The Court of Appeal

Review of the 2012/13 Legal Year

July 2012 – June 2013

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Introduction by the Judicial Registrar

This is a review of the work of the Court of Appeal for the 2012-13 year.

This review includes summaries of decisions handed down by the Court in that year. The summaries represent a cross-section of the work of the court with an emphasis on cases which establish a new principle, give guidance to lower courts or apply the law to an interesting factual scenario. The bulk of the summaries in this report were drafted by my Associate Katherine Farrell. Court of Appeal researcher Bryn Davies and registry lawyers Michael Wilson, Clare Mulqueen, Evelyn Shaw and Nicole Bristow also summarised decisions. I express my thanks to them.

This review also records the work and performance of the Court of Appeal during 2012-13. That year was the second year of the criminal appeal reforms known as the Ashley-Venne reforms designed to expedite the hearing of criminal appeals.

The criminal appeal reforms are set out in Supreme Court Practice Direction No 2 of 2011(first revision). The key aspects of the current criminal appeals regime are:

- The requirement that an applicant for leave file a written case (10 pages maximum) accompanying the grounds of appeal which outlines the arguments in support of each ground.
- Provision for the respondent to file a written case in response.
- Closer management of applications for leave to appeal and appeals by the Court of Appeal registry, including registry lawyers appointed to manage cases from initiation to determination.
- A neutral summary prepared by a registry lawyer and provided to the Court and parties. This summary outlines the evidence and grounds of appeal in each appeal.

The reforms have enabled the Court to cut through the backlog of criminal appeals. In early 2010, prior to the reforms, there were as many as 650 pending criminal appeals. At the end of the 2012-13 year there were 149 pending criminal appeals. Criminal appeals are now determined more promptly and with greater capacity to list cases urgently when required. The median time for finalising appeals against conviction for the 2012-13 year was 12.8 months and 6 months for appeals against sentence. This is a very significant improvement on the 2010-11 year in which the median time for conviction appeals was 19.4 months and 12.2 months for sentence appeals. Further improvement is expected over the 2013-14 year.

The relevant agencies - Victoria Legal Aid, Victoria Office of Public Prosecutions, Law Institute of Victoria, Victorian Bar, Commonwealth DPP, the Victorian Government Reporting Service, and the County Court - continue to support the reforms. That support has been, and remains, important to the success of the reforms.

The number of interlocutory criminal appeals, under Division 4 of Chapter 6 of the *Criminal Procedure Act 2009*, declined steeply. In 2012/13 there were 9 interlocutory appeals of which 2 were successful and 7 were unsuccessful.

The Court also took some steps in 2012-13 to improve the timeliness of hearing civil appeals. The success of the criminal appeal reforms encouraged the Court to consider

and recommend similar reforms for civil appeals. It is anticipated that similar civil appeal reforms will be adopted and commence in the second half of 2014.

At the end of 2012-13 the number of pending civil appeals was 149. This was down from 203 at the end of 2011-12. The median time for finalising civil appeals was 9 months in 2012-13 which was slightly longer than the 8.5 months median for 2011-12. As the backlog of older civil appeals is dealt with it is expected that the median time for disposition of civil appeals will increase temporarily and then fall as occurred when the criminal appeal reforms commenced.

In 2013 the Court trialled a new civil listing process for applications for leave to appeal with the aim of expediting the hearing of civil appeals where leave was granted. Previously, if leave to appeal was granted, a notice of appeal was filed and the appeal would be managed in the appeal list where a timetable would be set for the necessary material including an appeal book. Often there was a significant hiatus between the granting of leave and the appeal. Under the new trial listing process if the two judges hearing the civil leave application determined that leave should be granted the two judges (sometimes with the addition of a third judge) heard the leave application and appeal together on the same day or soon after in the following week. This change has enabled the Court of Appeal to expedite the hearing of some appeals and to reduce costs to the parties to the appeal. This changed listing practice was reported on in the Supreme Court Annual Report for 2012-13 at page 50.

A new civil Practice Direction - Practice Direction No 3 of 2013 was issued in June 2013 to support the new civil applications process. This requires litigants to organise and file their supporting materials for civil applications in a standard way. This assists the Court to more quickly grasp the history of the matter and the issues and so expedite the hearing.

In 2012/13 the Court heard appeals on circuit in Shepparton and Ballarat.

This report contains statistics on the performance of the Court from page 57. They include statistics comparing 2012/13 with the earlier year. I express my thanks to Michael Howe, Matthew French and Chris Temperley who prepared these statistics.

I also record my thanks to the staff of the registry for their work in supporting the Court through closer management of appeals, working closely with the staff in judges' chambers and the Court of Appeal researchers. This has involved a willingness to consider and suggest different ways of managing so as to provide more assistance to the judges. One of those ways has been to commence the shift to greater reliance on electronic material. In 2013/14 greater reliance will be placed on electronic material.

I also record my thanks to David Tedhams, Deputy Registrar (Legal) and Chris Temperley, Deputy Registrar (Administration) for their contribution to the efficient running of the Registry which in turn has assisted the Court.

Mark Pedley

Judicial Registrar
Court of Appeal
July 2014

Cases of note

The Registrar's office, in consultation with the Judges of Appeal and their Associates, has selected 98 decisions of note handed down in the period July 2012–June 2013 for inclusion in this report. These cases represent a cross-section of the work of the Court, with a particular focus on cases which establish a new principle, give guidance to lower courts, or apply the law to an interesting factual scenario.

A large amount of the Court's work is in the area of criminal appeals. These can be grouped as follows: appeals against sentence, appeals against conviction and interlocutory appeals. The Court also hears appeals in civil matters.

Appeals against sentence

Principles applicable to contested plea hearings

In ***Formosa v The Queen*** **[2012] VSCA 298**, the Court set out the following legal principles that apply to a contested plea hearing:

1. Conventionally, the Crown opening constitutes an agreed factual basis upon which a judge passes sentence.
2. It is standard practice to use the depositions and related exhibits as the basic materials.
3. Should either party seek to have the sentencing judge take a matter into account in passing sentence, it is for that party to bring the matter to the attention of the judge and, if necessary, call evidence about it.
4. A contested factual assertion upon a plea must be proved by admissible evidence. There is, however, no requirement that the evidence should all have been given on oath, or that there should have been a prior opportunity for cross-examination.
5. A sentencing judge may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities.

Prosecution submissions on sentencing range

In ***Barbaro v The Queen; Zirilli v The Queen*** **[2012] VSCA 288**, the Court held that the sentencing judge had committed no error of law by refusing to entertain a submission from the Crown on sentencing range. The Court held, applying *R v MacNeil-Brown* (2008) 20 VR 677, that the function of a Crown submission on range is to assist the sentencing judge. Judges can reasonably expect a submission on range if the prosecutor perceives a risk that the judge might otherwise fall into error, but judges are under no obligation to hear the submission. No question of procedural fairness arises if a judge declines to hear a submission of law that he or she adjudges to be unnecessary or unhelpful.

The Court also commented on remorse in sentencing, stating that a person wishing to rely on remorse as a mitigating factor must satisfy the court that there is genuine penitence, contrition and desire to atone. Assertions that the plea itself is sufficient to establish the presence of remorse should be approached with caution. Sentencing discounts for remorse should not be given unless remorse is established by proper evidence or the offender has been relieved of the need to discharge that burden on a proper basis. In many instances, the most compelling evidence of remorse will come from testimony by the offender. A judge is not bound to accept second-hand evidence of what the offender said to a psychiatrist or other professionals, let alone from testimonials of family or friends, or statements from the Bar table.

On 12 February 2014 the High Court dismissed the appeal from the Court of Appeal in ***Barbaro v The Queen; Zirilli v The Queen*** **[2014] HCA 2**. In their majority judgment the Court held that, to the extent that *R v MacNeil-Brown* supports the practice of counsel for the prosecution making a submission on sentencing range, it should be overruled. The Court held that the practice is wrong in principle and should cease. The practice may lead to an erroneous blurring of the sharp distinctions between the role of the prosecutor and the role of the judge. The practice does not accord with the instinctive synthesis approach to sentencing as it wrongly suggests a mathematical approach to sentencing. The Court held that a prosecution submission on range is a statement of opinion, not a submission of law, and so should not be taken into account by the sentencing judge.

Common law sentencing principles

In ***Pantazis v The Queen; Elias v The Queen; Issa v The Queen; Rasimi v The Queen; Tricarico v The Queen; Finn v The Queen*** **[2012] VSCA 160**, the Court considered the scope and nature of the common law sentencing principle identified in *R v Liang; R v Li* (1995) 124 FLR 350.

The Court cited with approval the formulation and application of the principle in *R v Vellinos* [2001] VSCA 131 at [11]:

> *The prosecuting authority, whilst possessing an unchallengeable right to frame its presentment in whatever manner it thinks fit, cannot thereby preclude the sentencing tribunal from mitigating the penalty if it concludes that the charges alleged exposed the prisoner to a more punitive regime of sentencing than that to which he ought reasonably have been exposed by the preference of charges more appropriate to the crimes alleged.*

The Court held that the principle does not require a judge sentencing an offender for a state offence to have regard to a comparable commonwealth offence that attracts a lesser penalty. A sentence imposed in the exercise of state judicial power on conviction for a state offence is not to be reduced to conform to a lesser maximum penalty applicable to the comparable commonwealth offence. The principle is confined to less punitive offences that exist within the jurisdiction in which the judicial power is being exercised. In relation to the application of the principle to a negotiated presentment, the court held that considerable restraint should be exercised before upsetting a negotiated plea.

The Court held that the offence of attempting to pervert the course of justice created by s 43 of the *Commonwealth Crimes Act 1914* (Cth) did not abolish the common law offence of attempting to pervert the course of justice.

An appeal to the High Court was dismissed on 27 June 2013 on the ground that under the common law of sentencing there is no warrant for a judge to take into account the lesser maximum penalty for an offence for which the offender could have been, but has not been, convicted. The High Court stated that the "principle" set out in Liang was without solid foundation see ***Elias v The Queen; Issa v The Queen*** (2013) 248 CLR 483.

In ***O'Toole v The Queen*** **[2013] VSCA 62**, the Court stated that the application of the principles concerning the impact on sentencing of impaired mental function outlined in *R v Verdins* (2007) 16 VR 269 should be regarded as exceptional and that the burden lies on the offender. *Verdins* states the bases on which mental impairment may reduce an offender's moral culpability and/or be a mitigating factor in sentencing. The Court found that in the appellant's case it was open to the sentencing judge to conclude that there was

no causal connection between the offending and the post-traumatic stress disorder relied upon, and that insofar as a limited causal connection might be made out on the balance of probabilities it was insufficient to reduce the appellant's moral culpability.

On appeal, the appellant submitted that the sentencing judge erred in finding that the mere fact of the appellant possibly being at risk of relapse in prison, did not engage the sixth *Verdins* principle. The Court stated that in order for the sixth principle to apply an appellant must demonstrate, on the balance of probabilities, that there was a serious risk that being unable to access therapy in prison would have a significant adverse effect on the appellant's mental health. That burden had not been satisfied as the psychological reports the appellant relied upon, failed to provide any account of the degree or severity of the symptoms (with the exception of anxiety), or show that the more serious symptoms were likely to occur. No submissions were put forward to suggest the degree of risk of relapse re-occurring.

Breaches of parole and the principle of totality

In ***Waugh v The Queen*** **[2013] VSCA 36**, the appellant was convicted of armed robbery and pleaded guilty to firearms, dishonesty and drug offences. The offending occurred whilst on parole in respect of an earlier sentence of four years with a non-parole period of two years six months, leading to the cancellation of parole. This meant the appellant was liable to serve a further 18 months ('the parole sentence'), in addition to the total effective sentence of nine years three months with non-parole period of seven years for the most recent offending. By the time he was sentenced, the appellant had served about 11 months of the parole sentence and the balance of that sentence was seven months. On appeal, the Court held that the sentencing judge had erred in relation to the totality principle. The prosecutor had invited the error by suggesting that the sentencing judge use the s 6AAA declaration made by another judge when sentencing the appellant's co-offender. The co-offender had pleaded guilty and fulfilled an undertaking to give evidence against the appellant. While the individual sentences and cumulation orders were within range, it was incorrect in principle to use the co-offender's s 6AAA statement as a benchmark in sentencing the appellant. The sentencing judge also erred in taking into account the original four years of imprisonment rather than the length of the parole sentence (18 months). Further, it was necessary to take into account the entire parole sentence of 18 months, not merely the seven months of unserved balance. Finally, the parole sentence was relevant to both the head sentence and the non-parole period, not just the non-parole period as the sentencing judge had stated.

In ***Koumis v The Queen*** **[2013] VSCA 47**, the Court considered the application of the principle of totality to an offender who was liable to serve an additional sentence due to a breach of parole. The majority (Kaye AJA and Lasry AJA) held that the principle of totality requires the court to evaluate the overall criminality involved in all the offences for which the offender is being sentenced. The Court is required to ensure that there is appropriate relativity between the totality of the criminality and the totality of the effective length of sentences imposed. In considering whether the total period to be spent in custody breaches the principle of totality, it is appropriate to examine the nature of the original offending and sentences imposed, including the term of imprisonment already served. This is because part of the original sentence has been activated due to the breach of parole. This consideration must occur in light of the clear legislative policy expressed in s 16(3B) of the *Sentencing Act 1991* (Vic) which, unless otherwise ordered, requires a sentence for an offence committed on parole to be cumulative on other sentences. This section was previously considered and explained in *DPP v Johnson* (2011) 35 VR 25.

Neave JA noted that while the approach to totality supported by the majority was simpler than the approach taken by the Court in *McCartney v The Queen* (2012) 226 A Crim R 274 and *Waugh v The Queen* [2013] VSCA 36, the correctness of *McCartney* and *Waugh* could only be determined by a bench of five. *McCartney* and *Waugh* both held that the

court is confined, when considering the principle of totality, to considering only the balance of the parole sentence to be served and the sentence for the later offences.

Factors to be taken into account on sentencing

Morrison v The Queen **[2012] VSCA 222**, was an exceptional case in which the intoxication of the appellant was held to be a mitigating factor in sentencing the appellant for murder. Intoxication was held to bear upon the existence and degree of the appellant's remorse, the circumstances in which the crime was committed, the appellant's reaction to it and his prospects of rehabilitation. The need for denunciation was moderated by the affect that the appellant's intoxication had upon his judgement and self-control. The appellant had been an alcoholic for more than 30 years and had no convictions for any serious crimes of violence. There was no suggestion that he was inclined to be violent when intoxicated. As a result, the Court held that the appellant had discharged the heavy onus of showing that his offending conduct could not reasonably have been anticipated and was out of character.

In ***JBM v The Queen*** **[2013] VSCA 69**, the appellant appealed his sentence of seven years imprisonment with a non-parole period of four years and six months for two sex offences committed on his three year old niece. The victim told her mother about the offending and her mother reported it to the police. A VARE (video and audio-recorded evidence) interview was conducted with the victim who was unable to particularise any specific incident. The police then interviewed the appellant who, while aware that the victim would have been unable to give a coherent account of what had been done to her, admitted the offending. It was common ground that but for the appellant's admission to police, he could never have been prosecuted for the offending. The Court found that, in the unusual circumstances of the case, the sentence was manifestly excessive and upheld the appeal in reliance on the principles established in *R v Doran* [2005] VSCA 271. That the appellant had admitted his offending voluntarily and without any prevarication entitled him to a significant discount, greater than that which would normally be accorded to a plea of guilty. The appellant's level of cooperation was also highly relevant in assessing the degree of his remorse and in evaluating the weight to be accorded to specific deterrence. The Court held that public policy demanded that the appellant receive a significant reduction in any sentence that might otherwise have been imposed as offenders should be encouraged, so far as practicable, to admit their crimes and, in so doing, ensure that they can be successfully prosecuted. That policy is of even greater importance in cases involving offending against very young children who would not be capable of giving evidence in court. The appellant was re-sentenced to five years and six months' imprisonment with a non-parole period of three years and six months.

In ***Walters v The Queen*** **[2013] VSCA 164**, the applicant had been convicted and sentenced for murder. The applicant submitted that because it was accepted by the sentencing judge that he had intended to cause really serious injury rather than kill, a lesser sentence should have been imposed. On appeal, the Court held that the applicant's contention was not supported by authority. The moral culpability of an offender will be determined by the nature of the killing, including the conduct of the offender, rather than the particular intent with which the conduct was carried out. The applicant's culpability was found to be high and leave to appeal was refused

Maximum penalties

In ***Hogarth v The Queen*** **[2012] VSCA 302**, the Court held that a sentencing judge is obliged to take both the maximum penalty and current sentencing practises for an offence into account in determining an appropriate sentence. A key indicator of the objective seriousness of an offence is the maximum penalty fixed by Parliament. Where there is a conflict between the guidance given by the maximum penalty and that given by current sentencing practices, it is the maximum which must prevail. The Court commented that

current sentencing practices for confrontational aggravated burglary, which clustered around a median of two years, were inadequate and did not reflect the objective seriousness of this form of offence reflected in the maximum penalty. As a result, sentencing judges should no longer regard themselves as constrained by existing sentencing practice. The necessary change in sentencing practice for confrontational aggravated burglary would evolve over the course of decisions in individual cases. By way of general guidance, in the circumstances of this offence and this offender, a total effective sentence of six to eight years, with a non-parole period of four to six years is an appropriate identification of the indicative range.

In ***Driver v The Queen*** **[2012] VSCA 242**, the appellant pleaded guilty and was sentenced to terms of imprisonment for theft, armed robbery, incitement to commit armed robbery and numerous weapons offences, including possessing an unregistered handgun. At the time of the offending, the latter offence carried a maximum penalty of seven years under the *Firearms Act 1996* (Vic) that was subsequently reduced to 2 years under the *Control of Weapons Act 1990* (Vic). Despite some differences in the nature of the two offences, it was appropriate that the new maximum penalty be taken into account to indicate Parliament's view of the seriousness of the offence had changed. The sentencing judge's failure to take the new maximum penalty into account was an error, although the sentencing judge could not be criticised for failing to identify the issue as it had not been relied on below.

Non-parole periods

In ***Kumova v The Queen*** **[2012] VSCA 212**, the Court considered whether the concept of a 'usual non-parole period'. The Court considered the concept of a 'usual non-parole period to be problematic as taken literally it undermines intuitive synthesis in sentencing by implying the existence of a starting point in sentencing. While comparable cases can and do provide guidance in sentencing, each case is unique and as the setting of a non-parole period is a matter of sentencing discretion, the length of the non-parole period is likely to vary. The empirical observation that non-parole periods have tended to range between 60-75% of head sentence did not mean that there had not been non-parole periods outside that range. The Court cited, with approval Redlich JA's comments in *Romero v R* (2011) 32 VR 486, that the ratio between the head sentence and non-parole period for murder and other serious crimes attracting long head sentences, was likely to be higher, as otherwise, it would create long parole periods and the non-parole periods would not reflect the seriousness of the offences.

The Court reiterated that it disapproved of judges saying 'I propose to give you a shorter than usual non-parole period' because it is likely to mislead and to create false expectations leading to misconceived appeals against sentence. The Court commented that in that context the sentencing judge is understood to have meant something like 'In the view of your strong prospects for rehabilitation [or other special feature], I propose to give you a shorter non-parole period than I would otherwise have done'.

Remedying error in sentencing under s412 *Criminal Procedure Act 2009* (Vic)

In ***Zamfirescu v The Queen*** **[2012] VSCA 157**, an administrative error led to an incorrect pre-sentence detention amount being entered onto the County Court record. On appeal, the Court held that under s 412 of the *Criminal Procedure Act 2009* (Vic) it had the power to amend the record. The Court considered that the mistake could also have been amended by relying on the Court's power to correct clerical mistakes under s 104A(3) of the *Sentencing Act 1991* (Vic) or by adjusting the pre-sentence declaration after allowing the appeal and resentencing the offender.

The decision in *Zamfirescu* was followed by the Court in ***McDonald v The Queen*** **[2013] 89.** There the Court amended an erroneous recorded period of pre-sentence detention pursuant to s 412 of the *Criminal Procedure Act 2009* (Vic).

In ***DPP v Edwards*** **[2012] VSCA 293**, the respondent had pleaded guilty to one charge of recklessly causing serious injury. The sentencing judge was unaware that recent amendments to the *Sentencing Act 1991* (Vic) had excluded a suspended sentence as a sentencing option and sentenced the respondent to a suspended sentence (the first sentence). After the order had been entered in the record of the court, the sentencing judge was informed of the error. The sentencing judge considered that he had the power under s 412 of the *Criminal Procedure Act 2009* (Vic) ('*CPA*') to set aside the suspended sentence order and impose a new sentence. He re-sentenced the respondent to a Community Correction Order (the second sentence).

On appeal, the majority (Weinberg JA and Williams AJA) held that s 412 of the *CPA* could not be used in that way. Once a judge of any court of record has passed sentence, and that sentence has entered into the records of the court, then, subject to legislative provisions to the contrary, that judge is functus officio and has no power to recall it. If the sentence is made in excess of jurisdiction, it can be rectified by either instating the appeal process set out in the *CPA* or, in the case of the County Court, by seeking certiorari.

The majority held that, while as a general rule it may be that inferior court orders made without jurisdiction are void and not voidable, it does not necessarily follow that the doctrine of functus officio does not apply, and that at any time, a court can recall its orders and re-hear the matter. In every case, it is necessary to examine the statutory context surrounding a decision made in excess of jurisdiction to determine its legal effects. In determining the scope of the power to recall a decision context, including the nature of the court and the decision made, is of paramount importance. This approach was endorsed by Gleeson CJ and Kirby J in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 and should be followed in preference to the views of Gaudron, Gummow and McHugh JJ in *Bhardwaj*. Having regard to s 36A(2) *County Court (Jurisdiction) Act 1968* (Vic), s 104 of the *Sentencing Act 1991* (Vic) and s 412 of the *CPA*, a judge of the County Court is functus officio with regard to a sentence entered into the record of the court even when affected by jurisdictional error. In this case the suspended sentence imposed was invalid due to jurisdictional error and the second sentence was invalid as the sentencing judge was functus officio.

The majority distinguished the High Court's decision in *Pelechowski v Registrar of the Court of Appeal* (1999) 198 CLR 435 stating that the case did not support the proposition that an order of an inferior court, made beyond power, can never have any effect in law, regardless of the statutory context in which that decision was made. The Court explicitly stated that *R v Brattoli* [1971] VR 446 should not be followed as it can no longer be reconciled with later decisions of the High Court.

The majority decided that the second sentence imposed was invalid, as the sentencing judge was functus officio when it was announced, and the first sentence was invalid as beyond power. The majority extended time for the DPP to appeal the first sentence and imposed a Community Corrections Order, as the sentencing judge had purported to do.

Warren CJ (dissenting) held that the first sentence was a nullity as it was made by an inferior court in excess of jurisdiction. The sentencing power remained unexercised, consequently the sentencing judge was not functus officio and had the power to impose the second sentence. The second sentence was therefore valid and effective until set aside. While Warren CJ considered the second sentence manifestly inadequate when imposed, she considered that no different sentence should now be imposed and that the appeal should be dismissed.

This decision was appealed. The appeal was heard by the High Court on 27 November 2013. The High Court reserved its decision.

Power of the Court to permit a notice of abandonment to be withdrawn

In ***Tognolini v The Queen* (No 2) [2012] VSCA 311**, the Court held that where the interests of justice require it, it has inherent power to permit a notice of abandonment to be withdrawn, notwithstanding that the filing of the notice has the effect of leading to the dismissal of the application for leave to appeal.

The applicant had been sentenced by a trial judge to eight years six months' imprisonment with a non-parole period of six years and six months ('the first sentence'). While the applicant was serving the non-parole period for the first sentence, he was sentenced on unrelated charges ('the second sentence'). Accordingly, the judge imposing the second sentence was required by s 14(1) of the *Sentencing Act 1991* (Vic) to fix a new single non-parole period in respect of both the first and the second sentences. The applicant then appealed against the first sentence. The Court allowed the appeal in part, reducing the sentence and non-parole period by two years.

As a consequence of the successful appeal, the applicant's non-parole period for the second sentence had been fixed on an incorrect basis. The Court held that the bench that dealt with the appeal against the first sentence had no jurisdiction to consider or modify the second sentence as it had not been appealed. The Court held that the fact that the applicant's success on the sentence appeal did not occur until after the second sentence had been imposed could not operate to deprive him of the opportunity to have the overall non-parole period fixed on the correct basis. The applicant had made an application for leave to appeal against the second sentence, but had abandoned it. The Court, therefore, permitted the applicant to reinstate his application for leave to appeal against the second sentence and fixed a new single non-parole period in respect of both sentences.

DPP's appeals

***DPP (Vic) v Leys & Leys* [2012] VSCA 304** concerned a question of statutory construction in relation to the Community Correction Order Regime ('the CCO regime') provided for in the *Sentencing Act 1991* (Vic) ('the Act'). As a consequence of amendments made to the Act by the *Sentencing Amendment (Community Correction Reform) Act 2011* ('the Amending Act') the literal construction of cl 5 of the Act conflicted with s 117(1) of the Act. On appeal the Court held that while in ordinary circumstances the literal interpretation of a statutory provision will give effect to its purpose where, as here, the literal interpretation fails to promote the purpose of a provision it is necessary to determine whether an alternative construction, one that does achieve the purpose, ought to be adopted even if that construction requires departure from the literal meaning. The question as to what construction is reasonably open is illuminated by context. The statutory scheme, comprising the 'context' and the statute as a whole, may disclose that a particular construction is open although it is not one which the words used, on their face, can support. The construction under consideration, to be tested against the requirement that it be reasonably open within the statutory scheme, is that of the words that have been found to be omitted together with the words employed by the drafter. This approach is reflected in the judgement of Fraser JA in the recent decision of the Queensland Court of Appeal in *Special Projects (QLD) Pty Ltd v Simmons* [2012] QCA 205.

The Court held, in express disagreement with the view of Spigelman CJ in *R v PLV* (2001) 51 NSWLR 736, that the question of whether a construction should be adopted that departs from the literal meaning of the words used in a statutory provision should not be answered with reference to whether or not the construction will 'confine the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words will suggest'. Rather, the Court held that the question should be answered by

reference to the three conditions set out by Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74 that must be satisfied before a court may read words into a legislative provision to give effect to its purpose, together with the additional requirement that the modified construction is reasonably open. For a modified construction to be reasonably open it must be possible to 'read in' or imply the additional words into the relevant statutory provisions without giving the provision an unnatural, incongruous or unreasonable construction and the provision as modified must produce a construction that is in conformity with the statutory scheme.

The Court went on to uphold the appeal stating that the sentencing judge had not complied with s 44(2) which prohibits the imposition of a CCO on a single offender sentenced to multiple terms of imprisonment for multiple offences and where the aggregate of those terms of imprisonment exceeds three months.

In ***DPP v Sokaluk* [2013] VSCA 48**, the Court dismissed an appeal by the Director of Public Prosecutions against the sentence of 17 years and nine months' imprisonment with a non-parole period of 14 years imposed on the intellectually impaired respondent who lit the Black Saturday Bushfire that swept across the La Trobe Valley. Ten people died while fleeing the fire or fighting it and the fire caused enormous economic loss. The Court considered whether the sentencer had given too much weight to the respondent's intellectual disability and whether it had given adequate weight to community protection. The Court recognised that when an offender causes a terrible event, such as a bushfire, members of the affected community and the relatives of those who died often consider that only a very high sentence can adequately recognise the gravity of the offending. Whilst the Court emphasised that community protection is a very important sentencing consideration, the law does not treat an offender with an intellectual disability or impairment in the same way as an offender who does not have such a disability. The sentencing judge had to strike a difficult balance between taking into account the mitigating effect of the respondent's intellectual disability and giving weight to the appalling consequences of his arson. It was the view of the Court that the sentences imposed fell well within the reasonable exercise of the judge's sentencing discretion.

In ***DPP (Cth) v Maxwell* [2013] VSCA 50**, the Commonwealth Director of Public Prosecutions appealed against the sentence the respondent received for two counts of importing a commercial quantity of a border-controlled drug called gammabutyrolactone (GBL). In dismissing the appeal, the Court commented that as the sentencing regime for these counts was quantity-based, the scale of the importation would almost always be a very significant factor in sentencing. Ordinarily the larger the quantity imported the more serious the offence. Since importations can involve many multiples of a commercial quantity of the drug in question, an importation that involves only one or two multiples is 'at the bottom end' of the quantitative scale. The financial reward received or anticipated by the offender is also relevant to the objective gravity of the offence. An importation that is undertaken because it is expected to bring a large financial reward to the offender will be more serious than one where the expected reward is small or non-existent. This is because the greater the anticipated reward of criminal conduct, which inflicts harm on the community, the higher the offender's moral culpability. The scale of the anticipated reward is also relevant to both specific and general deterrence as the sentence to be imposed for the offence must signal to the offender, and to other would-be offenders, that the potential financial rewards to be gained from such activities are outweighed by the risk of severe punishment. The greater the anticipated reward the more powerful the deterrent message must be. The converse is also true. Considerations of general deterrence and community protection are also more significant if the anticipated reward from dealing in illicit drugs is high.

The Court held that to treat a low reward drug like GBL differently for sentencing purposes is not inconsistent with the statutory assumption that a commercial quantity of drug A is to be viewed for sentencing purposes as being just as harmful as a commercial quantity of

drug B. It is recognising that the very high maximum penalties fixed for offences involving a commercial quantity reflect a legislative intention to visit very heavy punishment on drug profiteers. The lower sentences consistently imposed on importers of GBL are justified by the enormous reward differential when compare to the importation of equivalent qualities of other drugs such as heroin and cocaine.

In ***DPP (Cth) v Couper*** **[2013] VSCA 72**, the Court considered the procedure to be followed when formulating a sentence in which reductions have been made to reflect both a discount for an undertaking to co-operate pursuant s 21E of the *Crimes Act 1914* (Cth) and a discount for a plea of guilty pursuant to s 6AAA of the *Sentencing Act 1991* (Vic). The Court approved of the approach to sentencing adopted by T Forrest J in *The Queen v Newton Chan* (2010) 79 ACSR 189. The Court held that there was not one methodology that is faithful to the requirements of the two sections. In some circumstances the reduction in the sentence given for the undertaking to co-operate may be specified before the reduction for the plea of guilty; in other circumstances it may be more appropriate to indicate the reduction given by reason of the plea of guilty before indicating the reduction to reflect the undertaking to co-operate. Whichever sequence is adopted, it is important that the actual sentence imposed reflects the fact that the offender has had the benefit of both forms of reduction. A way of ensuring this has occurred is to indicate plainly, as T Forrest J did in *Chan*, what discount is referrable to the undertaking to co-operate and what discount is referrable to the guilty plea. The actual sentence imposed on the offender must reflect the fact that the offender has had the benefit of both reductions. The sentencing judge should specify the sentence that would have been imposed but for the undertaking to co-operate and the plea of guilty. The sentencing judge should then identify the specific reduction that has been given for each of those matters, identified in a number of days, weeks, months or years.

In ***DPP (Cth) v Haidari*** **[2013] VSCA 149**, the Court commented on the task of the sentencing court under a mandatory minimum sentencing regime. The respondent had been convicted and sentenced on a number of charges relating to people smuggling and organising to bring of groups of non-citizens into Australia, contrary to the *Migration Act 1958* (Cth). As a result of these convictions, the respondent fell to be sentenced within the mandatory minimum sentencing regime established under that Act. At the same time the respondent was also sentenced for importing methamphetamine. The respondent was sentenced to 11 years six months' imprisonment with a non-parole period of eight years. The CDPP appealed the sentence on the basis it was manifestly inadequate. The appeal was dismissed.

