THE SPECIAL CASE PROCEDURE IN THE HIGH COURT OF AUSTRALIA: HISTORY, USE AND MISUSE

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In recent years, the special case has become the procedure of choice for parties seeking to ventilate matters of significance in the original jurisdiction of the High Court of Australia. Yet, the use of this procedure has received negligible scrutiny. This article addresses this deficiency. It considers the history of special cases, explores how the procedure evolved in Australia, examines the reasons behind its contemporary popularity and reviews several recent examples where the procedure was used and misused. As the High Court demonstrates increasing willingness to scrutinise the use of special cases, there is a renewed need for parties to have a better understanding of the operation and limits of the procedure, and the importance of formulating the facts and questions of law appropriately.

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I Introduction

Facts are important in any litigation, including litigation before the High Court of Australia. In its original jurisdiction, there exist several procedures for placing facts before the High Court. This includes the special case procedure, which allows parties to agree between them a set of facts and state questions of law for the Full Court to determine.[1] It is a procedure designed for efficiency, providing the High Court a factual basis to determine questions of law that assists in the determination of the rights and obligations as between the parties, without the need for a trial of facts.[2]

The special case procedure has a long history at common law, and has existed in some form in the High Court's rules since its inception.[3] But, as the Court observed, the procedure has taken on renewed significance in recent times, for it 'has come in this century to be the predominant means by which the High Court has resolved questions of constitutional validity in proceedings commenced in its original jurisdiction'.[4] A review of the Court's cases identified only one case having been determined by way of special case[5]

[1] *High Court Rules 2004* (Cth) r 27.08.01 ('*2004 Rules*').

[2] *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, 247 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) ('*Mineralogy*'). See also Part III below.

[3] See *High Court Procedure Act 1903* (Cth) sch 1 ord 29 r 1. See, eg, *Tasmania v Commonwealth* (1904) 1 CLR 329. See also Part III(A) below.

[4] *Mineralogy* (n 2) 247 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[5] Those heard under *High Court Rules 1953* (Cth) ord 35 r 1 or *2004 Rules* (n 1) r 27.08.

in the 1980s[6] and one in the 1990s.[7] In contrast, nine were brought in the 2000s[8] and 47 in the 2010s.[9]

The prevalence of the procedure continues notwithstanding that, throughout history and continuing to the present-day, courts (especially the High

6 *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340.

7 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

8 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; *Combet v Commonwealth* (2005) 224 CLR 494; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 ('*Bodruddaza*'); *Bennett v Commonwealth* (2007) 231 CLR 91; *Thomas v Mowbray* (2007) 233 CLR 307 ('*Thomas*'); *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.

9 *Wainohu v New South Wales* (2011) 243 CLR 181; *Haskins v Commonwealth* (2011) 244 CLR 22; *Nicholas v Commonwealth* (2011) 244 CLR 66; *Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163; *Wotton v Queensland* (2012) 246 CLR 1; *Phonographic Performance Company of Australia Ltd v Commonwealth* (2012) 246 CLR 561; *Crump v New South Wales* (2012) 247 CLR 1; *Williams v Commonwealth* (2012) 248 CLR 156; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; *Unions NSW v New South Wales* (2013) 252 CLR 530 ('*Unions NSW [No 1]*'); *Williams v Commonwealth [No 2]* (2014) 252 CLR 416; *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 199; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179; *Pollentine v Bleijie* (2014) 253 CLR 629; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219; *Tajjour v New South Wales* (2014) 254 CLR 508 ('*Tajjour*'); *Kuczborski v Queensland* (2014) 254 CLR 51; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 ('*CPCF*'); *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; *Queensland Nickel Pty Ltd v Commonwealth* (2015) 255 CLR 252; *Duncan v New South Wales* (2015) 255 CLR 388 ('*Duncan*'); *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*'); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42; *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500; *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 259 CLR 431; *Murphy v Electoral Commissioner* (2016) 261 CLR 28; *Cunningham v Commonwealth* (2016) 259 CLR 536; *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622; *Knight v Victoria* (2017) 261 CLR 306 ('*Knight*'); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1; *Wilkie v Commonwealth* (2017) 263 CLR 487; *Brown v Tasmania* (2017) 261 CLR 328; *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217; *Minogue v Victoria* (2018) 264 CLR 252; *Unions NSW v New South Wales* (2019) 264 CLR 595 ('*Unions NSW [No 2]*'); *Spence v Queensland* (2019) 268 CLR 355; *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 ('*Plaintiff M47/2018*'); *Taylor v A-G (Cth)* (2019) 268 CLR 224; *Minogue v Victoria* (2019) 268 CLR 1; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219.

Court) have, on occasion, criticised parties' preparation of special cases.[10] Most significantly, in *Mineralogy Pty Ltd v Western Australia* ('*Mineralogy*'), the High Court identified increasing examples of 'misuse' of the special case procedure, with parties failing to frame the facts and questions of law in a special case with sufficient precision.[11] The plurality recounted several recent instances[12] where the Court has cautioned that parties have 'no entitlement to expect an answer to a question of law' unless 'there exists a state of facts which makes it necessary to decide [the] question in order to do justice in the given case and to determine the rights of the parties'.[13] Despite the Court's caution, instances of 'misuse' persist.[14]

The tendency for parties to misuse the special case may in part be attributed to the fact that the procedure has received scant judicial or academic scrutiny. Little has been said about the principles that govern the use of the special case procedure, how it differs from other fact-finding processes available to the Court,[15] and how the procedure affects the Court's adjudication.[16] There has also been little reflection on whether the special case procedure is appropriate for particular classes of cases.

This article addresses this lacuna. Part II explores the complexities posed by the special case procedure as a means for the High Court to establish facts in its original jurisdiction, particularly in constitutional cases. Parts III and IV explore the origin of the present-day procedure, tracing the contemporary principles governing the preparation of special cases back to their historical roots. Part V explores the decline in popularity of other fact-finding procedures in the High Court, which may explain the corresponding increase in the

10 See below Parts III(B), VI.

11 *Mineralogy* (n 2) 247–8 [55]–[56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

12 See *Duncan* (n 9) 410 [52] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ); *Knight* (n 9) 324 [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216, 229–30 [21] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) ('*Zhang*'); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 36 [90] (Kiefel CJ, Keane and Gleeson JJ) ('*LibertyWorks*').

13 *Mineralogy* (n 2) 247–8 [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon CJ for the Court) ('*Lambert*').

14 See below Part VI.

15 See, eg, *Judiciary Act 1903* (Cth) ss 18, 44 ('*Judiciary Act*'); *2004 Rules* (n 1) r 27.07.

16 See generally Michael Coper, 'Outcomes, Effects of Procedures on' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 514; Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2022) ch 7.

special case's popularity over recent decades. Part VI explores instances of 'misuse' of the procedure in recent cases and the Court's increasing scrutiny of special cases. Part VII reflects on the limitations of the special case as a fact-finding procedure.

It is beyond the scope of this article to comprehensively analyse all fact-finding procedures available to the High Court in its original jurisdiction, or to proffer a framework for determining the most appropriate procedure in a given case. Rather, in light of the growing scrutiny from the Court with respect to the preparation and use of special cases, this article provides a synthesis of the principles governing that procedure and highlights its limitations. Such an analytical foundation may assist parties in assessing whether a special case is the appropriate procedure for a particular matter and, if so, how the procedure is best used. It is hoped that with a better understanding of the special case procedure, further 'misuse' will be limited.

II Special Case as a Means of Fact-Finding in the High Court

At its core, the exercise of judicial power involves an application of law to facts.[17] Yet fact-finding is not a process with which the High Court is often associated. Appeals to the High Court are in the nature of a strict appeal, where the Court is solely concerned with whether error has been demonstrated in the decision of the court below.[18] In the exercise of its appellate jurisdiction, the Court is limited to the facts found below.[19] The Court also has broad discretion through the special leave process to decline to hear cases where the facts as found do not present a suitable vehicle for the determination of the particular legal question sought to be agitated on appeal.[20]

In contrast, in its original jurisdiction, the Court must itself establish the necessary facts so as to enable the quelling of the controversy between the parties. Several procedures are available. The Court can, as with any first instance court, conduct a trial of facts before a single Justice.[21] A Justice may,

17 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J).

18 *Fox v Percy* (2003) 214 CLR 118, 129 [32] (Gleeson CJ, Gummow and Kirby JJ).

19 *Eastman v The Queen* (2000) 203 CLR 1, 11 [12]–[13], 12–13 [16]–[17] (Gleeson CJ), 24 [68] (Gaudron J), 35 [111] (McHugh J), 63 [190] (Gummow J), 96–7 [290] (Hayne J).

20 David O'Brien, *Special Leave to Appeal* (Federation Press, 3rd ed, 2021) 82–3.

21 *Judiciary Act* (n 15) s 77A. See, eg, *Re Day* (2017) 340 ALR 368; *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559 ('*A-G (Vic) ex rel Black*').

based on facts found or agreed, state a case under s 18 of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*').[22] The Court can remit the matter to a lower court for fact-finding,[23] or remove a cause pending in a lower court once facts are established by that court.[24] A matter can proceed on a demurrer.[25] Or, as is increasingly common, a matter can proceed by way of a special case.[26]

Put succinctly, the special case procedure allows parties to put an agreed set of facts before the Court so as to enable the determination of certain questions of law.[27] On first impression, it is an unremarkable procedure, reflective of the common practice in ordinary litigation of parties reaching agreement as to facts in the interest of expediting the resolution of their disputes.[28] However, unique complexities arise when the procedure is used as a means to put facts before the High Court in its original jurisdiction.

The complexities manifest in two ways. First, through the historical evolution of the procedure, courts have developed an extensive set of principles that govern the use of special cases.[29] Failure to adhere to these principles, often prudential in nature, can render questions sought to be raised by way of a special case inappropriate for determination.[30] These principles take on additional importance by virtue of the High Court's status as the apex court whose fact-finding function is otherwise circumscribed. Furthermore, these prudential principles assume constitutional significance.[31] Nevertheless, these principles are not readily apparent from the face of the Court's rules providing for the procedure. Parties may, as recent examples indicate, fail to give them due regard when preparing a special case.[32]

22 See, eg, *Almalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').

23 *Judiciary Act* (n 15) s 44. See, eg, *Palmer v Western Australia [No 4]* [2020] FCA 1221.

24 *Judiciary Act* (n 15) s 40.

25 *2004 Rules* (n 1) r 27.07. See, eg, *Gerner v Victoria* (2020) 270 CLR 412 ('*Gerner*').

26 *2004 Rules* (n 1) r 27.08.

27 Ibid.

28 See *Evidence Act 1995* (Cth) s 191.

29 See, eg, *Mineralogy* (n 2) 247–8 [56], 248–9 [59]–[60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

30 See, eg, *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582, 607 [44] (Gageler J) ('*Plaintiff M1*'), discussed below in Part VI(B)(1).

31 For example, the judicial function requires the avoidance of hypothetical questions: see *Mineralogy* (n 2) 248–9 [57]–[59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

32 See below Part VI.

Second, additional complexities arise when the special case is used in constitutional matters. The vast majority of the High Court's original jurisdiction work now concerns matters arising under the *Constitution* or involving its interpretation.[33] This often necessitates the consideration of constitutional facts: 'matters of fact upon which … the constitutional validity of some general law may depend'.[34] Where the validity of a law is dependent on the presence of certain facts,[35] these constitutional facts 'must be ascertained by the court responsible for deciding the validity of the law'.[36] They are different from adjudicative facts: 'ordinary questions of fact which arise between the parties' and are necessary for the determination of rights and obligations as between them.[37]

As Gageler J explained in *Maloney v The Queen*:

> A distinction has long been drawn between 'ordinary questions of fact', which arise between parties and which are determined in accordance with the ordinary rules of evidence, and 'matters of fact upon which … the constitutional validity of some general law may depend', which 'cannot and do not form issues between parties to be tried like the former questions' and which fall to be ascertained by a court 'as best it can'. A court finding constitutional facts is not constrained by the rules of evidence. The court 'reaches the necessary conclusions of fact largely on the basis of its knowledge of the society of which it is a part', 'supplementing … that knowledge [by processes] which [do] not readily lend [themselves] to the normal procedures for the reception of evidence'.[38]

Facts, including constitutional facts, comprise a large component of constitutional decision-making — they frame the questions and identify issues that properly arise: 'Facts, or lack of them, often determine constitutional validity.'[39] The importance of fact-finding is elevated in light of developments in

[33] Kenneth Hayne, 'High Court Rules 2004' (Speech, Seminars for the Legal Profession, October/November 2004) <https://www.hcourt.gov.au/resources-and-publications/speeches/kenneth-madison-hayne-ac>, archived at <https://perma.cc/KX5S-W56Z>.

[34] *Breen v Sneddon* (1961) 106 CLR 406, 411 (Dixon CJ) ('*Breen*').

[35] For an overview on how changing constitutional facts may change a law's validity: Ben Ye, 'How and When Can a Constitutionally Valid Statute Become Invalid?' (2019) 30(1) *Public Law Review* 120, 134–9.

[36] *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292 (Dixon CJ) ('*Commonwealth Freighters*').

[37] *Breen* (n 34) 411 (Dixon CJ).

[38] (2013) 252 CLR 168, 298–9 [351] (citations omitted).

