Part 3: Report on court performance

The work of the Court in 2021–22

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* (Cth) 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* (Cth). This jurisdiction falls under the Administrative and Constitutional Law and Human Rights National Practice Area, 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 six 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* (Cth), *Fair Work (Registered Organisations) Act 2009* (Cth) 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* (Cth) 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* (Cth) 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 National Practice Area. 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 National Practice Area.

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 National Practice Area 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 and Family Court of Australia (Division 2) 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 and Family Court of Australia (Division 2) concerning decisions under the *Migration Act 1958* (Cth). 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.

Changes to the Court's jurisdiction in 2021–22

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

- *Online Safety Act 2021* (Cth)
- *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (Cth)
- *Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Act 2021* (Cth)
- *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (Cth)
- *Security Legislation Amendment (Critical Infrastructure) Act 2021* (Cth)
- *Offshore Electricity Infrastructure Act 2021* (Cth)
- *Telstra Corporation and Other Legislation Amendment Act 2021* (Cth), and
- *Data Availability and Transparency Act 2022* (Cth).

Amendments to the Federal Court of Australia Act

During the reporting year the *Federal Court of Australia Act 1976* was amended by the *Courts and Tribunals Legislation Amendment (2021 Measures No.1) Act 2022* (Cth). These amendments provided clarification on the exercise of the Court's jurisdiction through remote hearings by way of video link, audio link or other appropriate means.

Fee regulation

The *Federal Court and Federal Circuit Court Regulation 2012* was amended by *Federal Circuit and Family Court of Australia Legislation (Consequential Amendments and Other Measures) Regulations 2021* to become the *Federal Court and Federal Circuit and Family Court Regulations 2012*.

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 of Australia Act 1976*. 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* (Cth) 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 29 April 2022, the Chief Justice approved a new form, Form 138: Amicus Curiae. This form relates to the certification by a judicial officer when it is determined that an amicus curiae be appointed to a matter pursuant to rule 9.12 of the *Federal Court Rules 2011*. The form was issued on 17 May 2022.

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 21 December 2021, the Court published the Commercial Arbitration Practice Note CA-1 which outlines the arrangements for the management within the National Court Framework of applications in the Court that concern commercial arbitration. The Court prepared drafts of a Referee and Assessor Practice Note and a General and Personal Insolvency Sub-Area Practice Note. The draft Referee and Assessor Practice Note provides guidance on the Court's practice and procedure relating to orders of referral and orders for the appointment of an assessor, including the standard terms of such orders. The draft Personal Insolvency Sub-Area Practice Note sets out arrangements for the management of matters under the *Bankruptcy Act 1966* within the National Court Framework. Both these drafts were sent to the profession for consultation. After considering the feedback received, these Practice Notes have been finalised and are in the process of being published on the Court's website.

On 7 March 2022, the Court published two practice notes relating to the Migration National Practice Area. Practice Note MIG-1 provides information on the Court's practices and procedures for the case management of its migration workload, so that parties and the profession can better prepare and assist the Court. Practice Note MIG-2 pertains to the removal from Australia of immigration detainees who have proceedings before the Court, with parties expected to advise the Court of any removal arrangements being contemplated or made, in order to facilitate the efficient administration of justice.

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 and Family Court of Australia (Division 2)

The Federal Court has concurrent jurisdiction with the Federal Circuit and Family Court of Australia (Division 2) 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 and Family Court of Australia (Division 2) in its general federal law jurisdiction.

In 2021–22, a total of 10,114 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 and Family Court (Division 2). 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

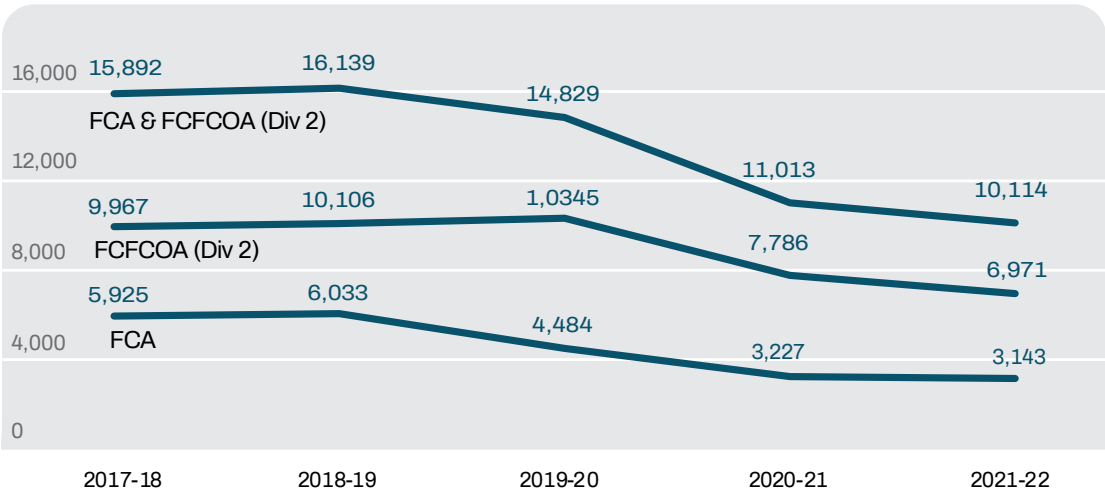
The Court has adopted, as one of its key case flow management principles, the establishment of time goals for the disposition of cases and the delivery of reserved judgments. The time goals are supported by the careful management of cases through the Court's individual docket system and the implementation 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

FIGURE 3.1: FILINGS TO 30 JUNE 2022 – FEDERAL COURT OF AUSTRALIA AND FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)



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 2017 to 30 June 2022, 89 per cent of cases (excluding native title matters) were completed in 18 months or less; 81 per cent in 12 months or less; and 62 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 1,889 judgments for 1,698 court files. Of these, 525 judgments were delivered in appeals (both single judge and Full Court) and 1,364 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 2021–22 compared to the number of judgments delivered in 2020–21.

