The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal

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The existing regime, for which ss 35 and 35A of the *Judiciary Act* 1903 (Cth) provide, prescribing the grant of special leave to appeal as a condition of an appeal to the High Court, is an exercise of Parliament's power to regulate appeals conferred by s 73 of the Constitution. Section 73 of the Constitution, so far as is presently material, provides:

> 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:
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> (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
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> (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State ... and the judgment of the High Court in all such cases shall be final and conclusive. But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal form the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

At the establishment of the Commonwealth, an appeal lay to the Privy Council from the Supreme Courts of the States. It is convenient to take New South Wales as an example. An appeal lay pursuant to the *Australian Courts Act* 1828 (Imp) s 15, and an Order in Council of 13 November 1850 from any judgment etc given by the Supreme Court for or in respect of any sum or matter at issue above the amount or value of £500 sterling involving directly or indirectly any claim, demand or question to or respecting property or civil right amounting to or of the value of £500. The appeal was by way of grant of leave to appeal by the Supreme Court. In the case of an appeal

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from a final judgment etc, the appeal was of right; in the case of an interlocutory order, the grant of leave was at the discretion of the Supreme Court. The Order in Council left unimpaired the prerogative power of Her Majesty to grant leave to appeal from any decision of a colonial court.

The Judicial Committee of the Privy Council in effect exercised the prerogative by advising his Majesty to grant or refuse special leave to appeal. Leave of appeal requires an applicant to show that he or she has an arguable case whereas special leave of appeal is distinguished by the need for public or general importance.

The Legislation

Section 35(1) of the *Judiciary Act*, as enacted in 1903, provided that the appellate jurisdiction of the High Court should extend to the judgments of the Supreme Court of a State or any other court of a State from which, at the establishment of the Commonwealth, an appeal lay to the Queen in Council. The class of judgments from which an appeal lay was the class described in the 1850 Order in Council, except that the sum, amount or value specified was £300, not £500. In addition, an appeal lay to the High Court from judgments involving any claim, demand or question affecting the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy or insolvency. Such an appeal was of right unless the judgment was interlocutory, in which event an appeal could not be brought except by leave of the Supreme Court or the High Court. An appeal also lay to the High Court from any judgment, whether final or interlocutory, with respect to which the High Court granted special leave to appeal.[1]

In 1955, s 35(1) was amended[2] by substituting £1,500 for £300. In 1973, s 35(1) was amended by deleting the reference to any other court of a State from which an appeal lay to the Privy Council.[3] In 1976, the old s 35 was repealed and a new s 35 substituted. This new section provided for an appeal as of right from a final judgment of a Full Court of the Supreme Court of a State given or pronounced:

> (a) for the sum of $20,000 or more; or
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> (b) in any proceedings in which the matter in issue amounted to or was of the value of $20,000 or more or which involved directly or indirectly a

1 s 35(1)(b).

2 Act No 35 of 1955, s 2.

3 Act No 216 of 1973, s 3, Schedule 1.

> claim, demand or question to or respecting any property or civil right amounting to or of the value of $20,000 or more.[4]

No appeal was to be brought from such a judgment on a ground that related to the quantum of any damages in respect of death or personal injury unless the High Court gave special leave to appeal on that ground.[5] In other cases, no appeal was to be brought from the Supreme Court of a State or a court exercising federal jurisdiction unless the High Court gave special leave to appeal,[6] save that an appeal lay as of right from a final judgment of the Full Court of the Supreme Court of a State where a ground of appeal involved the interpretation of the Constitution.[7]

In 1984, s 35 was replaced by a new s 35 and s 35A.[8] These provisions are still in force. By virtue of the new s 35(2), an appeal shall not be brought from the Supreme Court of a State or a court exercising federal jurisdiction unless the High Court grants special leave to appeal. Section 33 of the *Federal Court of Australia Act* 1976 (Cth), which was amended by the *Federal Court of Australia Amendment Act* 1984 (Cth),[9] makes similar provision for an appeal from the Federal Court to the High Court, as does s 95(2) of the *Family Law Act* 1975 (Cth) with respect to an appeal from the Family Court to the High Court. Provision is also made by s 95(b) for an appeal to the High Court upon the issue of a certificate by the Full Court of the Family Court that an important question of law or of public interest is involved. A discussion of this little-used procedure lies outside the scope of this article.

Section 35A provides:

> In considering whether to grant an application for special leave to appeal ... the High Court may have regard to any matters that it considers relevant but shall have regard to:
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> (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
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> (i) that is of public importance whether because of its general application or otherwise; or
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> (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion be-

4 s 35(3).

5 s 35(4).

6 s 35(2).

7 s 35(6).

8 *Judiciary Amendment Act (No 2)* 1984, s 3(1) which introduced s 35(2) of the *Judiciary Act* in its present form.

