CONTROLLING THE HIGH COURT'S AGENDA

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In 1984, Parliament abolished the automatic right of litigants to appeal to the High Court in cases involving claims of $20 000 or more. Since then, there have been significant changes in the functioning of the Court. The Court itself now mostly determines what cases it hears. Increasingly they are the cases which involve important and controversial points of law. Though the Court aims to develop and clarify the law, the use of multiple judgments often prevents it from succeeding in this goal. Another disturbing aspect of the Court's work is that, occasionally, it relies on materials which have not been cited by counsel in argument. Such materials have not been the subject of detailed analysis and debate.

This paper is about the way in which the High Court of Australia today has become a very different court from what it was 90, 50 or even 10 years ago. While this partly reflects the fact that the Justices today are very different people from most of their predecessors, it has more to do with structures and the Court's image of itself and its role in modern Australia. The procedures are still evolving to reflect the role that the Court wants to perform now and in the immediate future.

I will say very little about the internal deliberations of the Court because there is very little I can usefully report. What I will say is intended generally to demonstrate that legislative and other changes in recent years have given the Court the chance to control what it does and how it does it, and that the Court is clearly committed to ensuring that its agenda is controlled by it alone.

I will need to begin, however, by setting out some of the fundamental constitutional and legislative provisions which determine the structure of the Court, before going on to discuss its jurisdiction and the way in which the Court controls the exercise of that jurisdiction. This will be followed by a discussion of the Court's procedures. The single most important element in

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the Court's control of its own processes, the special leave procedure, will then be examined in detail as will the implications of the approach the Court has adopted in recent years. Finally, I will look briefly at the Justices of the Court and the way they exercise their powers.

STRUCTURE

Since the passage of the Australia Acts in 1986,[1] the High Court has been at the apex of the Australian court system. It is ultimately responsible for the interpretation of the Commonwealth Constitution, the laws of the Commonwealth, State and Territory Parliaments, and the elucidation of what since 1988 has been known as the common law of Australia.[2] Yet the Court's paramountcy developed slowly and is not beyond challenge.

The Court is provided for in the Commonwealth Constitution. Section 71 states:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

It is worth noting that, in so far as the High Court is concerned, this is only an enabling provision. The Constitution does not create the Court nor does it grant it life in perpetuity. The constitutional provision allows the Commonwealth's judicial power to be exercised by other courts, Federal and State. It does not require that the High Court, once created, should continue in existence forever. The sections dealing with the High Court may be contrasted with those which mention the Inter-State Commission. Section 101 of the Constitution provides:

> There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

The Inter-State Commission was created by the Parliament twice. On each occasion it was allowed to fade away, either through the non-appoint-

1. Australia Act 1986 (Cth) which came into operation on 3 March 1986. In addition to this, the Australia Act 1986 (UK), in substantially identical terms, was enacted by the UK Parliament pursuant to a request made and consent given by the Parliament and Government of the Commonwealth in the Australia (Request and Consent) Act 1986 and with the concurrence of all the States of Australia.
2. Judiciary Act 1903 (Cth) s 80. This was amended in 1988 to refer to "the common law in Australia". It had previously referred to the "common law of England".

ment of new members or through acts of government to obtain the resignation of current members. Despite the apparent constitutional imperative, "There *shall* be an Inter-State Commission" there is no such body. Is the High Court in a better position? In constitutional terms, probably not — though of course any challenge to legislation which sought to disband the High Court might come to be decided by the Court. But the answer to the question is more dependent on political rather than legal factors.

In 1902 and 1903, the Commonwealth Parliament was not easily persuaded that it was either necessary or desirable that it should establish a High Court of Australia. The Judiciary Bill which the Attorney-General, Alfred Deakin, introduced and spoke to at great length on 18 March 1902 was not brought on for debate until the following year, on 9 June, with some amendments. Two days later, after an extensive debate, the Second Reading was agreed to (by a majority of nine).[3] The debate in committee continued for many days and involved substantial changes to Deakin's original proposals, some of them being carried over Deakin's objections. Nevertheless, the measure was eventually passed by the House and the Senate and became law on 27 August 1903.

