The High Court's approach to taxation special leave applications

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Abstract: While there is no one factor that ensures success in a High Court special leave application, a tax issue with "wide-spread application" significantly increases the chances of the application being granted. Counsel who are able to frame the matter in these terms are then much more likely to be successful.

The process of special leave applications

What are special leave applications and how do they begin?

Litigation may come before the High Court of Australia either in the court's original jurisdiction (pursuant to ss 73 and 76 of the Constitution), or the court's appellate jurisdiction (pursuant to s 73 of the Constitution). Due to the nature of taxation cases, they primarily come before the High Court in the latter jurisdiction.

Unlike original jurisdiction, the High Court's appellate jurisdiction does not allow appeals as of right. It is a discretionary jurisdiction, and special leave must be obtained from the High Court to appeal a case to the full bench. Applications for special leave are dealt with under r 41 of the *High Court Rules 2004* (Cth) (HCR).

The difficulty presented to those involved in special leave applications is the brevity of oral argument and written submissions which the HCR promote. This difficulty is often exacerbated by the factual complexity present in taxation cases.

Generally, a "summary of argument" may not exceed 10 pages in length (r 41.07 HCR), and the maximum time allocated to oral argument is 45 minutes, that is, 20 minutes for the applicant, 20 minutes for the respondent, and a further five minutes for the applicant to reply (r 41.11.3 HCR).

Moreover, the introduction of the HCR in early 2005 aligned Australia with many other common law jurisdictions (including the United States, the United Kingdom, Canada and South Africa) in allowing appeals to the final court of appeal to be determined without oral argument. In 2010-11, 50% of leave or special leave applications were determined on the papers.[1]

Clarity and succinctness are invaluable in special leave applications, especially in written submissions.

By examining recent tax litigation (from February 2009 to February 2010), this article attempts to distil the common characteristics or themes present in successful leave applications in the High Court.

What makes a successful special leave application?

Viewing appeals to the High Court as a purely clerical process is to misunderstand the role of the High Court. Members of the High Court themselves have admitted that the process for determining a special leave application is not "wholly logical or scientific"[2] and that the court will inevitably determine the outcome of an application on the basis of "[a]n inescapable element of intuition wrapped up in experience".[3]

The process of special leave in taxation cases has been said to be particularly unusual and faced with greater hurdles than other cases.[3] The High Court has historically been open about its preference for the Full Federal Court of Australia to effectively be the final arbiter in tax matters. This preference of the High Court was noted in the special leave application of *FCT v Westfield Ltd*, where Mason CJ said:[4]

> "The Full Court of the Federal Court is the ultimate court of appeal in taxation matters subject only to the exceptional cases in which this court grants special leave to appeal. It follows that a question of fundamental principle must arise for decision in such a matter before this court will grant special leave."

However, there is also some evidence that this view may be shifting. In the special leave application for *Bruton Holdings*,[5] counsel for the Commissioner made reference to the comment of Mason CJ, and in reply Gummow J said:[6]

> "I do not believe any court is the final court of appeal in anything … and that idea that was once around I can assure you is no longer around." (emphasis added)

Additionally, the statistics presented in this article also support the view that the High Court may be shifting away from Mason CJ's comments in *Westfield*. In practice, the existence of such a principle is, perhaps, less important than an understanding of the factors which appear to have led the court to grant special leave in each particular matter.

Unsuccessful taxation applications

Rather than focusing primarily on the successful arguments mounted by counsel in applications for special leave, we have focused on unsuccessful applications in the hope of identifying why the court rejected counsel's arguments. We have tried to do this by discussing counsel's arguments under the headings that Kirby J used when discussing factors that might lead to a grant of special leave in his paper "Maximising special leave performance in the High Court of Australia".[7]

Widespread application: the prevailing consideration

We believe that the most significant factor influencing the outcome of taxation special leave applications is the "general application" of the issues in the matter.[8] The High Court is obliged to consider this factor under s 35A of the *Judiciary Act 1903* (Cth):

> "In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to:
>
> (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
>
> (i) that is of public importance, whether because of its general application or otherwise; or

(ii) n respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between 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." (emphasis added)

The fundamental importance of widespread application is further supported by the fact that almost none of the recent applications refused could be said to have widespread application.

A good example of the court focusing on this issue can be found in the *South Steyne* application for special leave.[9] This case involved Div 40 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GSTA) dealing with input-taxed supplies of residential premises. In his opening address to French CJ and Kiefel J, counsel for the applicant presented the issues raised by the case as being of fundamental importance to the operation of the GSTA:[10]

> "That one point concerns the attribution for the purposes of 40-35, the notion of a supply of premises, of the actions or activities of an agent to a principal. As such, it raises a matter which we submit is of transcendent importance to other, indeed many other, provisions in the Act."