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.

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, 2,495 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 and Family Court of Australia Act 2021*.

During the reporting year, 174 matters were remitted or transferred to the Court:

- 6 from the High Court
- 18 from the Federal Circuit and Family Court of Australia (Division 2)
- 67 from the Supreme Courts, and
- 83 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 2021–22, 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 3,096.

Current matters

The total number of current matters in the Court's original jurisdiction at the end of the reporting year was 3,799 (*see* Table A5.1).

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	33	24	7	10	12	86
Admiralty	9	5	4	5	11	34
Bankruptcy	107	50	15	5	28	205
Competition law	5	5	4	5	8	27
Trade practices	41	54	18	30	91	234
Corporations	218	138	75	76	138	645
Human rights	19	17	5	10	19	70
Workplace relations	0	0	0	2	0	2
Intellectual property	40	49	26	17	47	179
Migration	67	87	26	14	50	244
Miscellaneous	109	110	63	37	97	416
Taxation	36	46	23	9	60	174
Fair work	79	58	31	37	46	251
Criminal	4	7	1	0	8	20
TOTAL	**767**	**650**	**298**	**257**	**615**	**2,587**
Percentage of total	29.6%	25.1%	11.5%	9.9%	23.8%	100.0%

TABLE 3.2: AGE OF CURRENT 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	23	16	9	19	179	246
Percentage of total	9.3%	6.5%	3.7%	7.7%	72.8%	100.0%
RUNNING TOTAL	**9.3%**	**15.9%**	**19.5%**	**27.2%**	**100.0%**	

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 2022 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.

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 and Family Court of Australia (Division 2), 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), 25(1AA) and 25(5) of the *Federal Court of Australia Act 1976*, appeals from the Federal Circuit and Family Court of Australia (Division 2) 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 were also 14 Full Courts that the Chief Justice convened to be heard as special fixtures outside of the four scheduled sittings periods, including a joint hearing with the New Zealand Court of Appeal.

The appellate workload

During the reporting year, 907 appellate proceedings were filed in the Court. They include 695 appeals and related actions (648 filed in the appellate jurisdiction and 47 matters filed in the original jurisdiction), 18 cross appeals and 194 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 and Family Court of Australia (Division 2) is a significant source of appellate work accounting for 54 per cent of the appeals and related actions filed in 2021–22. 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 filed in 2021–2022, from 815 to 648 for the current reporting year. This decrease was largely attributable to a 33 per cent decrease in migration appeals, as well as decreases in the areas of taxation and employment and industrial relations. However, these decreases were offset by increases in the areas of intellectual property, native title, commercial and corporations and other federal jurisdiction.

In the reporting year, 710 appeals and related actions were finalised. Of these, 194 matters were filed and finalised in the reporting year. At 30 June 2022, there were 966 appeals currently before the Court, with 709 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 2022 is set out in Table 3.3.

Of the appellate and related matters pending at present, just under 30 per cent are less than six months old and 50 per cent are less than 12 months old. At 30 June 2022, there were 487 matters that were over 12 months old (*see* Table 3.3).

Managing migration appeals

In 2021–22, 70 migration appeals and applications 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 304 migration matters were filed in relation to judgments of the Federal Circuit and Family Court of Australia (Division 2).

Table 3.4 shows the number of appellate proceedings involving the *Migration Act 1958* as a proportion of the Court's overall appellate workload since 2017–18.

Although the number of migration appellate filings has decreased by 33 per cent since the last reporting year, 57 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. 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 2021–22 reporting year, the Chief Justice specially convened four 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, many by remote access technology, due to restrictions on in-person attendance at court premises in response to the COVID-19 pandemic.

TABLE 3.3: AGE OF CURRENT APPEALS, CROSS APPEALS AND INTERLOCUTORY APPELLATE APPLICATIONS AT 30 JUNE 2022

CAUSE OF ACTION	UNDER 6 MONTHS	6–12 MONTHS	12–18 MONTHS	18–24 MONTHS	OVER 24 MONTHS	SUB-TOTAL
Appeals and related actions	266	213	152	152	183	966
Percentage of total	27.5%	22.0%	15.7%	15.7%	18.9%	100.0%
RUNNING TOTAL	**266**	**479**	**631**	**783**	**966**	

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	2017–18	2018–19	2019–20	2020–21	2021–22
Migration jurisdiction	1,021	1,139	749	547	367
Percentage	80.8%	80.5%	72.6%	67.1%	56.6%
TOTAL APPEALS AND RELATED ACTIONS	**1,263**	**1,415**	**1,031**	**815**	**648**

The Court's native title jurisdiction

Statistics and trends

In 2021–22, the Court resolved 53 native title applications (commenced under section 61 of the *Native Title Act 1993*, consisting of 40 native title applications, nine non-claimant applications, two compensation applications, and two revised native title determination applications. There were 13 additional applications managed by the native title practice area that were also finalised.

