SPECIAL LEAVE TO APPEAL TO THE HIGH COURT: WHICH APPLICATIONS ARE MOST LIKELY TO BE GRANTED LEAVE?

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This article – 'Special leave to appeal to the High Court: Which applications are most likely to be granted leave?' – first appeared in Precedent, the journal of the Australian Lawyers Alliance, issue 158, published in June 2020 (Sydney, Australia, ISSN 1449-7719). It has been reproduced with the kind permission of the ALA. For more information about the ALA, please go to: www.lawyersalliance.com.au.

The High Court of Australia is the final appellate court. It has ultimate authority on the interpretation and application of all law in Australia, across state and federal systems of government. The workload of the High Court is 'divided approximately into one third criminal law, one third civil/private law, and one third public/government law'.[1] In each of these areas, the Court sits at the apex in the judicial development of substantive law. This is the law-making role of the Court.

The bulk of the High Court's work is appellate.[2] The right to be heard on appeal is discretionary[3] and the High Court filters special leave applications under s35A of the *Judiciary Act 1903* (Cth).[4] While figures vary from year to year, typically around 500 applications for special leave to appeal are made annually.[5] From those, roughly 10% are selected for appellate hearing so that the High Court manages its workload to determine around 50–60 appeals each year, in addition to cases it hears under the Court's original jurisdiction.

As finite resources require the High Court to allocate its attentions to only the most significant legal questions, the framework for the selection and hearing of special leave applications will necessarily have an impact on the wider legal system. Because the High Court is the final appeal court for all Australian jurisdictions the special leave applications granted are critical to the development of substantive law.

This article discusses the findings of a recent study of special leave applications determined by the High Court.[6] The study identified factors which may render it more likely that special leave will be granted. Of the 783 special leave applications determined by the High Court between March 2013 and February 2015 (the study period), 80 were granted, while 703 were refused. The findings which have particular relevance for appellate lawyers are highlighted below.

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We thank Professor James Brown, ABS Professor of Official Statistics, Dr Adel Rahmani and Dr Tapan Rai, and all of UTS for their interest in our research; data scientists Passiona Cottee and Rory Angus for data analysis; and Ellen O'Brien for research assistance. We thank the High Court for cooperation with this study in the provision of electronic data from its annual reports. Any errors are our own.

This article provides an overview of the legislative criteria for the grant of special leave, outlines the study's methodology and findings, and considers the correlation between specific attributes of special leave applications and success rates.

BACKGROUND: s35A OF THE *JUDICIARY ACT* AND JUDICIAL DISCRETION

As observed above, the bulk of the High Court's work is appellate work. The High Court selects cases it will hear on appeal according to s35A of the *Judiciary Act*. The special leave process in s35A has been described by the High Court itself as 'unusual'.[7] The provision states that 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 directs that the Court '*shall* have regard' to the public importance of the question of law and whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court. While s35A allows the High Court to 'choose the cases which it entertain[s], and thus influence the direction and pace of legal change',[8] our study provides evidence that the application of the 'public interest' test in s35A of the *Judiciary Act* is constrained by a range of factors outside of the High Court's control.

METHODOLOGY

Analysis of special leave applications is difficult. This study required a specially constructed data set consisting of all 783 special leave applications disposed of by the High Court between March 2013 and February 2015. This study period was selected because during this period:

- the members of the High Court remained constant;[9]
- the number of applications could be coded manually;[10] and
- during this period the results of special leave applications were publicly accessible on the High Court's website[11] and the decisions on the AustLII database.[12]

The data set was coded by the authors manually without machine learning or other digital assistance. It reflected all information which could be extracted and coded from publicly available records of special leave dispositions and transcripts, with 50 plus variables being coded. These variables included, for example: legal practice categories; outcome; court appealed from; jurisdiction; and characteristics of parties and their lawyers. This produced approximately 40,000 pieces of information. Analysis of the data was undertaken by the authors with interdisciplinary assistance.[13] The annual reports of the High Court publish data on special leave applications; this study supplements that data.

THE STUDY RESULTS

The average success rate of special leave applications was a little over 10% for all applicants. This means that around one in ten applications were granted. Certain features were more prominent in successful applications. The discussion below provides a general guide, based on the study's data, as to which cases had the best chances of a leave application being granted during the study period.

Which practice areas were most successful?