9 s 3(1).

tween different courts, or within the one court, as to the state of the law; and

(b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

Section 35A reflects a tension between the Court's law-making and adjudicative function. Requirement for special leave, as a condition of an appeal to the High Court, stems from acceptance of the proposition that litigants are entitled to one appeal from a judgment at first instance, but a second appeal to an ultimate court of appeal can only be justified if it serves the public interest. Public interest may be served by clarifying the law, or by insisting on procedural regularity, though, in the particular case, this might be said to relate more closely to the adjudicative function of the courts. The tension to which I refer arises between the public and the private interests served by an appeal to the High Court, a matter to be discussed shortly in the context of an examination of the nature of that appeal.

The 1984 amendments excited some debate including talk of denying a constitutional right of appeal and professional apprehension that the High Court might be too restrictive in granting special leave. Arguments in favour of abolishing appeals as of right prevailed as the volume of work coming to the High Court was oppressive and appeals as of right often involved issues of fact. Obvious difficulty existed in maintaining appeals as of right on the basis that some financial test was appropriate.[10] In the light of experience since 1984, which has seen a substantial increase in the filing of special leave applications each year, appeals as of right appear to be a thing of the past. Indeed, the experience may well indicate further steps need to be taken to lessen the demands made on the Court's time. In the year 1994-95, the number of special leave applications filed fell from 387 in the previous year to 334. A fall in criminal special leave applications also occurred in that period, from 139 to 81. Whether those figures indicate a trend or are simply a 'blip', remains to be seen. Statistics for the current year to the end of April, indicate an increase in the filing of both civil and criminal special leave applications as compared with the figures for the same period in the 1994-95 year.

In the course of debate in the Senate on the 1984 bill, the Attorney-General, Senator Evans, stated that the Government and the High Court had agreed in principle to the holding of regular sittings in

10 Commonwealth Parliamentary Debates, Senate, 2 April 1984, p 1062.

Sydney and Melbourne for the hearing of special leave applications.[11] In Brisbane, Adelaide, Perth and Hobart the Court hears applications annually. Where there is sufficient work to justify a sitting in other States, the Court hears such applications on what has been described as a 'video link', though these days it is a form of digital transmission. Curiously enough, hearings on 'video link' are generally shorter than 'eyeball to eyeball' hearings. It seems that viewing a screen enhances concentration and succinctness of participants.

During the 1984 bill debate, Senator Evans also stated his desire 'that the applicants be given reasons, if that is possible, by the Court for its decisions'.[12] Provision of full reasons for such decisions would be an onerous and oppressive undertaking and defeat one of the objects of the amendments, namely to lessen the burden on the High Court. Giving full reasons would also have been a novel development as neither the Privy Council nor the High Court has previously given reasons for such decisions. In the event, the Court decided it would assign a ground or grounds for refusing an application and this practice has been followed since the 1984 amendments came into force.

Validity of s 35(2) of the *Judiciary Act* and s 33(3) of the *Federal Court of Australia Act*

In *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth*,[13] the High Court rejected unanimously a challenge to the validity of s 35(2) of the *Judiciary Act* and s 33(3) of the *Federal Court of Australia Act*. Validity of these provisions was upheld on the ground that requirement for a grant of special leave to appeal is a condition of an appeal to the High Court, and imposition of that requirement constitutes a 'regulation' of the appeal within the meaning of s 73 of the Constitution. The Court also rejected a contention that the function of granting of special leave is legislative, rather than an exercise of judicial power. On that point, the Court said:[14]

> From time to time statements have been made which draw attention to the unusual character of an application for special to appeal.[15] Such an application has special features which distinguish it from most other legal proceedings. It is a long-established procedure which enables an appellate court to control in some measure or filter the volume of work requir-

11 Id at 1063.

12 Ibid.

13 (1991) 173 CLR 194.

14 Id at 217-281.

15 See *Coulter v The Queen* (1988) 164 CLR 350 at 356.

> ing its attention. Ordinarily, it results in a decision which is not accompanied by reasons, or particularly by detailed reasons. It involves the exercise of a very wide discretion and that discretion includes a consideration of the question whether the question at issue in the case is of such public importance as to warrant the grant of special leave to appeal.

The Court continued:

> To that extent, at least, the Court, in exercising its jurisdiction to grant or refuse special leave to appeal, 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.[16] Notwithstanding these special features, an application for special leave to appeal, like an application for leave to appeal, is an accepted and long-standing curial procedure in this country.[17]

After referring to the nature of the hearing and the end result of the Court's determination, the conclusion reached was that the application involved an exercise of judicial power.