Of the total finalised applications, 39 were resolved by consent of the parties or were unopposed, four were finalised following litigation, and 23 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-four new applications were filed under section 61 of the *Native Title Act 1993* during the reporting period. Of these, 14 are native title determination application, 15 are non-claimant applications, four are compensation applications, and one is an applications to revise an existing determination. In addition, 18 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 National Practice Area.

At the commencement of the reporting year, there were 12 compensation applications before the Court: two in the Northern Territory, one in Queensland, one in New South Wales and eight in Western Australia.

During the reporting year:

- the New South Wales compensation application was withdrawn
- one compensation application in Western Australia was finalised by consent
- three further compensation applications were filed in Western Australia, and
- one compensation application was filed in South Australia.

At the end of the reporting year, there were 176 current native title applications, comprising 125 determination applications, 35 non-claimant applications, 14 compensation applications, and two variation applications. This is a downward trend from the 192 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.

There are 63 consent determinations or hearings of either the substantive matter or separate questions currently forecast for the 2022–23 financial year. Many of those hearings will include an on-country component if travel is feasible. There are also approximately 22 matters currently identified that will require some aspects to be mediated on-country by a judicial 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. Increasing use of co-mediation or facilitation with an Indigenous facilitator is being employed successfully. 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 intensive court management of native title matters is demonstrated by the listings data over the past three years. There were 263 mediations and 633 case management hearings in 2019–2020; and 331 mediations and 617 case management hearings and 16 regional case management conferences held during 2020–21. During 2021–22 and despite the continuing need to manage more matters remotely and administratively, the native title practice area still conducted 326 mediation listings, 567 case management hearings and substantive hearing listings, 726 administrative listings and one regional case management hearing.

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 reason for the request is often to prepare a compensation application. The Court has continued to advance projects in relation to the digitisation of files (including retained audio-visual material) for the purpose of archiving and to make the material more accessible.

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 was scheduled to occur in-person in Queensland in early 2022, but was postponed due to the peak of Omicron COVID-19 infections at that time. Similarly, a stakeholder forum was intended to be convened in Western Australia which was delayed by COVID-19 and has been impacted by the workload once COVID restrictions lessened allowing travel to proceed.

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, notably:

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 including on-country mediation.

In the Torres Strait, the Warral and Ului matter was the subject of a month long on-country lay evidence hearing, which involved evidence being heard at various locations in the Torres Strait including Thursday Island (Waiben), Moa, Badu, Warral and Ului.

In Cape York, 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 two determinations having occurred in November 2021. In the next reporting period eight consent determinations are scheduled across July and October 2022. It is estimated that the matter will not be fully disposed of

until 2024–25 and involves intensive case management and mediation to progress concurrent timetables.

Northern Region

The 'Cairns cluster' of claims that has been the subject of intensive case management and mediation has progressed significantly during this reporting period. This cluster was referred by the Court under section 54A of the *Federal Court of Australia Act 1976* and rule 28.61 of the *Federal Court Rules 2011* to two independent referees. Implementation of the referees report has been the subject of court case management and interlocutory hearings during the reporting year which culminated in a number of decisions handed down by Justice Charlesworth resolving those applications. The Cairns Regional Claim Group (QUD692/2016), Gimuy Walubara Yidinji People (QUD23/2019), Yirrganydji (Irukandji) People #1 (QUD14/2019), and Yirrganydji (Irukandji) People #2 (QUD337/2015), each now return to usual case management as they progress without the former overlapping issues.

A month-long on-country hearing in the Wakaman People cluster of matters, which comprises three claimant applications and three non-claimant applications, was also held during the reporting year at locations in and around Mareeba and Chillagoe.

Southern Region

On 2–4 November 2021, Justice SC Derrington held an on-country preservation of evidence hearing in the Barada Kabalbara Yetimarala native title applications (QUD13/2019 and QUD15/2019).

The 'GNP or Gangulu cluster' hearing was completed during the reporting year and judgment is reserved. The Wongkumara People matter and the overlapping Yandruwandha Yawarrawarrka People matter have also been the subject of extensive case management and mediation during the reporting year. The lay evidence in these matters was heard on-country by Justice Murphy in May 2022, and the matters continue to be the subject of intensive mediation and case management as they progress towards an expert evidence hearing in March 2023.

On 23 December 2021, Justice Reeves delivered the decision *Malone v State of Queensland (The Clermont-Belyando Area Native Title Claim) (No 5)* [2021] FCA 1639, finding that there is no native title in the claim area. As a result, this matter was appealed by the Clermont Belyando and Jangga #3 applicants and is currently scheduled for a Full Court sitting in February 2023.

On 13 April 2022, Justice Mortimer handed down the decision *Melville on behalf of the Pitta Pitta People v State of Queensland* [2022] FCA 387, dismissing interlocutory applications brought by the State of Queensland and the Pitta Pitta Aboriginal Corporation RNTBC to have the compensation application summarily dismissed. Consequently, the Pitta Pitta Aboriginal Corporation RNTBC appealed the decision which was heard by the Full Court in August 2022 and dismissed.

On 26 April 2022, due to the slow progress of the Applicant in prosecuting the native title compensation application-related appeal proceeding of QUD106/2021 Wharton on behalf of the Kooma People v State of Queensland & Ors, orders were made requiring the Applicant to show cause why the application for extension of time and leave to appeal should not be dismissed. The Applicant failed to comply with the orders and, as a result, on 18 May 2022 an order providing for the dismissal of the appeal took effect. QUD107/2021 *Saunders on behalf of the Bigambul People v State of Queensland & Ors* was discontinued by consent during the reporting period.

