THE 'PRICE' OF JUSTICE? COSTS-CONDITIONAL SPECIAL LEAVE IN THE HIGH COURT

KIERAN PENDER*

This article considers the High Court of Australia's occasional practice of granting special leave to appeal on a costs-conditional basis, whereby the appellant pays the respondent's costs regardless of the outcome. Despite the dissonance between this practice and traditional costs principles, there is little academic or judicial reflection on costs-conditional special leave. While several policy considerations support this practice, it is not unproblematic. What factors guide the exercise of this discretion? Why must an ultimately successful appellant fund the litigation? Should a party's financial status be a relevant consideration? If the Court is willing to depart from traditional costs rules here, why not elsewhere? This article uses quantitative and qualitative frameworks to consider such issues.

CONTENTS

* BA (Hons), LLB (Hons) (ANU); Legal Advisor, International Bar Association, London. This research was undertaken at the Centre for International and Public Law, Australian National University. It was approved by the Humanities and Social Sciences Delegated Ethics Review Committee (Protocol 2017-206). The author acknowledges with gratitude the supervision of Professor James Stellios and Margie Rowe. Thanks are also due to Heather Roberts, Brendan Lim, Associate Professor Gabrielle Appleby, the two anonymous reviewers and the research participants who generously volunteered their time and insight.

I Introduction

> [Prior to a special leave hearing, the appellant in *Freidin v St Laurent* had offered to pay the respondent's appeal costs in any event if leave was granted.]
>
> Kirby J: Mr Casey, it is rather ungracious of you to reject all this money that the applicant is bringing to Court trying to buy its way into the High Court of Australia.
>
> …
>
> Mr Casey: We have not seen any buckets yet, your Honour.[1]

From time to time, the High Court of Australia grants special leave to appeal on the condition that the appellant pays the respondent's appeal costs in any event and undertakes not to disturb costs orders below. This is unusual. Costs typically follow the event,[2] and Australian courts have resisted departing from

[1] Transcript of Proceedings, *Freidin v St Laurent* [2007] HCATrans 251, 366–72.

[2] See, eg, *Donald Campbell & Co Ltd v Pollak* [1927] AC 732, 811–12 (Viscount Cave LC); *Latoudis v Casey* (1990) 170 CLR 534, 569 (McHugh J). The principle that costs follow the event has a long history. One jurist writes: 'The rule appears to have its origins in the thirteenth century, when the *Statute of Gloucester 1275* gave plaintiffs a right to certain costs in specified real property actions. The "loser pays" principle was gradually extended over the

the traditional principle in a range of contexts.[3] Why should an appellant bear the entire costs of a dispute if they are ultimately successful in the High Court? It is not far-fetched to suggest that, in complex cases fought out across several fora, the price could reach seven figures, as the appellant is unable to recover its own costs and is liable for the respondent's costs. Counsel in one such case quipped: 'Justice does not come cheap.'[4]

Yet the High Court's practice is not without compelling policy justifications. Costs-conditional special leave is typically imposed where the appellant is a deep-pocketed public or commercial party with a broader interest in the disputed jurisprudence, while the respondent is an individual concerned solely with the litigation at hand. Requiring this condition thereby allows the Court to fulfil its law-developing role at the apex of the Australian judicial system without 'burdening other parties swept along in expensive litigation'.[5] When a 'large and recurrent litigant', such as an insurer or the Commissioner of Taxation, seeks to change the law 'in order to vindicate their long-term commercial [or public] interests', it seems entirely reasonable for special leave to be conditioned on this basis.[6] The practice may also have desirable consequences: the respondent is financially empowered to retain eminent senior counsel (to the benefit of the Court), and will be disinclined to settle safe in the knowledge that they are protected from adverse costs.

A review of the High Court's costs-conditional special leave practice is overdue. To the author's knowledge, it has never been previously considered in any depth in academic literature. Nor has it been the subject of much introspection by the Court. In one of the few judgments to consider the practice, *Oshlack v Richmond River Council* ('*Oshlack*'), the Court split on its

centuries until in modern times it applies generally to all litigation subject to [certain exceptions]': Geoffrey Woodroffe, 'Loser Pays and Conditional Fees: An English Solution?' (1998) 37(2) *Washburn Law Journal* 345, 345.

[3] See, eg, *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280, 294–5 [74]–[75] (Allsop CJ, Foster and Gleeson JJ); *Qantas Airways Ltd v Cameron [No 3]* (1996) 68 FCR 387, 389 (Lindgren and Lehane JJ) ('*Qantas Airways*'); Gary Cazalet, 'Unresolved Issues: Costs in Public Interest Litigation in Australia' (2010) 29(1) *Civil Justice Quarterly* 108, 119. But see *Kent v Cavanagh* (1973) 1 ACTR 43, 55–6 (Fox J); *Ruddock v Vadarlis [No 2]* (2001) 115 FCR 229, 242 [29] (Black CJ and French J) ('*Ruddock v Vadarlis*').

[4] Transcript of Proceedings, *CSR Ltd v Thompson* [2004] HCATrans 544, 132–3 (MJ Joseph).

[5] Justice Michael Kirby, 'Maximising Special Leave Performance in the High Court of Australia' (2007) 30(3) *University of New South Wales Law Journal* 731, 750.

[6] *CSR Ltd v Eddy* (2005) 226 CLR 1, 35 [80]–[81] (Gleeson CJ, Gummow and Heydon JJ) ('*CSR v Eddy*').

ramifications.[7] There is also disagreement as to the practice's frequency and nature. It has variously been described as 'rare',[8] 'occasional'[9] and occurring 'quite frequently',[10] while views differ as to whether the condition is ordinarily 'volunteered' by the appellant,[11] sought by the respondent, or 'extracted' at the Court's initiative.[12] Given the dissonance between this practice and the traditional costs rule, an exploration of these diverging opinions is warranted.

This paper utilises both quantitative and qualitative research methods. It begins with a review of the sparse literature and judicial dicta on this topic. It then undertakes a quantitative assessment of the practice, reviewing all successful special leave applications from May 1998 to January 2017 (the Gleeson and French Courts) to determine when and in what circumstances costs-conditional special leave is granted. The paper then considers broader questions about the practice, its justifications and appropriateness through a mixed methods framework. Qualitative interviews with a range of stakeholders provide varied perspectives on costs-conditional special leave, which are analysed and synthesised with the support of the data set. The paper concludes by considering the wider impact of this practice.

Beyond the intellectual and policy relevance of the following discussion, it is hoped that this research may also have practical utility. While costs undertakings are now widely understood to be the 'price' of special leave in appropriate cases,[13] and there was unanimity among research participants that appellants never refuse the costs-conditions lest special leave be declined, from time to time it has been an issue in dispute. In May 2017, the question was squarely raised during a special leave hearing.[14] Counsel for the appellant resisted funding the respondent's appeal because they were 'a well-heeled union'.[15] Kiefel CJ held: 'On condition that the applicant does not seek an

[7] (1998) 193 CLR 72, 88–9 [40]–[45] (Gaudron and Gummow JJ), 109–10 [98]–[101] (McHugh J) ('*Oshlack*').

[8] Kirby (n 5) 747.

[9] *Oshlack* (n 7) 109 [98] (McHugh J).

[10] Ibid 124 [137] (Kirby J).

[11] Transcript of Proceedings, *CSR Ltd v Thompson* [2004] HCATrans 544, 99–101 (Callinan J).

[12] Ibid 103 (DF Jackson QC).

[13] Transcript of Proceedings, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2017] HCATrans 112, 369–74 (Gageler J) ('*Probuild Constructions (transcript)*').

[14] Transcript of Proceedings, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] HCATrans 106.

[15] Ibid 654 (TM Howe QC).

order for costs of the appeal, there will be a grant of special leave. The Court is not minded to take the question of indemnification further.'[16] In several other cases, disagreement between the parties has seen the question of costs deferred for determination at the appeal.[17] Given the absence of rules or prior reasons controlling the Court's discretion in such matters, guidance as to why and in what circumstances costs-conditions will be required may assist litigants.

II Literature and Judicial Dicta: A (Limited) Review

The practice of costs-conditional special leave has origins in the Privy Council.[18] Writing in 1912, Norman Bentwich explained: 'Occasionally it has been made a term [of special leave to appeal] that the petitioner shall in any event pay the costs of both sides.'[19] Bentwich cited an 1850 case involving the East India Company where leave was granted, notwithstanding the small sum in dispute, because the appellants undertook to pay 'all costs, charges, and expenses of the respondent'.[20] The comments of Lord Langdale in that case are instructive:

> The question is, whether this prosecution being by the East India Company, and no doubt important to have decided, for the benefit of the whole country, the whole expense of this appeal should not be borne by them. However important it may be to establish the law, upon a question of this kind, it would be very wrong to put the party to so great expense in a case where so small amount is at issue. Even if the right of appeal were granted, you might be

[16] Ibid 701–3.

[17] Transcript of Proceedings, *CSR Ltd v Thompson* [2004] HCATrans 544; Transcript of Proceedings, *Air Link Pty Ltd v Paterson* [2004] HCATrans 394; Transcript of Proceedings, *Sons of Gwalia v Margaretic* [2006] HCATrans 321.

[18] Frank Safford and George Wheeler, *The Practice of the Privy Council in Judicial Matters* (Sweet & Maxwell, 1901) 762. The authors offer: 'In granting special leave to appeal, the Judicial Committee will put the petitioner upon such terms as the circumstances of the case require'. Safford and Wheeler cite a number of cases where costs conditions were imposed, including several originating from Australia: see, eg, *Graham v Berry* (1865) 3 Moo PC NS 207, 227; 16 ER 78, 85–6 (Lord Chelmsford) ('*Graham*'); *Shenton v Smith* [1895] AC 229, 236 (Lord Hobhouse); *Main v Stark* [1890] 15 App Cas 384, 390 (Earl of Selborne).

[19] Norman Bentwich, *The Practice of the Privy Council in Judicial Matters* (Sweet & Maxwell, 1912) 234.

[20] Ibid 237, citing *Spooner v Juddow* (1850) 4 Moo Ind App 353, 361; 18 ER 734, 737 (Lord Langdale) ('*Spooner*').

> defeated in this way; the Respondent may say, that it would be much better to pay his 250 rupees, than to come here, and pay the expense of this prosecution.[21]

More than a century later, the *Judiciary Amendment Act (No 2) 1984* (Cth) removed the last remaining appeals as of right to the High Court and established a regime whereby appeals could not be brought unless special leave was granted.[22] The question of costs was not adverted to by the legislation's Explanatory Memorandum.[23] However, following the Australian implementation of special leave, the Privy Council's historical practice was adopted.[24] In one work, the author cites cases from the mid-1980s where costs-conditional special leave was granted.[25]

The High Court's power to require costs undertakings stems from the discretionary nature of special leave.[26] Section 35A of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*') provides that the Court 'may have regard to *any matters* that it considers relevant' in determining whether to grant special leave.[27] It then identifies several factors which the Court shall have regard to, including 'whether the interests of the administration of justice, either generally or in the particular case, require consideration [of the appeal] by the High Court'.[28] Accordingly, the question of costs is a factor reasonably within the Court's purview when determining special leave, allowing it to require costs conditions as it sees fit. While a corollary issue might arise as to whether imposing

[21] *Spooner* (n 20) 737 (Lord Langdale). While it is unclear whether *Spooner* represents the first example of costs-conditional special leave, it became the preferred precedent to cite in later cases: see, eg, *Graham* (n 18) 86 (Lord Chelmsford).

[22] *Judiciary Amendment Act (No 2) 1984* (Cth) ss 3–4; Explanatory Memorandum, Judiciary Amendment Bill 1984 (Cth) ss 2–3. Before its removal, Parliament had gradually restricted the right of appeal to the High Court. In 1976, amendments to the *Judiciary Act 1903* (Cth) circumscribed this right through the imposition of minimum damages: *Judiciary Amendment Act 1976* (Cth) s 6(1). It was not until 1984, though, that the right was removed altogether and replaced by the special leave mechanism.

[23] Explanatory Memorandum, Judiciary Amendment Bill 1984 (Cth).

[24] Interview with David Jackson (Kieran Pender, Sydney, 31 April 2017).

[25] David O'Brien, *Special Leave to Appeal: The Law and Practice of Applications for Special Leave to Appeal to the High Court of Australia* (LBC Information Services, 1996) 173 n 258 ('*Special Leave to Appeal*').

[26] Dean Mildren, *The Appellate Jurisdiction of the Courts in Australia* (Federation Press, 2015) 173. In *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194 ('*Smith Kline*'), the Court observed: '[Special leave] involves the exercise of a very wide discretion': at 218 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[27] *Judiciary Act 1903* (Cth) ('*Judiciary Act*') s 35 (emphasis added).

