

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* 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. See Figure 6.6 on page 113 for comparative statistics regarding Trade Practices matters.

Administrative law is an 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 page 120 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 (up to its abolition on 31 May 1999) and the Refugee Review Tribunal. See Figure 6.7a on page 116 for comparative statistics regarding Migration Act matters. The Federal Parliament is considering legislation which will give the Court jurisdiction to hear appeals for judicial review of decisions of the Migration Review Tribunal (which replaced the Immigration 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, are to a Full Federal Court.

Part of the Court's jurisdiction derives from the *Native Title Act 1993*. In September 1998 this Act was amended to provide that new applications for determination of native title or compensation be made to, and determined by, the Court, and for existing applications filed with the National Native Title Tribunal to be transferred to the Court. Under s 81 of the Act, the Court has jurisdiction to hear and determine applications lodged with the Court under ss 61 and 69, namely 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 Act provides for the Court's way of dealing with native title matters. In particular, the Act provides that the Court is bound by the rules of evidence, except to the extent that it otherwise orders (s 82(1)), and that the Court may take account of the cultural and customary concerns of indigenous people, but not so as to prejudice unduly any other party to the proceedings (s 82(2)). The Court also hears matters filed under the Administrative Decisions (Judicial Review) Act involving native title, and appeals from the Tribunal.

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 under this Act to hear maritime claims. 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 the deep sea fishing vessel "Aliza Glacial" subsequent to its arrest by the Admiralty Marshal. After Court ordered payments to some of the parties and the payment of costs associated with the arrest and sale of the vessel, the Marshal paid the balance of the proceeds of the sale to a creditor of the vessel. See Figure 6.8 on page 117 for a comparison of Admiralty matters filed in the past five years.

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 resulted in a reduction in the number of Corporations Law matters commenced in the Court, and in particular, matters relating to the winding up of companies. See Figure 6.5 on page 111 for a comparison of current Corporations Law 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 extends to matters arising from the administration of bankrupt estates. The *Bankruptcy Legislation Amendment Act 1996*, 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 the 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.

The Court has a substantial and 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. Figure 6.9 on page 118 provides statistical information concerning the number of Full Court appeals.

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 page 100.

New jurisdiction

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

- *Native Title Amendment Act 1998*
- *Australian Radiation Protection and Nuclear Safety Act 1998*
- *National Environment Protection Measures (Implementation) Act 1998*
- *National Transmission Network Sale Act 1998*
- *Financial Sector (Transfer of Business) Act 1999*
- *Wool International Privatisation Act 1999*.

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 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 to coincide with the changes to the Court's jurisdiction under the Native Title Act were made. New rules were also introduced in relation to expert witnesses, and Court appointed referrals for legal assistance. Minor amendments were made to a number of other rules.

Practice Notes supplement the procedures established in the Rules of Court. During the reporting year the Chief Justice issued a revised Practice Note on the 'usual undertaking as to damages' given to the Court. He also issued a new Practice Note setting out the Court's approach to orders for discovery.

Practice Notes are available without charge through District Registries. They have been reproduced in looseleaf services by law publishers. The Court has also published a guide to instituting an appeal in the Federal Court and various notices to practitioners issued by the District Registries. These are also available from the District Registries and in looseleaf legal services.

Rules Revision Project

In September 1998 the Judges' Meeting established a project to revise the Court's Rules. The goals of the project are that the Court have Rules which:

- (a) facilitate access to justice;
- (b) promote efficiency in the administration of the law;
- (c) complement and reflect the Court's case management philosophy and systems;
- (d) take into account current and future advances in information technology (eg facsimile filing and electronic filing);
- (e) are easily capable of being updated; and
- (f) are simple and clear.

The revised Rules will contain a preamble in the nature of a statement of overriding objectives, and will, where practicable, not use legal jargon or Latin terms. Work on the project is continuing.

2.2 DECISIONS OF INTEREST

During the year the judges published over 1,800 decisions. To give some illustration of the Court's work, a few of these decisions are summarised below. The range of decisions highlights the varied jurisdiction of the Court.

Native title – Recognition of native title in the sea and sea-bed

Yarmirr & Ors v Northern Territory & Ors (the Croker Island Case)
(6 July 1998, Justice Olney)

This case involved a determination whether native title was capable of recognition in the sea and sea-bed in certain offshore areas in the vicinity of Croker Island in the Northern Territory.

The applicants, who were members of the Mandilarri-Ilduglara, Murran, Gadura, Minaga and Ngaynjaharr peoples, applied under s13(1)(a) of the Native Title Act ("the Act") for a determination that they held native title rights and interests in the seas in the Croker Island region of the Northern Territory. The claimant group asserted that, by their traditional laws and customs, they had the right to exclusive possession, occupation and use and enjoyment of the sea and sea bed in the claimed area.

Justice Olney determined that native title existed in the sea and sea bed in the claimed area and that native title was held by the Aboriginal peoples who are the *yumumuru* members of the Mandilarri-Ildugij, Mangalara, Murran, Gadura-Minaga and Ngaynjaharr clans. In so doing, his Honour rejected the Commonwealth's contention that native title was not capable of being recognised and protected under the Act in respect of the sea, sea-bed, subsoil and airspace above the seas and reefs beyond the limits of the Northern Territory. Justice Olney stated that in confirming the application of the Act to the coastal sea and extending its effects to all waters over which Australia asserts sovereign rights, Parliament had indicated a specific intention to provide a statutory basis for native title offshore.

Justice Olney concluded that although the claimant group fished, hunted for and caught dugong and collected oysters and various crustacea in the claimed area, there was not evidence to support any traditional claim to the

use and control of any of the resources of that area. Similarly, there was held to be no evidence that any traditional law or custom of the claimant group related to the acquisition or use of, or trading in, minerals found on or in the sea bed or subsoil of the waters of the claimed area.

His Honour rejected the claim of exclusive possession in respect of the claimed area but determined that the claimant group was entitled, in accordance with traditional laws and customs to fish, hunt and gather within the claimed area to satisfy personal and communal needs and to have access to and travel within the claimed area for those purposes of observing or protecting cultural, ritual and spiritual laws and customs. The claim for exclusive possession was also held to fail as it was said to infringe the right of innocent passage of ships which Australia was obliged to recognise and enforce under international law. Exclusive possession was also held to be inconsistent with the public right of navigation and the public right to fish each of which was held to be a 'skeletal' principle of the legal system to which native title was subordinated.

His Honour held that the native title rights that had been established were capable of coexistence with the Northern Territory and Commonwealth fisheries legislation as such regulations were not indicative of an intention to extinguish non-exclusive non-commercial native title which had been established. Nor did the fishing legislation create third party rights that were inconsistent with that title. Thus, the native title rights had been regulated, but not extinguished, by prior legislative enactments or administrative action.

This matter is the subject of an appeal to the Full Court of the Federal Court.

Patents – Naturally occurring drug with well-known anti-cancer properties – whether patentable

Bristol-Myers Squibb Company V FH Faulding & Co Ltd

(22 July 1998, Justice Heerey)

This case concerned two petty patents in respect of the administration of the drug Taxol, a naturally occurring compound sourced from the bark of the western or Pacific yew tree. A petty patent confers protection for 12 months from the date of grant (extendable to a total of 6 years) and is designed to provide a rapid, enforceable monopoly right in respect of inventions predicted to have a relatively short commercial life. In this matter the patents claimed a method of administration of Taxol which allows administration in a short time frame, with resultant advantages for patient care. Taxol had been known, since at least the late 1960s, to be effective in the treatment of cancer.

Bristol-Myers, the applicant, was the registered proprietor of the petty patents. It commenced proceedings against the respondent alleging infringement. The Respondent cross-claimed, seeking revocation of the petty patents on a number of grounds.

The Court held that the patents should be revoked on the following grounds.

- The patents were not an "invention" within the meaning of the *Patents Act 1990*. Taxol itself was a naturally occurring substance and was, therefore, unpatentable. In addition, the patents were sought for the administration of a substance which was already well-known as an effective anti-cancer agent. In these circumstances the necessary quality of inventiveness was absent.
- The patents were not sought for a method of manufacture within the meaning of the Patents Act. While a majority of the Full Court in *Anaesthetic Supplies Pty Ltd v Rescare Ltd* (1994) 50 FCR 1 had expressed the view that a method of medical treatment of the human body was not necessarily unpatentable, observations in a number of High Court decisions tended to the contrary view. In addition, the New Zealand Court of Appeal had decided against the grant of patents for methods of treating the human body. Given the views of the High Court, and the policy interest of maintaining consistency in the commercial laws of Australia and New Zealand, the Court held that a method of medical treatment of the human body is not patentable.
- The patents were invalid as they lacked novelty and an inventive step. Evidence was presented to the Court of a number of publications each of which was an anticipation of the patent sought and each of which conveyed the essential information. The anticipations set out in the publications were such that, if the patent were valid, they constitute an infringement. In addition, the administration of Taxol as an anti-

cancer agent was a routine procedure. In these circumstances, the Court found that there was no novelty about the procedures described in the patents, and that there had been no inventive step.

