SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

ANNUAL REVIEW 2016–17

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"The English jurist Lord Chancellor Frederick Maugham described lawyers some seven decades ago as 'custodians of civilisations, than which there can be no higher or nobler duty', and his words are as apt today as they were then.

This is not empty grandiloquence from a quieter or more genteel past, because you do, now, become part of the mechanism which guards the lynchpin of our civil society, the rule of law, and you must take that responsibility seriously. Without it people can lose their human rights or at least have them ignored…

The rule of law is no empty mantra. It should be a bright lodestar to underpin your professional work. …It is an underpinning of the kind of civilised society in which we all hope to live."

The Hon Justice Richard Refshauge addressing newly admitted lawyers at the Admission Ceremony 20 August 2010

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Chief Justice Helen Murrell and Supreme Court Registrar Annie Glover: Construction site of new Supreme Court building

Welcome

Chief Justice Helen Murrell

The 2016/2017 year saw many changes to the Court, including the Court Bench.

At the commencement of the 2016/2017 year, Justice Elkaim was appointed as the Court's first fifth judge. In February 2017, Justice Mossop was appointed as a resident Judge to fill the place of Justice Refshauge, who retired in May 2017. Finally, in June 2017, we welcomed Associate Justice McWilliam. With her Honour's appointment, we attained gender equality on the bench. I believe that we are the first Australian Supreme Court to achieve gender equality.

Last year, the Court agreed on a Strategic Statement which contained judicial priorities for 2016/2017. I am pleased to report that, over the past 12 months, the Court has addressed a number of the priorities.

In January 2017, we commenced new Court of Appeal procedures. The procedures are designed to minimise the documents that are provided to appellate judges, focusing on relevance and documents and authorities that are being referred to in written submissions. During the 2017/2018 year we hope to review the new procedures.

Justice John Burns has chaired an active and enthusiastic working party that is investigating the potential for a Drug and Alcohol Court to operate within the Supreme Court. It is expected that the working party will make recommendations in the near future.

Our attempts to review our mediation process have been less successful; to date, we have had limited success in obtaining feedback about the process from lawyers and litigants. In the forthcoming year, we will pursue other options regarding obtaining feedback.

Together with the Magistrates Court, the Court is working towards the development and implementation of an International Frameworks for Court Excellence plan. Our capacity to do so has been limited by our restricted financial and other resources. Nevertheless, the Court remains committed to the project.

The judges and staff of the Court have been closely involved in the design of the new Supreme Court building and the new shared courts facilities. It has been exciting to observe the construction, and rapid rise, of the new building and I am pleased to report that the construction has caused very little interference to the Court's operations.

The Court is committed to promoting cultural diversity. In February 2017, we signed a Memorandum of Understanding with the Australian National University and Canberra University to facilitate the placement of Indigenous law students with the Court, barristers or other legal practitioners. It is hoped that providing students with an insider's perspective on the judiciary and legal profession will reinforce their confidence and desire to join the profession. To date, three indigenous students have each spent one week with the Court.

Principal Registrar Philip Kellow

During 2016–17 the courts administration continued to focus on the new courts facility, the new case management system (ICMS), courts governance and how the organisational structures and processes best support the business of the Supreme Court and Magistrates Court.

The design and construction of the new courts facility made significant progress during the reporting year with a 'topping out' ceremony held in July 2017 to mark completion of the structure of the new building along Vernon Circle. The refurbishment of the combined courts registry commenced in early 2017 and I would like to thank staff for their patience as this work progresses while we maintain business as usual.

The civil release for the ICMS was successfully implemented in September 2016. This release also dealt with the ACT Court of Appeal and the probate jurisdiction. Work continued on the programming for the criminal release of the ICMS that is due to be completed in mid-2018. The implementation of major changes arising from the new family violence legislation that commenced in May 2017 has impacted on the timetable for the criminal release. The criminal release is the most complex of the releases and will also include interfaces with a number of justice agencies and the first tranche of online services.

Negotiations to procure a new jury management system from another jurisdiction were unsuccessful and work is underway to identify and procure another system. The process has also provided an opportunity to identify amendments to the *Juries Act 1967* that will help streamline the administrative processes for the selection and support of jurors in the ACT.

During the reporting year the administration worked with the Court to develop an implementation plan based on the assessment carried out by Michael Vallance from the Supreme Court of Victoria and Anne O'Hehir from Court Services Victoria of the Court's current performance, customs and practices against the criteria of the International Framework for Court Excellence. The implementation plan will guide a range of initiatives to be undertaken during 2017–18.

In late 2016 the Supreme Court published its first strategic statement. The strategic priorities identified in the statement will help ensure the administration is focused on those matters of most importance to the Court and will guide initiatives to strengthen staff and financial management within the administration and improving customer services.

During the reporting year the administration updated the emergency management and business continuity policies and related arrangements for the Court. This included negotiating arrangements with other courts to use their facilities in the event that the ACT facilities become unavailable. The Court sat in the Queanbeyan courthouse on a couple of occasions to identify any practical issues with such alternative arrangements.

The last 12 months have again been a particularly busy and productive period for the administration as major projects and other activities have made significant progress while staff also provided a range of high quality Registry, Sheriff and corporate services to the Court. I would like to acknowledge the hard work and commitment of staff that has made this to occur.

I look forward to working with the Chief Justice, Judges, Associate Judge and staff over the next 12 months as we continue to progress a number of important projects and initiatives that will enhance the Court's operations.

Construction of the new Supreme Court building

ABOUT THE COURT

Strategic Statement

The Court's Purpose

1. To maintain and promote the rule of law
2. To provide leadership within the justice system

The Court achieves its purpose:

1. By delivering impartial, high quality and timely decisions
2. By resolving each case by the process most suited to achieving a just, quick and effective outcome
3. By ensuring transparent, easy and cost-effective access to the Court for all
4. By communicating openly, clearly and respectfully
5. By being accountable for the use of public resources
6. By developing and applying best practice

Judicial Priorities for 2017/2018

1. To review the operation of the new Court of Appeal rules.
2. To review the Court's alternative dispute resolution scheme and improve outcomes.
3. As part of implementing the International Framework for Court Excellence, to undertake self-assessment and a user survey of the Court, and to start developing appropriate performance indicators for the Court.
4. To transition smoothly to the new Supreme Court building and to develop the best methods of integration into the new physical environment.
5. To finalise a proposal for a Drug and Alcohol Court and commence implementing the proposal.
6. To develop protocols for undertaking Court processes by electronic means.
7. To develop and implement a strategic plan to facilitate access to the Court for Indigenous peoples.

History

The Supreme Court of the Australian Capital Territory was established as a superior court of record on 1 January 1934 by the *Seat of Government Supreme Court Act 1933* (Cth). The principal reasons behind the establishment of the Supreme Court were to relieve the High Court of Australia of its original jurisdiction in relation to the Australian Capital Territory and to provide an intermediate court of appeal from what was then the Court of Petty Sessions.

The first sitting of the Supreme Court was held at the Acton House Courthouse on 12 February 1934 and was presided over by Justice Lionel Oscar Lukin. From January 1941 the Court sat at the then new Patents Office in Parkes. The Court has occupied its present accommodation in Knowles Place on the western side of City Hill since the Law Courts Building was opened by the then Prime Minister, Sir Robert Menzies, in 1963.

When the Law Courts Building was opened, the Australian Capital Territory had a population of less than 80,000 people and the Supreme Court had no resident judge. Instead, the Court was principally constituted by additional judges; judges whose primary commission was as a judge of another Commonwealth Court. In 2015–16, the 390,000 people of the Territory were served by four resident Judges and the Associate Judge. To deal with the Territory's growing population and the Court's growing workload, the Executive appointed the Court's first fifth resident judge in July 2016.

Supreme Court atrium

Jurisdiction

The Supreme Court of the Australian Capital Territory is a superior court of record and it is invested with the original and appellate jurisdiction necessary to administer justice in the Territory.

In 2016–17, the Court consisted of the Chief Justice, four other resident Judges, a resident Associate Judge, Additional Judges (Federal Court Judges who have an additional appointment to the ACT Supreme Court) and Acting Judges (Judges who have short term appointments of up to twelve months).

The judiciary was supported in interlocutory case management directions by a Registrar (Ms Annie Glover) and Deputy Registrar (Mr Grant Kennealy) and by combined Registry staff who assist by maintaining records, processing orders, listing cases and performing other functions. The Sheriff's Office provides security and administers the jury system. The Russell Fox Library is the main legal reference resource for the ACT Law Courts.

The original and appellate jurisdiction of the Supreme Court is usually exercised by a single Judge. The Associate Judge manages most civil matters and hears many of the civil trials. Criminal trials are heard before a Judge and jury, or (in a limited range of cases) by a Judge alone, at the election of the accused.

In civil matters the Supreme Court has an unlimited monetary jurisdiction. Claims for less than $250,000 are usually brought in the Magistrates Court. The Supreme Court hears appeals from the Magistrates Court, the Children's Court and the ACT Civil and Administrative Tribunal.

In most cases, an appeal from the Associate Judge or from a single Judge is heard by the Court sitting as a Court of Appeal which is constituted by three Judges, at least one of whom is a resident Judge.

Judges of the Court

Resident Judges

CHIEF JUSTICE HELEN GAY MURRELL

On 28 October 2013, Helen Murrell was sworn in as the Chief Justice of the Australian Capital Territory.

Her Honour was admitted as a solicitor of the Supreme Court of New South Wales in 1977. From 1977 to 1981 her Honour practised at the Commonwealth Crown Solicitor's Office and NSW Legal Aid Commission. From 1981 to 1996 her Honour practised as a barrister in criminal law, administrative law, environmental law, common law and equity. In 1994 her Honour was appointed the first Environmental Counsel to the NSW Environment Protection Authority. In 1995 her Honour was appointed Senior Counsel in New South Wales.

From 1996 to 2013 her Honour was a Judge of the District Court of New South Wales. In 1996 her Honour was also an Acting Judge in the Land and Environment Court of New South Wales. From 1997 to 1999 her Honour was President of the Equal Opportunity Tribunal of New South Wales. Her Honour then became Deputy President of the Administrative Decisions Tribunal of New South Wales (Head of the Equal Opportunity Division). From 2005 to 2013 her Honour was a Deputy Chairperson of the New South Wales Medical Tribunal.