[28] Ibid.

costs conditions — and the manner in which the Court does so — are consistent with the exercise of judicial power, such questions will not be considered by this paper.[29]

Little has been written, by judges or commentators, about costs-conditional special leave in the High Court. David O'Brien highlighted the practice in his 1996 contribution, noting that '[s]pecial leave is sometimes granted upon conditions' before citing a host of cases to support his short additional commentary.[30] In a 2007 *University of New South Wales Law Journal* article, Justice Michael Kirby offered passing observations: 'In some (rare) cases where an applicant represents a large group interest, it might offer to pay the respondent's costs … and not to disturb costs below, as a sweetener to signify the importance of the case.'[31] He continued:

> Similarly, if the Court voices concern that any grant of leave should be subject to [costs] requirements … such conditions should ordinarily be accepted as the price of having a test case of importance to the applicant heard, without burdening other parties swept along in expensive litigation.[32]

Costs authority GE Dal Pont has also made brief comments on the topic, noting that the High Court pursues this course of action in cases where 'the resolution of a point is desirable from the point of view of a large and recurrent litigant … but the opponent … is not well positioned to meet adverse costs orders'.[33] While several other commentators have made similarly cursory observations, no scholar has considered costs-conditional special leave in any depth.

Nor has there been much judicial introspection. The practice first received a degree of scrutiny in 1998 in *Oshlack*, when the High Court split over whether special leave conditions could be used to justify a departure from the traditional costs rule in another context.[34] *Oshlack* was not a costs-conditional case — it involved an appellant seeking costs protections — but both the

[29] For another critique of the constitutionality of the High Court's current special leave mechanism, see Luke Beck, 'The Constitutional Duty to Give Reasons for Judicial Decisions' (2017) 40(3) *University of New South Wales Law Journal* 923.

[30] O'Brien, *Special Leave to Appeal 1996* (n 25) 172–4. See also David O'Brien, *Special Leave to Appeal* (Supreme Court of Queensland Library, 2nd ed, 2007) 216.

[31] Kirby (n 5) 747.

[32] Ibid 750.

[33] GE Dal Pont, 'Costs' in Graeme Blank and Hugh Selby (eds), *Appellate Practice* (Federation Press, 2008) 197, 198.

[34] *Oshlack* (n 7).

majority and the minority analogised with the practice of granting costs-conditional special leave. Gaudron and Gummow JJ pointed to conditional special leave — '[a]s the practice in this court testifies' — to support the view that '[t]here is no absolute rule … a successful party is to be compensated by the unsuccessful party. Nor is there any rule that there is no jurisdiction to order a successful party to bear the costs of the unsuccessful party'.[35] Kirby J concurred, drawing similarities with 'the special orders which this Court quite frequently makes providing special leave to appeal upon [costs conditions]' to identify 'a discrete approach … where courts have concluded that a litigant has properly brought proceedings to advance a legitimate public interest'.[36] The plurality thereby developed a narrow exception to the traditional costs rule, and held that Al Oshlack was not required to pay costs, upholding judgment at first instance.[37]

In dissent, McHugh J (with Brennan J agreeing) took issue with the costs-conditional special leave analogy. 'The offering or requiring of such an undertaking,' his Honour wrote, 'is far removed' from a court failing to issue the usual costs order because of 'some suggested public interest element associated with the litigation'.[38] His Honour continued:

> The analogy suggested by [counsel] cannot be maintained. Indeed, if anything the example of special costs orders in special leave applications tends to support the Council's position. The practice of requiring the applicant to pay the costs of the appeal, irrespective of the outcome is to protect *the respondent* from the costs of further litigation by the applicant. In this case, [counsel's] argument seeks to protect *the applicant* from the costs that it has brought on the respondent.[39]

McHugh J re-enlivened this debate several years later in *CSR Ltd v Eddy* ('*CSR v Eddy*'), an asbestos case.[40] During the special leave hearing, the respondent sought costs undertakings in reliance on a similar case where such

[35] Ibid 88–9 [40]–[42].

[36] Ibid 124 [136]–[137].

[37] Ibid 91 [49]–[50] (Gaudron and Gummow JJ), 120 [133] (Kirby J). For the judgment at first instance, see *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236. See generally Kellie Edwards, 'Costs and Public Interest Litigation after *Oshlack v Richmond River Council*' (1999) 21(4) *Sydney Law Review* 680.

[38] *Oshlack* (n 7) 109 [100].

[39] Ibid 109–10 [100] (emphasis in original).

[40] *CSR v Eddy* (n 6).

conditions had been imposed.[41] This led to disagreement among the bench: Kirby J suggested that if leave was being granted 'to resolve a difference between jurisdictions of Australia' then the condition would be 'very proper',[42] while Callinan J expressed reluctance: 'So the first one who challenges it has to pay the costs[?]' his Honour asked rhetorically.[43] Ultimately, the question of costs was reserved for the Full Court to decide following the appeal.

That ensuing judgment offers the most lucid clarification of the practice. While CSR Ltd were successful, Gleeson CJ, Gummow and Heydon JJ awarded costs against them and ordered that costs below remain undisturbed. They wrote: 'The appellants … prosecuted the appeals, in order to vindicate their long-term commercial interests … In contrast, the plaintiff had no interest in the legal position beyond this particular litigation.'[44] The plurality continued:

> It is common in this Court in cases where the resolution of a point is desirable from the point of view of a large and recurrent litigant, whether corporate (for example, an insurance company) or government (for example, the Commissioner of Taxation or the Australian Competition and Consumer Commission), but the other party to the litigation is not a recurrent litigant and is not well-positioned to meet adverse costs orders on the point being tested, for the grant of special leave to be made [on a costs-conditional basis].[45]

In separate dissents, McHugh J and Callinan J awarded costs to the appellant. McHugh J sought to distinguish requiring costs conditions for special leave and imposing them ex post facto, despite the issue being deferred in the special leave hearing: '[A] different area is reached when special leave has been granted without such a condition and the insurer succeeds in the appeal … I can see no principled justification for requiring [the appellant] to pay both parties' costs in this Court.'[46] Callinan J argued similarly.[47] *Oshlack* and *CSR v Eddy* are the only two substantive judgments where the topic of

[41] Transcript of Proceedings, *CSR Ltd v Thompson* [2004] HCATrans 544, 85–92. The case nomenclature changed following the death of the respondent, prior to the hearing of the appeal.

[42] Ibid 142–7.

[43] Ibid 165.

[44] *CSR v Eddy* (n 6) 35 [80]–[81].

[45] Ibid 35 [81].

[46] Ibid 48 [118]–[119].

[47] Ibid 49–50 [122]–[127].

costs-conditional special leave has been considered to any extent. As the disagreement in both cases indicates, neither propounded a comprehensive rationale for the practice. Further examination is therefore necessary.

The obvious starting point for that analysis is the strands of reasoning offered by different judges in the various hearings and judgments discussed above. In its early jurisprudence on this topic, the Privy Council relied on fairness considerations in imposing costs-conditional special leave: '[I]t would be very wrong to put the party to so great expense in a case where so small amount is at issue.'[48] Practicality was also relevant — the respondent might have simply settled if costs protections were not given. Similar issues have been posited by the High Court, with the nature of the parties and their interest in the litigation informing the practice. The Court has also underscored that questions of special leave and costs are both discretionary, giving the bench considerable flexibility.[49]

Finally, the practice is not unique in Australia to the High Court, and at minimum seems to have been adopted by the New South Wales Court of Appeal. In *New South Wales v Corby*, for example, Basten JA imposed costs conditions when granting leave to appeal.[50] His Honour identified several relevant factors, including that the legal uncertainty was due to unclear legislative drafting and because 'there are other cases which will turn on the outcome of this case, in each of which the State is the respondent or defendant'.[51] While this paper will not consider the position in courts other than the High Court, that costs-conditional leave is not distinct to Australia's apex judiciary emphasises the relevance of this research.

III Quantitative Analysis

To establish the frequency and nature of the High Court's costs-conditional special leave practice, this paper will undertake a quantitative analysis. This is achieved through a review of all special leave transcripts available on the Australasian Legal Information Institute's website ('AustLII') from the

[48] *Spooner* (n 20) 737 (Lord Langdale).

[49] See, eg, *Smith Kline* (n 26) 218 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[50] (2010) 76 NSWLR 439, 441 [9] ('*Corby*'). There is an interesting coincidence here: John Basten QC appeared as counsel for the respondent in *Oshlack*, and in argument made the connection between a public interest costs exception and costs-conditional special leave that drew McHugh J's ire in the ultimate judgment: *Oshalck* (n 7) 109–10 [100].

[51] *Corby* (n 50) 441 [9].

elevation of Chief Justice Gleeson in May 1998 until the departure of Chief Justice French in January 2017. The chosen time period adequately balances methodological soundness with practicality — it is sufficiently lengthy so as to constitute a valid sample size, yet remains within the timeframe for which special leave transcripts are readily available online. The elevation of Chief Justice Gleeson and the retirement of Chief Justice French offer helpful markers to delineate the study, although it is not this paper's intention to scrutinise variation between each Court. An appendix listing all cases within the data set is available following the conclusion.[52]

Empirical research of judicial processes is fraught with limitations, and researchers should be transparent about potential shortcomings.[53] The data set relied upon here is imperfect — AustLII does not profess to be exhaustive, rather admitting that '[t]his database contains *selected* transcripts of the High Court of Australia'.[54] In recent years, the Court has moved towards determining the majority of special leave applications 'on the papers',[55] such that the data for the French Court may be incomplete.[56] Finally, it is possible that the costs issue may not always be articulated during special leave hearings — where the appellant volunteers the condition, for example, it may be agreed between the parties prior to oral argument.[57] Yet these limitations are not fatal to the utility of the present exercise. As early pioneers of quantitative legal research noted, the resulting statistics 'are not an end in themselves but are intended to present a foundation for more detailed consideration'.[58] Given the

[52] See below Part VIII.

[53] Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of its First Five Years' (2003) 26(1) *University of New South Wales Law Journal* 32, 35–6; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2012 Statistics' (2013) 36(2) *University of New South Wales Law Journal* 514, 514–15.

[54] High Court of Australia Transcripts, *AustLII* (Web Page) <http://www.austlii.edu.au/au/other/HCATrans/> (emphasis added).

[55] Michael Pelly, 'High Court Decides Leave Applications on Paper', *The Australian* (online, 22 July 2016) <http://www.theaustralian.com.au/business/legal-affairs/high-court-decides-leave-applications-on-paper/newsstory/016ccc6667e4f2b9ab52114d0715618d>.

[56] The implications of this change are discussed below.

[57] In a 2007–08 insurance case, for example, there was no discussion of costs during the special leave hearing: Transcript of Proceedings, *CGU Insurance Ltd v Porthouse* [2007] HCATrans 599. However, in the ultimate judgment, the majority noted: 'In accordance with an undertaking given by the appellant on the application for a grant of special leave to appeal, the appellant should pay the respondent's costs of the appeal to this Court': *CGU Insurance Ltd v Porthouse* (2008) 235 CLR 103, 123 [77] (Gummow, Kirby, Heydon, Crennan and Kiefel JJ) ('*Porthouse*').

[58] Note, 'The Supreme Court, 1948 Term' (1949) 63(1) *Harvard Law Review* 119, 119.

absence of any detailed research into or data concerning the phenomena under study — including in the High Court's annual reports, which do not discuss costs or costs-conditional grants of special leave — this quantitative analysis is a necessary and important starting point.