South Australia

On 24 September 2021, Justice Charlesworth delivered a consent determination for the Barngarla, in Port August (SAD6011/1998). The determination finalised the 25 year old matter, and added Port Augusta to more than 44,000 square kilometres of the Eyre Peninsula already recognised as Barngarla country.

Sparrow v State of South Australia (Mirning Eastern Sea and Land Claim SAD76/2021) [2021] FCA 1357 was delivered by Justice Charlesworth on 4 November 2021, striking out the originating application insofar as it covered the area within the boundaries of the Mirning Eastern Sea and Land Claim Part A and Part B (MESLC). The original application sought a determination of native title in relation to a large area of sea in and around the Great Australian Bight, together with a portion of land situated on the Eyre Peninsula incorporating the town of Streaky Bay. The MESLC overlapped the Far West Coast Sea Claim, and three claims made on behalf of the Wirangu People (Wirangu no 2 Part A), Wirangu no 3 Part A, Wirangu Sea Claim and a portion of the Wirangu no 2 non-claimant application Part A.

Stuart v State of South Australia (Oodnadatta Common Overlap Proceedings SAD38/2013) (No 4) [2021] FCA 1620 was delivered by Justice White on 21 December 2021. It was determined that the application by Aaron Stuart and Ors in SAD38/2013 be dismissed, and the Walka Wani (files SAD78/2013 and SAD220/2018) claim was granted. These orders were appealed (SAD37/2022 and SAD38/2022), and will be listed before the Full Court in the November 2022 sittings.

The Far West Coast Sea Claim (SAD71/201) hearing commenced on-country before Justice Charlesworth on 15 March 2022. Judgment is reserved following closing submissions on 15 July 2022. By an amended originating application filed on 24 June 2021, the claim area was reduced so that it now extends seaward to a maximum of about 300 metres in some parts, and includes some islands and incorporates an area 50 metres along the Bunda Cliffs.

The Antakirinja Matu-Yankunytjatjara Aboriginal Corporation RNTBC filed a compensation application on 22 April 2022. The applicant seeks compensation for the effects of specified compensable acts on the continued existence, enjoyment and exercise of native title rights and interests in land and waters located in and around Coober Pedy, South Australia – the claim area was the subject of the Antakirinja Matu-Yankunytjatjara native title determination on 11 May 2011 (SAD6007/1998).

New South Wales

The Widjabul Wia-bal matter is still in intensive case management and mediation before the Court working towards a consent determination in November 2022.

A non-claimant application brought by Dungog Shire Council is proceeding to a separate question hearing concerning whether the Applicant has power under the *Local Government Act 1993* (NSW) and/or the *Crown Land Management Act 2016* (NSW) to bring the application. The hearing is listed for 5 December 2022.

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. 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. The appeal judgment was delivered on 23 November 2021 with the Full Court upholding the decision in first instance.

In July 2020, a separate question hearing concerning nine 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 was heard by the Full Court from 17–19 August 2021 and the judgment was handed down on 16 March 2022 dismissing the appeal.

On 21 August 2020, the first compensation application in New South Wales was filed by *Patricia Johnson & Anor on behalf of the Barkandji Malyangapa People* over the area of the determined application NSD6084/1998. The matter was actively case managed by Justice Jagot to address preliminary issues raised in the proceeding including whether the claim has been properly authorised. On 17 August 2022, the first respondent filed an interlocutory application to have the claim summarily dismissed, excluding three lots. The applicant discontinued the proceeding on 8 April 2022, before the interlocutory application was heard.

A claim brought by Mr Ralph Lavender and Mr Jack Lavender in relation to an area on the south coast of New South Wales was also subject to an interlocutory application brought by the first respondent seeking to strike out the proceeding ('the strike out application'). The strike out application was brought on the basis that the application contained frivolous or vexatious material, or in the alternative failed to disclose a reasonable cause of action, or was likely to cause prejudice and/or delay in the proceedings. The strike out application was heard in early 2021, and judgment was delivered by Justice Perry on 31 March 2022 dismissing the claim.

Western Australia

Pilbara

Dhu v Karlka Nyiyaparli Aboriginal Corporation RNTBC (No 2) [2021] FCA 1496 was delivered by Justice Mortimer on 29 November 2021, relating to a declaration sought for memberships to a prescribed body corporate (PBC). While the Court allowed declarations that resolutions made by the PBC were not decisions made under traditional law and custom, and were not effective to refuse recognition of membership of the applicants, the Court did not make a declaration that the applicants were eligible for membership. The Court left it with the applicants and the PBC to engage constructively themselves to seek to resolve the issue of memberships, noting the difficult situation in the proceeding brought about by the imperfections of the native title system. As the applicants were partially successful, the Court ordered the PBC to pay 75 per cent of the applicants' costs of the proceeding.

Justice Banks-Smith delivered *Gilla on behalf of the Yugunga-Nya People v State of Western Australia* (No 3) [2021] FCA 1338, a Part A consent determination in a 1996 application. The Part B proceeding is subject to an overlap programmed for trial on all issues commencing August 2022.

