

ANNUAL REVIEW 2005



**Supreme Court**  
of New South Wales

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## FOREWORD BY CHIEF JUSTICE OF NSW

This Review provides information on the Court's stewardship of the resources made available to it. The full details of the Court's contribution to the people of New South Wales exists in the large volume of documentation produced – encompassing tens of thousands of pages of judgments and hundreds of thousands of pages of transcript. The bald figures of filings, disposals and pending caseload, upon which this Review reports, cannot reflect the richness that is contained in the considerable volume of documentation which the Court's judicial officers and registrars generate in the course of the year.

An indication of the contribution made by the Court, and the effectiveness and efficiency of its procedures, can be gleaned from this Review, which contains information of a quantitative kind about how the Court has dealt with its caseload and the speed with which litigants have had their disputes resolved.

However, the primary measure of the Court's performance must be qualitative: fidelity to the law and fairness of its processes and outcomes. This Review sets out in short summary a few of the cases decided in the year 2005. This is a small sample of the 2,000 or so separate substantive judgments delivered by the 51 judicial officers of the Court.

Two particular matters are worthy of special mention. First, this year, after a considerable investment of time and effort, the courts of New South Wales adopted a uniform set of court rules for civil cases. Secondly, considerable progress has been made in developing the CourtLink system. These two matters will improve the cost effectiveness of the administration of justice in this State, both from the point of view of the courts themselves and from the perspective of litigants. They manifest the dedication of the judges and officers of the Court to continued reform.

Throughout the year, the rule of law was administered by the judicial officers of the Court with a high level of independence, impartiality, integrity, efficacy and efficiency. I am confident that this will continue to be the case.

J J Spigelman AC

## 2005: AN OVERVIEW

- Notable judgments
- Court operations
- Commencement of uniform civil rules and new Practice collection
- Pilot of CourtLink eFiling
- Education and public information
- Consultation with Court users

### **Notable judgments**

During 2005, the Court of Appeal handed down 481 judgments, and the Court of Criminal Appeal delivered 463. In respect of its criminal and civil trial work, the Court delivered 1,370 judgments at first instance. Some judgments were particularly notable either for their contribution in developing the law, their factual complexity or the level of public interest they generated. Summaries of a selection of these judgments appear in Appendix (i) to this Review.

### **Court operations**

The avoidance of excessive delay remains a priority for the Court. In most areas of its work, the Court has been able to surpass results achieved in 2004, or at least maintain its position. Of particular significance are the results achieved in the Court of Criminal Appeal where the number of pending cases has been reduced to the lowest level in 25 years. The *Court operations* chapter outlines the specific time standards set by the Court along with detailed analysis of the results achieved in each jurisdiction. This chapter should be read in conjunction with the comprehensive statistical data tabled in Appendix (ii) to this Review.

### **Education and public information**

Many judicial officers updated and developed their skills and knowledge during the year by attending conferences, seminars and workshops. Some of the educational activities were tailored specifically to the Court's needs, whilst others targeted the international legal community. The Public Information Officer continued to provide the media, and consequently the general public, with reliable information about contentious issues or proceedings before the Court. The Court's Registrars spoke to 70 student and community groups during the year, providing them with a unique insight into the work of the Court and its place in the State's legal system. These are some of the activities featured in Chapter 5 of the Review.

### **Commencement of uniform civil procedures and new Practice Collection**

The *Civil Procedure Act 2005* and attendant *Uniform Civil Procedure Rules 2005* substantially commenced in August. The new legislation consolidates provisions relating to civil procedures that had previously been replicated in the individual acts and rules governing the Local, District and Supreme courts. The legislations' commencement is the culmination of three years' work spent identifying similarities and unnecessary differences between civil procedures in these jurisdictions, and finding ways to simplify processes wherever possible. To coincide with the legislations' introduction, the Court overhauled its Practice Collection to ensure case management practices are consistent with the legislations' provisions and terminology. For more information, refer to the chapter entitled *Other aspects of the Court's work*.

### **Pilot of CourtLink eFiling**

In November, the Court invited a small group of law firms to file documents electronically using CourtLink's eFiling facility. The firms electronically filed documents in Corporations and Possession List matters for a trial period. The pilot group observed cost and time reductions through eFiling when compared with filing process over the counter in the registry. The pilot of eFiling was highly successful and a wider release is scheduled for 2006. For more information on the CourtLink project and the pilot of eFiling, refer to *Other aspects of the Court's work*.

### **Consultation with Court users**

In 2005 the Court continued to work closely with users to improve systems and procedures through its network of Committees and User Groups. Representatives on the Committees and User Groups include judicial officers (from the Court and other jurisdictions), senior registry staff and representatives from justice agencies and the legal profession. A list of the Court's Committees and User Groups, and their members during 2005, forms Appendix (iii) to this Review.

## 2

## COURT PROFILE

- The Court's jurisdiction and Divisions
- Who makes the decisions?
- Supporting the Court: the Registry

## THE COURT'S JURISDICTION AND DIVISIONS

### **The Supreme Court of New South Wales: our place in the court system**

The court system in New South Wales is structured on a hierarchical basis. The Supreme Court is the superior court of record in New South Wales and, as such, has an inherent jurisdiction in addition to its specific statutory jurisdiction.

The Supreme Court has appellate and trial jurisdictions. The appellate courts are the:

- Court of Appeal, and
- Court of Criminal Appeal.

The work of the first instance criminal and civil jurisdictions, is divided between two Divisions:

- Common Law Division, and
- Equity Division.

This structure facilitates the convenient despatch of business in accordance with the provisions under section 38 of the *Supreme Court Act 1970*.

Section 23 of the *Supreme Court Act 1970* provides the Court with all jurisdiction necessary for the administration of justice in New South Wales. The Supreme Court has supervisory jurisdiction over other courts and tribunals in the State. The Court generally exercises its supervisory jurisdiction through its appellate courts.

The Industrial Relations Commission of New South Wales and the Land and Environment Court of New South Wales are specialist courts of statutory jurisdiction. The Judges of these courts have the status of Supreme Court Judges.

The District Court of New South Wales is an intermediate court whose jurisdiction is determined by statute. The Local Court sits at the bottom of the hierarchy of New South Wales courts, and has broad criminal and civil jurisdictions. There are also tribunals and commissions in New South Wales with statutory powers similar to the District and Local Courts.

Figures 2.1 and 2.2 overleaf illustrate the court hierarchy in New South Wales and the gateways to appeal in the criminal and civil jurisdictions.

### **Court of Appeal**

The Court of Appeal is responsible for hearing appeals in civil matters against the decisions of the judicial officers of the Supreme Court, other courts, commissions and tribunals within the State, as prescribed in the *Supreme Court Act 1970*.

### **Court of Criminal Appeal**

The Court of Criminal Appeal hears appeals from criminal proceedings in the Supreme Court, the Industrial Relations Commission, the Land and Environment Court, the District Court and the Drug Court. Appeals may challenge convictions and sentences imposed upon indictment or in the trial court's summary jurisdiction, or interlocutory orders made by the trial court. Appeals from committal proceedings in the Local Court may also be heard in certain circumstances.

Sittings of the Court of Criminal Appeal are organised on a roster basis whilst taking into account the regular judicial duties and commitments of the Judges who form the Court's bench. The Judges who sit in the Court of Criminal Appeal are the Chief Justice, the President, the Judges of the Court of Appeal, the Chief Judge at Common Law and Judges of the Common Law Division.

### Common Law Division

The Division hears both criminal and civil matters. The criminal matters heard involve homicide offences and offences where the prosecution seeks life imprisonment. Other matters involving serious criminality or the public interest may be brought before the Court with the Chief Justice's approval. The Judges of the Division also hear bail applications, matters concerning proceeds of crime, and post-conviction inquiries.

The Division deals with all serious personal injury and contractual actions, in which the Court has unlimited jurisdiction. The civil business of the Division also comprises:

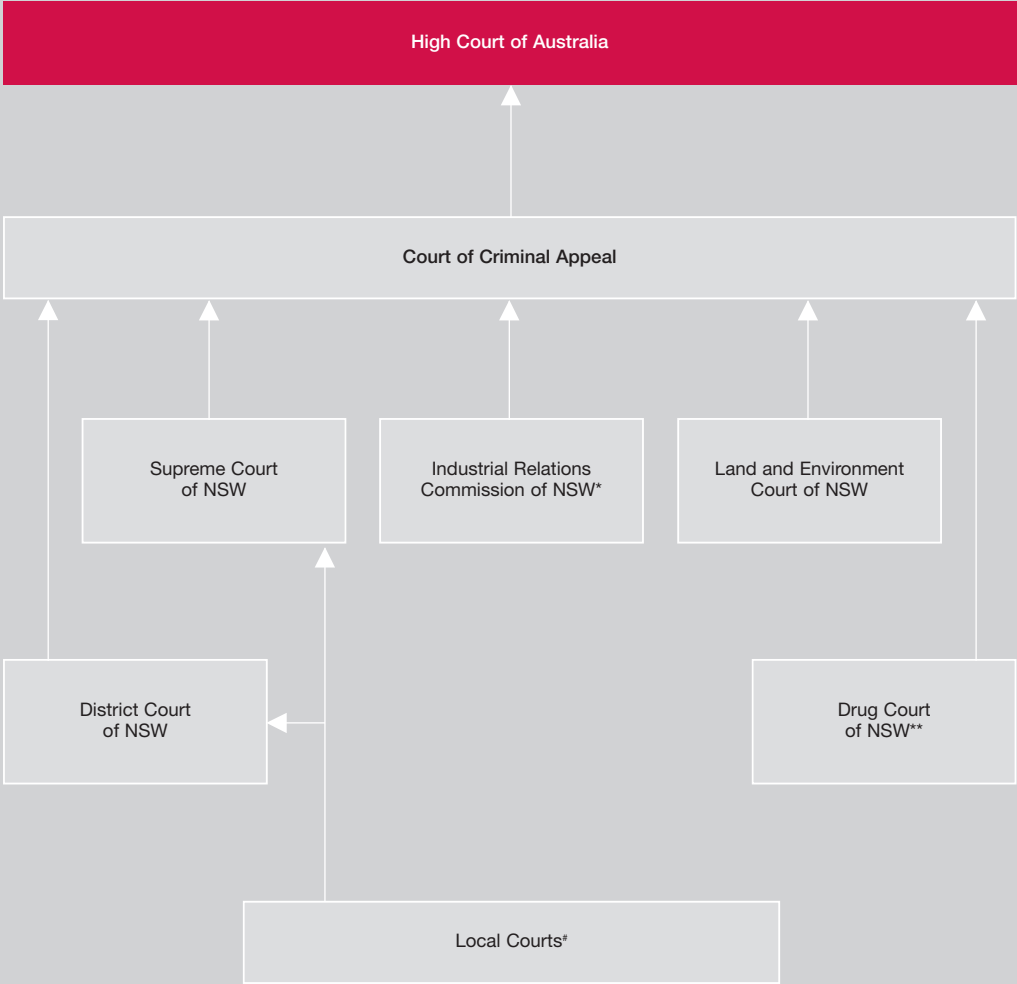
- claims for damages;
- claims of professional negligence;
- claims relating to the possession of land;
- claims of defamation;
- administrative law cases seeking the review of decisions by government and administrative tribunals; and
- appeals from Local courts.

### Equity Division

The Equity Division exercises the traditional Equity jurisdiction dealing with claims for remedies, other than damages and recovery of debts, including contractual claims, rights of property, and disputes relating to partnerships, trusts, and deceased estates. The Division hears applications brought under numerous statutes, including the *Corporations Act 2001 (Commonwealth)*, the *Family Provision Act 1982*, and the *Property (Relationships) Act 1984*. The Division also handles a diverse range of applications in the areas of Admiralty law, Commercial law, Technology and Construction, Probate and the Court's Adoption and Protective jurisdictions.



FIGURE 2.1 NSW COURT SYSTEM – CRIMINAL JURISDICTION



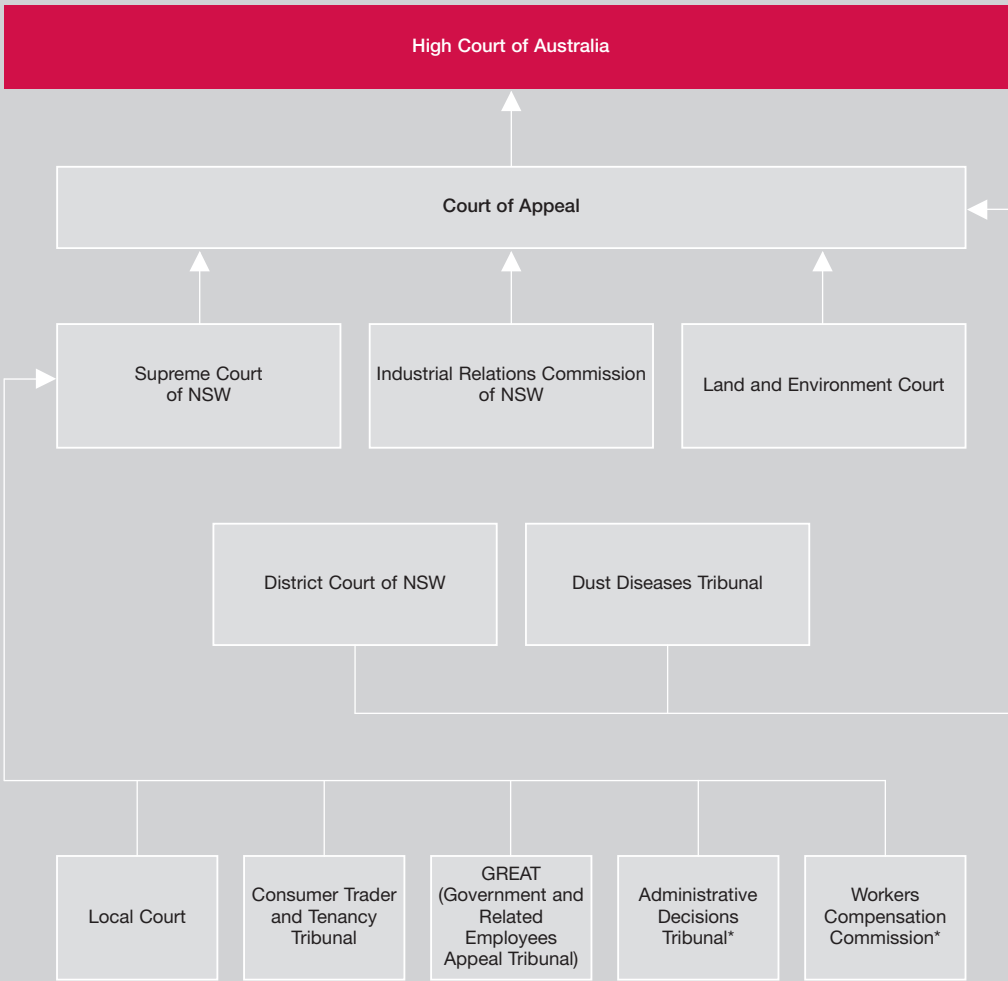
Note: the above diagram is a simplified representation of the appeal process in NSW. Actual appeal rights are determined by the relevant legislation.

\*The Court of Criminal Appeal may hear some appeals in matters relating to section 32A of the Occupational Health and Safety Act 2000.

\*\* Some appeals are made to the District Court of NSW.

# Some appeals from committal proceedings may be made to the Court of Criminal Appeal.

FIGURE 2.2 NSW COURT SYSTEM – CIVIL JURISDICTION



Note: the above diagram is a simplified representation of the appeal and judicial review process in NSW. Actual appeal rights are determined by the relevant legislation.

\*Some claims may instead be made directly to the Court of Appeal pursuant to Section 48 of the Supreme Court Act 1970.

## WHO MAKES THE DECISIONS?

The Judicial Officers of the Supreme Court of New South Wales are its Judges and Associate Judges. The Registrars of the Court have limited decision-making powers.

### The Judges

The Governor of New South Wales appoints the Judges of the Court on the advice of the Executive Council. Judicial appointments are made on the basis of a legal practitioner's integrity, high level of legal skills and the depth of his or her practical experience.

The Governor appoints judges pursuant to section 25 of the *Supreme Court Act 1970*. Section 25 specifies that the Court will include: a Chief Justice, a President of the Court of Appeal and, such other Judges of Appeal, Judges and Associate Judges, as the Governor may appoint from time to time. The Governor is also empowered to appoint qualified persons as Acting Judges of Appeal or Acting Judges when the need arises.

The Chief Justice is, by virtue of his office, a Judge of Appeal, and the senior member of the Court of Appeal. The other members of the Court of Appeal are the President and the other Judges of Appeal. The Judges of the Court are assigned to specific Divisions, and ordinarily confine their activities to the business of those Divisions. In certain circumstances, the Chief Justice may certify that a particular Judge should act as an additional Judge of Appeal in a certain proceedings before the Court of Appeal.

The *Supreme Court Act 1970* also provides that the Chief Justice may appoint Judges to administer a specific list within the Common Law or Equity Divisions. Details of the Judges assigned to these lists in 2005 can be found in the chapter entitled *Caseflow Management*.

As at 31 December 2005 the Judges, in order of seniority, were as follows:

### Chief Justice

The Honourable James Jacob Spigelman AC

### President

The Honourable Justice Keith Mason AC

### Judges of Appeal

The Honourable Justice  
Kenneth Robert Handley AO

The Honourable Justice  
Margaret Joan Beazley

The Honourable Justice  
Roger David Giles

The Honourable Justice  
David Hargraves Hodgson

The Honourable Justice  
Geza Francis Kim Santow OAM

The Honourable Justice  
David Andrew Ipp

The Honourable Justice  
Murray Herbert Tobias AM RFD

The Honourable Justice  
Ruth Stephanie McColl AO

The Honourable Justice  
John Purdy Bryson

The Honourable Justice  
John Basten

### Chief Judge in Equity

The Honourable Mr Justice  
Peter Wolstenholme Young AO

### Chief Judge at Common Law

The Honourable Justice  
Peter David McClellan

## Judges

The Honourable Mr Justice  
Michael Brian Grove RFD

The Honourable Mr Justice  
Timothy James Studdert

The Honourable Mr Justice  
Brian Thomas Sully

The Honourable Mr Justice  
Bruce Meredith James

The Honourable Mr Justice  
William Victor Windeyer AM RFD ED

The Honourable Mr Justice  
Robert Shallcross Hulme

The Honourable Justice  
Carolyn Chalmers Simpson

The Honourable Justice  
Peter John Hidden AM

The Honourable Justice  
Graham Russell Barr

The Honourable Mr Justice  
John Pery Hamilton

The Honourable Justice  
Clifford Roy Einstein

The Honourable Justice  
Michael Frederick Adams

The Honourable Justice  
David Kirby

The Honourable Justice  
Robert Peter Austin

The Honourable Justice  
Patricia Anne Bergin

The Honourable Justice  
Virginia Margaret Bell

The Honourable Justice  
Anthony Gerard Joseph Whealy

The Honourable Justice  
Roderick Neil Howie

The Honourable Justice  
Reginald Ian Barrett

The Honourable Justice  
George Alfred Palmer

The Honourable Justice  
Joseph Charles Campbell

The Honourable Justice  
Terence Lionel Buddin

The Honourable Justice  
Ian Vitaly Gzell

The Honourable Justice  
William Henric Nicholas

The Honourable Justice  
Robert Calder McDougall

The Honourable Justice  
John David Hislop

The Honourable Justice  
Richard Weeks White

The Honourable Justice  
Clifton Ralph Russell Hoeben AM RFD

The Honourable Justice  
Peter Anthony Johnson

The Honourable Justice  
Peter Michael Hall

The Honourable Justice  
Megan Fay Latham

The Honourable Justice  
Stephen Rothman

The Honourable Justice  
Paul Le Gay Brereton RFD

## Acting Judges

The following persons held commissions during 2005 and sat from time to time. Unless otherwise indicated, the judicial officer's commission was effective throughout the entire calendar year.

### *Acting Judges and Acting Judges of Appeal (in alphabetical order)*

- The Honourable John Edward Horace Brownie QC.
- The Honourable James Charles Sholto Burchett QC (commission effective between 1 Jan and 2 Sep).
- The Honourable Michael William Campbell QC (commission effective between 1 Jan and 22 Dec).
- The Honourable Jerrold Sydney Cripps QC (commission effective between 1 Jan and 22 Jan).
- The Honourable David Anthony Hunt AO QC (commission effective between 31 Jan and 31 Dec).
- The Honourable Jane Hamilton Mathews AO.
- The Honourable Jeffrey Allan Miles AO.
- The Honourable Mahla Pearlman AO.
- The Honourable Paul Leon Stein AM.

#### *Acting Judges (in alphabetical order)*

- The Honourable Harvey Leslie Cooper AM (commission effective between 31 Jan to 31 Dec).
- The Honourable David Henry Lloyd (commission effective between 3 Oct and 16 Dec).
- The Honourable Peter James Newman RFD.
- The Honourable David Louthean Patten.
- The Honourable Rex Foster Smart QC.

### **Appointments and Retirements**

#### **Appointments**

- Peter Anthony Johnson was appointed a Judge of the Supreme Court on 1 February 2005.
- Peter Michael Hall was appointed a Judge of the Supreme Court on 8 March 2005.
- Her Honour Judge Megan Fay Latham, a Judge of the District Court, was appointed a Judge of the Supreme Court on 12 April 2005.
- John Basten was appointed a Judge of Appeal and a Judge of the Supreme Court on 2 May 2005.
- Stephen Craig Rothman was appointed a Judge of the Supreme Court on 3 May 2005.
- Paul Le Gay Brereton RFD was appointed a Judge of the Supreme Court on 15 August 2005.
- The Honourable Peter David McClellan, Chief Judge of the Land and Environment Court, was appointed the Chief Judge at Common Law and a Judge of the Supreme Court on 2 September 2005.

#### **Retirements**

- The Honourable Justice Harold David Sperling retired as a permanent Judge of the Supreme Court on 27 February 2005.
- The Honourable Justice David Daniel Levine retired as a permanent Judge of the Supreme Court on 31 March 2005.
- The Honourable Mr Justice John Robert Dunford retired as a permanent Judge of the Supreme Court on 1 May 2005.

- The Honourable Justice Gregory Reginald James retired as a permanent Judge of the Supreme Court on 1 May 2005.
- The Honourable Mr Justice Charles Simon Camac Sheller retired as a permanent Judge of Appeal and Judge of the Supreme Court on 2 May 2005.
- The Honourable Justice James Roland Tomson Wood AO retired as Chief Judge at Common Law and a Judge of the Court on 31 August 2005.

#### **The Associate Judges (formerly “Masters”)**

With the introduction of the *Courts Legislation Amendment Act 2005* on 15 June, the office of “Master of the Supreme Court” was abolished and replaced by the office of Associate Judge. Associate Judges are formally known and referred to as “The Honourable Associate Justice X”. In court or conversation, the appropriate form of address is “Your/His/Her Honour”.

The Governor appoints Associate Judges to the Court under section 111 of the *Supreme Court Act 1970*. Associate Judges are usually assigned to perform work within either the Equity or Common Law Division, but may be asked to work outside the confines of these Divisions in the interests of flexibility.

The work of the Associate Judges generally involves hearing applications that arise before trial, certain types of trial work and work on proceedings that the Court of Appeal or a Judge may refer to them.

Applications that arise before trial include:

- applications for summary judgment;
- applications for dismissal of proceedings;
- applications for extensions of time to commence;
- proceedings under various Acts; and
- applications for the review of decisions of Registrars.

In the Common Law Division, Associate Judges conduct trials of actions for personal injury and possession of property. Associate Judges do not hear jury trials.

The Common Law Associate Judges also hear other trials (without a jury) that are referred to them by the Court of Appeal or a Judge, in addition to appeals from the Local Court and various tribunals. The Associate Judges also handle appeals against the determinations of costs assessors.

In the Equity Division, Associate Judges deal with proceedings under the *Family Provision Act 1982* and the *Property (Relationships) Act 1984*, and applications for the winding up of companies under the *Corporations Act 2001 (Commonwealth)*. They also deal with inquiries as to damages, or accounts referred to them by the Court of Appeal or Equity Judges, along with applications relating to the administration of trusts, and certain probate matters.

As at 31 December 2005, the Associate Judges were:

- The Honourable Associate Justice John Kennedy McLaughlin;
- The Honourable Associate Justice Bryan Arthur Malpass;
- The Honourable Associate Justice Richard Hugh Macready, and
- The Honourable Associate Justice Joanne Ruth Harrison.

## The Registrars

Registrars to the Court are appointed under section 120 of the *Supreme Court Act 1970* pursuant to the provisions of the *Public Sector Management Act 2002*. The Chief Justice may also certify officers of the Supreme Court or Local Courts to act as deputy registrars of the Court from time to time.

Registrars are allocated to work within the Court of Appeal, the Court of Criminal Appeal, or to one of the Court's Divisions. However, they are permitted to work outside these boundaries if required.

Registrars are afforded limited powers of the Court under the *Supreme Court Rules 1970* and the *Uniform Civil Procedure Rules 2005*, and undertake some of the functions formerly performed by Judges and Associate Judges.

The work of the Registrars commonly includes:

- defended applications in relation to security for costs, discovery, interrogatories, provision of particulars and subpoenas;
- costs disputes if the amount in question is unlikely to exceed \$20,000;
- unopposed applications for the removal of cases to, or from, the District Court;
- conducting examinations under various Acts, including the *Corporations Act 2001 (Commonwealth)* and the *Proceeds of Crime Act 1987 (Commonwealth)*;
- dealing with applications for orders under many of the provisions of the *Corporations Act 2001 (Commonwealth)*, such as the winding up of companies;
- handling applications as referred to them by an Associate Judge;
- issuing court orders and writs of execution; and
- entering default judgments.

The *Supreme Court Rules 1970* and delegations under the *Civil Procedure Act 2005* permit registrars to directly assist the Judges in caseload management. For instance, in the Court of Appeal, the Registrar deals with most interlocutory applications, excluding applications to stay judgment pending an appeal; in the Common Law Division, a Registrar conducts status and final conferences in the General Case Management List, and also assists the Possession List and Professional Negligence List Judges.

The Registrars may also be called upon to mediate cases. During 2005, eleven of the Court's Registrars were qualified mediators and available to conduct mediations throughout the year on a rostered basis.

Deputy Registrars are also rostered to act as Duty Registrar and provide procedural assistance to court users in the Registry each day. They also attend to the issue of court orders, writs of executions and other miscellaneous matters.

As at 31 December 2005, the Registrars were as follows:

**Chief Executive Officer and  
Principal Registrar**

Megan Greenwood

**Manager, Court Services and Prothonotary**

Jerry Riznyczok

**Registrar of the Court of Appeal**

Peter Schell

**Registrar in Probate**

Jonathan Finlay

**Registrar in Equity**

Leonie Walton

**Registrar of the Court of Criminal Appeal**

Catherine Ridge

**Assistant Registrar at Common Law**

Bruce Howe

**Senior Deputy Registrars**

Paul Studdert

Nicholas Flaskas

Phillippa Wearne

**Deputy Registrars**

Emoke Durkin

Geoffrey Haggett

Bhaskari Siva

Suzin Yoo

Pauline Green

Jane Probert

**The Work of the Registry**

The Court operates with the support of the registry which provides administrative and clerical support to the Court. In civil matters, the registry is responsible for: accepting documents filed at the Court; securing the custody of court documents including exhibits and documents produced under subpoena; listing matters for hearing; issuing court process; attending to the information needs of the Court's users by providing procedural guidance; maintaining the Court's physical files and computer records, and ensuring that all the necessary facilities are available for hearings. In criminal matters, the registry provides support in processing committals, bail applications, applications under section 474D of the *Crimes Act 1900* and Common Law Division criminal summary jurisdiction proceedings.