A *Frequency*

How often does the High Court require costs-conditional special leave? Figure 1 presents the frequency of the condition from May 1998 until January 2017. Special leave applications are included within this data set where one or both of the costs conditions — the appellant paying the respondent's costs in any event and/or the appellant undertaking not to disturb costs orders below favourable to the respondent — were articulated during special leave. Applications are also included where the circumstances of the case gave rise to a suspicion that the condition might have been attached despite not being apparent in the transcript and a condition's existence was confirmed by reference to the ultimate judgment.[59]

Figure 1: Frequency of Costs-Conditional Special Leave

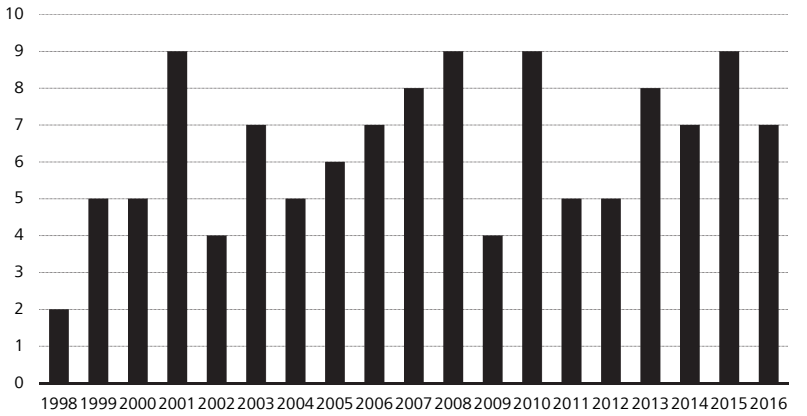


Figure 1 indicates that, despite some year-on-year variation, the practice has remained consistent over the past two decades. Between May 1998 and January 2017, 121 special leave applications were granted on a costs-conditional basis. On average, the condition(s) were required in 6.37 applica-

[59] See, eg, *Porthouse* (n 57).

tions per year. In the same period, the Court heard an average of 60.94 appeals per year, such that costs conditions were prevalent in approximately 10% of cases. As the Gleeson Court experienced a higher appellate workload, its individual average was approximately 8.5% of cases compared with 13.85% for the French Court.[60] Thus, while there has been a slight increase in the frequency of costs-conditional special leave over the past two decades, it is not considerable. That the condition is required in approximately 10% of special leave cases indicates, although the practice does not occur 'quite frequently',[61] it is hardly 'rare' either.[62]

B *Nature of Parties*

What type of party is most likely to be faced with costs-conditional special leave, and in what circumstances? Table 1 and Figure 2 indicate that the condition(s) arise most frequently when an appellant public authority is against an individual litigant respondent. The Minister for Immigration and Border Protection (and predecessors) is the party most commonly faced with the condition(s), being the appellant in almost a quarter of such cases over the Gleeson and French Courts. Costs-conditional special leave is also regularly imposed on the Commissioner of Taxation (and related parties), Comcare and the States. Quasi-public authorities included within this category include the Australian Broadcasting Corporation,[63] a public university,[64] the Victorian Legal Services Board[65] and the New South Wales Independent Commission against Corruption.[66] Public authority against individual litigant cases constitute over two thirds of total costs-conditional special leave in the relevant period.

[60] These particular averages are somewhat imperfect as the appellate data is available per financial year whereas the Court changed in September 2008. This imperfection is not significant.

[61] *Oshlack* (n 7) 124 [137] (Kirby J).

[62] Justice Kirby (n 5) 747.

[63] Transcript of Proceedings, *Australian Broadcasting Corporation v O'Neill* [2005] HCATrans 1029.

[64] Transcript of Proceedings, *Griffith University v Tang* [2004] HCATrans 103.

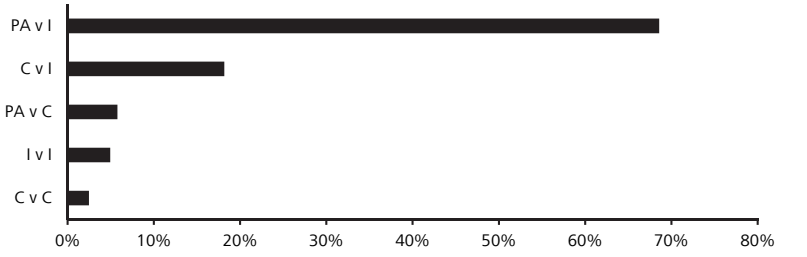
[65] Transcript of Proceedings, *Legal Services Board v Gillespie-Jones* [2013] HCATrans 53.

[66] Transcript of Proceedings, *Independent Commission against Corruption v Cunneen* [2014] HCATrans 296.

Table 1: Nature of Parties

Identity of Parties	Frequency	Percentage (2dp)
Public Authority (PA) v Individual (I)	83	68.60%
Corporation (C) v Individual (I)	22	18.18%
Public Authority (PA) v Corporation (C)	7	5.79%
Individual (I) v Individual (I)	6	4.96%
Corporation (C) v Corporation (C)	3	2.48%
Total	**121**	**100%**

Figure 2: Nature of Parties



The next most frequent category of dispute where costs-conditional special leave arises is between a corporation and an individual, amounting to almost 20% of such cases. About half of these matters involved workers' compensation claims.[67] In seven cases involving a public authority appellant and corporate or quasi-corporate respondent, one or both of the conditions has

[67] See, eg, Transcript of Proceedings, *ADCO Constructions Pty Ltd v Goudappel* [2013] HCATrans 250.

been required.[68] Three involved the Commissioner of Taxation, while in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* the undertaking was extracted on the basis that the issue had 'far more importance for [the Australian Broadcasting Corporation] than it has for [the respondent]'.[69]

The condition(s) have also been required in six disputes between individual litigants.[70] All six were tort cases, suggesting that an insurer was standing behind the appellant. French CJ was explicit in *King v Philcox*: 'I take it [that] it is an insurer who is, in effect, seeking a determination of wider importance … .'[71] Finally, in three cases, the condition(s) have been required from a corporate or quasi-corporate appellant against a corporate respondent.[72] In *Maxwell v Highway Hauliers Pty Ltd*, an insurer volunteered the conditions by seeking leave 'on terms that we paid for the improvement of jurisprudence'.[73] The relative infrequency of costs conditions in corporate litigation indicates that it will only be imposed where volunteered or in light of exceptional circumstances.

[68] Transcript of Proceedings, *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCATrans 193 ('*Quest South Perth Holdings (transcript)*'); Transcript of Proceedings, *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* [2015] HCATrans 82; Transcript of Proceedings, *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCATrans 76; Transcript of Proceedings, *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* [2007] HCATrans 809; Transcript of Proceedings, *Northern Territory v Arnhem Land Aboriginal Land Trust* [2007] HCATrans 324 ('*Arnhem Land Aboriginal Land Trust (transcript)*'); Transcript of Proceedings, *Bankstown City Council v Alamdo Holdings Pty Ltd* [2004] HCATrans 491; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (High Court of Australia, H18/1999, Gleeson CJ and Kirby J, 12 May 2000) *('Lenah Game Meats (transcript)*').

[69] *Lenah Game Meats (transcript)* (n 68) 472–3 (Gleeson CJ).

[70] Transcript of Proceedings, *Stewart v Ackland* [2015] HCATrans 226; Transcript of Proceedings, *Allen v Chadwick* [2015] HCATrans 154; Transcript of Proceedings, *King v Philcox* [2014] HCATrans 253 ('*King (transcript)*'); Transcript of Proceedings, *Daly v Thiering* [2013] HCATrans 139; Transcript of Proceedings, *Neindorf v Junkovic* [2005] HCATrans 430; Transcript of Proceedings, *Derrick v Cheung* (High Court of Australia, S195/1999, Gaudron and Callinan JJ, 16 June 2000).

[71] *King (transcript)* (n 70) 397–8.

[72] Transcript of Proceedings, *Maxwell v Highway Hauliers Pty Ltd* [2014] HCATrans 51 ('*Maxwell (transcript)*'); Transcript of Proceedings, *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* [2007] HCATrans 606; Transcript of Proceedings, *International Air Transport Association v Ansett Australia Holdings Ltd* [2007] HCATrans 159 ('*Ansett Australia (transcript)*').

[73] *Maxwell (transcript)* (n 72) 28–9 (BW Walker QC).

C *Nature of Dispute*

What type of disputes typically see special leave granted on a costs-conditional basis? There is, of course, a degree of overlap between this question and the immediately preceding subsection. As Table 2 shows, immigration matters constitute approximately a quarter of costs-conditional special leave cases. Similarly, areas of law that often generate disputes between individuals and recurrent, institutional litigants (whether corporate or public) are well-represented: tort law, workers' compensation law and taxation law cumulatively represent almost 40% of total cases. The condition(s) are also prevalent in cases likely to have wide-ranging legal impact across Australia, including constitutional law, administrative law and employment law.[74] As Kirby J quipped in *Santos*, 'if … [Santos and the Northern Territory] want to bring up a case as a test case … and it raises an important constitutional question, it is a bit hard to have an ordinary citizen on the receiving end of costs orders'.[75]

[74] For cases on constitutional law, see, eg, Transcript of Proceedings, *A-G (NT) v Emmerson* [2013] HCATrans 244; Transcript of Proceedings, *New South Wales v Kable* [2012] HCATrans 356; Transcript of Proceedings, *A-G (SA) v Corporation of the City of Adelaide* [2012] HCATrans 107 ('*City of Adelaide (transcript)*'); Transcript of Proceedings, *Santos Ltd v Chaffey* [2007] HCATrans 49 ('*Santos (transcript)*'); Transcript of Proceedings, *A-G (Cth) v Breckler* (High Court of Australia, P10/1998, Gummow and Hayne JJ, 19 June 1998) ('*Breckler (transcript)*'). For cases on administrative law, see, eg, Transcript of Proceedings, *Commonwealth v Kutlu* [2012] HCATrans 35 ('*Kutlu (transcript)*'); Transcript of Proceedings, *Griffith University v Tang* [2004] HCATrans 103; Transcript of Proceedings, *Shergold v Tanner* (High Court of Australia, M128/2000, Gummow and Kirby JJ, 22 June 2001). For cases on employment law, see, eg, Transcript of Proceedings, *Commonwealth Bank of Australia v Barker* [2013] HCATrans 325; Transcript of Proceedings, *Commissioner of Police v Eaton* [2012] HCATrans 189; *Quest South Perth Holdings (transcript)* (n 68).

[75] *Santos (transcript)* (n 74) 135–8.

Table 2: Nature of Dispute

Dispute Subject Matter	Frequency	Percentage (2dp)
Immigration Law	30	24.79%
Tort Law	21	17.36%
Taxation Law	13	10.74%
Workers' Compensation Law	13	10.74%
Criminal Law	8	6.61%
Corporate Law	6	4.96%
Constitutional Law	5	4.13%
Statutory Interpretation Law	5	4.13%
Administrative Law	3	2.48%
Conflict of Laws	3	2.48%
Employment Law	3	2.48%
Other	11	9.09%
Total	**121**	**100%**

An interesting appearance in Table 2 is criminal law. In the period under consideration (1998–2017), costs-conditional special leave was not imposed in a criminal matter until 2007.[76] In the 2009 case of *R v LK*, exchanges between the bench and counsel led to the conclusion that 'it has not been a practice to make costs conditional in criminal cases' and the question of costs

[76] Excluding an environmental law test case involving criminal penalties: Transcript of Proceedings, *Morrison v Peacock* (High Court of Australia, S274/2000, Gleeson CJ and McHugh J, 10 August 2001); and an exceptional case considering criminal penalties under fishing regulations where a government department had induced the commission of the crime: *Ostrowski v Palmer* (High Court of Australia, P25/2002, McHugh and Heydon JJ, 9 May 2003). See also Warwick Gullett, 'Relying on Fishy Advice: The *Ostrowski* Decision' (2004) 21(4) *Environmental and Planning Law Journal* 245. The conditions were first required in a criminal forfeiture case: Transcript of Proceedings, *DPP (Vic) v Le* [2007] HCATrans 250.

was deferred for determination with the appeal.[77] Yet costs conditions have been present in numerous state-as-appellant criminal matters in subsequent years,[78] suggesting that the rationale and application of the practice is amenable to development. However, as the respondent in *R v Dookheea* discovered, such change in the criminal context is incomplete — counsel for Mr Dookheea unsuccessfully sought the condition in 2016.[79]

D *Nature of Conditions*

Lastly, what is the nature of the conditions imposed? The High Court has distinguished between two limbs of costs-conditional special leave: the appellant paying the respondent's appeal costs (the first limb), and the appellant undertaking not to disturb costs below (the second limb). How often are these required together, and how often is only one condition imposed? Table 3 indicates that, in the vast majority of cases, both conditions are volunteered or required. In nearly 16% of cases, only the first limb is imposed. In terms of party identity, this subset is broadly representative: 68% of 'first limb only' cases involve a public authority against an individual, which is identical to the overall ratio of such cases as a percentage of all costs-conditional cases. However, criminal and constitutional cases are overrepresented: 21.05% of 'first limb only' matters are criminal compared with 6.61% in the total data set, while 15.79% are constitutional compared with 4.13% overall. In the former, this is likely because costs are not typically awarded in criminal cases, such that there will not ordinarily be costs orders below at risk of disturbance.[80]

Even where the second limb is not required to gain special leave, the imposition of the first may later weigh against an order to disturb costs below. As much was the case in *Maurice Blackburn Cashman v Brown* ('*Maurice Blackburn*'), where the High Court rejected the successful appellant's applica-

[77] Transcript of Proceedings, *R v LK* [2009] HCATrans 146, 677–8 (TA Game SC). On the first day of the appeal, the appellant volunteered to pay the respondent's costs but not the costs of the respondent's notice of contention: *R v LK* (2010) 241 CLR 177, 213 [79] (French CJ).