[39] Michelle Gordon, 'Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law' (2023) 49(1) *Monash University Law Review* 1, 5.

certain constitutional doctrines, including the rise of structured proportionality which demands constitutional facts be established to demonstrate the legitimacy of the legislative purpose and the justification of the legislative action.[40] This is particularly so in cases concerning the implied freedom of political communication, where there is often no dispute that an impugned law burdens political communication; constitutional validity, rather, turns on justification.[41]

The centrality of constitutional facts sits somewhat uncomfortably with the High Court's task to determine 'questions of law' in a special case, being an essential feature of the procedure. In the context of administrative law, the distinction between fact and law, and between questions of fact and questions of law, are of profound importance, underpinning the constitutional limits of judicial power.[42] More generally, when defining a court's jurisdiction,[43] including the High Court's jurisdiction,[44] the phrase 'questions of law' reflects a command that the court ought not to usurp the fact-finding function of another body.[45] In constitutional litigation, however, the need for a court to determine constitutional facts 'as best as it can'[46] is difficult to reconcile with the command that a court be solely concerned with questions of law as applicable to the facts. Constitutional questions are more likely to be novel, unsettled and not immutable — fertile ground for that penumbra where questions of law and fact become blurred.[47] In this regard, certain constitutional questions may inherently and irredeemably be a mixed question of law

40 Carter (n 16) 1–3. This issue is intensified when there are prospects of changing facts that may affect constitutional validity: see generally Ye (n 35).

41 *Unions NSW [No 2]* 607 [15], 616 [45] (Kiefel CJ, Bell and Keane JJ), 631 [93] (Gageler J), 637 [108] (Nettle J), 646 [138] (Gordon J), 650 [151] (Edelman J). See also Gabrielle Appleby and Anne Carter, 'Parliaments, Proportionality and Facts' (2021) 43(3) *Sydney Law Review* 259, 262–8.

42 See *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J); Stephen Gageler, 'What Is a Question of Law?' (2014) 43(2) *Australian Tax Review* 68, 72 ('What Is a Question of Law?').

43 See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 44(1); *Administrative Review Tribunal Act 2024* (Cth) s 172(1); *Corporations Act 2001* (Cth) s 1057(1).

44 Section 73(iii) of the *Constitution* provides that the High Court has jurisdiction to hear appeals from 'the Inter-State Commission, but as to questions of law only'. The phrase 'questions of law *only*' is understood as containing words of confinement: *Ruhani v Director of Police* (2005) 222 CLR 489, 546 [177] (Kirby J) (emphasis in original).

45 See *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320, 332 [19] (French CJ, Gummow and Bell JJ); *Repatriation Commission v O'Brien* (1985) 155 CLR 422, 430 (Gibbs CJ, Wilson and Dawson JJ).

46 *Commonwealth Freighters* (n 36) 292 (Dixon CJ).

47 Stephen Gageler, 'Fact and Law' (2009) 11(1) *Newcastle Law Review* 1, 2.

and fact, however 'baffling' such a concept may be.[48] In any event, these are difficulties with which courts and parties must continue to grapple, since 'no satisfactory test of universal application has yet been formulated' to distinguish between questions of fact and questions of law.[49] These difficulties are increasingly evident in cases decided by the High Court which have proceeded by way of special case, necessitating questions as to the suitability of the procedure as a means of fact-finding in certain constitutional matters, particularly those where the existence of constitutional facts is at the centre of the controversy.

These two sets of complexities often reinforce one another. Nevertheless, it is convenient to start with the history of the special case procedure, which developed at a time when the only facts in question were adjudicative facts, and the courts were not called upon to determine questions as to constitutional validity. As will be seen, the principles developed by English courts, relevant to the first set of complexities, remain applicable to this day.

III Origin of the Special Case Procedure

A *Common Law*

Common law courts have historically maintained a strict separation between, on the one hand, the responsibilities of triers of questions of fact; and, on the other hand, the responsibilities of triers of questions of law.[50] The separation originated from the development of the jury system itself following the Norman conquest, where older methods of trial such as compurgation, ordeal or battle were replaced.[51] The jury, drawn locally, were understood to know better the facts underpinning the dispute than the judges administrating the King's law.[52] The principle that factual issues should be left to juries (or the

[48] See Gageler, 'What Is a Question of Law?' (n 42) 72, discussing Timothy Endicott, 'Questions of Law' (1998) 114 (April) *Law Quarterly Review* 292, 300–1.

[49] *DPP (Cth) v JM* (2013) 250 CLR 135, 157 [39] (French CJ, Hayne, Crennnan, Kiefel, Bell, Gageler and Keane JJ) ('*JM*'), quoting *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 394 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ).

[50] Sir William Holdsworth, *A History of English Law*, ed AL Goodhart and HG Hanbury (Methuen & Co, 7th ed, 1966) vol 1, 298. See also *Altham's Case* (1611) 8 Co Rep 150b; 77 ER 701, 709 (Coke CJ): 'Matter of fact is to be averred by the party, and triable by the jurors: the other, being matter in law, is to be discussed by the Judges of the law'.

[51] Holdsworth (n 50) 299.

[52] John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 82.

trier of fact), not meddled in by judges (or the trier of law), evolved[53] with the development of the requirement for unanimity, saving judges from making difficult decisions on facts.[54]

In early English history, notwithstanding that juries had sole authority to decide facts, they were often reluctant to do so for fear of being punished on a writ of attaint for giving a false verdict.[55] The reluctance was particularly pronounced when there was uncertainty of the law preventing the jury from confidently pronouncing a general verdict for a party.[56] As such, a practice of giving 'special verdicts' emerged, where juries stated the facts as they found to be proven and left the questions of law to be resolved by either the justices of peace or by the courts sitting at Westminster.[57] At the same time, justices at nisi prius were subject to amercement (to be at the King's mercy with regard to the fine to be imposed)[58] should they fail to give judgment in accordance with the facts found by the jury.[59] Thus, 'the contest between the justices and the jurors was not one for the enlargement of jurisdiction but for the evasion of responsibility', and there was little temptation for the justices to encroach upon the province of the jurors[60] — so much so that, in 1285, Parliament prohibited Justices from compelling the jury to give a general verdict in certain actions where it wished to give a special verdict.[61]

The special case emerged a few centuries later, but the origin of the practice is somewhat illusive. The term 'special case' was used variously across times, and by different commentators or law reporters, to connote very different things. Additionally, practices have evolved over time. These factors combine to make it difficult to disentangle one practice from another.[62] One 19th century commentator viewed the special case as 'so nearly allied to the special verdict' that they were addressed under the same entry of his legal

[53] Ibid 83.

[54] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 1895) vol 2, 624.

[55] Edmund M Morgan, 'A Brief History of Special Verdicts and Special Interrogatories' (1923) 32(6) *Yale Law Journal* 575, 575–7.

[56] Ibid 577.

[57] See George Crompton and Baker John Sellon, *The Practice of the Courts of King's Bench and Common Pleas* (Gould, Banks and Gould, rev ed, 1813) vol 1, 472–3.

[58] William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1768) bk 3, 376.

[59] Morgan (n 55) 585–6.

[60] Ibid 586.

[61] *Statute of Westminster II 1285*, 13 Edw 1, c 30.

[62] MJ Prichard, 'Nonsuit: A Premature Obituary' (1960) 18(1) *Cambridge Law Journal* 88, 93–5.

dictionary.[63] The special case was described as being 'usually dictated by the court, the facts being found and assented to by the jury' and signed by counsel for both parties before the jury was discharged.[64] The case would then be argued similarly to a special verdict.[65] A somewhat different species of special case concerned the practice, prior to the creation of statutory appeals, of the reservation of points of law by a judge at nisi prius for the consideration of a panel of judges sitting in banc in Westminster.[66] Such a practice was said to be less expensive given the case would not be entered on the record and no verdicts would be entered until the point of law had been resolved.[67] The quasi-appellate function of the special case in superior courts was removed following the introduction of the *Appellate Jurisdiction Act 1876* and is not the focus of the current inquiry.[68] However, it is to be noted that the practice sees some parallels with the statutory procedure of an appeal by way of case stated by courts of summary jurisdiction to a superior court on a point of law,[69] a species of which could still be found in Australian law in the early 20th century.[70]

The early common law development indicates that the language of 'special case' referenced a procedure that departed from the usual mode of trial (hence 'special'), whereby pertinent facts were required to be found and were stated so as to enable the determination of questions of law by the court. A trier of fact — the jury — still had a role to play, but that role evolved with the demands of efficiency and cost saving.[71] These themes have by no means become outdated.

63 Thomas Lee, *A Dictionary of the Practice in Civil Actions in the Courts of King's Bench and Common Pleas* (W Reed, 1812) vol 2, 1190.

64 Ibid.

65 Ibid.

66 Baker (n 52) 90, 92.

67 Ibid 92.

68 *Appellate Jurisdiction Act 1876*, 39 & 40 Vict, c 59; Prichard (n 62) 95–6.

69 *Summary Jurisdiction Act 1857*, 20 & 21 Vict, c 43, s 2, later expanded by *Summary Jurisdiction Act 1879*, 42 & 43 Vict, c 49, s 33(1). See generally AC Forster Boulton, *The Law and Practice of a Case Stated* (Butterworth & Co, 1902).

70 See generally, eg, *Carberry v Cook* (1906) 3 CLR 995.

71 Baker (n 52) 92.

B *Statutory Provisions before the* Judicature Acts

The first statutory provision for special cases in common law courts was enacted in 1833. Section 25 of the *Civil Procedure Act 1833* provided:

> [I]t shall be lawful for the Parties in any Action or Information, after Issue joined, by Consent and by Order of any of the Judges of the said Superior Courts, to state the Facts of the Case, in the Form of a special Case, for the Opinion of the Court, and to agree that a Judgment shall be entered for the Plaintiff or Defendant, by Confession or of Nolle prosequi, immediately after the Decision of the Case, or otherwise as the Court may think fit; and Judgment shall be entered accordingly.[72]

One important feature of this procedure was the recognition that the parties could agree on facts, thereby removing the need for a jury or other trier of facts. This feature would assume greater prominence in future evolutions of the provision.

The provision does not expressly provide that the special case could only raise a question of law. Nevertheless, that the procedure was only permitted after issues joined and that a judgment was to be entered immediately after the case strongly indicate that only questions of law were contemplated as being submitted to the courts. The historical context of the development of the special case puts this beyond any doubt.

In the following two decades, common law courts in England developed a body of jurisprudence concerning the special case procedure. Three propositions emerge from the case law that remain apposite today. First, the courts demonstrated a reticence to hearing and determining a special case when the factual matters stated were insufficient to enable the courts to adjudicate the question of law. In *Aldridge v The Great Western Railway Company*, a 'stack of beans' standing in a field was destroyed when sparks flew from an engine operating on an adjoining railway.[73] The plaintiff sued the railway company for negligence and the parties stated a special case.[74] However, the special case did not contain any facts to the effect that the conduct on the part of the railway company or its employees was careless.[75] The Court of Common Pleas refused to adjudicate the case as there were insufficient facts stated to permit the conclusion that, because sparks were emitted from the engine, there was

[72] *Civil Procedure Act 1833*, 3 & 4 Wm 4, c 42, s 25 ('*Civil Procedure Act 1833*').

[73] (1841) 3 Man & G 515; 133 ER 1246, 1247.

[74] Ibid.

[75] Ibid 1250 (Tindal CJ, Coltman J and Maule J agreeing at 1250).

negligence.[76] At the same time, the facts were insufficient for the conclusion that the railway company was not negligent.[77] The Court thus ordered the special case to be withdrawn and the case went to trial.[78] It was 'not the kind of case which the statute contemplated should be stated for [the Court's] consideration'.[79]

Second, the courts were reluctant to entertain a special case stated under this procedure if there was reason to believe that the action was not bona fide — that is, it was not being brought for the purpose of determining a matter in controversy between the parties. In *Duntze v Duntze*, a special case was stated to determine whether the legal estate in a mortgage had passed by the will of the mortgagee.[80] The Court of Common Pleas declined to pronounce judgment on the basis that the suit was brought for 'the mere purpose of allaying a doubt' that had been suggested as to the construction of the will.[81] In actuality, there was nothing in dispute between the parties to the cause.[82] Chief Justice Wilde reasoned that it would be 'inexpedient that the time of the court should be occupied with these speculative matters'.[83] It might be said that 19th century courts were declining to determine special cases based on mere hypothetical questions.

Third, the courts refused to entertain special cases that asked the courts to draw inferences from the facts. In *Engstrom v Brightman*, Maule J held that a special case containing a clause enabling the court to draw inferences indicated that there was 'no absolute agreement of the parties' to submit themselves to the decision of the Court, rendering the case outside of the scope of s 25 of the *Civil Procedure Act 1833*.[84] Parties were not allowed to turn a special case into a special verdict, as an appellate court could be forced to deal with 'a totally different set of facts from those upon which the judgment of the court below [was] founded'.[85]

The 1833 procedure was updated in 1852, whereby s 46 of the *Common Law Procedure Act 1852* came to provide: 'The Parties may, after Writ issued,

76 Ibid.

77 Ibid.

78 Ibid.

79 Ibid 1250 (Coltman J).

80 (1848) 6 CB 100; 136 ER 1189, 1189 (Wilde CJ) ('*Duntze*').

81 Ibid 1190 (Wilde CJ).

82 Ibid.

83 Ibid.

84 (1848) 5 CB 419; 136 ER 941, 941.

85 Ibid. See also *Cocks v Purday* (1848) 6 CB 69; 136 ER 1177.

and before Judgment, by Consent, and Order of a Judge, state any Question or Questions of Law in a Special Case for the Opinion of the Court, without any Pleadings.'[86]

Commentators at the time observed that the 1852 procedure was an improvement from the 1833 procedure.[87] Where the 1833 procedure had allowed a special case to be stated after 'issue joined',[88] the 1852 procedure required only that the writ was issued and without pleadings.[89] This saved expenses and reduced the risk that a case be defeated by the parties not properly raising the question of law to be decided.[90] The de facto leave requirement of obtaining an 'order of a Judge' in addition to consent was retained in the 1852 procedure. The case law concerning the 1833 procedure continued to apply, though with the courts placing emphasis on weeding out improper special cases at the leave stage.[91]

Turning then to the Court of Chancery, a special case procedure was introduced by the *Court of Chancery (England) Act 1850*.[92] The Act permitted parties, after validly engaging the Court's jurisdiction, 'to concur in stating such Question in the Form of a Special Case for the Opinion of the said Court'.[93] The Court was empowered to determine the questions raised and declare upon the rights of the parties involved.[94]

Section 8 importantly provided:

> That every such Special Case shall concisely state such Facts and Documents as may be necessary to enable the Court to decide the Question raised thereby; … and the Court shall be at liberty to draw from the Facts and Documents stated in any such Special Case any Inference which the Court might have drawn therefrom if provided in a Cause.