The Court held that the imposition of a mandatory minimum sentencing regime modifies, but does not oust, the sentencing principles of the common law and the accommodation of those principles effected by s 16A of the *Crimes Act 1914* (Cth). Minimum sentences may affect the sentencing court's approach to mitigating circumstances, especially when considerations of totality also apply. The objective circumstances against which the gravity of people smuggling crimes are to be judged includes that Parliament requires the imposition of minimum penalties for those offences. Whether an offence falls within the least serious category is to be determined by reference to all relevant sentencing considerations, including matters personal to the offender. Where there is a minimum statutory sentence of imprisonment the question for the sentencing judge is where, having regard to all relevant sentencing factors, the offending falls within the range between the least serious category of offending, for which the minimum is appropriate, and the worst category of offending, for which the maximum is appropriate.

The totality principle of sentencing has particular relevance. It is impossible to evaluate a submission that the sentence imposed in respect of a particular charge was manifestly inadequate without also examining the sentences imposed in respect of the other offences for which the respondent was sentenced, before fixing a total effective sentence which is proportionate to the overall criminality. If the total effective sentence is

unimpeachable then an individual sentence which has been adjusted to achieve that end will also be unimpeachable, as will a total effective sentence which has been reached by sensible orders for concurrency. The totality principle applies to all situations in which an offender may become subject to more than one sentence; and, where sentences are passed on different charges in an indictments or on different indictments, where the offender is subject to a suspended sentence or probation order where he is already serving a short sentence of imprisonment, or makes appearances in different courts within a short space of time. The courts have shown an aversion to the imposition of crushing sentences except when they are either required by statute or justified by exceptional circumstances. There is no justification for imposing a crushing sentence if the only warrant for it is the notion that where an offender has committed an offence which carries a minimum sentence, that minimum must be cumulated in full upon all other sentences imposed at the same time.

Conviction appeals

Criminal appeals of public interest

In ***DPP v Moran*** **[2012] VSCA 154**, the Director of Public Prosecutions appealed the decision of the trial judge to dismiss an application for a forfeiture order. The order was sought over the proceeds of the sale of a property at Ormond Road, Ascot Vale, on the basis that the property had been used in connection with an offence namely the murder of Desmond Moran, the respondent's brother-in-law. Geoffrey Armour shot and killed Desmond Moran as part of an arrangement between himself and the respondent. Following the murder the car used to drive the killer away from the murder was parked for a short time at the Ormond Road property and items used in the murder kept at the property. The respondent gave Mr Armour a Land Rover as payment for committing the offence. She had bought the Land Rover with part of the money from a loan she had obtained by using the Ormond Road property as security. The court dismissed the appeal as it found that the trial judge rightly concluded that the connection between the property and the offence was too remote for the property to be 'tainted'.

Collins v The Queen **[2012] VSCA 163**, concerned conviction and sentence appeals against for two murders.

The convictions were appealed on the ground that the trial judge erred by failing to exclude evidence of the post-offence conversations of the appellant that were relied upon by the Crown to prove consciousness of guilt. The appellant's submissions involved an attack on the judge's finding of facts. The Court held that the judge's findings were open on the evidence and so it was open for the trial judge to admit the evidence.

The sentences were appealed on the ground that they were crushing and did not allow for life beyond the non-parole period. The appellant had been sentenced to life imprisonment and would not be eligible for parole until three months before his 95th birthday. The Court accepted that it was likely the appellant would die before being eligible for parole. The Court, in dismissing the appeal, held that the sentencing judge was not required to impose a non-parole period that would guarantee the appellant life after prison. The Court found that in fixing the non-parole period the sentencing judge had regard to the appellant's age and other relevant factors.

In ***Farquharson v The Queen*** **[2012] VSCA 296**, the Court dismissed an appeal against convictions. The appellant had been convicted of murdering his three sons aged two, seven and 10. On Father's Day 2005 the appellant was driving along the Princess Highway at Winchelsea with his sons to return the children to their mother. The car ran off the highway, broke through a fence before sinking in a seven metre deep dam. The appellant got out of the car before it sank but the children drowned. The appellant's motive, as contended by the Crown, was revenge on the childrens' mother, his ex-partner.

The Court rejected the appellant's submission that the verdict was unreasonable or could not be supported having regard to the evidence. The Court also rejected the submission that the trial judge had erred in failing to direct the jury that, before convicting the accused, they must be satisfied beyond reasonable doubt of the accuracy of Greg King's version of his conversation with the appellant. Mr King had given evidence of a conversation he had with the appellant in which the appellant said that he would 'pay [his ex-partner] back big time', after nodding his head towards the window of the shop where his children were, by taking away 'the most important thing' from her. The appellant did not deny this evidence but disputed Mr King's further evidence that he had then made a threat to kill the children. The Court held that the version of Mr King's evidence that included the threat was not an indispensable element in the Crown case. The Court also rejected the submission that the trial judge erred in not leaving to the jury a verdict of manslaughter by criminal negligence holding that manslaughter was never an issue, real or otherwise, in the trial.

***Mokbel v The Queen* [2013] VSCA 118**, was an appeal against sentence and an application for leave to appeal against conviction. The appellant, Tony Mokbel, had fled to Greece in 2006 whilst on trial for a Commonwealth drug importation offence (cocaine). The trial continued in his absence and the appellant was convicted and sentenced to 12 years' imprisonment with a non-parole period of 9 years. In June 2007 he was apprehended in Greece. Pursuant to the extradition treaty between the two countries, Australia requested that Greece extradite the appellant so that he could serve the sentence already imposed and face further charges. The appellant challenged the validity of the extradition request. The challenge failed in the Federal Court, in the Full Federal Court and in the High Court of Australia. The Court of Appeal in Athens upheld Australia's request and ordered the extradition. The appellant then appealed to the Greek Supreme Court which confirmed the order for extradition on 18 March 2008.

The final step in the appellant's extradition was for the Greek Minister of Justice to approve the extradition. In anticipation of this decision being made the appellant lodged an application with the European Court of Human Rights asserting that to extradite him would violate rights guaranteed to him by the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, to which Greece was a party. The application sought a grant of 'provisional protective measures' from the Court to restrain Greece from extraditing him to Australia until the Court had ruled on his application. On 7 May 2008, the Greek Minister of Justice ordered the appellant's extradition and on 16 May 2008, the appellant was surrendered into the custody of the Australian Federal Police and escorted back to Australia. At the time of his extradition, the European Court had made no order for interim measures.

On his return to Australia the appellant mounted three unsuccessful challenges to the further drug charges against him, seeking a permanent stay of the proceedings. In his third application the appellant contended that Greece had acted unlawfully in that it had violated its obligations under the European Convention on Human Rights and that by accepting his surrender, Australia had knowingly participated in this unlawful conduct. The appellant subsequently pleaded guilty to two state drug trafficking offences and was sentenced to a total of 30 years' imprisonment with a non-parole period of 22 years. He then sought leave to appeal against conviction on the ground that his third stay application should have succeeded. The Court dismissed the appeal against sentence and refused the application for leave to appeal against conviction, upholding the decision of the Court to refuse the third application for a permanent stay.

A High Court application for special leave to appeal was dismissed on 13 December 2013

Indictments

In ***Macfie v The Queen* [2012] VSCA 314**, the applicant sought leave to appeal on, amongst other things, the ground that an overloaded and unnecessarily complicated indictment resulted in a substantial miscarriage of justice. The indictment contained 52 charges including a multiplicity of charges and complainants. The Court commented that it would have been difficult for the jury to accurately allocate particular segments of the evidence to the particular charge or charges to which they related. This difficulty can be removed by careful cross-referencing by those responsible for drawing the indictment, and by both counsel and the trial judge, of the path between the evidence and the charges – with reference to any points at which the path becomes obscure, or vanishes. If, at the conclusion of the judge's charge to the jury, counsel does not think that the jurors are in a position to follow the path that the prosecution suggests to them then it is counsel's duty to bring that circumstances to the attention of the judge.

The Court commented that it was not common for an indictment to contain 52 counts, and any indictments that match it in number should be carefully scrutinised before being

signed. No jury should be asked to grapple with the very taxing intellectual and psychological demands that such an indictment places upon them, unless justice to the Crown and the accused cannot otherwise be done. In this case the court found that the position of the Crown was justified. It was significant that experienced trial counsel made no submissions about whether or not the jurors were in a position to follow the route between the evidence and the charges, and did not raise any issue about the form of the indictment or the number of charges. The suggestion that the indictment should have been severed was impractical. It would be difficult if not impossible to group the offences in a sensible way. When that difficulty was coupled with the importance of presenting the full criminality of the applicant's behaviour in a series of inter-connected offences during a single, and clearly defined, period of offending, the criticisms of the indictment largely fall away. The appeal was dismissed.

Transferring charges to the Magistrates' Court

In ***Nguyen v The Queen*** **[2012] VSCA 297**, the appellant pleaded guilty to one charge of conspiracy to import heroin, one charge of attempting to possess unlawfully imported heroin and four indictable offences. With the consent of the parties, the County Court judge had purported to transfer the additional charges from the Magistrates' Court to the County Court under s 243 of the *Criminal Procedure Act 2009* (Vic) (*'CPA'*) on the erroneous assumption that they were summary offences. On appeal, the Court accepted the Crown's concession that the transfer of charges was invalid as the charges were indictable and s 243 does not apply to indictable offences. The Court accepted that the convictions had to be quashed, but did not have power to make an order under s 277 of the *CPA* for a new trial as that section presupposes that there has already been a trial, which was not the situation. The Court instead transferred the four additional charges to the Magistrates' Court pursuant to s 168 of the *CPA*. The Court considered that the transfer was appropriate given the consent of the parties and the adequacy of the range of sentences available to the Magistrates' Court for the offending. The Court held that although, under s 158 of the *CPA,* the transfer procedure in s 168 only applies when an accused has been committed for trial, the fact that the appellant had been committed in respect of the drug offences was sufficient to enliven the Court of Appeal's jurisdiction to transfer charges to the Magistrates' Court under s 168 even though the appellant had not been committed in respect of the four additional offences**.**

Evidence Law

McCartney v The Queen **[2012] VSCA 268**, was a conviction appeal where it was contended that the trial judge erred in allowing evidence of a photo-board identification to be before the jury, on the basis that the evidence was more probative than prejudicial under s137 of the *Evidence Act 2008* (Vic) ('the Act'). The appeal required the Court to consider the nature that an appeal against conviction following a decision not to exclude evidence under s 137 of the Act. Pursuant to s 137, a court must refuse to admit evidence if the danger of unfair prejudice outweighs its probative value.

The Court determined that the trial judge's assessment of the evidence under s 137 of the Act is not a discretionary judgment but an evaluative process where the trial judge must assess the probative value of the evidence and the danger of unfair prejudice to the accused. If the trial judge concludes that the probative value is outweighed by the danger of unfair prejudice then the evidence must be excluded. No exercise of discretion is called for. In following the NSW decision in *Riley v The Queen* [2011] NSWCCA 238, and the High Court decision in *Aytugrul v R* (2012) 247 CLR 170, the Court decided that, when considering such a ground of appeal, the correct approach is for the Court to consider the result of the balancing exercise under s 137 to determine whether the evidence must have been excluded. The correct approach was not to decide whether it was open to the trial judge to conclude that the prejudice did not outweigh the probative error (*House v King* (1936) 55 CLR 499 type error). After considering the evidence itself the Court decided that

the appeal failed as any danger of unfair prejudice would have been removed by the careful direction of the trial judge.

In ***Dupas v R*** **[2012] VSCA 328**, the Court considered whether a trial judge is required to take into account the reliability and weight of identification evidence in determining whether it must be excluded under s 137 of the *Evidence Act 2008* (Vic). Section 137 requires a court to refuse to admit evidence adduced by the prosecution if its probative value is outweighed by the danger of unfair prejudice to the accused.

The Court, constituted by five judges, decided that a trial judge is required to make some assessment of the weight that the jury could, acting reasonably, give to the evidence and balance that against the risk that the jury will give the evidence disproportionate weight. The question had earlier answered in the negative by the New South Wales Court of Appeal in *R v Shamouil* (2006) 66 NSWLR 228, and that decision had been followed and applied in a number of decisions of that court and the Victorian Court of Appeal. On appeal, the Court stated that the decision in *Shamouil* was manifestly wrong and should not be followed. The Court reasoned that the task under s 137 was the same as at common law so the trial judge is only obliged to assume the jury will accept the truthfulness of the evidence, not its reliability. To construe s 137 to mean that a trial judge was not required to take into account the reliability and weight of the identification evidence, did not accord with the language and context of the section. The Court decided that the trial judge did have regard to the weight that could properly be assigned to the identification evidence when determining its admissibility pursuant to s 137. The appeal was dismissed.

In ***Latorre v the Queen*** **[2012] VSCA 280**, the Court commented on voice identification evidence where a witness claimed to recognise a voice ('voice recognition') and where a jury was invited to make a comparison between two samples ('voice comparison'). Voice recognition evidence may be given by non-experts and may be admitted even where a witness lacks prior familiarity with the voice, their exposure to it was short or it lacks distinctive features. These matters are relevant to what weight should be accorded to the evidence, which is a matter for the jury.

Voice comparison emphasises different considerations: the quality, including the similarity of surrounding circumstances, vocabulary, and quantity of material available for comparison. Where a judge has formed the view that quantity and quality are sufficient for a useful comparison to be made, an appellate court should be slow to depart from it. At the same time, a failure to give very careful direction on the difficulties and dangers attending the specific evidence would be unsafe. Finally, the Court observed that juries benefit from repeated listening to comparison material and that counsel should be afforded the opportunity to point out relevant differences or similarities.

In Latorre, the Court also rejected the view that the principles of agency were applicable to the attribution of criminal responsibility outside of the special cases of 'innocent agency', coercion, deceit or the exercise of authority. Citing from *R v Franklin* (2001) 3 VR 9 the Court reaffirmed that this position would be both doctrinally undesirable and practically unnecessary. It followed that the trial judge had misdirected the jury when she told them that a demand through an intermediary was a demand made by the person. The Court noted that the prosecution had not been put on the basis that the person and intermediary were parties to a joint criminal enterprise.

In ***Roberts v The Queen*** **[2012] VSCA 313**, the appellant had made an application pursuant to s 342 of the *Criminal Procedure Act 2009* (Vic) ('*CPA*') to cross-examine the complainant about her sexual history, including prior sexual abuse she had suffered. Section 349 of the *CPA* provides that leave should not be granted under s 342 unless the evidence has 'substantial relevance to a fact in issue' and it would be in the interests of justice to allow the cross-examination or admit the evidence, taking into account a number

of factors. Part 8.2 of the *CPA*, in which ss 342 and 349 appear, was introduced in response to the findings of the Victorian Law Reform Commissions, *Sexual Offences: Final Report* (July 2004), which concluded, following a review of sexual offences law, that there was a 'widely held perception that the criminal justice system does not always deal fairly with complainants in sexual offence cases' was contributing to the under-reporting of sexual offences. The report found, while acknowledging that 'cross examination of witnesses is an essential feature of an adversarial criminal justice system' that 'the focus on the complainant's behaviour and credibility during cross-examination can also cause significant distress.' The Court held that the provisions of Part 8.2, including ss 349 and 352, should be construed to promote its purpose as highlighted by its legislative history and the principles in s 338 of the *CPA* that guide its interpretation and application.

The Court held that the trial judge did not err in refusing the appellant leave to cross-examine. To satisfy the test under s 349, in the light of the purpose of the provision as manifested by s 338 and its legislative history, there needed to be an evidentiary plank to link the prior sexual abuse with the sexual activity that occurred between the appellant and the complainant. In the present case there was no such evidentiary plank that could give rise to a grant of leave under s 349 as there was no tension, inconsistency or direct contradiction between the complainant's evidence in relation to her sexual history and earlier sexual abuse. The fact of earlier sexual abuse could not itself supply the necessary evidentiary connection.

In ***MA v The Queen*** **[2013] VSCA 20**, the Court considered the admissibility of expert evidence concerning the behaviour of sexual assault victims. The appellant was tried for sexual offences against his daughter. The defence argued that the complainant's behaviour, particularly her failure to cry out and complain at the time and her maintenance of a cordial, ongoing relationship with her father where she lived at home as an adult, was inconsistent with the truth of her allegations. The trial judge permitted the Crown to rebut the defence case as to counter-intuitive behaviour by calling expert evidence from a psychiatrist to the effect that the complainant's behaviour was neither necessarily inconsistent with the allegations nor an abnormal response to the alleged offending. The evidence also concerned parental reactions to complaints and how this may affect a victim's behaviour. On appeal, the Court rejected the appellant's argument that the psychiatrist's evidence was irrelevant or otherwise so unfairly prejudicial as to require exclusion. The evidence could not establish that it was probable the complainant was telling the truth, but it could establish that her behaviour was not demonstrative of untruthfulness by reference to common or usual patterns of behaviour as asserted by the defence. The evidence was relevant and admissible both under ss 79 and 108C of the *Evidence Act 2008* (Vic) and s 388 of the *Criminal Procedure Act 2009* (Vic), and was not unfairly prejudicial so as to require exclusion under s 135 and 137. However, a different view of the consequences of s 108C, 135 and 137 may result with respect to evidence of the type which the trial judge properly excluded, namely expert evidence as to the specific reactions of an alleged victim of sexual abuse.

In ***Semaan v The Queen*** **[2013] VSCA 134**, the appellant appealed against his convictions for one charge of dangerous driving causing death and five charges of dangerous driving causing injury. The grounds of appeal were that the trial judge erred in admitting evidence of the earlier driving of the accused and in his directions to the jury concerning the use of that evidence. The evidence was of four separate incidents of the accused driving between Mt Hotham to Omeo in a manner that was described by the passengers in the car as dangerous.

On appeal, the Court held that evidence regarding the prior driving of a person later involved in an accident for which they are charged, can only be admissible if there is a sufficient relationship between the earlier driving and the driving which is the subject of the charges. The Court found that the trial judge's directions to the jury in relation to the wrongly admitted evidence were wrong. The trial judge's instructions to the jury not to act

on propensity reasoning could not have ameliorated the unacceptable prejudice flowing to the appellant from the wrongful admission of the evidence and therefore were also in error. The Court found that, as a result of the evidence being admitted and the trial judges' instructions, there had been a substantial miscarriage of justice. The appeal was allowed.

In ***Audsley v The Queen*** **[2013] VSCA 41**, the appellant had been convicted of four charges of handling stolen goods contrary to s 88(1) of the *Crimes Act 1958* (Vic).The first ground of appeal was that the appellant was denied a fair trial by the loss or destruction, or failure to retain, the property that was the subject of two charges. On appeal, the Court held that in order for the ground to succeed, the appellant had to demonstrate that the absence of the property was likely to have had a significant effect on his right to a fair trial. It was insufficient for the appellant to demonstrate that the evidence, if available, might have resulted in his acquittal on any of the charges. The effect of the missing evidence must be viewed in the context of the evidence, which was in fact adduced, and in particular, by considering whether, in light of both the adduced evidence and the missing evidence, the trial was fair. The appellant failed to demonstrate that the missing evidence was likely to have had a significant effect on his right to a fair trial.

Elements of offences

In ***El-Waly v The Queen*** **[2012] VSCA 184**, the Court considered the judge's decision to allow Crown to amend the indictment to allow the jury to consider both penile and digital penetration on a charge of rape with instructions that they did not need to be unanimous about the precise method of penetration. The Court held that the trial judge was correct to permit the Crown to amend the indictment as either of the modes of penetration alleged would make out the rape offence charged.

At all times the appellant faced an allegation that he had sexually penetrated the complainant without her consent while aware that she was not or might not be consenting. The Court concluded there was no uncertainty as to the case the appellant had to meet, and that due to the expansive definition of sexual penetration in the *Crimes Act 1958* (Vic), if either mode of penetration was demonstrated, the only possible consequence was a guilty verdict for the statutory offence of rape.

In ***Ravarotto v The Queen*** **[2012] VSCA 263**, the applicant pleaded guilty to a number of drug offences, including the trafficking of a drug known as 4-methylmethcathinone (4-MMC) under the *Crimes Act 1914* (Cth). The applicant then appealed against conviction on the basis that, while it is an offence to traffick 4-MMC now, at the time of the offending 4-MMC was not included in the exhaustive list of substances of controlled drugs for that offence.

The Crown conceded the applicant was correct as to the charge being not one at law and raised the additional issue that a state Crown Prosecutor who had signed the Indictment was not authorised to sign indictments for Commonwealth offences. The applicant adopted this as a ground of appeal and the Court decided that, the indictment was a nullity for the Commonwealth charges. Both convictions relating to the 4-MMC were quashed and acquittals were entered.

In ***Beqiri v The Queen*** **[2013] VSCA 39** the appellant had pleaded guilty and been sentenced to terms of imprisonment for two drug offences under the Commonwealth Code, being possession of a marketable quantity of cocaine (charge one) and manufacturing cocaine (charge two). Charge one was based on possession of a suitcase containing towels and clothing impregnated with cocaine, whilst charge two was based on extraction of that cocaine from the clothing and towels. The appellant appealed against conviction and sentence principally on the ground that he could not be guilty of manufacturing something which already existed. Section 305.1 of the *Criminal Code Act 1995* (Cth) stated "… manufacture means any process by which a substance is produced

(other than the cultivation of a plant), and includes … the process of extracting or refining a substance." The Court, in applying this definition, held that "for a person to be guilty of an offence under that section, the person must bring a substance into existence from other materials having chemical or physical properties resulting in a new substance." In this case, the cocaine was already in existence, so the appellant could not be guilty in law of manufacture. The conviction on charge two was quashed and the appellant was resentenced on charge one.

In ***HA v The Queen*** **[2013] VSCA 77**, the appellant had been convicted of one count of sexual penetration of a child under 16, and two counts of indecent act with a child under 16. The offences were committed on the Spirit of Tasmania ferry as it travelled between Victoria and Tasmania. Two of the appeal grounds related to whether the ferry was within the jurisdiction of Victoria at the time the offences occurred. The indictment did not repeat the language of the *Crimes at Sea Act 2000* (Cth) in setting out the location of the offence. The language used in the Act was the "adjacent area" for Victoria rather than "a place adjacent to Victoria" as stated in the indictment. It was contended that the failure to track the language of the Act caused a miscarriage of justice because the appellant stood trial for offences the jurisdictional element had not been properly pleaded.

The Court concluded that there was adequate evidence for the jury's conclusion that the offences occurred within the jurisdiction. The majority (Nettle and Buchanan JJA) held that it is not necessary to identify in an indictment the place where the offence is alleged to have occurred unless it is an offence for which the location is an essential element. Jurisdiction was not an essential element of the offences charged as they were offences wherever committed, and consequently, the indictment would have been good if the words "in an area adjacent to Victoria" had been omitted. The majority held that only if the jurisdiction of the court is challenged does the prosecution bears the onus of proving, on the balance of probabilities, that the crime was committed within jurisdiction. In that sense, the place of commission may become a necessary ingredient of the offence. But that does not mean that it is, or becomes necessary, for the indictment to allege the place of commission. It is essentially a question of proof. The Crown could have pleaded that the offences occurred 'in the adjacent area for Victoria' and, had the Crown done so, then, by force of clause 4 of Schedule 1 of the *Crimes at Sea Act 2000*, it would have been presumed that, in the absence of evidence to the contrary, the offences did occur in the adjacent area. But it is not mandatory for the Crown to invoke that presumption. It is permissible to prove jurisdiction in another way.

Priest JA, while agreeing that the appeal should be dismissed, disagreed on this point as he considered that proof of jurisdiction is a pre-requisite of guilt. He considered that the prosecution needed to show that the offences charged on the indictment were within the jurisdiction of Victoria, as without jurisdiction, there could be no conviction. He concluded that there was sufficient evidence before the jury to permit the conclusion that the offences had occurred within jurisdiction. The appeal was dismissed.

In ***RR v The Queen*** **[2013] VSCA 147**, the appellant appealed against his conviction for stalking the complainant by engaging in a course of conduct with the intention of causing physical or mental harm to the victim as defined in s 21A(2) *Crimes Act 1958* (Vic). The course of conduct was sending nine letters to nine different schools. The letters contained a fake newsletter purporting to have been produced by the school at which the complainant was employed. The newsletter contained three sexually explicit images of the complainant and warned that the complainant had posted sexually explicit photographs of herself on the internet, that she taught sex education at the school 'not because she is unskilled in that area' and had been sexually involved with at least three current staff members. On appeal the appellant submitted that as the letters were all posted at the same time, the posting of the letters could not constitute a course of conduct. The Court held that there was no reason why the jury was not entitled to treat each act of posting to

a different addressee as a separate piece of conduct and so the posting of the letters was a course of conduct. The Court also rejected the contention that the verdicts were unsafe and unsatisfactory because the jury could not be satisfied that the accused's intention was to cause mental harm rather than to embarrass the complainant. Given the content of the images the Court decided it was well open to the jury to exclude the possibility that the intention of the appellant was to embarrass only, and to find he intended to cause mental harm to the victim.

The appellant also appealed his conviction for making a false document with the intention that he, or another person, use it to induce another person to accept it as genuine. The trial judge had directed the jury that the necessary intention was to cause economic prejudice. The appellant submitted that the verdict was unsafe and unsatisfactory as the newsletter was obviously a fake it was not open to the jury to exclude the possibility that the appellant did not intend the recipients to accept it as genuine. The majority (Ashley and Redlich JJA) held that it was open to the jury to reason that the appellant had created the document intending, probably irrationally, to induce the recipients to accept it as genuine. It was open to the jury to find that the newsletter was a false document with the meaning of s 83A of the *Crimes Act* and his intention was to cause economic prejudice to the complainant. The evidence that all the recipients realised that the newsletter was a fake, while of some relevance to proof of the appellant's subjective intention, could not be conclusive on that point. Priest JA dissented as he considered it was not open to the jury to infer that the appellant might have harboured an intention to induce someone to act to the complainant's economic prejudice, as opposed to causing embarrassment and humiliation, as a result of accepting the document as genuine.

Sexual offences and consent

In ***Brennan v The Queen*** **[2012] VSCA 151**, the Court held that the trial judge's directions to the jury on charges of indecent assault were erroneous because, in effect, they stated the element of the offence, namely awareness that the complainant was not or might not be consenting, would be established if the applicant was aware that the complainant had agreed to the touching of her breasts in the mistaken belief that this was for medical purposes. Section 37AA of the *Crimes Act 1958* (Vic) made it clear that where the applicant asserts a belief that the complainant was consenting, the applicant's awareness that the complainant gave her consent to the touching on a mistaken belief is relevant to, but not determinative of, proving that the accused was aware that the complainant was not, or might not be, consenting. The reasonableness of the accused's stated belief (that the complainant had consented) is also relevant to the jury's assessment of whether the applicant actually held the belief. The Court agreed with its previous observations in *Wilson v R* (2011) 33 VR 340 that while in some cases the facts making out there was not free agreement by the complainant, and so no consent, would be sufficient to satisfy the jury that the accused was aware that the complainant was not, or might not have been, consenting the jury must still assess this element of the offence on the whole of the evidence. The High Court had refused special leave in *R v Wilson* [2012] HCASL 82.

In ***GC v The Queen*** **[2013] VSCA 139** the Court, in dismissing appeals against convictions for rape, examined the circumstances in which a complainant is not considered to have freely agreed to a sexual act under s 36 of the *Crimes Act 1958* (Vic). Section 36 states the circumstances in which a person does not freely agree to an act include, inter alia, the following;

(a) The person submits because of force or the fear of force to that person or someone else;
(b) The person submits because of the fear of harm of any type to that person or someone else;
(c) The person submits because she or he is unlawfully detained;

(d) The person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing.

The Court considered that circumstances (a) to (c) require proof of a causal connection between the conduct directed at the complainant and the complainant's submission to the act. For example in relation to s 36(a), if a person submits 'because of' force or the fear of force then but for that force he or she would not have consented. Submitting to a sexual act 'because of' force is not consistent with agreeing freely. This reasoning also applies to s 36(b) and (c). Where an accused is aware that any of the circumstances identified in paragraphs (a) to (c) exist then the accused must also be aware that the complaint was not consenting or might not be consenting, or had not given any thought as to whether the complainant was not consenting or might not be consenting. There is an incompatibility between the accused being aware, for example under s 36(a), that a complainant has submitted 'because of' force and holding the belief, or being aware, that the complainant has freely agreed to a sexual act. Awareness that a complainant might be submitting 'because of' force entails an awareness that the complainant might not be consenting.

The Court distinguished *R v Getachew* (2012) 248 CLR 22 as that case exclusively concerned the circumstances found in s 36(d) as the complainant was asleep when the accused sexually penetrated her. Unlike circumstances 36(a)-(c), to establish circumstance (d) a causal connection between the circumstance and the submission to the sexual activity is not required.

Jury directions and the role of trial counsel

In ***MB v The Queen* [2012] VSCA 248**, the grounds of appeal against conviction were rejected because they were premised on conduct of the trial that was in fact different from the trial that was actually conducted. The Court noted that trial judges are entitled to expect clear identification from defence and prosecution counsel of what the issues are and what directions are necessary. Where no direction is sought, the Court will ordinarily be entitled to conclude that trial counsel either did not perceive any risk (in the absence of the direction) or else decided, for forensic reasons, not to seek a direction.

In ***NJ v the Queen* [2012] VSCA 256**, the Court reaffirmed the value of agreements between trial counsel as to whether certain evidence will be led or excluded. Subject to judicial approval, these agreements have the potential to enhance the administration of justice and their use should be encouraged. For this reason, appellate courts should only disturb them in the 'most exceptional circumstances', lest they have a chilling effect on this beneficial practice.

The Court also outlined the proper direction regarding the offence of rape. In addition to a lack of consent by the complainant, rape requires a mental element that can be satisfied in either of two ways, or 'limbs'. In directing a jury, a judge is not always required to treat these as totally isolated from one another. Some circumstances, like intoxication, might make one limb less probable at the same time as making the other more so. There is no error in treating both with one composite direction, and doing otherwise may work to the disadvantage of the accused.

The judge is also entitled to take a jury's collective intelligence into account when reminding them of the relevance of certain evidence to certain questions. While a jury might reason that specific facts suggesting actual consent by the complainant to one act might also be suggestive of the accused's belief in consent to a later act, any direction on this nature would have to be carefully worded to avoid any suggestion that a finding of innocence of one charge was suggestive of innocence of other charges. The resulting directions would risk confusion over the burden and standard of proof, and further complicate the 'already labyrinthine' directions required by the *Crimes Act 1958* (Vic).

In ***Greensill v The Queen*** **[2012] VSCA 306**, the appellant submitted that the trial judge had erred in failing to give a forensic disadvantage direction in circumstances where the defence counsel had not sought, and had in fact eschewed, such a direction at trial. The Court commented that generally an accused is bound by the conduct of their counsel at trial. While it would have been appropriate – if not highly desirable – to have given a forensic disadvantage warning, the circumstances of the case were not such that the trial judge was obliged to give such a direction to avoid a miscarriage of justice. This does not mean that any forensic disadvantage flowing to the appellant is to be ignored in determining whether the verdicts of guilty are unsafe and unsatisfactory. The significant forensic disadvantage the appellant suffered has an important bearing on whether the verdicts are unsafe and unsatisfactory. The court went on to find that the verdicts were unsafe and unsatisfactory for nine reasons, one of which was the forensic disadvantage.

The Court held that an application by the accused is not an indispensible pre-condition to a forensic disadvantage warning being given under s 61 of the *Crimes Act 1958* (Vic) and s 165B of the *Evidence Act 2008* (Vic). The duty of a trial judge to give any warning necessary to avoid a perceptible risk of a miscarriage of justice is unfettered. Once a warning is given it must be in accordance with the respective section. In other words, the judge must not warn the jury that it would be dangerous or unsafe to convict solely because of the delay (or the consequences of delay) but must both inform the jury of the nature of the forensic disadvantage, and direct them to take the forensic disadvantage into account. This is consistent with the common law obligation of a trial judge to give any direction necessary in the circumstances to avoid a perceptible risk of a miscarriage of justice. Consistent with that principle, the declaration in s 61(1E) of the *Crimes Act* that 'any rule of law to the contrary is hereby abrogated' must be understood solely as an abrogation of the principle in Longman. The declaration does not release a trial judge from any obligation to give such directions where to do so is essential in order to ensure a fair trial and avoid a risk of a miscarriage of justice.

