

# PART 3

Report on Court  
performance

## The work of the Court in 2020–21

This chapter of the annual report details the Federal Court's performance and workload during the financial year, as well as its management of cases and performance against its stated workload goals.

Aspects of the work undertaken by the Court to improve access to the Court for its users, including changes to its practice and procedure, are discussed. Information about the Court's work with overseas courts is also covered.

### Management of cases and deciding disputes

The following examines the Court's jurisdiction, management of cases, workload and use of assisted dispute resolution.

#### *The Court's jurisdiction*

The Court's jurisdiction is broad, covering almost all civil matters arising under Australian federal law and some summary and indictable criminal matters. It also has jurisdiction to hear and determine any matter arising under the Constitution through the operation of section 39B of the *Judiciary Act 1903*.

Central to the Court's civil jurisdiction is section 39B (1A)(c) of the *Judiciary Act 1903*. This jurisdiction includes cases created by federal statute and extends to matters in which a federal issue is properly raised as part of a claim or of a defence and to matters where the subject matter in dispute owes its existence to a federal statute.

The Court has jurisdiction under the *Judiciary Act 1903* to hear applications for judicial review of decisions by officers of the Commonwealth. Many cases also arise under the *Administrative Decisions (Judicial Review) Act 1977* which provides for judicial review of most administrative decisions made under Commonwealth enactments on grounds relating to the legality, rather than the merits, of the decision.

The Court also has jurisdiction to hear and determine a question of law referred to it by the Administrative Appeals Tribunal pursuant to section 45(2) of the *Administrative Appeals Tribunal Act 1975*. This jurisdiction falls under the Administrative and Constitutional Law

and Human Rights National Practice Area (NPA), which also includes complaints about unlawful discrimination and matters concerning the Australian Constitution. Figure A5.9.1 in Appendix 5 (*Workload statistics*) shows the matters filed in this practice area over the last five years.

In addition to hearing appeals in taxation matters from the Administrative Appeals Tribunal, the Court also exercises a first instance jurisdiction to hear objections to decisions made by the Commissioner of Taxation. Figure A5.9.7 in Appendix 5 (*Workload statistics*) shows the number of taxation matters filed over the last five years.

The Court shares first instance jurisdiction with the Supreme Courts of the states and territories in the complex area of intellectual property (copyright, patents, trademarks, designs and circuit layouts). All appeals in these cases, including appeals from the Supreme Courts, are to a Full Court of the Federal Court. Figure A5.9.5 shows the number of intellectual property matters filed over the last five years.

The Court also has jurisdiction under the *Native Title Act 1993*. The Court has jurisdiction to hear and determine native title determination applications and is responsible for their mediation. It also hears and determines revised native title determination applications, compensation applications, claim registration applications, applications to remove agreements from the Register of Indigenous Land Use Agreements and applications about the transfer of records. In addition, the Court also hears appeals from the National Native Title Tribunal and matters filed under the *Administrative Decisions (Judicial Review) Act 1977* involving native title. The Court's native title jurisdiction is discussed in this part. Figure A5.9.6 in Appendix 5 (*Workload statistics*) shows the number of native title matters filed over the last five years.

A further important area of jurisdiction for the Court derives from the *Admiralty Act 1988*. The Court has concurrent jurisdiction with the Supreme Courts of the states and territories to hear maritime claims under this Act. Ships coming into Australian waters may be arrested for the purpose of providing security for money claimed from ship owners and operators. If security is not provided, a judge may order the sale of the ship to provide funds to pay the claims. During the reporting year, the Court's Admiralty Marshals made five arrests. See

Figure A5.9.2 in Appendix 5 (*Workload statistics*) for the number of Admiralty and Maritime Law matters filed in the past five years.

The Court has jurisdiction under the *Fair Work Act 2009*, *Fair Work (Registered Organisations) Act 2009* and related industrial legislation. Workplace relations and fair work matters filed over the last five years are shown in Figure A5.9.4 in Appendix 5 (*Workload statistics*).

The Court's jurisdiction under the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* covers a diverse range of matters, from the appointment of registered liquidators and the winding up of companies, to applications for orders in relation to fundraising, corporate management and misconduct by company officers. The jurisdiction is exercised concurrently with the Supreme Courts of the states and territories.

The Court exercises jurisdiction under the *Bankruptcy Act 1966*. It has power to make sequestration (bankruptcy) orders against persons who have committed acts of bankruptcy and to grant bankruptcy discharges and annulments. The Court's jurisdiction includes matters arising from the administration of bankrupt estates.

Cases arising under Part IV (restrictive trade practices) and Schedule 2 (the Australian Consumer Law) of the *Competition and Consumer Act 2010* constitute a significant part of the workload of the Court. These cases often raise important public interest issues involving such matters as mergers, misuse of market power, exclusive dealings or false advertising. These areas fall under the Commercial and Corporations NPA. Figure A5.9.3 in Appendix 5 (*Workload statistics*) provides statistics on this practice area.

The Court has jurisdiction to hear defamation matters, civil aviation, negligence and election-related disputes. These cases fall under the Other Federal Jurisdiction NPA.

Since late 2009, the Court has also had jurisdiction in relation to indictable offences for serious cartel conduct. This jurisdiction falls under the Federal Crime and Related Proceedings NPA together with summary prosecutions and criminal appeals and other related matters.

The Court has a substantial and diverse appellate jurisdiction. It hears appeals from decisions of single judges of the Court and from the Federal Circuit Court in non-family law matters and from other courts exercising certain federal jurisdiction.

In recent years, a significant component of its appellate work has involved appeals from the Federal Circuit Court concerning decisions under the *Migration Act 1958*. The Court's migration jurisdiction is discussed in this part.

The Court also exercises general appellate jurisdiction in criminal and civil matters on appeal from the Supreme Court of Norfolk Island. The Court's appellate jurisdiction is also discussed in this part.

This summary refers only to some of the principal areas of the Court's work. Statutes under which the Court exercises jurisdiction, in addition to the jurisdiction vested under the Constitution through section 39B of the *Judiciary Act 1903*, are listed on the Court's website at [www.fedcourt.gov.au](http://www.fedcourt.gov.au).

## Changes to the Court's jurisdiction in 2020–21

The Court's jurisdiction during the year was enlarged or otherwise affected by a number of statutes including the following:

- *New Tax System (Family Assistance) (Administration) Act 1999*
- *Australia's Foreign Relations (State and Territory Arrangements) Act 2020*
- *Australian Immunisation Register Act 2015*
- *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*
- *Export Control Act 2020*
- *Export Control (Consequential Amendments and Transitional Provisions) Act 2020*
- *Industrial Chemicals Environmental Management (Register) Act 2021*
- *Intellectual Property Laws Amendment (Productivity Commission Response Part 2 and Other Measures) Act 2020*
- *Payment Times Reporting Act 2020*
- *Recycling and Waste Reduction Act 2020*

- *Student Identifiers Act 2014*
- *Aged Care Quality and Safety Commission Act 2018*
- *Export Control Act 2020*
- *Industrial Chemicals Act 2019*
- *Insurance Contracts Act 1984*
- *Inspector-General of Live Animal Exports Act 2019*
- *National Sports Tribunal Act 2019*
- *Student Identifiers Act 2014*, and
- *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

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

There were no amendments made to the Federal Court of Australia Act during the reporting year.

### **Fee regulation**

The operation of the Federal Court and Federal Circuit Court Regulation 2012 remained unchanged in the reporting year insofar as Federal Court proceedings are concerned.

The fee for filing applications under section 539 of the *Fair Work Act 2009* in certain circumstances is fixed at the same rate as prescribed under subsection 395(2) of that Act. That fee is adjusted on 1 July of each year for changes in the consumer price index by regulation 3.07 of the Fair Work Regulations 2009.

### **Federal Court Rules**

The judges are responsible for making the Rules of Court under the Federal Court Act. The Rules provide the procedural framework within which matters are commenced and conducted in the Court. The Rules of Court are made as Commonwealth Statutory Legislative Instruments.

The Rules are kept under review. New and amending rules are made to ensure that the Court's procedures are responsive to the needs of modern litigation. A review of the Rules is often undertaken as a consequence of changes to the Court's practice and procedure described elsewhere in this report. Proposed amendments are discussed with the Law Council of Australia and other relevant organisations, as considered appropriate.

There were no amendments made to the Federal Court Rules 2011 during the reporting year.

### **Other rules**

In some specialised areas of the Federal Court's jurisdiction, the judges have made rules that govern relevant proceedings in the Court; however, in each of those areas, the Federal Court Rules continue to apply where they are relevant and not inconsistent with the specialised rules.

The Federal Court (Corporations) Rules 2000 govern proceedings in the Federal Court under the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*, as well as proceedings under the *Cross-Border Insolvency Act 2008* which involve a debtor other than an individual. There were no changes to the Federal Court (Corporations) Rules 2000 in the reporting year.