All special leave applications (783) were classified as either civil or criminal applications. While the margin is slight, the success rate for special leave applications in criminal cases was higher than for civil cases (14.3% and 11.7% respectively). There were many more civil special leave applications than criminal (622 or 79.4% and 161 or 20.5% respectively). The largest category of civil applications was immigration (168 or 21.5%).[14]

Table 1 sets out the top ten civil practice areas where special leave to appeal was granted during the study period.[15] The most successful practice area was corporations law where a surprising 50% of applications were granted. Practice areas with slightly less but comparatively large success rates were statutory interpretation and equity (35.3% for both); intellectual property (28.6%); followed by taxation (20.8%). While there were two practice areas that were more successful (100% success rate for both), the number of applications were extremely low: native title (two) and admiralty law (one).[16]

Table 1. Civil practice areas most often granted special leave to appeal (top 10)

Civil practice areas	All cases (n)	Leave granted (%)	Leave granted (n)
Native title	2	100	2
Admiralty	1	100	1
Corporations law	16	50	8
Statutory interpretation	17	35.3	6
Equity	17	35.3	6
Intellectual property	7	28.6	2
Taxation	24	20.8	5
Insurance	5	20	1
Constitutional law	6	16.7	1
Competition law	7	14.3	1

Table 2. Civil practice areas least often granted special leave to appeal

Civil practice areas	All cases (n)	Leave granted (%)	Leave granted (n)
Tort	71	7	5
Civil procedure	69	4.4	3
Immigration	168	2.4	4
Contract	34	–	–
Family law	34	–	–
Property	22	–	–

Estate law	10	–	–
Bankruptcy	7	–	–
Discrimination	7	–	–
Evidence	4	–	–
Social security	3	–	–

The most unsuccessful practice areas in terms of numbers of applications made and percentages granted were contract law and family law, as shown in Table 2. In both of these practice areas all 34 special leave applications were refused. Tort law was another area with a large number of applications and a low success rate: of 71 applications, only five (or 7%) were granted special leave. Immigration cases were also extremely unlikely to succeed; Special leave was only granted in 2.4% of immigration cases. This figure is remarkable given the large number of applications for special leave in these cases. Of the 168 immigration applications in the study (seven more than in criminal law matters), only four were granted special leave. This extremely low success rate is likely to be related to the fact that most applicants in immigration matters were self-represented; and the difficulties applicants faced in satisfying the criteria in s35A of the *Judiciary Act* where their cases had already been administratively and judicially reviewed.[17]

Which types of applicant were the most successful?

The applicants most likely to be granted special leave were corporations, along with government and public authorities, as detailed in Table 3.[18]

Table 3. Grants of special leave to appeal by type of applicant

Applicants	**Applications by practice areas (n)**	**Leave granted (n)**	**Leave granted – overall (%)**	**Leave granted – civil matters (%)**
Individuals	642 (326 civil; 153 criminal; 163 immigration)	40 (16 civil; 22 criminal; 2 immigration)	6.2	5 (excl. immigration) 3.7 (incl. immigration)
Corporations	97 (all civil)	21	21.6	21.6
Government and public authorities	38 (28 civil; 5 criminal; 5 immigration)	18 (15 civil; 1 criminal; 2 immigration)	47.4	53.6 (excl. immigration) 51.5 (incl. immigration)
Crown	3 (criminal)	–	–	–
Sovereign states	1 (civil)	–	–	–

Ships	1 (civil)	1	100	100
Association	1 (civil)	–	–	–

Corporations succeeded in 21.6% of their applications, all in civil cases. Government and public authorities succeeded in 51.2% of civil applications (including immigration matters) and 53.6% of civil applications (excluding immigration matters), and 20% of criminal applications; an average success rate of 47.4% across all areas of practice.[19]

Government and corporations would be well-resourced and have the benefit of timely expert legal advice and representation throughout the litigation process, so their success rates are perhaps unsurprising. There is considerable published research on 'party capability' theory, which supports the conclusion that litigants who are 'repeat players' and have significant resources are more successful than others.[20]

Individuals significantly outnumbered all other types of applicants for special leave. They applied for 82% of all special leave applications (642 of 783). This may be partly due to the number of applications made in immigration and criminal cases. However, even excluding these, individuals significantly outnumbered corporate and government applicants in civil matters (326 individuals as against 125 corporate and government applicants combined). Yet, while the number of applications by individuals is large, their overall success rate is low. Individual applicants succeeded in only 5% of their applications in civil matters (excluding immigration matters) and in 6.2% of their applications across all practice areas.