- The petty patents were not fairly based within the meaning of the Patents Act. The Court held that the terms of the petty patents meant they effectively constituted a claim of monopoly for the use of Taxol in any dosage in a specified range in combination with any other drug in the treatment of any cancer in any outpatient treatment.

Although finding that the petty patents were invalid, the Court also considered the issue of infringement. It held that, even if the patents were valid, there had been no infringement as the respondent had not exploited or used the inventions disclosed in the patents, and had not authorised any other person to exploit the invention.

The application was dismissed and the petty patents revoked. The decision is the subject of an appeal to the Full Court of the Federal Court.

Constitutional law - Validity of mining lease

Yvonne Margarula v Minister for Resources and Energy & Ors

(21 August 1998, Justices Beaumont, Lindgren and Emmett)

This was an appeal from Justice Sackville, a Judge of the Court, upholding the validity of a mining lease granted in 1982 by the Northern Territory to the predecessor in title of Energy Resources Australia Ltd. The lease permitted the exploitation of deposits of uranium ore in lands at Jabiluka.

The appellant was the principal custodian of those lands by Aboriginal tradition. She challenged the power of the Northern Territory's Minister for Mines and Energy to grant the lease. The essence of the appellant's case was that neither the Northern Territory, nor the Territory's Minister, had any valid authority under any Commonwealth law to execute the lease, or to grant to any person any entitlement to mine uranium from the land in question.

The Full Court dismissed the appeal. It made the following findings in relation to the appellant's arguments.

- The *Atomic Energy Act 1953* (Cth) permits the *Mining Act 1980*, a law of the Northern Territory, to grant a right in relation to uranium, and the Mining Act authorised the grant of a lease which was binding on the Commonwealth in relation to uranium.
- The Northern Territory's Legislative Assembly had the power to deal with uranium, which was Commonwealth property; and the Mining Act does not interfere with the Commonwealth's right to maintain and enjoy its property in uranium.
- The change in status of the Northern Territory following self-government did not alter the way in which Commonwealth laws applied to the Territory. In particular, the Mining Act did not become inconsistent with the *Lands Acquisition Act 1955* (Cth), with the consequence that the Mining Act remained available to allow a Northern Territory Minister to grant the lease. In addition, the relevant provisions of the *Atomic Energy Act 1980* still applied notwithstanding the introduction of the *Northern Territory (Self-Government) Act 1978* (Cth).
- The land containing the uranium was not, at the time the lease was granted, a "place" acquired by the Commonwealth for public purposes under s 52(i) of the Constitution as part of it belonged to the Jabiluka Aboriginal Land Trust and the remainder was owned by the Northern Territory. Nor could the acquisition or retention by the Commonwealth of an 'interest' in 'land' which is otherwise owned by another be characterised as a "Commonwealth place" for the purposes of s 52(i).
- The execution of the lease was a valid exercise of executive authority by the Northern Territory Minister pursuant to the Northern Territory (Self Government) Regulations.

Intellectual Property – Aboriginal artwork and communal title in copyright

Bulun Bulun & Anor v R & T Textiles Pty Ltd; Minister for Aboriginal and Torres Strait Islander Affairs, intervening

(3 September 1998, Justice von Doussa)

This case concerned the protection of the interests of indigenous peoples in their cultural heritage. It represented another step forward in having communal title in traditional ritual knowledge, and in particular in artwork, recognised and protected by the law. In addition, it further highlighted the inadequacies of statutory remedies as a means of protecting communal ownership. The codification of copyright law by statute prevents communal title being successfully asserted as part of the common law.

The case concerned the unauthorised reproduction of a painting by a leading aboriginal artist, Mr John Bulun Bulun entitled “Magpie Geese and Water Lillies at the Waterhole” (“the artistic work”), which was painted in 1978 with the permission of senior members of the Ganalbingu people – the traditional Aboriginal owners of Ganalbingu country. The painting depicts material of importance and sacred significance to the Ganalbingu people. It represents the place of creation of the Ganalbingu people and their law and customs - described as the corpus of ritual knowledge.

The respondent, R & T Textiles Pty Ltd, imported and sold in Australia fabric that infringed the copyright in the artistic work.

Mr Bulun Bulun sued as the legal owner of the copyright pursuant to the *Copyright Act 1968* (Cth) for remedies for infringement. A second Aboriginal artist, Mr George Milpurrurru, claimed, in his own right and on behalf of the Ganalbingu people, equitable ownership of copyright in the artistic work arising as an incident of the Ganalbingu peoples’ ownership of, and relationship to, the land.

The respondent admitted infringement and the offending fabric was withdrawn from sale. However, the question of equitable ownership of the copyright in the artistic work proceeded to trial where Mr Milpurrurru argued that because the Ganalbingu people had the power under customary law to control the reproduction of manifestations of the corpus of ritual knowledge, Mr Bulun Bulun held the copyright in the artistic work on trust for the Ganalbingu people or as a fiduciary.

Justice von Doussa held that the relationship of Mr Bulun Bulun, the artist and owner of the copyright in the painting, with the Ganalbingu people gave rise to a fiduciary relationship between them because permission to use the ritual knowledge had been given to the artist in accordance with the customs of the Ganalbingu people and was predicated on the trust and confidence which the Elders of the community had in the artist. Accordingly, equity imposed obligations on the artist as a fiduciary not to exploit the work inappropriately. That included the obligation to pursue copyright infringement.

In this case the artist took action in respect of the infringement, but had he not done so the Ganalbingu people would have a right in personam (that is, a right of action against a specific person) to invoke equitable remedies such as the imposition of a remedial constructive trust to compel the artist to perform his fiduciary obligations.

Elections - Whether "Langer-style" votes are informal under the current Commonwealth electoral legislation

Joseph Richard Bryant v Commonwealth of Australia

(30 September 1998, Justice Wilcox)

In this matter the Court considered an application to restrain the Australian Electoral Commission ("the AEC") from printing, distributing and publishing allegedly incorrect information in respect of a particular method of voting. The application raised the issue of whether or not, under the legislation governing Commonwealth elections, a "Langer-style" vote is informal. "Langer-style" voting occurs where voters express preferences as far as they wish and then put the same number in every square

In 1998 the *Commonwealth Electoral Act 1918* was amended in light of the 1996 decisions by the High Court and the Federal Court in *Langer v Commonwealth of Australia* and *Langer v Australian Electoral Commission* respectively. The amendments were intended to make a "Langer-style" vote informal. The Act required a voter to mark his or her ballot by writing the number one in the square opposite the name of the candidate for whom the person votes as his or her first preference and then to write the numbers 2, 3, 4 and so on, as the case required, in the squares opposite the names of all the remaining candidates so as to indicate the order of the voter's preference for them. The amendment provided that the numbers must be consecutive and without repetition of any number.

On 9 September 1998 Mr Bryant instituted a proceeding in the High Court of Australia against the Commonwealth of Australia which involved questions as to the constitutional validity of the legislation. He subsequently sought urgent interlocutory relief in the High Court restraining the AEC from publishing material for the information of voters leading up to the 1998 general federal election which included a reference to "Langer-style" voting, and indicated that a vote cast in such a manner would not be regarded as being formal and would therefore be wasted. The High Court remitted the application to the Federal Court. The central constitutional issue remained in the High Court for determination.

Justice Wilcox held that a "Langer-style" vote was informal. His Honour found that the legislation required a voter to express an order of preference for all candidates, not just some of them. It followed that the advice given to the voters by the Electoral Commission about the effect of a "Langer-style" vote was correct.

The application for interlocutory relief was dismissed.

Intellectual Property - Definition of "sell"

Sun World International Inc (Formerly Sun World Inc) v Registrar, Plant Breeder's Rights (Formerly Registrar, Plant Variety Rights) and Murray Valley Grape Growers Council

(2 October 1998, Justices Burchett, Carr and Mansfield)

In this appeal the Full Court considered whether the word "sale" in s 14 of the now repealed *Plant Varieties Act 1987* ("the Act") should be understood according to its narrow technical meaning at common law.

The Act was based upon the International Convention for the Protection of New Varieties of Plants 1961 (as revised), and created various exclusive rights in relation to new varieties of plants known as Plant Variety Rights. Section 14 of the Act provided that Plant Variety Rights were not to be granted if there had been "a sale of a plant, or reproductive material of a plant, of that variety" in Australia before the making of the application, or in another country earlier than six years before the making of the application.

