Open justice, efficient justice and the rule of law: the increasing invisibility of special leave to appeal applications in the High Court of Australia

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This article examines the application of the rule of law to special leave to appeal applications (SLAs) in the High Court of Australia. SLAs are a fusion of administrative and judicial power. As an administrative tool, determinations of SLAs are a workload filter, limiting the appeals heard by the Court. As an exercise of judicial power, SLA determinations have significant impact upon the parties to litigation and the development of substantive law. Presenting the findings of data analysis of the determination of SLAs in the High Court of Australia from 2013-2015, we identify the loss of publicly available information brought about by changes to the High Court Rules in 2016. Using this evidence we argue that the current administration of SLAs preferences efficiency to the detriment of public confidence in the administration of justice. We suggest facilitating the rule of law through publication of the written submissions for SLAs.

I INTRODUCTION

This article argues for increased transparency in the determination of special leave to appeal applications[1] (SLAs) in the High Court of Australia. Referencing the rule of law principles of open justice and efficient justice, we suggest that the current administration of SLAs preferences efficiency to the detriment of public confidence in the administration of justice.[2]

SLAs are a fusion of administrative and judicial functions. Administratively, the High Court utilises the process of special leave to control its own workload.[3] It selects the cases it will hear on appeal in accordance with the public interest test in section 35A *Judiciary Act 1903* (Cth). As the grant or refusal of special leave is a 'virtually unfettered'[4] discretion, written reasons are not given and determinations may be made by a panel of any 2 Justices. This is

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[1] The focus of this article is upon special leave to appeal applications (SLAs) rather than **l**eave to appeal. The latter are rare as such appeals concern judgments of Justices exercising the High Court's original jurisdiction.

[2] Note the difference here between administration and the administration of justice, the former is an administrative function and the latter is a judicial function: Hon Justice Kiefel, 'Judicial Independence' (Conference Paper, North Queensland Law Association, 30 May 2008).

[3] The number of substantive appeals the Court hears annually is around 80: David O'Brien, *Special Leave to Appeal* (Supreme Court of Queensland Library, 2nd ed, 2007). This number is confirmed by this study, of the 783 SLAs 80 or 10% were granted and 703 or 90% refused (see Part V). This is not unique to the High Court see Roy B Flemming, *Granting Judicial Review in Canada* (UBC Press, 2003) for the discussion of the Canadian Supreme Court and 102-104 for a brief overview of other international courts.

[4] Hon Ian Callinan, 'An over-mighty court' in *Upholding the Australian Constitution* (Proceedings of the Fourth Conference of the Samuel Griffith Society 1994) 81113.

efficient justice. SLAs are also an exercise of Commonwealth Constitutional judicial power. Determinations of special leave affect both the rights of parties and the development of substantive law, allowing the High Court to select and determine which questions of law require judicial consideration. The outcomes of SLAs are disseminated in the High Court Annual Reports, in published Special Leave Dispositions and in the transcripts of SLAs heard orally. Parties' written submissions for final appeal hearings (though not SLAs) are publicly available on the High Court website. This is open justice.

We make the case for increased transparency in the determination of SLAs firstly, by engaging with the rule of law and the open justice jurisprudence of the High Court and secondly, by examining the exceptionalism of SLAs. Tension between efficient justice and open justice, both of which are critical to the rule of law,[5] is resolved by the express jurisprudential preference of the High Court for efficiency in determining SLAs. Utilising the results of a data study of High Court SLAs from 2013-2015, we demonstrate the reduction in publicly available information about SLAs as a result of the High Court Rule changes in 2016 governing the filing and determination of SLAs and leave to appeal applications.[6] These changes to Part 41 of the *High Court Rules 2004* (Cth)[7] reflect the practical necessity to control the ever increasing volume of work funnelled to the High Court[8] through streamlining procedures and reducing[9] oral hearings of SLAs.[10] Finally, acknowledging limited Court resources, we suggest enhancing the rule of law through making publicly available all SLA submissions by parties (subject to any Court imposed restrictions), redressing the growing imbalance between efficient justice and open justice.

This article makes three important contributions. First, the findings provide empirical evidence of the *machinery* of the SLA process. It is the first study to collate, synthesize and analyse data to highlight the impact of the 2016 Rule changes with respect to the *manner* in which applications are managed and determined by the High Court.[11] Second, consideration of jurisprudence and literature concerning the rule of law and open justice demonstrates the link between the administrative role of the court and the complexity of the judicial role,

[5] Hon Wayne Martin AC, 'Court Administrators and the Judiciary – Partners in the Delivery of Justice' (2014) 6(2) *International Journal for Court Administration* 3.

[6] Andrew Phelan, 'Changes to High Court procedures for considering applications for special leave', Chief Executive and Principal Registrar of the High Court of Australia, <http://www.hcourt.gov.au/assets/corporate/policies/Special_Leave_Changes.pdf>; *High Court Amendment (2016 Measures No. 1) Rules 2016* (Cth); *High Court Amendment (2016 Measures No. 2) Rules 2016* (Cth).

[7] Subsection 21(1) of the *Judiciary Act 1903* (Cth) provides that special leave will be determined subject to the Rules.

[8] This necessity is not new, almost 60 years ago Justice McClemens noted that '... for purely pragmatic reasons some thought may have to be given in the future to some form of limitation of appeals to the High Court from State courts', Justice McClemens, 'Judicial Problems in a Growing State' (1960) 3 *Sydney Law Review* 221, 232.

[9] A new form (Form 23) now consolidates the draft Notice of Appeal and the Summary of argument/written case into a single form for both leave to appeal and special leave to appeal.

[10] *High Court Rules 2004* (Cth) r 44.08.2 and the new form (Form 27F) which states the outline of oral submissions. The High Court may now grant leave without an oral hearing see Michael Pelly, 'High Court decides leave applications on paper' *The Australian*, 22 July 2016.

[11] This article complements other published findings of this study as to the *substance* of SLAs, including parties, legal representation, nature of cases, main issues on appeal: Pam Stewart and Anita Stuhmcke, 'Litigants and Legal Representatives: A Study of Special Leave Applications in the High Court of Australia' (2019) 41(1) *Sydney Law* Review 34.

whereas previous empirical work using quantitative material alone has been criticised for: measuring performance;[12] reflecting upon the quality of the work of justices; or explaining judicial efficiency.[13] Instead our analysis supplements qualitative evaluation[14] by raising awareness as to the *manner* the Court undertakes its work. Third, we extend commentary on the adequacy of Court resourcing[15] and the need for public confidence and transparency of Court processes[16] with respect to the loss of publicly available information through the 2016 Rule changes. We suggest that while the movement towards paper only determinations is not itself problematic, the loss of publicly available information is. In summary, the value of our analysis is to open for scrutiny the *type* or *kind* of work the Court is being asked to do through SLAs and the way in which it seeks to *manage* that work.

II THE HIGH COURT OF AUSTRALIA: THE RULE OF LAW, OPEN JUSTICE AND THE OPEN COURT RULE

The rule of law, that all members of a society are equally subject to publicly available legal codes and processes,[17] is an overarching principle of the Australian democratic system of government.[18] The rule of law opposes the exercise of arbitrary power. In Albert Venn Dicey's oft-cited formulation the rule of law 'excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government'.[19] This exclusion of arbitrary power is both aspirational and formal: aspirational as it is an ideal of justice and formal as the constitutional role of the courts is to hold the Executive to account and to act as a balance against legislative supremacy.[20]

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[12] Described as an 'infant science' see Hon Murray Gleeson, 'Current Issues for the Australian Judiciary' (Conference Paper, 17 January 2000) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_Japanj.htm>.

[13] Bathurst CJ, 'Who Judges the Judges, and how should they be judged?' (2019 Opening of law term address, 30 January 2019) [45]-[46], [49]-[50].

[14] Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001' (2004) 32(2) *Federal Law Review* 255.

[15] Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of its First Five Years' (2003) 26(1) *University of NSW Law Journal* 32.

[16] Kirby P stated in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, that 'Justice is done in public so that it may be discussed and criticised in public'.

[17] Geoffrey de Q Walker, *The rule of law: foundation of constitutional democracy* (Melbourne University Press, 1988).

[18] While its definition may be contested and varied it is part of the Commonwealth Constitution: *South Australia v Totani* (2010) 242 CLR 1 (French CJ) [42].

[19] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics, 8th ed, 1982) 104–273. For further discussion see Mark D Walters, 'Dicey on Writing the Law of the Constitution' (2012) 32(1) *Oxford Journal of Legal Studies* 21. On the much earlier antecedents of the rule of law, see James Spigelman, 'Magna Carta: The Rule of Law and Liberty' (2015) 31(2) *Policy: A Journal of Public Policy and Ideas* 24 and Friedrich Hayek, 'The Origins of the Rule of Law' in *The Constitution of Liberty* (University of Chicago Press 1960), 162, attributing the concept to Aristotle; on political and philosophical foundations of the concept, see Judith Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1, ch 1.

[20] *Chu Kheng Lim v. Minister for Immigration* (1992), 176 CLR 1 (Brennan, Deane and Dawson JJ) [38].

The courts themselves are subject to both the aspiration and formality of the rule of law.[21] Open justice, a core principle of the common law,[22] renders judicial authority subject to, and limited by, the rule of law. In the English decision, *Scott v Scott* open justice is reverently described by Lord Shaw as '…a sound and very sacred part of the constitution of the country and the administration of justice'[23] and by Lord Atkinson as 'the best security for the pure, impartial and efficient administration of justice'.[24] The High Court confirmed these sentiments in *Dickason v Dickason*[25] since observing there to be 'a strong tradition of open justice that characterises the courts of this country'[26] and that '[T]he clear authority of this court, of other final courts and of other Australian courts lays consistent emphasis on the fact that the principle of open justice is deeply entrenched in our law.'[27]

The core principle of open justice is the open court rule. This maintains public confidence in the administration of justice by safeguarding against secrecy, allowing the public and the media access to courts. The fact that courts of law are held in public is 'one of the most pervasive axioms of the administration of justice in our legal system'[28] and is a long standing principle of common law systems.[29] The open court rule also ensures records of judicial decisions may be accessed by the public. The High Court's commitment to the open court rule is both operational and jurisprudential. Operationally High Court Justices are accountable for their decision making firstly, in public court proceedings and secondly, by the *High Court Rules 2004* (Cth)[30] requiring publication of written reasons for judgment. Jurisprudentially, the High Court has held the open court rule to be fundamental,[31] with limits only being placed upon the rule only where 'necessary for the administration of justice' or 'in the interests of justice'[32] or by statutory exception.[33]

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[21] Writing some 50 years earlier than AV Dicey, Governor Forbes wrote of the NSW Supreme Court that '…the judicial office … stands uncontrolled and independent, and bowing to no power but the supremacy of law.' Cited in Murray Gleeson, 'Courts and the Rule of Law, *The Rule of Law Series* (Speech, 7 November 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm#_edn13>.