From 1998 to 2003, her Honour was the first Senior Judge of Drug Court of New South Wales. In 1999 her Honour was a member of a United Nations Expert Working Group on Drug Courts. Her Honour maintains a continuing interest in therapeutic jurisprudence.

Her Honour has a longstanding involvement in the professional development of judges. Currently, her Honour chairs the Council of the National Judicial College of Australia (NJCA) and contributes to a number of NJCA programs.

Her Honour is an Honorary Air Commodore of No 28 (City of Canberra) Squadron, Patron of the Hellenic Australian Lawyers Association (ACT Chapter), committee member of the Australian Association of Women Judges and a Fellow of the Australian Academy of Law.

JUSTICE RICHARD CHRISTOPHER REFSHAUGE

Justice Richard Refshauge was sworn in as a judge of the Supreme Court of the Australian Capital Territory on 1 February 2008. His Honour retired on 11 May 2017.

His Honour commenced legal practice in 1976 in the ACT with the then-leading law firm of Macphillamy Cummins and Gibson. He became a partner in 1981 and senior partner in 1992. The firm merged with Sly and Weigall and his Honour became Chairman of Canberra partners. The firm changed its name later to Deacons Graham and James. In practice, his Honour specialised in commercial litigation, administrative and constitutional law, reconstruction and insolvency industrial law and criminal law.

In 1998 his Honour was appointed the ACT's third Director of Public Prosecutions, a position he held until his appointment to the Court. His Honour was appointed Senior Counsel in 2000. In 2001 his Honour was appointed as a Distinguished Honorary Professor in the ANU College of Law and an Adjunct Professor in the School of Law of the University of Canberra.

His Honour has a wide involvement in community activities. He chairs the Ministerial Advisory Council on Sexual Health, HIV/AIDS, Hepatitis C and Related Diseases and is Chair of the Board of QL2 Dance. His Honour was, until recently, the Chair of the Board of Australian Volunteers International and of the Anglican Board of Mission Australia. His Honour is Chancellor of the Anglican Diocese of Canberra and Goulburn and a member of the Appellate Tribunal of the Anglican Church of Australia.

In the Court, his Honour chaired the Joint Rules Advisory Committee and the Criminal Procedure Committee. His Honour also represented the Court on the Council of Chief Justices Harmonisation of Rules Committee. His Honour is editor and an author of the standard text on court procedure and practice in the ACT, *Civil Procedure ACT* and is a member of the Council of the Australasian Institute of Judicial Administration Inc and its Project and Research Committee.

JUSTICE HILARY RUTH PENFOLD

On 1 February 2008, Hilary Penfold PSM QC was sworn in as a judge of the Supreme Court of the Australian Capital Territory.

Born in 1953 in Dunedin, her Honour was educated at Ascham School and the Australian National University, from which she graduated BA in 1975 and LLB (Hons) in 1977. After completing the Legal Workshop at the Australian National University, her Honour was admitted as a barrister and solicitor of the Supreme Court of the Australian Capital Territory in 1977.

In 1977 her Honour joined the Commonwealth Office of Parliamentary Counsel, where she worked as a legislative drafter, and in due course as First Parliamentary Counsel for ten years until 2004. In 2001, she was appointed a Commonwealth Queen's Counsel on the recommendation of the then Attorney-General, the Hon Daryl Williams QC MP.

During her career as a legislative drafter, her Honour drafted legislation covering many subject areas, including taxation, corporations law, defamation, industrial relations, human rights, sex discrimination, and forensic procedures, as well as the constitutional amendments proposed to create an Australian republic in 1999. Her Honour was also actively involved in the work of the Parliamentary Counsel's Committee (covering Australia and New Zealand), and was the President of the Commonwealth Association of Legislative Counsel, representing all legislative drafters in the [British] Commonwealth, from 1999 until 2003. Her Honour was a member of the Board of Taxation from 2000 until 2004, and headed the Migration Litigation Review commissioned by the then Attorney-General, the Hon Philip Ruddock MP, in 2003.

In 2004 her Honour was appointed Secretary of the newly-formed Department of Parliamentary Services.

JUSTICE JOHN DOMINIC BURNS

Justice John Burns was first admitted to practice as a solicitor of the Supreme Court of New South Wales in 1981. He practised as a Legal Aid solicitor in the Legal Services Commission of NSW, specialising in criminal law, until January 1983 when he joined the Deputy Crown Solicitors office in Canberra as a Prosecutor.

In 1984 he joined the newly created office of the Australian Government Solicitor in Canberra as a senior solicitor. In August 1985 he resigned from the Australian Government Solicitor's office to take up a position in the firm of Gallens Barristers and Solicitors. He subsequently became a partner in the firm of Gallens Barristers and Solicitors. When Gallens merged with the firm of Crowley and Chamberlain, he became a partner in the new firm of Gallens Crowley and Chamberlain. During this period, his Honour practised predominately in the field of criminal law and civil litigation.

In April 1989 his Honour commenced practice at the bar at Blackburn Chambers. His Honour practised in criminal law and general civil litigation.

His Honour was appointed as a Magistrate and Coroner of the Australian Capital Territory in April 1990. At the same time his Honour was also appointed as a Magistrate of the Norfolk Island Territory. During his time as a Magistrate his Honour spent three years as the Children's Court Magistrate. His Honour also took over responsibility for managing the lists of the Magistrates Court as List Co-Coordinating Magistrate in 2007.

In December 2009 his Honour was appointed Chief Magistrate and Chief Coroner of the Australian Capital Territory. He held those positions until he took up his appointment as a Judge of the Supreme Court on 1 August 2011. Since 2012 his Honour has been a member of the ACT Law Reform Advisory Committee. Since 2016 his Honour has been the Section Editor of the Australian Law Journal for the Australian Capital Territory.

As of 2017, his Honour chairs the Supreme Court's Criminal Procedure Committee. Justice Burns is also leading a working group within the Court for the purpose of developing an appropriate Drug and Alcohol Court model for the Supreme Court of the ACT. The working group includes Judges, Legal Professionals, Corrections experts, and Health experts.

JUSTICE MICHAEL ELKAIM

Justice Elkaim grew up in Northern Rhodesia (now Zambia) and was educated from secondary school level in Rhodesia (now Zimbabwe).

His Honour completed a Bachelor of Laws degree at the University of Rhodesia in 1974 and then moved to England, where he completed a Master of Laws degree at the University of London in 1976 specialising in international law. His Honour also obtained a Diploma in Air and Space Law from the London Institute of World Affairs.

His Honour married in 1977 with a daughter being born in London and two more daughters being born in Sydney. His Honour was admitted to the Bar of England and Wales in 1978 and began practising in London Chambers, 2 Kings Bench Walk in the Temple.

In 1980 his Honour came to Australia and was admitted to the bar in New South Wales in June 1980. During this time Justice Elkaim had a wide ranging practice, mostly dealing in Common Law.

His Honour was appointed Senior Counsel in October 2002. In May 2008 his Honour became a District Court judge and on 4 July 2016 was sworn in as the ACT Supreme Court's fifth judge.

JUSTICE DAVID MOSSOP

David Mossop was sworn in as a Judge of the Court on 13 February 2017.

At the time of his appointment he was the Associate Judge of the Court, a position which he had held since 2013, first as Master and then as Associate Judge after the title of that office was changed when the *Courts Legislation Amendment Act 2015* (ACT) came into effect on 21 April 2015.

His Honour holds a Bachelor of Science and Bachelor of Laws from the University of New South Wales and a Master of Laws (Public Law) from the Australian National University.

His Honour was admitted to practice as a solicitor in 1992. He practised as a barrister for 14 years from 1998 to 2011.

His Honour served as a Magistrate and Coroner from 2012 to 2013.

ASSOCIATE JUSTICE VERITY McWILLIAM

On 26 June 2017, Verity Alexandra McWilliam was sworn in as the Associate Judge of the Supreme Court of the Australian Capital Territory.

Her Honour obtained BA (Hons I)/LLB degrees from the Australian National University in 2000, and a Masters degree in International Law from the University of Sydney in 2005.

In 2002, her Honour was admitted as a solicitor to the Supreme Court of New South Wales, working in Sydney at PwC Legal in the Commercial and Regulatory Litigation Division and later at the Crown Solicitor's Office of NSW, in the Torts (Justice) division.

Interspersed with her employment as a solicitor, McWilliam AsJ worked as an associate to the Hon. Justice Mary Finn in the Appeal Division of the Family Court of Australia, and the Hon. Justice Beaumont and the Hon. Justice Madgwick in the Federal Court of Australia.

In 2006, her Honour was called to the NSW bar, developing a general practice over 11 years across the areas of commercial/equity, criminal, employment, environment/planning, public law and torts.

In addition, from 2010 until 2017, McWilliam AsJ lectured variously in public law, federal constitutional law and litigation at the University of NSW, and in public law at the University of Sydney over 2010 to 2012.

Before her appointment, her Honour was a nationally accredited mediator and is currently a member of the Board of Directors of the Commercial Law Association of Australia.

Additional Judges

During 2016–17 the following additional judges sat:

The Honourable Justice Steven David Rares

The Honourable Justice Michael Andrew Wigney

The Honourable Justice Darryl Cameron Rangiah

The Honourable Robert Stanley Osborn

The Honourable Simon Paul Whelan

The Honourable Phillip Geoffrey Priest

Acting Judges

During 2016–17 the following acting judges sat:

The Honourable Acting Justice Murray Kellam

The Honourable Acting Justice Linda Margaret Ashford

The Honourable Acting Justice Stephen Lewis Walmsley

The Honourable Acting Justice David Peter Robinson

Gender makeup of the Supreme Court

Supreme Court Gender Statistics

	Female	Male	Female (%)	Male (%)	Total
Judges	3	4	43	57	7
Registrar and Listing	3	2	60	40	5
Associates	13	4	76	24	17
Executive Assistants	8	0	100	0	8
Library	3	1	75	25	4
Sheriff's Officers	16	10	62	38	26
Total	**46**	**21**	**69**	**31**	**67**

Russell Fox Library

About the Russell Fox Library

The key function of the Russell Fox Library – named after the Territory's first Chief Judge, the late Honourable Russell Walter Fox AC QC – is to provide and maintain legal resources for use by judicial officers of the ACT Supreme Court, the Magistrates Court and members of the ACT Civil and Administrative Tribunal.