What can be observed from these remarks and the subsequent arguments put to the bench is a considered approach by counsel to frame the issue in the case with its broadest possible application.

Ultimately, special leave was refused in this case on the basis that the court did not accept the universal application of the issues before the court. Instead, French CJ noted that the case turned heavily on its facts:[11]

> "The application for special leave which challenges [the primary judge's finding], in our opinion, turns on the characterisation of the relationships between the management company and the lessee company by reference to particular terms of the management agreement between them. In our opinion, no question of principle warranting the grant of special leave is disclosed."

By contrast, the court allowed the *Travelex* special leave application[12] on the basis of the case's widespread application. The case involved the question of whether a sale of Fijian currency past the customs barrier at Sydney Airport was GST-free on the basis that the supply was made in relation to rights that are for use outside Australia under item 4(a) in s 38-190(1) of the GSTA. In the special leave application, Bell J put to counsel for the respondent:[13]

> "There might be a real issue concerning the characterisation of the transaction as one involving dominant and ancillary purposes when one is looking at the supply of foreign currency. Presumably that is an issue that has some broader ramifications than the facts of this particular case throw up."

Counsel for the respondent rejected this notion, and drew the court's attention to the narrower issue of the application of specific provisions of the GSTA to the foreign currency. However, the court remained convinced that there were broader issues present in the application.

The issue for taxpayers, then, is how to frame their case with its broadest possible application and how to identify legal issues in the case which are likely to affect a significant number of taxpayers. This can be an important thought process (even in the courts below) in order to ensure that arguments which may be appropriate for special leave are not compromised

Novelty of the issue in taxation cases: new provisions

Counsel have frequently relied on the fact that the case deals with new or novel areas of the law to the High Court, in the hope that the bench will see this as an opportunity to "make its mark" and deliver a seminal decision. Moreover, the absence of case law on point may aid counsel in demonstrating that a question of legal principle, rather than merely characterisation, exists. This allows counsel for the applicant to present to the High Court a question of principle, as there may be little or no relevant case law.

This approach has been met with mixed success. On the one hand, applications like *Travelex* may support the proposition that new areas of the law (in that case, GST) may be more appealing to the High Court than other areas.[14] However, since the beginning of 2009, two applications presenting the High Court with opportunities to deliver judgments regarding the consolidation regime have been refused special leave,[15] and one GST case was also refused.[16]

The *Handbury Holdings* special leave application[17] presented the High Court with its first opportunity to consider the consolidation provisions in Pt 3-90 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97). The application primarily involved statutory construction of the phrase "at the leaving time" contained in s 711-45(1) ITAA97. Accordingly, while the question may have been new, it may not have been novel or "scholarly".[18]

The *MW McIntosh*[19] special leave application presented the High Court with another opportunity to deliver a judgment involving the consolidation regime. However, this case involved the Commissioner's administrative power to grant an extension of time to lodge a form specifying that the consolidatable group should be taken to be consolidated at an earlier time. What appeared fatal in that case was that the Commissioner had indicated that he was going to exercise his discretion against the taxpayer in any event. In dismissing the application, Gummow J stated:[20]

> "… in any event the adverse exercise of discretion which occurred makes this an inappropriate occasion to consider the issue of statutory construction advanced by the applicant."

This lends support to the idea that the High Court looks for the right case in which to "make its mark" in an area of tax law.

By contrast to these applications, the *Aid/Watch*[21] special leave application did raise a 'scholarly controversy' with an interesting legal history. This case involved the question of whether an organisation, Aid/Watch Incorporated, was a charitable organisation for tax purposes. Specifically, the extent to which an organisation's political purpose (in respect of influencing government policy in this case) must be present before it is classified as non-charitable. The High Court examined the British judicial history on charitable institutions, including the first British income tax statute, the *Income Tax Assessment Act 1799*, *Commissioners for Special Purposes of Income Tax v Pemsel*[22] and the Statute of Elizabeth 1601 (43 Eliz I c 4). Moreover, the court granted leave without hearing any oral submissions from the applicant.

What is clear from these cases is that disputes regarding new areas of taxation law are not, by virtue of that fact alone, guaranteed special leave. The reason this approach has found it difficult to persuade a grant of special leave is that narrow questions of statutory interpretation generally do not warrant special leave. Kirby J stated that:[23]

> "… in most contests over statutory interpretation, it is possible, by the time a case reaches the High Court, to present sound arguments in support of each construction. This will sometimes render pure questions of statutory construction unsuitable for a grant of special leave."

This presents a serious issue for taxation cases, as tax law is a "species of statutory

law"[24] and necessarily requires construction of a tax statute for their resolution. Accordingly, there must be a further issue present to succeed in a grant of special leave beyond mere statutory construction.