One of the compromises forced on Deakin was to fix the number of Justices at three, rather than five. It was not until 1906 that the number of Justices was raised to five. At the end of 1912 the Judiciary Act (Cth) was amended again to bring the number of Justices to seven. The Depression persuaded Parliament to reduce the number to six in 1933. The move of the Labor Government to restore a seven member Court was passed in 1946, over the opposition of the Liberal Party led by Mr R G Menzies KC. While occasionally there have been suggestions that membership of the Court should be further increased to nine, the only relevant change to the Judiciary Act concerning the Justices has been a cosmetic one. That was the concession which was included in the High Court Act 1979 (Cth) which required the Commonwealth Attorney-General to consult with State Attorneys-General whenever a vacancy occurred on the High Court.[4] That change was meant to alleviate a long-standing grievance of the States. In fact it has made little difference to the approach of successive Commonwealth governments. They now obtain a list of possible appointees from the States, but these are not made public and the Cabinet still makes its decision on the basis of the recommendation made to it by the Commonwealth Attorney-General (or, on occasions, by the Prime Minister).

3. Australia, House of Representatives, 1903 *Debates* Vol 13, 841.
4. High Court of Australia Act 1979 (Cth) s 6.

One of the major changes concerning the Justices occurred without controversy in 1977. In that year a referendum was approved removing the constitutional requirement that federal judges be appointed for life. High Court Justices now have tenure to age 70. While the amendment did not affect the tenure of serving Justices, there was in fact a remarkably quick turnaround, due to the retirement, death or promotion (to Chief Justice) of the then serving members of the Court. Less than 10 years after the referendum, there were no longer any life-time appointees still serving on the Court.

A change which has occurred more gradually concerns the salaries paid to members of the Court. This is mentioned here because in 1902–1903 this was a matter of some importance in the Parliamentary debates about whether the Court should be created or not. The three Justices were given salaries which befitted their position as members of the highest court in the land. Their salaries of £3 500 for the Chief Justice and £3 000 each for the other two Justices were comparable with judicial salaries elsewhere in Australia. They totally overshadowed the salaries paid to members of the first Parliaments (£400) and no-one would have claimed that MPs were underpaid by the standards of the day.[5]

Until 1980, the High Court had been, as Mr J M Bennett has described it, an "itinerant" Court.[6] Its initial Justices established themselves in Sydney, using space provided by the State Government in its court-house at Darlinghurst. Similarly, in Melbourne, the Court occupied space provided by the State until a separate building was provided for it in Little Bourke Street. Most of its hearings were in one or other of these capitals, though within a year of its creation it had established that annual sittings would also be held in Hobart, Adelaide, Perth and Brisbane, so long as there was sufficient business to justify a visit.

The acquisition of its own building in Canberra has made some difference to the Court's procedures. Appeals are no longer heard in either Sydney or Melbourne, though special leave hearings in both civil and criminal matters are conducted each month in one or other (or sometimes both) of those cities. The Court still makes an annual visit to the other State capitals (usually, Hobart in March, provided there is sufficient work, Brisbane in June, Adelaide in August, and Perth in October). But all major appeals and constitutional cases are heard in Canberra, where all seven Justices can sit and where relevant materials, library facilities and support staff are more readily

5. D Solomon *The Political Impact of the High Court* (Sydney: Allen & Unwin, 1992) 168–169.

6. J M Bennett *Keystone of the Federal Arch* (Canberra: AGPS, 1980) 99–113.

available. For the past few years the Court has also conducted some special leave applications from Canberra to Brisbane, Adelaide and Perth via a video-conferencing link.

The move to Canberra was accompanied by the introduction of the High Court of Australia Act 1979 (Cth), which incorporated parts of the former Judiciary Act 1903 (Cth) and the High Court Procedure Act 1903 (Cth). Significantly, the new Act gave the Court control over its own building and the administration of its own affairs. The Court remains dependent on the Government of the day to determine the total size of its annual budget, and on Parliament to approve it. It is subject to Parliamentary supervision in the expenditure of its appropriation. Parliament also has the power to disallow any rules of court and, as occurred in 1992, to use legislation to override those rules and determine the level of fees which the Court will charge.

JURISDICTION

Until 1986, and the abolition of appeals from State Supreme Courts in non-federal matters to the Privy Council, the High Court was not the ultimate court for all litigation. However, the High Court over a long period had asserted its independence of the Privy Council. In *Viro*,[7] the Court said that it was not bound by Privy Council decisions. Any possible conflict was finally resolved in 1986 when the Australia Acts (Cth)[8] abolished appeals from Australian courts to the Privy Council (other than in the most unlikely event of the High Court itself granting a certificate under section 74 of the Constitution for an appeal against one of its own judgments).