In addition to ensuring that legal resources remain relevant and up-to-date, the Library also assists judicial officers and their associates with locating reference material as well as with supplying a research service. Whenever possible, Library staff also help legal practitioners, self-represented litigants and members of the public.

The Library is also responsible for the publication of judgments and decisions on the ACT Courts website as well as updating web pages as required. Judgments and decisions appear on the ACT Courts and Tribunal website at www.courts.act.gov.au

As with most other superior court libraries, resources of the Russell Fox Library are available to the general public. Although members of the public are welcome to visit the Library, they are unable to borrow Library material – only legal practitioners who are registered Library clients have borrowing privileges.

Library staff – Russell Fox Library

Digitisation

Digitisation of the Russell Fox Library's collection continued during 2016–2017 with scanning of various materials including legislation, judgments and records. In this financial year digitisation the following items were either started or finalised:

- ACT Magistrates Court Tenancy Tribunal decisions covering the years 1995–2001;
- Adoption Records, 1955–1966; 1971–1977;
- Civil matters, 1938–1959;
- Criminal cause book , 1954 to 1959;
- Criminal ledger, 1942–1959, completed in the first quarter;
- Probate ledger / index listing party names and file numbers, thought to be circa 1942 to 1959;
- Sheriff's collection book, 1954–1960; and
- Supreme Court Matrimonial Register, 1934–1937.

During the first quarter of the financial year, a number of boxes containing sentencing remarks by former ACT Supreme Court judge, the Honourable Justice Gallop, were rediscovered and digitised. The sentences date back to when His Honour – though appointed as a judge of the ACT Supreme Court – also heard matters as a judge of the Northern Territory Supreme Court. The sentences cover the years, 1978 to 1982 and 1989.

In addition to the above, two unpublished volumes of sentences – from 1982 to 1994 – handed down in the ACT Supreme Court by Justice Gallop have also been digitised. These sentencing remarks do not appear on the Supreme Court website. Anyone wishing to view these remarks is encouraged to contact the Russell Fox Library.

A magpie visiting the Library

Medium Neutral Citation – ACT Coroner's Court

ACT Coroner's Court findings were made available for the first time to AustLII in early 2017. Only coronial findings displaying a medium neutral citation have been provided to AustLII. Earlier Coroner's Findings are held in the Library.

New Supreme Court Building

Construction of the new ACT Supreme Court building has provided the Library with the opportunity to review and rationalise its hardcopy collection of texts and law reports prior to its move to new facilities sometime in 2018.

Excavation underneath the existing Supreme Court building commenced during this financial year for the creation of a new custodial area. This work required that the Library relocate its large collection of law reports from Basement East to Basement West. Various English and Canadian law reports needed to be quickly relocated and additional shelving installed to cope with the influx of the relocated Library material.

Commonwealth Office of Parliamentary Counsel

The Russell Fox Library also provided support to the Commonwealth Office of Parliamentary Counsel (OPC) in its digitisation of government gazettes from 1901 to 2012. Government Notice from 1956, 1968 through to 1973 were provided by the Library to the OPC to help fill in the missing gaps in their collection.

The Gazettes will be available on the Federal Register of Legislation at https://www.legislation.gov.au/Content/HistoricGazettes

Statistics

The following table displays the number of judgments, decisions and findings uploaded onto the ACT Supreme website during 2016–2017:

Jurisdiction	Number of Items Published
Supreme Court of the Australian Capital Territory Court of Appeal	73
Supreme Court of the Australian Capital Territory Full Court	2
Supreme Court of the Australian Capital Territory *(Note: includes both single Judge and the Associate Judge)*	217
Sentencing Remarks	169

Library workroom with new legislation

Sheriff's Office

The Sheriff's Office is responsible for the service and execution of process, the enforcement of civil judgments, the provision of juries, the provision of court attendants and security within the Supreme Court precinct.

The Sheriff's Office provides an integral service to the Supreme Court throughout the year, particularly during the criminal listing periods. The Office facilitates the jury service process, including jury empanelment, which contributes to trials commencing in a timely manner as well as the professional management of the Courts.

The Sheriff's Office continues to investigate options to acquire and configure a jury management system for the ACT. Due to the specific nature of such a system and the importance of ensuring efficiency in jury processes, several options are currently being considered. Negotiations to implement a system within 2017–18 will follow. In 2016–17, the Office reinforced the significant improvements implemented during 2015–16, which has resulted in revised and improved procedures and up to date information to the public.

The Sheriff [2nd from the right] and her Sheriff's Officers

In 2016 the Sheriff's Office Review Team, including all Office staff members, was nominated for the Justice and Community Safety Directorate Director-General's Awards for customer service. This nomination recognised the significant and crucial work performed by the staff in their focus on customer services in implementing the review of the Sheriff's Office.

The construction of the new courts facility has seen minimal impact on the operations of the Sheriff's Office. The challenges experienced by the progression of the building works will be met through ongoing consultation with the judiciary and profession and continuing business improvements during 2017–18.

Sheriff's Office staff farewell Justice Refshauge at his retirement

Ceremonial sitting: Elkaim J swearing-in

HIGHLIGHTS

Indigenous awareness

Namadgi National Park Tour

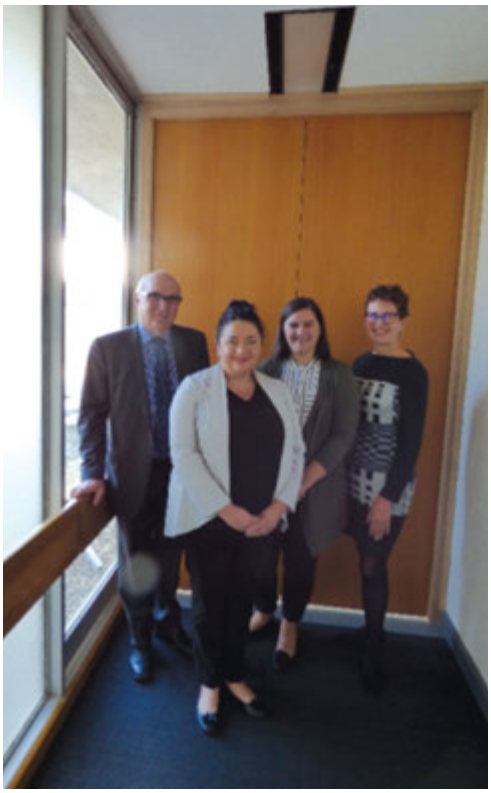
To further cultural engagement and indigenous awareness training, the Judges and Magistrates took a tour of Namadgi National Park with ranger Brett McNamara on 11 November 2016. The judicial officers received a welcome to country and a guided tour of the park, during which they were shown Aboriginal rock art sites.

Tour of the Namadgi National Park

Aboriginal and Torres Strait Islander Law Student Mentoring Program

On 16 February 2017, the ACT Supreme Court signed a memorandum of understanding to provide for the placement of Aboriginal and Torres Strait Islander law students, from the Australian National University or the University of Canberra, with an ACT Judge, Magistrate, Barrister or Solicitor. The purpose of the program is to provide students with further insight into the legal profession and to create opportunities for career development. The Court has enjoyed hosting three students to date.

Signing the MOU – Chief Justice and Principal Registrar



Justice Elkaim, Associate Antonija Kurbalija, Chief Justice Murrell with one of the program participants, Lauren Webb [in the foreground]

Involvement with the legal community

Judicial Mentoring Lunch

As the patron and an honorary member of the Women Lawyers Association, Justice Penfold helped to organise, and attended, the annual Judicial Mentoring Lunch hosted by King & Wood Mallesons on 15 September 2016. These lunches provide an opportunity for women lawyers to meet, network and have informal discussions with women Judges, Magistrates and Tribunal members.

Advocate Training

On 6 May 2017, the Supreme Court hosted a voice training workshop for advocates and solicitors organised by the Women Lawyers Association and Prue Bindon. Lucy Cornell, who ran the workshop, coached participants in specific techniques to improve oral advocacy, while also drawing attention to the ways in which advocacy depends on more than words alone. Chief Justice Murrell offered some words of support and insight from the perspective of the bench.

'Come to the Bar' Event

On 7 June 2017, the Women Lawyers Association and the ACT Bar Association held an information event called 'Come to the Bar', aimed at women who are considering a career at the bar. Chief Justice Murrell and Justice Penfold spoke at the event. Speakers provided information about the practicalities, realities and rewards of a career at the bar, mixed in with stories about personal experiences of the bar.

'Come to the Bar' event

'Come to the Bar' event

Jessup Moot

The Philip C Jessup International Law Moot Court Competition is the oldest, largest and most prestigious student mooting competition in the world. For some years, the Supreme Court has hosted the semi-finals of the competition in the Courts Building, as it did in 2017. Justice Refshauge was again a member of one of the two judging panels. The Supreme Court was proud to receive an award for its support of the competition this year from the Australian organisers and sponsors of the competition.

Jessup Moot: Receiving the award: Justice Refshauge with Dr Helen Watchirs

Ceremonial sittings

Ceremonial sitting: Mossop J swearing in: [L–R] Walmsley AJ, Robinson AJ, Gageler J, Ashford AJ, Rangier J, Burns J, Murrell CJ, Mossop J, Refshauge J, Penfold J, Elkaim J

Ceremonial sitting: Refshauge J retirement

4 July 2016

Ceremonial sitting for the swearing-in of the Honourable Justice Michael Elkaim

[EXTRACTS FROM HIS HONOUR'S SPEECH] ELKAIM J: I cannot of course say why I was chosen for this appointment. I'm sure the reasons included my performance as a District Court judge in New South Wales. In that position I did my best to be fair, to listen and to make timely decisions.

I was only able to do that because of the environment in which I worked. The environment included a Chief Judge always concerned for the welfare of his judges, the friendship and advice of other judges, and the support of staff. I am looking forward to making friends in Canberra, to working under a Chief Justice who has established a reputation as a sound leader of this court, and to work with my colleagues and staff in the hope of being a good Supreme Court judge. I add here that I am very grateful for the welcome and assistance I have received in my preparations for today.

I am also looking forward to sitting as a judge of appeal. I think a system in which judges sit at both first instance and on appeal has the huge benefit of enabling the appeal court to fully understand the process that occurred before the primary judge.

I obviously will not disclose what was said during the interview for this position, but I would like to applaud the ACT Government for engaging in an approach which allowed for applicants to be chosen on their merit rather than by a less open process.