The appellant applied to the first respondent for a grant of Plant Variety Rights under the Act in respect of a variety of grapevine known as "Sugarone". The first respondent decided that the appellant could not be granted Plant Variety Rights because grapevines of that variety had

been sold by the breeder in the United States in 1972. Five other agreements made by the appellant were also characterised as disqualifying sales.

Justice Carr, with whom Justices Burchett and Mansfield agreed, considered whether Parliament intended the word “sell” in the Act to be construed in accordance with the common law as being confined to a transfer of the general absolute property in the plant or reproductive material for a consideration limited to money.

His Honour decided there were sufficient contextual indicators to find that Parliament did not intend the words “sale” and “sell” to be interpreted in the technical common law sense. The words should be interpreted in a very wide sense, and be used with their ordinary English meaning. The fact that the Act referred to transactions in a country other than Australia suggests that the transactions do not need to be characterised strictly as “sales” in the primary sense of that term under Australian law. A broad interpretation was also supported by s 3 of the Act, which provided that “sell” in relation to a plant or reproductive material of a plant, includes let on hire and exchange by way of barter.

Justice Carr concluded that each transaction involved a sale of the plant or reproductive material for a consideration which included money. Neither the fact that the price was low or nominal, nor that the sale was part of larger transactions, nor that restrictive covenants were imposed, removed the legal characteristic of a relevant sale from the transactions. Consequently, “sell” encompassed the sales which were made as part of the five transactions.

Native Title - The meaning and extinguishment of native title

Ben Ward & Ors (on Behalf of the Miriuwung and Gagerrong People) & Ors v State of Western Australia & Ors

(24 November 1998, Justice Lee)

This was the first contested application for determination of native title to be dealt with by the Federal Court. The hearing occupied 83 days with much of the applicants’ primary evidence being taken at various sites within the claim area.

Three applicant groups applied for a determination of native title over some 7900km² of land in the Eastern Kimberley area of Western Australia and part of the Northern Territory. The area claimed consisted mainly of vacant and reserved Crown land, pastoral leases and land granted to the Aboriginal Lands Trust. The first applicants, the Miriuwung and Gagerrong People, claimed the entire area, while the second applicants, as sub-groups of the Miriuwung and Gagerrong group, claimed the part of the claim area that was within the Northern Territory. The Balangarra People, the third applicants, sought a determination that they shared native title to Lacrosse Island with the first applicants.

Evidence

Justice Lee found that, in any proceeding in which native title is in issue, rules of evidence must recognise the evidentiary difficulties faced by Aboriginal people. The exclusion of histories and accounts, often localised in nature, may work substantial injustice. His Honour therefore applied the rules of evidence in a way which would avoid prejudice to the Aboriginal applicants. He also held that the Court was entitled to rely upon its own historical knowledge and research, in addition to taking judicial notice of the facts of history.

To help reduce the amount of hearing time, at the conclusion of the applicants’ primary evidence the Court adjourned the proceedings and directed the respondents to produce notices to admit facts as appropriate.

Meaning of native title

Justice Lee held that native title is the means by which the common law recognises the rights enjoyed by indigenous inhabitants of land by reason of their occupation of that land, and reconciles the rights of those inhabitants with rights obtained by the Crown upon claiming sovereignty over the land. Native title is a burden on the radical title acquired by the Crown upon its acquisition of sovereignty. It is not necessary for proof of the existence of native title to show that it has been asserted against the Crown.

Native title will ordinarily be a communal interest held by the indigenous community that had an entitlement to use or occupy the land at the date of sovereignty. In determining whether a community's use and occupation of the land is sufficient to constitute native title, the demands of the land and the community's needs, traditional practices, habits, customs and usages must be considered. Occupancy of land for native title does not equate with possession at common law, but arises from an acknowledged connection between an indigenous community and the land.

Native title will continue to be held by an indigenous community provided that the Crown has not extinguished it and the connection with the land has been substantially maintained by the community that acknowledges and observes the laws and customs of its predecessors. The Court held that it was not necessary for the community's laws and customs to have remained frozen in time, only that the general nature of the connection between the indigenous people and the land has continued. Nor was it necessary for the applicants to prove that each member of their group was a direct descendant of a person in occupation of the land when the Crown acquired sovereignty. It was sufficient for the applicants' to show that a reasonable number of their ancestors were present on the land at that time.

The Court accepted that the special nature of a native title interest makes it difficult to precisely identify the boundaries of native title land, and that it was possible for several indigenous communities to have native title interest in the same land. However, the question of how an organised indigenous community's traditional laws, customs and practices are distributed, or allocated within subgroups is irrelevant to a determination that native title exists. Native title is held by the entire community, and not by subgroups of the community.

Extinguishment of native title

Justice Lee held that the onus of proving extinguishment of native title lies on the party seeking to assert extinguishment. He also held that, under the common law, native title cannot be partially extinguished by extinguishing some native title rights. Further, the suspension or regulation of these rights does not mean that the native title itself has been extinguished.

Justice Lee confirmed that native title may be extinguished by act of the Crown, but only if a clear and plain intention to extinguish native title is apparent from the public record either by an act of the legislature or an Executive act authorised by the legislature. Native title may also be extinguished by "adverse dominion", where there is a grant of tenure to a third party that permits the land to be used in a way that is permanently inconsistent with the exercise of native title rights. It must, however, be shown that the Crown intended that the exercise of the rights granted to a third party would remove all connection of the indigenous community with the land. It is not sufficient if the exercise of rights granted to a third party simply regulates or modifies the rights exercisable by native title holders.

His Honour held that the grant of a pastoral lease is not the creation of a permanent interest in respect of the land, and it is unlikely that an act by a pastoral lessee will amount to actual use of land in a manner permanently inconsistent with the continued existence of native title. The construction of dwelling houses, reservoirs and dams by a lessee may extinguish native title by adverse dominion, but the erection of fences could not.

Justice Lee held that the creation and vesting of a Crown reserve does not extinguish native title. Furthermore, a reserve created for a purpose or use will not impact on native title until the purpose or use has commenced, and will only extinguish native title if the purpose or use is permanently inconsistent with native title and amounts to adverse dominion. For example, native title will be extinguished where reserves are created and used as showgrounds, race courses, telecommunications sites, power stations or dams. Extinguishment will not occur

when reserves are used for national parks, landscape and conservation protection, as Aboriginal reserves, or stock watering points.

Where leases or licences are granted in respect of reserved land, extinguishment will depend upon the purpose, term, conditions and nature of the lease or licence. None of the leases or licences over the land the subject of the determination had the effect of extinguishing native title. In a similar manner, the declaration of a townsite and the proclamation of the Ord River District did not extinguish native title; that could only occur where appropriate land was used for the appropriated purpose and this was inconsistent with native title. Even in respect of the areas flooded to create Lake Kununurra and Lake Argyle, native title continued because the applicants' connection with the land continued despite the fact that the area was under water.

Other matters

Justice Lee rejected a submission by the Government party that the *Limitations Act 1935* (WA) prevented a native title claim being brought if the period between the acquisition of native title and the bringing of a determination application exceeded the period set out in the legislation. He also rejected its argument that the provisions of the *Fauna Protection Act 1950* (WA) and its predecessors extinguished native title by depriving the indigenous inhabitants of their right to take sustenance from the land. In his view this legislation was directed at conservation not extinguishment of native title, and whilst it regulated the rights of native title holders it did not extinguish the underlying native title. Similarly, legislation prohibiting Aborigines from an area 'in the interest of Aborigines' and for the purpose of quarantining an area to prevent the spread of a weed did not have the effect of extinguishing native title. The respondents' submissions that the validation of past act provisions in the State and Territory Titles Validation legislation extinguished native title was rejected, Justice Lee holding that the legislation only applied to acts that had extinguished native title at common law.

Determination

Justice Lee held that native title was proven to exist and be held by the first applicants over most of the area claimed, the only extinguishment occasioned by roads, permanent public works, freehold grants and some reserves. Native title was held concurrently with the third applicants over Lacrosse Island. The claim of the second applicants on behalf of sub-groups of the first applicants was rejected.

The judgment is the subject of an appeal to the Full Court of the Federal Court.

Corporations Law – Manipulating the market

Australian Securities Commission v Nomura International Plc

(10 December 1998, Justice Sackville)

In this case the Court had to consider whether Nomura International ("Nomura") contravened the Corporations Law and the Trade Practices Act by, in effect, manipulating the market for securities on the Australian Stock Exchange ("ASX"). At the relevant times, Nomura was a company incorporated in the United Kingdom and did not have any permanent presence in Australia.

Nomura was a stock index arbitrageur. It would purchase or sell securities on a stock market together with an offsetting sale or purchase of those securities at approximately the same time on another stock market for the purpose of obtaining a profit from the difference between the prices of those securities in the two stock markets.

