

## **CHAPTER 3**

# **THE WORK OF THE COURT IN 2003-04**



### 3.1 INTRODUCTION

The Federal Court has one key outcome identified for its work, which is, through its jurisdiction, to apply and uphold the rule of law to deliver remedies and enforce rights and in so doing, contribute to the social and economic development and well-being of all Australians.

This Chapter reports on the Court's performance against this objective. In particular, this Chapter reports extensively on the Court's workload during the year, as well as its management of cases and performance against its stated workload goals. The Chapter also reports on aspects of the work undertaken by the Court to improve access to the Court for its users, including changes to its practices and procedures and the increased use of technology within the Court. The Chapter includes information on the Court's work with overseas jurisdictions.

### 3.2 MANAGEMENT OF CASES AND DECIDING DISPUTES

#### Introduction

This part of the annual report examines the Court's jurisdiction, management of cases, workload and use of assisted dispute resolution.

#### The Court's jurisdiction

The Court's jurisdiction is broad, covering almost all civil matters arising under Australian federal law and some summary criminal matters. It also has jurisdiction to hear and determine any matter arising under the Constitution or involving its interpretation.

Cases arising under Part IV (restrictive trade practices) and Part V (consumer protection) of the *Trade Practices Act 1974* constitute a significant part of the workload of the Court. These cases often raise important public interest issues involving such matters as mergers, misuse of market power, exclusive dealing or false advertising. See Figure 5.7 on page 123 for comparative statistics regarding Trade Practices Act matters.

Administrative law is an important area of jurisdiction. Many cases arise under the *Administrative Decisions (Judicial Review) 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. The Court also hears appeals on questions of law from the Administrative Appeals Tribunal under the Act. The Tribunal has power to review on the merits many Commonwealth administrative decisions. Appeals from the Tribunal are heard by the Court in its original jurisdiction.

The Court has jurisdiction under the *Judiciary Act 1903* to hear applications for judicial review of decisions by officers of the Commonwealth. This jurisdiction includes the review of 'privative clause' and other decisions by the Migration Review Tribunal and the Refugee Review Tribunal under the Migration Act. Most of the

decisions for which review is sought are concerned with whether a person may reside in Australia permanently. The Court's migration jurisdiction is discussed on page 33.

The Court hears taxation matters on appeal from the Administrative Appeals Tribunal. It also 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, are to a Full Federal Court.

A significant part of the Court's jurisdiction derives from the Native Title Act. Since 30 September 1998, the Court has had jurisdiction to hear and determine native title determination applications, revised native title determination applications, compensation applications, claim registration applications, applications to remove agreements from the Register of Indigenous Land Use Agreements and applications about the transfer of records. The Court also hears appeals from the National Native Title Tribunal ('NNT Tribunal') and matters filed under the Administrative Decisions (Judicial Review) Act involving native title. The Court's native title jurisdiction is discussed on page 35.

Another important part of the Court's jurisdiction derives from the *Admiralty Act 1988*. The Court has concurrent jurisdiction with the Supreme Courts of the States and Territories to hear maritime claims under this Act. 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's Admiralty Marshal made 12 arrests, with 3 ships still under arrest as at 30 June 2004. One ship, the 'MV Estancia', was sold in the reporting year pursuant to an order of the Court. See Figure 5.9 on page 125 for a comparison of Admiralty Act matters filed in the past five years.

The Court's jurisdiction under the Corporations Act and *Australian Securities and Investments Commission Act 2001* ('ASIC Act') covers a diversity of matters ranging from the appointment of provisional liquidators and the winding up of companies, to applications for orders in relation to fundraising, corporate management and misconduct by company officers. The jurisdiction is exercised concurrently with the Supreme Courts of the States and Territories. See Figure 5.6 on page 122 for a comparison of corporations matters filed in the last five years.

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 includes matters arising from the administration of bankrupt estates.

The Court has a substantial and diverse appellate jurisdiction. It hears appeals from decisions of single judges of the Court, and from the Federal Magistrates Court in non-family law matters. The Court also exercises general appellate jurisdiction in criminal and civil matters on appeal from the Supreme Court of Norfolk Island. The

Court's appellate jurisdiction is discussed on page 31. Figure 5.10 on page 126 shows the appeals filed in the Court since 1999-2000.

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 to cases arising under Commonwealth anti-discrimination legislation. Statutes under which the Court exercises jurisdiction are listed in Appendix 4 on page 109.

### **Changes to the Court's jurisdiction in 2003-04**

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

- *Age Discrimination Act 2004*
- *Australian Crime Commission Amendment Act 2004*
- *Bankruptcy Legislation Amendment Act 2004*
- *Communications Legislation Amendment Act (No 1) 2004*
- *Designs Act 2003*
- *Financial Services Reform Amendment Act 2003*
- *Health Legislation Amendment (Private Health Insurance Reform) Act 2004*
- *Law and Justice Legislation Amendment Act 2004*
- *Maritime Transport Security Act 2003*
- *Medical Indemnity Legislation Amendment (Run-Off Cover Indemnity and Other Measures) Act 2004*
- *Migration Legislation Amendment (Protected Information) Act 2003*
- *Migration Amendment (Duration of Detention) Act 2003*
- *Migration Legislation Amendment (Sponsorship Measures) Act 2003*
- *Military Rehabilitation and Compensation Act 2004*
- *National Measurement Amendment Act 2004*
- *Postal Services Legislation Amendment Act 2004*
- *Spam Act 2003*
- *Veterans' Entitlements (Clarke Review) Act 2004.*

### **Amendments to the Federal Court of Australia Act**

On 27 May 2004, the *Law and Justice Legislation Amendment Act 2004* made a number of amendments to the Federal Court of Australia Act. These included new provisions which enhance the power of a single judge to exercise Full Court jurisdiction in relation to certain interlocutory matters.

The Court is seeking further amendments to the Federal Court of Australia Act to make it clear that a single judge may grant an interlocutory injunction to operate pending a determination of an appeal to a Full Court, and provide that a person seeking leave to intervene in a proceeding has no right to appeal against an order refusing intervention or an order specifying the terms and conditions to which intervention will be subject.

## **Amendments to the Federal Court of Australia Regulations**

During the reporting year, the Court provided detailed comments to the Attorney-General's Department in relation to a draft of the revised Federal Court of Australia Regulations. The new Regulations are being written using plain language and a simpler structure, and incorporate a number of amendments to address various administrative issues. As noted in previous annual reports, many of the suggested changes will support the Court's electronic filing facility.

## **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. The Rules are drafted by the Court's Rules Committee with the assistance of the Deputy Registrar. An officer from 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 is often undertaken as a consequence of changes to the Court's practice and procedure described elsewhere in this report. Where appropriate, proposed amendments are discussed with the Law Council of Australia and other relevant organisations.

During the reporting year, a number of amendments were made to the Rules. These included amendments to:

- replace the rules and forms concerning subpoenas with the new harmonised subpoena rules and form of subpoena;
- provide for lump sum costs in certain migration matters;
- regulate the use of recording and communication devices during a proceeding;
- introduce a general provision that, unless a rule expressly provides otherwise, the Court may exercise any power under the Rules of its own motion or on the application of a party or of any person who has sufficient interest;
- require a party's solicitor to certify that affidavits filed on behalf of the party comply with the formal requirements for affidavits;
- provide greater guidance as to the power of the Court or a judge to order a legal practitioner who is responsible for costs incurred improperly or without reasonable cause, or wasted by undue delay or by any other misconduct or default, to be liable for those costs.

Other amendments were made in relation to the taxation of costs, the form of applications for relief under the *Human Rights and Equal Opportunity Commission Act 1986*, allowing access to written submissions without the leave of the Court and the form of expert reports. Minor amendments were made to a number of other rules.

The *Federal Court (Corporations) Rules 2000*, which sets out the rules for proceedings in the Court under the Corporations Act and the ASIC Act, was amended in December 2003 to provide that a person who is substituted as an applicant in a

proceeding for a company to be wound up must publish a notice at least seven days before the date fixed for the hearing of the person's application that the company be wound up. Minor amendments were also made to Form 1 in Schedule 1 and to Note 3 of Schedule 3.

Practice Notes supplement the procedures set out in the Rules of Court. During the reporting year, the Chief Justice issued:

- a revised Practice Note No 1 on appeals to a Full Court;
- a new Practice Note No 19 on lists of authorities and legislation that must be provided to the Court; and
- a new Practice Note No 20 setting out guidelines on the disclosure by insolvency practitioners of fees to be charged.

The Chief Justice also issued a revised version of the *Practice Direction – Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*.

Practice Notes are available without charge through District Registries and on the Court's Internet web site. They are also reproduced in looseleaf services by law publishers. The Court has also published various notices to practitioners issued by the District Registries. These are available from the Court's web site, the District Registries and in looseleaf legal services.

The Court also issues notices and guides on particular aspects of its practice and procedure. In December 2003, the Registrar issued the *National Guide to Counsel Fees 2004* for the purpose of assisting the Court's taxing officers when determining the amount of Counsel fees that might be recovered pursuant to a costs order.