The Constitution gives the High Court, potentially, the widest possible jurisdiction as Australia's ultimate court. The jurisdiction is detailed in a series of distinct sections, of which the most important are sections 73, 75, 76 and 77.

This vast jurisdiction has been made manageable by Parliament making laws (mainly in the Judiciary Act) providing that in most matters, either another court may also exercise jurisdiction, or the High Court can remit the matter or part of it, to another court.[9] In particular, the Federal Court has been given original jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.[10] There are two exceptions provided: first, in relation to

7. *Viro v The Queen* (1978) 141 CLR 88.
8. Supra n 1.
9. See the Judiciary Act 1903 (Cth), ss 38, 39, 39B, 44.
10. Id, s 39B(1).

persons holding office under the Industrial Relations Act 1988 (Cth) or the Coal Industry Act 1946 (Cth), and second, in relation to judges of the Family Court.[11] The first of these is significant because it means that the High Court retains a substantial work-load in relation to what are effectively appeals from decisions of the Industrial Relations Commission. There is no logical reason why this jurisdiction should not have been given to the Federal Court. There was, however, a political reason. A Labor Government, under the influence of the ACTU, enacted this provision. The High Court has shown what it thinks of the duty it has been left with by assigning just three Justices to hear Industrial Relations Commission matters — the same as normally hear special leave applications — unless the matter has some constitutional significance.

If the time the Court spends on its various jurisdictional areas is any indication, its most important work is, first, acting as the ultimate appellate court in civil matters, secondly, acting as a constitutional court, and thirdly, acting as an appellate court in criminal matters.

ENLIVENING THE COURT'S JURISDICTION

Constitutional cases often get fast-track treatment from the Court. This is particularly the case when what is sought to be determined is whether an Act of the Commonwealth Parliament is within the Commonwealth's constitutional power. Despite the Court's refusal to give advisory opinions,[12] it will hear a challenge to an Act once it has been signed into law, even though it has not yet been proclaimed. The Judiciary Act 1903 (Cth), section 78B(1), makes it clear that when a constitutional issue arises in any matter before any court in Australia it is the duty of the court to ensure that notice of the issue is provided to Commonwealth, State and Territory Attorneys-General. If any of them decide that the matter is of sufficient importance they can apply to the High Court under section 40(1) for its removal (in whole or in part) into the High Court. A party may also apply but will rarely succeed without the support of an Attorney-General. The procedure ensures that the Court may determine if and when it should intervene in a constitutional matter. Again, the timing is very much within the Court's control. Even a matter removed into the Court by an Attorney-General under section 40(1) may be remitted to another court under section 42.

The use of the removal power under section 40 of the Judiciary Act 1903

11. Id, s 39B(2).
12. *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

(Cth) is not restricted to constitutional matters. Several times a year litigants will seek to have their cause removed into the High Court, arguing either that the matter is of great importance, or that an intermediate court of appeal will be bound by precedent (based either on its own previous decisions or on a High Court decision) and as a consequence both time and money will be spent to get a decision which is inevitable. Occasionally the High Court is persuaded and does remove the case.

Until 1984, unsuccessful litigants in civil matters had a right of appeal to the High Court from a judgment of the full court of a State Supreme Court so long as their case satisfied a monetary qualification. From 1903 until 1955 the judgment or the claim in dispute had to be of the value of £300 or more. In 1955, this was raised to £1 500, and in 1976 to $20 000 or more. In 1984, Parliament effectively abolished this right of appeal in civil cases. As with criminal cases, the only avenue available to most litigants would be by obtaining special leave to appeal from the court.

The criteria which the High Court is to apply when deciding whether or not it should grant special leave are set out in section 35A of the Judiciary Act 1903 (Cth). I shall return to this shortly. First, however, I must mention that some senior members of the Bar were extremely unhappy with the abolition of the automatic right of appeal to the High Court, particularly as it was plain that the ability to appeal to the Privy Council from State courts in non-federal matters was also about to disappear. It was suggested that the move was unconstitutional; but given the fact that the Court itself had sought to have Parliament make the change which eventuated in 1984, the chances of anyone succeeding in a challenge to the law seemed remote.

