

**MAURICE BYERS CHAMBERS, SYDNEY**  
**MAXIMISING SPECIAL LEAVE PERFORMANCE**  
**The Hon Justice Michael Kirby AC CMG<sup>\*</sup>**

STARTING AT THE VERY BEGINNING

Taking the advice of Julie Andrews in *Sound of Music*, I will start at the very beginning. I pay respects to the memory of Maurice Byers, whose memory these chambers honour. He was President of the New South Wales Bar Association when I was admitted to the Bar in 1967. He presented me with the Bar Rules, endorsed with his signature. The Bar was much smaller in those days: an intimate, interactive community.

From 1973 I had junior briefs in constitutional cases with Maurice Byers, then Solicitor-General of the Commonwealth. In his chambers in the old Administrative Building in Canberra and in court, I watched his special combination of sweetness of disposition, steely resolve, assurance and great experience in High Court advocacy. I was his guest at his home meeting his wife, Pat and his family, and forming a friendship that I treasure.

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<sup>\*</sup> Justice of the High Court of Australia 1996-; President of the Court of Appeal of the Supreme Court of New South Wales, 1984-96.

After I was appointed Chairman of the Australian Law Reform Commission in 1975, we served together on that body. Later still, when I was President of the New South Wales Court of Appeal, he appeared before me following his return to general practice. I hoped that his accolades were not just further evidence of his advocate's guile.

In the High Court, he appeared before me in *Wik Peoples v Queensland*<sup>1</sup>. He was a supreme advocate. His argument in that case succeeded. Although I never saw him present or resist an application for special leave to appeal, I did witness his deployment of the critical skills of the advocate: confidence, clarity, focus and precision mixed with charm and a tiny sprinkling of humour. He is a great example of the best that the profession of advocates, in Australia, can produce.

The reference to charm and humour is another beginning point. Books and essays are written on the main techniques of appellate advocacy, including in special leave applications. Advice is sometimes tendered, as if the necessary skills can be reduced to mechanical rules. Rules there are. Knowing them may be helpful, and in some cases essential. I have myself attempted to collect a number of them<sup>2</sup>.

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<sup>1</sup> (1996) 187 CLR 1.

<sup>2</sup> M D Kirby, "Ten Rules of Appellate Advocacy" (1995) 69 ALJ 964.

### 3.

However, an enterprise so subtle as persuading a decision-maker with power to accept a partisan viewpoint in a short time is not a mechanical one. It is filled with nuance and personal differences. If I am truthful, I could not deny that Maurice Byers had gifts that were not purely intellectual, that gave him advantages in the advocacy stakes. The large body and presence. The face of a cherubim. The ever-willing readiness to smile and chuckle at a judicial point or, more likely, a well targeted shaft of his own. The hand that swept the air and had a special way of putting down a contrary submission, as if patting it on the head like a docile dog and sending it on its way.

Some attributes of successful advocates are probably genetic. Intelligence, 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 nature. Any 'rules' can only be aimed to help us make the most of our genetics. Nature itself does not observe the principle of equal opportunity.

I cannot pretend that the process of judging special leave applications is wholly logical or scientific. An inescapable element of intuition, wrapped in experience, contained within an exercise of judgment produces the outcomes. As lawyers and judges, we may strive to minimise human elements, with their risks of personal attitudes and values. Yet we deceive ourselves if we think that we can eliminate altogether these elements 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>3</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 concluded by endorsing a comment of my own, written extra-judicially in 1998, on "the moment of decision"<sup>4</sup>:

"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 part aware"<sup>5</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 succinctly crystallised their own findings and conclusions<sup>6</sup>. This opinion may be discouraging, even depressing, for

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<sup>3</sup> *Markarian v The Queen* (2005) 79 ALJR 1048; 215 ALR 213.

<sup>4</sup> M D Kirby, "Judging: Reflections on the Moment of Decision" (1999) 18 *Australian Bar Review* 4.

<sup>5</sup> *Ibid*, at 21.