The Federal Court (Bankruptcy) Rules 2016 govern proceedings in the Federal Court under the *Bankruptcy Act 1966*, as well as proceedings under the *Cross-Border Insolvency Act 2008* involving a debtor who is an individual. There were no changes to the Federal Court (Bankruptcy) Rules 2016 in the reporting year.

The Federal Court (Criminal Proceedings) Rules 2016 govern all criminal proceedings in the Federal Court, including summary criminal proceedings, indictable primary proceedings and criminal appeal proceedings. There were no changes to the Federal Court (Criminal Proceedings) Rules 2016 in the reporting year.

The Admiralty Rules 1988 govern proceedings in the Federal Court under the *Admiralty Act 1988*. There were no changes to the Admiralty Rules 1988 in the reporting year.

### **Approved forms**

Approved forms are available on the Court's website. Any document that is filed in a proceeding in the Court must be in accordance with an approved form. The Chief Justice may approve a form for the purposes of the Federal Court Rules 2011, the Federal Court (Bankruptcy) Rules 2016 and the Federal Court (Criminal Proceedings) Rules 2016.

On 6 November 2020, the Chief Justice approved the revocation and reissuance of Form 26: *Summary of the document to be served*, with effect from 6 November 2021, for the purposes of the Federal Court Rules 2011.

On 20 January 2021, the Chief Justice approved the revocation and reissuance of Form CP20: *Summons to attend for jury service*, with effect from 20 January 2021, for the purposes of the Federal Court (Criminal Proceedings) Rules 2016.

On 1 April 2021, the Chief Justice approved the revocation and reissuance of the following forms, with effect from 1 April 2021, for the purposes of the Federal Court (Bankruptcy) Rules 2016:

- Form B2: *Application*
- Form B3: *Interim application*, and
- Form B6: *Creditor's petition*.

### Practice notes

Practice notes are used to provide information to parties and their lawyers involved in proceedings in the Court on particular aspects of the Court's practice and procedure.

Practice notes supplement the procedures set out in the Rules of Court and are issued by the Chief Justice upon the advice of the judges of the Court and the Court's inherent power to control its own processes. All practice notes are available on the Court's website.

On 20 November 2020, the Court introduced *Practice Information Note APP 1: Case Management of Full Court and Appellate Matters*, the purpose of which is to acquaint parties and the profession with the Court's practice and procedure for the case management of its Full Court and appellate workload so that they can better prepare and assist the Court.

The Court has developed a draft Commercial Arbitration Practice Note which outlines the arrangements for the management within the National Court Framework of applications in the Court that concern commercial arbitration. The draft practice note has been sent to the profession for consultation and feedback from the profession is currently being considered by the Court.

### Guides

The Federal Court issues national guides. These guides cover a variety of subject areas, such as appeals, migration, human rights and insolvency matters. Other guides cover a range of practical and procedural matters, such as communicating with chambers and registry staff, clarifying the role and duties of expert witnesses, and providing guidance on the preparation of costs summaries and bills of costs.

In its response to the COVID-19 pandemic, the Federal Court developed a series of guides to support the practices developed for online hearings and the use of Microsoft Teams, including a *National Practitioners and Litigants Guide* intended to provide guidance for the legal profession and litigants-in-person appearing in online hearings.

All guides are available on the Court's website.

## Workload of the Federal Court and Federal Circuit Court

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

In 2020–21, a total of 10,191 matters were filed in the two courts. The number of filings has an impact on the Federal Court's registries, as the staff members of the Federal Court's registries process the documents filed for both the Federal Court and Federal Circuit Court (in its general federal law jurisdictions). The registries also provide the administrative support for each matter to be heard and determined by the relevant court.

## Case flow management of the Court's jurisdiction

The Court has adopted, as one of its key case flow management principles, the establishment of time goals for the disposition of cases and the delivery of reserved judgments. The time goals are supported by the careful management of cases through the Court's individual docket system and the implementation of practice and procedure designed to assist with the efficient disposition of cases according to law. This is further enhanced by the reforms of the National Court Framework.

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

### Disposition of matters other than native title

In 1999–2000, the Court set a goal of 18 months from commencement as the period within which it should dispose of at least 85 per cent of its cases (excluding native title cases). The time goal was set having regard to the growing number of long, complex and difficult cases, the impact of native title cases on the Court's workload and a decrease in the number of less complex matters. The time goal is reviewed regularly by the Court in relation to workload and available resources. The Court's ability to continue to meet its disposition targets is dependent upon the timely replacement of judges.

Notwithstanding the time goal, the Court expects that most cases will be disposed of well within the 18 month period, with only particularly large and/or difficult cases requiring more time.

Indeed, many cases are urgent and need to be disposed of quickly after commencement. The Court's practice and procedure facilitates early disposition when necessary.

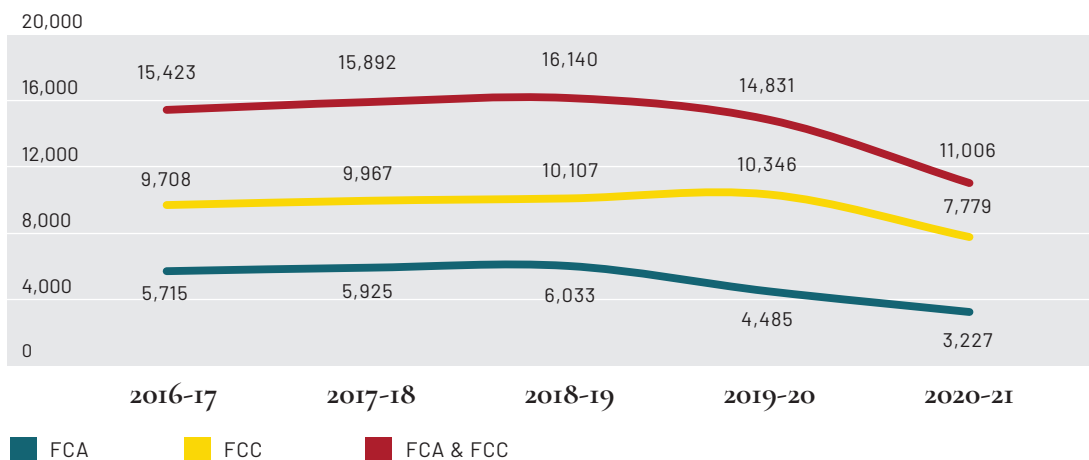
During the five-year period from 1 July 2016 to 30 June 2021, 91 per cent of cases (excluding native title matters) were completed in 18 months or less; 84 per cent in 12 months or less; and 67 per cent in six months or less. See Figure A5.4 in Appendix 5 (*Workload statistics*). Figure A5.5 shows the percentage of cases (excluding native title matters) completed within 18 months over the last five reporting years.

### Delivery of judgments

In the reporting period, the Court handed down 1,906 judgments for 1,656 court files. Of these, 486 judgments were delivered in appeals (both single judge and Full Court) and 1,420 in first instance cases. These figures include both written judgments and judgments delivered orally on the day of the hearing, immediately after the completion of evidence and submissions. There was a decrease in the total number of judgments delivered in 2020–21 compared to the number of judgments delivered in 2019–20.

The nature of the Court's workload means that a substantial proportion of the decisions in the matters that proceed to trial in the Court will be reserved by the trial judge at the conclusion of the trial.

Figure 3.1: Filings to 30 June 2021 – Federal Court and Federal Circuit Court



The judgment is delivered at a later date and is often referred to as a 'reserved judgment'. The nature of the Court's appellate work also means a substantial proportion of appeals require reserved judgments.

Appendix 7 includes a summary of decisions of interest delivered during the reporting year and illustrates the Court's varied jurisdiction.

## Workload of the Court in its original jurisdiction

### Incoming work

In the reporting year, 2,412 cases were commenced in, or transferred to, the Court's original jurisdiction. See Table A5.1.

### Matters transferred to and from the court

Matters may be remitted or transferred to the Court under:

- *Judiciary Act 1903*, section 44
- Cross-vesting Scheme Acts
- *Corporations Act 2001*, and
- *Federal Circuit Court of Australia Act 1999*.

During the reporting year, 163 matters were remitted or transferred to the Court:

- 16 from the High Court
- 33 from the Federal Circuit Court
- 46 from the Supreme Courts, and
- 68 from other courts.

Matters may be transferred from the Court under:

- *Federal Court of Australia Act 1976*
- *Jurisdiction of Courts (Cross-vesting) Act 1987*
- *Administrative Decisions (Judicial Review) Act 1977*
- *Bankruptcy Act 1966*
- *Corporations Act 2001*, and
- *Administrative Appeals Tribunal Act 1975*.

During 2020–21, no matters were transferred from the Court.

### Matters completed

Figure A5.2 in Appendix 5 (*Workload statistics*) shows a comparison of the number of matters commenced in the Court's original jurisdiction and the number completed. The number of matters completed during the reporting year was 2,916.