Nevertheless, a challenge was brought in 1991. Two separate challenges were made, one to section 35(2) of the Judiciary Act 1903 (Cth) and the other to section 33(3) of the Federal Court Act 1976 (Cth), which controlled appeals from the Federal Court to the High Court.[13] The principal argument was that the restrictions were invalid because of the provision in section 73 of the Constitution which provides in part:

> But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from 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.

A unanimous Court relied on the Convention debates and the Court's

13. *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth*; *Carson v John Fairfax Ltd*; *Carson v Slee* (1991) 103 ALR 117.

decision in *Parkin v James*[14] to reject this argument and hold that a requirement to obtain special leave was a "regulation" for the purposes of the Constitution. That being so, the provisions under challenge did not "prevent" the High Court from hearing appeals. The Court stated:

> The Parliament does not prevent the court from hearing and determining any appeal when, by its legislation, it requires the grant of special leave to appeal as a condition of the appeal. The court is at liberty to hear and determine such appeals as it considers appropriate in accordance with the criteria or considerations relevant to the grant or refusal of special leave.[15]

Another argument was that the two provisions amounted to an invalid delegation. But the Court said that Parliament had exercised its right to regulate appeals. The Court held that its function in granting or refusing special leave was not legislative, nor administrative, but rather a judicial function, thus disposing of another argument which had been raised.

It is worth quoting exactly what the Court said about the special leave function. As is apparent, the Court repeats here what had been said in two earlier cases, both of them applications for special leave to appeal in criminal matters:

> 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 R* (1988) 76 ALR 365; 164 CLR 350, per Mason CJ, Wilson and Brennan JJ at 356; Deane and Gaudron JJ at 359. 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 requiring 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: section 35A of the Judiciary Act. 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: *Morris v R* (1987) 74 ALR 161; 163 CLR 454, per Dawson J at 475.[16]

THE SPECIAL LEAVE FUNCTION

As mentioned earlier, one of the issues dealt with by the Court in the *Smith Kline & French* case[17] was whether an application for special leave

14. (1905) 2 CLR 315.
15. Supra n 13, 130.
16. Id, 131.
17. Supra n 13.

involved an exercise of judicial power. The Court's conclusion was that, "If the application be refused, the order dismissing the application is the final curial act which brings the litigation between the parties to an end. An application for special leave to appeal therefore involves the exercise of judicial power."[18] That conclusion, the Court pointed out, "disposes of the plaintiffs' argument that all the Justices of the court must participate in the disposition of an application for special leave to appeal."[19] It also leaves it entirely in the hands of the Justices as to how they will go about determining whether special leave should be granted or not. Significantly, this is a matter which has been the subject of some recent experimentation and which seems certain to undergo further possibly radical changes in the future. In particular, over the past few years the High Court, with the co-operation of some senior members of the profession, has been making changes to the way it deals with special leave applications in criminal cases.

Three years ago there was a set procedure. An application for special leave to appeal in the criminal jurisdiction was automatically considered by a full court of five Justices, the reason being that if the members of the Court considered there was merit in the application it would transform the hearing into an appeal proper. The application would begin with a warning to counsel that their primary aim should be to persuade the Court whether or not special leave to appeal should be granted, but because in very many cases the special leave point was essentially the same as the appeal point, and even as a special leave point it needed to be argued by reference to the evidence as well as to what had been said by the first appellate court, there was little or no difference between the two arguments. Indeed, it was common for counsel not to be asked to move from the argument in relation to special leave to the argument on the appeal until the very end of the case, when there was little or nothing to be added. The main difference between an application for special leave and a "real" appeal was that, when the Court decided to refuse special leave, it normally did so after an adjournment of 10 to 20 minutes, and brief reasons were given. When there was any substance in the appeal point, the matter would be reserved for a written judgment, which would not necessarily favour the applicant. Indeed, it could finally result in the refusal of special leave.

Several years ago the Court began to consider different procedures. Essentially, it wanted to move towards the use of a three-person court which

18. Ibid.
19. Ibid.

was concerned only with the special leave issue. As with civil cases, if special leave was granted, the appeal would then be heard by a bench of five or seven. But this was not the procedure adopted initially. Counsel were allowed a choice, after receiving "hints" from the Court. What happens is that counsel are required to submit detailed summaries of their arguments which are considered, on the papers, by an undisclosed bench of (presumably) three Justices. Those Justices decide whether the matter should go straight to a five or seven judge court or be argued as a special leave matter in the same manner as a Civil special leave case. The filtering process does not really work as those who do not succeed in gaining what amounts to special leave on the papers still want their day in court. As it stands, the special procedure appears to create a lot more work for the Court than was anticipated.

