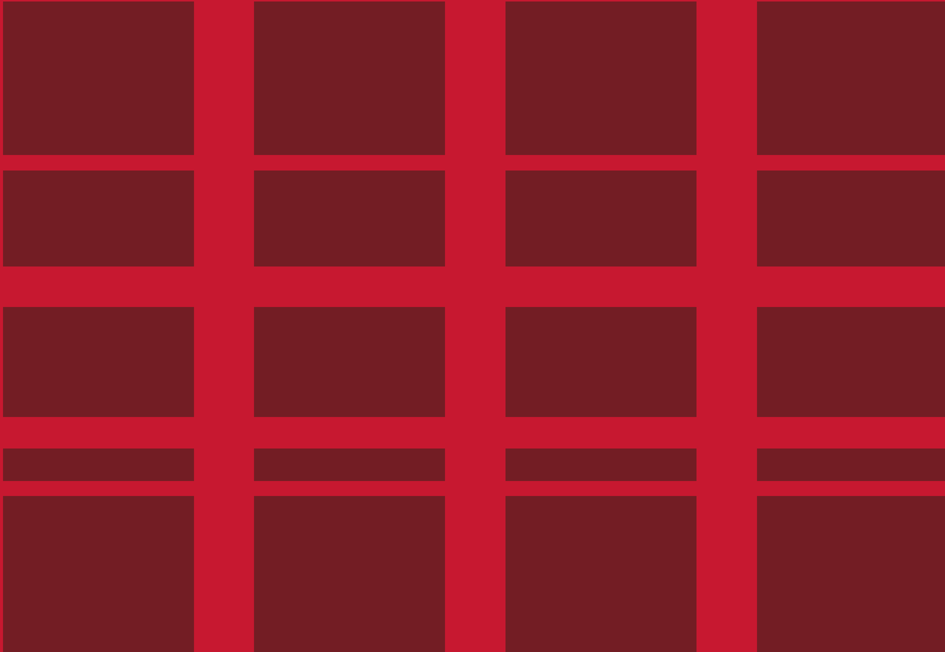
ANNUAL REVIEW 2004



Supreme Court
of New South Wales

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FOREWORD BY CHIEF JUSTICE OF NSW

This Review provides information of the Court's stewardship of the resources made available to it. The primary measure of the Court's activity must be qualitative: fidelity to the law and fairness of its processes and outcomes. This Review sets out in short summary a few of the cases decided in the year 2004. They are a small sample of the 2,000 or so separate substantive judgments delivered by the 51 judicial officers of the Court.

The Review also contains information of a quantitative kind relevant to the efficiency with which the Court deals with its caseload and the speed with which litigants have their disputes resolved.

The judicial officers and the staff of the Court take a collective pride in the substantial contribution which the Court makes to social stability and the economic prosperity of this State. Without the rule of law, administered by judges with a high level of independence, impartiality and integrity neither personal freedom nor economic progress would be possible.

Participants in the legal system, both judges and practitioners, are well aware that its efficacy depends on the high level of trust that the public has in the operations of the courts. Public confidence in the administration of justice cannot be taken for granted. It is a trust which must be continually earned so public confidence can be continually replenished.

The manner in which that trust has been earned during the course of this year has depended on the participation by members of the public in the entire process of the administration of justice, whether as parties, witnesses, or jurors. That participation cannot be adequately reflected in a Review of this character.

The full detail of the court's contribution exists in the volume of documentation produced - encompassing tens of thousands of pages of judgments and hundreds of thousands of pages of transcript. The bald figures of filings, disposals and pending caseload upon which this Review reports cannot reflect the richness that is contained in the considerable volume of documentation which the court's judicial officers and registrars generated in the course of the year.

Nevertheless, some indication of the contribution made by the court and the effectiveness and efficiency of its procedures can be gleaned from the Review. I am quite confident that during 2004 the Court operated at as high a level as it has ever done.

J J Spigelman AC

1 2004: AN OVERVIEW

- Notable judgments
- Court operations
- Education and Public Information
- CourtLink and Uniform Civil Procedures legislation update
- Consultation with Court users
- Other judicial activities

Notable judgments

During 2004, the Court of Appeal handed down 478 judgments, and the Court of Criminal Appeal delivered 475. At first instance, a total of 1,288 judgments related to the Court's criminal and civil trial work. Some judgments were particularly notable, either for their contribution in developing the law, their factual complexity, or the level of public interest they generated. Summaries of a selection of these judgments appear in Appendix (i) to this Review.

Court operations

The avoidance of excessive delay remains a priority for the Court. The Court's efficiency was subject to some media and public scrutiny in 2004. In most areas of its work, the Court has either been able to consolidate upon gains achieved in recent years, or at least maintain its position. However, some areas could not realise their expected outcomes during 2004 or improve upon their achievements in 2003. The *Court operations* chapter outlines the specific time standards set by the Court, and provides detailed analysis of the results achieved in each jurisdiction. This chapter should be read in conjunction with Appendix (ii) which contains comprehensive statistical data regarding the Court's caseload during 2004.

Education and public information

The Court organised several conferences and seminars during the year for its judicial officers that aimed to enhance awareness of recent developments in the administration of justice domestically and abroad. The Public Information Officer provides reliable information about contentious issues or proceedings before the Court to the media and thus the community. In addition, regular court talks delivered by Registrars provide student and community groups with a unique insight into the work of the Court and its place in the State's legal system. The new chapter *Education and public information* details the Court's judicial education and public information programme during 2004.

CourtLink and uniform civil procedures legislation update

The CourtLink system is a significant development for the Court. The NSW Attorney General's Department is managing the project in close consultation with the Court's Judges and staff to ensure that CourtLink delivers improved services to Court users. A single system – CourtLink – with linked databases for each NSW Court jurisdiction, will mean greater ease of access for Court users. Implementation of CourtLink will enable time standards to be adopted for all of the Court's work. The Attorney General's Department also worked closely with the Court during 2004 in drafting legislation designed to increase cross-jurisdictional uniform civil processes. Further details about the Court's involvement in the CourtLink and uniform civil procedures projects during 2004 can be found in the chapter *Other aspects of the Court's work*.

Consultation with Court users

In 2003 the Court continued to work closely with Court users through a number of different processes. Registry managers and staff met regularly with different groups of Court users and also attended meetings with the legal profession and justice agencies. A number of Court committees seek to improve the Court's systems and procedures to give effect to suggestions made by Court users. A list of the Court's Committees and User Groups forms Appendix (iii) to this Review.

Other judicial activities

The Judges of the Court participate in a wide range of activities other than the administration of justice, including judicial education, speeches and the publication of articles and books (generally on legal matters), and involvement in a wide range of community organisations. The practices, procedures, structures and systems of NSW courts are of interest to court officials in other countries, especially those in the Asia-Pacific region. The Court's Judges are committed to providing appropriate assistance within the region, as evidenced by the delegations hosted by the Court and the international work undertaken by the Court's Judges. Such other judicial activity is set out in Appendix (iv).

2 COURT PROFILE

- The Court's jurisdiction and Divisions
- Who makes the decisions: the Judges, Masters and Registrars
- Supporting the Court: the Registry

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

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

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

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

- Common Law Division, and
- Equity Division.

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

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

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

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

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

Court of Appeal

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

Court of Criminal Appeal

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

Sittings of the Court of Criminal Appeal are organised on a roster basis whilst taking into account the regular judicial duties and commitments of the Judges who form the Court's bench. The Judges who sit in the Court of Criminal Appeal are the Chief Justice, the President, the Judges of the Court of Appeal, the Chief Judge at Common Law and Judges of the Common Law Division. During 2004, the Court sat during each week of law term.

Common Law Division

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

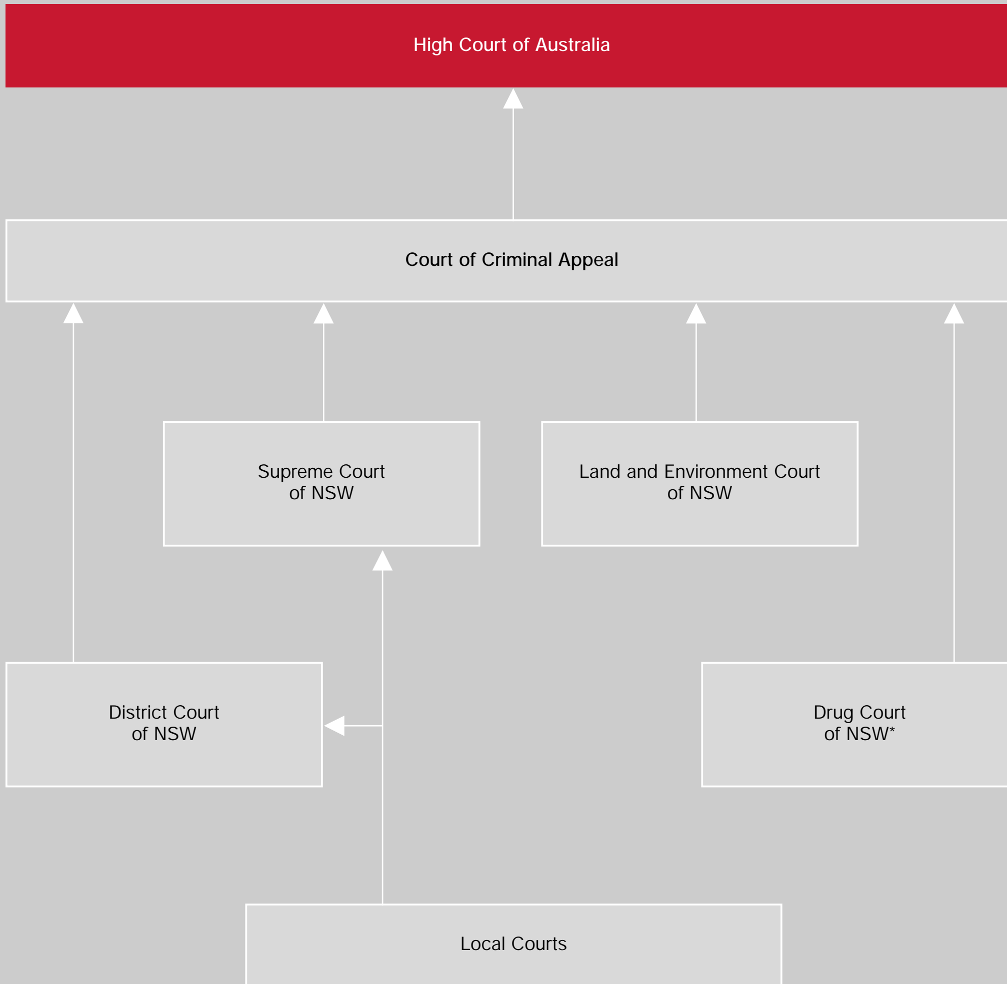
The Court deals with all serious personal injury and contractual actions, in which the Court has unlimited jurisdiction. The civil business of the Division also comprises:

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

Equity Division

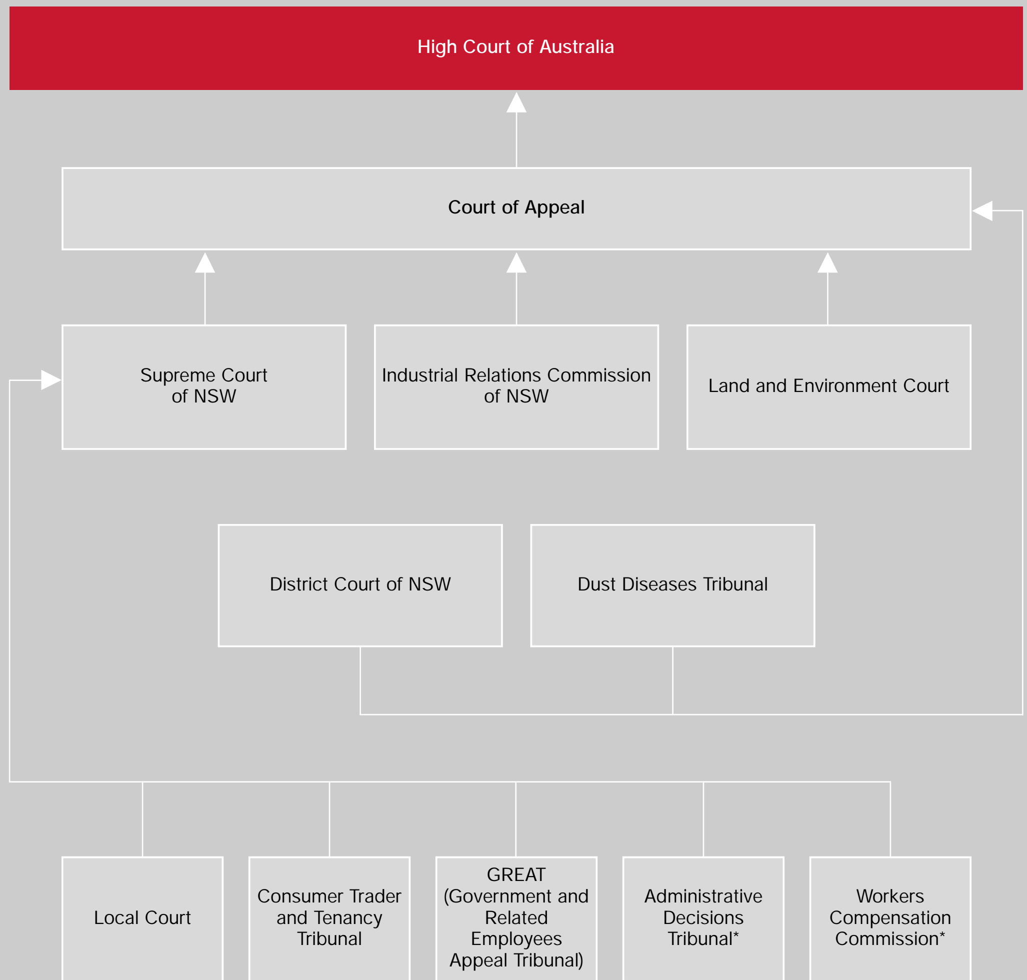
The Equity Division exercises the traditional Equity jurisdiction dealing with claims for remedies other than damages and recovery of debts, principally in respect to contractual claims, rights of property, disputes relating to partnerships, trusts, and deceased estates. The Division hears applications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

FIGURE 2.1 **NSW COURT SYSTEM – CRIMINAL JURISDICTION**



Note: the above diagram is a simplified representation of the appeal process in NSW. Actual appeal rights are determined by the relevant legislation.
** Some appeals are made to the District Court of NSW.*

FIGURE 2.2 **NSW COURT SYSTEM – CIVIL JURISDICTION**



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

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

The Judicial Officers of the Supreme Court of New South Wales are its Judges and Masters. The Registrars of the Court have limited judicial powers.