### Current matters

The total number of current matters in the Court's original jurisdiction at the end of the reporting year was 3,736 (see Table A5.1).

### Age of pending workload

The comparative age of matters pending in the Court's original jurisdiction (against all major causes of action, other than native title matters) at 30 June 2021 is set out in Table 3.1.

Native title matters are not included in Table 3.1 because of their complexity, the role of the National Native Title Tribunal and the need to acknowledge regional priorities.

**Table 3.1: Age of current matters (excluding appeals and related actions and native title matters)**

| CAUSE OF ACTION     | UNDER 6 MONTHS | 6–12 MONTHS | 12–18 MONTHS | 18–24 MONTHS | OVER 24 MONTHS | SUB-TOTAL |
|---------------------|----------------|-------------|--------------|--------------|----------------|-----------|
| Administrative law  | 37             | 31          | 4            | 6            | 10             | 88        |
| Admiralty           | 9              | 8           | 5            | 1            | 8              | 31        |
| Bankruptcy          | 100            | 17          | 20           | 15           | 18             | 170       |
| Competition law     | 5              | 6           | 0            | 3            | 7              | 21        |
| Trade practices     | 45             | 55          | 33           | 33           | 64             | 230       |
| Corporations        | 234            | 138         | 69           | 75           | 92             | 608       |
| Human rights        | 37             | 17          | 7            | 8            | 18             | 87        |
| Workplace relations | 0              | 2           | 0            | 0            | 0              | 2         |

| CAUSE OF ACTION            | UNDER 6 MONTHS | 6–12 MONTHS  | 12–18 MONTHS | 18–24 MONTHS | OVER 24 MONTHS | SUB-TOTAL     |
|----------------------------|----------------|--------------|--------------|--------------|----------------|---------------|
| Intellectual property      | 53             | 34           | 10           | 19           | 59             | 175           |
| Migration                  | 122            | 59           | 18           | 5            | 51             | 255           |
| Miscellaneous              | 141            | 72           | 42           | 41           | 74             | 370           |
| Taxation                   | 42             | 25           | 36           | 4            | 46             | 153           |
| Fair work                  | 76             | 69           | 31           | 21           | 54             | 251           |
| Criminal                   | 2              | 0            | 0            | 3            | 6              | 11            |
| <b>Total</b>               | <b>903</b>     | <b>533</b>   | <b>275</b>   | <b>234</b>   | <b>507</b>     | <b>2,452</b>  |
| <b>Percentage of total</b> | <b>36.8%</b>   | <b>21.7%</b> | <b>11.2%</b> | <b>9.5%</b>  | <b>20.7%</b>   | <b>100.0%</b> |

**Table 3.2: Age of current native title matters (excluding appeals)**

| CAUSE OF ACTION            | UNDER 6 MONTHS | 6–12 MONTHS | 12–18 MONTHS | 18–24 MONTHS | OVER 24 MONTHS | SUB-TOTAL     |
|----------------------------|----------------|-------------|--------------|--------------|----------------|---------------|
| Native title action        | 17             | 25          | 9            | 16           | 196            | 263           |
| <b>Percentage of total</b> | <b>6.5%</b>    | <b>9.5%</b> | <b>3.4%</b>  | <b>6.1%</b>  | <b>74.5%</b>   | <b>100.0%</b> |
| <b>Running total</b>       | <b>17</b>      | <b>42</b>   | <b>51</b>    | <b>67</b>    | <b>263</b>     |               |

The number of native title matters over 18 months old decreased slightly compared with figures recorded in the 2019–20 annual report. The number of native title matters between 12–18 months decreased significantly and between 18–24 months old also increased. Further information about the Court’s native title workload can be found later in this part.

The Court will continue to focus on reducing its pending caseload and the number of matters over 18 months old. A collection of graphs and statistics concerning the workload of the Court is contained in Appendix 5 (*Workload statistics*).

## The Court’s appellate jurisdiction

The appellate workload of the Court constitutes a significant part of its overall workload. While most appellate matters arise from decisions of single judges of the Court or the Federal Circuit Court, some are in relation to decisions by state and territory courts exercising certain federal jurisdiction. For reporting purposes, matters filed in the original jurisdiction of the Court but referred to a Full Court for hearing are treated as appellate matters.

The number of appellate proceedings commenced in the Court is dependent on many factors, including the number of first instance matters disposed of in a reporting year, the nature and complexity of such matters, the nature and complexity of issues raised on appeal, legislative changes increasing or reducing the jurisdiction of the Court and decisions of the Full Court or High Court (for example, regarding the interpretation or constitutionality of legislative provisions).

Subject to sections 25(1), (1AA) and (5) of the Federal Court Act, appeals from the Federal Circuit Court and courts of summary jurisdiction exercising federal jurisdiction, may be heard by a Full Court of the Federal Court or by a single judge in certain circumstances. All other appeals must be heard by a Full Court, which is usually constituted by three, and sometimes five, judges.

The Court publishes details of the four scheduled Full Court and appellate sitting periods to be held in February, May, August and November of each year. Each sitting period is up to four weeks in duration and matters will generally be listed in the next available sitting in the capital city where the matter was heard at first instance. In the reporting year, a large number of appellate matters were scheduled for hearing by



remote access technology, as part of the Court's special measures in response to the COVID-19 pandemic. There was also an increase in the number of matters listed outside of the four scheduled sitting periods, with the Chief Justice specially convening 51 Full Courts outside of the four scheduled sitting periods, involving 62 sitting days or part thereof.

## The appellate workload

During the reporting year, 1,057 appellate proceedings were filed in the Court. They include 871 appeals and related actions (815 filed in the appellate jurisdiction and 56 matters filed in the original jurisdiction), 23 cross appeals and 163 interlocutory applications such as applications for security for costs in relation to an appeal, a stay, an injunction, expedition or various other applications.

The Federal Circuit Court is a significant source of appellate work accounting for over 60 per cent (541 of the 871) of the appeals and related actions filed in 2020–21. The majority of these proceedings continue to be heard and determined by single judges exercising the Court's appellate jurisdiction.

Further information on the source of appeals and related actions is set out in Table A5.3 in Appendix 5 (*Workload statistics*). There was an overall decrease in the total number of appeals and related actions filed in 2020–21, from 1,031 in 2019–20 to 815 for the current reporting year. This decrease was largely attributable to a 27 per cent decrease in migration appeals and related actions, as well as decreases in the areas of taxation and administrative and constitutional law and human rights. However, these decreases were offset by increases in the areas of intellectual property, native title, federal crime and other federal jurisdiction.

In the reporting year, 654 appeals and related actions were finalised. Of these, 207 matters were filed and finalised in the reporting year. At 30 June 2021, there were 1,021 appeals currently before the Court, with 779 of these being migration appeals and related actions.

The comparative age of matters pending in the Court's appellate jurisdiction (including native title appeals) at 30 June 2021 is set out in Table 3.3.

Of the appellate and related matters pending at present, 33 per cent are less than six months old and 63 per cent are less than 12 months old. At 30 June 2021, there were 378 matters that were over 12 months old (see Table 3.3).

## Managing migration appeals

In 2020–21, 57 migration appeals were filed in the Court's appellate jurisdiction related to judgments of single judges of the Court exercising the Court's original jurisdiction. A further 485 migration matters were filed in relation to judgments of the Federal Circuit Court and five from another source.

Table 3.4 shows the number of appellate proceedings involving the Migration Act as a proportion of the Court's overall appellate workload since 2016–17.

Although the number of migration appellate filings has decreased by 27 per cent since the last reporting year, 67 per cent of the Court's total appellate workload concerned decisions made under the *Migration Act 1958*.

The Court continues to apply a number of procedures to streamline the preparation and conduct of these appeals and applications and to facilitate the expeditious management of the migration workload.

**Table 3.3: Age of current appeals, cross appeals and interlocutory appellate applications at 30 June 2021**

| CAUSE OF ACTION             | UNDER 6 MONTHS | 6–12 MONTHS | 12–18 MONTHS | 18–24 MONTHS | OVER 24 MONTHS | SUB-TOTAL |
|-----------------------------|----------------|-------------|--------------|--------------|----------------|-----------|
| Appeals and related actions | 338            | 305         | 214          | 131          | 33             | 1,021     |
| Percentage of total         | 33.1%          | 29.9%       | 21.0%        | 12.8%        | 3.2%           | 100.0%    |
| Running total               | 338            | 643         | 857          | 988          | 1,021          |           |

**Table 3.4: Appellate proceedings concerning decisions under the Migration Act as a proportion of all appellate proceedings (including cross appeals and interlocutory applications)**

| APPEALS AND RELATED ACTIONS              | 2016–17      | 2017–18      | 2018–19      | 2019–20      | 2020–21    |
|--|--------------|--------------|--------------|--------------|------------|
| Migration jurisdiction                   | 764          | 1,021        | 1,139        | 749          | 547        |
| Percentage                               | 73.0%        | 80.8%        | 80.5%        | 72.6%        | 67.1%      |
| <b>Total appeals and related actions</b> | <b>1,046</b> | <b>1,263</b> | <b>1,415</b> | <b>1,031</b> | <b>815</b> |

The Court reviews all migration matters to identify cases raising similar issues and where there is a history of previous litigation. This process allows for similar cases to be managed together resulting in more timely and efficient disposal of matters.

