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THE PROCEDURAL AND SUBSTANTIVE ASPECTS OF APPLICATIONS FOR SPECIAL LEAVE TO APPEAL IN THE HIGH COURT OF AUSTRALIA

I PROCEDURAL ASPECTS

The final courts of appeal in Australia, the United States of America, Canada, the United Kingdom, New Zealand, South Africa and India all share the requirement of some form of leave to appeal to access their respective appellate jurisdictions. Until recently, the High Court of Australia was alone in allowing largely unrestricted access to oral argument as part of this process, irrespective of any manifest lack of merit. Whilst the aforementioned jurisdictions, with the exception of the US Supreme Court, retain discretion to permit oral argument in connection with leave applications, such discretion is rarely, if ever, exercised.

The High Court of Australia also has a hefty workload numerically, let alone per capita, by comparison with the ultimate Courts of appeal of the United Kingdom, New Zealand and Canada. It also has an unusually high proportion of self-represented litigants. To make a brief comparison, in 2005-2006, the Supreme Court of Canada received 575 leave applications,[1] the nascent Supreme Court of New Zealand received 98,[2] and the House of Lords received 219 petitions for leave.[3] In the year ended 30 June 2005, the High Court received 720 special leave applications, 57 per cent of which involved unrepresented applicants. Only the United States had a greater workload.[4]

The burgeoning number of special leave applications and the concomitant lengthening of finalisation times, not to mention the amount of judicial and court resources devoted to hearing such applications, gave rise to concerns that the Court was being diverted from its core functions and that it would buckle under the weight of its leave list. Change was required.

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1 Supreme Court of Canada, 2005-2006 Performance Report: www.ths-sct.gc.ca/dpr-rmr/0506/SC-Cs/SC-CS_e.asp

2 (http://www.courtsofnz.govt.nz/about/supreme/case-summaries-06.html) The Supreme Court of New Zealand does not appear to keep statistics on the number of leave applications it receives. However, looking at the judgment summaries on their web-site, there were 98 cases filed and determined in 2006.

3 House of Lords, Judicial Business Statistics for 2006.

4 Bureau of National Affairs, 11.7.06: approximately 9600 applications on its docket a year in the year 2005-2006.

In January 2005, new rules of Court came into force which gave effect to a paradigm shift which had been growing in force in the preceding years.[5] Written argument is now paramount in the special leave process and it can reasonably be expected that, on the present course, the majority of special leave applications will be determined on the papers. Whilst some judges of the Court, notably Justice Kirby, have expressed misgivings about the demise of the primacy of oral argument in the special leave process, [6] it is entirely possible that within the next few years, oral argument in special leave applications will be all but otiose except in limited circumstances. The reality is that an applicant will, for the most part, have a maximum of 10 pages of written argument to convince the Court that a point of principle is involved, and that the case is a suitable vehicle for its determination. This is no mean feat. However, it is a challenge similar to that faced by appellate litigants across the common law world.

In the case of unrepresented applicants who, statistically, have enjoyed extremely remote prospects of success, there is now a form of presumption against oral argument. Under the new rules, an applicant is required to file a short written submission known as a written case, together with a draft notice of appeal and lower court documents. Service on the respondent is not required unless a panel of two Justices so direct.[7]

The majority of unrepresented applications are dismissed without oral argument and without the written case being served on the respondent. In some instances, often in serious criminal matters and failed refugee applications, the Court will direct that the written case be served on the respondent and the matter will proceed in the usual course. It is not unusual for the Panel to discern some area of concern in the lower Court decision not alluded to by the applicant. Registrars of the Court will often seek the assistance of pro bono counsel, with varying degrees of success, for such matters.

In cases of unrepresented litigants who have surmounted this first obstacle, and in all cases of represented litigants, consideration is then given to whether oral argument is warranted. This is a new aspect of the leave process. In making this assessment, the Court may have regard, amongst other things: to the prospects of success; whether a certain point requires elaboration or clarification; whether it will be assisted by oral argument in narrowing or elucidating possible grounds of appeal; and whether there is a public interest in having the application agitated via oral submissions.

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5 As early as 1993, the Court was considering abolishing oral argument on special leave applications: 'Interview with Chief Justice Mason' (1993) 28 *Australian Lawyer* 18.