The Judges

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

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

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

The *Supreme Court Act 1970* also provides that the Chief Justice may appoint Judges to administer a specific list within the Common Law or Equity Divisions. Details of the Judges assigned to these lists in 2004 can be found in the chapter entitled *Caseflow Management.*

As at 31 December 2004 the Judges, in order of seniority, were as follows:

Chief Justice
The Honourable James Jacob Spigelman AC

President
The Honourable Justice Keith Mason AC

Judges of Appeal
The Honourable Justice
Kenneth Robert Handley AO

The Honourable Mr Justice
Charles Simon Camac Sheller AO

The Honourable Justice
Margaret Joan Beazley

The Honourable Justice
Roger David Giles

The Honourable Justice
David Hargraves Hodgson

The Honourable Justice
Geza Francis Kim Santow OAM

The Honourable Justice
David Andrew Ipp

The Honourable Justice
Murray Herbert Tobias AM RFD

The Honourable Justice
Ruth Stephanie McColl AO

The Honourable Justice
John Purdy Bryson

Chief Judge at Common Law
The Honourable Justice
James Roland Tomson Wood AO

Chief Judge in Equity
The Honourable Mr Justice
Peter Wolstenholme Young AO

Judges
The Honourable Mr Justice
Michael Brian Grove RFD

The Honourable Mr Justice
Timothy James Studdert

The Honourable Mr Justice
Brian Thomas Sully

The Honourable Mr Justice
Bruce Meredith James

The Honourable Mr Justice
William Victor Windeyer AM RFD ED

The Honourable Justice
David Daniel Levine RFD

The Honourable Mr Justice
John Robert Dunford

The Honourable Mr Justice
Robert Shallcross Hulme

The Honourable Justice
Carolyn Chalmers Simpson

The Honourable Justice
Harold David Sperling

The Honourable Justice
Peter John Hidden AM

The Honourable Justice
Graham Russell Barr

The Honourable Mr Justice
John Perry Hamilton

The Honourable Justice
Clifford Roy Einstein

The Honourable Justice
Gregory Reginald James

The Honourable Justice
Michael Frederick Adams

The Honourable Justice
David Kirby

The Honourable Justice
Robert Peter Austin

The Honourable Justice
Patricia Anne Bergin

The Honourable Justice
Virginia Margaret Bell

The Honourable Justice
Anthony Gerard Joseph Whealy

The Honourable Justice
Roderick Neil Howie

The Honourable Justice
Reginald Ian Barrett

The Honourable Justice
George Alfred Palmer

The Honourable Justice
Joseph Charles Campbell

The Honourable Justice
Terence Lionel Buddin

The Honourable Justice
Ian Vitaly Gzell

The Honourable Justice
William Henric Nicholas

The Honourable Justice
Robert Calder McDougall

The Honourable Justice
John David Hislop

The Honourable Justice
Richard Weeks White

The Honourable Justice
Clifton Ralph Russell Hoeben AM RFD

Acting Judges

The following persons held commissions as Acting Judges of Appeal or Acting Judges of the Court during 2004, and sat from time to time:

The Honourable John Edward Horace Brownie QC
(Acting Judge & Acting Judge of Appeal)
1 January 2004 to 31 December 2004

The Honourable Jane Hamilton Mathews
(Acting Judge & Acting Judge of Appeal)
1 January 2004 to 20 December 2004

The Honourable Peter David McClellan
(Acting Judge & Acting Judge of Appeal)
1 January 2004 to 31 December 2004

The Honourable Jerrold Sydney Cripps QC
(Acting Judge & Acting Judge of Appeal)
1 January 2004 to 20 December 2004

The Honourable Jeffrey Allan Miles AO
(Acting Judge & Acting Judge of Appeal)
1 January 2004 to 26 November 2004

The Honourable Rex Foster Smart QC
(Acting Judge)
1 January 2004 to 31 December 2004

The Honourable Kenneth John Carruthers QC
(Acting Judge)
1 January 2004 to 9 May 2004

The Honourable Peter James Newman RFD
(Acting Judge)
1 January 2004 to 31 December 2004

The Honourable Thomas Swanson Davidson
(Acting Judge)
1 January 2004 to 31 December 2004

The Honourable James Charles Sholto Burchett QC
(Acting Judge)
1 January 2004 to 31 December 2004

The Honourable David Louthean Patten
(Acting Judge)
15 November 2004 to 31 December 2004

The Honourable Paul Leon Stein AM
(Acting Judge & Acting Judge of Appeal)
2 February 2004 to 31 December 2004

The Honourable Mahla Pearlman
(Acting Judge & Acting Judge of Appeal)
2 February 2004 to 31 December 2004

The Honourable William Harwood Knight
(Acting Judge)
15 November 2004 to 31 December 2004

The Honourable Michael William Campbell
(Acting Judge & Acting Judge of Appeal)
5 February 2004 to 31 December 2004

Appointments, Retirements and Resignations

Appointments

- Justice John Purdy Bryson was appointed a Judge of Appeal on 17 March 2004
- John David Hislop QC was appointed a Judge of the Court on 23 March 2004
- Richard Weeks White SC was appointed a Judge of the Court on 27 April 2004
- Clifton Ralph Russell Hoeben SC AM RFD was appointed a Judge of the Court on 16 August 2004.

Retirements

- The Honourable Justice Roderick Pitt Meagher retired as a permanent Judge of Appeal on 16 March 2004.
- The Honourable Justice Barry Stanley John O'Keefe AM retired as a permanent Judge of the Supreme Court on 22 March 2004.
- The Honourable Justice John Robert Arthur Dowd AO retired as a permanent Judge of the Supreme Court on 23 August 2004.
- The Honourable Justice Jeffrey William Shaw resigned as a permanent Judge of the Supreme Court on 12 November 2004.

The Masters

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

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

Applications that arise before trial include:

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

In the Common Law Division, Masters conduct trials of actions for personal injury and possession of property. Masters do not hear jury trials. The Common Law Masters also hear other trials (without a jury) that are referred to them by a Judge or the Court of Appeal, in addition to appeals from the Local Court and various tribunals. The Masters also handle appeals against the determinations of cost assessors.

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

As at 31 December 2004, the Masters were as follows:

- John Kennedy McLaughlin
- Bryan Arthur Malpass
- Richard Hugh Macready
- Joanne Ruth Harrison

Grahame James Berecry, Registrar in Equity, held a commission as an Acting Master of the Supreme Court throughout 2004.

For detailed information regarding the Court's Caseflow Management procedures, refer to the chapter entitled Caseflow Management.

The Registrars

Registrars are appointed by the Governor pursuant to section 120 of the *Supreme Court Act 1970*. Registrars are allocated to work within the Court of Appeal, or to each Division; however, they are permitted to work outside these boundaries, if required.

Registrars are afforded limited judicial powers under the Supreme Court Rules, and undertake some of the duties formerly performed by Judges and Masters.

The work of the Registrars commonly includes:

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

Registrars are assigned specific powers under the *Supreme Court Rules 1970* that permit them to directly assist the Judges in caseflow management. For instance, in the Court of Appeal, the Registrar deals with most interlocutory applications, excluding applications to stay judgment pending an appeal; in the Common Law Division, the Registrar conducts status and final conferences in the Differential Case Management List, and also assists the Possession List and Professional Negligence List Judges.

The Registrars may also be called upon to mediate cases. During 2004, ten of the Court's Registrars were qualified mediators and available to conduct mediations throughout the year on a rostered basis.

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

As at 31 December 2004, the Registrars were as follows:

Chief Executive Officer and Principal Registrar
Megan Greenwood

Manager, Court Services and Prothonotary
Jerry Riznyczok

Registrar of the Court of Criminal Appeal
Jerry Riznyczok

Registrar of the Court of Appeal
Peter Schell

Registrar in Equity
Grahame Berecry

Registrar in Probate
Jonathan Finlay

Assistant Registrar at Common Law
Bruce Howe

Senior Deputy Registrars
Deborah Robinson

Paul Studdert

Nicholas Flaskas

Phillippa Wearne

Deputy Registrars
Emoke Durkin

Geoffrey Haggett

Bhaskari Siva

Suzin Yoo

Leonie Walton

The Work of the Registry

The Court operates with the support of four registries. There are two general registries for civil claims and criminal matters, and one specialist registry each for the Court of Appeal and the Court of Criminal Appeal. Generally, each Registry provides administrative and clerical support to each jurisdiction.

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

The Court of Appeal Registry provides specialist support and procedural guidance to the Court of Appeal's judges, litigants and their representatives, as well as performing the general administrative tasks outlined above. Staff of the Court of Criminal Appeal Registry provide similar support to the Court of Criminal Appeal's judicial officers and users, and also enforce orders concerning the custody of prisoners.

How the Registry is Managed

The Chief Justice directs the priorities to be pursued by the Registry. In general, the priorities reflect the central aim of meeting the expectations of Court users, whilst servicing their needs with competency, efficiency and professionalism.

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

3 CASEFLOW MANAGEMENT

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

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

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

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

Court of Appeal

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

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

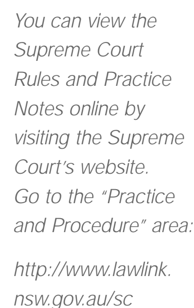
The Registrar case-manages and lists most appeals and applications for leave to appeal, however some cases may be referred to a Judge of Appeal for special case management. Urgent cases are expedited and can be heard at short notice, if appropriate. The Registrar in the Court of Appeal also deals with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

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

Court of Criminal Appeal

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

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



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

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

Common Law Division

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

Common Law List Judge

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

Justice Bell was the Common Law List Judge in 2004.

Common Law Duty Judge List

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

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

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

Masters' List

The Masters in the Common Law Division deal with statutory appeals from the Local Court (except under the *Crimes (Local Courts Appeal and Review) Act 2001)*, the Consumer Trader and Tenancy Tribunal, and against cost assessors. The Masters also deal with applications for summary judgment and dismissal, applications for extension under the *Limitations Act 1969*, as well as opposed applications to transfer matters from the District Court. The Masters may deal with other matters as outlined in Schedule D of the *Supreme Court Rules 1970.*

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

Lists of the Division

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

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

The Chief Justice appoints a specific Judge to be responsible for the management of a List throughout the year. The Judges responsible for the management of a list during 2004 are detailed below.

Administrative Law List

The Administrative Law List reviews decisions of government, public officials and administrative tribunals such as the Consumer Trader and Tenancy Tribunal. The Administrative Law List operates in accordance with the procedures outlined in Practice Note No 119.

In 2004, Mr Justice Dunford was responsible for the management of the Administrative Law List, with the assistance of Justice Adams.

Bails List

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

Criminal List

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

The arraignment procedure involves counsel at an early stage of the proceedings. This allows both the prosecution and defence to consider a range of issues that may provide an opportunity for an early plea of guilty, or shorten the duration of the trial. The procedures for arraignment are detailed in Practice Note No 112.

Justice Barr was responsible for the management of the Criminal List during 2004.

Defamation List

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

The Defamation List was managed by Justice Nicholas during 2004. A Registrar assists by case-managing matters listed for directions. Practice Notes Nos 14 and 114 govern the operation of the List.

Differential Case Management (DCM) List

This List comprises all civil cases commenced by Statement of Claim that cannot be included in the Administrative Law, Defamation, Professional Negligence or Possession Lists. It includes money claims, personal injury claims, claims for possession (excluding land), breach of contract, personal property damage, malicious prosecution, and claims under *the Compensation to Relatives Act 1897*. These cases are case-managed by a Registrar who conducts status conferences, and final conferences. At the status conference, the Registrar gives directions to ensure the case is ready for hearing by the compliance date. The procedures associated with the running of this List are set out in Practice Note No 120.

The DCM List was managed by Justice Hoeben from 30 August 2004.

Possession List

The Possession List deals with all proceedings for the recovery of possession of land. The management of the List encourages early resolution of cases through mediation, other alternative dispute resolution processes, or settlement. Case management is also used to clarify the real issues in dispute. Practice Note No 106 applies to cases in this List.

Justice Greg James was responsible for the management of the Possession List during 2004.