[86] *Common Law Procedure Act 1852*, 15 & 16 Vict, c 76, s 46 ('*Common Law Procedure Act 1852*'). See also at s 179 regarding an action of ejectment: 'By Consent of the Parties, and by Leave of a Judge, a Special Case may be stated according to the Practice heretofore used.'

[87] Samuel Prentice, *Chitty's Archbold's Practice of the Court of Queen's Bench* (10th ed, 1858) vol 1, 853.

[88] *Civil Procedure Act 1833* (n 72) s 45.

[89] *Common Law Procedure Act 1852* (n 86) s 46.

[90] Prentice (n 87) 853. See also Robert Malcolm Kerr, *The Common Law Procedure Act* (John Crockford, 1852) 57, 59.

[91] See Prentice (n 87) 853.

[92] *Court of Chancery (England) Act 1850*, 13 & 14 Vict, c 35 ('*Court of Chancery Act 1850*').

[93] Ibid s 1.

[94] Ibid s 14.

Several jurisprudential principles were developed. In *Langdale v Briggs*, Turner LJ (who was the architect of the statute)[95] observed that the statutory procedure was not intended to embrace the declaration of future rights by courts of equity.[96] The courts would not declare rights based on some future events that might not eventuate.[97] In a similar vein, where the special case contained only 'a partial or garbled statement of the facts', which did not enable the court to determine the rights of the parties, the court refused to make any orders.[98] Furthermore, the court would only answer those questions stated in a special case that were sufficient to dispose of the matter, not every question the parties saw fit to put.[99] Many of these principles stemmed from rules governing ordinary suits in Chancery, which were held to be equally applicable to special cases.[100]

These principles are similar to those developed by the common law courts. The one difference was that the Court of Chancery was explicitly permitted by statute to draw inferences from a special case. That said, the Court could not act upon inferences drawn by the parties when the underlying evidence was scant or insufficient.[101] It was therefore important that a special case stated all the facts upon the subject which could be ascertained.[102]

It appears that the Court of Appeal could also hear a special case at first instance with leave.[103] This can be seen as an emerging recognition of the utility of having important questions of law being determined by an appellate court, which reduced both costs and delay for the parties and served a broader public interest in having such questions resolved promptly.

95 Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery: Part II' (2004) 22(3) *Law and History Review* 565, 578–9.

96 (1856) 8 De G M & G 391; 44 ER 441, 455.

97 Leonard Field and Edward Clennell Dunn, *The Practice of the High Court of Chancery* (Stevens and Sons, 5th ed, 1871) vol 2, 1709. See also John Sidney Smith, *The Practice of the Court of Chancery* (William Maxwell, 7th rev ed, 1862) vol 1, 1097.

98 *Bulkeley v Hope* (1856) 8 De G M & G 36; 44 ER 302, 303 (Turner LJ).

99 *Barrington v Liddell* (1852) 2 De G M & G 480; 42 ER 958, 969 (Lord St Leonards LC). See also *Bailey v Collett* (1854) 18 Beav 179; 52 ER 71, 72 (Romilly MR).

100 See *Hampton v Holman* (1877) 5 Ch D 183, 187 (Jessel MR).

101 *Domville v Lamb* (1852) 9 Hare App I lvi; 68 ER 790, 790.

102 Ibid 790 (Turner VC).

103 See, eg, *Tassell v Smith* (1858) 2 De G & J 713; 44 ER 1166; *Mortimore v Mortimore* (1859) 4 De G & J 472; 45 ER 183; *Hume v Richardson* (1862) 4 De G F & J 29; 45 ER 1093.

C Judicature Acts *Rules*

Court procedures in the United Kingdom underwent a complete rewrite in the late 19th century. The higher court system, which had been in place since the Middle Ages, was completely reorganised through the *Judicature Acts* reforms. By the Rules of Court, found in the First Schedule to the *Supreme Court of Judicature Act 1875* ('*Judicature Act Rules*'), all proceedings in the High Court of Justice and the Court of Appeal came to be regulated.[104] The *Judicature Act Rules* had statutory force and superseded all enactments prior to the *Judicature Acts* which were in any way inconsistent.[105] Order 34 r 1 of the *Judicature Act Rules* provided:

> The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at trial.

This procedure combined features of the special case procedure from both the common law courts and the Court of Chancery. As such, many of the pre-*Judicature Acts* authorities and principles concerning the special case procedure remained relevant.[106] For example, the House of Lords affirmed in 1896 that a proceeding would exceed jurisdiction if the special case was calculated and intended to raise for determination a question of fact alone.[107] That special cases were only to be used to determine questions of law had been well settled under the former rules.[108]

In addition to maintaining and refining the procedure, the *Judicature Act Rules* also provided for the first time, in ord 34 r 2, a separate special case

[104] *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77, s 16.

[105] MD Chalmers, *Wilson's Supreme Court of Judicature Acts* (Stevens and Sons, 3rd ed, 1882) 111.

[106] See, eg, *Republic of Bolivia v Bolivian Navigations Co* (1876) 24 WR 361 ('*Republic of Bolivia*'), where Jessel MR observed that the impugned order to state a special case would have been beyond jurisdiction before the *Judicature Act*: at 362.

[107] *Burgess v Morton* [1896] AC 136, 136–8 (Lord Halsbury LC), 139–43 (Lord Watson), 144–5 (Lord Shand).

[108] See above Part III(B).

procedure a court could order without the parties' consent. Under that rule, the court was empowered to direct any question of law to be raised for the opinion of the court 'either by special case or in such other manner as the Court or Judge may deem expedient'. It bears some resemblance to the early common law practice whereby a judge could state a case for the consideration of judges sitting in banc at Westminster.[109] The discretion of the court under the rule was broad and it was unnecessary for the point of law to appear on the face of pleadings.[110]

The authorities on ord 34 rr 1 and 2 appear to apply to both rules interchangeably, having regard to the discussions by contemporary commentators.[111] The aversion to deciding hypothetical questions remained. The courts continued to refuse to entertain a special case where the question of law was such that it might never arise in the action, since the procedure was 'intended for cases where the judge sees his way to the final determination of the action'.[112] In *Grosvenor v White*, an application to state a case under the rule was refused where the defendant admitted matters pleaded solely for the purpose of argument of the question.[113] In circumstances where other defences might have been raised to render the determination of the question of law unnecessary, the Court declined to exercise its discretion and decide the question of law before the issues of fact were tried.[114]

These rules formed the foundation of the High Court's contemporary special case procedure. This history is significant; it established many of the prudential principles that govern the use of special cases today.[115] This history does not, however, offer guidance for the complexities peculiar to constitutional adjudication and constitutional facts, which have only arisen in recent decades.

[109] See above nn 66–7 and accompanying text.

[110] *Metropolitan Board of Works v New River Co* (1876) 1 QBD 727, 729 (Blackburn J), 729–30 (Quain J); affd (1876) 2 QBD 67, 68–9 (Cockburn CJ, Bramwell JA agreeing at 69).

[111] See Chalmers (n 105) 306–7; Cecil CM Dale et al, *The Practice of the Chancery Division of the High Court of Justice* (Stevens and Sons, 7th ed, 1901) vol 2, 1679–80.

[112] *Republic of Bolivia* (n 106) 362 (Jessel MR).

[113] (1890) 38 WR 201, 202–3 (North J).

[114] Ibid 203.

[115] See *Mineralogy* (n 2) 247–9 [56]–[60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), discussed further below at Part VI(A).

IV Evolution of the Special Case Procedure in the High Court

The High Court has utilised the special case procedure since its inception.[116] Similar to the *Judicature Acts Rules*, the High Court's original rules ('*1903 Rules*') were contained in a schedule to the *High Court Procedure Act 1903* (Cth) ('*High Court Procedure Act*'). The Justices of the Court, or a majority of them, were afforded power to make Rules of Court not inconsistent with the *1903 Rules*.[117] A similar rule-making power could also be found in the *Judiciary Act*,[118] assented to three days prior to the *High Court Procedure Act*. It was observed in the second reading speech to the *High Court Procedure Act* that the *1903 Rules* were largely modelled on the 'Queensland rules',[119] being the *Rules of the Supreme Court 1900* (Qld) which itself reflected the *Judicature Act Rules* and the work of Sir Samuel Griffith.[120]

Order 29, titled 'Questions of Law and Issues Without Pleadings', was contained under pt 1 of the *1903 Rules* concerning the original jurisdiction of the High Court. Order 29 r 1 provided:

> The parties to any cause may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of the case the Court and the parties shall be at liberty to refer to the whole contents of any documents referred to therein, and the Court shall be at liberty to draw from the facts and documents stated in the case any inference, whether of fact or law, which might have been drawn therefrom if they had been proved at a trial.

Order 29 r 2 stated:

> If in any cause it is made to appear to the Court or a Justice that there is any question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, the Court or Justice may make an order accordingly, and may direct the question of law to be raised for

116 See, eg, *Tasmania v Commonwealth* (n 3).

117 *High Court Procedure Act 1903* (Cth) s 33(1).

118 *Judiciary Act* (n 15) s 86.

119 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 July 1903, 1622–3 (Alfred Deakin, Attorney-General).

120 A Douglas Graham, *The Life of the Right Honourable Sir Samuel Walker Griffith* (Law Book Co of Australasia, 1939) 89.

> the opinion of the Court, either by special case or in such other manner as the Court or Justice deems expedient: and all such further proceedings as the decision of the question of law renders unnecessary may thereupon be stayed.

The similarity with ords 34 r 1 and 2 of the *Judicature Act Rules* is striking.

In 1937, the Schedule to the *High Court Procedure Act*, along with the rule-making powers under that Act and other federal statutes, was repealed, and the rule-making powers of the Court were expanded and consolidated under an amended s 86 of the *Judiciary Act*.[121] The *1903 Rules* as in force were continued and deemed to be made under the *Judiciary Act*.[122] They were amended several times by the Court both before and after 1937, although there were no substantive changes to the special case procedure.[123] Several significant cases were decided in accordance with the procedures in these rules, such as *Union Steamship Co of New Zealand Ltd v Commonwealth* (under r 1, which was described as a 'special case')[124] and *Australian Communist Party v Commonwealth* (under r 2, which was described as a 'case stated').[125]

In 1952, the Court adopted a new set of Rules of the Court, which commenced on 1 January 1953 ('*1952 Rules*').[126] Order 35 of the *1952 Rules* retained both procedures for special case by consent and special case by order, subject only to minor drafting changes.[127]

Those rules remained substantially the same until 1 January 2005, when the current *High Court Rules 2004* (Cth) ('*2004 Rules*') commenced.[128] The *2004 Rules* saw a significant re-writing of the procedure concerning special cases. The *2004 Rules*, at the time of writing, provide as follows:

121 *Judiciary Act 1937* (Cth) ss 2, 4, amending *Judiciary Act* (n 15) s 86.

122 Ibid s 5.

123 Sometime between 1908 and 1917, ord 29 was renumbered to ord 22: see *Eastern Extension Australasia & China Telegraph Co Ltd v Commonwealth* (1908) 6 CLR 647, 648, referring to ord XXIX. Cf *Ward v CW McFarlane & Co* (1917) 22 CLR 488, 489, which concerned an order for discovery under ord XXIX r 8.

124 (1925) 36 CLR 130, 152 (Higgins J).

125 (1951) 83 CLR 1, 5–6 ('*Communist Party Case*').

126 *High Court Rules 1952* (Cth) ('*1952 Rules*') ord 1 r 2, notified in the Commonwealth Gazette on 1 May 1952: JG Hardman, 'Notification of the Making of Rules of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 33, 1 May 1952, 2356.

127 *1952 Rules* (n 126) ord 35 rr 1–2.

128 *2004 Rules* (n 1) r 1.03.1, as enacted. See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 373 [101] n 162 (Gummow J), noting that r 27.08.1 is equivalent to ord 35 r 1.

27.08 Questions of law

27.08.1 By leave of the Court or a Justice, the parties to a proceeding may agree in stating the questions of law arising in the proceeding in the form of a special case for the opinion of the Full Court.

27.08.2 The special case shall be divided into paragraphs numbered consecutively.

27.08.3 The special case shall state the facts and identify the documents necessary to enable the Court to decide the questions raised.

27.08.4 Upon the argument of the special case the Court and the parties may refer to the content of the documents identified in the special case.

27.08.5 The Court may draw from the facts stated and documents identified in the special case any inference, whether of fact or law, which might have been drawn from them if proved at a trial.

27.08.6 The special case must:

(a) be prepared by the plaintiff; and

(b) be signed by the parties or their counsel or their solicitors; and

(c) be filed and served on each party to the proceeding who has filed an appearance.

Despite the substantive rewriting, four features of the special case procedure persist. First, the special case procedure remains a product of agreement between the parties and can only be invoked with the parties' consent: 'A special case is the parties' case.'[129] Second, the requirement that parties must state 'the facts and identify the documents necessary to enable the Court to decide the questions raised'[130] continues, harking back to language used in Chancery.[131] Third, it remains that the special case procedure is designed for answering a 'question of law'.[132] While r 27.08 is not primary legislation, the language carries the weight of the historical statutory command that the Court ought not to usurp the functions of the trier of fact.[133] It does not enable the Court to be concerned with questions of facts, or mixed questions

[129] Gordon (n 39) 9.