In *Papertalk on behalf of the Mullewa Wadjari People v State of Western Australia* [2022] FCA 221, Justice Mortimer found that while there were no enforceable agreements reached in a lengthy mediation process spanning over three years regarding six overlapping proceedings, the Court was satisfied that the conduct of the applicant was an abuse of the mediation process of the Court. The appropriate relief for the abuse of process was further considered by the Court in *Papertalk on behalf of the Mullewa Wadjari People v State of Western Australia (No 2)* [2022] FCA 593, delivered on 20 May 2022. The relief includes a further applicant meeting being conducted which is presently awaiting a result.

Following an on-country hearing in July 2019 for the Yinhawangka Gobawarrah, Jurruru and Jurruru #2 matters, Justice Mortimer delivered judgment on 2 December 2020 in Smirke on behalf of the Jurruru People v State of Western Australia (No. 2) [2020] FCA 1728, referring the matter back to mediation for finalisation. The matters have been resolved through the mediation process and a consent determination is scheduled for mid-2022.

The Nyamal Palyku proceedings hearing dates were hampered by border closures and COVID-19 restrictions and September 2021 hearing dates were vacated in favour of preservation evidence being heard in Port Hedland in December 2021. The substantive hearing was listed and heard on-country in remote locations of Port Hedland, Nullagine and surrounds in May 2022. Expert evidence was heard in June 2022 and the matter was referred back to mediation. Mediation is ongoing.

Goldfields

Separate question closing submissions in Maduwongga were heard in April 2021 and judgment reserved. Three interlocutory applications were heard by Justice Bromberg in December 2021 in the Goldfields region relating to progress of various applications. Judgments were delivered in February 2022, resulting in the Jardu Mar proceeding (which overlapped seven applications), being dismissed, and Justice Bromberg refusing joinder of seven Indigenous respondents in the Darlot proceeding. Resolution of both interlocutory applications resolved the final outstanding issues to progress the filing of a minute of consent determination of native title and joint submissions in the Darlot proceeding in April 2022 in preparation for a consent determination listed on-country in early July 2022.

Central Desert

On 29 November 2021, Justice Griffiths delivered a Part A consent determination recognising native title in *Forrest on behalf of the Nangaanya-ku Native Title Claim Group (Part A) v State of Western Australia* [2021] FCA 1489. The Part B proceeding will progress as a separate question hearing on the outstanding issues of whether the grant of a specific mining lease was an act consisting of the creation of a right to mine to which section 26D(1) of the *Native Title Act 1993* applied, and whether section 47B applies.

The programming timetable for trial commencing August 2022 in the three Tjiwarl compensation applications was vacated by Justice Mortimer in December 2021 as a result of substantive progress to settle the proceedings in mediation. On 3 May 2022, the applicants and State reached in-principle agreement for settlement, which was subsequently endorsed by Tjiwarl native title holders during community consultations. The final agreement, which will settle the State's liability, will be in the form of an Indigenous Land Use Agreement to be authorised by 30 November 2022. Negotiations are concurrently progressing between the applicants and mining respondents with a view to reaching full and final settlement on all matters by the end of 2022.

The Pila Nature Reserve claimant application and the Gibson Desert Compensation application were determined together, by consent on 15 June 2022. The Court attended an on-country celebration at Mina Mina in the Pila Nature Reserve. Native title and the relevant compensation were determined over the Pila Nature Reserve, this agreement included the recognition of native title utilising section 47C of the *Native Title Act 1993* to disregard extinguishment over a national park area. This was the first determination of its kind under the *Native Title Act 1993*.

Kimberley

Following various extensions of time and assisted dispute resolution processes in Birriman-gan, orders will come into effect in early July 2022 determining the Indigenous Land and Sea Corporation (ILSC) as the default agent PBC in the absence of a nominated body by the common law holders. This is the first time the ILSC will be required to fulfil a role as temporary agent PBC.

Following an on-country hearing in August 2019 in respect of a separate question in the Gajangana Jaru, Purnululu and Purnululu #2 matters, Justice Mortimer delivered judgment on 22 October 2020 referring the matter back to mediation for finalisation. There are currently 13 matters in the Kimberley in mediation. There have been four consent determinations in the Kimberley in the period, all delivered on the papers. One matter in the region was discontinued.

Preservation evidence was heard in the Malarngowem Compensation application in December 2021 and the matter was immediately referred to mediation. Mediation is ongoing and the matter is also the subject of programming orders for a hearing on-country in September 2022.

Southwest

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 Indigenous Land Use Agreement, the South West regional claimant and compensation applications are now under intensive case management before the Court to resolve the claims. The Whadjuk People, Ballardong People, Gnaala Karla Booja, South West Boojarah #2, Wagyl Kaip, Southern Noongar (South West Area Two), Wagyl Kaip (Dillon Bay), Harris Family (Southwest Area One), Single Noongar #2, and most of the area covered in the Single Noongar Claim #1 and Yued applications, were finalised by consent on 1 December 2021. The remaining portions of the Single Noongar #1 and Yued claims and the Bodney Family Compensation claims are the subject of self-executing orders made on 13 June 2022 to finalise the matters in the Court.

Victoria

Mediation continues to progress the outstanding connection issues in First Peoples of the Millewa Mallee proceeding, expected to reach a result in late 2022. Mediation has also progressed in the Eastern Maar proceeding seeking to resolve interests asserted by a number of Indigenous respondent parties. Concurrently over other areas where mediation outcomes currently appear unlikely, separate question hearings commencing May 2023 are being progressed. In relation to areas of the Eastern Maar claim that are

uncontested, progress is being made for consent determination of native title in early 2023. The Boonwurrung proceeding is listed for preservation evidence hearing before Justice Murphy for two weeks in December 2022. Preparation for a likely separate question hearing commencing in February 2023 is also occurring focused on resolution of the proper composition of the native title claim group.