Towards the end of March 1996, Nomura had established an arbitrage position in index futures traded on the Sydney Futures Exchange ("SFE"), known as SPI Contracts, and in securities traded on the ASX. Its holdings were very large. Nomura held 10,912 sold March 1996 SPI Contracts due to expire on 29 March 1996. It held a "matching" basket of securities, as part of its arbitrage position, worth about A\$600,000,000.

Nomura adopted strategies which, according to it, were designed to capture the profit from the arbitrage position it had built up by 29 March 1996. The strategies adopted by it were complex. The two key strategies, however, were the "March Sale Orders" and the "Bid Basket".

The March Sale Orders comprised instructions given by Nomura to ten separate brokers. These required the brokers to sell Nomura's basket of securities very aggressively near to the close of trading on 29 March 1996.

The brokers were instructed, in substance, to sell without being concerned about the extent of any drop in price that extremely aggressive selling would produce.

The second key aspect of Nomura's strategy on 29 March 1996 was the placement of the Bid Basket. This consisted of buy orders for the same securities and in the same quantities as the March Sale Orders. However, the broker responsible for placing the Bid Basket was instructed to record bids at prices substantially below the last traded price of each security.

For a variety of reasons, most of the brokers entrusted with the March Sale Orders did not fully comply with their instructions. Even so, in the case of two securities, Nomura's aggressive selling at the close of trading on the ASX produced the result that it "hit" its own Bid Basket. That is, in two cases brokers implementing the March Sale Orders "hit" bids placed on Nomura's behalf in the Bid Basket. Since the Bid Basket recorded bids well below the previous sales, the effect was that Nomura "bought" its own securities at depressed prices. Nomura's position was that, in implementing these and other strategies, it was merely acting as an index arbitrageur. However, the Court found that Nomura was not merely a price-insensitive seller of securities on the ASX. Nomura wished to realise a profit from its arbitrage position. But the strategies devised on its behalf were intended to lower the price of securities included in the All Ords at the close of trading on 29 March 1996. In particular, Nomura intended that the combined effect of the Bid Basket and the March Sale Orders would be to lower the price of the securities at the close of trading. Nomura's motivation was to obtain "speculative" profits by entering into arrangements whereby it would benefit from the expected fall in the price of securities and the consequential fall in the closing level of the All Ords and the expiry price of SPI Contracts.

The Court's findings included the following.

- In two instances, by the combined operation of the March Sale Orders and the Bid Basket, Nomura both sold and purchased securities in a manner that involved no change of beneficial ownership. It thereby contravened s 998(1) and (3) of the Corporations Law.
- Nomura, in placing the Bid Basket and giving instructions for the March Sale Orders, engaged in conduct intended to create a false and misleading appearance of active trading on the ASX in the securities held by it on 29 March 1996. It also engaged in conduct intended to create a false or misleading appearance with respect to the price of the securities held by it on the same day. Nomura's conduct in this respect contravened s 998(1) of the Corporations Law.
- Nomura intended to determine unilaterally the closing price on 29 March 1996 for some securities within the All Ords. It knew and intended that this would have an impact on the closing level of the All Ords and, consequently, the cash settlement price of SPI Contracts going to expiry on 29 March 1996. Nomura intended to create a false and misleading appearance with respect to the price for dealings in contracts in the futures market. It thereby contravened s 1260(1)(b) of the Corporations Law.

Native Title –Obligation on Government party to negotiate in good faith

Kevin Peter Walley on Behalf of the Ngoonooru Wadjari People v The State of Western Australia & Ors

(6 January 1999, Justice Carr)

The issue in this case was whether the State of Western Australia ("the Government party") had negotiated in good faith with the applicant and the second respondent, WMC Resources Ltd, with a view to obtaining the applicant's agreement of the doing of an act (in this case the granting of two mining leases) either with or without conditions.

In June 1995 the Government party gave notice of its intention to grant applications for two mining leases to WMC Resources Ltd ("the Mining Leases"). In August 1995 the applicant applied to the National Native Title Tribunal ("the Tribunal") for a determination of native title over an area of land that coincided precisely with the area which was the subject of the Mining Leases, excluding any freehold land which might be within that area.

In November 1997 the Government party applied to the Tribunal for a determination on whether it could grant the Mining Leases. The applicant submitted to the Tribunal that this application for determination could not proceed because the Government party had not negotiated in good faith in accordance with s 31(1)(b) of the

Native Title Act. The Tribunal found in favour of the Government party, and the applicant applied for judicial review by the Federal Court.

The applicant claimed that there was a possibility that the granting of the Mining Leases may lead to productive mining, and that this should be given proper consideration when determining whether there had been negotiations in good faith.

Justice Carr considered that the appropriate way to assess whether the Government party had negotiated in good faith was to judge its conduct in the context of matters related to, or connected with, the doing of the particular future act in question. While there was no limitation on what the parties may include in their discussions and any agreement, the obligation on the Government party to negotiate in good faith is to do so by way of making or considering proposals which are related to or connected with the doing of the future act and its potential consequences. The subject of the negotiation is to have the native title parties agree on one basis or another to their native title rights or claimed native title rights being affected by the act upon which the Government party has resolved to embark.

Whether the Government party negotiated in good faith is a question of fact. In some cases the reasonableness or unreasonableness of the Government party's proposals or offers may be relevant to this question. In other cases there may be a difference between making reasonable offers and being reasonable in negotiating in good faith.

The Court concluded that, in the circumstances of this case, the Tribunal had not erred in finding that the Government party had negotiated in good faith. The application was accordingly dismissed.

Migration – Indiscriminate abuse of authority and cruelty

Perampalam v Minister For Immigration And Multicultural Affairs

(1 March 1999, Justices Burchett, Lee and Moore)

In this case the Full Court considered whether an elderly Tamil widow from Sri Lanka, who had been abused by members of a government authority, was a refugee within the meaning of the Convention Relating to the Status of Refugees ("the Convention").

The applicant came from the Amparai district, a scene of conflict for many years between Tamil Tigers ("LTTE"), the Sri Lankan army and police, the Sri Lankan Special Task Force (STF) and the Muslim Home Guard. While living there, the applicant found herself in a situation where, for various reasons, she was seen to be aligned with the LTTE by the STF on the one hand, while being accused by the LTTE of acting as an informant for the STF on the other. She had been beaten by the STF during interrogations as well as being threatened and assaulted in her own home. The LTTE had also attempted to extort money from the applicant. On one occasion, while an STF detachment were ransacking her house, the applicant suffered a painful hip injury and lost a tooth after being pushed and kicked by soldiers. One soldier forced her into a room and tore off her clothing until she was exposed. He stopped when other soldiers entered, who then, however, continued to destroy valuables in her home. The applicant left Sri Lanka for Australia immediately after this event.

Although the Refugee Review Tribunal had considered the applicant a credible witness and accepted her account of these events, it found that she did not suffer "persecution" within the meaning of the Convention, for the reason that the mistreatment she had suffered in her home and during interrogation by the authorities exhibited an "indiscriminate abuse of authority and an act of inhuman cruelty" and not a course of "systematic conduct" directed at the applicant for a Convention reason.

Allowing the appeal, the Full Court affirmed the principles in *Paramananthan*, a Full Court decision in which it was held that any maltreatment during detention and interrogation should not necessarily be considered as indiscriminate cruelty short of persecution simply because the detention had begun in an action taken for a legitimate end of government policy. The correct approach is to determine whether there is a causal connection between the abuse of authority and any perceived political opinion, race or social group. Where this is the case, it is then necessary to consider whether the authorities are willing or able to provide protection. The Full Court also rejected any requirement, in order to establish persecution, that conduct directed at the applicant for a Convention reason be also "systematic".

Workplace relations – Effect of certified agreement on the AIRC jurisdiction

Gordonstone Coal Management Pty Ltd v Australian Industrial Relations Commission & Anor

(25 March 1999, Chief Justice Black, Justices Heerey and Goldberg)

In this case the Full Federal Court considered whether the Australian Industrial Relations Commission (AIRC) had jurisdiction to deal with an industrial dispute between Gordonstone Coal Management Pty Ltd (Gordonstone) and the Construction, Forestry, Mining and Energy Union (the Union).

Gordonstone operated a mine in which most of the workforce were members of the Union. In October 1996 the AIRC certified an agreement between Gordonstone and the Union under the *Industrial Relations Act 1988* (Cth). The agreement included two clauses setting out problem resolution procedures.

In February 1997 the Union notified the AIRC of an alleged industrial dispute between it and Gordonstone concerning a number of industrial matters. The notification stated that the matters had been the subject of the problem resolution procedures under the agreement, but that Gordonstone was intending unilaterally to change the arrangements made in relation to the matters. In March 1997 the Union notified the Commission of a further dispute regarding access by union officials to the Gordonstone site.