I am aware that the appointment of a fifth judge to this court has been debated for some time. I am honoured to be the first fifth judge, and I hope I will justify the creation of the position.

I will end now with once again thanking you all very much for your presence and enabling me to start this appointment in the knowledge that it rests on so much goodwill and encouragement. Thank you.

Ceremonial sitting: Elkaim J swearing-in

13 February 2017

Ceremonial sitting for the swearing-in of the Honourable Justice David Mossop

[EXTRACTS FROM HIS HONOUR'S SPEECH] MOSSOP J: Thank you Mr Attorney, Mr Archer and Ms Avery, for your overly generous remarks. It is only at funerals and swearing-in ceremonies that such kind things are said about the subject of the occasion. I am, for obvious reasons, particularly appreciative of the fact that we are all present at an occasion of the latter, rather than the former kind, although I note that what is said of the subject on either occasion may stray somewhat from an accurate portrait.

I wish to acknowledge the friendship and support that I have had from the members of the court and its staff since my appointment as master in May 2013, as well, in particular, of the current members of the Court, both in my role as associate judge and when facing the challenge of my new role as resident judge.

Notwithstanding all the legitimate criticism that may be made of the court system, the limits on access to justice and the adversarial process of litigation, it has, at its core, ideals of which all those involved should recognise and be proud. There are few areas of public discourse where rationality, fairness, courtesy and historical continuity are institutional values affecting the daily experience of all those who participate. Those are values which receive less emphasis than they deserve in the public discussion of the court. It is a privilege to play a role of significance in an institution at the heart of which those values lie. It is also an honour to do so in the service of a community which has had from its inception, and continues to have, a degree of idealism underlying its development and government not mirrored in other Australian jurisdictions.

As pointed out by earlier speakers, my experience at the small community legal centres, the Environmental Defenders Office, both in Sydney and in Canberra, was an excellent introduction to many aspects of the law and litigation, access to justice, the relationship between government and law and the capacity of law to affect or influence societal change.

I have a significant debt to Michael McHugh, for whom I was associate in 1995. Working at the High Court opened my eyes to the legal world beyond environmental law. Now moving from the role of associate judge to resident judge, in which criminal rather than civil proceedings will dominate, I recall the words in a speech given by McHugh J shortly before his retirement when he said:

> *You would not have to be on the High Court for very long before you concluded that the only limit to human evil, depravity and dishonesty was physical impossibility, nor would you have to be there very long before you concluded that there is no limit to human gullibility.*

I bring to my new role my resignation to these facts of human behaviour.

My 14 years at the bar were spent in Blackburn Chambers. That was a friendly and collegial environment, and I thank my colleagues, both past and present, for their support and camaraderie. While at the bar I had the good fortune to work with many leading silks, a number of whom are now on the bench, and I have endeavoured to absorb the lessons that they provided for me. One of those was Gageler J, who does me and the court the honour of his attendance here today.

I wish particularly to acknowledge the debt that I owe to John Harris SC, formerly of Blackburn Chambers, with whom I read in 1998. I wish also to acknowledge John Purnell SC, who led me in many cases from the beginning of my time at the bar. I also acknowledge my debt to the magistrates of the Magistrates Court. They uniformly gave me great encouragement and assistance when I was coming to grips with my first experience of judicial office and the diverse aspects of the Magistrates Court jurisdiction.

Finally, today is also an occasion to recognise my family, the great good fortune bestowed upon me and my sisters through the efforts and sacrifice of my own parents, Rilda and Stanley. I acknowledge the constant love and support of my wife, Helga, and of my children, Ingrid, Petra and Carl, who are all here today. Without them I would not be here.

Having been in the role of associate judge for some time I recognise that the work of the Court is unremitting and that the job of a judge is a marathon and not a sprint. I will do my best to discharge the duties of a judge of the court and thereby to serve the ACT community. I thank you all for your attendance here today.

Ceremonial sitting: Mossop J swearing-in: [L–R] Burns J, Refshauge J, Murrell CJ, Mossop J, Elkaim J, Penfold J

11 May 2017

Ceremonial sitting to mark the retirement of the Honourable Justice Refshauge

[EXTRACTS FROM HIS HONOUR'S SPEECH] REFSHAUGE J: Those of you who know me will also know that I see an important part of the law as the collective wisdom of judges in which is found the common law. That led to my friend Bryan Meagher SC suggesting at the launch of the ACT Law Reports that a decision of mine reported in the first volume had more authorities cited than all of the other reported cases combined, and my case was only an appeal from a Magistrates Court decision on a sentence for a drink driving offence. Nevertheless, I do see the need to be very grounded in precedent as the bedrock for the rule of law and to distinguish it from the rule of individual judge.

I want to say a few things about the Court, for it has been the focus of my prejudicial practice as well as the court in which I have served. The building was where I commenced practice, for in those days it housed the Magistrates Court and the Conciliation and Arbitration Commission, as well as ancillary services such as the marriage room, where the sheriff's officers now congregate.

It is perhaps fitting that I retire just before the building, now creaking from its old age and struggling into the 21st century, is to be largely replaced and partially reengineered into a more fit-for-purpose building. At the time when I joined the court it had been judicially populated by those elevated from the ranks of local practitioners after a period when most of the appointments came from interstate. This trend has largely been reversed and we are seeing the benefits, not only of local appointments, but that cross-pollination which is as welcome as the recognition of talent from within the local profession.

It has been a very collegial court, and I have flourished in the camaraderie of my colleagues, all of whom are very skilled jurists. I particularly enjoyed the passionate commitment of the Chief Justice to a creative and efficient court, the intellectual rigour of Penfold J, the pragmatism of Burns J, the wicked wit of Elkaim J, and the legal acumen of Mossop J. I enjoy the warm friendship of them all, as I did my past colleagues, including PNG Justice Higgins, the Honourable Malcolm Gray and David Harper.

Judicial work is challenging. The complexity of life in our society, the everexpanding laws being made and the ingenuity of litigants make that so. None is more challenging than sentencing, ensuring a balance of the need to vindicate any victim, to protect the community and to respect the interests of the offender.

Crimes can cause deep hurt and irremediable damage. The courts cannot repair or resolve those consequences, and revenge does not provide the solace that victims seek. Taking victims seriously, especially by respectful participation in the thought processes, is now an accepted part of sentencing practice. The development of restorative justice gives back to victims a degree of control and respectful participation. That, of course, doesn't replace the need for the community, through the court, to establish standards of conduct and ensure that bad behaviour does have consequences.

My commitment to the profession has led me to participate as often as I am asked or can do so in learning and mentoring opportunities for members of the profession and I am proud to have taught pleadings to ANU students for over 30 years. The continuing legal education, moots for students, and introductory talks to visiting students from Alabama, have all, I hope, helped new lawyers, and certainly given me heart and satisfaction.

My editorship of Civil Procedure ACT produces, I hope, a valuable core resource to the profession and has eased the load of those who work through the complex rules now required for challenging litigation. My ten years as DPP was a challenging one, though I suspect that some who are still working there think of me sometimes as an apostate when I fail to give the maximum possible sentence for every offender who comes into my court. I'm proud of the work that the Office did in the time that I was there in actively assisting in the establishment of the family violence intervention Programme, the sexual assault reform programme, the Galambany Court, restorative justice, and the new Sentencing Acts, and the increase of women in the office, especially in senior positions.

How does a judge avoid going insane? I involve myself in community affairs, in a suite of activities that may resonate with you, Attorney: I'm involved in my church, the arts and social justice issues. What it has given me is an understanding of the fact that there are people out there with incredible talent, incredible commitment, that have nothing to do with law, who don't know and don't want to know anything about it, but who labour for the good of our community, underpaid and under-recognised. It is the duty of all of those like me, to support them and to give them encouragement.

It is beyond reasonable doubt that my commission ends at midnight and I will then retire.

Once again, I think you all for the honour and generosity you've given in attending today, it's a great privilege to celebrate this occasion with you all, and I very much appreciate it.

Ceremonial sitting: Refshauge J retirement: Refshauge J

26 June 2017

Ceremonial sitting for the swearing-in of the Honourable Associate Justice McWilliam

[EXTRACTS FROM HER HONOUR'S SPEECH] McWILLIAM AJ: The commingling of this Territory and the State of New South Wales has been a feature of my life for many years. It is a great honour to have been entrusted with the appointment as Master and it will be a real privilege to work with the members of this Court. I am truly delighted to be able to serve in my home town. It is not just the ACT community that I see myself serving but the justice system as a whole and I take that responsibility very seriously, as the success of the justice system and the respect for, dare I say it, the rule of law, depends in part upon the quality of service by those who are part of it. I include in that solicitors and barristers of the profession.

For me, the most important part of this address is to publicly acknowledge those who have supported me on my journey here today. When I started at the Bar in 2006, I was fortunate to read with Justin Smith, Senior Counsel of the Seventh Floor, now Judge Smith of the Federal Circuit Court and John Hennessy, now a Senior Counsel, of the Tenth Floor. I have enjoyed being a licensee or member of a number of chambers and as it happens, on each, I found informal mentors to supplement my tutors. I can only single out a few. Ian Hemmings of Senior Counsel and Peter Tomasetti of Senior Counsel at Martin Place Chambers who each invested in me, taking me through the learning curve of the Land and Environment Court jurisdiction. They showed me how to read plans, saving me from myself when I assumed a circle on a piece of paper was a tree when, in fact, it was a staircase – and no, it was not inside a house.

Penny Wass of Senior Counsel, now Judge Wass of the District Court of New South Wales, must share significant responsibility in my path to this Court. On the Tenth Floor, I have worked with Geoffrey Kennett of Senior Counsel in a number of cases including, as you have heard, on the council amalgamation cases. He was a delight to work with, long-suffering awaiting drafts from me, low maintenance in his requirements of me and an inspiration on his feet. I also owe a huge debt to Julian Sexton of Senior Counsel on the Tenth Floor.

I said to the floor members last week how pleased I was to be part of a chambers that achieves excellence without arrogance with some exceptions and they know who they are. Some of you may not be aware of the significant connection between the Tenth Floor and this court. Indeed, I was not aware of it until our floor leader, Malcolm Oakes of Senior Counsel, drew it to my attention. The Tenth Floor has been the source of a Chief Justice in Russell Fox, resident judge Sir John Kerr and six additional judges holding a concurrent Federal Court commission. They were Trevor Morling, Bryan Beaumont (who I worked for), Anthony Whitlam, Marcus Einfeld, Roger Gyles and Brian Tamberlin.