Migration appellate proceedings that are to be heard by a Full Court are generally listed for hearing in the next scheduled Full Court and appellate sitting period. In circumstances where a matter requires an expedited hearing or where a judge's commitments preclude a listing during the sitting period, a matter may be referred to a specially convened Full Court. In the 2020–21 reporting year, the Chief Justice specially convening 27 Migration Full Courts outside of the four scheduled sitting periods.

Migration appellate matters heard by single judges were listed for hearing throughout the reporting year, predominately by remote access technology, due to restrictions on in-person attendance at Court premises in response to the COVID-19 pandemic. The Court continues to apply a number of procedures to streamline the preparation and conduct of these appeals and applications and to facilitate the expeditious management of the migration workload. The Court reviews all migration matters to identify cases raising similar issues and where there is a history of previous litigation. This process allows for similar cases to be managed together resulting in more timely and efficient disposal of matters. Then, all migration-related appellate proceedings (whether to be heard by a single judge or by a Full Court) are listed for hearing in the next scheduled Full Court and appellate sitting period. The exceptions to this are where expedition of an appeal may be necessary or where a judge's commitments preclude listing allocated matters during the sitting period. Where any migration-related appellate proceeding requires an expedited hearing, the matter is allocated to a single judge or referred to a specially convened Full Court.

Fixing migration-related appellate proceedings for hearing in the four scheduled sitting periods has provided greater certainty and consistency for litigants. It has also resulted in a significant number of cases being heard and determined within the same sitting period.

## The Court's native title jurisdiction

### Statistics and trends

In 2020–21, the Court resolved 75 native title applications (commenced under section 61 of the *Native Title Act 1993* (Cth)), consisting of 50 native title applications, 12 non-claimant applications, three compensation applications, and 10 revision applications. There were 10 additional applications managed by the native title practice area that were also finalised.

Of the finalised applications, 52 were resolved by consent of the parties or were unopposed, three were finalised following litigation, and 30 applications were either discontinued or dismissed. There are several other matters in which a consent determination was made, however the file remains on foot due to the determination being conditional on a subsequent event or further issues such as costs which remain to be disposed of.

Thirty-nine new applications were filed under section 61 of the *Native Title Act 1993* during the reporting period. Of these, 19 are native title determination applications, 12 are non-claimant applications, six are compensation applications, and two were applications to revise existing determinations. In addition, six new applications were filed which were not commenced under section 61 of the *Native Title Act 1993*, but relate to native title matters and are case managed in the native title NPA. None of the above figures include appeals from native title decisions.

At the commencement of the reporting year, there were nine compensation applications before the Court: one in the Northern Territory, two in Queensland and six in Western Australia.

During the reporting year:

- two extant Queensland compensation applications were withdrawn
- three extant Western Australian compensation applications continued to await the resolution of the appeals against the registration of the South-West Noongar Indigenous Land Use Agreements (ILUAs)
- one compensation application in Western Australia was withdrawn
- three further compensation applications were filed in Western Australia
- one further compensation application was filed in Queensland
- three further compensation applications were filed in Western Australia
- one further compensation application was filed in the Northern Territory, and
- one compensation application was filed in New South Wales.

At the end of the reporting year, there were 192 current native title applications, comprising 150 determination applications, 29 non-claimant applications, 12 compensation applications, and one variation applications. This is a downward trend from the 237 extant at the end of the previous financial year and reflects some intensive case management by the Court to resolve ageing claims and a reduced number of new filings during the reporting year.

Subject to the constraints imposed by the COVID-19 pandemic, there are 68 consent determinations or hearings of either the substantive matter or separate questions currently forecast for the 2021–22 financial year. Many of those hearings will include an on-country component if travel is feasible. There are also approximately 25 matters that will require some aspects to be mediated on-country by the case-managing registrar.

The Court continues to focus on targeted case management by specialist registrars and judges and on mediation, predominantly conducted by registrars. The Court also maintains a panel of specialist accredited mediators who can be called upon to mediate from time to time, including by way of co-mediation. Registry based, on-country and remote mediation by way of

various technology platforms have been used to progress matters during the reporting period.

The objective of both mediation and case-management processes is to identify the genuine issues in dispute between the parties and the most effective means of resolving those disputes. This process accords with the Court's responsibilities under the *Native Title Act 1993* and its overarching purpose under sections 37M and 37N of the *Federal Court of Australia Act 1976* to facilitate the just resolution of disputes according to the law as quickly, inexpensively and efficiently as possible.

While full native title trials are reducing in number, there remains a significant number of litigated separate questions and interlocutory proceedings that can be extremely complex and lengthy in nature.

The trend of increasing court facilitation is demonstrated by the listings data over the past three years. There were 316 mediations and 983 case management hearings in 2018–19; and 263 mediations and 633 case management hearings and 35 regional case management conferences held during 2019–20. During 2020–21 and despite the abrupt halt to many scheduled events during some periods and the need to manage more matters remotely and administratively, the native title practice area still conducted 331 mediation listings, 617 case management hearings and substantive hearing listings, 671 administrative listings and 16 regional case management hearings.

Access requests are being made more frequently in all states and are becoming more onerous in nature. It remains a sensitive issue having regard to the nature of the material sought and as the instigation for the request is often to prepare a compensation application. The Court has been partnering with AIATSIS to enter into a memorandum of understanding around various areas of common interest, including consideration of access protocols within the framework of the Federal Court Rules.

### *Stakeholder engagement*

The Court continues to regularly engage with stakeholders in a manner and at a regularity appropriate to the activity level and local processes in each jurisdiction. The ability to convene in-person forums has unfortunately been limited by COVID-19 restrictions during the reporting year.

A forum and workshop were held on consecutive days in April 2021 at the Federal Court in Sydney for practitioners working in NSW.

The forum was convened both in-person and online, with approximately 80 people attending. The forum addressed topical matters in the practice area including compensation claims, evidentiary standards for connection in consent determination proceedings, the role of expert anthropologists and access to court documents in native title matters. The workshop was a smaller event for practitioners representing the state and the native title representative body in NSW to work pragmatically on developing best practice models for recurring issues which arise in practice.

A smaller hybrid working group was convened in Darwin in March 2021, with some participants linking in by phone. The Queensland user group has continued meeting bi-annually by video conference and it is hoped an in-person forum can occur in early 2022 for both Queensland and Western Australia.

## Significant litigation and developments

### Queensland

Regional call overs continue to be a key feature of the Court's approach to the management and progression of native title claims in Queensland. Call overs have been convened in Cairns (by remote conferencing) with regard to the Cape York and Torres Strait matters and the Northern Region, and in Brisbane with regard to the Southern Region. The case management landscape in Queensland has also involved regional approaches in a number of instances. Notably:

- In the Cape York, Torres Strait and Carpentaria Region, the 'Torres Strait cluster' of overlapping claims and the Cape York United claim comprising many local groups have both been the subject of intensive case management and mediation. The Cape York United matter is to be resolved by a series of local determinations under section 87A of the Native Title Act 1993 with the first three determinations scheduled for November 2021.
- In the Northern Region, the 'Cairns cluster' of overlapping claims continues to be the subject of intensive case management and mediation. This cluster was referred by the Court under section 54A of the *Federal Court Act 1976* and

rule 28.61 of the Federal Court Rules 2011 to two independent referees. Implementation of the referees report has been subject of court case management and interlocutory hearings during the reporting year. Also in the Northern region, the on-country hearing in the Wakaman People cluster of matters, which comprises three claimant applications and three non-claimant applications, was held during the reporting year.

- In the Southern Region, the 'GNP or Gangulu cluster' has been the subject of a separate questions hearing about connection during the reporting year, with final submissions due in late 2021. The Wongkumara People matter, together with the overlapping Yandruwandha Yawarrawarrka People matter and the Malyangapa People Part B matter, have also variously been the subject of extensive case management and mediation during the reporting year.

The hearing in the Clermont-Belyando Area application (formerly called the Wangan and Jagalingou People matter) was finalised late in the reporting year and is now reserved for judgment. The decision in the Kurtjar matter, over an area on the Gulf of Carpentaria remains reserved, which will determine the extent of a consent determination in this matter.

### South Australia

The Oodnadatta Common Overlap Proceeding hearing (SAD38/2013) commenced before Justice White in September 2019, with expert evidence to be heard in October 2020. The proceedings concern a small area of land around Oodnadatta in the far north of South Australia, covered by three overlapping claims: Arabana No 2 (Part 2) application and the applications made in Walka Wani No 1 and Walka Wani No 2. The decision in an interlocutory matter regarding the giving and publication of male restricted evidence was appealed to the Full Federal Court, which dismissed the appeal.