<sup>6</sup> H Bennett and G A Broe, "Judicial neurobiology, *Markarian* synthesis and emotion: How can the human brain make sentencing

those who hope for completely predictable outcomes in special leave applications (and anything else). Yet honesty obliges us to acknowledge the part that individual impression plays in such matters. The aim of judicial institutions and of settled procedures is 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 us, evident in the publication of dissenting reasons<sup>7</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>8</sup>. In other instances, deemed more important, the Justice in dissent on the disposition may provide more extensive reasons (falling short of a full opinion) as to why special

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decisions?" (2007) 31 *Criminal Law Journal* 75 at 90; cf R A Posner, "The Role of the Judge in the Twenty-first Century" (2006) 86 *Boston University Law Review* 1049 at 1061-1063.

<sup>7</sup> A Lynch and G Williams, "The High Court of Australia: Some Statistics" (2007) 16 *The Commonwealth Lawyer* 35.

<sup>8</sup> See eg *Commissioner of Taxation v Cajkusic* [2007] HCATrans ..... at .....

leave should have been granted<sup>9</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>10</sup>. Sometimes, rarely, special leave, having been granted, it is revoked after full argument, occasionally over the objections of minority opinions that favour resolution of the appeal on the merits<sup>11</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 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 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.

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<sup>9</sup> See eg *Muir v The Queen* (2004) 78 ALJR 780 at 782-784 [12]-[28]; 206 ALR 189 at 191-195. The decision is noted [2004] 78 ALJ 445 at 449.

<sup>10</sup> *South West Defence Foundation Inc v Executive Director, Department of Conservation & Land Management (WA)* (1998) 72 ALJR 837 at 838-840 [11]-[23]; 154 ALR 405 at 407-410.

<sup>11</sup> *Klein v Minister for Education (WA)* (2007) 81 ALJR 582 at 586 [16]; 232 ALR 306 at 310 per Gummow, Hayne and Heydon JJ. Compare at 584, 307 [2]-[4] per Gleeson CJ and at 590-592, 314-320 [36]-[58] of my own reasons.

## 7.

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 agree in identifying the cases that test the boundaries of law and justice amongst the many cases 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 seven Justices occasionally gives rise to differences of opinion. But, on the whole, such differences are rare. This fact 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 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 are selected, that judges, particularly in the final court, will 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. In this sense, the universal

special leave system that has operated in the High Court of Australia since 1976<sup>12</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 system, the surprise may not be in the high numbers 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 stress that they impose on the advocate<sup>13</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 then it may be more likely to hit its mark.

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<sup>12</sup> *Judiciary Amendment Act 1976* (Cth). See D Jackson, "Practice in the High Court of Australia" (1997) 15 *Australian Bar Review* 187 at 190.

<sup>13</sup> K M Hayne, "Advocacy and Special Leave Applications in the High Court of Australia", 22 November 2004 (Address to the Victorian Bar - Continuing Legal Education) unpublished, available on the High Court website; K M Hayne, "Persuasion with Style" in *Lawyers Weekly*, 13 April 2007, 19; Jackson, above n 12. See also D F Jackson, "Appellate Advocacy" (1992) 8 *Australian Bar Review* 245; R Sackville, "Appellate Advocacy" (1997) 15 *Australian Bar Review* 99.

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 follow these up with 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 alert they must exhibit to new points that may not earlier have been considered, including by the advocate; the ever-present concern that they may 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.

### BEHIND THE CURTAIN

In countless decisions in the past decade the High Court, unanimously, has 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>14</sup>. So far, the attempt has enjoyed only partial success.

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<sup>14</sup> Many of the cases are collected in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)* (2006) 80 ALJR 1509 at 1528 [84], fn 64; 229 ALR 1 at 22.

The lesson is rudimentary; but it is hard to change the 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. 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 method in the nineteenth century, with its teaching of law by analysis of judicial decisions, has recently revised its undergraduate 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.

Justice Hayne has remarked on the paramountcy of two other principles in special leave applications before the High Court. These are first, to "remember what court you are in" and secondly to "think about the case"<sup>15</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>16</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 s 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

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<sup>15</sup> K M Hayne, "Advocacy and Special Leave Applications in the High Court of Australia", above n 13 at p 3.

<sup>16</sup> Constitution, s 71.

Commonwealth an appeal lies to the Queen in Council ...

and the judgment of the High Court in all such cases 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 s 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>17</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>18</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>19</sup>.

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<sup>17</sup> (1991) 173 CLR 194 at 201 concerning *Federal Court of Australia Act 1976* (Cth), s 33(3).