The appellant sought to rely on fresh evidence arising out of an account that one of the complainants had given to a psychiatrist for the purposes of a compensation hearing. The complainant's account to the psychiatrist, in stark contrast to his evidence at trial, contained no description of penile-vaginal penetration having taken place during what was referred to at trial as the 'tent incident'. The complainant recounted other incidents where he claimed that penile-vaginal penetration had occurred. The court held that the fresh evidence was credible evidence and could not have been discovered with reasonable diligence prior to trial. The Court held that the penetration evidence was so significant to the complainant's evidence at trial that the jury may well have regarded the failure to mention it to the psychiatrist as impinging markedly on the credibility and the plausibility of his evidence. The fresh evidence significantly undermined the complainant's credit in circumstances where his credit was central to the trial, and as a result there had been a substantial miscarriage of justice.

The Court, in ordering an acquittal, noted that while often success on a fresh evidence ground would lead to a retrial rather than an acquittal, in this case they would order an acquittal even if it had been the only successful ground of appeal. This was because by the time the appeal was heard the appellant had completed all but two and a half months of the non-parole period imposed upon her, 33 years had elapsed since the alleged offences and the evidence was weak. Balancing the public interest of wrongdoers against the public inconvenience and expense and the oppression of placing the appellant in jeopardy again, when she had been through a trial and an appeal, and spent almost two and a half years in prison, the court held that the proper exercise of discretion favours the verdict of acquittal.

In ***James v The Queen*** **[2013] VSCA 55**, the majority (Maxwell P and Whelan JA) held that (outside the murder/manslaughter category) a rational forensic decision by counsel – not to request that an alternative verdict be left to the jury, is likely to be very significant in

determining whether the failure to leave the alternative offence resulted in a miscarriage of justice. Rational forensic judgements made by defence counsel constitute an exercise of the accused's right to a fair trial. This reinforces the conclusion in *R v Saad* (2005) 156 A Crim R 533 that the principle in *Gilbert v The Queen* (2000) 201 CLR 414 and *Gillard v The Queen* (2003) 219 CLR 1 should be confined to cases in which the offence charged is murder. The objective test to be applied is whether counsel's conduct is explicable on the basis that it resulted, or could have resulted, in a forensic advantage. A related, but no less important consideration is the obligation of a judge to frame the charge to the jury by reference to only the real issues in the trial. In a criminal trial much of the responsibility for defining the 'real issues' falls to defence counsel. As a result, the significance of decisions made by defence counsel and the need to define the real issues are closely linked.

In the current case, where defence counsel, deliberately decided not to ask the judge to direct the jury about the lesser alternatives, the issue then becomes what is the trial judge's legal obligation in relation to lesser alternatives in these circumstances. In cases other than murder, the test to be applied in determining whether lesser alternatives are to be left open to the jury is what justice requires in the particular circumstances of the case. Justice Priest dissented as he considered the right to a fair trial meant the accused was entitled to have the alternatives put – and the trial judge was required to put them – to the jury notwithstanding the 'calculated abstention of his counsel' from requesting that they be left to the jury. The appeal was dismissed.

In ***James v The Queen*** **[2014] HCA 6** the High Court, in dismissing the appeal, held that the trial judge's duty with respect to leaving alternative verdicts to the jury is part of the duty to secure a fair trial to the accused. The question of whether the failure to leave an alternative verdict occasioned a miscarriage of justice is determined by considering what justice requires in the particular circumstances of the case. This includes consideration of the real issues at the trial and the forensic choices made by trial counsel. The forensic choices of counsel are not determinative. The duty to secure a fair trial rests with the trial judge and on occasions that duty will require that an alternative verdict is left despite defence counsels objections.

In ***NT v The Queen*** **[2012] VSCA 213**, the Court determined that a miscarriage of justice resulted from the admission into evidence of an inaccurate translation of the appellant's record of interview.

The applicant was convicted of abduction of a child under the age of 16, three counts of indecent act with a child under 16 and two counts of rape. The applicant, who spoke limited English, was interviewed through a police-appointed interpreter. A DVD of the interview was shown to the jury and formed a major part of the Crown case. According to the translation of the interview on the DVD, the applicant admitted the sexual acts but claimed that he believed the applicant was an adult and had consented. Before the trial, defence obtained an independent translation of the applicant's answers (but not the questions) which demonstrated that there were material deficiencies and inaccuracies in the translation. With the agreement of the prosecution, the independent translation was placed before the jury in written form as evidence to be considered whilst they watched the DVD of the interview. Post-trial, defence obtained an independent translation of the questions which demonstrated "pervasive simplification and serial omissions from the terms of the questions" asked by the police.

On appeal, the Court held that the deficiencies in the translation during the interview were such that they materially affected the extent to which the applicant answered at all, the meaning of relevant admissions, and matters going to credibility and context. Further, in

the absence of evidence from the interpreter, the evidence was hearsay, and whilst the parties could agree to tender such evidence, the agreement in the present case was ineffective as it was based on the mistaken premise that the translation was accurate. Accordingly, defence counsel's forensic decision to agree to allow matters to proceed as they did was no bar to an assessment of the fairness of the situation. The appeal was allowed on that basis.

The Court rejected the argument that the judge had misdirected the jury by saying "You might find that the accused believed the complainant was consenting, but still be satisfied beyond reasonable doubt that the accused was aware of the possibility that she was not consenting." The Court observed that in R v Getachew (2012) 248 CLR 22, the High Court made it clear that an accused may have a belief that a complainant is consenting and yet still be guilty of rape on the basis that he was aware the complainant might not be consenting.

Whilst in the circumstances of the present case, the trial judge did not need to go any further than she did, the Court considered it desirable that the jury be told:
a) There is a difference between the state of mind of belief in consent and awareness that the complainant might not be consenting;
b) The prosecution must establish that the accused did not have a belief in consent that creates a reasonable doubt that he was aware that the complainant was not or might not be consenting;
c) Whether the belief does create a doubt will depend upon the jury's findings of fact as to the nature and extent of that belief.

The Court observed that s 36, 37, 37AA and 37AAA of the *Crimes Act 1958* (Vic) are almost unworkable in the context of jury trials and can only be addressed by urgent, wholesale legislative amendment.

In ***Medici v The Queen*** **[2013] VSCA 111**, the Court considered whether the judge had impermissibly dictated the sequence of the jury's deliberations, in contravention of the principle in *Stanton v The Queen* (2003) 198 ALR 41. The appellant had been tried on one count of drug trafficking (count one) and eight counts of possessing drugs and precursors for the purposes of sale laid in the alternatives. No verdicts were taken on the alternative counts, as the appellant was convicted of count one. In his directions, the trial judge essentially told the jury that they only needed to consider the alternative counts if they found the appellant not guilty of count one. The majority (Priest and Coghlan JA) held that although some of the criticised directions came "perilously close to infringing the prohibition in *Stanton*", the judge did not instruct the jury that they had to organise their deliberations in any particular fashion. The jury would have understood that the instructions related to the return of their verdicts rather than the sequence of deliberations. Even if the judge erred, no substantial miscarriage occurred, because on any view, the jury would necessarily have needed to consider the acts underlying the alternative charges in order to determine whether the appellant was in the business of drug trafficking, as alleged by count one. Harper JA (dissenting) concluded that the judge did impermissibly dictate the jury's sequence of deliberations, but that made no difference to the result in the circumstances of the case. The appeal was dismissed.

In ***Dragojlovic v The Queen*** **[2013] VSCA 151**, the Court found that the applicants had failed to demonstrate that their trial was unfair or that there was any miscarriage of justice due to the dislocated presentation of evidence, and length of the trial. The applicants were arraigned before jury on 22 July 2009 and the jury commenced deliberations in June 2010. During that time there were only 117 productive sitting days as there were many interruptions to the trial. While the trial ran for many months longer than it should have, it was not particularly complex or difficult. The issues raised for the jury's consideration were entirely within their capacity to resolve and there is nothing to suggest that they struggled

to understand their task. Additionally, the jury had the transcript of the key witnesses' evidence, which reduced the taxation on their memory.

In dismissing the applicants' appeals against conviction, the Court commented that when considering whether there has been a miscarriage of justice significant weight must be accorded to any legitimate forensic choice taken at trial by the applicant to decline to seek a discharge. When something has gone wrong during the course of the trial, the decision whether or not to seek a discharge of the jury is best made by the accused, on the advice of his or her legal representatives. The obligation is upon counsel at trial to take objection to any matters that are regarded as prejudicial to the fair trial of the accused. Ordinarily, any failure to do so will be regarded as indicating that counsel saw no injustice or error in what was done. In this case the Court held that the decision to continue with the trial and refuse to seek a discharge of the jury was an informed decision based upon careful consideration and made on clear instructions from the applicants. An appellate court will not lightly set aside a conviction where a forensic choice of that kind has been made. That is not to say that a failure to seek a discharge by the accused will result in the point failing on appeal. The question on appeal is always whether it has been established that there was a miscarriage of justice. Where no application is made to discharge the jury, the question will sometimes arise as to whether the trial judge should have discharged the jury of his or her own motion. The circumstances in which an extreme measure of that kind is warranted are very rare. There is no general rule that a trial judge must discharge a jury where prejudicial evidence is inadvertently admitted. In this case, the Court held that the trial judge was not obliged to discharge the jury of her own motion and no unfairness resulted from her failure to do so.

The Court held that the sentence imposed on the first applicant (five years and four months' imprisonment with non-parole period of three years) was manifestly excessive taking into account the extraordinary delay in the applicant's case. Search warrants were first executed in 2001 and the sentence was not imposed until August 2010. In the applicant's case it was necessary to take into account the additional delay resulting from the length of the trial. While the length of a trial is not ordinarily a mitigating factor, where the trial occupies an extraordinary period, different considerations may arise. While the applicant contributed to the length of the trial, his liberty was still curtailed for a very protracted period. He was required to attend court each sitting day for well over twelve months, during what would have been a particularly anxious period. This delay should be taken into account. The applicant should not be denied that mitigation merely because he had elected to proceed to trial. He was resentenced to four years' imprisonment with non-parole period of 27 months.

Disclosing jury division numbers

HM v The Queen **[2013] VSCA 100** concerned an appeal against conviction. The appeal was allowed and a retrial ordered. The main issue on appeal was whether the requirements of procedural fairness obliged a trial judge to disclose to counsel the precise content of a jury note which set out the jury numbers for and against a verdict before determining whether to discharge the jury or permit a majority verdict. The majority (Redlich JA and Kaye AJA) allowed the appeal on the basis that the trial judge should have disclosed the contents of the jury note, including the numbers for and against a verdict. The majority reviewed the case law and held that where voting details have come into the possession of the trial judge procedural fairness requires their disclosure when such information is relevant to a decision that the trial judge is required to make. In other words, where a judge receives information (regardless of whether he or she should have received it) that is relevant to an unresolved issue in the trial, this information must be disclosed to the parties. This disclosure enables counsel to make informed decisions and submissions. In these situations the confidentiality of jury deliberations can be preserved by the judge making appropriate orders prohibiting, or restricting, the publication of the information.

Justice Whelan, in dissent, noted that numbers for and against should not be disclosed to the judge by the jury, and held that if they are, the trial judge, ordinarily, should not reveal the numbers to counsel. He noted that there were exceptional cases where the disclosure of the numbers is required, for example where the judge is, or will be considering, a majority verdict and the numbers reveal that the requisite for a majority verdict exists. The present case was not an exceptional case and, therefore, the failure of the trial judge to reveal the numbers did not give rise to procedural unfairness.

Criminal procedure

In ***RWS v The Queen*** **[2012] VSCA 249**, the Crown's written case in response contended that the applicant's first and third grounds of appeal were 'totally misconceived' as they proceeded on an incorrect assumption about what was the key issue at trial. At the commencement of the hearing, counsel for the applicant indicated that two grounds - one and three - were abandoned. The Court commented that it was unsatisfactory that the grounds had been maintained until that morning as their untenability had been pointed out by the Crown months earlier in their written case. Counsel for the applicant should have appreciated much sooner that the grounds were not reasonably arguable. The Court went on to say that counsel will never be criticised for abandoning grounds, rather, they will be criticised for persisting with untenable grounds. While it is never too late to abandon a ground, counsel should be astute to maintain their own critical scrutiny of the grounds and arguments in a timely fashion. The procedure of insisting on detailed written cases and Crown responses is designed to ensure that joinder of issue takes place well ahead of the hearing. It enables both sides to reflect on their positions and, if appropriate, to concede before the hearing that a particular point will no longer be maintained.

In ***DPP v Patrick Stevedores Holdings Pty Ltd; Victorian Workcover Authority v Patrick Stevedores Holdings Pty Ltd*** **[2012] VSCA 300**, the Court held that the Director of the Office of Public Prosecutions ('the Director'), unlike the Victorian Workcover Authority, is empowered under s 159(2) of the *Criminal Procedure Act 2009* (Vic) to institute a prosecution on indictment for an offence under the *Occupational Health and Safety Act 2004* (Vic) ('*OHS Act*') at any time. The two-year period for bringing proceedings specified in s 132 of the *OHS Act* has no application to prosecutions brought by the Director. Under s 132 prosecutions can be brought at any time with the written authorisation of the Director. The trial judge decided that, as the two year period had expired, the respondent had an accrued right not to be prosecuted. If the Director was minded to deprive the respondent of that right or immunity, the Director was obliged to afford the respondent the right to be heard in relation to that matter.

The Court, in allowing the DPP's appeal, held that the Director was not obligated to afford the respondent procedural fairness in respect of his decision to authorise the prosecution under s 132 of the *OHS Act*. No substantive right on the part of the defendant is affected by the Director's decision to permit the prosecution under s 132. The Court commented that the *OHS Act* confers on the Director a specific function that is somewhat akin to a supervisory role. Under s 132 only the Director may authorise the Authority, or an inspector, to bring proceedings after the expiration of two years. This function is in line with the Director's position as the leading prosecutor in the state responsible for the prosecution of all serious offences. The Directors right to bring prosecutions for indictable offences against the *OHS Act* is expressly preserved by the legislation. When determining whether to authorise a prosecution outside the two year period, the Director is obliged to consider the reasons for the delay, the likelihood of the prosecution succeeding, and whether, in his opinion, the public interest requires it to be instituted. It follows that the Director's decision is not susceptible to judicial review.

The Court also commented on the approach to be taken by an intermediate court to decisions of intermediate appellate courts of other states and territories. The starting point

was the principle enunciated by the High Court in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 and extended in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, that intermediate appellate courts are required to follow decisions of other intermediate appellate courts on matters involving the common law of Australia, unless they were 'plainly wrong'. The Court considered that the meaning of the term 'plainly wrong' goes well beyond merely considering an earlier judgement to have been erroneously decided. The decisions of the intermediate appellate courts do not have the precedential weight of decisions of the High Court. An intermediate court, such as the Victorian Court of Appeal, faced with conflicting decisions of other intermediate appellate courts is not bound to follow any of those decisions.

In ***Charters v The Queen*** **[2012] VSCA 318**, the applicant – who was self-represented at hearing – was refused leave to appeal his conviction and sentence. He appealed his conviction on five charges of obtaining property by deception that stemmed from his marriage to the complainant. The Crown case at trial was that the applicant married the complainant and defrauded her of $147,987.10 on five separate occasions by misrepresenting that he was a member of ASIO (Australian Security Intelligence Organisation) and needed money to flee to Canada with his co-accused to avoid being sent to Iraq.

The applicant was originally represented by counsel who drafted his initial submissions. The applicant became self-represented and sought to argue an additional 17 grounds of appeal, which was later narrowed to 11 additional grounds of appeal. One of the grounds of appeal argued that the jury verdict was unsafe and unsatisfactory. The Crown provided submissions that set out the evidence of the complainant that it relied upon to establish that the verdict was not unsafe and unsatisfactory. Maxwell P stated that this was exactly the kind of assistance the Court needed when an unsafe and unsatisfactory ground was advanced.

In ***AB v The Queen*** **[2013] VSCA 8**, the Court held that the correct procedure to be followed when an applicant sought leave in the Court of Appeal, and required material that had been suppressed by the trial judge pursuant to a non-publication order, was for the applicant to apply to the Court of Appeal for access to the material on notice to the DPP. The Court commented that before an application for leave had been filed the correct procedure was for an application for access to material covered by a trial judge's non-publication order be made to the trial judge in court and on notice to the DPP.

In ***Bowling v The Queen*** **[2013] VSCA 87**, the court considered the applicant's failure to comply with the time limits for commencing an appeal prescribed under the *Criminal Procedure Act 2009* (Vic). The court commented that the time limits set out in the rules of Court are not to be treated as some empty formality. The rules are intended to ensure the finality of litigation and compliance with time limits will be required in the ordinary case. Generally, the applicant must place material before the Court which will persuade the Court that there are special and substantial reasons to extend the time. The longer the time that has elapsed since the expiration of the prescribed time limit, the more special the circumstances have to be. Where there is a considerable lapse of time, the practice of the Court is not to grant the extension unless the Court is satisfied that the proposed appeal would probably succeed. An applicant who is dilatory or who has acted so as to indicate that they do not intend to appeal has no entitlement to expect that the discretion will be exercised in their favour. Even where the applicant demonstrates that there are substantial reasons for delay, if there has been a significant delay, the grant of an extension of time will ordinarily depend upon the applicant establishing that it is likely that the appeal will succeed.

Practice Direction No 2 of 2011 is designed to ensure that, in addition to the obligation to give prompt notice of the intention to appeal, a written case is filed which outlines the issues the applicant wishes to pursue. The practice direction places responsibility for

these matters with the legal practitioners who represented the applicant at the time of trial or sentence. The Court's ability to deal efficiently and expeditiously with criminal appeals depends upon the profession's adherence to the time limits imposed under the Act, and compliance with the procedures contemplated by the rules and practice directions. The unavailability of trial transcript or exhibits does not provide an excuse for non-compliance. Counsel, and those instructing counsel, at the trial or on sentence are assumed able to draw the necessary grounds of appeal and an appropriate written case setting out in substance why there is merit in those grounds.

Delay is not permitted because new solicitors of an applicant's choosing or counsel of choice is either unavailable or cannot give the matter the immediate attention required. Even where an applicant is out of time through no fault of their own, the applicant will be required to demonstrate to a higher standard that the appeal has prospects of success. That burden is a direct result of non-compliance with time limits by the applicant's legal representatives.

Miscarriage of justice under section 276 of the *Criminal Procedure Act 2009* (Vic)

In ***Baini v The Queen* [2013] VSCA 157**, the Court reconsidered the applicant's appeal as a result of the matter being remitted from the High Court. The appeal was originally considered by the Court in *Baini v R* (2011) 33 VR 252. In its original decision, the Court held that appellate courts were required to approach the question of whether there had been a substantial miscarriage of justice under s 276 of the *Criminal Procedure Act 2009* (Vic) ('*CPA*'), in accordance with the High Court's decision in *Weiss v The Queen* (2005) 224 CLR 300. The Court accepted that some inadmissible evidence had been put before the jury, but it was not persuaded that the receipt of that inadmissible evidence constituted a substantial miscarriage of justice. The applicant appealed the Court's decision to the High Court.

In *Baini v The Queen* (2012) 246 CLR 469, the High Court held that s 276 of the *CPA* was not to be interpreted solely by reference to the interpretation given to the common form criminal appeal provision in *Weiss*. The High Court held that there was no universally applicable definition of a substantial miscarriage of justice because the possible kinds of miscarriage of justice dealt with by s 276 are too numerous and too different to permit prescription of a single test. The types of substantial miscarriage of justice include cases where there has been an error or an irregularity in, or in relation to, the trial and the Court cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial. They also cover cases where there has been a serious departure from the prescribed processes for trial. The inquiry that must be made is whether a guilty verdict was inevitable, not whether the verdict was open. If it is submitted that the verdict was inevitable, the appellant need show no more than that, had there been no error, the jury may have entertained a doubt. In cases where the evidence has been wrongly admitted or excluded the Court cannot determine that there has been no substantial miscarriage of justice unless it determines that it was not open to the jury to entertain a doubt as to guilt. In deciding whether it was not open to the jury to entertain a doubt as to guilt, the Court must determine whether the result at trial might have been different had the error not been made. That determination is not to be made by speculating about what a jury, this jury, or a reasonable jury might have done but for the error. Nothing short of satisfaction beyond reasonable doubt willl do. The Court can only be satisfied on the record of the trial that an error of the kind that occurred did not amount to a substantial miscarriage of justice if the court concludes from its review of the record of the trial that conviction was inevitable.

On remittance the Court of Appeal applied the approach set out by the High Court. The Court was satisfied beyond reasonable doubt that a verdict of guilty was inevitable in the sense that the jury acting reasonably on the evidence properly before them (that is excluding the inadmissible evidence) and applying the correct onus and standard of proof

would have been bound to conclude that the Crown case was overwhelming and left no room for reasonable doubt.

High Court application for special leave to appeal was dismissed on 8 November 2013

In ***Andelman v The Queen*** **[2013] VSCA 25**, the Court followed the approach of the High Court in *Baini v The Queen*. In upholding the appeal and ordering a retrial the Court commented that as a result of the High Court's decision, the task of a respondent seeking to uphold a conviction would generally be more difficult under s 276 *CPA*.

Interlocutory appeals

In ***Dale v The Queen*** **[2012] VSCA 324**, the Court considered the interpretation of the words 'state offence' in s4A of the *Australian Crime Commission Act 2002* (Cth) ('the *ACC Act*'). The Australian Crime Commission ('ACC') is empowered under the *ACC Act* to investigate state offences, however, for constitutional reasons it can only investigate those state offences that amount to a 'federally relevant criminal activity' i.e. where the relevant crime is an offence against 'a law of a state' and has a 'federal aspect', s 4(1) the *ACC Act*. Section 4A of the *ACC Act* sets out the circumstances in which a state offence is deemed to have a federal aspect. On appeal, the applicant contended that the expression 'law of the state' must be construed as meaning an offence against an enacted law and not an offence at common law.

The Court, in dismissing the applicant's interlocutory appeal, held that the definition of the term 'state offence' in s 4A(6) of the *ACC Act* includes both enacted law and common law. There is nothing in s 4(1) or 4A which dictates that the ACC should be confined in its investigative role to examining statutory offences only. In contrast, the phrase 'state offence' as used in s 4A(2)(a) and 4A(2)(b) does mean an offence created by, or under state legislation. This is because these provisions are intended to identify the circumstances under which a 'state offence' has a 'federal aspect'. While as a general rule, words contained within statutory provisions will bear the same language throughout the entirety of those provisions, the applicant's submission that "state offence" must be consistently interpreted in s 4A is incorrect. Section 4A(2) covers territory well beyond the direct relationship between statutes creating a state offence and the laws of the Commonwealth that is central to the purposes of paragraphs (a) and (b). Set in the context of the remaining subsections of 4A(2) the phrase 'state offence' naturally and appropriately covers both statute and common law offences. The applicant's proposed construction would substantially defeat or impair the purpose of the *ACC Act*, lead to capricious, irrational and arbitrary outcomes and would have deleterious consequences for Commonwealth-assisted criminal investigations.

The Court commented that while there are no formal limits on the matters a party may raise on an interlocutory appeal, highly complex issues are ordinarily unsuitable for such appeals, especially when the trial is likely to be short. The Court referred with approval to the observations of Redlich JA (with whom Weinberg and Bongiorno JJA agreed) in *M A v The Queen* (2011) 31 VR 203 [7]-[10] concerning interlocutory appeals in short trials.

The Queen v Chaouk & Ors **[2013] VSCA 99** concerned an application by the Director of Public Prosecutions ('The Director') for leave to appeal against an order of the Supreme Court. The background to this appeal is that the respondent had been charged with one count of attempted murder and three counts of recklessly engaging in conduct endangering life. Before the respondent's trial commenced his counsel became aware that Victorian Legal Aid (VLA) were only willing to provide the assistance of an instructing solicitor for two half days of an expected two week trial. Consequently the respondent's counsel made an application that the trial would be unfair to the respondent. The Supreme Court ordered that the hearing of the trial be adjourned, and not commence, until counsel for the respondent has the assistance of an instructing solicitor on a day to day basis for the duration of the trial. The Crown did not oppose that order being made.

The Director later sought to appeal the order, as despite the Director's efforts, VLA had declined to alter its previous determination with the result that the temporary stay had effectively become a permanent stay.

The Court of Appeal dismissed the appeal for four reasons:

1. The stay was not temporary but conditional.

2. The Crown had previously accepted the Supreme Courts determination that without the attendance of a solicitor at court to instruct counsel for each day the trial would not be fair.
3. The Crown had previously accepted the Supreme Court's determination of what practically must be provided to render the trial fair.
4. The determination of the Supreme Court that a fair trial necessitates the attendance of an instructing solicitor at court for each day of the trial is unaffected by VLA's refusal to fund the costs of a solicitor's attendance for more than two half days of the trial. The determination of what is fair must reflect the court's assessment of what is reasonably necessary to ensure that justice is done, notwithstanding the executive policy as to what the State chooses to provide. To allow the Crown to argue that the judge erred in making that determination would be to allow the Director to advance a new and radically different point for the first time on interlocutory appeal and would be unjust.

The Court of Appeal rejected the Director's submissions that the Supreme Court had failed to have regard to whether the need for a stay could be avoided by trial management techniques and stated that it did not find it surprising that the trial judge would have concluded that such techniques were inadequate in the circumstances of the case.

In ***DPP (Cth) v FM*** **[2013] VSCA 129**, the Commonwealth DPP's interlocutory appeal was dismissed. The respondent had been charged with using carriage service to 'procure' a person under 16 to engage in sexual activity contrary to s 474.26(1) of the *Criminal Code Act 1995* (Cth), using carriage service to 'groom' person under 16 contrary to s 474.27(1), and using carriage service to transmit indecent communication to person under 16 contrary to s 474.27A(1). The trial judge had ruled that the offence of grooming could not established where communications were 'purely and simply a fantasy'. The Court upheld the trial judge's decision, stating that if either a jury is positively persuaded that an accused was 'purely fantasising' when communicating with a recipient, or if the Crown cannot exclude the reasonable possibility that the accused was 'purely fantasising', it will be fatal to a charge of using a carriage service to procure, or groom, a person under 16 years of age. The Court defined 'purely fantasising' as communicating whilst having no intention of engaging in sexual activity with the recipient, for example where the sender's intent in communicating was solely to gain sexual satisfaction from the fact of communicating. If, at time of communicating, there is a real possibility that the accused intends on engaging in sexual activity with the person to whom he is communicating then there is no reason why they should not be convicted of 'procuring' or 'grooming'. The accused need not have formed a 'fixed intent' to pursue that course.

Civil appeals

Civil procedure

Szaintop Homes Pty Ltd & Ors v Krok & Anor **[2012] VSCA 176** was an interlocutory application made by the applicants seeking orders that the trial judge disqualify himself on the basis of bias. Comments made by the trial judge during the course of a directions hearing were alleged to give rise to an apprehension of bias in relation to a trust dispute. The applicants alleged that the comments suggested that there had been a breakdown of relationship between the parties which would result in the current trustees (i.e. the applicants) being replaced. The appellants alleged that the issue of whether a new trustee should be appointed was a central issue in the trust dispute. The trial judge refused the application to disqualify himself.

The Court considered whether a lower threshold/test applied for leave to appeal in applications involving issues of apprehended bias than would apply in other applications for leave against an interlocutory decision. The applicants contended that a lower threshold applied and relied on *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427. In dismissing this argument, the Court noted that *Wilson* was not designed to formulate a special rule lowering the threshold for a grant of leave where bias was contended. The Court confirmed the current test for leave to appeal against interlocutory decisions is that of *Niemann v Electronic Industries Ltd* [1978] VR 431, which requires the applicant to establish that the decision in question was attended by sufficient doubt to warrant it being reconsidered, and that substantial injustice would result if leave was refused. The Court affirmed the trial judge's decision not to disqualify himself on the basis that a fair-minded, lay observer would appreciate that the comments were made very closely to the hearing of the trial and in the context of a directions hearing where the trial judge was attempting to further narrow and define the issues in dispute between the parties.

In ***Shaw v Yarranova Pty Ltd & Anor*** **[2012] VSCA 189**, the applicant sought leave to appeal the decision of a Supreme Court Judge to refuse his application, under r.27.06 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), to direct the Prothonotary to accept his notices of appeal in relation to costs orders made against him. The Prothonotary had refused to accept the notices for filing as they did not comply with rules in relation to orders made by the Costs Court. The Supreme Court Judge refused to order that the application be issued as the notices were non-compliant and would be an abuse of process, as either the grounds had previously been dealt with by other decisions of the Court, or the opportunity to raise them had long since passed. The applicant contended that he was denied the opportunity to make submissions with respect to the abuse of process issue relied on by the Judge.

The Court refused leave to appeal as the decision of the Judge was not attended by sufficient doubt. The Court of Appeal decided it was open to the Judge to uphold the Prothonotary's decision and noted the rules do not contemplate a hearing for the purposes of determining whether an appeal notice should be accepted for filing. The Court decided that the applicant was on notice about the abuse of process issue as it had been raised in an earlier decision, and if the applicant had been invited to make a submission, the outcome would have been no different.

The Court commented that whilst the Registry tries to assist self-represented litigants, there are limits on how far it can go. The Registry's role is not to provide legal advice and it cannot become partisan or be seen to do so.

In ***Brakatselos v ABL Nominees Pty Ltd & Ors; Clancy v ABL Nominees Pty Ltd & Ors; Meyer v Primary Yield Finance Pty Ltd & Ors*** **[2012] VSCA 231**, the applicants sought leave to appeal against the orders of a Supreme Court Judge who dismissed their

appeal from self-executing order made by an Associate Judge of the Court. The self-executing order was that the applicant's defence would be struck out if they did not provide a list of documents and witness statements they intended to rely upon.

The applicants had appealed to a trial judge seeking special leave under rule 77.06(7)(b) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) to rely on affidavits that were not before the Associate Judge. That rule stated that an appeal to a Supreme Court judge was as a hearing de novo and that special leave of a Judge was required to rely on evidence not before the Associate Judge. The trial judge refused the application, stating that the court should not be assumed to have made the rules having adopted the word 'special' in its description if it were not intended to mean something significant.

The Court of Appeal stated that the grant of special leave is a discretionary decision, not to be granted lightly. The rule is designed to prevent a party from obtaining an unreasonable advantage of a hearing de novo. It is undesirable to attempt to prescribe the circumstances in which leave is to be granted, as it is not possible to identify with any precision when special leave is appropriate. The rule accommodates a range of circumstances in which a grant of special leave will do justice by allowing a party a further opportunity to introduce evidence. Parties must demonstrate a good reason to justify the judge permitting something that would not ordinarily be allowed by granting special leave. The Court recognised that where a party is prevented from pursuing its claim or defence by a self-executing order, the Court has a wide discretion to set aside or vary the order if injustice flowed from its operation, even though at the time it was made, there was no fault in the making of the order. The seriousness of the consequences of non-compliance with the order may affect how severely the court will treat that non-compliance, but will not of itself excuse such disobedience. In some cases, the nature of the non-compliance may be so serious that its consequences cannot be mitigated. That outcome is more likely where no satisfactory explanation is provided for the non-compliance. A litigant who disregards the consequences of disobedience to a court order does so at their peril. In the present case, in addition to the absence of a satisfactory explanation, s 25 and s 26 of the *Civil Procedure Act 2010* (Vic) impose overarching obligations on the parties and their legal representatives to act promptly, minimise delay and disclose the existence of documents. Section 28 specifically provides that the Court, in exercising any power, may take into account any contravention of these overarching obligations.