Trials in the following matters are scheduled to commence in the first half of 2021, each for several weeks duration:

- the Ngadjuri Wilyakali overlap proceedings, and
- the Ngarrindjeri and First Nations of the South East Overlap proceedings.

Trials in respect of native title claimant applications filed by the Wirangu and Nauo people were also listed to commence on a five week on-country hearing on 19 July 2021. At the end of the reporting period, these matters were successfully mediated and are now proceeding down a consent determination path.

### New South Wales

In March 2020, Justice Jagot convened a hearing on-country in the non-claimant matter Wagonga Local Aboriginal Land Council, which covers a small area entirely overlapped by the South Coast People claim application. Due to the COVID-19 pandemic, the on-country portion of the hearing was reduced and the hearing was finalised remotely through Microsoft Teams. Justice Jagot delivered her judgment on 5 August 2020, finding that native title was extinguished on the relevant lot. The decision was subject to an appeal and cross appeal which was heard by the Full Court on 24 and 25 May 2021, with judgment reserved.

In July 2020, a separate question hearing concerning nine suites of tenure categories and 49 specific tenures proceeded before Justice Griffiths by Microsoft Teams in the matter *Elaine Ohlsen & Ors on behalf of the Ngemba/Ngiyampaa People* (NSD38/2019). Judgment was delivered on 5 March 2021 and has since been appealed by the Attorney General of New South Wales. The appeal will be heard by the Full Court from 17 to 20 August 2021.

On 21 August 2020, the first compensation application in NSW was filed by Patricia Johnson & Anor on behalf of the Barkandji Malyangapa People over the area of the determined application NSD6084/1998. The matter has been actively case managed by Justice Jagot to address preliminary issues raised in the proceeding including whether the claim has been properly authorised. Notification of the claim has been deferred until such matters are resolved.

There was one consent determination proceeding in NSW in the 2020–21 reporting year. On 30 April 2021, Justice Rares convened a consent determination hearing at Evans Head in the matter *Veronica Wilson & Ors on behalf of the Bandjalang People*. The Widjabul Wia-bal matter is now in intensive case-management and mediation before the Court working towards a consent determination in early 2022.

### Western Australia

#### Pilbara

On 23 October 2020, the Yamatji Nation ILUA was conclusively registered enabling the Yamatji Nation native title consent determination made by Justice Mortimer on 7 February 2020 to come into effect and finalising four underlying claims. This provides for long term financial, social and land benefits to the native title holders and future generations.

*Lawson on behalf of the Badimaya Barna Guda People v State of Western Australia (No 2)* [2021] FCA 468 was delivered by Justice Mortimer on 7 May 2021, dismissing a native title application made by various Badimaya people for failing the registration test on multiple grounds including substantive merits grounds.

Following an on-country hearing in July 2019 for the Yinhawangka Gobawarra, Jurruru and Jurruru #2 matters, Mortimer J delivered judgment on 2 December 2020 and Smirke on behalf of the *Jurruru People v State of Western Australia (No. 2)* [2020] FCA 1728, the matter was referred back to mediation for finalisation.

#### Goldfields

A separate question connection hearing in Maduwongga commenced in December 2020 with on-country evidence and judgment is reserved. Justice Bromberg delivered *Champion on behalf of the Marlinyu Ghoorlie Claim Group v State of Western Australia* [2020] FCA 1175 on 14 August 2020, relating to an interlocutory application to inspect anthropological reports from a litigated native title determination in the region. His Honour having considered the principle of open justice and the interest in preserving confidentiality of sensitive information, granted leave to inspect and copy the documents on various conditions including that the documents cannot be communicated to any other person and cannot be used for any other purpose other than the proceeding. Additionally, Justice Colvin made negative determination orders by consent in the final part of the Mirning application consisting of nine blocks of land, on 18 January 2021, subject to registration of an ILUA.

## Kimberley

Outstanding issues regarding nomination of a prescribed body corporate (PBC) in the Birrimangan application, have been referred to mediation. It is likely that the Indigenous Land and Sea Corporation which has been made a party to the proceeding, will be determined as the agent PBC in the absence of a nominated body. Also in the Kimberley region, following an on-country hearing August 2019 in respect of a separate question in the Gajangana Jaru, Purnululu and Purnululu #2 matters, Justice Mortimer delivered judgement on 22 October 2020 in *Drill on behalf of the Purnululu Native Title Claim Group v State of Western Australia* [2020] FCA 1510 was referred back to mediation for finalisation. There are currently eleven matters in the Kimberley in mediation. There have been three consent determinations in the Kimberley in the period, two were on-country determinations in late November and early December 2020 and one was delivered on the papers, being a subsequent determination following a prior determination of native title for the group.

## Central Desert

Following the filing of two related compensation applications in the Central Desert region by a registered native title body corporate and the Tjiwarl common law holders on 17 June 2020, a third related compensation application was filed on 26 November 2020. All three applications have been the subject of intensive case management to timetable the applications towards hearing on-country commencing in August 2022, with concurrent mediation being convened between the applicant and State of Western Australia. Also in the region, on 27 July 2020, Justice Griffiths delivered a consent determination of native title in favour of the Untiri Pulka claimants. The determination includes recognition of both exclusive and non-exclusive native title rights and interests in the south east area of the Central Desert region.

The Nyamal Palyku Proceedings is now the subject of programming orders, with on country lay evidence commencing in September 2021. The Nyamal Palyku Proceedings is now comprised of three applications. A portion of WAD23/2019 Palyku and WAD483/2018 Palyku #2 were determined by consent on the papers as was WAD439/2019 Budina #2 also from the Pilbara region.

## Revision applications

Two revised native title determinations were decided on the papers: *Karlka Nyiyaparli Aboriginal Corporation RNTBC v State of Western Australia* [2021] FCA 9 and *Robe River Kuruma Aboriginal Corporation RNTBC v State of Western Australia* [2021] FCA 20 following applications made by the RNTBC's to alter the terms of the consent determination.

## South west

Following the decision of the High Court in *Northern Land Council v Quall* [2020] HCA 33 and the subsequent steps to resolution being met in the South West Settlement ILUA, the South West regional claimant and compensation applications are now under intensive case management before the Court to resolve the claims. This has included the dismissal of *AC (deceased) v State of Western Australia* [2021] FCA 735 following a strike out application made by the State of Western Australia. The compensation claim *Smith on behalf of the Single Noongar Claim Group v the State of Western Australia* [2021] FCA 252 was discontinued.

## Northern Territory

In the Northern region, a further compensation application was filed on 14 December 2020, the McArthur River Project Compensation Claim (NTD25/2020). The compensation application area is within the outer boundaries of the area covered by the earlier native title determination in *Ngajapa v Northern Territory* [2015] FCA 1249 (McArthur River Pastoral Lease), which was made by Justice Mansfield on 26 November 2015. An application to vary this determination has been filed, and both this and the compensation application are progressing together. The compensation application focuses in particular on the entitlement to compensation for the grant, validation and re-grant of mineral titles and the authorisation of mining activities. This is the third compensation claim in the Territory, the second being the Gove Peninsula claim which was filed in 2019 and remains in case management.

On 23 December 2020, an application was filed by seven native title holders to replace the PBC in nine different determinations of native title, *Mark Raymond & Ors v Top End (Default PBC/CLA) Aboriginal Corporation RNTBC*. The area covered

by the application includes the Newcastle Waters determination and surrounding pastoral leases in the Beetaloo Basin. The application sought to replace the Top End (Default PBC/CLA) Aboriginal Corporation with the Nurrdalinjji Native Title Aboriginal Corporation (ICN 9392). Orders granting leave to discontinue the matter were made by consent on 4 March 2021 and the matter was discontinued on 5 March 2021.

On 23 April 2021, Mr Kevin Quall filed an application for judicial review seeking review of the Kenbi ILUA registration decision. The Northern Land Council and the Northern Territory of Australia have been joined as respondents and the matter is ongoing.

Since July 2020, 14 consent determinations have been made in the Northern Territory, 11 of those were in the Northern region and three in the Central region. All seven revised determination applications in the Central region have now been finalised by consent.

## Victoria

In Victoria, *Margaret Gardiner & Ors v Taungurung Land and Waters Council & Ors* [2021] FCA 80 was delivered on 9 February 2021, setting aside the decision of the Registrar of the National Native Title Tribunal to register an ILUA negotiated between the State of Victoria and Taungurung Traditional Owner Group negotiated under the *Traditional Owner Settlement Act 2010* (Vic). Mediation is currently progressing in the First Peoples of the Millewa Mallee native title application seeking to resolve outstanding connection issues. Mediation is also continuing in the Eastern Maar People application seeking to resolve a number of interests asserts by Indigenous respondent parties with expert conferences to take place if the issues are not resolved, in September 2021. The Boonwurrung People claim which was filed on 29 May 2020 over land and waters in greater metropolitan Melbourne and the south east coast encompassing Wilson's Promontory, is awaiting notification following the discontinuance on 30 June 2021 of an application to the Court for a review of the delegate of the Registrar not to accept the claim for registration.