Speaking of judges, I am greatly gratified to see both Rodney Madgwick QC (formerly of the Federal Court of Australia) and Mary Finn (formerly of the Family Court of Australia) here today. They have been influential on my career and inspired me and encouraged me to go to the Bar.

Life at the Bar can be solitary and it often is. Making it bearable are the friends and colleagues who are living the same life. My parents in particular have witnessed firsthand the sacrifices that come with a career in the law. Many a family holiday has started with them waiting for me to finish written submissions and they reminded me last night of the point one Sunday when I had committed to vacating my home for tenants and at the same time travelling to Bathurst for a three-day hearing with my leader, Mr Hemmings SC. Finally accepting that I could never achieve the two, I enlisted my parents who, although in Canberra, were on a plane within the hour and they proceeded to pack up and move my belongings, pausing only for an 11 pm dinner at McDonalds. The ones who love you help you move. The ones who really love you do it in your absence. I have asked too much of my parents but they have always been there and I thank them.

Lastly, Ian Denham. I cannot imagine my life without him. He is the calm in my storm. He is the zest in my day and the class in our double act. He is perhaps making the greatest sacrifice going forward, supporting me in the decision to come home even though it comes at a cost to us. I thank him in advance for sharing this journey with me.

Although I am, like the timber in this room, donated from New South Wales, I really do feel that I have come home and I hope that I love being a part of the ACT Supreme Court.

Ceremonial sitting: McWilliam AsJ swearing-in: McWilliam AsJ

Selected cases

Legal Practitioner v Law Society of the ACT [2016] ACTSC 203

On 3 December 2015, the President of the ACT Civil and Administrative Tribunal refused an application for leave to appeal out of time. The application was made by a legal practitioner, against whom orders had been made by the Tribunal in October 2014 and March 2015. The legal practitioner subsequently applied to the ACT Supreme Court for leave to appeal against the decision of the President.

On 3 August 2016, this application was listed for hearing before Elkaim J. An application of the Law Society of the ACT to strike out the proceedings as incompetent was also listed for hearing on that date. The central issue before the Court was whether or not the decision of the President was "a decision of the appeal tribunal" for the purposes of s 86 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) ("the Act").

Elkaim J held that the President was not sitting as an "appeal tribunal" under s 81 of the Act. Although s 81 (3) provides that an "appeal tribunal" may be made up of one presidential member, the application did not relate to an appeal "on a question of fact or law", as required by s 81 (1) (a). Further, his Honour rejected the practitioner's submission that s 86 of the Act applied, noting that the term "appeal tribunal" is defined in the Act as "a tribunal made up under s 81 to review a decision of the Tribunal". Accordingly, the legal practitioner's proceedings for leave to appeal were struck out as incompetent, pursuant to r 5172 of the *Court Procedure Rules 2006* (ACT), and the practitioner was ordered to pay the costs of the proceedings.

R v Pahl [2017] ACTSC 68

Mr Pahl was charged with one count of burglary and three counts of recklessly causing damage to property. He pleaded not guilty by reason of mental impairment.

On 10 February 2015, Mr Pahl consumed a substantial quantity of alcohol before driving to Canberra Airport. There, he crashed his car through metal bollards and a boom gate at a carpark. He broke into an office building where he deployed four high flow fire hydrants and caused over half a million dollars' worth of damage to the building. He then hid under a desk.

At the time of the incident, Mr Pahl was experiencing a psychotic episode that included delusions of being chased and caused him to activate the fire hydrants to draw attention to his plight. At the time, he did not know that his conduct was wrong. Mr Pahl had a history of alcohol-induced psychotic episodes. He submitted that he had a mild neurocognitive disorder that made him vulnerable to alcohol induced psychosis and that this underlying infirmity satisfied the definition of mental illness under the *Criminal Code 2002* (ACT); the alcohol induced psychotic episode was not a reactive condition that was excluded from the definition of mental illness.

Murrell CJ found that the evidence did not establish that Mr Pahl suffered from a mild neurocognitive disorder. Even if he did have such a disorder, it was not the operative cause of the behaviour. The psychotic episode was the reaction of a relevantly healthy mind to the external stimulus of alcohol. Mr Pahl was found guilty of all counts.

Dimech v Watts [2016] ACTSC 221

Ms Dimech was convicted, after entering a plea of guilty, of two counts of obtaining a financial advantage, contrary to s 135.2 (1) of the *Criminal Code* (Cth). She was sentenced to three months imprisonment and released forthwith, pursuant to s 20 (1) (b) of the *Crimes Act 1914* (Cth), on entering into a recognisance to be of good behaviour of a period of two years and perform 160 hours of community service within twelve months. The Commonwealth Crown appealed the imposition of a community service order. The appeal was not opposed.

The single ground of appeal advanced by the Commonwealth Crown was that "[t]he imposition of community service as a condition of a Commonwealth recognizance order under s 21 (1) (b) of the *Crimes Act 1915* (Cth) constitutes an error at law". The principle of *expressum facit cessare tacitum* – what is expressly made excludes what is tacit – was at the core of the appellant's argument.

The appellant submitted that, when s 20 and s 20AB of the *Crimes Act 1915* (Cth) are read together, it is evident that it is only the latter section that enables a Court to order an offender to perform community service following conviction of a federal offence. It was also submitted that a community service order made pursuant to s 20 is not capable of being enforced. His Honour agreed with the interpretation advanced by the appellant, noting that such an interpretation is consistent with the Queensland Court of Appeal's judgment in *R v Shambayati* (1991) 105 A Crim R 373. Accordingly, his Honour allowed the appeal and set aside the sentence imposed for the performance of 160 hours of community service.

R v Toumo'ua [2017] ACTCA 9

The offender was employed by a company that provided security services to banks and financial institutions. The owner of the security company left the respondent in charge while he travelled interstate. That night, the respondent obtained keys and passwords from his employer's offices and used them to remove a total of $775 340 cash from ATM safes in the ACT and Queanbeyan.

On 21 June 2016, he was sentenced for four burglaries, one theft and one offence of money laundering. The primary judge imposed a total sentence of five years' imprisonment and set a nonparole period of 20 months' imprisonment.

The prosecution appealed on three grounds: that the sentencing discount of 25 per cent for the guilty pleas was too high; that both the individual sentences and the total sentence were manifestly inadequate; and that the primary judge should not have applied a 'sentencing practice' of setting a low nonparole period because the offender was not a 'direct danger' to the community.

The Court of Appeal allowed the appeal.

In relation to the plea discount, the Court held that the primary judge should have assessed the earliness of the pleas by reference to the date of charging (not the date when the terms of the indictment were finalised) and should not have considered the offender's remorse when determining the amount of the discount for pleading guilty.

In relation to the complaint about nonparole period, the Court held that there is no practice or principle whereby offenders who do not represent a 'direct danger' to the community receive a shorter nonparole period.

In relation to the argument of manifest inadequacy, the Court observed that the starting point of the sentences did not suggest manifest inadequacy.

The Court re-sentenced the offender to a total of six years' imprisonment with a nonparole period of three years.

Steen v Senton [2017] ACTCA 5

The Court of Appeal delivered judgment (*Steen v Senton* [2015] ACTCA 57) in an appeal relating to the assessment of contributory negligence in a motor vehicle accident involving a pedestrian. The appellant's Further Amended Notice of Appeal identified an appeal ground relating to the costs orders made at first instance, but that ground was not mentioned in written or oral submissions before the Court, and was not addressed in the Court of Appeal's judgment. Some weeks after the Court of Appeal delivered its judgment on 6 November 2015, and after orders giving effect to that judgment had been entered in the Court Registry after the parties filed an agreed general form of order on 23 December 2015, the appellant's solicitors sought to have the outstanding appeal ground listed for directions.

The appellants submitted that under s 37J(1)(d) and (l) of the *Supreme Court Act 1933* (ACT) the appeal against the first instance costs order could be determined by a single judge exercising the Court of Appeal's jurisdiction. Failing that, the appellants said, the Court of Appeal should re-open the appeal to deal with the outstanding appeal ground.

The Court concluded that the appeal against first instance costs orders was a substantive matter and could only be determined by a Court of Appeal of three judges. Furthermore, since orders giving effect to the Court's decision on the appeal had been entered, the Court concluded that the appeal proceedings had come to an end, and could only be re-opened if both parties consented. The respondent did not consent, and accordingly the Court declined to deal with the appeal ground relating to the first instance costs orders.

R v West [2017] ACTSC 135

Ms West was sentenced in June 2016 to 9 months imprisonment for her fairly minor part in an aggravated burglary. The remaining eight months of the sentence was suspended, and a good behaviour order (GBO) was made, requiring Ms West to accept supervision and to complete 80 hours of community service.

Later in 2016, Corrective Services reported that Ms West had breached the GBO by failing to complete community service requirements and by failing to attend supervision appointments. She had not, however, re-offended during her time in the community. It became apparent that Ms West had no particular inclination to offend, but was struggling with a complex variety of inter-related socio-economic problems that rendered compliance with the Court's orders very difficult.

Ms West did not have a driver's licence and she had no stable accommodation. Ms West's doctor, who was treating her for depression and anxiety, was based in Queanbeyan. The job-search provider assigned to Ms West by Centrelink was based in Belconnen. Her failure to attend meetings with the job-search provider had on several occasions led to Ms West's Centrelink payments being stopped, which left her without an income and thus made public transport inaccessible. Her court-imposed obligations required her to attend in Civic. Ms West's depression seemed to affect her capacity to organise herself in the face of these multi-faceted obstacles.