The two dispute notifications were referred to the Full Bench of the AIRC, which rejected Gordonstone's submissions that it had no jurisdiction to deal with the disputes, and that in any event its jurisdiction was constrained by s 89A of the Workplace Relations Act ("the Act"). Section 89A limits the matters that the AIRC may deal with when it is dealing with an industrial dispute by arbitration, preventing or settling an industrial dispute by making an award or order, or maintaining the settlement of an industrial dispute by varying an award or order.

Gordonstone then applied to the High Court for an order nisi for writs of certiorari and prohibition which would prevent the AIRC from dealing with the disputes. The High Court remitted the matter to the Federal Court.

The Full Court was asked to examine whether:

- the certification of the agreement in October 1996 was sustained by an industrial situation within the meaning of the Act;
- the problem resolution procedures were invalid on the basis that they were inserted in the agreement for the purpose of determining local or interstate disputes and an award establishing such a procedure was not within the jurisdiction of the AIRC; and
- any assumption of jurisdiction by the AIRC under the problem resolution procedures was subject to and restricted by s 89A of the Act.

The Full Court held that the AIRC did have jurisdiction to certify the agreement because the industrial situation giving rise to it possessed an interstate element. In particular, there were a number of outstanding disputes between Gordonstone and the Union at the time the agreement was certified, including an interstate industrial dispute found by the AIRC in October 1995 with respect to the service and rejection of a log of claims in August 1995.

The argument that the problem resolution procedures in the agreement were invalid was also rejected by the Full Court. It found that the intention of the parties was to empower the AIRC to settle disputes which are "disputes over the application of the agreement". The agreement provided for a "staged process" for resolving such disputes - a process which ended with resolution by a decision of the AIRC. The Full Court did not think it necessary to determine whether the dispute resolution procedure might have a wider operation that would not involve the exercise of any power by the AIRC.

The Full Court accepted Gordonstone's final submission that any assumption of jurisdiction by the AIRC under the dispute resolution procedures would be subject to and restricted by s 89A of the Act. It held that, when the AIRC exercises arbitral powers conferred on it by parties to a certified agreement, those powers are necessarily limited to the matters specified in s 89A(2) and (3). The Full Court consequently ordered that a writ of prohibition be issued to the AIRC prohibiting it from proceeding further in

relation to notifications by the Union otherwise than on the basis that s 89A of the Act applies to the determination of those disputes.

Migration – Well-founded fear of persecution in cases of civil war

Minister for Immigration & Multicultural Affairs v Abdi
(26 March 1999, Justices O'Connor, Tamberlin and Mansfield)

In this appeal the Full Court examined how the definition of “refugee” in the Convention Relating to the Status of Refugees (“the Convention”) should be applied in cases arising from civil or clan warfare. In particular, the Full Court had to consider the approach of the House of Lords in *Adan v Secretary of State for the Home Department* [1998] 2 WLR 702, which held that something over and above the risk of harm inherent in the civil or clan war must be shown in order to satisfy the Convention.

The respondent in the appeal was a Somali national and a member of a sub-clan of the Darod clan in Somalia. It had been accepted that his father was involved in a leadership and land struggle involving Darod sub-clans, as the result of which his father was killed and the applicant injured. The Refugee Review Tribunal (“the RRT”), having adopted the approach in *Adan*, found that Mr Abdi did not satisfy the Convention. The trial judge set aside the RRT’s decision.

The Full Court accepted that, to establish persecution for a Convention reason, it is not enough that there be a fear of being involved in incidental violence as a result of civil or communal disturbances. However, it held that the approach in *Adan* went beyond the requirements of the Convention by imposing additional or differential requirements even where the civil war in question is based on racial or clan grounds.

The Full Court found that, where a war is properly characterised as being clan based, the Convention requires that consideration must be given to the question whether the reasons for the war are to selectively harm on the basis of race or clan, or whether the struggle is in substance directed to control of resources or the assertion of dominance over territory. To demand something “over and above” the existence of a state of war is a source of error because it eliminates a critical step in the process, namely analysis of the objectives and the conduct of the war.

The Full Court held that the RRT had fallen into error by applying the gloss on the Convention set out in *Adan*’s case. It dismissed the appeal and referred the matter to the RRT for further reconsideration in accordance with law.

This Full Court’s decision is the subject of an appeal to the High Court.

Human rights – Stolen generation

Lorna Cubillo and Peter Gunner v Commonwealth of Australia
(30 April 1999, Justice O’Loughlin)

In this case the Court had to consider whether proceedings commenced by two people claiming to be members of “the Stolen Generation” (being the term that has become well known in its application to part Aboriginal children who were taken from their families and placed in homes and institutions) should be summarily dismissed. The applicants claimed that the Commonwealth, through its servants and agents, was the party responsible for their removal and detention. It was their case that the removal and detention was unlawful, and that the Commonwealth had breached its fiduciary and other duties to the applicants.

The Commonwealth denied all responsibility. However, despite its claims that it had defences on the merits, the Commonwealth submitted that these matters should not go to trial. It made two preliminary claims.

First, it argued, as a matter of law, that the applicants did not have any causes of action against the Commonwealth. Secondly, it raised a question of hardship on the basis that the proceedings should have been instituted, in the case of Mrs Cubillo, thirty seven years ago, and, in the case of Mr Gunner, twenty six years ago. The Commonwealth argued that so much time had elapsed, so many witnesses had died and the memories of those living were so impaired that it would be manifestly unfair to the Commonwealth if the Court were to grant the applicants an extension of time in which to bring their proceedings.

Justice O’Loughlin found that there were some deficiencies in the statements of claim. However, in his view they were not sufficient to justify summary dismissals, and could be remedied by giving the applicants leave to file and serve fresh statements of claim. Subject to those comments, His Honour rejected the Commonwealth’s submissions that, as a matter of law, the pleaded causes of action were not available to the applicants.

As to the issue of hardship, the Court concluded that the Commonwealth’s claim had been made prematurely. While the Commonwealth had advanced a strong case, Justice O’Loughlin considered it would not be fair to make a decision on it without first giving Mrs Cubillo and Mr Gunner the opportunity to be heard in their applications for extensions of time. After all, it was the applicants who would suffer hardship if the Court decided not to grant them their extensions.

The Court was not prepared to order that the applications by Mrs Cubillo and Mr Gunner for extensions of time be heard and determined prior to the substantive trial. As this would amount to a mini-trial, the Court considered it would be more effective and more cost-efficient, in the long run, to hear their applications for extensions of time during the course of the main trial. That would also be the occasion when the issue of the Commonwealth’s hardship could be raised and evaluated.

Justice O’Loughlin made it clear that his decision in relation to the Commonwealth’s application did not mean he had formed a final opinion on any aspect of the applicants’ respective cases; it only meant that he was satisfied that they should be allowed to argue their respective causes. In his view, the cases were of such importance - not only to the individual applicants and to the larger Aboriginal community, but also to the Nation as a whole - that nothing short of a determination on the merits with respect to the competing issues of hardship was warranted. That could not be achieved until the applicants had placed before the Court all the material that they would wish the Court to receive before it ruled on their applications for extensions of time.

Patents – Pharmaceutical formulation – whether patentable

Aktiebolaget Hässle & Anor v Alphapharm Pty Ltd

(12 May 1999, Justice Lehane)

In this case the Court considered whether a patent for an oral dosage form of the drug omeprazole was valid and, if so, whether it would be infringed by the respondent marketing a competing formulation of the same drug.

The first applicant, a Swedish corporation, held a patent in omeprazole, a drug which inhibits gastric acid secretion once it has been absorbed into the bloodstream; that patent was due to expire. It also held a patent in a formulation which allowed the drug to be taken orally (“the patent in suit”). The respondent proposed to market and sell a competing formulation upon the expiry of the applicant’s patent for omeprazole.

The applicants alleged that the respondent’s proposed product infringed the patent in suit and sought injunctions restraining its marketing and sale. The respondent disputed that allegation and made a cross-claim for revocation of the patent. Invalidity was claimed on a large number of grounds, the most substantial of which was that the formulation claimed involved no inventive step.

The combination of integers claimed in the patent in suit was, in summary, a tablet or pellet consisting of a “core” containing omeprazole and certain other compounds; a water-soluble “sub-coat” displaying certain properties; and an “enteric coat”. That formulation was said to constitute an inventive solution to problems associated with omeprazole, in particular its instability and the difficulty of ensuring its absorption into the bloodstream.