The system is likely to change so that criminal special leave applications, like civil applications, will be heard by a bench of three, who will refer them to a larger bench if they consider that special leave should be granted. The major difference between criminal and civil applications is that the former tend to take longer, because more facts need to be detailed. Normally the court will not try to hear more than six criminal special leave cases in a day. It will regularly hear eight to nine civil special leave applications in a day.

The Court has not, in my view, reached a concluded view about the way it should treat special leave applications, civil or criminal. It is now spending two or three days out of each eight sitting days on special leave applications. Four years ago it would spend one day out of each eight sittings days on civil matters and perhaps another day in each 16 days on criminal cases. The primary workload, the number of applications for civil and criminal special leave, is increasing considerably. That the Court's backlog of cases to be heard has not increased is due primarily to an increase in its rejection rate of special leave applications. Eight years ago almost a third of applicants gained special leave. Now only between a fifth and a quarter get to the appeal stage.

The position will worsen, and the court knows it. It should be noted that in the *Smith Kline & French* case, the court said of the way it considers special leave applications, "The procedure calls for a hearing, either orally or on written materials".[20] The Court introduced video-conferencing for civil special leave matters for Brisbane, Adelaide and Perth to save time and money for *litigants*. I suggest that its next major change will be to save time for the *Court*. To reduce the time the Court has to spend on special leave it

20. Ibid.

seems likely to introduce stricter time limitations on oral argument, possibly backed up by a requirement that counsel submit written outlines of argument before the hearing occurs. The Court has also increased its filtering time by occasionally having two three-person courts simultaneously hearing special leave cases in different cities.

To what is the declining rate of success of special leave applications due? Is it simply that an increasing number of applications have no merit? If one were to judge by the reasons the court gives for refusing special leave one would have to answer, yes. I have examined all the reasons the Court gave for refusing special leave in civil matters in 1991 and, without being disrespectful, the reasons tend to change somewhat depending on who the presiding judge is.

Of the 91 cases examined, in half (45 to be exact) special leave was refused because the Court said there was no error of principle in the judgment appealed from, or the actual decision was correct, or there was not sufficient doubt about the decision below. In another 15 cases the Court said that no ground of law or matter of principle had been raised, or the matter was not of sufficient importance to warrant the grant of special leave. Seven cases were said to involve factual issues only. Four were in areas where the Court has recently declared that it will not *normally* give special leave to appeal: tax, town planning and interlocutory matters. On tax matters, the Court has said it regards the Federal Court as the Court where most appeals will be determined. Only in cases of great importance will special leave be granted for a High Court appeal. Town planning is a matter the High Court also regards as requiring the specialist attention of the relevant State Supreme Court or Court of Appeal.

Of the remaining 20 cases examined, in half there were reasons which essentially denied there was any importance in the issue raised, while in four the ground upon which special leave was sought had not been properly raised in the courts below. In one case the reason for refusal was that there was not sufficient prospect of success, while in five the Court said the particular case was not a suitable vehicle to explore the issues which were sought to be raised. In about three-quarters of the cases the Court refused special leave without calling on the respondent to present any argument. Very occasionally the Court divided 2:1 in refusing special leave.

It is noteworthy that while the Court on rare occasions will refuse special leave because it says there is insufficient prospect of the appeal succeeding, there is a steady stream of cases where it grants special leave but is later unanimous in refusing the appeal. This may occur because the appellant is