6 Justice Kirby, 'The Future of Appellate Advocacy' (2006) 27 *Australian Bar Review* 141, 145.

7 See High Court Rules, Rule 41.10.

Whilst this process is relatively new, many represented special leave applications have already been dealt with on the papers. Typically, such cases have involved mere factual disputes, a decision below involving the application of settled principle or where the absence of a genuine special leave point is abundantly clear. Of course, it is sometimes the case that it will be more difficult for the Court to resolve a complex application without the assistance of counsels' oral submissions.[8]

In represented and unrepresented cases where oral argument has not been made, the Court will announce its decision in open court and give brief reasons for its refusal of special leave to appeal.

II SUBSTANTIVE CONSIDERATIONS

Whilst some of the procedural aspects of the special leave process have been reformed, the substantive considerations informing this process remain unchanged. It must be steadily borne in mind that the High Court, as it has said on countless occasions, is not an ordinary court of appeal. In exercising its largely unfettered discretion to grant leave it 'gives greater emphasis to its public role in the evolution of the law than to the private rights or interests of the parties to the litigation.'[9] However, it is surprising to observe the regularity with which counsel are lost for words when faced with the exasperated question from the bench of 'what question of principle is involved?' The Court is directed to have regard to the well-known criteria postulated in s 35A of the *Judiciary Act*[10] which provide a template for decision-making. Broadly, the application should give rise to a question of law of public importance,[11] or the interests of the administration of justice may require a grant of leave. The latter is sometimes referred to as the Court's visitation or visitorial jurisdiction.

A *Public importance*

Issues of public importance loom large in most special leave applications and the public utility of the issues at stake assume, for the most part, primacy. The Court must be satisfied that there is a gap in its jurisprudence which requires filling. Alternatively, the Court may find it compelling when it is suggested that lower Courts have interpreted its decisions in an unintended fashion. Applications for special leave to appeal are not simply the next step in the adversarial process. There

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8 See Chief Justice Gleeson, 'The High Court of Australia: Challenges for its New Century' (2004) 7 *The Judicial Review* 1.

9 *Smith Kline & French Laboratories (Aust) v The Commonwealth* (1991) 173 CLR 194, 218.

10 Section 35A came into force in 1984 and has not been amended. See *Judiciary Act 1903* (Cth).

11 Because of its general application or otherwise or in respect of which a decision of the High Court is required to resolve a difference of opinion between different courts or within the one court as to the state of law.

is a more or less tacit expectation that the Court should afford priority to constitutional interpretation and adjudication. It is not sufficient that mere error be demonstrated or that a contestable point is raised. It must be established that if the error is left to stand, a state of unsatisfactory incoherence in the law will exist.

Often litigants tend to think that the importance of the case to them can be extrapolated to the effect that it is important in a general sense. Seldom will such an argument attract the approval of the Court. The Court is not interested in the application of settled principle unless the application is manifestly perverse and falls within the visitation jurisdiction.

The interpretation of a particular statutory provision without relevant equivalents in different states is unlikely to provoke great interest on the bench. Often one sees counsel hunting desperately for statutory equivalents in order to elevate essentially local questions to ones of national importance. Planning laws are a typical example of legislation without relevant inter-state parallels. However, provisions of a particular statute may be hastily drafted or internally inconsistent such that its interpretation will give rise to successful special leave applications time and time again. For example, provisions of the *Migration Act 1958* (Cth) have received close attention from the Court.

For some time, it was also thought that the Federal Court possessed particular expertise in matters of intellectual property, taxation and bankruptcy and it remains the case that there must be a question of general principle or application at stake before the Court's appellate jurisdiction is engaged.

Similarly, in matters of criminal sentencing, the Court, in refusing applications for special leave to appeal, cites the mantra that it is not an ordinary court of criminal appeal. It will usually defer to local expertise. Again, a question of general principle must be at stake. Manifest excess of sentence is not a question that the Court regards as being of sufficient general importance.

The construction of contracts, leases and deeds is generally of little interest. The Court is loath to fragment proceedings by entertaining questions that have arisen on an interlocutory basis. As intermediate courts are reluctant to interfere with discretionary decisions, interlocutory matters and assessments of witness credibility, the High Court is even more pronounced in its reticence in taking on such matters.

