

Criminal Appeal Act 1912 No 16

[1912-16]



New South Wales

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Criminal Appeal Act 1912 No 16



New South Wales

An Act to establish a court of criminal appeal; to amend the law relating to appeals in criminal cases; to provide for better consideration of petitions of convicted persons; to amend the *Crimes Act 1900*; to amend the *Supreme Court Act of 1900*; and for other purposes consequent thereon or incidental thereto.

Part 1 Preliminary

1 Name of Act

This Act may be cited as the *Criminal Appeal Act 1912*.

2 Definitions

(1) In this Act, unless the context or subject-matter otherwise requires or indicates:

Conviction includes a finding or verdict under or in accordance with section 14, 22 (1) (c) or (d) or 30 (2) of the *Mental Health (Criminal Procedure) Act 1990* in respect of a person.

Court means the Court of Criminal Appeal established by this Act.

Court of trial means any court from whose finding, sentence, order, or other determination, a person is by this Act entitled to appeal or to apply for leave to appeal.

Indictment includes any information presented or filed as provided by law for the prosecution of offenders.

Prescribed means prescribed by rules of court made under the authority of this Act.

Registrar means the registrar of the court.

Sentence means:

(a) any order made by the court of trial on convicting a person of an offence, including:

(i) any sentence of imprisonment (including any sentence of imprisonment the

subject of a periodic detention order or home detention order and any sentence of imprisonment whose execution is suspended), and

(ii) any community service order, and

(iii) any good behaviour bond, and

(iv) any fine,

imposed under Part 2 of the *Crimes (Sentencing Procedure) Act 1999*, or

(b) any order made by the court of trial in respect of a person under section 10 or 11 of the *Crimes (Sentencing Procedure) Act 1999* on finding the person guilty of an offence, or

(c) any order made by the court of trial in respect of a person under section 12 or 17A of the *Crimes (Sentencing Procedure) Act 1999* on convicting the person of an offence, or

(ca) any order made by the court of trial, after a person's conviction for an offence, revoking a good behaviour bond and any order made by the court of trial as a consequence of the revocation of the good behaviour bond, or

(d) any order made by the court of trial imposing a limiting term of imprisonment on a person under section 23 (1) of the *Mental Health (Criminal Procedure) Act 1990*, and any other order or penalty made or imposed by the court of trial in respect of the person under section 23 (2) of that Act, or

(e) any order made by the court of trial in respect of a person under section 39 of the *Mental Health (Criminal Procedure) Act 1990*, or

(f) any direction for compensation made by the court of trial in respect of a person under section 71 or 77B of the *Victims Support and Rehabilitation Act 1996*, or

(g) any order for restitution made by the court of trial in respect of a person under section 43 of the *Criminal Procedure Act 1986*, or

(h) any order for the payment of costs made by the court of trial in respect of a person under Division 3 of Part 5 of Chapter 4 of the *Criminal Procedure Act 1986*, or

(i) any child protection registration order made under section 3D of the *Child Protection (Offenders Registration) Act 2000*, or

(j) a banning order under the *Sporting Venues (Offenders Banning Orders) Act 2005*,

and the power of the Court of Criminal Appeal to pass any such sentence includes power to make any such order or direction.

The appellant includes a person who has been convicted and desires to appeal under this Act.

- (2) For the purposes of this Act, a sentence is imposed or passed on a person on conviction or on a finding of guilt even if it is imposed or passed after the conviction or finding of guilt or as a result of re-sentencing.

Part 2 Court of Criminal Appeal

3 Constitution of court

- (1) The Supreme Court shall for the purposes of this Act be the Court of Criminal Appeal, and the court shall be constituted by such three or more judges of the Supreme Court as the Chief Justice may direct.
- (2) More than one sitting of the court may be held at the same time.

4 Registrar and officers of court

- (1) A registrar and such other officers as may be required for carrying out this Act may be employed under Chapter 2 of the [Public Sector Employment and Management Act 2002](#).
- (2) The Prothonotary of the Supreme Court is to be the first registrar of the Court of Criminal Appeal.
- (3) A registrar of the Supreme Court may, subject to the rules, exercise the powers of a registrar of the Court of Criminal Appeal and, when exercising those powers, is taken to be a registrar of the Court of Criminal Appeal.
- (4) An officer of the Supreme Court may, subject to the rules, exercise the powers of an officer of the Court of Criminal Appeal and, when exercising those powers, is taken to be an officer of the Court of Criminal Appeal.

Part 3 Right of appeal and determination of appeals

5 Right of appeal in criminal cases

- (1) A person convicted on indictment may appeal under this Act to the court:
 - (a) against the person's conviction on any ground which involves a question of law alone, and
 - (b) with the leave of the court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal, and

(c) with the leave of the court against the sentence passed on the person's conviction.

(2) For the purposes of this Act a person acquitted on the ground of mental illness, where mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

5AA Appeal in criminal cases dealt with by Supreme Court in its summary jurisdiction

(1) A person:

(a) convicted of an offence, or

(b) against whom an order to pay any costs is made, or whose application for an order for costs is dismissed, or

(c) in whose favour an order for costs is made,

by the Supreme Court in its summary jurisdiction may appeal under this Act to the Court of Criminal Appeal against the conviction (including any sentence imposed) or order.

(1A) An appeal against an order referred to in subsection (1) (c) may only be made with the leave of the Court of Criminal Appeal.

(2) For the purpose of this Act, a person acquitted on the ground of mental illness, where mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

(3), (3A) (Repealed)

(4) The Court of Criminal Appeal, in proceedings before it on an appeal under this section, may confirm the determination made by the Supreme Court in its summary jurisdiction or may order that the determination made by the Supreme Court in its summary jurisdiction be vacated and make any determination that the Supreme Court in its summary jurisdiction could have made on the evidence heard on appeal.

(5) Section 7 (4) applies to an appellant on an appeal under subsection (1) in the same way as it applies to an appellant on an appeal under section 5 (1).

