

## Chapter 2

# THE WORK OF THE COURT

## 2.1 GENERAL

### Jurisdiction

The Court's jurisdiction is broad, covering almost all civil matters arising under Australian federal law and some summary criminal matters. Cases arising under Part IV (restrictive trade practices) and Part V (consumer protection) of the *Trade Practices Act 1974* still constitute a significant part of the workload of the Court. These cases may raise important public interest issues involving such matters as mergers, misuse of market power, exclusive dealing or false advertising. Other cases may only concern the immediate parties.

The Court's jurisdiction under the *Corporations Law* covers a diversity of matters ranging from the appointment of provisional liquidators and the winding up of companies, to applications for the orders available in relation to fundraising, corporate management and misconduct by company officers. This jurisdiction is exercised concurrently with the Supreme Courts of the States and Territories. Amendments to the Federal Court of Australia Regulations changing fees and introducing a number of new fees have had an impact on the number of *Corporations Law* matters commenced in the Court, and in particular, matters relating to the winding up of companies.

The Court exercises jurisdiction under the *Bankruptcy Act*. It has power to make sequestration (bankruptcy) orders against persons who have committed acts of bankruptcy and to grant bankruptcy discharges and annulments. The Court's jurisdiction extends to matters arising from the administration of bankrupt estates. The *Bankruptcy Legislation Amendment Act*, which amended the *Bankruptcy Act*, commenced on 16 December 1996. The effect of the amendment was to transfer many of the administrative functions performed by the Registrars in Bankruptcy to Insolvency and Trustee Service, Australia. The functions transferred included the acceptance of debtors' petitions and the issuing of bankruptcy notices. The office of Registrar in Bankruptcy was abolished upon the commencement of the *Bankruptcy Legislation Amendment Act*.

Administrative law is another important area of jurisdiction. Many cases arise under the *Administrative Decisions (Judicial Review) Act 1977*. This Act provides for judicial review of most administrative decisions made under Commonwealth enactments on grounds relating to the legality, rather than the merits, of the decision (see Table 6.4 on pages 113 to 116 for a list of some of the enactments under which decisions have been made). Many cases also arise under the *Administrative Appeals Tribunal Act 1975* which provides for a review on the merits by the Administrative Appeals Tribunal of many Commonwealth administrative decisions, and which also provides for a right of appeal from the Tribunal to the Court on questions of law. The Court has jurisdiction under the *Migration Act 1958* to hear appeals for judicial review of decisions of the Immigration Review Tribunal and the Refugee Review Tribunal.

The Court hears taxation matters on appeal from the Administrative Appeals Tribunal, mostly concerning income tax and sales tax. It exercises a first instance jurisdiction to hear objections to decisions made by the Commissioner of Taxation.

The Court shares first instance jurisdiction with the Supreme Courts of the States and Territories in the complex area of intellectual property (copyright, patents, trade marks and designs). All appeals in these cases, including appeals from the Supreme Courts, lie to a Full Federal Court.

The Court also has jurisdiction under the *Native Title Act 1993*. It may hear contested applications to determine native title, claims by native title holders for compensation for certain acts which have affected their rights and ancillary matters and other matters arising under the Act. During the year the Native Title Amendment Bill 1997 was introduced into the Parliament. The Bill proposes amendments to the *Native Title Act* and if passed in its current form will require parties to commence native title matters in the Federal Court. Under the current legislative scheme matters are required to be commenced in the National Native Title Tribunal. The new scheme will require the Court to refer matters to the National Native Title Tribunal for mediation.

Another important part of the Court's jurisdiction derives from the *Admiralty Act*. The Court has concurrent jurisdiction with the Supreme Courts of the States and Territories under this Act to hear maritime claims and ships coming into Australian waters may be arrested for the purpose of providing security for money claimed from ship owners and operators. If security is not provided, a judge may order the sale of the ship to provide funds to pay the claims. During the reporting year the Court ordered the judicial sale of two ships (one in Perth and one in Brisbane) subsequent to their arrest by the Admiralty Marshal. The Admiralty Marshal also paid out part of the proceeds of sale to creditors of three vessels arrested and sold during the last two reporting years.

The Court has a diverse appellate jurisdiction. It hears appeals from decisions of single judges of the Court and also exercises general appellate jurisdiction in criminal and civil matters on appeal from the Supreme Court of the Australian Capital Territory and the Supreme Court of Norfolk Island. Appeals on points of law from the Administrative Appeals Tribunal are within the original jurisdiction of the Court.

This summary refers only to some of the principal sources of the Court's work. Other matters heard by the Court range from cases involving anti-dumping notices, tariff concession orders, to cases arising under Commonwealth anti-discrimination legislation. Statutes under which the Court exercises jurisdiction are listed in Appendix 5 on pages 91 to 94.

### **New jurisdiction**

The Court's jurisdiction during the year was enlarged or otherwise affected by several statutes including:

- *Bankruptcy Legislation Amendment Act 1996*;
- *Workplace Relations and Other Legislation Amendment Act 1996*;
- *Aviation Legislation Amendment Act (No 1) 1997*;
- *Law and Justice Legislation Amendment Act 1997*;
- *Telecommunications Act 1997*;

- *Trade Practices Amendment (Telecommunications) Act 1997*;
- *Export Markets Development Grants Act 1997*;
- *Private Health Insurance Incentives Act 1997*;
- *Retirement Savings Account Act 1997*;
- *Australian National Railways Commission Sale Act 1997*.

## **Federal Court Rules and Practice Notes**

The judges are responsible for making the Rules of Court under the *Federal Court of Australia Act*. The Rules provide the procedural framework within which matters are commenced and conducted in the Court. The Rules of Court are made as Commonwealth Statutory Rules and are published by the Australian Government Publishing Service. The Rules are drafted by the Judges' Rules Committee with the assistance of a Deputy Registrar. An officer of the Office of Legislative Drafting within the Attorney-General's Department assists with the form and publication of the new Rules.

The Rules are kept under review. New and amending rules are made when needed to ensure that the Court's procedures are up to date and responsive to the needs of modern litigation. They also provide the framework for new jurisdiction conferred upon the Court. A review of the Rules will be undertaken as a consequence of the changes to the Court's practice and procedure described elsewhere in this report.

During the reporting year new Rules were introduced to deal with the *Bankruptcy Act, Evidence Act 1995*, inspection of documents in the registry and leave to serve court documents outside the Commonwealth of Australia. The Court also made new Native Title Rules following the cessation of the original Rules as a result of the operation of a sunset clause. New rules to coincide with the vesting of the jurisdiction of the Industrial Relations Court in the Federal Court pursuant to the *Workplace Relations and Other Legislation Amendment Act* were drafted during the year.

The Court has previously reported on the consultative process with interested parties before important rule changes are made. During the year important new Bankruptcy Rules were drafted in consultation with members of the legal profession practising in that area. The new Rules coincided with the commencement of the *Bankruptcy Legislation Amendment Act* which amended the *Bankruptcy Act* and gave the Court power to make Rules of Court in relation to the practice of bankruptcy pursuant to the *Federal Court of Australia Act*. Previously the Bankruptcy Rules had been made by the Governor-General pursuant to the *Bankruptcy Act*.