In respect of the Court of Appeal, the Registry provides specialist administrative and clerical support to the Court of Appeal's judges and offer procedural guidance to litigants and their representatives. Similarly, in Criminal Appeal matters, the Registry provides support to the Court of Criminal Appeal's judges and users, and also enforces orders concerning the custody of prisoners.

**How the Registry is managed**

The Chief Justice directs the priorities to be pursued by the Registry. In general, the priorities reflect the central aim of meeting the expectations of Court users competently, efficiently and professionally.

Day to day management of the Registry is handled by the Chief Executive Officer and Principal Registrar of the Court. In addition, the Chief Executive Officer is responsible for securing and managing the resources provided to the Court by the NSW Attorney General's Department, providing executive support to the Judges and Associate Judges and developing strategies for improving service delivery to the Court and its users. The Chief Executive Officer undertakes these duties in close consultation with the Chief Justice, other judicial officers, the Department, and representatives from key professional bodies and other Court users.

## 3

# CASEFLOW MANAGEMENT

- Overview by jurisdiction
- Regional sittings of the Court
- Alternative dispute resolution



## INTRODUCTION

The Court manages the flow of its cases from inception to completion in a number of different ways, and is continually looking to improve its processes and outcomes.

Caseflow management strategies are reflected in the Uniform Civil Procedure Rules, the Rules of the Supreme Court and the Practice Notes issued by the Chief Justice. The Judges, Associate Judges and Registrars work together to ensure that cases are resolved as efficiently and justly as possible.

Commonly, cases will be allocated to Registrars to establish the core arguments in dispute and determine when cases should progress to hearing before a Judge or an Associate Judge. A Registrar makes directions to ensure that the case is properly prepared for hearing. If an issue arises that falls outside the specified duties of a Registrar, the Registrar may refer that case to a Judge or an Associate Judge.

## OVERVIEW BY JURISDICTION

### **Court of Appeal**

New appeal cases are initially reviewed for competency and, if necessary, referred back to legal representatives to either substantiate the claim of appeal as of right, or seek leave to appeal. Applications for leave to appeal are examined to ascertain whether they are suitable for hearing concurrently with the argument on appeal.

Appeals are allocated a directions call-over date before the Registrar when a notice of appeal is filed. At that call-over, the appeal may be listed for hearing if the appellant has filed written submissions and the red appeal book. Case management may be ordered with respect to lengthy or complex appeals.

The Registrar case-manages and lists most appeals and applications for leave to appeal, however some cases may be referred to a Judge of Appeal for special case management. Urgent cases are expedited and can be heard at short notice, if appropriate. The Registrar in the Court of Appeal also deals with most interlocutory applications, except applications to stay judgments pending an appeal.

Mediation is offered to parties in appeals identified as capable of resolution by this process. Detailed statistics regarding the number of matters referred to mediation can be found in Appendix (ii).

### **Court of Criminal Appeal**

Case management begins in the Court of Criminal Appeal when an appeal or application is filed in the registry. The appeal or application is listed for callover within two weeks of filing. Callovers are held fortnightly, although special callovers can be held in urgent matters. At the callover, the presiding Registrar will fix a hearing date and make directions for the filing and serving of submissions by the parties.

Generally, three Judges hear an appeal or application. The Chief Justice may also direct that more than three Judges sit on an appeal or application, particularly in matters involving an important issue of law. In some circumstances, the Chief Justice may direct that two Judges hear an appeal against sentence. A single judge hears sentence appeals from the Drug Court of New South Wales, and also deals with bail applications and other interlocutory applications in the Court.

Since 1 July 2002, pre-appeal management procedures have been implemented for sentence and conviction appeals to the Court of Criminal Appeal. Accused persons may initially lodge a Notice of Intention to Appeal, without specifying their grounds of appeal. The Notice of Intention to Appeal allows the accused person six months (or such longer time as the Court grants) to file an actual appeal. Transcripts and exhibits are now provided to accused persons free of charge to facilitate the preparation of an actual appeal.

The impact of these pre-appeal management procedures on disposal rates can be seen by comparison with previous years. For detailed statistical analysis of the effects these procedures have had on disposal rates, refer to the chapter entitled *Court operations*.

### **Common Law Division**

Case management in the Division begins when a summons or statement of claim is filed in the registry. Each summons or statement of claim (with the exception of default matters) is given a return date before a Judge or Registrar and placed in a List. A Judge is appointed to manage each List, whilst the Common Law List Judge monitors all matters listed for hearing before a Judge. Registrars of the Division handle default matters administratively.

### **Common Law List Judge**

The List Judge manages the progress of cases from Call-up until a trial judge is appointed. Judges and Registrars refer matters to the Call-up that are ready for hearing and a hearing date is allocated. At the Call-up, the List Judge considers a number of factors, including the availability of Judges, the type of matters, and estimates of duration, before listing matters for hearing.

The List Judge also hears any applications for adjournment. Justice Hislop was the Common Law List Judge in 2005.

### **Common Law Duty Judge list**

The Duty Judge is available each day to hear urgent applications, including applications for interlocutory injunctions, during and outside normal Court hours when required. Judges of the Division are rostered to act as the Duty Judge for a week at a time during law term. A Vacation

Judge is rostered during the court vacation to perform this same role.

The Duty Judge also conducts an applications list each Monday. The applications in this list are matters that cannot be determined by an Associate Judge or a Registrar. These matters include appeals from the Local Court under the *Crimes (Local Courts Appeal and Review) Act 2001*, applications for restraining orders, applications for declaratory relief, and applications to dispense with a jury. Matters are initially listed at 9am before a Registrar to determine whether the application is ready to proceed. The Duty Judge may specially fix matters that cannot be heard on the Monday to later that week.

The Duty Judge determines interlocutory applications for restraining assets and issuing examination orders under the *Confiscations of Proceeds of Crime Act 1989*, *Criminal Assets Recovery Act 1990*, and *Proceeds of Crime Act 1987 (Commonwealth)*. The Duty Judge also considers, in chambers, applications seeking authorisation of warrants, such as those made under the *Listening Devices Act 1984*.

### **Associate Judges' list**

The Associate Judges in the Common Law Division deal with statutory appeals from the Local Court (except under the *Crimes (Local Courts Appeal and Review) Act 2001*), the Consumer Trader and Tenancy Tribunal, and against costs assessors.

The Associate Judges also deal with applications for summary judgment and dismissal, applications for extension under the *Limitations Act 1969*, and opposed applications to transfer matters from the District Court. The Associate Judges may deal with other matters as outlined in Schedule D of the *Supreme Court Rules 1970*.

Matters allocated to the Associate Judges' List are case managed by a Registrar daily at 9am. The Registrar refers applications to an Associate Judge when ready for hearing.

## **Lists of the Division**

In addition to the above, the work of the Division is also distributed amongst a number of specialised Lists. These Lists (in alphabetical order) are:

- Administrative Law List;
- Bails List;
- Criminal List;
- Defamation List;
- General Case Management List;
- Possession List; and
- Professional Negligence List.

The Chief Justice appoints a specific Judge to be responsible for the management of a List throughout the year. The Judges responsible for the management of a list during 2005 are detailed below.

### **Administrative Law List**

The Administrative Law List reviews decisions of government, public officials and administrative tribunals such as the Consumer Trader and Tenancy Tribunal. The Administrative Law List operates in accordance with the procedures outlined in Practice Note SC CL 3.

In 2005, Justice Hall was responsible for the management of the Administrative Law List, with the assistance of Justice Adams.

### **Bails List**

Applications for bail or to review bail determinations can be made to the Supreme Court under the *Bail Act 1978* in respect of any person accused of any offence, even if the trial will not be heard in the Supreme Court. These applications are listed throughout the year, including during the court vacation. Common Law Division Judges are rostered on a weekly basis to determine these applications.

### **Criminal List**

Arraignment hearings are held each month during Law Term. The aim of the arraignment procedure is to minimise the loss of available judicial time that occurs when trials are vacated after they are listed for hearing, or when a guilty plea is entered immediately prior to, or on the day of, the trial's commencement.

The arraignment procedure involves counsel at an early stage of the proceedings. This allows both

the prosecution and defence to consider a range of issues that may provide an opportunity for an early plea of guilty, or shorten the duration of the trial. The procedures for arraignment are detailed in Practice Note SC CL 2. Justice Barr was responsible for the management of the Criminal List during 2005.

### **Defamation List**

Section 7A of the *Defamation Act 1974* sets out the respective functions of the Court and jury in defamation proceedings. An initial hearing is held before a jury to determine whether the matter complained of carries the imputation alleged and, if it does, whether the imputation is defamatory. A separate, subsequent hearing takes place before a Judge to determine whether any defence can be established and if damages are payable. This second hearing is only required if the jury determines that the matter complained of was defamatory.

The Defamation List was managed by Justice Nicholas during 2005. A Registrar assists by case-managing matters listed for directions. Practice Note SC CL 4 governs the operation of the List.

### **General Case Management (GCM) List**

This List comprises all civil cases commenced by Statement of Claim that are not included in the Administrative Law, Defamation, Professional Negligence or Possession Lists. It includes money claims, personal injury claims, claims for possession (excluding land), breach of contract, personal property damage, malicious prosecution, and claims under the *Compensation to Relatives Act 1897*. These cases are case-managed by a Registrar who conducts status conferences and final conferences. At the status conference, the Registrar gives directions to ensure the case is ready for hearing by the compliance date. The procedures associated with the running of this List are set out in Practice Note SC CL 5. Justice Hoeben managed the GCM List during 2005.

### **Possession List**

The Possession List deals with all proceedings for the recovery of possession of land. The management of the List encourages early resolution of cases through mediation, other alternative dispute resolution processes, or

settlement. Case management is also used to clarify the real issues in dispute. Practice Note SC CL 6 applies to cases in this List. Justice Johnson was responsible for managing the Possession List during 2005.

### **Professional Negligence List**

Claims against medical practitioners, allied health professionals (such as dentists, chemists and physiotherapists), hospitals, solicitors and barristers are allocated to the Professional Negligence List. Specialisation in the List allows the parties to focus on the real issues under dispute in these types of claims. A Registrar monitors cases at regular conference hearings. Conference hearings provide an opportunity for parties to discuss outstanding issues in the case, and provide a forum for mediation between the parties. Practice Note SC CL 7 applies to this list.

The Professional Negligence List Judge hears applications and makes directions according to the specific needs of each matter. Mr Justice Studdert managed the List during 2005. Justice Sperling assisted Mr Justice Studdert with the list until he retired in February.

### **Equity Division**

Several general lists operate in the Equity Division to assist in managing the Division's caseload:

- Expedition list;
- Short Matters list;
- Equity Duty Judge list;
- General list;
- Long Matters list, and
- Associate Judges' list.

### **Expedition list**

In 2005, two Judges were made available to hear expedited cases. A case is expedited when sufficient urgency is shown. When the application is granted, the Judge gives directions and monitors the preparations for hearing. The Expedition list Judges heard all applications for expedited hearings in 2005. The same Judge hears the case when it is ready to proceed. Mr Justice Young was the Expedition list Judge during 2005.

### **Short Matters list**

Cases in this List are fixed for hearing before a Judge when judicial time becomes available at short notice. A Registrar maintains this List, which includes cases that will be ready for hearing with three days' notice. These are mostly cases of a less complex kind that can usually be disposed of within one day. The Short Matters List is called over before the Expedition list Judge on the last Friday of each month immediately after the Expedition list.

### **Equity Duty Judge list**

The Duty Judge mainly hears urgent applications, sometimes outside normal court hours. The Duty Judge also hears uncontested or short cases. Judges of the Division are ordinarily rostered as Duty Judge for a two-week period. There is provision for the Duty Judge to fix an early hearing date for a case and engage in pre-trial management of that case. The Duty Judge would make use of this provision if he or she considers that an early final hearing would result in a substantial saving of the Court's time. The work carried out by the Duty Judge is extremely varied and may include urgent applications by the Department of Community Services to intervene where a child's welfare is involved, or property and commercial disputes.

### **General list**

Other cases are placed in the General list when set down for hearing (if commenced by a statement of claim), or when the Registrar considers the matter ready for hearing (if commenced by summons). Provided the estimated hearing length is less than six days and there are fewer than 100 matters already listed, the Registrar will place the matter in the next periodic call-over. At the call-over, the Registrar allocates a date for provisional hearing of the case, as well as a time for pre-trial conference, ordinarily before the trial judge.

### **Long Matters list**

Matters in the General list are placed in the Long Matters list when the Registrar becomes aware a matter may require more than six hearing days. Parties are required to file a synopsis of facts of the case and the issues under dispute. On receipt of this synopsis and any other details required by

the Registrar, the matter will be referred to a Judge who will then conduct case management hearings and fix the hearing date.

### **Associate Judges' list**

The work of the Equity Division Associate Judges includes dealing with contested procedural applications and conducting inquiries as directed by Judges. Their work also includes the hearing of most applications under the *Family Provision Act 1982*, the *Property (Relationships) Act 1984*, and certain provisions of the *Corporations Act 2001 (Commonwealth)*. An Associate Judge conducts a monthly callover of matters, at which time a hearing date (usually in two months' time) is allocated. An Associate Judge also handles weekly referrals from the Registrar, determining those that can be dealt with immediately, and adjourning the balance. The Registrar only refers matters where the hearing time is not expected to exceed an hour. More complex matters are listed in the next call-over of proceedings in the Associate Judges' list. Urgent referrals, such as the extension of a caveat, may be made at any time.

### **Lists of the Division**

The Equity Division's caseload is also managed by allocating certain matters to specific Lists according to the nature of the claims. These Lists are set out below in alphabetical order:

- Admiralty List;
- Adoptions List;
- Commercial List;
- Corporations List;
- Probate List;
- Protective List; and
- Technology and Construction List.

The Chief Justice appoints a Judge to each of these Lists to bear responsibility for monitoring the List throughout the year. The Judges allocated to each List during 2005 are noted below.

### **Admiralty List**

The Admiralty List deals with maritime and shipping disputes. It is administered in the same manner as the Commercial List (see below). Justice Palmer had responsibility for this List in 2005.

### **Adoptions List**

This List deals with applications for adoption orders and declarations of the validity of foreign adoptions under the *Adoptions Act 2000*. Most applications are unopposed. Once all supporting affidavits are filed, a Judge will deal with the application in the absence of the public, and without the attendance of the applicants or their lawyers. Unopposed applications require close attention for compliance with formal requirements, but there is little delay. A small number of contentious hearings take place in court in the absence of the public. Most of these relate to dispensing with consent to adoption. The Registrar in Equity deals with requests for information under the *Adoptions Act 2000*. Justice Palmer was the List Judge during 2005.

### **Commercial List**

The Commercial List is concerned with cases arising out of transactions in trade or commerce. The caseload management strategy applied to the running of this List aims to have matters brought on for hearing quickly by:

- attending to the true issues at an early stage;
- ensuring witness statements are exchanged in a timely manner; and
- intense monitoring of the preparation of every case.

There is also adherence to the allotted hearing dates, and hearings are continued to conclusion, even though time estimates may be exceeded. Justice Bergin was the List Judge in 2005.

### **Corporations List**

A Judge sits each Monday and Friday to hear short applications under the *Corporations Act 2001 (Commonwealth)* and related legislation. The Registrar may refer applications to the Judge, with urgent applications to be heard on Friday.

The Judge will give directions and monitor preparations for hearing in longer matters, as well as in other complex corporate cases. Cases managed in this List are generally given a hearing date as soon as they are ready.

The Corporations List Judge during 2005 was Justice Austin, assisted by Justice Barrett.

### **Probate List**

The work performed by the Judges and the Probate Registry consists of both contentious and non-contentious matters. The majority of non-contentious cases are dealt with by the Registrar and Deputy Registrars. This includes the granting of common form probate where applications are in order and unopposed.

Both the Probate List Judge and the Registrars have procedures whereby some supervision is kept over executors in the filing of accounts, and ensuring beneficiaries are paid.

In court, the Registrar considers routine applications, and applications concerning accounts. Should a routine application require a decision on a matter of principle, the application is referred to the Probate List Judge.

The Probate List Judge sits once a week to deal with complex applications. If an application can be dealt with quickly, it is usually heard immediately. Others are set down for hearing, normally within a month.

Contentious matters are monitored by either the Registrar or a Judge. Contentious matters commonly include disputes as to what was a testator's last valid will. When these cases are ready to proceed, they are placed in the call-over list to receive a hearing date before an Equity Judge.

The Probate List Judge meets with the Registrars on a regular basis to discuss the efficient working of the List. Mr Justice Windeyer was the Probate List Judge during 2005.

### **Protective List**

The work of this List involves ensuring that the affairs of people deemed incapable of looking after their property, or themselves, are properly managed. The List also deals with appeals from the Guardianship Tribunal of NSW, along with applications (in chambers) by the Protective Commissioner for advice regarding the administration of estates. From July 2005, the Court also considered applications regarding missing persons' estates and, in certain circumstances, may order that their estate be managed under the *Protected Estates Act 1983*.

Often, the issues under dispute in the Protective List are of a highly sensitive nature. The Court acknowledges this situation, and endeavours to be as flexible as permissible in handling these proceedings with a minimum of formality. However, when there is a dispute which cannot be solved in this way, it is decided according to law.

The Deputy Registrar dedicated to the Protective List sits in court one day a week and almost all cases are listed in front of her. The Deputy Registrar may submit a case to be determined by the Judge without further appearance or adjourn a case into the Judge's list. A Judge sits once a week to deal with any referred cases. Most cases are considered on the Judge's usual sitting day as soon as the parties are ready. Longer cases, however, are specially fixed, usually within one month.

The Protective List Judge consults regularly with the Deputy Registrar to discuss the efficient working of the List. Mr Justice Windeyer was the Protective List Judge during 2005.

### **Technology and Construction List**

Cases involving complex technological issues and disputes arising out of building or engineering contracts are allocated to this List. The List is administered by the same Judges and in the same manner as those in the Commercial List.

## REGIONAL SITTINGS OF THE COURT

The Court of Criminal Appeal sat in Newcastle and Albury in 2005. Several first instance criminal trials were conducted in the following regional locations: Bathurst, Dubbo, Griffith, Newcastle and Wollongong. Criminal trials will continue to be held in regional venues as required.

Civil hearings were held at regional venues by special fixture at the following locations during the year: Albury, Newcastle, Orange, Wagga Wagga and Wollongong.

All proceedings are managed from Sydney irrespective of where the proceedings commenced or the venue for hearing.

## ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution is a broad term that refers to the means by which parties seek to resolve their dispute, with the assistance of a neutral person, but without a conventional contested hearing. The two alternative dispute resolution processes most commonly employed in Supreme Court proceedings are mediation and arbitration.

### Mediation

The option of dispute resolution through mediation is available for most civil proceedings pursuant to Part 4 of the *Civil Procedure Act 2005*. Mediation is not available in criminal proceedings.

A matter may proceed to mediation at the request of the parties, or the Court may refer appropriate cases to mediation, with or without the consent of parties. If the Court orders that a matter be referred to mediation, there are several ways in which a mediator may be appointed. Firstly, parties may be in agreement as to a particular mediator. Secondly, the Court may appoint a specific mediator, who may also be a Registrar of the Court. If parties cannot come to an agreement, the Court is responsible for appointing a qualified mediator from a prescribed list. This procedure is set out in Practice Note SC Gen 6.

The role of the mediator is to assist parties in resolving their dispute by alerting them to possible solutions, whilst allowing the parties to choose which option is the most agreeable. The mediator

does not impose a solution on the parties. The Court made eleven of its qualified Registrars and Deputy Registrars available throughout 2005 to conduct mediations at specified times each week.

Settlement of disputes by mediation is encouraged in the Court of Appeal, and both the Common Law and Equity Divisions. Parties may derive the following benefits from mediation:

- an early resolution to their dispute;
- lower costs; and
- greater flexibility in resolving the dispute as the solutions that may be explored through mediation are broader than those open to the Court's consideration in conventional litigation.

Even where mediation fails to resolve a matter entirely and the dispute proceeds to court, the impact of mediation can often become apparent at the subsequent contested hearing. Mediation often helps to define the real issues of the proceedings and this may result in a reduction in eventual court time and, consequently, lower legal costs.

### Arbitration

While arbitration involves adjudication of a dispute by a third party, this adjudication is not conducted by the Court. Determination of a dispute regarding recovery of damages through arbitration is permitted under Part 5 of the *Civil Procedure Act 2005*.

The Chief Justice appoints experienced barristers & solicitors as arbitrators following a nomination by their respective professional associations. Arbitrators generally hold their appointment for two years and the Chief Justice may also reappoint the arbitrator.

By contrast with a mediator, an arbitrator imposes a solution on the parties (an award) after listening to the arguments and evidence presented.

A decision of an arbitrator becomes a final judgment of the Court 28 days after the award is given. Any party to the arbitration may apply for a rehearing, upon which, the matter is then reheard before a Judge.

## 4

# COURT OPERATIONS

- Overview of operations by jurisdiction
- Time standards

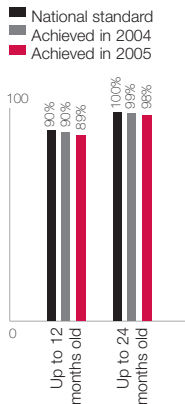


## OVERVIEW OF OPERATIONS BY JURISDICTION\*

\* to be read in conjunction with Appendix (ii)

FIGURE 4.1

### Court of Appeal achievements against time standards for pending caseload



### Court of Appeal

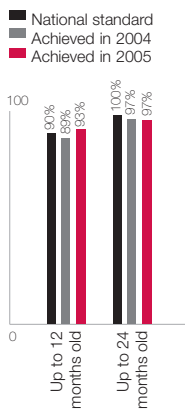
Since last year, the number of new cases coming to the Court of Appeal has decreased by approximately nine per cent. This reduction is likely to continue into 2006, indicated by a 22 per cent reduction in lodgments of holding appeals and holding summonses in 2005, compared with 2004.

The disposal rate increased slightly. An increased number of leave applications were disposed of in 2005, particularly where the parties elected to have the application for leave heard concurrently with the appeal. In 2005 there were 107 cases finalised by concurrent hearing (14 per cent of all disposals), compared with 64 cases in 2004 (nine per cent of all disposals that year). Among the disposals of substantive appeals, 271 were finalised by delivery of reserved judgments, and 52 were finalised by ex tempore judgments.

The reduced filing rate and the maintained disposal rate have brought about a nine per cent reduction in the pending caseload during 2005. Performance in relation to the national time standards remained steady since 2004 and is very close to the nominated standards (see Figure 4.1). Of the 490 cases pending at the end of 2005, 10 were older than 24 months.

FIGURE 4.2

### Court of Criminal Appeal achievements against time standards for pending caseload



### Court of Criminal Appeal

The number of new cases coming to the Court of Criminal Appeal has remained relatively stable since 2002. The disposal rate for 2005 was almost identical to the filing rates seen in 2003, 2004 and 2005. The Court of Criminal Appeal finalised 91 per cent of cases by substantive hearing of an appeal, a similar proportion to that seen in 2004. The proportion of cases finalised by abandonment or withdrawal rose slightly to nine per cent in 2005, from seven per cent in 2004.

At the end of 2005 the number of pending cases has been brought to the lowest level in more than 25 years. The age profile has continued to improve as depicted in Figure 4.2. Against the national standards, performance against the 12-month standard improved from 89 per cent in 2004 to 93 per cent in 2005, a result well above the national standard of 90 per cent. Against the 24-month standard the performance has remained steady and close to the standard. Seven

of the 229 appeals pending at the end of 2005 were older than 24 months. Those cases generally involve serious charges, and have been delayed by ongoing proceedings in the lower court, or by complications in appeal presentation or judgment preparation.

### Common Law Division criminal cases

Comparison of this year's activity with activity in previous years is limited because the Court applied new counting rules from 1 January 2005. The new counting rules are:

- the counting unit is now defendants (previously it was cases, regardless of the number of defendants in a case);
- disposal is counted at the time of sentence, acquittal or other final disposal (previously it was counted at verdict, plea or other final disposal); and
- where a trial collapses and a re-trial is ordered, the counting of the age of the case continues (previously the time taken for the collapsed trial was ignored and age was calculated from the date of the order for the re-trial).

Allowing for the effect of the new counting rules, fewer cases came to the Criminal List in 2005, and the disposal rate remained at a good level.

At the end of 2005 there were 93 defendants pending, a 26 per cent reduction from 2004, when there were 125 defendants (represented by 99 cases). Against the national standards, performance improved significantly against the 12-month standard, from 60 per cent in 2004 to 73 per cent in 2005 (see Figure 4.3). Against the 24-month standard, performance has dropped. There were 13 pending defendants at the end of 2005 whose cases were older than 24 months. Of these, eight defendants were at the sentence hearing stage. For each of the other defendants there had been at least one collapsed trial. When evaluating the Court's performance against the national standards, it is worth bearing in mind that almost all indictments in the Court's Criminal List are for offences of murder, manslaughter or cases where a life sentence may be imposed, whereas the range of charges routinely brought in supreme courts in other states and territories is broader.

There continue to be fewer pleas of guilty entered at arraignment or later. Consequently, a greater number of defendants are proceeding to trial. With average hearing estimates of four to six weeks per trial (and some trials estimating a need for up to 24 weeks of hearing time), this represents a considerable demand for judicial time. The Court used its acting judges to enable more hearing time to be allocated for criminal trials during 2005. Without acting judges, the listing delays would have increased and significantly added to overall delay in finalising cases.

During 2005, listed trials for 11 defendants either collapsed or were adjourned. For one defendant, a trial was “not reached”. This is the second occasion on which a criminal trial has been “not reached” in the last five years. There is limited over-listing of criminal trials. The Court is aware of the financial impact for the various publicly funded agencies involved in the criminal justice system, and of the emotional and financial impact for family of the victim and for witnesses, when trials are not able to run. All options are explored to attempt to start a listed criminal trial.

### Common Law Division civil cases

The civil work of the Common Law Division can be separated into two groups: defended cases (including the specialist case-managed lists) and uncontested cases (such as those proceeding to default judgment, and applications dealt with administratively by Registrars and Registry officers). At the end of 2005, the defended cases represented 39 per cent of the pending civil caseload of the Common Law Division, down from 60 per cent at the end of 2004. That change is a direct result of increased filings in the Possession List.

Common Law Division civil filings increased by 37 per cent in 2005. This followed a 25 per cent increase during 2004. The increase continues to come principally from filings that proceed as uncontested matters in the Possession List, which were 61 per cent higher in 2005 than in 2004. Filings that proceeded as defended cases decreased by four per cent.

Overall, disposals increased by 21 per cent, largely on account of the increased number of cases proceeding to default judgment. Among the defended cases there was a 12 per cent increase, which included disposal of 282 of the last 283 cases in related actions seeking damages for injuries arising from silicon implants (from an original group of approximately 4,000 cases). Among the uncontested cases there was a 25 per cent increase. The increase in disposals does not match the increase in filings, and is not expected to while the filing rate continues to grow. The disposal rate is only likely to catch up with the filing rate after the filing rate has levelled or decreased.

The Division has reduced its pending caseload of defended cases, even when the 282 disposals of silicon implant cases are excluded. Significantly, reduction has continued within the caseloads of the largest of the defended lists, particularly in the General Case Management List and the Professional Negligence List. This is a significant outcome as those two lists also have the longest median finalisation times. The pending caseload of uncontested cases has inevitably increased because of the activity in the Possession List.

During 2005 there were 565 cases listed for hearing, compared with 620 during 2004. Although fewer hearings were listed, the number (and proportion) that proceeded to be heard was higher: 257 (45 per cent) in 2005, compared with 244 (39 per cent) in 2004. Fewer cases settled after taking a listing: 206 (37 per cent) in 2005, compared with 248 (40 per cent) in 2004. So that available judicial time is optimally used, the Common Law Division’s civil hearings are over-listed. This has a risk that some cases may be “not reached”. In 2005 the proportion of “not reached” cases was the same as in 2004 (five per cent).