[78] See, eg, Transcript of Proceedings, *DPP (Vic) v Dalgliesh* [2016] HCATrans 312; *Police v Dunstall* [2015] HCATrans 63; *R v Khazaal* [2011] HCATrans 279 ('*Khazaal (transcript)*').

[79] Transcript of Proceedings, *R v Dookheea* [2016] HCATrans 284, 455–65 (OP Holdenson QC, French CJ).

[80] See, eg, *Latoudis v Casey* (1990) 170 CLR 534, 561 (Dawson J); *R v Mosely* (1992) 28 NSWLR 735, 738 (Gleeson CJ).

tion for its Court of Appeal costs.[81] The Court held: 'This being a test case on a point of general application and the [first limb] undertaking having been given, the orders for costs made by the Court of Appeal in favour of the plaintiff should not be disturbed.'[82] Finally, there are also a small number of cases where the transcript and ultimate judgment are ambiguous as to one limb but not the other.

Table 3: Nature of Conditions

Conditions	Frequency	Percentage (2dp)
Both Limbs Imposed	91	75.21%
Only First Limb Imposed	19	15.70%
First Limb Imposed; Ambiguity Regarding Second Limb	9	7.44%
Ambiguity Regarding First Limb; Second Limb Imposed	1	0.83%
Conditions Imposed, but Ambiguity Regarding Both Limbs	1	0.83%
Total	**121**	**100%**

IV Consideration

This paper will now consider broader issues surrounding the practice, including its rationale and appropriateness. It does this through a mixed methods framework, combining elite stakeholder qualitative interviews with analysis of the above data set.

A *Qualitative Methodology*

Given the lack of academic or curial writing on this topic, qualitative interviews provide an opportunity to explore costs-conditional special leave with key stakeholders. During this research, the author interviewed six individuals:

[81] (2011) 242 CLR 647, 663 [43] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Maurice Blackburn*').

[82] Ibid.

Justice Stephen Gageler (sitting High Court justice); Justin Gleeson SC (former Solicitor-General of Australia, currently a practising barrister); Tom Howe QC (Chief Counsel Dispute Resolution, Australian Government Solicitor);[83] The Hon Michael Kirby AC CMG (former High Court Justice); David Jackson QC (practising barrister); and Ben Wickham (Deputy Registrar, High Court). While the author did not seek a representative sample, participant selection was purposive to achieve a sufficiently diverse sample.

The participants cumulatively provide judicial, governmental and commercial perspectives — indeed, in some cases the same participant was able to offer more than one viewpoint in light of their mixed professional background. Justice Gageler frequently appeared before the High Court as a barrister and then Solicitor-General of Australia, and his elevation to the bench enables him to provide a contemporary judicial perspective on the topic. Gleeson SC likewise offers mixed governmental and commercial insight. Howe QC is heavily involved in the Commonwealth's High Court litigation, and is one of the few counsel to engage with the bench on the question of costs conditions on multiple occasions. Kirby also frequently commented on the topic during his time on the Court, and was on the bench for much of the period under study. Jackson QC is one of the most experienced appellate counsel in Australia, thus offering an informed and longer-term perspective. Finally, Wickham was able to provide an institutional viewpoint.

The interviews were conducted in person or, in one case, via telephone, in Canberra and Sydney. Interviews lasted between 30 minutes and an hour. A semi-structured interview methodology was adopted, with funnel questioning allowing the participant's uninfluenced perspective to be elicited before specific propositions were put to them. Participants were forthcoming in their responses, and while legal professional privilege inhibited complete disclosure of case-specific details, all participants were prepared to speak at a level of generality. Consistent with the ethics protocol for this research, each participant was given an opportunity to review their extracted quotations prior to publication. The primary limitation of the sample was size — absent time and financial restrictions, an increased number of participants may have provided a greater variety of responses. Future research may also wish to consider perspectives from litigants themselves — public authorities or corporate parties could shed light on the appellant approach to these conditions, while

[83] Mr Howe's views were expressed in a personal capacity, and do not necessarily reflect the views of the Australian Government Solicitor or the Attorney General's Department.

individual respondents may offer interesting insight into the impact of costs protections on their attitude towards the proceedings.

B *Why?*

Several factors appear to motivate the Court's costs-conditional special leave practice. These can be delineated into three distinct, albeit interrelated themes: practical considerations, fairness and the nature of the High Court. It is important to reiterate, though, that these motivations are deciphered from expert perspective and brief commentary in special leave transcripts, rather than directly specified in judicial statements. As Howe QC recalled: 'I do not think I have ever been in a case where the court has actually articulated in any precise way its rationale for attaching these conditions.'[84] This observation was supported by Kirby, who commented: '[T]here were no detailed rules or protocols … essentially this was an ad hoc decision in each case … reasons were not given.'[85]

1 *Practical Considerations*

The imposition of costs conditions has practical benefits for the Court. Firstly, it promotes — in the words of Gleeson SC — 'equality of arms'.[86] Counsel for the respondent in *Australian Broadcasting Corporation v O'Neill* identified the 'disparity of resources between the parties' and implored the Court to 'look very carefully at the need to have that imbalance redressed so as any point that is allowed to be raised on appeal can be properly argued, and properly resourced by the parties'.[87] Costs conditions were imposed. A less pecunious respondent is thereby not disadvantaged by financial factors in choice of representation, ensuring (at least in theory) that the strongest arguments are put on their behalf. This has a 'systemic benefit for the Court', according to Justice Gageler, because it guarantees that 'the question of law will be examined with the benefit of properly funded representation on both sides'.[88]

This rationale has been explicated during special leave hearings on several occasions. In *Minister for Immigration and Multicultural Affairs v White*, McHugh J told counsel for the appellant: '[T]he Court would be assisted by

[84] Interview with Tom Howe (Kieran Pender, Canberra, 13 April 2017).

[85] Email from Michael Kirby to Kieran Pender, 2 May 2017.

[86] Interview with Justin Gleeson (Kieran Pender, Sydney, 1 May 2017).

[87] Transcript of Proceedings, *Australian Broadcasting Corporation v O'Neill* [2005] HCATrans 1029, 266–72 (PW Tree SC).

[88] Interview with Justice Stephen Gageler (Kieran Pender, Canberra, 11 May 2017).

the best possible arguments … I have in mind senior counsel appearing, if possible, on behalf of the respondents.'[89] In *R v Tang*, meanwhile, the Court advised the appellant of an expectation that their undertaking 'would extend to senior counsel'.[90] This factor was also recognised by some participants — Howe QC observed that, absent the conditions, 'there would be a lot more appeals heard with junior counsel representing the litigant'.[91] Accordingly, the conditions ensure that respondents without ample financial resources are adequately represented by the collective efforts of junior and senior counsel, to the Court's ultimate benefit.

Costs-conditional special leave also discourages respondents from settling. While settlement may be desirable elsewhere, in the present context it deprives the High Court of its law-developing function.[92] Recall the comments of Lord Langdale in an early Privy Council case imposing costs conditions: 'Even if the right of appeal were granted, you might be defeated in this way; the Respondent may say, that it would be much better to pay his 250 rupees, than to come here, and pay the expense of this prosecution.'[93] Protecting the respondent from adverse costs removes a considerable incentive for settlement.

Finally, costs conditions ensure the case includes an effective contradictor.[94] Even absent settlement, a respondent who does not wish to fully defend the appeal might leave the Court without opposing argument. This concern has been articulated in numerous special leave hearings.[95] Most recently, in the 2015 case of *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*, the Court required that the appellant

> undertake to pay [the respondent's] costs as a party if they participate as a contradicting respondent and if they are not prepared to participate … you

[89] Transcript of Proceedings, *Minister for Immigration and Multicultural Affairs v White* (High Court of Australia, P30/2000, McHugh J and Kirby J, 5 September 2000) 414–17.

[90] Transcript of Proceedings, *R v Tang* [2007] HCATrans 810, 496–7 (Kirby J).

[91] Interview with Tom Howe (Kieran Pender, Canberra, 13 April 2017).

[92] The persuasiveness of this view in the present context is not universally held: see *CSR v Eddy* (n 6) 50 [126] (Callinan J): 'Settlements are encouraged by the courts in the public, as well as the parties', interests. The purpose that they are intended to serve is not to be subverted in a particular case simply because one of the parties has miscalculated his prospects.'

[93] *Spooner* (n 20) 737.

[94] Interview with Tom Howe (Kieran Pender, Canberra, 13 April 2017).

[95] See, eg, Transcript of Proceedings, *A-G (WA) v Marquet* (High Court of Australia, P114/P115/2002, Gummow J, Callinan J and Heydon J, 11 April 2003) 87–92 (SJ Gageler SC); *City of Adelaide (transcript)* (n 74) 272–6 (French CJ).

> undertake to fund the costs of counsel to appear as an amicus curiae in lieu of a contradictor.[96]

The quantitative data set from Part III provides ample support for the relevance of these practical considerations. An overwhelming 91.73% of costs-conditional special leave cases involved a natural person respondent — the litigant type where financial factors are likely to be significant. Indeed the most common typology of dispute — public authority v individual (constituting approximately two thirds of the total) — is that where resource disparity will be most evident. The minimal number of corporate respondents (8.27%) and complete absence of public authorities receiving costs protections is similarly indicative of the importance of these practical considerations.

2 *Fairness*

Ensuring a degree of fairness between the parties has been expounded as an important reason for the practice of granting costs-conditional special leave. This has at least two elements. Firstly, where the appellant has a broader interest in the litigation than the respondent, it is not unreasonable for the appellant to foot the bill. The representative statement is found in *CSR v Eddy*: 'The appellants … prosecuted the appeals, in order to vindicate their long-term commercial interests … In contrast, the plaintiff had no interest in the legal position beyond this particular litigation.'[97] This is especially so given the respondent has already been through two levels of the judiciary — as Gleeson SC observed, they have a 'legitimate expectation' in the extant outcome.[98]

Kirby and Howe QC both endorsed this view. The former offered that 'where a matter of public interest was urged on behalf of the applicant, the Court would not unnaturally take the view that its superior economic means should require that it indemnify the respondent';[99] similarly, the latter concurred:

> [W]hen the Commonwealth is there, it is nearly always referable to a wider concern about some aspect of public administration, and the Court therefore

[96] *Quest South Perth Holdings (transcript)* (n 68) 65–8 (French CJ).

[97] *CSR v Eddy* (n 6) 35 [80]–[81] (Gleeson CJ, Gummow and Heydon JJ).

[98] Interview with Justin Gleeson (Kieran Pender, Sydney, 1 May 2017).

[99] Email from Michael Kirby to Kieran Pender, 2 May 2017.

> considers that it is inappropriate, in most such cases at least, for the individual litigant to be subjected to a costs risk.[100]

Similar statements were made in numerous hearings.[101]

The imbalanced financial position of the parties was also often invoked during special leave hearings as an aspect of the fairness consideration. In *Dasreef Pty Ltd v Hawchar*, for example, counsel for the respondent sought 'that the grant be conditioned, having regard to the nature of the appeal by an insurer against a worker who is not in good circumstances'.[102] In other cases, reference has been made in pursuit of costs protections to respondents being 'a 90-year-old woman with a very small shareholding'[103] and 'a lady who is permanently and totally incapacitated … [and where] [t]he amount of tax involved is $2,000'.[104] Justice Gageler identified this rationale, highlighting the case of a 'deep pocketed applicant' against a respondent 'not having the wherewithal to fund an examination in the interests of the legal system as a whole' as typically giving rise to the costs conditions.[105]

Part III's quantitative data is consistent with the relevance of this fairness consideration. That 86.78% of costs-conditional special leave cases involved a corporate or public authority litigant against an individual strongly supports the conceptualisation of costs conditions as being applicable where one party has a broader interest in the litigation and the other does not. Data regarding the nature of the dispute is also harmonious with this factor. In these cases, 63.64% involved either immigration law, tort law, taxation law or workers' compensation law — all areas where an individual respondent's interest is unlikely to extend beyond the case itself, but where the corporate or public authority appellant has a broader interest in the jurisprudential development. Immigration cases are an archetypal example — the relevant minister is concerned with the wider state of the law due to pending cognate cases and their ongoing responsibilities, while a migrant or refugee is only interested in the particular adverse decision they initially challenged. Such disputes were

[100] Interview with Tom Howe (Kieran Pender, Canberra, 13 April 2017).

