

## BOOK

Conti QC, Roddy Meagher QC, Clive Evatt QC, David Yeldham QC and Sir Lawrence Street. Even though many readers will not be familiar with all of the names and personalities, they bring to life Einfeld's career and a life at the Bar over the last 50 years.

In spite of the length and breadth of his career, Einfeld is a modest and self-effacing man. For instance, he recounts the occasion when Justice Denys Needham commented that Einfeld's submissions had left him 'none the wiser, Einfeld responded with FE Smith's great line: 'Perhaps none the wiser, my Lord... but much better informed'. The punchline, however, lies in his Honour's response: 'Touché Mr Einfeld, but I have to say that it loses something in the translation, coming from you and not FE Smith!'

Einfeld is also generous about his clerks, describing them as one of a barrister's greatest assets.

I have had the privilege of being Einfeld's junior on several occasions. It was always an enjoyable experience, but the preparation was always extensive and detailed, verging on the perfectionist. I read then with a wry smile his acknowledgement to his secretary Tracy McLeod having 'typed and retyped (countless times) the manuscript' and his thanks for her 'patience and indulgence'.

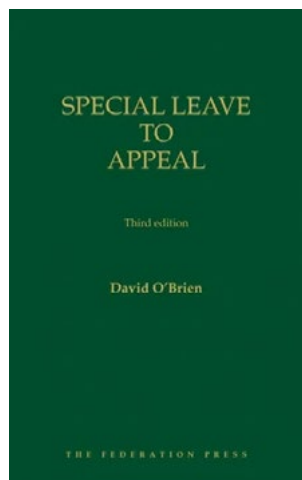
In that vein, I enjoyed the juxtaposition between his reference to Dick Conti QC as 'a prodigious worker, arriving in chambers most mornings before the sun rose' and attributing Ken Handley QC with having taught him 'that no case could be over-prepared', and his description of arriving on the morning of a hearing in the chambers of Roddy Meagher QC only to be told by Meagher QC, apparently without any alarm, that he had not been able to find the brief.

I found Sir Lawrence Street's comment to Einfeld, after his many years of mediations and experiencing the burden placed on ordinary people in bringing claims to court, to be tantalising: 'If I had my time as a judge over again, I would have been much more pro-plaintiff.'

As I did the comment of McHugh J to Einfeld, counselling against the common practice of counsel declining to argue weak points on appeal lest they lessen the force of any stronger points on the basis that judges sometimes did 'pick up and run' with those apparently weak points.

I would have liked more comment and conclusion from Einfeld, informed by his long and fascinating career, but perhaps I will have to wait for his autobiography (or at least a chambers tea!). In the meantime, *I Object!* provides a well of entertaining stories that is important as a written record of life at the Bar over the last 50 years.

Reviewed by Anthony Cheshire SC



## *Special Leave to Appeal*

By David O'Brien (3rd edition,  
Federation Press, 2022)

*This is the third edition of a work that deals with niche subject matter, but subject matter that is immensely important. As Pincus J observed in the forward to the first edition, for many litigants in Australia the 'last nail in the coffin' is the news that the High Court of Australia has refused special leave to appeal.*

*At that time of the first edition, most matters were disposed of following a brief oral hearing, although some were disposed of on the papers. Now, however, the tables have turned.*

At that time of the first edition, most matters were disposed of following a brief oral hearing, although some were disposed of on the papers. Now, however, the tables have turned. In 2021 for example, 254 applications were dealt with on the papers (of these, there were grants of special leave in only one case), and only 98 applications proceeded to an oral hearing (of which there were grants in only 26 cases). This change in the practice of the High Court necessitates greater attention be given to the written Application for Special Leave.

Central to the grant (or refusal) of special leave is determining whether the proposed appeal is sufficiently 'special'. While s 35A of the *Judiciary Act 1903* (Cth) specifies *some* criteria to be applied by the court, the list is neither exhaustive nor comprehensive. This work collects together the various authorities that help to explain the features of a case that facilitate the advocate in persuading a panel of the court that special leave ought to be granted, and the features of a case that militate against such a grant.

It begins with a chapter entitled 'First Principles' containing matters that are largely of historical interest, but which are nonetheless of practical importance if only to explain the jurisdictional basis for the course adopted in earlier cases. It then has separate chapters that address the criteria as they apply in civil cases, and in criminal cases. A useful chapter entitled 'Civil Procedure' then follows, although it should be noted that many of the matters referred to in this chapter will be relevant to criminal appeals as well. A smaller, more narrowly confined chapter entitled 'Criminal Procedure' addresses questions of bail, a stay or surrender and extradition orders, and a prisoner's attendance.

Given the predominance of special leave applications being determined on the papers, perhaps the most significant chapter of this revised edition is the last, entitled 'Persuasive Submissions'. This is an expanded version of the chapter from previous editions, although it must be said that considerably more can be written on the subject, particularly with respect to written submissions. There remains a need for an Australian work dedicated to the subject matter (mirroring the writings in an American context by Bryan Garner, and in particular his collaboration with the late Antonin Scalia). This chapter is not such a work, but it does helpfully extract passages from a number of articles by Kenneth Hayne, Dyson Heydon and David Jackson which themselves warrant a close and comprehensive reading.

Overall, this is an extremely useful book for both the frequent flyer and the occasional tourist in the special leave lists.

Reviewed by D F Villa SC