The Court commented that the purpose of a self-executing order is to ensure timely compliance with a procedural requirement, and the means of achieving it are the threat of the consequences of failure. It would significantly undermine the utility of self-executing orders, and cast doubt on the integrity of the court processes, if a party that chose not to comply in time with a self-executing order could expect to be relieved from the consequences by demonstrating that they have since complied with them, and that if their breach is not excused, they will suffer the consequences it was intended they should suffer, if they failed to comply. The Court of Appeal refused leave to appeal.

In ***Spotlight Pty Ltd v NCON Australia Ltd*** **[2012] VSCA 232**, the Court considered the situation where a trial judge, whilst working on his judgment, provided the parties with a memorandum about the deficiencies in the respondent's case. In the memorandum the trial judge invited the respondent to reopen its case on damages in light of the possible findings he outlined. The Court noted that whilst the trial judge had stressed that he had not yet made such findings, the memorandum was very much in the form of an embryo judgment and disclosed a number of problems with the respondent's damages claim. On appeal, the Court considered that the judge had moved uncomfortably close to the line that divides the Bench from the Bar Table and is not to be crossed. By issuing an unsolicited invitation to one party alone after both parties had closed their cases, the trial judge was inevitably placed in the same general territory as one of the parties.

The Court confirmed that where each party had delivered their closing addresses and judgment had been reserved it is only in exceptional circumstances that a court may allow a case to be reopened. This is due to the need for finality in litigation and the extreme difficulty in limiting, defining and protecting the boundaries of what could be adduced. The Court noted that whilst the trial judge had tried to restrict the evidence permitted to be led on the rehearing to that of a certain kind, the appellant made complaints that the respondent had sought to introduce evidence that did not meet the trial judge's description. The Court concluded that if the case was re-opened the judge's memorandum would assume a pivotal importance, influencing how the parties, in particular the respondent, tailored their reopened cases. Similarly, if the Court were to dismiss the appeal or grant a new trial it would have substantially the same effect as re-opening the case. The Court allowed the appeal and remitted the matter to the trial judge so he could complete his task of writing the judgment.

On appeal, the parties could not reach an agreement on the summary of facts and issues, despite the intervention of the Judicial Registrar. The document provided by the parties contained little information recording the chronology of the matter. The Court expressed its disappointment at the unhelpfulness of the document provided and commented that the defects in the document appeared to be a product of the parties' unwillingness to put the longer term interests of the litigation ahead of the short term interests of the litigators. The Court noted that *Practice Statement, Court of Appeal No 2 of 1995* [1996] VR 16 designed to assist the efficient disposition of appeals was not followed as it should have been.

Discovery and group proceedings

In ***National Australia Bank Ltd v Pathway Investments Pty Ltd & Anor*** **[2012] VSCA 168**, the Court considered the obligations of group members of a class action in relation to discovery obligations. Pathway (representing shareholders) sought damages against the respondent for alleged breaches of the appellant's obligation to disclose information relating to its exposure to losses under its collateral debt obligations arising out of the collapse of the US subprime mortgage market. This was alleged to be contrary to s 674 of the *Corporations Act* (Cth) ('the Act') and resulted in the share prices of the appellant company being artificially inflated which caused loss to the respondents.

In this interlocutory proceeding, the appellant sought orders as to the identity of the top 20 group members of the respondent and also sought wide discovery from each of these members. The orders sought were refused. On appeal the appellant contended that the material sought was necessary to establish that the information pertaining to losses was publicly available and was not required to be disclosed under the Act. The appellant further contended that the information was not material to the value of the shares and that such information was required so that expert reports and evidence could be prepared.

The Court affirmed the primary judge's reasoning that the forensic benefits were not sufficient to warrant the wide discovery sought, and that there was no evidence suggesting that the group members had private knowledge/material that was not held by other shareholders. The Court also noted that there was no evidence that the group members had any knowledge or information relevant to the expert reports/evidence that was contemplated. The primary judge had taken into account the role of group members in class proceedings, who usually play a passive role. Hence, discovery orders are not generally made against such parties unless they are necessary for the conduct of the defendant's case. The Court agreed with this approach.

The Court noted the very large scope of documents that were sought by the appellant and they were unnecessary for the just determination of the real issues in dispute. The Court commented that the powers of the Court to order discovery by group members to a class action should be informed by the purposes and objectives of the *Civil Procedure Act 2010*

(Vic), which is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. This requires a tighter focus on the relevance of the documents and how the documents would affect a party's case in relation to the real issues in dispute.

In ***Regent Holdings Pty Ltd v State of Victoria*** **[2012] VSCA 221**, the Court considered an application for leave to appeal orders made by a judge for discovery of documents in the lead up to mediation. The Court refused the application as it did not accept that the order for discovery was attended by sufficient doubt to warrant leave to appeal, or likely to be productive of any injustice. The Court rejected the applicant's submission that it was generally accepted that group members were not required to take any step in a class action until after a determination of the representative party's claim, stating that it was a misconception of a statement made in *Mobil Oil Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1 regarding the opt-out nature of Part 4A proceedings. The Court determined that the statement made meant no more than that there were some Part 4A actions in which it was likely to be so. Each case turns on its own facts. In the present case it was not inappropriate for the judge to make certain procedural orders as the group was limited and in effect closed, all members were represented by the same firm, and the litigation was maintained by a single litigation funder for the benefit of both the representative party and group members alike. As it was proposed to mediate the whole class action in advance of the trial, it made sense to order discovery to provide the defendants with sufficient information to formulate rational settlement offers.

The Court distinguished the present case from *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No. 2)* [2010] FCA 176 wherein the Federal Court denied discovery in relation to mediation that was already well advanced as discovery at that point might do more harm than good. The Court emphasised that the judge in *P Dawson Nominees* had stated that he would be prepared to make the order sought if the mediator involved reported to the court that he thought it would assist.

The Court concluded that it is not improper for a judge to make orders for particulars and discovery calculated to facilitate mediation. The Court held that where a party seeks the court's assistance to obtain further information that will facilitate the court directed mediation process, cogent submissions are required to demonstrate that the provision of that assistance will undermine the process.

The Court held that *NAB v Pathway Investments* (above) was not an authority on discovery of general application and emphasised the need for caution when using interlocutory decisions as precedents as fact specific interlocutory issues of practice and procedure should not be read as though they were determinative of precepts and principles of general application.

Torts law

In ***Utility Services Corporation Limited v SPI Electricity Pty Ltd & Ors*** **[2012] VSCA 158**, the Court overturned the trial judge's decision refusing to allow amendments to the defence and counterclaim in bush fire litigation arising out of the Kilmore East bushfire in February 2009 to allege that SPI Electricity Pty Ltd was liable for the negligent acts and omissions of the State Electricity Commission of Victoria and Electrical Services Victoria Limited. SPI had, in practical terms, acquired the electricity distribution network for eastern Victoria in September 1994. The Court of Appeal decided that because the contentions in the proposed amendments were arguable, they should not have been refused.

In allowing the appeal the court considered the construction of s 24AH of the *Wrongs Act 1958* (Vic) ('the Act') and specifically the interpretation of the phrase 'concurrent wrongdoer'. Under the Act, the liability of a concurrent wrongdoer in a claim is limited to the proportion of loss or damage that the Court considers just, having regard to the extent of the concurrent wrongdoer's responsibility for the loss or damage.

24AH Who is a concurrent wrongdoer?

A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.

The Court held that a concurrent wrongdoer is a defendant who was not originally liable, but who is presently liable, because responsibility for the relevant acts and omissions of the original wrongdoer were transferred from the original wrongdoer to that defendant and without that transfer the original wrongdoer would still be liable. Such a defendant is liable for the same damage. In that situation the phrase 'whose acts or omissions caused' refers to the conduct for which the new defendant is responsible and not the conduct of the original defendant. The principle that qualifies 'caused' in s 24AH is evaluated on the basis of the causal relationship between conduct and damage, not the wrongdoers 'legal liability' to the plaintiff. The wrongdoer must be both liable to the plaintiff for the damage and responsible for the conduct that caused it.

The Court held that it was not the intention of the statute to confine the defence to the detriment of a concurrent wrongdoer by excluding the comparative responsibility of a wrongdoer against whom the plaintiff has legal recourse. Therefore, there is no limitation on the defence when another concurrent wrongdoer is insolvent, dead or otherwise ceases to exist. The risk of incomplete recovery rests with the plaintiff.

In ***Bainbridge v James & Ors*** **[2013] VSCA 12**, the Court considered whether an employer and an owner of a shopping centre (as respondents) were liable for an assault on an employee who worked as a Santa Claus. The appellant had been injured by a teenage boy when he was walking from his throne after the conclusion of his shift to a room where he could get changed. The appellant was usually accompanied by a security guard (provided by the owner) on such occasions, but was unaccompanied when the injury occurred. The appellant claimed that his employer and the owner were both in breach of their duty of care towards him. The County Court upheld the appellant's claims against his employer, but dismissed his claims against the owner.

On appeal, the Court upheld the trial judge's decision that the owner did not breach its duty of care on the basis that the injury was not foreseeable and was far-fetched and fanciful. The Court overturned the decision of the trial judge in relation to the employer on the same basis. The appellant had argued that by providing a security escort on almost all occasions, the owner had assumed a duty of care and foresaw the risk to him. The Court rejected this argument, observing that there was little foreseeability of such an injury occurring given that the owner had no knowledge or awareness of danger to the appellant as there had been no previous criminal activities or threats. The mere fact that the owner had the capacity or ability to provide a security guard did not give rise to any specific duty to do so.

In ***Willett v State of Victoria*** **[2013] VSCA 76**, the Court commented on its discretionary power to award damages. Ms Willett had been a police officer and had suffered a serious mental disturbance due to bullying and harassment at her workplace. At trial, the jury found that as a result of the respondent's negligence, Ms Willet had suffered pain, suffering and loss of enjoyment of life, and awarded her $108,000. The Court of Appeal upheld Ms Willet's appeal on the basis that the award of damages was so inadequate that no jury could have reasonably awarded them, and were out of all proportion to the severity of the circumstances of the case.

The respondent submitted that if the Court upheld the appellant's claim that the award of damages was manifestly inadequate then it ought to remit the matter for a re-trial. The Court rejected these submissions and held that, upon reviewing the case law, it undoubtedly has discretionary power under s 14(1) of the *Supreme Court Act 1986* (Vic)

to substitute its own award of damages for a jury verdict. The Court found that there were four reasons that justified a substitution of an award of damages in this case:

(1) First, the Court is dealing with one head of damages only, pain and suffering and loss of enjoyment of life, there is no need to engage in a calculation of loss of earnings or the components that might comprise;
(2) Secondly, having found that the jury's assessment was not open – and in so doing having analysed the evidence in detail – the Court is in as good a position as any to assess damages;
(3) Thirdly, the plaintiff is vulnerable psychologically, and this must be a relevant consideration in the exercise of the discretion to order a retrial limited to damages (particularly where the Court is in a good position to assess damages);
(4) Fourthly, there must be an end to litigation.

The court substituted its own award of damages for the jury verdict and awarded Ms Willett $250,000.

In ***Rosa v Galbally & O'Bryan*** **[2013] VSCA 116** the Court allowed an appeal against a trial judge's decision as to the damages to be awarded to the appellant where she had not been properly advised by her solicitor of her rights in a personal injury claim. The trial judge decided that the negligence of the solicitor had caused the appellant the loss of a chance to pursue her common law claim for damages for pain and suffering. The trial judge also decided the client would not have pursued a loss of earnings claim, even if she had received appropriate legal advice, but rather would have accepted the statutory payments for loss of earnings. The Court of Appeal allowed the appeal, finding that the judge ought to have concluded that Rosa would have continued successfully with her claim for loss of earnings. The Court also allowed the appeal on the basis that the trial judge had erred in discounting the damages awarded by 17.5% without identifying the particular difficulties Rosa would have faced in establishing her cause of action given that he had concluded that there was a substantial likelihood that her claim would succeed and it was most unlikely there would be any finding of contributory negligence. The Court also allowed the appeal against the finding that Rosa would not have worked beyond 62 as the evidence supported a finding that she would have worked until retiring at age 69.

Restraint of trade

Specialist Diagnostic Services Pty Ltd (formerly Symbion Pathology Pty Ltd) v Healthscope Pty Ltd & Ors **[2012] VSCA 175** was an appeal concerning the construction and validity of a restraint of trade clause in three leases of pathology businesses in hospitals. The appellant 'Symbion' leased premises in three hospitals to carry on its pathology. Each of the leases contained a restraint of trade prohibiting the landlord from carrying on a business similar to that carried on by the appellant during the term of the leases. Subsequently, the first named respondent 'Healthscope' effectively purchased the business and land of the three hospitals and acquired two companies that provided pathology services and Healthscope then encouraged the use of the acquired companies' pathology services to doctors and staff at the hospitals.

Symbion brought proceedings against the respondents alleging that, amongst other things, Healthscope had breached the restraint of trade clause in the lease. The primary judge determined that the clause was invalid as the doctrine of restraint of trade applied to it and the clause was unreasonable as the length and ambit it covered were more than was necessary to protect the landlord's legitimate interest.

On appeal, Symbion submitted that the restraints of trade in the leases were not subject to the restraint of trade doctrine as they fell under the 'trading society test' formulated by Lord Wilberforce in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 ('Esso'). The Court stated that the test only removed restraints of trade from examination in a provisional way. Firstly, because the underlying public policy must be

flexible so it can evolve as social and economic circumstances change. Secondly, the initial formulation of the 'trading society test' accepts that a restraint will fall to be examined if there is some greater than usual restraint of an individual's right to trade or an artificial use of an accepted technique. The Court stated that there was a well-established line of authority for the proposition that the rules relating to restraints of trade do not ordinarily apply to restraints accepted by a party acquiring a lease in land. As demonstrated by the decisions in *Esso* and in *Amoco Australia Pty Limited v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 331 it does not follow that simply because a restraint relates to land it will not be subject to the rules governing restraint of trade.

The Court did not accept that there was authority that justified the postulation of a general exception with respect to restraints of trade compromised in a landlords covenant under a lease. The Court found that there were at least four reasons why the restraint of trade doctrine should be applied to the covenants contained in the lease in this case:

- The obligation constituted by the restraint clause extends beyond the land retained by the lessor.
- Even where a covenant contained in a lease is reasonable as between the parties questions of the public interest might arise in respect of restraints upon the supply of essential medical services.
- There is no evidence of an accepted practice relating to restraint of trade limitations in respect of covenants given by the hospitals granting exclusivity to pathology providers.
- The restraint clause raises the question of whether the particular provisions go beyond the restraints of a right to trade commonly embodied in exclusivity provisions in commercial leases and so would fall to be examined under the proviso to the trading society test.

The Court held that the clause was a valid restraint of trade and that Healthscope was in breach of it. The Court considered that the clause had been breached as a similar business was one which carried out pathology services conducted by the landlord and required by doctors practicing at the hospital. The restraint in the clause was limited and reasonable. The Court commented that if it was wrong then Healthscope was in breach of a duty of good faith arising from the need to give the relevant clause business efficacy. The matter was remitted to the Court below.

Accident compensation

In ***Georgopoulos v Silaforts Painting Pty Ltd & Ors*** **[2012] VSCA 179** the Court considered s134AB of the *Accident Compensation Act 1985* (Vic) ('the Act'). The appellant, a painter, was injured when he fell from a scaffold while working at a building site. The appellant was granted a serious injury certificate by the Victorian Workcover Authority pursuant to s 134AB(16)(a)(ii) of the Act. The certificate certified that the appellant's psychiatric injuries arising as a consequence of the physical injuries, but not the physical injuries themselves, were a serious injury within the meaning of s 134AB(38)(b)(i) and (ii) of the Act. The appellant then issued a claim against his employer (the first respondent), a builder (the second respondent) and a scaffolder (the third respondent). In his statement of claim, the appellant alleged that as a result of the fall, he suffered an injury to his left ankle, his lumbar spine and a psychiatric injury. The trial judge, on an application made by the first respondent, struck out the particulars relating to the physical injuries in the appellant's statement of claim, concluding that, given the certificate, the appellant was prohibited by s 134AB from bringing a common law claim for damages other than in respect of psychological injuries. The Court of Appeal allowed the appeal holding that it was the consequences of the injury which determine whether it is a serious injury, not the character of the injury itself. The Court held that the effect of s 134AB(1) and (2) of the Act is that a worker may recover damages in respect of all the components of an injury which is compensable pursuant to s 82(1) of the Act if the

compensable injury results in consequential impairment of the kind defined as a serious injury by the Act.

In ***Alcoa of Australia Retirement Plan Pty Ltd v Frost*** **[2012] VSCA 238**, the appellant, the trustee, appealed against the trial judge's decision to set aside its decision to refuse the respondent's application for total and permanent disability benefit under the Alcoa Retirement Plan. In dismissing the appeal, the Court found that the trustee had failed to give real and genuine consideration to the respondent's claim because there was insufficient material to make a properly informed decision. The Court confirmed that a trustee has a duty to obtain sufficient information to enable them to make a properly informed decision. The Court relied on the High Court decision in *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, which held that if the materials are insufficient, it is incumbent on the trustee to make further inquiries. The trustee's contention that, even if the onus were on them to seek further information, they had discharged it by requesting more medical reports from the respondent was inconsistent with the High Court decision in *Finch*. As the trustee was not satisfied that the claim was made out, the prima facie inconsistencies in the reports required further investigation at least by making further inquiries of the experts that had provided them if not taking advice from further experts. A trustee is not required to undertake an endless search for perfect information, however if a strong prima facie case was established that the trustee regarded as insufficient, the trustee was bound to make further inquiries sufficient to confirm or allay its concerns.

McVey v GJ & LJ Smith Pty Ltd & Anor **[2012] VSCA 312** raised two important questions of accident compensation law. The first concerned the scope of an appeal from the County Court under s 52(1) of the *Accident Compensation Act1985* (Vic) ('the Act'). Section 52(1) of the Act provides that any person who was a party to proceedings before the County Court, at which a judgement or decision was given or made, may appeal to the Court of Appeal on a question of law raised during those proceedings. The appellant submitted that the County Court was bound to find on the evidence before it that he did not have the mental capacity to make a claim for compensation for his psychological injury at the time that he made the first claim. The respondent submitted that those grounds of appeal were not questions of law 'raised during' the proceeding. On appeal, the Court held that if a judge was 'bound' on the evidence to arrive at a particular conclusion in the judgement or decision but has not done so, that is a question of law on which an appeal could be brought under s 52(1) of the Act.

The second question raised in the appeal concerned the prohibition against lodging more than one claim for compensation under s 98C of the Act in respect of injuries arising out of the same event. At the time the appellant lodged his first claim s 104B(5B), (replaced in 2004 with s104B (5AA)) permitted a worker to make only one claim for compensation under s 98C for injuries arising out of the same event. The Court held that s 104B(5AA) and its predecessor s 104B(5B) did not prevent the lodgement of a second claim under s 98C if the claimant is proved to have been suffering from a relevant mental incapacity at the time of lodging the first claim under s 98C.

The Court found that, on the evidence, the County Court was bound to find that the appellant lacked relevant mental capacity at the time of making the first claim, accordingly s 104B(5B) did not prevent the appellant from pursuing the second claim for psychiatric injury. The second claim should be assessed pursuant to s104B and 98C of the Act for the purpose of the payment of compensation.

Primary Health Care Ltd v Giakalis **[2013] VSCA 75** was a case stated by a judge of the County Court in a claim by the plaintiff pursuant to s 138 of the *Accident Compensation Act 1985* (Vic) ('the *AC Act*'). On 7 February 2006 Ms Davies was injured when a motor vehicle she was driving collided with a vehicle driven by the defendant. At the time of the collision, Ms Davies was performing work in the course of her employment with the plaintiff. The plaintiff was a self-insurer for the purposes of the *AC Act* and so became

liable to make, and has made, compensation payments to Ms Davies in the sum of $214,291.07. The plaintiff commenced the proceeding against the defendant pursuant to s 138 of the *AC Act* to recover those payments, and any future payments, paid to Ms Davies. It was common ground that Ms Davies injuries were caused as a result of a 'transport accident' for the purpose of s 93(1) of the *Transport Accident Act 1986* (Vic). However as Ms Davies had not sought to commence common law proceedings against the defendant, the Transport Accident Commission ('the Commission') had not determined the degree of her impairment for the purposes of s 93(2) of the *Transport Accident Act*. The defendant admitted that the collision was caused solely by his negligence but denied that the plaintiff was entitled to recover the compensation payments from him.

The question stated for the Court was whether, for the purposes of s 138(1) of the *ACA Act*, the plaintiff was able to establish that the injuries to Ms Davies were caused under circumstances 'creating a liability' in the defendant to pay damages, in the absence of a determination, by the Commission, of the degree of Ms Davies' impairment for the purposes of s 93(2) of the *Transport Accident Act 1986* (Vic).

The Court came to the following conclusions:

(1) Section 138(2) of the *AC Act* does not have the effect that s 93 of the Transport Accident Act is to be disregarded in determining whether, for the purposes of s 138(1) of the Accident Compensation Act, a worker injured in a transport accident, was injured in circumstances creating a liability in a third party to pay damages.
(2) In a case where a worker, injured in a transport accident, has not accessed one of the gateways prescribed by s 93 of the *Transport Accident Act*, the common law liability of the third party, who caused that injury, has been contingently extinguished for the purposes of s 138(1) of the *AC Act*.
(3) Section 138(1) of the *AC Act* does not apply in a case where the only 'liability' of a third party to an injured worker has been contingently extinguished by s 93 of the *Transport Accident Act*.
(4) The plaintiff's claim was not maintainable.

Contract law

In ***Cardona & Anor v Brown & Anor*** **[2012] VSCA 174**, the Court dealt with a building dispute for the construction of a domestic dwelling and attached garage under the *Domestic Building and Contracts Act 1995* (Vic) ('the Act'). The Court determined that a builder's right to progress payment for the lock-up stage of construction was contingent upon the builder having first completed the frame stage of construction within s 40(1) of the Act. The Court considered the structure of the Act and stated that the five stages of domestic construction under s 40(1) (i.e. base, frame, lock-up, fixing and completion) were not to be treated as labels with separate statutory criteria that could be satisfied independently of each other; but should be viewed as sequential and consecutive. Therefore, a progress payment could not be claimed without completion of the previous construction stage of development.

The Court determined that the lock-up stage had not been completed because the builder had failed to install external doors, which would have prevented the house from being accessed. In support of this conclusion, the Court examined the scope of the building works that had to be completed and held that the parties had agreed that the garage formed part of that scope. The Court noted that s 5 of the Act declares that construction of a home includes that of a garage. If the garage were not treated as part of the home, its construction would not form any of the five stage stages of construction under s 40(1) of the Act, such an interpretation did not sit comfortably with the Act.

In ***ABN Amro Clearing Sydney Pty Ltd (formerly Fortis Clearing Sydney Pty Ltd) v Primebrokers Securities Limited (recs & mgrs apptd) (in liq)*** **[2012] VSCA 287**, the Court had to consider the proper construction of the standard securities transfer form known as the 'Australian Masters Securities Lending Agreement' or 'AMLSA'. In doing so, the Court commented that it was important that the courts intervene in the securities lending market only to the extent that the law and legitimate commercial interests require. Where standard documentation has been developed by leading trade associations, that documentation should be construed so far as possible in ways which achieve the object of its creation. Generally speaking, it is for parliaments, rather than the courts, to correct any imbalance between the private and the public good.

In the current case, the Court held that the effect of the securities transfer must be determined by reference to what the parties intended its legal effect to be, and not the commercial effect they sought to achieve. Accordingly, the Court found that Fortis was the beneficial owner of the borrowed securities and, as a result, the netting clause of the AMSLA was applicable and had operated to require Fortis to account to Primebrokers for the value of the borrowed securities on 7 July 2008. As the netting clause had operated, Fortis could not choose to deal with the borrowed securities under the default provisions. It was therefore unnecessary to decide whether those provisions would otherwise have been applicable.

The parties were also in dispute about the market value of one of the securities, namely notes in Octaviar Ltd. Under the contract, the value of the notes was to be calculated by reference to the value of those securities on the first business day after the default, which was 7 July 2008. However there were no trades in the note that day. The trial judge determined the market value of the notes to be $24.50 by averaging the Deutsche Bank purchase of the notes on 23 June 2008 at $26.50 and Octaviar's offer to note holders on 17 July 2008 to purchase notes at $22.50 a note. The Court, in upholding the decision of the trial judge, held that the value of the note transactions occurring both before and after 7 July were probative of the value of the notes on 7 July. The relevant directors were well-placed to form an opinion as to a value that would be attractive to note holders and evidence of what Octaviar was willing to pay in mid-July 2008, in a falling market, established a floor price at that time. There is no reason to disregard the offer merely because it is not a transaction. The market value of a security is determined by what the market participants perceive its value to be. Accordingly, evidence of market participant's assessment of the value of the security is highly probative of the security's value.

In ***Australian Associated Motor Insurers Limited v Elmore Haulage Pty Ltd*** **[2013] VSCA 54**, Mr Boot, who was insured by the appellant, was driving his motor vehicle and collided with a prime mover that was owned by the respondent. The appellant submitted that Mr Boot had intentionally collided with the truck because he intended to kill himself and that damage caused by that conduct came within the exclusion clause of the insurance policy. The Court upheld the trial judge's conclusion that the appellant had failed to establish, on the balance of probabilities, that Mr Boot intended the collision to occur.

The Court went on to determine whether, had the collision been intentional, the exclusion clause of the policy would have applied. The court held that, on a plain reading of the clause, the clause excludes a claim for indemnity for liability in respect of 'loss or damage' intentionally caused by the insured person. The court held that in construing the exclusion clause, a distinction must necessarily be drawn between damage caused by an intentional act of the insured and damage intentionally caused by the insured. On its plain terms the exclusion clause is directed to an intended result ('loss or damage') and not to the action which produced that result. The Court stated that generally where the state of mind of a person is in issue, the existence of that state of mind is determined by the process of inference. Ordinarily, where a motorist intentionally drives their vehicle at high speed, headlong towards another vehicle it might readily be inferred from those facts that they

intended to collide with it and cause damage to it. In the present case, if Mr Boot did intend to cause a collision,that inference has been displaced by the unchallenged evidence of Dr Kornan that in such circumstances, Mr Boot would not have intended to cause damage to the respondent's vehicle as at all relevant times his sole focus would have been on ending his own life. The evidence of Dr Kornan thereby negated the application of an inference which would otherwise have arisen as a matter of common experience.

Corporations law

In ***Re Willmott Forests Ltd*** **[2012] VSCA 202**, Willmott Forests Ltd was in liquidation and its liquidator wished to sell its interest in properties it owned which were subject to lease agreements. The liquidator applied to the Supreme Court for approval of the disclaimers. The trial judge decided that the disclaimers did not extinguish the lessees' interest in the land. The Liquidator appealed.

On appeal the critical issue was whether a leasehold interest in land was extinguishable by the disclaimer of the lease by the liquidator of the lessor, pursuant to s 568(1) of the *Corporations Act 2001* (Cth). The Court decided it did. The Court noted that the consequences of a disclaimer were set out in s 568D which provided that a disclaimer terminates the company's rights, interests and liabilities in the disclaimed property to the extent necessary to 'release the company and its property from liability'. In applying this provision, the Court determined that the ongoing obligation of a lessor to provide the lessee with 'possession' and 'quiet enjoyment' (tenure) were both 'liabilities' for the purposes of s 568D. The Court held that in order to release the lessor/liquidator from its liability it was necessary to terminate the lease (and the lessee's tenure).The Court further determined that rights under a lease were contractual rather than proprietary in nature, and a lease, like all other contracts, came to an end upon the contract's termination. The lease could not survive the termination of the contract upon which it was created. The Court also determined that the purpose of s 568 was to assist the liquidator in the prompt and efficient winding up of the company. To compensate the rights of the affected parties are transmuted into various statutory rights and claims.

In ***360 Capital Re Limited v Watts & Ors*** **[2012] VSCA 234**, the Court considered the limitation imposed on a responsible entity of managed investment scheme registered under Chapter 5C of the *Corporations Act 2001* (Cth) ('the Act'). The Act provided that the entity could modify the constitution of the scheme if the entity reasonably considers the changes will not adversely affect members' rights. The entity attempted to modify the constitution to provide for the issue of redeemable unsecured convertible notes, and to place considerable restrictions on the convening and conduct of meetings of members of the fund. The respondents' issued proceedings claiming that the directors' of the entity could not reasonably have considered that the purported changes did not adversely effect members' rights, and therefore had no power to make the amendments.

The Court of Appeal upheld the decision of the trial judge, who declared the amendments to the constitution were ineffective, and dismissed the appeal. The Court reasoned that members of the fund had rights to require that new units in the fund only be issued in accordance with the constitution. The Court applied the reasoning in *Premium Income Fund Action Group Incorporated v Wellington Capital Limited* [2011] FCA 698 that members' rights to have a managed fund managed and administered in accordance with the constitution of the fund are 'members rights' within the meaning of s 601GC(1)(b) of the Act. The Court considered that the right of a member to have a managed investment scheme administered according to the constitution of the scheme is fundamentally the most important right of membership. Without it, all other rights of membership, as well as the continuance, success and security of the scheme, would be at the whim of the responsible entity. Amendments can be made which are plainly not adverse to members' rights, such as the abbreviation of the period for redemption of units from 90 days to 60

days. The focus of s 601GC(1)(b) is on the rights created or secured by the constitution. The focus on the constitution bespeaks an intention that 'members' rights' include the rights of members to have a scheme administered according to the constitution. The Court found that the proposed changes would have removed, curtailed or impaired the existing rights of members and so were unfavourable and disadvantageous to unit holders.

The Court rejected the applicant's submissions that it was reasonable for them to have based their decision on legal advice they received, without considering themselves whether the effect of the proposed changes would be adverse to members' rights. The Court held that because the board was wrongly advised that the proposed changes did not affect members' rights, the board had proceeded on the basis of a mistake of law and thereby failed to consider the question. If the board commits an error of law in making a determination to amend the constitution an aggrieved party can seek declaratory and injunctive relief against the consequences of that error. While the Act did not provide for a statutory right of appeal, the Court has jurisdiction to grant declaratory relief in relation to both the statutory and contractual rights of members, and equitable jurisdiction (and under s 1324 of the Act) to grant an injunction in aid of legal rights.

Bankruptcy

In ***Sharma v Victorian Workcover Authority*** **[2012] VSCA 254**, the Court considered the interpretation of s 60(4) of the *Bankruptcy Act 1966* (Cth) ('the Act') and whether a bankrupt appellant was entitled to pursue his appeal against the Victorian Workcover Authority in his own name (as opposed to the bankruptcy trustee) given that he contended that his appeal related to personal injury. Section 60(4) entitled a bankrupt to continue an action in his or her own name in respect to any personal injury.

The appellant had received compensation and periodic payments from the respondent under the *Accident Compensation Act 1985* ('*the AC Act*') for a workplace injury that was suffered in South Africa. Later, the appellant also received a settlement payment for his injury in South Africa. The respondent claimed the recoupment of the settlement payment pursuant to s 85(6) of the *AC Act*, which provides that if a person receives compensation under the Act and also obtains damages/settlement payments outside Victoria (whether in Australia or not) that the respondent shall be able to recover the amount of damages/settlement payment that was received outside Victoria. The County Court upheld the respondent's claim to recover.

On appeal, the appellant argued that the County Court had erred in deciding for the respondent and claimed that he had received an underpayment of his entitlements to compensation under the *AC Act*. The appellant contended that his appeal vested with him because he suffered personal injury (and was not property of the bankruptcy trustee nor divisible amongst his creditors).