Practice Notes supplement the procedures established in the Rules of Court. The Practice Notes were revised and reissued during the 1993-94 reporting year. They are available without charge through District Registries. They have been reproduced in looseleaf services by law publishers. In April 1997 the Chief Justice issued a Practice Note dealing with the service of court documents outside the Commonwealth of Australia under Order 8 of the Rules of Court. The Court has also published a guide to instituting appeals to the Federal Court of Australia and various notices to practitioners issued by the District Registries. These are also available from the District Registries and in looseleaf legal services.

## 2.2 DECISIONS OF INTEREST

During the reporting year the judges published over 1,200 decisions. To give some illustration of the Court's work, a few of these decisions are summarised below. The range of the decisions highlights the varied jurisdiction of the Court.

### **Income tax and bankruptcy law - additional tax for late payment**

*Deputy Commissioner of Taxation v Kavich* (8 August 1996, Justices Lockhart, Lee and Tamberlin)

The question in this appeal was whether, in the particular circumstances of the case, additional tax under s 207 (penalty for unpaid tax) of the *Income Tax Assessment Act 1936*, was a debt provable in the bankruptcy of the first respondent, Mrs Kavich.

The judge at first instance had held that the Australian Taxation Office could not claim for the late lodgement penalty as a creditor in the bankruptcy and could not recover the penalty out of the surplus of the estate after distribution to creditors.

The facts of the case were as follows. On 28 February 1978 Mrs Kavich was made bankrupt (sequestered). As a result of the bankruptcy there vested in the second respondent, the Official Trustee, shares in a company called Antlers Pty Ltd which was being wound up (liquidated). The shares were not disclosed by Mrs Kavich to the trustee.

On 27 November 1978, the Commissioner of Taxation issued amended assessments to Mrs Kavich for the 1972 to 1974 years of income and notices of assessment in respect of 1975 and 1976, with tax payable totalling \$102,054. The Commissioner lodged a proof of debt for tax in the amount of \$99,620 against Mrs Kavich's estate. No part of this sum was paid from the bankrupt estate.

Mrs Kavich was discharged from bankruptcy on 1 March 1981 under the automatic discharge provisions of the *Bankruptcy Act*. In August 1992 the Deputy Commissioner lodged a further proof of debt in the amount of \$338,448. This proof included an amount of \$239,916 claimed under s 207 of the *Income Tax Assessment Act*, as additional tax for late payment. By this time it had become known that Mrs Kavich would be entitled to a substantial distribution from Antlers Pty Ltd.

Both Mrs Kavich and the Deputy Commissioner of Taxation applied to the Court to have the status of the proof of debt determined.

The Court had to determine whether the late payment penalties satisfied s 82(1) of the *Bankruptcy Act* which provides that: "... all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of bankruptcy ... are provable in his bankruptcy."

The Full Court held that the late payment penalty did not satisfy the requirements of s 82 of the *Bankruptcy Act*. There was no debt or liability of the relevant kind as at the date of bankruptcy or one to which Mrs Kavich may have become subject to prior to her discharge from bankruptcy.

While amended assessments and the notices of assessment were served upon Mrs Kavich after the date of bankruptcy, the primary tax was a provable debt in the bankruptcy, as it was a debt which arose by reason of an obligation arising under the *Income Tax Assessment Act*.

There was, however, no obligation which made the penalty tax due and payable as the penalty tax did not arise until the due date for payment of the primary tax had passed (this was after the date of bankruptcy). The penalty tax could also not be classed as a contingent liability until the assessments were served, and again, this occurred after the date of bankruptcy.

In addition, as the primary tax had been converted into a right to prove in bankruptcy upon service of the assessments, there was no longer a debt which Mrs Kavich was personally liable to pay. As there was no primary tax debt, there was no failure to pay and hence no late payment penalty could arise.

The Court also held that there was no liability on the trustee of Mrs Kavich's estate to pay any amount to the Commissioner as tax.

### **Bankruptcy - "All moneys" clause in a mortgage document**

*In the bankrupt estate of Murphy; Donnelly v Commonwealth Bank of Australia*  
(26 September 1996, Justice Hill)

The question for determination by the Court in this matter was the construction of a mortgage document.

The facts of the case were as follows. On 19 December 1988 Ms Murphy, an employee of the Commonwealth Bank of Australia Ltd (the Bank), executed a mortgage over a property owned by her and her husband, in favour of the Bank. The mortgage to the Bank contained an "all moneys" clause.

In November 1995 Ms Murphy was dismissed by the Bank after she withdrew \$57,952 from customers' accounts with forged signatures. This money was not recovered.

On 15 December 1995 Ms Murphy became bankrupt on the presentation of her own petition to the Court and in the same month contracts were exchanged for the sale of the property the subject of the Bank's mortgage. Notwithstanding the bankruptcy, the contracts were executed by Ms Murphy and her husband. The trustee of Ms Murphy's bankrupt estate, Mr Donnelly, permitting this transaction to proceed to settlement.

On settlement the Bank claimed not only moneys owing on the loan transaction but also the \$57,952 misappropriated. Mr Donnelly sought a declaration from the Court that the \$57,952 was not a sum due to the bank under the mortgage.

After reviewing a number of decisions of the Supreme Court of New South Wales dealing with the construction of “all moneys” clauses, Justice Hill proceeded upon the principles which he felt were accepted law in New South Wales. Some of those principles were as follows:

- No principle of law that an “all moneys” clause should be read down because it is prepared by a bank.
- A bank mortgage is traditionally drawn to secure the bank in a multitude of possible situations.
- An “all moneys” clause is to be construed in the context in which it came to be executed and by reference to its commercial purpose.

Justice Hill found that Ms Murphy’s obligation to repay the \$57,952 she had misappropriated from the Bank fell within the “all moneys” clause of the mortgage. The Court made declarations accordingly.

### **The Rugby League case**

*News Ltd v Australian Rugby Football League Ltd* (4 October 1996, Justices Lockhart, von Doussa and Sackville)

This well-known case involved a challenge by News Ltd to “commitment” and “loyalty” agreements between the Australian Rugby League (the ARL), the New South Wales Rugby League Ltd (the League) and the twenty clubs that comprised the national rugby league football competition. News Ltd was attempting to establish a new rugby league competition known as “Super League”. Agreements between some 300 players and coaches to participate in the Super League were signed after the commitment and loyalty agreements with the ARL and the League. The commitment and loyalty agreements precluded the clubs participating in a competition other than one organised by the League or the ARL. The League also relied on contracts with the clubs to compete in the 1995 competition.

The League and ARL had also claimed that the clubs were parties to a joint venture with the League and ARL, and that each club owed fiduciary duties to the other participants in the joint venture.

The trial judge found that some of the clubs participating in the national competition breached fiduciary and contractual obligations owed to the League, the ARL and other clubs, and that News Ltd and associated Super League companies induced or encouraged those breaches. Orders were made which had the effect of preventing the Super League interests from organising or participating in a rugby league competition, other than one authorised by the League or the ARL, until the year 2000.