A new application VID14/2022 Wamba Wemba was filed on 24 December 2021 and is awaiting notification following a decision of the delegate of the Registrar not to accept the claim for registration and leave granted to amend the application. A second judicial review application in relation to the registration of the Taungurung Indigenous Land Use Agreement filed in September 2021, was settled in mediation and discontinued in March 2022.

Northern Territory

The McArthur River Project Compensation Claim (NTD25/2020) was filed on 14 December 2020. The compensation application area is in the northern region of the Northern Territory and 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 and varied by Justice Jagot on 7 February 2022. The compensation application is listed for hearing before Justice Jagot in June 2023 and 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 (NTD43/2019) which was filed in 2019 and is listed for a demurrer hearing before the Full Federal Court in Darwin from 24–31 October 2022. In the Gove Peninsula claim, the Commonwealth has given notice that the proceeding involves matters arising under the Constitution or involving its interpretation within the meaning of section 78B of the *Judiciary Act 1903*. In this instance, the constitutional issue is whether the just terms requirement contained in section 51(xxxi) of the Constitution applies to certain acts set out in the statement of claim.

On 9 December 2021, a claimant application was filed over a portion of the Katherine River in the Northern Region of the Northern Territory – NTD24/2021 Katherine Families Beds and Banks Native Title Claim. The parties to the competing claims over the Town of Katherine, known as the Katherine Proceeding, will participate in a mediation in Katherine from 7–9 November 2022.

Over the past 12 months, the COVID-19 pandemic has had a significant impact on the ability of the Northern Land Council and Central Land Council to complete work in the field. Due to high infection rates in the first half of the year, the land councils have only recently recommenced travelling to communities. Two on-country consent determinations are scheduled in September 2022 for matters in the Northern Region.

Assisted dispute resolution

Assisted dispute resolution (ADR) is an important part of the efficient resolution of litigation in the Court context, with cases 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 has been a Recognised Mediator Accreditation Body since September 2015 and has 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 areas where their opinions are in agreement and disagreement without the supervision of a registrar.

In 2021–22, the majority of mediations were conducted by remote access technology due to travel and other restrictions associated with the COVID-19 pandemic.

During this period, there was a 13 per cent reduction in the number of matters referred to mediation compared with the 2020–21 reporting period, although referrals by matter type are broadly consistent with past years.

A collection of statistics concerning the workload of the Court by National Practice Area 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*).

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).

TABLE 3.5: MEDIATION REFERRALS IN 2021–22 BY NATIONAL PRACTICE AREA AND REGISTRY

NATIONAL PRACTICE AREA	NSW	VIC	QLD	WA	SA	NT	TAS	ACT	TOTAL
Administrative and constitutional law and human rights	10	9	7	4	2	0	0	0	32
Admiralty and maritime	2	0	1	0	0	0	0	0	3
Commercial and corporations	79	68	27	17	11	1	4	10	217
Employment and industrial relations	52	29	12	14	8	1	0	0	116
Federal crime and related proceedings	0	0	0	0	0	0	0	0	0
Intellectual property	23	24	7	3	1	0	0	0	58
Migration	1	6	0	0	0	0	0	0	7
Native title	1	0	7	4	1	0	0	0	13
Other federal jurisdiction	18	2	1	1	0	0	1	0	23
Taxation	3	0	1	0	0	0	0	0	4
TOTAL	**189**	**138**	**63**	**43**	**23**	**2**	**5**	**10**	**473**

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.

All Special Measures Information Notes are currently under review, reflecting the winding down of government restrictions in response to the COVID-19 pandemic.

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. It is the Court's policy that detainees who are unrepresented will be referred for pro bono legal assistance and the Court continues to work with national and state Bar Associations to facilitate this. Where legal representation is not available, hearings involving detainees may be conducted by remote access technology by link to the relevant detention facility, or in-person if the Judge hearing the matter or the Court otherwise considers it is in the interests of the administration of justice to do so. In such a case, a judge may order the attendance of the detainee in Court.

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, National Practice Area 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 National Practice Area, 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 National Practice Area (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, through the Federal Court/Law Council of Australia Liaison Committee. This meeting is held twice a year, with liaison on specific issues between representatives of the Law Council of Australia and the Chief Justice, leading judges from relevant National Practice Areas 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 and Family 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, 436 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 2021–22 BY REGISTRY

ACTIONS COMMENCED	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	TOTAL
SRLs	6	234	4	35	12	4	80	61	436
PERCENTAGE OF TOTAL	1%	54%	1%	8%	3%	1%	18%	14%	**100%**

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

TABLE 3.7: PROCEEDINGS COMMENCED BY SRLS IN 2021–22 BY CAUSE OF ACTION

CAUSE OF ACTION	TOTAL ACTIONS	% OF TOTAL
Administrative law	13	3%
Admiralty	0	0%
Appeals and related actions	280	67%
Bankruptcy	13	3%
Bills of costs	0	0%
Competition law	0	0%
Consumer protection	9	2%
Corporations	3	1%
Cross claims	0	0%
Fair work	23	5%
Human rights	7	2%
Industrial	1	0%
Intellectual property	1	0%
Migration	54	13%
Miscellaneous	11	3%
Native title	4	1%
Taxation	2	0%
TOTAL	**421**	**100%**