[22] *Hogan v Hinch* (2011) 243 CLR 506; see generally Beverley McLachlin, '*Openness and the Rule of Law*' (Annual International Rule of Law Lecture, 8 January 2014). <https://www.barcouncil.org.uk/media/270848/jan_8__2014_-_12_pt.__rule_of_law_-_annual_international_rule_of_law_lecture.pdf>; Right Honorable Beverley McLachlin, *The 21st Century Courts: Old Challenges and New*, April 28, 2006 (AIJA, 2006).

[23] *Scott v Scott* [1913] AC 417, 473 (Lord Shaw).

[24] Ibid, 463 (Lord Atkinson).

[25] (1913) 17 CLR 50.

[26] *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 (Kirby J) [89].

[27] *Application by the Chief Commissioner of Police (Vic), Re* (2005) 214 ALR 422 (Kirby J) [114].

[28] Justice Spigelman, 'Seen to be Done: The Principle of Open Justice' (Keynote address to the 31st Australian Legal Convention, 9 October 1999).

[29] Sir Edward Coke traced this to *Statute Of Marlborough* 1267, see Edward Coke, *The Second Part of Institutes of Law of England* (London 1642) 103-104.

[30] *High Court Rules 2004* (Cth) r 6.03.

[31] *Russell v Russell; Farrellly v Farrelly* (1976) 9 ALR 103 (Gibbs J) 122.

[32] *Hogan v Hinch* (2011) 243 CLR 506. The limitations are justified, as the open administration of justice serves the interests of society and is not an end in itself: Garth Netheim, 'Open Justice versus Justice' (1985) 9(4) *The Adelaide Law Review* 487.

[33] See also *Rinehart v Walker* [2011] NSWCA 403 and discussion of section 6 of the *Court Suppression and Non-Publication Orders Act 2010* (NSW) which include: control of public attendance to protect orderly court

However, the application of the open court rule, is limited by the concept of 'court' and 'open court'.[34] Administrative judicial functions, such as determinations of SLAs, are removed from its application. The High Court is empowered to 'administer its own affairs' under section 17 of the *High Court of Australia Act 1979* (Cth). This self-administration, is a discretionary 'collegiate autonomous model'[35] of governance. It includes, at least, the assignment of Justices to cases and timing of court sittings as well as the court lists, allocation of court rooms and the direction of administrative staff engaged in these functions.[36] None of these is subject to public scrutiny under the open court rule.

Nevertheless, internal Court administration is exposed to some public scrutiny. Section 47 of the *High Court of Australia Act 1979* (Cth) requires the Court to produce an Annual Report. This public report on the workings of the Court is recognition of the importance of public availability of accurate information about its practice and procedures.[37] The Court also provides extensive information online, much of which is not required by legislation. For example, as discussed below, the Court has, since January 2011, made available on its website the written submissions filed on behalf of parties in advance of Full Court appeal hearings. This willingness to publish information relevant to internal Court governance is not mandated by statute or Court jurisprudence. It is discretionary. This raises the difficult issue, discussed in Part VI below, as to whether this exercise of discretion which establishes the current levels of transparency for SLAs is sufficient.

This question is made more complex due to the tension High Court self-administration creates within the rule of law. On the one hand judicial self-administration conflicts with open justice as the judiciary is exercising an administrative function.[38] This can be discretionary and secretive. On the other hand, Court self-governance upholds judicial independence leaving the judiciary free from Executive interference over significant matters such as the allocation of caseloads to individual justices and the development of court procedures and policy.[39] This independence of the judiciary is traditionally secured by the guarantee that the judiciary will

proceedings; sensitivity to the reputation of trial participants and to protect state security. Similarly Schedule 2 of the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) as to suppression and non-publication of information.

[34] *Russell v Russell* (n 31) determined that the open court rule applied to state courts as per Chapter III of the Commonwealth Constitution referred to in *Williams v Williams* (1976) 134 CLR 495 (Stephen J) 532, (Barwick CJ) 505. Cited with approval in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, (French CJ) [49] discussing state courts and the application of the open court principle.

[35] Tin Bunjevac, 'Court Governance: The Challenge of Change' (2011) 20 *Journal of Judicial Administration* 201.

[36] Cheryl Saunders, 'Separation of Powers and the Judicial Branch' (2006) 11 *Judicial Review* 337 citing the Supreme Court of Canada in *Valente v The Queen* [1985] 2 SCR 673.

[37] High Court of Australia, *Annual Report 1997-1998*, 7.

[38] There must be separation between executive and judicial functions: *Abebe v The Commonwealth* (1999) 197 CLR 510 (Gummow and Hayne JJ) 560; *Enfield City Council v Development Assessment Commission* (2000) 199 CLR 135 (Gaudron J) 157. Murray Gleeson, 'Courts and the Rule of Law, *The Rule of Law Series* (7 November 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm#_edn13>.

[39] Martin (n 5); Justice Bryan Beaumont, 'The Self-administering Court: from Principles to Pragmatism' (1999) 9 *Journal of Judicial Administration* 61.

be publicly accountable through the principles of open justice. As Justice McHugh J observed in *Grollo v Palmer:*[40]

> The maintenance of public confidence in the independence and impartiality of the Federal Court Justices in hearing disputes between the citizen and the government and its agencies is contingent upon the public perception that the Justices of the federal courts are impartial and entirely independent of the executive arm of government.

Thus competing policy objectives are thrown into sharp relief by Court self-administration. Independence from the Executive arm of government with the expense and delay of ensuring public accountability through the application of principles of open justice must be pursued by the Court against the administrative reality of limited budgets. Managerial efficiency and control of a growing workload may best be achieved through closed administrative processes.

Answering the question as to appropriate levels of transparency over judicial self-administration is further complicated by the imprecision as to what open justice encompasses. The public scrutiny the rule affords is pointless without the machinery and manner of the workings of the Court affording litigants a right to be heard with equal access to the courts and equality before the law. It follows that the principle(s) of open justice must be broadly construed. Open justice is a collection of principles which act as a balance against the countervailing exercise of arbitrary power.[41] These principles exist together with the open court rule and include: availability of judicial review; judicial accountability; integrity of courts; access to court documents and fairness. 'Efficient justice'[42] is also an important principle.[43] Single justices in the High Court refer to 'the efficient administration of justice'[44] and the 'public interest in the timely and efficient administration of civil justice'[45] and of criminal law[46] and explain the 'risk of adverse consequences for the efficient administration of justice' if litigation became 'more lengthy, more complex and more costly.'[47] As discussed in Part IV efficient justice is the principle driving the judicial administration of SLAs.

III THE EXCEPTIONALISM OF SPECIAL LEAVE TO APPEAL: JUDICIAL POWER AND ADMINISTRATIVE PROCEDURE

The breadth and application of open justice principles to Court self-administration is critical in analysis of the public availability of SLA information. This is because, as discussed in Part II

[40] 184 CLR 348 [29].
[41] *Kimber v Press Association* [1893] 1 QB 65 cited in Emma Cunliffe, 'Open Justice: Concepts and Judicial Approaches' (2012) *Federal Law Review* 15, Note 8.
[42] This term is used in the United Kingdom where it is observed as being in tension with open justice, see Lord Chief Justice Bingham in *SmithKline Beecham Biologies SA v Connaught Laboratories Inc* [1999] All ER 498.
[43] The term is not used by the 'High Court, in Federal Court judgments the term is mentioned briefly in obiter: *Hinton v Alpha Westmean Private Hospital Pty Ltd* (2016) FCAFC 107.
[44] *Ebner v Official Trustee in bankruptcy (M131 of 1999)* (2000) 176 ALR 644 (Guadron J) [95].
[45] *UBS AG v Tyne (as trustee of the Argot Trust)* (2018) 360 ALR 184 (Gageler J) [70], [72].
[46] *Ousley v R* (1997) 148 ALR 510 (McHugh J) 534.
[47] *Giannarelli & Ors v Wraith & Ors* (1988) 81 ALR 417 (Mason CJ) 422.

and confirmed below, High Court jurisprudence expressly excludes determinations of SLAs from the open court rule.

This is significant. SLA determinations impact upon the wider legal system. At the apex of state and federal courts, the High Court has two principal jurisdictions: as a court of original constitutional jurisdiction and as the final appeal court for all Australian jurisdictions in all matters. As finite resources require the High Court to allocate its attentions only to the most significant legal questions and the bulk of the High Court's work is appellate,[48] outcomes of SLAs will necessarily influence the development of substantive law. This is especially clear in the public interest test for special leave to appeal to the High Court in section 35A of the *Judiciary Act 1903* (Cth). This states that the High Court '**may** have regard to any matters that it considers relevant' but directs the Court that it '**shall** have regard' to the 'public importance' of the question of law and whether 'the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court' [emphasis added]. This is a strict test which emphasizes the public interest in the evolution of law and the private interests of the parties to the litigation.[49] The significance of SLA outcomes to the development of substantive law means that the administrative framework applied to select cases for hearing is critical to public confidence in the administration of justice.

The framework for SLA selection is one of both form and function. The *form* of SLAs is prescribed in the High Court Rules. Significant rule changes were introduced in 2016 to decrease delay and costs to parties. As of June 2016 SLAs must be filed within 28 days of the judgment being appealed and the form of application is limited to a maximum of 12 pages in length. The previous right to request an oral hearing of the SLA (previously in r 41.07.3) has been removed. Rule 41.08.1 provides that:

> Any 2 Justices may determine an application without listing it for hearing and direct the Registrar to draw up, sign and seal an order determining the application.

The High Court Justices can therefore determine an SLA on the papers in camera without any opportunity for the applicant or respondent to present oral argument.[50] In the 2017-2018 year, 77% of SLAs were finalised without an oral hearing.[51]

The *function* of the special leave requirement is twofold. Firstly, a grant of special leave to appeal provides an opportunity for litigants to pursue legal action through to finality while simultaneously enabling the High Court to shape the law across State, Territory and Federal

[48] The High Court also hears other matters such as applications under section 75(v) of the Constitution against officers of the Commonwealth, removals from other courts into the High Court under section 40 of the *Judiciary Act 1903* (Cth), cases stated, references under section 18, and election petitions.