News Ltd and related companies and clubs appealed. They sought orders that the commitment and loyalty agreements were void and restraining the League and the ARL from requiring compliance with the agreements. A large number of players and coaches were affected by the trial judge’s orders and they intervened to argue that as they had not been joined as parties, certain of the orders should be set aside.

The Full Court held that:

1. The evidence showed that the conduct of the “rebel” Super League clubs destabilised the conducting of the 1995 season and this action breached an implied term of the contract with the League in doing all that was necessary to allow the League to have the benefit of the 1995 season.
2. The making of the commitment and loyalty agreements contravened s 45(2) of the *Trade Practices Act* because they included “exclusionary provisions” and the League and ARL were to be precluded from giving effect to any such provisions in the agreements.
3. That as there were too many indicators that the clubs were entitled to act in accordance with their own interests where to do so involved conflicts with the interests of the other participants. Accordingly the trial judge had made an error in concluding that the League, the ARL and “loyal clubs” had established the fiduciary duties associated with the League Joint Venture.

As it was not possible to sever the terms of the commitment and loyalty agreements which prohibited the participation of the clubs and the players in a competition not conducted by the League or the ARL, the agreements as a whole could not be enforced.

The Full Court declared that the commitment and loyalty agreements were void and each of the respondents were restrained from requiring compliance or otherwise enforcing the agreements.

### **Administrative law - Natural justice - appearance of bias**

*Gaisford v Hunt* (6 December 1996, Justices Beaumont, O’Loughlin and Lehane)

In this appeal Mr Gaisford applied to the Court for judicial review of the conduct of the first respondent, Mr Hunt.

In essence Mr Gaisford sought an order that Mr Hunt not proceed with a statutory inquiry. Mr Gaisford alleged that he had been denied natural justice by Mr Hunt by virtue of there being a reasonable apprehension of bias by Mr Hunt in carrying out his Inquiry.

At first instance a judge of the Court had dismissed Mr Gaisford’s application.

The events that led to the appeal concerned an Inquiry, conducted by Mr Hunt, into alleged paedophile activity by officers and former officers of the Department of Foreign Affairs and Trade (DFAT).

At the time of the Inquiry an article detailing preliminary findings from a source close to the Inquiry, appeared in the Canberra Times. The judge at first instance had found that Mr Hunt had been the person who had had discussions with the Canberra Times journalist. The purpose of these discussions, according to Mr Hunt, was to obtain publicity for the Inquiry and to stimulate further information or submissions to it. Mr Gaisford was a DFAT officer who at the time when the article appeared in the Canberra Times, had not given evidence to the Inquiry.

At an Inquiry hearing and in correspondence, Mr Hunt sought to dispel any view that he had reached conclusions on any issues, and that he was the source of the information in the newspaper article.

When Mr Gaisford was to give evidence to the Inquiry, his solicitor raised concerns about the newspaper article. Mr Hunt then modified his position, indicating that he had had discussions with a journalist from the Canberra Times. Mr Gaisford's solicitor requested that Mr Hunt disqualify himself from the Inquiry.

The Full Court held that there was an appearance of bias and that the appearance of bias was made worse by the additional circumstances of the uncertainty as to whether the comments were actually made by Mr Hunt. He had not given evidence but asked the Court to assume that they could be attributed to him.

The appeal was allowed, the orders made at first instance set aside and in place of those orders it was ordered that Mr Hunt not proceed with the Inquiry.

### **Foreign Relations and Media and Communication Law - Australian content on commercial television**

*Australian Broadcasting Authority v Project Blue Sky Inc* (12 December 1996, Justices Northrop, Wilcox and Finn)

The question that arose in this appeal was the validity of a standard, relating to the Australian content of programs, that was made by the Australian Broadcasting Authority (the ABA) on 15 December 1995.

The ABA is under a duty pursuant to various sections of the *Broadcasting Services Act 1992* (the Act), and in particular, s 122 of the Act, to determine standards with respect to specified programs. Section 160 requires the ABA to perform its function, including the making of standards in a manner consistent with Australia's obligations under the CER Agreement (Australia New Zealand Closer Economic Relations Trade Agreement of 1983).

The purpose of the CER Agreement was to expand free trade between Australia and New Zealand; it also envisaged the gradual elimination of all trade barriers between the two countries and the creation of a free trade area.

The practical effect of the Australian Content Standard is that each commercial television broadcasting licensee must each day broadcast Australian programs for a minimum time. The Standard identifies Australian programs by reference to the citizenship or residence of the producers, directors and actors involved in a program. The Standard therefore confers a benefit on Australians at the expense of non-Australians.

On the day the Standard was determined Project Blue Sky Inc and the other respondents initiated proceedings by filing a Writ in the High Court of Australia. By consent of the parties, the High Court remitted the matter for determination to the Federal Court of Australia.

When the case came on for hearing at first instance, the issue before the Court, was whether the Standard was invalid because it failed to impose the same requirement of preferential treatment of New Zealand programs that it imposed for Australian programs.

The Court declared that the Standard was invalid for failure to comply with the CER Agreement and ordered that unless it was revoked or varied by the ABA on or before 31 December 1996 the Standard would be set aside with effect from that date.

The ABA appealed against the declaration and orders of the judge at first instance.

The Full Court concluded that if the ABA specified the Australian content of television programs in such a way as to allow any of that required content to be satisfied by New Zealand programs, however that might be defined, it would fail to carry out its statutory task. It would not then be specifying the (minimum) Australian content of each licensee's program time, but rather the minimum Australian-New Zealand content, in whatever proportion the licensees thought fit.

The only standard consistent with the CER Agreement which the ABA could set, would be one which allowed for no Australian content programs at all, provided that New Zealand programs were broadcast in lieu of Australian content programs. While this would be a standard it would be inconsistent with the ABA's statutory obligation.

A majority of the Court held that there was an irreconcilable conflict between the special provision (the Australian content of programs) constituted by paragraph 122(2)(b) of the Act and the general provision of subsection 160(d), as it applied to the CER Agreement, and that paragraph 122(2)(b) must prevail. The appeal accordingly was allowed.

The High Court of Australia has granted Special Leave to Appeal from the Full Court's judgment. The appeal has been heard and judgment reserved.

## **Copyright in the design of the Aboriginal Flag**

*Thomas v Brown* (9 April 1997, Justice Sheppard)

The application to the Court in this matter concerned the ownership of the copyright in the design of the flag known as the Aboriginal Flag. The flag is divided into two sections. The upper half is black and the lower half is red. In the centre of the flag is a large yellow circle which, in present representations of the flag, has half its area in the black upper part of the flag and the other half in the red lower part of it.

The applicant, Mr Thomas, a professional artist who resides at Humpty Doo, 60 miles south of Darwin, claimed to have designed the flag in 1971 while living in Adelaide.

In his application Mr Thomas sought a declaration to the effect that he was the author of the artistic work being the design for the flag described in a schedule to a proclamation dated 27 June 1995 under s 5 of the *Flags Act 1953* (that is, the flag had become an official flag of Australia). He also sought a declaration that he was the owner of the copyright comprised in the flag.