### **Workload of the Federal Court and Federal Magistrates Court**

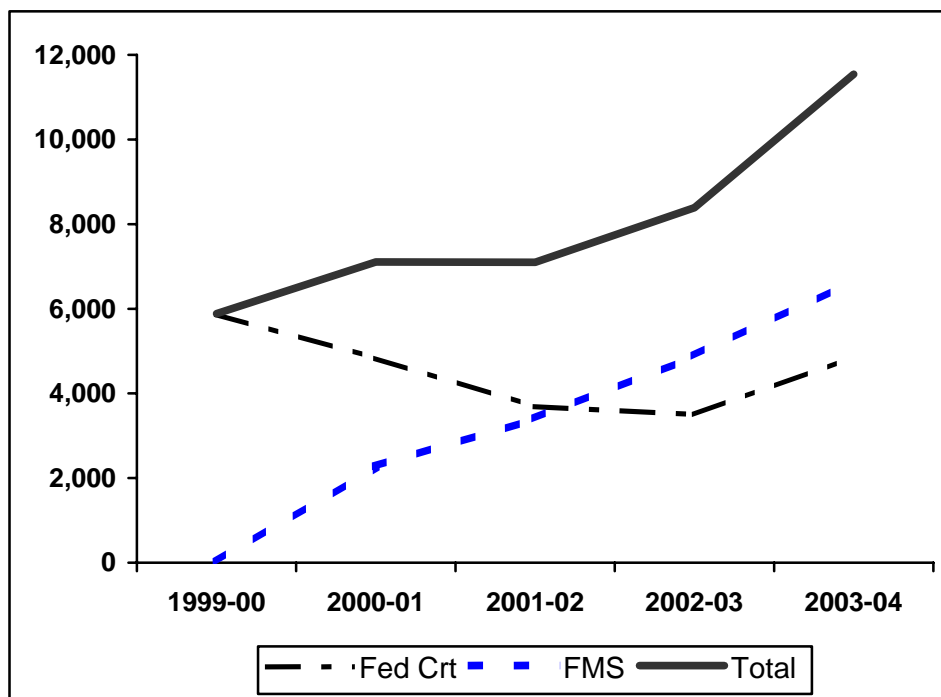
The Court has concurrent jurisdiction with the Federal Magistrates Court in a number of areas of general federal law including bankruptcy, human rights and migration matters. The registries of the Federal Court provide registry services for the Federal Magistrates Court in its general federal law jurisdiction.

As shown in Figure 3.1 below, the combined number of filings (excluding appeals) in the two courts has been increasing since the establishment of the Federal Magistrates Court in mid-2000. In 2003-04, a total of 11,541 first instance matters were filed in the two courts compared to a total of 8,388 in 2002-03 and 5,885 in 1999-2000.

This increase has had a considerable impact on the Federal Court's registries, which must process the documents filed in these matters and provide the administrative support for each matter to be heard and determined by the relevant Court. The impact is even more significant when the following factors are also taken into account:

- each matter transferred between the Federal Court and the Federal Magistrates Court involves the registries opening and processing two files – in 2003-04 this occurred on 472 occasions; and
- in 2003-04 the registries had to deal with 704 appeals to the Federal Court (of which 348 were from decisions of the Federal Magistrates Court) compared to 622 in 2002-03 and 407 in 1999-2000.

**Figure 3.1**  
**Filings to 30 June 2004 (excluding appeals)**  
**Federal Court and Federal Magistrates Court**



### **Caseflow management of the Court's jurisdiction**

The Court has adopted as one of its key caseflow management principles the establishment of time goals for the disposition of cases and the delivery of reserved judgments. The time goals are supported by the careful management of cases through the Court's Individual Docket System, and the implementation of practices and procedures designed to assist with the efficient disposition of cases according to law.

Under the Individual Docket System, a matter will usually stay with the same judge from commencement until disposition. This means a judge has greater familiarity with each case and leads to the more efficient management of the proceeding.

### ***Disposition of matters other than native title***

In 1999-2000 the Court set a period of eighteen months from commencement as the goal within which it should dispose of at least 85 per cent of its cases (excluding native title cases). The time goal was set having regard to the growing number of long, complex and difficult cases, the impact of native title cases on the Court's workload, and a decrease in the number of less complex matters (such as winding up and related applications under the Corporations Act). It is reviewed regularly by the Court in the light of changes to the incoming workload and the resources available to dispose of that workload. The Court's ability to continue to meet its disposition targets is dependent upon the timely replacement of judges.

Notwithstanding the time goal, the Court expects that most cases will be disposed of well within the eighteen month period, with only particularly large and/or difficult legal and/or factual cases requiring more time. Indeed, many cases are urgent and

need to be disposed of quickly after commencement. The Court's practice and procedure facilitates early disposition when necessary.

During the five year period from 1 July 1999 to 30 June 2004, 89 per cent of cases (excluding native title matters) were completed in less than eighteen months, 82.3 per cent in less than twelve months and 60.8 per cent in less than six months (see Figure 5.4 on page 120). Figure 5.5 on page 121 shows the percentage of cases (excluding native title matters) completed within eighteen months over the last five reporting years. The figure shows that in 2003-04, 92 per cent of cases were completed within eighteen months. This compares to 80.2 per cent in the previous reporting year.

The increase in the proportion of cases completed with eighteen months is primarily due to the careful case management of the large number of migration matters remitted to the Court by the High Court which led to their timely disposition. The Court expects that the proportion of cases completed with eighteen months will gradually decrease as the mix of cases dealt with by the Court returns to that in previous years. In particular, it is expected that the proportion of complex cases that make up the Court's workload will increase as simpler matters are commenced in, or transferred to, the Federal Magistrates Court. The longer time needed to resolve complex cases, coupled with the impact of the large number of native title matters, will affect the Court's ability to meet its goal of disposing of 85 per cent of matters within eighteen months. However, the change in the mix of cases will lead to a reduction in the time to complete complex cases as more judicial resources become available to deal with them.

Special issues arise in native title matters. Information on the disposition of these matters is discussed from page 35.

### *Delivery of judgments*

In the reporting period, 2,134 Full Court and single judge judgments were delivered. Of these, 546 were delivered in Full Court appeals and 1,588 in single judge matters. These figures include both written judgments and judgments delivered orally on the day of the hearing, immediately after the completion of evidence and submissions.

The nature of the Court's workload means that a substantial proportion of the matters coming before the Court will go to trial and the decision of the trial judge will be reserved at the conclusion of the trial. The judgment is delivered at a later date and is often referred to as a "reserved judgment". The nature of the Court's appellate work also means a substantial proportion of appeals require reserved judgments.

The Court has set a goal for the delivery of judgments of three months from the date a judgment is reserved to the date when it should be delivered. The degree to which the Court is able to meet this goal depends on the complexity of each case in question and other issues, such as the pressure of the business upon the Court.

During the reporting period the median time between reserving and delivery of judgments was 36 days for Full Court appeals and 29 days for single judge matters. Almost 74 per cent of reserved judgments in Full Court appeals, and 78 per cent in single judge matters, were delivered within 3 months. It is important to note that these

figures do not take into account the significant number of judgments in Full Court appeals and by single judges that are delivered on the day of the hearing. These calculations do not include the many decisions by registrars.

### *Decisions of interest*

During the year the judges published over 2,132 decisions. As an illustration of the Court's varied jurisdiction, Appendix 7 on page 134 includes a summary of the following decisions.

- *Torpedoes Sportswear Pty Limited v Thorpedo Enterprises Pty Limited & Anor* – In this case the Court had to consider an appeal against a decision of the Registrar of Trade Marks to accept the application made by Thorpedo Enterprises Pty Limited to register the trade mark 'THORPEDO'.
- *Visa International Service Association v Reserve Bank of Australia* – In this case the Court had to determine whether a decision by the Reserve Bank designating various credit card schemes as 'payment systems' (with the result that aspects of the schemes were liable to regulation by the Reserve Bank) was valid.
- *Erubam Le (Darnley Islanders) No.1 v State of Queensland* – In this appeal the Full Court considered whether native title was extinguished by the construction of public works such as a windmill, a dam, a sewerage system, a school and residential houses.
- *Hewlett Packard Australia Pty Ltd v GE Capital Finance Pty Ltd* – In this appeal the Full Court had to determine whether a court has power to extend time for the lodgement of a notice in respect of a charge under section 266 of the Corporations Act.
- *Spassked Pty Limited v Commissioner of Taxation* – In this appeal the Full Court had to determine whether a subsidiary of Industrial Equity Ltd ('IEL') was entitled, for taxation purposes, to carry forward losses resulting from its long incurred interest on monies borrowed from Industrial Equity Finance Limited (which was itself owned by IEL).
- *Australian Competition & Consumer Commission v Oceana Commercial Pty Ltd* – This case was brought under the Trade Practice Act. The Court was asked to determine whether a scheme involving the marketing and sale of residential units at the Gold Coast was misleading and deceptive, whether solicitors involved in the scheme were accessories to misleading or deceptive conduct and whether a bank that lent money for the purchase of a unit through the scheme had acted unconscionably.
- *Cassidy v Saatchi & Saatchi Australia Pty Ltd* – In this appeal the Full Court considered whether an advertising agency which created and prepared an advertisement for a client, using its skill to convey a representation that when made would be misleading, contravened the ASIC Act as a principal, when its

client had final approval of the form of the advertisement and arranged for its publication.