The change in the proportions of heard and settled cases has implications for case duration and judicial time, as more of the cases listed for hearing will also require judgments to be written. The Judges assigned to the Common Law Division also sit in the Court of Criminal Appeal, where usually each bench includes at least two Judges from the Common Law Division.

FIGURE 4.3

**Criminal List achievements against time standards for cases of pending defendants**

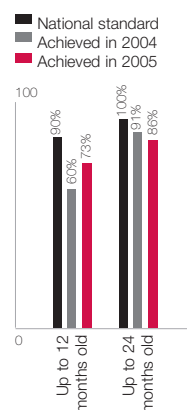
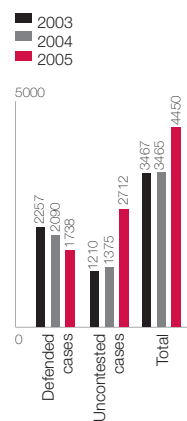


FIGURE 4.4

**Common Law Division pending civil caseload 2003-2005**



In most lists, median finalisation times have either improved or been maintained. There was a slight increase in median finalisation time for the General Case Management List, which is being intensively reviewed so that older cases in particular can be case-managed and finalised. The increase therefore reflects the finalisation of old cases during the year rather than an expectation of increased delay for proceedings.

### **Equity Division**

After four successive years of increase, there has been a six per cent decrease in filings in the Equity Division. Filings have reduced in the two largest lists of the Division, the Corporations List (by nine per cent) and the General List (by six per cent).

The reported disposal rate overall was similar to that in 2004. The pending caseload has remained steady since 2004, although there has been a 12 per cent growth since 2001.

The figures for disposals and pending cases in the Division's two largest lists, the General List and Corporations List, are not considered to be fully reliable. Those lists cannot be monitored sufficiently to eliminate counting of cases that have been re-opened after finalisation of the substantive issues. A significant number of cases may have more than one disposal recorded against them. This counting problem is expected to diminish when the CourtLink system becomes available for civil cases. Meanwhile, however, trends can be inferred from any significant patterns of change over time.

During 2005 there were 565 cases listed for hearing, compared with 620 during 2004. Although fewer hearings were listed, the number (and proportion) that proceeded to be heard was higher: 257 (45 per cent) in 2005, compared with 244 (39 per cent) in 2004. Fewer cases settled after taking a listing: 206 (37 per cent) in 2005, compared with 248 (40 per cent) in 2004.

There were 305 listed cases heard to conclusion before Judges or Associate Judges during 2005, compared with 312 during 2004. Additionally there were 250 cases that settled after being listed for hearing, an increase of five per cent over the number in 2004 (223). Typically, about half of the disposals within the Equity Division are achieved in the Registrar's lists (and most of those would have

not have required a listing before a Judge or an Associate Judge). Unlike the Common Law Division, the Equity Division does not routinely over-list the cases for hearing.

The median case finalisation times are shown in Appendix (ii). These have either improved or are within reasonable levels. The large increase in median finalisation time for Admiralty List cases is not of concern – volatility in statistics is expected in small lists. The improved level achieved within the Technology and Construction List during 2004 has been maintained in 2005.

Registrars deal with the uncontested applications relating to probate matters. A total of 21,515 applications were filed during 2005. Where an application for a grant of probate, letters of administration or re-seal (of a probate grant) meets all procedural requirements, the grant is usually made within two working days.

### **Use of alternative dispute resolution**

During 2005, there were 517 recorded referrals to mediation, of which 250 were referrals to court-annexed mediations conducted by the Court's Registrars. The court-annexed programme continued to achieve a healthy percentage of settlements.

No cases were referred to arbitration this year. The number of arbitration referrals has progressively declined since 1997, when the District Court's jurisdiction expanded to include most of the work that had typically been arbitrated in the Supreme Court.

The statistics for mediation and arbitration are detailed in Appendix (ii).

## TIME STANDARDS

For its appellate courts and for the Criminal List, the Court's performance in dealing with cases in a timely way is now reported in terms of the age of the pending caseload. Achievement for 2005 against national standards is shown in Appendix (ii).

Other courts and organisations may use different methods for reporting timeliness of case handling, and statistics are not necessarily comparable. Filings and disposals may be dealt with in different ways. To cite criminal cases as an example, the District Court of New South Wales reports performance in terms of the time between committal and the commencement of trial, while the Australian Bureau of Statistics produces national statistics that report performance in terms of the time from committal to acquittal or sentencing.

The Court has now aligned its timeliness reporting for criminal matters with the methods used by the Productivity Commission in its annual *Report on Government Services*. Timeliness reporting for the Court of Appeal is also aligned with the methods used by the Productivity Commission, with the exception that reporting here is confined to those cases lodged in the Court of Appeal (rather than covering all civil cases that are appellate in nature). Measurement of the age distribution within a pending caseload shows a current position that reflects the degree of success of delay reduction strategies, and helps identify areas for further strategic management.

For the civil work of the Common Law Division and for the Equity Division, the Court has determined that it will report on the age distribution within those pending caseloads once the CourtLink system is able to provide precise and timely statistics on the age of those cases. Current systems are unable to provide statistics of sufficient detail and accuracy for these two areas of the Court's work, which represented approximately 8,500 pending cases at the end of 2005 (excluding non-contentious probate applications). Once a year the Court completes a one-off analysis, using special counting rules, to provide an annual estimate (as at 30 June) of the age distribution for these cases as a single group to the Productivity Commission for publication in the *Report on Government Services*.

## 5

## EDUCATION AND PUBLIC INFORMATION

- Judicial officer education
- Public education programme
- The role of the Public Information Officer

## JUDICIAL OFFICER EDUCATION

Many judicial officers updated and developed their skills and knowledge during the year by attending conferences, seminars and workshops. Some of the programmes are tailored specifically to the Court's needs, whilst others target the international legal community. An overview of some of the educational activities completed during 2005 appears below. Please refer to Appendix (iv) for a more comprehensive list of "Other Judicial Activity" during 2005.

### Domestic activities

- Seven judges attended the Supreme and Federal Courts Judges' Conference in Darwin. The Honourable Justice Bell presented a paper entitled "How to Preserve the Integrity of Jury Trials in a Mass Media Age". Other papers presented at the Conference addressed the following: a discussion regarding the case *Dhakiyarr v The King*; indigenous health; the affects of drugs and alcohol on the brain; the role of judges in protecting human rights; judicial and legal writing; administrative law, and establishing a judicial system in East Timor.
- Forty Judges and four Associate Judges attended the Supreme Court Annual Conference in Port Stephens. The three-day programme included sessions on recent developments in criminal trials, judgment writing, the Chinese legal system; a trustee's duty of disclosure and a beneficiary's right to information; statutory construction; fusion issues; Islamic law, and the NSW prison system. Speakers at the Conference were: the Right Honourable Lord Justice Robin E Auld (Court of Appeal, Royal Courts of Justice, UK); the Honourable Justice Mason; the Honourable Justice Howie; Professor James Raymond; Professor Wang Chenguang (School of Law, Tsinghua University, China); Ms Hilary Penfold QC (Commonwealth Department of Parliamentary Services); Chief Superintendent Lee Downes (Commander for Women's Facilities and Services), and Professor Tim Lindsey (Director, Asian Law Centre and Deputy Director, Centre for the Study of Contemporary Islam, University of Melbourne).

- Fifteen Judges and one Associate Judge attended the Court's judgment writing workshop in Sydney with Professor James Raymond. The Judicial Commission of New South Wales assisted with organising the workshop.
- Three judges attended the Ninth Colloquium of the Judicial Conference of Australia at the Sunshine Coast. The Right Honourable Sir Gerard Brennan AC KBE delivered the keynote address on the topic of "The Common Law, Law for a Time, Law for a Place". The Honourable Justice McClellan presented a paper entitled "Complaints against and Removal of Judges". Other issues covered during the two-day Colloquium included: Human Rights, Terrorism and the Law; Magistrates: Independent but Accountable, and Judicial Exchange.
- Four judges attended the National Judicial Orientation Programme in Sydney. This Programme is jointly organised and run by the National Judicial College of Australia, the Australian Institute of Judicial Administration and the Judicial Commission of New South Wales.

### International activities

- The Chief Justice attended the 6th World Wide Common Law Judiciary Conference in Washington DC. A range of topics were discussed, such as: science and the law; appellate court case loads; relationships between the judiciary and the media; terrorism and human rights; technology in courts, and the use of foreign law. Presenters at the Conference included three justices of the Supreme Court of the United States; the Master of the Rolls; the Chief Justice of India, and senior Appellate judges from the United States, Canada, England, Ireland, Australia and New Zealand. The Chief Justice presented a paper on the impact of internet technology on criminal trials.

From left to right:  
Chief Justices  
of NSW, Russia,  
France, Canada,  
China, North Korea  
and Japan at the  
World Jurists'  
Conference in  
Shanghai.



- The Chief Justice attended the biennial Pacific Judicial Conference in Vanuatu. The Conference was attended by many judges, including Chief Justices from throughout the Pacific Region. Papers delivered concentrated on issues of human rights. The Chief Justice presented a paper on statutory interpretation and human rights. At the Conference, the Chief Justices of the Pacific met with representatives of AUSAID and NZAID and adopted a new Pacific Judicial Development Programme as a five year plan for financial and training support for the judges in the developing nations of the Pacific.
- The Chief Justice attended the World Jurists' Conference in Beijing and Shanghai. The Conference was attended by some 1,000 Chinese delegates and 500 international delegates including approximately 60 Chief Justices. The Conference sessions covered a wide range of legal issues. The Chief Justice delivered a paper at the Rule of Law session, together with the Chief Justices of China, Canada, France, Japan, Russia, North Korea and a Justice of the Supreme Court of the United States.
- The Chief Justice attended the Media Law Resource Centre Conference in London, at which most major media organisations in the United States and the United Kingdom were represented by in-house counsel and other practitioners. The Conference considered a range of media law issues including defamation, privacy, reporters' privilege, reporting of court proceedings and freedom of information. The Chief Justice presented a paper on the principle of open justice.
- The Chief Justice and Justices McClellan and Adams attended the Commonwealth Law Conference in London. The Chief Justice presented a paper on Tort Law Reform and Justice McClellan presented a paper on Access to Justice in Environmental Law. The papers at the conference covered the broadest possible range of issues. Panels were chaired and papers were presented by various senior judges and lawyers throughout the Commonwealth including the Chief Justices of Australia, Canada, South Africa, England, India and Hong Kong.
- Two judges participated in an international exchange programme organised by the Court of Appeal of Quebec. The programme focused on integrated judicial mediation in the various fields of law (civil, commercial, family and criminal) and judicial authorities (first instance and appeal courts). About 80 persons took part in the training, including expert delegates from central and Eastern Europe and judge mediators from France, Germany, Netherlands, Norway, several Canadian provinces, Mexico and the Caribbean.
- Two judges and one Associate Judge attended the 23rd Australian Institute of Judicial Administration (AIJA) Conference in Wellington, New Zealand. The Conference's theme was "Technology, Communication, Innovation". Presenters covered a range of topics at the Conference including the provision of e-services in courts, security and access issues surrounding electronic court documents and the relationship between courts and the media. The Hon Madam Justice Frances Kiteley, Ontario Superior Court of Justice, offered attendees an insight into Canada's experience of information and communications technology in courts.

## PUBLIC EDUCATION PROGRAMME

The Court's Registrars address secondary school students and community groups regarding the Court's jurisdiction and daily operations. The lectures culminate in the groups being escorted to an appropriate courtroom to observe a Supreme Court trial. Demand for these group talks remains high, particularly amongst secondary school Legal Studies students. In 2005, the Registrars addressed over 1,000 students and members of the public over the course of 69 scheduled talks conducted during the year.

The Court's public education programme also extended to participating in *Law Week 2005: Relationships and the Law* and the History Council of NSW's History Week. The activities offered by the Court included architectural tours of the King Street Complex and free educational displays of historic court documents.

## THE ROLE OF THE PUBLIC INFORMATION OFFICER

The Court's Public Information Officer (PIO) is the principal media spokesperson for the superior NSW courts and provides a professional court-media liaison service.

The major role of the position is to provide the media with information about court proceedings in the NSW Supreme Court, the Land and Environment Court, the Industrial Relations Commission of NSW and the District Court of NSW.

The PIO works with the media to ensure that judicial decisions are correctly interpreted and reported to the community, and that initiatives taken by the courts to enhance access to justice are widely promoted.

The PIO is also responsible for ensuring that media outlets are alert to any suppression orders issued in proceedings, and that they are familiar with the terms and impacts of these orders.

The distribution of, and adherence to, suppression or non-publication orders is critical as the media's failure to acknowledge them in their coverage could compromise proceedings.

During 2005, the PIO handled 1,309 enquiries from the media. Of these:

- 83 per cent related to Supreme Court matters;
- 14 per cent related to District Court matters, and
- three percent of inquiries related to other courts, including the Industrial Relations Commission and the Land and Environment Court.

Of the 1,086 media inquiries relating to the Supreme Court: 72 per cent were from Sydney metropolitan journalists/reporters (major newspapers, radio and TV stations); 14 percent were from interstate or international journalists, specialist/trade publications or members of the public; nine per cent were from journalists at NSW regional newspapers, radio and TV stations, and five per cent were from journalists at Sydney suburban newspapers.



## 6

## OTHER ASPECTS OF THE COURT'S WORK

- Uniform Civil Procedure Rules project
- CourtLink
- Law Courts Library
- Admission to the Legal Profession and appointment of Public Notaries
- Admission under the Mutual Recognition Acts
- Administration of the Costs Assessment Scheme
- Pro Bono scheme
- Judicial Assistance Program

## UNIFORM CIVIL PROCEDURE RULES PROJECT

The Uniform Civil Procedure Rules project commenced in 2003 when the Attorney General's Department developed a cross-jurisdictional Working Party, chaired by Mr Justice Hamilton. The Working Party's chief aim was to consolidate provisions about civil procedure into a single Act and develop a common set of rules for civil processes in the Supreme, District and Local Courts. The new rules would only cover procedural matters in general civil proceedings; jurisdictional matters would remain the preserve of the specific acts relating to each Court. This year saw the culmination of the Working Party's efforts with the commencement of the *Civil Procedure Act 2005* and *Uniform Civil Procedure Rules*. The Act and Rules introduce significant and welcome changes to civil processes in New South Wales. A new Uniform Rules Committee has been established under sections 8, 17 and Schedule 2 of the Act. The Committee is chaired by the Chief Justice, and the Court is also represented by the President of the Court of Appeal, Mr Justice Hamilton and Justice Hoeben.

At this stage, the Act and Rules do not extend to Court of Appeal proceedings or those placed in specialist lists within the Court's civil jurisdiction. Work will continue towards incorporating these matters into the uniform legislation.

## COURTLINK

The Court continued to be actively involved in the NSW Attorney General's Department's CourtLink project during the year. The work of the CourtLink Steering Committee has proven particularly valuable in ensuring that CourtLink will meet the needs of the Court. The Committee is an initiative of the Department and includes representatives from the Supreme, District and Local Courts. The following judicial officers and registry staff represented the Supreme Court during 2005:

- The Honourable Mr Justice Hamilton;
- The Honourable Justice Howie;
- The Honourable Justice Gzell;
- The Honourable Associate Justice Macready, and
- Ms Megan Greenwood, Chief Executive Officer and Principal Registrar

Significant progress was made in 2005 in respect of electronic services ("e-services"). In November 2005 the Court implemented a limited release of electronic filing (e-filing) in its Corporations and Possession lists. A pilot group of five firms participated in the trial implementation. The feedback from the firms was extremely encouraging. All firms recognised e-filing's potential to significantly cut down the amount of time required to process these applications compared to traditional over-the-counter filing methods. Work will continue in 2006 to expand the application of e-filing and the range of e-services made available to users.

## LAW COURTS LIBRARY

The Law Courts Library acts as a legal resource and information centre to the Judges, Associate Judges and Registrars in the Law Courts Building. The Library offers: legal reference and research services and guides; access to a comprehensive range of electronic resources and services; guides to the Library's collections and resources; legal research training; document delivery and inter-library loan services, and an online current awareness service.

The NSW Attorney General's Department and the Federal Court of Australia jointly fund the Law Courts Library. There are two committees that oversee the operations of the Library. These committees are the Operations Committee and the Advisory Committee.

The Operations Committee comprises an equal number of representatives from the NSW Attorney General's Department and the Federal Court of Australia. The Operations Committee is responsible for setting budget priorities, revenue, business planning and Library policy. The Advisory Committee consists of three Judges from the Federal Court of Australia and three Judges from the Supreme Court of NSW. The Advisory Committee consults with the Operations Committee on matters of budget, collection development and service provision. During 2005, the Supreme Court representatives on the Advisory Committee were:

- The Honourable Mr Justice Sheller AO (until April);
- The Honourable Justice Basten (from May);
- The Honourable Justice Ipp, and
- The Honourable Justice Austin.

Mr C Cawley  
 Mr J McIntyre  
 Professor C Sappideen  
 Mr J Feneley  
 Executive Officer and Secretary:  
 Mr R Wescombe

#### ADMISSION TO THE LEGAL PROFESSION AND APPOINTMENT OF PUBLIC NOTARIES

The Legal Profession Admission Board is a self-funding statutory body established under the *Legal Profession Act 2004*. The Board is responsible for making rules for and approving applications for the admission of lawyers and the appointment of public notaries. Once admitted as a lawyer, a person may apply to the Law Society of NSW or the NSW Bar Association for a practising certificate as either a solicitor or barrister.

The Board comprises the Chief Justice, three other Judges of the Supreme Court, a nominee of the Attorney General and key members of the legal profession. The Board maintains a close working relationship with the Court in other respects, by providing officers to assist in the administration of admission ceremonies, maintaining the Rolls of Lawyers and Public Notaries, and liaising with the Court's Registry about applications made under the Mutual Recognition Acts. In addition, five Judges of the Court provide important policy input by maintaining positions on the Board's committees.

During 2005, the members of the Legal Profession Admission Board were:

The Honourable the Chief Justice  
 The Honourable Mr Justice Windeyer AM RFD ED (Presiding Member)  
 The Honourable Mr Justice Sully (Deputy Presiding Member)  
 The Honourable Mr Justice Studdert  
 Professor D Barker (until 4 March)  
 Professor J McKeough (from 4 March)  
 Mr P Taylor SC  
 Mr J Gormly SC

#### The Board's work during 2005

- In April, the Board moved to the new premises it had purchased at 37 Bligh Street, Sydney. The new premises provide additional space for the efficient storage of current records and some additional office space to accommodate a legally qualified staff member to increase the quality of the Board's examination and other operations.
- The Board also adopted new rules, the *Legal Profession Admission Rules 2005*, to accommodate the significant changes involved in the *Legal Profession Act 2004*. The new act and the new rules provide, among other things, for persons to be admitted as "Lawyers" rather than "Legal Practitioners".
- Two new university degrees were accredited by the Board under the Admission Rules: the JD degree at the University of New England, and the LLB degree at the University of Notre Dame.

TABLE 6.1:  
**Summary and comparison of the Legal Practitioners Admission Board's workload**

	2003	2004	2005
Legal Practitioner admissions approved by the Board	1,843	1,965	1,585
Lawyer admissions approved by the Board			381
Certificates of Current Admission produced by the Board	691	534	585
Public Notaries appointed by the Board	34	51	50
Students-at-Law registrations	965	920	733

## Legal Qualifications Committee

The Legal Qualifications Committee is constituted under the Legal Profession Admission Rules to superintend the qualification of candidates for admission and to advise the Board in relation to the accreditation of academic and practical training courses in New South Wales. The Committee performs its work largely through its sub-committees and reviews decisions of these sub-committees at the request of unsuccessful applicants.

During 2005 the members of the Legal Qualifications Committee were:

The Honourable Justice Barrett (Chairperson)

The Honourable Justice Kirby

The Honourable Justice Palmer

Mr J Fernon SC

Ms J Oakley

Mr D Toomey

Mr J Dobson

Mr H Macken

Mr C Cawley

Mr R Harris

Associate Professor A Goh (until 15 June)

Associate Professor A Lamb

Associate Professor K Maxwell

Mr M Fitzgerald

Dr G Elkington (from 24 June)

Executive Officer and Secretary:

Mr R Wescombe

## Work during 2005

The Legal Qualifications Committee, working from amended admission rules, commenced a more flexible approach to the assessment of overseas practical training. Under the new arrangements, the assessment of overseas practical training was done on a competency by competency basis rather than on an almost all or nothing basis. The new arrangements allowed the Committee to impose training requirements on overseas practitioners which were more precisely tailored to their individual competencies.

TABLE 6.2:

### Applications considered by the Legal Qualifications Committee

	2003	2004	2005
Applications for Academic Exemptions	525	424	411
Applications for Practical Training Exemptions	281	212	176

## Examinations Committee

The Examinations Committee is constituted by the Legal Profession Admission Rules to oversee the content and conduct of the Board's examinations and the candidatures of Students-at-Law. It has three sub-committees. The Performance Review Sub-Committee determines applications from students seeking to avoid or overcome exclusion from the Board's examinations. The Curriculum Sub-Committee, in consultation with the Board's examiners and revising examiners, plans the curriculum for the Board's examinations, and the Quality Sub-Committee oversees the quality of examinations and marking.

During 2005, the members of the Examinations Committee were:

The Honourable Justice Simpson (Chairperson)

The Honourable Justice Campbell  
(Deputy Chairperson)

Mr M Christie

Mr J Dobson

Mr F Astill

Associate Professor G Monahan

Mr R Anderson

Executive Officer and Secretary:

Mr R Wescombe

### Work during 2005

During 2005 the Committee made further advances in assuring the quality of the Board's examinations. It revised: communication with students about examinations; examination marking procedures; monitoring of examiner administrative performance, and publication of past examination papers.

TABLE 6.3:  
**Three-year comparison of the Examination Committee's workload**

	2003	2004	2005
Examination subject enrolments by Students-at-Law	5,303	5,693	5,368
Approved applications to sit examinations in non-scheduled venues	44	39	51
Approved applications for special examination conditions	14	13	17
Student-at-law course applications	392	322	296
Applications from students-at-law liable for exclusion from the Board's examinations	393	400	396

### ADMISSION UNDER THE MUTUAL RECOGNITION ACTS

The management of applications from legal practitioners for admission under the Mutual Recognition Acts forms another aspect of the Registry's work. The Registry liaises with the Legal Profession Admission Board in performing this small task. In 2005, 290 interstate and New Zealand practitioners were enrolled under Mutual Recognition Acts, compared with 304 in 2004 and 330 in 2003. Although the number of practitioners enrolled under Mutual Recognition Acts is generally trending downwards under the influence of recent legislation that permits practitioners in one State to practise in another, there is still a significant number of practitioners seeking such enrolment.

### ADMINISTRATION OF THE COSTS ASSESSMENT SCHEME

The Costs Assessment Scheme commenced on 1 July 1994. It is the process by which clients and practitioners determine the amount of costs to be paid in two principal areas: between practitioners and their clients and party/party costs. Party/party costs are costs to be paid when an order is made from a Court (or Tribunal) for unspecified costs. The Costs Assessment section of the Registry undertakes the day-to-day administration of the Costs Assessment Scheme.

The Costs Assessment Scheme is the exclusive method of assessment of legal costs for most jurisdictions. A costs assessment application enables an assessor to determine costs disputes between practitioners and clients, between practitioners and practitioners or between parties to legal proceedings. Applications under the Scheme are determined by external assessors appointed by the Chief Justice. All assessors are members of the legal profession and educational seminars are arranged for them each year by the Costs Assessors' Rules Committee. Mr Robert Benjamin, solicitor, was the Chair of the Costs Assessors' Rules Committee during 2005.

In conjunction with the Costs Assessment Rules Committee, a Costs Assessors Users' Group meets on a quarterly basis to discuss issues in costs assessment from a user's perspective. The Costs Assessors Users' Group is chaired by Justice Barrett and consists of court assessors, costs consultants and a representative of the Office of the Legal Services Commissioner.

From 1 January 2005 to 31 December 2005 there were 2,052 applications lodged. Of these, 1,457 (71 per cent) related to costs between parties, 219 (11 per cent) were brought by clients against practitioners, and 349 (17 per cent) were brought by practitioners. The remaining applications were 27 applications lodged between legal practitioners for assessment of costs either instructing practitioners against retained practitioners and the reverse. The review process, which is relatively informal in nature, is carried out by two senior assessors of appropriate experience and expertise and is conducted along similar lines to that used in the original assessment process. The review panel can vary the original assessment and is required to provide a short statement of its reasons. During 2005 there were 161 applications filed for review of costs assessments. There is still provision to appeal the review panel's decision to the Court, as of right on questions of law and otherwise by leave. These appeals are heard by Associate Judges in the Common Law Division and form part of the Division's civil caseload. A small number of appeals in relation to costs assessment are lodged each year.

## PRO BONO SCHEME

The Pro Bono Scheme under Part 66A of the *Supreme Court Rules 1970* was established in 2001 with support from the NSW Bar Association and the Law Society of NSW. The scheme enables unrepresented litigants, who have been considered by the Court to be deserving of assistance, to be referred to a barrister and/or solicitor. Seventeen referrals were made during the year: one referral was made in the Court of Appeal, 11 referrals were made in Common Law matters and five were made in the Equity Division. The Scheme's success depends upon the continued goodwill of barristers and solicitors, and the Court gratefully acknowledges those who give of their time so freely in supporting the Scheme.

## JUDICIAL ASSISTANCE PROGRAM

A Judicial Assistance Program was launched to help New South Wales judicial officers meet the demands of their work whilst maintaining good health and well-being. The scheme provides for 24-hour access to a professional, confidential counselling service and free annual health assessments. The Court administers this Program on behalf of all the jurisdictions.



## APPENDIX (j): NOTABLE JUDGMENTS - SUMMARIES OF DECISIONS

The Court's full text judgments are accessible online at: <http://www.lawlink.nsw.gov.au/lawlink/caselaw>

### 1. Application of O and P

This was a dispute over the naming of a Korean infant adopted into an Australian family. The applicants, O and P, wished to place a Western name before the child's Korean given and family names. The applicants had applied this name structure to their eldest son, whom they had also adopted from Korea. The applicants referred to their youngest child using a Western name for 22 months' prior to the Court making the adoption order and now wished to make the name legal. Under section 101(5) of the *Adoptions Act 2000* ("the Act"), the applicants must establish "special reasons" relating to the child's best interests before the Court can approve a change of name. The Department of Community Services ("the Department") opposed the application on the basis that O and P failed to prove "special reasons" in this case. The Department also claimed the application contravened international laws designed to preserve a child's identity and birth name. Justice Campbell examined the construction of section 101 of the Act and whether the applicants had breached Article 8 of the United Nations Convention on the Rights of the Child ("UNCROC").

Justice Campbell scrutinised the construction of section 101 and considered binding precedent on the topic. His Honour determined that the "special reasons" supporting the changing of a child's name upon adoption were entirely at the Court's discretion and those reasons would vary according to each application. In this case, His Honour found that the child had been referred to by the Western name for the greater part of his life and it formed part of his identity. His Honour also noted the applicants' wish to encourage a relationship between the two siblings and agreed that similar name structures would assist this aim. Justice Campbell concluded that the applicants' desire to change the child's name did not stem from a wish to downplay or ignore his Korean origins, but from a desire to protect their child's best interests.

Justice Campbell also dismissed the Department's claim that the applicants had not acted in the best interests of the child according to Article 8 of UNCROC. His Honour noted the Commonwealth's decision not to implement UNCROC as domestic law and consequently its provisions bind neither

Australian individuals nor Courts. His Honour also found the Court need not interpret section 101(5) of the Act in terms of UNCROC's provisions. Section 101(5) was unambiguous in its meaning and there was no need to qualify its construction by referring to the treaty. Justice Campbell also found that, in any event, Article 8 did not preclude the name of a child being changed, but rather protected the identity of a child (including its name) from being interfered with in an unlawful way. His Honour interpreted "lawfulness" as being in accordance with domestic law and noted that, in the present case, each phase of the adoption had been carried out in accordance with Korean and Australian law. Furthermore, Justice Campbell found there was no relevant international law principle that prevented the name of a child being changed on adoption. UNCROC specifically recognises that intercountry adoptions occur and does not require the preservation of a given name in these circumstances. The Court approved the name change.