The application was commenced in the Copyright Tribunal pursuant to s 183 of the *Copyright Act 1968* and asserted that the Commonwealth was making copyright usage of the flag design for the purposes of the Crown without entering into any appropriate agreement with the applicant for the use of the flag design. During the hearings in July 1996 there were discussions concerning the suitability of the Tribunal as an appropriate forum for the determination of the question of the ownership of the copyright in the flag. The Tribunal and the parties therefore decided that it was a safer course for Mr Thomas to file an application for declaratory relief in the Court.

As the matter proceeded, the question was raised as to whether Mr Thomas was entitled to claim copyright in the flag design, as it was stated that over the years a number of persons had claimed that they were the creators of the flag.

Justice Sheppard therefore arranged for the publication of advertisements in newspapers calling upon anybody who claimed ownership of the flag design to apply to the Court to have their claim determined. The advertisements led to two claims to ownership, namely from Messrs Brown and Tennant, the respondents to the application.

The Court rejected the claims of Messrs Brown and Tennant. Justice Sheppard noted the strength of Mr Thomas's claim and corroborating evidence concerning events in 1971 when, according to Mr Thomas, he had created the flag design. That evidence included the production (in evidence) of a black and red round centrepiece retained from the first flag, the centrepiece being cut out to allow for the stitching in of the central sun emblem.

Justice Sheppard considered that copyright in the design had not been lost by reason of "industrial application" (pursuant to the design/copyright overlap provisions in s 77 of the *Copyright Act*), accepting that Mr Thomas had never authorised any mass reproduction of the flag design for any commercial purpose.

On 9 April 1997 the Court declared that Mr Thomas was the author of the artistic work being the design, known as the Aboriginal Flag, and that he was also the owner of the copyright subsisting in that artistic work.

## **Extradition**

***Papazoglou v The Republic of the Philippines*** (17 April 1997, Justices Wilcox, Tamberlin and Sackville)

This was an appeal from a decision of a single judge of the Supreme Court of Victoria relating to a request from the Republic of the Philippines for the extradition of the appellant, Mr Papazoglou, to that country. The Supreme Court of Victoria had confirmed the order of a magistrate that Mr Papazoglou was eligible for surrender for the purposes of the *Extradition Act 1988*. The jurisdiction of the Federal Court in this type of matter is set out in s 21(3) of the *Extradition Act* which provides for an appeal to the Full Court of the Federal Court.

Mr Papazoglou was the principal of a company which promoted the services of Philippines Airlines in return for commissions. It was alleged that between 1984 and 1988 he had falsely claimed commissions totalling \$11 million.

In 1989 Mr Papazoglou was charged in Australia with offences in relation to the false claims made between 1986 and 1988. The claims made from 1984 to 1985 were not pursued. Mr Papazoglou pleaded guilty to a number of counts of furnishing false and misleading information and was sentenced to six years in prison.

Towards the end of the term of imprisonment a warrant for the arrest of Mr Papazoglou was issued in the Philippines based on the claims made in 1984 and 1985. The respondent, the Republic of the Philippines, sought to extradite him to that country to face trial.

The two matters dealt with by the Supreme Court of Victoria and the subject of the appeal were:

1. An application seeking a review of the determination by the magistrate that Mr Papazoglou was “eligible for surrender”.
2. An application for a declaration that the proceedings brought by the Philippines for the extradition constituted an abuse of process.

The magistrate hearing the extradition proceedings had agreed with a submission by Mr Papazoglou that it would be an abuse of process for him to face a further trial, and the possibility of further time in prison, arising from the 1984 and 1985 offences. However, the magistrate held that he had no power to stay the proceedings on this ground. The magistrate determined that Mr Papazoglou was a person “eligible for surrender” in accordance with the *Extradition Act*. The Supreme Court of Victoria reached the same conclusion and Mr Papazoglou appealed to the Full Court of the Federal Court. The Full Court held that:

- the magistrate had no implied or inherent power to terminate the proceedings under s 19 of the *Extradition Act* as an abuse of process.
- the Supreme Court of Victoria had no jurisdiction to declare that the proceedings before the magistrate constituted an abuse of process. The Supreme Court’s powers are limited to the review provided by s 21 of the *Extradition Act*.
- there was no substance in Mr Papazoglou’s argument that the magistrate and primary judge had erred in concluding that he was eligible for surrender.

### **When is a person a refugee?**

*Jong v Minister for Immigration and Multicultural Affairs* (2 May 1997, Chief Justice Black, Justices Foster and Lehane)

Mr Jong, who was born in East Timor, applied for judicial review of a decision of the Refugee Review Tribunal that he was not a refugee and was therefore not entitled to an Australian protection visa. He came to Australia in April 1992 and had Indonesian nationality.

When judicial review is sought of a decision of the Refugee Review Tribunal (the Tribunal), the Court’s function is to consider whether the Tribunal made any errors of law. The Court does not decide the facts of the case.

To be granted a protection visa an applicant must be a person to whom Australia has protection obligations under the *Convention Relating to the Status of Refugees 1951* as amended by the *Protocol Relating to the Status of Refugees 1967* (the Refugee Convention), an international treaty to which Australia is a party. The Refugee Convention defines a refugee as someone who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, unwilling to avail himself or herself of the protection of that country.

The Tribunal found that if Mr Jong returned to Indonesia he would face a real chance of persecution there on account of his political opinion. It found, however, that as well as his Indonesian nationality he also had Portuguese nationality, which he acquired at birth at a time when East Timor was a Portuguese colony. As he held no fear of persecution in Portugal he was not a refugee for purposes of the Refugee Convention. This was because the Convention, in a provision specifically dealing with dual nationality, requires that to be a refugee a person must have a fear of persecution in *each* of his countries of nationality, not just in one of them.

The Court held that where a person who claims to be a refugee has more than one nationality, the Refugee Convention requires consideration to be given not only to the formal fact of nationality but to the *effectiveness* of the protection available to the person by the country of his second nationality, in this case, Portugal. The effectiveness of protection has to be considered as a practical matter in the light of all the circumstances of a particular case. The Court held that the Tribunal did not do this in this matter, and even though it did consider aspects of that question, it did so in a different context. The Court concluded that the Tribunal had made an error of law, being the interpretation of the requirements of the Refugee Convention.

The decision of the Tribunal was set aside and the matter returned to the Tribunal for further consideration.

## **Military law**

***Hembury v Chief of the General Staff*** (7 May 1997, Chief Justice Black, Justices Lockhart, Sheppard, Mathews and Madgwick)

This was an appeal from a decision of the Defence Force Discipline Appeal Tribunal dismissing an appeal from conviction by a Military Restricted Court Martial. The appellant, Sergeant Hembury, had been charged in relation to his conduct towards a female soldier and was convicted on three of six counts. The appeal to the Defence Force Discipline Appeal Tribunal was against both conviction and punishment.

On the hearing of the appeal two grounds of the four originally relied on were of significance. One ground concerned the effect of a direction given to the court martial by the Judge Advocate before it retired to consider its verdict as to the application of rule 33 of the Defence Force Discipline Rules.

The rule provides:

“33. On any question to be determined by the court martial, the members of the court martial shall vote orally, in order of seniority commencing with the junior in rank.”.