anxious for the Court to examine the question of law, win or lose, and the Court considers the matter to be of importance, as in the medical negligence case of *Rogers v Whittaker*.[21] Sometimes, on an appeal, the facts or the law emerge in a different way from the way they appeared at the special leave hearing. Indeed, on some occasions this becomes apparent so early in the appeal hearing that the court simply revokes its grant of special leave. In some cases where the appeal is heard by five Justices, a 3:2 or 4:1 refusal of the appeal may be explained by the "lottery effect", that is, that most of the Justices who gave special leave did not hear the appeal. However, even as the Court develops increasingly strict criteria for granting special leave, there has, nonetheless, been an increase in the number of cases heard by the whole Court. It is three or four years since most appeals were heard by a Court of five Justices. Seven has become the norm in civil appeals and is rapidly becoming so in criminal appeals. What is happening is that most cases the Court decides to hear raise important questions of law, and the more important these are the more difficulty the Court has in providing an answer. It is hardly surprising then that judgments are becoming lengthier and are taking longer to produce. These developments have implications for the way the Court works. It will soon be necessary for the Court to review its once a year pilgrimages to Brisbane, Hobart, Adelaide and Perth. For various reasons the whole Court does not travel to each city, which means that only special leave cases or the less important appeals can be heard away from Canberra. More importantly, however, the Court will have to review the procedures it adopts when hearing appeals. Increasingly, in the most important cases, it requires the parties to present detailed written arguments. These allow the Court to force counsel to compress their oral arguments. This practice is likely to lead to formal time limits. In November 1992, Sir Gerard Brennan said, "On appeals, where the results of research can be effectively conveyed in writing, there is much to be said for focusing oral argument by restricting the time allocated to each party."[22]

THE JUSTICES

Many of those who appear before the Court, and those who brief them, would argue that the increasing strain on the Court is concerned not with the way in which counsel present their arguments, but with the way the Court later deals with them. There are several problem areas. The most obvious

21. (1992) 109 ALR 625.
22. G Brennan "The Judiciary", George Higinbotham Centenary Conference 1992, 26.

concerns the published judgments of the court. They are becoming longer and more diverse. It is perhaps inevitable that as the number of matters heard by the whole Court increases, the number of unanimous judgments will decrease — that is, it is easier to get a Bench of five to agree than a Bench of seven. And, as noted earlier, the Court now has fewer "easy" cases. The special leave system ensures that most of the time only matters where there is considerable doubt about what the applicable law is, or should be, come before the Court.

The Court has not adopted the approach to producing judgments used by the United States Supreme Court, that is, it does not have formal meetings to determine the majority/minority positions and assign judgment writing to particular Justices. Justices tend to determine their own priorities. They circulate what they have written to their colleagues. Other Justices may suggest amendments to a draft which has been sent to them and eventually they may become joint authors. Sometimes a prepared judgment may prompt one or more of the other Justices to write a response. Or a judgment will receive agreement subject to particular additional or alternative arguments. Occasionally it is possible to glean from the judgments themselves who wrote what first, and how a whole series of judgments came together.[23]

The system (or lack of it) employed for judgment-writing is clearly inefficient and the production of multiple judgments often does little to clarify the law. Fortunately, it is only rarely that the judgment leaves even the Court's decision in doubt. That worst-case scenario occurred in *Hepples v Federal Commissioner of Taxation*.[24] In that case, seven separate judgments were written, and different 4:3 majorities rejected the application of two separate sub-sections of the Income Tax Assessment Act 1936 (Cth) to the particular payment which was in issue. Because of the way the case had come to the Court, as an appeal on a stated case, the parties were allowed to return to the Court and argue about what the Court's decision really meant. The resulting judgment explains how to work out what the majority opinion is in relevant cases.[25]

One disturbing aspect of the Court's work is that, occasionally, Justices need to rely on materials which have not been used by counsel in argument.

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23. There was a correction circulated in 1992 concerning the *The Queen v Glennon* (1992) 173 CLR 592, where one judgment referred to a matter dealt with in another judgment. The correction was to add the name of an additional Justice as co-author of the judgment to which reference was being made. The co-authorship may have occurred at a late point in the writing of the judgments.
24. (1991) 173 CLR 492.
25. *Hepples (No 2)* (1992) 173 CLR 492.

Although this no doubt is a reflection on some counsel, there are obvious problems when the Court relies on untested materials.[26]

The Court, though reliant on counsel to argue all relevant aspects of the law and to bring all relevant materials to its attention, will sometimes raise issues which counsel have not sought to argue. Most notably, when the *Nationwide News* case[27] was argued in 1991, it was the Court which raised questions about whether either section 92 of the Constitution, or some implied constitutional protection of free speech, might support Nationwide's argument. This aspect of the case had to be argued some months later. When the *Political Advertising Ban* case[28] was argued, the parties were told they did not have to re-argue this point.