The Court determined that the appellant's claims relating to the underpayment of compensation under the *AC Act* related to personal injury and therefore fell within s 60(4) of the Act and so he was able to pursue this personally notwithstanding his bankruptcy. The Court also determined that the amount owed to the respondent due to the reimbursement of compensation had no nexus to personal injury. So this did not fall within s 60(4) of the Act and the appellant had no standing to pursue his appeal challenging the decision upholding the respondent's claim to recover against the appellant.

Wills and probate

In ***State Trustees Limited v Whitehead*** **[2012] VSCA 274**, the Court considered the varying types of social units that were tantamount to families in the context of a claim for an order that provision be made from the estate under Part IV of the *Administration and Probate Act 1958* ('the Act'). The Court decided that family relationships had become

increasingly diverse, with changes in the law resulting in ties based on affection rather than legal status receiving greater recognition. The Court held that the scope of Part IV of the Act is not confined to those in a relationship which does not conform to traditional ideas about male/female and parent/child relationships. The Court concluded that a man and a woman may have an emotional commitment to each other, like that of a family, even when they do not live together. Such a commitment may exist even though the parties are not financially dependent on one another and neither party contributes to the building up of the other parties' property.

The claimant and the deceased had been involved in a sexual relationship for approximately ten years, during which the claimant had a child by another man. The Court found that there was nothing to preclude the trial judge from drawing the inference that they considered themselves a 'family', even though they did not live together and maintained separate finances, as the three of them had a loving and mutually supportive relationship and spent a good deal of time together on that basis. The Court held that the trial judge was not incorrect in finding that the relationship between the claimants and the deceased represented a social unit tantamount to a family and as such, the deceased had responsibility to make adequate provision for them.

Administrative law and judicial review

In ***Kocak v Wingfoot Australia Partners & Ors*** **[2012] VSCA 259**, the Magistrate's Court had referred three medical questions to the Panel for determination under s 45(1A) of the *Accident Compensation Act 1985* (Vic) ('the Act'). The Panel then gave the court its opinion pursuant to s 68 of the Act. The Court held that the High Court's decision in *Maurice Blackburn Cashman v Brown* (2011) 242 CLR 647 meant that the finality which the Act gives to a Medical Panel Opinion is binding for the purposes of determining any question or matter arising under the Act. Applying this reasoning, the Court determined that in the present case this meant that the opinion of the Panel had legal effect for the continuing serious injury application as the County Court would be compelled by s 68(4) of the Act to adopt and apply the Panel's opinion in the determination of the serious injury application. Further, the adoption and application of the Panel's opinion by the Magistrate's Court, when dismissing the statutory compensation application, created an issue estoppel binding the parties in the conduct of the serious injury application. The Court found that as a consequence of the Panel's decision having a legal effect, it was open to the Court to make an order in the nature of certiorari, quashing the opinion of the Panel. The Court made an order in the nature of certiorari on the basis that the Panel had given inadequate reasons for its opinion and so had failed to comply with its statutory obligation to provide reasons under s 68(2) and (3) of the Act.

In ***Wingfoot Australia Partners Pty Ltd v Kocak*** **[2013] HCA 43**, the High Court unanimously upheld an appeal against this decision. The High Court held that the correct construction of s 68(4) of the Act is that the finality it gives to an opinion of a Medical Panel is only for the purposes of determining a question or a matter arising under or for the purposes of the Act. This means that the Act does not apply to a subsequent action for personal injuries against an employer, and so no issue estoppel arises out of an opinion expressed by the Panel.

The High Court held that the opinion of the Panel could not be quashed for two reasons. Firstly, the opinion had no continuing legal effect as the matter, in respect of which the medical question was referred to the Panel, had already been brought to a final resolution. Secondly, the reasons given by the Panel for its opinion met the required standards.

The High Court determined that reasons given by a Panel under the Act must explain the actual path of reasoning by which the Panel arrived at the opinion it formed on the medical question referred to it. The reasons must be of sufficient detail to enable a court to see

whether the opinion does or does not involve an error of law. If a statement of reasons fails to meet that standard that failure is a basis for which an order in the nature of certiorari can be made removing the legal effect of the opinion. The Panel is under no obligation to explain why it did not reach an opinion it did not form.

In ***Priest v West*** **[2012] VSCA 327**, the Court set aside rulings of the Coroner investigating the death of a child, Linda Stilwell. The Coroner had been satisfied that Derek Percy had been in the vicinity when Linda Stilwell disappeared. In his rulings the Coroner excluded from evidence statements about the deaths of five other children (the first ruling). The Coroner did not compel Derek Percy to give evidence or advise him that he would be given a certificate of immunity for his evidence were he to give evidence (the second ruling).

The Court held that the Coroner was obliged to take into account the statements (with the exception of one aspect of one statement which was unlikely to assist the Coroner) given that Derek Percy had been in the vicinity when Linda Stilwell disappeared and that he subsequently abducted and murdered another young girl. This was the case, irrespective of whether the statements satisfied any of the criteria for admissibility of evidence in a criminal trial. This was because the role of the Coroner was inquisitorial, and the Coroner, investigating a death, was required to investigate all reasonable lines of inquiry.

The Court also decided that the second ruling of the Coroner was wrong as s 57(3) of the *Coroners Act 2008* (Vic) required the Coroner to inform Percy that he could give evidence willingly, and if he did he would be given a certificate prohibiting the use of any evidence he gave in accordance with the requirements of the Act. The failure to do so invalidated the second ruling. The Court directed that the inquest be reconvened.

Victoria Toll & Anor v Taha and Anor; State of Victoria v Brookes & Anor **[2013] VSCA 37** concerned two offenders with intellectual disabilities who were arrested and sentenced to a brief period of imprisonment following their failure to pay fines imposed for numerous minor infringements of the law. On appeal, the Court upheld the trial judge's conclusion that s 160 of the *Infringements Act 2006* (Vic) ('the Act') must be read as a unified whole, and her finding that the Magistrate had erred in the first instance by failing to consider whether there were 'special circumstances' that justified an alternative sanction to imprisonment under s160(2)-(3).

On appeal, the Court held that the Magistrate had had a duty to enquire into the existence of 'special circumstances', irrespective of the submissions of the legal representative of one of the offender's, given the particular circumstances of the appellants' offending. The failure to enquire before making an imprisonment order was jurisdictional error. The Court agreed that a unified construction of s 160 was in accordance with the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

In ***ASIC v Ingleby*** **[2013] VSCA 49**, the central issue was the proper role of the Court when considering agreed penalties put forward by the parties in civil penalty proceedings. It had become common practice for regulatory bodies (like ASIC) and the defendant to approach the court with an 'agreed statement of facts' and agreed penalty and ask the Court to ratify these into formal orders. Agreed penalties were commonly ratified by the Court provided they were in the permissible range for the regulatory provision, even if the Court may have been disposed to impose a different penalty. This approach was endorsed by the Full Court of the Federal Court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285.

The Court of Appeal was critical of the approach endorsed by *NW Frozen* as being 'plainly wrong'. The Court considered the imposition of a civil penalty to be a judicial, as opposed to an executive, function and it was the Court's obligation to impose an

appropriate sentence rather than acting as a rubber stamp in imposing penalties. Furthermore, the Court noted that great care had to be applied when preparing an agreed summary of facts so it properly reflected the agreed penalty proposed (which was in issue in this proceeding). The Court also signalled it would prefer parties to file an agreed penalty 'range' rather than specific fine. This would be non-binding and treated as a submission to the Court for determination of the appropriate penalty.

In ***DPP v Batich*** **[2013] VSCA 53**, the respondent had entered a plea of guilty to one count of recklessly causing serious injury in the County Court. During the course of the plea, the County Court judge transferred the proceeding to the Magistrate's Court to be heard and determined summarily pursuant to s 168 of the *Criminal Procedure Act 2009* (Vic) ('*CPA*'). The Director of Public Prosecutions sought judicial review of the decision but the application for judicial review was refused by the Supreme Court. The Director then sought to appeal that refusal to the Court of Appeal.

The Court of Appeal dismissed the appeal and held that there is no power to transfer proceedings under s 168 of the *CPA* unless the judge determines that the matter is appropriate to be determined summarily having regard to the matters in s 29(2) of the *CPA*. Section 29(2)(b) of the *CPA* requires the court to have regard to 'the adequacy of sentences available to the court, having regard to the criminal record of the accused'. The court held that 'adequacy' means 'acceptability' or 'sufficiency'. The 'adequacy of sentences available to the court' calls for a consideration of both the maximum term of imprisonment available within the Magistrates' Court and the types of sentences that are available. 'Adequacy' involves a judgment as to whether, in the circumstances, an acceptable or sufficient level or measure is met or exists. It does not require a conclusion that every possible contingency is covered. 'Adequacy' might be met by circumstances which are barely adequate or more than adequate. 'Adequacy' is the relevant consideration, but the degree of adequacy may bear on the significance of that consideration. It will not be appropriate to make such an order unless a judge is of the view that a sufficient portion of the range falls within the Magistrates' Court's jurisdiction so that the range of sentences available will be adequate.

In ***McKenzie & Anor v Magistrate's Court of Victoria & Anor*** **[2013] VSCA 81**, the Court considered the power of a magistrate to compel journalists to give evidence during a committal hearing of an accused in which they were asked to reveal their sources relating to a published newspaper article. The applicants were investigative journalists, their article was about the allegedly corrupt behaviour of the second respondent, Mr Leckenby, and a number of other officers associated with the Reserve Bank of Australia, who had allegedly paid bribes to Indonesian officials in order to win contracts to print bank notes for them. The applicants made an application to set aside the summonses which required them to give evidence about their sources. The Magistrates' Court rejected the application and held that the interests of justice prevailed over the interests of the applicants in maintaining the confidentiality of their sources, and the disclosure of the information would assist in determining the issue as to whether some or all of the criminal charges laid against the accused should be dismissed. A trial division judge had dismissed the applicants' judicial review application and upheld the decision made by the Magistrate. The applicants' then appealed to the Court of Appeal.

The Court of Appeal set aside the witness summonses as it held that the Magistrate did not have the requisite jurisdiction to compel the journalists to give evidence at the committal. Section 97 of the *Criminal Procedure Act 2009* (Vic) does posit as one of the purposes of a committal 'enabling the accused to adequately prepare and present a case'. Another purpose is 'enabling the issues in contention to be adequately defined.' The Court commented that unless that case and those issues are directed towards assisting the magistrate to determine whether the evidence tendered by the prosecution is of sufficient weight to support a conviction for an indictable offence, they will merely prolong the

committal proceeding for no purpose other than the exploration of matters with which only a judge can deal.

The Court rejected Mr Leckenby's contention that the magistrate could stay the charge of conspiracy laid against him. The Court determined that in conducting a committal hearing the magistrate is exercising executive or ministerial function and has no inherent power to stay or dismiss, rather they have only the powers given to them by statute. The power to stay or dismiss is a judicial power and has no place in committal proceedings unless conferred by statute. The power of a court to stay a conspiracy charge in the interests of justice, as provided for in s 11.5(6) of the *Criminal Code Act 1995* (Cth) is a power limited to a judge.

In ***The Chief Examiner v Brown (a pseudonym)*** **[2013] VSCA 167**, the Court of Appeal considered the scope of the powers of the Chief Examiner in relation to non-publication orders under the *Major Crime (Investigative Powers) Act 2004* (Vic) ('the Act') where evidence was obtained through the use of the Chief Examiner's coercive powers.

The Court held that where a non-disclosure order has been made the power of the Chief Examiner to share information under s 67 of the Act cannot be relied upon to provide information to the Office of Public prosecutions for inclusion in a prosecution brief, with the general obligations of disclosure to a defendant. Providing the information for that purpose would be inconsistent with the protection demanded by s 43(2) and thus 'contrary to the law of the State' and so an invalid exercise of the discretionary power conferred upon the Chief Commissioner under s 67. Such disclosure would be contrary to a law of the State as a non-publication order 'trumps' a general provision authorising disclosure. Where a non-publication order has been made the mechanism provided by s 43-45 (inclusive) of the Act is the only means by which evidence given by a witness can be relied upon in a prosecution. Those sub-sections provide for a specific procedure by which evidence given before the Chief Examiner can be made available to a person charged or that person's legal practitioner, under the supervision of the court before which he or she has been charged. The power of the Chief Examiner to create exceptions under s 43(1), and so provide the evidence to such specified persons, does not extend to permitting the evidence of a witness obtained in an examination to be released to members of Victoria Police or the Office of Public Prosecutions for the purpose of prosecution where a non-disclosure order exists.

As a contravention of the non-publication order carries penal sanction, it is important for the Chief Examiner to identify with certainty and precision the persons to whom the information can be published. The persons to whom the information can be published can lawfully be identified as a class, and need not be identified by their individual names. However, the class should be specified with particularity as those members of the Victoria Police investigating the particular organised crime offence that is the subject of the coercive powers order. The Chief Examiner is also required to specify the means by which the information can be published or communicated, for example in full, or in part, by video, audio or written transcript.

Sex Offences Registration Act 2004 **(Vic)**

In ***WBM v Chief Commissioner of Police*** **[2012] VSCA 159**, the court considered the definition of an 'existing controlled registrable offender' under s 3(d) of the *Sex Offences Registration Act 2004* (Vic) ('the Act').The court held that an 'existing controlled registrable offender' is any person who, immediately before 1 October 2004, was serving a sentence as a result of having been sentenced for a registrable offence (whether by itself or with other offences). This included where an offender was sentenced to an aggregate sentence of imprisonment for offences only one of which was a registrable offence. The court commented that the inclusion of the date was designed to create certainty and reduce the administrative burden in enforcing the Act.

The appellant submitted that the Act negated his common law right to carry on a business or work in a trade of his own choosing. The court held that, while there may be such a common law right, it had been qualified by the introduction of legislation requiring checks and certificates to work with children. As a result working with children is now a privilege rather than a right. As such, if there ever was such a right at common law, it has been weakened by legislation to such an extent that the legislative intention of the Act should not be cut down.

The appellant also submitted that the Act abrogated his right to privacy under the *Charter of Human rights and Responsibilities Act 2006* (Vic) ('the Charter'). The Court held that in the present case the Charter had no application as it was not in place when the appellant was eligible to be added to the Register, nor when he was added to the Register. The Court commented that even if the Charter had been applicable none of the proposed constructions of the Act were incompatible with the Charter.

The court upheld the trial judge's finding that the primary purposes of the Act were preventative and protective not penal, and that the registration and reporting schemes do not amount to a penalty.

***Working with Children Act 2005* (Vic)**

***DFJ v Secretary to the Department of Justice* [2012] VSCA 177** was an appeal against the decision of the Secretary to the Department of Justice (DOJ) to refuse to provide the appellant with an assessment notice (commonly known as a working with children check) under the *Working with Children Act 2005* ('the Act').The appellant had been convicted in 2002 under s 262(1) of the *Children and Young Person Act 1989* (Vic) for having left a child unattended. The appellant had been at home with his child when he fell asleep. While he was asleep, the child left the home and was found on a busy street. The Secretary's refusal prevented the appellant from carrying-out child-related work.

Section 17(1A) of the Act gave the Secretary discretion to refuse to give an assessment where an applicant had been charged, convicted, or found guilty of, an offence. To justify the refusal under s 17(1A) exceptional circumstances must exist and there must be a significant or notable link between the offence and the risk the applicant poses to the safety of children. In interpreting s 17(1A) the Court held that the appellant needed to have been found guilty of an offence and that the significant or notable link between the offence and the risk to the safety of children could only be demonstrated by looking at the facts and circumstances surrounding the charge.

The Court concluded that the purpose of the Act was protecting children from sexual or physical harm and that the appellant's previous conviction did not involve any such behaviour. The Court ordered that an assessment notice be given to the appellant as he posed no significant risk to the safety of children.

***Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)**

In ***NOM v DPP & Ors* [2012] VSCA 198**, the appellant appealed the decision of the Supreme Court to refuse his application to revoke a non-custodial supervision order. In 1988 the appellant was found not guilty of murder by reason of insanity and ordered to be detained at the Governor's pleasure. Since the commencement of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('the Act') he had been subject to various custodial and non-custodial orders.

The Court held that in applications for the revocation of non-custodial supervision orders there is no legal or evidential onus of proof on any party in the proceedings including the applicant. In deciding such applications, the decision-maker must be satisfied that the

facts are proven to the civil standard of proof, informed by the principle in *Briginshaw v Briginshaw* (1936) 60 CLR 336 that the decision-maker must be persuaded as to the existence of the fact, or where the evidence is circumstantial a reasonable and definite inference of the fact. The court found that there was no conceptual difference between the principle in *Briginshaw* and the operation of s 140 of the *Evidence Act 2008* (Vic) on the civil standard of proof.

The Court decided that an appeal from a decision refusing to revoke a supervision order was an appeal against a discretionary decision and required that the appellant establish appellable error as set out in *House v The King* (1939) 55 CLR 499.

The Secretary to the Department of Health and the Attorney General to the State of Victoria both appeared at the hearing as parties to the proceedings, but neither adopted a clear position as to whether they opposed or supported the application. On appeal the Court stated that the Secretary and the Attorney-General should adopt a clear and unequivocal position where the evidence permits. If for any justifiable reason they are unable to do so, they must inform the court of why they are unable to do so.

Client legal privilege – joint clients

In ***Great Southern Managers Australia Limited (recs & mgrs apptd) (in liq) v Clarke & Ors*** **[2012] VSCA 207**, the Court considered the proper construction and application of section 124 of the *Evidence Act 2008* (Vic) ('the Act'), as it related to the tendering of a board paper at trial. Section 124 enables a party who has jointly retained a lawyer with another to adduce evidence of that advice. The board paper contained legal advice that was received by the applicant for the benefit of scheme members, one of whom is a respondent in the case. The trial judge ruled that the respondent could adduce evidence of that advice. On appeal the applicant submitted that the Court had erred in holding that s 124 of the Act applied in circumstances were one party did not jointly retain, or have any involvement with the engagement and provision of instructions to a lawyer. The Court concluded that the trial judge was correct to allow the respondent to adduce evidence of the advice as the joint retention requirement of s 124(1) is met when one of the joint privilege holders retains the lawyer for its own benefit, and the benefit of the other joint privilege holders. There is no reason to distinguish between the rights of those who actively participate in retaining of the lawyer and those who take a passive role in having the lawyer retained by the joint privilege holder for their benefit.

The applicant also submitted that s 124 of the Act does not apply where there are parties to the proceeding other than the holders of the joint client legal privilege. The Court found that s 124(1) applies to proceedings in connection with which two or more parties have the requisite interest and is not restricted to litigation between such parties. It is a natural feature of litigation being conducted in open court that parties other than the joint privilege holders might gain access to material that is the subject of the joint privilege.

Application for compensation under the *Sentencing Act 1991* (Vic)

In ***Werden v Legal Services Board*** **[2012] VSCA 278**, the appellant, a solicitor, had stolen money from his clients to finance a gambling habit. The Legal Service Board ('the Board'), as the responsible body for the Legal Practitioners Fidelity Fund ('the Fund'), made payments out of the Fund to reimburse the appellant's clients for the losses they had suffered. In 2006 the appellant was convicted and sentenced for offences arising out of those circumstances. At that time, the Board chose not to make an application for compensation under s 86(1) of the *Sentencing Act 1991* (Vic) ('the Act') as it believed that the appellant had no money, and so would be unable to satisfy any restitution or compensation order. In 2009 the Board was notified that the Crown had received a restraining order for a bank account that they believed the appellant had an interest in. The Board then sought compensation for those payments from the appellant.

One of the questions on appeal was whether the Board had satisfied the requirement of s 86(5)(a) of the Act that the application be made 'as soon as practicable' after the appellant's conviction. The Court determined that the procedure under s 86 of the Act was intended to be a summary proceeding brought after a finding of guilt. In order to determine whether to grant a compensation order courts are required to consider the range of circumstances that bear upon what is practicable, and to apply the criteria of 'as soon as practicable' in a manner generous to the claimant. However, the court held that the words 'as soon as practicable' are intended as words of limitation so that claimants do not have an open-ended right to the making of such orders. The fact that the offender may not be able to satisfy the order does not necessarily preclude its making and does not make it impracticable to seek the order. The court found that to seek a compensation order some years after conviction, as the Board had done, because it now believed that the offender may be able to satisfy such an order is not to have made the application as soon as practicable. The Court upheld the decision of the trial judge and the Board's appeal was dismissed.

Contempt of Court

In ***Allen v The Queen*** **[2013] VSCA 44**, the Court of Appeal, in the course of determining a sentence appeal for contempt of court, provided guidance as to the appropriate respondent for contempt matters, being The Queen, and the exercise of the summary contempt power in the lower Courts.

Due to the nature of the summary contempt power - in which the presiding judge is a witness to the contempt, who then lays the charge and determines the sentence - the Court said that where there is no urgency or pressing need, it is preferable that the presiding judge use the procedure set out in Order 75 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

DPP v Green and Magistrates' Court **[2013] VSCA 78** concerned the correct procedure for charging a person with contempt. The first respondent, Mr Green had been required to attend the Magistrates Court to give evidence about his alleged involvement in an assault. During the course of his evidence, Mr Green repeatedly refused to answer questions and was subsequently charged by the Magistrate and found guilty of contempt. The Court of Appeal upheld the trial judge's decision that a magistrate, before convicting a person of contempt for refusing to answer questions, should;

(1) Sufficiently articulate the charge of contempt.
(2) Conduct a separate inquiry as to whether the charge of contempt is made out.
(3) Take a plea to the charge of contempt.

In particular, the Court of Appeal held that these three procedural steps, as laid down earlier by J Forrest J in *Zukanovic v Magistrates Court* (2011) 32 VR 216, applied equally to contempt arising from a refusal to answer questions and contempt in the face of the court.

Appeals from the Victorian Civil and Administrative Tribunal

In ***Frugtniet v Law Institute of Victoria Ltd*** **[2012] VCSA 178**, the Court dismissed the appellant's appeal against an order made by VCAT that declared him to be a 'disqualified person' under Part 2.2 of the *Legal Profession Act 2004* ('the Act'). The Law Institute of Victoria (LIV), in its capacity as delegate of the Legal Services Board, had sought an order for disqualification under s 2.2.6(1)(b) of the Act in VCAT because the appellant (who was legally qualified but had not been admitted to practise) had misrepresented himself as a solicitor (i.e. legal practitioner) to a barrister and a magistrate.

The appellant contended that s 2.26 applied exclusively to 'associates' and legal practitioners, and so could not be applied to persons who were not admitted to practise.

The Court rejected this argument and declared that there was no valid reason to restrict the natural and ordinary meaning of the provision.

Importantly, the Court decided that leave to appeal from VCAT was not required under the s 2.2.6 of the Act (as is generally required from appeals from VCAT) as the section confers an automatic appeal right in the nature of judicial review on a question of law. The Court also declared that it was unacceptable for the appellant to file further written submissions after the hearing of the appeal without leave. The Court reminded all parties and practitioners that the Court would not accept or consider further submissions once the appeal hearing had concluded without leave and that leave would only be granted in very exceptional circumstances.

In ***Patient Review Panel v ABY & ABZ*** **[2012] VSCA 264**, ABY and ABZ were a married couple seeking IVF treatment. IVF treatment is regulated by the *Assisted Reproductive Treatment Act 2008* ('the Act'). Under the Act a women may undergo treatment if, among other things, no presumption against treatment arises. If a presumption arises a person can apply to the Patient Review Panel for a review, the Panel then decides whether there is a barrier to the woman undergoing that treatment procedure.

A presumption against treatment arose because in 2009 the husband had pleaded guilty to and was sentenced on three counts of sexual penetration of a 16/17 year old under his care, supervision or authority. The couple applied to the Panel for a review and the Panel decided that a barrier to treatment existed. The couple then applied to the Victorian Civil and Administrative Tribunal (VCAT) for a review of that decision. VCAT decided that there was no barrier to treatment, the Panel then sought to appeal the decision of VCAT to the Court of Appeal.

The appeal was concerned with the correct interpretation of the expressions 'best interest of a child' and 'welfare and interests of persons born' contained in s 15(3)(b)(ii) and 5(a) of the Act. The Court held that these expressions require an evaluation of any identifiable and established risk factors to the child to be born. This includes, but is not limited to, risk factors relating to the matter that gave rise to the presumption against treatment and whether the matter that gave rise to the presumption against treatment creates a risk of harm to the child to be born. The Court decided that VCAT had applied the wrong test in considering the best interests of the child and remitted the case back to VCAT to be heard and decided by a differently constituted tribunal.

Kozanoglu v Pharmacy Board of Australia **[2012] VSCA 295** was an appeal from a decision of VCAT. The background to the appeal was that on 29 June 2011 the Immediate Action Committee ('IAC'), as delegate of the Pharmacy Board of Australia 'the Board' determined that immediate action was necessary to protect public safety and imposed a condition on the appellant's registration as a pharmacist, namely that he not practise unless under supervision. The determination was based on an allegation, being investigated by the police, that the appellant was supplying a chemical compound for the manufacture of ecstasy pills. Ordinarily this condition would have operated only temporarily awaiting referral by the Board for determination by either a panel or the responsible tribunal under the *Health Practitioner Regulation National Law 2009* (Vic) (the 'National Law'). In the appellant's case, however, the Board considered it appropriate to await the completion of the police investigation before taking any further action and so did not refer the matter to either body. The condition imposed seriously compromised the appellant's pharmacy business. Unable to finalise the matter in any other way, the appellant unsuccessfully challenged the IAC's decision to take immediate action before VCAT. The appellant then sought to appeal the decision of VCAT to the Court of Appeal.

The Court held that an appeal to a responsible tribunal under the National Law is neither an appeal in the strict sense nor a rehearing de novo. It is a hybrid appeal whereby the material to be considered is confined to that placed before the initial decision-maker but

with the opportunity for both parties to present additional evidence that bears directly upon that decision as originally taken. It was not open to adduce evidence of facts and matters that occurred after the notification by the IAC.

The Court noted that IAC and VCAT had both erred in not having regard to the appellant's previous good record but that, if that had been considered, it would have made no difference to the outcome. The Court, in dismissing the appeal, held that the balance would still have fallen heavily in favour of the protection of the public and the type of conditions imposed would still have been required.

In ***Kordister Pty Ltd v Director of Liquor Licensing and the Chief Commissioner of Police*** **[2012] VSCA 325** the Court of Appeal considered the relevance of harm minimization in decisions under the *Liquor Control Reform Act 1998* (Vic) as to the permitted trading hours of a licensed premises under the Act. Section 4(2) of the Act required that every discretion under the Act must give due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol. The Court decided that harm minimisation is a fundamental principle of the Act and the primary regulatory object of the Act and therefore the primary regulatory consideration in liquor licensing decisions. However, harm minimisation was not the only relevant consideration as the Act included other express objects including the development of a diversity of licensed facilities reflecting community expectations. Chief Justice Warren and Justice Osborn commented that harm minimisation is directed to the practical reduction of harm resulting from the consequences of alcohol and other substance misuse but it was not a synonym for prohibition; rather it is concerned with regulating the supply of alcohol to ensure, so far as practicable, net community benefit.

The Court also considered what evidence might be relevant to the decision maker in an application to reduce trading hours of a licensed premises. The Court decided that evidence of the nature of the local context within which a licensed premises operated was relevant as was the general connection between the conditions of supply of alcohol and social harm falling to be considered in that context. It was not necessary for the decision maker to determine whether the operation of the premises with extended trading hours is a direct cause of the harm to be minimised. It was sufficient for it to be relevant to show that it demonstrated that the aim of harm minimisation would not be well served by refusing to reduce the trading hours. By contrast if reliance is placed on specific incidents concerning the operation of the licensed premises it was necessary to establish a causal connection between the harm complained of and the operation of the premises.

In ***Aitken v State of Victoria*** **[2013] VSCA 28**, the parents of eight children at Victorian state primary schools brought proceedings in VCAT alleging that the provision of special religious instruction in the schools constituted direct and ongoing discrimination, contrary to the *Equal Opportunity Act 1995* (Vic) and the *Equal Opportunity Act 2010* (Vic), in that such instruction singled out their children as not participating and in limiting their access to other instruction during school hours. The policies in place at the time the VCAT proceedings commenced provided that parents could choose to 'opt out' of special religious instruction for their children, which meant that if a parent failed to return a form specifically 'opting out', they were regarded as having consented to a child's participation. Prior to the hearing of this appeal, the policies were changed to 'opt in' so that the children of parents who did not return the form or who did not consent would not attend special religious instruction. VCAT dismissed the proceedings, after rejecting the arguments regarding discrimination or discriminatory effect.

The Court of Appeal refused leave to appeal concluding that VCAT's findings were open on the evidence and the correctness of its reasons did not justify a grant of leave. The Court was also asked to make a protective costs order limiting the applicants' exposure to $10,000, but since it had refused leave to appeal, the Court concluded it was unnecessary for it to reach the question. The Court stated that, presuming jurisdiction to make such an

order existed, it would have declined to exercise it in favour of a protective order. The Court noted that the policy on religious instruction in state schools had subsequently changed.

In ***Office of the Premier v The Herald & Weekly Times Pty Ltd*** **[2013] VSCA 79**, the Court of Appeal dismissed an appeal from a decision by VCAT, holding that the Office of the Premier ('OTP') had been incorrect at law in refusing the Herald-Sun's parent company's request for access to the electronic diary of the Chief of Staff of then Premier pursuant to the *Freedom of Information Act 1982* (Vic). The Court held that the diary was an 'official document of a Minister' since it was in 'the possession of a Minister' and 'relates to the affairs of an agency'. Accordingly, the case was remitted to the OTP for consideration in accordance with law and any exemptions upon which the OTP might wish to rely.

Statistics

Criminal

Figure 1: Pending criminal appeals/applications in 2011/12 and 2012/13

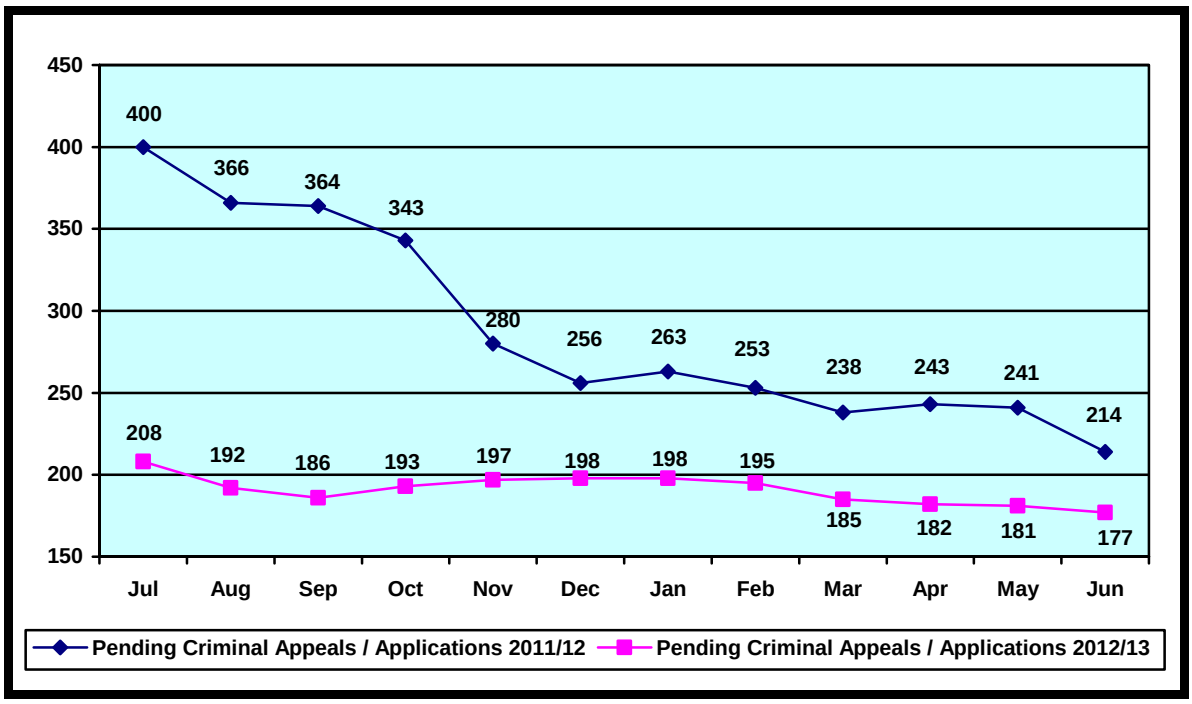


Figure 2: Pending criminal appeals/applications over 12 months old in 2011/12 and 2012/13

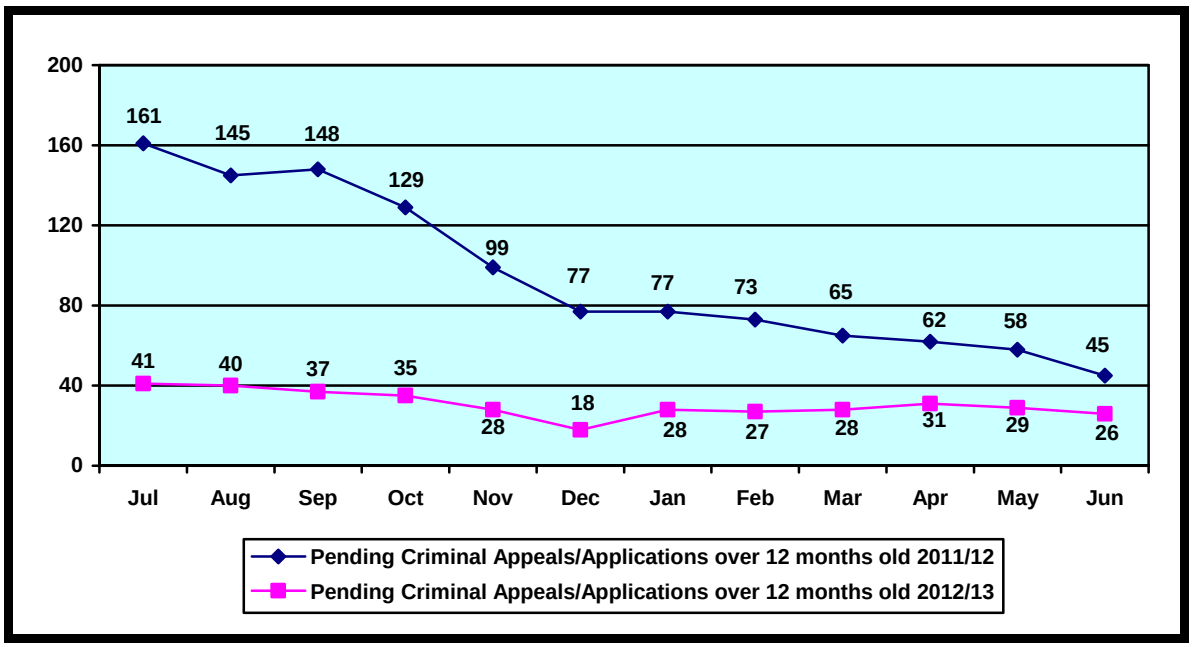


Figure 3: Pending appeals/applications against conviction over 12 months old in 2011/12

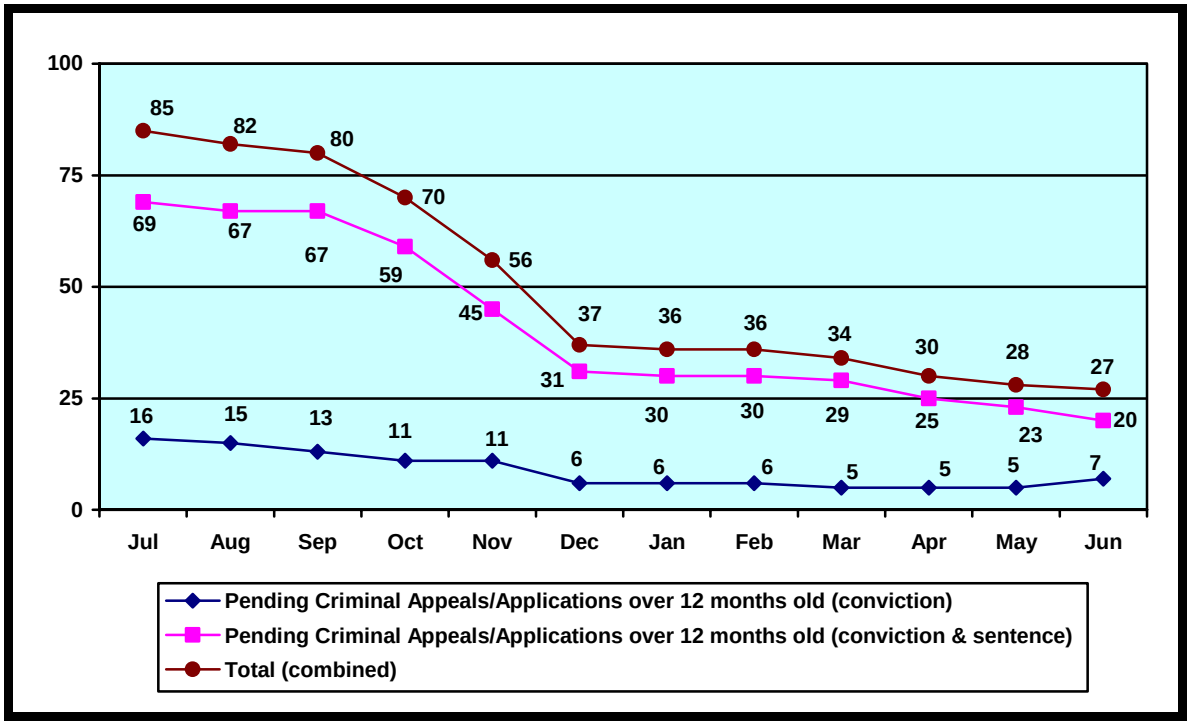


Figure 4: Pending appeals/applications against conviction over 12 months old in 2012/13

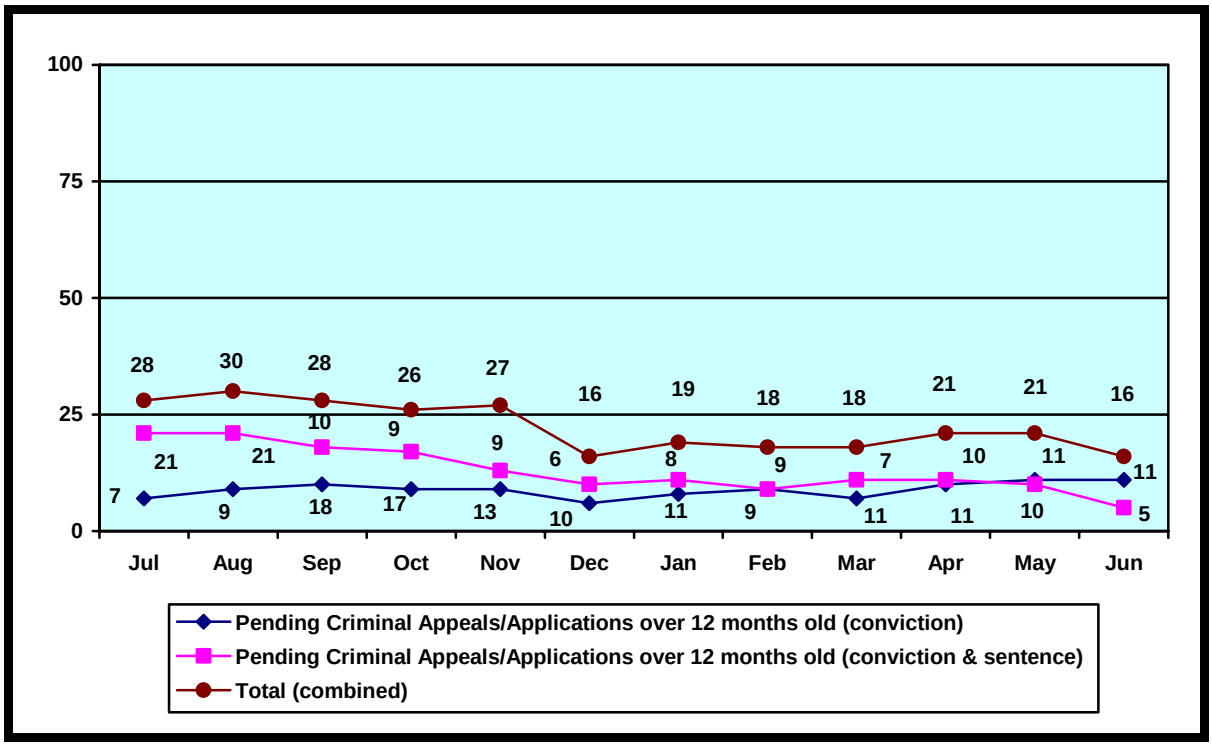


Figure 5: Pending appeals/applications against sentence over 9 months old in 2011/12 and 2012/13

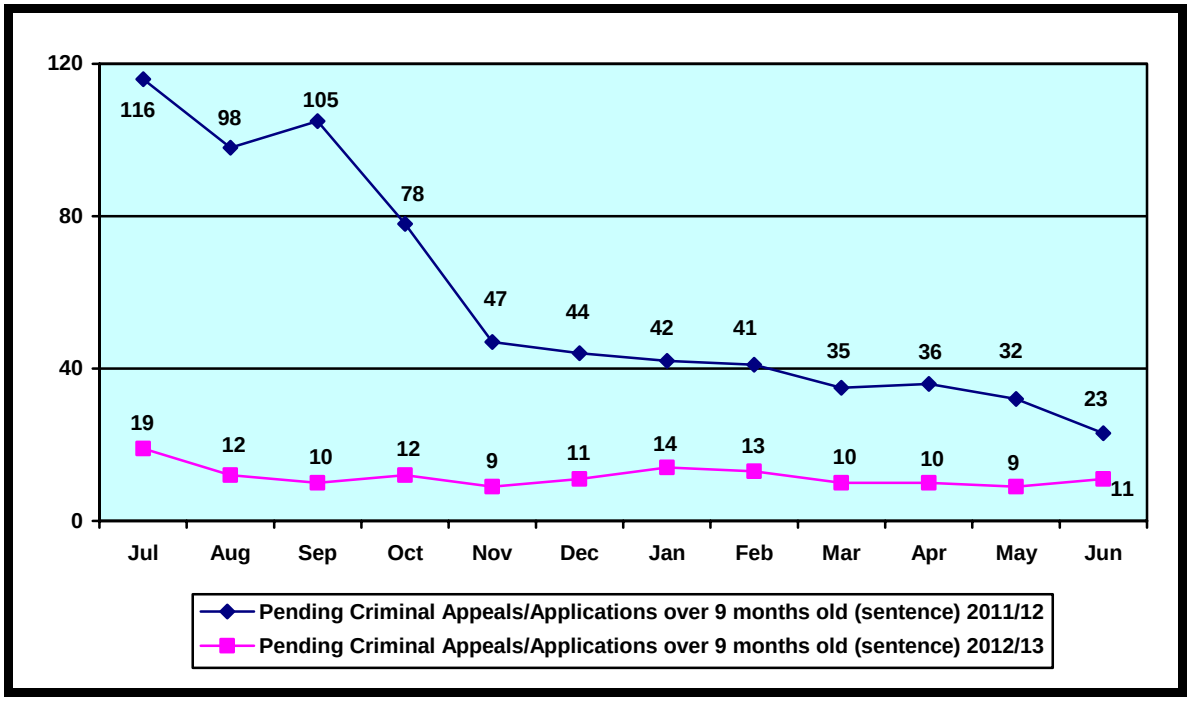


Figure 6: Initiations (criminal) in 2011/12

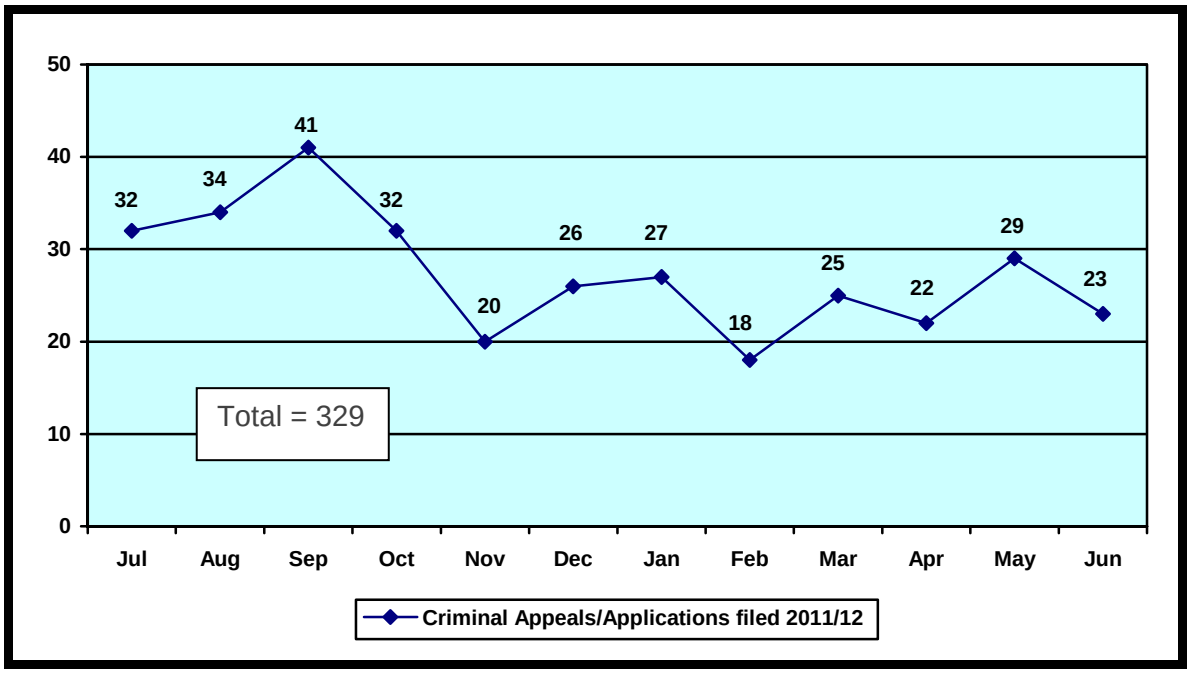


Figure 7: Initiations (criminal) in 2012/13

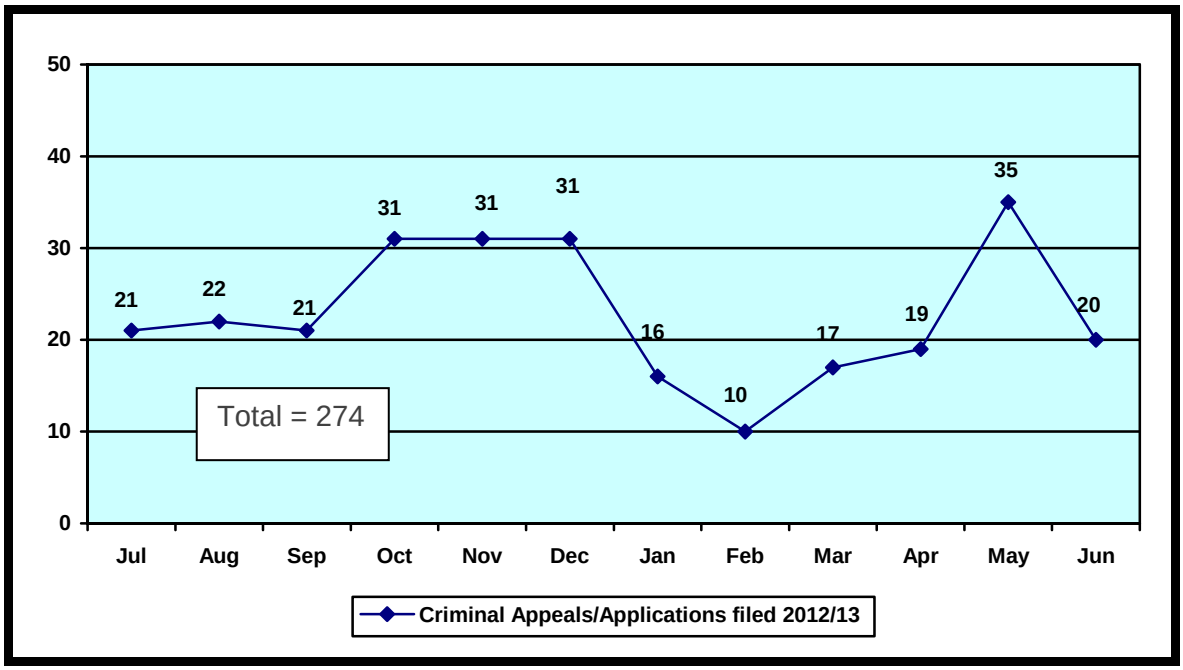


Figure 8: Finalisations (criminal) in 2011/12

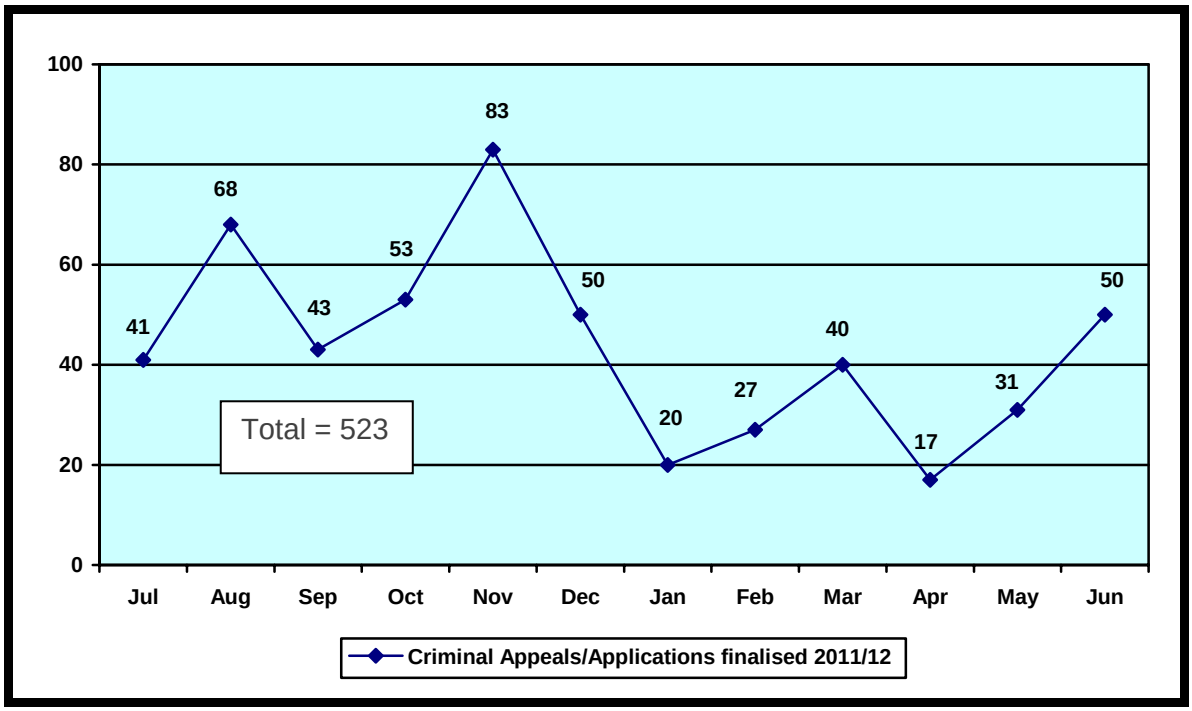


Figure 9: Finalisations (criminal) in 2012/13

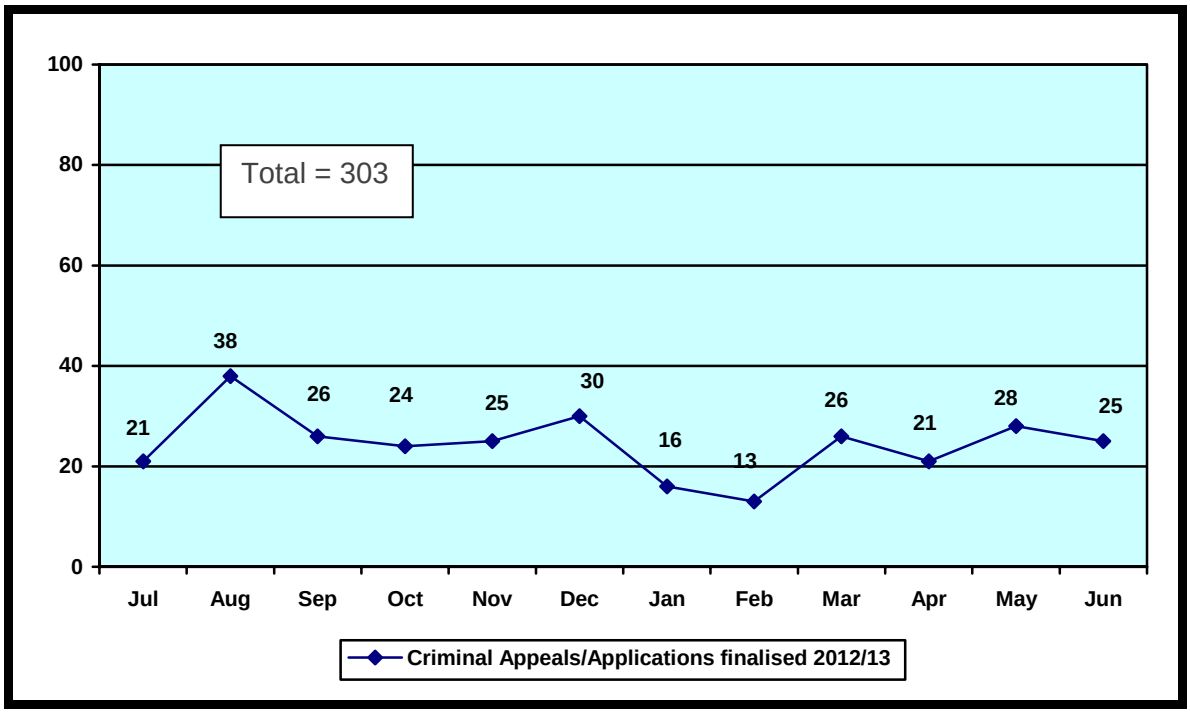


Figure 10: Single judge leave applications (criminal) – success rate in 2011/12

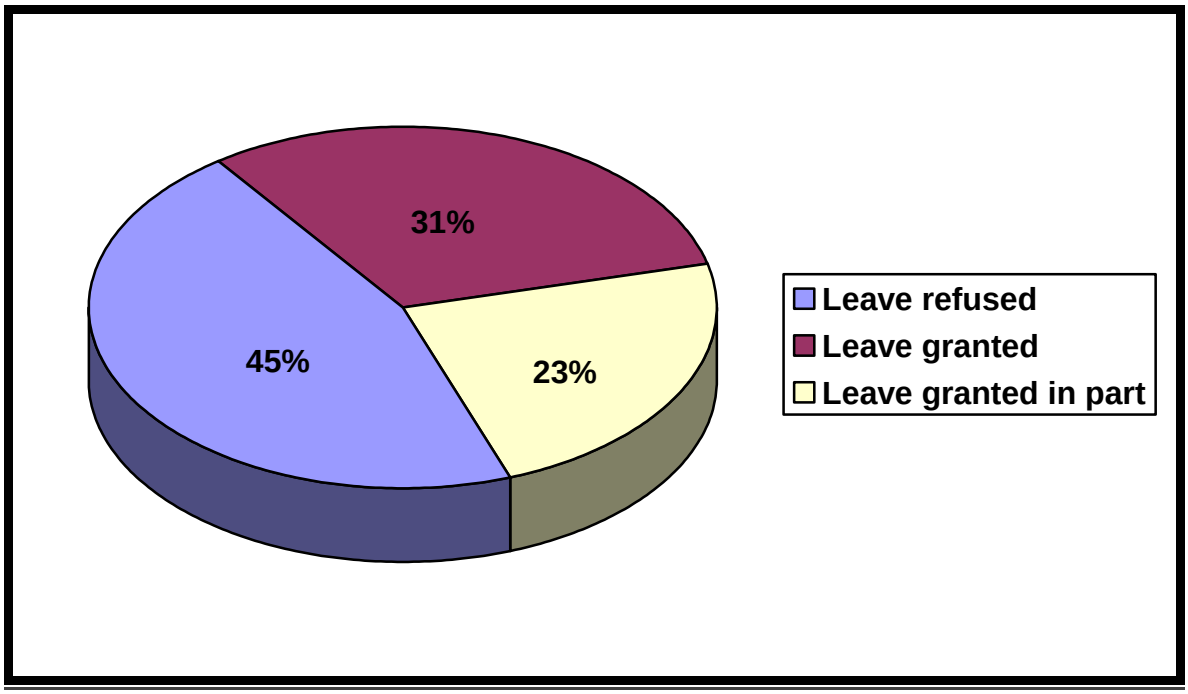


Figure 11: Single judge leave applications (criminal) – success rate in 2012/13

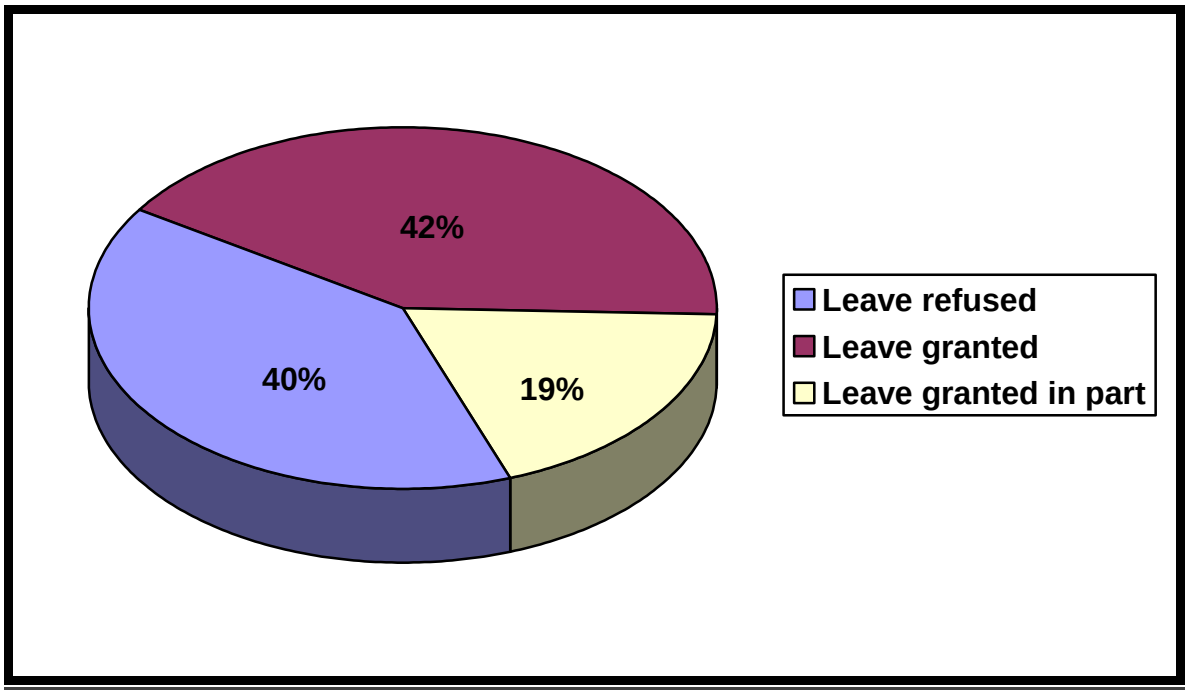


Figure 12: Leave applications (criminal) – percentage of oral hearings in 2011/12

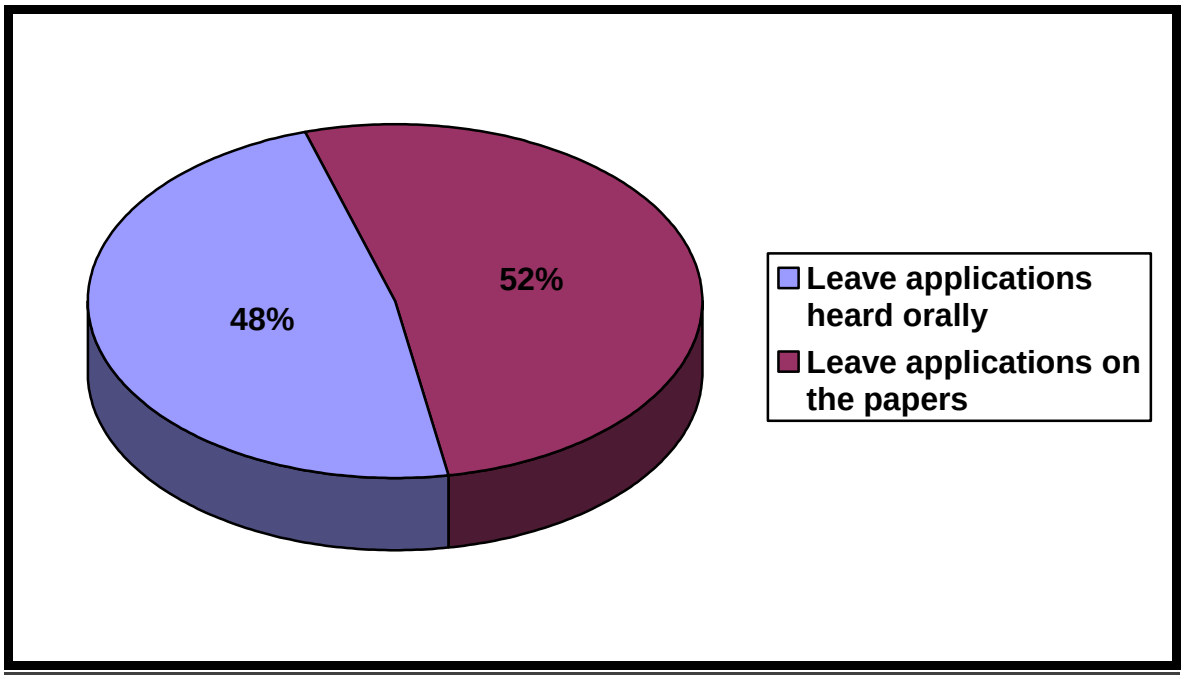


Figure 13: Leave applications (criminal) – percentage of oral hearings in 2012/13

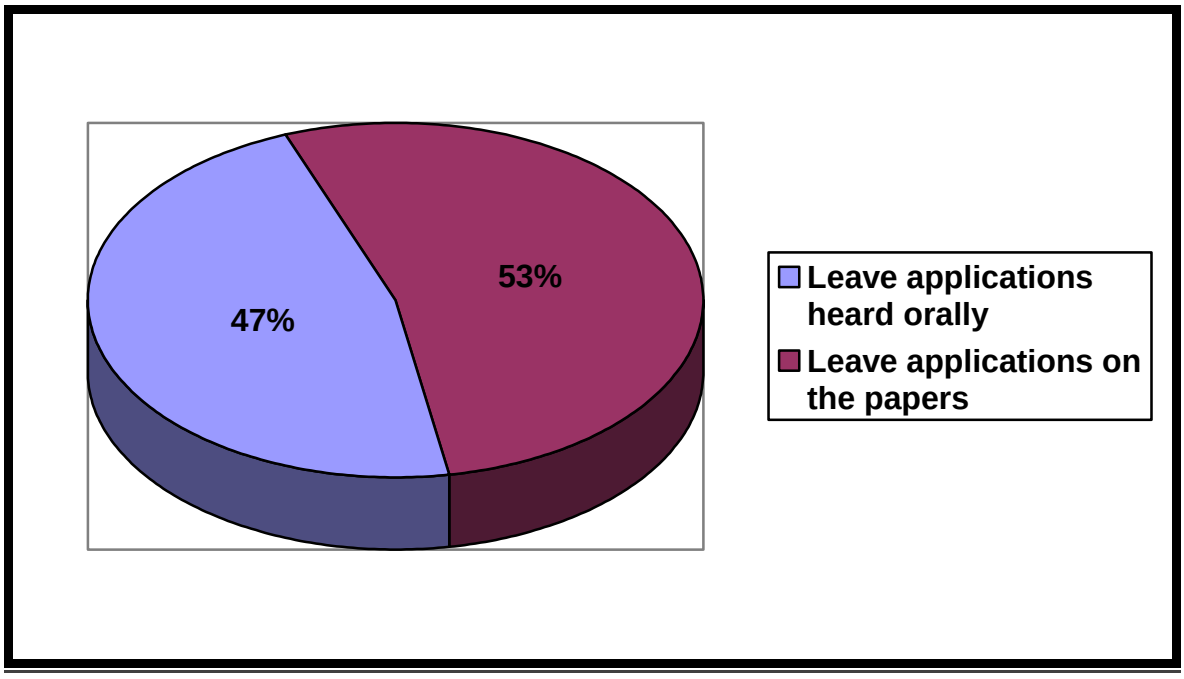


Figure 14: Elections/renewals (criminal) – success rate in 2011/12

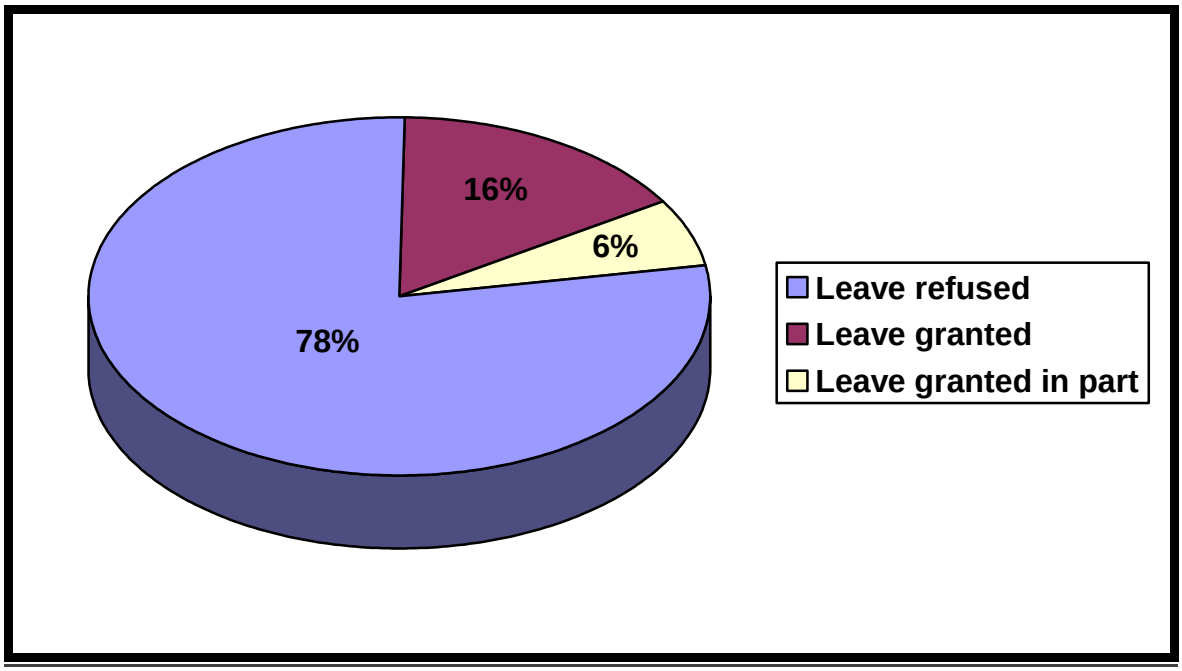


Figure 15: Elections/renewals (criminal) – success rate in 2012/13

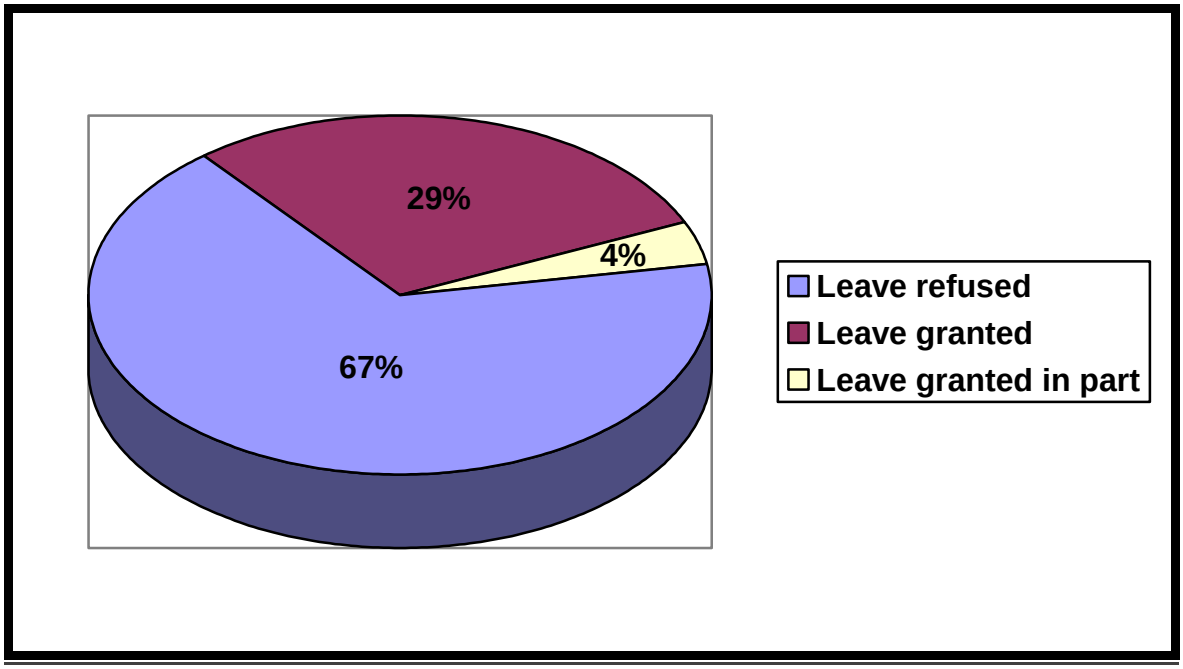


Figure 16: Elections/renewals (criminal) – percentage of oral hearings in 2011/12

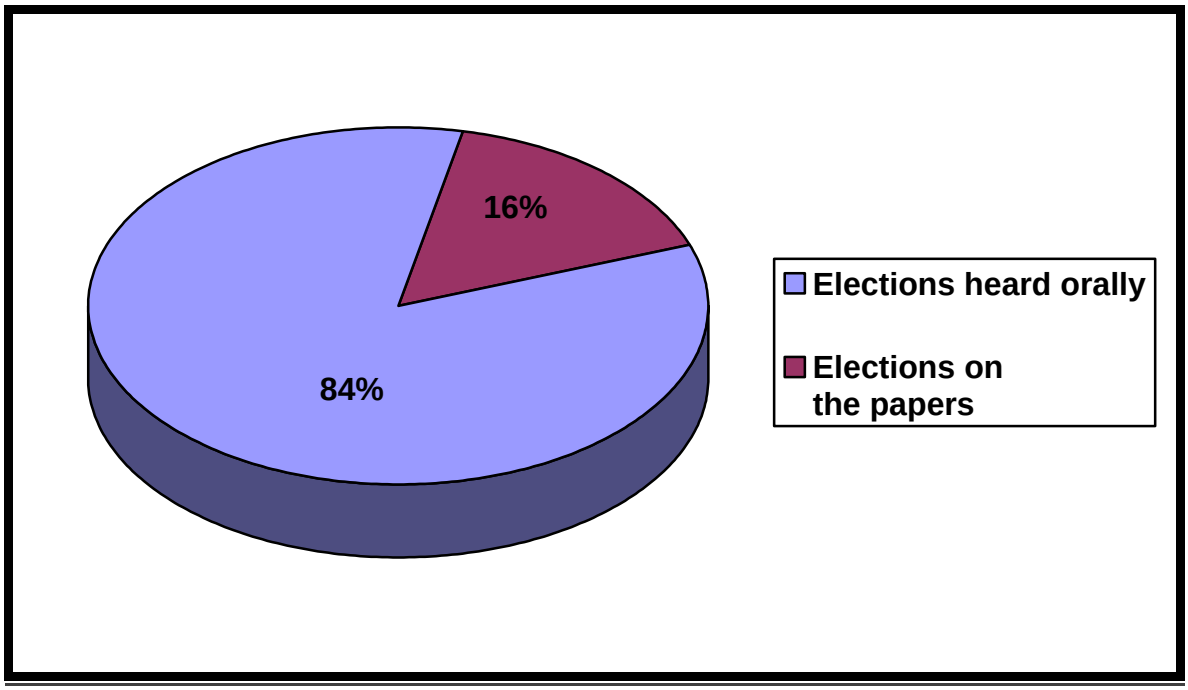


Figure 17: Elections/renewals (criminal) – percentage of oral hearings in 2012/13

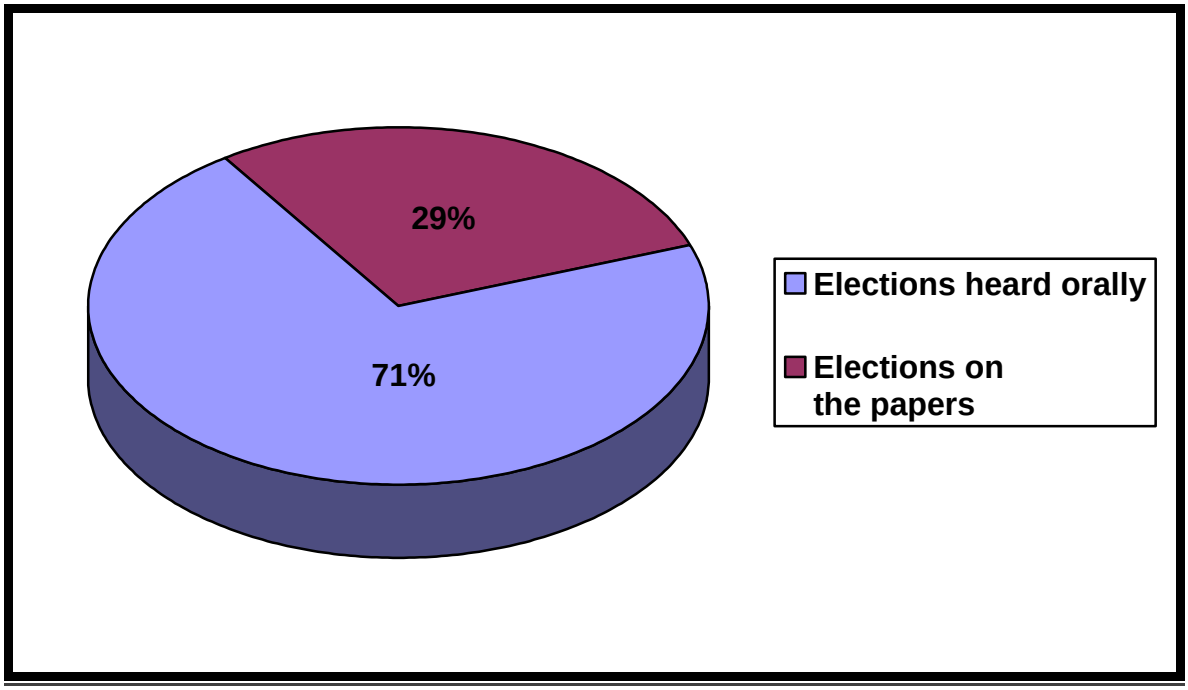


Figure 18: Conviction appeals – success rate of applications finalised in 2011/12

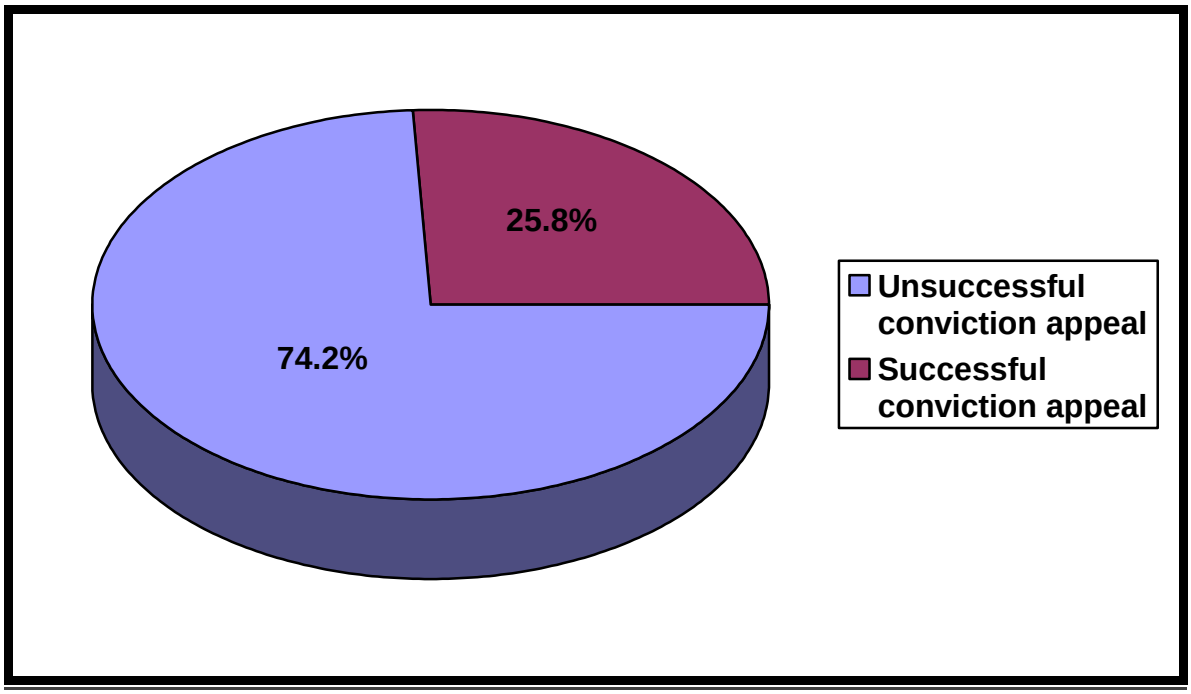


Figure 19: Conviction appeals – success rate of applications finalised in 2012/13

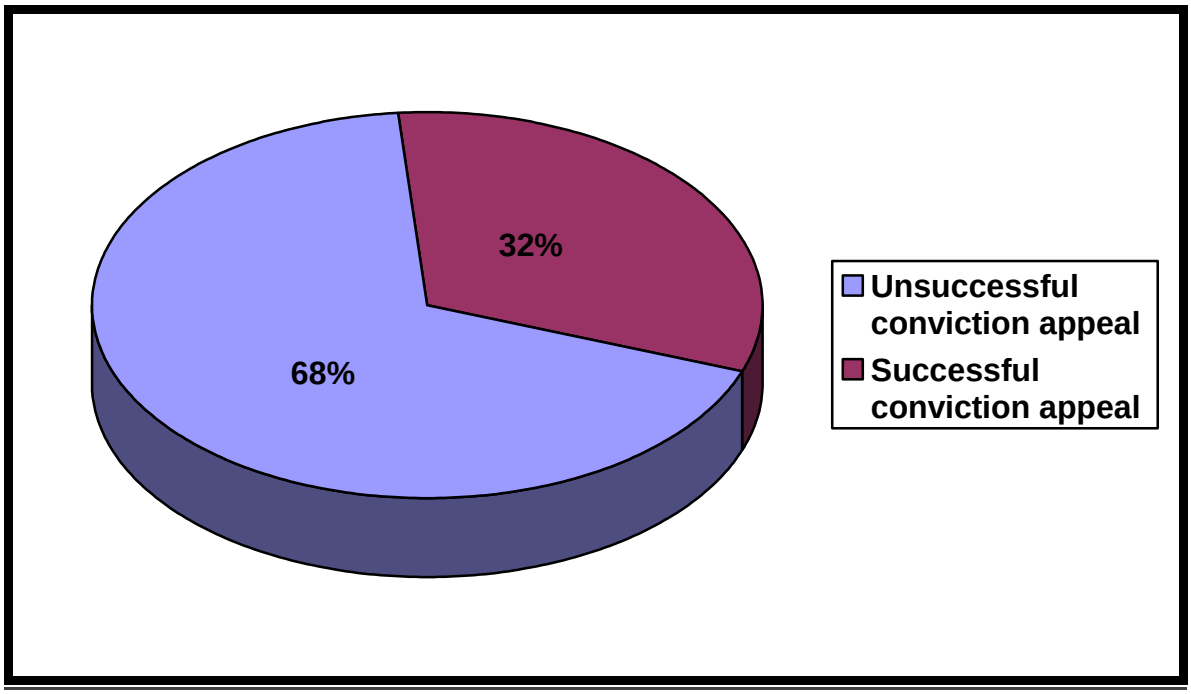


Figure 20: Sentence appeals – success rate of applications finalised in 2011/12

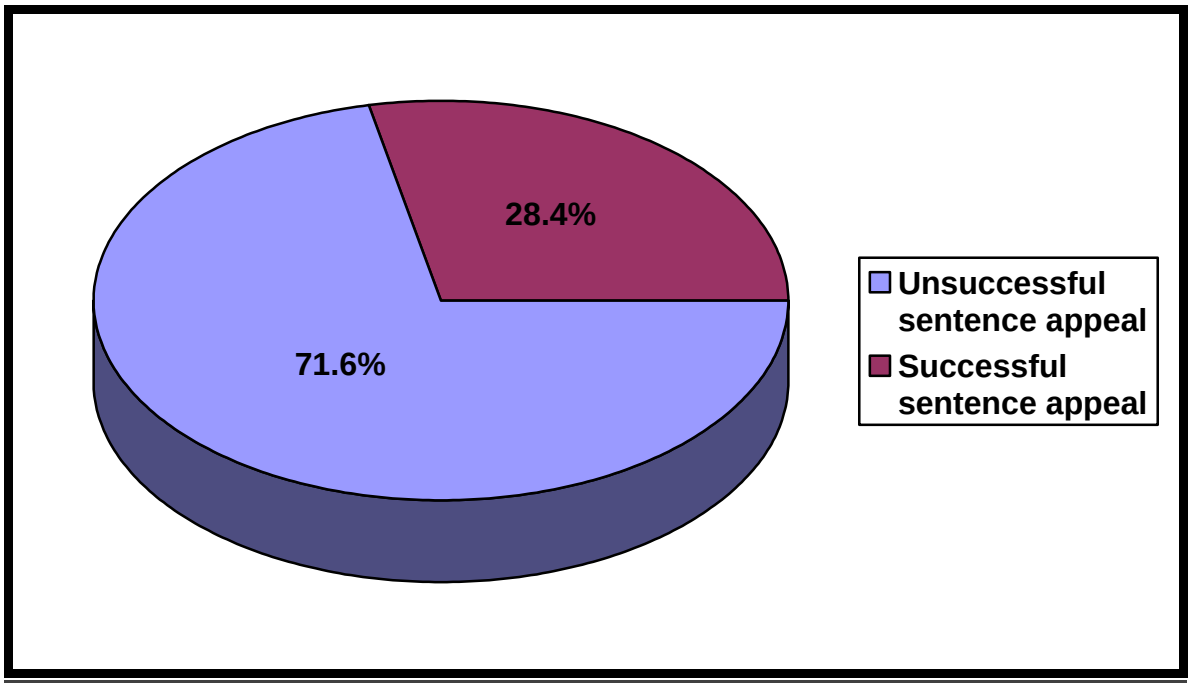


Figure 21: Sentence appeals – success rate of applications finalised in 2012/13

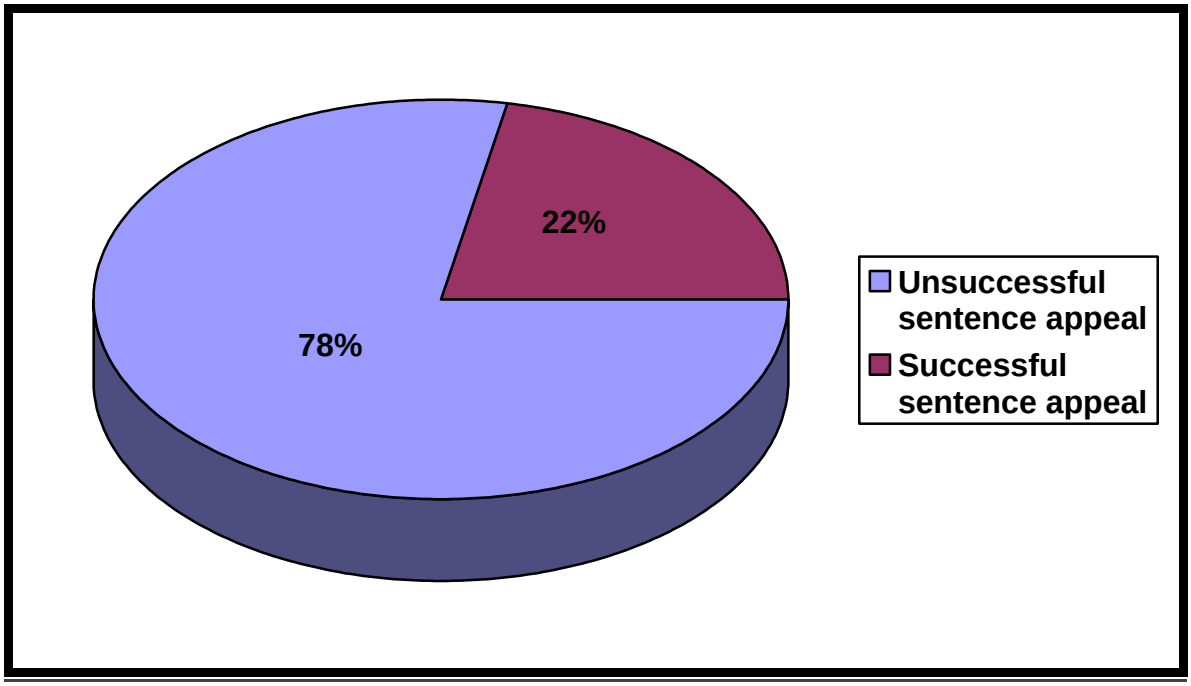


Figure 22: Percentage of criminal initiations that were filed by self-represented litigants in 2011/12

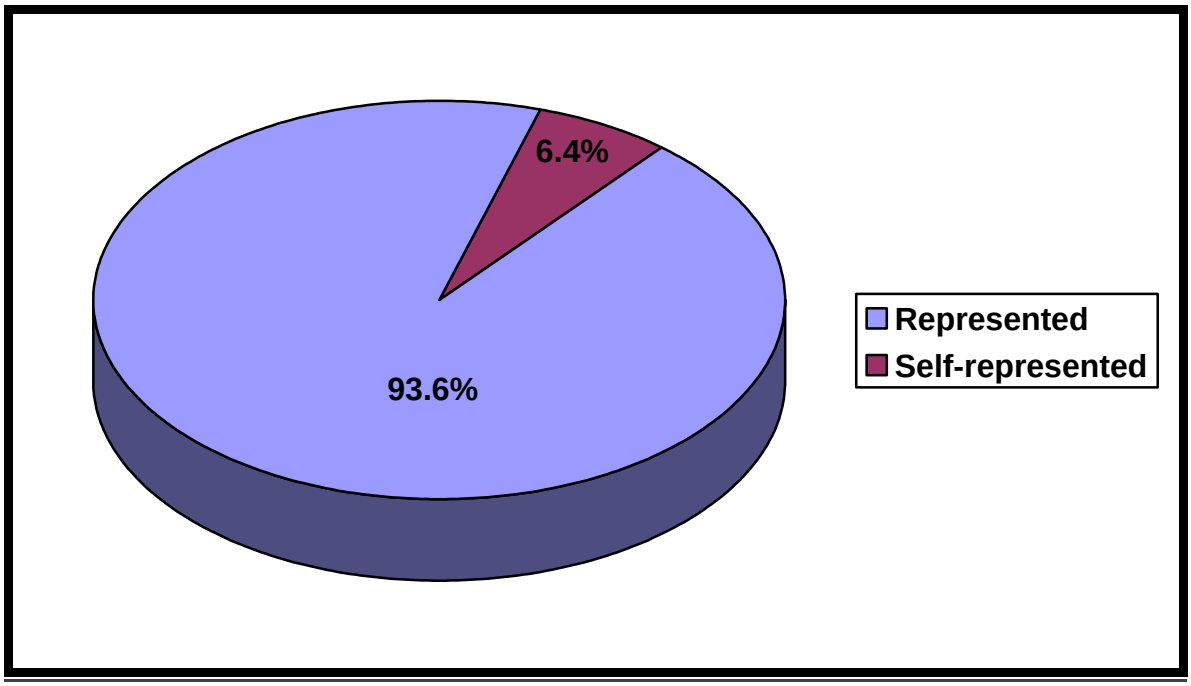
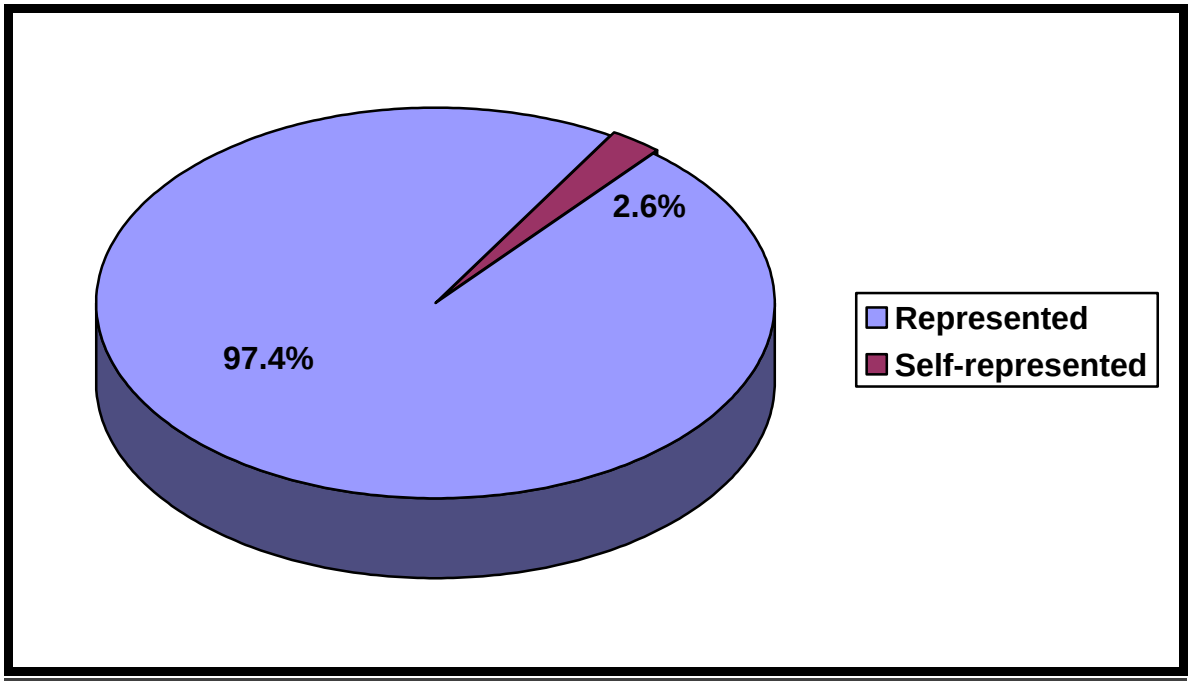


Figure 23: Percentage of criminal initiations that were filed by self-represented litigants in 2012/13



Interlocutory

Figure 24: Interlocutory appeals filed in 2009/10, 2010/11, 2011/12 and 2012/13

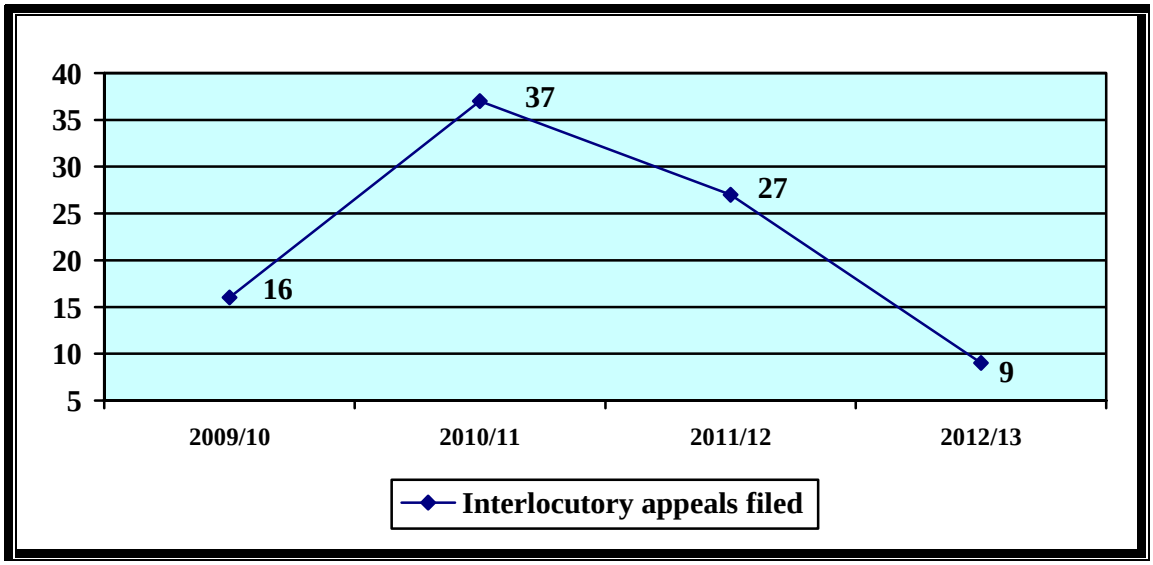


Figure 25: Interlocutory applications (criminal) – success rate of applications filed in 2011/12