Rule 33, which can be traced back to the eighteenth century, is intended to prevent junior members of courts-martial being influenced by the opinions of the senior members.

The direction to the court martial by the Judge Advocate was in the following terms:

“When you come to voting on the questions of guilt, you should vote, orally, in order of seniority. Voting is by majority vote. It does not have to be unanimous.”

The other ground concerned a direction given by the Judge Advocate on the question of the onus of proof. The relevant portion of the direction relied on by Sergeant Hembury was in the following terms: “... the accused need do no more than raise a reasonable doubt in the mind of the court...”. It was argued that this direction could have been construed by the court martial as reversing the onus of proof which is ordinarily upon the prosecution to prove its case beyond reasonable doubt.

It was argued by Sergeant Hembury before the Tribunal and the Full Court that both directions contained a “material irregularity” in the course of the proceedings, which resulted in a “substantial miscarriage of justice” occurring within the meaning of s 23(1)(c) of the *Defence Force Discipline Appeals Act 1955*. If the Tribunal had agreed, Sergeant Hembury would have been entitled to have the convictions quashed.

The Court held that when the direction was read in context there was no substantial miscarriage of justice arising from the misdirection as to the onus of proof.

A majority of the Court held that there was no substantial miscarriage of justice arising from the misdirection concerning rule 33 of the Defence Force Discipline Rules.

An application for special leave to appeal has been filed in the High Court of Australia.

### **Resale price maintenance**

*Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd*  
(30 May 1997, Justice Goldberg )

The Australian Competition and Consumer Commission (the Commission) sought pecuniary penalties against one of the respondents, George Weston Foods Ltd (GWF), and another company and two of its employees in relation to contraventions of ss 45 and 48 of the *Trade Practices Act*. GWF admitted to five contraventions and reached an agreement with the Commission as to the facts to be put to the Court. In some cases under these provisions the Commission will reach an agreement with the respondent as to the appropriate penalty to recommend that the Court impose. There was no agreement as to the pecuniary penalties.

The contraventions involved anticompetitive conduct and actual and attempted resale price maintenance in relation to the sale of bread products by small retailers in Victoria.

The Court held that the following principles were relevant to the determination of the pecuniary penalties to be imposed:

- where a large listed corporation carries on business through divisions rather than through separate operating companies, a pecuniary penalty should be imposed with reference to the entire company.
- the object of the penalties imposed under the Act is to deter repetition of the breaches by the party and the community.
- the penalty imposed under the Act might in an appropriate case include a component for punishment.
- the number of distinctions that could be drawn when considering the penalty renders the drawing of an analogy with other cases virtually useless.
- behaviour in contravention of the Act is not to be considered anything but deliberate and systematic merely because it was initiated by the conduct of others.
- the penalty should take into account the existence of a compliance program within the company and the failure of the program to prevent the breach.
- the principle of sentencing known as the “totality” principle is relevant to the penalties imposed under the Act.

The Court imposed pecuniary penalties totalling \$1,250,000 on GWF.

### **Trade Practices and Noah’s Ark**

*Fasold v Roberts* (2 June 1997, Justice Sackville)

The second applicant in this matter, Professor Plimer, claimed to have been affronted by statements made by the first respondent, Dr Roberts, in the course of public lectures throughout Australia in April and May 1992. He also complained about statements made or authorised by Dr Roberts in certain publications and in audio and video tapes of the lectures. The first applicant, Mr Fasold, claimed that Dr Roberts had infringed his copyright by reproducing or authorising the production of a diagram from a book by Mr Fasold in a brochure and newsletter distributed in 1992.

Dr Roberts publicly supported the view that a boat-shaped geological formation at a place near Mount Ararat in Eastern Turkey could contain the remnants of Noah’s Ark, as referred to in *Genesis*.

The matter required two major questions to be answered. The first was whether Dr Roberts contravened the *Fair Trading Acts* of the States and of the Australian Capital Territory. The *Fair Trading Acts* provide that a person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive. The applicants alleged that Dr Roberts, in the course of a series of public lectures given in early 1992 and in certain publications, misrepresented his qualifications and the nature of the investigations he personally carried out at the Mount Ararat site.

The second question was whether Mr Fasold was entitled to relief under the *Copyright Act* in respect of what he claimed was an infringement of his copyright. Mr Fasold is the author of a book entitled “*The Ark of Noah*”, published in the United States in 1989. He claimed that Dr Roberts infringed his copyright by reproducing or authorising the reproduction of a diagram from his book in a newsletter and brochure published in 1992.

In relation to the first issue the applicants claimed that although Dr Roberts was not paid for his lectures, he was acting in trade or commerce, because he was promoting the business of an organisation known as Noah’s Ark Research Foundation (“NARF”).

Justice Sackville rejected the argument that Dr Roberts was engaging in trade or commerce for two reasons. First, NARF was not carrying on a business because its activities lacked the necessary degree of system and continuity. Thus, there was no foundation to the argument that Dr Roberts was promoting NARF’s business. Secondly, even if NARF were to be regarded as having conducted a business, Dr Roberts activities did not bear the required “trading or commerce character”. Accordingly, his conduct could not be regarded as being “in trade or commerce”.

In view of the Court’s conclusion that Dr Roberts did not make representations “in trade or commerce” it was not necessary for the Court to consider whether any of his statements in the public lectures or elsewhere constituted misleading or deceptive conduct. The claim against Dr Roberts in this respect was dismissed.

In relation to Mr Fasold’s claim, the Court concluded a drawing appearing in the brochure and newsletter published by NARF in 1992 reproduced, in substance, a diagram appearing in Mr Fasold’s book. As Dr Roberts authorised the reproduction of the diagram in the brochure and newsletter he infringed Mr Fasold’s copyright. Mr Fasold was awarded \$2,500 in damages for this breach.

There has been an appeal to the Full Court of the Federal Court and the Court has reserved its decision.

### **Admiralty - the arrest of ships**

***KMP Coastal Oil Pte Ltd v The Owners of Motor Vessel “Iran Amanat”*** (5 June 1997, Justices Wilcox, Burchett and Emmett)

The appellant, KMP Coastal Oil Pte Ltd, commenced an action against the owner of 85 vessels, including the motor vessel “Iran Amanat” which was arrested by a Marshal of the Court at the Port of Geelong in October 1996. The claim was for the sum of US\$150,400 for bunker fuel supplied to other ships owned by the owner of the “Iran Amanat”. It is permissible to arrest surrogate ships or sister ships owned by the one owner in respect of some types of claims under the *Admiralty Act*.

The owner of the arrested ship, Islamic Republic of Iran Shipping Lines, denied that it was liable for the fuel and applied for release of the ship on the basis that the Court did not have jurisdiction to order the arrest of the vessel and hear the dispute. This matter was an appeal from the decision to release the vessel on the basis that the owner of the vessel was not liable to KMP Coastal Oil and

therefore was not a “relevant person” for the purposes of the *Admiralty Act*. A “relevant person” is defined, in relation to a maritime claim, to mean a person who would be liable on the claim in a proceeding commenced in an action *in personam*. The matter involved an interpretation of the words “who would be liable” in that definition. The term *in personam* means “against the person”.