- *Bropho v Human Rights & Equal Opportunity Commission* – In this appeal the Full Court determined whether publication of a newspaper cartoon which the Human Rights and Equal Opportunity Commission had found was reasonably likely to offend, insult, humiliate or intimidate Aboriginal persons was done reasonably and in good faith.
- *Finance Sector Union of Australia v Commonwealth Bank of Australia* – In this case the Court considered whether former employees of the Bank who resigned from their employment when the information technology services of the Bank were outsourced had effectively been made redundant with the result that they should be entitled to severance pay.
- *Kennedy v Wallace* – In this case the Court had to determine whether communications for the purpose of seeking or receiving foreign legal advice are entitled to legal professional privilege in an Australian proceeding.
- *McNeil v Commissioner of Taxation* – In this case the Court had to determine whether the proceeds of the sale of sell back rights to the issuing company was income according to ordinary concepts in shareholder's hands.
- *State of South Australia v Honourable Peter Slipper MP* – In this appeal the Full Court had to determine whether a decision by a Commonwealth Minister to acquire land in South Australia for the purpose of constructing a low level nuclear waste facility was valid.

## **The workload of the Court in its original jurisdiction**

### ***Incoming work***

In the reporting year, 5,312 cases were commenced in, or transferred to, the Court's original jurisdiction, an increase of 1,094 compared to 2002–03. The increase in filings between the two reporting years was due principally to an increase in the number of migration matters (755 more filings) and corporations cases (170 more filings). These increases were partly offset by a decrease in filings in other areas of the Court's jurisdiction, including bankruptcy (40 fewer filings) and native title cases (13 fewer filings).

### ***Matters transferred to and from the Court***

Matters may be remitted or transferred to the Court under:

*Judiciary Act 1903*, section 44  
*Cross-vesting Scheme Acts*  
*Corporations Act 2001*  
*Federal Magistrates Act 1999*

During 2003-04, 1,771 matters were remitted or transferred to the Court:

- 1,727 from the High Court of Australia
- 30 from the Federal Magistrates Court
- 14 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 2001*  
*Administrative Appeals Tribunal Act 1975*

During 2003-04, 462 matters were transferred from the Court:

- 1 to the Family Court of Australia
- 442 to the Federal Magistrates Court
- 18 to State or Territory Supreme Courts
- 1 to State District or County Courts

### ***Matters completed***

Table 5.2 on page 115 shows a comparison of the number of matters commenced in the Court's original jurisdiction and the number completed. The number of matters (including bankruptcy matters) completed during the report year was 5,392, against 4,651 in the previous reporting year. The increase in the number of completed matters was primarily due to the large number of the migration cases remitted from the High Court being dismissed summarily. The number of matters transferred to the Federal Magistrates Court, while less than that in 2002-03, also contributes to the disposition of cases. If transferred matters are excluded, then the number of matters completed in 2003-04 is 4,950 compared to 3,935 in 2002-03.

### ***Matters on hand***

The total number of matters on hand in the Court's original jurisdiction at the end of the reporting year was 3,369 (see Table 5.2 on page 115), being 293 fewer than for the previous reporting year. This decrease is due to the efficient management of migration cases which led to their early determination. The capacity to transfer less complex cases to the Federal Magistrates Court also contributed to the reduction in the number of matters on hand at the end of 2003-04. The transfer of cases to the Federal Magistrates Court increases the Court's capacity to complete the more complex matters which remain.

### ***Age of pending workload***

The comparative age of matters pending in the Court's original jurisdiction (other than native title matters) as at 30 June for the reporting year and the four previous reporting years is set out in Table 3.1 below.

Native title matters are not included in Table 3.1 because of their complexity, the role of the NNT Tribunal and the need to acknowledge regional priorities. The age of pending native title matters is set out in Table 3.4 on page 39.

**Table 3.1 Current matters  
(excluding Full Court appeals and native title matters)**

Age of matter	Current as at 30-Jun-00	Current as at 30-Jun-01	Current as at 30-Jun-02	Current as at 30-Jun-03	Current as at 30-Jun-04
under 6 months	1,709	1,894	998	1,403	1,118
6-12 months	896	676	656	459	563
12-18 months	355	324	846	207	371
<b>under 18 months</b>	<b>2,960</b>	<b>2,894</b>	<b>2,500</b>	<b>2,069</b>	<b>2,052</b>
18-24 months	246	332	279	265	179
over 24 months	460	520	525	484	339
<b>over 18 months</b>	<b>706</b>	<b>852</b>	<b>804</b>	<b>749</b>	<b>518</b>
<b>TOTAL</b>	<b>3,666</b>	<b>3,746</b>	<b>3,304</b>	<b>2,818</b>	<b>2,570</b>

Table 3.1 shows the number of cases over 18 months old in the Court's original jurisdiction (excluding native title matters) has continued to decrease from the peak of 852 as at 30 June 2001. As at 30 June 2004 there were 518 cases over eighteen months old compared to 749 as at the same day in 2003. This decrease confirms the positive impact that the Federal Magistrates Court is having on the Court's capacity to finalise more complex matters more quickly.

The Court will continue to focus on reducing its pending caseload and the number of matters over 18 months old.

A collection of graphs and statistics concerning the workload of the Court is contained in Appendix 5 to this report commencing on page 113.

## **The Court's appellate jurisdiction**

### *The appellate jurisdiction*

The appellate workload of the Court continues to be substantial. While most of the appeals arise from decisions of single judges of the Court or the Federal Magistrates Court, some are in relation to decisions by State and Territory courts exercising certain federal jurisdiction.

Appeals from the Federal Magistrates Court may be heard by a Full Court of the Federal Court or by a single judge. All other appeals must be heard by a Full Court, which is

usually constituted by three, and sometimes five, judges. Any increase in the number of Full Court hearings adds to the workload of the Court and, as judges who sit on Full Courts have less time to devote to their own individual docket work, impacts on the Court's ability to dispose of first instance work. Any substantial increase in Full Court work may result in a proportionate reduction in the Court's ability to do trial work.

The Court monitors the effects on its workload of increases in the number of appeals and, as necessary or relevant, will introduce changes to appellate practice and procedure to ameliorate or limit these effects so that the Court continues to deal with its appellate and first instance work in an efficient, effective and timely manner.

Towards the end of each calendar year, the Court publishes its program of Full Court sittings for the following year. In the 2004 calendar year, four Full Court sittings have been programmed for Sydney, Melbourne, Brisbane, Perth, Adelaide, Canberra, Hobart and Darwin. Once appeal books are prepared by the parties, an appeal can usually be listed for the next scheduled Full Court sitting in the capital city where the matter was heard at first instance.

When appeals are considered to be sufficiently urgent, the Court will convene a special sitting of a Full Court which may, if necessary and appropriate, hear the appeal in a capital city other than that in which the case was originally heard or use video conferencing facilities. During the reporting year, 13 special hearings of the Full Court (totalling 10.5 hearing days) were held to enable the early disposition of urgent appeals.

### ***The appellate workload***

In 2003-04, 704 appeals were filed in the Court (see Table 5.3 on page 116). This was 82 appeals, or 13.2 per cent, more than the number of appeals in 2002-03. The number of appeals is dependent on many factors including the number of first instance matters disposed of in a reporting year, the mixture and the types of matters filed in the Court, and whether the jurisdiction of the Court is enhanced or reduced by legislative changes or decisions of the High Court of Australia as to the constitutionality of legislation.

The source of appeals has continued to change, with 49.4 per cent of the total number of appeals to the Court in 2003-04 being against decisions of the Federal Magistrates Court. This compares to 36.5 per cent in 2002-03 and 10.9 percent in 2001-02. This change is primarily due to a greater proportion of migration cases being heard at first instance by the Federal Magistrates Court, many of which are then the subject of an appeal to the Federal Court. Further information on the source of appeals is set out in Figure 5.11 on page 127.

Although it is difficult to predict future appellate workload, the Court expects that the number of appeals is likely to increase in the next reporting year as a result of the increase in the number of migration matters being dealt with at first instance by the Court and by the Federal Magistrates Court.

In the reporting year, 671 appeals were completed, against 645 in 2002-03. The higher number is largely due to over 87 per cent of appeals from the Federal Magistrates Court being heard by a single judge, and changes to the type and complexity of appeals being heard by the Full Court.

As at 30 June 2004 there were 354 pending appeals, which is 23 more than for the previous reporting year. This is consistent with the increase in the number of appeals commenced in the Court during 2003-04.

The comparative age of matters pending in the Court's appellate jurisdiction (including native title appeals) as at 30 June for the reporting year and the four previous reporting years is set out in Table 3.2 below. The table shows that as at 30 June 2004 there were 12 appeals over 18 months old – a decrease from the 21 appeals over 18 months old as at 30 June 2003.