**Bench:** Campbell J

**Judgment citation:** Application of O and P [2005] NSWSC 1297

**Judgment date:** 15 December 2005

### 2. Attorney General of New South Wales v World Best Holdings Limited & Ors

This case concerned an unconscionable conduct claim in the Retail Leases Division of the Administrative Decisions Tribunal (the "ADT").

Following an adverse decision by the ADT, World Best Holdings Ltd appealed to the Supreme Court asserting the decision was invalid on two grounds: the first being that the constitution of the Tribunal by Mr B McDonald was invalid because Mr McDonald did not meet the qualifications required by the *Administrative Decisions Tribunal Act 1977*, Schedule 2, Part 3B, Clause 4(1); the second being that two members purporting to assist the tribunal had participated in the adjudication in violation of the Act at Schedule 2, Part 3B, Clause 4(3). Clauses 4(1), 4(2) and 4(3) of Part 3(B) of Schedule 2 of the Act prescribes the manner in which the Tribunal is to be constituted and operate when exercising functions in relation to unconscionable conduct claims made pursuant to the *Retail Leases Act 1994*.

2. The participation of two non-judicial members in a decision of the ADT crossed clearly drawn statutory lines between assistance and adjudication



3. Observations about the admissibility of expert opinion evidence

The Supreme Court held that the ADT decision was invalid on both grounds. During the Supreme Court hearing the Attorney General successfully sought leave to be joined as a defendant. The Attorney General subsequently appealed the decision of the Supreme Court to the Court of Appeal.

Nine days after the Court of Appeal had heard oral submissions, the *Courts Legislation Amendment Act 2005* was introduced and passed by the Parliament of New South Wales. The Act amended the qualifications required for a Tribunal member. Regarding the constitution of the Tribunal, the Court held that the appeal was to be determined in accordance with the law as it currently stood. Given that the amending Act operated retrospectively, it applied to the present proceedings. The Tribunal had therefore been validly constituted.

However, the Court of Appeal held that the Supreme Court's finding of fact, that there had been impermissible participation by the non-judicial members in the decision-making process, was correct. The Attorney General sought to support the order of the Tribunal on the basis of Section 81(3) of the ADT Act, which provides that certain failures to comply with the requirements of respective Acts are to be "treated as an irregularity", and are not to "nullify" proceedings. By majority, the Court held s 81(3) was directed only at non-compliances of a procedural nature. In the present case the non-compliance was a jurisdictional error of a fundamental kind and consequently did not apply to save the Tribunal's decision from invalidity.

**Bench:** Spigelman CJ, Mason P, Tobias

**Citation:** Attorney General (NSW) v World Best Holdings Ltd [2005] NSWCA 261; 63 NSWLR 557

**Date:** 11 August 2005

### 3. Australian Securities & Investments Commission (ASIC) v Rich & Anor

This was an appeal against a trial judge's decision to reject expert evidence tendered in proceedings in the Supreme Court's Equity Division. At trial, ASIC had sought to introduce a report by Mr Carter containing critical expert financial and accounting evidence concerning One.Tel and the conduct of its former directors, Mr Rich and Mr Silbermann ("the Respondents"). Mr Carter had helped with ASIC's initial investigation that spawned these legal proceedings, and was privy to a large body of information about One.Tel, including interviews with business associates and former employees. Whilst drafting his report, Mr Carter was able to draw upon this full body of information. However, before finalising the report he was instructed to exclude much of the material and confine himself largely to One.Tel's business records. Broadly speaking, Mr Carter's final report identified: the true financial position of the One.Tel group of companies at relevant times; information that ought to have been supplied to its directors, and the amount of compensation that ASIC sought from the Respondents. During the trial, the Respondents challenged the admissibility of this report on the grounds that it contained opinions originally formed using excluded information. Consequently, the report did not reflect the real factual basis and true reasoning process adopted by the author. The trial judge accepted the Respondents' submissions and ruled that Mr Carter's report was inadmissible. Alternatively, the trial judge found that the Court should reject the report as the risk Mr Carter had taken excluded information into account outweighed its probative value. ASIC challenged these rulings in the Court of Appeal.

The Court of Appeal unanimously held that the trial judge erred in ruling that Mr Carter's report was inadmissible. The Court disagreed with the trial judge's conclusion that expert opinion evidence is inadmissible unless it is true, historical fact, based solely on the facts detailed in the report, and arrived at only by the process of reasoning set out in the report. The Court held that expert evidence is admissible as long as it discloses the facts and reasoning process that the expert asserts will justify his or her opinion. The critical concern should not be how the expert first formed their

opinion, but whether the expert has placed the court in a position where it can evaluate the evidence placed before it. The fact that an expert's opinion is based on facts that are assumed (and not proved) at the time the expert gives evidence, is no reason to immediately exclude the evidence - these assumed facts may be proved later by other evidence. Also, the fact that an expert's opinion was initially formed or later reinforced by reference to facts not mentioned by the expert in their evidence, is irrelevant to the question of admissibility; once the opinion is capable of being based on the proved facts, it is admissible. The Court set aside the trial judge's orders.

The trial judge concluded that the substantial risk that Mr Carter's report referenced excluded material was enough to diminish the probative value of his evidence. The Court found that the trial judge made a fundamental error by failing to weigh the potentially damaging aspects of the report against the crucial role it might play in proving ASIC's allegations against the Respondents. The balancing exercise of section 135 of the *Evidence Act 1995 NSW* always requires an evaluation of the probative value of the evidence. Contrary to the trial judge's ruling, the Court of Appeal found that reliance on a broader range of information does not automatically limit the probative value of evidence. The Court upheld ASIC's appeal and set aside the trial judge's order that it should be excluded.

**Bench:** Spigelman CJ; Giles JA; Ipp JA

**Citation:** *Australian Securities & Investments Commission v John David Rich & Ors* [2005] NSWCA 152; 54 ACSR 326; (2005) 23 ACLC 1,100

**Judgment date:** 20 May 2005

#### 4. *Chen & Ors v City Convenience Leasing Pty Ltd & Anor*

This was an appeal against a decision of the District Court. The dispute was between a lessor (Mr Chen and his associates), the lessee (City Convenience Leasing Pty Ltd), and the lessee's guarantor, Mr Gebara. In the District Court, the Chen interests sued City Convenience and Mr Gebara for damages, primarily relating to unpaid rent. City Convenience and Mr Gebara successfully defended the claim for damages. They also succeeded in their cross claim to have the lease declared void. The trial judge accepted City Convenience's and Mr Gebara's allegations that the agent for the Chen interests, Mr Lui, breached the *Fair Trading Act 1987* and induced them to enter the lease through false and misleading representations about air conditioning and loading dock arrangements. Although the terms of the formal lease agreed to by Mr Gebara in consultation with his solicitor were inconsistent with Mr Lui's representations, Mr Gebara argued that he relied upon these representations in deciding to execute the lease. On numerous occasions whilst cross-examining Mr Gebara, counsel for the Chen interests sought to establish what advice he received from his solicitor regarding the lease prior to its execution. On each occasion, Mr Gebara's counsel successfully claimed client legal privilege. The critical issue on appeal was whether the trial judge should have allowed these claims of privilege.

On appeal, Mr Chen and his associates submitted that, by making a cross claim alleging reliance on false representations about the terms of the lease, City Convenience and Mr Gebara impliedly consented to being cross-examined about legal advice received prior to the lease's execution. By doing so, they effectively waived their right to client legal privilege. Section 122 of the *Evidence Act 1995* ("*the Act*") sets out the statutory exceptions to the rule of client legal privilege. The Court considered the Act's provisions covering consent to adduce evidence and its relationship with the common law rule of implied waiver. Upon examining the authorities, the Court found that implied waiver constitutes consent to the disclosure of otherwise privileged information. However, the authorities offered different, yet related triggers for the operation of the common

4. *An examination of the statutory provisions and caselaw that define waiver of client legal privilege*

law rule of implied waiver. *Telstra Corporation Ltd v BT Australasia Pty Ltd (1998) 85 FCR 152* established that, based on the notion of fairness, if a party relies on a cause of action involving their state of mind, the party is taken to have waived privilege in respect of legal advice received before or at the time they formed their opinion. In *Mann v Carnell (1999) 201 CLR 1*, the High Court held that a party is deemed to have waived privilege if their conduct is inconsistent with the aim of maintaining confidentiality.

The Court found both tests applied to the present case. Mr Gebara's counsel claimed client legal privilege each time it was suggested Mr Gebara had received legal advice regarding the air conditioning and loading dock arrangements; counsel could not make these claims unless advice had been given on these topics. Mr Gebara's assertion of reliance on Mr Lui's representations was inconsistent with maintaining confidentiality in respect of the advice he had certainly received. In the interests of fairness, client legal privilege for the advice ought not to be maintained and waiver of that privilege is implied, consistent with provisions in section 122 of the Act. The trial judge should have allowed Mr Gebara to be cross-examined. The Court allowed the appeal and ordered a new trial.

**Bench:** Bryson JA; Windeyer J; Gzell J

**Citation:** *Chen & Ors v City Convenience Leasing Pty Ltd & Anor* [2005] NSWCA 297

**Judgment date:** 12 September 2005

### 5. Cross v Barnes Towing and Salvage (QLD) Pty Ltd & Ors

The *Tow Truck Industry Act 1998 (NSW)* ("TTA") prohibits a person from carrying on a business as a tow truck operator within NSW without an appropriate license. Clause 69 of the associated regulations excludes towing work that is commenced outside of NSW by an operator who holds an equivalent license in another state. The plaintiff in this case appealed a Local Court ruling that the regulatory scheme contravened the requirements of section 92 of the Constitution by restricting the freedom of interstate intercourse.

The defendant company ("Barnes") carried on its towing business from Rocklea, QLD, and was the only towing company in Australia that operated a

heavy vehicle recovery unit which utilised air cushion technology. The company completed a contract to retrieve a semi-trailer that had overturned near Lismore, NSW, to the trailer owner's premises in QLD. The plaintiff, acting on behalf of the Tow Truck Authority of NSW, attended the scene of the accident and cautioned the director of Barnes and the driver of the recovery unit that they did not possess an appropriate NSW license and driver's certificate. The proceedings in the Local Court arose from those contraventions of the TTA.

The Court of Appeal considered section 92 of the Constitution, which has two limbs: one relating to intercourse between the states, the other, to trade and commerce. The Court first considered if the towing work was a matter of intercourse between the states. The Court observed that the term "intercourse" was so broad that it covers a substantial part of what could fall under trade and commerce. The Court found that aspects of trade and commerce capable of answering the description "intercourse" should not be given broader protection than other aspects of trade and commerce. Consequently, the Court found that the Local Court erred by basing its ruling on the intercourse limb of section 92.

The Court then considered the trade and commerce limb. The Court determined that the authoritative test for deciding when a burden on trade and commerce is impermissible is whether it imposes a discriminatory burden of a protectionist kind. The Court found that, as the licensing burden was imposed on all participants in the regulated industry, including those operating solely within NSW, there was no discrimination in form or substance. The Court also found no evidence to suggest it was more difficult for interstate operators to obtain NSW licenses, nor was there evidence of any protectionist intent. The Court expressed doubt that such intent could exist in the absence of discrimination.

The defendants also argued that the "towing work" started when it dispatched its heavy vehicle recovery unit to the accident site outside NSW, and thus their actions fell within the exception in clause 69 of the regulations. However, relying on dictionary and statutory definitions of "tow" as well as maritime cases involving tug and tow, the

majority (Chief Justice Spigelman dissenting) ruled that the towing work commenced when defendants started towing the semi-trailer in NSW and that clause 69 did not apply.

The appeal was successful and the Local Court's orders were set aside.

**Bench:** Spigelman CJ; Handley JA; Beazley JA

**Citation:** *Cross v Barnes Towing and Salvage (QLD) Pty Ltd & Ors* [2005] NSWCA 273

**Judgment date:** 18 August 2005

### 6. *Davis v Turning Properties Pty Ltd & Anor*

This was an application to the Supreme Court of NSW for an order freezing the assets of the defendant (a "Mareva order") in support of a Mareva order issued in the Bahamas. The plaintiff, Mr Davis, was an Australian citizen who had resided in the Commonwealth of the Bahamas since 2003. The first defendant, Turning Properties Pty Ltd, was an Australian company owned by the second defendant, Mr Turner. Mr Davis had become acquainted with Mr Turner whilst living in the Bahamas. Mr Turner purported to be a stockbroker and in 2001 Mr Davis entrusted him with US\$4.7m to invest on his behalf.

In April 2005, Mr Turner was arrested in the United States on charges of wire fraud. Mr Davis discovered that Mr Turner had never invested any of his monies on the stock exchange. Mr Davis lodged proceedings in the Supreme Court of the Commonwealth of the Bahamas against Mr Turner and two of his companies in the Bahamas. The Supreme Court of the Bahamas made a worldwide Mareva order restraining Mr Turner and all his companies from dealing with real estate and land in the Bahamas, and globally. Mr Davis applied to the Supreme Court of New South Wales for an order that the Mareva order made in the Bahamas be given full force and effect in New South Wales and sought injunctive relief effectively freezing the New South Wales assets of Mr Turner and his Australian company for three weeks. The Supreme Court of New South Wales had to consider whether it had the jurisdiction to enforce a foreign Mareva order without the applicant commencing substantive proceedings.

The Court concluded that it could not determine the question of jurisdiction by applying any existing Commonwealth or State legislation relating to the registration and enforcement of foreign judgments. Whether the Court has jurisdiction to enforce a foreign Mareva order as a means of interlocutory relief depended on the general law. Drawing upon the High Court of Australia's judgment in *Cardile v LED Builders Pty Ltd (1999) 198 CLR 380*, the Court found it had the power to grant injunctive relief in the form of a Mareva order on account of the inherent jurisdiction conferred on it by section 23 of the *Supreme Court Act 1970*. It was observed that in times where international commerce and international monetary transactions are a daily reality, and money can be transferred overseas with the click of a computer mouse, the administration of justice in New South Wales is no longer confined to litigation that is commenced, tried and resolved in this State. The administration of justice in New South Wales includes the enforcement in this State of rights established elsewhere. Justice Campbell granted the plaintiff interlocutory relief in the form of a Mareva order and both defendants' assets were frozen for a further three weeks.

**Bench:** Campbell J.

**Judgment citation:** *Davis v Turning Properties* [2005] NSWSC 742; (2005) 222 ALR 676

**Judgment date:** 15 July 2005

### 7. *Dalton v Ellis; Estate of Bristow*

This was a complex dispute involving conflicting claims on an intestate estate. The estate essentially comprised a property at Newport valued at \$1.5million. Dr Dalton, the first plaintiff, claimed that she shared a relationship with the deceased, Mr Charles (Tim) Bristow, between 1970 and 1977. Dr Dalton gave birth to her daughter, Isis, in 1973 and maintained that Mr Bristow was the father. Ms Isis Dalton was the second plaintiff in the proceedings. Ms Dalton claimed an entitlement to half Mr Bristow's estate. Both plaintiffs relied upon a deed delivered by the deceased whilst Dr Dalton was still pregnant. In this deed, the deceased acknowledged that he fathered Dr Dalton's child and outlined his intention to execute a Will that would ensure his daughter and any other of his children, receive an

6. *The Court may make a Mareva order in aid of proceedings overseas*

7. *Estate insufficient to meet a legitimate claim*

8. Proofing witnesses as a group to encourage them to speak with one voice is improper

equal share of any assets left after his death. The sole defendant in proceedings, Ms Ellis, was Mr Bristow's defacto partner for 29 years and had lived with the deceased in his Newport home for 26 of those years. Ms Ellis' claim was based on her undisputed standing as an eligible person under section 6 of the *Family Provision Act 1982* ("the FPA"). The Court considered if the plaintiffs could sue on the deed and to what relief they might be entitled. The Court also considered how a successful claim under the deed would impact on Ms Ellis' entitlement to the estate under the FPA.

To determine the plaintiffs' eligibility to claim on the deed, the Court first considered the deed's validity. The Court found neither evidence to suggest the deed was a sham, nor reason to suspect the deed had not been executed in good faith. The Court also rejected the defendant's argument that the deed contravened public policy by seeking to override the FPA's provisions. The Court found that the deed did not offend these statutory provisions, but was merely subject to them. The Court then turned to the plaintiffs' eligibility to claim on the deed. The Court found that the deed established Dr Dalton as a trustee and Ms Dalton as a beneficiary able to sue on a contract that required the deceased to name her in his will. The Court further found that Ms Dalton could claim on the deed in either the trustee's (Dr Dalton's) name, or her own name. However, the Court issued the qualification that any claim by the plaintiffs must be subject to an order under the FPA.

The Court decided that although Ms Dalton had a legitimate claim on the estate under the deed, subject to the FPA requirements, Ms Ellis' claim to keep her house must take precedence. The Court found that forcing a woman to sell her long-term residence, especially when the deceased had expressed a wish that she retain the property, would be inconsistent with public policy and community expectations. As there were inadequate assets for a coexisting claim without Ms Ellis selling her house, Ms Dalton could receive no benefit from the estate and the Court awarded the entire estate to Ms Ellis.

**Bench:** Young CJ in Eq

**Citation:** Dalton v Ellis; Estate of Bristow [2005] NSWSC 1252

**Judgment date:** 8 December 2005

## 8. Day v Perisher Blue Pty Ltd

This was an appeal from a judgment delivered in the District Court in October 2003. After sustaining an injury whilst working on the snowfields, Mr Day claimed his employer, Perisher Blue Pty Ltd, breached its duty of care by failing to provide him with a safe system of work. During the trial, evidence emerged that before the trial commenced, witnesses for Perisher Blue had participated in a teleconference in which they discussed their evidence with each other and others, including Perisher Blue's solicitors. A letter from Perisher Blue's solicitors to their client was produced by one of the witnesses. The letter referred to the teleconference and gave details about the areas of questioning the witnesses could expect at trial. Cross-examination by Mr Day's counsel of Perisher Blue's witnesses revealed the general nature of the communications during the teleconference.

In his written submissions at trial Mr Day's counsel argued that the weight of the evidence of the witnesses had to be measured in the context of the solicitor's letter and the fact they had discussed their evidence with each other. The trial judge did not deal with this aspect of the written submissions in his judgment. He accepted the evidence of Perisher Blue's witnesses and the claim.

The Court of Appeal concluded that the trial judge erred in failing to take critical evidence into account, set aside the verdict and judgment, and ordered a new trial.

The Court of Appeal said it was hard to see that the intention of the teleconference with witnesses discussing amongst themselves the evidence that they would give was for any reason other than to ensure, so far as possible, that in giving evidence the Perisher Blue's witnesses would speak with one voice about the events that occurred and that what was done was improper. The Court observed that it had long been regarded as proper practice for legal practitioners to take proofs of evidence from lay witnesses separately and to encourage such witnesses not to discuss their evidence with others, and particularly not with other potential witnesses.

The Court of Appeal also concluded that what had happened was of sufficient seriousness prima facie for the papers to be sent to the Legal Services Commissioner. After hearing submissions from Perisher Blue's solicitors as to whether this course should be taken, the Court directed the Registrar of the Court of Appeal to refer the papers to the Legal Services Commission to investigate whether, having regard to the conduct disclosed, he ought to initiate a complaint pursuant to the Legal Profession Act: See *Day v Perisher Blue Pty Ltd [No.2] [2005] NSWCA 125*

**Bench:** Sheller JA; McColl JA; Windeyer J.

**Citation:** *Day v Perisher Blue Pty Ltd* [2005] NSWCA 110; (2005) 62 NSWLR 731

**Judgment date:** 11 April 2005

### 9. *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd\**

This was an appeal against orders made in 17 separate claims in the Supreme Court's Equity Division. The claims were commenced by tobacco retailers seeking to recover license fees they had paid to their licensed wholesalers. A third party, Firmstones, funded each claim and engaged a solicitor to represent the tobacco retailers. The claims were purported to be a representative action on behalf of all tobacco retailers who wished to opt-in and recover their licence fees. Each represented person who opted-in would seek an individual money judgment commensurate with his, her or its specific circumstances.

The claims followed two High Court decisions in *Ha v State of New South Wales (1997) 189 CLR 465* ("Ha") and *Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516* ("Roxborough"). The Ha decision declared the states' and territories' tobacco licensing schemes invalid whilst Roxborough allowed retailers to recover licence fees paid to wholesalers before the licensing scheme was declared invalid. The plaintiffs claimed that their circumstances were indistinguishable from the tobacco retailers in Roxborough who successfully won the right to recover their licence fees in the High Court.

The lead plaintiffs sought interlocutory orders for the discovery of the names and addresses of all members of the class of represented retailers to

invite each identified party to opt-in to the action. The trial judge held that the retailers did not have the "same interest" within the meaning of Part 8 r 13 of the Supreme Court Rules and the proceedings should not continue as representative proceedings. The judge permanently and unconditionally stayed the proceedings on the basis that they were (or likely to lead to) an abuse of process. The trial judge's finding hinged upon a combination of factors concerning the funding arrangements including: reservations about the solicitor's commitment to the retailers he represented; suspicions about Firmstone's role in proceedings and their anticipated profits (approximately 33% of the recovered fees), and his perception that Firmstone was selling the right to join the proceedings and effectively "trafficking" in the retailers' litigation.

A group of tobacco retailers ("the appellants") challenged these conclusions in the Court of Appeal. The Court of Appeal disagreed that the proceedings were an abuse of process. The Court found no evidence pertaining to the solicitor's conduct that could lead to a finding of abuse. With respect to Firmstone's role in the litigation, although the firm's involvement may have been profit-driven, this alone does not constitute an abuse of process that would attract dismissal or a permanent stay of proceedings. The Court noted that, for reasons of access to justice, courts have changed their approach to litigation funding. This changed perspective is reinforced and reflected in caselaw and the introduction in 1993 of legislation abolishing the crime and tort of maintenance and champerty. The Court also noted that abuse of process must actually be demonstrated before such a finding is justified. Reference to the overriding purpose principle was not a valid ground for staying the proceedings. Although acknowledging that trafficking in litigation may exist, the Court found the concept was difficult to define, especially given the changed legislative approach to litigation funding.

The Court held that the proceedings should be allowed to continue as representative proceedings as there were common issues of law (relating to the application of Roxborough) linking the claims of each represented group of retailers. Further,

9. Examines whether funded representative proceedings are an abuse of process

10. For public policy reasons, a duty of care may not extend to actions that result in non-physical injury if those actions concern the control of risk or vulnerability

material issues of fact were sufficient to satisfy the jurisdictional requirements of the Court rules. The Court of Appeal set aside the trial judge's orders.

**Bench:** Mason P; Sheller JA; Hodgson JA  
**Citation:** *Fostif Pty Ltd v Campbells* [2005] NSWCA 83; 63 NSWLR 203  
**Judgment date:** 31 March 2005

\*The High Court of Australia granted special leave to appeal this decision on 30 September 2005. At the time of publication, the High Court was yet to deliver their judgment.

### 10. Hunter Area Health Service & Anor v Presland

This was an appeal against the Supreme Court's finding of negligence against a psychiatric hospital (Hunter Area Health Service) and one of its practitioners (Dr Nazarian). The respondent, Mr Presland, was taken to a psychiatric hospital by police following an episode of hallucinatory and extremely violent behaviour. Dr Nazarian discharged Mr Presland into his brother's care after only one night in hospital. On the day of his release, Mr Presland murdered his brother's fiancée. Although acquitted of murder on the grounds of mental illness, Mr Presland was detained in custody as a forensic patient under section 39 of the *Mental Health (Criminal Procedure) Act 1990*.

In the lower court, Mr Presland successfully sued the hospital and Dr Nazarian for failing to restrain and care for him when his mental illness rendered him a risk to himself and others. Mr Presland argued that, had the hospital and Dr Nazarian detained him as an involuntary patient under the *Mental Health Act 1990* ("the MHA"), the murder, his subsequent imprisonment and accompanying distress and economic loss would have been averted. The trial judge accepted this argument and awarded Mr Presland \$369,300 in damages. On appeal, the hospital and Dr Nazarian challenged the trial judge's findings in respect of the duty of care (including the nature and scope of that duty and whether it had been breached) and damages (including Mr Presland's entitlement to recover damages and the amount awarded).

The Court of Appeal acknowledged that the appellants owed Mr Presland a duty of care and should not have released him into an environment

where he could harm others. However, by a majority, the Court held that this did not adequately support a finding that the appellants were legally responsible for harm suffered by Mr Presland. The Court found that provisions in the MHA allowing the involuntary admission of psychiatric patients were intended to be last resort measures only. The Court expressed doubt that the policy behind the Act contemplated a party recovering damages because a medical superintendent refused to detain a person in hospital as an involuntary patient, even in cases of negligence. Such a finding could discourage hospitals and their staff from performing their statutory duties.

The extended liability that would flow from a finding of negligence on the part of a psychiatrist could compromise the impartiality of patient assessments under the MHA by promoting a bias towards detention, regardless of individual circumstances. The Court held that the finding of a breach of duty of care was inconsistent with the statutory provisions of the MHA. The Chief Justice, dissenting, thought the factors entitled to weight in determining the scope of the duty of care owed to the respondent under the MHA were control and vulnerability. The Chief Justice believed the option of voluntary admission did not detract from the high level of control exercised by the appellants and the high level of vulnerability exhibited by Mr Presland. The duty of care owed by the appellants to Mr Presland was clearly breached.

Regarding the harm suffered by the respondent, the Court found Mr Presland had been detained as the result of an unlawful killing. The damages sought in the present case were akin to damages sought for being unlawfully detained. In the circumstances, public policy must be considered when deciding to compensate the respondent for the harm suffered. The statutory framework applicable to the events leading up to and after the murder was also of prime importance. The majority of the Court found that the nature of the harm suffered by Mr Presland precluded, on the grounds of commonsense, a finding that the appellants were legally responsible for that harm, despite their negligence. Consequently, there was

no basis upon which Mr Presland could be entitled to damages and the trial judge's decision was overturned

**Bench:** Spigelman CJ, Sheller JA, Santow JA  
**Citation:** *Hunter Area Health Service v Presland* [2005] NSWCA 33; 63 NSWLR 22  
**Judgment date:** 21 April 2005

### 11. *John Fairfax Publications Pty Limited & 2 Ors v Ryde Local Court & 3 Ors*

Ms O'Shane, the fourth opponent, was the subject of an interim Apprehended Domestic Violence Order "ADVO" proceedings, later made final by consent. Three media organisations ("the Claimants") had unsuccessfully sought access to the complaint and other documents in the ADVO proceedings in the Local Court. The Court found that there was no entitlement to access the complaint under Part 15A of the *Crimes Act 1900*. The Local Court later ordered the same proceedings be heard in a closed court pursuant to section 562NA of the *Crimes Act 1900*. The Claimants approached the Court of Appeal for prerogative and declaratory relief in relation to two rulings of the Local Court. The Claimants appealed to the Court's supervisory, rather than appellate, jurisdiction. The Claimants submitted that both Local Court determinations violated the principle of open justice and were incompatible with implied protections in the Commonwealth Constitution concerning freedom of communication. The Claimants further submitted they had a right to access the documents and queried whether the Local Court had the power to refuse them access in the first place.