KMP Coastal Oil argued that the trial judge had adopted an incorrect approach in determining whether the owner was a relevant person for the purposes of s 19 of the *Admiralty Act*.

The Full Court held that where there was a challenge to the jurisdiction of the Court in this way it is not necessary to determine whether the owner is as a matter of fact and law liable on the claim. The question that must be answered is whether, if the claim succeeds against some entity, that entity has the relevant relationship with the ship against which the proceedings *in rem* are brought, namely, its owner. It is not necessary for the Court to first determine the liability of the relevant person. In an admiralty law context the term *in rem* means “against the ship”.

The Court concluded that as the Islamic Republic of Iran Shipping Lines had conceded it was the owner of both the vessel arrested and the ship that had the bunker fuel supplied the Court had jurisdiction to order the arrest and hear the claim.

An application for special leave to appeal has been filed in the High Court of Australia.

### **Copyright - techno music and Carmina Burana**

*Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd*  
(19 June 1997, Justices Wilcox, Hill and Lindgren).

This case was an appeal from the decision of Justice Tamberlin given on 26 November 1996. The appeal was dismissed.

The matter was brought before the Court on behalf of the estate of the composer Carl Orff to determine whether a “techno” version (a dance remix) of the “O Fortuna” chorus from Orff’s work “Carmina Burana”, released by Colossal Records on a compact disk called “Excalibur”, debased the original.

Section 55 of the *Copyright Act* entitles a record manufacturer to make a record of a work without infringement of the owner’s copyright provided that the adaptation does not debase the original.

At the hearing at first instance Justice Tamberlin held that the adaptation did not debase the original work. He considered that a broad approach should be taken to determining the question.

The Full Court was therefore called upon to determine the meaning of “debase”.

All three appeal judges found for slightly different reasons that the “techno” version did not debase the original work.

Their Honours all indicated that where an adaptation has its own artistic integrity it is unlikely to be a debasement. The respondents were therefore entitled to a compulsory licence under s 55(1) of the *Copyright Act*.

### **Negligence, Trade Practices - cattle contaminated by pesticide**

*McMullin v ICI Australia Operations Pty Ltd* (24 June 1997, Justice Wilcox)

This was a representative action under Part IVA of the *Federal Court of Australia Act* by husband and wife graziers who claimed that they had suffered loss as a result of the contamination of their cattle by a pesticide (Helix).

The first three respondents were related companies (which were referred to collectively and individually as ICI) and other respondents included the States of New South Wales and Queensland.

The pesticide which had been developed by ICI for the control of insects that feed on cotton plants was registered for that use in 1989 by relevant government bodies. The contamination of the McMullin's cattle was caused by the ingestion of the pesticide from over-spray and spray drift as a result of aerial spraying and or from the cattle being fed cotton gin trash. The feeding of cotton gin trash to cattle was a practice sanctioned by the relevant New South Wales and Queensland State departments. The pesticide contained the chemical, chlorfluazuron, which had a tendency to accumulate in the fat of mammals (bio-accumulate).

Although the characteristic of bio-accumulation was known to ICI, it marketed the pesticide without carrying out full environmental field studies that were recommended by a related United Kingdom company.

By the end of 1994 contaminated cattle were discovered. Steps were then taken to curtail the movement and sale of contaminated cattle and exporters refused to purchase cattle having any contamination. As a result many people suffered financial loss.

The McMullin's case against ICI was based on negligence and a breach of s 52 (misleading conduct) of the *Trade Practices Act*. The case against New South Wales alleged negligence and a breach of s 42 of the *Fair Trading Act 1987 (NSW)* and against Queensland, negligence only.

The misleading conduct part of the McMullin's case related to ICI's failure to warn that chlorfluazuron had a tendency to build up in the tissue of cattle which consumed cotton trash and by-products, stubble and pasture and to notify an appropriate withholding period. The withholding period being the time that chlorfluazuron remained within crops, cotton trash and by-products, and soil.

As to the *Fair Trading Act* claim against New South Wales, the McMullins argued that the representation by that State's Department of Agriculture that cotton trash was suitable for consumption by cattle, was misleading or deceptive or likely to mislead or deceive.

The Court decided that the negligence claim (breach of duty of care) against ICI succeeded in the case of four types of claimants, namely: claimants such as graziers whose cattle became contaminated during their period of ownership; claimants such as graziers and abattoir operators who unwittingly purchased contaminated cattle; claimants such as meat processors and exporters who owned meat which was contaminated and thus condemned and claimants such as feedlot operators who had to feed detained contaminated cattle.

The negligence claims against New South Wales and Queensland failed for the reason that relevant decisions, such as, to register the pesticide under State law were policy decisions.

The Court also held that the s 52 claim was only important to claimants who fell outside the ambit of the common law duty of care. The question of whether these claimants could make out a case under s 52 was reserved for future decision.

The case against the New South Wales government under the *Fair Trading Act* was also unsuccessful. While the Court held that the New South Wales State department's representations that cotton trash was suitable for consumption by cattle were misleading and deceptive, given the contamination problem, they were not made by the State in the course of carrying on business.

## **2.3 MANAGEMENT OF THE WORKLOAD OF THE COURT**

### **Caseflow management**

As mentioned in last year's report, the Court has embarked on a complete and fundamental review of its practice and procedure, particularly having regard to caseflow management principles. During the reporting year the Court continued to develop and refine its practice and procedure proposals and in particular its decision to adopt the Individual Docket System as the basis of its listing and case management system throughout Australia.

The Individual Docket System is intended to produce substantial benefits for litigants and the legal profession. It will be simpler than the present system and more certain. It will facilitate case management by greater involvement of the Court's officers and judges' staff. Some routine case management issues may be dealt with without the necessity of a court hearing.

Most importantly, the design of the new procedures has placed an emphasis upon the requirement to minimise cost to the parties. The new procedures are expected to take much less time before the Court and much less preparation time by practitioners. Less time and less work is expected to reduce costs.

In developing the Individual Docket System, the Court identified key case management events and proposed time standards as to when these events should ordinarily occur, although the requirements of each individual case will, of course, continue to be the paramount consideration. These key case management events are designed to allow sufficient time for work to be conducted to assist in the disposition of the case but not too much time which might permit case preparation to result in a disposition taking place outside of the Court's time goal.

One of the key caseflow management principles is the establishment of a time goal within which cases will be disposed, together with procedures designed to dispose of cases within the time goal. The Court has set the period of 18 months from commencement as the goal within which it should dispose of at least 98% of its cases. The Court recognises, however, that the majority of cases will be disposed of well within this period, while some particularly large and or difficult cases will require more time. During the reporting year 84.2% of matters were completed in less than 18 months, 75% in less than 12 months and 57.3% in less than 6 months.

The Court expects that the key events in the new case management procedures should reduce the number of appearances and thus reduce costs. The aim is to minimise the number of events and to maximise the results of each appearance before the Court.

The Court has conducted a program of Assisted Dispute Resolution (ADR) since 1987. The Court's ADR program is integrated with its program of caseflow management under which a new matter must ordinarily come before a judge for directions within a short time of filing and before any further procedural steps are taken. This enables matters suitable for ADR to be identified early and referred to mediation at an appropriate stage.