(6) Provisions shall be made by rules of court for detaining an appellant on an appeal under subsection (1) who has been sentenced to imprisonment until the appeal has been determined, or for ordering the appellant into any former custody.

5AB Appeal in criminal cases dealt with by Land and Environment Court in its summary

jurisdiction

Section 5AA applies to and in respect of a person:

- (a) convicted of an offence, or
- (b) against whom an order to pay costs is made, or whose application for an order for costs is dismissed, or
- (c) in whose favour an order for costs is made,

by the Land and Environment Court in its summary jurisdiction in the same way as it applies to a person referred to in section 5AA (1), and, for the purposes of this section, a reference in section 5AA to the Supreme Court shall be read and construed as a reference to the Land and Environment Court.

5AC Appeal in criminal cases dealt with by Court of Coal Mines Regulation in its summary jurisdiction

Section 5AA applies to and in respect of a person:

- (a) convicted of an offence, or
- (b) against whom an order to pay costs is made, or whose application for an order for costs is dismissed, or
- (c) in whose favour an order for costs is made,

by a Court of Coal Mines Regulation in its summary jurisdiction in the same way as it applies to a person referred to in section 5AA (1), and, for the purposes of this section, a reference in section 5AA to the Supreme Court shall be read and construed as a reference to a Court of Coal Mines Regulation.

5AD Appeals as to related summary offences in criminal cases dealt with by the Supreme Court or the District Court

- (1) Section 5AA applies to and in respect of a person convicted of an offence by the Supreme Court or District Court in the exercise of its jurisdiction under Division 7 of Part 3 of Chapter 3 of the [Criminal Procedure Act 1986](#) in the same way as it applies to a person referred to in section 5AA (1).
- (2) For the purposes of this section, a reference in section 5AA to the Supreme Court is to be construed as including a reference to the District Court.
- (3) The power of the Court of Criminal Appeal to hear and determine an appeal under this section is to be exercised by such single judge of the Supreme Court as the Chief Justice may direct unless:
 - (a) the judge considers that the appeal should be dealt with by the full court and

notifies the Chief Justice accordingly, or

(b) an appeal is lodged under this Act in relation to the related indictable offence.

5AE Point of law stated during summary proceedings

- (1) At any time before the completion of proceedings before the Supreme Court in its summary jurisdiction, the Land and Environment Court in its summary jurisdiction or a Court of Coal Mines Regulation in its summary jurisdiction, the judge hearing the proceedings may, or if requested by the Crown must, submit any question of law arising at or in reference to the proceedings to the Court of Criminal Appeal for determination.
- (2) The Court of Criminal Appeal may make any such order or give any such direction to the court concerned as it thinks fit.

5AF Appeals by offenders against sentences imposed by the Drug Court

- (1) Section 5AA applies to and in respect of a person sentenced by the Drug Court in the exercise of its jurisdiction under Part 2 of the *Drug Court Act 1998*:
 - (a) in relation to a sentence determined by the Drug Court under section 7D or 7E of that Act, or a final sentence determined by the Drug Court under section 12 of that Act, for an indictable offence, or
 - (b) in relation to a sentence determined by the Drug Court under section 7D or 7E of that Act, or a final sentence determined by the Drug Court under section 12 of that Act, for a summary offence,in the same way as it applies to a person referred to in section 5AA (1).
- (2) For the purposes of this section, a reference in section 5AA to the Supreme Court is to be construed as including a reference to the Drug Court.
- (3) The power of the Court of Criminal Appeal to hear and determine an appeal under this section is to be exercised:
 - (a) in relation to an appeal under subsection (1) (a)—by such 2 or 3 judges of the Supreme Court as the Chief Justice may direct, or
 - (b) in relation to an appeal under subsection (1) (b)—by such single judge of the Supreme Court as the Chief Justice may direct unless the judge, on the application of either party or of his or her own motion, considers that the appeal raises matters of principle or it is otherwise in the interests of justice for the appeal to be dealt with by the full Court of Criminal Appeal and notifies the Chief Justice accordingly, in which case the appeal is to be heard and determined by such 3 or more judges of the Supreme Court as the Chief Justice may direct.

- (4) Despite section 12 (4) of the *Drug Court Act 1998*, on an appeal against a final sentence imposed by the Drug Court under section 12 of that Act, the Court of Criminal Appeal may pass a more severe sentence than the initial sentence imposed on the relevant offender under section 7A or 7B of that Act.

5AG Appeal in certain criminal cases dealt with by Industrial Relations Commission in Court Session

- (1) A person convicted of an offence under section 32A of the *Occupational Health and Safety Act 2000* and sentenced to any term of imprisonment by the Industrial Relations Commission in Court Session (including a sentence imposed on appeal) may appeal under this Act to the Court of Criminal Appeal against:
- (a) the person's conviction, or
 - (b) the sentence passed on the person's conviction.
- (2) A person may not appeal under this section to the Court of Criminal Appeal unless the person has first exercised any right the person has to appeal to the Full Bench of the Industrial Relations Commission in Court Session under the *Industrial Relations Act 1996*.
- (3) The Court of Criminal Appeal, in proceedings before it on an appeal under this section, may confirm the determination made by the Industrial Relations Commission in Court Session or may order that the determination made by the Industrial Relations Commission in Court Session be vacated and make any determination that the Industrial Relations Commission in Court Session could have made on the evidence heard on appeal.
- (4) This section has effect despite section 179 (Finality of decisions) of the *Industrial Relations Act 1996*.

5A Point of law stated by judge

- (1) The judge before whom any person is tried and convicted on indictment may submit any question of law arising at or in reference to such trial or conviction to the Court of Criminal Appeal for determination, and such submission shall be dealt with as if it were an appeal under section 5.