B *The interests of the administration of justice or the visitation jurisdiction*[12]

The High Court has long taken the view that an intermediate right of appeal in most instances is sufficient for error correction and that a case should only proceed in the High Court if public interest dictates this. This is not to say that individual considerations, particularly in criminal matters, do not weigh heavily, or that the Court may wish to exercise its 'visitorial' jurisdiction to curb any excesses of lower courts, as it has done with respect to the law of negligence in recent times.

The consideration of the interests of the administration of justice is more amorphous and permits the Court, particularly in criminal matters, a greater measure of discretion in considering cases which, by their procedural conduct or substantive outcome, cause disquiet. Of course, mere error is not enough. Appeals against conviction must be regarded as unique in the special leave milieu. A potentially wrongful conviction of itself engages concerns about the administration of justice. Criminal special leave applications will often focus on miscarriage of justice arguments without seeking to extrapolate questions of principle, though any argument will be fortified by the presence of the latter. However, the Court in refusing a criminal special leave application may apply proviso type arguments or may refuse on the basis of failure to object or to seek a re-direction at trial. Forensic decisions are given due weight

Procedural irregularities may also come under this rubric. The frequency with which special leave to appeal is granted with respect to migration decisions can be attributed, in part, to the exercise of the visitation jurisdiction.

C *The language of refusal*

The language employed by the Court in refusing leave can be illuminating in terms of what is required to access its appellate jurisdiction. Typically the Court does not give detailed reasons for the refusal of a grant of special leave to appeal, though it must be noted that where there has been no oral argument, reasons for refusal tend to be more comprehensive.

There are some standard phrases used by the Court in refusing special leave to appeal. For example, the well-worn phrase 'the decision below is not attended by sufficient doubt to justify a grant of special leave to appeal' may point to disapproval of some, usually unspecified, aspect of the lower Court decision which is nevertheless of insufficient gravity to warrant correction in the High Court. The

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12 See the speech delivered by Justice Hayne 'Advocacy and Special Leave Applications in the High Court of Australia', 22 November 2004 (speech delivered to the Victorian Bar, Continuing Legal Education).
See www.hcourt.gov.au/speeches/haynej/haynej_22nov04.html.

phrase 'there is no reason to doubt the correctness of the decision' is a more resounding endorsement of the lower court's decision. The Court may state that the question raised is hypothetical or that no question of public importance is arises. It may say that the interests of justice do not require a grant of leave. The Court is also very resistant to taking on cases where the points raised have not been the subject of lower court deliberation. It has a preference to fasten its analysis to something said in the lower court, rather than cogitating in a vacuum. It may have recently considered the point of law in issue.

Sometimes the Court will be more explicit and state that it does not wish to be taken to agree with everything said in the lower Court. Short of allowing the application and appeal instanter, this is as close to appellate opprobrium as will be encountered on a leave application. Of course, it is often difficult for litigants to accept that a decision that is affected by some sort of error is left undisturbed by the High Court; this reflects the unique position of the Court at the apex of the judicial system.

Similarly, it is not uncommon to hear the Court state that any appeal would not enjoy sufficient prospects of success to warrant a grant of special leave to appeal. This may indicate that there is a viable point lurking somewhere in the impugned decision but that even if the point is resolved in the applicant's favour, it would not alter the ultimate outcome. The Court may be more charitable and simply state the decision below is plainly correct.

It is frequently said that an application is not a suitable vehicle through which to explore the purported questions of principle. This may be because of adverse findings of fact or credibility which cannot properly be disturbed or that a party has tried to fasten a question of principle onto a case where no such question truly arises.

III CONCLUSION

In order for the High Court to maintain its primary role of constitutional adjudication and the resolution of important questions of legal principle in the face of ever increasing applications for special leave to appeal, it has had to take measures which, in a legal culture where oral advocacy has been prominent, may cause some consternation. However, Australia now joins the other final courts of appeal across the common law world in relying on the written word and the ability of senior justices to discern for themselves questions of importance. Whether this has any deleterious effect on the quality of appellate justice in Australia remains to be seen, but if the experience of other jurisdictions is any guide, it would seem unlikely.