The Individual Docket System with case management by the same judge from commencement to disposition will put a greater emphasis on referral to mediation and is expected to lead to a greater identification of cases suitable for referral to ADR.

Creditors' petitions under the *Bankruptcy Act*, most of which are not contested, are generally dealt with by registrars. In 1996-97 3,261 petitions were presented (see figure 6.10 in Appendix 6 on page 108). This practice saves a substantial amount of judicial time as does those matters under the *Corporations Law* which are also dealt with by registrars. Registrars' decisions may be reviewed by a judge of the Court on the application of a party.

### Appellate jurisdiction

The Court has a substantial appellate workload. During the year, 298 appeals to the Full Court were filed. (See Figure 6.9 in Appendix 6 on page 107 for comparative filings.) Towards the end of each calendar year, the Court publishes its program of Full Court Sittings for the following year. In the 1997 calendar year, four Full Court Sittings have been programmed for Sydney, three each for Melbourne, Brisbane, Perth and Canberra, two for Adelaide and Hobart and one for Darwin. Once appeal books are prepared by the parties, an appeal can usually be listed for hearing at the next hearing in the capital city where the matter was heard at first instance. During the reporting year, 11 special Full Court hearings were held to enable the early disposition of urgent appeals. On occasions when matters have been sufficiently urgent, it has been necessary to convene an urgent sitting of a Full Court in a capital city other than that in which the case was originally heard.

As previously mentioned, the Court will be introducing a new Full Court rostering system in 1998.

### Allocation of hearing dates

In addition to the time goal mentioned above, the Court's objective is to have matters listed for hearing within two to three months of a judge being satisfied that a case is ready for trial.

Table 2a shows the position, at the end of the reporting year, in each of the registries.

**Table 2a**  
**Estimated periods between readiness and hearing date**

Registry	Short matters (up to 3 days)	Long matters (more than 3 days)
Australian Capital Territory	2 - 3 months	2 - 3 months
New South Wales	6 months	7 months
Northern Territory	1 - 3 months	1 - 3 months
Queensland	4 - 5 months	9 months
South Australia	3 - 4 months	5 - 7 months
Tasmania	2 - 3 months	3 - 4 months
Victoria	6 months	7 months
Western Australia	2 - 3 months	2 - 3 months

The table shows that the Court has not been able to meet its objective in New South Wales, Queensland, South Australia, Tasmania and Victoria.

Difficulties in meeting the objective are the result of a number of factors, including the needs of other courts and tribunals upon which Federal Court judges hold commissions or appointments as well as a trend towards an increasing number of long, complex matters. It is not unusual for single cases to occupy individual judges for many weeks (sometimes many months) and long cases have a serious impact on the Court's capacity to deal with its workload. Although the frequency of long cases has increased and has been reported upon in previous years, urgent cases are still given priority and the Court continues to hear them as promptly as possible. Nevertheless, it is becoming increasingly difficult to meet the time demands of long cases on the one hand and the time demands of urgent matters on the other. These issues have been under consideration by the Practice and Procedure Committee and it is hoped that the implementation of the Individual Docket System will lead to a significant improvement in the time that elapses between readiness for trial and the commencement of the hearing.

### **Delivery of judgments**

In the reporting period, 1,266 Full Court and single judge judgments were delivered. This figure includes both written judgments and judgments delivered on the day of the hearing. When decisions are published, they are immediately made available to the parties and the media.

The Court has implemented a system of providing electronic copies of judgments for legal publishers via the Judgments Bulletin Board. Judgments are also available on the Internet on the AustLII site. The availability of judgments electronically will assist in reducing delays in disseminating the Court's judgments to the legal and wider community. At the end of the reporting year, the Judgments Bulletin Board had 12 external users.

The nature of the Court's workload means that a substantial proportion of the matters coming before the Court will go to trial and that the decision of the trial judge will be reserved at the conclusion of the trial. The nature of the Court's appellate work also means that a substantial proportion of appeals require reserved judgments.

For the reporting period, the median time between reserving and delivery of judgments, in both single judge matters and Full Court appeals, was between 30 and 60 days. Some 52% of all reserved judgments in single judge matters were delivered within 30 days. It is important to note that these figures do not take into account the significant number of single judge and Full Court judgments delivered on the day of the hearing.

Any party having a concern about delay in delivery of a reserved judgment may direct an inquiry to the President of the appropriate Bar Association or Law Society. The President then refers the inquiry to the Chief Justice for attention without disclosing which of the parties has raised the matter.

Court policy continues to allow fixed periods out of court to write reserved judgments. This policy is difficult to maintain and comes into conflict with the necessity to hear listed matters, as well as fresh matters which require urgent disposition. The workload of the Court is dealt with below in Section 2.4.

## 2.4 WORKLOAD TRENDS

### General trends

During the reporting year there were a number of factors which affected the Court's workload and the manner in which it reported upon it. These factors were as follows:

- 381 matters were transferred from the Industrial Relations Court of Australia (IRCA) to the Court on 26 May 1997 on account of legislative changes.
- The transfer to Insolvency and Trustee Service, Australia, on 16 December 1996 of administrative functions undertaken by officers of the Court, including the issue of bankruptcy notices and the processing of debtors' petitions, pursuant to the *Bankruptcy Legislation Amendment Act*. Prior to 16 December 1996 creditors' petitions and other bankruptcy applications were recorded in a specific bankruptcy database. Since that date they have been recorded in the Court's general applications database. For this reporting year the bankruptcy statistics are shown separately, however, in future years it is expected that they will be incorporated into the general statistical workload of the Court.
- Amendments to the Federal Court of Australia Regulations changing fees and introducing a number of new fees, which took effect in September and December 1996, probably led to the decline in *Corporations Law* matters, and in particular winding up applications.
- On 17 April 1997 the *Federal Court of Australia Act* was amended. One of the amendments removed the Divisional structure from the Court. In this reporting year the Court's report and the statistics contained therein will refer to General Division, however, that will not occur in future years.

Table 6.1 on page 96 shows that with the exception of the reporting year, there have been increases in the Courts incoming work in each of the five previous reporting years. For example, in 1991-92, 1994-95 and 1995-96 the number of the actions commenced in the General Division (including *Corporations Law* matters) was 2,679, 4,155 and 4,307 respectively.

In the reporting year the number of incoming matters decreased to 3,855. The major reason for the decrease can be directly attributable to the decline in *Corporations Law* matters from 1,946 in 1995-96 to 1,096 in the reporting year. For the same periods, the General Division incoming matters (excluding *Corporations Law* matters) increased from 2,361 to 2,759, however, as mentioned above, 381 matters were transferred from the IRCA on 26 May 1997.