[101] See, eg, *King (transcript)* (n 70) 396–400 (French CJ); Transcript of Proceedings, *Ruddock v Taylor* [2004] HCATrans 390, 4–10 (Kirby J) ('*Ruddock v Taylor (transcript)*').

[102] Transcript of Proceedings, *Dasreef Pty Ltd v Hawchar* [2010] HCATrans 339, 474–6 (BM Toomey QC) ('*Dasreef (transcript)*').

[103] Transcript of Proceedings, *Commissioner of Taxation v McNeil* [2006] HCATrans 39, 256–7 (Kirby J).

[104] Transcript of Proceedings, *Federal Commissioner of Taxation v Scully* (High Court of Australia, M58/1998, McHugh and Gummow J, 12 February 1999) (GJ Davies QC).

[105] Interview with Justice Stephen Gageler (Kieran Pender, Canberra, 11 May 2017).

the most frequent in the data set, constituting almost one quarter of the total number of costs-conditional special leave cases.

The typical imposition of both limbs of the costs conditions also demonstrates the relevance of fairness considerations. If the High Court was only concerned about the practical factors discussed above, these would be largely ameliorated by requiring the appellant to pay the respondent's appeal costs (the first limb). However, in 75.21% of cases, the appellant also agreed (or was required) not to disturb the costs orders below, which are typically favourable to the respondent. This second limb does not assist in improving quality of representation in the High Court, nor does it ensure the presence of an effective contradictor. While it may discourage settlement and prevent costs in one court being set off against costs in another, broadly speaking, the second limb ensures fairness to the respondent rather than addressing practical matters.

Inevitably, this factor will involve a degree of value judgment from the bench (except where costs undertakings have been volunteered), to determine whether the mismatch of interests and resources is such that fairness considerations require costs-conditional special leave. This point was starkly made by Kirby J in *Ruddock v Taylor*, where Solicitor-General David Bennett QC proffered an undertaking as to costs of the appeal (the first limb) but resisted imposition of the second limb (costs below).[106] Bennett argued that '[t]he logic of the undertaking does not extend to the second limb', to which Kirby J retorted: 'Logic may not but the justice may.'[107]

3 *Nature of the High Court*

Finally, the unique nature of the High Court provides an additional justification for costs-conditional special leave. This point is related to the question of fairness, albeit considered from an institutional perspective. Kirby explained: 'Do not make the mistake of thinking that the High Court is just another Court. The High Court is the end of the litigious line. It is a national court with national responsibilities to express and develop the law.'[108] In light of this law-making role, 'costs should not necessarily fall on the hapless party who has been brought into the Court by more powerful or monied interests'.[109] Ordinary litigants, Kirby continued, 'generally have no particular interest in

[106] *Ruddock v Taylor (transcript)* (n 101).

[107] Ibid (DMJ Bennett QC, Kirby J).

[108] Interview with Michael Kirby (Kieran Pender, Telephone Interview, 11 May 2017).

[109] Ibid.

helping the community to clarify an area of the law'.[110] Several participants identified this public interest associated with High Court cases, and it aligns with the statutory basis on which special leave applications are considered pursuant to s 35A of the *Judiciary Act*: '[W]hether the proceedings … involve a question of law … that is of public importance.'[111]

Special leave, in turn, has a distinct nature that supports these considerations. A party seeking special leave has ordinarily already had the benefit of a first instance judgment and an intermediate tier of review. The appellant is thus 'asking for an exercise of extraordinary power to come to this court and have yet another appellate tier of review'.[112] Justice Gageler therefore disagreed that costs conditions were discordant with traditional costs rules, because 'we have moved to another stage. We are talking about a condition of this grant of what is called special leave for very good reason — it is special, it is different, it is not normal'.[113] Such points have also been ventilated in special leave hearings.[114]

While it is more difficult to discern the particular relevance of this factor in Part III's data set, the nature of the disputes where costs conditions were imposed does provide some quantitative corroboration. Costs conditions were prevalent in areas of law likely to have an Australia-wide impact (such as immigration law, taxation law, corporate law, constitutional law, statutory interpretation law and employment law, cumulatively constituting 53.72% of cases in the data set) and those where state-level divergence is common (such as tort law and workers' compensation law, cumulatively constituting 28.10% of cases). This aligns with another limb of s 35A of the *Judiciary Act*: '[W]hether the proceedings … involve a question of law … in respect of which a decision of the High Court … is required to resolve differences of opinion between different courts.'[115] Conversely, costs conditions were rarely imposed in areas of law that are more jurisdictionally-particular, such as environmental law, planning law and procedure (one case each). To be truly instructive, this data would need to be compared with the frequency of these case types in all appeals (not only those where costs-conditional special leave is granted); such analysis goes beyond the present paper's scope.

110 Ibid.

111 *Judiciary Act* (n 27) s 35A.

112 Interview with Justice Stephen Gageler (Kieran Pender, Canberra, 11 May 2017).

113 Ibid.

114 See, eg, *Ruddock v Taylor (transcript)* (n 101) 4–10 (Kirby J).

115 *Judiciary Act* (n 27) s 35A.

C *A Preliminary Assessment*

The appropriateness of each factor will now be briefly considered. While it is not the central purpose of this paper to cast definitive judgment on the appropriateness (or otherwise) of each factor, it is intended that this subsection will complement the underlying data and provide, in the words of Crennan J, 'food for thought'.[116]

1 *Practical Considerations*

The relevance of practical considerations in imposing costs-conditional special leave is uncontroversial. While arguably these factors might support a more radical reform of costs (adequate representation is important at any stage of the litigious process), their relevance is heightened given the exalted nature of the particular judicial forum. Similar considerations motivated the federal government's underwriting of representation in the dual citizenship constitutional litigation. Attorney-General George Brandis said at the time: 'It's the customary and long established practice in cases like this that the Commonwealth pays … there's a public interest in doing so.'[117] Concerns regarding the presence of an effective contradictor were also raised during that litigation, in light of the parallel positions of many parties.[118]

2 *Fairness*

The financial element of the fairness factor raises several perplexing questions. The wealth of a party is not typically a pertinent factor in determining costs — otherwise government litigants would never recover against individual parties. Yet in the special leave context, a party's financial capacity seems to become squarely relevant. This was starkly illustrated in *Commissioner of Taxation v Qantas Airways Ltd*.[119] In the immediately preceding special leave hearing, the respondent had successfully sought costs conditions on the grant, despite the appellant's objections.[120] Qantas then requested costs conditions

[116] Transcript of Proceedings, *Barclay v Penberthy* [2012] HCATrans 98, 2123.

[117] Stefan Armbruster and James Elton-Pym, 'Dual-Citizen Politicians Will Wait until October for High Court Hearing', *SBS News* (online, 24 August 2017) <http://www.sbs.com.au/news/article/2017/08/24/dual-citizen-politicians-will-wait-until-october-high-court-hearing>, archived at <https://perma.cc/36AJ-GWE5>.

[118] Transcript of Proceedings, *Re Canavan* [2017] HCATrans 171.

[119] Transcript of Proceedings, *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCATrans 36.

[120] *Kutlu (transcript)* (n 74) 132–5 (MA Robinson SC), 164–6 (Gummow J).

'on the very same grounds that were rehearsed in the immediately preceding application',[121] which led to the following illuminating exchange:

> Gummow J: They related to the personal circumstances of those litigants. Your client's personal circumstances are rather different.
>
> Ms Batrouney: Yes and no, although the reason this was being granted is the matter of public importance and for those reasons, it does not seem right that Qantas should have to pay the costs.
>
> Gummow J: What do you say about that, Mr Slater?
>
> Mr Slater: Qantas is not quite in the same position as a struggling doctor who is facing bankruptcy, your Honour …[122]

While at first glance it may seem absurd to suggest that Qantas, a multi-billion dollar company, requires costs protection, there is some force in Jennifer Batrouney QC's (ultimately unsuccessful) submissions. If the basis for costs-conditional special leave is the public interest in the case (and fairness considerations relating to the respondent's disinterest beyond the resolution of the immediate dispute), then why shouldn't Qantas receive costs protection? Gummow J's comments highlight the relevance of the parties' relative financial position in the decision-making process, raising questions as to whether that should be a legitimate consideration for the court.

Conversely, in the ordinary costs context, courts have reiterated their indifference to a party's financial position. In *Scott v Secretary, Department of Social Security [No 2]*, Beaumont and French JJ observed:

> The appellants are litigants in person. They are impecunious. They rely on social security benefits. They are not able to satisfy any costs order made against them. However sympathetic one may personally be to arguments of this kind, inability to meet a costs order or the fact that the losing party has limited financial means has never been a sufficient reason to deny a successful party his costs …[123]

Brereton J adopted the same approach in a more recent case, adding: '[T]hat an adverse costs order will occasion hardship, or even prove ruinous, to an

[121] Transcript of Proceedings, *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCATrans 36, 331–2 (JJ Batrouney SC).

[122] Ibid 334–44.

[123] [2000] FCA 1450, [4] ('*Scott*'). See also *Yilan v Minister for Immigration and Multicultural Affairs* [1999] FCA 1212, [5] (French, Nicholson and Finkelstein JJ).

unsuccessful plaintiff is hardly if ever sufficient reason not to make the order: it is a risk that the plaintiff assumes in bringing proceedings.'[124] It is difficult to reconcile these conflicting positions. Why should a 'worker who is not in good circumstances' receive costs protection,[125] while an 'impecunious' litigant is afflicted with an adverse costs order?[126] The only apparent distinction is that one won in the court below and the other did not — a problematic division discussed further below.

A related point concerns the six cases in the data set where costs-conditions were imposed on individual applicants in disputes against individual respondents. All six were tort cases, suggesting that an insurer was standing behind the applicant — something made explicit by the bench in *King v Philcox*.[127] It is one thing for the Court to take an educated guess as to the financial status of a party directly involved in the proceedings, but arguably quite another for judicial notice to be taken of an insurer standing behind the applicant.[128] With the rise of third-party litigation funding, this issue could gain greater importance.

3 *Nature of the High Court*

While the peculiar nature of the High Court is a compelling rationale, its persuasiveness is weakened somewhat by the observation that arguably *all* High Court appeals have a public interest element — indeed, it is a statutory criterion for a grant of special leave.[129] The Court rarely, if ever, considers appeals that do not have some broader relevance to the state of the law in Australia, and it is often said that legal error is not alone a sufficient ground for special leave.[130] It might therefore be reasonably asked: if the nature of the High Court and the cases it hears are a primary motivation for costs-conditional special leave, why aren't more appeals conditioned on that basis?

Conversely, the central idea that the High Court's broader law-developing role — and the correlative public interest going beyond the parties — is sufficiently distinct so as to warrant an alternative approach to costs is not

[124] *Fay v Moramba Services Pty Ltd* [2010] NSWSC 725, [3].

[125] *Dasreef* (n 102) 476 (BM Toomey QC).

[126] *Scott* (n 123) [4] (Beaumont and French JJ).

[127] *King* (n 70) 397–8 (French CJ).

[128] In offering his comments on the paper, Jackson QC made the quite reasonable point that it is not entirely guesswork in circumstances where the insurance is compulsory.

[129] *Judiciary Act* (n 27) s 35A(a)(i).

[130] See generally Justice Kirby (n 5) 743–50; Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24(3) *Melbourne University Law Review* 784, 785–6.

uncontroversial. As Heerey, Whitlam and North JJ put forcefully in a 1998 case:

> In a common law jurisdiction decisions of the courts, in private as well as public law, often clarify the law or lay down new law for the benefit of citizens, taxpayers, traders, patentees, insurers and insureds, landlords and tenants, etc etc. To that extent, much litigation has a public interest going beyond the interests of the parties. But this feature is inherent in common law litigation and provides no ground for departure from the usual rule as to costs. And, as has been pointed out in another context, what interests the public is not necessarily in the public interest …[131]

V Other Observations

The research undertaken also illuminates a range of related issues deserving discussion.

A *Extent of Costs*

Where the appellant is required to pay the respondent's costs, that condition is typically made — albeit implicitly — on a party and party basis ('all [costs] that are necessary to enable the adverse party to conduct the litigation, and no more').[132] This was previously a matter of uncertainty. In 1995, Jackson QC wrote to then Chief Justice Brennan as to 'the intended basis of the condition — is it to provide for costs as on a party and party basis, or on a solicitor and client indemnity basis? There is no particular reason, in my view, why it should not be on the higher basis.'[133] While Chief Justice Brennan promised to refer the correspondence to the Rules Committee,[134] Jackson QC's suggestion was not ultimately adopted. In 1998, counsel for the respondent in the proceedings of *Attorney-General (Cth) v Breckler* sought indemnity costs on the basis that his clients 'find themselves having to argue a

[131] *Hollier v Australian Maritime Safety Authority [No 2]* [1998] FCA 975 ('*Hollier*').