A problem of a different kind arose during the computer copyright case, *Autodesk Inc v Dyason.*[29] The Court determined the outcome of the appeal on a basis that "was not in the forefront of the appellants' submissions" to the High Court.[30] The issues had been generally raised in the courts below and in the High Court, after the Court had reserved its decision, the Registrar wrote to the parties inviting them to make further submissions, an invitation which they accepted. Whether that letter raised the issues with sufficient specificity is a matter of some dispute. After the judgment was given the unsuccessful respondent sought to have the case relisted so that the central issues could be argued in more detail. Some months later the High Court bench which heard the original appeal rejected — by a 3:2 majority — the application.[31] One member of the minority thought that the respondents had not been given sufficient opportunity to present their case. The other thought it was arguable that there had been no breach of copyright. Clearly the Court will be even more conscious in future of the need to ensure that the parties have been given every opportunity to present arguments on the issues which the Court considers crucial to its decision. It is worth noting the following remarks of one of the Justices in the majority, Justice Dawson:[32]

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26. This occurred in the *Brown v West* (1990) 169 CLR 195 (*MPs' Stamps* case) when the Court relied on Browning's House of Representative Practice to describe the appropriation process. A Study of Odgers' Senate Practice might have led it to form a different view. Indeed, had it sought factual information about what had occurred in the Scenario debate of the particular appropriation, it might have reached a different conclusion on this particular aspect (although not a different result).
27. *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681.
28. *Australian Capital Television Pty Ltd v The Commonwealth (No 2)* (1992) 108 ALR 577.
29. (1992) 173 CLR 330.
30. Id, 348.
31. (1993) 3 Leg Rep 1.
32. Id, 9.

> [I]t should be added that even though a party fails to present his case in a manner which is open on the pleadings and on the facts, a final appellate court with responsibility to determine the law cannot be precluded from disposing of a case upon the basis which appears to it to be correct. This is particularly so where matters not raised on appeal have been raised in the courts below. 'Judges are more than mere selectors between rival views - they are entitled to and do think for themselves.'[33]

THE FUTURE

I have previously mentioned that the last life-time appointees to the Court had ceased to hold office within 10 years of the referendum which introduced a new 70 year age limit. However, there has been considerable stability on the Court recently with only one Justice appointed in the past six years (McHugh J in 1989). That comparative stability is likely to remain until after the turn of the century.[34] The criteria for special leave are unlikely to be changed despite a suggestion by the Attorney-General when he introduced this provision that he would review it at a later time. There is little direct correlation between the formal requirements set out in section 35A of the Judiciary Act 1903 (Cth) for the grant of special leave and the reasons the Court tends to give for refusing special leave. Counsel try to fashion their arguments to incorporate those special factors mentioned in section 35A — public importance, differences of opinion in the courts as to the state of the law and the interests of the administration of justice. Most special leave applications are dismissed because the Court sees nothing wrong with the decision below or because it claims that only factual issues are in dispute. What is important for the Court about section 35A is that it does not set out to establish the grounds which need to be met for special leave to be granted. They are not actually "criteria". They are matters to which the Court "shall have regard" — just as it "may have regard" to anything else it considers relevant.[35]

Governments, and politicians generally, seem unconcerned about the internal organisation of the Court. They are occasionally excited, however, by decisions of the Court. And in the past few years there has been much for politicians to be excited about: *Mabo*,[36] the *MPs' Stamps* case,[37] the *Political*

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33. *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, Lord Wilberforce, 212.
34. Mason CJ is due to retire in 1995 and Brennan J in 1998. The retirement (through age) dates of the other Justices are: Toohey J - 2000, Deane J - 2001, Dawson J - 2003, McHugh J - 2005 and Gaudron J - 2013.
35. Including, presumably, its list.
36. *Mabo v State of Queensland [No 2]* (1992) 107 ALR 1.
37. Supra n 26.

Advertising case[38] and the *Cleary* case,[39] to mention just a few. People with political barrows to push have helped create an organisation whose aim is to re-establish an earlier view of the Constitution and to "correct" the Court. The formation of the Samuel Griffiths Society suggests that the Court is likely to have its judgments subjected to more criticism than has been customary in the past, which means that its work will be seen to be more "political". While it is impossible to imagine, given the character of the Court, that this will affect the decisions it makes in constitutional and other cases of political significance, the probability is that politicians from one side or the other will come under pressure to "do something" about the Court. It would be foolish to suggest that the Court is under any real threat at the moment. However, it is not invulnerable and it may need in the future to pay more attention to explaining its role and its functioning.

38. Supra n 28.
39. *Sykes v Cleary* (1992) 107 ALR 577.