The Nature and Purpose of the Requirement for Special Leave

The Court in *Smith Kline & French* identified the main characteristics, and principal purpose, which the requirement for special leave serves, namely to operate as a filter of work coming to the High Court. Courts are empowered to winnow out those cases which are unworthy of its attention where an appeal has insufficient prospects of success, or the point to be argued lacks general importance or some other reason. Through such mechanisms, the Court makes better use of its resources in hearing cases worthy of its attention. An incidental advantage for litigants, who are refused special leave, flows from termination of the case at less expense than that incurred as a result of an appeal which advances to a full hearing.[18]

Putting to one side responsibility as a constitutional entity, the Court's duty is 'to develop and clarify the law and to maintain procedural regularity in the courts below', to repeat the words of Dawson J in *Morris v The Queen*.[19] His Honour went on to say:[20]

16 *Morris v The Queen* (1987) 163 CLR 454 at 475.

17 See *Coulter v The Queen* (1988) 164 CLR 350 at 359.

18 Ibid.

19 (1987) 163 CLR 454 at 475. This statement was endorsed by all the members of the Court in *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194 at 218. Of course, a case which involves maintaining procedural regularity may also involve a question of principle. *Abalos v Australian Postal Commission* (1990) 171 CLR 167 is an example.

> The Court must necessarily place greater emphasis upon its public role in the evolution of the law than upon the private rights of the litigants before it. Whilst procedurally and otherwise this Court performs in many ways a truly appellate function, more significantly it operates as a court of review and this must ultimately be the most important factor in the selection of those cases in which special leave to appeal is to be granted ...

In the exercise of its appellate jurisdiction, the High Court acts as a court of appeal rather than as a court of review. The difference between the two functions has been explained by Professor JA Jolowicz in his article 'Appeal and Review in Comparative Law: Similarities, Differences and Purposes'.[21] Although the High Court's appellate jurisdiction is expressed with reference to 'appeals', they are not unqualified appeals. An unqualified appeal would call for a fresh hearing on the facts as well as the law. A review, on the other hand, involves no fresh hearing and is limited to errors of law, whether substantive or procedural. Appeals to the High Court are qualified appeals, in the sense that the Court will not, as a general rule, disturb findings of fact based on an assessment of the credibility of witnesses.[22] Although an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or are established by the trial judge's findings of fact, the Court will give weight and respect to the conclusion of the trial judge.[23] Nor will the Court set aside an exercise of discretion otherwise than for disconformity with the principles regulating the exercise of a discretion.[24] Thus, in *Norbis v Norbis*,[25] Mason and Deane JJ said:[26]

> If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between judges on appeal and the judge at first instance.

20 (1987) 163 CLR 454 at 475.

21 (1986) 15 *Melbourne University Law Review* 618.

22 An appellate court will interfere when the decision is clearly wrong on grounds which do not depend merely on credibility as, for example, on the ground that the evidence which was accepted was inconsistent with established facts or was glaringly improbable: *Brunskill v Sovereign Marine* (1985) 62 ALR 53 at 56-57; *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479 (but cf the dissenting judgment of Deane and Dawson JJ at 480-483).

23 See *Warren v Coombes* (1979) 142 CLR 531.

24 *House v The King* (1936) 55 CLR 499 at 504-505.

25 (1986) 161 CLR 513.

26 Id at 518-519. My emphasis.

> In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. *According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal.*

Even where our conception of appeal is so qualified, the appeal amounts to something more than review and lies somewhere between the unqualified appeal and review.

The precise nature of High Court appeal is important in terms of Professor Jolowicz's discussion as he identifies the purpose of 'pure' appeal in serving the private interests of litigants, whereas the purpose of review is to serve public interest by clarifying and developing the law. If this identification of purpose is to be accepted, it would follow that the purpose of High Court appeals serve both public and private interests. However, Professor Jolowicz was writing with reference to appeals in England and France and his remarks were directed at appeals to the Court of Appeal in addition to the House of Lords.

For my part, the purpose of appeals to the High Court is primarily to serve public interest as identified above. Section 35A shows this by the requirement that the Court, in considering whether to grant or refuse special leave, shall have regard to whether the proceedings involve a question of law that is of public importance or a question of law in respect of which a High Court decision is required to resolve differences. The same may be said about the interests of the administration of justice ground in s 35A(b), though that ground may be made out in a particular case without having more general ramifications.

These provisions do not rule out grant of special leave for the purpose of ventilating an issue of fact. Consideration of what in substance is an issue of fact or a mixed question of law and fact may, in a very exceptional situation, be of general importance. The High Court's decision in *Hatzimanolis v ANI Corporation Ltd*,[27] might perhaps be regarded as an example. The decision in that case had a general impact on how the words 'out of or in the course of employment'

27 (1992) 173 CLR 473. But the case can also be regarded as involving an error of principle on the part of the court below in its approach to an issue of fact. That is how Mason CJ, Deane, Dawson and McHugh JJ dealt with it (at 482). They said: 'Consequently, the rational development of the law requires a reformulation of the principles which determine whether an injury occurring between periods of actual work is within the course of the employment so that their application will accord with the current conception of the course of employment as demonstrated by the recent cases ...'

in workers' compensation statutes should be applied to injuries sustained in an interval or interlude occurring within an overall period or episode of work.