[132] *Smith v Buller* (1865) LR 19 Eq 473, 475 (Malins V-C).

[133] Letter from David Jackson to Chief Justice Gerard Brennan, 19 April 1995.

[134] Letter from Chief Justice Gerard Brennan to David Jackson, 24 April 1995.

matter which, in a number of respects, is academic'.[135] The Acting Solicitor-General contended that the condition 'should be party/party costs in the normal course',[136] and the Court agreed that such costs would be 'sufficient'.[137]

Almost a decade later, counsel for the respondent in *New South Wales v Ibbett* sought indemnity costs on the basis of the respondent's infirmity and the appellant's prior conduct.[138] Kirby J found no reason to depart from the typical practice: 'I have been sitting here for 10 years and I do not think I can remember a full indemnity basis.'[139] The extent of the costs condition has also been described as requiring payment of '[r]easonable costs',[140] although there is likely no distinction. While the imposition of party and party costs now appears standard, the concluding comments of Jackson QC in his correspondence with Chief Justice Brennan still ring true. 'The result of adopting a party and party basis,' he wrote, 'is really that the lawyers end up bearing the difference'.[141]

B *Limitations*

On the other hand, the Court has resisted attempts to further discount or otherwise restrict the costs conditions. In *Minister for Immigration and Citizenship v Kumar*, the appellant argued that, to achieve a 'level playing field',[142] the condition should be limited to 'Commonwealth rates'.[143] The Court was unconvinced: 'I think we might dispense with that particular limitation', determined French CJ.[144] A question has arisen on several occasions as to the scope of an appellant's obligation to fund the respondent's appeal. In *Minister for Home Affairs v Zentai*, an extradition case, the appellant volunteered the conditions but expressed reservations about funding the entirety of the respondent's case: 'We understand that they may wish to raise a

135 *Breckler (transcript)* (n 74) (DH Solomon).

136 Ibid (HC Burmester QC).

137 Ibid (Gummow J).

138 Transcript of Proceedings, *New South Wales v Ibbett* [2006] HCATrans 319.

139 Ibid 1085–6.

140 Transcript of Proceedings, *Commissioner of Taxation v Stone* [2004] HCATrans 219, 29 (Gummow J).

141 Letter from David Jackson to Chief Justice Gerard Brennan, 19 April 1995.

142 Transcript of Proceedings, *Minister for Immigration and Citizenship v Kumar* [2008] HCATrans 341, 254 (French CJ).

143 Ibid 257 (SJ Gageler SC).

144 Ibid 259.

notice of contention and we say we should not be put to guarantee them to pay them for anything raised in a notice of contention.'[145] After an assurance from the respondent that any such notice would be limited, French CJ simply held that 'the appellant will meet the respondents' costs on the appeal'.[146]

Only two months earlier, the Director of Public Prosecutions had attempted the same strategy without success. In *R v Khazaal*, the appellant volunteered both limbs of the condition but 'limited to the costs of the grounds raised by the Applicant'.[147] This was insufficient for Gummow J, who granted special leave on costs conditions 'on terms that that undertaking not have the final limitation as to the grounds raised by the appellant, but [that] it would include the notice of contention if that were to be forthcoming'.[148] This approach is consistent with the motivations for the costs-conditional practice — it would hardly assist the Court if one party was forced to argue with a hand tied behind its back.

C *Inconsistency and Timing*

While special leave transcripts indicate that the imposition of costs conditions is occasionally at the Court's initiative,[149] that practice appears to be more ad hoc than systematic in the absence of conditions being volunteered or sought. The cases of *Minister for Immigration and Multicultural Affairs v Jia* ('*Jia*') and *Minister for Immigration and Multicultural Affairs v White* ('*White*') are instructive.[150] The substantive hearings for each were held together and a single judgment issued. Yet despite considerable similarity in factual matrixes and legal issues, special leave was granted on a costs conditional basis in the latter but not the former.[151] Hence, although the appellant was successful in

145 Transcript of Proceedings, *Minister for Home Affairs v Zentai* [2011] HCATrans 339, 241–4 (SB Lloyd SC).

146 Ibid 463.

147 *Khazaal (transcript)* (n 78) 380 (Gummow J).

148 Ibid 499–501.

149 See, eg, Transcript of Proceedings, *Transport Accident Commission v Katanas* [2016] HCATrans 286, 614–25 (Kiefel J); Transcript of Proceedings, *Downview Pty Ltd v Fox* [2008] HCATrans 386, 1083–6 (Gummow J); *Arnhem Land Aboriginal Land Trust* (n 68) 17–19 (Gummow J); Transcript of Proceedings, *Kennedy Cleaning Services Pty Ltd v Petkoska* (High Court of Australia, C20/1998, Gaudron J and Kirby J, 6 August 1999) (Gaudron J).

150 (2001) 205 CLR 507 ('*Jia*'). The applications for *Jia* and *White* were heard together.

151 Transcript of Proceedings, *Minister for Immigration and Multicultural Affairs v Jia* (High Court of Australia, P34/1999, Gaudron J and Hayne J, 14 April 2000); Transcript of

both, Mr Jia faced an adverse costs order but Mr White did not.[152] There may of course have been good reason for this disparity not immediately evident in the transcript or judgment, and it may have been that the Minister did not enforce the costs order against Mr Jia. Regardless, *Jia* and *White* provide an apt reminder for respondent counsel that it is they who should be seeking costs conditions on special leave where appropriate.

A related point is that costs undertakings must be sought at the time of special leave — forgetful counsel cannot seek to remedy their error during the appeal. This issue was directly addressed by the High Court in the 1986 case of *J Robins (Chippendale) Pty Ltd v Sakic* ('*Sakic*'), where the respondent sought favourable costs orders prior to the hearing of the substantive appeal.[153] Despite the plurality noting that 'an order such as was belatedly sought by the respondent may well have been made as a condition of the grant of special leave', the Court allowed the appeal with costs.[154] Brennan J's comments are apposite:

> An appellant who prosecutes his appeal pursuant to an unconditional grant of leave ought not to be met at the hearing of the appeal with an application for an ex post facto insertion of the condition which, if inserted at the time that the grant was made, would have permitted him to elect between pursuing the appeal or not.[155]

The High Court did however adopt a divergent approach in the more recent case of *Maurice Blackburn*, where — as highlighted above — the imposition of a first limb costs condition (costs of the appeal) was used to justify no order as to costs below in the ultimate judgment.[156] While these cases are not strictly inconsistent — *Sakic* concerned appeal costs, *Maurice Blackburn* concerned costs below — there is logical incongruity.

D *Practicalities*

Finally, two practical matters deserve brief discussion. Firstly, where costs conditions are sought by the respondent or exacted by the Court, counsel for

Proceedings, *Minister for Immigration and Multicultural Affairs v White* (High Court of Australia, P30/2000, McHugh J and Kirby J, 5 September 2000), 456–8 (McHugh J).

152 *Jia* (n 150) 540 [107] (Gleeson CJ and Gummow J).

153 (1986) 161 CLR 410, 416 (Mason, Wilson and Dawson JJ) ('*Sakic*').

154 Ibid.

155 Ibid 420.

156 *Maurice Blackburn* (n 81) 663 [43] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

the appellant may not readily have instructions to make the necessary undertakings. While in some cases a short adjournment may facilitate the taking of instructions, to avoid difficulties the Court has developed a practice of granting leave subject to written undertakings being filed with the Registry.[157] In a 2007 case, Kirby J offered:

> I realise that your client is an international body established … in Canada and you may not be able to get instructions, we do not want to put you in an embarrassing position. Maybe we could, if we were minded to grant special leave, grant it subject to a condition and then you could take instructions from your client.[158]

It is also apparent that *when* the costs will be paid is a matter for the parties. In *Minister for Immigration and Multicultural Affairs v Rajamanikkam*, counsel for the respondent sought 'that costs be paid in advance … We have had problems with the Commonwealth paying us in other cases where these orders have been made'.[159] The Court did not alter its usual costs conditions, with Gleeson CJ quipping: 'There is a lot of insolvency in the air at the moment but I did not think it affected [the Commonwealth].'[160] In *Minister for Immigration and Multicultural Affairs v Singh*, Gaudron J asked: 'Does … [the condition] ordinarily involve your making financial resources available in advance, or perhaps it does not matter.'[161] Counsel for the Minister replied: 'I think that it is a matter of negotiation and sometimes it does … and sometimes it is afterwards but I am sure it is a matter the solicitors can sort out.'[162] In his 1995 correspondence with Chief Justice Brennan, Jackson QC highlighted the difficulty of 'an appellant not prepared to pay until the last moment', in light of the expenses 'the respondent may have to bear … until after a successful taxation'.[163] Jackson QC proposed that an appellant might be required to deposit a fixed sum with the Registrar, with a portion distributed

[157] See, eg, Transcript of Proceedings, *Master Education Services Pty Ltd v Ketchell* [2008] HCATrans 89, 456–62 (Gummow J).

[158] *Ansett Australia* (n 72) 130–4.

[159] Transcript of Proceedings, *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (High Court of Australia, S206/2000, Gleeson CJ and Gaudron J, 1 June 2001) 483–9 (TA Game SC).

[160] Ibid 497–8.

[161] Transcript of Proceedings, *Minister for Immigration and Multicultural Affairs v Singh* (High Court of Australia, A38/2000, Gaudron J and Kirby J, 16 February 2001) 508–9.

[162] Ibid 511–17 (A Robertson SC).

[163] Letter from David Jackson to Chief Justice Gerard Brennan, 19 April 1995.

to the respondent to cover disbursements. However, this proposed practice has not been adopted.

VI Wider Implications

Finally, this paper will consider the larger relevance of the High Court's practice, other mechanisms aimed at similar policy objectives and prospects for reform.

A *Broader Application*

Notwithstanding the High Court's development in *Oshlack* of a public interest costs exception, which drew support by analogy with costs-conditional special leave, courts have been slow to embrace any deviation from the traditional costs rule. Writing after his retirement from the bench, Kirby observed: '[post-*Oshlack*] developments in Australia have indicated the exceptional character of the decision in that case and the persisting general disinclination of Australian courts to depart from the "usual rule" as to costs.'[164] Just seven years after *Oshlack*, a six-member majority of the High Court were curt in rejecting a submission that the unsuccessful litigant should not be subject to adverse costs on a public interest basis: 'The applicant commenced these proceedings, and his arguments have failed. The ordinary consequences as to costs should follow.'[165] This reluctance to follow *Oshlack* is also evident in the Federal Court.[166] In *Nair-Marshall v Secretary, Department of Family and Community Services*, for example, Spender J cited McHugh J's dissent from *Oshlack* in justifying a refusal to make a special order as to costs.[167] In light of the applicant's financial circumstances, his Honour merely noted that '[i]t is,

[164] Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 (October) *Law Quarterly Review* 537, 551.

[165] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, 459–60 [40] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ). See generally Patrick Keyzer, 'A Battle and a Gamble: The Spectre of an Adverse Costs Order in Constitutional Litigation' (2010) 22(3) *Bond Law Review* 82, 82–5.

[166] Natalie Cujes, *Litigation in the Federal Court: Promoting the Overarching Purpose* (LexisNexis Butterworths, 2016) 315–16; *Nair-Marshall v Secretary, Department of Family and Community Services* [2005] FCA 1341 [8]–[9] (Spender J) ('*Nair-Marshall*'); *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (n 3) 294–5 (Allsop CJ, Foster and Gleeson JJ); *Qantas* (n 3) 389 (Lindgren and Lehane JJ); *Hollier* (n 131) (Heerey, Whitlam and North JJ). But see *Ruddock v Vadarlis* (n 3) 242 [29] (Black CJ and French J).

[167] *Nair-Marshall* (n 166) [8]–[12].

of course, a matter for the respondent … to decide whether to enforce the costs order'.[168]

Yet if the High Court is willing to depart from traditional costs principle in the special leave context, why not elsewhere? Many of the rationales identified as supporting the imposition of costs conditions are also applicable in other cases: the practical benefits are equally salient, questions of fairness persist and the nature of the court is unchanged. While the special leave process may provide a simple mechanism for the imposition of the conditions, the Court is not necessarily prevented from exercising its discretion following a decision by not awarding costs or imposing a special costs order favourable to an unsuccessful party.[169]

These points are emphasised by a simple counterfactual comparison. Imagine two individual litigants commence proceedings on the basis of an established albeit dated intermediate court precedent, and both are successful at first instance (cases A and B respectively). The respondent, a wealthy corporation, appeals as it faces a number of similar disputes. In case A, the intermediate court is cautious and rejects the appeal. In case B, another intermediate court is more activist, deciding not to follow precedent and upholding the appeal. If the corporate respondent sought special leave in case A, it may be granted on a costs-conditional basis, and the individual plaintiff will be insulated from adverse costs whatever the outcome. In case B, if the individual plaintiff receives special leave but is ultimately unsuccessful, they will face the costs of the entire proceedings.