Professional Negligence List

Claims against medical practitioners, allied health professionals (such as dentists, chemists and physiotherapists), hospitals, solicitors and barristers are allocated to the Professional Negligence List. Specialisation in the List allows the parties to focus on the real issues under dispute in these types of claims. A Registrar monitors cases at regular conference hearings. Conference hearings provide an opportunity for parties to discuss outstanding issues in the case, and provide a forum for mediation between the parties. The Professional Negligence List Judge hears applications and makes directions according to the specific needs of each matter.

Mr Justice Studdert managed the List during 2004 with the assistance of Justice Sperling.

Equity Division

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

- Expedition List;
- One Day List;
- Equity Duty Judge List;
- Masters' List, and
- General List.

Expedition List

In 2004, the List was assigned one Judge only as delays in general Equity matters allocated to the callover were reduced considerably. The Expedition List Judge heard all applications for expedited hearings in 2004. A case is expedited when sufficient urgency is shown. When the application is granted, the Judge gives directions and monitors the preparations for hearing. The same Judge hears the case when it is ready to proceed.

Justice Gzell, was the Expedition List Judge during 2004.

One Day List

Cases in this List are fixed for hearing before a Judge when judicial time becomes available at short notice. A Registrar maintains this List, which includes cases that will be ready for hearing with three days' notice. These are mostly cases of a less complex kind that can usually be disposed of within one day.

The One Day List was suspended in 2004, and matters were instead allocated to the Expedition List on the last Friday of the month.

Equity Duty Judge List

The Duty Judge mainly hears urgent interlocutory applications, and uncontested or short cases, sometimes outside normal court hours. Judges of the Division act as Duty Judge on a roster system, for two weeks at a time.

There is provision for the Duty Judge to fix an early hearing date for a case and engage in pre-trial management of that case. The Duty Judge would make use of this provision if he or she considers that an early final hearing would result in a substantial saving of the Court's time.

The work carried out by the Duty Judge is extremely varied and may include urgent applications by the Department of Community Services to intervene where a child's welfare is involved, or property and commercial disputes.

Masters' List

The work of the Equity Division Masters includes dealing with contested procedural applications and conducting inquiries as directed by Judges. Their work also includes the hearing of most applications under the *Family Provision Act 1982*, the *Property (Relationships) Act 1984*, and certain provisions of the *Corporations Act 2001 (Commonwealth)*.

A Master conducts a monthly callover of matters, at which time a hearing date (usually in two months' time) is allocated. A Master also handles weekly referrals from the Registrar, determining those that can be dealt with immediately, and adjourning the balance. The Registrar only refers matters where the hearing time is not expected to exceed an hour. More complex matters are listed in the next call-over of proceedings in the Masters' List. Urgent referrals, such as the extension of a caveat, may be made at any time.

Lists of the Division

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

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

The Chief Justice appoints a Judge to each of these Lists to bear responsibility for monitoring the List throughout the year. The Judges allocated to each List during 2004 are noted below.

Admiralty List

The Admiralty List deals with maritime and shipping disputes. It is administered in the same manner as the Commercial List (see below).

Justice Palmer had responsibility for this List in 2004.

Adoptions List

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

Justice Palmer was the List Judge during 2004.

Commercial List

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

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

There is also adherence to the allotted hearing dates, and hearings are continued to conclusion, even though time estimates may be exceeded.

Justice Bergin was the List Judge during 2004.

Corporations List

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

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

The Corporations List Judge during 2004 was Justice Austin, assisted by Justice Barrett.

More information on mediation can be accessed if you visit the "Practice and Procedure" section of the Court's website at: www.lawlink.nsw.gov.au/sc

Probate List

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

Both the Probate List Judge and the Registrars have procedures whereby some supervision is kept over executors in the filing of accounts, and ensuring beneficiaries are paid. This supervision is usually by way of "spot checks" or upon receiving a complaint.

The Registrar sits in court twice each week to consider routine applications, and applications concerning accounts. Should a routine application require a decision on a matter of principle, the application is referred to the Probate List Judge.

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

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

The Probate List Judge meets with the Registrars on a regular basis to discuss the efficient working of the List. Mr Justice Windeyer was the Probate List Judge during 2004.

Protective List

The work of this List involves ensuring that the affairs of people deemed incapable of looking after their property, or themselves, are properly managed. The List also deals with appeals from the Guardianship Tribunal of NSW, along with applications (in chambers) by the Protective Commissioner for advice regarding the administration of estates.

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

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

The Protective List Judge meets with the Deputy Registrar each month to discuss the efficient working of the List. Mr Justice Windeyer was the Protective List Judge during 2004.

Technology and Construction List

Previously known as the "Construction List", the alteration to the List's name was made in 2001 to reflect the increasing number of cases involving complex technological issues. These cases, as well as disputes arising out of building or engineering contracts, are administered by the same Judges and in the same manner as the Commercial List.

REGIONAL SITTINGS OF THE COURT

The Court of Criminal Appeal sat in Lismore in August 2004, and several first instance criminal trials were conducted during the year in the following regional locations: Armidale, Bathurst, Dubbo, East Maitland, Gosford, Griffith, Katoomba, Lismore, Newcastle, Orange, Queanbeyan and Wollongong. Criminal trials will continue to be held in regional venues on a needs basis.

Demand for civil hearings at regional venues continued to decline and, except for the Riverina district, there was insufficient work in regional areas to warrant proceeding with the scheduled civil circuits in 2004. The Court heard two civil proceedings in Wagga Wagga whilst on circuit in the Riverina region. Additional civil proceedings were specially fixed for hearing during the year at Wagga Wagga, Lismore, Newcastle, Young, East

Maitland and Coffs Harbour. From 2005, the Court will hear matters in regional venues by special fixture and will no longer conduct civil circuits on account of the declining workload.

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

ALTERNATIVE DISPUTE RESOLUTION

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

Mediation

The option of dispute resolution through mediation is available for most civil proceedings pursuant to Part 7B of the *Supreme Court Act 1970*. Mediation is not available in criminal proceedings.

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

The role of the mediator is to assist parties in resolving their dispute by alerting them to possible solutions, whilst allowing the parties to choose which option is the most agreeable. The mediator does not impose a solution on the parties. The Court made ten of its qualified Registrars and Deputy Registrars available throughout 2004 to conduct mediations at specified times each week.

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

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

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

Arbitration

While arbitration involves adjudication of a dispute by a third party, this adjudication is not conducted by the Court. Determination of a dispute regarding recovery of damages through arbitration is permitted under Section 76B of the *Supreme Court Act 1970*. Arbitrations are conducted under the *Arbitration (Civil Actions) Act 1983*.

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

By contrast with a mediator, an arbitrator imposes a solution on the parties (an award) after listening to the arguments and evidence presented. A decision of an arbitrator becomes a final judgment of the Court 28 days after the award is given. Any party to the arbitration may apply for a rehearing, upon which, the matter is then reheard before a Judge.

NEW MEDIATION PROCEDURES

Significant changes to the Court's mediation referral procedures took effect from 1 January 2004. The changes involve the implementation of a Joint Protocol designed to assist the Court in appointing mediators when parties cannot, or will not, appoint a mediator of their choosing. Practice Note No 125 details the new procedures in full.

Go to the "Practice and Procedure" section of the Court's website to read Practice Note No 125 and find out more information about the Joint Protocol

www.lawlink.nsw.gov.au/sc

4 COURT OPERATIONS

- Time standards
- Overview of operations by jurisdiction

TIME STANDARDS

Since 2000, the Court has set time standards for cases dealt with in the Court of Appeal, Court of Criminal Appeal and the Criminal List. Those standards have been reviewed each year and, in some cases, adjusted to reflect changes in circumstances, such as changes in the work flowing to the Court.

Other courts and organisations also report on case disposal times but statistics are not necessarily comparable. Filings and disposals may be dealt with in different ways. To cite criminal cases as an example, the District Court of New South Wales measures the time between committal and commencement of the trial, while the Australian Bureau of Statistics produces national statistics that measure the time from committal to acquittal or sentencing.

The Court has determined that future reporting of timeliness in case handling will not use case finalisation times but will instead use the age of pending cases (a measure similar to the "backlog indicator" used by the Productivity Commission in its national reports). In the Criminal List:

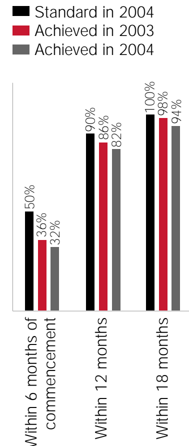
- the counting unit will be defendants (not trials);
- cases awaiting sentence will be included (under the previous reporting used by the Court, cases were excluded once a verdict had been reached or plea entered); and
- if a trial has been started in a case but has subsequently collapsed, that trial time will be included.

For the Court of Appeal, the Court of Criminal Appeal and the Criminal List, the court will report the percentages of pending cases that are within 12 months of age and within 24 months of age.

By measuring changes in the age of the pending caseload, a current position will be shown that reflects the effectiveness of delay reduction strategies and helps identify factors influencing the management of future cases. This contrasts with use of case finalisation times, which may be misinterpreted. For example, when a large number of old cases has been finalised, longer finalisation times are reported – this is commonly interpreted as indicating entrenched delay for future cases; the correct interpretation is, however, that the Court has finalised a large number of its older cases.

The Court has determined that it will report on the age of pending cases for the civil work of the Common Law and Equity Divisions once the CourtLink system is available to provide precise and timely statistics on the age of these cases. Currently the Court's civil workload comprises approximately 7,500 pending cases, excluding non-contentious probate applications.

FIGURE 4.1
COURT OF APPEAL ACHIEVEMENTS AGAINST TIME STANDARDS FOR DISPOSALS



OVERVIEW OF OPERATIONS BY JURISDICTION

Court of Appeal

Since 2000, there has been approximately 11 per cent growth in the overall work handled by the Court of Appeal. Although the Court has maintained a high level of disposals since 2001, the amount of work on hand has grown during that time by 20 per cent. In the last two years there has been a 17 per cent increase in filings of appeals and applications for relief, cases that typically demand more of the resources of the Court of Appeal. More appeals and applications for relief were disposed of by judgment than by other methods this year compared with last year (72 per cent compared with 65 per cent).

Although the amount of work on hand has grown, the age profile of the pending caseload remains in a good position. The pending caseload's age was monitored throughout 2004 and at the end of the year the position was:

Age of pending cases	Position at end of 2004
Percentage of cases younger than 12 months	59 per cent
Percentage of cases younger than 24 months	91 per cent

For the Court of Appeal, the time standards referred to the time taken to dispose of appeals (including any preceding application for leave to appeal), summonses (for other relief) and applications for leave to appeal where an appeal does not follow. Figure 4.1 illustrates the achievements against time standards in 2004 and provides a comparison with the previous year.

The increased number of substantive appeal matters that required judgment to be reserved may have contributed to the small decrease in the 12-month and 18-month categories. Also, the reduced disposal rate for leave applications, which

FIGURE 4.2
COURT OF CRIMINAL APPEAL ACHIEVEMENTS AGAINST TIME STANDARDS FOR DISPOSALS

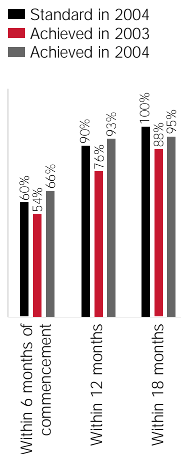
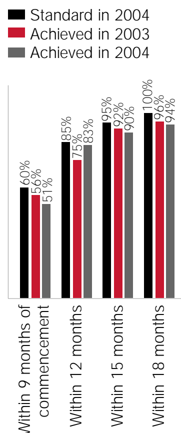


FIGURE 4.3
ACHIEVEMENTS AGAINST TIME STANDARDS FOR THE DISPOSAL OF CRIMINAL CASES IN THE COMMON LAW DIVISION



are generally finalised at significantly younger ages than are substantive appeal matters, is likely to have influenced the change in performance in the six-month category.

Court of Criminal Appeal

The impact of the changes, commenced on 1 July 2002, to criminal appeal procedures, has now largely stabilised. The filing and disposal rates 2004 are comparable with the figures for 2003. However, the number of cases finalised by hearing of the substantive issues increased by 11 per cent during 2004, compared with the previous year.

The age profile of the pending caseload was monitored throughout 2004. During the year it continued to shift as the number of "old system" cases diminished. By the end of 2004 there were only seven "old system" cases remaining (representing three per cent of all pending criminal appeals). At the end of the year the position was:

Age of pending cases	Position at end of 2004
Percentage of cases younger than 12 months	89 per cent
Percentage of cases younger than 24 months	97 per cent

The standard applied to disposals within 6 months of commencement for Court of Criminal Appeal matters was tightened for 2004, and there was a significant improvement in disposal times across the other time standards. Figure 4.2 illustrates the achievements and improvements in disposal times during 2004.

Common Law Division criminal cases

The number of criminal cases filed during 2004 was 26-33 per cent lower than in years between 2000 and 2003. The acting judge program enabled disposals to be maintained at 2002 and 2003 levels and this, together with the low filing rate, resulted in an 18 per cent decrease in the pending caseload.

The age profile of the Criminal List, for trial and sentence cases, is presented based on the new counting rules for the Criminal List. These figures count the number of defendants (not the number of trials) and do not include applications made under s474D Crimes Act. The age of criminal cases is measured from the date of committal, presentment of an ex-officio indictment, referral of a case from the Mental Health Review Tribunal, or execution of a bench warrant. If a trial has been started in a case but has subsequently collapsed, that trial time is included. At the end of 2004 the position was:

Age of pending cases	Position at end of 2004
Percentage of cases younger than 12 months	59 per cent
Percentage of cases younger than 24 months	91 per cent

While the reduced number of filings has assisted to bring down the number of pending cases, the achievements have decreased marginally in some categories. This is because there were fewer pleas of guilty entered at trial and because some very long trials were run during 2004. These factors increased the listing delay for some criminal cases. The Court used its acting judges to enable more hearing time to be allocated for criminal trials during 2004 and 2005 to contain the increase in listing delay.