[130] *2004 Rules* (n 1) r 27.08.3.

[131] See *Court of Chancery Act 1850* (n 92) s 8.

[132] *2004 Rules* (n 1) r 27.08.1.

[133] See above n 45 and accompanying text.

of law and fact; nor does it recognise the possibility that the Court may need to find constitutional facts (although the language does not necessarily prohibit it).[134] Finally, the Court retains the ability to draw inferences, including from the documents identified and annexed in the special case.

The most curious change wrought by the *2004 Rules* was the abolition of special case by order, previously found in ord 35 r 2. No justification was proffered. However, inferences can be drawn from Justice Hayne's observation in a seminar to practitioners about the changes made by the *2004 Rules*:

> The *High Court Rules 1952* were drawn at a time when a very substantial amount of work was done in the original jurisdiction of the Court. They were drawn at a time when the Court could and did try witness actions. They were drawn at a time when appeals to the Court lay as of right. … Now the work which the Court does in its original jurisdiction is largely confined to constitutional work and, often enough, that work proceeds by way of stated case pursuant to s 18 of the *Judiciary Act 1903* (Cth) or by demurrer. … Some, but by no means all, of these changes found some reflection in amendments to the Rules. But, with their heavy emphasis on trial of actions, many of the provisions of the *1952 Rules* no longer find ready application to the work of the Court.[135]

With respect to those remaining cases heard in the Court's original jurisdiction, Justice Hayne observed:

> Pleadings have been retained in actions commenced by writ. We have retained the old procedure by way of demurrer to pleadings (see rule 27.07). Although I think demurrer is less frequently employed now than once it was, it remains a useful procedure for determining some questions of constitutional validity. That was reason enough to retain the procedure and there seemed to be no advantage to be gained by renaming it.[136]

No reference was made to the special case procedure. But it is suggested that, similar to the reason why demurrer was retained, the Court considered the special case procedure to be useful for constitutional adjudication, which by 2004 occupied a majority of the Court's original jurisdiction work. It may also be inferred that the Court had determined that the special case by order procedure was no longer a necessary procedure. Such an inference is support-

[134] See above Part II. See also *Mineralogy* (n 2) 246–7 [54]–[55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[135] Hayne (n 33).

[136] Ibid, discussing *2004 Rules* (n 1) r 27.07.

ed by the apparent duplication between that procedure and s 18 of the *Judiciary Act*.[137]

The only substantive amendment of the *2004 Rules* to date occurred in 2018, when the phrase '[b]y leave of the Court or a Justice' was inserted into r 27.08.1.[138] It brought the special case procedure back in line with its pre-*Judicature Acts* common law origin where leave and supervision of the Court was required.[139] This amendment attracted little judicial or academic commentary. There was no clear statement as to the rationale behind the amendment. The Explanatory Statement simply stated that '[t]he Court has taken the opportunity to update and clarify' the *2004 Rules*.[140] Presumably, in light of the growing prevalence of the use of the special case procedure, the Court wished to exercise more control over the formation of special cases before they were referred to the Full Court. As discussion in Part VI(C) will demonstrate, the leave requirement has now taken on significant importance.

V Other Fact-Finding Procedures

Examination of the special case procedure is incomplete without a brief consideration of the alternatives. This Part will focus on the demurrer and case stated, the two procedures identified by Justice Hayne in 2004 as the usual procedures of choice for constitutional work in the Court's original jurisdiction.[141] It will also briefly address other, less frequently used, fact-finding procedures. The limits of these procedures may assist in explaining the rise in popularity of the special case in recent decades. Conversely, as the limits of the special case become more apparent, considerations as to the utility of these alternatives may assist in assessing the suitability of the special case in particular circumstances.

[137] See Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the* Judiciary Act 1903 *and Related Legislation* (Report No 92, 2001) 228 [10.20], 231 [10.35] ('ALRC Report No 92').

[138] *High Court Amendment (Constitutional Writs and Other Matters) Rules 2018* (Cth) sch 1 item 2.

[139] See *Civil Procedure Act 1833* (n 72) s 25; *Common Law Procedure Act 1852* (n 86) s 46.

[140] Explanatory Statement, *High Court Amendment (Constitutional Writs and Other Matters) Rules 2018* (Cth) 2.

[141] Hayne (n 33). Intriguingly, the special case did not warrant a mention at that time.

A *Demurrer*

Another 'old procedure'[142] that has been utilised in original jurisdiction matters since the Court's inception is demurrer,[143] which is now found in r 27.07.[144] By demurrer, the defendant assumes the truth of a particular set of facts as pleaded by the plaintiff, but argues that such facts do not reveal a cause of action or otherwise entitle the plaintiff to a remedy.[145] Thus, the facts upon which the Court must adjudicate are confined to those pleaded by the plaintiff.[146] As Dixon CJ observed, the demurrer 'certainly has been found a speedy and not unsatisfactory procedure'.[147] Historically, it produced a large body of important constitutional jurisprudence, such as *Melbourne Corporation v Commonwealth*,[148] *Koowarta v Bjelke-Petersen*[149] and the *Work Choices Case*.[150]

Demurrers differ from special cases in that a demurrer is not a product of consent,[151] and the Court, on a demurrer, is limited to the four walls of the pleadings with no ability to draw inferences.[152] In other words, 'the pleadings exhaust the universe of relevant factual material'.[153] Thus, demurrers serve a particular class of case. They are not appropriate when pleadings are defective, or when parties are uncertain whether relevant factual materials beyond what had been pleaded by the plaintiff may be necessary.[154] Indeed, to the extent there is any doubt, a prudent and risk-averse defendant may well elect to proceed by way of special case instead of demurrer.

142 Ibid.

143 See *Bond v Commonwealth* (1903) 1 CLR 13.

144 *2004 Rules* (n 1) r 27.07.

145 *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117, 135 (Gibbs J) ('*Kathleen Investments*'); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 357 [50] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Bass*'); *JM* (n 49) 154 [32] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

146 *Kathleen Investments* (n 145) 135 (Gibbs J).

147 *South Australia v Commonwealth* (1962) 108 CLR 130, 142.

148 (1947) 74 CLR 31.

149 (1982) 153 CLR 168.

150 *New South Wales v Commonwealth* (2006) 229 CLR 1. See also Gordon (n 39) 7 n 39 and the cases there cited.

151 Although in practice, the defendant's promise to demur may convince the plaintiff to amend certain aspects of their statement of claim.

152 *Kathleen Investments* (n 145) 135 (Gibbs J).

153 *Bass* (n 145) 357 [50] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

154 Gordon (n 39) 8.

The limits of demurrers may not have been significant in the past for constitutional litigation, when most constitutional doctrines were focussed on *legal* questions of construction or characterisation.[155] For example, s 109 inconsistencies are determined as a matter of construction of the respective Commonwealth and state laws.[156] Similarly, head of power questions are generally determined by assessment of the sufficiency of the connection between the Commonwealth law (properly construed) and the head of power.[157] Neither enquiry demands close scrutiny of facts.

The preference for demurrers persisted, even at a time where the Court was developing doctrines concerning the implied freedom of political communication. As Brennan CJ observed in 1997:

> Although it is possible that the validity of a law with respect to a subject within legislative power could depend upon some factual matter touching the freedom of discussion of government or politics, questions of fact seldom have to be resolved. Only in rare instances would it be impossible to determine the validity of such a law on demurrer.[158]

Yet, as observed in Part II, recent developments in constitutional doctrine have elevated the importance of constitutional facts in constitutional litigation, at least with respect to certain types of constitutional questions. For example, contrary to Brennan CJ's observation, in implied freedom cases it is now critical for the government to justify the burden imposed by the impugned legislation, and to establish the facts on which that justification depends.[159] Similarly, the Commonwealth must identify appropriate justification (including the identification of a legitimate and non-punitive purpose, capable of being achieved 'in fact')[160] to sustain the validity of its laws that are prima facie punitive,[161] so as not to fall afoul of the *Lim* principle.[162]

155 See Ye (n 35) 133–4.

156 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 447 [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

157 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

158 *Levy v Victoria* (1997) 189 CLR 579, 598.

159 *Unions NSW v New South Wales* (2023) 277 CLR 627, 644 [31] (Kiefel CJ, Gageler, Gordon, Gleeson, and Jagot JJ) ('*Unions NSW [No 3]*').

160 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 157 [40] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) ('*NZYQ*').

161 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 419 ALR 457, 468 [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

The centrality of facts a defendant must establish in order to succeed in these constitutional cases renders it unlikely (and unwise) for defendants to demur. Instead, in recent years, demurrers have only been used in cases where the defence to a constitutional claim does not require establishment of constitutional facts,[163] or in the rare circumstances where a proceeding in the Court's original jurisdiction involves no constitutional questions at all.[164]

B *Case Stated*

Another alternative to the special case procedure is found in s 18 of the *Judiciary Act.* It states:

> 18 Reference to Full Court
>
> Any Justice of the High Court sitting alone, whether in Court or otherwise, may state any case or reserve any question for the consideration of a Full Court, or may direct any case or question to be argued before a Full Court, and a Full Court shall thereupon have power to hear and determine the case or question.

There have been no substantive amendments of s 18 since its enactment, except in 1976 when the section was amended to remove the ability for 'any Judge of the Supreme Court of a State exercising federal jurisdiction' to exercise the same power as a Justice of the High Court.[165] That change was brought at the same time of removal of appeals to the High Court as of right.[166]

Under s 18, by its express terms, a Justice has three powers or options: 'state any case', 'reserve any question', or 'direct any case or question to be argued before a Full Court', although both the Australian Law Reform Commission and the Court have omitted the last limb of s 18 when discussing

162 *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

163 See generally, eg, *JT International SA v Commonwealth* (2012) 250 CLR 1 (concerning the meaning of 'acquisition' and 'property' for the purpose of s 51(xxxi) of the *Constitution*); *Gerner* (n 25) (concerning the existence of an asserted limitation implied in the *Constitution*); *Rehmat & Mehar Pty Ltd v Hortle* (High Court of Australia, M16/2023, commenced 23 February 2023) (concerning an alleged s 109 inconsistency).

164 See generally, eg, *Glencore International AG v Federal Commissioner of Taxation* (2019) 265 CLR 646.

165 *Judiciary Amendment Act 1976* (Cth) s 4 ('*Judiciary Amendment Act*'). See also *Alexander Stewart & Sons Ltd v Robinson* (1920) 29 CLR 55; *Griffin v South Australia* (1924) 35 CLR 200.

166 *Judiciary Amendment Act* (n 165) s 5. See also Hayne (n 33).

the provision.[167] In *Mineralogy*, the Court observed that a Justice can state a '"case" on the basis of facts found or agreed'.[168] As Justice Gordon observed extra-curially, the Justice who states a case often succinctly identifies the facts which 'sometimes consist[] of ten or so paragraphs',[169] and which may be reproduced within the headnotes of the *Commonwealth Law Reports*.[170] This limb of s 18 is often labelled as the 'case stated procedure'.[171]

Alternatively, a Justice can 'reserve a question' which requires resolution to determine the rights of the parties. There, the Justice may 'make further directions to establish the basis, whether of fact or evidence or pleading, on which the Full Court is being asked by the Justice to resolve the question'.[172] It was observed that the procedure is used for 'pure' questions of law, which can be referred without any agreed facts, or upon removal from a lower court where facts are already determined.[173]

For the 'case stated' procedure, an early practice was for a single Justice to conduct a trial or otherwise to find the facts, and then formally state a case for the Full Court.[174] However, since the 1980s, in light of its expanding workload, the Court has become increasingly willing for parties to agree on facts.[175] Practically, therefore, the distinction between the case stated and special case procedure becomes illusive, particularly following the introduction of the leave requirement in 2018 and the Court adopting an increasingly interventionist approach in case-managing the parties' negotiation of a special case and its contents.[176] The illusive nature of the distinction is further exacerbated when considering earlier High Court decisions which appear to treat s 18 as

[167] Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Discussion Paper No 64, December 2000) 134–6 [3.52]–[3.59]. See also ALRC Report No 92 (n 137) 224–5 [10.6]–[10.7]. Justice Gordon also made no mention of the direction power: Gordon (n 39) 8–9.

[168] *Mineralogy* (n 2) 246 [52] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[169] Gordon (n 39) 9.

[170] Justice Gordon identified the *Engineers' Case* (n 22) 131–2; *Communist Party Case* (n 125) 6–9; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 4–7: see ibid 9 n 54.

[171] See, eg, Gordon (n 39) 8. The practice of a single Justice stating a case for the Full Court finds some parallel with the historical practice of appeal by way of case stated: see above Part III(A).

[172] *Mineralogy* (n 2) 246 [52] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[173] Frank WD Jones, 'The Story behind the Headlines: Constitutional Procedures' (1994) 12(2) *Australian Bar Review* 148, 153.

[174] See, eg, *Armstrong v Victoria [No 2]* (1957) 99 CLR 28, 37 (Dixon CJ); *A-G (Vic) ex rel Black* (n 21) 586 (Gibbs J).

[175] Jones (n 173) 151.