## Assisted dispute resolution

Assisted dispute resolution (ADR) is an important part of the efficient resolution of litigation in the Court context, with cases now almost routinely referred to some form of ADR. In addition to providing a forum for potential settlement, mediation is an integral part of the Court's case management.

In recognition of the Court's unique model of mediation and commitment to a quality professional development program, the Court became a Recognised Mediator Accreditation Body in September 2015 and implemented the Federal Court Mediator Accreditation Scheme (FCMAS). The FCMAS incorporates the National Mediator Accreditation Standards and the majority of court-ordered mediations are conducted by registrars who are trained and accredited by the Court under the FCMAS.

In the native title jurisdiction, while native title registrars now conduct most mediations of native title matters, the Court maintains a list on its website of appropriately qualified professionals if there is a need to engage an external mediator or co-facilitate mediation.

Since the 2010–11 reporting period, the Court has maintained comprehensive statistical information about referrals to ADR and the outcomes of ADR processes held during the relevant reporting period. Mediation referrals are summarised in Table 3.5. As in previous years, the data should be considered in light of various factors. Firstly, referrals to mediation or other types of ADR may occur in a different reporting period to the conduct of that mediation or ADR process. Secondly, not all referrals to mediation or the conduct of mediation occur in the same reporting period as a matter was filed. This means that comparisons of mediation referrals or mediations conducted as a proportion of the number of matters filed in the Court during the reporting period are indicative only. Thirdly, the data presented on referrals to ADR during the reporting period does not include information about ADR processes that may have been engaged in by parties before the matter is filed in the Court, or where a private mediator is used during the course of the litigation. Similarly, the statistics provided in Table 3.5 do not include instances where judges of the Court order

experts to confer with each other to identify areas where their opinions are in agreement and disagreement without the supervision of a registrar.

In response to the COVID-19 pandemic, since 17 March 2020 the Court has modified its practice in conducting mediations. A large number of mediations are now conducted by remote access technology or by a hybrid of in-person and remote access technology.

In 2020–21, there was an 11 per cent increase in the number of matters referred to mediation compared with the 2019–20 reporting period, with increases in particular in the administrative and constitutional and human rights, native title and other federal jurisdiction NPAs.

A collection of statistics concerning the workload of the Court by NPA is contained in Appendix 5 (*Workload statistics*).

## Improving access to the Court and contributing to the Australian legal system

The following section reports on the Court's work during the year to improve the operation and accessibility of the Court, including reforms to its practice and procedure. This section also reports on the Court's work during the year to contribute more broadly to enhancing the quality and accessibility of the Australian justice system, including the participation of judges in bodies such as the Australian Law Reform Commission and the Australian Institute of Judicial Administration, and in other law reform, community and educational activities.

An outline of the judges' work in this area is included in Appendix 8 (*Judges' activities*).

**Table 3.5: Mediation referrals in 2020–21 by NPA and registry**

| NPA  | NSW        | VIC        | QLD       | WA        | SA        | NT       | TAS       | ACT       | TOTAL      |
|--|------------|------------|-----------|-----------|-----------|----------|-----------|-----------|------------|
| Administrative and constitutional law and human rights | 17         | 15         | 13        | 2         | 1         | 1        | 0         | 1         | 50         |
| Admiralty and maritime                                 | 1          | 0          | 1         | 0         | 0         | 0        | 0         | 0         | 2          |
| Commercial and corporations                            | 58         | 64         | 28        | 10        | 12        | 0        | 16        | 9         | 197        |
| Employment and industrial relations                    | 53         | 42         | 19        | 12        | 7         | 1        | 3         | 2         | 139        |
| Federal crime and related proceedings                  | 0          | 0          | 0         | 0         | 0         | 0        | 0         | 0         | 0          |
| Intellectual property                                  | 21         | 29         | 5         | 2         | 3         | 0        | 0         | 0         | 60         |
| Migration  | 1          | 1          | 1         | 0         | 0         | 0        | 0         | 0         | 3          |
| Native title   | 4          | 0          | 15        | 8         | 2         | 1        | 0         | 0         | 30         |
| Other federal jurisdiction                             | 32         | 10         | 2         | 0         | 1         | 0        | 0         | 0         | 45         |
| Taxation   | 2          | 0          | 1         | 1         | 0         | 0        | 0         | 0         | 4          |
| <b>Total</b>   | <b>189</b> | <b>161</b> | <b>85</b> | <b>35</b> | <b>26</b> | <b>3</b> | <b>19</b> | <b>12</b> | <b>530</b> |



## Special measures relating to COVID-19

The Court continued, where necessary, to operate under practices designed to minimise in-person attendance on court premises, with the Court's priority being the health and safety of the community, including parties, practitioners, judges and staff, and the families of all of these groups.

Online hearings continued to be utilised using remote access technology such as Microsoft Teams. Upgrades to the Court's information technology infrastructure initiated last year which included increased internet bandwidth and video conference enabled courtrooms allowed for increased online hearings with the necessary transcript support.

The Court continued to utilise the following special measures information notes:

- Special measures in response to COVID-19 (SMIN-1)
- Special measures in Admiralty and Maritime: Warrants for the arrest of ships (SMIN-2)
- Special measures in Appeals and Full Court hearings (SMIN-3), and
- Special measures in relation to Court Attendance (SMIN-4).

A new Special Measures Information Note was introduced on 29 April 2021 for Appeals and Full Court Hearings (SMIN-5). SMIN-5 sets out arrangements for the conduct and management of appeals and Full Court hearings during the ongoing COVID-19 outbreak.

The Court has continued to operate at 80 per cent of its courtroom capacity, though at any given time this can depend upon the applicable restrictions across the different states and territories. The Court continues to monitor and adjust its practices and procedures to maximise its responsiveness to the ongoing challenges presented by the COVID-19 pandemic.

## Hearings for detainees

For litigants in immigration detention, the prospect of conducting online hearings by remote access technology can present particular challenges. The Court continues to work with national and state Bar Associations to arrange pro bono referrals to counsel where a litigant does not already have representation.

## eLodgment process improvements

The Court has implemented improvements to its lodgment process for the application of pseudonyms to certain protection visa proceedings. Legal representatives are encouraged to contact the registry to obtain a pseudonym before filing, which can then be used in the eLodgment system. Similar measures are being developed in relation to self-represented litigants seeking to register as a user of eLodgment in order to file proceedings.

## Practice and procedure reforms

The National Practice Committee is responsible for developing and refining policy and significant principles regarding the Court's practice and procedure. It is comprised of the Chief Justice, NPA coordinating judges and the national appeals coordinating judges, and is supported by a number of registrars of the Court.

During the reporting year, the committee dealt with a range of matters including:

- considering feedback received in respect of its national practice notes, and
- managing responsibilities and support for each NPA, including enhancing and developing national arrangements for liaison with the profession (including through court user-groups and forums in key practice areas), and developing a framework for skilled and experienced Judicial Registrar support for each NPA (including in class actions, migration and intellectual property).

## Liaison with the Law Council of Australia

The Court maintained a liaison with the Law Council of Australia, with discussions focused on the re-initiation of the Federal Court/Law Council of Australia Liaison Committee meeting following a break during the initial stages of the COVID-19 pandemic. The Federal Court/Law Council of Australia liaison meeting is held twice a year, with liaison on specific issues between representatives of the Law Council of Australia and leading judges from relevant NPAs and senior staff occurring between those meetings.

## Assistance for self-represented litigants

The Court delivers a wide range of services to self-represented litigants (SRLs). These services have been developed to meet the needs of SRLs for information and assistance concerning the Court's practice and procedure.

During the reporting year, the Attorney-General's Department continued to provide funding to LawRight, Justice Connect, JusticeNet SA and Legal Aid Western Australia to provide basic legal information and advice to SRLs in the Federal Court and the Federal Circuit Court.

These services involved providing assistance to draft or amend pleadings or prepare affidavits, giving advice on how to prepare for a hearing,

advising on how to enforce a court order and dissuading parties from commencing or continuing unmeritorious proceedings. While the services are independent of the courts, facilities are provided within court buildings to enable meetings to be held with clients.

Tables 3.6, 3.7 and 3.8 provide broad statistics about the number of SRLs appearing in the Court as applicants in a matter (respondents are not recorded). As the recording of SRLs is not a mandatory field in the Court's case management system, and the representation status of a party during the course of a proceeding may vary from time to time, statistics shown in the tables are indicative only. In the reporting year, 570 people who commenced proceedings in the Court were identified as self-represented. The majority were appellants in migration appeals.