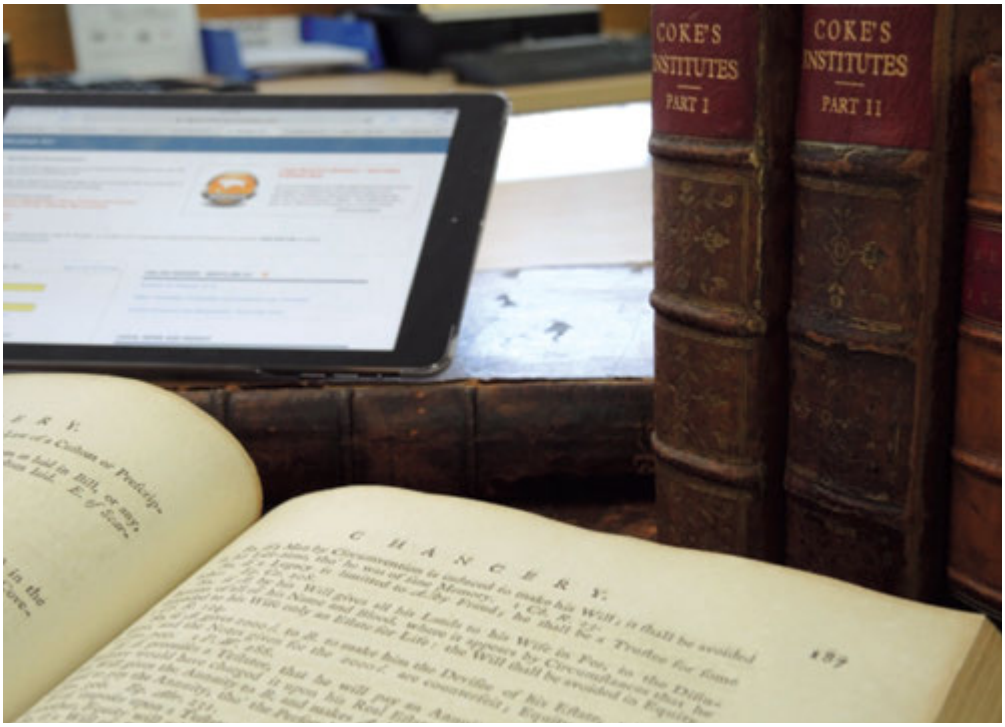
It is apparent that these many different problems combined to make her life, and particularly her obligations, almost unmanageable. However, since there had been no re-offending, Penfold J concluded that it would not be appropriate to respond to Ms West's failures by sentencing her to full-time custody. Accordingly, after a period of case-managing the matter to a point where there seemed grounds for optimism, Penfold J re-sentenced Ms West, this time without any community service obligation, but still with a supervision condition in the hope that Corrective Services would offer Ms West continuing support in her struggles.

Roberts v Westpac Banking Corporation [2016] ACTCA 68

In this case, the appellant was a customer of the respondent bank, Westpac. He appealed against the dismissal of his claim for damages related to his development of post-traumatic stress disorder, following him being caught up in an attempted armed robbery at a Westpac branch. The appellant argued that Westpac, as occupier of the bank premises, owed him a duty to take reasonable care not to increase the risk of harm to him, as a bank customer lawfully on the premises, from the actions of an armed criminal attempting a robbery there. The relevant precautions said to be necessary against the risk of such harm was for Westpac to properly train its staff including, importantly, training that staff must always (or almost always) obey an offender's instructions during the course of the robbery.

The primary judge concluded, in effect, that Westpac did not owe a duty to the appellant to take reasonable care to avoid foreseeable risk of injury to him from the criminal actions of another. This conclusion was primarily based on her Honour's finding that Westpac had no control over an armed robber's conduct which was unpredictable.

On appeal, Murrell CJ in her judgment found that the appellant established neither breach of duty nor causation. The appellant did not convincingly articulate what the "something more" should have been done in terms of training staff. Burns and Gilmour JJ discussed a number of factors, and did not find that the duty of care alleged by the appellant existed. Assuming that Westpac had owed a duty, it was not found that a breach would have been established, as it was held that the precaution that staff should be trained to always obey an offender's instructions is not one that a reasonable person would have taken. Furthermore, factual causation was not established. The appeal was dismissed.



R v Lou [2017] ACTSC 127

The applicant in this case was charged with seven offences including trafficking in a controlled drug other than cannabis, dealing with money which was the proceeds of crime and dealing with property which was the proceeds of crime. In October 2015, the applicant presented himself at a police station and made what appeared to be admissions relating to trafficking drugs and dealing with the proceeds of crime telling the officers "I'm a drug dealer and I need to be put downstairs". On the evidence, Burns J found that the applicant was suffering from a drug-induced psychosis at the time that he attended the police station.

The applicant sought orders to exclude certain admissions made, as well as exclude evidence obtained under a search warrant granted upon the basis of some of those admissions. The applicant submitted that evidence of the admissions should be excluded because they were not voluntary confessional statements, or otherwise pursuant to ss 85(2), 90, 137 or 138(1) of the *Evidence Act 2011* (ACT) (the Evidence Act). The applicant further submitted that evidence obtained under the search warrant should be excluded pursuant to s 138(1) of the Evidence Act as evidence obtained in consequence of an impropriety or contravention of an Australian law, being s 23V of the *Crimes Act 1914* (Cth).

Burns J ruled that evidence of admissions made in the course of the car journey would not be admitted at the applicant's trial but that the remainder of the evidence would be admitted. At a later point, the applicant entered pleas of guilty, but his Honour gave his reasons nonetheless. Burns J found that the Crown satisfied the test under s 85(2), finding that the circumstances of the questioning of the applicant did not act upon him, as a mentally ill person, in such a way as to adversely affect the truth of the admission. As such, whether the admissions were true would be a matter for the jury at trial. Burns J found the probative value of the evidence to be very high, and the relevant danger of admitting the evidence as very low and the weight to be given to the evidence of the applicant's admissions would also be a matter for the jury, taking into account all relevant evidence, including any evidence called about the applicant's mental condition at the time. His Honour allowed the evidence located during the execution of the search warrants pursuant to the discretion granted by s 138.

R v Al-Harazi (No 5) [2017] ACTSC 61; and *R v Al-Harazi (No 6)* [2017] ACTSC 63

Maged Mohammed Ahmed Al-Harazi was charged with the murder of his wife, Sabah Al-Mdwali. Prior to the trial commencing, counsel for Mr Al-Harazi raised a question about the accused's fitness to plead. His Honour Justice Refshauge made orders under the *Crimes Act 1900* (ACT) for investigation of Mr Al-Harazi's fitness to plead. Following consideration of three different psychiatrists' reports, his Honour determined that Mr Al-Harazi was not unfit to plead. The six week trial commenced on 7 March 2017, with the accused pleading not guilty.

Two of the couple's three children participated in several police recorded interviews. The couple's eldest son took part in four such interviews, in the first three of which he denied allegations that his father could have murdered his mother. In his fourth and final interview, he, however, recanted those earlier statements and made an admission that Mr Al-Harazi had coerced him into giving the earlier accounts of events to relay to the police. During the trial, counsel requested that his Honour make a ruling under Division 4.2.2A of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) as to their playing to the jury. His Honour ordered that the eldest son's final recorded interview be played as his evidence-in-chief interview, followed then by the first interview in time, played to enable context to be given to the retraction in the final interview. The two other interviews recorded, the second and third interviews in time, were not played.

On 13 April 2017 the jury found Mr Al-Harazi guilty of murder. He was sentenced to a term of imprisonment of 30 years with a nonparole period of 21 years.

Tuggeranong Town Centre Pty Limited v Brenda Hungerford Pty Limited (No 2) [2017] ACTSC 88

The defendant, Brenda Hungerford Pty Limited, purchased a small business and became the sublessee by assignment of a sublease of certain premises at the Tuggeranong Hyperdome on 1 September 2003, a shopping centre in the south of Canberra. At the time, the third party, Leda Commercial Properties Pty Limited was the landlord. On 31 January 2008, Brenda Hungerford Pty Limited abandoned the premises and, in the ordinary course, was required to pay the then landlord, Tuggeranong Town Centre Pty Limited, the plaintiff, the rental and other payments due under the sublease until the expiry of the term. As a result, the plaintiff commenced proceedings claiming the moneys it said the defendant owed it under the sublease, whilst the defendant defended the claim and counter-claimed for damages caused by misrepresentations it said had been made in connection with its entry into the sublease.

It was conceded by the plaintiff and the third party that the building developments that had commenced or planned to be were highly relevant matters to the inquiry and the success of the business, and were not disclosed to the defendant. The issue then became one of silence or non-disclosure as a form of misleading and deceptive conduct rather than a positive representation that was misleading and deceptive. His Honour Justice Refshauge held that certain of the representations as well as non-disclosure did amount to misleading or deceptive conduct and entered judgment for the defendant on its third party claim in the sum of $1,377,561.94.

His Honour also found that by abandoning the premises, the defendant breached the terms of the sublease and became liable to the plaintiff for the moneys payable plus interest under the sublease until the premises were re-let, whereupon any liability of the defendant to the plaintiff ceased and entered judgment for the plaintiff on its claim in the sum of $88,223.06 with costs.

Knight v Commonwealth of Australia (No 3) [2017] ACTSC 3

Julian Knight was a cadet at the Royal Military College, Duntroon in 1987. He resigned from the Army in June 1987 and his service ended on 24 July 1987. On 9 August 1987 he committed what has become known as the Hoddle Street Massacre in which seven people were killed and 19 were injured. On 23 May 2014 Julian Knight filed an originating claim and an application for an extension of time for a claim seeking damages arising from negligence on the part of the Commonwealth and assaults committed by other cadets at the Royal Military College at the time of his cadetship.

Julian Knight alleged that, by reason of the negligence of the Commonwealth, he was "subjected to continual bastardization and workplace bullying that adversely affected his performance as a staff cadet". He further alleged that "the combination of these events" resulted in him "being forced to resign his appointment as a staff cadet". As a result, Julian Knight alleged that he failed to graduate as a Lieutenant in the Australian Regular Army and suffered damage as a result.

As Julian Knight's claim was made some 27 years after the incidents that gave rise to his claim Mossop J had to determine whether to grant an extension of time. His Honour dismissed the application for an extension of time. His Honour reasoned that the extension sought was a long one and found that there would be prejudice to the defendants in relation to lack of recollection surrounding the assaults and batteries alleged to have taken place by Julian Knight. Moreover, his Honour considered with respect to Julian Knight's claim for economic loss, that even if his commission of the Hoddle Street Massacre were not a bar to him in establishing causation, the presumed prejudice to the Commonwealth from the need to address the counterfactual situation that would have arisen would have been significant.

In the adoption of LGL [2016] ACTSC 360 and In the adoption of LGL (No 2) [2017] ACTSC 76

The plaintiff in this case was a man, born in Germany, who had become the adopted child of his Australian mother's second husband in the ACT. The plaintiff's mother later divorced the plaintiff's adoptive father and the plaintiff reported to the Court that he no longer kept in contact with his adoptive father. However, as an adult the plaintiff returned to Germany and developed a relationship with his birth father, in the affidavit supporting his claim to have his adoption order discharged, the plaintiff explained "the German courts ... would not proceed with the application to have [the plaintiff's biological father] recognised as my father until my adoption in Australia was cancelled."