[176] As is seen in *NZYQ* (n 160), discussed below at Part VI(C).

the ultimate source of power for a matter to be brought before the Full Court, including where a special case had been agreed between the parties.[177]

In *Mineralogy*, however, the Court explicitly treated s 18 as being distinct and separate from the special case procedure under r 27.08, on the basis that s 18 is invoked by a Justice, whereas r 27.08 is invoked by the parties together with consent.[178] Another distinguishing factor is the availability of inferences. Like demurrer, the Court cannot draw inferences from a case stated under s 18; the Court 'is limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of [the] parties'.[179] By contrast, the ability of the Court to draw inferences from a special case provides 'a degree of flexibility regarding the arguments [the parties] may make that is lacking from the demurrer and case stated procedures'.[180]

For completeness, it must be noted that historically, in addition to s 18 of the *Judiciary Act*, there was a second category of Commonwealth statutes which, when conferring original jurisdiction on the High Court, included provisions for 'cases' to be 'stated' for the Court's determination.[181] At times, the Court would describe these as 'special cases', despite the absence of such

177 *Bodruddaza* (n 8) 660 [10] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). See also *Caltex Ltd v Federal Commissioner of Taxation* (1960) 106 CLR 205, 221 (Dixon CJ) ('the authority to state the special cases lies … in s 18 of the *Judiciary Act*'). Although neither the judgment nor the headnote made any mention of s 18, this case was reported as a 'case stated' in the *Commonwealth Law Reports*.

178 *Mineralogy* (n 2) 246–7 [51]–[52], [54] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

179 Ibid 246 [52], quoting *R v Rigby* (1956) 100 CLR 146, 151 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ).

180 Gordon (n 39) 9. Cf ALRC Report 92 (n 137) 234 [10.47]. However, the Court may not be satisfied that any alleged inference can be drawn based on the facts in a special case: see *Plaintiff M47/2018* (n 9) 300–1 [43], 301–2 [47]–[49] (Bell, Gageler and Gordon JJ).

181 Such statutes covered matters including tax appeals: see, eg, *Land Tax Assessment Act 1910* (Cth) s 46(3); *Estate Duty Assessment Act 1914* (Cth) s 27(1); *Income Tax Assessment Act 1915* (Cth) s 38(3); *War-Time Profits Tax Act 1917* (Cth) s 29(3); *Income Tax Assessment Act 1922* (Cth) s 51(6); *Sales Tax Assessment Act (No 1) 1930* (Cth) s 42(6); *Income Tax Assessment Act 1936* (Cth) s 198(1), as enacted. Bankruptcy: *Bankruptcy Act 1924* (Cth) s 20(3). Patents: *Patents Act 1952* (Cth) s 150. Industrial relations: *Commonwealth Conciliation and Arbitration Act 1904* (Cth) s 31(2). Marriage: *Matrimonial Causes Act 1959* (Cth) s 91(1). Further, for a survey of the various statutes conferring original jurisdiction on the High Court: MH Byers and PB Toose, 'The Necessity for a New Federal Court' (1963) 36(10) *Australian Law Journal* 308, 311–12.

references in the statutes.[182] Those statutes were repealed following the transfer of much of the High Court's original jurisdiction to the Federal Court following the latter's establishment, and are therefore no longer in use.[183]

C *Less Common Procedures*

Other fact-finding procedures have always been available, albeit less commonly used. Indeed, in any suit in the Court's original jurisdiction, the statutory default position is for a single Justice to conduct a trial, unless the Court orders otherwise.[184] There also remains the theoretical possibility of a trial by jury.[185] A trial is likely to lead to precisely the costs and delay that the parties were trying to avoid by pursuing proceedings in the Court's original jurisdiction and, more importantly, it is a course unlikely to be favoured by the Court, having regard to the limits of its resources and the flow-on effects for other matters before the Court caused by the unavailability of a Justice.[186]

Similar issues attend other options, such as remittal for fact-finding by a lower court.[187] A separate trial in a different court is inherently likely to be more time-consuming and costly for the parties. Additionally, the general paucity of remittals for fact-finding purposes may also reflect concerns over shortcomings in divorcing the Court's fact-finding and adjudicative functions.[188] Therefore, while not without precedent,[189] these alternatives tend to hold little appeal both for the parties and for the Court.

[182] See, eg, *Australian Tramway Employees Association v Prahran and Malvern Tramway Trust* (1913) 17 CLR 680, 686 (Barton ACJ); *Lunney v Federal Commissioner of Taxation* (1958) 100 CLR 478, 486 (Dixon CJ).

[183] See, eg, *Income Tax Assessment Amendment (Jurisdiction of Courts) Act 1976* (Cth) s 8.

[184] *Judiciary Act* (n 15) s 77A.

[185] Ibid s 77B.

[186] As Kiefel CJ remarked upon remitting part of *Palmer v Western Australia* to the Federal Court of Australia for findings of fact rather than having a trial of issues before a single Justice of the High Court, 'we are but seven Judges': *Palmer v Western Australia* [2020] HCATrans 88, 292–3.

[187] *Judiciary Act* (n 15) s 44. A predecessor provision was found in s 45 of the *Judiciary Act* (n 15) as enacted.

[188] Reasons for such concerns may be discerned in *Palmer v Western Australia* (2021) 272 CLR 505, 546–8 [119]–[126] (Gageler J). However, for a recent example of a remittal: see below n 251.

[189] See above nn 21, 23.

D *Popularity of the Special Case*

The efficiency and timeliness of the special case procedure is often cited as the main reason behind its rising popularity.[190] Certainly, when compared to those alternatives where a formal trial of facts is required, efficiency and timeliness are significant considerations. However, as analysis in this Part reveals, the declining popularity of other procedures — those that do not involve a trial of facts — may also explain the growing reliance on the special case. The development of constitutional doctrines means that constitutional matters being litigated today are unlikely to be of the kind that incentivises a defendant to demur; and parties retain a greater degree of control and ownership in the formation of a special case, as opposed to having a case stated by a Justice. The decreasing use of some procedures necessarily means the increasing use of others.

With the additional advantages associated with the availability of inferences,[191] and the possibility for parties to invite the drawing of differing inferences from and assert different characterisations over documents annexed to a special case,[192] it is unsurprising that the High Court has described the special case as having 'come in this century to be the predominant means by which [it] has resolved questions of constitutional validity in proceedings commenced in its original jurisdiction'.[193] One may argue that the special case has now become the default procedure for placing facts before the Court and, at least in this regard, is no longer 'special'.[194]

As recent cases before the Court demonstrate, however, a lack of consideration as to whether the procedure is appropriate for the matter at hand, coupled with a lack of due regard paid to principles governing the drafting of special cases, can produce outcomes that negate any perceived benefit of the special case.

190 *Mineralogy* (n 2) 237 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); Gordon (n 39) 9.

191 Which, as discussed in Part VII, also serve to cover the lack of *real* agreement on facts. See also Gordon (n 39) 9–10.

192 Stephen Gageler, 'Matters in the High Court Arising under the *Constitution* or Involving its Interpretation' in Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 507, 512 ('Matters in the High Court'), quoting *2004 Rules* (n 1) r 27.08.5. Cf *South Australia v Commonwealth* (n 147) 142 (Dixon CJ), quoted in Gordon (n 39) 9–10.

193 *Mineralogy* (n 2) 247 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

194 In contrast to the default approach under *Judiciary Act* (n 15) s 77A. See also Part III(A).

VI Recent Developments

As the special case procedure grew in popularity, so too did the instances of its misuse.[195] Of course, 'misuse' of special cases is by no means a recent phenomenon, nor is it limited to constitutional matters. As demonstrated, courts and parties have been grappling with aspects of the procedure ever since it was first given statutory force in 1833.[196] Even under the *2004 Rules*, the Court has, at times, had reason to criticise a special case where parties have failed to adequately grapple with the prudential complexities of the procedure.[197]

What has changed in recent years is the additional complexities wrought by the development of constitutional doctrines that rely on the establishment of constitutional facts. On occasion, such as in *Thomas v Mowbray*, the deficiency of facts contained in a special case have necessitated that the Court have regard to facts beyond the agreed case itself.[198] However, as more recent cases considered below demonstrate, the additional complexities that attend constitutional litigation requiring adjudication of constitutional facts can be obscured by the parties' failure to adhere to the longstanding prudential principles that attend special cases. It is thus unsurprising that the question of how the special case procedure interacts with or accommodates the need to establish constitutional facts, whilst still having due regard to these longstanding prudential principles, remains relatively unexplored.

This Part commences with a discussion of *Mineralogy*. It is appropriate to do so as *Mineralogy* is the first case since the 2018 amendments to the *2004 Rules* where the High Court has explicitly expressed concerns about the misuse of special cases and sought to set out its expectations of what an appropriate special case may look like. This Part then reviews several subsequent cases where the Court has seen fit to build upon those warnings, or which otherwise highlight the ramifications if a special case is prepared without due regard to the prudential principles. Finally, it examines recent examples which indicate that, in light of these warnings and the reintroduc-

195 See above nn 11–13 and accompanying text.

196 See above Part III(B).

197 See, eg, *CPCF* (n 9) 529 [13]–[14] (French CJ), 561 [124]–[126] (Hayne and Bell JJ), 585 [219]–[220] (Crennan JJ), 605–6 [229]–[304] (Kiefel J); *Thomas* (n 8) 397–8 [255]–[256] (Kirby J), 444–6 [396]–[403] (Hayne J); *Duncan* (n 9) 410–11 [52]–[54] (French CJ, Hayne, Kiefel, Bell, Gageler and Nettle JJ); *Knight* (n 9) 324–6 [30]–[37] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

198 *Thomas* (n 8) 349 [83]–[85] (Gummow and Crennan JJ), 397–400 [255]–[261] (Kirby J), 444–6 [396]–[403] (Hayne J), 523–5 [640]–[649] (Heydon J).

tion of the leave requirement, the Court may be increasingly prepared to adopt an interventionist approach to case management in the interests of ensuring that a special case is appropriate to be determined by the Full Court.

A Mineralogy

In *Mineralogy*, the plaintiffs sought declarations of invalidity in respect of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ('*Amending Act*'), which amended the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ('*State Act*').[199] The essence of the amendments was to deprive the plaintiffs of the benefit of arbitral awards against the State.[200] The plaintiffs' argument was put on a variety of bases, including contravention of s 6 of the *Australia Act 1986* (Cth), s 107 of the *Constitution*, and limitations derived from ch III or ch V of the *Constitution*.[201] The questions of law stated in the special case asked whether the *Amending Act* was wholly invalid or, alternatively, whether a smorgasbord of provisions in the *Amending Act* were invalid.[202]

The Court was critical of the special case, identifying a 'measure of imprecision as to the scope of the plaintiffs' challenges'.[203] The plurality remarked:

> The procedure adopted by the parties is inappropriate to obtain judicial resolution of legal issues which might or might not arise in relation to the numerous other legal bases on which the plaintiffs seek declarations of invalidity in respect of Pt 3 of the *State Act*. The reason is that the facts agreed between the parties for the purpose of the special case provide an inadequate foundation upon which to crystallise those legal issues or to demonstrate the necessity of their resolution to the determination of any immediate right, duty or liability in controversy between the parties.[204]

The plurality (with Edelman J agreeing)[205] acknowledged, consistently with its historical rationale, the potential for the special case procedure to further an efficient and timely resolution of proceedings, but noted the procedure's

[199] *Mineralogy* (n 2) 232–3 [2]–[5] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[200] Ibid 241 [36] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ss 10(4)–(7).

[201] *Mineralogy* (n 2) 234 [6] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[202] Ibid 233–4 [5]–[7] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[203] Ibid 234 [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[204] Ibid 235 [10] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[205] Ibid 258 [96] (Edelman J).

increasing use and misuse.[206] The parties have no entitlement to expect an answer to a question of law stated in a special case unless the Court can be satisfied, by reference to the facts and documents in the special case, that 'there exists a state of facts which makes it necessary to decide [the] question in order to do justice in the given case and to determine the rights of the parties'.[207] This reflects both the broader prudential approach the Court adopts when it deals with constitutional questions,[208] and the recognition that, in answering questions of law in a special case, the Court exercises an adjudicative rather than an advisory function, a function anchored on the determination of legal rights or liabilities within a pre-existing controversy.[209] In other words, a party is not permitted to 'roam at large', but must confine their grounds of challenge to those 'which bear on the validity of the provision in its application to that party'.[210] Thus, a special case must include facts 'with sufficient clarity both to identify the right, duty or liability that is in controversy and to demonstrate the necessity of answering the question of law to the judicial resolution of that controversy'.[211]

Applying these principles, the Court found it inappropriate to determine a large portion of the questions stated in the special case.[212] Out of the 20 sets of provisions identified by the questions of law, the Court found it necessary to affirm the validity of only two of them.[213]

Mineralogy is the most explicit warning the Court has issued in recent years as to its expectations of special cases, and demonstrates the Court's willingness to scrutinise the use of the procedure in matters proceeding in its original jurisdiction. The Court's discussion of the procedure remained

206 Ibid 247–8 [55]–[56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

207 Ibid 247–8 [56], quoting *Lambert* (n 13) 283 (Dixon CJ for the Court).

208 *Mineralogy* (n 2) 248 [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). One of these approaches is that the Court will avoid 'the formulation of a rule of constitutional law broader than [that] required by the precise facts to which it is to be applied': *Zhang* (n 8) 230 [22] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ), quoting *Tajjour* (n 9) 588 [174] (Gageler J).

209 *Mineralogy* (n 2) 248 [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), citing *Clubb v Edwards* (2019) 267 CLR 171, 217 [137] (Gageler J).

210 *Mineralogy* (n 2) 248 [59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Knight* (n 9) 325 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

211 *Mineralogy* (n 2) 249 [60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

212 Ibid 249–51 [62]–[70] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

213 Ibid 257 [93] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ, Edelman J agreeing at 284 [166]).

resonant with the historical rationale of the special case, being an efficient device for parties to place facts before the Court so as to enable the determination of the instant dispute.[214] Similarly, the prudential principles the Court identified remain consistent with the early English authorities. In other words, the Court focused on the special case as being a procedure producing only adjudicative facts so as to enable the Court's adjudication.[215] Nothing said in *Mineralogy* engaged with the additional nuance that exists in constitutional litigation, including the need to have regard to constitutional facts, and the difficulty of adequately framing questions of law that are ripe for determination and which do not impermissibly rove into the realm of questions of fact. These were complexities with which the Court did not need to engage.