Likewise, the Court might grant special leave to appeal on an issue of fact when the resolution of that issue is so contrary to the evidence as to engage in a significant way the interests of justice in the particular case. A finding of fact might be so outrageous as to call for intervention. And, of course, the Court could grant special leave because the way in which an issue of fact was resolved raises an important question of principle. A primary judge might 'misdirect himself' in relation to the finding in such circumstances as to raise such a question. And a question of principle might arise by means of a challenge to an existing principle or authority, such as *Warren v Coombes*.[28]

The Professional View of Special Leave

The professional view of special leave applications has a somewhat different focus. Lawyers, like the parties, tend to see the special leave application as no more than an extension of adversarial litigation. They recognise that special leave will be granted only if the public interest considerations, such as public importance and the interests of the administration of justice, are shown to arise. Lawyers tend to think that if arguable error exists - which they equate with miscarriage of justice - then an appeal should lie. The reality is that the High Court could not cope with the volume of work that such an approach would generate. There may well be a sentiment that the Court should be less reluctant to grant applications. An increase in the volume of the Court's work would ensue and result in the Court spending less time on constitutional cases and the appeals it hears. In turn, this would impact upon the time for consideration of important cases, and for scholarship on which the Court's reputation depends. In one sense the choice is between thorough consideration of selected cases leading to closely reasoned judgments, and shorter consideration of a larger number of cases leading to a briefer statement of reasons. In view of the importance of the major cases, the second approach is not easy to justify.

Balancing the Public and Private Interests

In granting special leave, the Court often singles out one or more questions, being questions of public or general importance, from all

28 (1979) 142 CLR 531.

the grounds which an applicant desires to argue on appeal. The professional view of special leave, as an extension of the litigation, is somewhat resistant to the notion that one question only should be separated out from the other issues for the purposes of appeal. This view is taken as the outcome of the appeal might conceivably be different if other questions were taken on appeal. Here again, there is some tension between the public interest, which the appeal is designed to serve, and the private interests of the parties.

It goes almost without saying that, in dealing with an application, the Court is concerned to do justice between the parties. When appropriate, the Court will impose conditions on the grant of leave, or put a party on terms. The Court sometimes requires an applicant, as a condition of granting special leave, to undertake not to seek costs in relation to some part of the proceedings. The Commissioner of Taxation, or a public authority which seeks special leave in order to clarify a principle which will apply in other cases, may be required to pay the respondent's costs of the appeal in any event. Such a requirement may be imposed by undertaking, or by an order making it a condition of the grant of special leave.

The Nature of the Determination

While the exercise of the jurisdiction to grant or refuse special leave is an exercise of judicial power, the criteria applied are not precise. In this respect, the Court does not differ from other constitutional courts or ultimate courts of appeal. In my experience, judges of such courts in other countries acknowledge the generality of the criteria and the difficulty of converting them into precise rules. This is only to be expected, when the task confronting the Court is to identify cases which are worthy of its attention as an appellate court. Instead of applying precise rules, the Court, in deciding to grant or refuse special leave, is therefore required to make a sound discretionary judgment. In doing so, the Court may be called upon to consider any one or more of a number of grounds which, in given circumstances, may constitute a ground for refusing an application. I shall consider these grounds below.

Grounds for a Grant of Special Leave

1 Question of Law of Public Importance

Question of principle or application of principle

The majority of successful applications for special leave raise a question of law which is of public importance. They are cases in which the

question of how the principle should be formulated is at stake, rather than the question of how the principle should be applied. A distinction is therefore drawn between the existence or formulation of principle, on the one hand, and, on the other, the application of principle to the facts. That is not to say that, in exceptional circumstances, an application of principle to the facts might not qualify for special leave. In some situations, the application of principle to a set of facts, might give much-needed guidance to other courts. The decision to grant special leave in *Louth v Diprose*,[29] the case on unconscionability, could be regarded as such an instance.

Statutory interpretation

In terms of general importance, there is a tendency to regard questions of interpretation of statutes having a wide-ranging application, particularly when they confer rights, as having a greater claim to the mantle of public importance, than questions relating to the principles of private law. Likewise, there is a tendency to believe questions of public law have a greater claim to public importance than private law. I have heard it said that emphasis on public importance, in the context of special leave applications, has led the High Court to neglect private law and, consequently, the Court is increasingly concerned with questions of an administrative kind. For my part, I do not consider this criticism to have a sound base. Evidently, the critic does not include the Commonwealth Law Reports in his reading list. Yet it is not surprising that, from the perspective of public importance, the Court regards questions of statutory interpretation having a wide-ranging impact, as having a stronger claim to public importance than many questions which arise in relation to the well-settled principles of private law. Although dedicated equity practitioners and common lawyers regard questions of doctrine and principle as of pre-eminent importance, they do not always match the public importance of questions arising on statutes.