The difficulty in this case was that the power to discharge the plaintiff's adoption order had been repealed in legislative amendments since the making of that order, prompting Mossop J to remark "[s]ometimes when cleaning up you throw out something useful." In particular, it became apparent that amendments to clean up and improve the ACT statute book had disabled the Court from being able to properly deal with adoption orders made under a repealed Act. Mossop J remarked in his first judgment that it was "a matter deserving of prompt legislative attention."

Following the insertion into s 39L(10) of the Adoption Act an extended definition of "adoption order" so that it also included adoption orders made under one of the various repealed laws, under the *Statute Law Amendment Act 2017*, his Honour was able to discharge the adoption order made in 1981 (see: *In the adoption of LGL (No 2)* [2017] ACTSC 76).

In discharging the plaintiff's adoption order his Honour noted that while the plaintiff was unfortunate to have been caught up in the legislative complication identified by his Honour, the plaintiff was fortunate to have that difficulty arise in "a jurisdiction where the executive and legislative branches of government were responsive enough to be able to remedy that problem in a timely fashion."

Construction of the new Supreme Court building 23 August 2016

TECHNOLOGY AND ONGOING PROJECTS

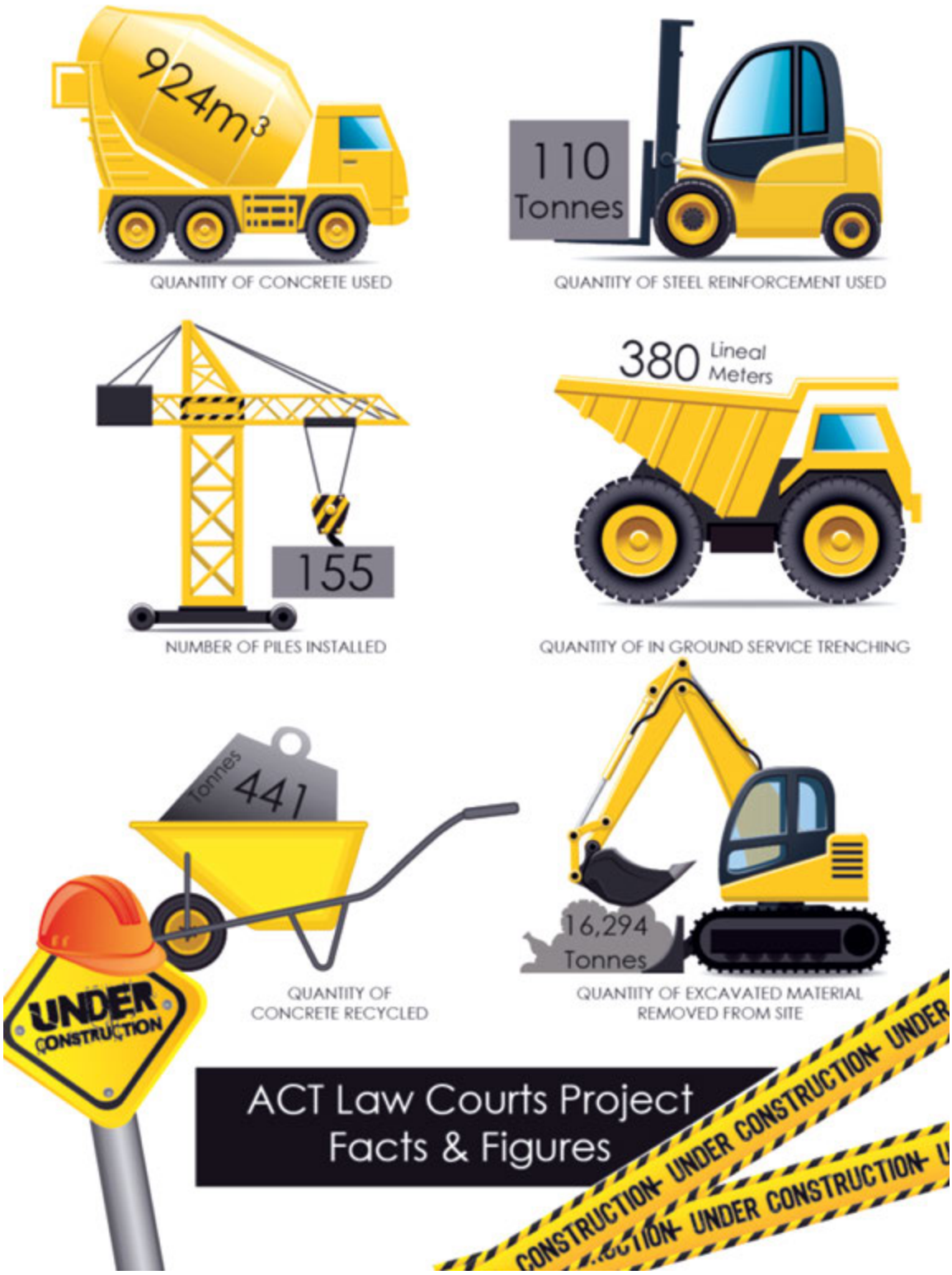
New Supreme Court building

The last year has seen construction progress well on the ACT Courts project. The project will create a combined Law Courts facility for the ACT which will maximise operational efficiencies while still respecting the jurisdictional separation between the Supreme Court and the Magistrates Court.

The new Supreme Court will be located within a four storey building (including 6 jury courtrooms and Judges' chambers) constructed along Vernon Circle and will also occupy part of the existing but reconfigured Supreme Court (including 2 civil courtrooms and mediation rooms). A new public entrance and registry will be built in the open space between the two existing buildings to provide access to courtrooms and other common facilities for members of the public and the legal community.

View of the new Supreme Court building from Vernon Circle

Major excavation works were undertaken from July to November 2016. Approximately 17,000 tonnes of soil and rock were removed to construct the new building. While at times the noise and vibration presented a challenging working environment, the project team and the construction team worked together to find a suitable compromise.



Construction statistics for the new Court building

In 2017 we have seen the structure of the building emerge at a surprisingly fast pace. At a tour of the construction site at the end of June 2017 it was apparent that the work that had been completed inside the building, particularly in the basement area, was significantly advanced. As at 30 June 2017 the structure was complete to the chambers level and structural steel had been installed for the public foyer of the building.

23 June 2017: site tour of the new Supreme Court building

June 2017: site tour new Supreme Court building

2018 will see the completion of Stage One of works with the new four storey Supreme Court building in full operation. Work will also commence to refurbish the existing heritage building including the two larger civil courtrooms, which to be completed by the end of 2018, giving the Supreme Court a total of 8 courtrooms.

30 June 2017: site tour: Chambers level of new Supreme Court building

30 June 2017: site tour: Chambers level of new Supreme Court building

Construction of the new Supreme Court building 29 March 2017

Court technology

Courts and Tribunal Website

In September 2016 the updated ACT Law Courts and Tribunal websites successfully went live on the courts.act.gov.au and acat.act.gov.au domains. The new content management system, developed by Squiz Matrix, has overcome various limitations that existed in the previous website and has meant that sought after enhancements were able to be realised.

One key improvement was to provide clients with better search functions for locating judgments and decisions. Search fields were expanded to include file number, judicial officer and catchwords. In addition, sophisticated search commands were made available including a proximity operator. The layout of the website was also redeveloped, allowing for easier site navigation, better content display, improved accessibility and an ability to view the website via a mobile device. The ability to filter judgments and decisions by jurisdiction is still awaiting completion.

In the latter half of the financial year work began on ensuring that judgments and decisions appear in more than one format. Wherever possible, judgments have been made available in PDF and Word format.

ACT Sentencing Database

The ACT Sentencing Database (ACTSD) is hosted by and mirrors the NSW Judicial Information Retrieval System (JIRS). Like JIRS, the ACTSD is designed to facilitate consistency in sentencing and to enhance judicial, practitioner and public access to ACT Supreme Court and Magistrates Court sentencing data.

The ACTSD captures sentencing outcomes and provides general statistical information. It also enables users to 'drill down' for the purpose of obtaining more detailed information. The database also provides an access point to ACT and Commonwealth legislation. Full-text searching of recent and historic ACT Supreme Court judgments and sentencing remarks, including Magistrates Court decisions, is also available.

The next few years will see database content gradually increase to a level where information regarding particular offences is statistically significant.

In Court Technology

May 2017 saw the completion of the Priority works, concentrating on the Court Technology refurbishments in the Supreme and Magistrates Court. During this time, 19 rooms were completed, including 15 courtrooms and four remote witness rooms. All 10 Magistrate Court rooms were acoustically upgraded to match industry level standards. This has provided the courts with uniformity of operation across the two court precincts and a strong platform for implementing the technology into the new building project.

New features such as free Wi-Fi, court annotation, evidence displays for all court participants, back-up recording capabilities, hearing assistance systems, and a flexible graphical user interface for the Associate's control of court technology have been favourably received. By the close of 2017, court users will also be able to present material wirelessly via their personal devices.

2018 will not only see the construction of eight new Supreme Court courtrooms but also the implementation of a new remote witness suite, containing seven rooms fully equipped for video conferencing to courtrooms in the ACT and other jurisdictions.

Ceremonial sitting: Refshauge J retirement

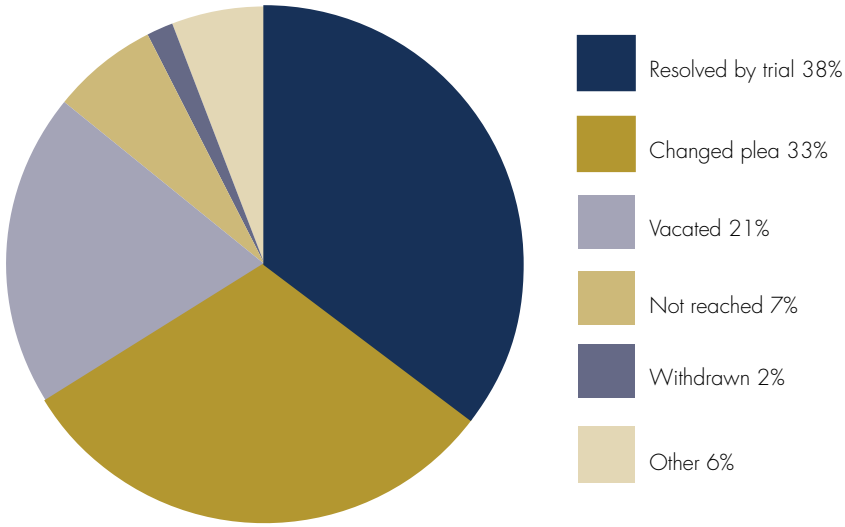
CASE MANAGEMENT

Criminal listings

During 2016–17, 149 matters were listed for trial during central criminal listing periods. Of those matters, 57 proceeded to trial and in 34 cases a guilty verdict was returned. In the matters that did not proceed to trial, 49 accused changed their plea prior to trial, 21 cases were vacated, 10 were not reached and the prosecution withdrew in another 3 cases.

