PART 2
THE YEAR IN REVIEW

CASE SPECIFIC RESPONSIVE

PRIORITY LIST

COURT MEDIATION

CASE MANAGEMENT

ACCELERATION

THE YEAR IN REVIEW

INTRODUCTION

During the year under review the Court continued to achieve its objective of promptly, courteously and effectively deciding disputes according to law, in order to fulfil its role as a court exercising the judicial power of the Commonwealth under the Constitution. The Court's innovative approach to managing its work, and the way it operates as an organisation, brought continuing recognition of its leading role.

During 2010–11 the Court maintained its commitment to achieving performance goals for the Court's core work, while also developing and implementing a number of key strategic and operational projects. These are discussed separately below.

SIGNIFICANT ISSUES AND DEVELOPMENTS

Native Title Review of Caseload and Priority Setting

Comment was made in the 2009–2010 Annual Report about the *Native Title Amendment Act 2009* (the Act) and the significance of this legislation to the work of the Court. The amendments empowered the Court to:

- Refer a matter to a mediator, other than the National Native Title Tribunal (NNTT) or a Court registrar.
- Make orders to give effect to the terms of an agreement between the parties that are about matters other than native title, whether or not a determination of native title is made.
- Make these orders where only some of the parties are in agreement about the orders which are sought.

The Attorney-General, the Hon Robert McClelland MP, in the Second Reading Speech for the Act, said that the amendments were intended to '…contribute to broader, more flexible and quicker negotiated settlements of native title claims' and that 'these changes will result in better outcomes for participants in the native title system'.

During the reporting period the Court's Native Title Practice Committee met on many occasions to focus on the practice initiatives that had been put in place to ensure, where possible, that resolution of native title cases be achieved more easily and delivered in a more timely, effective and efficient fashion.

It is timely now to report on the effectiveness of these practice initiatives, the detail of which is to be found in Part 3 of this Report. What follows below is a summary of the Court's response to the opportunities presented by the amendments.

Priority Cases

In considering how to improve the time in which it takes to resolve a native title case, the Court has recognised that it is not possible for all pending cases to be intensively managed at the same time by the Court and the parties. It decided that there was a need to prioritise cases across Australia, on a regional basis and within the area covered by each native title representative body.

The process of making decisions about the order in which the Court will deal with pending cases involved numerous factors. The judges approached this task by reviewing each case either through directions hearings, regional case management conferences or State or region based callovers. In addition, the Queensland and Western Australian users' forums and associated committees provided an opportunity for more focussed consideration of this and related challenges.

When determining priorities the criteria applied included:

- whether the case involved a matter of the public interest
- whether the resolution of the case will impact on other cases or the attitudes of the parties and in turn speed up the resolution of other related cases
- the number of notifications issued by governments about proposed land use activity
- the views of the parties
- the level of preparedness of the Applicant (that is, the extent of evidence gathered and issues identified)
- the age of the case.

Importantly, in deciding to publish a priority list of cases, the Court acknowledged that the list will evolve and change for a variety of reasons. The list was first published on the Court's website on 1 July 2010 and includes links to the case status. It is regularly updated to reflect changing priorities and the finalisation of cases.

The Court acknowledges the substantial contribution made by the parties to these cases in the settling of the priority list and maintaining the momentum required to finalise the cases. The outcomes clearly demonstrate the substantial effort made by all parties. Forty-four cases on the list have been finalised since its publication on 1 July 2010. Of these, twenty-four have been determined and twenty have been finalised through discontinuance, dismissal or combination with other cases. It is anticipated that up to eighty matters will be dealt with by the end of 2012.

Table 1.1 – Priority cases 1 July 2010 to 30 June 2011

JURISDICTION	PRIORITY CASES CURRENT AS AT 1 JULY 2010	REMOVED FROM LIST AS NO LONGER CONSIDERED A PRIORITY CASE	ADDED TO LIST AS DETERMINED A PRIORITY	FINALISED	CASES CURRENT AS AT 30 JUNE 2011
NSW	7	0	1	2	6
QLD	26	4	6	7	21
NT	30	1	25	27	27
SA	7	0	0	1	6
VIC	9	1	1	2	7
WA	38	5	0	6	27
Total	**117**	**11**	**33**	**45**	**94**

List of Mediators

The 2009 amendments to the Act gave clear responsibility to the Court for managing all aspects of native title proceedings from beginning to finalisation, including the opportunity to refer a matter to mediation before a person or body other than the NNTT or a registrar of the Court.

Expressions of interest were sought from suitably qualified mediators for inclusion on a list of names for the Court and the parties to refer to when considering the reference of a matter or part of a matter to a mediator (other than a member of the NNTT or a registrar).

Compilation of the list was finalised within the reporting period. The mediators on the list are aware that it is to be used by the Court and parties as a resource and appointments will be made on a case by case basis. The list, along with some introductory information, is available to all involved in native title cases via the Court's website at: http://www.fedcourt.gov.au/litigants/native/litigants_nt_mediator.html

To date the Court and the parties have identified three matters suitable for referral to private mediators. The case note about the Kalkadoon matter at page 14 in Part 3 of this Report covers one of these referrals.