That a question of statutory construction is one which would arise in a number of cases, does not mean it would necessarily attract a grant of special leave. If the question raises no general principle of statutory construction and the arguments are evenly balanced, there is no compelling reason why the High Court should entertain it. From the perspective of public interest rationale, which underlies the existence of the second and final appeal, the High Court would not advance that interest by dealing with the appeal.

29 (1992) 175 CLR 621.

The endless questions which arise under workers' compensation legislation illustrate the point. Many queries raise no question of general principle, and the answer is finely balanced. On the other hand, some questions are more fundamental and have a more profound impact on the operation of workers' compensation legislation and the rights of individuals. A factor which should not be overlooked is that workers' compensation legislation is constantly and regularly amended. Income tax legislation is similar. In these areas, judicial interpretation is under continuing executive and legislative review.

Some statutory regimes are specialist in character and are applied by specialist courts and tribunals; for example, planning and licensing legislation. Such regimes do not often attract a grant of special leave.[30] Questions of interpretation which arise are frequently technical or specialist in character. A consideration of these questions would require a thorough understanding of the way in which specialist tribunals or courts have built a body of law on the foundation of the statute, and might even set that body of law at risk. For obvious reasons, the High Court's intervention in fields of specialist interpretive endeavour is not likely to serve the public interest, particularly in light of the expertise or experience held by members of the specialist court or tribunal, which is not shared by the Justices of the High Court. It will, of course, be otherwise if the question sought to be agitated has some fundamental, or more general, significance.

A similar approach has been taken to copyright questions. In *Interlego AG and Lego Australia Pty Ltd v Croner Trading Pty Ltd*,[31] it was said that 'unless there are special circumstances in the case, the interpretation and application of the provisions of the *Copyright Act* are matters which ought ordinarily to be determined by the Federal Court'.

So also with taxation appeals. Special leave will only be granted in exceptional circumstances where a question of fundamental principle arises. As the Federal Court is, in ordinary circumstances, the final court of appeal in tax matters, a question of statutory construction involving no question of general principle may not be enough.[32] Likewise, the Supreme Court is the proper tribunal to consider whether an applicant is suitable for admission as a barrister.[33]

30 *Courtney Hill Pty Ltd v South Australian Planning Commission* (1991) 65 ALJR 348.

31 (1993) 68 ALJR 123 at 123.

32 *Deputy Commissioner of Taxation v NSW Insurance Ministerial Corporation* (1994) 68 ALJR 616.

33 *Wentworth v NSW Bar Association* (1994) 68 ALJR 494.

Public importance of the case

The specific reference to 'public importance' in the context of a 'question of law', should not be taken as exhausting or confining the relevance of the element of 'public importance' to a principle of law. There are bound to be some cases of considerable public importance where the question of law, though strongly arguable, is not inherently of great importance when considered in isolation from the facts of the case. Such a case may be deserving of special leave, if only on the footing that there is a general expectation the Court should resolve the issue. The question in its setting is then one of public importance and answers the statutory description. In very exceptional circumstances, what is in essence a question of fact may warrant the grant of special leave on the ground of public importance.

Public importance in one State only

It is sometimes urged that public importance means 'of importance to the Australian public', and that therefore a question which is of public importance in one State only does not surmount the public importance barrier. While the fact that public importance is limited to one State only is an important matter for consideration, it may be that the importance of the question in that State is so great that special leave should be granted. In *Crump v The Queen*,[34] the Court said that it:

> would not ordinarily regard sentencing in criminal cases (which raises considerations of a local character) as being of such exceptional public interest as to warrant the grant of special leave... Still less will it grant leave in a case turning on the construction of s 13A of the *Sentencing Act* 1989 (NSW) - a provision with no precise counterpart in other States, and application of which is properly to be resolved by the courts of New South Wales.

Limitation imposed by State law on appeal to the Full Court of the Supreme Court of a State

From time to time, applications have been made for special leave to appeal from the decision of a Judge of a Supreme Court when, by State law, that decision is final and conclusive. In earlier days, the High Court looked on these applications with more favour than it does today. Generally speaking, if the decision under State legislation lacks the public importance to qualify for appeal to the Full Court or Court of Appeal of the State, then it lacks the public importance required for a High Court appeal.

34 (1995) 69 ALJR 570 at 570.

