

**Appellate Courts and the
Management of Appeals in Australia**

Brian Opeskin

Conclusions

Part 8

Conclusions

244. Throughout this Report, suggestions have been made for the further consideration of specific questions in relation to each topic. In making these suggestions the Report has drawn on a discussion paper of the Judges' Sub-Committee on the Harmonisation of Appellate Practice and Procedure, written under the auspices of the Council of Chief Justices.¹ It is unnecessary to repeat these detailed suggestions here. Rather, the Report concludes by identifying broader themes that emerge from this background study of appellate courts and case management in Australia.
245. *Need for further research.* The most significant conclusion of this Report is the clear need for a large-scale study of appellate courts in Australia. There are significant gaps, not only in Australian legal literature, but in the framework for legislation and delegated legislation, at least in some jurisdictions. Such a study should examine in detail the interaction between structural, functional, personnel and procedural approaches to the management of appeals in the Australian judicial system. The study should draw on the reviews that are increasingly being conducted by individual Australian courts.² It should also draw on the considerable experience of other countries, some of which are much further advanced than Australia in their understanding and implementation of appellate case management procedures. In the United States, for example, the "crisis of volume" that emerged in the 1960s led to significant reforms in appellate procedure in the United States Courts of Appeals. In the United Kingdom, Lord Woolf's review of access to justice and Sir Jeffrey Bowman's review of the operation of the Court of Appeal similarly provide valuable insights into the operation of major appellate courts in the common law world.³
246. *Statistics.* A significant deficiency of the current system is the paucity of statistical information on which sound judicial reforms can be based.

It is true that there has been a significant improvement in the collection and dissemination of judicial statistics in Australia in recent years. The publication of statistics on the workload of appellate courts in annual reports and reviews is an encouraging development. Moreover, the range of institutions with an interest in analysing the work of Australian courts is also expanding—as reflected in the work of the Council of Chief Justices, the AIJA, the Australian Law Reform Commission, the Justice Research Centre (NSW) and the Socio-legal Research Centre (Qld). However, there are still many shortfalls in the collection and dissemination of judicial data. These include important issues on which there are little or no public data; or the available data are too highly aggregated; or the data are not directly comparable because of differences of definition or sample period. For example, as small a matter as whether court data are collected on a calendar year or financial year basis can make a large difference to the ability to aggregate data across Australian courts. As discussed further below, there is a very real need for co-ordination between jurisdictions in the scope and content of statistics collected.

247. In 1993 the Council of Australian Governments established a Review of Commonwealth–State Service Provision to develop data on the performance of government agencies. Under the auspices of that Review, the Court Administration Working Group has been working with the Australian Bureau of Statistics to improve the usefulness and coverage of court performance indicators at a national level. It remains the case, however, that the Working Group is years away from developing court performance indicators to cover Australian courts comprehensively.⁴ Efforts should be made to expedite the work currently being undertaken.
248. The precise specification of the types of statistics that could usefully be kept and published in relation to appeals is a matter requiring further investigation. The list on the following page provides an indication of the distance that must still be traveled by most Australian courts in providing a meaningful picture of their management of appeals.
249. *Harmonisation.* There is also a need for further consideration of the harmonisation of many aspects of appellate procedure in Australia. The desirability of greater coordination is manifest in two ways. The role of the High Court as a general appellate court from federal, state and territory courts—a role not shared, for example, by the United States Supreme Court—heightens the importance of harmonising appellate procedures across jurisdictions if maximum benefit is to be obtained at the highest level. Second, the nationwide extension of a lawyer's right to practice under the mutual recognition laws exposes the difficulties presented by the myriad of unimportant variations in appellate procedures throughout Australia. This Report identifies many examples of situations in which small variations in rules of appellate procedure appear to be justified by nothing more compelling than the accidents of history. For example, the difference between the time allowed to file an appeal in a criminal matter and a civil matter in the Queensland Court of Appeal (one month versus 28 days) seems as arbitrary as the difference between the time allowed to file a criminal appeal across Australian jurisdictions (14, 21, 28 days, or one month). While the possibilities of harmonisation may benefit from further research, some issues are ripe for immediate attention through existing institutions, such as the Council of Chief Justices and other extant Committees.
250. *Level of Regulation.* A further conclusion is that attention should be given to the level at which regulation of appellate matters takes place. In relation to any one issue, the jurisdictions differ widely as to whether regulation

occurs at the level of a constitutional provision, an Act, a Rule of Court, a Practice Direction, or merely through the informal practices of a Registrar or other court official. Even within the same jurisdiction, different levels of regulation are sometimes adopted in civil and criminal matters.