The Local Court had rejected the Claimants' application for access on the basis that they had failed to prove how releasing allegations of a personal nature, that had no bearing on the outcome of proceedings, would serve the interests of justice or the public. The Claimants challenged this determination on the basis that it inverted the principle of open justice by placing the burden of proof on the applicant. The Court of Appeal dismissed this submission. The principle of open justice relates to the operation of the judicial system and maintaining public confidence in the integrity of this system. The principle does not relate to issues of freedom of the press or speech. The Court of Appeal found that the Magistrate

properly applied the principle and released all the information necessary to facilitate legitimate public scrutiny of the judicial process. The Court also found that neither the Claimants, nor the public at large, have a right at common law to access court documents in proceedings where they are not a party.

In respect of the constitutional issues raised by the Claimants, the Court of Appeal found that neither the Local Court's refusal to grant access, nor the decision to close the courtroom, were incompatible with the Constitution. The Court held that the implied constitutional freedom on communication creates an immunity rather than a freestanding right. This immunity does not provide a right of access to judicial documents. The Court also discussed the Local Court's power to allow non-parties access to court documents in ADVO proceedings. The Court of Appeal found that the Local Court had no power to grant access to non-parties in these proceedings. However, as the Court had only been called upon to exercise its supervisory jurisdiction, and given that no fault could be found with the Magistrate's reasoning in assessing the application, this finding had no bearing on the final outcome. The Court of Appeal dismissed the Claimants' proceedings with costs.

**Bench:** Spigelman CJ; Mason P; Beazley JA  
**Citation:** *John Fairfax Publications Pty Ltd & 2 Ors v Ryde Local Court & 3 Ors* [2005] NSWCA 101; 152 A Crim R 527; 62 NSWLR 512  
**Judgement date:** 11 April 2005

### 12. *Kogarah Municipal Council v Golden Paradise Corporation & Anor*

This was an appeal against a decision of the Land and Environment Court ("the lower court"). The initial dispute was over a strip of council land that was dedicated for use as a laneway, but later reconveyed to the original private owner. Kogarah Municipal Council ("the Council") was the registered proprietor of the land until it was reconveyed to Blakehurst Properties Pty Ltd ("Blakehurst") in 2002. The owner of an adjoining property, Golden Paradise Corporation ("the Corporation"), submitted that the transfer breached section 45(1) of the *Local Government Act 1993* ("the LG Act"). This section prevents a council from selling, exchanging or otherwise disposing of community land. The Corporation

11. *Explores the concept of open justice and constitutional issues relating to access to court documents*



12. *The Land and Environment Court cannot order a private owner to remedy a breach of the Local Government Act for which they are not legally responsible*

sought to have the land transferred back to the Council. The Corporation successfully obtained a declaration from the lower court that the transfer breached section 45(1) of the LG Act, and an order that Blakehurst retransfer the land to the Council. The Council did not challenge whether the transfer breached section 45(1) and the appeal proceeded upon the assumption that a breach had indeed occurred. The Council submitted that the lower court erred by failing to recognise that Blakehurst had indefeasible title to the land and by ordering Blakehurst to transfer the land back to the Council.

13. *Subject to certain conditions, a court may hear a party whilst it is in contempt*

The critical issue on appeal was whether the lower court had the power to order Blakehurst to retransfer the land to the Council when Blakehurst had not breached the LG Act. The importance of the issue of indefeasibility to this proceedings was diminished by the fact that the Corporation had, at all stages, acted as though Blakehurst's interest in the land was a forgone conclusion. The Corporation failed to exploit a potentially significant legal argument regarding the contrary relationship between section 42 of the *Real Property Act 1900* and section 45 of the LG Act. Although admitting that the discussion is academic in terms of this appeal, Justice Basten makes some compelling and original observations on this topic in the closing paragraphs of this judgment.

With respect to the lower court's jurisdiction, the Council submitted that the lower court did not have the power pursuant to section 676(1) of the LG Act to make any order against Blakehurst where it was not found to be in breach of section 45(1). Whether Blakehurst had breached section 45(1) of the LG Act was never pleaded, argued or decided in the lower court. On appeal, the Corporation submitted that Blakehurst had breached sections 35 and 47D of the LG Act that require community land to be managed according to a council's plan of management. Drawing upon *Hillpalm Pty Ltd v Heaven's Door Pty Ltd (2002) 55 NSW LR 446*, the Court of Appeal unanimously decided that the lower court did not have the power to order Blakehurst to remedy a breach of a section of the LG Act for which it was not legally responsible. Once the land was transferred from the Council to Blakehurst, and ceased to be

vested in or under the Council's control, it ceased to be community land. Therefore, it could not be argued that Blakehurst invalidly used the land for its private purposes. The Council's appeal was allowed and the lower court's orders were dismissed.

**Bench:** Tobias JA; McColl JA; Basten JA

**Citation:** Kogarah Municipal Council v Golden Paradise Corporation & Anor [2005] NSWCA 230

**Judgment date:** 12 July 2005

### 13. *Leaway v Newcastle City Council & Anor*

Leaway operated a waste management facility within the local government area administered by Newcastle City Council. Leaway filed a statement of claim in the Supreme Court's Equity Division alleging that the Council and its solicitor ("the defendants") distributed misleading notices to its customers indicating that Leaway could no longer take delivery of second-hand building materials. Leaway sought an injunction from the Court to prevent the defendants from issuing any further notices, and relief in the form of damages. Both Leaway and the Council were parties to proceedings recently concluded in the Land and Environment Court ("LEC"). The LEC determined that Leaway's facility did not comply with the development consent governing its operations and ordered Leaway to suspend its activities. The LEC later found Leaway continued to operate in contempt of these orders and imposed a \$50,000 penalty on the company. At the time of filing proceedings in the Supreme Court, Leaway was yet to pay any part of this penalty. The defendants submitted that Leaway should not be heard whilst in contempt of the LEC's orders.

In the absence of a binding precedent on whether the party in contempt should be heard, the Court examined general case law and statutory provisions relating to contempt. The Court found that different streams of case law existed, concerning the structure of the law about when a person in contempt could be heard. One stream held that there was a clear rule that a person in contempt should not be heard, which was subject to a number of exceptions. Another stream held that whether a person in contempt should be heard was a matter for the Court's discretion.

The Court did not decide which of these different streams of case law was correct. Rather, Justice Campbell found that each of them led to the same conclusion. If it was right to follow the stream which said that there was a fixed rule that a party in contempt should not be heard, but that that rule was subject to exceptions, that stream recognised as one of the exceptions that the contempt had occurred in a different set of proceedings to the proceedings in which the person in contempt was seeking to be heard. Because the proceedings in the LEC in which Leaway was seeking in contempt were different to the Supreme Court proceedings in which Leaway was seeking to be heard, Leaway was within a recognised exception and so could be heard.

If it was right to follow the stream which said that whether a party should be heard was a matter of discretion, the Court's foremost considerations were the proper administration of justice and whether denying a party a hearing will achieve this aim. The Court accepted that in a variety of different cases, both ones where a litigant was in contempt and ones not involving contempt, the proper administration of justice can involve refusing to hear a litigant. Considerations of the administration of justice in the particular case, and of the administration of the system of justice as a whole, can both be taken into account when deciding to hear a litigant who is in contempt.

In this case, Justice Campbell held that the contempt of the LEC would not prevent the Supreme Court from administering justice in the case before it, because the issues in the two cases were different and there had been no defiance of the authority of this Court. So far as the administration of the system of justice as a whole was concerned, the quasi-criminal nature of contempt of court was relevant. The objectives of criminal sentencing would not be advanced by imposing a punishment whereby the contempt of the LEC resulted in Leaway being deprived of access to the Supreme Court for its new application. As well, a range of sanctions for non-payment of fines has been prescribed by statute, and those sanctions were sufficient to enable a general objective of the administration of justice, that orders of the LEC not be flouted, to be achieved without requiring that this Court refuse to

hear Leaway. Thus, in the exercise of discretion it would not be appropriate to refuse to hear Leaway's new application. The Court dismissed the defendants' submission that Leaway should not be heard.

**Bench:** Campbell J

**Citation:** *Leaway v Newcastle City Council* (No. 2) [2005] NSWSC 826

**Judgment date:** 26 August 2005

#### 14. *McPherson's Ltd v Eaton & Ors*

The Court of Appeal held in this case that the relationship between a retailer and purchaser does not automatically give rise to a duty of care. For a duty of care to exist, something more is required. The Court discussed the criteria to be applied in determining what a defendant "ought to know" in the context of considering whether the defendant owed a duty of care. This was a particularly relevant consideration where it was submitted that the defendant ought to have known of the dangers of asbestos when the articles containing asbestos it sold contained a very small part of a very large number of goods that it stocked for sale to the public.

**Bench:** Mason P; Hodgson JA; Ipp JA

**Citation:** *McPherson's Ltd v Eaton & Ors* [2005] NSWCA 435

**Judgment date:** 16 December 2005

#### 15. *Noor Al Houda Islamic College Pty Limited & Anor v Bankstown Airport Limited*

This case involved a claim for damages under sections 52 and 74 of the *Trade Practices Act* ("TPA") and for negligence. The plaintiff, Noor Al Houda Islamic College ("the College"), was an independently run Muslim school. When it opened in 1995, the College was housed on land leased from the operators of Bankstown Airport. The College entered into this lease with the Federal Airports Corporation ("FAC") in 1994, which four years' later became known as Bankstown Airport Limited ("BAL"), the defendant in these proceedings. In 1998, whilst negotiating a new lease to help the College secure a Commonwealth grant available to private schools, BAL released an environmental report indicating that a portion of the land was contaminated. The 1998 report indicated that earlier tests performed before the

lease's execution in 1994, had revealed the presence of contaminants. Subsequent environmental assessments confirmed that the land was an unsuitable site for a school and the College relocated in 2002.

The Court considered the validity of the College's claims under the TPA. The claim under section 52(1) of the TPA focused on FAC's and, by association, BAL's failure to inform the College of the contamination when they entered into the lease. The Court considered whether this failure constituted misleading or deceptive conduct required by section 52(1). The Court dismissed BAL's submission that it was not obliged to disclose the report. The College had clearly stated its intentions to operate a school on the land entitling the College to a reasonable expectation that BAL would disclose transparently relevant facts, such as contaminated land and its associated health risks. The Court also rejected BAL's contention that it should not be held accountable as it had not intended to mislead. The Court found that intention was a relevant, but not decisive, consideration. By failing to disclose the level of contamination detailed in the 1994 report, BAL created an impression that the land would be acceptable for a school. This misleading conduct led to the College suffering a loss of chance from establishing the school at a more appropriate location. The Court accepted the College's claim under section 52. However, the College's second claim for damages under section 74(2) for breach of contract was dismissed. Section 74 deals with contracts between corporations and consumers. The Court accepted BAL's submission that the College did not fall within the statutory definition of "consumer" and was ineligible for relief under this section.

The College's negligence claim was founded on the idea that BAL owed them a duty to exercise reasonable care. BAL contended that, where pure economic loss is concerned, the terms of the lease and not the law of negligence should determine a duty between a landlord and tenant. However, the Court found that these types of negligence claims must be decided on a case-by-case basis. In this case, the College's vulnerability was particularly relevant. The College was

completely reliant upon the Airport's operator to disclose the potential contamination, as this was not something that reasonable, general inquiries would reveal. The Airport's operator ought to have known that its failure to disclose this information would substantially impair the College's ability to operate and prosper at the site. FAC, and therefore the defendant BAL, should have had the College's interests in mind. In their defence, BAL sought to rely upon particular exclusionary clauses of the 1994 lease. The Court dismissed this argument. The original lease had not even alluded to the site being contaminated, therefore its terms could not be relied upon. In respect of the successful claims under section 52 of the TPA and in negligence, the Court awarded the College just over one million dollars in damages. This amount compensated for the College's past and future loss of profits, its past loss of capital grants from the Commonwealth, staff redundancy payments and relocation costs.

**Bench:** Hoeben J

**Citation:** Noor Al Houda Islamic College Pty Limited & Anor v Bankstown Airport Limited [2005] NSWSC 20

**Judgment date:** 24 February 2005

## **16. One.Tel Limited (in Liquidation) v John David Rich & Ors**

Orders for compensation of a company may be made when the Court is satisfied that a person has contravened a civil penalty provision of the *Corporations Act 2001 (Cth)* ("the Act") and damage to a company has resulted from such contravention (compensation proceedings). The Australian Securities and Investments Commission (ASIC) or a company claiming to have suffered damage may bring compensation proceedings (s 1317J). ASIC may also bring proceedings for declarations of contravention of civil penalty provisions of the Act and consequential orders that directors of a company be banned from managing a corporation for a period and/or for the imposition of pecuniary penalties (civil penalty proceedings). In civil penalty proceedings the defendants are able to claim privilege against exposure to penalties (penalty privilege) and are not amenable to orders compelling them to disclose information by way of discovery prior to trial: *Rich v ASIC (2004) 220 CLR 129*.

The plaintiff, One.Tel Limited (in Liquidation), brought compensation proceedings against the defendants, John David Rich, Lifecell Pty Limited and Rodney Stephen Adler, under s 1317H of the Act. In the case management of the proceedings, orders were made for the defendants to file their evidence prior to trial. The defendants applied to have those orders vacated on the basis that compensation proceedings are proceedings for the imposition of a penalty and therefore they were entitled to claim penalty privilege and should not be compelled to file evidence. The defendants' main contention was that once the Court was satisfied that there had been a contravention of a civil penalty provision of the Act (a pre-requisite to the making of a compensation order), it was required to make a "declaration of contravention" that may then expose the individual defendants to the imposition of a penalty if ASIC brought civil penalty proceedings against them.

Justice Bergin considered the legislative history of the relevant provisions of the Act, including the introduction of what appeared to her Honour to be the new development of "statutory notes" that are operative parts of the Act. Her Honour held that in compensation proceedings the Court is only required to make declarations of contravention of civil penalty provisions of the Act when the proceedings are brought by ASIC. Her Honour held that when the company brings compensation proceedings, as was the case in these proceedings, the Court is not required to make a declaration of contravention of a civil penalty provision prior to making an order for compensation, although it must be satisfied that such a contravention has occurred and that damage to the company resulted from the contravention. Justice Bergin held that compensation proceedings brought by a company for orders under s 1317H (or s 1317HA) are not proceedings for the imposition of a penalty.

Justice Bergin expressed a concern that under the Act, as recently amended, there was a real possibility that the privilege available in civil penalty proceedings might be circumvented or rendered nugatory, if a company brought compensation proceedings before ASIC brought civil penalty proceedings. Her Honour suggested that amendment to the legislation was needed to

ensure that did not occur and observed that, until such amendment, the Court is able to adjust its procedures to ensure that does not occur in pending proceedings. Her Honour vacated the orders requiring the defendants to file their evidence.

**Bench:** Bergin J

**Citation:** One.Tel Limited (In Liquidation) v John David Rich & Ors [2005] NSWSC 226; (2005) 53 ACSR 623

**Judgment date:** 23 March 2005

### 17. R v David John Iby

Mr Iby, the appellant, was convicted of manslaughter in the District Court. The appellant was driving a vehicle that collided head on with a car driven by a woman in her 38th week of pregnancy. The woman survived the collision. The child she was carrying was later delivered in poor condition by emergency caesarean. The infant survived for approximately two hours after delivery. During this time, the baby's heartbeat was monitored and it breathed with the assistance of medical ventilation. Medical tests revealed little or no electrical activity in the baby's brain after delivery. The baby was pronounced dead when tests failed to detect a heartbeat.

The appellant opted for a trial by judge alone. The trial judge concluded that the existence of a heartbeat was evidence that the baby had lived independently of its mother for nearly two hours and could therefore be the subject of a manslaughter charge. On appeal, the appellant submitted that the trial judge erred by finding the baby was "born alive". He also asked the Court of Criminal Appeal to consider that the baby was already dead upon delivery, hence he could not be held criminally responsible for the baby's death. The appellant's submissions were based on the baby's inability to breathe unassisted and inadequate evidence of brain activity during the two hours after delivery. The Court of Criminal Appeal considered the evidentiary requirements of the "born alive" rule and whether there is any legitimate relationship between this common law rule and the statutory definition of "death".

The Court of Criminal Appeal held that no single test could determine what constitutes "life" under the born alive rule. Live birth can be proven by

17. Observations about the "born alive" rule and the conviction of manslaughter

many different overt acts including, crying, breathing, heartbeat and motion. The Court found the trial judge was correct to hold that the evidence of heartbeat was sufficient to satisfy the common law born alive rule. In addition, the Court found the trial judge correctly rejected the appellant's submission that a person cannot be born alive unless they had demonstrated the ability to breathe without assistance. The Court also discussed whether the common law should be adapted so that the definition of life complements the statutory definition of death in section 33 of the *Human Tissue Act 1983 (NSW)*. The Court concluded that there need not be a reciprocal relationship between the common law test establishing life and the statutory definition of death. The appeal against conviction was dismissed.

**Bench:** Spigelman CJ, Grove J and Bell J

**Citation:** R v David John IBY [2005] NSWCCA 178; 154 A Crim R 55; 63 NSWLR 278

**Judgment Date:** 9 May 2005

### 18. R v Trent Benischke

Mr Benischke, the applicant, was one of four men accused of attacking JN and his five-week old daughter, EN. At the time of the attack EN was strapped to JN's chest, his jacket entirely obscuring her from sight. JN was punched and kicked repeatedly in the head and chest during the course of the attack in which EN was injured. One of the charges faced by the applicant and his co-accused was maliciously inflicting grievous bodily harm on EN under sections 35(1)(b) and 35(2) of the *Crimes Act 1900*. The applicant sought leave to appeal the District Court's interlocutory decision to deny him a permanent stay of proceedings. The applicant argued for a permanent stay on the basis that he could not have maliciously harmed EN as he was unaware of her presence and the Crown could not prove he committed the offences against EN. The Court of Criminal Appeal considered evidence from both sides seeking to establish the applicant's role in the attack and the likelihood of his being alert to EN's presence during the attack.

The applicant relied on a statement of agreed facts indicating none of the accused knew of EN's existence at "any relevant time". The Crown

claimed that this statement had been removed from the statement of agreed facts. Although acknowledging that none of the accused knew of the baby's presence prior to the assault on JN, the Crown referred to evidence from a witness and one of the co-accused indicating they heard EN cry during the attack. The Court of Criminal Appeal found that there was evidence from which a jury might conclude all four co-accused were present throughout the attack. The Court held that there was significant evidence that could lead to a jury accepting that the applicant was present and participated in the attack, and consequently infer the applicant continued the assault after he became aware of EN's presence. The Court of Criminal Appeal unanimously rejected the application for leave, and that a jury should determine if Mr Benischke attacked EN.

**Bench:** Spigelman CJ; Grove J; Howie J

**Citation:** R v Trent Benischke [2005] NSWCCA 169

**Judgment date:** 28 April 2005

### 19. Regina v MMK; Regina v MRK

The appellants, MMK and MRK, were both convicted (with three co-accused) of multiple sexual assault charges in the Supreme Court. Their crimes against two teenage girls generated substantial community concern and media attention throughout their trial, and interest in the outcome of their appeals remained high. MMK was convicted of nine counts of sexual intercourse in company and without consent, including charges of aggravated sexual assault. Although MRK did not commit an assault himself, the jury accepted he was part of a joint criminal enterprise whose common goal was to commit acts of aggravated sexual assault in company. On appeal, MMK and MRK argued their convictions should be overturned for a number of differing reasons.

MMK objected to his conviction on three grounds: that the jury's verdict was unreasonable and not supported by the evidence, that the trial judge failed to properly instruct the jury about the dangers inherent in identification evidence, and the trial judge erred in his instructions to the jury regarding alibi evidence. The first ground of appeal related to MMK's insistence that he was not present during the assaults. The Court of Criminal

Appeal dismissed this assertion and found compelling forensic evidence supported the witnesses' claims that MMK was present. The Crown's case against MMK was held to be strong, leaving a reasonable jury with no cause to doubt his guilt. The second ground of appeal followed MMK's claim at trial that the witnesses mistook him for one of his brothers, two of whom had almost identical names and a strong physical resemblance to MMK. He asserted that the trial judge inadequately instructed the jury about the dangers of misidentification. The Court of Criminal Appeal rejected this argument and found the trial judge sufficiently instructed the jury on this point. MMK's final ground of appeal asserted that the trial judge undermined MMK's alibi by incorrectly reversing the burden of proof. MMK claimed the trial judge's instructions to the jury too heavily concentrated on what more the defence might have done to prove MMK was not at the scene of the crime, when the focus should be on the Crown's responsibility to prove, beyond reasonable doubt, that he was indeed present. Once again, the Court of Criminal Appeal dismissed MMK's submission and held that the trial judge's directions to the jury were entirely proper.

MRK offered five grounds of appeal against his conviction. The first two grounds related to the jury's finding that MRK knew a knife was to be used in the assaults, which led to his conviction on the more serious charge of aggravated assault. On appeal, MRK argued there was not enough evidence to prove he knew about the plans to use a knife during the attacks and that the trial judge should have directed the jury to acquit him on this charge. The Court of Criminal Appeal dismissed both grounds of appeal. The Court found that there was sufficient evidence for the jury to infer that the joint criminal enterprise's activities extended to using knives during their planned assaults, and to find that MRK was an integral member of that enterprise with full knowledge of its plans. The third and fourth grounds of appeal alleged that the trial judge's directions about MRK's participation in the joint criminal enterprise were inadequate and incorrect. The Court of Criminal Appeal rejected both these grounds. The Court found that the trial judge provided the jury with a detailed explanation of the legal principles

that help define criminal enterprise. The judge also repeatedly emphasised the nature and extent of participation required before MRK could be found guilty of the offence, including the aggravated component. The Court did not address MRK's final ground of appeal as its failure was sealed by the outcomes of the preceding four grounds.

**Bench:** Spigelman CJ; Grove J; Hall J (in both cases)  
**Citation:** Regina v MMK [2005] NSWCCA 273; Regina v MRK [2005] NSWCCA 271  
**Judgment date:** 4 August 2005 (in both cases)

## 20. Regina v NZ

NZ, the appellant, and a co-accused were charged with aggravated sexual assault, or in the alternative, sexual intercourse with a child between 10 and 16 years old. Both charges related to the same complainant who was a juvenile at the time of the incident. During the trial, the complainant, and several other juvenile witnesses for the Crown, primarily gave evidence via videotaped interviews with police officers. The jury was given transcripts of each interview and the videotapes were tendered as exhibits. The videotapes were given to the jury (along with the other exhibits) when they retired to consider their verdict. The defence offered no objection. The jury found NZ guilty of aggravated sexual assault whilst the co-accused was convicted of the lesser, alternate charge. NZ appealed his conviction.

NZ's grounds of appeal concerned the different verdicts given by the jury in respect of NZ and the co-accused, and the Crown's use of videotaped witness interviews. The Court of Criminal Appeal considered whether the jury's verdict in NZ's case was unreasonable and if the jury had a rational basis for differentiating between the two Crown cases and delivering different verdicts. The Court also considered if the provision of videotapes to the jury whilst unsupervised during their deliberations and the trial judge's failure to warn jurors about giving disproportionate weight to that evidence, automatically constitutes a miscarriage of justice.

In respect of the inconsistent verdicts, the Court found that there was a reasonable basis upon which the jury could distinguish between the Crown case against NZ from that of his co-offender. The jury was entitled to doubt whether

*20. Supervised jury access to videotaped evidence in sexual assault proceedings is preferred, but not a requirement of a fair trial*

the Crown had proved the co-accused knew the complainant did not consent to intercourse (a requirement of the offence of aggravated sexual assault), but not to have similar doubts on the available evidence in NZ's case. The different verdicts were not unreasonable and the Court unanimously rejected this ground of appeal.

By a majority (Chief Justice Spigelman dissenting), the Court was also satisfied that the jury's unsupervised access to videotaped evidence in the jury room did not result in a miscarriage of justice. The majority of the Court agreed that confining the playing and re-playing of videotaped evidence to the courtroom, and reminding jurors not to give disproportionate weight to only a portion of the evidence that they have seen repeatedly, should be encouraged. However, the Court found that a breach of this preferred procedure does not automatically result in a miscarriage of justice, as the significance of the videotaped evidence varies dramatically from case to case. In this case, the Court found that repeated viewing of the complainant's videotaped evidence was unlikely to influence the jury on account of the controlled manner in which it was delivered. The Court also found it significant that the jury had sought access to the transcript of the defence counsel's cross-examination of the complainant. The Court regarded this as support that the jury gave equal weight to both the evidence in chief and cross-examination of the witness.

The majority of the Court also found that a miscarriage of justice does not automatically follow a trial judge's failure to specifically warn jurors about replaying videotaped evidence. In this case, the Court found that the trial judge had given the jury adequate warnings and directions about the nature of evidence and videotaped evidence during the trial, and that failure to issue a specific warning before they retired to reach a verdict did not deny NZ a fair trial. The appeal was dismissed.

**Bench:** Spigelman CJ (Dissenting); Wood CJ at CL; Hunt AJA; Howie J and Johnson J

**Citation:** Regina v NZ [2005] NSWCCA 278; (2005) 63 NSWLR 628

**Judgment date:** 17 August 2005

## 21. Regina v Richard James Frawley

Between 21 May and 8 July 1998, Mr Frawley purchased 253,500 shares in the company JNA Telecommunications Limited. Around two weeks after his final purchase, Mr Frawley sold his shares for a profit of \$479,789. At the time of the transactions, Mr Frawley was employed by another telecommunications company seeking to establish a strategic partnership with JNA. Mr Frawley had access to information concerning JNA that was not generally available and that he knew would have a material effect on the company's share price. Mr Frawley used this information to carefully time the sale of his shares and maximise his profits. In 2002, Mr Frawley was charged with insider trading pursuant to sections 1002G(2)(a) and 1311(1)(a) of the *Corporations Act 2001 (Cth)*. The offence carries a maximum penalty of five years' imprisonment or a fine of \$200,000 or both. Mr Frawley pleaded guilty to the charge. In determining an appropriate sentence, the Court weighed Mr Frawley's good character and contrition against the severity of his crime and the substantial financial reward it had brought him.

The Court heard various submissions regarding Mr Frawley's good character. He had no previous convictions and was a loving husband, father and son who gave generously to charity. In evidence given at his sentence hearing, Mr Frawley admitted that his conduct was wrong and that he felt intensely ashamed of his behaviour. Evidence from a clinical psychologist responsible for treating Mr Frawley after his arrest supported his claims of reformation and growing self-awareness about his crime. The Crown also indicated a degree of leniency was appropriate whilst sentencing Mr Frawley due to the time that had lapsed between the offence and his conviction and the delay caused by two vacated hearings.

At the sentence hearing, the Court acknowledged that insider trading is viewed as a serious offence due to its ability to undermine the integrity of the public securities market. When considering the available penalties, the Court found that section 320(d) of the *Proceeds of Crime Act 2002 (Cth)* prevented the enforcement of a pecuniary penalty. The Court then considered Part 1B sections 16A(2) and 17A of the *Crimes Act 1914 (Cth)* and

their impact on sentencing. The nature and seriousness of the offence and a desire that the sentence deters re-offending were particularly relevant considerations in Mr Frawley's case. After having regard to all these factors, the Court determined that imprisonment was the only appropriate sentence. The Court sentenced Mr Frawley to two and a half years' imprisonment to be served by way of periodic detention, becoming eligible for release after serving 20 months of that sentence.

**Bench:** Bell J

**Citation:** Regina v Frawley [2005] NSWSC 585

**Judgment date:** 24 June 2005

## 22. Regina v Rodney Stephen Adler

Mr Adler, a former director of HIH insurance, pleaded guilty to two counts of knowingly relaying false information likely to encourage the purchase of HIH shares, one count of obtaining money by false or misleading statements and one count of failing to discharge his duties as a director in good faith and in the best interests of the company. All but the third count were offences under the *Corporations Act 2001 (Cth)*, carrying a maximum penalty of five years' imprisonment and a potential \$20,000 fine. The third count was an offence under section 178BB of the *Crimes Act 1900 (NSW)* for which the maximum penalty was five years' imprisonment. The very public collapse of HIH Insurance generated considerable interest in the Court's sentencing of Mr Adler. However, the sentencing judge carefully noted none of the four charges related to HIH's collapse, and Mr Adler's guilty pleas should not be construed as an admission that he was in any way responsible for that company's collapse.