[49] Ben Wickham, 'The Procedural and Substantive Aspects of Applications for Special Leave to Appeal in the High Court of Australia' (2007) 28 *Adelaide Law Review* 153, 155.

[50] At the same time, the reforms place greater stress on practitioners to prepare a SLA within tightly constrained timeframes, and tightly constrained page limits on applications, see Chris Corns, 'Leave to Appeal in Criminal Cases: The Victorian Model' (2017) 29(1) *Current Issues in Criminal Justice* 39.

[51] High Court of Australia, *Annual Report 2017-2018*, 21.

jurisdictions. Secondly, as there is no appeal as of right,[52] the High Court controls its own workload by filtering SLAs.[53]

Importantly whilst this administrative framework is a preliminary step in appellate proceedings, the determination of an SLA involves the exercise of judicial power under section 71 of the Commonwealth Constitution. The High Court held in *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (‘*Smith Kline’*):

> The procedure calls for a hearing, whether orally or on written materials, and a determination in the form of a curial order. If the application be refused, the order dismissing the application is the final curial act which brings the litigation between the parties to an end. An application for special leave to appeal therefore involves the exercise of judicial power.[54]

The Court thus expressly acknowledges that special leave determinations are an exercise of judicial power under Chapter III of the *Commonwealth Constitution*. This confirms a separation of powers between Court administration of SLAs as a power of the judiciary distinct from that of the executive and the legislative arms of government. SLAs, as an exercise of judicial power, are therefore part of the larger precept of judicial independence and the separation of powers doctrine.

However the exceptional nature of SLAs as an administrative tool is also emphasized by the Court. High Court jurisprudence concedes workload considerations involved in SLAs. The Court observes the determination of an SLA to be not ‘in the ordinary course of litigation’,[55] not resolving a dispute between parties, though it may be the final chapter in the dispute.[56] Again in the joint judgment in *Smith Kline* the High Court observed:

> From time to time statements have been made which draw attention to the unusual character of an application for special leave to appeal. Such an application has special features which distinguish it from most other legal proceedings. It is a long-established procedure which enables an appellate court to control in some measure or filter the volume of work requiring its attention. Ordinarily, it results in a decision which is not accompanied by reasons, or particularly by detailed reasons.[57]

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[52] The provision of appeals as of right was abolished in 1976: Hon Michael Kirby, ‘Law at Century’s End – A Millenial View from the High Court of Australia’ (2001) 1 *Macquarie Law Journal* 1, 7. Until 1984 litigants to appeal in civil matters had a right, as long as their case was of a certain monetary value, see David Solomon, ‘Controlling the High Court’s Agenda’ (1993) 23 *Western Australian Law Review* 33.

[53] *Smith Kline and French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194; see also Hon Sir Anthony Mason, ‘The High Court as Gatekeeper’ (2000) 24 *Melbourne University Law Review* 784.

[54] Ibid (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) [36].

[55] *Hogan v Hinch* (2011) 243 CLR 506 (French CJ) [21].

[56] *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 (McHugh J) 643; *Re Sinanovic's Application* (2001) 180 ALR 448 (Kirby J) 450. The principle of finality of litigation applies to SLAs see *Hughes Trueman Pty Ltd & Anor v Young* [2017] FCCA 468 (Judge Dowdy) [18].

[57] *Smith Kline* (n 53) (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) 217-218.

Here the High Court acknowledges the exceptionalism of SLAs. While an exercise of judicial power, the open court rule does not apply to SLAs. An SLA does not have to be heard in open court, the determination of an SLA in private is not a denial of natural justice,[58] and reasons do not have to be provided. In fact the absence of the application of the open court rule ensures the 'availability, the speed and the efficiency of justice.'[59] SLAs are thus a unique blend of efficient administrative process and opaque judicial power.

IV. THE CHANGING LANDSCAPE FOR SLAS: PREFERENCING EFFICIENT JUSTICE

Efficient justice is important. Administrative efficiency is critical to the rule of law. Complexity, expense and delay have been described as the 'unholy trinity'[60] inhibiting access to the justice system and leading ultimately to denial of justice.[61] Some rationing is necessary.

High Court litigation is affected by the adoption of managerial judging techniques.[62] Of these techniques, managing special leave is now the most important consideration in High Court efficiency. The major[63] amendment enabling filtering of the Court's work by the requirement for special leave was introduced through section 35A of the *Judiciary Act 1903* (Cth) in 1984. This was enacted for the purpose of workload management.[64] In *Smith Kline*[65] the High Court upheld the constitutional validity of section 35A, 'inherent in which is the absence of a right of appeal to the High Court'.[66] The unanimous judgment in *Smith Kline* observed that the High Court has a 'very wide discretion' to grant special leave to appeal[67] and further, that '[i]t is not an ordinary court of appeal'.[68] This is because the bulk of appellate work is now governed by the special leave requirement.[69]

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[58] *Coulter v R* (1988) 164 CLR 350 (Mason CJ, Wilson and Brennan JJ) 356 ('Coulter').
[59] Ibid (Deane and Gaudron JJ) 359.
[60] Neil Andrews, 'A new civil procedural code for England: party-control' going, going, gone' (2000) 19 *Civil Justice Quarterly* 19, 20.
[61] Lord Dyson, 'Delay too often defeats justice' (2015) 12(3) *Judicial Review*, 285-299.
[62] Saunders (n 36).
[63] These amendments began in 1976 when the *Judiciary Amendment Act 1976* (Cth) removed appeals as of right to the High Court.
[64] *Commonwealth Trading Bank of Australia v Inglis* (1974) 3 ALR 19 (Barwick CJ and McTiernan J). During the second reading speech of the amending legislation (the Judiciary Amendment Bill (No 2) 1984), the Attorney-General, Senator Gareth Evans, pointed out that the justices of the High Court had expressed concern about the effect of the increasing workload of the High Court on its capacity to function effectively as a final appellate court in Australia. See Hansard (Sen) 8 March 1984, 584–5 cited in S O'Bryan 'High Court appeals' (1984) 19 *Australian Law News* 11, 244. See also, Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (ALRC Discussion Paper 64) December 2000, 242. From its inception in 1903 the Australian High Court was a court of appeal: Nicholas Aroney, Peter Gerangelos, Sarah Murray, James Stellios, *The Constitution of the Commonwealth of Australia* (Cambridge University Press), 505 citing JM Bennett, *Keystone of the Federal Arch* (Australian Government Publishing Service, 1980) 3.
[65] Above (n 53).
[66] *Milat v The Queen* [2004] HCA 17 (McHugh J) [26].
[67] *Smith Kline* (n 53). See also *Collins v. The Queen* (1975) 133 CLR 120, where the High Court observed that 'The jurisdiction which the Court exercises in determining an application for leave is not a proceeding in the ordinary course of litigation' (Mason CJ, Wilson and Brennan JJ) 122 [9].
[68] *Smith Kline* (n 53) 218.
[69] See O'Brien (n 3).

This was a monumental shift. For most of the last century, the High Court was not an ultimate court of appeal given that there were still Australian appeals to the Privy Council.[70] At the same time, civil litigants could appeal to the High Court virtually as of right. The above amendments to the *Judiciary Act 1903* (Cth) require that all appellants must have a grant of special leave to appeal. Large numbers of SLAs[71] mean that the mix of work, between substantive law and error correction, is within Court control. The Court, through refusal of SLAs, determines the areas of law it will not reconsider.[72] The High Court can and does 'choose the cases which it entertain[s], and thus influence[s] the direction and pace of legal change.'[73] Thus judicial self-administration of SLAs is part of the administration of justice.

Theoretically, the absence of application of the open court rule to SLAs means determinations are made in secret. However the practice of the High Court ameliorates the effect. As noted in Part III publicly available data is provided by the High Court Annual Reports. The Court voluntarily makes significant amounts of information about its own function, limits and internal organisation available to the public on its website. The website publishes the transcripts of applications heard orally and the determinations of applications heard on the papers. Where applications are refused on the papers they are accompanied by very short formal reasons for refusal, and if granted leave to appeal, no reasons are recorded. By way of example, a reason commonly recorded where applications are refused is 'this appeal would not enjoy sufficient prospects of success.'[74] This form of statement has been described as 'extremely brief' and 'often uninformative', with the brevity due to a 'crushing' workload.[75]

These brief statements are now the primary source of SLA public information. The only other source of data is that contained in High Court Annual Reports. Appendix 1 details the four publicly available sources of information about SLAs. It provides a snapshot of the impact of the 2016 High Court procedural rule changes concerning SLAs. Increasing reliance upon the short formal reasons of refusal is largely, although not solely, attributable to the reduced number of oral hearings and the corresponding diminution in transcripts of oral hearings. Transcripts of oral hearings are the richest source of information about the process and deliberations of the High Court under section 35A of the *Judiciary Act 1903* (Cth). In 2017/18, 77% of all SLAs were heard on the papers with a total of 35 grants of special leave

[70] Privy Council appeals were abolished in 1986.

[71] In 2005-2006 873 matters filed (720 SLAs); 2006-2007 945 matters (809 SLAs); 2007-2008 692 matters (575 SLAs); 2008-2009 692 matters (575 SLAs); 2009-2010 680 matters (562 SLAs); 2010-2011 715 matters (494 SLAs); 2011-2012 728 matters (487 SLAs); 2012-2013 618 matters (458 SLAs); 2013-2014 630 matters (508 SLAs); 2014-2015 698 matters (470 SLAs); 2015-2016 795 matters (536 SLAs).

[72] David Jackson, 'The Role of the Chief Justice: A View from the Bar' in Cheryl Saunders (ed), 'Courts of Final Jurisdiction: The Mason Court in Australia' (Federation Press, 1996) 22.

[73] David Jackson, 'The Australian Judicial System: Judicial Power of the Commonwealth' (2001) 24(3) *University of New South Wales Law Journal* 737, [6].

[74] In 1991 Solomon (n 52) examined 91 cases where the High Court refused special leave in civil matters and observed 'There is little direct correlation between the formal requirements set out in section 35A of the Judiciary Act 1903 (Cth) for the grant of special leave and the reasons the Court tends to give for refusing special leave.' This remains the case.