(1A)-(3) (Repealed)

5B Case stated from District Court

- (1) A Judge of the District Court may submit any question of law arising on any appeal to the District Court in its criminal and special jurisdiction coming before the Judge to the Court of Criminal Appeal for determination, and the Court of Criminal Appeal may make any such order or give any such direction to the District Court as it thinks fit.

- (2) At the request of a person who was a party to appeal proceedings referred to in subsection (1), a question of law may be submitted under that subsection to the Court of Criminal Appeal for determination even though the appeal proceedings during which the question arose have been disposed of. The question of law must be submitted not later than 28 days after the end of the appeal proceedings, or within such longer period as the Court of Criminal Appeal may allow.
- (3) The Court of Criminal Appeal may, in connection with the determination of a question of law in the circumstances referred to in subsection (2), quash any acquittal, conviction or sentence of the District Court on the appeal to the District Court.

5BA Case stated from Land and Environment Court

- (1) A Judge of the Land and Environment Court may submit any question of law arising on any appeal to the Land and Environment Court in its environmental offences appeals jurisdiction coming before the Judge to the Court of Criminal Appeal for determination, and the Court of Criminal Appeal may make any such order or give any such direction to the Land and Environment Court as it thinks fit.
- (2) At the request of a person who was the appellant in an appeal referred to in subsection (1), a question of law may be submitted under that subsection to the Court of Criminal Appeal for determination even though the appeal proceedings during which the question arose have been disposed of. The question of law must be submitted not later than 28 days after the end of the appeal proceedings, or within such longer period as the Court of Criminal Appeal may allow.

5C Appeal against quashing of an indictment

Where the Supreme Court or the District Court has quashed any information or indictment or any count thereof or the Supreme Court in its summary jurisdiction, in any proceedings to which the Crown was a party, has quashed any application made under section 246 (1) of the *Criminal Procedure Act 1986* or any charge specified in such an application, or the Land and Environment Court in its summary jurisdiction, in any proceedings to which the Crown was a party, has quashed any application made under section 41 (1) of the *Land and Environment Court Act 1979* or any charge specified in such an application, the Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against the order made, and such court may thereupon determine the appeal and if the appeal is sustained may make such order for the prosecution of the trial as may be necessary.

5D Appeal by Crown against sentence

- (1) The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may

seem proper.

- (1A) The Environment Protection Authority may appeal to the Court of Criminal Appeal against any sentence pronounced by the Supreme Court or the Land and Environment Court in any proceedings for an environmental offence (otherwise than on an appeal), if those proceedings have been instituted or carried on by, or on behalf of, the Environment Protection Authority. The Court of Criminal Appeal may impose such sentence as to it may seem proper.
- (2) In this section, a reference to proceedings to which the Crown was a party includes a reference to proceedings instituted by or on behalf of:
- (a) the Crown, or
 - (b) an authority within the meaning of the *Public Finance and Audit Act 1983*, or by an officer or employee of such an authority acting in the course of his or her employment.
- (2A) In this section, a reference to an environmental offence is a reference to an offence against the environment protection legislation as defined in the *Protection of the Environment Administration Act 1991*.
- (3) This section does not apply to an appeal referred to in section 5DA or 5DC.

5DA Appeal by Crown against reduced sentence for assistance to authorities

- (1) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence imposed on a person that was reduced because the person undertook to assist law enforcement authorities if the person fails wholly or partly to fulfil the undertaking.
- (2) On an appeal the Court of Criminal Appeal may, if it is satisfied that the person has failed wholly or partly to fulfil the undertaking, vary the sentence and impose such sentence as it thinks fit.
- (3) A reference in subsection (1) to a sentence imposed on a person includes a reference to a sentence that was varied or imposed by the Court of Criminal Appeal.

5DB Appeals by Crown against sentences for related summary offences in criminal cases dealt with by Supreme Court or District Court

- (1) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence imposed by the Supreme Court or District Court on the conviction of a person for a related summary offence in the exercise of its jurisdiction under Division 7 of Part 3 of Chapter 3 of the *Criminal Procedure Act 1986*.
- (2) The Court of Criminal Appeal may, in its discretion, do any one or more of the

following:

- (a) confirm, quash, set aside or vary the sentence,
 - (b) impose such sentence as to the Court of Criminal Appeal may seem proper,
 - (c) exercise, by order, any power that the Supreme Court or District Court might have exercised.
- (3) Any sentence varied or imposed, or any order made, by the Court of Criminal Appeal under this section is to have the same effect and be enforced in the same manner as if it had been imposed by the Supreme Court or District Court.
- (4) The Court of Criminal Appeal may not:
- (a) vary a sentence so that the sentence as varied could not have been imposed by the Supreme Court or District Court, or
 - (b) impose a sentence that could not have been imposed by the Supreme Court or District Court,
- as the case may be.
- (5) The power of the Court of Criminal Appeal to hear and determine an appeal under this section is to be exercised by such single judge of the Supreme Court as the Chief Justice may direct unless:
- (a) the judge considers that the appeal should be dealt with by 2 or more judges and notifies the Chief Justice accordingly, or
 - (b) an appeal is lodged under this Act in relation to the related indictable offence.
- (6) On an appeal under this section against a sentence, new evidence or information may be given with the leave of the Court of Criminal Appeal. However new evidence or information may be given by the prosecution only in exceptional circumstances.
- (7) Except as provided by subsection (6), nothing in this section limits section 12.

5DC Appeals by Crown against sentences imposed by Drug Court

- (1) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence imposed by the Drug Court in the exercise of its jurisdiction under Part 2 of the [Drug Court Act 1998](#):
- (a) in relation to a sentence determined by the Drug Court under section 7D or 7E of that Act, or a final sentence determined by the Drug Court under section 12 of that Act, for an indictable offence, or
 - (b) in relation to a sentence determined by the Drug Court under section 7D or 7E of

that Act, or a final sentence determined by the Drug Court under section 12 of that Act, for a summary offence.

- (2) The power of the Court of Criminal Appeal to hear and determine an appeal under this section is to be exercised:
 - (a) in relation to an appeal under subsection (1) (a)—by such 3 judges of the Supreme Court as the Chief Justice may direct, or
 - (b) in relation to an appeal under subsection (1) (b)—by such single judge of the Supreme Court as the Chief Justice may direct unless the judge, on the application of either party or of his or her own motion, considers that the appeal raises matters of principle or it is otherwise in the interests of justice for the appeal to be dealt with by the full Court of Criminal Appeal and notifies the Chief Justice accordingly, in which case the appeal is to be heard and determined by such 3 or more judges of the Supreme Court as the Chief Justice may direct.
- (3) Despite section 12 (4) of the *Drug Court Act 1998*, on an appeal against a final sentence imposed by the Drug Court under section 12 of that Act, the Court of Criminal Appeal on appeal may pass a more severe sentence than the initial sentence imposed on the relevant offender under section 7A or 7B of that Act.
- (4) The Court of Criminal Appeal may, in its discretion, do any one or more of the following:
 - (a) confirm, quash, set aside or vary the sentence,
 - (b) impose such sentence as the Court of Criminal Appeal may seem proper,
 - (c) exercise, by order, any power that the Drug Court might have exercised.
- (5) Any sentence varied or imposed, or any order made, by the Court of Criminal Appeal under this section is to have the same effect and be enforced in the same manner as if it had been imposed by the Drug Court.
- (6) On an appeal under this section against a sentence, new evidence or information may be given with the leave of the Court of Criminal Appeal. However, new evidence or information may be given by the prosecution only in exceptional circumstances.
- (7) Except as provided by subsection (6), nothing in this section limits section 12.

5E Appeal by any person pronounced an habitual criminal

Any person who:

- (a) is pronounced to be an habitual criminal under the provisions of the *Habitual Criminals Act 1957* and is sentenced under the provisions of that Act, may, by leave of the court, appeal against such pronouncement and sentence, or

(b) is an habitual criminal and is sentenced under the provisions of subsection (5) of section 8 of that Act, may, by leave of the court, appeal against such sentence, and the provisions of this Act applicable to an appeal against a sentence passed on a conviction on indictment shall apply to such an appeal.

5F Appeal against interlocutory judgment or order

- (1) This section applies to:
 - (a) proceedings (including committal proceedings) for the prosecution of offenders on indictment in the Supreme Court or in the District Court, and
 - (b) proceedings under Division 5 of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986*, and
 - (c) proceedings in Class 5 of the Land and Environment Court's jurisdiction (as referred to in section 21 of the *Land and Environment Court Act 1979*).
- (2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in proceedings to which this section applies.
- (3) Any other party to proceedings to which this section applies may appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in the proceedings:
 - (a) if the Court of Criminal Appeal gives leave to appeal, or
 - (b) if the judge or magistrate of the court of trial certifies that the judgment or order is a proper one for determination on appeal.
- (3A) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case.
- (4) An appeal under this section shall, unless the Court of Criminal Appeal gives leave to adduce fresh, additional or substituted evidence, be determined on the evidence (if any) given in the proceedings to which the appeal relates.
- (5) The Court of Criminal Appeal:
 - (a) may affirm or vacate the judgment, order, decision or ruling appealed against, and
 - (b) if it vacates the judgment, order, decision or ruling, may give or make some other judgment, order, decision or ruling instead of the judgment, order, decision or ruling appealed against.

- (6) If leave to appeal under this section is refused by the Court of Criminal Appeal, the refusal does not preclude any other appeal following a conviction on the matter to which the refused application for leave to appeal related.
- (7) A person may not appeal to the Court of Criminal Appeal under this section against an interlocutory judgment or order if the person has instituted an appeal against the interlocutory judgment or order to the Supreme Court under Part 5 of the *Crimes (Local Courts Appeal and Review) Act 2001*.

6 Determination of appeals in ordinary cases

- (1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
- (2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5 (1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.
- (3) On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

6AA Appeal against sentence may be heard by 2 judges

- (1) The Chief Justice may direct that proceedings under this Act on an appeal (including proceedings on an application for leave to appeal) against a sentence be heard and determined by such 2 judges of the Supreme Court as the Chief Justice directs.
- (2) Such a direction may only be given if the Chief Justice is of the opinion that the appeal is not likely to require the resolution of a disputed issue of general principle.
- (3) For the purposes of proceedings the subject of a direction under this section, the Court of Criminal Appeal is constituted by the 2 judges directed by the Chief Justice.
- (4) The decision of the court when constituted by 2 judges is to be in accordance with the opinion of those judges.
- (5) If the judges are divided in opinion:
 - (a) as to the decision determining the proceedings, the proceedings are to be reheard

and determined by the court constituted by such 3 judges as the Chief Justice directs (including, if practicable, the 2 judges who first heard the proceedings on appeal), or

(b) as to any other decision, the decision of the court is to be in accordance with the opinion of the senior judge present.

(6) Proceedings heard by the court constituted by 2 judges under this section are rendered abortive for the purposes of section 6A (1) (a1) of the *Suitors' Fund Act 1951* if they are required to be reheard because the judges were divided in opinion as to the decision determining the proceedings. The rehearing of the proceedings is considered to be a new trial for the purposes of that Act.

6A Powers of court in relation to certain convictions and sentences concerning mentally ill persons

On an appeal under section 5 (1) against a conviction or sentence, being:

(a) a finding or verdict under or in accordance with section 14, 22 (1) or 30 (2) of the *Mental Health (Criminal Procedure) Act 1990* in respect of a person, or

(b) a limiting term within the meaning of section 24 of the *Mental Health (Criminal Procedure) Act 1990* or an order under section 39 of that Act in respect of a person, or

(c) a penalty imposed, or any order made, under section 23 (2) of the *Mental Health (Criminal Procedure) Act 1990* in respect of a person,

the court may make any finding, verdict, order or determination which could have been made in relation to the proceedings before the court of trial.

7 Powers of court in special cases

(1) If it appears to the court that an appellant on an appeal under section 5 (1), though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed at the trial or pass such sentence whether more or less severe in substitution therefor as it thinks proper, and as may be warranted in law by the conviction on the count or part of the indictment on which it considers the appellant has been properly convicted.

(1A) If on an appeal against a sentence under section 5 (1), 5D, 5DA or 5DB, the court quashes or varies the sentence passed at trial on any count or part of an indictment, the court may quash or vary any other sentence passed at the trial:

(a) in relation to any offence charged in any other count or part of the same indictment, or

(b) in relation to any offence charged in any count or part of any other indictment, or

(c) in relation to any offence dealt with under section 105 of the *Criminal Procedure Act 1986*, or

(d) in relation to any back up offence or related offence dealt with under section 167 of the *Criminal Procedure Act 1986*,

and pass such sentence, whether more or less severe, in substitution for the other sentence as the court thinks proper, and as may be warranted in law, in respect of the offence.

- (2) Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.
- (3) Where on the conviction of the appellant the jury have found a special verdict, and the court considers that a wrong conclusion has been arrived at by the court of trial on the effect of that verdict, the court may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence whether more or less severe, in substitution for the sentence passed, as may be warranted in law.
- (4) If, on any appeal, it appears to the court that, although the appellant committed the act or made the omission charged against the appellant, the appellant was mentally ill, so as not to be responsible, according to law, for the appellant's action at the time when the act was done or omission made, the court may quash the conviction and sentence passed at the trial and order that the appellant be detained in strict custody in such place and in such manner as the court thinks fit until released by due process of law or may make such other order (including an order releasing the appellant from custody, either unconditionally or subject to conditions) as the court considers appropriate.

8 Power of court to grant new trial

- (1) On an appeal against a conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make.
- (2) Provision shall be made by rules of court for detaining the appellant until the fresh

trial has terminated, or for ordering the appellant into any former custody.

8A Power of court to order committal proceedings to be continued in certain cases

- (1) Where a person deemed to be convicted on indictment under section 105 (2) of the *Criminal Procedure Act 1986*, appeals to the court against the conviction, the court may, either of its own motion, or on the application of the appellant, order that the proceedings before the Magistrate at which the appellant pleaded guilty be continued at a time and place to be specified in the order, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, the miscarriage of justice can be more adequately remedied by an order that those proceedings be so continued than by any other order which the court is empowered to make.
- (2) Where an order is made under subsection (1), the proceedings before the Magistrate shall be continued in all respects as if the appellant had not pleaded guilty and as if those proceedings had been adjourned by the Magistrate to the time and place specified in the order.

Upon the making of the order, the court may, subject to the *Bail Act 1978*, exercise any power that the Magistrate might have exercised under section 41 of the *Criminal Procedure Act 1986*, if the order had been an order made by the Magistrate adjourning the proceedings to the time and place so specified, and the provisions of section 41 of that Act apply to and in respect of the appellant.

- (3) The powers conferred on the court by this section are in addition to any other power conferred on the court by this Act.

9 Revesting and restitution of property

- (1) The operation of any order for the restitution of any property, or for the payment of compensation to an aggrieved person, made by the court of trial shall (unless such court directs to the contrary in any case in which in its opinion the title to the property is not in dispute) be suspended:
 - (a) until the expiration of the time provided by this Act for giving the court notice of intention to appeal or to apply for leave to appeal, and
 - (b) if the notice is given within that time, until the determination of the appeal or the refusal of the application (or until the expiration of any time prescribed by the rules of court for making the appeal or application after the giving of the notice),

and in cases where the operation of any such order is suspended until the determination of the appeal, the order shall not take effect as to the property in question if the conviction is quashed on appeal, except by the special order of the court.

- (2) The court may annul or vary any such order although the conviction is not quashed.
- (3) The court or a judge thereof may give such directions as the court or judge thinks fit for the custody of any such property pending the suspension of any such order.
- (4) Where a direction for the payment of compensation is given under section 71 or 77B of the *Victims Compensation Act 1996* against any person in respect of an offence taken into account under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* in passing sentence:
 - (a) the operation of the direction shall be suspended until the expiration of the time provided for appealing to the court, and
 - (b) where notice of appeal or of application for leave to appeal is given within the time provided, the operation of the direction shall be suspended until the determination of the appeal or refusal of the application,

and in cases where the operation of any such direction is suspended until the determination of the appeal, the direction shall not take effect if the conviction for the offence or, if more than one, all the offences, of which that person was convicted in the proceedings in which the direction was given, is quashed on appeal, except by the special order of the court.

- (5) Where a direction for the payment of compensation is given under section 71 or 77B of the *Victims Compensation Act 1996* against any person in respect of an offence taken into account under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* in passing sentence, the court may annul or vary any such direction although the conviction for the offence or, if more than one, all the offences, of which that person was convicted in the proceedings in which the direction was given is not quashed on appeal.

Part 4 Procedure

10 Method and time for making appeal

- (1) The following provisions apply to an appeal, or application for leave to appeal, under this Act against a person's conviction or sentence:
 - (a) The person is required to give the court, in accordance with the rules of court, notice of intention to appeal, or notice of intention to apply for leave to appeal, within 28 days after the conviction or sentence.
 - (b) The court may, at any time, extend the time within which the notice under paragraph (a) is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice.
 - (c) The appeal, or application for leave to appeal, is to be made in accordance with

the rules of court, which may include:

- (i) provision with respect to any statement of grounds of appeal, transcripts, exhibits or other documents or things to accompany the appeal or application, and
 - (ii) provision with respect to the timely institution and prosecution of the appeal or application, and
 - (iii) provision with respect to the period during which the notice under paragraph (a) has effect.
- (2) For the purposes of any other Act or statutory instrument (whether enacted or made before or after the commencement of this subsection):
- (a) the period provided for making or lodging an appeal or notice of appeal to the court against a conviction or sentence is taken to be the period for giving the court notice of intention to appeal or notice of intention to apply for leave to appeal, or
 - (b) an appeal against a conviction or sentence is taken to be pending in the court if notice of intention to appeal or apply for leave to appeal has been duly given to the court (unless the appeal or application has not been made within any time it is required to be made by the rules of court).

11 Judge's notes and report to be furnished on appeal

The judge of the court of trial may, and, if requested to do so by the Chief Justice, shall, in case of any appeal or application for leave to appeal, furnish to the registrar the judge's notes of the trial, and also a report, giving the judge's opinion upon the case, or upon any point arising in the case:

Provided that where shorthand notes have been taken in accordance with this Act, a transcript of such notes may be furnished in lieu of such judge's notes.

12 Supplemental powers of the court

- (1) The court may, if it thinks it necessary or expedient in the interests of justice:
- (a) order the production of any document, exhibit, or other thing connected with the proceedings, and
 - (b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial, or order any such persons to be examined before any judge of the court or before any officer of the court or other person appointed by the court for the purpose, and admit any deposition so taken as evidence, and
 - (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable witness, and

- (d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot, in the opinion of the court, be conveniently conducted before the court, the court or any judge thereof may refer the question for inquiry and report to a commissioner appointed by the court, and act upon the report of any such commissioner so far as the court thinks fit, and
- (e) appoint any person with special expert knowledge to act as assessor to the court in any case in which it appears to the court that such special knowledge is required for the determination of the case,

and exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters, and issue any warrant or other process necessary for enforcing the orders or sentences of the court: Provided that in no case shall any sentence be increased by reason of, or in consideration of any evidence that was not given at the trial.

- (2) The Court of Criminal Appeal may remit a matter or issue to a court of trial for determination and may, in doing so, give any directions subject to which the determination is to be made.

13 (Repealed)

14 Right of appellant to be present

- (1) An appellant, notwithstanding that the appellant is in custody, shall be entitled to be present if the appellant desires it, on the hearing of the appellant's appeal, except where the appeal is on some ground involving a question of law alone. On an appeal on such ground and on an application for leave to appeal, and on any proceedings preliminary or incidental to an appeal, the appellant shall not be entitled to be present, except by leave of the court.
- (2) The power of the court to pass any sentence under this Act may be exercised notwithstanding that the appellant is not present.

14A Crown appeals—absence of respondent

An appeal under section 5C, 5D, 5DA or 5DB may be dealt with, and the court may pass any sentence under this Act, in the absence of the respondent if the court is satisfied:

- (a) that:
 - (i) the respondent has been given notice of the date on which the appeal is to be heard, or
 - (ii) although the notice of appeal was served on the respondent, the respondent has not been given notice of the date on which the appeal is to be heard because the

respondent's whereabouts are unknown, and

- (b) that it would not be unjust to deal with the appeal, and pass sentence, in the absence of the respondent.

15 Appeals permitted in writing

An appellant shall be entitled to present the appellant's case and the appellant's argument to the court in writing if the appellant so desires.

16 Notice of appeals

Notice of all appeals and applications for leave to appeal shall be given by the registrar to the Attorney-General in the prescribed manner.

17 Costs of appeal

- (1) On the hearing or determination of an appeal, or any proceedings preliminary or incidental thereto under this Act, no costs shall be allowed on either side.
- (2) The expenses of any Australian legal practitioner assigned, and of any assessor appointed, and of any witnesses attending on the order of the court or examined, and of and incidental to any examination or reference under this Act, and of the appearance of an appellant on the hearing of the appellant's appeal or on any proceedings preliminary or incidental to the appellant's appeal, shall be defrayed out of the Consolidated Fund up to an amount allowed by the registrar, but subject to any regulations as to rates of payment made by the Minister administering the *Criminal Procedure Act 1986* the decision of the registrar may be reviewed by the court or a judge thereof.

18 Certain time to count as part of appellant's sentence

- (1) (Repealed)
- (2) The time during which an appellant is at liberty on bail (pending the determination of his or her appeal) does not count as part of any term of imprisonment under the appellant's sentence.
- (3) The time during which an appellant is held in custody counts as part of any term of imprisonment under the appellant's sentence. However, if the court is satisfied that the appeal was unarguable or frivolous, the court may order that the time in custody does not count.
- (4) (Repealed)

19 Duties of registrar with respect to notices of appeal

- (1) When an appeal or application for leave to appeal is duly made under this Act, the registrar must take all necessary steps for obtaining a hearing under this Act of the

appeal or application.

- (1A) The rules of court may make provision with respect to the transcripts, exhibits or other documents or things relating to the proceedings in the court of trial that are required for the determination of the appeal or application.
- (2) If it appears to the registrar that the appeal papers relating to a conviction do not show any substantial ground of appeal, the registrar may refer the appeal to the court for summary determination, and the court may thereupon, if it considers that the appeal is frivolous or vexatious, dismiss the appeal summarily, without calling upon any person to attend the hearing.
- (3) The registrar shall furnish the necessary forms and instructions in relation to notices of intention to appeal or to make application under this Act to any person who demands the same, and to officers of courts, governors of prisons, and to such other officers or persons as the registrar thinks fit, and the governor of a prison shall cause such forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application under this Act, and shall cause any such notice given by a prisoner in the governor's custody to be forwarded on behalf of the prisoner to the registrar.
- (4) (Repealed)

20 Documents, exhibits etc

Any documents, exhibits, or other things connected with any proceedings before a court of trial in respect of which any person is entitled, or may be authorised, to appeal under this Act, shall be kept in the custody of the court of trial for such time as may be prescribed, subject to such power as may be prescribed for the conditional release of any such documents, exhibits, or other things from that custody.

21 Shorthand notes of trial

Shorthand notes shall if practicable be taken of the proceedings at every trial of any person on indictment, and on any notice of intention to appeal or to apply for leave to appeal, a transcript of the notes, or any part thereof, shall be made if the registrar so directs, and furnished to the registrar for the use of the court, or a judge thereof, and a transcript shall be furnished to any party interested upon the payment of such charges as may be prescribed by the Governor-in-Council.

21A Exercise of court's powers

- (1) The decision of the court is to be in accordance with the opinion of the majority of the judges of the court present.
- (2) If the judges present are equally divided in opinion, the decision of the court is to be in accordance with the opinion of the Chief Justice or other judge presiding.

- (3) The decision of the court on any appeal heard before 3 or more judges is not affected merely because one or more of the judges dies before the decision on the appeal is given, so long as a majority of the judges before whom the hearing of the appeal commenced are in agreement as to the court's decision.
- (4) If, in dismissing an appeal, the court is of the unanimous decision that the appeal does not raise any question of general principle, it may, in accordance with the rules, give reasons for its decision in short form.
- (5) This section does not affect any provision of this or any other Act that authorises or requires a power of the court to be exercised in any other manner.
- (6) In this section:
appeal includes any matter before the court.

22 Powers of a judge sitting alone

- (1) The following powers of the court may be exercised by any judge of the court in the same manner as they may be exercised by the court, and subject to the same provisions:
 - (a) the power to give leave to appeal,
 - (b) the power to extend the time within which notice of intention to appeal is to be given (or any time within which the appeal is to be made),
 - (c) the power to extend the time within which notice of intention to apply for leave to appeal is to be given (or any time within which the application is to be made),
 - (d) the power to allow the appellant to be present at any proceedings (in cases where the appellant is not entitled to be present without leave),
 - (e) the power to order the production of any document, exhibit or other thing concerned with proceedings,
 - (f) the power to order any person who would have been a compellable witness at the trial to attend and be examined before the court,
 - (g) the power to order any such person to be examined,
 - (h) the power to admit any deposition taken as evidence,
 - (h1) in the case of the hearing of an application under Division 2 of Part 8 of the *Crimes (Appeal and Review) Act 2001*, the power to conduct any part of the hearing as directed by the court,
 - (i) the power to dispose of an appeal for failure to prosecute the appeal diligently,

- (j) the power to order that time spent by an appellant in custody is not to count towards the sentence imposed when an appeal, or an application for leave to appeal, is abandoned,
 - (k) the power to dismiss an appeal as incompetent.
- (2) If the judge refuses an application on the part of the appellant to exercise any such power in the appellant's favour, the appellant is entitled to have the application determined by the court.

22A Judgment of the court may be delivered by a single judge of the court

- (1) When judgment in a proceeding in the court is delivered it is not necessary for any of the judges before whom it was heard to be present in court to state their opinions.
- (2) The opinion of any of the judges may be reduced to writing and made public by any judge of the court when judgment in the proceeding is delivered.
- (3) The judgment of the court has the same effect as if each judge of the court whose opinion is so made public had been present in court and declared his or her opinion in person.
- (4) For the purpose of delivering judgment the court may be constituted by one or more judges of the court.

23 Writs of error abolished

- (1) Writs of error, and the powers and practice now existing in the Supreme Court in respect of motions for new trials, and the granting thereof in criminal cases, save as aforesaid, are hereby abolished.
- (2) Sections 428, 470, 471, 472, 473 and 474 of the *Crimes Act 1900* are repealed.

Part 5 Appeals from the decisions of the court

24 Postponing execution of order quashing conviction on Crown's application

- (1) Where an appeal to the court is upheld, and the appellant is entitled under this Act to have the conviction against the appellant quashed by order of the court, the court may, upon application on behalf of the Crown, at any time before the release of such appellant, either by the same or by a separate order, direct that the execution of the order quashing the appellant's conviction be stayed for such time (not exceeding four days) as the court thinks fit, and the court or judge thereof shall, subject to the *Bail Act 1978*, thereupon make such order for the detention of the appellant or the appellant's return to any former custody as the court or judge thinks fit, for the time during which such stay has been directed.
- (2) The court or a judge thereof may, subject to the *Bail Act 1978*, upon application made

by the Attorney-General make such order for the detention of the appellant pending the hearing of an appeal to the High Court as the court or a judge may think fit, and may at any time vary or rescind such order.

25 Court may release on failure to prosecute appeal

On the application of any appellant deeming the appellant wronged by any failure to diligently prosecute such appeal, the court or a judge thereof may order the immediate execution of the original order of the court quashing the conviction, and may order the appellant's immediate release, and the court may further, if it thinks fit, award the appellant such compensation as appears just.

25A Certain time to count as part of appellant's sentence

- (1) Any time during which a person is at liberty on bail pending the determination of the person's appeal to the High Court from an order or determination of the Court of Criminal Appeal does not count as part of any term of imprisonment or penal servitude under the person's sentence.
- (2) (Repealed)
- (3) The time during which a person is held in custody counts as part of any term of imprisonment or penal servitude under the person's sentence.
- (4) (Repealed)
- (5) A reference in this section to **bail** is a reference to bail whether or not granted under the [Bail Act 1978](#).
- (6) In this section, **appeal** includes an application for special leave to appeal.

Part 6

26 (Repealed)

Part 7 Miscellaneous

27 Prerogative of mercy preserved

Nothing in this Act limits or affects in any manner the prerogative of mercy.

28 Rules of court

- (1) Rules of court for the purposes of this Act may be made under the [Supreme Court Act 1970](#).
- (1A) Subsection (1) does not limit the rule-making powers conferred by the [Supreme Court Act 1970](#).

- (2) Such rules may be made with respect to all or any of the following matters:
- (a) The regulation of the practice and procedure under this Act,
 - (b) The sitting of the court if necessary during any vacation,
 - (c) The powers and duties of the registrar and other officers of the court,
 - (d) The detention of an appellant pending any appeal, or application for leave to appeal, or new trial,
 - (e) The safe custody of any property with respect to which an order for restitution has been suspended,
 - (f) The taking of shorthand notes and the making of transcripts thereof,
 - (g) Applications for and furnishing of notes of trial and reports by judges of courts of trial,
 - (h) Any matters which in the opinion of the Rule Committee of the Supreme Court are necessary or expedient for giving effect to the purposes of this Act.
- (3), (4) (Repealed)

28A Operation of sections 18 and 25A

- (1) This section applies if, under section 18 or 25A, any period does not count as part of any term of imprisonment under an appellant's sentence.
- (2) The court may make any order that it thinks fit to give effect to section 18 or 25A (including an order specifying the date of the commencement or re-commencement of the sentence).
- (3) If the court does not make such an order, the sentence commences or re-commences on the appropriate date required for the operation of section 18 or 25A.
- (4) This section extends to apply in respect of the following appeals:
 - (a) an appeal made, but not determined, before the commencement of this section,
 - (b) an appeal in respect of which notice of intention to appeal or to apply for leave to appeal or application for leave (or for special leave) to appeal was made before the commencement of this section.

29 Bail Act 1978 to prevail

The *Bail Act 1978* shall prevail to the extent of any inconsistency between that Act and this Act and, without affecting the generality of the foregoing provisions of this section, shall prevail to the extent of any inconsistency between that Act and rules referred to in sections 5AA (6), 8 (2) and 28 or in section 5AA (6) as applied by section 5AB.

30 Savings and transitional provisions

Schedule 1 has effect.

Schedule 1 Savings and transitional provisions

(Section 30)

1 Criminal Appeal (Amendment) Act 1994

- (1) The amendment made to this Act by Schedule 1 (2) to the *Criminal Appeal (Amendment) Act 1994* does not apply to any appeal from a decision made in proceedings commenced before the commencement of the amendment.
- (2) The amendment made to this Act by Schedule 1 (3) to the *Criminal Appeal (Amendment) Act 1994* applies to any appeal, or application for leave to appeal, made to the Court of Criminal Appeal whether before, on or after the commencement of the amendment, but not to proceedings commenced to be heard by the Court of Criminal Appeal before that commencement.
- (3) The amendment made to this Act by Schedule 1 (4) to the *Criminal Appeal (Amendment) Act 1994* applies to proceedings for judgment in the Court of Criminal Appeal whether the proceedings were commenced before, on or after the commencement of the amendment.

2 Courts Legislation Further Amendment Act 1995

The amendments made to section 18 by the *Courts Legislation Further Amendment Act 1995* apply to any appellant whose appeal is determined, or abandoned, on or after the commencement of the amendments.

3 Crimes Legislation Amendment Act 1997

The amendments to this Act made by Schedule 1.3 [1]–[4] to the *Crimes Legislation Amendment Act 1997* do not enable an appeal to be brought against a sentence imposed in proceedings in respect of an offence committed before the commencement of the amendments.

4 Crimes Legislation Amendment Act 1998

- (1) In this clause, **amending Act** means the *Crimes Legislation Amendment Act 1998*.
- (2) Section 5AE, as inserted by the amending Act, extends to proceedings commenced but not completed before the commencement of that section.
- (3) However, section 5A, as in force immediately before the repeal of section 5A (1A) by the amending Act, applies to any question of law submitted, under that section before that repeal, to the court for determination.

5 Crimes Legislation Further Amendment Act 1998

Section 25A, as inserted by the *Crimes Legislation Further Amendment Act 1998*, applies to any person whose appeal to the High Court is pending at the commencement of that section or whose appeal to the High Court is made after that commencement.

6 Courts Legislation Amendment Act 2000

The amendment made to section 5AA by the *Courts Legislation Amendment Act 2000* does not apply in respect of an appeal against a conviction or costs order that was made before the commencement of the amendment.

7 Criminal Legislation Amendment Act 2001

An amendment made by the *Criminal Legislation Amendment Act 2001* does not apply in respect of an appeal pending immediately before the commencement of that amendment.

8 Crimes Legislation Further Amendment Act 2003

- (1) Sections 5AA, 5AB and 5AC, as amended by the *Crimes Legislation Further Amendment Act 2003*, extend to orders for costs, and orders dismissing applications for orders for costs, made before the commencement of the amendments to those sections made by that Act.
- (2) Section 5F, as amended by the *Crimes Legislation Further Amendment Act 2003*, extends to decisions and rulings made in proceedings that had been commenced, but not finally disposed of, before the commencement of the amendments to that section made by that Act.

10 Courts Legislation Amendment Act 2005

- (1) Section 4 (3) and (4), as inserted by the amending Act, is taken to apply, and to have always applied, to any registrar or officer of the Supreme Court appointed to that office before the relevant day.
- (2) Any appointment of a person before the relevant day as a registrar or officer of the Court of Criminal Appeal by the appropriate Department Head (within the meaning of the *Public Sector Employment and Management Act 2002*), that could have been validly made if it had been made by the Governor, is validated.
- (3) In this clause:

amending Act means the *Courts Legislation Amendment Act 2005*.

relevant day means the date of commencement of Schedule 4 to the amending Act.

11 Crimes and Courts Legislation Amendment Act 2006

- (1) The amendments made to this Act by Schedule 1.10 [2]-[4] to the *Crimes and Courts*

Legislation Amendment Act 2006 do not apply to any appeal proceedings commenced before the commencement of those amendments.

- (2) The amendment to the definition of **Sentence** in section 2 (1) made by the *Crimes and Courts Legislation Amendment Act 2006* extends to orders referred to in paragraph (ca) of that definition that were made before the commencement of that amendment, but does not affect any appeal proceedings that were finally determined before the commencement of that amendment.