B *Post*-Mineralogy *Cases*

1 Plaintiff M1

Plaintiff M1/2021 v Minister for Home Affairs ('*Plaintiff M1*') concerned whether a delegate must consider non-refoulement obligations that may be owed to a person when deciding whether to revoke the mandatory cancellation of the person's visa under s 501CA(4) of the *Migration Act 1958* (Cth).[216]

The plaintiff relevantly sought a writ of certiorari to quash the delegate's decision not to revoke the cancellation of his visa.[217] A special case was prepared. At a directions hearing, Gordon J commented that the draft questions of law 'read like a set of interrogatories' and that the Court may not be 'too pleased to be faced with them in that form'.[218] Her Honour suggested that the parties revisit the form of the questions 'so that they are short, directed and, to put it bluntly, do not appear as a long set of interrogatories'.[219]

This was one of the first instances following *Mineralogy* where a member of the Court expressed concern, in a case management context, of the adequacy of a special case. Nevertheless, Gordon J did not formally order the parties to amend the questions,[220] reflecting one of the central features of the

[214] See above Part III(A).

[215] *Mineralogy* (n 2) 247 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[216] *Plaintiff M1* (n 30) 592 [8] (Kiefel CJ, Keane, Gordon and Steward JJ).

[217] Ibid 591–2 [7].

[218] Transcript of Proceedings, *Plaintiff M1/2021 v Minister for Home Affairs* [2021] HCATrans 80, 13–16.

[219] Ibid 34–6.

[220] See ibid 67–70.

special case procedure: that a special case is the product of consent. As Gordon J said, a 'special case is the parties' case'.[221]

It is unclear whether the parties amended the questions, but the questions ultimately referred to the Full Court received express criticism.[222] In particular, Gageler J considered the questions stated to be inappropriate to answer as they were 'in a form inappropriate to be asked'.[223] His Honour criticised the questions as being 'cast in contentious and ambiguous language', better included as reasons for judgment than in a judicial order.[224] Referring to *Mineralogy*, his Honour cautioned that the special case procedure must be framed 'with a view to obtaining by its answer the judicial determination of a legal right or legal obligation as a step in resolving the justiciable controversy between [the parties]', as opposed to a question of law framed in a special leave application to highlight its public importance.[225] In other words, questions stated in a special case should be cast in 'succinct, unambiguous and uncontentious language'.[226]

Plaintiff M1 is, importantly, not a constitutional case. Therefore, the additional complexities that attach to constitutional adjudication, particularly the entanglement of a special case and constitutional facts, were absent. Nevertheless, *Plaintiff M1* demonstrates that, even for non-constitutional matters in the Court's original jurisdiction, there remain difficulties in appropriately framing questions of law so as to enable the Court to exercise its adjudicative function. Justice Gageler's comments are also redolent of the need for the questions put before the Court to be properly tailored to the instant dispute — ones tailored to give rise to a 'matter' as opposed to questions seeking an advisory opinion. Furthermore, that the questions received criticism even after Gordon J's comments at the directions hearing highlights the need for parties to remain

221 Ibid 11.

222 The first question of the special case in *Plaintiff M1* (n 30) 606 [42] (Kiefel CJ, Keane, Gordon and Steward JJ) read:

> In deciding whether there was another reason to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth), was the Delegate required to consider the plaintiff's representations made in response to the invitation issued to him pursuant to s 501CA(3)(b) of the *Migration Act*, which raised a potential breach of Australia's international non-refoulement obligations, where the plaintiff remained free to apply for a protection visa under the *Migration Act* ?

223 Ibid 607 [44].

224 Ibid.

225 Ibid 607–8 [45]–[46].

226 Ibid 608 [46] (Gageler J).

proactive in addressing any concern the Court may express with respect to their case.

2 Farm Transparency

Farm Transparency International Ltd v New South Wales ('*Farm Transparency*')[227] concerned the *Surveillance Devices Act 2007* (NSW) ('*Surveillance Devices Act*'). Sections 7–10 respectively prohibited the installation, use and maintenance of listening devices, optical surveillance devices, tracking devices and data surveillance devices.[228] Sections 11 and 12 prohibited, respectively, the communication or publication of a record or report, and the possession of a record, of the carrying on of an activity obtained as a direct or indirect result of contraventions of ss 7–10.[229]

The plaintiffs were animal welfare activists.[230] They sought declarations that ss 11 and 12 were invalid.[231] They claimed that ss 11 and 12 impermissibly burdened their freedom of political communication as those sections inhibited their ability to publish photographs, videos and audio-visual recordings of animal agricultural practices in New South Wales which were obtained by surveillance devices.[232] In the special case, the questions of law asked (reflective of the declaratory relief sought) whether ss 11 and 12 impermissibly burden the implied freedom in all of their operations (that is, in their operations with each of ss 7 to 10).[233]

However, the facts contained in the special case were only concerned with the operation of ss 11 and 12 based upon a contravention of s 8, with no reference to any conduct involving ss 7, 9 and 10.[234] Furthermore, the facts only concerned the communication or publication of unlawfully obtained information by trespassers and those complicit in the trespass under s 8.[235] The facts did not concern third party recipients of information, such as journalists, or any other third parties who received the information with or

227 (2022) 277 CLR 537, 544 [3] (Kiefel CJ and Keane J) ('*Farm Transparency*').

228 Ibid 546 [8]–[10] (Kiefel CJ and Keane J).

229 Ibid 547–8 [13] (Kiefel CJ and Keane J).

230 Ibid 544 [1]–[2] (Kiefel CJ and Keane J).

231 Statement of Claim in *Farm Transparency International Ltd v New South Wales* (High Court of Australia, S83/2021, 10 June 2021) [27].

232 *Farm Transparency* (n 227) 544–5 [1]–[4] (Kiefel CJ and Keane J).

233 Ibid 549 [19] (Kiefel CJ and Keane J), 575 [111] (Gordon J).

234 Ibid 600 [198] (Edelman J).

235 Ibid 600 [199] (Edelman J).

without knowledge of the unlawful manner in which it was obtained.[236] The facts also revealed no finding of any court that established the unlawfulness of any activity depicted in a record that was obtained or that might be obtained.[237] That is, the special case was presented on the basis that the activities recorded, albeit undeniably cruel, were not unlawful.[238]

The scope of the plaintiffs' challenge was therefore confined by the special case.[239] Citing *Mineralogy*, Gordon J observed that the amended special case did not demonstrate the existence of a state of facts which made it necessary to decide the validity of ss 11 and 12 in their operations with respect to ss 7 and 9.[240] Instead, Gordon J considered that the Court was limited in its determination of the constitutional validity of ss 11 and 12 only to their operation with s 8.[241] In that limited respect, her Honour found ss 11 and 12 to be invalid.[242]

Similarly, Edelman J lamented 'the vast, unexplored breadth of the plaintiffs' challenge[,] … extending to circumstances far removed from the factual substratum of this case',[243] and which reached to grossly outrageous yet improbable hypothetical situations.[244] Warning that '[the] Court should be very wary before adjudicating on a broad basis that extends over all such hypothetical cases',[245] Edelman J (Steward J agreeing)[246] confined his judgment to the question of whether the implied freedom of political communication was contravened by the operation of ss 8, 11 and 12 of the *Surveillance Devices Act* in prohibiting trespassers, and those complicit in a trespass, from publishing or communicating information exclusively obtained from that trespass and which did not reveal unlawful conduct, and concluded that ss 11 and 12 were valid in these operations.[247]

236 Ibid.
237 Ibid 601–2 [204] (Edelman J).
238 Ibid 602 [206] (Edelman J).
239 Ibid 575 [112] (Gordon J).
240 Ibid 575–8 [113]–[120].
241 Ibid 577–8 [120].
242 Ibid 597–8 [191]–[192].
243 Ibid 599 [196].
244 See ibid 598–9 [193]–[194].
245 Ibid 599 [196].
246 Ibid 623 [269].
247 Ibid 602 [207].

Chief Justice Kiefel and Keane J took a broader view of the valid operation of ss 11 and 12.[248] Nevertheless, they were able to agree with Edelman J's more narrow conclusions.[249] Therefore, the Court, by majority, answered the questions stated in the amended special case in the narrow way framed by Edelman J.[250]

It may be readily assumed that, by commencing the proceeding, the plaintiffs wished to agitate the broader issues of any hindrance on their ability to effectively expose unlawful or unethical farming practices created by the *Surveillance Devices Act*.[251] It may also be possible that the plaintiffs could have adduced the necessary adjudicative facts had the case proceeded to a full trial. But here, the parties (as well as the general public) were left with a narrow judgment of limited utility given the 'real' issue in dispute. *Farm Transparency* thus serves as an example of how the benefits of the special case procedure — including its efficiency — may well be negated when a special case is inadequately prepared and framed.

3 Unions NSW [No 3]

Unions NSW v New South Wales ('*Unions NSW [No 3]*')[252] is the latest in a series of cases concerning the constitutional validity of various aspects of NSW' campaign financing law.[253] Section 29(10) of the *Electoral Funding Act 2008* (NSW) ('*EF Act*') provided a cap of $500,000 for a third-party campaigner's electoral expenditure in a general election.[254] Section 29(11) provided a cap of $20,000 in a by-election[255] and s 35 prohibited third-party campaigners from acting in concert with another to incur electoral expenditure for an election that exceeded the applicable cap.[256] In *Unions NSW v New*

[248] Ibid 560–1 [58].

[249] Ibid.

[250] Ibid 560–1 [58] (Kiefel CJ and Keane J), 622–3 [268] (Edelman J), 623 [269] (Steward J).

[251] Indeed, a subsequent constitutional challenge to the same provisions has since been brought on a more expanded factual basis, where the plaintiff allegedly received a recording without being complicit in the trespass: Pearson, 'Further Amended Statement of Claim', in *Pearson v New South* Wales, S109/2024, 30 October 2024, [7]–[8]. There, the parties were unable to agree to a special case, and the matter was remitted by consent to the Federal Court for fact-finding: Order of Gordon J in *Pearson v New South Wales* (High Court of Australia, S109/2024, 3 March 2025).

[252] *Unions NSW [No 3]* (n 159).

[253] See generally *Unions NSW [No 1]* (n 9); *McCloy* (n 9); *Unions NSW [No 2]* (n 9).

[254] *Unions NSW [No 2]* (n 9) 606 [9] (Kiefel CJ, Bell and Keane JJ).

[255] *Unions NSW [No 3]* (n 159) 635 [7] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

[256] Ibid 636 [9] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

South Wales ('*Unions NSW [No 2]*'), the Court unanimously struck down s 29(10).[257] A majority refused to rule on s 35 because, having held s 29(10) invalid, there was no applicable cap upon which s 35 could operate.[258] Section 29(11) was not in issue.

Ahead of the 2023 New South Wales general election, the Government introduced the Electoral Legislation Amendment Bill 2022 (NSW) ('2022 Bill') in the Legislative Assembly which would increase the cap in s 29(10) to $1,288,500.[259] Soon after, Unions NSW and its affiliated unions commenced proceedings in the Court, seeking declarations that ss 29(11) and 35 of the *EF Act* were invalid because they impermissibly burden the implied freedom of political communication.[260] No by-elections were scheduled at the time.[261] In the statement of claim, the plaintffs asserted standing to challenge s 35, in its operation on s 29(10), in addition to s 29(11), 'if an expenditure cap for third-party campaigners is reinstated in that setting'.[262]

Noting that, 'barring natural disasters and national emergencies', the matter was 'likely to be probably the most important case before the Court towards the end of the year',[263] Keane J made programming orders for the preparation of a special case on an expedited basis.[264] In the special case, there was only a brief mention of the 2022 Bill and the fact that it was pending before the Legislative Council.[265] A copy of the Bill, as it then stood, was annexed.[266] The questions of law were formulated broadly, asking relevantly whether s 35 was invalid in all of its operations.[267]

Unfortunately, the special case became superseded by later events. The 2022 Bill was enacted, but not before incorporating an Opposition amend-

[257] *Unions NSW [No 2]* (n 9) 618 [53] (Kiefel CJ, Bell and Keane JJ), 634 [102] (Gageler J), 641 [119] (Nettle J), 641 [122] (Gordon J), 651 [153] (Edelman J).

[258] Ibid 618 [54] (Kiefel CJ, Bell and Keane JJ), 622–3 [68] (Gageler J), 641 [119] (Nettle J), 641 [122] (Gordon J). Justice Edelman held, in dissent, that s 35 was also invalid: at 653 [160].

[259] Electoral Legislation Amendment Bill 2022 (NSW) sch 3 item 11.

[260] *Unions NSW [No 3]* (n 159) 635 [6]–[7], 636 [9] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

[261] Ibid 646 [39] (Edelman J).

[262] Statement of Claim in *Unions NSW v New South Wales* (High Court of Australia, S98/2022, 29 June 2022) [114], [122(d)].

[263] Transcript of Proceedings, *Unions NSW v New South Wales* [2022] HCATrans 142, 2.

[264] See Order of Keane J in *Unions NSW v New South Wales* (High Court of Australia, S98/2022, 26 August 2022).

[265] Special Case, *Unions NSW v New South Wales*, S98/2022, 23 September 2022, [104]–[105].

[266] See ibid annex no 323.