The Court held that the patented formulation involved no inventive step. The evidence of the respondent demonstrated that the hypothetical non-inventive skilled worker, faced with the task of formulating a dosage form of omeprazole at the priority date, would, by taking routine steps and armed with the relevant common general knowledge, have arrived at the combination claimed in the patent. In this regard the Court had the benefit of evidence given for the respondent by an expert who had been instructed to undertake the hypothetical formulation task and had been quarantined from any knowledge about the actual invention the subject of the patent in suit.

The Court also found that the information contained in certain documents, although it might not have formed part of the common general knowledge in the field in Australia at the priority date, would have been found and used by the skilled worker during the routine steps taken in the hypothetical formulation.

Evidence was given about the hypotheses formed (during and after the development of the formulation) by the first applicant as to the causes of various difficulties encountered in the process of formulation, and the reasons why the result achieved by the final combination of features was a surprising one. The Court considered that the hypotheses were less relevant to the question of lack of inventive step than evidence about the steps which the skilled addressee would actually have taken during the hypothetical formulation.

The Court rejected the respondent's claims that the patent in suit was invalid on other bases, such as lack of novelty, lack of invention on the face of the specification, fraud, false suggestion or misrepresentation, lack of fair basis, insufficiency and inutility.

On the question of infringement, the Court held in confidential reasons, which were later published in edited form, that the patent, if it had been held to be valid, would have been infringed by the sale of the respondent's product.

The Court declared the patent in suit to be invalid and ordered that it be revoked. The order for revocation was stayed pending the determination of any appeal or until earlier further order.

The decision is the subject of an appeal to the Full Court of the Federal Court.

Social Security – Sole Parent Pension where parental responsibility is shared

Secretary, Department Of Social Security v Lowe

(28 May 1999, Justices Burchett, Kiefel and Hely)

In this case the Full Court had to consider which parent should receive the Sole Parent Pension where the mother and father have separated but equally share parental responsibility for their child.

Following their divorce, the parents of a young child came to a mutual arrangement to share her upbringing. It was agreed that she live with each parent on alternate weeks. All major decisions concerning her were to be made jointly.

Section 251(1) of the *Social Security Act 1991* ("the Act"), as it stood when this case arose, provided that only one person "at a time" could be the recipient of the Sole Parent Pension ("the Pension"). Where two or more persons shared parental responsibility, s 251(2) allowed the Secretary of the Department of Social Security to make a determination specifying who was to be the recipient of the Pension. In this case the Secretary determined that the Pension be paid to the mother. The Social Security Appeals Tribunal and the Administrative Appeals Tribunal ("the AAT") subsequently affirmed the Secretary's determination, and the father then appealed to the Federal Court.

The judge at first instance rejected the father's argument that the pension should be shared to reflect the shared parenting. He construed the words "at a time" in s 251(1) with reference to the standard fortnightly period in which a pension is paid under the Act, and held that, on a strict construction, because the child was never in either parent's care for a full fortnight, neither became entitled to the pension.

On appeal, the Full Court held that "at a time" in s 251 should be interpreted broadly to refer to "a period during which particular arrangements with respect to the care of the child endure". It also found that it is possible for a parent to participate actively in raising a child, even without having immediate physical proximity, by delegating responsibility to the other parent or carer. The Full Court concluded that the particular arrangements in this case fell within the requirements of s 251(2), and that this provision enabled the AAT to select for payment of the pension the needier of the two parents who shared responsibility for their child on an equal basis.

Corporations Law – Takeovers

Australian Securities and Investments Commission v Yandal Gold Pty Ltd & Ors

(16 June 1999, Justice Merkel)

In this matter the Court had to determine whether two companies, which owned shares in a third company, could combine through a bidding vehicle to acquire that company in a manner which did not breach s 615 of the Corporations Law. Section 615 prohibits an acquisition of more than 20 per cent of the shares in a listed company otherwise than pursuant to a takeover scheme.

Normandy Mining Holdings, a part of the Normandy group of companies, and Edensor Nominees owned 27.81 per cent and 12.56 per cent respectively in Great Central Mines Ltd. In January 1999, the Normandy group and Edensor Nominees combined through a bidding vehicle, Yandal Gold Pty Ltd, to acquire Great Central Mines. Yandal Gold is a wholly owned subsidiary of Yandal Gold Holdings which is owned by Edensor and Normandy Consolidated Gold, which is part of the Normandy group of companies. The Court held that the agreement to use Yandal Gold as a bidding vehicle breached s 615 in two respects.

First, the Court found that there had been agreements between Normandy Mining Holdings and Edensor Nominees that neither would accept the takeover offers in respect of their respective holdings of shares in Great Central Mines and would retain the shares. It was held that, as a result of these agreements, each of the parties had acquired a “relevant interest” in the shares of Great Central Mines held by any of the other parties. The acquisition of relevant interests in this way contravened s 615.

Second, it was held that Yandal Gold Holdings' ownership of Yandal Gold, and the shareholdings of Edensor and Normandy Consolidated Gold in Yandal Gold Holdings, resulted in each of them being deemed, by reason of s 33 of the Corporations Law, to have power to vote and to dispose of the shares held by Edensor and Normandy Mining Holdings in Great Central Mines and, therefore, to have a relevant interest in those shares. Section 33 operates to regulate indirect holdings of shares and provides that where a company has power to vote in respect of a share or power to dispose of a share, a person shall be deemed to have in relation to the share the same power as the associate company. Justice Merkel concluded that it was consistent with the legislative scheme and policy for no distinction to be drawn between acquisitions of an actual or deemed relevant interest. This meant each company had acquired the relevant interest that it was deemed to have under s 33. His Honour held that this acquisition contravened s 615.

The Court also found that, as a consequence of the breaches of s 615, certain statements made in Yandal Gold's statement and offer to purchase shares were misleading to the shareholders in Great Central Mines, thereby breaching the relevant provisions of the Trade Practices Act, *Australian Securities and Investments Commission Act 1989* and the Corporations Law.

The question of the appropriate relief to be granted in this case posed some difficulty. By the time the matter came before the Court, 94.37 per cent of the shares in Great Central Mines (including the 40.37 per cent held by Normandy and Edensor) had been acquired by the bid vehicle but the market value of the shares had dropped significantly due to the falling price of gold. As a consequence, forfeiture of the shares and their resale on the market was unlikely to have resulted in any benefit to shareholders and therefore would have been of little utility.

However, the Court concluded that the agreement had allowed Yandal Gold to offer a lower share price than it would have otherwise had to offer for the bid to succeed. The benefit of utilising the bid vehicle with Edensor's support was found to be the benefit provided by Normandy to Edensor to secure its support for the bid, which was valued at \$28.5 million. The Court, in exercising its discretion to provide ‘just’ relief, ordered Edensor to disgorge that benefit to shareholders who had accepted the takeover offer. The Court also ordered that shareholders who had accepted the offer were entitled to avoid their contracts.

The judgment is the subject of an appeal by Edensor to the Full Court of the Federal Court.

2.3 MANAGEMENT OF THE WORKLOAD OF THE COURT

Caseflow Management

One of the key caseflow management principles is the establishment of a time goal within which cases will be disposed. A related principle is the implementation of practice and procedure designed to dispose of cases within the time goal.

The Court has previously reported that it has set the period of eighteen months from commencement as the goal within which it should dispose of at least 98 per cent of its cases. The Court recognises, however, that the majority of cases will be disposed of well within the eighteen month period, while some particularly large and/or difficult legal and/or factual cases will require more time. Indeed, many cases need to be disposed quickly after commencement and the Court's practice and procedure facilitates this. During the year, 68 per cent of cases were disposed of in less than six months.

During the five year period from 1 July 1994 to 30 June 1999, 87.5 per cent of matters were completed in less than eighteen months, 80.1 per cent in less than twelve months and 64.3 per cent in less than six months (see Figure 6.4 in Appendix 6 on page 109). By focussing upon achievement of its time goals, the Court has increased the percentage of cases disposed of in less than eighteen months. Figure 6.4a at page 110 shows the percentage of matters completed within eighteen months over the last four reporting years. The figure shows a steady rise leading to 90.6 per cent of matters in 1998-99 completed within eighteen months.

Figure 6.4a also shows that in 1995-96, 3,879 matters were completed compared to 4,883 matters in 1996-97, an increase in the completion rate of 26 per cent. In 1997-98, 7,357 matters were completed, an increase of 51 per cent over the previous reporting year. For the current reporting year, 7,546 were completed which was an increase of 2.6 per cent over the 1997-98 reporting year.

As is mentioned elsewhere in the report, bankruptcy and related cases are included in the total completed figure from 16 December 1996. These cases have contributed to a proportion of the increase.