At the end of the reporting year, 9 cases either had not concluded or had reached an irregular outcome. These included: adjourned part heard (2), trials ending in a hung jury (4), trials having to be aborted (2), warrant issued (1). For statistical purposes, these cases are included as 'other'.

Criminal listings by finalisation



Civil case management

The Supreme Court maintains its commitment to reduce the number of pending civil cases. The Supreme Court continues to provide a case management framework that facilitates increased efficiency in the resolution and determination of civil cases.

During 2016–17, the Supreme Court held seven mediation blocks. Parties to the mediations were aware that the matter would proceed to hearing a few weeks after the mediation, should the mediation fail to resolve the matter. The mediations were conducted by experienced practitioners, mediators and former judicial officers, including Mr Bryan Meagher SC, Mr Graeme Lunney SC, the Honourable Margaret Sidis, Ms Mary Walker, Mr Michael Finnane QC and Mr Campbell Bridge SC.

Court based mediations 2016–17

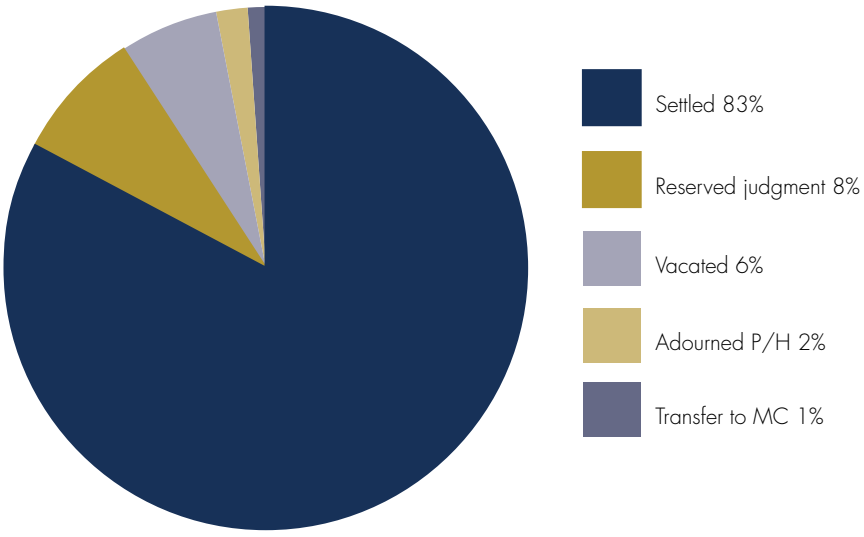
	No of Matters Listed	Vacated	%	Settled*	%	Did not settle	%
July	10	0	0.0	8	80.0	2	20.0
Oct/Nov	40	0	0.0	22	55.0	18	45.0
February	20	3	15.0	10	50.0	7	35.0
March/Apr	20	3	15.0	12	60.0	5	25.0
May/June	26	1	3.8	11	42.3	14	53.8
Total	**116**	**7**	**6.0**	**63**	**54.3**	**46**	**39.6**

* Settled at mediation. This figure does not include matters that settled as a result of, and after, mediation.

Central civil list

During 2016–17, 159 matters were listed for hearing during central civil listing periods. Of those matters, 14 proceeded to hearing and judgment was delivered or reserved. In the matters that did not proceed to hearing, 9 matters were vacated, 3 were adjourned part-heard and 1 was transferred to the Magistrates Court.

Central civil list matters by outcome

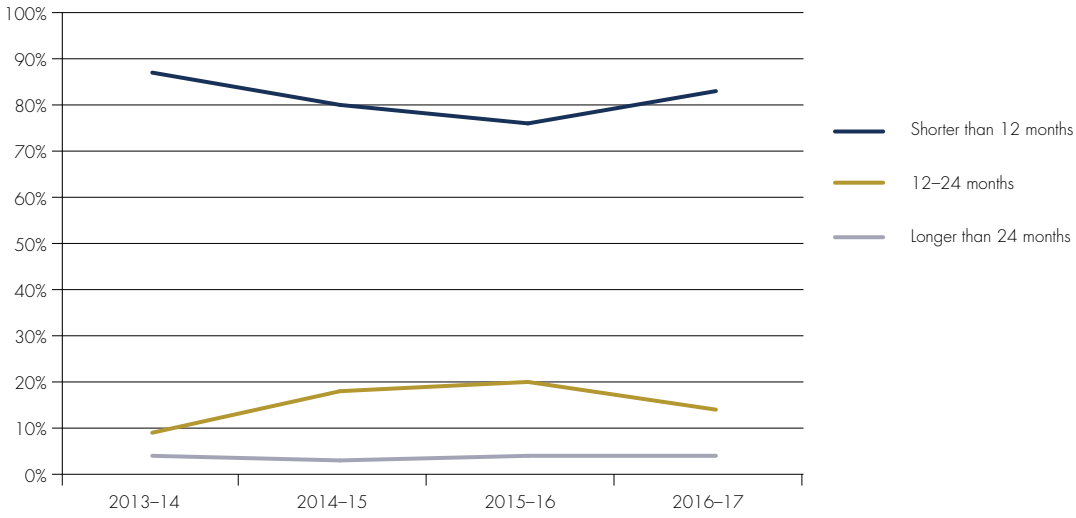


Statistics

Outstanding Matters

Court Time	2015/16 Criminal	2015/16 Civil	2015/16 Criminal	2015/16 Civil	2016/17 Criminal	2016/17 Civil	2016/17 Criminal	2016/17 Civil
< 12 months	206	430	76%	68%	231	346	83%	72%
12–24 months	54	106	20%	17%	39	89	14%	19%
>24 months	10	98	4%	15%	10	46	4%	10%
Total	**270**	**634**			**280**	**481**		

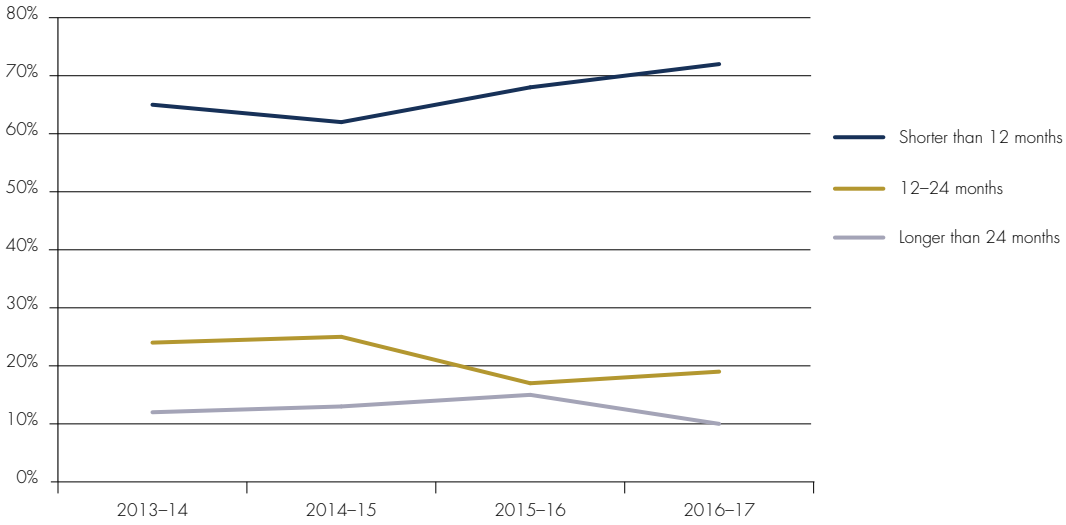
Outstanding criminal matters (in percentages)



	2013–14	2014–15	2015–16	2016–17
Shorter than 12 months	87%	80%	76%	83%
12–24 months	9%	18%	20%	14%
Longer than 24 months	4%	3%	4%	4%

* Includes Magistrates Court Appeals Matters (CA) but not Court of Appeal Matters (AC)

Outstanding civil matters (in percentages)



	2013–14	2014–15	2015–16	2016–17
Shorter than 12 months	65%	62%	68%	72%
12–24 months	24%	25%	17%	19%
Longer than 24 months	12%	13%	15%	10%

* Includes Magistrates Court Appeals Matters (CA) but not Court of Appeal Matters (AC)

Summary data 2016/17

Supreme Court – Civil matters (includes Magistrates Court appeals)	2015–16	2016–17
Lodgements	614	561
Finalisations	619	648
Clearance Rate	101%	116%
Pending Total	634	481
Pending < 12 months	430	346
Pending > 12 months*	204	135
Pending > 24 months	98	46

* Includes [> 12 months] + [> 24 months]

Supreme Court – Criminal matters (includes Magistrates Court appeals)	2015–16	2016–17
Lodgements	279	319
Finalisations	262	270
Clearance Rate	94%	85%
Pending Total	270	280
Pending < 12 months	206	231
Pending > 12 months*	64	49
Pending > 24 months	10	10

* Includes [> 12 months] + [> 24 months]

Court of Appeal*	2015–16	2015–16	2016–17	2016–17
	Civil	Criminal	Civil*	Criminal*
Lodgements	22	33	27	36
Finalisations	24	26	60	37
Clearance Rate	109%	79%	222%	100%
Pending Total	48	38	18	33
Pending < 12 months*	15	28	14	28
Pending > 12 months	10	7	4	5
Pending > 24 months	23	3	1	0

* All Court of Appeal (COA) matters are heard as part of the civil jurisdiction for registry purposes.
* COA matters are defined in this report by a civil or criminal remedy type
* COA matters > 12 months includes both >12 and > 24 months