[267] Ibid [106] (Keane J).

ment to repeal s 35, in circumstances described by the then Attorney-General as 'under protest'.[268] Consequently, while the cap in s 29(10) was increased, there was no more s 35.[269] These amendments commenced a few days before the Full Court hearing.[270] The special case had to be urgently amended to include an additional question of law as to whether the Court retained jurisdiction to determine the validity of s 35 'as it stood from 1 July 2018 until 2 November 2022'.[271] Ultimately, the Court unanimously held that, following the repeal of s 35, the unions ceased to have standing to challenge its validity in the absence of any facts in the special case asserting that any of their rights, duties or legal interests had been infringed by the past application of s 35.[272]

On one view, this special case was an abuse of process designed to circumvent the fundamental requirement for the existence of a 'matter'.[273] When it was prepared, the 2022 Bill had yet to become law.[274] The validity of s 35, as applicable in a general election, was a hypothetical question — the position would remain unchanged from *Unions NSW [No 2]* unless and until the 2022 Bill was enacted in the form the parties had assumed that it would be.[275] The 'matter' that could be said to arise between the parties was confined to the validity of s 29(11), and that of s 35, in its operation on by-elections. No by-elections were upcoming.[276] One may argue that the challenge to s 29(11) was therefore not bona fide because there was not a 'real' issue in dispute.[277] The apparent motivation was to challenge s 35 as operating on the anticipated new cap in s 29(10), with the s 29(11) challenge open to being construed as an anchor to impugn s 35 in anticipation that the 2022 Bill would pass. In these circumstances, the parties could be said to have 'roam[ed] at large', and invited the Court to consider whether s 35 'would have an invalid operation in

268 New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 October 2022, 8705 (Mark Speakman, Attorney-General).

269 *Electoral Legislation Amendment Act 2022* (NSW) sch 3 items 11–12.

270 *Unions NSW [No 3]* (n 159) 636 [10] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

271 Ibid.

272 Ibid 642 [25] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ), 647 [44] (Edelman J), 662 [94] (Steward J).

273 See ibid 638–9 [15]–[16], 639–40 [18]–[20] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

274 Ibid 641 [23] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ), 646 [40] (Edelman J).

275 Ibid 641–2 [23]–[24] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

276 Ibid 646 [39] (Edelman J).

277 Cf *Duntze* (n 80) 1190 (Wilde CJ).

circumstances which [had] not arisen and which may never arise'.[278] On this view, *Unions NSW [No 3]* is a clear example of the 'misuse' of the special case.

Of course, it must be acknowledged that the special case was a product of agreement between the unions and the State, raising important and difficult constitutional issues in circumstances where the parties had to move quickly ahead of an upcoming election. Nevertheless, *Unions NSW [No 3]* demonstrates that the special case may not be an appropriate procedure in circumstances of urgency, when the necessary facts have not crystalised or are subject to change.

C *Increasing Scrutiny from the High Court*

With the High Court's explicit warning in *Mineralogy* and with the ongoing issues as seen in subsequent cases so far discussed, and in light of the leave requirement inserted by the 2018 amendments to the *2004 Rules*, it is perhaps unsurprising that the Court has demonstrated an increasing willingness to scrutinise the framing of a special case. Three recent examples serve to illustrate this point.

1 Hornsby Shire Council

In *Hornsby Shire Council v Commonwealth* ('*Hornsby*'), Hornsby Shire Council commenced proceedings in the Court's original jurisdiction against the Commonwealth and NSW.[279] It alleged that the notional goods and services tax ('GST') it paid to the Commonwealth was an unconstitutional tax imposed on the property of a state, contrary to s 114 of the *Constitution*.[280] The Council also sought restitution of the payments made.[281] The impugned legislative regime consisted of Commonwealth and state statutes introduced to give effect to an intergovernmental agreement regarding GST, whereby the Commonwealth paid states GST revenue and states assumed responsibility for payment of financial assistance to local governments.[282]

[278] *Mineralogy* (n 2) 248–9 [59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Knight* (n 9) 324–5 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[279] *Hornsby Shire Council v Commonwealth* (2023) 276 CLR 645 ('*Hornsby*').

[280] Ibid 658–9 [1]–[2] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

[281] Ibid 668 [29] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

[282] See ibid 665–6 [20]–[25] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

In what has become a usual practice, the parties provided to the Court a draft special case. At a directions hearing, Gageler J observed that the proposed special case failed both takeaway points from *Mineralogy*: namely, the facts in the special case were not set out with precision, and the questions of law were not necessary to be answered in order to determine the rights of the parties in dispute.[283] His Honour noted that, among other things, 'the case for restitution is entirely unpleaded' with 'some vague hint in the order sought that there may be some non-restitutionary basis for recovery'.[284] The special case had 'a complete lack of precision as to what transactions gave rise to what liability at what time'.[285] The questions of law referred to a 'scheme' which included both current and repealed legislation supposedly governing payments made over a 22-year period.[286] As such, his Honour declined to grant leave, instead adjourning the matter to give the parties an opportunity to 'formulate a plan'.[287]

A week later, Gageler J observed that many aspects of the special case appeared 'superfluous', and it was unclear whether parts of the case 'were meant to be convenient summaries of the law or statements of fact'.[288] While expressing hope that the parties were 'moving towards a special case', his Honour noted that it may just be 'a case that needs to go to trial'.[289] Only after 'huge progress' was made, and not insignificant direction was given by the Court, were the parties given leave to file a 'very targeted special case' focusing on one single transaction arising out of the supply of a single vehicle.[290]

The benefit of a 'very targeted special case' — a product of significant case management by the Court — became evident when the Court unanimously held that the notional GST paid by the Council was not a 'tax', and therefore did not offend s 114 of the *Constitution*.[291] No relief, including restitution, was

[283] Transcript of Proceedings, *Hornsby Shire Council v Commonwealth* [2022] HCATrans 105, 13–31.

[284] Ibid 39–43.

[285] Ibid 52–5 (Gageler J).

[286] Ibid 61–5 (Gageler J).

[287] See ibid 125–6, 161–71.

[288] Transcript of Proceedings, *Hornsby Shire Council v Commonwealth* [2022] HCATrans 116, 137–43.

[289] Ibid 161–3.

[290] Transcript of Proceedings, *Hornsby Shire Council v Commonwealth* [2022] HCATrans 143, 17–19 (RL Seiden SC), 34–5 (Gageler J).

[291] *Hornsby* (n 280) 660 [4], 672 [44] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

available.[292] As the Court observed, '[w]hilst the special case concerned only the sale of one car by the Council', the Court's reasoning 'would apply to any local government body' in like circumstances.[293] Further, the narrow question of law answered by the Court also resolved the parties' broader dispute concerning payments made over the 22-year period, without the need to consider each transaction.

2 Crawford

In 2022, Catherine Crawford, a Magistrate of both the Magistrates Court and Children's Court of Western Australia, filed a writ of summons seeking, relevantly, a declaration that amendments made by the *Courts Legislation Amendment (Magistrates) Act 2022* (WA) were invalid.[294] Under those amendments, the President of the Children's Court was empowered at their 'absolute discretion' to, in effect, give the Chief Magistrate a notice that a particular dually appointed Magistrate is to change the extent of their performance of Children's Court functions.[295] Ms Crawford contended that these powers compromised the institutional integrity of the Magistrates Court and Children's Court, contrary to ch III of the *Constitution*.[296] After the close of pleadings, the parties proposed a special case which identified three questions of law and provided consent directions for that proposed special case to be referred to the Full Court.[297]

Notwithstanding the parties' agreement, Gordon J was not satisfied that leave should be granted.[298] Her Honour noted 'the discursive nature of the facts' set out in the proposed special case and questioned the appropriateness of the proposed questions of law.[299] In a short judgment, Gordon J refused leave for the parties to state the proposed special case, instead remitting the matter to the Federal Court.[300] Her Honour reasoned:

292 Ibid 672–3 [44] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

293 Ibid 660 [5] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

294 Transcript of Proceedings, *Crawford v Western Australia* [2022] HCATrans 213, 41–50 (Gordon J).

295 Ibid 52–6 (Gordon J).

296 Ibid 56–9 (Gordon J).

297 Ibid 65–8 (Gordon J).

298 Ibid 77–9.

299 Transcript of Proceedings, *Crawford v Western Australia* [2022] HCATrans 211, 44–50.

300 Transcript of Proceedings, *Crawford v Western Australia* [2022] HCATrans 213, 107–15.

> [I]t is by no means clear … that the proposed special case includes all of the facts necessary to answer the questions stated for the opinion of the Full Court. Also, it is by no means clear that the questions stated for the opinion of the Full Court are the right questions or are questions which necessarily will arise for determination by the Full Court … The proceeding should be remitted to enable the relevant factual and legal issues to be identified and resolved at trial.[301]

Crawford v Western Australia ('*Crawford*') appears to be the first instance since the 2018 amendment to the *2004 Rules* where the Court formally refused leave under r 27.08.1.[302] Justice Gordon's judgment lays in contrast to earlier, but relatively recent, decisions of the Court to let special cases progress notwithstanding concerns of adequacy — whether on the basis that a 'special case is the parties' case' or otherwise.[303] On remittal, the Federal Court dismissed the proceeding on the basis that the impugned provision, properly construed, did not pose any threat to judicial independence, rendering it unnecessary to explore the ch III authorities in any detail.[304]

3 NZYQ

In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*'), the plaintiff challenged the validity of his ongoing immigration detention.[305] He sought to overturn *Al-Kateb v Godwin* ('*Al-Kateb*')[306] which, for 20 years, stood for two propositions.[307] First, ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) require the continuing detention of an unlawful non-citizen in respect of whom there is no real prospect of removal becoming practicable in the reasonably foreseeable future.[308] Second, these provisions, so construed, do not offend ch III of the *Constitution*.[309]

301 Ibid 79–84, 93–5.

302 Ibid.

303 See above Part VII(B).

304 *Crawford v Western Australia* [2024] FCA 222, [108]–[109], [112] (Perram J), affd (2025) 307 FCR 511.

305 *NZYQ* (n 160) 147 [6] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

306 (2004) 219 CLR 555.

307 *NZYQ* (n 160) 149 [14]–[15] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ), discussing ibid.

308 Ibid 149 [14] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

309 Ibid.

NZYQ was successful.[310] The Court unanimously overturned the second proposition for which *Al-Kateb* stood and held that the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia comes to an end when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future.[311] In doing so, the Court observed that the notions of 'practicability' and 'reasonably foreseeable future' are 'essential to anchoring the expression of the constitutional limitation in factual reality'.[312]

NZYQ's success was dependent on the Court's acceptance of the critical fact that there was no real prospect of removal of NZYQ from Australia being practicable in the reasonably foreseeable future. That fact was critical for two reasons. First, it provided the essential factual basis which 'made questions about reopening and overruling *Al-Kateb* necessary to be addressed by the Court in order to determine the rights of the parties in issue before it'.[313] Previous attempts in reopening *Al-Kateb* had failed at that hurdle.[314] Second, it provided the factual basis upon which the Court could apply the constitutional limitation and grant the relief sought.[315]

NZYQ thus again demonstrates the importance of facts in constitutional litigation: facts upon which validity of the detention depended, and which were front of mind for the Court throughout the case management of the matter.

When Gleeson J referred to the Full Court the original special case,[316] which was agreed between the parties on 30 May 2023, there was no contest regarding the critical fact.[317] Contest soon arose, however, as officers of the Department undertook inquiries into the potential for the plaintiff to be

310 Ibid 166 [71] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

311 Ibid 156–8 [38]–[43], 162 [55] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

312 Ibid 162 [57] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

313 Ibid 149–50 [16] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

314 Cf *Commonwealth v AJL20* (2021) 273 CLR 43, 64 [24]–[26] (Kiefel CJ, Gageler, Keane and Steward JJ). See also *NZYQ* (n 160) 149–50 [16] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

315 See *NZYQ* (n 160) 163–6 [59]–[70] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

316 Order of Gleeson J in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (High Court of Australia, S28/2023, 2 June 2023).

317 *NZYQ* (n 160) 164 [63] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

removed to one of the 'Five Eyes' countries after 30 May, resulting in evidence being filed to the effect that the United States Department of State had advised that it would 'consider' the plaintiff's case.[318]

At a directions hearing before Gageler J on 20 October 2023, counsel for the Commonwealth expressed concerns about the suitability of the special case as agreed in circumstances where there might no longer be agreement as to the key facts.[319] Counsel noted that the questions of law stated in the special case were framed by reference to the lawfulness of the plaintiff's 'present' detention, and expressed concern about the hearing before the Full Court degenerating into a debate about competing inferences to be drawn or not drawn from incomplete facts in the special case.[320]

Justice Gageler observed that 'one problem with language like "reasonable prospect" and "reasonably foreseeable future" is that there is a certain elasticity built into the conclusory language'.[321] In the circumstances, 'it may be of more utility to leave the special case as it is and to update the special case by evidence to bring the Court to the position on [the date of the hearing] when it will understand exactly what has occurred to that date'.[322] Nevertheless, Gageler J ordered the parties to confer upon proposed amendments to the special case relating to factual developments that had occurred after 30 May 2023.[323]

The parties proceeded to prepare an amended special case, amending the question of law by reference to the lawfulness of the plaintiff's detention 'as at 30 May 2023'.[324] At a further hearing on 30 October 2023, Gageler J pointed out the tension between the utility of considering the question by reference to one particular point in time (where the factual basis was agreed and stable), and the possibility that the facts would have changed between that point in time and the hearing.[325] Additionally, Gageler J repeated his concern over the need to give content to propositions such as 'reasonably practicable' and 'real

[318] Ibid 164–5 [64]–[66] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

[319] Transcript of Proceedings, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 149, 35–49 (PD Herzfeld SC).

[320] Ibid 51–3, 67–77 (PD Herzfeld SC).

[321] Ibid 210–12.

[322] Ibid 220–2 (Gageler J).

[323] Ibid 235–40.

[324] See Transcript of Proceedings, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 150, 12–14, 25–6 (Gageler J), 47–8 (CL Lenehan SC).