A key factor in the ability of the Court to maintain its disposal rate is the mix of cases. If the number of bankruptcy cases were to increase substantially then it could be expected, if the rest of the case mix remained unchanged, for the disposal rate to continue to increase. This is because bankruptcy matters, the majority of which are dealt with by Registrars in sequestration proceedings, are usually completed in less than six months. However, working against such a trend may be another major change in the case mix, such as a large increase in Native Title actions. Native Title matters are usually complex, protracted, and resource intensive. Many may take between two and three years to complete, particularly as a result of the need to conduct long and remote locality hearings.

The mix of cases will therefore affect the Court's ability to meet its goal of disposing 98 per cent of matters within 18 months. The Court may need to revise its goal in the light of the incoming workload and the resources available to dispose of that workload.

The Court believes that the increased disposal rates for reporting years 1996-97 onwards is in a large measure attributable to the introduction of the individual docket system and associated practice and procedural reforms.

The key elements of the individual docket system are as follows.

- A case will ordinarily stay with the same judge from commencement until disposition. The benefits to the legal profession, the parties and the Court include the familiarity the judge will have with the facts and circumstances of the case.
- The adoption of a time standard of no more than eighteen months for the disposal of most cases.
- Most cases are allocated to judges shortly after they have commenced.
- Cases are managed from commencement to disposition, including the monitoring of compliance with directions by parties and maintaining regular contact with parties regarding the progress of a case.
- Fewer formal directions and events requiring appearance in the case management process.
- Better identification of cases suitable for assisted dispute resolution.

Combined with an ability to provide greater efficiency and flexibility in setting dates for interlocutory applications, short hearings and trials, the application of these key elements appears to be contributing to the

increase in the number of matters completed by the Court and thereby narrowing the gap between the current disposal rate (90.6 per cent) and the Court's goal of disposing of 98 per cent of matters within eighteen months of commencement (see Figure 6.4a at 110).

Appellate jurisdiction

The Court has a substantial and increasing appellate workload. In 1997-98, 330 appeals to the Full Court were filed, while in the reporting year, 419 appeals were filed, an increase of 27 per cent between the two reporting periods. (See Figure 6.9 on page 118 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 1999 calendar year, four Full Court sittings have been programmed for Sydney, Melbourne, Brisbane, Perth, Adelaide and Canberra, two for Hobart and one for 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. During the reporting year, 37 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 either convene an urgent sitting of a Full Court in a capital city other than that in which the case was originally heard or use video-conferencing facilities.

Delivery of judgments

In the reporting period, 1,838 Full Court and single judge judgments were delivered. This figure includes both written judgments and judgments delivered 'ex tempore' on the day of the hearing. When decisions are published, they are immediately made available to the parties and the media.

The Court provides electronic copies of judgments for legal publishers. This service was provided via a dial-in Bulletin Board. However, as the Bulletin Board software was not Year 2000 compliant it was replaced in early June 1999 by an e-mail service. Judgments are now e-mailed to the subscribers several times a day as they are indexed. At the end of the reporting year, the e-mail service had 13 external users.

Judgments are also available on the Internet at the Australasian Legal Information Institute (AustLII) site. These judgments are accessible directly from the Federal Court's Home Page at <http://www.fedcourt.gov.au>. The availability of judgments electronically assists the speedy dissemination of the Court's judgments to the legal and wider community.

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 single judge matters and Full Court appeals together, was less than 36 days. Some 50 per cent of reserved judgments in single judge matters were delivered within 30 days. In Full Court matters, 65 per cent of reserved judgments were delivered within 60 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. Judgments involving judicial registrars, registrars and Industrial Relations Court of Australia matters were excluded in the above calculations.

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.

2.4 WORKLOAD TRENDS

General trends

In previous Annual Reports the Court reported upon a number of factors which affected its workload. Some of those factors continued in the reporting year and are set out below.

- Matters which would have been filed in the Industrial Relations Court of Australia ("IRCA") prior to 26 May 1997 are now filed, on account of legislative changes, in the Court since that day. In the reporting year 212 Workplace Relations matters were filed in the Court. In addition, of the 381 matters transferred from the IRCA on 26 May 1997, 20 were still current.

- 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, contributed to a decline in Corporations Law matters and, in particular, winding-up applications (usually uncontested and dealt with very quickly by Registrars). In the reporting years ending 30 June 1996, 30 June 1997 and 30 June 1998, 1,946, 1,096 and 832 Corporations Law matters were filed. The decline in Corporations Law matters has continued into the reporting year with 668 matters filed (see Figure 6.5 on page 111).
- The Bankruptcy Legislation Amendment Act, which commenced on 16 December 1996, transferred certain bankruptcy administration functions previously undertaken by officers of the Court to the Insolvency and Trustee Service, Australia. One of the consequences of the changes in administrative functions is that bankruptcy statistics, formally recorded in their own database, are now recorded in the Court's general applications database FEDCAMS (Federal Court Case Management System). Court statistics since 1997-98 therefore need to be considered in that context when comparison are made to earlier reporting years.

In addition, the following factors in the reporting year impacted upon the Court's workload and will continue to do so in future.

- On 17 June 1999 the High Court of Australia delivered judgments in *Re Wakim Ex parte McNally & Anor* and three other related cases. In brief, the High Court held that the *Corporations Act 1989* (Cth) and the *Corporations (NSW) Act 1990* (NSW) were invalid in so far as they purported to give the Federal Court jurisdiction to exercise State judicial power. Likewise, the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) and the *Jurisdiction of Courts (Cross-Vesting) Act 1987* of each of the States were also invalid with regards to the Federal Court and its purported exercise of State judicial power. The decisions mean that the Court can no longer hear Corporations Law matters unless they relate to a Territory Corporation or fall within the pendent or associated jurisdiction of the Court.

The conferral on the Court of jurisdiction to determine a particular issue normally carries with it authority to decide the whole of any single justiciable controversy of which the issue forms an integral part. This added jurisdiction has been described as "pendent", "accrued" or "attached". The "associated" jurisdiction of the Court is set out in s 32 of the Federal Court of Australia Act and provides that, to the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked.

- The Native Title Act was amended by the *Native Title Amendment Act 1998*. One of the amendments to the Act was to provide, from 30 September 1998, for new applications for a determination of native title (including a revised determination) or compensation, to be made to and determined by the Court, and for existing applications to be transferred from the National Native Title Tribunal (the Tribunal) to the Court. At 30 June 1999, 65 new Native Title matters had been commenced in the Court, and 726 of the 794 matters transferred from the Tribunal remained current.

Incoming work

Table 6.1 on page 105 is a summary of workload statistics for the reporting years 1994-95 to date. The table shows that 4,523 cases were commenced in 1998-99, an increase of 1,026 compared to 1997-98, when 3,497 cases were commenced.

By comparison, the decline in incoming matters in 1996-97 and 1997-98 was due to the decline in Corporations Law matters from 1,946 in 1995-96 to 1,096 in 1996-97 and 832 in 1997-98. In the same periods the incoming matters, (excluding Corporations Law matters), were 2,361, 2,759 and 2,665. As noted above, 381 matters were transferred to the Court from the Industrial Relations Court of Australia in 1997. These matters were included in the 1996-97 statistics. In addition, 794 Native Title matters were transferred to the Court on 30 September 1998. The trend, therefore, with the exception of 1995-96, is for the Court's incoming workload (excluding Corporations Law matters) to increase in every year since 1994-95, including the reporting year.

Matters completed

Table 6.1 also allows for a comparison between the number of matters commenced and the number completed. The number of matters (including Corporations Law matters) completed during the report year was 3,999, as against 4,085 in the previous reporting year. This slight decline in completed matters was against the trend, commencing in 1994-95, of the number of matters completed increasing in every reporting year. However, if completed Corporations Law matters are excluded there was a slight increase in the number of matters completed in the reporting year compared to 1997-98.

Matters on hand

The number of matters on hand in the reporting year was 3,651 (Table 6.1, page 105), which is 583 more than the previous reporting year. Prior to the reporting year 1996-97, the number of current matters continued to increase for the reporting years 1994-95 onwards. As mentioned in last year's report, the decline in current matters in 1996-97 and 1997-98 can, in some respects, be attributable to the decline in Corporations Law filings. This decline continued in the reporting year. If the 726 Native Title matters current at 30 June 1999 are not included in the current workload then the trend of a decline in current matters is continued in the reporting year.

Appellate workload

Figure 6.9 on page 118 shows that there were 419 appeals to the Full Court in the reporting year. This was an increase of 89 matters or 27 per cent above the filings for 1997-98. The trend since 1994-95 has been for Full Court appeals to increase in every reporting year. In 1994-95 there were 254 appeals, with the increase between that year and the current reporting year being 165 matters or 65 per cent. If the number of appeals were to continue to increase by the average percentage over the last five reporting years (12 per cent), there will be 470 appeals lodged in 1999-2000. However, if the rate of increase in 1998-99 compared to 1997-98 continues (27 per cent), then more than 530 appeals could be lodged in 1999-2000. This will be a 110 per cent increase in the last five years.