In both cases, the individual plaintiff has a narrow individual interest while the corporate respondent has a broader interest in the jurisprudence. In both cases, the individual plaintiffs were successful at first instance and the corporate respondent sought to overturn established precedent. Yet despite these similarities, there would be a substantial disparity in costs outcomes. What is the rational basis for protecting one party from adverse costs consequences while requiring the other to pay costs in their entirety, when the only distinction between each litigant is the decision of the intermediate court? In *Oshlack*, McHugh J in dissent suggested these two categories of cases were 'far removed' from each other, but failed to provide a cogent rationale for the distinction.[170]

[168] Ibid [12].

[169] But see *Sakic* (n 153) 420 (Brennan J).

[170] *Oshlack* (n 7) 109 [100].

This paper is not the appropriate place for a broader exposition on the benefits (or otherwise) of deviating from the traditional costs rule, whether in public interest litigation or elsewhere.[171] However, its intended purpose is to highlight this dissonance in the High Court's practice — between continuing the practice of costs-conditional special leave and maintaining the orthodox approach to costs (including via adopting a narrow interpretation of the *Oshlack* exception). For now, the question of whether the former could influence changing attitudes as to the latter remains in the realm of the hypothetical. Justice Gageler demurred: 'I think I would not want to comment on that with any particularity. But it seems like an interesting question to explore.'[172]

B *Alternative Mechanisms*

Another way to conceptualise costs-conditional special leave is as an ad hoc response to the lack of effective alternative mechanisms for funding such litigation. Kirby reflected:

> Maybe if we had a proper suitors' fund system and ways of providing public funding for important legal cases, we would not need this discretion. But we do not have those other means, so this is a broad way in which the court can try to even the scales.[173]

Suitors' funds have operated for decades in several states,[174] and the *Federal Proceedings (Costs) Act 1981* provides a federal equivalent. These operate to reimburse litigants in certain situations. The federal statute, for example, includes a mechanism for respondents to seek payment of their costs from the Commonwealth where an adverse appeal is successful[175] — in other words, in

[171] For discussion of the broader issue of costs orders in public interest litigation, see, eg, Cazalet (n 3); Enid Campbell, 'Public Interest Costs Orders' (1998) 20(2) *Adelaide Law Review* 245, 261–4; Chris Tollefson, Darlene Gilliland and Jerry DeMarco, 'Towards a Costs Jurisprudence in Public Interest Litigation' (2004) 83(2) *Canadian Bar Review* 473; Adrian Zuckerman, 'Protective Costs Orders: A Growing Costs-Litigation Industry' (2009) 28(2) *Civil Justice Quarterly* 161; Australian Law Reform Commission, *Costs Shifting: Who Pays for Litigation* (Report No 75, October 1995) [13.8]–[13.11]; Chris Tollefson, 'When the "Public Interest" Loses: The Liability of Public Interest Litigants for Adverse Costs Awards' (1995) 29(2) *University of British Columbia Law Review* 303, 336–9.

[172] Interview with Justice Stephen Gageler (Kieran Pender, Canberra, 11 May 2017).

[173] Interview with Michael Kirby (Kieran Pender, Telephone Interview, 11 May 2017).

[174] See, eg, *Suitors' Fund Act 1951* (NSW); *Suitors' Fund Act 1964* (WA).

[175] *Federal Proceedings (Costs) Act 1981* (Cth) s 6.

the exact same situations as that in which costs-conditional special leave can apply.

However, these schemes have proven to be largely ineffective and underutilised, partly because of the limited reimbursement available.[176] Howe QC observed: 'You have an Act of Parliament speaking to this general topic that may be getting insufficient traction.'[177] The one bright spot is the Australian Taxation Office's test case litigation program, which funds cases where there is uncertainty about taxation legislation that extends beyond a single taxpayer.[178] In the costs-conditional special leave context, the High Court has shown cognisance of this program — in a 2016 hearing, Bell J said: 'We note that there is an understanding in relation to the costs in light of the applicants' test case litigation program.'[179]

The coexistence of judicial, legislative and executive activity in this sphere has twofold relevance. Firstly, it demonstrates that imposing costs conditions on special leave is not inherently necessary, because other mechanisms do exist to address similar policy issues. However, that costs-conditional special leave persists provides strong evidence of the ineffectiveness of legislative efforts. It might be supposed that, in the absence of renewed statutory efforts to address the cost of justice at this rarefied appellate level, the High Court will feel compelled to maintain its current approach.

C *Reform*

The likelihood of reform to a practice that has remained largely unchanged since the mid-1800s appears slim. Interview participants were unanimous that reform was unlikely, with most also considering it unnecessary. The

[176] Michael Pelly, 'Blow-Out in the Cost of Court Errors', *Sydney Morning Herald* (online, 6 July 2005) <http://www.smh.com.au/news/national/blowout-in-the-cost-of-court-errors/2005/07/05/1120329448495.html>; 'Payment of Costs Certificates', *Attorney General's Department* (Web Page) <https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Commonwealthlegalfinancialassistance/Pages/Paymentofcostscertificates.aspx>, archived at <https://perma.cc/4EVS-WY4U>.

[177] Interview with Tom Howe (Kieran Pender, Canberra, 13 April 2017).

[178] 'Test Case Litigation Program', *Australian Taxation Office* (Web Page, 26 March 2018) <https://www.ato.gov.au/Tax-professionals/TP/Test-case-litigation-program/>, archived at <https://perma.cc/7KDZ-WYEM>.

[179] Transcript of Proceedings, *Commissioner of Taxation v Jayasinghe* [2016] HCATrans 275, 500–1.

comments of Jackson QC — asked whether, for example, a practice direction clarifying costs conditions might be welcomed — are representative:

> I do not think it needs a practice direction. I mean, it is a pretty simple concept, isn't it? In an appropriate case the conditions are imposed. You might say: 'What is an appropriate case?' They would say: 'Well, whatever the case may be.' We are not talking about Practice Directions in the Magistrates Court.[180]

In 2016, the High Court announced changes to its special leave process, whereby 'there will be fewer oral hearings in applications for special leave' and instead more applications determined on the papers.[181] The reform has made the aforementioned practice of written costs undertakings more commonplace; as Gordon J stated in a recent grant, 'there should be a grant of special leave, subject to the applicant filing in Court within seven days a written undertaking [as to costs]'.[182] Participants did not consider that the partial change in mechanism would impact the process of costs-conditional leave. It may, though, shift the onus further on to parties to specify their position as to costs in written submissions, with the absence of oral dialogue possibly dissuading greater intervention from the Court. In marginal cases heard on the papers, the Court may be deterred by the prospect of seeking further written submissions on the possible imposition of costs conditions, whereas previously the matter could be swiftly dealt with during the oral hearing. It is too early to ascertain any variation in the frequency of conditioned grants.

The change in practice will limit opportunities for scrutinising the special leave process, emphasising the timeliness of this paper. With the bulk of special leave applications now being heard on the papers, it will become considerably more difficult to identify and analyse considerations guiding the exercise of the costs discretion in that context (and, indeed, special leave decision-making more broadly). A cloak of secrecy has been imposed upon the process, limiting transparency and imposing barriers to informed scrutiny. The research undertaken by this paper would not have been possible under the new process.

There are reasons why the High Court should consider altering its approach to costs-conditional special leave. As has been demonstrated above,

[180] Interview with David Jackson (Kieran Pender, Sydney, 1 May 2017).

[181] Andrew Phelan, 'Changes to High Court Procedures for Considering Applications for Special Leave', *High Court of Australia* (Web Page) <http://www.hcourt.gov.au/assets/corporate/policies/Special_Leave_Changes.pdf>, archived at <https://perma.cc/ZPR6-DZC8>.

[182] Transcript of Proceedings, *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2016] HCATrans 168, 2–4.

the Court has not outlined a comprehensive and considered rationale for the practice, instead offering piecemeal asides littered across special leave transcripts. This presents two interrelated difficulties: the practice lacks transparency, because the Court is not explicit about why it is imposing costs-conditional special leave, and there is no guidance controlling future exercise of the discretion. Even accepting that (a) there are compelling justifications for the practice; (b) the High Court has a special nature by virtue of its exalted position in the Australian legal system; and (c) special leave is in itself a discretionary decision, does not undermine the persuasiveness of these concerns. Howe QC concurred: 'If the Court is going to resort to a default practice [in this context], it should be one that is overt and known to be supported by a line of reasoning that the litigants can see and understand being applied to a particular case.'[183] He continued: 'That is not to say there cannot be very defensible justifications for the practice, but I do think it needs to be articulated and any exceptions to it need to be identified.'[184]

There may of course be risks attendant with a greater elucidation of costs-conditional special leave. Deeper consideration of the practice's unorthodoxy could see it become utilised only in exceptional cases, while specifying with more exactitude the criteria a respondent must satisfy to benefit from costs protection could likewise narrow its application. The comments of Black CJ and French J in *Ruddock v Vadarlis [No 2]*, albeit in a different context, are apposite.[185] While in that case criticisms of the application of ordinary costs rules to public interest litigation did not 'justify a global modification', their Honours observed: 'They do however indicate the desirability of avoiding calcification of the discretion with rigid rules governing its exercise.'[186]

Kirby, who was a frequent commentator on costs conditions during special leave hearings, offered a nuanced and thought-provoking perspective deserving of quotation at length. The former High Court justice said:

> Generally speaking, I believe that there should be clarity about the exercise of discretion. As has often been said, unbridled discretions are a form of tyranny. Therefore, it is desirable that judges should make as clear as they can the grounds on which they exercise a discretion, particularly where that discretion is exercised in a way different from the general rule … [Kirby then analogised with sentencing cases which have limited the need to provide reasons.] Those

[183] Interview with Tom Howe (Kieran Pender, Canberra, 13 April 2017).

[184] Ibid.

[185] *Ruddock v Vadarlis* (n 3).

[186] Ibid 235–6 [13] (Black CJ and French J).

> were justified on the basis that it sometimes is not possible to indicate with greater precision the modes of thinking, and I think that is the reaction judges of the High Court would have to this question …
>
> What more can one say than the fact that this is an instance where it is to be applied or not to be applied? I did not feel uncomfortable about the decision on any occasion that I can recollect where it was applied … I do not feel uncomfortable with the fact that there is an exception. Just as entirely unlimited discretions are a form of tyranny, so are entirely rigid rules — that is the tyranny of the laws of the Medes and Persians …
>
> Finally, keep in mind that special leave days are very hard for the justices, as well as the parties and their advocates. You are under so much pressure during the day, and you have to do quite a few things intuitively. That limits the amount of time you can pause and analyse what you are doing.[187]

Kirby's comments focus attention on an entirely practical point — only so much attention can be paid to the broader considerations discussed in this paper during the maelstrom of a special leave hearing. Counsel typically have just 20 minutes each to persuade the bench,[188] who in turn usually deliver their decision *ex tempore* or after a very brief adjournment. The character of these special leave proceedings is therefore exceptional, and the issue of costs are only a small part therein. While this is not the place for a broader exposition of such processes, these eminently human considerations do have a bearing on the nature of costs-conditional special leave.

VII Conclusion

From time to time, the High Court of Australia conditions grants of special leave to appeal on the basis that the appellant pay the respondent's costs and not disturb costs below. This practice has been the subject of this paper, which has sought to comprehensively outline its nature, rationale and ramifications. The research has drawn on both a quantitative data set — created through a review of special leave hearing transcripts during the Gleeson and French Courts — and qualitative interviews with elite stakeholders. It has found that costs-conditional special leave is present in approximately 10% of appeals, predominantly those involving a public authority appellant and an individual litigant. By combining judicial comments and the perspectives of participants,

[187] Interview with Michael Kirby (Kieran Pender, Telephone Interview, 11 May 2017).

[188] Justice Michael Kirby, 'Law at a Century's End: A Millennial View from the High Court of Australia' (2001) 1(1) *Macquarie Law Journal* 1, 10.

the paper has articulated three categories of motivations for the practice, relating to practical considerations, fairness and the nature of the High Court. It has concluded by highlighting the wider implications of costs-conditional special leave, and called for greater transparency.