The age and gender of individuals is also a relevant issue. Women and children made very few applications for special leave to appeal compared with adult males. Women made up only 18% of individual lead applicants during the study period, with child applicants making up 1.7%.[21] These findings accord with previous research on the under-representation of women and children in High Court negligence appeals.[22]

Which type of counsel were most successful?

Special leave applications heard orally with a male senior counsel (SC) or Queen's counsel (QC) as lead counsel were more likely to succeed.[23]

There were no successful special leave applications determined on the papers in the study period. Of the 783 applications, 336 matters were heard orally. Of these, 80 (or 23.8%) were successful in obtaining a grant of special leave. Senior or Queen's Counsel were briefed as lead counsel by the first applicant in 269 or 80.1% of applications heard orally . Senior or Queen's counsel were successful in 27.1% of the applications in which they appeared as lead counsel for the applicant, whereas junior counsel were successful in only 10.6% of the cases in which they appeared as lead counsel for the applicant.[24]

The figures for respondents' counsel are very different, because the success rates were not weighted to adjust for the probability that a barrister is more likely to succeed if appearing for a respondent

where more than 85% of cases are refused leave. For respondents, a refusal of a grant of special leave was counted as a 'success'.

Table 4. Grants of special leave to appeal by counsel type

Counsel type – applicant	Applications heard orally (n)	Counsel type (%)	Leave granted[25] (n)	Leave refused (n)	Leave granted – overall (%)	Leave granted – by counsel type (%)
Applicant without barrister	1	0.3	–	1	–	–
Applicant without QC/SC	66	19.6	7	59	8.8	10.6
Applicant with QC/SC	269	80.1	73	196	91.3	27.1
Total	**336**		**80**	**256**		
Counsel type – respondent	**Applications heard orally (n)**	**Counsel type (%)**	**Leave refused (n)**	**Leave granted (n)**	**Leave refused – overall (%)**	**Leave refused – by counsel type (%)**
Respondent without barrister	3	0.9	1	2	0.4	33.3
Respondent without QC/SC	58	17.3	53	5	20.7	91.4
Respondent with QC/SC	275	81.9	202	73	78.9	73.5
Total	**336**		**256**	**80**		

The study confirms gender bias in briefing counsel to appear in oral hearings of special leave applications. The under-briefing of female counsel in oral applications was clear, as detailed in Table 5.

Table 5. Grants of special leave to appeal by gender of lead counsel

Lead counsel – applicant	Appearances (n)	Leave granted (n)	Leave granted – same gender (%)	Leave granted – any gender (%)	Oral hearings[26] (%)
Male for applicant	311	76	24.4	22.7	92.6
Female for applicant	24	4	16.7	1.2	7.1

Total	335	80		23.88	99.70
Lead counsel – respondent	**Appearances (n)**	**Leave refused (n)**	**Leave refused – same gender (%)**	**Leave refused – any gender (%)**	**Oral hearings (%)**
Male for respondent	310	234	75.5	70	92.3
Female for respondent	23	21	91.3	6	6.9
Total	**333**	**255**		**76**	**99.11**

Overall, the number of female barristers appearing as lead counsel (that is, with a speaking role) for applicants and respondents was 47, representing just 7% of the total number of lead advocates (668). Only 24 applications (7.1% of the 336 oral hearings) had a female barrister appearing in the lead advocate role for the applicant and there were 23 matters where a female barrister appeared in the lead advocate role for the respondent (6.9% of all oral hearings). The success rates for cases in which female counsel appeared in the lead role for the applicant were almost 8% lower than in cases where the applicant's lead counsel was male. The female lead counsel success rates when appearing for applicants – 16.7% (of the cases in which female leaders appeared) – is well below the overall success rate of 23.8% for all applications heard orally.[27]

The most frequently appearing 12 counsel were all male. They appeared in 142 cases out of the 336 cases heard orally, that is in 42.3% of all oral hearings.