<sup>18</sup> (1991) 173 CLR 194 at 203 concerning *Judiciary Act 1903* (Cth), s 35(2).

<sup>19</sup> *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 *Carson* (1991) 173 CLR 194 at 205-206. When the *Judiciary Act* was first enacted in 1903, provision was made equivalent to that 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

The result of the earlier statutory "regulations" was to reduce the discretionary element in the cases heard by the Court; to impose an effective pecuniary 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>20</sup> came several alterations relevant to the business of the Court. First, the Court was given respite from appeals which had gradually increased in number 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

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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.

<sup>20</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 s 35AA of the *Judiciary Act* 1903 (Cth).

commensurately larger, reaching their highest levels at the beginning of the twenty-first century with a flood of appeals in migration cases. The latter, in turn, stimulated still further thinking about the special leave system.

By 2001, the High Court of Australia was one of the few final national courts of appeal to persist with a right 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<sup>21</sup>. These rules, particularly as amended by the High Court Amendment Rules 2006<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 trained 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

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<sup>21</sup> Statutory Rules 2004 (Cth) No 304.

<sup>22</sup> Select Legislative Instrument 2006 (Cth) No 218.

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 migration law), 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 system 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

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<sup>23</sup> HCR Rule 41.10.5.

<sup>24</sup> HCR Rule 41.11.3.

<sup>25</sup> The Full Court of the High Court consists of two or more Justices. See *Judiciary Act* 1903 (Cth), s 19.

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 applicants, such applications will, unless the Court or a Justice otherwise directs, not be served on any other person who is a 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, ie 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>.

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<sup>26</sup> 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). See *Industrial Relations Act 1988* (Cth) s 57(2). Appeals lie to a Full Court from a single Justice of the High Court by leave. See *Judiciary Act 1903* (Cth) s 34(2).

<sup>27</sup> HCR Rule 41.10.1.

<sup>28</sup> cf A Ward and D L Weidon, *Sorcerers' Apprentices*, (New York University Press, 2006) at 109-149. See also B Woodward and S Armstrong, *The Brethren*, (Simon and Schuster, 1979) at 272-273.

This, then, is the constitutional and statutory context in which applications for special leave now come before a Full Court, normally 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 matter 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.

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 can 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, envisaged by the 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 learned 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>29</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 to acknowledge the growing significance of written argument. Skills in oral and written argumentation are not always concordant. I have known

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<sup>29</sup> *Mikasa (NSW) Pty Ltd v Festival Stores Ltd* (1972) 127 CLR 617. The changing role of written submissions in appellate courts is explained in M D Kirby, "The future of appellate advocacy", (2006) 27 *Australian Bar Review* 141 at 144-146.

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 issues. Precision is inescapable. Flaws of logic and defects of argument may be missed in a compelling 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 them. The number of days in the Court sitting year dedicated to special leave hearings has been halved. The difficulty of explaining rudimentary 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, 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. There are few, if any, easy cases where 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 to the reading enjoys marginal utility.

In my own case, in the week before a special leave hearing day, the entire Monday at least is devoted to considering the special leave application books in Canberra. 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 the summary, prepared in the Registry or Library of the High Court and now, 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 grounds of the application. Other internal documents are sometimes available to assist in the consideration of the application book. Occasionally, the Justices exchange references to cases, articles or other materials. They will sometimes perceive 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 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 my 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 any application for which he or she has not been rostered to sit. On the other hand, all appreciate the need for an efficient sharing of the special leave burden and the necessity that this creates for a

panel system, as proposed by the Chief Justice. I have always assumed that the circulation of the details of matters listed for oral hearing, rostered before other panels, is 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 myself done this. Only once did I contemplate "pulling up my chair". In the end, I thought the better of it, but have occasionally regretted the failure to do so.

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 but now with Justice Callinan. 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. 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 Bar. This will sometimes also happen in an oral hearing<sup>30</sup>. All Justices regularly do this.

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<sup>30</sup> cf *Cameron v The Queen* (2002) 209 CLR 339 at 369-370 [96]-[97].

So far as the applications listed for oral hearing are concerned, the application books are distributed to the Justices' chambers about a fortnight before the hearing. The proposed 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 (increasingly in recent years myself) to make a 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 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.