[75] Mark Weinberg, 'Adequate, Sufficient and Excessive reasons' (Judicial College of Victoria, 4 March 2014) <http://classic.austlii.edu.au/au/journals/VicJSchol/2014/9.pdf> [118].

in 2018: the lowest annual number of grants in the past decade.[76] Details of the 35 cases granted special leave are publicly accessible via the appeal judgments handed down and through online public dissemination of party submissions for the Full Court hearings. Neither of these avenues of transparency is available for the SLAs refused. Post 2016 we have increasingly scant information about unsuccessful applications especially those determined on the papers.

V. THE PRE-2016 STUDY OF SLAS: ILLUSTRATING THE PUBLIC INTEREST IN INFORMATION ABOUT SLAS

This Part examines the sources of publicly available information outlined in Appendix 1 with particular focus upon the role and function of the Justices. It reports the findings of an analysis of a specially constructed data set of SLAs. This study supplements High Court Annual Report data through collating *all* information publicly available on SLAs. The data set used in this study was coded by the authors by hand[77] and collated variables defined by the information available in the special leave dispositions and transcripts. More than 50 variables were coded including legal practice area; application outcome; paper versus oral hearing; court below; membership of judicial panels; judicial grant rates, details of parties and legal representation. Approximately 40 000 pieces of information were coded.[78]

The findings of this study evidence the extent to which SLAs are conducted in public view and raise the issue of whether the available information is sufficient to maintain public confidence in the administration of justice. The study findings demonstrate the value of publicly available information in providing insights into the challenges of efficient administration of the special leave process and the flow of appellate work to the High Court. It also exposes the depth of information lost to the public following the 2016 Rule changes due to the consequent rapid and significant increase in paper based determinations of SLAs.

The data set consists of all 783 SLAs disposed of by the High Court between March 2013 and February 2015. This time frame was selected for four reasons: firstly, it immediately precedes the most recent 2016 High Court rule changes; secondly, it was a period where the membership of the High Court remained static;[79] thirdly, the number of applications enabled the authors to code them manually and finally because the currency of this period provides

[76] Jeremy Gans, 'News: Five new special leave grants bring the yearly total to 35' (Blog Post, 15 December 2018) <https://blogs.unimelb.edu.au/opinionsonhigh/2018/12/15/news-five-new-special-leave-grants-bring-the-yearly-total-to-35/>.

[77] The manner of publication of special leave results meant that machine coding – to the extent required by this analysis was not possible. The authors are grateful for the cooperation from the High Court in providing available electronic information which formed the basis of its Annual Reports during the period under study.

[78] Analysis of the data was undertaken by the authors with interdisciplinary assistance, with assistance of statisticians and data science research students.

[79] Between March 2013 and February 2015 the High Court Justices were French CJ; Kiefel J; Crennan J; Bell J; Gageler J; Keane J and Hayne J.

access to the publicly available special leave application results published on the High Court website[80] and the decisions publicly available on AustLII.[81]

A *The Study Findings: Justices' SLA Work*

In this study, 447 of the 783 SLAs (57.08%) were decided on the papers and 336 (42.92%) were heard orally. This is on trend with the growth in paper only determination of SLAs which has been steadily evolving since February 1982 when the first steps were taken to adopt a 'universal requirement of written submissions' for SLAs.[82] In 2003 the High Court observed that written submissions filed by applicants were by then 'the principal vehicle for demonstrating that the case is one in which leave should be given.'[83] The increase in paper hearings is the culmination of a steady condensation and reduction of oral argument.[84] It is directed at efficiency. Following new High Court Rules in 2004 the Court noted that '…the High Court Rules now provide that the Court may determine special leave applications on the papers.... As a consequence of this procedure overall waiting times have been reduced.'[85]

During the period of this study none of the 447 SLAs determined on the papers was granted leave. The 80 cases (or 10.22% of total cases) granted leave were all heard orally. There is no transparent means to explain why this is the case. As Gans observes, '[T]he mystery remains of how the court distinguishes between such cases [where oral argument would be critical] and the many others where no oral hearing is held.'[86] As discussed below, the process for selection of cases for final appeal to the High Court is, following the 2016 rule changes, with the reduction in oral hearings increasingly invisible to the world outside the court.[87]

In all 447 applications determined on the papers, only 2 Justices sat. At oral hearings, either 2 or 3 Justices presided. This seems to indicate that oral hearings are granted in cases with more complex, or more divisive, issues of law, the implication being that the more Justices required the more difficult and demanding the legal issues at stake.[88] Table 1 shows success rates for the 336 SLAs heard orally. It demonstrates a striking reluctance to commit more than 2 Justices to determine SLAs. Of the 336 oral SLAs only 43 or 12.8% were determined by a panel of 3 Justices.

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[80] High Court Website, <http://www.hcourt.gov.au/registry/special-leave-applications-results-2016>.

[81] The four sources used to obtain and cross-check the data: High Court Bulletins listing applications granted and refused (available on High Court website and AustLII); Dispositions (available on High Court website and AustLII); SLA transcripts (available on AustLII); High Court lists (available on the High Court website). See Appendix One.

[82] Hon Justice Michael Kirby, 'The future of appellate advocacy' (2006) 27(2) *Australian Bar Review* 141.

[83] High Court of Australia, *Annual Report 2003-2004*, 8 (the relevant new rules commenced in January 2005).

[84] In 2005-2006, 50% of SLAs heard on the papers; 2006-2007, more than 50%; 2007-2008, 73%; 2008-2009, 66%; 2009-2010, 59%; 2010-2011, 50%; 2011-2012, 49%; 2012-2013 53%; 2013-2014, 47%; 2014-2015, 60%; 2015-2016, (new rules on 7 June 2016) 65%; 2016-2017, 75%; 2017-2018, 77%.

[85] High Court of Australia, *Annual Report 2005-2006,* 33. See below (89).

[86] Gans (n 76) 3 August 2016.

[87] Meador has observed this process in the United States: Daniel J Meador, 'Toward Orality and Visibility in the Appellate Process' (1983) 42(4) *Maryland Law Review* 732, 736.

[88] Justice Michael Kirby, 'Maximising special leave performance in the High Court of Australia' *University of New South Wales Law Journal* 731, 742.

TABLE 1: Oral Hearings: Number of Justices and Outcome

	Outcome				
Number of Justices	Granted	Refused	**Success rate**	**Total SLAs**	**Load (% of all SLAs)**
2 Justices	72	221	24.57%	293	87.20%
3 Justices	8	35	18.60%	43	12.80%
Total	**80**	**256**	**23.81%**	**336**	**100%**

Of the successful oral applications Table 1 shows that 18.6% of applications succeed when there is a 3 Justice panel as opposed to 24.57% for a 2 Justice panel. Once both oral and paper based determinations are included in the figures for two Justice panels (whether heard orally or on the papers), a total of 72 applications, just under 10%, were successful and 90% or 668 were refused leave. Where there were three Justices sitting, almost 19% or 8 applications were granted leave and 81% or 35 were refused. The type of data used in Table 1 will be available and that analysis will be able to be replicated post the High Court 2016 Rule changes.

The number of Justices assigned to a special leave panel is an indication of the resources the High Court is willing to commit to the special leave process. SLAs comprise the bulk of matters filed in the High Court and the total number of Justices, 7, has remained unaltered as the workload has dramatically increased. Changes to special leave procedures have enabled this increase to be managed. Rule changes in 2004 cut sitting days in half by introducing written submissions, allowing the Justice panels to reduce from 3 to 2 and enforcing time limits for oral argument.[89]

Table 2 allows for comparison of the work of judicial panels in oral hearings across the three main legal categories of SLAs:

TABLE 2: Oral Hearings: Number of Justices and Outcome, by Practice Area

		Outcome				
Number of Justices	*Practice Area*	Granted	Refused	**Success rate**	**Total SLAs**	**Load (% of all SLAs)**
2 Justices	*Civil Law*	48	133	26.52%	181	53.87%
	Criminal Law	21	75	21.88%	96	28.57%
	Immigration Law	3	14	17.65%	17	5.06%
3 Justices	*Civil Law*	5	24	17.24%	29	8.63%
	Criminal Law	2	10	16.67%	12	3.57%
	Immigration Law	1	0	100%	1	0.30%
	Total SLAs	**80**	**256**	**23.81%**	**336**	**100.00%**

[89] In 2007 Justice Kirby observed that this development had halved the days in the Court sitting year dedicated to special leave: Ibid 740.

The majority of successful oral applications, be they before 2 or 3 Justices concern civil law. This figure differs when all 783 applications (both oral and paper hearings) are accounted for, comprising 454 civil matters, 161 criminal matters and 169 immigration matters.[90] The success rate overall for civil matters was 11.67% compared to 14.29% for criminal matters and 2.38% for immigration.[91]

The information required for Table 2 will be lost post the 2016 Rule changes as practice area is not now disclosed on dispositions for SLAs decided on the papers. While often it is possible to deduce information about the general practice area from the names of the parties to the case, it is certainly not possible to ascertain from the dispositions a more granular classification of practice area. General information about the numbers of cases in practice areas overall is, to date, available in the Annual Reports of the High Court but there is no breakdown of success rates in individual areas (see Table 6 & 7).

As Table 2 demonstrates public reporting of the number of Justices sitting on applications, and their identity, does provide some assurance, albeit limited, of accountability. At minimum it assures the public that determinations must be made through a process of judicial consultation. It also facilitates analysis which in turn promotes public understanding of the complexity of the judicial role.

This is further illustrated by Table 3 which identifies each Justice and the number of SLAs determined, together with the individual Justice's grant and refusal rate. This rate is then broken down into oral hearings and matters determined on the papers.

TABLE 3: Oral and Paper Hearings: Justices, Grant Rates and SLA Load

	Outcome		**Grant rate**	**Grant rate**	**Total SLAs**	**Hearings**	**'On the papers'**	**Load (% of all SLAs)**
Judge	Granted	Refused	(all SLAs)	(hearings only)	(appear-ances)	(appear-ances)	(appear-ances)	
Bell J	22	232	8.66%	19.30%	254	114	140	32.44%
Crennan J	19	208	8.37%	24.36%	227	78	149	28.99%
French CJ	36	80	31.03%	31.03%	116	116	-	14.81%
Gageler J	23	244	8.61%	21.50%	267	107	160	34.10%
Hayne J	21	214	8.94%	24.42%	235	86	149	30.01%
Keane J	21	225	8.54%	19.44%	246	108	138	31.42%
Kiefel J	26	238	9.85%	24.53%	264	106	158	33.72%
				Total	**1609**	**715**	**894**	32.44

[90] Immigration is separated from civil law due to the significant numbers of these applications where the applicant was self-represented. Accordingly they were almost all determined on the papers.
[91] See also Stewart (n 11).