Public importance and contract cases

I sense that commercial lawyers are somewhat disappointed that the High Court has not granted special leave more often in contract cases. The problem is that most contract cases turn on a question of construction of the contract.[35] Unless the contract is a standard form contract, the decision will not have an impact beyond the immediate parties to the litigation. Further, even if it is a standard form contract, it may not involve a question of general principle. Difficulties therefore exist in satisfying the 'public importance' criterion in contract cases, and subsequently relatively few pure contract cases have gone on appeal to the High Court since 1984. Cases in which leave has been granted frequently involve an equitable rather than a contract principle: see *Taylor v Johnson*,[36] *Commercial Bank of Australia v Amadio*,[37] *Waltons Stores (Interstate) Ltd v Maher*[38] and *Foran v Wright*.[39]

In the past, an unsuccessful litigant in a commercial case had a stronger prospect of appealing to the High Court and to the Privy Council, when an appeal lay as of right subject to a pecuniary limitation. That limitation did not amount to a significant bar in the large commercial case. For some time after the introduction of the present regime in 1984, an applicant would rely on the magnitude of the amount in issue or the value of the property in issue as a reason for granting leave, and some reliance is still placed on it as a consideration which should weigh with the Court. It would be going too far to say that it is an irrelevant consideration, yet it is not an influential factor in itself. If the case lacks an element of public importance, the magnitude in money terms of the dispute will not bridge the gulf.

The question is not sufficiently 'mature' or 'ripe'

I doubt whether this ground has yet been adopted by the High Court. It is a ground taken by the Supreme Court of the United States, for refusing a *certiorari* petition when the Court considers that insufficient is known about the operation of a new statutory provision or principle to enable the Supreme Court to give an informed decision. Further experience of the operation of the provision or principle would enable the Court to decide whether to grant the petition. Refusal of special leave on this ground entails a risk that an approach,

35 *Rockwell Graphic Systems Ltd v Fremantle Terminals Ltd* (1991) 65 ALJR 514.

36 (1983) 151 CLR 422.

37 (1983) 151 CLR 447.

38 (1988) 104 CLR 387.

39 (1989) 168 CLR 385.

which later might be held to be erroneous, will become entrenched in the meantime.

2 Conflicting Decisions

From time to time, but by no means frequently, the existence of conflicting decisions of different courts generates the grant of special leave. The existence of such a conflict may fail to do so simply because the Court considers the decision under challenge to be correct, or not attended with sufficient doubt to justify a grant of special leave. Conflicting decisions within a particular court raises different considerations. I have not understood why courts in the hierarchy below the High Court did not take steps to resolve such conflicts within their own jurisdiction, by convening a court of five judges to resolve internal conflicts. That is now happening. Perhaps, in earlier times, an expectation existed that the High Court should, or would, resolve the conflict. Some courts may also have felt an obligation to support previous decisions. Why an intermediate court of appeal should bind itself inflexibly, to not reconsider its prior decisions, is not easy to understand. To bind itself in that way appears to be a departure from the responsibility of an appellate court to monitor the rules of judge-made law, including interpretive decisions on statutes. Naturally, an intermediate appellate court will not reconsider its previous decision unless there are very strong reasons to do so.

3 The Interests of the Administration of Justice

Cases which raise questions concerning maintenance of procedural regularity come within this ground. They may also raise a question of public importance. However, it does not follow that special leave will be granted simply because there appears to be a more arguable possibility that a rule has not been complied with. Something more needs to be shown - a distinct possibility or likelihood that there has been a significant departure from an important procedural rule.

This ground is not confined to departures from procedural rules. It is wide enough to embrace any error which goes to the administration of justice, generally, or in the particular case. Again, that does not mean that the existence of a more arguable possibility of error is enough. It must appear that there is such a likelihood of error as to enable one to say that, in the interests of justice, special leave should be granted. This ground does not have the same force in civil applications as it has in criminal special leave applications. It will be convenient to deal with that aspect below.

Grounds for the Refusal of Special Leave Applications

1 Not Arguable

The Court will refuse an application when the point, or the case, is not sufficiently arguable. Refusal may be based on any one of the following grounds:

- the decision below is correct;
- the decision below is not attended with sufficient doubt to justify the grant of special leave; or
- the decision below does not enjoy sufficient prospects of success to justify the grant of special leave.

The Court will occasionally, in stating the ground, refer to 'the *actual* decision'. This statement covers cases in which, although the Court may have some doubt about the reasons given by the court below, or some aspect of them, it nonetheless considers that the decision itself is not sufficiently arguable to justify an appeal. In more exceptional cases, the Court may say that the case does 'not enjoy sufficient prospects of *ultimate* success to justify the grant of special leave'. This ground signifies that, while the proposed appeal may succeed, the applicant's prospects of ultimate success in the litigation are not sufficiently strong.

In a different context, special leave to appeal for the making of orders, which might be overridden administratively, will be refused.[40]

The Court has, on occasions, remarked that the refusal of special leave is not to be taken as indicating agreement with all that was said by the court below in its reasons for judgment. The remark suggests that there is doubt about the accuracy of a passage in the reasons for judgment.