251. It is widely accepted that it is necessary to make some laws by means of delegated legislation, of which judge-made Rules of Court are an example. Reasons for this include the scarcity of parliamentary time to deal with the volume and complexity of laws; the need for flexibility and responsiveness in areas of rapid change; and the undesirability of having primary legislation cluttered with excessive detail.⁵ In the case of Rules of Court, the comparative expertise of judges in formulating rules governing court practice and procedure is also a factor. Primary legislation, made by elected representatives in Parliament, and Rules of Court, made by judges in committee, differ significantly in the opportunities they afford for transparent and accountable law making. The passage of a Bill through Parliament is an inherently public and democratic process that permits and promotes public debate of laws that affect individuals. By contrast, Rules of Court are subject to more limited scrutiny and provide a lesser opportunity for consultation and debate.
252. In 1992 the Administrative Review Council (ARC) conducted an extensive inquiry into rule making by Commonwealth agencies and recommended that the following matters should be implemented only through Acts of Parliament:⁶
- significant questions of policy including new policy or fundamental changes to existing policy;
 - rules which have a significant impact on individual rights and liberties;
 - procedural matters that go to the essence of the legislative scheme;
 - provisions creating offences which impose significant criminal penalties;
 - administrative penalties for regulatory offences;
 - provisions imposing taxes;
 - significant fees and charges (more than \$1000); and
 - amendments to Acts of Parliament.

The recommendations of the ARC impose no legal requirement but nonetheless provide a desirable benchmark for approaching the task of dividing subject matter between primary and delegated legislation. The first three listed items have particular relevance to the implementation of appellate case management in Australia.

253. ***Role of Discretion.*** Closely related to the previous point is the role of discretion in managing appeals. Judicial discretion is relevant to virtually every stage of the appeals process, including extensions of time to appeal, expediting hearing, dispensing with oral argument, the treatment of litigants in person, and nearly all aspects of judgment writing. Court registrars and other court officials also exercise broad discretions. The reasons for the heavy reliance on discretion are not difficult to identify. They include the difficulty of fashioning rules to regulate the wide variety of circumstances that arise in the course of appellate litigation, as well as the importance of flexibility in delivering justice in individual cases. As Kenneth Davis observed in his celebrated study of discretionary justice in the United States in the 1960s:

No legal system in world history has been without significant discretionary power. None can be. Discretion is indispensable for individualized justice, for creative justice, for new programs in which no one yet knows how to formulate rules, and for old programs in which some aspects cannot be reduced to rules.⁷

254. In the present context, discretions come in various forms. Some are closely confined by legislation or rules of court, so that the preconditions for the exercise of the discretion and the factors relevant to its exercise are clearly laid down. Other discretions are conferred by primary or delegated legislation, but the factors relevant to their exercise are left completely at large. An example of this is the Rules of Court providing for the expedition of appeals “in appropriate circumstances”—it is entirely for the judge to decide what circumstances are appropriate and whether they have been fulfilled in the instant case. Still other discretions are regularly exercised by appellate courts but have no legislative foundation other than the general jurisdiction conferred on all superior courts to do all things necessary for the administration of justice.⁸ Examples of this include the degree of assistance rendered to a litigant in person by an appellate judge, or a judge’s instruction to counsel to bring his or her argument to a close.
255. While discretion is an indispensable component of appellate case management, it also poses a risk of arbitrariness. The broader the discretion the greater the risk. It is for this reason that Davis advocated that unnecessary discretionary power should be dramatically cut back and that discretionary power that is found to be necessary should be “properly confined, structured, and checked”.⁹

256. The three suggested qualifications provoke some final reflections on managing appeals in Australia. In Davis' terminology, a discretion is *confined* by keeping it within designated boundaries and fixing its limits. A discretion is *structured* by mechanisms that seek to clarify, regularise and explain the exercise of the discretion—such as having open plans and policy statements, open reasons and clear precedents. A discretion is *checked* when there are adequate mechanisms for formal or informal review as a protection against arbitrariness. These considerations should prompt us to consider whether, in respect of each of the issues discussed in this Report, procedural discretions relevant to appeals should be more closely defined by legislation or Rules of Court; whether adequate mechanisms exist for structuring these discretions through the provision of reasons in open court and the following of clear and open precedents; and whether these discretions should be checked through the possibility of review or appeal.

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