**Table 3.2**  
**Current Full Court appeals**

Age of appeal	Current as at 30-Jun-00	Current as at 30-Jun-01	Current as at 30-Jun-02	Current as at 30-Jun-03	Current as at 30-Jun-04
under 6 months	139	163	233	219	256
6-12 months	33	47	67	73	74
12-18 months	26	10	15	18	12
under 18 months	198	220	315	310	342
18-24 months	6	3	8	6	4
over 24 months	17	22	11	15	8
over 18 months	23	25	19	21	12
TOTAL	221	245	334	331	354

### **The Court's migration jurisdiction**

In October 2001 the Migration Act was amended by the substitution of new provisions which gave the Court jurisdiction under sections 39B and 44 of the Judiciary Act to review 'privative clause decisions' made by the Migration Review Tribunal and the Refugee Review Tribunal. The Act provides that a 'privative clause decision' is a decision of an administrative character under the Migration Act, or regulations or other instruments made under the Migration Act, and that such a decision is final and conclusive and not subject to judicial review.

In February 2003 the High Court in *Plaintiff S157/2002 v Commonwealth of Australia* found that an administrative decision involving jurisdictional error is not a privative clause decision, and that proceedings where the plaintiff asserts jurisdictional error

may be commenced in the Federal Court and Federal Magistrates Court, and may be remitted by the High Court to the Federal Court.

Since that decision the High Court has remitted over 2,300 migration matters to the Federal Court, including 1,716 matters remitted in 2003-04. There has also been a significant increase in the number of applications to the Federal Court (and the Federal Magistrates Court) following the High Court's decision.

The bases for seeking relief in the Court in migration cases has changed in recent years. To permit a meaningful analysis of the Court's migration workload for the period 1999-2000 to 2003-04, the migration workload for each year includes all applications for the review of decisions under the Migration Act, irrespective of the legislative basis for that review. These figures are set out in Figure 5.8 on page 124.

The number of matters concerning decisions under the Migration Act filed in, or remitted to, the Court's original jurisdiction was 2,591 in 2003-04 compared to 1,836 in 2002-03. This increase was primarily due to the High Court remitting 1,716 cases to the Court during the reporting year. The number of migration cases would have been significantly greater but for the Federal Magistrates Court, in which 2,231 applications were commenced which would otherwise have been started in the Federal Court.

In 2003-03 the Court established specific procedures in New South Wales, Victoria and South Australia to deal with the large number of migration cases remitted to them by the High Court. These procedures, which involve the careful management of each case in accordance with a strict timetable, continued to be used in 2003-04 and have been very effective in ensuring that cases are finalised quickly and efficiently.

To help manage its migration workload, the Court aims to complete migration matters at first instance within four months from the date of filing where the applicant was in migration detention, and within six months in other cases. In 2003-04, 51 per cent of cases involving an applicant in detention were completed within four months of filing, and 45 per cent of other migration cases were completed within six months of filing.

Migration Act matters also form a substantial and increasing proportion of the Court's appellate jurisdiction. In 1998-99, 22.7 per cent of appeals concerned decisions under the Migration Act. This can be contrasted with 2003-04, where 74.6 per cent of appeals involved a review of a decision under the Migration Act. Table 3.3 shows how the number of appeals involving the Migration Act has increased as a proportion of the appellate workload since 1998-99.

**Table 3.3**  
**Migration Act appeals as proportion of all appeals to Full Court**

Full Court Appeals	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04
Migration Appeals	94 22.6%	146 35.8%	191 44.8%	362 59.6%	419 66.5%	525 74.6%
Total Appeals	416	408	426	607	630	704

### **The Court’s native title jurisdiction**

#### *Native title jurisdiction*

Since 30 September 1998 the Court has had responsibility for the management and determination of native title applications. The Court’s jurisdiction is discussed on page 22. To perform these functions the Court has a wide range of powers in relation to the management and resolution of native title applications.

Under the regime, applications are filed in the Court and not the NNT Tribunal. Applications that satisfy the Court’s requirements are referred to the NNT Tribunal, which applies a registration test to determine whether the native title applicant has the right to negotiate. The NNT Tribunal will also mediate applications referred to it by the Court.

The native title jurisdiction presents particular challenges from a case management perspective for the Court. The Court has adopted an active and innovative approach to achieving the effective and efficient management and resolution of native title cases. This section of the report sets out some of the ways in which the Court meets this challenge.

#### *The national allocation protocol*

The Court continues to manage the jurisdiction on a national basis in accordance with its national allocation protocol for the case management and listing of native title matters. The protocol provides that each case is allocated provisionally to a judge (‘the Provisional Docket Judge’) who, with the assistance of a Deputy Registrar, is responsible for the initial management of the case. The provisional allocation usually continues while the NNT Tribunal considers the matter for registration and while it is in active mediation with the NNT Tribunal. When the matter requires substantive action (such as the hearing of a contentious interlocutory application), or is ready for a main hearing, the matter is referred to the Court’s National Native Title Unit for substantive allocation to a trial judge.

As at 30 June 2004, 332 native title matters had been substantively allocated, of which 181 were still active and managed by judges of the Court.

### ***Strategic management of native title cases***

The Court has a range of roles in relation to native title applications. The Court settles the list of parties to each application, refers matters to the NNT Tribunal for mediation, deals with any applications to have matters struck out, supervises the mediation, determines questions of fact or law referred to it by the NNT Tribunal, determines whether mediation should continue, settles the terms of agreements for consent determinations and, where it orders that mediation ceases, sets matters down for trial and hears and determines the issues in dispute.

When a claim for native title is successful, either through agreement between the parties or litigation, it is a matter for the Court to decide whether the proposed determination is supported by a prima facie case and is just and equitable in the circumstances. The determination of the Court is that native title exists according to the traditional laws and customs of the people and according to the law of Australia.

A determination can be the result of litigation or by consent. The Court, like those who have an interest in native title proceedings and outcomes, recognises that consent agreements in respect of the existence and effect of native title are highly desirable. The Court has undertaken a range of initiatives which aim to facilitate such agreements.

The Court, however, also recognises that the strategic use of litigation will often be not only necessary but desirable. Decisions by the Court assist mediation and negotiation by clarifying legal or factual issues, including the admissibility of evidence. These decisions rarely finalise the proceeding, and many cases return to mediation.

The Court is responding to the challenge of achieving an appropriate balance between the litigation process, the scheme of the Native Title Act and the resource demands placed upon applicants and others.

Central to the Court's strategy is the implementation of sensible and transparent processes for prioritising native title matters in each State, Territory and region. There is general acceptance of the need for a more systematic and focussed approach to ensuring appropriately resourced native title claims can be progressed to trial or consent determination in a timely manner. The processes developed by the Court, including the use of user group meetings and regional case management conferences, acknowledge the rights of the parties and the institutional constraints on the Court and the other key agencies in the native title system.

### ***Regional case management conferences***

In general terms, the regional case management conferences allow a judge or judges (sometimes sitting together) to identify priorities and timeframes for mediation, negotiation and litigation on a regional basis having regard to regional priorities, interrelated claims and resource considerations. The conferences allow parties to inform the Court of their priorities on a regional, rather than case-by-case, basis. In considering whether it is desirable for the Court to make orders reflecting regional priorities, the judge or judges might take into account such factors as whether:

- the matter was filed solely for the purpose of attracting the right to negotiate and, if so, whether the matter should be withdrawn once the relevant future act has been done or is agreed to be done;
- the applicants are seeking a determination of native title and/or a non-native title outcome and, if so, what progress has been made in that regard;
- the respondents actively oppose the applicants' case;
- the applicants are unlikely to have the capacity required to progress the case to finality; and
- the relationship of each case to other cases in the region.

The regional case management conferences will often be convened by both the Provisional and Substantive docket judges, particularly where the region includes cases that are managed by many judges. This has occurred, for example, in the conferences in Western Australia concerning the claims with respect to the Goldfields area.

### *Native title user groups*

The Court has maintained its commitment to provide information to, and receive feedback from, users through a variety of forums including regular user group meetings. A number of meetings were held during the reporting year, including one in Western Australia where participants were encouraged to take a flexible and innovative approach to proving connection for the purpose of mediation and provide feedback to the Court on how it might further assist and monitor the effectiveness of the mediation process.

### *Remote hearings evaluation*

During the reporting period the Court arranged for a report to be prepared on the effectiveness and efficiency of 'on country' native title hearings. The report included an analysis of:

- the methods used to take evidence in native title cases;
- the causes of excessive cost and delay;
- the options to reduce cost and delay;
- the procedures and case management initiatives used by the Court to manage the conduct of native title hearings; and
- the options for gathering evidence, including the taking of early evidence and the videotaping of evidence.

The report, which involved extensive consultations, not only identified what the Court was doing well and where improvements could be made in respect of 'on country' hearings, but also commented on the way in which the Court manages cases before and after on country hearings. The Court is considering its response to the report.

### *Mediation*

The Court has continued its practice where a judge may refer one or more issues in a native title case to a registrar for a case management conference or mediation. To date, this practice has been working favourably for the parties with issues being resolved without the need to resort to a contested hearing. Registrars will also mediate

discrete and narrow issues in a native title proceeding where it has the potential to assist and support the NNT Tribunal's broader mediation role.