The information in Table 3 remains available post 2016 however the sense of the role of the Chief Justice will be lost due to the decline in the number of oral hearings. In our study Chief Justice French was a member of the bench for the most oral hearings. Atkins has observed, in the context of the United States Supreme Court, that the role of the Chief Justice deserves attention in any examination as to how a court uses its resources and power.[92] As Table 3 shows Chief Justice French sat on 116 of the 336 oral hearings. The Chief Justice also had the highest grant rate with special leave granted in 31.03% of matters determined by a panel that included the Chief Justice. Justice Kiefel was the next highest leave granter in oral hearings (24.53%). Justices Bell and Keane had the lowest rates of granting special leave in oral hearings at 19.30% and 19.44%, respectively. Justice Bell sat on only 2 fewer oral hearings than Chief Justice French: 114 hearings. Table 3 shows when matters determined on the papers are included, Justice Gageler had the greatest load sitting on 34.10% of all applications. Conversely Chief Justice French had a comparatively lower judicial participation rate owing to his absence from any panels that considered applications 'on the papers.' . The involvement of the Chief Justice in only oral hearings and the fact that it was only from oral hearings that grants of special leave were made supports the view that the role of the Chief Justice in the Australian context deserves close scrutiny.

The number and identity of Justices allocated to a special leave application panel, is discretionary. The High Court Justices exercise administrative independence over rostering and case management. [93] There is no published explanation as to firstly, how the number of Justices (2 or 3) is chosen to sit on special leave panels or secondly, why particular Justices are selected and finally, how applications are selected for oral hearing rather than consideration on the papers.[94] There is limited insight offered extra-judicially as to judicial panel allocations. Justice Kirby, as he then was, observed that the practices of individual justices vary and that the assignment of Justices to special leave panels is proposed by the Chief Justice.[95] His Honour states that the recommendation as to 'whether two or three Justices should participate in a particular application … is done by reference to a preliminary study of the subject matter raised by the applications.'[96] It may indicate the level of complexity of the case or the level of interest individual Justices have in an issue. Justice Kirby observed that at times justices may sit in a special leave application because of particular interest.[97]

There is no evidence that the choice of Justice influences SLA outcomes. However there is international scholarship on the importance and influence of the choice of Justices on substantive legal proceedings.[98] The High Court internal process of panel selection with an

[92] Burton M Atkins, 'Alternative Models of Appeal Mobilization in Judicial Heirarchies' (1993) 37(3) *American Journal of Political Science* 780.
[93] This role is performed by the Justices themselves and not the officers of the Court or clerks: Ibid 738.
[94] There are exceptions to this – such as the rules around self-represented litigants.
[95] Kirby (n 88) 18-20.
[96] Ibid.
[97] Ibid.
[98] Marco Febri and Philip M Langbroek, 'Is there a Right Judge for each case? A Comparative Study of Case Assignment in Six European Countries' (2007) 1(2) *European Journal of Legal Studies* 1.

absence of transparency may be contrasted with case allocation systems used in other jurisdictions, such as Germany and the United States where objective neutral case allocation criteria are imposed including judicial rotation.[99] Butler explains it is vitally important for the maintenance of the rule of law that the public have confidence that they have 'not lost a case because of decisions made to appoint a particular judges or judges to the case in order to produce a particular result.'[100] While the assignment of Justices to final appellate hearings, may be of critical import to outcomes, the present study does not evidence that this is the case with respect to SLA determinations.[101]

Tables 4 and 5 confirm the SLA grant rate of individual Justices. Again, similarly to Table 3, this information is now impossible to replicate as special leave dispositions do not provide information as to legal practice areas. Table 4 shows percentage grant rates by individual justices across all practice areas.

TABLE 4: Oral and Paper Hearings: Justices Grant rates by Practice area

	Civil Law		**Criminal Law**		**Immigration Law**	
Judge	**Grant rate** (all Civil SLAs)	**Grant rate** (Civil hearings only)	**Grant rate** (all Criminal SLAs)	**Grant rate** (Criminal hearings only)	**Grant rate** (all Immigra-tion SLAs)	**Grant rate** (Immigration hearings only)
Bell J	7.80	16.42	14.29	21.95	4.00	33.33
Crennan J	11.72	27.27	5.41	10.53	3.23	50.00
French CJ	32.88	32.88	31.25	31.25	18.18	18.18
Gageler J	9.87	22.06	11.48	18.92	1.85	50.00
Hayne J	10.24	24.07	16.33	25.81	0.00	0.00
Keane J	9.80	22.39	10.20	13.51	2.27	25.00
Kiefel J	11.18	27.69	15.22	21.88	1.75	11.11

While Justice Crennan had the lowest overall rate of grants of SLAs at 8.37%, when each practice area is examined Justice Crennan had the second highest rate of granting special leave for civil cases. The only Justice granting special leave more often was Chief Justice French. Table 5 shows that both Justice Crennan and Chief Justice French were most likely to grant special leave in civil law applications whereas Justices Bell and Hayne granted the most

[99] Petra Butler, 'The Assignment of Cases to Justices' (2003) 1 *New Zealand Journal of Public and International Law* 83, 84.
[100] Ibid.
[101] Also discretionary is the work practice of individual Justices: some Justices have their associates prepare memoranda on special leave cases. Andrew Leigh, 'Behind the Bench: Associates in the High Court of Australia' (2000) 25(6) *Alternative Law Journal* 295, 296. Kirby J notes that this is an individual Justices preference that he never followed: see Kirby (n 88) 18-20.

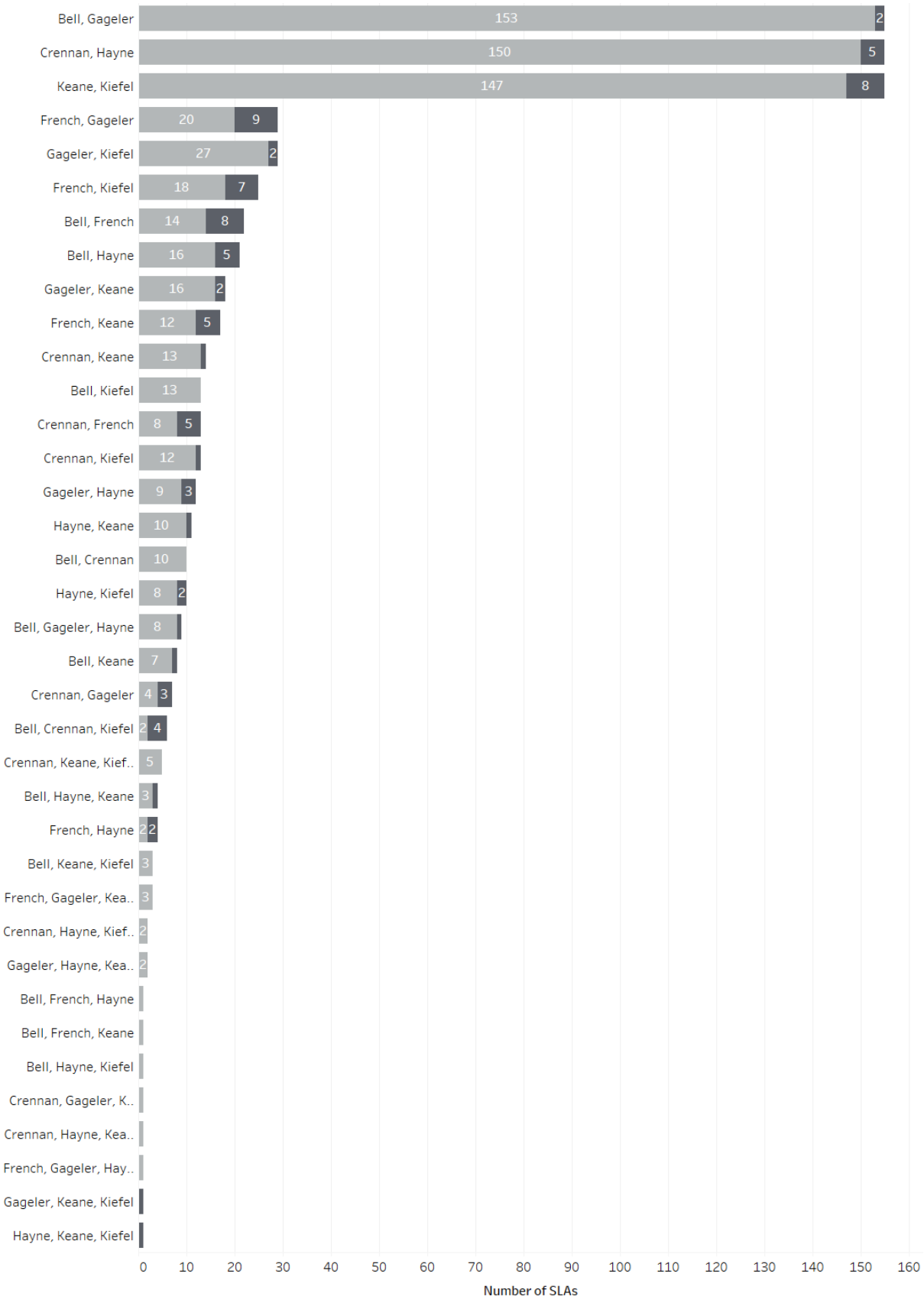
special leave in criminal law applications. Justice Bell having a background in criminal law[102] may sit on more criminal applications by choice (though this is speculative).

Table 4 does not explain judicial motivation or behaviour. The outcomes presented 'are not an end in themselves but are intended to present a foundation for more detailed consideration'.[103] To be instructive this data would need to be compared with a larger data set that would include the frequency of the grant of special leave in all years by all Justices and the outcomes of those cases on appeal. Nevertheless conclusions drawn may not be free from bias. In particular, analysis of legal data may overlook or discount fundamental legal values such as justice and fairness. In any event such analysis goes beyond the scope of the present paper. Table 4 is of interest as an example of questions raised by public scrutiny of judicial self-administration of special leave applications.

Table 5 provides an example of pre-2016 transparency of judicial panel combinations and applications granted or refused. It would only be possible to replicate Table 5 in a limited form today because of the reduction in oral hearings which will reduce triple Justice panels and decrease transparency as to the role of the Chief Justice.

TABLE 5: Justice Combinations (Oral & Paper Hearings), Number of SLAs, by Outcome

[102] Kathy Mack, Sharyn Roach Anleu and Anne Wallace, 'Caseload Allocation and Special Judicial Skills: Finding the 'Right Judge'?' (2012) *Internal Journal for Court Administration* 1, referring to lower court caseload allocation and specializations.
[103] Note, 'The Supreme Court, 1948 Term' (1949) 63(1) *Harvard Law Review* 119.