The judge outlined the acts that led to the charges. Counts 1 and 2 related to conversations between Mr Adler and a journalist. Mr Adler falsely claimed to have purchased shares in HIH with his own money to demonstrate his faith in the company and its future prospects. These dishonest claims were published in two separate newspaper articles and undoubtedly encouraged others to invest in HIH. The judge also found that by making the false claims, Mr Adler intended to raise HIH's share price for personal gain. The third charge alluded to a fax Mr Adler sent to HIH's

Chief Executive Officer, Ray Williams. The fax contained materially false information that prompted HIH to invest \$2 million in one of Mr Adler's other businesses. The fourth charge related to this \$2 million dollar transaction. Despite HIH's investment, the struggling company eventually went into liquidation, leaving HIH at a loss. To secure the \$2 million investment for his other company, Mr Adler deliberately and repeatedly misled Mr Williams and the other HIH Board members about its true financial position. Mr Adler had breached his duties as a director of HIH by placing his personal interests ahead of the company's and its shareholders.

The judge found all four offences were serious and demonstrated a significant lack of commercial morality. The judge found that only a sentence of full-time imprisonment would properly reflect the severity of Mr Adler's crimes and deter him from re-offending. When considering an appropriate sentence, the judge noted Mr Adler's personal, positive contributions to society, but remained unconvinced he recognised how unscrupulous his commercial activities had been. The fact that Mr Adler pleaded guilty was also taken into account. Mr Adler was ultimately sentenced to four and half years' imprisonment, to be eligible for parole after two and a half years.

**Bench:** Dunford J

**Citation:** Regina v Rodney Stephen Adler [2005] NSWSC 274; 53 ACSR 471; (2005) 23 ACLC 590

**Judgment date:** 14 April 2005

## 23. Regina v Ronen & Ors

Ida Ronen and her two sons, Izar and Nitzan, were charged and found guilty of tax evasion over an 11-year period. The trio ran "Dolina", a highly successful wholesale and clothing business. As well as supplying major outlets, Dolina operated a number of retail outlets, which had substantial cash turnovers.

Notwithstanding the "apparent homespun simplicity" of the tax evasion scheme which involved "skimming" most of the cash takings from the businesses, the Court found the concealed income to be in the order of \$15-\$17 million, representing about \$8.125 million in unpaid tax.



23. Is it proper for a sentencing court to take into account reduced maximum penalties when similar, new laws are created after charges have been laid?

Four months after the Ronens were arrested, the law changed markedly. Section 29D of the *Crimes Act 1914 (Cth)* was repealed and a series of new “conspiracy to defraud” offences were introduced. Significantly, the maximum penalties were halved from 20 to ten years.

In considering the sentences to impose, the question was asked: should the court take the legislative change into account – particularly the significantly reduced maximum penalties – even though the offenders were prosecuted under previous, harsher legislation?

The Court determined that the previous maximum penalties of 20 years should apply in this case however, “principles of fairness and justice require that the sentencing court not overlook or disregard...so significant a matter as the halving of a maximum penalty for a range of modern offences...”

The Court sentenced both Izar and Nitzan on two offences to 11 and a half years imprisonment, with a non-parole period of 5 and a half years. Mrs Ronen was sentenced on three counts to 12 years and two months imprisonment, with a non-parole period of four years and six months.

**Bench:** Whealy J

**Judgment citation:** *Regina v Ronen & Ors* [2005] NSWSC 991

**Judgment date:** 7 October 2005

#### 24. *Regina v Williams*

Mr Williams was the Chief Executive Officer of HIH Insurance Limited which, prior to its collapse and liquidation, was Australia’s second largest general insurer. Mr Williams was charged with three offences under the *Corporations Act 2001 (Cth)*, all of which related to derelictions of his responsibilities as a director. The offences related to Mr Williams authorising a material omission from a prospectus regarding the true risk-bearer of a substantial investment, supporting financial statements that grossly overstated HIH’s profits and recklessly misleading investors. The first and third offences carried a maximum penalty of five years’ imprisonment or a \$20,000 fine. The maximum penalty for the second count was two years’ imprisonment or a \$20,000 fine. Mr Williams pleaded guilty to all three offences.

The sentencing judge discussed the background to each of the three offences. The first followed Mr Williams’ endorsement of a prospectus aimed at raising \$155 million through unsecured converting notes. The prospectus failed to disclose that HIH had agreed to fully secure an external underwriter’s investment, a commitment of \$35 million. Mr Williams was undoubtedly aware of this commitment and obliged to question its omission from the prospectus. By failing to do so, he misled prospective investors about HIH’s liabilities, seriously breaching his duties as a director.

The second count related to Mr Williams’ authorisation of financial statements in the 1998/99 Annual Report that incorrectly accounted for a major reinsurance transaction. The accounting treatment authorised by Mr Williams overstated HIH’s operating profit by \$92.4 million. If the transaction had been correctly allocated, the statements would have revealed that HIH’s losses exceeded \$100 million. The judge viewed this second offence as the most serious. Regarding the final charge, Mr Williams issued a misleading letter to investors in the Medium Term Note Programme. The letter falsely assured investors that HIH was honouring its obligations under the Programme. This letter deprived investors of an opportunity to rightfully terminate their investments and demand repayment. The judge remarked that by issuing the false assurances, Mr Williams again seriously breached his fiduciary duty as a director.

When sentencing Mr Williams, the judge gave weight to his considerable positive personal and financial contributions to society. He also took Mr Williams’ contrition over HIH’s demise into account and the blow it dealt to his personal finances and employment prospects. However, the judge noted Mr Williams’ remorse and these other repercussions were more attributable to HIH’s collapse than these three criminal convictions. The judge determined that the balancing factors in Mr Williams’ favour could not outweigh the severity of his crimes, and a sentence of imprisonment was justified. The judge sentenced Mr Williams to four and a half years’ imprisonment, to be eligible for parole after two years and nine months.

**Bench:** Wood CJ at CL

**Citation:** Regina v Williams [2005] NSWSC 315; 53 ACSR 534; 152 A Crim R 548; (2005) 23 ACLC 601

**Judgment date:** 15 April 2005

### **25. Royal Alexandra Hospital for Children Trading as Children's Hospital at Westmead v J & Ors**

The Children's Hospital at Westmead sought an order from the Court to provide a further blood transfusion to a 16-year-old cancer patient. The patient, J, was a Jehovah's Witness and both he and his parents - the other two defendants in the matter - had refused the transfusion on religious grounds.

The hospital had successfully sought urgent orders for the first transfusion two weeks earlier and, though these initial orders allowed the hospital to continue providing subsequent transfusions, the hospital felt it prudent to make fresh application for this 'particular situation'.

The hospital claimed that without the transfusion, J was at risk of losing his life.

While Justice Einstein respected the beliefs of the child and his parents, he noted that the Court's responsibility in the matter was made clear in the *Children and Young Persons (Care and Protection) Act 1998* which deals with emergency medical treatment.

The Act provides in section 174(1) that a medical practitioner may carry out medical treatment on a child/young person without their consent or the consent of their parent if the medical practitioner is of the opinion that it is necessary, as a matter of urgency, to carry out the treatment in order to prevent serious damage to health or to save life.

His Honour stated that, on the material provided to the Court by the hospital, it was clearly in J's best interests that the orders be made. 'His life ought to be spared. He may well die in the absence of the order being made.'

Justice Einstein also ordered that a legal tutor be appointed to represent J.

**Bench:** Einstein J

**Citation:** Royal Alexandra Hospital for Children Trading as Children's Hospital at Westmead v J & Ors [2005] NSWSC 465

**Judgment date:** 11 May 2005

### **26. State of New South Wales v Ibbett \***

This appeal was brought by the State of New South Wales against the District Court's decision to award Mrs Ibbett damages for an assault and trespass to her land. The offending acts occurred when two police officers illegally trespassed on Mrs Ibbett's land whilst pursuing her son for a traffic violation. The first officer pursued Mr Ibbett into his mother's garage after he had dived under the closing roller door. Whilst engaged in a heated exchange with her son, the officer briefly swung around, pointed his gun at Mrs Ibbett and demanded that she open the garage door to allow his fellow officer entry. The State of New South Wales accepted vicarious liability for both officers' conduct. The trial judge awarded Mrs Ibbett \$15,000 in general damages and \$10,000 in exemplary damages for the assault. Mrs Ibbett was awarded \$20,000 in aggravated damages and \$20,000 in exemplary damages for the trespass. On appeal, the primary issues were whether provisions in the *Civil Liability Act 2002* ("CLA") precluded the award of exemplary damages and whether, given the circumstances, the trial judge's decision to award damages was reasonable. The Court also considered Mrs Ibbett's cross-appeal seeking aggravated damages for the assault.

In appealing the award of exemplary damages for the assault, the State sought to rely on section 21 of the CLA. Section 21 prohibits the award of exemplary damages in cases of personal injury involving negligence. However, the operation of section 21 is subject to section 3B which states that intentional acts causing injury are excluded entirely from the CLA's provisions. By a majority, the Court found that section 21 of the CLA did not preclude an award of exemplary damages in this case. Concerning the assault, the Court held that by pointing a gun at Mrs Ibbett, the first officer intentionally caused her fear and apprehension. The Court held that the definition of "injury" in

27. Statutory interpretation requires focus on the purpose and context of the specific legislation under dispute

section 11 of the CLA was broad enough to encompass the anxiety and stress Mrs Ibbett suffered during, and after, the assault. The Court also awarded Mrs Ibbett an additional \$10,000 for aggravated damages regarding the assault. At trial, the judge awarded a cumulative award of aggravated damages for the actions of trespass and assault. The Court of Appeal found the incidents were sufficiently separate as to warrant independent consideration. The Court upheld Mrs Ibbett's cross-appeal on the basis that the first officer's misconduct was so serious as to warrant the additional punishment of aggravated damages.

Concerning the District Court's award of exemplary damages for trespass to land, the majority of the Court found that the award was appropriate given the police officers' blatant disregard for the property owner's rights. The Court noted that the award of \$20,000 was sufficient to serve as a deterrent and reflect the disapproval of the Court. The Court also upheld the amount of aggravated damages for the trespass to land awarded by the trial judge, even though several errors were detected in his reasoning. The majority observed that the seriousness of the conduct and the inadequate disciplinary measures taken by the police justified extra compensation.

**Bench:** Spigelman CJ, Ipp JA, Basten JA

**Citation:** *New South Wales v Ibbett* [2005] NSWCA 445

**Date:** 13 December 2005

\*The High Court of Australia granted special leave to appeal this decision on 16 June 2006. At the time of publication, the High Court was yet to deliver their judgment.

### 27. Vice Chancellor Macquarie University v FM

This was an appeal on a point of law against a decision of the Administrative Decisions Tribunal Appeal Panel ("the Panel"). The Panel upheld the Tribunal's finding that Macquarie University breached section 18 of the *Privacy and Personal Information Protection Act 1998 (NSW)* ("the Privacy Act") by releasing a former student's personal information to another university. Section

18 of the Privacy Act details the limited circumstances under which public sector agencies may release personal information to another person or body. In the Court of Appeal, Macquarie University submitted that the Panel misinterpreted several definitions crucial in determining the form information must take before its release is prohibited under section 18. Macquarie University argued that section 18 could not apply to the information it had released as that information was held in the minds of its employees, and not tangibly by Macquarie University, the agency.

The appellant's primary submission was that the Privacy Act, on its true construction, is concerned with information held in a material form, whether that form be paper records, diagrams, photographs or in electronic storage of some character. The Panel rejected this contention with a sweeping statement that privacy statutes do not typically define "personal information" so narrowly. The Court of Appeal tested the validity of the appellant's submission by determining the proper construction of the statute rather than a general legislative trend. The Court of Appeal placed section 18 in context by scrutinising adjoining sections of the Privacy Act and examining existing and equivalent Commonwealth legislation's influence on the drafting of this section.

The Court of Appeal determined that section 18 should be construed in the context of the other Information Protection Principles contained in Division 1 of Part 2 of the Privacy Act. The operation of sections 12–19 (that deal with the collection, storage and disclosure of personal information) all hinge upon whether a public sector agency "holds personal information". According to the definition in section 4 of the Privacy Act, an agency only "holds" personal information when it is in its possession or control. The Court of Appeal believed it highly probable that this formulation was used in the same sense in the consecutive sections 12–19. The Court of Appeal unanimously decided that section 18 only prohibits the disclosure of personal information held by an agency that is tangibly under its possession or control and that this definition did not extend to

information in an employee's mind. The appeal was allowed and the Panel's orders were set aside.

**Bench:** Spigelman CJ; Tobias JA; Brownie AJA

**Citation:** Vice-Chancellor Macquarie University v FM [2005] NSWCA 192

**Judgment date:** 9 May 2005

### 28. Watt v Lord & Anor

This was a dispute over a property transaction where the purchaser failed to seek registration of title at, or near, the time of purchase. The dispute began after Mr Lord, the purchaser and first defendant, lodged a memorandum of transfer of land and certificate of title with the Registrar-General more than 43 years after the memorandum's execution. Mr Lord's application followed the death of the property's original owners and registered proprietors. The registered proprietors' surviving beneficiary, Mrs Holliday, commenced proceedings and sought to prevent registration of the transfer. Mrs Holliday died during the course of proceedings and her daughter, Mrs Watt, took her place as the plaintiff. Mrs Watt primarily opposed the transfer on account of Mr Lord's failure to lodge the memorandum of transfer until after the proprietors' deaths. The Court considered whether the death of a registered proprietor renders an unregistered memorandum of transfer ineffectual.

The Court examined precedent and authorities on the Torrens System of land title. The Court found that the critical factor in determining disputes of this kind is whether the former owner had, prior to death, delivered the memorandum of transfer and certificate of title to the purchaser. Provided the transferee is armed with all the necessary documents to obtain registration, the transferee has a right to registration, irrespective of whether the transferor dies before the transaction is registered. In Mr Lord's case there was no doubt that he purchased a property from Mrs Watt's relatives over 43 years ago and was given the memorandum of transfer and certificate of title. The Court found that these actions secured the memorandum of transfer's standing as an effective document notwithstanding Mr Lord's

failure to register himself as the property's owner prior to the previous owners' deaths.

The Court dismissed the plaintiff's opposition to Mr Lord's application for registration and concluded that there was nothing preventing the Registrar-General from registering the transfer.

**Bench:** Gzell J

**Citation:** Watt v Lord & Anor [2005] NSWSC 53

**Judgment date:** 18 February 2005

*28. A Memorandum of Transfer is indefinitely effective provided it has been delivered to the transferee*

APPENDIX (ii): COURT STATISTICS – COMPREHENSIVE TABLE OF STATISTICS

- Filings, disposals and pending cases
- Timeliness
- Court of Appeal, Court of Criminal Appeal, Criminal List - age of pending cases at 31 December
- Other lists - waiting times
- Use of alternative dispute resolution

**Notes**

The figures for pending cases will include cases that have been re-opened after judgment, and cases referred between case management lists. For this reason, the pending caseload figures will not always reconcile with associated filing and disposal figures in this table.

"n/a" – figures not available or not separately reported / "-" – item not applicable / "0" – zero count

TABLE 01: **FILINGS, DISPOSALS AND PENDING CASES**

	2001	2002	2003	2004	2005
<b>COURT OF APPEAL<sup>1</sup></b>					
Filings					
Appeals and applications for relief	504	446	485	516	442
Applications for leave to appeal <sup>2</sup>	256	314	330	287	285
Net new cases <sup>3</sup>	679	710	761	760	690
Disposals					
Appeals and applications for relief	627	494	443	497	456
Applications for leave to appeal	314	264	317	273	320
Net disposals <sup>4</sup>	852	707	703	728	739
Pending cases at 31 December					
Appeals and applications for relief	337	289	331	350	336
Applications for leave to appeal	112	162	175	189	154
Total	449	451	506	539	490

<sup>1</sup> These statistics exclude holding notices of appeal and holding summonses for leave to appeal.

<sup>2</sup> This item also includes applications where parties have elected to have a concurrent hearing of the application for leave to appeal and the appeal.

<sup>3</sup> Where an appeal has been preceded by an application for leave, this is regarded as one continuous case initiated by the application for leave to appeal.

<sup>4</sup> Where an appeal has been preceded by an application for leave, this is regarded as one continuous case, and disposal is counted only when the substantive appeal is finalised.

	2001	2002	2003	2004	2005
<b>COURT OF CRIMINAL APPEAL<sup>1</sup></b>					
Filings					
	940	516	538	539	524
Disposals					
	923	998	578	564	536
Pending cases at 31 December <sup>2</sup>					
	767	284	264	239	229

<sup>1</sup> The procedures for filing criminal appeals changed on 1 July 2002 and the operational figures for 2002 are therefore aberrant. From 2003 onwards, operational figures have stabilised at the anticipated lower level.

<sup>2</sup> The pending caseload does not reconcile from 2004 to 2005. There are currently no automated systems available for the Court of Criminal Appeal to produce statistical reports.

TABLE 01: FILINGS, DISPOSALS AND PENDING CASES CONTINUED

	2001	2002	2003	2004	2005 <sup>2</sup>
<b>COMMON LAW DIVISION - CRIMINAL<sup>1</sup></b>					
<b>Criminal List</b>					
Filings <sup>3</sup>	118	116	127	81	94
Disposals <sup>4</sup>	130	107	106	105	126
Pending cases at 31 December	90	87	118	99	93
<b>Bails List</b>					
Filings	2,531	2,315	2,691	2,756	2,715
Disposals	2,509	2,272	2,679	2,753	2,709
Pending cases at 31 December	165	209	212	240	344

<sup>1</sup> In all years, the figures exclude matters under s474D Crimes Act and applications for re-determination of life sentence.

<sup>2</sup> The figures for 2005 are based on new counting rules and are therefore not directly comparable with figures for earlier years. From 1 January 2005, the Court changed its counting rules as follows to align with national counting rules: the counting unit is now defendants (previously it was cases); disposal is now counted at the time of sentence/acquittal or other final disposal (previously it was at verdict/plea or other final disposal); and, where a trial collapses and retrial is ordered, the counting of the age of the case continues (previously the time taken for the collapsed trial was ignored and age was calculated from the date of the order for the retrial).

<sup>3</sup> The figures include committals for trial/sentence, ex officio indictments, re-trials ordered by the Court of Criminal Appeal or High Court, matters referred from the Mental Health Review Tribunal, transfers from the District Court, and re-activated matters (eg execution of a bench warrant).

<sup>4</sup> Since 1 January 2005, disposal is counted at sentence, acquittal or other final disposal (previously it was counted at verdict, plea of guilty, or other final disposal). "Other final disposal" includes referral to the Mental Health Tribunal, no bill, death of the accused, order for a bench warrant to issue, transfer to another court, other final orders.

	2001	2002	2003	2004	2005
<b>COMMON LAW DIVISION - CIVIL</b>					
<b>Administrative Law List</b>					
Filings	74	108	112	118	116
Disposals	97	96	125	114	128
Pending cases at 31 December	40	57	49	60	63
<b>Defamation List</b>					
Filings	63	45	50	57	56
Disposals	102	64	65	73	60
Pending cases at 31 December	122	112	105	92	90
<b>General Case Management List<sup>1</sup></b>					
<b>Filings</b>					
Contested	724	438	213	288	283
Uncontested	74	115	94	211	216
Total	798	553	307	499	499
<b>Disposals</b>					
Contested	461	626	527	442	414
Uncontested	312	56	33	91	191
Total	773	682	560	533	605
<b>Pending cases at 31 December</b>					
Contested	1,339	1,190	896	794	744
Uncontested	56	49	61	127	116
Total	1,395	1,239	957	921	860

TABLE 01: FILINGS, DISPOSALS AND PENDING CASES *CONTINUED*

	2001	2002	2003	2004	2005
<b>Possession List</b>					
Filings					
Contested	113	142	91	132	163
Uncontested	2,558	2,047	2,270	2,929	4,710
Total	2,671	2,189	2,361	3,061	4,873
Disposals					
Contested	159	117	97	103	124
Uncontested	2,502	2,229	1,981	2,823	3,544
Total	2,661	2,346	2,078	2,926	3,668
Pending cases at 31 December					
Contested	135	102	76	93	126
Uncontested	849	762	1,031	1,128	2,411
Total	984	864	1,107	1,221	2,537
<b>Professional Negligence List</b>					
Filings <sup>2</sup>	259	111	101	117	114
Disposals	255	236	204	157	183
Pending cases at 31 December	550	487	423	389	354
<b>Summons List</b>					
Filings	618	622	527	629	560
Disposals	934	624	505	690	582
Pending cases at 31 December	442	418	425	379	360
<b>Miscellaneous applications<sup>3</sup></b>					
Filings	548	500	465	405	456
Disposals	555	424	405	318	306
Pending cases at 31 December	37	101	118	120	185
<b>Related issues cases filed before February 1994<sup>4</sup></b>					
Disposals	308	17	4	0	282
Pending cases at 31 December	304	287	283	283	1
<b>COMMON LAW DIVISION TOTALS - Civil</b>					
<b>Filings</b>	<b>5,032</b>	<b>4,128</b>	<b>3,923</b>	<b>4,886</b>	<b>6,674</b>
<b>Disposals</b>	<b>5,685</b>	<b>4,489</b>	<b>3,946</b>	<b>4,811</b>	<b>5,814</b>
<b>Pending cases at 31 December</b>	<b>4,039</b>	<b>3,565</b>	<b>3,467</b>	<b>3,465</b>	<b>4,450</b>
<sup>1</sup> This list was formerly called the Differential Case Management List					
<sup>2</sup> Additionally, in 2001 and 2002 there were 50 and 47 cases, respectively, transferred into this List.					
<sup>3</sup> These include applications under the Mutual Recognition Act, Trans-Tasman Mutual Recognition Act and applications for production orders.					
<sup>4</sup> These are cases against Dow Corning and 3M where damages were claimed for personal injury arising from silicon implants					
	2001	2002	2003	2004	2005
<b>EQUITY DIVISION</b>					
<b>Admiralty List</b>					
Filings	4	1	6	3	2
Disposals	11	4	3	4	2
Pending cases at 31 December	4	2	5	4	4

TABLE 01: FILINGS, DISPOSALS AND PENDING CASES *CONTINUED*

	2001	2002	2003	2004	2005
<b>Adoptions List <sup>1</sup></b>					
Applications	143	170	151	207	205
Orders made	129	176	75	195	181
Pending cases at 31 December	41	38	38	23	38
<b>Commercial List</b>					
Filings	196	216	181	193	192
Disposals	173	203	203	175	196
Pending cases at 31 December	217	234	218	233	240
<b>Corporations List</b>					
Filings	3,148	3,113	3,289	3,460	3,134
Disposals <sup>2</sup>	2,455	2,872	2,777	2,903	2,807
Pending cases at 31 December	702	569	633	684	657
<b>Protective List <sup>3</sup></b>					
Applications	91	74	77	67	90
Disposals	89	76	63	39	85
Pending applications at 31 December	4	3	9	15	15
<b>Technology and Construction List <sup>4</sup></b>					
Filings	56	69	72	93	106
Disposals	29	76	56	110	94
Pending cases at 31 December	100	93	116	98	120
<b>General List</b>					
Filings	1,966	2,020	2,219	2,493	2,354
Disposals <sup>5</sup>	2,984	2,290	2,607	2,839	2,943
Pending cases at 31 December	2,212	2,391	2,436	2,956	2,933
<b>Probate (Contentious Matters) List</b>					
Filings	124	132	202	168	172
Disposals	136	143	174	177	167
Pending cases at 31 December	83	72	100	91	96
<b>EQUITY DIVISION TOTALS</b>					
Filings	5,728	5,795	6,197	6,684	6,255
Disposals <sup>6</sup>	6,006	5,840	6,159	6,442	6,475
Pending cases at 31 December	3,363	3,402	3,555	4,104	4,103
<b>PROBATE APPLICATIONS – UNCONTESTED <sup>7</sup></b>					
Applications received	20,825	21,895	21,966	22,506	21,515

<sup>1</sup> In this List, all applications types are counted, including information applications.

<sup>2</sup> These are Registrar's disposals only – disposals by Judges and Associate Judges are included in the total for the General List. Typically, the Registrar handles about 90 per cent of disposals.

<sup>3</sup> The cases in this List can be of a "perpetual" nature. During the period when a person's affairs or property are managed under the Protected Estates Act, it is possible that more than one application will be made in relation to that person.

<sup>4</sup> This list was formerly called the Construction List.

<sup>5</sup> The disposals in this list also include cases disposed from the Corporations List by a Judge or Associate Judge.

<sup>6</sup> The disposals counting for the Equity Division is not fully reliable because, for the two largest lists, a significant number of cases are re-opened (but not counted as fresh filings) and subsequently have a further disposal recorded against them.

<sup>7</sup> Registrars deal with the uncontested probate applications. Only a small proportion become contested and are handled in the Probate (Contentious Matters) List.



TABLE 02 (A): **TIMELINESS - AGE OF PENDING CASES**  
 COURT OF APPEAL, COURT OF CRIMINAL APPEAL AND CRIMINAL LIST <sup>1,2</sup>

<b>Number pending (and % of total)</b>	<b>National Standard<sup>3</sup></b>	<b>2004</b>	<b>2005</b>
<b>COURT OF APPEAL</b>			
Total number of cases pending		539	490
Cases within 12 months of age	90%	483 (90%)	436 (89%)
Cases within 24 months of age	100%	531 (99%)	480 (98%)
<b>COURT OF CRIMINAL APPEAL</b>			
Total number of cases pending		239	229
Cases within 12 months of age	90%	212 (89%)	214 (93%)
Cases within 24 months of age	100%	231 (97%)	222 (97%)
<b>COMMON LAW DIVISION - CRIMINAL<sup>4,5</sup></b>			
Total number of defendants pending		125	93
Cases within 12 months of age	90%	75 (60%)	68 (73%)
Cases within 24 months of age	100%	114 (91%)	80 (86%)

<sup>1</sup> Precise and timely reporting on the age of pending cases is not yet available for the civil cases of the Common Law Division and for the Equity Division. It is anticipated that the CourtLink system, when fully delivered, will provide the necessary reports.

<sup>2</sup> For cases in the Court of Appeal and the Court of Criminal Appeal, the age of cases includes any time taken to deal with a prerequisite application for leave to appeal.

<sup>3</sup> The national standards are taken from the "backlog" performance indicator within the Court Administration chapter of the Report on Government Services (published by the Productivity Commission). Note that the national standards apply to higher courts in all states and territories. While almost all indictments in the Criminal List in this Court are for offences of murder and manslaughter, the range of indictments routinely presented in other states and territories is broader.

<sup>4</sup> In all years, the figures exclude matters under s474D Crimes Act and applications for re-determination of life sentence.

<sup>5</sup> The figures for 2004 and 2005 are comparable. The counting unit is defendants, disposal is counted at the time of sentence/acquittal or other final disposal, and where a trial collapses and retrial is ordered the counting of the age of the case is calculated from the date of committal (not from the date of the order for the retrial).