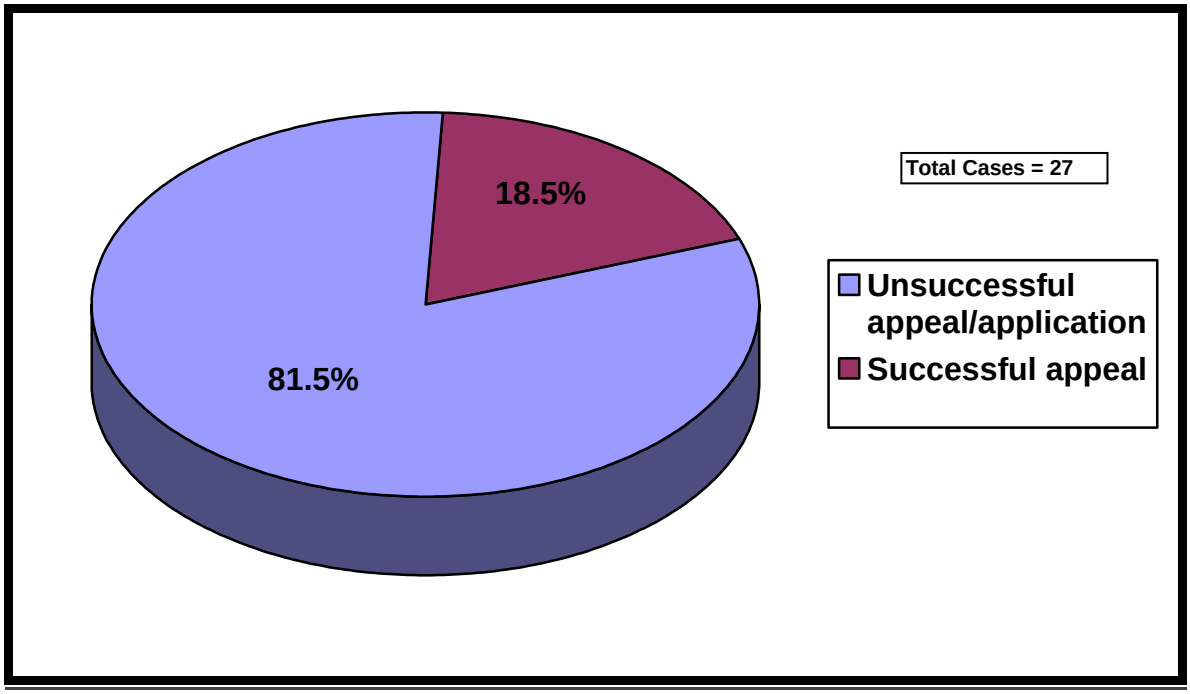
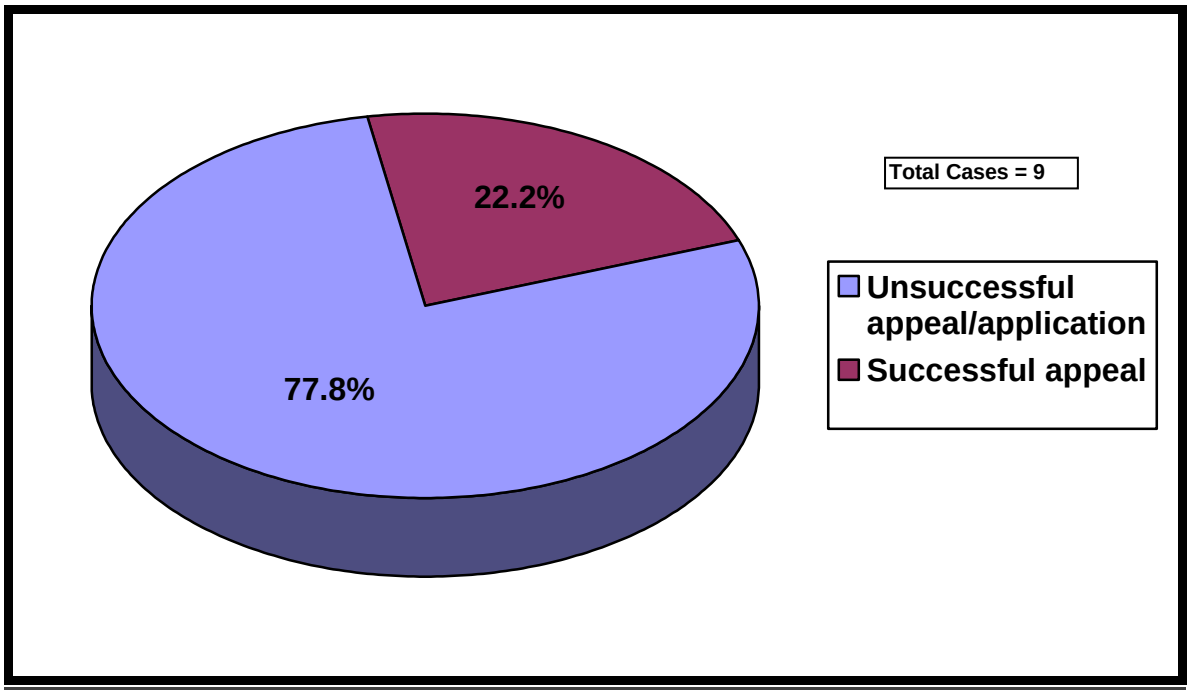


Figure 26: Interlocutory applications (criminal) – success rate of applications filed in 2012/13



Civil

Figure 27: Pending civil appeals/applications in 2011/12 and 2012/13

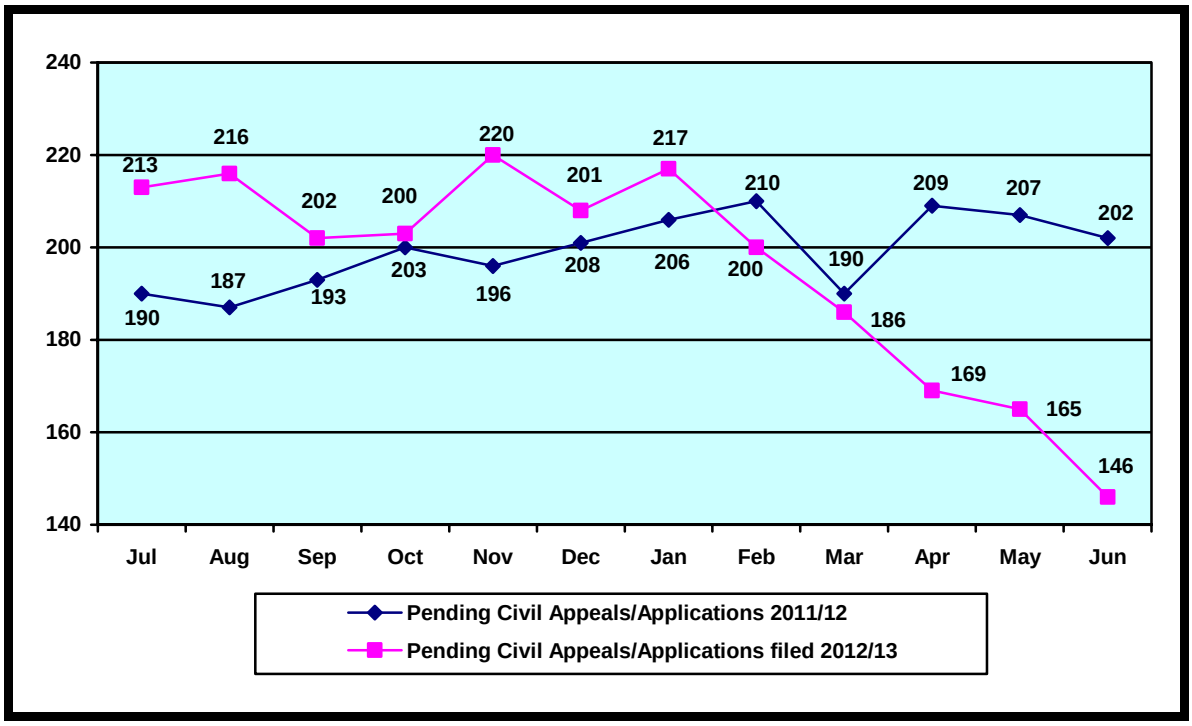


Figure 28: Pending civil appeals/applications over 12 months old in 2011/12 and 2012/13

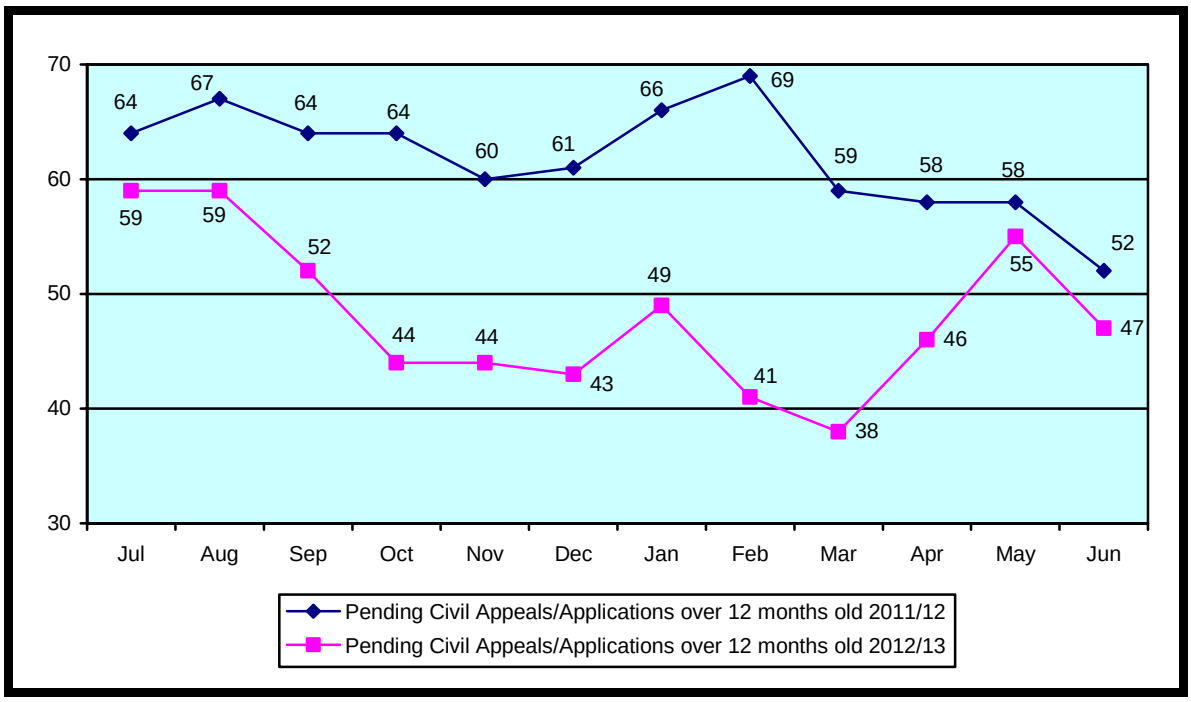


Figure 29: Initiations (civil) in 2011/12

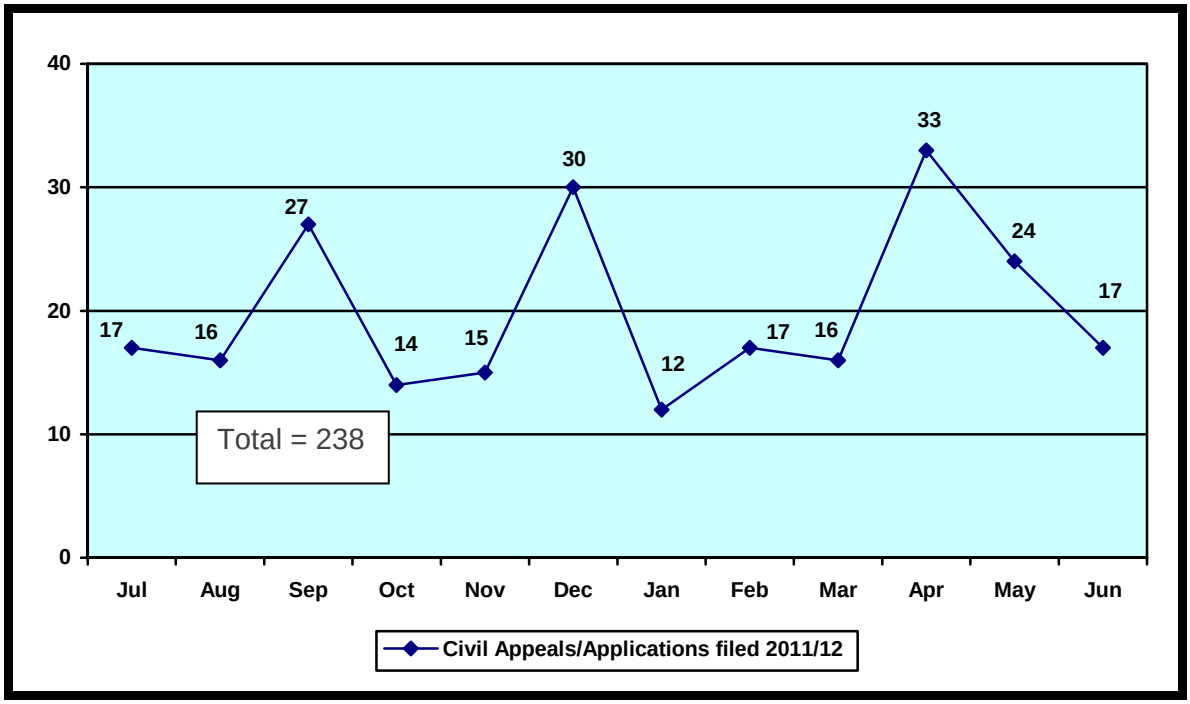


Figure 30: Initiations (civil) in 2012/13

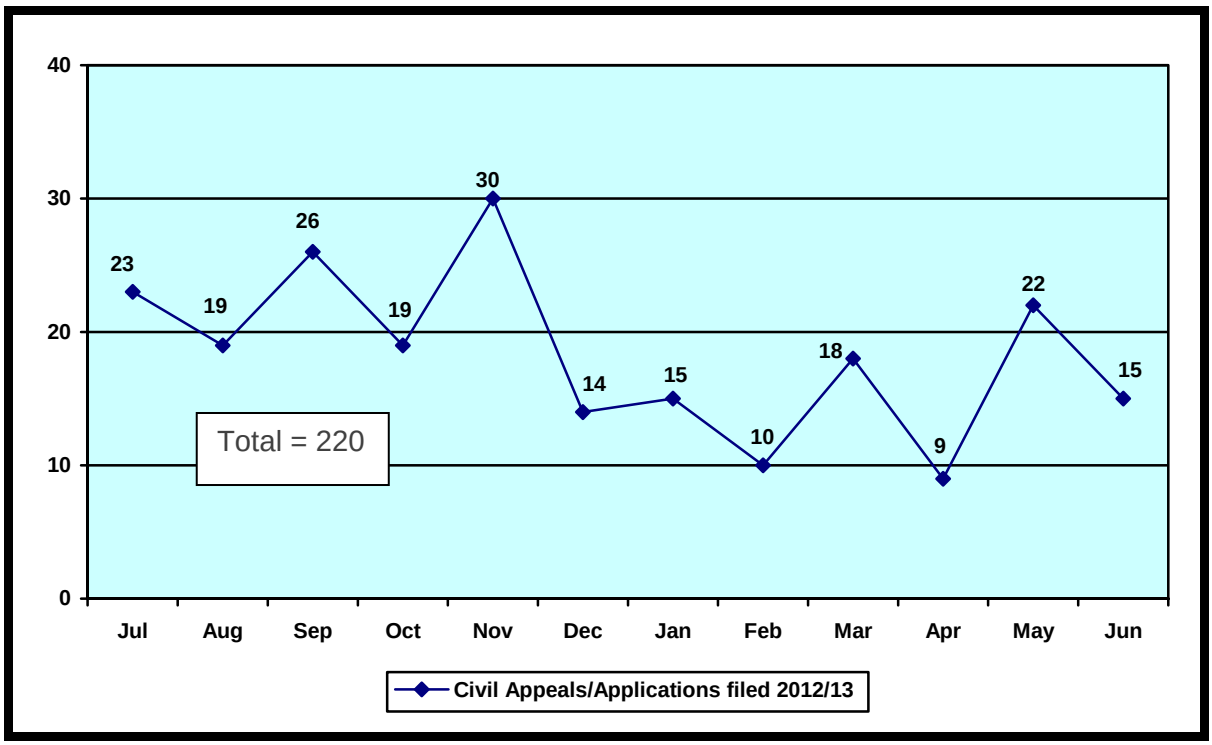


Figure 31: Finalisations (civil) in 2011/12

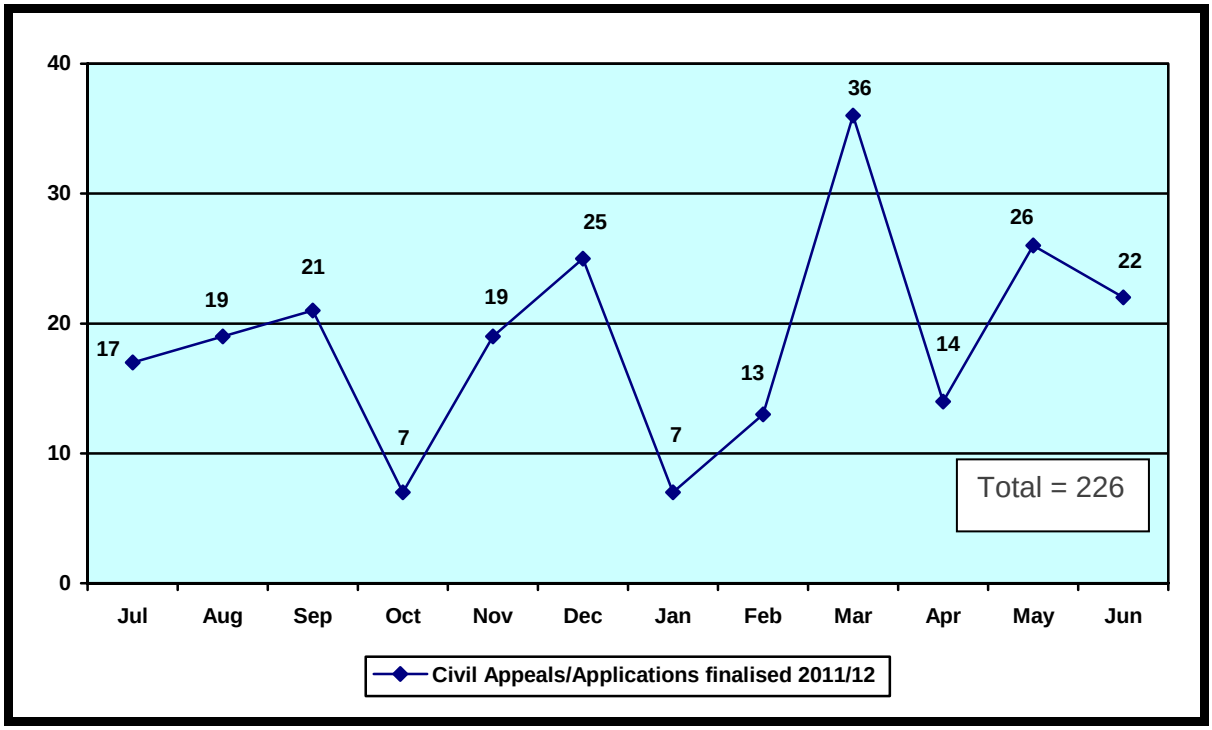


Figure 32: Finalisations (civil) in 2012/13

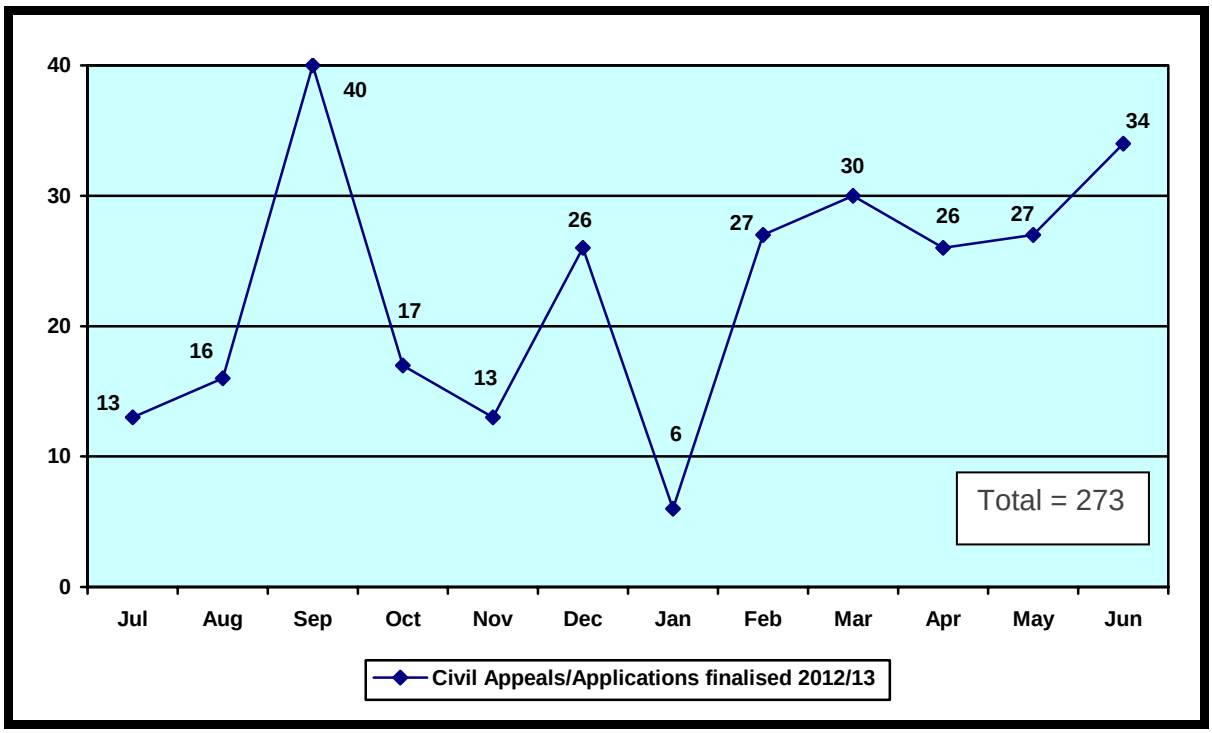


Figure 33: Percentage of civil initiations that were filed by self-represented litigants in 2011/12

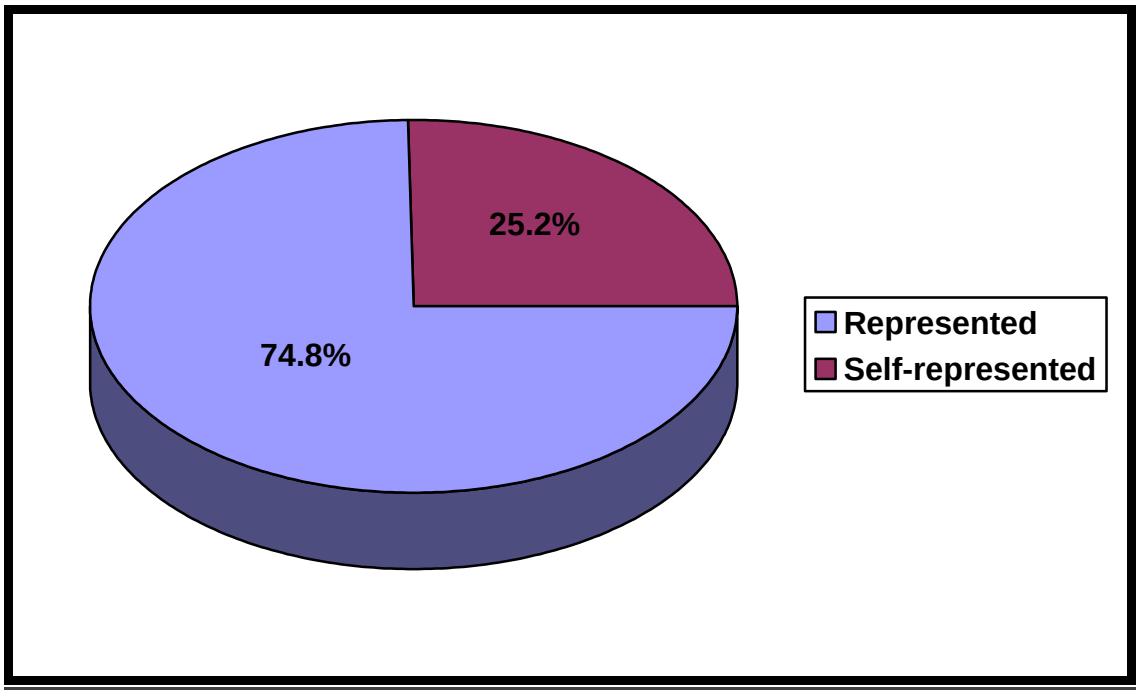


Figure 34: Percentage of civil initiations that were filed by self-represented litigants in 2012/13

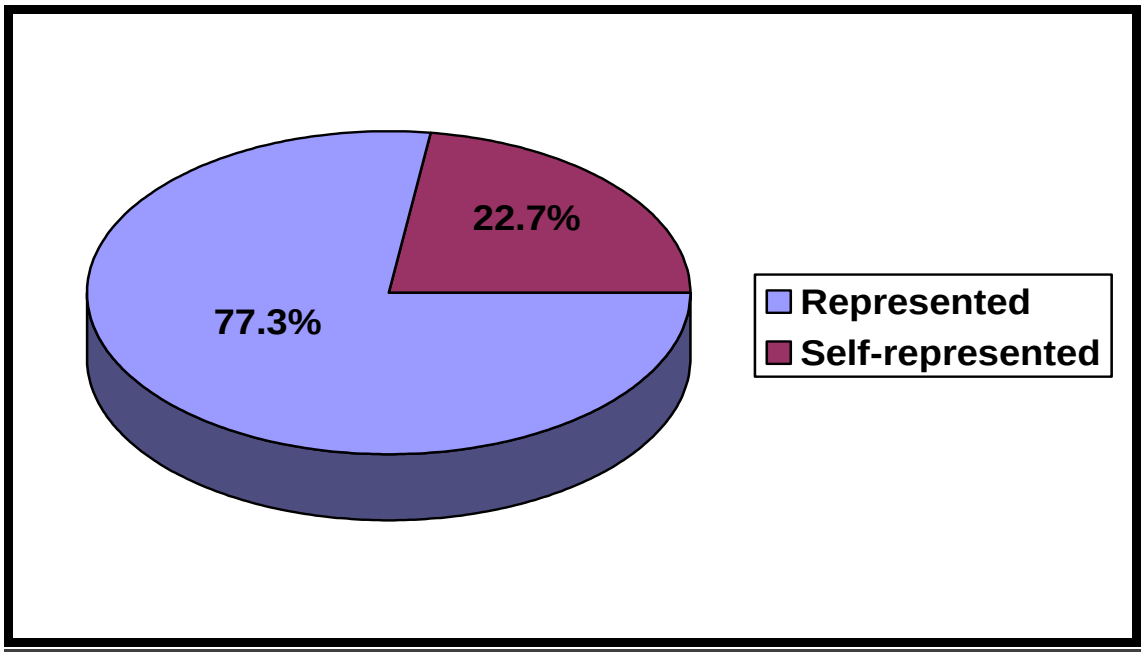
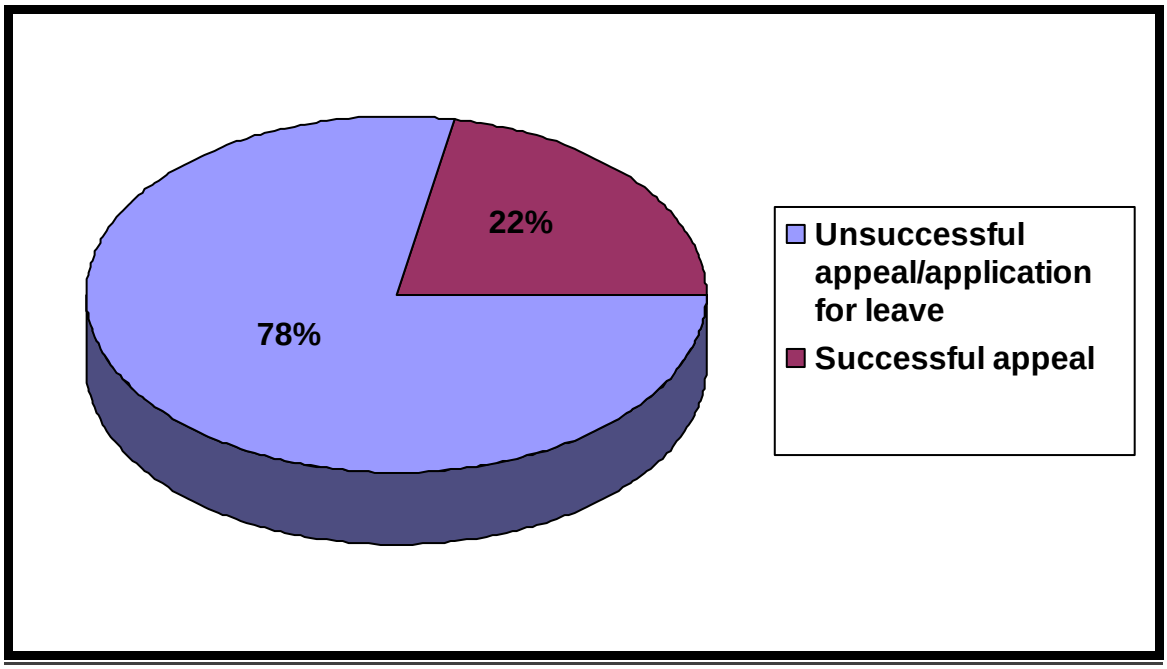
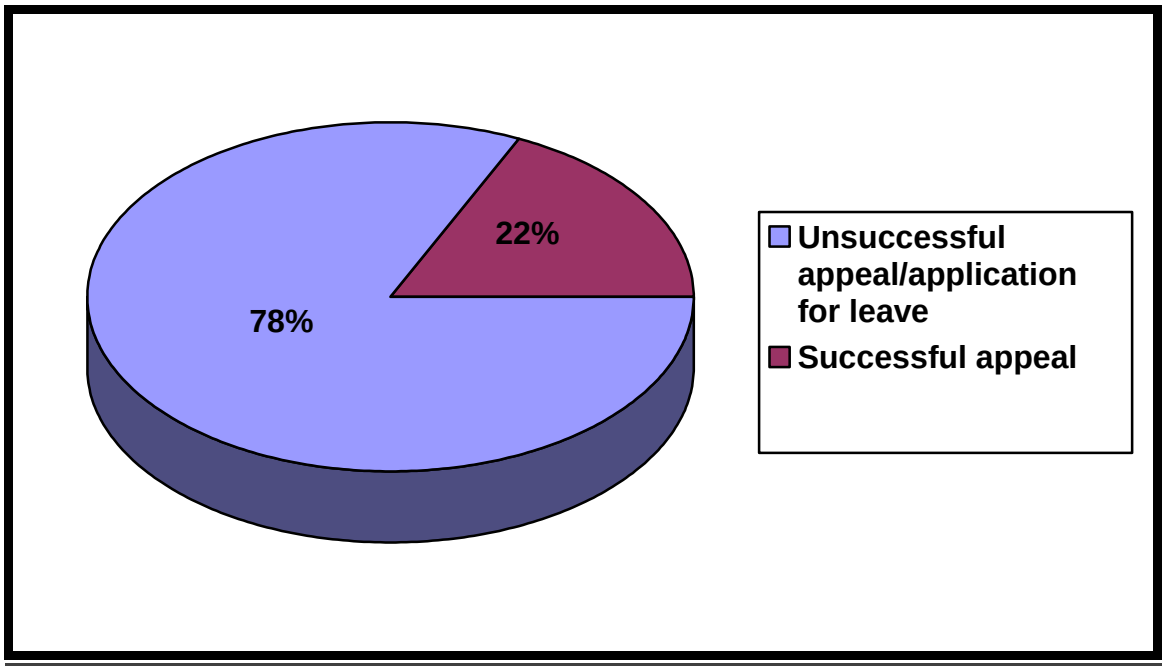


Figure 35: Success rate for civil appeals and applications for leave filed in 2011/12



*Note: The unsuccessful appeals/applications for leave includes those cases that were discontinued, settled, abandoned or withdrawn after filing.

Figure 36: Success rate for civil appeals and applications for leave filed in 2012/13



*Note: The unsuccessful appeals/applications for leave includes those cases that were discontinued, settled, abandoned or withdrawn after filing.