#### SOME GENERAL RULES

*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 stated 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<sup>31</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>32</sup>;

2. *General application*: Given the limited number of cases that the Court decides in a typical year (usually 70 or 80<sup>33</sup>) considerations of "public importance, whether because of ... general application otherwise"<sup>34</sup> are more likely to appear clearly in a contest about a statutory provision applicable throughout the nation (ie a federal law) than in one where the provision applicable 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

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<sup>31</sup> eg *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 50 [35], 69-70 [97[-99]; *Cameron v The Queen* (2002) 209 CLR 339 at 367 [88].

<sup>32</sup> eg *Forsyth v Deputy Commissioner of Taxation* (2007) 81 ALJR 662 at 676[67]; 233 ALR 254 at 270.

<sup>33</sup> An international trend of final courts to admit fewer proceedings to a hearing may be noted. See S G Breyer, "Reflections on the role of Appellate Courts: A view from the Supreme Court", 8 *Journal of Appellate Practice and Process* 91 at 96 (2006).

<sup>34</sup> *Judiciary Act* 1903 (Cth) s 35A(a)(i).

issue<sup>35</sup> or Parliament intervenes, the only way in which such differences can be resolved is by 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 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 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 transborder 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 and settled by earlier decisions of the Court. Advocates should not under-estimate the ongoing interest 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

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<sup>35</sup> *Australian Securities Commission v Marlborough Coal Mines Ltd* (1993) 177 CLR 485 at 492.

them so they can consider that aspect of the matter in advance, for themselves<sup>36</sup>;

5. *Injustice and disharmony*: Similarly, an advocate can gain attention to a point if 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>37</sup>. This is sometimes called the "visitation" jurisdiction. I know from my own experience in the Court of 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;

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<sup>36</sup> *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 600 [227] citing B McDonald, "Immunities Under Attack: The Tort Liability of Highway Authorities and Their Immunity from Liability for Non-Feasance" (2000) 22 *Sydney Law Review* 411.

<sup>37</sup> *Judiciary Act* 1903 (Cth), s 35A(b).

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 and 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 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 function 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 in which many issues have been litigated with consequent elaboration of the facts and applicable law. The skilful advocate in the High Court will aim to make the point 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>38</sup>. There is a greater appreciation now of the role and function of the intermediate courts in correcting factual, as well as legal, mistakes occurring at trial<sup>39</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. But 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 a relevant or important consideration for the

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<sup>38</sup> *Fox v Percy* (2003) 214 CLR 118 at 129-133 [32]-[46].

<sup>39</sup> See eg *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at 475 [76]; 224 ALR 1 at 20.

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 moneys 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>40</sup>. Although, according to the current doctrine of the Court, evidence may not be received in an appeal<sup>41</sup> (that process in the High Court 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;

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<sup>40</sup> *Judiciary Act* 1903 (Cth), s 35A(a)(i).

<sup>41</sup> *Eastman v The Queen* (2000) 203 CLR 1 applying *Mickelberg v The Queen* (1989) 167 CLR 259.

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>42</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<sup>43</sup>. Every year there are a couple of tax appeals. However, the applicant must first establish a reason why the point should not be left to 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>44</sup> were elaborated, the High Court

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<sup>42</sup> Jackson, above n 13 (1997) 15 *Australian Bar Review* 187 at 192.

<sup>43</sup> D G Hill, "What Do we Expect from Judges in Tax Cases?" (1995) 69 ALJ 992 at 1002.

<sup>44</sup> eg in *Mabo v Queensland [No 2]* (1992) 175 CLR 1; *Wik* (1996) 187 CLR 1; *Fejo v Northern Territory* (1998) 195 CLR 96; *The Commonwealth v Yarmirr* (2001) 208 CLR 1; *Risque v Northern Territory* (2002) 210 CLR 392; *Western Australia v Ward* (2003) 213 CLR 1; *Wilson v Anderson* (2003) 213 CLR 401 and *Yorta Yorta Aboriginal Community v Victoria* (2003) 214 CLR 422.

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>45</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 sentencing appeals<sup>46</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.

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<sup>45</sup> See eg *Marks v GIO Australia Holdings Ltd* (1999) 196 CLR 494; *Henville v Walker* (2000) 206 CLR 459; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2000) 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 ACCC* (2003) 216 CLR 53; *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1; *Butcher v Lachlan Elder Realty Pty Ltd* (2003) 218 CLR 592.