The number of matters commenced must, however, also be compared with the number completed and on hand. The number of General Division matters (including *Corporations Law* matters) finalised during the reporting year was 3,996 compared with 3,879 in the previous year. The increase in the number of matters finalised is a trend that has existed in all of the five previous reporting years, for example, in 1991-92 and 1993-94, 2,410 and 3,306 matters were finalised respectively. The number of matters on hand continued to increase for all years, with the exception of the reporting year, for example, in 1994-95 and 1995-96 there were 3,359 and 3,787 current matters respectively. In the reporting year there were 3,627

matters, the number of current matters being affected by the large decline in corporations law filings however, the decline in current matters between 1995-96 and 1996-97 (160) was not as great as the decline in filings between the two reporting periods (452). The underlying trend therefore, in the reporting year, is also for the number of matters on hand to increase.

A collection of graphs and statistics concerning the workload of the Court is contained in Appendix 6 to this report commencing at page 95. It should be noted that the number of appeals to the Full Court filed in 1996-97 (298) is the highest in the past five years (Figure 6.9 at page 107). This should not be surprising as it is a reflection of the increase in the number of first instance matters disposed. It is also important to record that Federal Court appeal benches are usually constituted by three judges. Thus as the number of appeals increase, there are fewer judges available for first instance work.

As mentioned above, in 1998 the Court will be adopting a change to the roster of Full Court sittings. The change will enable the Court's judges to have long periods of time without Full Court sittings in which they can deal with first instance matters in their individual dockets. The Court is also considering the role of Assisted Dispute Resolution (ADR) in the disposal of Full Court appeals. Figure 6.9 on page 107 provides statistical information concerning the number of Full Court appeals in the last five years.

### Age of pending caseload

Table 2b shows the comparative age of matters that were pending as at 30 June for each of the previous five years.

**Table 2b**  
**General Division current matters (including Corporations Law matters) - historical**

Age of matters	Matters current as at 30 Jun 93	Matters current as at 30 Jun 94	Matters current as at 30 Jun 95	Matters current as at 30 Jun 96	Matters current as at 30 Jun 97
under 6 months	1,029	1,039	1,547	1,444	1,427
6-12 months	775	650	573	754	729
12-18 months	357	368	310	769	390
<b>under 18 months</b>	<b>2,161</b>	<b>2,057</b>	<b>2,430</b>	<b>2,967</b>	<b>2,546</b>
1.5 - 2 years	227	374	280	232	256
over 2 years	271	387	649	588	825
<b>over 1.5 years</b>	<b>498</b>	<b>761</b>	<b>929</b>	<b>820</b>	<b>1,081</b>
<b>Total</b>	<b>2,659</b>	<b>2,818</b>	<b>3,359</b>	<b>3,787</b>	<b>3,627</b>

With the exception of the reporting year ending 30 June 1996, each reporting year in the Table has shown an increase in the number of cases more than 18 months old. In addition for all years with the exception of the reporting year the number of pending matters has also

increased. The Court will continue to focus upon avoiding delay and in reducing existing delays.

### **Native title matters**

The Court's jurisdiction in native title cases has the potential to have a major impact upon the Court's workload and resources.

In 1992-93 only one native title matter was commenced in the Court, with the number increasing to 13 in 1994-95, 12 in 1995-96 and 11 in the reporting year. It should be noted, however, that in the reporting year the Court also heard five *Administrative Decisions (Judicial Review) Act* matters involving native title, as well as four appeals from the National Native Title Tribunal. In addition, four Full Courts were constituted to hear appeals in native title matters from the decisions of judges of the Court at first instance.

In terms of time, size, cost, location of hearings and general impact on the Court's resources, native title cases are an important and resource-intensive addition to the Court's workload. Two cases illustrate this, namely the cases of *Ward (on behalf of the Miriuwung Gajerrong Peoples) v State of Western Australia* and the *Members of the Yorta Yorta Aboriginal Community v State of Victoria*.

The application in the case of *Ward* filed in the Court in February 1995 has involved site visits and hearings in the Kimberley region of Western Australia. The hearings which were expected to take approximately eight weeks are now likely to involve a further month of hearings for the purpose of taking respondents' evidence. Most of the evidence has been taken in the field where the applicants reside and where the land the subject of the claim is situated.

The *Yorta Yorta* case which was also filed in 1995 has involved 12 weeks of hearings in the reporting year with at least a further eight weeks of hearings listed for the rest of calendar year 1997. As in the *Ward* case, the Court is hearing the matter at the actual sites of contention, the Court, for example, sitting on some occasions in a marquee tent on the grounds of Aboriginal centres in towns of the Murray-Goulburn rivers region.

The above two cases are included among the Court's pending cases and it is expected that some of the other pending cases will take similar time to complete.

More importantly, based upon the predictions given to the Court about future native title workload, it has been assumed that the Court will receive up to 20 cases per annum of similar size to the two large cases mentioned above. This will have a very substantial impact on the Court's resources, which is expected to be met by additional funds from government for native title cases.

The administrative costs, not including salaries' costs, associated with hearings of these types are quite high. The Court will monitor very carefully the rate at which new native title cases are commenced so as to be able to identify the resource costs and needs of the Court.

## **2.5 MATTERS TRANSFERRED TO AND FROM THE COURT**

Matters may be remitted or transferred to the Court under:

*Judiciary Act 1903, s 44*  
*Cross-vesting Scheme Acts*  
*Corporations Law.*

During 1996-97, 39 matters were remitted or transferred to the Court:

9 from the High Court of Australia  
30 from State or Territory Supreme Courts.

Matters may be transferred from the Court under:

*Federal Court of Australia Act 1976*  
*Jurisdiction of Courts (Cross-vesting) Act 1987*  
*Administrative Decisions (Judicial Review) Act 1977*  
*Bankruptcy Act 1966*  
*Trade Practices Act 1974*  
*Corporations Act 1989.*

During 1996-97, 58 matters were transferred from the Court:

1 to the Family Court of Australia  
23 to State or Territory Supreme Courts  
34 to District or County Courts.

## **2.6 ASSISTED DISPUTE RESOLUTION (ADR)**

The Court's program of Assisted Dispute Resolution, which commenced in 1987, is of the type described as a court-annexed mediation program. The only matters dealt with in the program arise out of proceedings in the Court. Mediations are conducted by those of the Court's registrars who have been trained as mediators. The program has proved popular, with 90 matters being referred for mediation during the reporting year.

Prior to 17 April 1997 the program was based on parties consenting to mediation, however, from that date s 53A of the *Federal Court of Australia Act* was amended to provide for non-consensual mediation.

With the introduction of individual docketing and the various procedural reforms to be introduced at the same time, it is likely that there will be a further increase in the number of cases referred to mediation and in other forms of assisted dispute resolution. Greater importance will be attached to the identification, at an early stage, of cases suitable for assisted dispute resolution.

The settlement rates of cases referred to mediation since the commencement of the program in 1987 is 68%. Settlement rates at mediation should not, however, be the sole criteria by which the program is evaluated. Many matters which do not settle proceed to trial with issues better

defined, or on the basis of agreed facts, the facts being settled in cooperation with the mediator. In some instances the parties also agree that the Court should only be asked to determine liability or quantum. These types of results also mean savings in costs to the parties and court time.

Figure 1 shows the number of matters referred to mediation since 1992-93.

**Figure 1**

**Assisted Dispute Resolution (ADR)  
1992-93 to 1996-97  
(matters referred for mediation)**