TABLE 02 (B): **TIMELINESS – WAITING TIMES**  
**OTHER LISTS**

<b>Median finalisation time<sup>1,2</sup> (unless otherwise indicated)</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>
<b>COMMON LAW DIVISION - CRIMINAL</b>					
Bails List – usual delay (weeks)	1-2	1-2	1-2	2-3	2-3
<b>COMMON LAW DIVISION - CIVIL</b>					
Administrative Law List (months)	7.0	4.6	5.6	4.8	4.4
Defamation List (months)	19.4	22.6	19.1	16.2	12.6
General Case Management List (months)	n/a	23.1	25.1	27.1	28.8
Possession List (months)	n/a	8.5	9.5	6.7	6.6
Professional Negligence List (months)	32.1	28.1	30.6	39.9	34.2
Summons List –civil matters (months)	n/a	2.4	3.8	2.6	3.5
Summons List – criminal matters (months)	n/a	8.2	7.0	15.2	6.6
Cases proceeding by default (months)	6.8	5.3	5.6	5.6	4.6
<b>EQUITY DIVISION</b>					
Admiralty List (months)	n/a	18.3	5.7	14.4	17.4
Adoptions List – usual finalisation time (weeks)	n/a	8-12	4-5	4-5	2-6
Commercial List (months)	n/a	10.4	14.0	10.4	10.1
Corporations List (months)	n/a	1.6	1.5	1.6	1.6
Probate (Contentious Matters) List (months)	n/a	5.0	1.7	2.8	4.0
Protective List – usual time for orders to be made (weeks)	n/a	3.5	3.5	3	2-4
Technology and Construction List (months)	n/a	14.0	21.9	5.4	7.3
General List (months)	n/a	11.3	10.1	10.3	9.6
Probate applications (uncontested) – usual time for grant to be made (working days)	2	2	2	2	2

<sup>1</sup> The median finalisation time refers to cases finalised during the reporting year. It is not necessarily an indicator of future waiting time, or of entrenched delay. When an unusually high number of older cases are finalised in a reporting year, the median finalisation time may be relatively high, in comparison to other years.

<sup>2</sup> The median finalisation times are not fully reliable due to limitations in reporting capability in the present computer system. Where cases have been disposed, then re-opened post-judgment, and then closed again, the finalisation time is calculated from the date of original commencement of proceedings to the latest disposal date, which is an over-representation of finalisation time in such cases.

TABLE 03: **USE OF ALTERNATIVE DISPUTE RESOLUTION**

	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>
<b>Court-annexed mediation referrals<sup>1,2</sup></b>					
Common Law Division	6	8	19	7	6
Equity Division – not probate cases <sup>3</sup>	165	133	180	284	229
Equity Division – probate cases	n/a	6	8	7	8
Court of Appeal <sup>4</sup>	-	23	11	10	7
Percentage of cases settling at mediation	60%	64%	65%	67%	62%
<b>Arbitration referrals</b>					
Common Law Division	21	58	44	15	0

<sup>1</sup> "Court-annexed mediation" refers to the mediations that are conducted by Registrars of the Court who are qualified as mediators. It does not cover mediation provided by mediators external to the Court.

<sup>2</sup> During 2005 the Registry recorded 517 referrals to mediation. Of those, 250 were handled within the court-annexed mediation programme, and the statistics here refer to those mediations only. The Registry does not collect data for mediations conducted by external mediators.

<sup>3</sup> The number of referrals within this group for 2004 is extraordinarily high and may be an over-count.

<sup>4</sup> Before 2002 the Court of Appeal did not refer matters to mediation.

## APPENDIX (iii) THE COURT'S COMMITTEES AND USER GROUPS

### Chief Justice's Policy and Planning Committee

The Committee meets each month to determine strategic policy to be adopted by the Court, particularly in relation to legislative, procedural or administrative changes that are likely to affect the Court and its users. The Policy and Planning Committee is one of only two Court Committees with decision-making responsibilities, the other being the Rule Committee.

Caseload management remained an important focus throughout the year. The Committee also discussed developments in the CourtLink system and considered how the new technology will impact upon the Court's policies, particularly those governing access to court records. The Committee continued to review policy and procedural initiatives submitted by the Court's other Committees detailed in this Appendix.

### Members during 2005

The Honourable the Chief Justice (Chairperson)  
The Honourable the President  
The Honourable Justice Handley AO  
The Honourable Justice Giles  
The Honourable Justice Wood AO (until August)  
The Honourable Mr Justice Young AO  
The Honourable Justice McClellan (from October)  
Secretary: Ms M Greenwood

### Rule Committee

The Rule Committee meets each month to consider proposed changes to the Supreme Court Rules with a view to increasing the efficiency of the Court's operations, and reducing cost and delay in accordance with the requirements of access to justice. The Committee is a statutory body that has the power to alter, add to, or rescind any of the Rules contained in, or created under, the *Supreme Court Act 1970*. The Committee's membership is defined in section 123 of the Act, and includes representatives from each Division of the Court and key organisations within the legal profession.

### Members during 2005

The Honourable the Chief Justice (Chairperson)  
The Honourable the President  
The Honourable Justice Hodgson  
The Honourable Mr Justice Young AO (until June)  
The Honourable Mr Justice Bruce James  
The Honourable Mr Justice Hamilton  
The Honourable Justice Bergin  
The Honourable Justice Hoeben (from July)  
Mr M J Slattery QC (NSW Bar Association; until June)  
Mr Geoff Lindsay SC (NSW Bar Association; from July)  
Mr P Johnstone (Law Society of NSW)  
Secretary: Mr S Jupp  
Advising Officer: Mr N Flaskas

### Education Committee

The Supreme Court Education Committee is responsible for the continuing education of the Judges and Associate Judges of the Court. It meets three or four times each year, primarily to discuss arrangements for the Court's Annual Conference.

### Members during 2005

The Honourable Justice Ipp (Chairperson)  
The Honourable Justice Giles (until June)  
The Honourable Justice Santow OAM  
The Honourable Justice McColl AO (from July)  
The Honourable Justice Basten (from July)  
The Honourable Mr Justice Studdert (until June)  
The Honourable Justice Kirby (until June)  
The Honourable Justice Bell  
The Honourable Justice Gzell  
The Honourable Justice Hislop (from July)  
The Honourable Justice White (from July)  
The Honourable Justice Johnson (from July)  
The Honourable Associate Justice McLaughlin (until June)  
Ms M Greenwood  
Secretary: Ms R Windeler (Judicial Commission of NSW)

### **Building Committee**

The Committee meets approximately every two months to discuss matters affecting the buildings within the Darlinghurst and King Street court complexes, and the Law Courts Building in Phillip Street. The Committee submits recommendations to the Chief Justice through the Policy and Planning Committee concerning maintenance and restoration work, including the desired outcome from the work. The Committee also identifies facilities that are required to support courtroom operations and the needs of Court users. The upcoming refurbishment of the Law Courts Building was the Committee's primary concern during 2005.

### **Members during 2005**

The Honourable Mr Justice Sheller AO  
(Chairperson until April)

The Honourable Justice Giles

The Honourable Justice Wood AO (until August)

The Honourable Justice McClellan (from September)

The Honourable Mr Justice Dunford (until April)

The Honourable Justice McDougall (Chairperson from May)

The Honourable Justice Hoeben (from April)

The Honourable Justice Brereton (from October)

Ms M Greenwood

Mr G Byles (Sheriff of NSW)

Mr S Furness (Asset Management Service,  
Attorney General's Department)

Mr S Lawes (Law Courts Limited; from August)

Secretary: Mr J Grant

### **Information Technology Committee**

The Information Technology Committee meets every two months to assess the information technology needs of judicial officers and their staff, and to review the implementation of IT services. During the year, the Committee discussed the IT training needs of judicial staff, the re-design of the Court's website and the implementation of new software aimed at improving transcription services. The Committee also continued to discuss the Caselaw database and make recommendations about how to increase the database's value as a legal research tool.

### **Members during 2005**

The Honourable Justice Beazley (Chairperson)

The Honourable Justice McColl AO

The Honourable Justice Simpson

The Honourable Justice Einstein

Associate Justice Macready

Ms M Greenwood

Mr J Mahon (Information Technology Services,  
NSW Attorney General's Department)

Mr D Lane (Information Technology Services, NSW  
Attorney General's Department)

Ms J Gee (Information Technology Services, NSW  
Attorney General's Department)

Ms L O'Loughlin (Law Courts Library)

Secretary: Ms S Thambyrajah

### **Alternative Dispute Resolution Steering Committee**

The Alternative Dispute Resolution (ADR) Steering Committee meets every two months to discuss the Court's ADR processes and consider ways in which they might be improved. The work of the Committee encourages the use of ADR (particularly mediation) in solving disputes and ensuring that the Court has adequate infrastructure to provide this service. The Committee makes recommendations to the Chief Justice in pursuit of these objectives, occasionally in consultation with other courts and external organisations.

During 2005, the Attorney General's Department provided \$50,000 for a pilot program to increase use of mediation for Court of Appeal proceedings. The funds are used to subsidise mediation costs for appropriate Court of Appeal cases.

### **Members during 2005**

The Honourable Mr Justice Sheller AO  
(Chairperson until April)

The Honourable Justice Bryson

The Honourable Mr Justice Studdert

The Honourable Justice Greg James (until May)

The Honourable Justice Bergin  
(Chairperson from May)

The Honourable Justice Campbell (from June)

The Honourable Justice Hoeben (from June)

The Honourable Justice Hall (from June)  
The Honourable Justice Latham (from June)  
The Honourable Associate Justice Harrison  
Ms M Greenwood  
Mr G Berecny (until July)  
Secretary: Ms J Highet

### **Library Committee**

The Supreme Court Library Committee meets as required to provide advice on the management of the Judges' Chambers Collections and Supreme Court Floor Collections. The Committee met once during 2005.

### **Members during 2005**

The Honourable The President  
The Honourable Justice Ipp (Chairperson)  
The Honourable Mr Justice Young AO  
The Honourable Mr Justice Sully  
Ms M Greenwood  
Mrs L O'Loughlin (Law Courts Library)  
Secretary: Ms E Drynan (Law Courts Library)

### **Jury Task Force**

The Task Force was formed by the Chief Justice in 1992 to examine and report on matters relating to the welfare and wellbeing of jurors. The Task Force met regularly during 2005 to discuss issues affecting juries and jury service referred to it by the Chief Justice, a head of jurisdiction, or the Attorney General. The Task Force monitors areas of policy concerning jurors with disabilities, the Sheriff's power to disclose the identity of a juror in the event of jury tampering, and exemptions from jury service.

### **Members during 2005**

The Honourable Justice Greg James  
(Chairperson; until April)  
The Honourable Justice Buddin (Chairperson;  
from May)  
Ms N Ubrihien (until March)  
Mr M Lacey (from July)  
His Honour Judge Shadbolt (District Court)  
Mr G Byles (Sheriff of NSW)

Ms J Atkinson (Senior Policy Officer, Legislation and Policy Division, Attorney General's Department)  
Mr P Broderick (Manager, Major Works, Attorney General's Department; until November)  
Mr K Marshall (Assistant Director, Major Works, Attorney General's Department; from December)  
Ms L Anamourlis (Manager, Jury Services)  
Secretary: Mr R Escott

### **Court of Appeal Users' Group**

The Group was established in 1999 and consists of representatives from the legal profession nominated by the Bar Association and the Law Society. The Group meets with the President twice a year and provides users with an opportunity to share ideas and raise concerns about the Court of Appeal's operations.

### **Members during 2005**

The Honourable Justice Mason (Chairperson)  
Mr J Maconachie QC  
Mr D Davies SC  
Mr J Gleeson SC  
Mr N Mavrakis  
Ms R Kearney  
Mr P Baram

### **Court of Criminal Appeal/Crime User Group**

The joint Court of Criminal Appeal/Crime User Group was established in 2004 to promote effective communication between the Court and key users. The Group focuses on ensuring that Court of Criminal Appeal procedures work effectively within the required time frames. The Group met three times during 2005. Issues discussed included: Supreme Court bail procedures, the availability of transcript and the new Court of Criminal Appeal and Criminal Proceedings Practice Notes issued during 2005.

### **Members during 2005**

The Honourable Justice Wood AO  
(Chairperson until August)

The Honourable Justice McClellan  
(Chairperson from September)

The Honourable Justice Barr

Ms M Greenwood

Mr J Riznyczok

Ms N Ubrihien (until June)

Mr M Lacey (from July)

Mr C Smith (District Court of NSW)

Mr C Craigie (Public Defenders Office)

Mr P Cutbush (Reporting Services Branch,  
Attorney General's Department)

Mr D Barrow (Legal Aid Commission of NSW)

Ms M Goodwin (Legal Aid Commission of NSW)

Mr D Frearson (Office of the Director of  
Public Prosecutions NSW)

Ms D Kelly (Office of the Solicitor for Public  
Prosecutions NSW)

Mr M Day (Office of the Solicitor for Public  
Prosecutions NSW)

Ms G Drennan (Office of Commonwealth Director  
of Public Prosecutions)

Mr P Gibson (Law Society of NSW)

Ms R Geare (Law Society of NSW)

Mr D Giddy (Giddy & Crittenden)

Mr S Odgers SC

P Dwyer (Aboriginal Legal Services)

Mr J Cunningham (NSW Department  
of Corrective Services)

### **Common Law Civil Users' Committee**

The Committee provides a forum for discussing and addressing matters of concern or interest in the administration of the Common Law Division's civil trial workload. The Committee meets quarterly to discuss matters including: caseload management; listing practice and delays; specialist lists; jury issues, and regional hearings.

### **Members during 2005**

The Honourable Justice Wood AO  
(Chairperson; until June)

The Honourable Justice McClellan  
(Chairperson; from October)

The Honourable Justice Hislop

The Honourable Justice Hoeben

Ms M Greenwood

Mr J Riznyczok

Ms N Ubrihien (until June)

Ms M Shevlin (from October)

Legal profession representatives

Mr P Deakin QC

Ms N Goodman

Mr P Johnstone

Ms S Fernandez

Mr R Ishak

Ms A Sullivan

Mr T Hewitt SC

### **Equity Liaison Group**

This Group commenced during 2001 and met quarterly during 2005. The Group was established to promote discourse between the legal profession and representatives of the Equity Division upon matters of interest and importance to the operation of the Division. The Group is informal and the meetings facilitate candid discussions about the operations of the Division. Typically these discussions encourage cooperation between the judges and legal profession in developing suggested improvements to the Division's operations.

### **Members during 2005**

The Honourable Mr Justice Young AO  
(Presiding Member)

The Honourable Justice Bergin

Legal profession representatives

Mr R G Forster SC

Mr C (Robert) Newlinds SC

Mr R Harper SC

Ms A Kennedy

Mr J Martin

Mr B Miller

Ms J A Needham SC

### **Corporations List Users' Group**

The Group promotes open and regular discussion between judicial officers and legal practitioners regarding the Corporations List, and assists in ensuring that the List is conducted in a fair and efficient manner. The Group met quarterly during 2005 to consider and discuss various issues concerning the Court's work in corporations matters including Court procedures, listing arrangements, and application of the Corporations Rules.

### **Members during 2005**

The Honourable Justice Austin (Chairperson)

The Honourable Justice Barrett (Secretary)

The judicial officers of the Equity Division

Ms M Greenwood

Ms L Walton

Ms P Wearne

*Legal profession representatives*

Mr C (Robert) Newlinds SC

Mr M B Oakes SC

Mr G Cussen

Mr M Hayter

Mr J Johnson

Ms L Johnson

Mr D McCrostie

Ms M O'Brien

Mr J Thomson

Other members

Ms G Hayden (Australian Securities and Investments Commission)

Mr H Parsons (Insolvency Practitioners Association of Australia)

Mr K Rennie (Ernst & Young)

### **Commercial List Users' Group**

The Group provides a forum for discussion amongst the Commercial List Judges and legal practitioners who practise in the Commercial List and the Technology and Construction List (the Lists). The Group meets to discuss various issues concerning the administration of the Lists, including matters of procedure and practice in relation to the Lists and the potential for revision of the practice to ensure that the Lists operate as efficiently as possible.

### **Members during 2005**

The Honourable Justice Clifford Einstein

The Honourable Justice Bergin (List Judge)

The Honourable Justice McDougall

*Legal profession representatives*

*Barristers*

Mr T Alexis SC

Mr M A Ashhurst

Mr T F Bathurst QC

Ms E A Collins

Mr L V Gyles

Mr N C Hutley SC

Mr J C Kelly SC

Mr G C Lindsay SC

Mr R B Macfarlan QC

Mr G T Miller QC

Ms E M Olsson SC

Ms R P Rana

Mr S D Rares SC

Mr S D Robb QC

Mr M G Rudge SC

Mr R M Smith SC

*Solicitors*

Ms S C de Jersey

Mr R J Drinnan

Mr R K Heinrich

Ms L E Johnson

Mr R G Johnston

Mr P J Keel

Mr H D Keller

Mr B P Kermond

Mr D J Kemp

Mr S H Klotz

Mr S R Lewis

Mr G A McClellan

Mr S A McDonald

Ms N K Nygh

Ms M A Pavey

Ms R S Persaud

Mr R W Schaffer

Mr G P Standen

Mr G S Ulman

Mr M W Watson

Mr S D Westgarth

### **Probate Users' Group**

The Group meets quarterly to discuss matters concerning the operation of the Court's Probate work. The Group considers improvements to practices and processes and makes recommendations to the Rule Committee when appropriate. The Group also discusses specific issues pertinent to probate matters and deceased estates generally.

### **Members during 2005**

The Honourable Mr Justice Windeyer AM RFD ED  
Ms M Greenwood  
Mr J Finlay  
Professor R Croucher (Macquarie University, representing NSW law schools)  
Ms R Edenborough (Perpetual Trustee Company, representing corporate trustees)  
Mr R Neal (Law Society of NSW)  
Mr P Whitehead (Public Trustee NSW)  
Mr M Willmott (NSW Bar Association)  
Secretary: Mr P Studdert

### **Media Consultation Group**

The Media Consultation Group was established in 2002 to promote open discussion between key representatives from the courts, legal profession and media. The aim of the Group is to identify issues affecting the reporting of court proceedings by the media. Some of the issues considered by the Group included access to court records and the implications for the media when a suppression or non-publication order is issued. The Group meets on a needs basis. The Group did not convene in 2005.

### **Members during 2005**

The Honourable Justice McColl AO (Chairperson)  
The Honourable Justice Wood AO (until August)  
The Honourable Justice Kirby  
The Honourable Justice Nicholas  
Her Honour Judge Karpin (District Court of NSW)  
Ms S Zadel (Public Information Officer, NSW superior courts)  
Mr P Zahra SC (Senior Public Defender)  
Ms N Ferraz (AAP Sydney Bureau Chief)  
Mr R Coleman (Fairfax Legal)

Mr S Collins (ABC Legal)  
Mr M Cameron (News Ltd Legal)  
Mr D Smith (Channel 7 Reporter)  
Mr A Stewart (Channel 9 Legal)  
Secretary: Ms S Palagummi

### **Judges' CourtLink Committee**

The Committee meets weekly to monitor and discuss aspects of the CourtLink project specifically from the Supreme Court's perspective. The Committee consists of nominated judicial representatives from the Court and key staff members from the Court's Registry, the Attorney General's Department and the CourtLink project team. During 2005, the Committee focused on electronic access to court documents and data security.

### **Members during 2005**

The Honourable Mr Justice Hamilton  
The Honourable Justice Howie  
The Honourable Justice Gzell (Chairperson)  
The Honourable Associate Justice Macready  
Ms M Greenwood  
Mr S Jupp  
Mr P Ryan (Attorney General's Department)  
Ms J Atkinson (Attorney General's Department)  
Mr M McMullan (CourtLink project)  
Mr P Stark (CourtLink project)

### **Heritage Committee**

The Committee, which was established in 2002, is an advisory committee to the Chief Justice on matters concerning the Court's heritage. It comprises serving and retired judges and specialists in the fields of architecture, conservation and history. The Committee meets regularly to discuss ways of preserving and promoting aspects of the Court's heritage and history and makes recommendations to the Chief Justice as required. In 2005 the Committee, with the assistance of the Court and with funds provided by the Sesquicentenary of Responsible Government Committee, arranged for publication of a monograph entitled *Colonial Law Lords* written by J. M. Bennett, describing early relations between the legislature and judiciary in New South Wales.



**Members during 2005**

The Honourable Gordon Samuels,  
AC, CVO, QC (Chairman)  
The Honourable Justice Beazley  
The Honourable Justice Bergin  
The Honourable Justice Nicholas  
The Honourable Associate Justice McLaughlin  
The Honourable Simon Sheller, AO, QC  
The Honourable (Acting) Justice Stein, AM  
The Honourable (Acting) Justice Pearlman, AO  
Mrs M Betteridge (museum consultant)  
Ms D Jones (architectural consultant)  
Mr B Johnson (architectural consultant)

**Civil Registry Users' Group**

The Civil Registry Users' Group meets approximately every four months to facilitate open discussion between the Court and key users regarding the delivery of civil registry services. The Group was established to assist the Court in identifying and meeting the needs and expectations of its users.

**Members during 2005**

Ms N Ubrihien (until June)  
Ms M Shevlin (from February)  
Ms L Jennings (from February)  
Mr R Rosman (Law and Order)  
Ms L Allen (Minter Ellison)  
Ms D Hallet (Blake Dawson Waldron)  
Ms K Davidson (Deacons Lawyers)  
Mr D Willoughby (Thomson)  
Ms S Dart (Litsupport; from February)

## APPENDIX (iv): OTHER JUDICIAL ACTIVITY

As well as hearing and determining cases, Judges and Associate Judges actively contribute, both in Australia and overseas, in matters touching upon the law and legal education. Their contribution includes activities such as presenting papers and speeches at conferences and seminars, submitting articles for publication, giving occasional lectures at educational institutions, meeting judicial officers from courts around the world and hosting delegations. Many Judges and Associate Judges also serve as members of boards, commissions and committees for legal and cultural organisations within the community.

The Judges' and Associate Judges' activities during 2005 are summarised below:

### THE HONOURABLE J J SPIGELMAN AC, CHIEF JUSTICE OF NEW SOUTH WALES

#### Conferences:

19-21 Mar	Law Asia Conference, Gold Coast
29 May -3 Jun	Sixth Worldwide Common Law Judiciary Conference, Washington DC
26 – 30 Jul	Pacific Judicial Conference, Vanuatu
4-10 Sep	World Law Congress, Beijing and Shanghai, China
11 Sep	Conference of Chief Justices of the Commonwealth, London
11-15 Sep	14th Commonwealth Law Conference, London
19-21 Sep	Media Law Resource Centre Conference, London

#### Speaking Engagements:

31 Jan	Law Society Opening of Law Term Dinner
18 Mar	<i>The Principle of Legality and the Clear Statement Principle</i> , Opening Address to the New South Wales Bar Association Conference
15 Apr	Occasional Address, Faculty of Law Graduation Ceremony, University of New South Wales
29 Apr	Address on the Retirement of the Honourable Justice Sheller AO
19 May	Address at the launch of "Dowling's Select Cases"
1 Jun	<i>The Internet and the Right to a Fair Trial</i> , Address to the Sixth Worldwide Common Law Judiciary Conference, Washington DC
17 Jun	Address at the launch of World Refugee Day
26 Jul	<i>Statutory Interpretation and Human Rights</i> , Address to the Pacific Judicial Conference, Vanuatu
31 Aug	Address on the Retirement of the Honourable James Wood AO
8 Sep	<i>Judicial Review and the Integrity Branch of Government</i> , Address to the World Jurist Association Congress, Shanghai, China
14 Sep	<i>Negligence: Is Recovery for Personal Injury too Generous?</i> Address to the 14th Commonwealth Law Conference, London
20 Sep	<i>The Principle of Open Justice: A Comparative Perspective</i> , Address to the Media Law Resource Centre Conference, London
20 Oct	Formal Opening Ceremony, Court of Criminal Appeal at Albury
27 Oct	The Charles Perkins Memorial Oration 2005
5 Nov	Sesquicentenary of the University of Sydney Law Faculty, Address

#### Publications:

- "Blackstone, Burke, Bentham and the Human Rights Act 2004", (2005) 26 *Australian Bar Review* 1
- "Federal Law Review: 40th Anniversary Dinner Address", (2005) 33(1) *Federal Law Review* 1
- "A New Way to Sentence for Serious Crime", *Judicial Officers' Bulletin*, Vol 17 No 1 February 2005 and Reform, Winter 2005 Issue 86, p51
- "The Hon Justice Simon Sheller AO", *Bar News*, Winter 2005, p54
- "Tort Law Reform: An Overview", *Australian Construction Law Newsletter*, September/October 2005 Issue 104
- "The principle of legality and the clear statement principle", (2005) 79 ALJ 769
- "The internet and the right to a fair trial" (2005) 29 Crim LJ 331

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**Delegations and International Assistance:**

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22 Mar	Deputy Chief Justice of Papua New Guinea
22 Apr	Chief Justice of Fiji
4 May	Delegation from the China Central Party School, China, led by Professor Shi Taifeng
8 Aug	Delegation from Shenzhen Intermediate People's Court, China, led by Judge Zhuang Chao
25 Aug	Delegation from the Hanoi and Ho Chi Minh Law Universities, Vietnam, led by Professor Le Minh Tam and Dr Le Thi Bich Tho

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**Membership of Legal, Cultural or Benevolent Organisations:**

Member of the Expert Panel on the Constitution for Israel of the Constitutional Committee of the Knesset

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**THE HONOURABLE JUSTICE KEITH MASON, PRESIDENT OF THE COURT OF APPEAL****Conferences:**

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23 – 27 Jan	Supreme and Federal Courts Judges' Conference (Darwin, NT)
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**Speaking Engagements:**

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29 Mar	District Court Judges' Conference "Recurring Themes in the Court of Appeal"
20 May	Graduation Address, Sydney University, "Judicial Humour"
3 Aug	Fourth Australasian Drafting Conference, "The View from the Other Side: Judicial Experiences of Legislation"
19 Aug	Supreme Court Judges' Conference, "Fusion Issues"
9 Sep	Cable Memorial Lecture, St James' Church, Sydney "Believers in Court: Sydney Anglicans Going to Law"
12 Oct	Presided over Macquarie University's 2005 John Peden Contract Moot
19 Oct	Presided over University of New South Wales' Law School Moot
8 Nov	Graduation Address, Law Society "Specialist Accreditation"

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**Publications:**

"Fusion: Fallacy or Finished? In Degeling & Edelman eds, Equity in Commercial Law, LBC, 2005

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**Membership of Legal, Cultural or Benevolent Organisations:**

Chancellor, Anglican Diocese of Armidale  
Member, Appellate Tribunal of Anglican Church of Australia

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**Commissions in Overseas Courts:**

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1 Jan – 31 Dec	Held a commission as a judge of the Supreme Court of Fiji
5-13 Apr	Sat as a judge in the Supreme Court of Fiji

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**THE HONOURABLE JUSTICE HANDLEY AO****Conferences:**

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22-27 May	International Academy of Estate & Trust Law (Santa Fe New Mexico USA)
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**Membership of Legal, Cultural or Benevolent Organisations:**

President Council of Cranbrook School

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**Commissions in Overseas Courts:**

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1 Jan – 31 Dec	Held a commission as a Judge of the Supreme Court of Fiji
11-15 Apr	Sat as Judge of the Supreme Court of Fiji
10-21 Oct	Sat as Judge of the Supreme Court of Fiji

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**THE HONOURABLE JUSTICE R D GILES****Membership of Legal, Cultural or Benevolent Organisations:**

Member, Editorial Board of the Insurance Law Journal

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## THE HONOURABLE JUSTICE HODGSON

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### Publications:

"A plain person's free will" in *Journal of Consciousness Studies* Vol 12 No. 1 January 2005

"Responsibility and good reasons" in *Ohio State Journal of Criminal Law* Vol 2 No. 2 Spring 2005

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### Memberships of Legal, Cultural or Benevolent Organisations:

Part-time Commissioner, NSW Law Reform Commission

Supreme Court Representative on the Faculty of Law at the University of NSW

Member of Professional Category Selection Panel for Churchill Fellowships NSW

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## THE HONOURABLE JUSTICE SANTOW OAM

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### Conferences:

26-27 Aug Judgment Writing Workshop with Professor James C Raymond (Sydney)

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### Speaking Engagements:

15 Mar Message of Welcome on the occasion of the conferring of an honorary degree of Doctor of Medicine upon Catherine Hamlin, AC, Sydney University

18 Mar The University and Schools Club – a talk to mark its centenary of Sydney connection in an era of social change, Sydney University