The idea for this research first germinated in 2014, following *Commonwealth Bank of Australia v Barker* ('*Barker*').[189] A bank manager had sued his employer on an unsettled legal ground — the implied contractual term of mutual trust and confidence. The applicant won at first instance and on initial appeal, before the High Court ruled for the Bank, stridently rejecting the existence of such a term in Australia law. Despite its comprehensive legal victory, the Bank's grant of special leave had been on a costs-conditional basis, such that it had to foot the bill for the entire proceedings.[190] Why? Particularly given the unsettled state of the legal issue being determined, the dissonance between the costs outcome in *Barker* and the traditional rule seemed stark.

Querying the nascent research topic thereafter, a colleague asked the author: 'What's the point? It is just a matter of practice.' That may be true, but practice can be important, too, particularly when that practice can have million-dollar consequences. Interview participant Kirby said: 'I do not recall a single instance in my 13 years' service where the Court indicated that it was minded to impose [costs-conditional special leave] and the party affected responded that it was not prepared to agree to that term.'[191] Where such conditions are a fait accompli — few deep-pocketed institutional litigants would turn down their day in the High Court — and the conditions conflict with the tradition costs principle, proper analysis and consideration is desirable. It is this task that the present paper has sought to undertake. If, in the recent words of the High Court, costs conditions are sometimes 'the price to be paid' for a grant of special leave,[192] greater scrutiny is no pointless endeavour.

189 (2014) 253 CLR 169.

190 Ibid 196 [44] (French CJ, Bell and Keane JJ).

191 Email from Michael Kirby to Kieran Pender, 2 May 2017.

192 *Probuild Constructions* (n 13) 371 (Gageler J).

VIII Appendix: Costs-Conditional Special Leave in the High Court of Australia

Subject to the methodological caveats previously discussed, the below list provides citations for each case where costs-conditional special leave was granted by the High Court between May 1998 and January 2017. The complete coded data set is available on request.[193]

2016

1 *Director of Public Prosecutions (Vic) v Dalgliesh* [2016] HCATrans 312

2 *Transport Accident Commission v Katanas* [2016] HCATrans 286

3 *Minister for Immigration and Border Protection v Kumar* [2016] HCATrans 197

4 *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2016] HCATrans 168

5 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCATrans 159

6 *Comcare v Martin* [2016] HCATrans 116

7 *Minister for Immigration and Border Protection v SZSSJ* [2016] HCATrans 55

2015

8 *Military Rehabilitation and Compensation Commission v May* [2015] HCATrans 302

9 *Stewart v Ackland* [2015] HCATrans 226

10 *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCATrans 193

11 *Allen v Chadwick* [2015] HCATrans 154

12 *Alcan Gove Pty Ltd v Zabic* [2015] HCATrans 110

13 *Minister for Immigration and Border Protection v WZARH* [2015] HCATrans 92

[193] The author can be contacted at kieran.pender@anu.edu.au.

14 *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* [2015] HCATrans 82

15 *Police v Dunstall* [2015] HCATrans 63

16 *Minister for Immigration and Border Protection v WZAPN* [2015] HCATrans 26

2014

17 *Independent Commission Against Corruption v Cunneen* [2014] HCATrans 296

18 *King v Philcox* [2014] HCATrans 253

19 *Queensland v Congoo* [2014] HCATrans 190

20 *Hunter and New England Local Health District v McKenna* [2014] HCATrans 137

21 *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCATrans 76

22 *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2014] HCATrans 54

23 *Maxwell v Highway Hauliers Pty Ltd* [2014] HCATrans 51

2013

24 *Commonwealth Bank of Australia v Barker* [2013] HCATrans 325

25 *Registrar of Births, Deaths and Marriages (NSW) v Norrie* [2013] HCATrans 283

26 *ADCO Constructions Pty Ltd v Goudappel* [2013] HCATrans 250

27 *Attorney-General (NT) v Emmerson* [2013] HCATrans 244

28 *Daly v Thiering* [2013] HCATrans 139

29 *Comcare v PVYW* [2013] HCATrans 114

30 *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCATrans 105

31 *Legal Services Board v Gillespie-Jones* [2013] HCATrans 53

2012

32 *New South Wales v Kable* [2012] HCATrans 356

33 *Minister for Immigration and Citizenship v Li* [2012] HCATrans 295

34 *Commissioner of Police (NSW) v Eaton* [2012] HCATrans 189

35 *Attorney-General (SA) v Corporation of the City of Adelaide* [2012] HCATrans 107

36 *Commonwealth v Kutlu* [2012] HCATrans 35

2011

37 *Certain Lloyds Underwriters Subscribing to Contract No IH00AAQS v Cross* [2011] HCATrans 340

38 *Minister for Home Affairs (Cth) v Zentai* [2011] HCATrans 339

39 *R v Khazaal* [2011] HCATrans 279

40 *Federal Commissioner of Taxation v Bargwanna* [2011] HCATrans 211

41 *Amaca Pty Ltd (Under NSW Administered Winding Up) v Booth* [2011] HCATrans 152

2010

42 *Dasreef Pty Ltd v Hawchar* [2010] HCATrans 339

43 *Maurice Blackburn Cashman v Brown* [2010] HCATrans 331

44 *Insight Vacations Pty Ltd v Young* [2010] HCATrans 305

45 *Director of Public Prosecutions (Cth) v Poniatowska* [2010] HCATrans 304

46 *Australian Crime Commission v Stoddart* [2010] HCATrans 292

47 *Minister for Immigration and Citizenship v SZGUR* [2010] HCATrans 202

48 *Minister for Immigration and Citizenship v SZJSS* [2010] HCATrans 133

49 *British American Tobacco Australia Services Ltd v Laurie* [2010] HCATrans 132

50 *Commissioner of Taxation v Anstis* [2010] HCATrans 110

2009

51 *Henley Arch Pty Ltd v Kovacic* [2009] HCATrans 227

52 *Minister for Immigration and Citizenship v SZMDS* [2009] HCATrans 183

53 *Toyota Motor Corporation Australia Ltd v Jayatilake* [2009] HCATrans 118

54 *Minister for Immigration and Citizenship v SZIAI* [2009] HCATrans 28

2008

55 *Minister for Immigration and Citizenship v SZJGV* [2008] HCATrans 404

56 *Minister for Immigration and Citizenship v SZIZO* [2008] HCATrans 401

57 *Downview Pty Ltd v Fox* [2008] HCATrans 386

58 *Minister for Immigration and Citizenship v SZLFX* [2008] HCATrans 389

59 *Minister for Immigration and Citizenship v Kumar* [2008] HCATrans 341

60 *Commissioner of Taxation v Day* [2008] HCATrans 234

61 *Federal Commissioner of Taxation v Word Investment Ltd* [2008] HCATrans 201

62 *Stuart v Kirkland-Veenstra* [2008] HCATrans 217

63 *Master Education Services Pty Ltd v Ketchell* [2008] HCATrans 89

2007

64 *R v Tang* [2007] HCATrans 810

65 *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* [*2007*] HCATrans 809

66 *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* [2007] HCATrans 606

67 *CGU Insurance Ltd v Porthouse* [2007] HCATrans 599

68 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2007] HCATrans 324

69 *Director of Public Prosecutions (Vic) v Le* [2007] HCATrans 250

70 *International Air Transport Association v Ansett Australia Holdings Ltd* [2007] HCATrans 159

71 *Santos Ltd v Chaffey* [2007] HCATrans 49

2006

72 *New South Wales v Corbett* [2006] HCATrans 674

73 *Golden Eagle International Trading Pty Ltd v Zhang* [2006] HCATrans 531

74 *New South Wales v Fahy* [2006] HCATrans 472

75 *Commonwealth v Cornwell* [2006] HCATrans 464

76 *New South Wales v Ibbett* [2006] HCATrans 319

77 *Leichhardt Municipal Council v Montgomery* [2006] HCATrans 244

78 *Commissioner of Taxation v McNeil* [2006] HCATrans 39

2005

79 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2005] HCATrans 1045

80 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2005] HCATrans 1033

81 *Australian Broadcasting Corporation v O'Neill* [2005] HCATrans 1029

82 *Berowra Holdings Pty Ltd v Gordon* [2005] HCATrans 743

83 *Neindorf v Junkovic* [2005] HCATrans 430

84 *New South Wales v Amery* [2005] HCATrans 366

2004

85 *Bankstown City Council v Alamdo Holdings Pty Ltd* [2004] HCATrans 491

86 *Ruddock v Taylor* [2004] HCATrans 390

87 *Commissioner of Taxation v Stone* [2004] HCATrans 219

88 *Commissioner of Main Roads v Jones* [2004] HCATrans 114

89 *Griffith University v Tang* [2004] HCATrans 103

2003

90 *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2003] HCATrans 501

91 *Planning Commission (WA) v Temwood Holdings Pty Ltd* [2003] HCATrans 423

92 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2003] HCATrans 296

93 *Ostrowski v Palmer* (High Court of Australia, P25/2002, McHugh J and Heydon J, 9 May 2003)

94 *Federal Commissioner of Taxation v Hart* (High Court of Australia, S279/2002, Gummow J and Callinan J, 11 April 2003)

95 *Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S217/2002* (High Court of Australia, S217/2002, Gummow J and Heydon J, 11 April 2003)

96 *BHP Billiton Ltd v Schultz* (High Court of Australia, S385/2002, Gleeson CJ and Gummow J, 14 March 2003)

2002

97 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (High Court of Australia, B69/2001, Gaudron J and Callinan J, 26 June 2002)

98 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (High Court of Australia, P34/2001, Gummow J, Kirby J and Hayne J, 31 May 2002)

99 *Cattanach v Melchior* (High Court of Australia, B59/2001, Gaudron J and Kirby J, 19 March 2002)

100 *New South Wales v Lepore* (High Court of Australia, S104/2001, Gleeson CJ and Gaudron J, 5 March 2002)

2001

101 *Minister for Immigration and Multicultural Affairs v Wang* (High Court of Australia, S90/2001, Gleeson CJ, Hayne J and Callinan J, 14 December 2001)

102 *Minister for Immigration and Multicultural Affairs v Farahanipour* (High Court of Australia, P7/2001, McHugh J and Kirby J, 14 September 2001)

103 *Morrison v Peacock* (High Court of Australia, S274/2000, Gleeson CJ and McHugh J, 10 August 2001)

104 *Shergold v Tanner* (High Court of Australia, M128/2000, Gummow J and Kirby J, 22 June 2001)

105 *Minister for Immigration and Multicultural Affairs v Mohammad* (High Court of Australia, P49/2000, Gleeson CJ , Hayne J, 22 June 2001)

106 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (High Court of Australia, S206/2000, Gleeson CJ and Gaudron J, 1 June 2001)

107 *Minister for Immigration and Multicultural Affairs v Khawar* (High Court of Australia, S232/2000, Gleeson CJ and Gaudron J, 1 June 2001)

108 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (High Court of Australia, S157/2000, McHugh J and Gummow J, 20 February 2001)

109 *Minister for Immigration and Multicultural Affairs v Singh* (High Court of Australia, A38/2000, Gaudron J and Kirby J, 16 February 2001)

2000

110 *Regie National Des Usines Renault SA v Zhang* (High Court of Australia, S192/2000, Gaudron J and Kirby J, 15 December 2000)

111 *Minister for Immigration and Multicultural Affairs v White* (High Court of Australia, S192/2000, Gaudron J and Kirby J, 15 December 2000)

112 *Derrick v Cheung* (High Court of Australia, S195/1999, Gaudron J and Callinan J, 16 June 2000)

113 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (High Court of Australia, H18/1999, Gleeson CJ and Kirby J, 12 May 2000)

114 *Minister for Immigration and Multicultural Affairs v Israelian* (High Court of *Australia*, M64/1999, McHugh, Kirby J and Callinan J, 11 February 2000)

1999

115 *Minister for Immigration and Multicultural Affairs v Abdi* (High Court of Australia, S50/1999, Gaudron A CJ and Callinan J, 10 September 1999)

116 *Kennedy Cleaning Services Pty Ltd v Petkoska* (High Court of Australia, C20/1998, Gaudron J and Kirby J, 6 August 1999)

117 *Deputy Federal Commissioner of Taxation v Woodhams* (High Court of Australia, M2/1999, McHugh J, Kirby J and Callinan J, 14 May 1999)

118 *John Pfeiffer Pty Ltd v Rogerson* (High Court of Australia, C14/1998, Gummow J, Kirby J and Hayne J, 16 April 1999)

119 *Federal Commissioner of Taxation v Scully* (High Court of Australia, M58/1998, McHugh J and Gummow J, 12 February 1999)

1998

120 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (High Court of Australia, S31/1998, McHugh J and Kirby J, 11 December 1998)

121 *Attorney-General (Cth) v Breckler* (High Court of Australia, P10/1998, Gummow J and Hayne J, 19 June 1998)