In refusing special leave, the Court does not ordinarily identify the relevant passage in the judgment of the court below, which gives rise to doubt about its correctness. It might be suggested that the relevant passage should be identified and that, in appropriate cases, the Court should, in refusing special leave, state why the passage is incorrect. There are two difficulties with that approach. Firstly, the Court has not had the advantage of comprehensive argument. Secondly, as there is no appeal, the judgment below cannot be overruled. Indeed, if the judgment below is that of an intermediate court of appeal, it remains authoritative in courts lower in the hierarchy. But, any statement of

40 *Parker v Taylor* (1994) 68 ALJR 496 (where the application sought in substance to challenge a committal of the applicant for trial on a criminal offence).

principle made by the High Court in refusing special leave, especially in a reserved judgment, will be followed in later cases.[41]

The High Court has also remarked on some occasions that refusal of special leave is not necessarily an endorsement of the decision, or on the reasons given, by the court below.

2 Does Not Raise a Question of Principle or a Question of Sufficient Public Importance

This ground has been covered earlier. It is often invoked when the critical issue is a matter of fact or mere application of principle. A question which is otherwise of public importance may cease to be so if legislation has been enacted providing for a different legal approach to the problem in future cases.

3 Not a Suitable Vehicle for the Determination of a Question of Principle

This ground covers a variety of reasons which may render the case unsuitable for that purpose. The case may be unsuitable due to a failure to clearly raise the question of principle in the courts below,[42] having regard to the way in which the case was conducted, or for some other reason. Unsuitability may also be based on confrontation of applicant with the necessity of overturning adverse findings of fact in order to raise the question of principle, or because the case is too complex, or because it would be inequitable, when the litigation is viewed as a whole, to excise from it the one question of principle for determination by the High Court. Occasionally, absence of appropriate findings of fact render a case unsuitable for the purpose of determining the question of principle which the applicant seeks to raise. In other instances, the question of principle is but one of a number of questions, in circumstances where an adverse answer to any one of them would resolve the case against the applicant.

Another example sometimes encountered is where an applicant seeks to appeal directly to the High Court from a decision at first instance, on the ground that a very important question is involved. The High Court takes the view that it is entitled to the benefit of consideration of a question by an intermediate court of appeal. It may be otherwise however, if the relevant intermediate court of appeal has already de-

41 See, for example, the statements in *Bahri Kural v The Queen* (1987) 162 CLR 502 at 504 which were followed in *Saad v The Queen* (1987) 70 ALR 667 at 668; and see *Wilde v The Queen* (1988) 164 CLR 365 at 372, 381.

42 *Wenpac Pty Ltd v Allied Westralian Finance Ltd* (1992) 67 ALJR 165.

cided the point conclusively and there is no reason to regard it as willing to reconsider the point.

4 The Point Relates to Practice or Procedure

In general, questions relating to practice and procedure lie within the province of the relevant court below. The High Court is reluctant to grant leave in such cases, though in special circumstances, where the point is sufficiently important, the Court will do so: see for example *Knight v FP Special Assets Ltd*,[43] *Cachia v Hanes*,[44] and *Carnie v Esanda Finance Ltd.* [45]

5 The Proceedings are Interlocutory

Only in rare circumstances will special leave be granted in an interlocutory matter,[46] notwithstanding that the matter itself may be of general importance.[47]

Considerations Applicable to Criminal Special Leave Applications

In *Liberato v The Queen*,[48] a majority of the Court held that the High Court, not being a court of criminal appeal, will not grant special leave in criminal cases unless some point of general importance is involved which, if wrongly decided, might seriously interfere with the administration of criminal justice. The majority considered that it would not accord with the practice of granting special leave in a case where no question of law is involved and the Court is merely asked to substitute, for the view taken by an appellate court below, a different view of the evidence and of the summing-up.

It is doubtful whether the subsequent course of decisions entirely accords with what was said in *Liberato*. Special leave has been granted, pursuant to s 35A(b), where there was a real possibility that, by reason of a misdirection by the trial judge, a jury convicted on the basis of a choice between the Crown and the defence witnesses, without being satisfied of the ingredients of the offence charged. In other words,

43 (1992) 174 CLR 178 (discretion to award costs against persons not being parties to the litigation, who conduct the litigation).

44 (1994) 179 CLR 403 (claim by a successful litigant in person for inclusion in his costs for time spent on preparation of litigation).

45 (1995) 182 CLR 398 (making of representative orders).

46 *Wenpac Pty Ltd v Allied Westralian Finances Ltd* (1992) 67 ALJR 165.

47 *Trade Practices Commission v Santos Ltd* (1992) 67 ALJR 166.

48 (1985) 59 ALJR 792.

special leave has been granted where there was a real possibility of miscarriage of justice.

On the other hand, special leave has been refused when the Court of Criminal Appeal was divided, but where the division turned only on assessment of evidence and directions to the jury, not on matters of principle.[49] More recently, the Court has emphasised that it is not a court of criminal appeal.[50] For that reason, an application based on the ground that a criminal verdict is unsafe and unsatisfactory is unlikely to succeed.[51] However, such an application may succeed, if it appears that a court of criminal appeal has failed to review the conviction on that ground, in conformity with the relevant principles[52] governing review by the court of criminal appeal.