<sup>46</sup> M D Kirby, "Why Has the High Court Become More Involved in Criminal Appeals?" (2002) 23 *Australian Bar Review* 4.

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>47</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>48</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.

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<sup>47</sup> See eg *Freidin v St Lawrent* [2007] HCA Trans 251, 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.

<sup>48</sup> Jackson, above n 13, (1997) 15 *Australian Bar Review* 187 at 192.

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 tends to work 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.

*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:

- (1) *No clear point:* That there is no apparent important, interesting or arguable point in the application nor error on the part of the court below;
- (2) *Avalanche of facts:* That 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<sup>49</sup>;

- (3) *Orders not reasons*: That the decision below is plainly right and for the reasons advanced by the intermediate court. Where this appears to be so, the High Court will often say as much 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 court *a quo*, the High Court will endorse the conclusion, given effect in that 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>50</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

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<sup>49</sup> The High Court has repeatedly insisted that it is not simply a second level court of criminal appeal. *Gillard v The Queen* (2003) 219 CLR 1 at 31 [39]. The same is true of civil appeals.

<sup>50</sup> Constitution, s 73; cf M D Kirby, "The Mysterious Word 'Sentences' in s 73 of the Constitution" (2002) 76 *Australian Law Journal* 97.

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.
- (5) *Interrupting criminal trials*: Interference in the criminal process is another matter upon which the Court has spoken often and consistently<sup>51</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;

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<sup>51</sup> See eg *The Queen v Elliott* (1996) 185 CLR 250 at 257.

- (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>52</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; 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

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<sup>52</sup> *News Limited v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42].

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>53</sup>. This was the traditional formulation of the Privy Council. It is not particularly edifying. It implies a possible apprehension of doubt but not "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 a "suitable vehicle" for a grant of special leave<sup>54</sup>. This is also a somewhat unsatisfactory phrase, mocked by counsel who 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

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<sup>53</sup> eg *Norton v Taylor* (1905) 2 CLR 291 at 293-294.

<sup>54</sup> Jackson (above) n 13 (1997) 15 *Australian Bar Review* 187 at 196.

and any observations on the suggested issue reduced to proliferating *obiter dicta*; and

✍ A very common ground of 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>55</sup>.

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<sup>55</sup> cf *Forsyth v Deputy Commissioner of Taxation* (2007) 81 ALJR 661 at 672-673 [48]; 233 ALR 254 a 265 [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: Posner, above n 6, at 1063-1065. ("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.")

(10) *References and conditions:* Sometimes the Court 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>56</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 unreasonably 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 appeals, is the transcript of the special leave hearing. Usually it identifies the bottom line and that is always 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 prolonged or excessive introspection.

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<sup>56</sup> As was done in *South West Defence Foundation Inc* (1998) 72 ALJR 817; 154 ALR 405.

### 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 The Queen*<sup>57</sup>, it was only in the special leave hearing that the point was raised by the High Court, for the first time, that 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. The Justices themselves have to be alert to such points. From their experience, reading, discussion and

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<sup>57</sup> (2005) 79 ALJR 1250; 216 ALR 474.

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>58</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 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 occasion were Justices Toohey, McHugh and myself<sup>59</sup>. This fact was called to the

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<sup>58</sup> (2005) 224 CLR 124.

<sup>59</sup> (1996) 191 CLR 646.

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 of 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 universally accepted as having happened<sup>60</sup>.

There have been other instances where miscarriages of justice have been alleged<sup>61</sup>. There are many more, no doubt, in civil as well as criminal cases, where the parties and advocates feel that they should

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<sup>60</sup> 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. See *West Australian*, 12 April 2007, 9.

<sup>61</sup> See eg G Crowley and P Wilson, *Who Killed Leanne? An investigation into a Murder and Miscarriage of Justice*, (Zeus, 2005). The reference is to *Stafford v The Queen* noted (1998) 195 CLR 695 which likewise visited the High Court twice and in the second application the author participated in refusing leave.

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 became 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 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 the advocate 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".

**MAURICE BYERS CHAMBERS, SYDNEY**  
**MAXIMISING SPECIAL LEAVE OUTCOMES**  
**The Hon Justice Michael Kirby AC CMG**