Judge combinations listed in alphabetical order for the purpose of analysis. **NB** Any unmarked areas are equal to '1'. For example, the combination of Hayne J and Keane J refused ten SLAs and granted one.

Table 5 is not about workload. It is about panel combinations. It shows the grant and refusal rate of judicial combinations. When examining the numerical count for the 'top' three combinations the workload rate is equitable and the grant/refusal rate is consistent. The three highest combinations to refuse civil law matters were Justices Bell and Gageler (refused 10.34% granted none), Justices Hayne and Crennan (refused 9.45% and granted 0.52%) and Justices Keane and Kiefel (refused 11.37% and granted 0.77%). The same combinations of Justices also had the largest refusal rate for criminal matters: Justices Bell and Gageler (refused 3.58% and granted 0.26%); Justices Hayne and Crennan (refused 2.3% and granted 0.13%); and Justices Keane and Kiefel (refused 2.17% and granted 0.26%). It is a slightly changed order for immigration matters: Justices Hayne and Crennan (refused 7.41% and granted none); Justices Bell and Gageler (refused 5.62% granted none); and Justices Keane and Kiefel (refused 5.24% and granted none). We cannot find an obvious reason as to why these judicial combinations appear frequently together, for example comparative judicial seniority does not seem relevant.[104]

Tables 6 and 7 detail the oral hearings in each legal practice area (Table 6) and where relevant, the duration of oral and video link hearings in each area (Table 7). The post-2016 decrease in oral hearings and the absence of similar information being available for paper determinations will make this analysis impossible to replicate. Given that there will be fewer oral hearings, a researcher will need to trace the proceedings back to the intermediate State, Territory or Federal court to isolate the relevant legal practice area.

TABLE 6: Categories of case with numbers of oral hearings

Practice area	**Oral hearings of SLAs in category**
Administrative law (including discrimination law)	23
Admiralty	1
Banking & finance	2
Bankruptcy & insolvency (including corporate insolvency)	3

[104] Keane J (2013); Gageler J (2012); Bell J (2009); Kiefel J (2007); Crennan J (2005); Hayne J (1997); but see explanation of Kirby J (n 88).

Civil procedure	14
Companion Animals Act	1
Competition law	5
Constitutional law	5
Consumer law	NIL
Contract	19
Corporations law	11
Criminal law	107
Damages	NIL
Equity	13
Estate law	2
Evidence	3
Family law	2
Extradition	2
Immigration law	18
Industrial law	13
Insurance Law	3
Intellectual property	7
Judicial Process	NIL
Land & Environment(EPA)	1
Landlord & Tenant	NIL
Legal Practitioners	2
Local Government Law	NIL
Property law (including native title)	7
Personal Property	NIL
Procedural Fairness	NIL
Social Security	NIL
Statutory interpretation	15

Succession	NIL
Taxation	19
Tort	36
Wills	NIL
Workers Compensation	2
Total	**336**

Table 6 does raise more questions than it answers. For example Criminal Law SLAs at 107 oral hearings far outnumbered the next closest category of Tort Law with 36 and then Administrative Law with 23. While speculative, the principles of liberty at stake in criminal matters and the fairness of hearing oral submissions on behalf of a prisoner may operate in the selection of these matters for oral hearing. How this satisfies the public interest test in section 35A of the *Judiciary Act 1903* (Cth) is not addressed in the transcripts of the hearings.

Table 7 builds from Table 6 and shows the time taken by the Justices to determine oral hearings in person and through video link. It will not be possible to replicate the analysis in Table 7 with paper determinations where no duration of deliberation time is recorded on publicly available documents.

Table 7: Avg. duration, by detailed Practice Area and Outcome, by video link and 'in person'

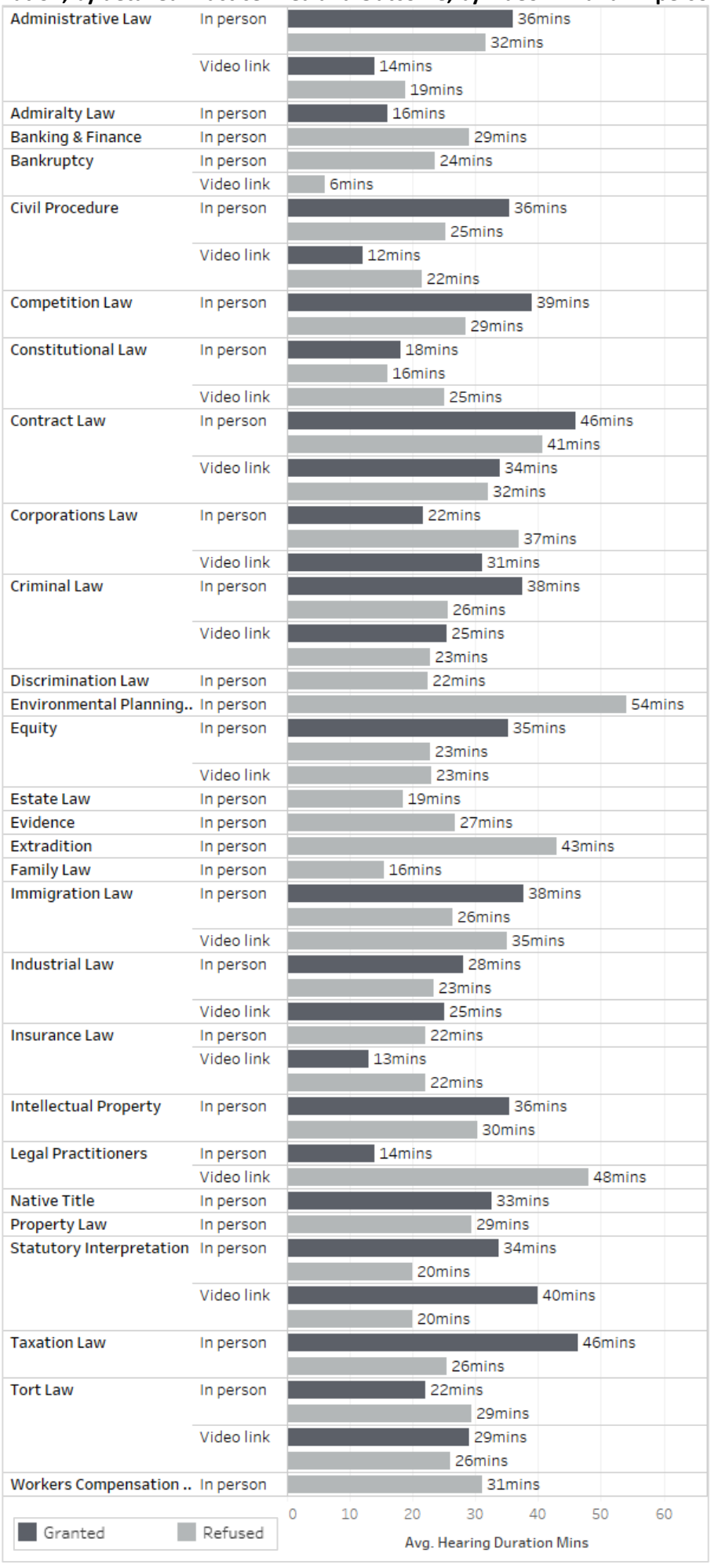


Table 7 evidences the duration of oral determinations. Table 7 confirms that individual SLAs are given due consideration (although the 'duration' measures submission time as well as judicial questioning and reasoning). If duration equates to complexity and depth of deliberation, then Table 7 also provides some indication of the gravitas accorded to SLAs by the Court. Analysis of the study's data evidences the longer an oral hearing the more likely the matter is to be granted leave to appeal. Indicating perhaps that the more complex matters will be granted leave to appeal. Longer hearings also indicate the Court may be engaged with both sides legal representatives. The data shows that video link hearings are shorter on average than 'in person' hearings across both Criminal Law and Civil Law practice areas, irrespective of outcome. In contrast, the average duration of Video linked hearings for Immigration Law exceeds 'in person' hearings. Only one Immigration Law case was heard via video link during the two year period.[105]

The information in Table 7, as evidence of the administration of justice, will be lost as paper based determinations become the primary means of SLA determination. There is no record kept of the duration of paper based determinations and thus no hint of the time taken to consider SLAs or evidence as to what main legal issues concerned the Court in any particular case. This material is only available in the transcripts of oral proceedings.

Tables 1-7 demonstrate the data analysis possible from the written and oral hearings of SLAs pre the 2016 rule changes. Pender describes the 2016 Rule changes as a 'cloak of secrecy [that] has been imposed upon the process, limiting transparency and imposing barriers to informed scrutiny.'[106] Studies of the judicial administration of High Court SLAs are rare[107] and Pender's point is prescient. While this study extends the existing scholarship of academics,[108] journalists,[109] court personnel,[110] former and current High Court Justices[111] and practitioners[112] who have written on the process of special leave to appeal to the High Court,

[105] *Patel v Minister for Immigration and Citizenship & Anor* [2013] HCTrans 240.

[106] Kieran Pender, 'The 'Price' of Justice?: Costs-Conditional Special Leave in the High Court' (2018) 42(1) *Melbourne University Law Review* 149, 187.

[107] As the former High Court Chief Justice Gleeson observes '[O]ne of the most important issues facing the Court concerns applications for special leave to appeal. This is a topic that is of keen interest to legal practitioners and other Justices, but appears to be off the radar screen of most commentators.' The Hon. Murray Gleeson, 'The High Court of Australia: Challenges for its New Century' (2004 Constitutional Law Conference, 20 February 2004).

[108] Gans (n 76), post 16 March 2016 'News: Court announces fewer oral hearings for special leave applications'; Luke Beck, 'The Constitutional Duty to Give reasons for Judicial Decisions' (2017) 40 *University of New South Wales Law Journal* 293.

[109] Pelly (n 10).

[110] Wickham (n 49); Denise Wybury, 'Self-represented Litigants in the High Court of Australia: A statistical Analysis' (AIJA Conference, 15-17 April 2014).

[111] Sir Anthony Mason, 'The regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15(1) *University of Tasmania Law Review* 1; Justice Geoffrey Nettle, 'Applications for Special Leave in Tax Matters' (Tax Bar Association Annual Dinner, 29 October 2015); Justice Hayne, 'Advocacy and Special Leave Applications in the High Court of Australia' (The Victorian Bar – Continuing Legal Education, 22 November 2004); Kirby (n 52).