**Table 3.6: Actions commenced by SRLs during 2020–21 by registry**

|                            | ACT       | NSW        | NT        | QLD        | SA        | TAS       | VIC        | WA         | TOTAL       |
|----------------------------|-----------|------------|-----------|------------|-----------|-----------|------------|------------|-------------|
| SRLs                       | 4         | 308        | 4         | 59         | 27        | 2         | 65         | 101        | 570         |
| <b>Percentage of total</b> | <b>1%</b> | <b>54%</b> | <b>1%</b> | <b>10%</b> | <b>5%</b> | <b>0%</b> | <b>11%</b> | <b>18%</b> | <b>100%</b> |

Due to rounding, percentages may not always appear to add up to 100 per cent.

**Table 3.7: Proceedings commenced by SRLs in 2020–21 by cause of action**

| CAUSE OF ACTION             | TOTAL ACTIONS | % OF TOTAL  |
|-----------------------------|---------------|-------------|
| Administrative law          | 22            | 4%          |
| Admiralty                   | 0             | 0%          |
| Appeals and related actions | 395           | 73%         |
| Bankruptcy                  | 8             | 1%          |
| Bill of Costs               | 0             | 0%          |
| Competition law             | 2             | 0%          |
| Consumer protection         | 2             | 0%          |
| Corporations                | 4             | 1%          |
| Cross claim                 | 0             | 0%          |
| Fair work                   | 7             | 1%          |
| Human rights                | 13            | 2%          |
| Industrial                  | 0             | 0%          |
| Intellectual property       | 0             | 0%          |
| Migration                   | 64            | 12%         |
| Miscellaneous               | 19            | 4%          |
| Native title                | 0             | 0%          |
| Taxation                    | 5             | 1%          |
| <b>Total</b>                | <b>541</b>    | <b>100%</b> |

Due to rounding, percentages may not always appear to add up to 100 per cent.

**Table 3.8: Appeals commenced by SRLs in 2020–21 by cause of action**

| CAUSE OF ACTION       | TOTAL ACTIONS | % OF TOTAL  |
|-----------------------|---------------|-------------|
| Administrative law    | 7             | 2%          |
| Admiralty             | 0             | 0%          |
| Bankruptcy            | 14            | 4%          |
| Competition law       | 0             | 0%          |
| Consumer protection   | 1             | 0%          |
| Corporations          | 0             | 0%          |
| Fair work             | 6             | 2%          |
| Human rights          | 0             | 0%          |
| Industrial            | 0             | 0%          |
| Intellectual property | 0             | 0%          |
| Migration             | 359           | 91%         |
| Miscellaneous         | 7             | 2%          |
| Native title          | 0             | 0%          |
| Taxation              | 1             | 0%          |
| <b>Total</b>          | <b>395</b>    | <b>100%</b> |

Due to rounding, percentages may not always appear to add up to 100 per cent.

### *Direct financial counselling project in bankruptcy proceedings*

With the assistance of Consumer Action in Melbourne and Uniting Communities in Adelaide, the Court has, in conjunction with the Federal Circuit Court, been able to maintain a program of targeted financial counselling assistance to SRLs in bankruptcy proceedings. Since the latter part of 2014 in Melbourne and 2018 in Adelaide, a financial counsellor attends the courtroom in every bankruptcy list. During the COVID-19 pandemic, a financial counsellor has been available either by telephone or via Microsoft Teams. The registrar presiding is able to refer an SRL to the financial counsellor for an immediate confidential discussion so that the SRL better understands his or her options when faced with the prospect and consequences of bankruptcy.

In the Melbourne registry, SRLs are also now provided with the details of financial counselling services ahead of the first court return date.

In the Adelaide registry, referrals may also be made by registry staff when assisting an SRL by telephone or over the counter, and creditor's solicitors have also provided the financial counsellor's details to SRLs. The latter has facilitated the settlement of several matters before the filing of a creditor's petition or before the first return date before the Court.

During the reporting year, both Melbourne and Adelaide experienced reduced numbers of filings due to changes to the Bankruptcy Act because of COVID-19. Numbers are beginning to increase in both registries.

Registrars in Melbourne and Adelaide have reported favourably about the program, and view it having significant advantages for SRLs, creditors and the presiding registrars.

### *Interpreters*

The Court is aware of the difficulties faced by litigants who have little or no understanding of the English language. The Court will not allow a party or the administration of justice to be disadvantaged by a person's inability to secure the services of an interpreter. It has therefore put in place a system to provide professional interpreter services to people who need those services but cannot afford to pay for them.

In general, the Court's policy is to provide these services for litigants who are self-represented and who do not have the financial means to purchase the services, and for litigants who are represented but are entitled to an exemption from payment of court fees, under the Federal Court and Federal Circuit Court fees regulation (see below).

## Court fees and exemption

Fees are charged under the Federal Court and Federal Circuit Court Regulation 2012 for filing documents; setting a matter down for hearing; hearings and mediations; taxation of bills of costs; and for some other services in proceedings in the Court.

During the reporting year, the rate of the fee that was payable depended on whether the party liable to pay was a publicly listed company (for bankruptcy filing and examination fees only); a corporation; a public authority (for bankruptcy filing and examination fees only); a person; a small business; or a not-for-profit association.

Some specific proceedings are exempt from all or some fees. These include:

- human rights applications (other than an initial filing fee of \$55)
- some fair work applications (other than an initial filing fee of \$74.50)
- appeals from a single judge to a Full Court in human rights and some fair work applications
- an application by a person to set aside a subpoena
- an application under section 23 of the *International Arbitration Act 1974* for the issue of a subpoena requiring the attendance before or production of documents to an arbitrator (or both)
- an application for an extension of time
- a proceeding in relation to a case stated or a question reserved for the consideration or opinion of the Court
- a proceeding in relation to a criminal matter
- setting-down fees for an interlocutory application
- a proceeding in relation to a matter remitted to the Federal Court by the High Court under section 44 of the *Judiciary Act 1903*, and
- a proceeding in relation to a referral to the Court of a question of law by a tribunal or body.

A person is entitled to apply for a general exemption from paying court fees in a proceeding if that person:

- has been granted Legal Aid
- has been granted assistance by a representative body to bring proceedings in the Federal Court under Part 11 of the *Native Title Act 1993* or has been granted funding to perform some functions of a representative body under section 203FE of that Act
- is the holder of a health care card, a pensioner concession card, a Commonwealth seniors health card or another card certifying entitlement to Commonwealth health concessions
- is serving a sentence of imprisonment or is otherwise detained in a public institution
- is younger than 18 years, or
- is receiving youth allowance, Austudy or ABSTUDY benefits.

A person who has a general exemption from paying a fee can also receive, without paying a fee, the first copy of any document in the court file or a copy required for the preparation of appeal papers.

A corporation, or other body, that had been granted Legal Aid or funding under the *Native Title Act 1993* has the same entitlements.

A person (but not a corporation) is exempt from paying a court fee that otherwise is payable if a registrar or an authorised officer is satisfied that payment of that fee at that time would cause the person financial hardship. In deciding this, the registrar or authorised officer must consider the person's income, day-to-day living expenses, liabilities and assets. Even if an earlier fee has been exempted, eligibility for this exemption must be considered afresh on each occasion a fee is payable in any proceeding.

More comprehensive information about filing and other fees that are payable, how these are calculated (including definitions used e.g. 'not-for-profit association', 'public authority', 'publicly listed company' and 'small business') and the operation of the exemption from paying the fee is available on the Court's website. Details of the fee exemptions during the reporting year are set out in Appendix 1 (*Financial statements*).

## Freedom of information

### Information Publication Scheme

As required by subsection 8(2) of the *Freedom of Information Act 1982*, the Federal Court has published, on its website at [www.fedcourt.gov.au/ips](http://www.fedcourt.gov.au/ips), materials relating to the Information Publication Scheme. This includes the Court's current Information Publication Scheme plan as well as information about the Court's organisational structure, functions, appointments, annual reports, consultation arrangements and freedom of information contact officer as well as information routinely provided to the Australian Parliament.

The availability of some documents under the *Freedom of Information Act 1982* will be affected by section 5 of that Act, which states that the Act does not apply to any request for access to a document of the Court unless the document relates to matters of an administrative nature. Documents filed in court proceedings do not relate to matters of an administrative nature; they may, however, be accessible by way of an application for inspection of court documents under the Federal Court Rules.

### Information for the media and televised judgments

The Director, Public Information (DPI) is responsible for dealing with all media inquiries which usually relate to accessing files and requests for judgments. Duties also involve issues that can require high-level contact and coordination.

Critical to the DPI's effectiveness is the close cooperation and support of registries, judges' chambers, web team and those responsible for external broadcasting via streaming and Microsoft Teams. The role also involves briefing associates about how the Court deals with the media, arranging camera access in cases of public interest, and contacting journalists when mistakes have been made.