There were fewer adjourned or collapsed trials during 2004 and, for the fourth year in succession, no criminal trial has been "not reached". Where there are early indications that a trial might not run, the Court will consider listing a reserve trial. Supreme Court trials generally involve murder and manslaughter charges and any unsuccessful over-listing can create emotional and financial stress for the family of the victim and for witnesses. It also has a financial impact for the community, which funds the various agencies involved in bringing criminal cases to trial and supporting the criminal justice system.

Common Law Division civil cases

The civil work of the Common Law Division can be separated into two groups: defended cases (including the specialist case-managed lists) currently representing about 60 per cent of the cases on hand, and administratively handled cases (such as cases proceeding to default judgment and applications dealt with by Registrars and Registry officers).

The volume of Common Law Division civil filings has fluctuated over the last five years – the number of cases filed in 2004 was 25 per cent higher than that in 2003 (and only three per cent below the peak seen in 2001). Numerically, most of the increase is within the cases that proceed to default judgment, Importantly, however, there has been a 23 per cent increase in the filing

of cases that proceed as defended matters. Increased judicial resources and improved caseflow management have led to a 27 per cent decrease in the pending caseload over the past five years. Each of the defended lists has reduced its pending caseload over the past five years. The largest list, the Differential Case Management List has achieved a 44 per cent reduction since 2000. These reductions help to reduce delay for cases that are waiting to be heard.

There was a decrease in the settlement rate among cases listed for hearing, and the proportion of hearings "not reached" returned to the 2002 level of five per cent after a record low of two per cent in 2003. As well as hearing defended civil cases, the judges of this Division hear all work in the Criminal List. Additionally, the bench constituted in the Court of Criminal Appeal usually includes two, and often three, judges from the Common Law Division.

In most lists, median finalisation times have either improved or been maintained. Significant increases in median finalisation time occurred in the Differential Case Management List and the Professional Negligence List – these increases reflect the finalisation of old cases during the year rather than an expectation of increased delay for cases on hand. For criminal cases in the Summons List, the median waiting time is not indicative of delay because many of these cases have dormant periods between separate examinations concerning proceeds of crime.

Equity Division

For the fourth year in succession the filings in the Equity Division have increased. During 2004 the increase was eight per cent, principally in the Corporations List and the General List. The disposal rate has also shown a trend of increase and the 2004 increase was five per cent. Filings outnumbered disposals in 2004 and, consequently, the pending caseload has increased again over the year. There has been a 12 per cent growth in the cases on hand since 2000.

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

There were 312 cases heard to conclusion before Judges or Masters during 2004. Among cases listed for hearing before Judges and Masters, the settlement rate improved by five per cent. Typically, about half of the disposals within the Equity Division are achieved in the Registrar's lists (and most of those would have not required any listing before a Judge or Master).

As with the Common Law Division civil work, no time standards were set for Equity Division case disposals during 2004. Median case finalisation times have either improved or been maintained at a good level. The apparent large increase in median finalisation time for Admiralty List cases is not of concern – volatility in statistics is expected in small lists. The improvement within the Technology and Construction List is substantial and reflects prompt finalisation of many of the cases making up the increased filings for the year in that List.

Registrars deal with the uncontested applications relating to probate matters. A total of 22,506 applications were filed during 2004. Where an application for a grant of probate, letters of administration or re-seal (of a probate grant) meets all procedural requirements, the grant is usually made within three working days.

Use of alternative dispute resolution

The number of cases referred to court-annexed mediation has continued to grow, with a large increase of 43 per cent during 2004. The Court's Registrars conducted 90 more mediations in 2004 than in 2003 and continued to achieve a healthy percentage of settlements.

Fewer cases were referred to arbitration this year, compared with last year. The number of suitable cases for arbitration has been significantly limited since 1997 when the District Court's jurisdiction expanded to include most of the work that had typically been arbitrated in the Supreme Court.

5 EDUCATION & PUBLIC INFORMATION

- The Supreme Court of NSW Annual Conference
- Judicial officer education initiatives
- The role of the Public Information Officer
- Pro Bono Scheme
- The Court's public education programme

THE SUPREME COURT OF NSW ANNUAL CONFERENCE

The 2004 Annual Conference was held in Bowral from 20 to 22 August. The Right Honourable the Lord Walker of Gestingthorpe provided the Keynote Address on the issue of constitutional changes in the United Kingdom's justice system. Lord Walker later spoke to some of the Court's judicial officers about the issue of dishonesty and unconscionable conduct in commercial life, particularly Accessory Liability and Knowing Receipt. Dr Grant Lester, Consultant Psychiatrist at the Victorian Institute of Forensic Mental Health, also addressed the Conference on the topic of Understanding and Managing the Difficult Litigant. Professor Peter Cane of the Australian National University delivered a speech on tort law developments; Professor Michael Furmston of Bristol University spoke regarding Universal Terms in Contract and Professor Larissa Behrendt addressed Issues Involved in the Sentencing of Aboriginal Offenders. Judges of the Court also gave papers at the Conference on such issues as recent developments in criminal trials, and civil penalty proceedings.

JUDICIAL OFFICER EDUCATION INITIATIVES

On 22 October 2004, Mr Luke Grant from the New South Wales Department of Corrective Services addressed the judges of the Court about current approaches to the rehabilitation of offenders in custody.

On 17 November 2004, the Honourable Justice McClellan, Chief Judge of the Land and Environment Court, presented a seminar to judicial officers entitled "Concurrent evidence – developments in the Land and Environment Court". His Honour talked about the method by which expert evidence is now taken in the Land and Environment Court, involving experts on the same topics giving evidence concurrently. The seminar described the process and Justice McClellan's observations of its benefits to the resolution of complex expert issues in civil litigation.

THE ROLE OF THE PUBLIC INFORMATION OFFICER

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

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

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

The PIO is also responsible for ensuring that media outlets are alert to any suppression orders issued in proceedings, and that they are familiar with the terms and impacts of these orders. The distribution of, and adherence to, suppression or non-publication orders is critical as the media's failure to acknowledge them in their coverage could compromise proceedings.

For the first time in 2004, statistics were kept for a sample period on the demand for information from the PIO. During the trial three month period:

- 349 media inquiries were completed at an average of 34.9 per week;
- 83% of inquiries related to Supreme Court matters;
- 13% of inquiries related to District Court matters; and
- 4% of inquiries related to other courts and including the Land and Environment Court and the Industrial Relations Commission of NSW.

PRO BONO SCHEME

The Pro Bono Scheme under Part 66A of the Supreme Court Rules was established in 2001 with support from the NSW Bar Association and the Law Society of NSW. The scheme enables unrepresented litigants, who have been considered by the Court to be deserving of assistance, to be referred to a barrister and/or solicitor. Ten referrals were made during the year; seven of these referrals were made in Common Law matters, two were made in the Equity Division and one in the Court of Appeal.

The Scheme's success depends upon the continued goodwill of barristers and solicitors, and the Court gratefully acknowledges those who give of their time so freely in supporting the Scheme.

PUBLIC EDUCATION PROGRAMME

During 2004, Registrars of the Court addressed more than 70 secondary school and community groups regarding the Court's jurisdiction and daily operations. These talks culminate in the groups being escorted to an appropriate courtroom where they witness an actual Supreme Court trial in progress.

In 2004, the Court's public education programme also extended to participating in Law Week 2004: Opening the Door to the Law, the National Trust's Heritage Week, the History Council of NSW's History Week and the Historic House's Trust Sydney Open Day. The activities provided by the Court ranged from architectural tours of the King Street Complex to free educational displays of historic court documents.

6 OTHER ASPECTS OF THE COURT'S WORK

- CourtLink
- Law Courts Library
- Admission to the Legal Profession and appointment of Public Notaries
- Admission under the Mutual Recognition Acts
- Administration of the Costs Assessment Scheme

COURTLINK

The CourtLink project represents a significant development for the Court. Unnecessary differences in the Supreme, District and Local courts have been identified and flagged for elimination. For example, upon Parliament passing the Courts Legislation Amendment Bill 2004, the number of criminal forms was reduced from more than 600 to less than 100. With regard to civil proceedings, work on the Uniform Civil Procedure Bill continued during 2004 with the aim of introducing common rules and procedures for all three New South Wales jurisdictions sometime in mid-2005.

Although the NSW Attorney General's Department manages the CourtLink project, judicial officers of the Court, and key Registry staff, have been actively involved since the project's inception. The work of the CourtLink Steering Committee and the Uniform Civil Procedure Working Party has proven particularly valuable in ensuring that CourtLink will meet the needs of the Court. Both bodies are initiatives of the NSW Attorney General's Department, and include representatives from the Supreme, District and Local Courts. The following judicial officers and Registry staff represented the Supreme Court during 2004:

The Honourable Justice Ipp (until July)

The Honourable Mr Justice Hamilton

The Honourable Justice Greg James

The Honourable Justice Howie (from August)

The Honourable Justice Gzell (from August)

Master Macready

Ms Megan Greenwood, Chief Executive Officer and Principal Registrar

During 2004, CourtLink was implemented in two areas of the Court: the Court of Criminal Appeal and the Common Law Division's criminal jurisdiction. Implementation of the CourtLink system into the Court of Appeal and civil jurisdictions has been postponed until early 2006.

LAW COURTS LIBRARY

Organisation of Business

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

The Operations Committee comprises an equal number of representatives from the NSW Attorney General's Department and the Federal Court of Australia. The Operations Committee is responsible for setting budget priorities, revenue, business planning and Library policy. The Advisory Committee consists of three Judges from the Federal Court of Australia and three Judges from the Supreme Court of NSW. The Advisory Committee consults with the Operations Committee on matters of budget, collection development and service provision. During 2004, the Supreme Court representatives on the Advisory Committee were:

The Honourable Mr Justice Sheller AO

The Honourable Justice Ipp

The Honourable Justice Austin

Library Services

The Law Courts Library acts as a legal resource and information centre to the Judges, Masters and Registrars of the Court and provides the following services:

- Legal reference and research services and guides;
- Access to a comprehensive range of electronic resources and services via the Library Homepage;
- Guides to the Library's collections and resources;
- Legal research training using hard copy, electronic databases and internet resources;
- Document delivery and inter-library loan services;
- On-line index to Hansard including details of first and second reading speeches, and assent and commencement dates for NSW and Commonwealth legislation; and
- On-line current awareness service.

ADMISSION TO THE LEGAL PROFESSION AND APPOINTMENT OF PUBLIC NOTARIES

The Legal Practitioners Admission Board is a self-funding statutory body established under the *Legal Profession Act 1987*. The Board is responsible for making rules for and approving applications for the admission of legal practitioners and the appointment of public notaries. Once admitted as a legal practitioner, a person may apply to the Law Society of NSW or the NSW Bar Association for a practising certificate as either a solicitor or barrister. The Board comprises the Chief Justice, three other Judges of the Supreme Court, a nominee of the Attorney General and key members of the legal profession.

The Board maintains a close working relationship with the Supreme Court in other respects, by providing officers to assist in the administration of admission ceremonies, maintaining the Rolls of Legal Practitioners and Public Notaries, and liaising with the Court's Registry about applications made under the Mutual Recognition Acts. In addition, five Judges of the Court provide important policy input by maintaining positions on the Boards' committees.

During 2004, the members of the Legal Practitioners Admission Board were:

The Honourable the Chief Justice

The Honourable Mr Justice Windeyer AM RFD ED (Presiding Member)

The Honourable Mr Justice Sully (Deputy Presiding Member)

The Honourable Mr Justice Studdert

Professor D Barker

Mr R Benjamin

Mr C Cawley

Mr J Feneley

Mr J Gormly SC

Professor C Sappideen

Mr P Taylor SC

Executive Officer and Secretary: Mr R Wescombe

The Board's work during 2004

- In 2004, commissioned by the Board, Mr Frank Riley, reviewed all Board-accredited practical training courses, evaluating them against the national framework of Competency Standards for Entry Level Lawyers. The Board will consider Mr Riley's findings and recommendations in 2005.
- The Board contributed to the drafting of admission-related sections of the *Legal Profession Act 2004* and to a review of the *Public Notaries Act 1997*. The subsequent legislation will necessitate extensive revision of the Board's rules and forms in 2005.
- In co-operation with the Law Extension Committee of the University of Sydney, the Board continues to provide access to academic legal qualifications at a considerably lower cost than universities. Table 6.1 below summarises the Board's workload in recent years.

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

	2002	2003	2004
New Legal Practitioners Admitted by the Board	1,748	1,843	1,965
Certificates of Current Admission produced by the Board	682	691	534
Public Notaries appointed by the Board	34	34	51
Students-at-Law registrations	861	965	920

Legal Qualifications Committee

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

During 2004 the members of the Legal Qualifications Committee were:

The Honourable Mr Justice Dunford (Chairperson) (until 30 June)

The Honourable Justice Barrett (Deputy Chairperson) (Chairperson from 1 July)

The Honourable Justice Kirby (from 1 July)

The Honourable Justice Palmer

Mr R Benjamin

Mr C Cawley

Mr J Fernon SC

Mr M Fitzgerald
Associate Professor A Goh
Mr R Harris (from 1 July)
Associate Professor A Lamb
Associate Professor K Maxwell (from 1 July)
Associate Professor G Monahan (until 1 July)
Ms J Oakley
Ms R Pepper (until 1 April)
Ms G Ramensky
Dr K F Sin (until 1 July)
Mr D Toomey (from 1 April)
Executive Officer and Secretary:
Mr R Wescombe

Work during 2004

The number of applications from overseas lawyers seeking recognition of their legal qualifications has diminished in the past year. Table 6.2 below provides a comparison of the number of applications processed in 2004 against previous years.