There were also significant variations between male and female counsel in terms of the legal practice areas in which they were briefed to appear:

- Of the 28 legal practice areas that were coded for the study, female lead counsel appeared in only ten practice areas. The most frequent practice area in which both male and female counsel were briefed as lead counsel was criminal law.[28]
- Female counsel were not briefed in a single corporate law case, yet there were 11 oral hearings in this area of law. As noted above, this practice area was also the most successful.
- Male lead counsels' second and third most common practice areas were tort (97%) and contract (100%), respectively. Female lead counsels' second and third most common practice areas were immigration (19%) and administrative law (15%).
- Female counsel were seriously under-represented in contract cases: 19 were heard orally, yet no female leading counsel appeared and only two 'secondary' female counsel were briefed in 'non-speaking' roles in those matters.[29]
- There were 13 equity cases heard orally, but only four secondary female briefs in those matters in non-speaking roles.

CONCLUSION

The special leave mechanism has been described as 'imperfect'.[30] This imperfection is traditionally attributed to the practice of filtering applications as they come in rather than allowing for a

comparative process whereby the Court could select the strongest and most meritorious claims for its attention.[31]

This study highlights a further imperfection. The High Court, while having considerable control over its own workload through s35A, simultaneously has no control of the litigants that apply for special leave to appeal.

In this study, disparity is seen across three aspects of special leave applications. First, certain types of litigant are more likely to be granted special leave to appeal. Secondly, cases in particular legal practice areas are more likely to be granted special leave. Finally, litigants who are represented by highly experienced senior male advocates are more likely to be successful in obtaining special leave. This study confirms a systemic bias towards government and corporations as litigants, corporations law and criminal law as practice areas suitable for appellate consideration, and male SC and QC advocates.

In 2016, the High Court of Australia announced significant changes to its rules and internal procedures which govern the filing and determination of applications for special leave and leave to appeal.[32] These changes mean that a study such as this will become even more difficult to undertake because of increasing numbers of paper-based, in camera hearings to determine applications for special leave. As a result, significantly less information about special leave applications will be publicly available. It seems likely that while the changes to pt 41 of the High Court Rules 2004 (Cth)[33] reflect the practical necessity to control the ever-increasing volume of work which is funnelled to the High Court, it will remain the case that matters directly affecting the types of cases available for final appellate consideration in the High Court will include the restricted diversity of litigants and counsel, and the advantages enjoyed by well-resourced and seasoned litigants. These are factors outside the control of the Court, yet they influence the Court's capacity to carry out the task of assessing special leave applications and selecting cases for appellate hearing. Ultimately, the development of Australian jurisprudence may be subtly restricted by these factors which operate at the gateway to the High Court.

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[1] <https://blogs.unimelb.edu.au/opinionsonhigh/about-the-high-court/why-is-the-high-court-important/>.

[2] The High Court also hears other matters such as applications under s75(v) of the *Constitution* against officers of the Commonwealth; removals from other courts into the High Court under s40 of the *Judiciary Act 1903* (Cth); cases stated; references under s18 *Judiciary Act*; and election petitions.

[3] The abolition of appeals as of right was a gradual process: *Judiciary Amendment Act 1976* (Cth); *Judiciary Amendment Act [No 2] 1984* (Cth). Until 1984, litigants in civil matters had a right to appeal if their case was of a certain monetary value: D Solomon, 'Controlling the High Court's agenda', *Western Australian Law Review,* Vol. 23, 1993, 33. In criminal matters, leave to appeal has always been required: *Judiciary Act*, ss35, 35AA. See DF Jackson, 'The Australian judicial system: Judicial power of the Commonwealth', *University of New South Wales Law Journal,* Vol. 24, 2001, 737; M Kirby, 'Law at century's end – a millennial view from the High Court of Australia', *Macquarie Law Journal,* Vol. 1, 2001, 1 at 7.

[4] *Smith Kline and French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 (*Smith Kline*); see also A Mason, 'The High Court as gatekeeper', *Melbourne University Law Review,* Vol. 24, 784.

[5] High Court of Australia, *Annual report 2018/19,* provides the following figures for special leave applications filed: 2014/15 – 470; 2015/15 – 536; 2016/17 – 498; 2017/18 – 523; 2018/19 – 565.