11 Apr Sancta Sophia College – Address for the Chancellor's Dinner, Sydney University

19 May Introduction of Professor Friedmund Hueber, Sydney University

15 Jun Welcome and Introduction of Writer and Curator Renee Free at the University Art Gallery

2 Sep The University of Sydney Presentation Ceremony - Congratulatory Remarks and Welcome to the speaker, Professor Gavin Brown (The Great Hall of the People, Beijing, People's Republic of China)

10 Oct Opening of the Australian Archaeological Institute at Athens' 25th Anniversary Symposium Athens

13-15 Oct "Where the best scholars go, the best tuition follows" Address to the Sydney University Graduates Union of North America (SUGUNA) with Professor Peter Wolnizer, Dean, Faculty of Economics and Business (University of Illinois, USA)

28 Sep "Music and Social Justice" Opening and welcoming remarks, Sydney University

5 Nov "Laying Foundations", Introducing the Chief Justice of New South Wales, Alumni Sesquicentenary Dinner of Sydney Law School

18 Nov Graduation Ceremony for Medical Faculty – Congratulations and Introduction of speaker, Sydney University

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### Membership of Legal, Cultural or Benevolent Organisations:

Chancellor, University of Sydney

Member, The Takeovers Panel, Australian Government

Member, International Council, Institute of Advanced Legal Studies, University of London

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## THE HONOURABLE JUSTICE DAVID ANDREW IPP

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### Conferences:

26-27 Aug Judgment Writing Workshop with Professor James C Raymond (Sydney)

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### Speaking Engagements:

3 Mar Opening Commentary Litigation Master Class, University of NSW Continuing Education Programme (Sydney)

5 Aug Address, "Judicial Humour", *Weld Club Perth*

26 Aug Facilitator, National Orientation Program, Coogee NSW

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### Publications:

"Must a prosecutor believe that the accused is guilty? Or, was Sir Frederick Jordan being recalcitrant?" (2005) 79 ALJ 233

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### Memberships of Legal, Cultural or Benevolent Organisations:

Chair of the Standing Advisory Committee on Judicial Education (Judicial Commission of NSW)

Committee Member, Admiralty Rules Committee

Member, Court of Arbitration for Sport – Appeals Division, Oceania Registry

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#### THE HONOURABLE JUSTICE RUTH MCCOLL AO

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##### Conferences:

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26-27 Aug	Judgment Writing Workshop with Professor James C Raymond (Sydney)
25-30 Sep	International Bar Association Annual Conference (Prague)

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##### Speaking Engagements:

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21 Feb	Address, Corrs Graduate Academy
2 Aug	Open Society of Sculptors' Annual Exhibition (Sydney)
25-30 Sep	" <i>The obsessed litigant – the Australian perspective</i> ", presented at the Judges' Forum, International Bar Association Conference (Prague)

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##### Memberships of Legal, Cultural or Benevolent Organisations:

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Treasurer, Judicial Conference of Australia
Member, NSW Rhodes Scholarship Selection Committee
Member, Law Council of Australia's Human Rights Observer Panel

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#### THE HONOURABLE JUSTICE BRYSON

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##### Conferences:

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3-7 Oct	International Exchange Program for the Development of an Integrated Judicial Mediation (Montreal, Quebec, Canada)
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#### THE HONOURABLE JUSTICE JOHN BASTEN

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##### Conferences:

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15 July	Roundtable on Inherent Executive Power, Centre for Comparative Constitutional Studies, Melbourne Law School
30 Oct – 4 Nov	National Judges College of China Conference, Beijing

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##### Speaking Engagements:

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12 May	Speech at launch of "Federal Discrimination Law – 2005" published by the Human Rights and Equal Opportunity Commission, Sydney
30 Jun	Paper, " <i>Limits on Procedural Fairness</i> ", Australian Institute of Administrative Law, 2005 Administrative Law Forum, Canberra
21 Jul	Comment on paper by Professor Carol Harlow at Australian Institute of Administrative Law (NSW Branch) Seminar, Sydney
30 Oct – 4 Nov	3 Papers at National Judges College of China Conference, Beijing, China: " <i>Court and Media Relationships</i> "; " <i>Judicial Conduct: Relationship with Government</i> "; " <i>Judicial Attributes</i> "
23 Nov	Speech – Administrative Law Seminar, Sydney
6 Dec	After Dinner speech – Construction Law Group Dinner

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##### Publications:

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Book review on "The Ultimate Rule of Law" by David M. Beatty for University of Melbourne Law Review (Prepared 1 August 2005)
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#### THE HONOURABLE JUSTICE WOOD AO, CHIEF JUDGE AT COMMON LAW (RETIRED)

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##### Speaking Engagements:

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Oct	National Judicial Orientation Programme
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##### Delegations and International Assistance:

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13 Apr	Chief Justice Webster and delegation from High Court of Tonga
22 Apr	Chief Justice Fatiaki and delegation from the High Court of Fiji

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##### Commissions in Overseas Courts:

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1 Jan – 31 Dec	Held a commission as a Judge of Appeal, Court of Appeal Fiji
Nov	Sat as a judge in the Court of Appeal, Fiji

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#### THE HONOURABLE MR JUSTICE YOUNG AO, CHIEF JUDGE IN EQUITY

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##### Conferences:

2-4 Sep Judicial Conference of Australia Colloquium (Maroochydore, Queensland)

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##### Speaking Engagements:

Feb & Sep Introductory Lecture in Equity, Bar Practice Course, NSW Bar Association, Sydney

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##### Publications:

Editor (with Professor E Tyler and CE Croft SC) *Fisher & Lightwood's Law of Mortgage: Second Australian Edition* (2005), LexisNexis  
Current Topics and Recent Cases section in Volume 79 of the *Australian Law Journal* (12 issues)

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##### Membership of Legal, Cultural or Benevolent Organisations:

President, Anglican Appellate Tribunal

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#### THE HONOURABLE JUSTICE MCCLELLAN, CHIEF JUDGE AT COMMON LAW

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##### Conferences:

2-4 Sep Judicial Conference of Australia's Colloquium 2005 (Sunshine Coast, Queensland)

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11-15 Sep Commonwealth Law Conference (London)

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24 Nov Australian Court Administrators Group Conference "Courts and Tribunals in the Community – The Role of Administrators"

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28-30 Nov International Conference & Showcase on Judicial Reforms (Philippines)

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##### Speaking Engagements:

2-4 Sep Paper – Judicial Conference of Australia's Colloquium 2005: *Judicial Conduct: Still a Live Issue, Some Thoughts on the paper by Prof Peter A Sallman* (Sunshine Coast)

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11-15 Sep Keynote address – Commonwealth Law Conference: *Access to Justice in Environmental Law. An Australian Perspective*, (London)

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24 Nov Paper – Australian Courts Administrators Group Conference: *Courts in the 21st Century – Should we do things differently?* (Sydney)

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#### THE HONOURABLE JUSTICE CAROLYN SIMPSON

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##### Conferences:

30 Apr Evidence Act Review – Judicial Workshop NJCA

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26 – 27 Aug Judgment Writing Workshop with Professor James C Raymond (Sydney)

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##### Speaking Engagements:

12 – 13 Sep Presenter, National Judicial College of Australia's Judgment Writing Program

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#### THE HONOURABLE JUSTICE HIDDEN AM

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##### Conferences:

26-27 Aug Judgment Writing Workshop with Professor James C Raymond (Sydney)

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#### THE HONOURABLE MR JUSTICE HAMILTON

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##### Conferences:

2-4 Sep Judicial Commission of Australia Colloquium (Sunshine Coast, Qld)

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14-16 Oct Mediation Course, Leo Cussen Institute/Bond University (Melbourne)

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##### Speaking Engagements:

16 Aug Paper – "The New Procedure: Nuts and Bolts for Judicial Officers", Judicial Commission of NSW Seminar on *The New Uniform Civil Procedure Rules* (Sydney)

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20 Oct Opening Commentary – University of NSW Continuing Legal Education Seminar: *New Uniform Civil Procedure Rules* (Sydney)

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3 Dec Address – "The 2005 Procedural Reforms from the Point of View of the Dust Diseases Tribunal", 2005 Annual Dust Diseases Tribunal of New South Wales Conference (Terrigal)

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##### Publications:

"Thirty Years of Civil Procedure Reform in Australia. A Personal Reminiscence", *Australian Bar Review* (2005) Vol 26 No 3

"Civil Procedure Reform: Gradualism or Revolution?" *Judicial Officers' Bulletin* (2005) Vol 17 No 7

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**Membership of Legal, Cultural or Benevolent Organisations:**

Chair, Attorney General's Working Party on Civil Procedure

Member, Attorney General's CourtLink Steering Committee

Member, Australian Chief Justices' Rules Harmonisation Committee

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**THE HONOURABLE JUSTICE C EINSTEIN****Conferences**

26-27 Aug Judgment Writing Workshop with Professor James C Raymond (Sydney)

**Speaking Engagements:**

5 Jul College of Law, Commercial Litigation, keynote address, (Sydney)

**Publications:**

"The Principles & Rules of Transnational Civil Procedure and their Application to New South Wales", Uniform Law Review NS – Vol IX, 2004-4, at page 815

"Trends in International Commercial Litigation in Australia, Part 1 – The Present State of Foreign Judgment Enforcement Law", IPRax 3/2005, May/June, s189-292, at page 273

"Trends in International Commercial Litigation, Part 11 – The Future of Foreign Judgment Enforcement Law", IPRax 4/2005, July/August, s293-400, at page 365

"Reflections on the commercial litigation landscape – lessons from the past – moving forward", (2005) 26 ABR 145

"A meaningful judicial dialogue", (2005) 27 ABR 205

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**THE HONOURABLE JUSTICE ADAMS****Conferences:**

11-15 Sep Commonwealth Law Conference (London)

**Speaking Engagements:**

19 Mar College of Law, Continuing Legal Education – Lunchtime speaker

9 Dec Adjudicator, Inter Schools' Mock Trial Competition

**Membership of Legal, Cultural or Benevolent Organisations:**

Chair, Law Reform Commission of New South Wales

Board Member, College of Law

Member, Anglican Synod

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**Commissions in Overseas Courts:**

15 Jul – 31 Dec Held a commission as a Judge of the Court of Appeal, Solomon Islands

14 –22 Jul Sat as a Judge of the Court of Appeal, Solomon Islands

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**THE HONOURABLE JUSTICE DAVID KIRBY****Conferences:**

15-21 Sep Pan Europe Asia Legal Conference (Rome, Italy)

**Membership of Legal, Cultural or Benevolent Organisations:**

Member, the NSW Law Reform Commission's Committee on Deaf or Blind Jurors

Member, the NSW Law Reform Commission's Committee on Majority Verdicts

Member, the NSW Law Reform Commission's Committee on Expert Witnesses

Member, the NSW Law Reform Commission's Committee on Community Justice Centres

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**THE HONOURABLE JUSTICE R P AUSTIN****Speaking Engagements:**

7 Feb "Regulating Conflicts of Interest in Contemporary Corporate Law", Corporate Law Teachers' Association Conference (Sydney)

18 Feb "What is corporate governance? Precepts and Legal Principles", Corporate Governance at the Crossroads Seminar, Legal Research Foundation (Auckland, NZ)

15 Mar Presented Plenary Session on Conflicts and Ethics in Appointments, INSOL 2005 (Sydney)

25 Aug Keynote presentation, "Liable to Offend – Some Current Issues in Corporations Law", Corporations & Company Law Conference, Law Society of South Australia (Adelaide)

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**Publications:**

Co-author, *Company Directors: Principles of Law & Corporate Governance* (LexisNexis) (822 pp)

Co-author, *Ford's Principles of Corporations Law* (LexisNexis, looseleaf)

Co-author, *Ford's Principles of Corporations Law*, 12th Student ed. (LexisNexis) (1,148 pp)

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**Membership of Legal, Cultural or Benevolent Organisations:**

Challis Lecturer in Corporate Law, University of Sydney (Master of Laws degree courses in *Takeovers and Reconstructions* and *Corporate Fundraising*)

Member, The Takeovers Panel, Australian Government

Member, Editorial Board, International and Comparative Corporate Law Journal

Member, Editorial Board, Company and Securities Law Journal

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**THE HONOURABLE JUSTICE VIRGINIA BELL****Conferences:**

23-27 Jan Supreme and Federal Courts Judges' Conference (Darwin, NT)

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**Speaking Engagements:**

23-27 Jan Presented the paper "How to preserve the Integrity of Jury Trials in a Mass Media Age" at the Supreme and Federal Courts Judges' Conference (Darwin, NT)

29 Mar Speaker at the District Court of NSW Annual Conference

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**Membership of Legal, Cultural or Benevolent Organisations:**

President Elect of the Australian Institute of Judicial Administration

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**THE HONOURABLE JUSTICE ANTHONY WHEALY****Conferences:**

29 May – 4 Jun Greek/Australian Legal and Medical Conference (Mykonos, Greece)

24 –30 Jun International Society for the Reform of Criminal Law (Edinburgh, Scotland)

21-23 Nov LexisNexis Law and Medicine Conference (Melbourne)

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**Speaking Engagements:**

3 Jun "Tort Reform in Medical Negligence Cases", Greek/Australian Legal and Medical Conference (Mykonos, Greece)

21 Nov "Recent cases in Medical Negligence Matters", LexisNexis Law and Medicine Conference (Melbourne)

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**THE HONOURABLE JUSTICE HOWIE****Speaking Engagements:**

29 Mar District Court Annual Conference, "*Criminal Law Update 2005*", Newcastle

20 Apr National Judicial College of Australia, Seminar for ACT judiciary – "*Commonwealth Criminal Code*", Canberra

31 Aug Annual Conference of the Local Court of NSW, "*How Recent Developments in Criminal Law Affect the Local Courts*", Sydney

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**Publications:**

Consulting Editor for *Criminal Law News* (Published by Lexis Nexis)

Co-author of *Criminal Practice and Procedure* (Lexis Nexis Looseleaf)

"Section 21A factors and the Sentencing Exercise" Judicial Officers' Bulletin Vol 17 No.6 July 2005

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**Membership of Legal, Cultural or Benevolent Organisations:**

Chairman of the Bench Book Committee, Judicial Commission of NSW

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**THE HONOURABLE JUSTICE REGINALD BARRETT****Conferences:**

12 – 13 Mar Sixth Joint INSOL/UNCITRAL (United Nations Commission on International Trade Law) Multinational Judicial Colloquium (Sydney)

1 – 3 Jul Law Council of Australia 2005 Corporations Workshop (Canberra)

6 – 7 Aug 22nd Annual Banking & Financial Services Law Association Conference (Cairns)

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**Speaking Engagements:**

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7 Feb	Paper – 5th Australian Insolvency Practice Symposium “Challenging encounters in insolvency practice – perspectives from the bench” (Sydney)
10 Mar	Opening remarks – Seminar on directors’ duties, Centre for Continuing Legal Education, University of New South Wales, (Sydney)
7 Aug	Paper – 22nd Annual Banking and Financial Services Law Association Conference “Cross border insolvency – aspects of the UNCTRAL model law” (Cairns)

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**Publications:**

Book review: R.P. Austin, H.A.J. Ford and I.M. Ramsay, “Company Directors: Principles of Law and Corporate Governances”, *Australian Law Journal* (2005) Vol 79, 722

**Membership of Legal, Cultural or Benevolent Organisations:**

Member, Editorial Board, Company and Securities Journal

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**THE HONOURABLE JUSTICE PALMER****Conferences:**

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26-27 Aug	Judgment Writing Workshop with Professor James C Raymond (Sydney)
5-7 Oct	Annual Maritime Law Association of Australia and New Zealand (MLAANZ) Conference (Auckland, New Zealand)

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**Speaking Engagements:**

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23 Feb	“Equitable Remedies, Trusts and Commercial Transactions”, Opening Commentary, University of New South Wales
28 May	Presided over a mock trial convened by the NSW Bar Association
6 Jul	“Artists in the Black – a Success Story”, Arts Law Centre of Australia
12 Jul	Presided over the International Maritime Law Arbitration Moot Competition
29 Aug	Presenter of the 4th Annual Supreme Court Concert

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**Membership of Legal, Cultural or Benevolent Organisations:**

President, Arts Law Centre of Australia  
Chairman, Pacific Opera Company  
Director, Ars Musica Australis  
Patron, Music Council of Australia

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**THE HONOURABLE JUSTICE CAMPBELL****Conferences:**

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26-27 Aug	Judgment Writing Workshop with Professor James C Raymond (Sydney)
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**Speaking Engagements:**

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18 Aug	“Variation of Church Trusts”, paper delivered to NSW Church Law Forum
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**Membership of Legal, Cultural or Benevolent Organisations:**

Academician, International Academy of Estate and Trust Law  
Member, Judicial Conference of Australia  
Member, Australian Institute of Judicial Administration  
Member, NSW Bar Association  
Member, Victorian Bar Association

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**THE HONOURABLE JUSTICE TERRY BUDDIN****Conferences:**

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24 Oct	National Judicial College of Australia (Sydney) – Chair of session – Litigants in person – National Judicial Orientation Program
28 Oct	Presenter, Session on Sentencing – National Judicial Orientation Program

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**Membership of Legal, Cultural or Benevolent Organisations:**

Member, Attorney-General’s Sexual Assault Offences Taskforce  
Member, National Judicial Orientation Program, Steering Committee

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## THE HONOURABLE JUSTICE GZELL

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### Conferences:

22-26 May	The International Academy of Estate and Trust Law Conference (Santa Fe, New Mexico)
26-27 Aug	Judgment Writing Workshop Facilitator to Professor James C Raymond (Sydney)
7-9 Oct	23rd Australian Institute of Judicial Administration (AIJA) Annual Conference (Wellington, New Zealand)

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### Speaking Engagements:

29 Apr	Regional Arts NSW Congress Dinner Speech
23 Jun	Taxation Institute of Australia NSW State Convention Dinner Speech
20 Aug	Supreme Court Annual Conference "A Trustee's Duty of Disclosure"

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### Membership of Legal, Cultural or Benevolent Organisations:

Vice-President Western Pacific, The International Academy of Estate and Trust Law
Member AIJA Steering Committee for 23rd Annual Conference in Wellington, New Zealand
Member, Attorney-General's Department CourtLink Steering Committee
Patron and Life Member, Regional Arts New South Wales
Honorary Member, Taxation Committee of Business Law Section of Law Council of Australia

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## THE HONOURABLE JUSTICE NICHOLAS

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### Speaking Engagements:

Mar	University of NSW Continuing Legal Education Seminar; Defamation Law Update
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### Membership of Legal, Cultural or Benevolent Organisations:

Chairman, St Paul's College Council
Director, NSW Cultural Management Ltd (Sydney Theatre)
Chairman, Kimberley Foundation Australia
Honorary Councillor, Royal Agricultural Society of NSW
Trustee, McGarvie Smith Institute
Member, Court of Arbitration for Sport, Oceania Registry

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### Delegations and International Assistance:

Aug	Met His Excellency Mr Meas Kim Heng Ambassador of the Kingdom of Cambodia
Aug	Met visiting Vietnamese academic lawyers led by Professor Le Minh Tam, Rector of Hanoi Law University

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## THE HONOURABLE JUSTICE ROBERT MCDUGALL

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### Conferences:

19-23 Sep	Court Architecture and Judicial Rituals (Paris, France)
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### Speaking Engagements:

28 May	30th Anniversary Conference of the Institute of Arbitrators and Mediators, "Developments in Building and Construction Law" (Canberra)
19 Jul	College of Law, "Expert Evidence" (Sydney)
3 Aug	Keynote speaker at the Annual Seminar of the Building Science Forum of Australia, "A fast game's a good game?" (Sydney)
1 Sep	LEADR Conference 2005, "The Court view of security of payment legislation in operation" (Sydney)
27 Oct	Chairman & Commentator at the Commercial Law Association Conference (Sydney)

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## THE HONOURABLE JUSTICE HISLOP

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### Conferences:

26-27 Aug	Judgment Writing Workshop with Professor James C Raymond (Sydney)
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## THE HONOURABLE JUSTICE WHITE

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### Conferences:

26-27 Aug	Judgment Writing Workshop with Professor James C Raymond (Sydney)
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#### THE HONOURABLE JUSTICE C R R HOEBEN AM RFD

##### Conferences:

7-9 Oct Australian Institute of Judicial Administration (AIJA) Annual Conference (Wellington, New Zealand)

##### Membership of Legal, Cultural or Benevolent Organisations:

Deputy Chairperson, Royal Humane Society of NSW

Honorary Colonel, University of NSW Regiment

Member, Royal United Service Institution of NSW

Member, Regimental Council, Sydney University Regiment

#### THE HONOURABLE JUSTICE JOHNSON

##### Conferences:

26-27 Aug Judgment Writing Workshop with Professor James C Raymond (Sydney)

#### THE HONOURABLE JUSTICE HALL

##### Conferences:

13 Apr "Can Judges make mistakes?" a seminar presented by Professor Sir Neil MacCormick QC; event hosted by University of NSW Faculty of Law and Freehills

26-27 Aug Judgment Writing Workshop with Professor James C Raymond (Sydney)

13 Sep "Alternatives to Sentencing Twilight Seminar" presented by Ms Catriona McComish, from the Department of Corrective Services; seminar hosted by the Judicial Commission of NSW

24-28 Oct Attended the National Judicial Orientation Program jointly organised by the Australian Institute of Judicial Administration (AIJA), National Judicial College of Australia and the Judicial Commission of NSW (Sydney)

#### THE HONOURABLE JUSTICE MEGAN LATHAM

##### Conferences:

26-27 Aug Judgment Writing Workshop with Professor James C Raymond (Sydney)

3-7 Oct International Exchange Program for the Development of an Integrated Judicial Mediation (Montreal, Quebec, CANADA)

#### THE HONOURABLE JUSTICE ROTHMAN

##### Conferences:

6 Jun AALS – *Advocacy in the High Court* by David Bennett QC (Sydney)

20 Jun NSW Bar Association – *Conduct of Criminal Proceedings* (Sydney)

18 Aug Judicial Commission of NSW: *Dealing with Difficult Litigants* (Sydney)

26-27 Aug Judgment Writing Workshop with Professor J Raymond (Sydney)

13 Sep Judicial Commission of New South Wales: *Alternatives to full time custodial sentences* (Sydney)

28 Sep Judicial Commission of New South Wales: *What does s.275 of Criminal Procedures Act mean to you as a Judicial Officer?* (Sydney)

24-28 Oct Attended the National Judicial Orientation Program jointly organised by the Australian Institute of Judicial Administration (AIJA), National Judicial College of Australia and the Judicial Commission of NSW (Sydney)

##### Speaking Engagements:

30 Jun WA Jewish Community Council - Keynote Address: "Personal Responsibility for Others – a Moral, Legal and Charitable Issue" (Perth)

26 Jul Young Lawyers Seminar – Keynote speaker: "AMCOR – An Analysis" (Sydney)

7 Aug Association of Jewish Lawyers/Holocaust Survivors – Keynote Address: "The Holocaust & Nuremberg Trials – Their Effect on Discrimination Law and Human Rights" (Sydney)

23 Aug Young Lawyers Seminar – Keynote speaker "Blackadder – an Analysis" (Sydney)

20 Nov Sydney Jewish Museum – Keynote Address: "Tolerance and Respect – the Sign of a Mature Democracy and a Commemoration of the Nuremberg Trials" (Sydney)

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**Membership of Legal, Cultural or Benevolent Organisations:**

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Member, Equality before the Law Handbook Committee – Judicial Commission of New South Wales

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Director; Chair Workplace Relations Committee – Association of Independent Schools

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Non-Trustee Governor; Executive Member – Jewish Communal Appeal

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Immediate Past President; Executive Member – NSW Jewish Board of Deputies

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Executive Member – Board of Jewish Education

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Co-Chair – Australian Coordinating Committee of Jewish Day Schools

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**Delegations and International Assistance:**

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18 Jul Professor Eli Salzberger, Dean, Faculty of Law, Haifa University, Israel – Lecture – “Common Law applied in the Israeli Constitutional Setting – the Role of the Israeli Supreme Court”

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**THE HONOURABLE JUSTICE BRERETON****Conferences:**

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26-27 Aug Judgment Writing Workshop with Professor James C Raymond (Sydney)

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**Speaking Engagements:**

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21 Sep NSW Young Lawyers, “Recent Developments in Family Law” (Sydney)

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1 Oct Qld Law Society, Family Law Residential, “Part VIIIAA of Family Law Act Update; Orders & Injunctions Binding Third Parties” (Brisbane)

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11-12 Nov Family Court of Australia, Judges’ Annual Conference, “Financial Issues – Part VIIIAA – Third Party Provisions” (Sydney)

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**THE HONOURABLE ASSOCIATE JUSTICE MCLAUGHLIN****Conferences:**

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29 May – 4 Jun 10th Greek/Australian International Legal & Medical Conference (Mykonos , Greece)

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**THE HONOURABLE ASSOCIATE JUSTICE MALPASS****Speaking Engagements:**

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1 Dec Speech – Consumer Trader & Tenancy Tribunal Members Conference “*Procedural Considerations*” (Sydney)

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**THE HONOURABLE ASSOCIATE JUSTICE MACREADY****Conferences:**

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26-27 Aug Judgment Writing Workshop with Professor James C Raymond (Sydney)

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7-9 Oct Australian Institute of Judicial Administration (AIJA) Annual Conference on Technology, Communication and Innovation (Wellington, New Zealand)

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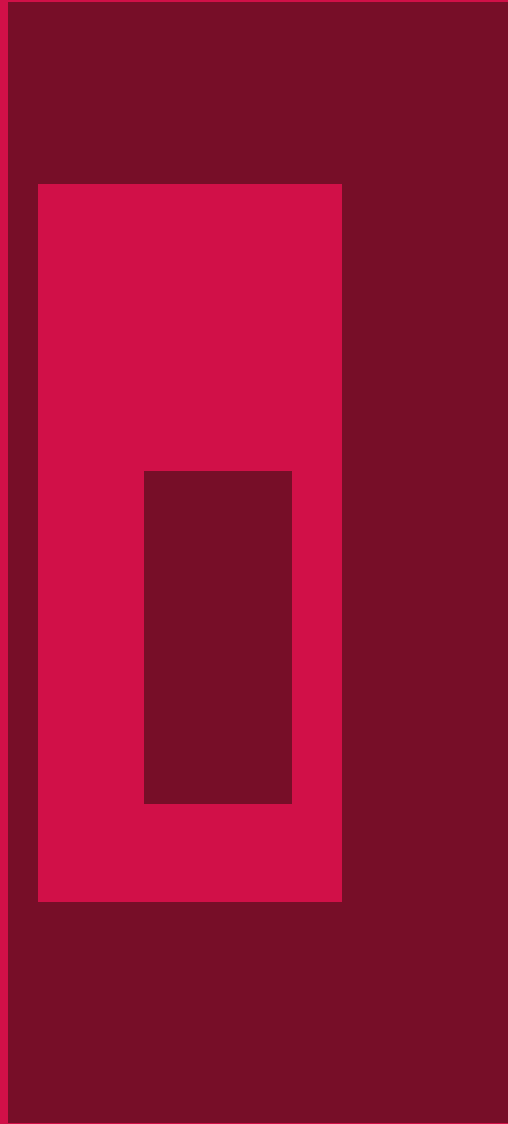
**Delegations and International Assistance:**

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20 Sep Presentation to delegation of judges from Thailand on electronic case management

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Supreme Court of New South Wales

Law Courts Building  
184 Phillip Street  
Sydney NSW 2000  
Australia

GPO Box 3  
Sydney NSW 2001  
Australia

DX 829 Sydney

Phone: + 61 2 9230 8111  
Fax: + 61 2 9230 8628  
Email: [supreme\\_court@courts.nsw.gov.au](mailto:supreme_court@courts.nsw.gov.au)  
Internet: [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc)