Supreme Court of Japan – Survey of Courts of Final Appeal:
Response from Supreme Court of New South Wales

Organisational Composition

The Supreme Court of New South Wales is the superior court of record in the State with "all jurisdiction which may be necessary for the administration of justice" in the State: *Supreme Court Act 1970* (NSW), s 23 ("the *Supreme Court Act*").

The Court consists of 50 judges (including the Chief Justice of New South Wales), three Associate Justices and a variable number of part-time Acting Justices (usually about five in number, with short term appointments).

The Court has two trial divisions (the Common Law Division and the Equity Division) and the Court of Appeal.

The Court of Appeal consists of the Chief Justice, the President of the Court of Appeal and nine judges of appeal (each of whom holds a commission as a Justice of the Supreme Court). In addition, the Chief Judge of each of the trial divisions is a member of the Court and there are presently two Acting Judges of Appeal. The Court of Appeal is the final court of appeal within the State, having both appellate and supervisory jurisdiction in respect of all other courts in the State system. Appeals from the Court of Appeal can be taken to the High Court of Australia, in matters of public or general importance and with leave of that Court.

Appeals in criminal matters go to the Court of Criminal Appeal which is established under its own Act of Parliament, but consists of all the justices of the Supreme Court.

The Court of Appeal sits in panels, generally constituted by three judges of appeal, the most senior judge on the panel presiding: s 43(1). On occasion a judge from a trial division will be commissioned as an acting Judge of Appeal.

On infrequent occasions, a panel will consist of five judges. Such panels are convened where there is a thought to be a conflict between two earlier decisions of the Court or where a party seeks to challenge a legal principle laid down in an earlier decision of the Court of Appeal: see, eg, *Wilson v State Rail Authority of New South Wales* [2010] NSWCA 198; *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* [2010] NSWCA 146.

The Court may be constituted by two judges where the appeal relates solely to the amount of compensation for personal injury or death, or is a challenge to an interlocutory judgement of a lower court: *Supreme Court Act*, s 46A. To be so constituted, the Chief Justice must be satisfied that no issue of general principle is likely to arise.

Applications for leave to appeal may also be dealt with by two judges (s 46B), although in many cases a single judge of the Court determines that the question of leave should be dealt with at the hearing of the appeal, and not separately.

Various interlocutory procedural steps can be dealt with by a judge of appeal sitting alone: s 46. A single judge may also deliver judgment of the Court: s 45A.

Work of the Court

The Court of Appeal hears applications for leave to appeal and appeals from single judges of the Supreme Court and from other NSW courts and tribunals. Rights of appeal are created solely by statute.

The scope of appellate jurisdiction may be limited in certain cases to questions of law, or be subject to a grant of leave to appeal. For example, leave is usually required in a case involving less than $A100,000. The main provisions creating appellate jurisdiction in the Court of Appeal (and stating when leave to appeal is required) are:

- Appeals from Supreme Court: *Supreme Court Act*, s 101 (general provision, including matters requiring leave in s 101(2)), 101A (criminal contempt, on a question of law), 102 (appeal after Supreme Court jury trial), 103 (appeal from separate decision in Supreme Court).

- Appeals from Land and Environment Court: *Land and Environment Court Act 1979* (NSW), ss 57, 58.

- Appeals from Dust Diseases Tribunal: *Dust Diseases Tribunal Act 1989* (NSW), s 32.

- Appeals from District Court: *District Court Act 1973* (NSW), ss 127, 142N. See also *Supreme Court Act*, s 48(1)(a)(iv).

- Appeals from the Government and Related Employees Appeal Tribunal: *Government and Related Employees Appeal Tribunal Act 1980*, s 54. See also *Supreme Court Act*, s 48(1)(a)(iii).

- Appeals from Workers Compensation Commission constituted by Presidential Member: *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 353.

- Appeals from other Tribunals: If the relevant statute confers a right of appeal to the Supreme Court and if s 48(1)(a)(vii) of the *Supreme Court Act* applies, the appeal is assigned to the Court of Appeal.

The Court of appeal also exercises powers of judicial review of the work of courts and tribunals exercising limited jurisdiction under State law: *Supreme Court Act,* s 69. This jurisdiction is protected from legislative diminution by the federal Constitution: see *Kirk v Industrial Relations Commission of NSW* [2010] HCA 1; 239 CLR 531.

Research Assistance

The Court of Appeal does not have a judicial research system like that of the Supreme Court of Japan. Each Judge of Appeal has a legally qualified tipstaff (usually a recent law graduate) on their personal chambers staff, who will assist the judge in preparation for hearings and judgment production, and may also perform legal research as directed. There is also a Court of Appeal researcher, who undertakes research for the Court at the direction of the President, including maintaining the Court's website. He or she is also available to assist individual judges as needed.

Particulars – Appeal System

Types of appeal

Appeals may be categorised in various ways. Generally speaking, an appeal lies "as of right" only in relation to the final determination of a case and only if the case is sufficiently important to justify an appeal. Thus, appeals from procedural or interlocutory judgments given in the course of a trial proceeding will usually be appellable only by leave. Similarly, there are monetary requirements in respect of most civil matters, the current level entitling a party to an appeal as of right is a final judgment where the dispute involves an amount exceeding $A100,000.

Appeals may be characterised in other ways. Thus, where an appeal is limited in some way to questions of law, the appeal court will not be entitled to revisit factual findings made by the trial court or tribunal. The general form of appeal, however, is an appeal by way of "rehearing": *Supreme Court Act*, s 75A. In such a case, the Court of Appeal is entitled to revisit findings of fact made by the trial court and may also hear evidence itself.

Although on an appeal by way of rehearing the Court may intervene in relation to findings of fact, it will be slow to do so, in circumstances where it considers the trial judge has properly given significant weight to oral testimony, where he or she has observed a witness and the Court of Appeal is restricted to a written transcript.

A further category of appeals involves challenges to discretionary judgments, where there is room for difference of opinion within a range of possible outcomes. (Quantification of damages is an example of such a case.) The Court will only interfere with such a judgment if satisfied that there has been an error of principle in the approach of the trial judge to the exercise.

In the past, appeals from jury trials were treated differently from appeals from a trial by a judge alone. In principle, that is still the case, because juries give no reasons for their conclusions. A judge is required not only to give reasons for his or her conclusions, but also for findings with respect to evidence. In civil jurisdiction, jury trials are now almost unknown in this State except in defamation cases.

Lodging an appeal

The procedural requirements for conducting proceedings in the Court of Appeal are found in Part 51 of the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR") and in the Court of Appeal Practice Note (Practice Note No SC CA 1).

The institution of appeal proceedings usually requires filing and service of a notice of appeal (or a summons). The time limit for doing so is governed by r 51.16, however, the Court "may extend time … at any time": r 51.16(2). There are no specified criteria for the exercise of the discretion to extend time for the institution of an appeal but will require an assessment of the interests of justice in the particular case: see eg, *Gallo v Dawson* (1990) 93 ALR 479. The power to extend time must be read subject to any contrary intention in statutes conferring a right of appeal. (If the statutory right of appeal is conditional on the notice of appeal being lodged within a specified time, that time may not be able to be extended under the present rule: see *Patterson v Public Service Board* [1984] 1 NSWLR 237.) A notice filed after the time specified in UCPR, r 51.16(1) may nevertheless be effective to institute an appeal. However, a respondent may rely on the delay to justify some ameliorating direction, and can apply to have the proceedings dismissed because of failure to comply with the rule.

A notice of appeal is required to identify with precision the grounds of appeal and the material factual findings in contention: see r 51.19 and *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 103 (the Court ordered the appellant to file a complying notice where excessive number of grounds of appeal).

Appeal proceedings are conducted on the basis of evidence adduced in the first instance hearing, unless there has been a successful application to adduce fresh evidence. There are specific provisions prescribing the manner and timing in which the pleadings and evidence are to be assembled in "appeal books" for the purposes of the appeal proceedings: UCPR, rr 51.25–51.30. If a party does not substantially comply with the rules or occasions costs or delay, the Court may impose costs sanctions: see eg, *The Nominal Defendant v Kostic* [2007] NSWCA 14; *Whalen v Kogarah Municipal Council* [2007] NSWCA 5. There is an overriding obligation on the parties to file an Orange Book (the Appeal Book that contains the submissions and chronology): UCPR, r 51.33(1). If any default by another party prevents, or is likely to prevent compliance with r 51.33(1), the appellant must apply promptly for a directions hearing: UCPR, r 51.33(3).

The requirements for written submissions and chronologies are set out in rr 51.34–51.38 and the Court of Appeal Practice Note. The late filing of submissions, particularly by the appellant, may result in delay and require additional directions, hearings or adjournment of proceedings. Failure to comply with the time requirements may constitute a breach of a legal practitioner's duty to the court and may expose the practitioner to a range of sanctions, including orders for costs: see *Civil Procedure Act 2005* (NSW) s 56 and *Lorbergs v State Transit Authority of New South Wales* [1999] NSWCA 59; for disciplinary proceedings, see *Whyte v Brosch* (1998) 45 NSWLR 354.

Objection to competency

A respondent may object to the competency of an appeal pursuant to UCPR, r 51.41(1), by applying to the Court for an order dismissing the appeal as incompetent within 28 days after the notice of appeal is served. If the respondent does not comply with r 51.41(1) and the appeal is nonetheless dismissed as incompetent, the respondent is not entitled to costs of the appeal unless the Court otherwise orders, and the Court may order the respondent to pay the appellant any costs of the appeal proving useless or unnecessary: UCPR, r 51.41(2).

Judges of Appeal also have power pursuant to s 46(1)(b) of the SC Act to dismiss an appeal or other proceedings for want of prosecution.

Checking competency of appeal

The court below is not involved in checking the competency of an appeal to the Court of Appeal in any way. (The Registrar of the court from which the appeal is brought does, however, receive notice of an appeal from a judgment of his or her Court.)

(It used to be common for judges who presided over criminal trials with a jury to provide a written report to the Court of Criminal Appeal. That was not intended to address the competency of the appeal, but to ensure that the appellate court understood the manner in which the criminal trial had proceeded. Because the evidence, and often the argument, is now recorded in all criminal trials and a transcript is available to the Court of Criminal Appeal, such reports are no longer made.)

Stay applications

The general rule is that the filing of an appeal does not operate as a stay of the judgment below, unless the Court of Appeal or court below so directs: UCPR, r 51.44. A respondent, or prospective respondent has no automatic right to a stay of the judgment.

Stay applications are, however, commonplace and the conditions on which a stay may be granted in various types of case are well understood by the legal profession. Stays are often made by consent.

By way of example, where an individual obtains a judgment in a personal injury claim, the defendant (often an insurance company) will usually resist paying the claim in accordance with the order of the trial court where the defendant seeks to appeal. That is usually justified on the basis that the successful plaintiff will be unlikely to retain the money pending the outcome of the appeal. Accordingly, even if the defendant is successful in overturning the judgment of the trial court, recovery of the money paid will, in practical terms, be difficult or impossible. On the other hand, where the judgment is intended to provide money to compensate the plaintiff for his or her inability to earn income, there will obviously be prejudice if payment is delayed, pending determination of the appeal. Depending on the circumstances, it is therefore not uncommon for the defendant to agree to pay part of the judgment but

to seek a stay of the balance. Orders in those terms are frequently made, often by consent.

Legal representation

Legal representation is not mandatory in the Court of Appeal or in civil proceedings generally: UCPR, r 7.1(1). Nevertheless, most parties have legal representation in the Court of Appeal. There is, however, a not insignificant, and frequently troublesome, category of cases involving litigants in person on at least one side of the record. It is inevitable that such cases absorb a disproportionate part of the Court's resources.

Some parties are unable (through lack of financial resources) to obtain legal representation. However, they are usually parties without a strong prospect of success on appeal. Because a successful appellant will usually obtain an order for the other party to pay his or her costs of the appeal, appeals which have reasonable prospects of success are likely to attract assistance from the legal profession on a speculative basis, the lawyers understanding that there will be no recourse against the client if the appeal does not succeed.

Grounds for Appeal

Violation of Constitution

As a superior court of record, the New South Wales Supreme Court has jurisdiction to do all which may be necessary for the administration of justice in New South Wales: *Supreme Court Act* , ss 22, 23.

Australia has a written Federal Constitution; in addition New South Wales (like other States) has its own written constitution. Australian law generally accepts the principle of legislative judicial review: that is, the courts have power to determine whether legislation is valid, in accordance with provisions of the relevant constitution.

The primary source of constraints on legislative power (both Commonwealth and State) is the Commonwealth Constitution. Claims that legislation is invalid almost always arise under one or another provision of the Federal Constitution. For example, the Federal Constitution (s 109) provides that a State law will be invalid to the extent of any inconsistency with a valid Commonwealth law. If a question of inconsistency (or invalidity on any other basis) arises in a particular case, the court hearing the dispute may need to determine the validity of the legislation. That principle is not restricted to the Court of Appeal. Accordingly, the Court has power to deal with appeals that challenge the constitutional validity of legislation: see eg, *International Finance Trust Company Limited v New South Wales Crime Commission* [2008] NSWCA 291.

Where a case requires the interpretation or application of the Federal Constitution (or any other law of the Commonwealth) the court will be exercising federal jurisdiction. For a State court, that jurisdiction cannot be conferred by the State Parliament, but arises under a law of the Commonwealth. Subject to certain limitations, s 39 of the *Judiciary Act 1903* (Cth) confers federal jurisdiction on state courts in all matters that

are within the original, non-exclusive jurisdiction of the High Court, and all matters in which original jurisdiction could be conferred upon the High Court.

Where a constitutional question is being raised in an appeal, notices must be provided to the Attorneys-General pursuant to s 78B of the *Judiciary Act*.

Generally speaking, an appeal is not filed on the ground that the judgment below involves a violation of the Constitution. Although the difference may appear to be more semantic than substantive, the ground will be, for example, that the trial judge erred in upholding the validity of a particular State law. An erroneous judgment may be subject to appeal, but it does not itself contravene the Constitution. (There may be rare cases in which that language would be appropriate where, for example, a trial judge purported to exercise a jurisdiction which was denied under the Constitution.)

Violation of procedure

A procedural error can give rise to an appeal: see eg, *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414; also [2011] HCA 2 (reasonable apprehension of bias); *Jeray v Blue Mountains City Council (No 2)* [2010] NSWCA 367 (denial of procedural fairness). There is no differentiating treatment for appeals brought against decisions of the Common Law or Equity Divisions of the Supreme Court, as opposed to other courts and tribunals.

A significant part of the court's workload involves challenges to procedural rulings, usually by way of interlocutory appeals, brought by leave. Some will be cases where the proceedings have been determined, with the result that the judgment is final, disposing of the case. However, other appeals are brought against procedural rulings taken in the course of the proceedings below, and before final judgment is given. For example, where one party has been refused leave to amend its case, there may be an interlocutory appeal against that procedural judgment. Leave may be granted on the basis that it will be more efficient to determine the proper scope of the trial before it occurs. On the other hand, there may be procedural steps taken in the course of the final hearing which are only challenged because it is asserted that the final judgment miscarried because of the procedural rulings. That to, is quite common. Apart from the question whether the appeal is brought from an interlocutory judgment (thus requiring leave) or a final judgment, the principal difference is that procedural grounds will almost always involve discretionary decisions on the part of the trial judge, with which an appellate court will not interfere unless there has been a clear breach of correct principle. Further, the court is conscious of the fact that challenges to procedural rulings have the capacity to increase costs and delay final disposition of cases: there is, accordingly, a reluctance to interfere. As was said in a leading case in relation to procedural orders, "if a tight rein were not kept upon interference with orders of judges of first instance, the result will be disastrous to the proper administration of justice": *In the Will of Gilbert* (1946) 46 SR (NSW) 318 at 323.

Violation of law

Many appeals allege that there was a "contravention of law", or an erroneous application of the law, in the judgment below. A notice of appeal must identify the

respects in which an error in law is said to have occurred, as well as the findings that should have been made at first instance: UCPR, r 51.18(1)(e) and (2). It should be noted that procedural errors are often described as errors of law.

Appeals from specialist tribunals are frequently limited to errors of law, the purpose being to protect the fact-finding exercising of such a tribunal from review by a court of general jurisdiction. Appeals brought against decisions of the Common Law or Equity Divisions of the Supreme Court, and the District Court in its general civil jurisdiction, are generally by way of rehearing, which permits challenge to the fact-finding and the determination and application of legal principle. In that sense, the right of appeal is broader in respect of the trial divisions than is the case with many specialist tribunals.

Requirement for grave contraventions?

There are various statutory restrictions on rights of appeal. These restrictions may operate by reference to different criteria, but the commonly encountered restrictions relate to the nature of the particular decision, e.g. whether it is a final, interlocutory, by consent or as to costs only, and the amount in issue in the proposed appeal: see *Supreme Court Act*, s 75A and *District Court Act 1973*, s 127(2). Where there is a relevant threshold restriction on the right of appeal, an appellant must comply with r 51.22 of the UCPR. A restriction that appears in several statutes is that the appeal must relate to "a question of law" (as opposed to a question of fact): see eg, *Administration Decisions Tribunal Act 1997*, s 119(1). In some statutes, the right to appeal may be restricted to grounds of "manifest error" on the face of the award and "strong evidence" of error of law: see eg, *Commercial Arbitration Act 1984* (NSW), s 38(5)(b). Thus, the threshold can vary and is dependent on the relevant statute.

Where an appellant seeks to challenge a previous Court of Appeal authority, the Court will only depart from its earlier decisions where it is "plainly wrong" or if there are "compelling reasons": *Gett v Tabet* [2009] NSWCA 76. Further, although it is not a limitation on the right of appeal, there is a restriction on the power of the Court to order a new trial, in a case where error has been established. As a matter of power, the Court of Appeal may only order a new trial where "some substantial wrong or miscarriage" has been occasioned: see UCPR r 51.53. This constraint does not operate where the Court can itself make such orders as are necessary to correct the identified error. Whether the Court can correct error or must remit the matter to the trial court will depend upon such factors as the failure of the trial court to make a finding of fact, a course which it may be difficult for the appeal court to correct, not having seen the witnesses.

The term "grave contravention" is not one which is familiar in this jurisdiction. However, as noted above, it is commonplace to see reference to the principle that an appellate court will not interfere with a discretionary judgment unless the result is outside the permissible range of legitimate opinion.

By way of contrast, the High Court of Australia, which only hears appeals after granting "special leave", is required by statute to consider whether the issue raised on the proposed appeal is one of general or public importance. There is no similar restriction applicable to the Court of Appeal.

Hearings

System of investigating grounds for appeal

Consistent with the adversarial nature of proceedings, the Court does not engage in investigations of grounds of appeal per se. Nevertheless, there is a system in place to ensure that by the time an appeal comes to hearing, the grounds of appeal alleged are clear. On filing a notice of appeal, the parties will be given a first return date for a directions hearing, usually before the Court of Appeal Registrar. The notice of appeal is looked over by the researcher to the President of the Court of Appeal, the President and the Registrar for any anomalies, which can then be dealt with during the initial directions hearing with the parties.

Such investigation is, however, not intended to limit the discretion of the parties as to whether or not to take objection to particular grounds of appeal, for example on the basis that they are hopeless or unintelligible. Such investigation as the Court undertakes is directed to ensuring that matters are not set down for hearing until they are ready to be heard without the need for any adjournment or risk of wasted time.

Form of trial (documentary/oral hearing)

Court of Appeal proceedings generally require written submissions, which are supplemented by oral submissions in a hearing. The requirements as to form of documentation and submissions are contained in Part 51 of the UCPR and Court of Appeal Practice Note. The form the documents take vary depending on the type of proceeding, e.g. an appeal, an application for leave to appeal or a concurrent hearing. Judges of Appeal can make directions or orders waiving compliance with the formal requirements for the efficient disposition of justice. Proceedings are generally heard in open court. Oral submissions for an appeal usually average 1 to 2 days, however, the length of the hearing will depend on the nature of the case. In applications for leave to appeal, parties must present their submissions within a 20 minute time limit. Leave applications can be determined in chambers without a hearing only where the application is unopposed, or if all parties agree that there should be no public hearing, which is very rare in practice: see UCPR, r 51.15. The Court can make consequential orders on the papers, e.g. if the orders are by consent. There is no provision in the rules for the Court of Appeal to determine a disputed appeal solely on the papers.

Restrictions – judgment at first instance?

The Court of Appeal is not bound by the judgment of the court below. The nature of different forms of appeal has been discussed above. Where, in the usual case involving civil appeals from a trial division of the Supreme Court or from the District Court, the appeal is by way of rehearing, then "the Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires": s 75A(10) of the *Supreme Court Act*. The fundamental principle inherent in the appeal concept is that an appeal court must determine whether the appealed decision was correct, that is, neither the result of "some legal, factual or discretionary error" (*Allesch v Mauntz* [2000] HCA 40), nor attended by significant procedural error, and not simply assess

whether the decision was reasonably open (*CSR Ltd v Della Maddalena* [2006] HCA 1): *Ritchie's Uniform Civil Procedure NSW* ("*Ritchie's*") at 15,553 [SCA s 75A.12].

However, the qualification to this fundamental principle is that an appeal court will recognise the comparative advantages available to a trial judge as a result of having experienced the progress of the trial, having seen and heard all the witnesses first-hand and having read all of the other evidence; and the inherent limitations in even meticulously expressed primary judgments: see *Fox v Percy* [2003] HCA 22; *Rosenberg v Percival* [2001] HCA 18; *Costa v Public Trustee* [2008] NSWCA 223; *Ritchie's* at 15.553 [SCA s 75A.12]. These advantages would assume significance where a trial judge's findings are based on an assessment of the credibility of witnesses.

Regarding additional evidence, parties can apply to call further evidence pursuant to UCPR, r 51.51. The Court of Appeal has a power to receive further evidence on an appeal, although only on "special grounds" where the appeal follows a "hearing on the merits" and the evidence relates to matters that occurred before the hearing. It is an essential characteristic of a judgment on an appeal by way of rehearing that the appellate court must apply the law and make findings of fact as at the date of its judgment. That is contrasted what is sometimes described as an appeal "in the strict sense", where the appellate court applies the law as it exists at the date of trial to the facts as they existed at the date of trial. That is not the appeal regime which operates in the Court of Appeal.

Restrictions – grounds of appeal?

The grounds of appeal must identify an error of a kind permitted by the relevant appeal regime. The Court of Appeal may exercise its powers under the *Civil Procedure Act 2005*, the *Supreme Court Act* and the UCPR even if there is no appeal from some part of the decision below, a party to the proceedings below has not appealed, a ground for allowing or dismissing the appeal or varying the decision is not included in any notice of appeal, notice of cross-appeal or notice of contention or there has been no appeal from some other decision in the proceedings: UCPR, r 51.52. (This rule should be read in conjunction with the *Supreme Court Act*, ss 75A, 102, 107 and 108: *Ritchie's* at 9254.143 [51.52.5].) In practice, however, the Court almost never moves beyond the scope of the issues defined by the parties and, if the parties seek to move outside the issues identified in the notice of appeal or notice of cross-appeal, the Court will usually insist that the relevant notice is amended so as to identify with precision the fresh argument.

There is no general principle which precludes an argument being raised on appeal which was not raised below. However, in practice a party will not be allowed to raise a new point if it is one which cannot conveniently be met by the other party in the course of the appeal. Further, no new point may be raised if it could require the calling of evidence not called at trial or the pursuit of some issue in a manner which had not been undertaken at trial because the point had not then arisen.

Judgment

As noted above, virtually every case which does not settle will be decided following an oral hearing. Where the matter is thought to be straightforward, the Court may be

in a position to deliver judgment immediately upon the completion of argument (ex tempore). On some occasions, the Court may give its decision immediately, but reserve its reasons. That course may be taken where the Court is not in doubt as to the outcome and it is desirable that the parties know the outcome immediately, but there is no time to deliver reasons, or the reasons require further consideration.

When an appeal is dismissed and judgment is handed down, this finalises the proceedings in the Court of Appeal. Similarly, when an appeal is allowed and judgment handed down, this finalises the proceedings. The unsuccessful party may seek to challenge the decision in the High Court by filing an application for special leave to appeal to the High Court.

The Court of Appeal may give "short reasons" for its decision when dismissing an appeal and the Court is satisfied that the appeal raises no question of general principle: *Supreme Court Act*, s 45(4), UCPR r 51.55. In practice, this course is rarely adopted. The Court usually considers that the parties are entitled to a reasoned judgment. Usually an appeal will involve a significant amount of money or a significant issue or will otherwise require a grant of leave. If there are no reasonable prospects of success and the appeal requires leave, leave will be refused. Accordingly, there are not many cases which are thought appropriate for dismissal without full reasons. Further, once the Court embarks on the process of giving some reasons for its decision it may take itself outside the scope of the rule and thus fail in its obligation to give full and proper reasons for its decision.

A judgment or order is taken as entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by UCPR rr 36.15, 36.16, 36.17 and 36.18. On rare occasions, an order will be entered directly into the court record system without a judgment hearing being listed, e.g. a consequential order by consent from all parties.

An appeal from a decision by a judge sitting alone is by way of re-hearing pursuant to s 75A(5) of the *Supreme Court Act* and attracts the general remedial power conferred by s 75A(10): *Ritchie's* at 15,773 [SCA s 102.10].

If a new trial is ordered, it may be appropriate to limit the issues involved: see eg, *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374 (retrial limited to defence of statutory qualified privilege); but only if those issues can properly be separately determined: *Ritchie's* at 9254.145 [51.53.15]. It will not normally be appropriate to direct that the re-trial be before a particular judge: *Amalgamated Television Services Pty Ltd v Marsden (No 2)* [2003] NSWCA 186; *Ritchie's* at 9254.145 [51.53.15]. Where the proper administration of justice requires that the further hearing not be conducted by the judge who conducted the first trial, the Court may so order: usually the composition of the court and the manner in which the further trial is conducted will be left for the discretion of the trial court.

There is no page or word limit on judgment length. In practice judgements may vary in length from a few paragraphs (often true where only costs are in issue) to over one hundred pages with complex commercial matters.

Abuse of right to appeal

The overriding purpose of the rules governing civil proceedings is to facilitate the "just, quick and cheap resolution of the real issues in the proceedings" and the Court must give effect to this in exercising its powers: *Civil Procedure Act*, s 56(1) and (2). A party to civil proceedings is under a duty to assist the court to further the overriding purpose and to participate in the processes of the Court and to comply with directions and orders of the Court, and legal practitioners must not cause their clients to breach this duty: *Civil Procedure Act*, s 56(3) and (4). To give effect to the overriding purpose, the Court has power to give directions as to practice and procedure generally, as to the conduct of the hearing and procedural irregularities: ss 61–63 of the *Civil Procedure Act 2005*. These principles apply equally to the Court of Appeal as to trial courts.

Judges of Appeal have broad powers and may dismiss an appeal or other proceedings for want of prosecution or for any other cause specified in the rules: *Supreme Court Act*, s 46(1)(b). Under UCPR r 13.4, the Court may order that proceedings be dismissed where the appeal is seen to be hopeless or otherwise an abuse of the process of the court. Further, there may be costs consequences for parties who do abuse the court process as costs are in the discretion of the Court: *Civil Procedure Act 2005*, s 98.

In addition to these provisions, repeated appeals without merit lodged by the same appellant could be subject to a vexatious proceedings order: see *Vexatious Proceedings Act 2008* (NSW). The consequences of such an order can be severe. The Court may make an order staying all or part of any proceedings in New South Wales already instituted by the person; an order prohibiting the person from instituting proceedings in New South Wales; and any other order that the Court considers appropriate in relation to the person: *Vexatious Proceedings Act*, s 8(7). Once deemed a vexatious litigant, a person requires leave of the Court to institute further proceedings: see *Vexatious Proceedings Act 2008*, s 13.

Amendments to the appellate system since 2000

There have been only minor changes to the procedures applying specifically to appeals since 2000.

The commencement of the *Civil Procedure Act* on 15 August 2005 was a major development in the regulation of civil litigation in NSW. It marked the first time that civil proceedings in the Supreme, District and Local Courts and Dust Diseases Tribunal would be governed by the same set of rules: see Second Reading Speech (Legislative Council, 24 May 2005) Hansard at p 15933. The Act was accompanied by the *Uniform Civil Procedure Rules 2005*.

The incorporation of the Court of Appeal into the scheme of the *Uniform Civil Procedure Rules* occurred on 1 January 2008. For a summary of the changes see: http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/6a64691105a54031ca256880000c25d7/454c0a79719150b0ca2573c100827d6e?OpenDocument.

Some changes to the rules were made when the rules governing appeals were transferred from the Supreme Court Rules (Part 51) to the UCPR (where they are

also Part 51). A number of changes were made which were designed to improve the operation of the existing system, rather than change the system in any substantial way. For example, responsibility for payment of professional costs is a major disincentive for parties seeking to pursue (or defend) weak claims. Under the general rule, the losing party pays the professional costs of the winning party, which are often significant sums of money. However, to encourage settlement, the rules provide for formal offers of compromise. Failure to accept an offer of compromise may have significant consequences with respect to costs. Thus, if the successful party had rejected an offer of compromise from the unsuccessful party and had failed to achieve a better result in the proceedings, he or she will be treated as an unsuccessful party from the date of the rejected offer and will have to pay costs, rather than receive costs. These principles apply equally in relation to appeals, but it was necessary to make some adjustment to the rules to ensure that they applied as intended in the Court of Appeal.

Commencing an appeal

The principal change which was introduced in 2008 concerned the mechanism for commencement of appeals. A party which succeeds at trial is entitled to know promptly whether an appeal will be brought against the judgment. The general rule is that proceedings must be commenced within 28 days of a final judgment. However, lodging and prosecuting an appeal is a serious step for any party and it is common practice to obtain advice from a senior lawyer, not involved in the trial, before pursuing that step. Obtaining such advice may well take more than 28 days. Some years ago, the Court became aware that a significant proportion of appeals were discontinued before hearing, because they had been instituted within strict time limits, in effect to keep the possibility of pursuing an appeal open. Accordingly, the Court introduced a procedure whereby a formal notice of appeal could be filed which did not require an immediate response from the respondent. Nevertheless, even that step imposed potentially unnecessary burdens on the Court, as such formal appeals had to be disposed of, even if only by consent. Accordingly, it was decided that the important purpose of expeditious lodging of appeals, while permitting the prospective appellant time to make a considered decision, could best be met by requiring the prospective appellant to serve "Notice of Intention to Appeal" on the proposed respondent within 28 days of the judgment below, but not requiring the lodgement of a notice of appeal until three months after the judgment below was delivered: UCPR rr 51.8 and 51.9. (The time scale provided for in the UCPR also varied that which applied under the Supreme Court Rules. Thus the Supreme Court Rules provided for a period of three months after the lodging of a formal appeal, giving, in effect, a period of four months for the prospective appellant to decide whether to appeal or not. That period has now effectively been reduced to three months.)

These changes appear to have been effective. Parties do not need to file notices of intention to appeal (thus reducing the administrative burden on the Court) but they are required to indicate, in any notice of appeal, if a notice of intention to appeal was served, and if so when. Nor does the reduction in the overall period appear to have caused any difficulties for prospective appellants. After an initial "teething" period, there does not appear to have been any increase in the number of applications for

leave to appeal out of time. Nor do such applications as are made suggest that the 3 month period is generally unfair or inadequate.

Preparing appeal papers

From the point of view of the Court, it is important that appeal books are filed promptly and present the material for consideration by the Court in a helpful form. For some years, the Court has adopted a colour-coding scheme for this purpose. Thus, the parties are required to file separately the documentary exhibits tendered in the court below (in blue appeal books), a copy of the transcript of the evidence given orally (in black appeal books), a copy of the pleadings by which the proceedings were commenced and defended at trial, the judgment at trial and the notice of appeal (in a red appeal book) and, finally, a book containing the written submissions of the parties on the appeal (the orange appeal book).

The Court encounters three common problems in this area. First, an appellant is likely to put all of the evidence at trial and all of the transcript into the blue and black appeal books, thus burdening the Court with a large volume of material, much of which is irrelevant to the appeal and is not referred to at any stage of the appeal. From the point of view of the litigants, this is done because it is cheaper to photocopy a large volume of material than have a lawyer sort the material into that which is thought to be relevant and that which is not.

Secondly, the Court insists that the materials be properly paginated and indexed. That is not usually a problem with a transcript which is itself paginated and is presented as a continuous record of the hearing below, but there are problems with the documentary evidence to be filed in a blue appeal book. Are the documents to be included in chronological order of their creation, in the order in which they were tendered at trial, or in an order which facilitates consideration of the various grounds of appeal? The third option is clearly the preferred option from the point of view of the appellate court, but, as a practical matter, it is difficult to impose such an obligation on the parties as it is likely to involve expense and delay. In practice the Court has emphasised the more straightforward requirement that the index identify separately each document and the page on which it commences, rather than referring to a bundle of documents generically.

Preparing written submissions

Thirdly, and most controversially, there are different views about when the parties should prepare their written submissions. One view is that they should be prepared promptly after the appeal is lodged, as that will force both parties to consider in careful detail at an early point in time the real merits of the case to be presented to the court. The opposing view is that such a course involves unnecessary expense to the parties, as the practitioners who prepared the written submissions, perhaps months before the hearing of the appeal, will need to repeat much of the preparation shortly before the appeal is heard, thus duplicating work and increasing the expense of the litigation. The present rules require that the appellant file its written submissions within six weeks of the notice of appeal being filed, the respondent having a further four weeks: UCPR r 51.37. However, the orange appeal book, in which the written submissions are presented to the court, do not have to be filed until four weeks before the hearing of the appeal: r 51.32. The rules also permit the filing

of amended written submissions to allow for the strong possibility that once the hearing of the appeal is imminent, more intense attention may be given by the lawyers to how the appeal will be presented, with resultant changes in approach.

Whether the present requirements are the best available in the circumstances remains a matter of discussion, both within the Court and between the Court and the Bar Association.

Statistics regarding appeals (civil/administrative/criminal)

The tables on the following two pages detail the methods by which cases heard in the Court of Appeal and Court of Criminal appeal were finalised during the last three years. The tables also include the average duration of appeals last calendar year, broken down by finalisation method. We have only supplied one year's worth of data for the average appeal's duration as calculating these averages is a time consuming process at the moment as all statistical data relating to disposals is currently compiled manually.

Please note that it is not possible to provide equivalent statistics for administrative appeals heard in the Administrative Law List of the Common Law Division. The Court does not collect data on method of finalisation in the Divisions, only in the appellate courts.

COURT OF APPEAL (civil appeals, but not administrative appeals)

Final disposal methods						Average duration (commencement to finalisation, in months)	
	2010		**2009**		**2008**	**2010**	
Leave to appeal refused	50		34		66	4.82	
Leave granted and appeal heard concurrently	50		97		60	9.02	
Leave application discontinued or finalised by consent	28		39		51	4.37	
Leave application struck out or other disposal	6		2		3	2.63	
Leave granted, but subsequent appeal not filed ^	4		5		0	5.1	
Appeal* decided by judgment (reserved)	184		224		209	11.15	#
Appeal* decided by judgment (extempore)	34		32		37	7.18	#
Appeal* settled or discontinued	77		95		117	5.85	#
Appeal* struck out	10		4		8	6.58	#
Appeal* disposal (other)	8		13		9	5.7	#
Total	**451**		**545**		**560**	**8.21**	**(90th percentile = 14.79)**

^ This is the number of leave applications granted, less the number of appeals filed pursuant to a grant of leave. A negative number can result, depending on the number of appeals filed during the year that are pursuant to a grant of leave made in the preceding year.

* Here 'appeal' will include any non-leave summons cases, ie cases where the Court of Appeal is the original jurisdiction.

Includes the time for any preliminary, but not concurrently heard, leave application.

COURT OF CRIMINAL APPEAL

Final disposal methods						Average duration (commencement to finalisation, in months)	
	2010		**2009**		**2008**	**2010**	
Abandoned	24		26		26	4.2	
Allowed	181		135		143	6.23	
Answered (stated case)	0		3		2	-	
Dismissed	197		202		216	7.1	
Refused	14		16		21	4.77	
Summarily dismissed	0		1		1	-	
Withdrawn	0		8		0	-	
Other	1		0		5	0.99	
Total	**417**		**391**		**414**	**6.47**	**(90th percentile = 10.70)**