Novelty of the issue in taxation cases: intersection with other law

Counsel have also approached the question of broad application by pointing to an intersection with other areas of law outside taxation law. This has the advantage of potentially avoiding the pronouncement in *Westfield* that taxation cases should generally not progress past the Federal Court.

A good and successful example of this was in the *Roy Morgan*[25] special leave application. The dispute originated as a case involving the question of whether certain individuals were employees or contractors of Roy Morgan Research Pty Ltd. However, as the case progressed to the High Court, a constitutional aspect was raised. Specifically, in relation to whether the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGAA) was a tax within s 51(ii) of the Constitution.

This approach was expanded on by Cordara QC in the *Travelex* special leave application when he discussed the success of tax cases involving an intersection of tax law with another principle of common law. In that application, Cordara QC stated:[26]

> "In Reliance, it was land law principles of a basic kind. In this case it s commercial law principles as to the meaning and function of bills of exchange."

However, this approach does require thought in the very initial stages of litigation, preferably at the case's first instance hearing. If the broader grounds are not raised at first instance, it may be difficult to raise it on appeal.

In *Roy Morgan*, the issue raised before the AAT was confined to whether certain individuals were employees within the meaning of the SGAA. In an appeal to the Full Federal Court, the taxpayer broadened its grounds to include a constitutional challenge to the SGAA, to which the Commissioner of Taxation and the Attorney-General for the Commonwealth did not object. Ultimately, the issue of whether the individuals were employees or not was not raised by the applicant in the special leave application. Instead, the applicant relied entirely on the constitutional limb of its argument.

Fact-specific cases

The most obvious way of presenting a case with its broadest application is to avoid presenting an overly complex factual scenario to the court, as this narrows the case's application to other taxpayers. Kirby J described it in the following way:[27]

> "Where any point that does exist is lost under an avalanche of facts, the sifting of which would take too much time and draw the High Court into a function that is not truly the role contemplated for it under the Constitution, enthusiasm to take the case on may be found wanting."

Counsel rarely present the full factual complexity of a case in a special leave application. Indeed, given the brevity of oral argument and written submissions prescribed by the HCR, it is often impossible to do so. Accordingly, it is far more likely to see counsel for the respondent attack the applicant's case as being concerned with characterisation of a transaction, rather than a broader underlying principle of law.

A mistake of characterisation is necessarily peculiar to the facts of the case, as the process of characterising a transaction involves an application of the law to the facts. This is opposed to an error of principle, which occurs when the law itself in incorrectly stated by the lower court. Accordingly, errors of principle necessarily affect greater numbers of taxpayers.

Generally, the High Court appears concerned when presented with arguments regarding characterisation. They will often push counsel to reveal whether there exists a dispute regarding legal principle.

In the *Department of Transport*[28] special leave application, the High Court's concern regarding a dispute involving characterisation was clear. In that case, the Department of Transport (DoT) administered a program which provided a 50% subsidy for taxi fares to certain Victorian residents with disabilities. The resident would pay 50% of the metered fare, while the DoT would pay the remaining 50% to the taxi operator. The issue in the case was whether the DoT was entitled to input tax credits for this latter amount.

French CJ was immediately concerned with the applicant's framing of the case as the first time the High Court would have to "deal with the basic principles underlying the Goods and Services Tax", to which French CJ responded:[29]

> "Are we really confronted with an issue of basic principle here, or are we just confronted with a characterisation of a particular transaction which was open."

After some discussion of the facts, French CJ again asked the Commissioner to discuss the underlying principle:[30]

> "Well, what shining bright principle do you propound that would act as an unerring guide to the correct characterisation [of the subsidy paid by DoT]? The special leave principle, if I may put it that way?"

The question was put even more bluntly by Bell J:[31]

> "… what is the principle that you are identifying that we find in Justice Jessup's [Full Federal Court] reasons that can be applied in other cases?"

After counsel for applicant was unable to clearly identify such a principle, counsel for the respondent framed the bulk of her argument in terms of the specific facts of the case, referring to specific conditions on the DoT subsidy (including whether tolls were included, wheelchair fees etc) and the contract that existed between the passenger and the taxi driver. This framed its argument as one of characterisation of the transaction rather than concerning any broad principle in the GST legislation.

French CJ, in dismissing the application, noted:[32]

> "This application involves challenging concurrent findings about the application of the GST Act to particular facts. We are not satisfied that the application, bearing as it does upon matters of characterisation, raises for consideration any general principle of public importance such as would warrant the grant of special leave."

A similar problem arose in the *St George* special leave application.[33] This case involved a complex factual scenario. However, the ultimate issue before the court was a simple one — whether payments made by St George Bank to a foreign subsidiary pursuant to its obligations under a subordinated debenture were deductible.