The Miriuwung & Gajerrong Peoples case (*Ben Ward on behalf of the Miriuwung and Gajerrong People v State of Western Australia and Ors*) is a good example of the successful interplay of mediation and judicial supervision. In this matter the initial mediation before the NNT Tribunal did not result in a settlement and the matter proceeded to a hearing by a single judge (1998), an appeal to the Full Federal Court (2000) and an appeal to the High Court (2002). The High Court remitted the matter in part to the Full Federal Court for further hearing. At that point the Court referred the matter to a registrar for mediation, which led to a consent determination being made in December 2003.

### ***Early neutral evaluation***

In addition to mediation, judges are increasingly looking to other informal procedures that will encourage the parties to identify, and deal with, the central issues with a view to assisting settlement. One procedure has been the use of early neutral evaluation ('ENE').

In *Dimer (on behalf of the Esperance Nyungars) v Western Australia*, Justice Gyles ordered that the matter be referred to mediation for the purposes of an ENE. An evaluator, acceptable to the Court and the parties, was engaged to provide a confidential assessment to the parties as to the strengths and weaknesses of their respective cases. The parties are considering the evaluator's report and the matter remains in mediation. The Court will in due course assess, to the extent possible, whether the ENE achieved what the parties intended it to achieve and consider whether there is an opportunity for it to be used in other cases.

*The native title workload*

**Table 3.4**  
**Current Native Title Matters (including appeals)**

Age of matter	Current as at 30-Jun-00	Current as at 30-Jun-01	Current as at 30-Jun-02	Current as at 30-Jun-03	Current as at 30-Jun-04
under 6 month	25	78	55	18	28
6-12 months	57	51	66	42	28
12-18 months	35	21	68	47	10
<b>under 18 months</b>	<b>117</b>	<b>150</b>	<b>189</b>	<b>107</b>	<b>66</b>
18-24 months	630	41	44	62	32
over 24 months	36	617	598	686	713
<b>over 18 months</b>	<b>666</b>	<b>658</b>	<b>642</b>	<b>748</b>	<b>745</b>
<b>TOTAL</b>	<b>783</b>	<b>808</b>	<b>831</b>	<b>855</b>	<b>811</b>

It is important to note that the figures set out in Table 3.4 are based on all applications under the Native Title Act that have been filed in the Court and which remain open on the Court's data base FEDCAMs. However, a large number of cases have been effectively closed as a result of being combined or consolidated with one or more cases. For these cases, the individual file has not been closed and remains 'open' for the purpose of the Court's database. The consolidation and streamlining of native cases often means that applications are dealt with as a single 'active claimant application' with the consolidated or subsidiary files remaining open for practical purposes until the lead matter has been determined or finalised. In effect, this means that as at 30 June 2004 there were, in practical terms, 594 active native title claimant applications.

Active judicial case management of native title cases since 1998 has led to a substantial number of native title applications being amended, combined, withdrawn or discontinued. At 30 June 2004 there were 594 active claimant applications before the Court, of which the NNT Tribunal is mediating 356. There were also 20 compensation claims and 18 non-claimant applications.

Of the 594 active claimant applications before the Court, 570 have been notified. Under the Native Title Act, the Native Title Registrar must notify the public about native title applications, compensation applications, non-claimant applications or applications to register an indigenous land use agreement. Applications are notified to ensure that relevant people and organisations have the opportunity to apply to the Federal Court to become a party to the application and to participate in mediation. Once the notification process has been completed, the application may proceed.

During the reporting year, the Court made four determinations that native title exists and two determinations that native title does not exist after contested hearings, one unopposed non-claimant application determination that native title does not exist and a number of matters were heard on appeal, some of which resulted in agreed outcomes.

### *Native title decisions of interest*

During the reporting year, a number of decisions of the Court clarified the following issues under the Native Title Act.

- Whether applications under subsection 66B(1) to replace the applicants in several claimant applications and to combine some of those applications into a single application were duly authorised – *Bolton v Western Australia*; *Anderson v State of Western Australia*; *Dingaal Tribe v Queensland* and *Wilkes v State of Western Australia*.
- Whether the Court should allow an amendment to a claimant application that would have the effect of excluding an area at a fairly late stage of the proceedings – *Walker v Queensland*.
- The admissibility of expert anthropological reports by reference to the *Evidence Act 1995* – *Neowarra v State of Western Australia* and *Neowarra v State of Western Australia*.
- What factors are relevant to the Court’s consideration of an application brought pursuant to subsection 84(5) of the Native Title Act by a person or group of persons seeking to become a party to a claimant application – *Adnyamathanha People No 1 v State of South Australia* and *Buru and Warul Kawa People v State of Queensland*.
- Whether native title has been extinguished by the construction or establishment of certain public works – *Erubam Le (Darnley Islanders) I v Queensland*.
- Whether the body corporate nominated by the native title holders complied with the requirements of the Native Title Act and the *Native Title (Prescribed Body Corporate) Regulations 1999* – *Ngalpil v Western Australia*; *Brown v Western Australia* and *James v Western Australia*.

### **Assisted Dispute Resolution**

The Court’s program of Assisted Dispute Resolution (‘ADR’), 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 normally conducted by the Court’s registrars who have been trained as mediators. However, when parties wish to use the services of appropriately qualified external mediators, the Court facilitates their doing so. Figure 3.2 on page 41 below sets out the number of matters referred to mediators during the period 1999-2000 to 2003-04. The program has proved popular, with a total of 3,444 matters referred to mediation since its commencement in 1987. Of that total, 1,478 were referred in the period 1999-2000 to 2003-04, or an average of 296 referrals per reporting year.

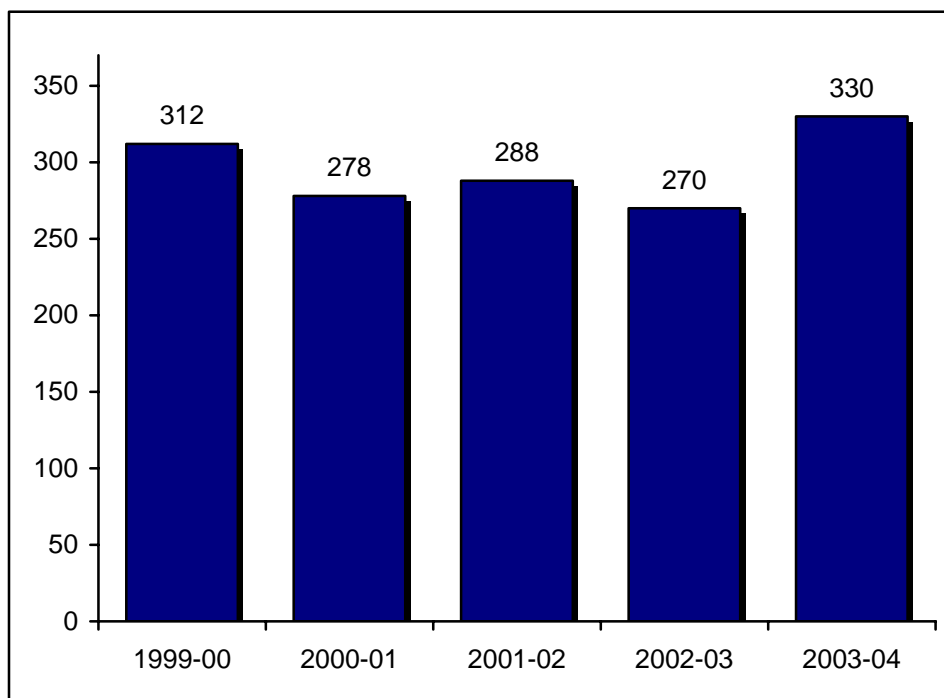
The types of matters referred can relate to most matters in the Court’s jurisdiction. However, the majority of referrals have been in matters concerning trade practices, intellectual property, native title, taxation, workplace relations, bankruptcy and admiralty.

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

With the introduction of the Court’s Individual Docket System greater emphasis has been put on the early identification of cases suitable for ADR. In the reporting year 330 matters were referred to ADR.

The settlement rates of cases referred to mediation since the commencement of the program in 1987 has averaged 55 per cent. 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 settled by the parties with the assistance of 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 mean savings in costs to the parties and the Court.

**Figure 3.2**  
**Assisted Dispute Resolution (ADR) 1999-00 to 2003-04**  
**(matters referred for mediation)**



#### *External mediations*

Fifty-six matters were referred to external mediators in 1999-00, 49 in 2000-01, 45 in 2001-02, 39 in 2002-03 and 53 in the reporting year. These figures are included in Figure 3.2.

Parties will often refer their case to external mediators without involving the Court. The Court does not keep a record of these mediations as they often occur without its knowledge.

### **Management of cases and deciding disputes by Tribunals**

The Court provides operational support to the Australian Competition Tribunal, Copyright Tribunal, Defence Force Discipline Appeal Tribunal and Federal Police Disciplinary Tribunal. This support includes the provision of registry services to accept and process documents for tribunal proceedings, collect tribunal fees (where payable), list matters for hearings, and to otherwise assist the management and determination of proceedings. The Court also provides the infrastructure for tribunal hearings, including hearing rooms, furniture, equipment and transcript services.

