

## Chapter 10

# Making a Special Leave Application in the High Court

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Determining what makes for a successful special leave application in the High Court is inherently difficult.<sup>1</sup>

Only a small percentage of decisions of intermediate courts of appeal are the subject of applications for special leave to appeal to the High Court. There is no way of knowing whether or not cases selected for special leave applications, and thus proposed appeals, represent the more meritorious prospective appeals. Indeed, it would be wrong to say that there is even a selection process; disparate factors influence decisions made by unsuccessful litigants to bring special leave applications.

It is also difficult to say whether or not those cases where special leave is granted by the Court are more meritorious than those in which special leave is refused. Anecdotal evidence and observation of the Court at work suggest that this is so but there is no way of demonstrating it, other than perhaps by looking at the success rate of appeals once special leave has been granted.

Nevertheless, the process by which special leave applications are brought and successfully prosecuted to the grant of special leave is anything but random. This much must be clear to anyone who watches the arguing of, or reads the transcripts of, special leave applications before the Court. Beyond the anecdotal, however, how does one make sense of this process?

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1 Considerable assistance can be gained from recent speeches by two High Court Justices on the subject: see Kirby M, 'Maximising Special Leave Performance in the High Court of Australia' (2007) 30 *University of NSW Law Journal* 731; Hayne KM, 'Advocacy and Special Leave Applications in the High Court of Australia', Address to the Victorian Bar - Continuing Legal Education, <[http://www.hcourt.gov.au/speeches/haynej/haynej\\_22nov04.html](http://www.hcourt.gov.au/speeches/haynej/haynej_22nov04.html)>; see also generally O'Brien D, *Special Leave to Appeal*, 2nd ed, Supreme Court of Queensland Library, 2007.

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