reaching lawful and just conclusions that are arrived at and explained as transparently as possible. The purpose of this essay has been to enlarge the transparency and to explain the process from the point of view of one of the decision-makers engaged in it.

If advocates can look at the challenge that is presented by a special leave application from the viewpoint of the Justices who must decide it, they may improve their performance. They may enhance the possibility that, at the conclusion, the hoped for words will be pronounced: 'Special leave is granted in this matter' or 'Special leave is refused'.

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60 (1996) 191 CLR 646.

61 The Hon John Dunford QC, a former judge of the Supreme Court of New South Wales, has been appointed an Acting Commissioner of the Corruption and Crime Commission of Western Australia to investigate the wrongful conviction of Mr Mallard. *Corruption and Crime Commission* (2007) Corruption and Crime Commission of Western Australia <[http://www.ccc.wa.gov.au/about\\_acting-john.php](http://www.ccc.wa.gov.au/about_acting-john.php)> at 15 October 2007.

62 See, eg, Graeme Crowley and Paul Wilson, *Who Killed Leanne? An Investigation into a Murder and Miscarriage of Justice* (2005). The reference is to *Stafford v The Queen* (1998) 195 CLR 695, which likewise visited the High Court twice and in the second application the author participated in refusing leave.