The pandemic has dramatically changed the way the Court operates – most significantly, through the use of Microsoft Teams and streaming so the public can follow individual cases. This has made cases much more accessible and easier for media. It facilitates the open justice principle, allowing many more to monitor proceedings than would otherwise be possible. Streaming – in particular – has been well-received, especially given the quality of the picture and

sound. The Federal Court was the first Court to ever live stream a hearing in 1999 and the commencement of a pilot program in February 2021 has given the use of this technology a massive boost.

In matters of extensive public interest, the Court has established online files where all documents approved accessible are placed. This removes the need for individual applications to registry and makes it easier for journalists, judges and court staff.

In the reporting year, such files were created for the following:

- NSD206/2021: Christian Porter v ABC
- NSD426/2021: Joanne Dyer v Sue Chrysanthou
- NSD1485, 1486, 1487, 1826, 1440/2018: Ben Roberts-Smith v Fairfax Media; The Age; The Federal Capital Press; Jonathan Pearlman
- NSD1220/2020: Australian Securities & Investments Commission v Melissa Caddick & Anor
- NSD388/2021: Gary Newman v Minister for Health and Aged Care.

At the end of the reporting year, the combined number of page views for the Porter and related Dyer matters was 73,341, eclipsing the previous highest number of 47,224 for *Rush v Nationwide News*.

### Community relations

The Court engages in a wide range of activities with the legal profession, including regular user group meetings. The aim of user groups is to provide a forum for court representatives and the legal profession to discuss existing and emerging issues, provide feedback to the Court and act as a reference group. Seminars and workshops on issues of practice and procedure in particular areas of the Court's jurisdiction are also regularly held.

### Working with the Bar

Registries across the country hosted advocacy sessions and a number of bar moot courts and moot competitions and assisted with readers' courses. The Western Australian registry hosted a silks ceremony in March 2021 and the Victorian registry hosted the Monash General Moot (junior and senior division) in March 2021 and the JD Moot Competition Grand Final in May 2021.

## User groups

User groups have been formed along NPA lines to discuss issues related to the operation of the Court, its practice and procedure, to act as a reference group for discussion of developments and proposals, and as a channel to provide feedback to the Court on particular areas of shared interest. During the reporting year, user groups met both nationally and locally in a number of practice areas.

## Legal community

During the year, the Court's facilities were made available for events for the legal community including:

- **Adelaide** – the Essential Trial Advocacy Course.
- **Brisbane** – the Professor Michael Whincop Memorial Lecture.
- **Canberra** – the biannual Courts and Legal professionals meeting in November 2020 and April 2021.
- **Darwin** – a Native Title User Group.
- **Hobart** – the UN Day Lecture.
- **Melbourne** – National Commercial Law webinars, a migration seminar, insolvency user group meeting, Monash General Moot and the JD Moot Competition Grand Final.
- **Perth** – a pro bono lawyers function, the Summer Clerks Program Seminar on 'Judicial Registrar work at the Federal Court' and 'The Workings of the Federal Court', a WA Silks Ceremony, and an Australian Academy of Law presentation.
- **Sydney** – the Whitmore Lecture, the Australian Law Reform Commission seminars, the Judicial Conference of Australia, a Consultative Council of Australian Law Reporting Forum, and events for the Australian Judicial Officers Association and the Australasian Institute of Judicial Administration.

## Involvement in legal education programs and legal reform activities (contribution to the legal system)

The Court is an active supporter of legal education programs, both in Australia and overseas. During the reporting year, the Chief Justice and many judges:

- presented papers, gave lectures and chaired sessions at judicial and other conferences, judicial administration meetings, continuing legal education courses and university law schools
- participated in Law Society meetings and other public meetings, and
- held positions on advisory boards or councils or committees.

An outline of the judges' work in this area is included in Appendix 8 (*Judges' activities*).

## National standard on judicial education

In 2010, a report entitled 'Review of the National Standard for Professional Development for Australian Judicial Officers' was prepared for the National Judicial College of Australia. The Court was invited and agreed to adopt a recommendation from that report to include information in the Court's annual report about:

- participation by members of the Court in judicial professional development activities
- whether the proposed standard for professional development was met during the year by the Court, and
- if applicable, what prevented the Court meeting the standard (such as judicial officers being unable to be released from court, lack of funding etc.).

The standard provides that judicial officers identify up to five days a year on which they could participate in professional development activities.

The judges' meetings scheduled for November 2020 and March 2021 in Sydney did not proceed, in light of the COVID-19 pandemic.

During 2020–21 the Court offered the following education sessions:

- Cyber security presented by panellists from CyberCX
- Judicial wellbeing

- Working with registrars
- National Practice Area sessions on:
  - Administrative and Constitutional Law and Human Rights
  - Commercial and Corporations
  - Employment and Industrial Relations
  - Intellectual Property.

In addition to the above, judges undertook other education activities through participation in seminars and conferences. Some of these are set out in Appendix 8 (*Judges' activities*).

In 2020–21, due to the COVID-19 pandemic, the Federal Court was unable to provide five days of professional development activities for its judicial officers.

### Work with international jurisdictions

Despite a number of projects and activities being postponed or cancelled as a result of the COVID-19 pandemic, the Federal Court continued to collaborate with a number of courts across the Asia-Pacific supporting regional local reform and development objectives.

The Court was able to re-engineer its major project, the Pacific Judicial Strengthening Initiative to be delivered remotely and to focus on the most pressing needs resulting from the pandemic. The Court's efforts to promote justice and the rule of law during this time of crisis were recognised by the 2021 World Justice Challenge, with the Initiative being selected as one of its global finalists.

As a particular response to the pandemic, Justices Collier and Logan assisted the Papua New Guinea judiciary to develop a practice note in relation to the hearing on the papers of appeals and other Supreme Court proceedings and later participated in the determination of appeals so heard.

### Regional collaborations

Through the New Zealand government-funded Pacific Judicial Strengthening Initiative, the Court continued to conduct activities contributing to building fairer societies by enabling the provision of more accessible, just, efficient

and responsive justice services. The Initiative supports improvements among 15 participating Pacific Island Courts, across five thematic areas:

1. Leading and managing change locally.
2. Enabling marginalised and vulnerable groups to access justice in and through courts.
3. Professionalism.
4. Protection of human rights, including those who have suffered gender and family violence.
5. Efficiency, accountability and transparency.

The Court delivered 44 activities across all Partner Courts, engaging with 681 participants (44 per cent female). Twenty locally led grant activities were approved enabling Partner Courts to develop, implement and report on key priorities for their Courts. Since its commencement in 2016, the Initiative has delivered 200 activities and supported the delivery of 77 locally-led activities. These activities have contributed to building the capacity of 3,000 people (47 per cent female) and engaged a similar number of people in community consultations to promote awareness about their rights and how to access them through court.

To support Partner Courts to continue to operate during the COVID-19 pandemic, the Court delivered a series of webinars to discuss approaches and provide tools to ensure that Pacific Courts remained open. In addition, the Court developed and circulated weekly COVID-related resources as a way to support Partner Courts in the challenges they faced due to the pandemic. Regional online learning webinars were delivered and a range of materials and resources to support Partner Courts were made available on the PJSI website.

A collection of 20 toolkits, on a range of topics, have been designed in recent years to support change through the promotion of local use, management, ownership and sustainability of judicial development in Partner Courts. By developing and making available these resources, the Initiative aims to build local capacity to enable Partner Courts to address local needs and reduce reliance on external support.

## World Intellectual Property Organisation

The Court has actively engaged with the World Intellectual Property Organisation (WIPO) in a number of projects. In 2020 it entered into a Memorandum of Understanding with WIPO in order to facilitate the Court's participation in 'WIPO Lex', a database hosted by WIPO of legislation and significant intellectual property cases from around the world. The database was launched in November 2020 and Australia was one of the 10 inaugural participants. Australia's contribution was uploaded and is maintained with the assistance of Justice Burley.

Justice Burley has also been appointed editor of a WIPO 'Intellectual Property Benchbook' for judges in the Philippines, Vietnam and Indonesia, with contributions from judges from each of those countries. This is an ongoing project and a first edition of the book is expected to be published in 2022. The Court is also contributing to a chapter on Patent procedure organised by WIPO.

## Australian Competition and Consumer Commission

The Court and the Australian Competition and Consumer Commission entered into an MOU in June 2020, to add to a series of 'Judicial Primers' on competition law. The Primers have been published by the Organisation for Economic Co-operation and Development (OECD) for the benefit of competition law judges across Association of South Asian Nations (ASEAN) member states. In the past year, Justice O'Bryan supervised the drafting of the 5th primer concerning 'market definition' and the 6th primer concerning 'vertical effects' and participated in their launch at OECD/Korea Policy Centre Competition Seminars for Asia-Pacific judges in February and June respectively. The Judicial Primers are considered to be an important aspect of supporting effective implementation of competition policy and law in ASEAN countries.