The increase in the number of appeals is not surprising given the increase in the number of first instance matters disposed of in the reporting year. Increases in the number of Full Court hearings, which are usually constituted by three and sometimes five Judges, increases the workload of the Court and its ability to dispose of its first instance work, as there are fewer Judges available for first instance work.

The Court is concerned at the possible effects of the increase in the number of appeals, including its impact on the Court's ability to continue to hear its appellate workload efficiently, effectively and in a timely manner.

Age of pending caseload

The comparative age of matters pending as at 30 June for each of the previous five years is set out in Table 2a below.

The Table shows that the trend (reported upon last year) for the number of cases over 18 months old to decrease has continued in the reporting year. For example, at 30 June 1997 the number of pending matters over 18 months old was 1,081. This figure has reduced to 754 in the reporting year.

Although the number of pending matters at 30 June 1999 (3,651) is higher than for 30 June 1998 (3,068), this can be explained by the 794 Native Title matters transferred to the Court on 20 September 1998, of which 726 were current as at 30 June 1999. If these Native Title matters are not included, then the trend towards a reduction in the number of pending matters, commencing in the reporting year ending 30 June 1997, is maintained into this reporting year. The Court will continue to focus upon avoiding delay and reducing existing delays.

Table 2a
Current matters (including Corporations Law matters) - historical

| Age of matters | Matters current as at 30-Jun-95 | Matters current as at 30-Jun-96 | Matters current as at 30-Jun-97 | Matters current as at 30-Jun-98 | Matters current as at 30-Jun-99 |
|-----------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|
| under 6 months | 1,547 | 1,444 | 1,427 | 1,196 | 1,257 |
| 6-12 months | 573 | 754 | 729 | 631 | 1,378 |
| 12-18 months | 310 | 769 | 390 | 391 | 262 |
| Under 18 months | 2,430 | 2,967 | 2,546 | 2,218 | 2,897 |
| 18-24 months | 280 | 232 | 256 | 268 | 197 |
| over 24 months | 649 | 588 | 825 | 582 | 557 |
| over 18 months | 929 | 820 | 1,081 | 850 | 754 |
| Total | 3,359 | 3,787 | 3,627 | 3,068 | 3,651 |

A collection of graphs and statistics concerning the workload of the Court is contained in Appendix 6 to this report commencing on page 104.

Native title matters

The role of the Court in native title matters was significantly changed when amendments to the Native Title Act commenced on 30 September 1998. The amendments established a new regime where the Court has responsibility for the mediation and determination of native title applications. To perform its new functions the Court has been given a wide range of powers in relation to the management and resolution of native title applications.

Under the new regime, applications are filed in the Court and not the National Native Title Tribunal (“the Tribunal”). Applications which satisfy the Court’s requirements are referred to the Tribunal which applies a registration test to determine whether the native title applicant has the right to negotiate. The Tribunal will also mediate applications referred to it by the Court.

When the amendments commenced, 794 native title determination applications before the Tribunal were taken to be filed with the Court. In addition, some 58 matters were already before the Court having been referred by the Tribunal under s 74 of the old Native Title Act. As at 30 June 1999, the Court had before it 830 native title determination applications.

To ensure that the Court’s enhanced native title jurisdiction is dealt with efficiently, the following key management initiatives were implemented during the reporting year.

- The Court has introduced a national allocation protocol for the case management and listing of native title matters. Under the protocol, each case is allocated provisionally to a judge (“the Provisional Docket Judge”) who, with the assistance of a Deputy Registrar for Native Title, is responsible for managing the

case initially. The provisional allocation usually continues while the matter is being considered for registration by the Native Title Registrar, and, where relevant, while it is in active mediation with the 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 Native Title Secretariat for substantive allocation to a trial judge.

- The Court has recruited experienced staff in the positions of Deputy Registrar for Native Title and native title case managers. These officers assist the Provisional Docket Judge in the review hearing process, and help applicants and parties to a native title proceeding in the practice and procedure of the Court.
- Order 78 of the Federal Court Rules was significantly amended in light of the Court's enhanced jurisdiction. The amended rules came into operation on 30 September 1998. Further amendments to Order 78 were also made during the reporting year.
- Under the auspices of the Court's Native Title Coordination Committee, notes have been prepared for the assistance of practitioners, unrepresented applicants and other interested persons to explain the practices adopted by the Court in native title cases.
- The Provisional Docket Judges in each State or Territory have convened user groups for native title cases. This approach has been adopted primarily because the native title cases have features which make them different from many other cases for the purpose of management and determination, for instance, the number of parties involved, and the nature of the evidence called. In general terms the aim of each native title user group is to allow the Court to explain its procedures to the people who use the Court; and to allow the users to explain to the Court their requirements and the extent to which the procedures can be modified to work better.

The number of native title matters, and the impact of the amendments to the Native Title Act, present a number of challenges for the Court. The case management and determination of many native title matters will be resource intensive, and hearings will often involve the taking of evidence on site. For example, the *Yorta Yorta* case involved 147 hearing days. To meet this challenge the Court will monitor the allocation process to ensure that the native title work does not become too burdensome, and that the native title cases will be managed, heard and determined in a timely and appropriate manner.

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 1998-99, 39 matters were remitted or transferred to the Court:

21 from the High Court of Australia
18 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 1998-99, 43 matters were transferred from the Court:

2 to the Family Court of Australia;
32 to State or Territory Supreme Courts; and
9 to District or County Courts.

2.6 CROSS-VESTING MONITORING COMMITTEE

The Chief Justice of the Federal Court is the Convenor of a body known as 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.

2.7 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 2a on page 53 sets out the number of matters referred to mediators during the period 1994-95 to 1998-99. The program has proved popular, with a total of 1098 matters referred to mediation during the period 1994-95 to 1998-99, or an average of 220 referrals per reporting year.

Prior to 17 April 1997, the program was based upon 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.

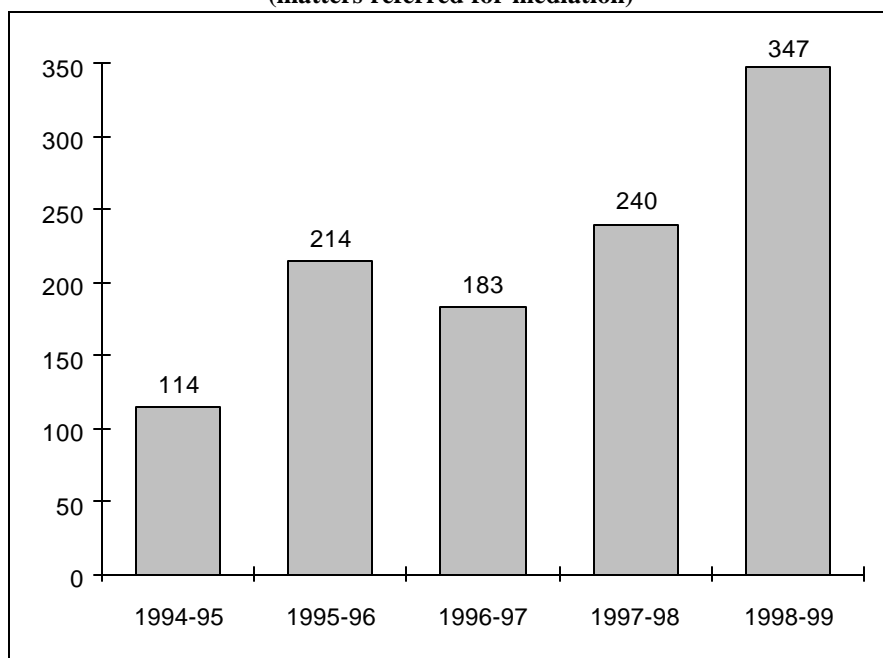
With the introduction of individual docketing, greater emphasis has been put on the identification, at an early stage, of cases suitable for assisted dispute resolution. In the reporting year 347 matters were referred compared with 240 in 1997-98.

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, 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 mean savings in costs to the parties and court time.

Figure 2a shows the number of matters referred to mediation since 1994-95.

Figure 2a

**Assisted Dispute Resolution (ADR) 1994-95 to 1998-99
(matters referred for mediation)**



It should be noted that the figures reported are different from the figures reported in previous years. These variations have occurred through the incorporation into previously published statistics of mediations conducted by external mediators, through refinements or enhancements to the Court's FEDCAMS database which necessitated the checking or verification and possible variation of data previously entered, and from random audits of earlier data.

External mediation

Enhancements to the FEDCAMS ADR database have made it possible to report on matters referred to external mediators. Eight referrals occurred in 1995-96, 70 in 1996-97, 28 in 1997-98 and 76 in the reporting year. These figures are included in Figure 2a.