[6] P Stewart and A Stuhmcke, 'Litigants and legal representatives: A study of special leave applications in the High Court of Australia', *Sydney Law Review,* Vol. 41(1), 2019, 35 (Stewart & Stuhmcke *SLR*); P Stewart and A Stuhmcke 'Open justice, efficient justice and the rule of law: The increasing invisibility of special leave to appeal applications in the High Court of Australia', *Federal Law Review* (forthcoming), 2020 (Stewart & Stuhmcke *FLR*).
[7] See *Smith Kline*, above note 4: 'From time to time statements have been made which draw attention to the unusual character of an application for special leave to appeal see, for example, *Coulter v The Queen* (1988) 164 CLR 350, per Mason CJ, Wilson and Brennan JJ, p356; Deane and Gaudron JJ, p359.' Justice Kirby suggested the section may not constitute 'sufficient compliance' with the *International Covenant on Civil and Political Rights 1966* (ICCPR): *Young v Registrar, Court of Appeal (No 3)* (1993) 32 NSWLR 262, 290.
[8] DF Jackson, 'The Australian judicial system: Judicial power of the Commonwealth', *University of New South Wales Law Journal,* Vol. 24(3), 2001, 73.
[9] Between March 2013 and February 2015, the High Court Justices were French CJ; Kiefel, Crennan, Bell, Gageler, Keane and Hayne JJ.
[10] The nature of the special leave applications meant that machine coding to the extent required by this analysis was not possible.
[11] <http://www.hcourt.gov.au/registry/special-leave-applications-results-2016>.
[12] Four sources were used to source and cross-check the data: The *High Court Bulletin* – which lists applications granted and refused (available on AustLII); Dispositions documents (available on AustLII); High Court transcripts (available on AustLII); High Court lists (available on High Court website).
[13] With the assistance of statisticians and Masters in Data Science research students.
[14] Stewart and Stuhmcke, *SLR*, above note 6, 44.
[15] The categories of practice area coded for the study were based on the catchwords used by the High Court in High Court Bulletins (produced by the Legal Research Officer, High Court of Australia Library) augmented by the catchwords used in other databases such as LexisNexis, AustLII and CCH. There were 38 practice areas identified.
[16] Stewart and Stuhmcke, *SLR*, above note 6, Figure 2, 45.
[17] Ibid, 50–51.
[18] Ibid, Figure 5, 54.
[19] The Crown is represented separately where it was applicant (which was the case only in three criminal matters) and it was unsuccessful.
[20] M Galanter, 'Why the "haves" come out ahead: Speculations on the limits of legal change', *Law and Society Review,* Vol. 9(1), 1974, 95; D Songer and R Sheehan, 'Who wins on appeal: Upperdogs and underdogs in United States courts of appeals', *American Journal of Political Science,* Vol. 36(1), 1992, 235; P McCormick, 'Party capability theory and appellate success in the Supreme Court of Canada, 1949–1992', *Canadian Journal of Political Science,* Vol. 26(3), 1993, 523; BM Atkins, 'Party capability theory as an explanation for intervention behaviour in the English Court of Appeal', *American Journal of Political Science,* Vol. 35(4), 1991, 881.
[21] Stewart and Stuhmcke, *SLR*, above note 6, 57–59.
[22] P Stewart and A Stuhmcke, 'Lacunae and litigants: A study of negligence cases in the High Court of Australia in the first decade of the 21st century and beyond', *Melbourne University Law Review,* Vol. 38(1), 2014, 151.
[23] Data was extracted only for the principal applicant's counsel.
[24] Stewart and Stuhmcke, *SLR*, above note 6, Figure 12, 62–65.
[25] For applicants, success is an application granted. For respondents, success is an application refused. Figures are not weighted to allow for the underlying probability that respondents are more likely to be successful.
[26] There were four parties not represented by counsel at an oral hearing: one self-represented applicant; one self-represented respondent; and two respondents that filed submitting appearances but did not have counsel appear at the hearing.
[27] Stewart and Stuhmcke, *SLR*, above note 6, Figure 12, 63.
[28] Ibid, Figure 13, 67.
[29] Ibid, Figure 14, 68.
[30] Mason, above note 4, 786.
[31] B Virtue, 'High Court is planning new rules', *Australian Lawyer,* Vol. 28, 1993, 18 at 21–22.
[32] A Phelan, 'Changes to High Court procedures for considering applications for special leave', Chief Executive and Principal Registrar of the High Court of Australia, <http://www.hcourt.gov.au/assets/corporate/policies/Special_Leave_Changes.pdf>;

High Court Rules 2004(Cth), r41.08.1; J Gans, ‘News: Court announces fewer oral hearings for special leave applications’ on J Gans, *Opinions on High: High Court Blog* (16 March 2016) <https://blogs.unimelb.edu.au/>.
[33] *Judiciary Act*, s21(1) provides that special leave will be determined subject to the Rules – see High Court Rules.