There is a general rule of practice or discretion not to grant special leave to appeal from a judgment regularly and correctly pronounced when the only valid ground of appeal is raised for the first time in the High Court. However, there are some cases in which it is expedient to allow a point to be argued on appeal which was not argued in the courts below.[53]

In determining whether special leave to appeal against a conviction should be granted, on the ground of miscarriage of justice arising from a misdirection, the Court will consider whether the applicant sought a re-direction at the end of the trial judge's summing-up, and the way in which the trial was conducted. A misdirection on the particular facts of a case will not in itself attract a grant of special leave.[54] Difficulties which can arise in determining whether an alleged misdirection should attract a grant of special leave, are illustrated by *Marwey v The Queen*.[55]

Special leave will not usually be granted to canvass a question of law that arises at an interlocutory stage, nor to consider a question of law, decided by an intermediate court of appeal on an application for judicial review of a matter of procedure to be followed in the primary tribunal.[56] Likewise, special leave will not be granted, other than in an exceptional case, in relation to a question agitated under the *Adminis-*

49 *Baraghith v The Queen* (1991) 66 ALJR 212.
50 *Warner v The Queen* (1995) 69 ALJR 557.
51 Ibid.
52 *Morris v The Queen* (1987) 163 CLR 454.
53 *Pantorno v The Queen* (1989) 63 ALJR 317 at 321.
54 *Cannon v The Queen* (1994) 69 ALJR 114.
55 (1978) 52 ALJR 211.
56 *Goldsmith v The Queen* (1993) 67 ALJR 513.

trative Decisions (Judicial Review) Act 1977 (Cth) arising from the applicant's committal for trial.[57] The Court has repeatedly drawn attention to the undesirability of fragmenting the criminal process by granting special leave to appeal from decisions which are interlocutory.[58] It is important that delay and dislocation of arrangements made for trial should be avoided. In *Yates v Wilson*,[59] the Court accepted the proposition that it would require an exceptional case to warrant the grant of special leave to appeal, in relation to the review by the Federal Court of a magistrate's decision to commit a person for trial. That is particularly so when the Court's decision may be disregarded administratively, as it could be by the Director of Public Prosecutions. In that case, Brennan CJ pointed out that the jurisdiction of the High Court is not fitted to the supervision of the interlocutory processes of the criminal trial.

Special leave to appeal should be granted to the Crown in a criminal matter 'only in very exceptional circumstances',[60] especially in cases where orders appealed from result in the quashing of a conviction and the entry of a verdict of acquittal.[61]

Sentences

An application merely asserting that a sentence imposed on appeal is excessive, will not usually attract a grant of special leave.[62] The Court has consistently expressed its reluctance to entertain appeals in sentencing matters and will only do so where a matter of principle is involved.[63] However, the Court does take up sentencing matters when there is an important question concerning the interpretation of legislation relating to sentencing, such as the minimum-term provisions. The proper approach of parity of sentencing, in cases concerning joint offenders,[64] and to the question of preventive detention,[65] are matters of principle which the Court has dealt with.

57 *Yates v Wilson* (1989) 64 ALJR 140.

58 Ibid.

59 Ibid.

60 *R v Lee* (1950) 82 CLR 133 at 138; *R v Benz* (1989) 168 CLR 110 at 112, 120, 131, 146.

61 *The Queen v LJM* (1994) 68 ALJR 208.

62 *Lowe v The Queen* (1984) 154 CLR 606.

63 *Radenkovic v The Queen* (1990) 65 ALJR 72 at 76-77; *Bini v The Queen* (1994) 68 ALJR 859.

64 *Lowe v The Queen* (1984) 154 CLR 606.

65 *Veen v The Queen (No 1)* (1979) 143 CLR 458; *Veen v The Queen (No 2)* (1988) 164 CLR 465.

Grant of Special Leave Subject to Revocation

In some cases, a satisfactory conclusion on the materials cannot be easily reached as to the suitability of the case as a vehicle for the determination of the point of principle which the applicant seeks to present. The Court has on several occasions granted special leave but in doing so has announced that on the hearing of the appeal it will have a better opportunity on a more complete examination of the materials in the appeal book to consider the case. With that prospect in view, the Court has stated that the grant might be subject to review or revocation when the appeal comes on for hearing.

There are a number of reported instances of the Court revoking the grant of special leave after hearing argument on an appeal, without having made a preliminary announcement calling attention to that possibility when the grant was made.

Conclusion

I have not discussed the current procedure regulating the presentation and hearing of special leave applications. Written submissions are required in advance of the hearing, and a time limit of twenty minutes is imposed on each party. The procedure has facilitated the consideration of applications and has enabled the court to deal with them more effectively.

However, the number of applications has steadily increased. The reading and consideration of the papers occupies a larger proportion of the Justices' time. Ultimately, a continuation of the trend may cause the Court to consider dispensing with oral argument, which can be of benefit. However, doing so will not alleviate the burden of time taken in reading materials, which is an inevitable element in special leave determinations.