A summary of the function of each tribunal and the work undertaken by it during the reporting year is set out in Appendix 6 on page 129.

## **3.3 IMPROVING ACCESS TO THE COURT AND CONTRIBUTING TO THE AUSTRALIAN LEGAL SYSTEM**

### **Introduction**

The following section reports on the Court's work during the year to improve the operation and accessibility of the Court, including reforms to its practices and procedures, enhancements in the use of technology and improvements to the information about the Court and its work.

This section also reports on the Court's work during the year to contribute more broadly to enhancing the quality and accessibility of the Australian justice system, including the participation of judges in bodies such as the Australian Law Reform Commission, the Judicial Conference of Australia and in other law reform and educational activities.

### **Practice and procedure reforms**

The Practice Committee is responsible for developing and refining the Court's practice and procedure. During the reporting year the Committee considered the following issues.

#### ***Costs in migration cases***

The Committee considered whether there is any merit in the implementation of a short form bill of costs regime for standard migration cases. After considering the potential savings for parties and the Court, the Committee consulted with the Department of Immigration and Multicultural and Indigenous Affairs, the Law Council of Australia and other interested parties. It subsequently recommended to the Rules Committee that the rules be amended to allow a short form bill of costs as an option in standard migration matters. The amendments were adopted by the Judges in May 2004.

### ***Migration workload***

The Practice Committee continues to monitor the migration case load of each registry, including those matters remitted to the Court from the High Court, and any related procedural issues that may require change.

### ***Procedures for matters brought under the Judiciary Act 1903***

The Committee considered the operation of the Court's rules in relation to judicial review proceedings under section 39B of the Judiciary Act and, in particular, the absence of special procedures directed to actions under section 39B and section 75(v) of the Commonwealth of Australia Constitution Act. A subcommittee of judges has been set up to consider the issue in more detail and provide recommendations to the Committee on what, if any, amendments to the Rules might be desirable.

### ***Two judge appeal panels***

The Committee considered and provided comments to the Attorney-General's Department on a proposal to amend the Federal Court of Australia Act so that it provides for certain appeals on interlocutory matters to be determined by a Full Court comprised of two judges.

The Committee further advised the Department that it supports the extension of the use of two judge appeal panels to substantive matters, at the discretion of the Chief Justice.

### ***Organisational Review recommendations***

The Committee considered the recommendations of the Organisational Review, in particular those relating to the filing and retention of court documents. Before examining the wider issue of what documents should be retained, the Committee sought advice on the Court's statutory and other obligations in relation to the retention of court records and other documents.

The Committee also considered the procedures relating to the filing and serving of affidavits, and recommended to the Rules Committee that the Rules be amended to provide that the period of retention of documents produced pursuant to a subpoena be limited to 28 days, and that a party giving discovery need only serve, and not file, the list of documents and verifying affidavit.

### ***Costs assessment scheme***

The Law Council of Australia has submitted a proposal to the Court in relation to a system for costs assessment in federal courts. This is currently being considered by an ad hoc Costs Committee convened by Justice Gyles. In due course that committee will report to the Practice Committee.

### ***Other issues considered by the Committee***

The Committee considered a range of other issues, including:

- the delivery of judgments via the eCourt Forum;

- the use of experimental proofs in evidence in patent cases;
- access to documents by the media and the public;
- interpretation of the Guidelines for Expert Witnesses;
- citation of electronic judgments;
- annexure to affidavits of service of copies of documents served;
- issues arising from court statistics and procedures in migration, human rights and corporations matters and transfers to, and appeals from, the Federal Magistrates Court;
- orders in absence of proof in intellectual property cases;
- binding of filed documents; and
- procedures for the preparation of Appeal Books.

### ***Liaison with the Law Council of Australia***

The Committee met during the reporting year with the Law Council's Federal Court Practice Committee to discuss matters concerning the Court's practice and procedure, including:

- costs in migration cases;
- the Council's proposal for a federal costs assessment scheme;
- discovery of electronic records;
- case management issues;
- native title;
- the Council's report on the erosion of legal representation; and
- verification of affidavits under Order 14 rule 5A of the Federal Court Rules.

### **Assistance for self represented litigants**

In recent years the growing number of self represented litigants has presented a range of problems for the Court. The complexity of the substantive law in a developed society, and statutory and judicial elaboration of procedural fairness and efficiency, make it difficult for many kinds of litigation to proceed in the most efficient way for all parties and the Court without the parties being legally represented.

In 2003-04, about 34 per cent of matters in the Court involved at least one party who was not represented at some stage in the proceeding. This is particularly common in migration cases and appeals (where about 40 per cent of cases involve a self represented litigant) and bankruptcy cases and appeals (about 60 per cent). Further information is set out in Figure 3.3 and Table 3.4 below.

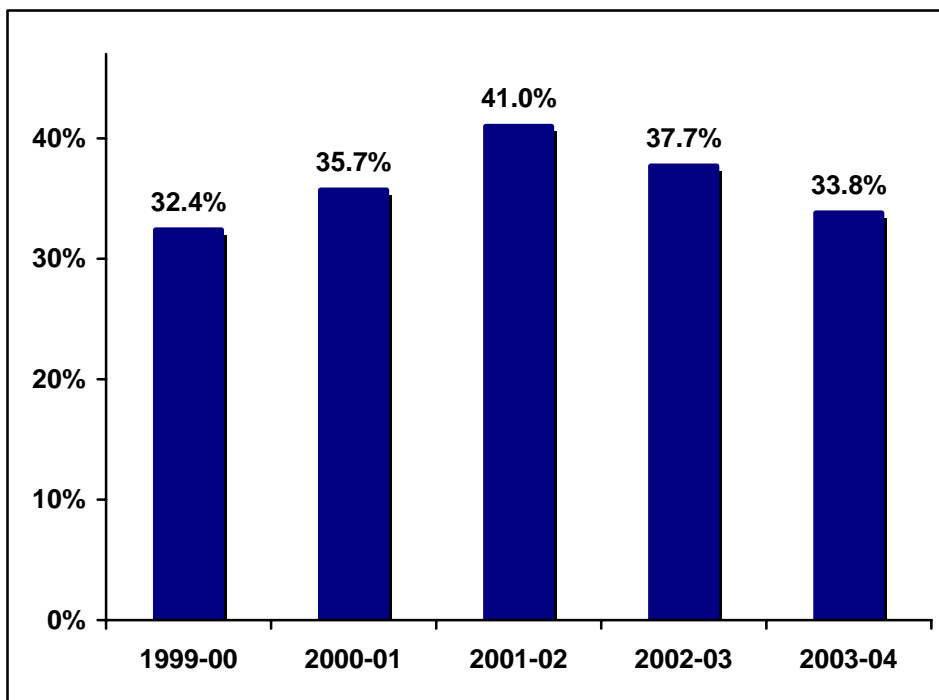
In August 2002 the Court adopted a Self Represented Litigants Management Plan which identifies a number of actions as to how some of the problems raised in respect to self represented litigants may be addressed. Implementation of the Plan has resulted in:

- arrangements being made to improve the nature and quality of information collected by the Court on self represented litigants and their needs;
- a rewriting of the Court's brochures and guides to ensure they use clear language and are simple to understand;
- the provision of further staff training on giving appropriate advice and assistance to self represented litigants, and on handling difficult situations involving self represented litigants; and

- the development of rules and practices that will allow the Court to more effectively deal with self represented litigants who are considered to be vexatious, frivolous or of a repeat kind with clearly hopeless cases.

The Court has also enhanced the content and location of information on its web site to provide greater assistance to self represented litigants, including details of possible sources of legal advice and assistance.

**Figure 3.3**  
**Yearly filings 1999-2000 to 2003-04**  
**in which at least one party was a Self Represented Litigant**



**Table 3.5**  
**Filings in which at least one party was a Self Represented Litigant**

Year	Total Cases	Cases involving Self Represented Litigants		
		Yes	No	Unknown
1999-00	6,280	2,035 32.4%	1,672 26.6%	2,573 41.0%
2000-01	5,395	1,927 35.7%	2,257 41.8%	1,211 22.5%
2001-02	4,528	1,858 41.0%	1,819 40.2%	851 18.8%
2002-03	4,840	1,827 37.7%	2,158 44.6%	855 17.7%
2003-04	6,016	2,035 33.8%	2,720 45.2%	1,261 21.0%

## **Interpreters**

The Court is aware of the difficulties faced by litigants who have little or no understanding of the English language. The Court will not allow a party or the administration of justice to be disadvantaged by a person's inability to secure the services of an interpreter. It has therefore put in place a system for providing professional interpreter services to people who need those services but cannot afford to pay for them. In general, the Court's policy is to provide these services for litigants who are unrepresented and who do not have financial means to purchase the services, and for litigants who are represented but have exemption from, or have been granted a waiver of fees under, the Federal Court of Australia Regulations.

## **Remission or waiver of court and registry fees**

Under the Federal Court of Australia Regulations, fees are charged for commencing a proceeding and for setting a matter down for hearing (including a daily hearing fee). A setting down fee is not payable in all matters and the amount of the daily hearing fee will vary depending on the nature of the hearing. The court fees were increased on 1 July 2002 in accordance with regulation 2AC, which provides a formula for increasing specific court fees every two years from 1 July 1996.

The Federal Court of Australia Regulations authorise registrars to remit or waive fees payable where a person:

- has been granted legal aid by a body approved by the Attorney-General; or
- is the holder of a health care card, a health benefit card, a pensioner concession card, or a Commonwealth seniors health card; or
- is the holder of any other card issued by the Department of Social Security or the Department of Veterans Affairs certifying entitlement to Commonwealth health concessions; or
- is an inmate of a prison or is otherwise lawfully detained in a public institution; or
- is a child under the age of 18 years; or
- is in receipt of an AUSTUDY allowance; or
- is in receipt of an ABSTUDY allowance.

Registrars also have a discretion to waive or remit a fee where payment would cause financial hardship to a person, taking into account the person's assets, day-to-day living expenses, income and liabilities. A registrar's decision to refuse an application to waive a fee is reviewable by the Administrative Appeals Tribunal. There were no applications to the Tribunal during the reporting period.

Details of the fees exempted or waived during the reporting year are set out in Appendix 1 on page 76.

## **Gender issues**

Since 1993 there has been a standing committee of judges of the Court (the Equality and the Law Committee) which considers and advises the Chief Justice and other judges of the Court on a wide range of gender issues, including issues concerning the administration and practice and procedure of the Court. The Committee also provides advice in relation to judicial studies on gender issues. During the reporting year the Committee was chaired by Justice Madgwick.

The Committee oversaw a number of activities related to gender issues, including active engagement with Bar Councils and the continued practice of meeting with women practitioners. This liaison helps the Court to identify and address difficulties which women practitioners may experience in their contact with the Court.

In terms of the Court's internal operations, the Committee continued to give close consideration to the Court's efforts to ensure greater representation of women in senior positions in the Court. The Committee also ensures that the Court's employment conditions accommodate the needs, circumstances and family commitments of its employees as far as possible.

## **Disability, race and sex discrimination**

The Equality and the Law Committee's terms of reference include oversight of the Court's practice and procedure and general administration to ensure that, in all of the Court's operations, persons who have contact with the Court are treated fairly and equitably and, where necessary, appropriate additional assistance is provided to people who may face particular disadvantage in their access to the Court. The Committee also considers disability, race and sex discrimination issues as they may affect staff of the Court.

The Committee undertook a range of activities in this area during the reporting year, including:

- monitoring the implementation of, and issues arising from, the Court's human rights jurisdiction and, particularly, issues related to the capacity of the Court's practice and procedure to respond to the particular needs of parties in human rights cases;
- overseeing the Court's workplace harassment policy;
- overseeing the management of the Court's pro bono legal assistance scheme – this scheme facilitates the provision of assistance to an unrepresented litigant by allowing a judge, in an appropriate case, to refer the litigant to a legal practitioner who is prepared to give legal advice and assistance for no, or a reduced, fee; and
- overseeing strategies to improve employment opportunities in the Court for women and for Aboriginal people and Torres Strait Islanders – in terms of the latter, the Committee has overseen the Court's scheme for employing indigenous research associates.

## **eCourt Strategy**

In line with its commitment to ensuring that the Court is relevant and responsive to the needs of the Australian community in the 21<sup>st</sup> century, the Court has continued this year to build on its eCourt strategy. The eCourt strategy was introduced by the Court in 2001 and aims to improve access to the Court by applying new and emerging technology to its practices and procedures. The strategy builds on the Court's established reputation for pioneering the application of technology in its work.

The eCourt strategy has involved the introduction of a range of electronic facilities including electronic filing, eCourt Forum, electronic trials and appeals and video-conferencing.

During the reporting year the Court undertook a detailed review as to how it might bring together the various elements of its eCourt strategy so that judges, staff, legal practitioners and the public may access case information and use such facilities as the eCourt Forum and electronic filing from within a single environment. The review has led to the development of the 'My Files' concept whereby a single web-based interface (or Portal) will effectively integrate the electronic provision of information and services.

The phased implementation of the 'My Files' project over the next few years will result in:

- improved access to the Court by increasing the services available on-line;
- a single logon which will allow the user (whether a judge, staff member or practitioner) to access all the services and information he or she requires, particularly through the use of electronic case files;
- a single point of data entry so that information does not have to be re-entered on multiple systems;
- easier access to a range of on-line 'tools' that will allow each user to work directly on his or her matters by, for example, updating information, lodging and accessing documents or participating in an on-line Forum; and
- increased automation of certain case management processes.

A central element of the project will be the new case management system, Casetrack. Casetrack will be used as one of the platforms for integrating the eCourt facilities with the Court's primary source of statistical, operational and other essential management information. Casetrack is discussed in Chapter 4.

## **Remote hearings**

Where appropriate, the Court will conduct hearings in remote locations. For example, in a number of native title cases the Court has travelled to remote areas of Western Australia, Queensland and the Northern Territory to take evidence from witnesses who may not otherwise be able to attend the Court.

## **Public information**

### ***Internet web site***

The use of the Court's web site at **www.fedcourt.gov.au** has increased markedly and is now integral to the conduct of the Court's business. In addition to links to a wide range of legal resources, the web site contains helpful information about the Court and its work including full text judgments, daily court lists, practice and procedure guides, forms and fees, information for litigants and new initiatives. It also provides access to the electronic filing system and the eCourt on-line forum. The site has been recognised by the legal profession as providing an excellent single point of access to legal resources in Australia and overseas.

In 2003-04 the Court undertook consultations with site users to assist in the planning of a new website that will include additional resources and services. The new web site is due for release in July 2004 and will include plain English guides to the Court's practice and procedure, information in community languages, a glossary of legal terminology and step by step guides for self represented litigants. These services are consistent with the Court's eCourt philosophy. The new site will also include searchable access to library databases and certain information on the Court's case management system.

### ***Published information***

The Court publishes a number of brochures on aspects of its work, including a guide for witnesses appearing in the Court and information on procedures in bankruptcy, native title and human rights cases and on the Court's use of mediation. These brochures are available from any of the Court's registries. Similar information is available on the Court's web site. The new web site will incorporate downloadable versions of the brochures.

### ***Access to judgments***

When a decision of the Court is delivered, a copy of it is immediately made available to the parties and the media. The Court also provides electronic copies of judgments to legal publishers and other subscribers.

Judgments are also made available in full text on the Internet at the Australasian Legal Information Institute ('AustLII') site. A link to this site is provided on the Court's web site. Judgments usually are made available on the AustLII site within a few hours of publication.

The rapid availability of judgments electronically assists their speedy dissemination to the legal and wider community.

### ***Information for the media and televised judgments***

Through the Court's Director, Public Information, assistance was provided to journalists covering Federal Court cases and issues related to the Court's work. This includes managing access to court proceedings by television news outlets in matters of public interest. Notable cases in the reporting year included:

- *Daniel v State of Western Australia* – This hearing involved the finalisation of a long-running native title claim by traditional owners in the Pilbara region in the north of Western Australia. The determination was recorded in Perth and made available to all media outlets.
- *Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd* – This case concerned the distribution of funds to former employees of the airline. In-court vision was recorded in Melbourne and made available to all mainstream media outlets.
- *Attorney-General of the Northern Territory v Ward* – This was a Full Court hearing which concluded a matter that had started in 1994, shortly after the enactment of the Native Title Act. The determination took place in Kununurra and involved a claim area of almost 8,000 square kilometres spanning the border between Western Australia and the Northern Territory. The ABC shot pool vision of the determination which was shared with Perth television outlets.
- *Qantas and Air New Zealand v ACCC* – This was an appeal against an ACCC decision to prevent a merger of the two airlines. Justice Goldberg and the other members of the Australian Competition Tribunal allowed camera coverage in Sydney which was used widely both in Australia and New Zealand.
- *State of South Australia v Honourable Peter Slipper MP* – This case concerned a challenge to the legality of the process by which the Commonwealth sought to acquire land near Woomera in South Australia to establish a national repository for the disposal of low level radioactive waste. Channel 7 provided pool coverage of the Full Court delivering its judgment in Adelaide. This coverage was used nationally by all media outlets.

During the reporting year, the video “A Quiet Revolution – Achieving Major Change in the Federal Court of Australia” was updated. Plans were also made to produce in-house instructional videos for court officers and video conferencing operators.

### **Community relations**

The Court is actively engaged in a program of national strategies to enhance public understanding of the Court and its work, as well as confidence in the justice system and courts more generally. As well as one off projects, these strategies include ongoing initiatives such as regular meetings at a national and local level with different users of the Court, as well as a program of engagement with schools and other educational and community organisations. The following highlights some of the significant activities during the year.