TABLE 6.2:
Applications considered by the Legal Qualifications Committee

	2002	2003	2004
Applications for Academic Exemptions	433	525	424
Applications for Practical Training Exemptions	254	281	212

Examinations Committee

The Examinations Committee, formed in July 2002, is constituted by the Legal Practitioners Admission Rules to oversee the content and conduct of the Board's examinations and the candidatures of Students-at-Law. It has three sub-committees. The Performance Review Sub-Committee determines applications from students seeking to avoid or overcome exclusion from the Board's examinations. The Curriculum Sub-Committee, in consultation with the Board's examiners and revising examiners, plans the curriculum for the Board's examinations, and the Quality Sub-Committee oversees the quality of examinations and marking.

During 2004, the members of the Examinations Committee were:

The Honourable Justice Simpson (Chairperson)
The Honourable Justice Campbell (Deputy Chairperson)
Mr R Anderson
Mr F Astill
Mr R Benjamin (until 30 June)
Mr M Christie
Mr J Dobson (from 30 June)
Associate Professor G Monahan
Executive Officer and Secretary:
Mr R Wescombe

Work during 2004

- The Committee commenced a project to involve the Board's examiners in the specification of its curriculum. This project will continue in 2005.
- The number of Students-at-Law sitting for the Board's examination sessions has increased for the third successive year. Table 6.3 details the type and number of applications considered by the Committee in recent years.

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

	2002	2003	2004
Examination subject enrolments by Students-at-Law	4,866	5,303	5,693
Approved applications to sit examinations in non-scheduled venues	48	44	39
Approved applications for special examination conditions	22	14	13
Student course applications determined by the Examinations Committee	308	392	322
Students-at-Law applications liable for exclusion from the Board's examinations	299	393	400

ADMISSION UNDER THE MUTUAL RECOGNITION ACTS

The management of applications from legal practitioners for admission under the Mutual Recognition Acts forms another aspect of the Registry's work. The Registry liaises with the Legal Practitioners Admission Board in performing this task. In 2004, 304 interstate and New Zealand practitioners were enrolled under Mutual Recognition Acts, compared with 330 in 2003 and 317 in 2002. Although the number of practitioners enrolled under Mutual Recognition Acts is generally trending downwards under the influence of recent legislation that permits practitioners in one State to practise in another, there is still a significant number of practitioners seeking such enrolment.

ADMINISTRATION OF THE COSTS ASSESSMENT SCHEME

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

The Costs Assessment Scheme is the exclusive method of assessment of legal costs for most jurisdictions. A costs assessment application enables an assessor to determine costs disputes between practitioners and clients, between practitioners and practitioners or between parties to legal proceedings. Applications under the Scheme are determined by external assessors appointed by the Chief Justice. All assessors are members of the legal profession and educational seminars are arranged for them each year by the Costs Assessors' Rules Committee. Mr Robert Benjamin, solicitor, is the current Chair of the Costs Assessors' Rules Committee. In conjunction with the Costs Assessment Rules Committee, a Costs Assessors Users' Group meets on a quarterly basis to discuss issues in costs assessment from a user's perspective. The Costs Assessors Users' Group is chaired by Justice Barrett and consists of court assessors, costs consultants and representative of the Office of the Legal Services Commissioner.

From 1 January 2004 to 31 December 2004 there were 2,203 applications lodged. Of these, 1,592 (72 per cent) related to costs between parties, 220 (10 per cent) were brought by clients against practitioners, and 355 (16 per cent) were brought by practitioners. The remaining applications were 36 applications lodged between legal practitioners for assessment of costs either instructing practitioners against retained practitioners and the reverse. The review process, which is relatively informal in nature, is carried out by two senior assessors of appropriate experience and expertise and is conducted along similar lines to that used in the original assessment process. The review panel can vary the original assessment and is required to provide a short statement of its reasons. During 2004 there were 160 applications filed for review of costs assessments. There is still provision to appeal the review panel's decision to the Court, as of right on questions of law and otherwise by leave. These appeals are heard by Masters in the Common Law Division and form part of the Division's civil caseload. There were nine appeals filed in 2004.

7 APPENDICES

The Court's full text judgments are accessible online at: http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll_caselaw.nsf/pages/cl_sc

1. Adler v Director of Public Prosecutions

This appeal was brought against the refusal of the trial judge, Mr Justice James, to permanently stay the prosecution of the appellant on the grounds of abuse of process because of exposure to double jeopardy. The appellant submitted that he had already been punished for the conduct that was subject to criminal prosecution, by virtue of earlier civil proceedings brought by ASIC. He argued that it was the commonality of facts in both proceedings, not the elements of the offence, which were relevant to the rule against double jeopardy.

The Court of Criminal Appeal held that the prosecution was not an abuse of process. Their Honours found that the criminal offences were different in important respects from all of the causes of action in the civil proceedings. In particular, the findings and orders made in the civil proceedings were based on a civil standard of proof and the elements were not identical. The situation of the appellant was thereby distinguished from the situation in *The Queen v Carroll (2002) 213 CLR 635*, where a perjury indictment for denials made at trial was manifestly inconsistent with an acquittal for murder. Further, the 'double jeopardy' that was the focus of Carroll, involved multiple prosecutions, that is, repeated jeopardy of criminal punishment for the one incident. The appellant's case did not involve repeated prosecutions.

Bench: Mason P; Grove J; Barr J.
Judgment citation: Adler v Director of Public Prosecutions [2004] NSWCCA 352
Judgment date: 15 October 2004

1. Where there are separate civil and criminal proceedings sharing a commonality of facts, there is no exposure to double jeopardy if the elements of the offences are not identical

2. AMACA Pty Ltd (Formerly known as James Hardie & Coy Pty Ltd) v The State of New South Wales & Anor

Mr Hay, while employed by Rolls Royce when it was constructing the Wallerawang Power Station for the Electricity Commission of New South Wales (now Pacific Power), was exposed to asbestos dust and fibre and, some 30 years later, contracted mesothelioma. He brought an action for damages against Rolls Royce and Pacific Power (the owner and occupier of the power station). Rolls Royce and Pacific Power consented to judgment in favour of Mr Hay. James Hardie (AMACA's previous name) manufactured and supplied products containing asbestos that were used in the construction of the power station. Rolls Royce and Pacific Power cross-claimed against James Hardie for contributions to the damages each became obliged to pay to Mr Hay. Each obtained an order for a contribution of 50 per cent from James Hardie. James Hardie cross-claimed against the State of New South Wales for an order for contribution towards any sum it might be ordered to pay by way of contribution to Rolls Royce and Pacific Power. It contended that the State negligently failed to exercise its powers under the *Scaffolding and Lifts Act 1912 (NSW)* by not adequately inspecting the site at which Mr Hay was working and not giving appropriate directions as to the dangerous manner in which the work was being carried out.

Eventually, after further litigation concerning James Hardie's claim against the State, it was the subject of a judgment by the High Court, the result being that the matter was remitted to the Court of Appeal to consider whether the claim should fail on the ground that the State owed no duty of care to Mr Hay.

The Court of Appeal drew a number of propositions from the leading authorities dealing with negligent performance of statutory duties. In particular, it noted that, generally, a public authority, which is under no statutory obligation to exercise a power, owes no common law duty of care to do so. A duty of care does not arise merely because an authority has statutory powers, the exercise of which might prevent harm to others. The existence of statutory powers and the prior exercise of those powers from time to time do not, without more, create a duty to exercise those powers in the future. Knowledge that harm may result from a failure to exercise statutory powers is not itself sufficient to create a duty of care. An authority may by its conduct, however, attract a duty of care that requires the exercise of power. The Court of Appeal identified several categories in which the duty of care may be attracted by a statutory authority, one being of particular relevance to the case, namely, where an authority exercises control, generally, over any situation that contains with it a risk of harm to others.

2. Knowledge that harm may result from a failure to exercise statutory powers is not in itself sufficient to create a duty of care

3. For serious high range PCA offences, imprisonment of some kind will generally be the appropriate penalty; for other high range PCA offences, dismissal of charges and reductions to the automatic disqualification period would rarely be appropriate

Applying these principles to the facts of the case, the Court of Appeal noted that the circumstances were not exceptional. The State was not the sole entity with knowledge of the potential dangers of the site. Its control over the site was limited. There was a tier of commercial entities in whom control over the activities of Mr Hay and the hazardous products with which he was required to work were vested. The practical capacity of the State to prevent danger to Mr Hay was substantially less than that of the others involved. The acts of the State did not increase the risk of harm to Mr Hay. Recognition of a duty of care would render the State liable to a massive obligation. Accordingly, the State owed no duty of care to Mr Hay.

Bench: Mason P; Ipp JA; McColl JA.
Judgment citation: AMACA Pty Ltd (Formerly known as James Hardie & Coy Pty Ltd) v The State of New South Wales & Anor [2004] NSWCA 124
Judgment date: 17 May 2004

3. Application for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol

The Attorney General for New South Wales made an application to the Court of Criminal Appeal pursuant to section 37 of the *Crimes (Sentencing Procedure) Act 1999* for a guideline judgment with respect to the offence of driving with a high range PCA, a summary offence generally dealt with in the Local Court. The Attorney General submitted that sentences imposed for that offence were generally inadequate and, in particular, that there was too much use being made of a provision permitting a court to dismiss a charge notwithstanding that the offence was found proved, see section 10 of the *Crimes (Sentencing Procedure) Act 1999*. The Attorney General also submitted that the courts were too frequently reducing the automatic period of disqualification that applied following conviction for that offence.

The Court of Criminal Appeal delivered a guideline judgment that indicated, in general terms, the options available to a court when sentencing for an offence of high range PCA depending upon the moral culpability of the offender and whether the offence was a "second or subsequent offence" for the purposes of the legislation. During the course of its judgment the Court of Criminal Appeal considered the factors that would increase the moral culpability of a high range PCA offender.

The Court of Criminal Appeal held that in an ordinary case of the offence the following factors would be present: the offender had prior good character with little or no traffic record; the offender pleaded guilty; there was little or no risk of re-offending and there would be a significant inconvenience to the offender by loss of licence. The presence of the factors would not themselves justify an order dismissing the charge under section 10 nor would they amount to good reasons for reduction of the automatic licence disqualification period. Nor could a conviction be avoided by the use of section 10 simply because the offender had attended, or was to attend, a driver's education or awareness course.

The guideline judgment also details circumstances in the commission of the offence that would increase the moral culpability of a high range PCA offender. These factors include: the degree of intoxication above 0.15; erratic or aggressive driving; a collision between the vehicle and any other object; competitive driving or showing off; the length of the journey at which others are exposed to risk and the number of persons actually put at risk by the driving. In such cases, an order under sections 9 or 10 would very rarely be appropriate. Where several aggravating factors are present to a significant degree, imprisonment of some kind would usually be the appropriate sentence.

In relation to sentencing for second or subsequent offences, the guideline states that orders under section 9, whereby sentence is deferred on the offender being placed on a bond, or under section 10 would rarely be appropriate. For such an offence, a community service order would generally be inappropriate.

In the most serious cases, where not only is the offence a second or subsequent offence, but the offender's moral culpability is also increased by one or more of the aggravating factors referred to above, the guideline indicates that imprisonment of some kind would generally be the appropriate sentence. Further, where any number of aggravating factors are present to a significant

degree, or where the prior offence is a high range PCA offence, full-time imprisonment should generally be the sentence imposed.

Bench: Spigelman CJ; Wood CJ at CL; Grove J; Dunford J; Howie J.
Judgment citation: Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 [2004] NSWCCA 303
Judgment date: 8 September 2004

4. Benwine Pty Ltd v Jabetin Pty Ltd and Liquor Administration Board NSW; Jabetin Pty Ltd v Liquor Administration Board & Ors

Two proceedings were heard together. A dispute had arisen between lessor (Jabetin Pty Ltd) and lessee (Benwine Pty Ltd) over the transfer of poker machine entitlements. During the course of proceedings, the Court considered the nature of poker machine entitlements and the validity of the Liquor Administration Board's approach to the transfer of entitlements following Jabetin's application for judicial review.

Jabetin Pty Ltd leased its hotel to Benwine Pty Ltd. Benwine purchased the business, goodwill and furniture of the hotel, including a number of poker machines. Benwine held the hotelier's licence. When the New South Wales government froze the number of gaming machines that could be operated in a hotel, 15 poker machines had been acquired and maintained by Benwine. Fifteen poker machine entitlements were allocated in respect of the licence. Benwine sought a declaration from the Court that Jabetin Pty Ltd did not have a financial interest in the hotelier's licence.

The *Gaming Machines Act 2001* required the approval of the Liquor Administration Board to a transfer of poker machine entitlements. Section 19(3)(c) required the Board to be satisfied that the transfer was supported by each person who, in the opinion of the Board, had a financial interest in the hotelier's licence. Section 19(5) provided that a person was taken to have a financial interest if the person was entitled to receive any income derived from the business carried on under the authority of the licence or any other financial benefit or financial advantage from the carrying on of the business whether the entitlement arose at law or in equity or otherwise. Section 19(6) provided that a person was not to be considered as having a financial interest by reason only of the person being the owner of the hotel.