[325] Ibid 25–33.

prospect', noting the difficulty in working out what they mean 'in concrete and evolving factual situations'.[326] In another departure from the usual deference to the parties, Gageler J proposed further amended questions of law which concerned both the validity of the detention of the plaintiff 'as at 30 May 2023', and the validity of 'the current detention of the plaintiff'.[327] These questions were the ones answered by the Full Court.[328]

Ultimately, the inquiry made to the United States did not alter the Court's finding that there remained no reasonable prospect to remove NZYQ in the reasonably foreseeable future, both as at 30 May 2023 and at the time of the hearing.[329] Nevertheless, *NZYQ* demonstrates how an agreement as to the critical facts through a special case may provide an efficient pathway for the Court to resolve important constitutional questions, and conversely, the risk of using the special case procedure when facts are not stable or are liable to change. Justice Gageler's comments at the two directions hearings provide a glimpse into the tension that can arise in circumstances where constitutional doctrines are anchored in a factual reality which may be said to always raise mixed questions of facts and law,[330] but where there is the ongoing need to formulate pure 'questions of law' in a special case for the determination of the Court.[331]

More generally, the centrality of constitutional facts in the resolution of such disputes — facts the existence of which are determinative of constitutional validity — appears at odds with the expectation that parties in a special case should reach agreement on all facts that are necessary to enable the Court to decide the questions raised. The Court's willingness to intensively case manage the preparation of the special case, including, in effect, dictating the terms of the questions, may reflect an increasing awareness on the part of the Court of the difficulties being encountered in navigating this tension and a growing unwillingness to refer cases that do not adequately address these issues to the Full Court.

[326] Ibid 35–44.

[327] See ibid 14–16 (Gageler J), 69–71 (SP Donaghue KC).

[328] *NZYQ* (n 160) 167 [74] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

[329] Ibid 166 [69]–[70] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

[330] See ibid 162 [57] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

[331] See *2004 Rules* (n 1) r 27.08.1. See also Part II above.

VII Limitations of Special Cases

Notwithstanding the pitfalls parties have encountered when utilising the special case, the popularity of the procedure persists.[332] Building upon the case studies above, this Part explores the practical hurdles faced by parties when preparing a special case, and the problems that arise when those hurdles are inadequately navigated.

First, parties tend to focus excessively on the outcome of the special case, consequentially losing sight of the underlying action. Answers by the High Court to the questions of law stated by a special case do not, in of themselves, finally determine the parties' rights and obligations in any particular case. A special case may only resolve part of the controversy in a matter and, depending on the answers given, further issues (whether constitutional or otherwise) may arise. Even where a special case resolves all substantive questions, it remains necessary for the underlying action to be disposed of by final order, such as by a declaration of invalidity or an order dismissing the writ of summons.[333] However, the importance of resolving the underlying action is often overlooked. This may explain why, at times such as in *Mineralogy*, *Farm Transparency* and *Hornsby*, parties frame questions of law in a special case too broadly without due regard to what is necessary to resolve the specific controversy.

Second, constitutional litigation, by its nature, likely involves the Commonwealth or a state as a party. Indeed, *all* of the matters that proceeded by way of special case following the introduction of the *2004 Rules* have had the Commonwealth or a state, or an officer or agency represented by the Commonwealth or a state, as defendants.[334] They are the repeat players in constitutional litigation. They have access to greater resources and information, and are represented by the Australian Government Solicitor or its state counterparts who have specialised expertise.[335] By contrast, the plaintiffs and their solicitors tend not to be frequent High Court litigants and are far less likely to be familiar with its procedures, giving rise to an inequality of arms.[336]

[332] See above n 9.

[333] See, eg, Transcript of Proceedings, *LibertyWorks Inc v Commonwealth* [2022] HCATrans 220, where parties failed to agree to final orders following *LibertyWorks* (n 12): at 27–46, 63–6 (Kiefel CJ, Gageler, Gordon, Edelman, Steward and Gleeson JJ).

[334] See above nn 8–9.

[335] Gordon (n 39) 10, 19.

[336] Ibid 19. This is in contrast with the position of, for example, the United States, where organisations such as the Americal Civil Liberties Union and the National Association for the Advancement of Colored People frequently act against governmental parties in

Of course, the inequality is sometimes mitigated by the involvement of (often very experienced) counsel for the plaintiff, and by the model litigant obligations of the defendant to act in the public interest.[337] Nevertheless, even among counsel who frequently appear before the Court in appellate matters, familiarity with the special case procedure in the Court's original jurisdiction is not guaranteed. Additionally, the defendant will ordinarily have greater control of documents and other evidence relevant to the case, which creates an inherent advantage when obtaining agreement to the facts to be included in a special case and the questions of law to be asked.

The discrepancy is exacerbated in circumstances where the plaintiff (such as Plaintiff M1 and NZYQ) is in detention,[338] or where urgency is otherwise present (such as was encountered in *Unions NSW [No 3]*).[339] The perception that the special case procedure is a quicker and cheaper alternative than discovery followed by a trial, combined with relative unfamiliarity with the procedure itself, may lead to a willingness to consent to proceeding by way of special case and, subsequently, to the inclusion of any facts the Commonwealth or states propose to include in the interest of expedition, with little regard as to whether the inclusion of particular facts is appropriate. To the extent that government parties intentionally leverage such vulnerabilities (and it is in no way suggested that this has in fact occurred), the use of the special case procedure may well amount to an abuse of process.

Third, there is increasingly a disconnect between the historical rationale underlying the development of the special case procedure — that it provides an efficient way to put uncontested and necessary facts before a court for the determination of questions of law — and the practical reality of modern litigation.[340] While the benefit of efficiency may be amplified in the case of the High Court given its status as the apex court and its otherwise limited role in fact-finding, special cases in recent years have grown in length and complexity. They are increasingly of a dynamic nature and involve an extensive factual matrix, with the relevance and implications of facts contested, and the stability of facts absent.

constitutional litigation, and have amassed substantive expertise and institutional knowledge: see, eg, *Brown v Board of Education*, 347 US 483 (1954); *Ashcroft v American Civil Liberties Union*, 535 US 564 (2002).

[337] See, eg, *Legal Services Direction 2017* (Cth) app B.

[338] See also Transcript of Proceedings, *CD v Commonwealth* [2025] HCATrans 19, 81–8 (DF O'Leary SC).

[339] See above Part VI(B)(3).

[340] See above Part III(A).

Rather than reconciling these complexities or contemplating the use of other fact-finding procedures, parties have instead been responding by filing voluminous special cases.[341] For example, the special case in *Unions NSW [No 3]* contained 106 paragraphs which spanned over 50 pages; it also referred to some 323 documents, covering over 10 volumes of court book totalling over 3,300 pages.[342] As another example, the special case in *Farm Transparency* contained 43 annexures across seven volumes of materials.[343] The relevance of these materials is not always apparent. A common practice is for a special case to begin with a statement that '[t]he agreement of the parties to the following facts and documents does not constitute agreement as to the relevance of any fact or document set out in this Special Case'.[344]

Such practice reflects the reality that, while parties may readily agree to the *existence* of any facts or documents, it is far more difficult to agree to their *relevance*, or the appropriate *inferences* to be drawn from them. As the Commonwealth Solicitor-General once lamented:

> [F]rom time to time the parties find themselves on the receiving end of criticism, that they have not agreed appropriate facts or facts that allow the issues to be properly criticised … one tries to compromise to reach agreement and one ends up with a document that actually is not helpful in terms of making sufficiently clear what the Court will need.[345]

In order to reach agreement and progress the matter, the practical solution is often to acquiesce to the inclusion of any facts and supporting documents the opposing party may wish to rely upon in the special case, with little regard to their relevance or utility.[346] The Court is therefore often left with a bloated special case and the difficulty of identifying the facts relevant to the matters in issue. The volume of materials may also obscure the factual deficiencies of a special case. All of this erodes the potential efficiency gained by the special case procedure itself.

341 Gordon (n 39) 10; Gageler, 'Matters in the High Court' (n 192) 512.

342 See generally Amended Special Case, *Unions NSW v New South Wales*, S98/2022, 5 October 2022.

343 See generally Amended Special Case, *Farm Transparency International Ltd v New South Wales*, S83/2021, 6 October 2021.

344 Ibid [3].

345 Transcript of Proceedings, *Ruddick v Commonwealth* [2021] HCATrans 202, 481–9 (SP Dongahue QC).

346 See Gordon (n 39) 10.

Ultimately, where factual contests are arising, parties are filing more materials to fill the gap — perhaps hoping the Court will discern what it needs within the pages and draw favourable inferences — and ignoring the more fundamental question as to whether the special case procedure is the appropriate one to litigate the issues at play. In such cases, the utility of the special case procedure diminishes, with the underlying limitations of the Court as a trier of fact resurfacing. It may be that, in such cases, the benefits of the establishment of targeted and relevant facts following a trial (either by a single Justice or, more likely, before a lower court), and the Court's subsequent adjudication based on such facts, outweigh any anticipated (but likely unrealised) benefits of proceeding by way of a special case.

Fourth, certain constitutional doctrines have now been expressed in such a way so as to render the issues necessarily as ones of mixed questions of law and fact, raising questions as to whether a procedure designed to enable the determination of questions of law alone is fit for purpose.[347] Further, such constitutional doctrines often require findings of constitutional fact that, by their very nature, are unlikely to be the subject of the parties' agreement. Of course, that there are disputes over constitutional facts in a particular case does not, by that reason alone, render the special case an unsuitable procedure. Parties can agree to the existence of facts that, while not constitutional facts themselves, are capable of enabling the Court to make findings about constitutional facts. Nevertheless, the presence of factual contests — including contests concerning constitutional facts — may well indicate that the procedure is inappropriate in these circumstances.[348] Indeed, the Solicitor-General's comment above may well reflect the ongoing tension between the special case procedure's command to put only relevant adjudicative facts before the Court, and the Court's need for constitutional facts to determine constitutional validity. This tension, coupled with the increasing challenges presented by the factual matrices in which constitutional questions are arising more generally, gives rise to the question of whether the special case procedure is fundamentally unsuited for certain classes of constitutional cases.

At times, the complexities that manifest in constitutional litigation may be obscured by the parties' more fundamental failure to have due regard to the prudential principles when preparing a special case, as examples such as *Mineralogy*, *Farm Transparency* and *Unions NSW [No 3]* demonstrate. However, cases such as *NZYQ* bring these complexities to the fore, and it can

[347] See, eg, *NZYQ* (n 160) 162 [57] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

[348] See *CPCF* (n 9) 560 [121] (Hayne and Bell JJ).

only be expected that such complexities will continue given the current trajectory of development of constitutional doctrines. It is therefore incumbent on parties to consider the appropriateness of the special case as the procedure to litigate the instant issues, and whether other procedures are more appropriate.

VIII Conclusion

The special case procedure has existed for centuries. An examination of its history reveals that, notwithstanding the drafting changes through the ages, the essence of the procedure has remained remarkably unchanged. Many of the issues now being identified by the Court are not novel. They are a continuation of deep-rooted tensions that have always existed. As such, the historical jurisprudence concerning the special case remains relevant to this day.

History reveals that the special case procedure evolved to improve the efficiency of proceedings and to save costs. It served to shift the onus of fact-finding from the trier of facts — the jury — to the parties. Where it was possible for parties to agree on the facts and issues to be determined in proceedings, a special case allowed the parties to avoid being drawn into protracted, contentious hearings of evidence with the attendant delays and costs. It allowed a swift determination of questions of law. But the importance of fact-finding to the determination of the dispute remained. The effectiveness of the procedure depended, and still does depend, on the effectiveness of the parties as the finders of fact.

The courts have never been obliged to determine special cases. They have always retained a discretion to refuse to hear a special case where the factual matters stated were insufficient or inadequate to enable the adjudication of the questions of law. There was also manifest reluctance by the courts to entertain a special case where there was reason to believe the action was not brought bona fide. The leave requirement enabled the courts to scrutinise whether special cases were in a form appropriate to be adjudicated. The High Court's warning in *Mineralogy*, and the shortcomings in many of the special cases that followed, highlights again these longstanding prudential principles and the complexities that arise if not adhered to.

More recently, further complexities have arisen where the special case is used for the Court's adjudication of matters arising under the *Constitution* or involving its interpretation. Development of constitutional doctrines has elevated the importance of constitutional facts (which are often contested) and has necessitated the consideration of more mixed questions of law and facts. Such development is difficult to reconcile with traditional understandings of a special case where parties state agreed facts for the Court to resolve questions of law. The effect of these complexities has remained relatively unexplored.

It may be that, in the early decades of the Court's history, the availability and popularity of alternatives such as the demurrer and case stated diminished the need to pay close attention to these complexities. However, with the growing popularity of special cases and the diminishing use of alternatives, the importance of ensuring that the special case is the appropriate procedure, and of framing a special case properly, is evident. Indeed, as demonstrated by the reintroduction of the leave requirement in 2018, and the recent case management of *Hornsby*, *Crawford* and *NZYQ*, the Court is increasingly willing to police the preparation of a special case. The Court has now demonstrated a willingness to refuse leave if a special case is inadequately drafted, or to suggest changes to ensure questions of law are appropriately framed.

Yet, with parties' consent remaining the hallmark of the special case procedure, the responsibility of avoiding its misuse continues to rest with the parties. Parties should take pause to consider whether the special case is the appropriate procedure for a particular matter. The procedure was developed from a historical era where the conception of a trier of fact was exclusively that of a jury called upon to determine adjudicative facts. It did not contemplate courts policing the bounds of a written constitution by reference to constitutional facts. Furthermore, the procedure assumed that the facts agreed on (irrespective of whether they were adjudicative or constitutional) were static, with no room left in the procedure for facts to evolve and change. When these assumptions shift, as is increasingly occurring, it is crucial that parties consider whether the special case remains the appropriate procedure to litigate the issues at hand. Absent such considerations, misuse of the special case will continue.