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

TABLE 3.8: APPEALS COMMENCED BY SRLS IN 2021–22 BY CAUSE OF ACTION

CAUSE OF ACTION	TOTAL ACTIONS	% OF TOTAL
Administrative law	5	2%
Admiralty	0	0%
Bankruptcy	17	6%
Competition law	0	0%
Consumer protection	2	1%
Corporations	0	0%
Fair work	1	0%
Human rights	2	1%
Industrial	0	0%
Intellectual property	1	0%
Migration	244	87%
Miscellaneous	8	3%
Taxation	0	0%
Native title	0	0%
TOTAL	**280**	**100%**

Direct financial counselling project in bankruptcy proceedings

For some time the Court has, in conjunction with the Federal Circuit and Family Court of Australia (Division 2), been able to maintain a program of targeted financial counselling assistance to SRLs in bankruptcy proceedings. With the assistance of Consumer Action in Melbourne (since 2014), Uniting Communities in Adelaide (2018) and Financial Rights Legal Service in Sydney (March 2022) a financial counsellor attends the courtroom in every bankruptcy list.

During the COVID-19 pandemic, a financial counsellor was made 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 all three registries, SRLs may also be provided with the details of financial counselling services ahead of the first court return date and referrals can be made by registry staff when assisting an SRL by telephone or over the counter.

In the Adelaide registry, some creditor's solicitors have also directly provided the financial counselling contact details to SRLs. This has facilitated the settlement of several matters before the filing of a creditor's petition or before the first return date before the Court.

The financial counselling services recently commenced in Sydney have been enabled by a generous grant from the Financial Counselling Foundation.

During the reporting year, all registries experienced reduced numbers of filings due to changes to the *Bankruptcy Act 1966* because of COVID-19. As a result, there were proportionally less referrals to financial counsellors. Numbers are beginning to increase in all registries.

Registrars in Sydney, Melbourne and Adelaide have reported favourably on the program, and view it as 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 and Family Court fees regulation (*see* below).

Court fees and exemption

Fees are charged under the *Federal Court and Federal Circuit and Family Court Regulations 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

Entities subject to the *Freedom of Information Act 1982* (Cth) are required to publish information to the public as part of the Information Publication Scheme (IPS). This requirement is in Part II of the *Freedom of Information Act 1982* and has replaced the former requirement to publish a section 8 statement in an annual report. Each agency must display on its website a plan showing what information it publishes in accordance with the IPS requirements.

The Federal Court has published, on its website at 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) deals 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.

The DPI is heavily reliant on the close cooperation and support of registries, judges' chambers, web team and those responsible for external webcasting.

The pandemic has dramatically changed the way the Court operates – most significantly, through the use of webcasting so the public can follow individual cases without the need to come to court.

During this period, the Court has effectively become a de facto broadcaster, making cases more accessible and easier to follow for media and general public.

In the reporting year cases that attracted a high level of media interest included:

- NSD912/2020: Clive Palmer v Mark McGowan
- NSD1485, NSD1486, NSD1487/2018: Roberts-Smith v Fairfax Media
- NSD616, NSD642/2018: Westpac v Forum Finance
- VID607/2020 (first instance), VID389/2021 (appeal): Sharma v Minister for Environment
- VID697/2021: Ferguson v Cricket Tasmania, and
- VID18/2022: Djokovic v Minister for Immigration.

The Roberts-Smith case is one of the longest running in the Court's history, clocking up exactly 100 hearing (trial) days at the conclusion of the reporting year when it was nearing its conclusion. In contrast, the Djokovic matter was dealt with in a very short timeframe, but attracted unprecedented worldwide interest. Viewing numbers for the appeal – broadcast on YouTube – peaked at 1.2 million.

In some cases of public importance, the Court establishes online files on to which documents are placed once approved. This assists media and the public in understanding cases better.

The Djokovic online file attracted a record 626,000 views, while the Roberts-Smith file – now the Court's second most viewed – has so far at the time of publication reached just under 93,000.

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 Victorian registry hosted the University of New England Law School Moot and the Monash JD Moot Grand Final Competition in May 2022. The New South Wales registry hosted the University of New England Moot Courts in May 2022. The Queensland registry hosted the ATSIS Moot and the AITSIS Moot (Final) in September 2021 and an exhibition Moot for the University of Queensland in June 2022.

User groups

User groups have been formed along National Practice Area 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:

- **Perth** – four Federal Court jurisdiction seminars on the topics of Federal Jurisdiction; An introduction to Native Title; Administrative Law with a focus on Migration Law; and Commercial and Corporate. The registry also held an Employment and Industrial Relations seminar and a feedback meeting on the Federal Court's insurance list information. In addition the registry hosted the 2021 Western Australia Courts Summer Clerkship Program.
- **Melbourne** – a national seminar 'Conversations on current issues in the practice of Employment and Industrial Law'; an Australian Academy of Law seminar 'The Legal and Ethical Regulation of the Internet of Things'; an Australian Law Reform Commission Financial Services Inquiry Advisory Committee Meeting; and a national Commercial Law seminar 'We need to talk about class actions!'.
- **Adelaide** – the South Australia Bar Readers Course on 1 September 2021.
- **Sydney** – Mahla Pearlman Oration, Whitmore Lecture, International Arbitration Lecture, the Australian Judicial Officers Association, the Australian Academy of Law and the Law Council and a Commercial Arbitration in Australia event.
- **Brisbane** – an Employment and Industrial Relations seminar; and a ceremonial sitting to welcome newly appointed Queen's Counsel.