The Board had concluded that Jabetin did not have a financial interest in the hotelier's licence and approved the transfer of some of the entitlements; the Court affirmed the Board's decision, rejecting Jabetin's application for judicial review. The Court held that section 19(5) was an exhaustive definition. The concept of financial interest in section 19(3)(c) was of wide import, section 19(5) referred to specific categories, also of wide import, and section 19(6) excluded a specific category suggesting that the word "taken" in section 19(5) was not intended to add further categories to those included in the natural meaning of a financial interest but, rather, was intended to define what were financial interests for the purpose of section 19(3)(c).

The Court held that Jabetin had no interest in the goodwill of the business. Goodwill was the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that had attracted custom to it. Goodwill arose from Benwine's conduct under the hotelier's licence. Jabetin was entitled to enforce covenants in its lease but those were not entitlements at which section 19(5) was directed. Its categories were entitlements to benefits derived from the carrying on of the business. Jabetin was confined to receipt of periodic rent.

The Court also held that poker machine entitlements were property. They had a clear identity, were recognisable by third parties, were transferable to third parties and had a degree of permanence, and as such, a resulting trust in favour of Benwine would arise in respect of any of the 15 poker machine entitlements held upon the expiry or earlier determination of the lease.

Bench: Gzell J.
Judgment citation: Benwine v Jabetin; Jabetin v Liquor Administration [2004] NSWSC 995
Judgment date: 1 November 2004

4. Poker machine entitlements are a distinct type of property and interests in the entitlements are separate from interests in hotelier's licences

5. Consideration of the principles applicable when the Court is requested to take evidence for use in foreign judicial proceedings

5. British American Tobacco Australian Services Limited v Sharon Y Eubanks for the United States of America; Nicholas Basil Cannar v Sharon Y Eubanks for the United States of America; British America Tobacco (Investments) Limited v Sharon Y Eubanks for the United States of America Findings in judgment No 1

The government of the United States commenced proceedings in the USA against a number of tobacco companies, alleging a conspiracy to deceive customers into smoking. A letter of request for international judicial assistance was issued to the Registrar of the New South Wales Supreme Court asking that the New South Wales Supreme Court obtain evidence from Mr Cannar, a former senior solicitor of one of the tobacco companies in both the UK and Australia, in relation to certain matters identified in the letter of request. Orders were made for Mr Cannar's evidence to be taken in ex parte proceedings pursuant to section 33 of the *Evidence on Commission Act 1995 (NSW)* ("the Act").

Mr Cannar sought to have the orders set aside on a number of grounds including that the letter of request sought an examination of a character which went beyond obtaining "evidence" within the meaning of the Act and therefore the Court lacked jurisdiction or power to make the orders. British American Tobacco Co (UK) ("BATCo") claimed that certain exhibits attached to the letter of request were the subject of legal professional privilege and could not be adduced into evidence, notwithstanding that the documents in question were already in the public domain, including being fully accessible on the internet. British American Tobacco Australia Services Limited ("BATAS"), the Australian affiliate of BATCo, sought to be joined as a party to the proceedings, on the basis that it had a right to confidentiality and legal professional privilege in information known by its former legal officer. Her Honour Justice Bell rejected all three applications and Mr Cannar, BATCo and BATAS each sought leave to appeal.

In relation to the Cannar application, leave to appeal was granted in relation to the jurisdiction and power issue but the appeal was dismissed. The Court held that the word "evidence" in the Act refers to material to prove or disprove facts rather than to material which may lead to the discovery of evidence. The history of the Australian legislation implementing the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, as well as the desirability of internationally uniform interpretation of such a treaty, indicates that British cases drawing a distinction between evidence and discovery should generally be followed in Australia. The terms of a letter of request are not conclusive. In this case the letter of request sought evidence for the purpose of the US proceedings within the meaning of the Act. A general determination of the apparent relevance of the evidence is all that is required. It is not necessary for the Supreme Court to be satisfied that the evidence sought by a letter of request is both admissible and will be admitted in the foreign proceedings before making an order pursuant to section 33 of the Act.

Leave to appeal was otherwise refused. The Court held that her Honour was correct to exercise her discretion to give effect to the letter of request. Her Honour was entitled to exercise the discretion notwithstanding that it may expose Mr Cannar to civil or criminal proceedings. Section 33 of the Act operates subject to section 34 of the Act, which contains a comprehensive regime to protect the privilege of witnesses. Similarly, the Court held that her Honour had committed no error of principle in rejecting the tender of certain evidence.

In relation to the BATCo application, leave to appeal was refused. Justice Bell's reasons for rejecting the application made by Mr Cannar did not indicate that her Honour had relied on the material that was the subject of the privilege claim. As such, the result would have been no different if the particular exhibits had not been tendered. Furthermore, BATCo had lost whatever privilege it may have had in the documents under section 122(4) of the *Evidence Act 1995 (NSW)*, because the substance of the evidence had already been disclosed with the express or implied consent of BATCo to claim privilege. BATCo had impliedly consented to the disclosure of the documents to the public by voluntarily entering into a consent judgment that put in place a procedure whereby such documents could be made public if BATCo's objections, which were allowed by the procedure, were unsuccessful. Consent under section 122(4) of the *Evidence Act* is not determined by the fact

that the claimant of legal professional privilege does not want the documents made public.

In relation to the BATAS application leave to appeal was refused. Her Honour was entitled to refuse BATAS's application to be joined. There is no general rule requiring the joinder of a third party where a person is ordered to disclose confidential information or documents belonging to that third party. Her Honour had indicated that BATAS could attend the examination and assert its claim to privilege.

Bench: Spigelman CJ; Handley JA; Bryson JA.
Citation: British American Tobacco Australian Services Limited v Sharon Y Eubanks for the United States of America; Nicholas Basil Cannar v Sharon Y Eubanks for the United States of America; British America Tobacco (Investments) Limited v Sharon Y Eubanks for the United States of America [2004] NSWCA 158
Judgment date: 18 May 2004

6. Carter v NSW Netball Association

This case highlighted the serious injustice which can result when a voluntary organisation, such as a sporting club or charity, conducts its own investigation into alleged child abuse and its finding is then recorded under section 39 under the *Commission for Children and Young People Act 1998 (NSW)*. The investigation or disciplinary hearing may be inadequate or flawed or may deny the accused person procedural fairness, yet the finding will be entered without further scrutiny in the Commission's records and can thereafter seriously affect the accused person's employment prospects and general standing in the community.

The plaintiff was a netball coach and president of a voluntary sporting club. She was accused of child abuse by a group of opponents in the club's organisation. The organisation appointed an investigator who took evidence only from the accusers' witnesses and refused to take evidence from the plaintiff's witnesses. The club's disciplinary committee did not follow the procedural requirements for a hearing under the organisation's constitution. The plaintiff was found guilty of "child abuse" although the charges amounted to no more than that the plaintiff had engaged in excessively enthusiastic coaching of netball teams. The finding of child abuse was notified to the Commission. The plaintiff's health was seriously affected by the trauma.

His Honour Justice Palmer held that the plaintiff had been denied procedural fairness and had been denied her rights to a hearing in accordance with the organisation's constitution and rules. The Court set aside the finding and directed the defendant to notify the Commission of the result.

His Honour found that the Court's intervention in the conduct of disciplinary proceedings leading to notification under section 39 of the *Commission for Children and Young People Act* was not contrary to any express or implied provision in the Act but was, instead, necessary when an injustice had been done.

Justice Palmer endorsed the observation of Mr Justice Young, Chief Judge in Equity, in *Hedges v Australasian Conference Association Ltd* [2003] NSWSC 1107 to the effect that the burden borne by voluntary organisations to police child abuse under the Commission for *Children and Young People Act* may well be too heavy. Justice Palmer concluded that the circumstances of the present case demonstrated that the notification procedure under section 39 required urgent review by the legislature.

Bench: Palmer J.
Judgment citation: Carter v NSW Netball Association [2004] NSWSC 737
Judgment date: 17 August 2004

6. Wrong finding of 'child abuse' by a sporting association and its effect under the Commission for Children and Young People Act 1998

7. Dalton v NSW Crime Commission

This appeal concerned the validity of leave to serve a summons upon the plaintiff, resident in Victoria, to attend and give evidence before the New South Wales Crime Commission, granted by Justice Greg James pursuant to section 76 *Service and Execution of Process Act 1992 (Cth)*. The appeal was dismissed (by majority).

The critical question was whether section 76, in so far as it extended to interstate summons to attend a commission of inquiry, was supported by s51(xxiv) *Constitution*, which confers on the Commonwealth the power to make laws with respect to "the service and execution throughout the Commonwealth of the criminal and civil process and the judgments of the courts of the States."

7. The Commonwealth Constitution authorised an interstate witness to be compelled to give evidence in a criminal investigation

8. The indemnity principle should be applied to ensure that a real party with an interest in the litigation can recover the costs incurred in proceedings brought in another's name

Chief Justice Spigelman (Justice Wood, Chief Judge at Common Law, agreeing) adopted a broad and purposive construction of the words "civil and criminal process", holding that placitum (xxiv) extended to the authorisation of federal laws designed to facilitate and ensure the efficacy of the enforcement of the criminal laws of the State. Accordingly, section 51(xxiv) encompasses compulsory attendance to give evidence in a criminal investigation by a statutory authority.

Justice Mason (dissenting) decided that the placitum did not extend to a subpoena issued by a commission of inquiry into criminal conduct. His Honour's view was that the phrase "civil and criminal process" does not extend beyond process associated with the establishment of legal rights or the enforcement of the criminal law.

Bench: Spigelman CJ; Mason P; Wood CJ at CL.
Judgment citation: Dalton v NSW Crime Commission [2004] NSWCA 454
Judgment date: 15 December 2004

8. Dyktynski v BHP Titanium Minerals Pty Ltd

This case concerned the question of whether an agreement between the appellant and his solicitor which provided that the appellant would not have to pay any costs or disbursements to his solicitors in relation to Court of Appeal proceedings brought in his name but for the solicitors' benefit (the "first appeal"), precluded the appellant from recovering the costs of the appeal from the unsuccessful respondent. Resolution of the issue turned on the ambit of the indemnity principle which is that, as party/party costs are an indemnity for costs incurred by the client, a successful party cannot recover costs if he or she is not liable to pay them to the solicitor.

Mr Dyktynski brought proceedings in the Compensation Court against the respondent. An award was made in his favour. The respondent was ordered to pay Mr Dyktynski's costs. The solicitors for the parties agreed those costs. The respondent paid the agreed costs soon after the agreement, approximately 11 months after the costs order was made. Mr Dyktynski's solicitors sought interest on the costs. The respondent refused to pay interest. Mr Dyktynski's application in the Compensation Court for an order for the interest was refused. The appellant appealed to the Court of Appeal (the "first appeal").

Prior to pursuing the first appeal Mr Dyktynski's solicitors wrote to him asking him to sign a costs agreement. The covering letter explained that the appeal had been brought in his name, that he would not be required to pay any legal costs whatever the outcome and that this was because the proceedings did not stand to benefit him in any way but were brought to determine a legal principle for the assistance of the firm. The costs agreement provided that Mr Dyktynski would "not have to pay any costs or disbursements to us in relation to the proceedings".

In the first appeal the Court of Appeal held that Mr Dyktynski was entitled to interest on costs: *Dyktynski v BHP Titanium Minerals Pty Limited* [2001] NSWCA 54; (2001) 50 NSWLR 710. The Court of Appeal ordered the respondent to pay Mr Dyktynski's costs of the first appeal and of the motion in the Compensation Court. In an assessment of costs pursuant to section 202 of the *Legal Profession Act 1987 (NSW)*, the costs assessor concluded that the indemnity principle operated to preclude Mr Dyktynski recovering the costs of the first appeal. The costs assessor's decision was affirmed on review and by Master Malpass on an appeal pursuant to section 208L of the *Legal Profession Act 1987 (NSW)*. This appeal was brought, by leave, against the orders made by Master Malpass.

The Court of Appeal concluded from a review of authorities that courts have consistently held that a nominal plaintiff, whether one who had not incurred any liability for costs or who had received an express indemnity in respect of such costs was entitled to a costs order even though the benefit of that costs order enured to a third party with an interest in the litigation. Such a result was just because, historically, "costs" were understood as an indemnity to the real party bringing the action without regard to the liability of the nominal party, whose name must necessarily appear on the record. In such cases the indemnity principle operated on the substance rather than the form to produce a sensible and just result.

The Court of Appeal said that the nominal plaintiff cases were based upon the proposition that costs have been incurred by the "real" not the "nominal" party and that costs are a "necessary consequence of a party having created litigation in

which he has failed." The cases recognise that the indemnity principle must be "reasonably understood and applied." Applying the indemnity principle to ensure that a real party with an interest in the litigation can recover the costs incurred in proceedings brought in another's name accorded with the proposition that "it is just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred".

The Court of Appeal observed that the principle that a Court was empowered to order costs in favour of a nominal party secured against a costs order by a "real party" was mirrored by the Court's power to order costs against the "real party" to a suit as considered in *Knight v F P Special Assets Limited* [1992] HCA 28; (1992) 174 CLR 178.

Bench: Mason P; McColl JA; Davies AJA.