Counsel for the applicant did not engage the High Court in a detailed application of the law to the facts. Instead, to demonstrate the widespread application of the underlying principle, counsel for the applicant made a comparison between the taxpayer's position and an agriculturalist who borrows funds to acquire land which is then mortgaged to secure certain obligations. However, counsel for the respondent was more willing to engage in the specific facts of the case[34] and framed the issue thus:[35]

> "Your Honour, we say that this is no more than a case of characterisation … if there is any error [in the judgment of the Full Federal Court], it is an error which is confined to these particular facts and that error is only, as we say your Honour, in relation to the question of characterisation. It is not in relation to the question of principle."

Table 1

Case type	Refused	Granted	Application referred to Full Court*	Application referred to enlarged court*	Granted on limited grounds	Stood over	Adjourned/ Discontinued/ Misc	Total
Tax	9	13	0	0	1	0	1	24
	37.5%	54.2%	0.0%	0.0%	4.2%	0.0%	4.2%	-
Non-tax	207	76	12	3	4	2	10	314
	65.9%	24.2%	3.8%	1.0%	1.3%	0.6%	3.2%	-
All	216	89	12	3	5	2	11	338
	63.9%	26.3%	3.6%	0.9%	1.5%	0.6%	3.3%	-

*** Applications referred to the Full Court or enlarged court are not technically "granted" by the High Court. Rather, they are referred to an enlarged sitting of the High Court, which may then hear the appeal instanter.**

Ultimately, the court accepted the argument on the basis that there was no challenge to the underlying principle (in this case, the debt/equity test in Div 974 ITAA97 and the capital/revenue test in *Sun Newspapers Ltd and Associated Newspapers Ltd v FCT*[36]).

What can be observed from these cases is the uphill battle that counsel for the applicant faces in special leave applications. The brevity of oral argument before the bench means that they cannot afford to engage in a detailed discussion of the facts, yet it is easy for opposing counsel to draw the court's focus to those facts. Indeed, concerned as they are with selecting the correct cases for their attention, the bench may insist on engaging counsel for the applicant on the facts.

We can see then the considerable skill and knowledge of the facts required by counsel for the applicant in order to link a response to a question on specific facts into an answer which advances an underlying legal principle.

Statistics

Table 1 shows the outcome of tax and non-tax High Court special leave applications during February 2009 to February 2010. Tax applications represented approximately 7% of all special leave applications made in this period.

The bare statistics indicate that tax applications had a greater chance of being granted than non-tax applications. This may be due in part to the fact that several tax special leave applications were compound applications. That is, there were multiple applications resulting from the same lower court hearing. For example, there were five separate successful special leave applications from the single Full Federal Court case of *FCT v BHP Billiton Finance Ltd*.[37]

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3 Kirby at 746; D Jackson, "Practice in the High Court of Australia", (1996-1997) 15(3) *Australian Bar Review* 187 at 192.
4 *FCT v Westfield Ltd* (1991) 22 ATR 400 at 402.
5 *Bruton Holdings Pty Ltd (in liq) v FCT & Anor, Transcript of Proceedings (High Court of Australia, Gummow, Heydon and Bell JJ, 19 June 2009).*
6 *Bruton Holdings* at 2.
7 (2007) 30(3) *UNSW Law Journal* 732.
8 Kirby at 743.
9 *South Steyne Hotel Pty Ltd & Ors v FCT, Transcript of Proceedings (High Court of Australia, French CJ and Kiefel J, 23 April 2010).*
10 *South Steyne* at 2.
11 *South Steyne* at 11.
12 *Travelex Ltd v FCT, Transcript of Proceedings (High Court of Australia, Gummow, Heydon and Bell JJ, 12 March 2010).*
13 *Travelex* at 5.
14 However, the authors submit that *Travelex may have been successful due mainly to counsel's argument regarding "intersection of laws" (see below).*
15 *Handbury Holdings* and *MW McIntosh*.
16 *South Steyne*.
17 *Handbury Holdings Pty Ltd v FCT, Transcript of Proceedings (High Court of Australia, Hayne and Crennan JJ, 23 April 2010).*
18 Kirby at 744.
19 *MW McIntosh Pty Ltd & Anor v FCT, Transcript of Proceedings (High Court of Australia, Gummow and Kiefel JJ, 3 September 2010).*
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23 Kirby at 749.
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25 *Roy Morgan Research v FCT & Anor, Transcript of Proceedings (High Court of Australia, French CJ, Crennan and Bell JJ, 10 December 2010).*
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29 *Department of Transport* at 2.
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31 *Department of Transport* at 7.
32 *Department of Transport* at 15.
33 *St George Bank Ltd v FCT, Transcript of Proceedings (High Court of Australia, French CJ and Heydon J, 3 November 2009).*
34 *St George* at 7 and 8.
35 *St George* at 9.
36 (1938) 61 CLR 337.
37 [2010] FCAFC 25.