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.

During 2021–22 the Court offered the following activities:

- four education sessions were scheduled at the Judges' meeting on 24–25 November 2021 (held remotely), and
- ten education sessions were scheduled at the Judges meeting on 25–27 May 2022 (in Adelaide).

Education sessions offered at the Judges' meetings in 2021–22 included:

- Workshops on the following national practice areas:
  - All national practice areas session
  - Native title
  - Administrative and constitutional law and human rights
  - Admiralty and maritime.
- Session for Judges under three years
- Judicial conduct
- Judicial wellbeing: Coming out of COVID
- Our linguistically diverse society
- Managing the judicial workload
- Federal Court and Law Council of Australia joint conference on tax law, including sessions on:
  - Issues/developments in international tax
  - Interpreting tax treaties
  - Income v capital
  - Case management and trial preparation.

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 the period from 1 July 2021 to 30 June 2022, the Federal Court of Australia met the National Standard for Professional Development for Australian Judicial Officers.

Work with international jurisdictions

Although the COVID-19 pandemic continued to limit international travel, the Federal Court was able to maintain relations and activities with several jurisdictions across the Asia-Pacific region. The Court also continued to support remotely reform and development objectives under the Pacific Judicial Strengthening Initiative (PJSI).

At the end of 2021, after five consecutive years of successful implementation, the Court's contract with the New Zealand Ministry of Foreign Affairs and Trade to manage and deliver the PJSI concluded. The Court facilitated the smooth transfer of the program to its new managing contractor, Te Kura Kaiwhakawā (formerly the Institute of Judicial Studies), under the Office of the Chief Justice of New Zealand.

Throughout its life, the Court delivered 237 activities; collaborated with over 8,000 members of the courts and the broader community and funded an additional 87 locally-led activities to address priority challenges. In its final evaluation, the initiative achieved and exceeded all its performance targets. Despite the challenges presented by COVID-19, the program was able to significantly expand access to justice through the courts, build the competent provision of substantive justice outcomes and increase the efficient delivery of procedural justice services.

In March 2022, the Court secured new funding from the Department of Foreign Affairs and Trade to extend its work within the Pacific region under the Pacific Judicial Integrity Program. In partnership with the Papua New Guinea Centre for Judicial Excellence, the program aims to deliver tailored training and development activities to support judicial and court officers to preside over and manage fraud and corruption-related cases within their respective jurisdictions. The program will also create and facilitate a regional network of judicial mentoring support to respond to the ongoing needs of courts beyond the life of the program and improve the transparency of fraud and corruption-related cases through the promotion of efficient case management and reporting. The design and delivery of these judicial and court officer training workshops will be informed and guided by the expertise of two professional panels comprising Judges and Registrars from the Pacific and Australia.

Twelve Pacific Island judiciaries are participating in the Program, including Fiji, Federated States of Micronesia, Kiribati, Nauru, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tokelau, Tonga and Vanuatu. The program will run for a duration of three years to 2025 at which time it will be transferred to the Centre for Judicial Excellence to continue its delivery.

Papua New Guinea

In May, Chief Justice Allsop met with Chief Justice Salika to discuss library support under the longstanding Memorandum of Understanding between the Court and the National and Supreme Courts of Papua New Guinea. As a sequel, Ms Angela Allen, Manager, Library and Information Services (Qld) visited the Law Courts complex at Waigani, Port Moresby in June to discuss library support and training needs with library staff in the particular context of the Law Courts expansion project.

Also in June, Chief Justice Allsop and Chief Justice Salika signed an Annex to the Memorandum, signifying the continued importance of the relationship between the Courts, and the strengthening of their partnership to jointly deliver the Pacific Judicial Integrity Program.

Justices Collier and Logan resumed attending in-person in Papua New Guinea to undertake sitting in the Supreme Court pursuant to a longstanding arrangement with the Papua New Guinea Judiciary which complements the Memorandum.

Supreme Court of Indonesia

In July and October 2021, Justice O'Bryan was a panellist at an international seminar between the Supreme Court of Indonesia and the Federal Court regarding Competition Law. The presentations focused on 'Competition Law in Australia: Structures of Enforcement and Review' and 'Examination process of witnesses and experts in competition law cases at the Federal Court'. This sharing of judicial knowledge and expertise provided input into the Supreme Court's initiative regarding the Procedure to Review Appeal from the Anti-Competition Commission.

In July 2022, Justice Burley gave a presentation on the 'International Treaties concerning Intellectual Property' to support the Supreme Court's judicial certification training for Commercial Court judges.

The sharing of judicial knowledge and mutual learning strengthens and reinforces the long-standing cooperation between the Supreme Court of Indonesia and Federal Court which enters its 18th year since the signing of first Memorandum of Understanding.

World Intellectual Property Organization

Through Justice Burley, the Court is collaborating with the World Intellectual Property Organization to develop resources for the conduct of Intellectual Property trials around the world. With the assistance of two judicial registrars, Justice Burley edited an 'Intellectual Property Benchbook' for judges hearing related cases in the Philippines and Viet Nam. Judges from each of those countries were contributing authors. The Benchbook will be launched in Geneva in November 2022 as part of the WIPO Intellectual Property Judges' Forum. Justice Burley will give a presentation at the launch whilst continuing to work on the development of a parallel Benchbook for Indonesia.

The Court also assisted in the preparation of the Australian chapter in a publication directed to patent procedure in various countries around the world.