Judgment citation: Dyktynski v BHP Titanium Minerals Pty Ltd [2004] NSWCA 154; 60 NSWLR 203
Judgment date: 14 May 2004

9. Edwards & Ors v Attorney General & Anor

Two subsidiaries of James Hardie Industries Ltd traded in asbestos products. It was likely that injury would be caused to their workers and to others over a period of forty years. There was no way to identify possible claimants. Estimates of the amount likely to be claimed were made. A company, Medical Research and Compensation Foundation (MRCF), became the holding company for the two former subsidiaries. MRCF was the trustee of a trust under which the two subsidiaries were to continue in operation and pay their debts, including claims for asbestos related injury. James Hardie had provided MRCF with funds intended to meet these liabilities. The instrument creating MRCF described the trust as a charitable trust. Proceedings were instituted by MRCF as trustee of the trust and by the directors of MRCF, who were also directors of the subsidiaries.

At the time of the hearing an inquiry was being conducted into the problems connected with claims against James Hardie. The directors became aware that there were potential claims against the companies which would considerably exceed the assets of MRCF and the two subsidiaries. The provable claims against the companies if a winding up occurred would be small. The directors, after receiving advice, wished to continue to pay all current claims until the inquiry released its report and they had time to study it, which they estimated to be approximately two months. They also took the view that, with their knowledge and experience, they should stay in office to administer the companies and the trust. The directors could not secure insurance covering the risk of personal claims being made against them, and were concerned that they would become personally liable if they continued to pay current claims in full.

The directors sought relief under section 1318 of the *Corporations Act 2001 (Cth)* to excuse them from liability for taking this action. MRCF sought judicial advice under section 63 of the *Trustee Act 1925 (NSW)* to the effect that it was justified in not seeking the appointment of a provisional liquidator to the subsidiaries. The applications were referred to the Court of Appeal.

The Court of Appeal dismissed the *Trustee Act* application on the basis that it was inappropriate to give the judicial advice sought. There was doubt as to whether the trust was in fact a charitable trust and it was inadvisable to assume the facts as presented by the applicants. There may have been an elision of roles. The problem had arisen in the subsidiary companies and was the concern of the directors of the trustee company in their capacity as directors of the subsidiaries.

The Court of Appeal held that section 1318 of the *Corporations Act* permitted the Court to protect directors from claims made by third parties. The Court of Appeal also held that section 1318(2) had no prospective operation. It was foreseeable that claims to be made against the assets of the subsidiaries would exceed those assets. People who have not yet suffered injury are neither prospective nor contingent creditors of those companies and would gain nothing by the appointment of a provisional liquidator or by any winding up process.

The Court of Appeal held that in all the circumstances the course adopted by the plaintiffs, i.e. to pay current claims and stay in office to administer the companies and the trust, was the reasonable course.

9. By order, the Court protected directors of a trust for asbestos victims from the consequences of meeting current claims

10. A foreign bank situated in Sydney remained liable under contract to repay a deposit even though authorities had purported to seize the funds in the USA

The Court of Appeal made orders that each of the directors be relieved from any negligence, default, breach of trust or breach of duty in their capacity as directors of MRCF and the subsidiaries arising out of payments made by those companies for debts, including debts arising in respect of asbestos-related liabilities, up until the date of judgment. The Court of Appeal gave liberty to the plaintiffs to apply for a similar order until a date approximately two months after the expected date of publication of the inquiry's report.

Bench: Spigelman CJ; Mason P; Young CJ in Eq.
Citation: Edwards & Ors v Attorney General & Anor [2004] NSWCA 272
Judgment date: 6 August 2004

10. European Bank Ltd v Citibank Ltd

The appellant made a US dollar deposit with the respondent in Sydney. The funds were transferred to the respondent by the appellant's correspondent bank in New York, which made a payment to the respondent's correspondent bank in New York. The contract between the appellant and the respondent for the US dollar deposit in Sydney contained a Force Majeure clause which protected the respondent if its performance of an obligation was prevented or hindered due to reasons beyond its reasonable control.

A United States District Court warrant, directed to the United States Marshal which purported to seize the appellant's funds in the respondent's account with its correspondent bank in New York, was served in New York on the correspondent bank. The correspondent bank paid $US8,110,073.30 to the United States Marshal and debited the respondent's account with this payment. When the appellant sued the respondent in Sydney to recover its deposit, the respondent relied on the Force Majeure clause. The trial judge upheld this defence and dismissed the action.

On appeal, the Court of Appeal held unanimously that $US funds in a bank account in Sydney held with the respondent could not be attached in the United States. The Court of Appeal held that the funds paid into the respondent bank's own account in New York were its own funds and not those of the depositor.

The situs of the debt created by a deposit in a $US account in Sydney was Sydney, the discharge of that debt was governed by the proper law of the contract which was the law of New South Wales, and the funds could only be attached in Sydney.

Bench: Spigelman CJ; Handley JA; Santow JA.
Judgment citation: European Bank Ltd v Citibank Ltd [2004] NSWCA 76.
Judgment date: 25 March 2004

11. Fatimi Pty Ltd v Bryant & 2 Ors

In 1994 the appellant, a judgment creditor of Rylegrove Pty Ltd, registered a writ of execution against the title of a block of vacant land which was the debtor's only unencumbered asset. In July 1995 it filed and served a summons for the winding up of the debtor based on its failure to comply with a statutory demand. In that month a bank also obtained judgment against Rylegrove and on 11 August it too served a statutory demand. The company was wound up on 7 September.

On 8 August 1995 the company entered into a contract to sell its vacant block of land on terms that were extremely advantageous to the purchasers, and it transferred the land the same day without receiving the purchase price. The liquidator had the transfer set aside.

The appellant brought an action for conspiracy against the directors of the company, a former director, the purchaser and its directors. The trial judge held that the defendants had not acted for the predominant purpose of injuring the appellant but to protect the property from the company's creditors for the benefit of its shareholders. He also held that, for this reason, a conspiracy to injure the appellant by unlawful means had not been established. The appellant also failed to establish that the conspiracy had caused it any loss because the judge found that the bank would have acted to prevent it completing its execution and retaining the proceeds for its own benefit. Judgment was therefore given for the defendants. The plaintiff appealed contending that a conspiracy to injure by unlawful means had been established and sought awards of compensatory and exemplary damages.

The Court of Appeal held that the tort of conspiracy to injure by unlawful means does not require proof that the defendants intended to harm

the plaintiff. It will be sufficient that the conspiracy and the unlawful means were aimed at the plaintiff and where this is established it will not matter that the defendants' predominant motive was not to injure the plaintiff but to further or protect their own interests.

The majority also decided that unlawful means for the purpose of a civil conspiracy to defraud included any fraudulent or dishonest conduct which attracted a civil remedy which could include the equitable remedies of an account of profits or rescission, and statutory remedies under section 37A of the *Conveyancing Act* and section 596 of the *Corporations Act* setting aside alienations of property in fraud of creditors.

The Court of Appeal held unanimously that exemplary damages could be awarded for the tort of conspiracy but only where compensatory damages were recoverable.

Bench: Handley JA; Giles JA; McColl JA.
Judgment citation: Fatimi Pty Ltd v Bryant & 2 Ors [2004] NSWCA 140.
Judgment date: 6 May 2004

12. Georgeski v Owners Corporation SP49833 & Ors

The case concerned the rights of a licensee of Crown land which was the site of a jetty and a slipway on a bank of the Georges River. The plaintiff owned a residential property bounded in part by the mean high water mark of the Georges River. The plaintiff held a licence from the Crown to use adjoining Crown land below the high water mark, including the jetty and slipway. She sought declarations that a right of footway granted to the owner's corporation of a nearby strata scheme (first defendant) over part of her land was not a right of access to the jetty or slipway. That claim was not opposed and the relief was granted.

The plaintiff also sought injunctive and declaratory relief against two lot owners in the strata scheme, maintaining that unauthorised entry by them on the jetty and the slipway was trespass. Justice Barrett held that the structures were fixtures and therefore part of the Crown land. A clause of the licence declaring them to be "the property of" the plaintiff operated in the context of comprehensive contractual restrictions on her right to deal with them and was seen as conferring no more than a right to remove at the end of the licence term. There was no valid analogy with tenant's fixtures. His Honour also held that the licence conferred no more than the Crown's permission to occupy for the stated purpose and that the plaintiff lacked a leasehold or other possessory right of the kind necessary to resist trespass. The decision of the English Court of Appeal in *Manchester Airport plc v Dutton (2001)* recognising the right of a mere licensee to sue in ejectment was regarded as inconsistent with High Court authority and was not followed. Common law rights of the public to use the tidal foreshore, recognised in English cases, were seen as attenuated by Crown lands legislation in New South Wales. The plaintiff's claims based on alleged trespass by the second and third defendants were dismissed.

Bench: Barrett J.
Judgment citation: Georgeski v Owners Corporation SP49833 [2004] NSWSC 1096
Judgment date: 22 November 2004

13. Harriton (by her tutor) v Stephens; Waller (by his tutor) v James & Anor; Waller (by his tutor) v Hoolahan

13. Damages are not recoverable by a disabled child who would not have been born at all if parents had been warned of the facts which caused the disability

The appellants, Alexia Harriton and Keeden Waller, were each born disabled to a catastrophic degree. They claimed damages for the harm they suffered by being born in their disabled condition. They did not contend that the respondents had brought about their disabled condition. Rather, they asserted that had the respondents, prior to their birth, diagnosed the circumstances that resulted in them being born disabled, their suffering and loss would not have materialised. This is because, in the case of Alexia, her mother would have terminated the pregnancy and, in the case of Keeden, his parents would have ensured that he would not have been conceived.

The appellants argued that the respondents owed them a duty of care that required each respondent to take reasonable steps to provide the respective mothers or parents of the appellants with information upon which they could base a decision about whether to prevent the appellants from being born. The appellants argued that they had sustained legally cognisable damage caused by the respondents.

14. By the application of the principle of open justice, the District Court had no power to prevent publication of the verdict in a criminal trial

The appellants' arguments were rejected by a majority of the Court. Chief Justice Spigelman said that it was not and has never been the law that a person who suffers foreseeable harm attributable to the negligence of another should receive compensation. A duty of care must reflect ethical values generally, or at least widely, held in the community. The duty asserted by the appellants should not be accepted as it does not reflect such values. An action by a child, as distinct from an action by the parents, involves an assertion by the child that it would be preferable if she or he had not been born. This proposition is not a widely accepted ethical principle.

Justice Mason dissented. He held that a doctor who treats a woman who is pregnant or seeking to become pregnant owes her an undoubted duty of care which extends to the care of the foetus and which is enforceable by the child if he or she is born alive. The contention that the appellants cannot prove any loss because they cannot demonstrate the monetary value of non-existence offends the principle that a wrongdoer bears the evidential onus of establishing the existence and value of offsets and collateral advantages said to stem from the wrong.

Justice Ipp said that the question whether a relevant duty was owed cannot be decided without determining whether the harm each appellant suffered is recoverable in law. That harm was not so recoverable as there is no comparator against which the appellants' damages can be calculated. Negligence and damage must co-exist to constitute a cause of action. As the appellants' damages are not capable of measurement, the damage claimed is not actionable and no duty of care arises. The interests of the appellants do not attract the protection of the law and policy considerations do not justify the recognition of the duty of care.

The decision of the trial judge dismissing the claims was upheld.

Bench: Spigelman CJ; Mason P; Ipp JA.
Judgment citation: Harriton (by her tutor) v Stephens; Waller (by his tutor) v James & Anor; Waller (by his tutor) v Hoolahan [2004] NSWCA 93 – (2004) 59 NSWLR 694
Judgment date: 29 April 2004

14. John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors

Following a trial in the District Court, Mr Fisher, the director of a group of companies, was found guilty of six breaches of the *Corporations Law*. The Crown proposed to indict Mr Fisher on twelve additional charges, involving breaches of the *Corporations Law* and the *Crimes Act 1900 (NSW)*, in two subsequent trials. During the first trial, District Court Judge Norrish made a number of suppression and non-publication orders, including an order suppressing publication of any material revealing the jury's verdict in the first trial. The claimants sought declarations and orders quashing the non-publication orders, on the basis either that a judge of the District Court had no power to make such orders, or alternatively, that the matters upon which His Honour relied in making the orders were insufficient in law to warrant them.

The Court of Appeal held that the principle of open justice is a most fundamental aspect of the system of justice in Australia and exceptions to the principle are few and strictly defined. An aspect of the principle of open justice is the entitlement of the media to report on court proceedings.

The District Court, as a statutory court, has only such powers as are expressly conferred on it or are necessarily implied from the express conferral of jurisdiction upon, and grant of powers to the Court. The District Court has no express power to make a non-publication order of the kind made by the trial judge. Nor could such a power be implied by the conferral of criminal jurisdiction on the District Court. The test of implication is a test of necessity. Where, as here, the implication of a power conflicts with the principles of open justice the test of *necessity* must be strictly applied. It could not be said that the power to make a non-publication order was necessary to ensure a fair trial of the accused because this could be achieved by means of adjournment or stay. Although the District Court possessed a limited power to make non-publication orders in a number of well-established categories, such as to protect the identity of an informer or witness, the suppression of a verdict did not fall into any such category. In any event, the particular order made by Judge Norrish should not have been made. It was directed to persons wholly unrelated

to the proceedings and the matters relied upon in making the orders were insufficient in law to warrant them.