### **User groups**

The Court continued its involvement in user groups to provide an opportunity for information exchange with practitioners and other people with an interest in particular areas of its jurisdiction. During the year meetings were held with local law societies and bar associations in the States and Territories and regular liaison meetings were held between the Practice Committee and the Law Council of Australia. User group meetings for general Court users, as well as in specific areas of the Court’s

jurisdiction, such as migration, corporations (including bankruptcy), admiralty, intellectual property and trade practices were also held.

### *Activities with the community*

During the year the Court was involved in the following activities with the legal profession, schools, students and community organisations.

In New South Wales, judges and staff participated in user group meetings with members of the legal profession to discuss general practice issues and particular areas of the Court's jurisdiction. A number of meetings were held in relation to the rules and practices for proceedings under the Admiralty Act. The registry organised or otherwise contributed to various seminars for the profession and members of the public, and hosted visits from schools.

In Victoria, the registry conducted user group meetings and hosted visits from schools and a number of tertiary education institutions. As part of Law Week, the registry gave guided tours of the court building.

In Queensland, the registry continued its involvement in the Legal Practice Course at the Queensland University of Technology. It also had regular meetings with the profession, including two meetings in Northern Queensland to discuss how court services to that region might be enhanced. The registry hosted visits by schools and various community organisations.

In South Australia, the registry gave presentations on a range of topics to newly admitted practitioners and the Bar Readers' Course. Judges and staff participated in regular user group meetings to discuss general issues and the Court's bankruptcy jurisdiction.

In Western Australia, registry staff gave presentations to a number of organisations, including the Institute of Arbitrators and Mediators. A number of user group meetings were held, including meetings in relation to admiralty and native title matters. A trial advocacy competition was held at the Court and judged by Justice Lee.

In Tasmania, the registry presented papers at various seminars and conferences, and participated in Lawfest.

In the Northern Territory, the Court participated in a number of meetings with the profession and interested organisations on its native title jurisdiction. It also participated in school information sessions during Law Week and hosted over 120 guests at the opening by the Chief Justice of its new premises. Justice Mansfield and the District Registrar met with the Law Society's Professional Development Committee and the Dean of the Law School at Charles Darwin University.

In the Australian Capital Territory, Justice Gyles, the District Registrar and the Deputy District Registrar gave presentations on the Court's jurisdiction to the law society and bar association. Presentations were also given by registry staff to a number of local law firms.

### **Complaints about the Court's processes**

During the reporting year 24 complaints were made to the Court in relation to its procedures, rules, forms, timeliness or courtesy to users. This figure does not include complaints about the merits of a decision by a judge or the Court, which may only be dealt with by way of appeal.

### **Cross-vesting Monitoring Committee**

The Chief Justice of the Federal Court is the Convenor of the Cross-Vesting Monitoring Committee. The other members of the committee, usually judges, are the nominees of the Chief Justices of the Family Court of Australia and the Supreme Courts of the States and Territories. The purposes of the Cross-Vesting Monitoring Committee are:

- to monitor and compile statistics on the operation of the cross-vesting scheme;
- to identify problems in the operation of the scheme and to consider how they may be resolved; and
- to consider, in the light of the experience of the operation of the scheme, possible improvements to it.

The Cross-Vesting Monitoring Committee prepares a report each year for the Council of Chief Justices.

### **Involvement in legal education programs and legal reform activities**

The Court is an active supporter of legal education programs, both in Australia and overseas. Information about the Court's engagement with legal education programs for international jurisdictions is described below. During the reporting year, the Chief Justice and many Judges and registrars:

- presented papers, gave lectures and chaired sessions at judicial and other conferences, judicial administration meetings, continuing legal education courses and university law schools; and
- participated in Bar reading courses, law society meetings and other public meetings.

An outline of the Judges' contributions in this area is included in Appendix 8 on page 151.

## **3.4 WORK WITH INTERNATIONAL JURISDICTIONS**

### **Introduction**

The Court is extensively involved in providing judicial and non-judicial support to assist the continuing development of international jurisprudence. Activities include individual judges holding second commissions in overseas courts, participation in international committees and conferences, involvement in legal education programs that provide training to judges and staff of overseas courts, and provision of library services to countries of the South Pacific. The following outlines the major areas of this work during the reporting year.

## Legal education programs

### *Indonesia*

The Court and the Mahkamah Agung (Supreme Court of Indonesia) have been partners in the Indonesian Judicial Training Program ('IJTP') which has run annually since 1999. In recognition of this partnership, a Memorandum of Understanding was signed by the respective Chief Justices in March 2004 which sets a foundation for ongoing judicial co-operation and assistance. It is believed that the memorandum is a 'World First' and a model for future collaboration between courts operating in different countries.

IJTP 5 was conducted during the year. The program was enhanced by the promulgation of the Indonesian Blueprint for Judicial Reform. The Blueprint included a formal statement of goals and objectives for the Indonesian judiciary, and these provided a useful reference point for the development of the program. The IJTP 5 program consisted of the following three elements:

- An 'In Indonesia' program focusing on contemporary regional judicial issues. Workshops were conducted in response to priorities identified by the Indonesian Supreme Court Training Centre ('SCTC') and focused on class actions, alternative dispute resolution, the Australian legal system and security and counter-terrorism.
- The Domestic Judicial Training Program ('DJTP') wherein Indonesian judges received training by eight Australian-trained Indonesian judges. The DJTP was considered a success by all involved and confirmed the capacity of the SCTC to provide in-house training programs as part of future programs.
- The 'In Australia' program saw sixteen Indonesian judges receive three weeks of intensive training and interaction with Federal Court judges and registry staff in Sydney and Melbourne. The program concluded with a dedicated workshop covering counter terrorism, internet/computer crime and money laundering issues.

### *China*

The Court continues to engage with courts of the People's Republic of China. In November 2003 the Court received a delegation of eight judges from the Shandong Provincial High People's Court. The delegation met with Federal Court judges and registry staff and discussion covered areas as diverse as self represented litigants, eCourt practices and the use of pro bono legal assistance schemes.

### *Sri Lanka*

During 2003-04 the Court hosted a judicial visit by Justice Nissanka Udalgama, President of the Court of Appeal, Sri Lanka. Discussions centred on the Court's docket management system, allocation of cases, listings and record keeping. The use of video conferencing during directions hearings and trials was also examined.

### **South Pacific**

Justice Beaumont is a member (representing Australia and New Zealand) of the Steering Committee of the Pacific Judicial Education Program, based at the University of the South Pacific in Suva. The program is funded by a partnership of the governments of Australia and New Zealand and facilitates judicial education activities for judges of the region.

During the year, the Court also received an AusAID grant to support the participation of three senior judges from Fiji, Vanuatu and Samoa to attend the Supreme Court and Federal Court Judges' Conference in New Zealand in January 2004. This was the third year the Court facilitated the provision of this assistance.

### **Participation in international committees and conferences**

A number of Federal Court judges actively participated in international committees and conferences during the reporting year. Examples of this work are included in the list of judges' activities in Appendix 8.

### **Library services to the South Pacific and Thailand**

The Court operates three programs which provide assistance to court and legal libraries in the South Pacific, including the administration of a five year AusAID grant of \$104,500 for library assistance in the South Pacific. The Court has established libraries for the Supreme Courts of Vanuatu and Tonga and provides some assistance to the libraries of the High Court and Court of Appeal of Fiji and the Supreme Court of Kiribati. The Court keeps these collections up to date with surplus monthly parts of law reports which the Court has bound up into volumes prior to despatch, and the supply of superseded and some new text books. The Court periodically sends law librarians to these countries to assist with library maintenance and advice.

The Court also uses AusAID funding to pay the freight costs of books and other publications donated by Australian law libraries to Pacific law libraries. In addition, the Court supports a specialist intellectual property court in Thailand, sending regular shipments of reports and textbooks.

### **Visitors to the Court**

The Court was visited by a significant number of judges and officials from overseas jurisdictions. These visits provided the judges and staff of the Court with an opportunity to develop relationships and learn from people involved in the administration of justice around the world. The number of visits reflects the international reputation of the Federal Court as a leading court, in its administration and its practice and procedure.

During the reporting year over 140 visitors from the following countries came to the Court, more than half of these to Sydney. These visits required significant planning and coordination by judges and Court staff. Visitors came from the Peoples Republic of China, Brunei, Canada, Malaysia, United Kingdom, United States of America,

Thailand, Trinidad and Tobago, East Timor, Papua New Guinea, Indonesia, Sri Lanka, New Zealand and Italy.

### **Pegasus Scholarship Trust**

The Pegasus Scholarship Trust was established in England to make it possible for gifted young lawyers to learn about the practical working of the common law system in countries other than their own, and to form enduring links with lawyers in those countries. Since 1987 the Trust has been sponsoring Pegasus Scholars from overseas to study and work in England, and Pegasus Scholars from England to live and work abroad. The Trust is supported by the Inns of Court, several major law firms, the Cambridge Commonwealth Trust, and government and commercial agencies.

During the reporting year the Chief Justice agreed that the Court would host a Pegasus Scholar, Mr Peter de Verneuil Smith, a London barrister. He was with the Court from 27 August to 18 September 2003 as a research assistant to the Melbourne judges. The Court has been supporting the work of the Trust in this way since 1995 and will host another Pegasus Scholar in 2004-05.