[112] Solomon (n 52); DF Jackson, 'Practice in the High Court of Australia' (1996-1997) 15 *Australian Bar Review* 187; Maree Kennedy, 'Applications for Special Leave to the High Court' (2005) 1 *High Court Quarterly Review* 1;

it is now impossible to replicate without recourse to extraneous information. As there are fewer oral hearings of SLAs and the written submissions are not published, the result is less publicly available information about SLAs at this point in history than ever before.[113]

VI. TRANSPARENCY: 'RE-BALANCING' EFFICIENT JUSTICE AND OPEN JUSTICE

> There is no greater danger of usurpation [of open justice] than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves.[114]

The High Court is not required, either by legislation or its own jurisprudence, to make information concerning SLAs publicly available.[115] Any call for transparency is based upon common law concepts of the rule of law and principles of open justice.

The difficulty is that open justice principles are applied against historical changes in Court practice. The discretionary self-administered selection of matters to be heard by a Court was not envisaged in Jeremy Bentham's call for judicial transparency stating, '[P]ublicity is the very soul of justice...'[116] Bentham was of course not referring to judicial self-administration, but to 'the authentic hall-mark of judicial, as distinct from administrative, procedure'.[117] Therein lies the conundrum. As observed in Part II the public requires certainty that the judiciary is 'impartial and entirely independent of the executive arm of government'[118] when making special leave determinations yet court self-administration is a 'special function' of courts[119] requiring the judiciary to perform an executive task.[120] High Court self-administration is not

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JGS, 'Practice Note: High Court Appeals – Objections to competency and applications for special leave to appeal' (1982) 56 *The Australian Law Journal* 608; O'Brien (n 3); Bennett (n 64).

[113] As to loss of information such as the nature of the parties and their legal representation see Part 41 inserted by *High Court Amendment (2016 Measures No. 1) Rules 2016* (Cth) and Stewart (n 11). For example, the only record of self-representation will now be the Annual Reports which record only the number of self-represented applicants as a percentage of all applicants or where a SLA is heard orally: the High Court *Annual Report 2016-17* (Canberra, 2017), 21 recorded that 42% of SLAs during 2016-17 were filed by self-represented litigants.

[114] *Scott* (n 23) (Lord Shaw of Dunfermline), commenting on the growing tendency of the Court to hear cases in camera.

[115] SLAs are not alone in this debate, the tension between efficient justice and open justice has been discussed with respect to the preparation of skeleton arguments, and Justices pre-reading material before the hearing, see Lord Bingham CJ later in *SmithKline Beecham Biologicals Special Advocate v Connaught Laboratories* [1999] 4 All ER 498, 511-512.

[116] Jeremy Bentham, 'Bentham's Draught for the Organisation of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same', The Works of Jeremy Bentham, v.4 (1843) 316.

[117] *McPherson v McPherson* (1976) 9 ALR 103, 123; *Farrellly v Farrelly* (1976) 9 ALR 103 (Gibbs J) 122.

[118] *Grollo* (n 40) (McHugh J) [29] (commenting upon the judicial exercise of police powers).

[119] Richard Mohr, Helen Gamble, Ted Wright and Brendan Condie, 'Performance Measurement for Australian Courts' (1996) 6 *Journal of Judicial Administration* 156; Aaron Patrick, 'Federal Court not Above Public Scrutiny' *Australian Financial Review* (/11/2018); Justice Michael Moore, 'Judicial Independence: Breaking Free from the Executive Branch' (2010) *Federal judicial Scholarship* 27.

[120] It has been the subject of a large amount of literature: Justice Smith, 'Court Governance and the Executive Model' The Judicial Conference of Australia, Colloquium 2006, Canberra (see Footnote 31 and Appendix C). This balance is also managed in a variety of ways, such as by the judicial adoption of guidelines: *Guidelines for*

subject to the open court rule, nor should it be. Nonetheless, according to the rule of law and the operational rules and jurisprudence of the Court itself, the machinery of the Court must be subject to some public scrutiny. The question is how much? What is the appropriate level of information provision which will satisfy both the requirement of public administration of justice and the need for Court efficiency?

The task then is to find a solution providing a desirable balance to satisfy both efficiency and the traditional values of open justice. We begin from the proposition that this balance will not be maintained if full public transparency, with written reasons justifying the dismissal of SLAs, is required. Here, while we agree with Cooney,[121] who has urged the Canadian Supreme Court to supply written reasons in SLAs, that full transparency has value, we believe that this would inevitably adversely impact Court time and efficiency. These practical concerns are dismissed by Cooney as 'hypothetical and are not in and of themselves sufficient to justify the fact that the Court provides no reasons for granting leave to appeal.'[122] However the Australian context differs, given that (as discussed in Part III) the express aim of the Court is to promote efficient justice. Chief Justice Kiefel observed in the 2017 High Court decision, *Mercanti v Mercanti* that the 2016 special leave rule changes mean that '…determination of such applications is able to be made more expeditiously by this Court'.[123] Expeditious determination is not conducive to the production of written reasons and oral hearings which are the kernels of the open court rule. Indeed in the Australian context there is no constitutional requirement for written reasons for SLAs. Here we disagree with Beck who argues that the absence of reasons for SLA determinations is unconstitutional.[124] Beck suggests that the Court has a constitutional duty to give reasons because SLAs are judicial decisions. As discussed above, SLAs have not been viewed by the Court as judicial decisions, though they are an exercise of judicial power. In this way, they are 'unusual' and accordingly we reject that such a constitutional requirement exists. In short we see the issue of public availability of SLA information as arising from Court practice, its jurisprudence and the requirements of the rule of law but we do not find justification for full written reasons for SLAs.

As discussed in Part III a SLA is exceptional. It is set apart from other judicial proceedings as it is an exercise of judicial power and '…it involves the exercise of an extremely wide judicial discretion.'[125] Yet, this discretion must encompass the public interest element that is a statutory criterion for the grant of special leave. Legal error in a court below is alone not sufficient for a grant of special leave.[126] It is therefore reasonable to view the determination of special leave as an issue for the administration of justice as well as the self-administration

Communications and Relationships between the Judicial Branch of Government and the Legislative and Executive Branches 2014 cited in The Hon French CJ, 'The State if the Australian Judicature' (2017) 13(2) *Judicial Review* 153.

[121] Denise Cooney, 'An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal' (2012) 70 *University of Toronto Faculty of Law Review* 41.

[122] Ibid, 48.

[123] [2017] HCA 1, [10].

[124] Luke Beck, <https://auspublaw.org/2017/11/high-court-special-leave-decisions/> (Blog Post, 20/11/2017); Beck (n 107).

[125] *Coulter* (n 60) (Deane and Gaudron JJ) 359-360.

[126] Mason (n 53).

of the Court. The Court's own categorisation of an SLA determination as an exercise of judicial power underscores this point.

There is international support for the limited release of information as to special leave determinations. The Anglo-Commonwealth counterparts for the High Court, the Canadian and English Supreme Courts determine leave to appeal applications on the papers - by panels of 3 Justices. The Canadian Supreme Court, determines applications without giving reasons, although it supplies a list of documents presented to the Court and publishes conditions of access to records. The United Kingdom Supreme Court gives brief, formulaic reasons for every dismissed application for leave to appeal.[127]In the Canadian context the Supreme Court has experienced a trajectory similar to that of the Australian High Court with respect to the *manner* in which applications are managed and determined.[128] The Canadian Supreme Court has near complete control over its own docket and has introduced administrative and procedural changes echoing those of the High Court. It is interesting that the Supreme Court has introduced a series of broad measures to increase public accessibility and knowledge of its role and to expand media access. [129] This public engagement perhaps highlights the absence of transparency or 'silence'[130] of Canadian special leave applications. It suggests also that there is value in the significant transparency measures the Australian High Court already offers outside curial proceedings.[131]

The exceptionalism of SLAs calls for a level of transparency neither as broad as the open court rule nor as restricted as a complete absence of published information. Importantly, as Doogue et al observe '... the appropriate level of detail to be divulged will depend on the nature of the administrative information'.[132] We suggest that the nature of SLAs – as both an administrative function and an exercise of judicial power - requires more public information than currently provided. This is not a call for data for the sake of data. [133] Rather this call to increase public information about SLAs within the jurisprudential framework articulated by the court itself. As the Court's work becomes more complex and more onerous, judicial self-

[127] Established by Part 3 of the *Constitutional Reform Act* 2005 and which came into being in 2009 Under the Supreme Court Practice Direction no 3 *Applications for Permission to Appeal* Rule 3.3.3 states that 'The reasons given for refusing permission to appeal should not be regarded as having any value as a precedent'. <https://www.supremecourt.uk/news/permission-to-appeal.html>. The amount of information published by the High Court is significantly greater than its Anglo-Commonwealth counterparts, seemingly confirming Sallman's 2007 observation that in relation to court governance reform Australia is a 'pacesetter and a luminary in the field by international standards': Pater A Sallman, 'Courts' governance: A thorn in the crown of judicial independence?' (2007) *Journal of Judicial Administration* 139, 145.

[128] Emmett Macfarlane, 'Administration at the Supreme Court of Canada: Challenges and change in the Charter era' (2009) 52(1) *Canadian Public Administration* 1.

[129] Ibid.

[130] Bruce Ryder and Taufiq Hashmani, 'Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appel Applications in Section 15 Cases, 198-2010' (2010) 41 *Comparative Research in Law & Political Economy Research Paper*.

[131] Here see Appendix One.

[132] Judge Jan-Marie Doogue, Judge Colin Doherty, Jeff Simpson, 'Accountability for the Administration and Organisation of the Judiciary: How should the Judiciary be Accountable for their Work beyond the Courtroom?' (Discussion at Asia Pacific Conference March 2013) <http://myold.lawsociety.org.nz/in-practice/practising-law/litigation/accountability-for-the-administration-and-organisation-of-the-judiciary>.

[133] Caryn Devins, Teppo Felin, Stuart Kauffman & Roger Koppl, 'The Law and Big Data' (2017) 27 *Cornell Journal of Law and Public Policy* 357.

administration is foregrounded[134] and justice has become increasingly less visible. The Tables in Part V evidence the loss of information that results from increased efficiency.