Bench: Spigelman CJ; Handley JA; Campbell AJA.
Citation: John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors [2004] NSWCA 324
Judgment date: 15 September 2004

15. Kadian v Richards

The plaintiffs were a 6 year old boy, Ankur, and his parents. Ankur had been born with a congenital heart defect which had not been detected until he was some months old. The plaintiffs sued a doctor who had treated Ankur during the first few months of his life, alleging that the doctor's failure to discover the heart defect was negligent and that the lateness in discovering it had reduced the chances of successful treatment. After the defect was discovered, Ankur had been treated by a different heart specialist.

When the final hearing of the case was still at any early stage of preparation, the defendant made application for (a) a declaration from the Court that by commencing the proceedings Ankur had waived his right to confidentiality from his present treating doctors, and (b) an order that the proceedings be stayed unless and until the plaintiffs authorised Ankur's present treating doctors to discuss Ankur's medical condition and history with the lawyers for the defendant.

A Canadian case decided in 1990, *Hay v University of Alberta*, had held that a patient's right to confidentiality from his medical advisers ceased whenever the patient put his health in issue by claiming damages in a lawsuit. The defendant submitted that the NSW courts should follow *Hay*. *Hay* had been followed in some Canadian cases but not in others, and also had been referred to without disapproval in some decisions in England and Ireland.

Justice Campbell examined the extent to which *Hay* had been followed, or not followed, in various common law jurisdictions. He examined the source of a doctor's obligation of confidentiality, the principles according to which a right (such as a right to confidentiality) can be waived, and concluded that *Hay* should not be followed in NSW. Rather, whether a patient's right of confidentiality had been waived depended upon whether, in the circumstances of the particular case, the person alleging waiver had made out a prima facie case that a fair trial could not be had unless the right of confidentiality was treated as waived. The same test also decided whether an action should be stayed until the plaintiff consented to his treating doctors talking with the defendant's lawyers. His Honour was not satisfied that the defendant had made out such a case. Hence the defendant's application was dismissed.

The case has already been described as an "important judgment" by Professor Pattenden in her web page updates to "The Law of Professional Client Confidentiality" (Oxford University Press 2003).

Bench: Campbell J.
Judgment citation: Kadian v Richards [2004] NSWSC 382
Judgment date: 22 June 2004

15. In applications seeking waiver of doctor/patient confidentiality, the applicant must prove that, without the waiver, their chance of a fair trial is compromised

16. Khan & Anor v Khan & Anor

This case concerned actual undue influence by a religious leader upon a vendor under an alleged contract for the sale of land. The plaintiffs were purchasers under an alleged contract for the sale of a residential property. The defendants, Mrs Sadiq and Mr M R Khan, as owners of the property, were the vendors. All the parties were Muslim.

Following agreement on a price between Mr M R Khan and the plaintiffs, Mr M R Khan arranged for solicitors to prepare a contract for sale. However, the co-owner, Mrs Sadiq refused to sell to the plaintiffs. The parties subsequently agreed on a higher price and the plaintiffs' solicitors forwarded to the defendants' solicitors the executed counterpart of the contract. When Mrs Sadiq again refused to sell, Mr M R Khan arranged a meeting with the parties and the Imam of the Green Valley Mosque. At the end of the meeting, an informal memorandum of sale was signed by both Mr M R Khan and Mrs Sadiq.

Justice Barrett found that the Imam had attended the meeting with the consent of all the parties. The Imam was not a beneficiary of the prospective transaction, but offered religious advice to assist resolution of the parties' differences. The Imam advised that all the parties were required by an

Islamic precept of honourable conduct to give effect to the oral bargain and to enter into and complete a contract for sale. Mrs Sadiq then signed the memorandum. Based on the memorandum, the plaintiffs sought an order for specific performance of the alleged contract.

The court found that Mrs Sadiq, as a Muslim woman, regarded the Imam as a person of authority, particularly in relation to matters of Islamic law or duty, and as capable of affecting her prospects in the 'after life'. The Imam's advice that she must sell thus represented a religious instruction or, at the least, a religious exhortation to do something she was not legally obliged to do, did not wish to do and had actively resisted. Mrs Sadiq was held to have been under the religious influence of the Imam when she signed the memorandum. By their presence at the meeting, the plaintiffs had notice of that influence and the effect of it upon Mrs Sadiq's will. By asking that the memorandum be prepared and signed before the parties dispersed, the plaintiffs took advantage of what they knew to be the religious influence of the Imam. Consequently, the bargain was unconscionable and unenforceable against Mrs Sadiq's will.

Bench: Barrett J.
Judgment citation: Khan & Anor v Khan & Anor [2004] NSWSC 1189
Judgment date: 10 December 2004

17. Maher v Bayview Golf Club

For many years Mr Maher, his family and visitors, had gained access to his home by crossing land belonging to the golf club. The golf club accepted that this use of its land gave Mr Maher the legal right, by prescription, to an easement over its land. The problem arose as to how extensive the easement was: could it be used only during daylight hours; was it one which could be used only for the benefit of one dwelling (and not by any extra houses which might be built on Mr Maher's land if he subdivided it); was it only wide enough to allow one vehicle to cross at a time; and, was it limited to use by non-industrial and non-commercial vehicles?

When there is a grant of easement, the scope of the activities permitted by the easement is expressed. However, when there is an easement arising by prescription – that is, by usage over time as in this instance – no details of entitlement have been formalised.

The use which is actually made of the site of the easement, and which gives rise to the prescriptive easement, should define the scope. This should not be described too precisely, but allow for those activities which conform in nature to the existing use. Any use which falls within that not-too-precise description is then permitted by the prescriptive easement, even if it is not precisely the same as the use which gave rise to the easement. However, a change in the nature of the use is not permitted.

Justice Campbell held that the scope of an easement arising by prescription can be decided by seeking to apply reasoning used in past cases.

Bench: Campbell J.
Judgment citation: Maher v Bayview Golf Club [2004] NSWSC 275
Judgment date: 4 June 2004

18. R v TS*

On 30 August 2000 the complainant, was accosted by a group of five youths on an afternoon suburban train. She was coaxed by them into accompanying them to what she was told would be a marijuana-smoking session. The complainant was escorted to a toilet block in a car park at Bankstown. There she was raped by four of the five youths including, on the Crown case, the appellant.

After this series of rapes, the complainant was, in effect, passed on to other groups of assailants. In each of four discrete incidents occurring at various other locations the complainant was raped by various combinations of assailants. The appellant was not charged with any offence related to any of those four further episodes of serial rape. No evidence of those further episodes was led at the appellant's trial.

The appellant on appeal was granted a separate trial from the other offenders. The trial of the other offenders had reached the point where the jury was considering its verdict. The trial of the appellant was due to commence immediately after the jury considered its verdict. The appellant applied to the trial judge initially for a stay of six

months and then, subsequently, a temporary stay. The trial judge refused each application.

The Court by majority (Justice Mason and Justice Wood) found that the trial judge should have discharged the jury as a result of prejudicial media coverage during his trial; and, a miscarriage of justice arouse as a result of prejudicial media coverage during the trial. A new trial was ordered. The Court held that the directions given to the jury in the appellant's trial did not remove the prejudice to a degree that enabled the trial to be not compromised. A conviction was not inevitable and the circumstances left a risk of substantial miscarriage of justice. The feelings of anger, revulsion and general hostility to young Lebanese men that emanated from the media coverage of the earlier trial would have lingered heavily in the atmosphere of the appellant's trial. Its fairness and the appearance of its fairness were undermined to an unacceptable degree due to the unnecessary decision to direct back-to-back trials.

Bench: Mason P; Wood CJ at CL; Sully J.
Judgment citation: [2004] NSWCCA 38
*section 11 of the *Children (Criminal Proceedings) Act 1987* prohibits general publication of the full judgment citation in this matter
Judgment date: 4 March 2004

19. R v Bilal Skaf, R v Mohammed Skaf

Bilal Skaf was convicted of two counts of aggravated sexual intercourse without consent. His brother, Mohammed Skaf, was convicted of one count of being an accessory before the fact to his brother's two counts. The victim of each count was Ms D. The two counts of aggravated sexual intercourse without consent occurred at Gosling Park, Greenacre on 12 August 2000.

Given the nature of this charge, the Crown had to prove that Mohammed Skaf knew that his brother was intending to have sexual intercourse without consent and in company of at least one other person. In addition, the Crown had to prove that he encouraged and assisted Bilal Skaf to carry out that crime.

The Crown case was that Mohammed Skaf's part in his brother's crime was to entice Ms D to accompany him in a car, then take her to Gosling Park, then seek to induce her to engage in sexual activity and then, when she proved unwilling to do so, to persuade her to remain in the park until Bilal Skaf and the other men, with whom he had been in constant communication by mobile phone, arrived in the park to seize her.

A key issue at Bilal Skaf's trial was whether he was properly identified by Ms D as the man who first sexually assaulted her and whether he was present when the second (unidentified) man did so. The adequacy of the lighting at the park was relevant.

The day before verdict, the jury went home early. The foreman called one of the other jurors and they decided to visit Gosling Park. They arrived at the park at about 8.15pm and spent about 15-20 minutes at the park determining visibility at various points.

Bilal Skaf's appeal was successful on one ground: That misconduct of the jurors caused the trial to miscarry. Bilal Skaf argued that "the trial miscarried by reason of a juror attending the scene of the alleged crime and informing himself as to the state of the lighting at the scene of the alleged crime".

The Court of Criminal Appeal found that, although the jury had been sent out to consider their verdict, the Gosling Park experiments could not be considered part of the jury's deliberations. Information obtained by the two jurors was not evidence in the trial or properly put to them by the judge with the knowledge of the parties. Also, the evidence was obtained in circumstances amounting to procedural unfairness (denial of natural justice) as the accused were unable to test the material in any way.

Bench: Mason P; Wood CJ at CL; Sully J.
Judgment citation: R v Bilal Skaf,
R v Mohammed Skaf [2004] NSWCCA 37
Judgment date: 6 May 2004

20. R v Studenikin

This was an application for leave to appeal to the Court of Criminal Appeal by Mr Studenikin who had been sentenced in the District Court for offences including the importation of ecstasy, an offence against the *Customs Act (Cth)*. The issue raised by the application concerned the effect of the repeal of section 16G of the *Crimes Act 1914 (Cth)* on the sentencing of Federal offenders.

20. Since the repeal of s16G of the Crimes Act 1914 (Cth), NSW courts do not have the power to discount the sentences of Federal offenders

Section 16G was enacted in order to overcome the disparity in the length of sentences to be served by Federal offenders in different jurisdictions within the Commonwealth depending upon whether prison remissions were available or not in the jurisdiction in which the offender was sentenced. The section required courts, in a jurisdiction where remissions of sentences were not available, to take into account that fact and to "adjust the sentence accordingly". This State had abolished prison remissions in 1989. The effect of the section was to reduce the otherwise appropriate sentence for Federal offenders by a period equivalent to the maximum earned for remissions for good behaviour; that is by a period of up to one third. The repeal of the section was to operate from the date it came into effect regardless of when the offence was committed.

The applicant came to be sentenced after the repeal of section 16G. The sentencing judge imposed a sentence of imprisonment upon the applicant without regard to the fact that sentences previously had been reduced by section 16G. The sentence imposed was about 50 per cent higher than sentences imposed when section 16G was in operation. Mr Studenikin's principal argument was that the repeal of the section should not result in courts in this State increasing sentences for Federal offenders because that was not the intention of the repeal of the provision. It was argued that sentences should remain within the range of sentences established as being appropriate prior to the repeal of section 16G as there was no suggestion that those sentences were inadequate. It was submitted that the sentence imposed was manifestly excessive when compared with the range that had been established for offences of the kind committed by the appellant before the repeal of the section.

The Court of Criminal Appeal rejected the applicant's argument. It noted that generally the availability or otherwise of remissions was irrelevant in determining the appropriate sentence to impose for an offence, as the regulations of prison sentences was a matter for the executive head of government. The effect of section 16G had been, however, to require the courts not only to take the unavailability of remissions into account, but also to reduce the otherwise appropriate sentence to compensate for the absence of remissions. The effect of the repeal of section 16G was that the courts were no longer authorised to take this matter into account and, therefore, could no longer reduce a sentence because of it. The courts have no power, absent a statutory warrant to do so, to reduce a sentence imposed according to law. Any increase in sentences following the repeal of the section was, therefore, a direct consequence of the repeal of the provision.

The Court held that the repeal of section 16G should not result in a mathematical formula being applied to the range of sentences existing at the time the section was operating in order to derive a particular sentence or range of sentences to be imposed after the repeal of the provision. A court should simply sentence a Federal offender in accordance with general sentencing principles and the provisions of the *Crimes Act 1914 (Cth).* However, the Court commented that, if a sentencing court were minded to look at the range of sentences that were imposed when section 16G applied, it had to bear in mind that the range had factored into it a sentence discount that was no longer applicable.

Bench: Grove J; Howie J; Newman AJ.
Judgment citation: R v Studenikin [2004] NSWCCA 164
Judgment date: 21 May 2004

21. Robb Evans of Robb Evans & Associates v European Bank Limited

Evans was the receiver of Benford Ltd, a company incorporated in Vanuatu. He was appointed pursuant to the *Federal Trade Commission Act* (US). European Bank conducted banking operations in Vanuatu and received funds into a deposit account in the name of Benford. Those funds were proceeds of fraud perpetrated by the controllers of Benford in the United States. During 1998 fraudulent debits had been made to about 900,000 US credit card accounts of about US$47.5 million of which about US$7.5 million was transferred to the Vanuatu account. European Bank subsequently placed those funds in its own Citibank account in Sydney.

Rather than sue on the debt in Vanuatu, where the Government had raised the prospect of forfeiture under proceeds of crime legislation, the receiver

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