However we also do not advocate a return to the pre-2016 levels of information. Rather we propose an increase in transparency. Given the significance of SLAs to both the workload of the Court and to the development of substantive law, a return to the information available when we undertook our study (2013-2015) is not proportionate to balancing the need for transparency with the requirements of administrative efficiency. While our study provides insight into SLA determinations between 2013 and 2015, the compilation of that data was the result of painstaking and time-consuming collection of information that can neither be replicated by machine learning nor otherwise quickly produced.

Therefore to promote both efficient justice and open justice, and to recognise the exceptionalism of SLAs, we suggest online publication of SLA written submissions. Specifically, public access should be given to the maximum 12 page submission which must be provided to the High Court by the parties under Rule 41.01.3. This call is based upon the current practice of the Court with respect to publication of the written submissions filed on behalf of parties which is already available on the High Court website in advance of Full Court hearings.[135] Part 1 of each of these published submissions contains a Certification that 'the submission is in a suitable form for publication on the Internet.' It will also contain the outline of oral argument where relevant, and that too must be certified as suitable for internet publication. The same certification could be required for SLAs.

The benefit of this approach is to serve the Court's two 'publics':[136] the citizenry as a whole and the individuals who interact with courts, from litigants to lawyers. It will benefit the former by enhancing public confidence in the judicial process and the latter by clarifying and making available for scrutiny an important component of the Court's work. Plus it will allow legal practitioners to provide more informed advice to clients as to the prospects of success of an SLA. The written submissions provide a rich source of information about the type of case, the parties, their lawyers, the area of law, the issues in question etc. Because the SLA submissions will give insight into the main issues in the proposed appeal and the arguments of the parties they will provide both 'publics' with a means of scrutinising the judicial administration of the Court. Of course they would not give any indication of the reasons for the Court's decision on the grant or refusal of leave which is also the case at present.

Access to written submissions is not novel. As noted above, subject to privacy or other interests which may require suppression, the Court makes available party submissions in advance of Full Court hearings. Further, in the Federal Court, a person can search and inspect documents specified in the *Federal Court Rules 1979* (Cth)—such as applications, pleadings, judgments, orders and submissions—unless the court or a judge has ordered that the

[134] It is perhaps instructive that the very first reported decision of the High Court concerned special leave to appeal. *Dalgarno v Hannah* 1 CLR 1; [1903] HCA 1 records a motion to rescind an order granting special leave to appeal which had been made before the passage of the *Judiciary Act* 1903 (Cth). Today, given the changes in the manner of Court work such a level of public information is unthinkable and unworkable.

[135] <http://www.hcourt.gov.au/cases/cases-heard.>.

[136] John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia's Courts: A Managerial Perspective* (Australian Institute of Judicial Administration Incorporated, 2004), 19-20. For further discussion of the public and courts see Stephen Parker, *Courts and the Public* (AIJA, 1998).

document is confidential.[137] It has also been proposed in legislation in NSW, where the still not proclaimed *Open Court Information Act 2010* (NSW) would allow access to originating process, pleadings, written submissions, transcripts of open court proceedings, statements and affidavits admitted into evidence, record of judgment given and any direction or order made in proceedings.

Our suggestion will impact Court resources. More material posted online is more work. However there may be efficiency benefits. Understanding the practices associated with applications for special leave assists with public appreciation of the judicial process and facilitates understanding of the complexity and broad scope of matters which the Court must resolve. In addition to the interests of the wider community in open justice,[138] increased transparency of SLAs benefits litigants and the legal community and promotes certainty. If it can be determined prior to filing proceedings that a matter is unlikely to be granted leave to appeal, this will save litigants and the Court time and money. In terms of the development of law and the legal community, great interest rests in the selection of cases for appellate hearing, given that the Court directs the nature and pace of legal change through selection of the cases for appellate hearing.

Finally, the interest of the public in having party submissions available is verifiable. The High Court noted the increase in website traffic following the 2011 online publication of the written submissions for Full Court hearings:[139]

> The Court has since January 2011 made available on the Court's website the written submissions filed on behalf of the parties in advance of Full Court hearings. It is hoped that the publication of submissions will assist people interested in following the legal argument in cases and provide a broader picture of the Court's work.
>
> This resource has proved popular, with a total of 138, 939 hits on the cases index pages in the period. The individual case pages where the written submission are loaded account for 22 per cent of the Court's website usage.

This increase in public attention would seem to support the oft stated expression that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[140] The availability and public interest in the online publication of written submissions secures public confidence in the courts and the law. As management of SLAs is now critical for Court administration, the requirement of transparency becomes more pressing. The shift in the significance of SLAs is a fundamental change in the '…character of the Court's every business'.[141] Courts change, times change and the concept of open justice is not frozen in

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[137] *Federal Court Rules 1979* (Cth) o 46 r 6(1), (2).

[138] The High Court has said that 'the rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances': *Commissioner of the Australian Federal Police v Zhao* (2015) 316 *ALR* 378 (French CJ, Hayne, Kiefel, Bell and Keane JJ) [44].

[139] High Court, *Annual Report 2011-2012*, 14.

[140] *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.

[141] Honourable Justice Murray Gleeson, '*The Centenary of the High Court: Lessons From History*, 3 October 2003, (AIJA, 2004).

time.[142] We suggest that the publication of party submissions for SLAs, which form the bulk of judicial self-administration, will promote judicial accountability, public confidence and the rule of law.

VII CONCLUSION

Open justice is expensive. It is also time consuming and often inconvenient. Resolve is demanded to defend it against incursion. Over the latter part of the 20th century Anglo-Commonwealth communities have demanded of both government and private corporations increased efficiency in the utilisation of available resources, both fiscal and human. Courts are not immune from such demands. Judges, court administrators and lawyers must accept new burdens and modify existing practices to ensure that available resources are efficiently used.

SLAs illustrate how managerial efficiency may conflict with public administration of justice. Whereas the open court rule has the virtue that judicial proceedings are held in public, with written reports, so that judicial behaviour can be analysed and thus subject to the rule of law, there is no such requirement of the discretionary administrative decision-making in determination of SLAs. Administrative efficiency is the justification for the determination of SLAs with limited public scrutiny.

The argument made in this article is that the data findings of the 2013-2015 SLA study support the need for increasing public scrutiny of judicial self-administration. The data findings demonstrate the outer limits of the publicly available information on SLAs with respect to the manner of Court work prior to the 2016 Rule changes. This information was publicly available yet is also the result of a systematic research project which coded and collated and analysed the data over several years of labour. Even this level of information is now unavailable following the 2016 changes to the High Court rules. The challenges the authors experienced in collecting and analysing the information together with the declining public dissemination of information due to the reduction in oral hearings following the 2016 Rule changes confirm that open justice is diminishing as administrative efficiency improves.

Open justice maintains public confidence in the integrity and independence of the courts. Our argument is not that the open court rule should apply in full rigour to special leave determinations but rather that enough information be supplied to ensure a appropriate level of public and professional scrutiny of the determination of SLAs. Given this function is one of the most demanding and time consuming tasks of High Court judicial self-administration we advocate public scrutiny for confidence in the administration of justice. The same rule of law based approach the High Court adopts in substantive appeal determinations should be applied to the grant or dismissal of applications for special leave to appeal. Yet, the exceptionalism of SLAs must be acknowledged. We argue that to meet the objectives of open and efficient justice, and thus facilitate the rule of law, the written submissions of all SLAs should be made publicly available.

[142] Sharon Roderick, 'Opportunities and Challenges for Open Justice in Light of the Changing Nature of Judicial Proceedings' (2017) 26 *Journal of Judicial Administration* 76, 78.

APPENDIX ONE

Sources of Data about the SLA Work of the High Court	Before 2016 Rule Changes	After 2016 Rule Changes
Transcripts of Oral Hearings of SLAs These comprise the richest data source about applications with details of parties, suit numbers, presiding justices, lawyers/representation, nature of case, main issues considered for SLA, hearing length (& whether video link), judicial engagement/questions to counsel, oral submissions, result, brief reasons in the event of refusal of leave, details of any costs order. Where the numbers of oral hearings of SLAs are reduced there is a correlating significant reduction in the available data concerning all aspects of applications for special leave to appeal.	Between 53% and 35% SLAs were heard orally with published transcripts of hearings available online. Figures as follows from HCA Annual Reports: 2013/14: 47% of SLAs determined on the papers 2014/15: 60% of SLAs determined on the papers 2015/16: 65% of SLAs determined on the papers	A very significant reduction in numbers of SLAs heard orally with transcripts published. Only Between 23% and 25% SLAs heard orally. Figures as follows from HCA Annual Reports: 2016/17: 75% of SLAs determined on the papers. 2017/18: 77% of SLAs determined on the papers.
Special Leave Dispositions (Publication of Reasons and Pronouncement of Orders) in respect of SLAs dealt with on the papers. These offer very limited data about the applications: names of Justices presiding, date of disposal, parties' names, suit number, brief formal reasons in the case of refusal and formal direction to the Registrar concerning orders including costs order if appropriate. There may in some instances be a reference to the Court below from whose orders the appeal is sought. There is no information as to the nature of the case or the issues raised by the application or the matters that were influential in the Panels' decisions to refuse/grant special leave.	Between 2013 and 2016 between 47% and 65% SLAs heard on the papers with Dispositions published.	Between 2016 and 2018, 75%-77% SLAs heard on the papers with Dispositions published.

High Court Bulletins. These are published monthly on the HCA website and contain details of all cases dealt with (including appeals handed down, decisions reserved, original jurisdiction matters and SLAs). The Bulletins include details of cases granted Special Leave and cases refused leave. In the case of applications granted special leave the Bulletin provides details of the names of parties; HCA suit number; link to the HCA transcript of hearing if there was a hearing); the court below; medium neutral citation to the judgment below. The entries in respect of Applications granted leave also include "Catchwords" detailing the legal category of case and the main issues in the application. In the case of applications refused special leave, available information is limited to names of parties; HCA suit number; court below with medium neutral citation to the judgment below and the SLA result with a link to the published special leave disposition.		The rule changes have had no impact on the availability of information via the Bulletins. But there is no guarantee that the HCA will continue to publish Bulletins or that they will comprise the same level of detail as at present.
High Court Results of SLAs Listed for Determination or for Hearing. These are published on the HCA website by reference to date and place of determination or hearing "as soon as possible after the applications conclude." These are published lists of all SLAs dealt with. The information concerning each SLA is scant comprising names of parties, HCA suit number, Court below with a medium neutral citation for the judgment below (in most cases) and the SLA Result.		The Rule changes have had no impact on the publication of results of SLAs. But there is no guarantee that the HCA will continue to publish the Lists.