Revision of the Federal Court Rules

As noted in previous Annual Reports, the Court has been undertaking a substantial project to revise its Rules. This is the first major revision of the Court's Rules since they were promulgated on 1 August 1979. The goals of the project are for the Court's Rules to:

- facilitate access to justice
- promote efficiency in the administration of the law
- complement and reflect the Court's case management philosophy and systems
- take into account current and future advances in information technology
- be easily capable of being updated
- be simple and clear.

In November 2010 the Court's judges approved the draft revised Rules and they were circulated to the legal profession for comments in late 2010. Substantial consultation about the new Rules was undertaken in early 2011. The Judges approved the Rules at a Judges' Meeting on 15 April 2011.

Justice Lander, convenor of the Court's Rules Revision Committee, continued to consult with the profession on the content of the Rules up until 15 July 2011 when the final version of the Rules and Forms was placed on the Court's website. During June and July, Justice Lander conducted information sessions for lawyers in each Registry with multiple sessions in Sydney (three), Melbourne (three) and Brisbane (two). A podcast of Justice Lander's presentation was placed on the Court's website along with answers to questions that arose during the information sessions and other frequently asked questions. Justice Lander conducted separate seminars with the Court's Registrars in each of the States.

As part of the project the Court developed new forms. The forms are user friendly but retain proper functionality as court documents. They have adopted the plain language style of the Rules and are clear and easy to understand. Each form has a logical structure and layout with helpful instructions about how to complete it. A new Practice Note has been developed to assist parties and lawyers to use the forms.

A working party of staff from across the Court chaired by Patricia Christie, District Registrar (South Australia and the Northern Territory), has been assisting Justice Lander and the Rules Revision Committee in preparing for the implementation of the revised Rules. The Court's Practice Notes and Administrative Notices have been reviewed; training sessions have been developed and run for Court staff; and relevant information on the Court's website has been reviewed. It is expected that this work will continue following the introduction of the revised Rules.

The revised Rules will commence on 1 August 2011. It should be noted that not all of the rules of the Court have been revised. The project did not include the Federal Court (Bankruptcy) Rules 2005 or the Federal Court (Corporations) Rules 2000, other than for minor consequential changes. Nor were the Admiralty Rules affected.

Freedom of information

During the reporting year substantial changes were made to the Freedom of Information (FOI) content on the Court's website following amendments to the *Freedom of Information Act 1982*.

Part 2 of the FOI Act establishes an Information Publication Scheme (IPS) for Australian Government agencies. The IPS, which commenced on 1 May 2011, requires agencies to publish a broad range of information on their websites as well as prepare an Information Publication Plan (IPP) explaining how they will implement and administer the IPS.

In early 2011 the Court developed an IPP which has been publicly available since 1 May 2011. In addition to the IPP, the FOI section of the website includes information about the Court's:

- organisation and structure
- functions and powers
- reports to Parliament
- process for making a formal FOI request.

A disclosure log is also available on the website that will list information which has been released in response to an FOI access request. The disclosure log has been in place since 1 May 2011 and as at 30 June 2011 there were no releases by the Court that met the criteria for disclosure.

Further information can be found at http://www.fedcourt.gov.au/courtdocuments/foi.html.

THE COURT'S PERFORMANCE

Workload

In 2010–11 the total number of filings (including appeals) in the Federal Court increased by thirty-six per cent to 4941. Filings in the Court's original jurisdiction (excluding appeals) increased by forty-six per cent. The majority of the increase was in the Court's corporations workload which increased by seventy per cent.

While the Court's appellate workload decreased slightly over the twelve months, the decrease was in migration appeals, the majority of which are heard by single judges. In contrast, the Court's more complex and lengthier non–migration appellate workload increased by twenty-one per cent. Significant resource implications arise from an increase in the full court workload with three judicial resources being required to hear and determine what are often very complex matters. This is in addition to each judge's docket of first instance cases.

Further information about the Court's workload, including the management of appeals, can be found in Part 3 on page 26.

The Federal Court's registries also provide registry services for the Federal Magistrates Court (FMC). The overall workload has grown since 2000, when the FMC was established. In 1999–2000 the combined filings in the FMC and the original jurisdiction (i.e. not including appeals) of the Federal Court were 5885, compared with 10 923 this year.

During the reporting year there were 4941 actions (including appeals) commenced in the Court and 6620 in the general federal law jurisdiction of the FMC, a total of 11 561. This represents a ten per cent increase on the combined workload in 2009–10.

It should be noted that Federal Court Registrars hear and determine a substantial number of cases in the FMC, particularly in the bankruptcy jurisdiction. During the year Federal Court Registrars dealt with, and disposed of, 4635 FMC bankruptcy matters which equates to ninety-three per cent of the FMC's bankruptcy caseload, or almost seventy-one per cent of the FMC's general federal law caseload.

Performance against time goals

The Court has three time goals for the performance of its work: the first goal concerns the time taken from filing a case to completion; the second goal concerns the time taken to deliver reserved judgments; and the third goal concerns the time taken to complete migration appeals. The time goals assist the Court in managing its work to achieve the performance targets. The goals do not determine how long all cases will take, as some are very long and complex and others will, necessarily, be very short.

Time goal 1: Eighty-five per cent of cases completed within eighteen months of commencement
During the reporting year, the Court completed ninety per cent of cases in less than eighteen months, compared with eighty-eight per cent in the previous year. As shown in Figure 6.5 and Table 6.5 in Appendix 6 on page 91, over the last five years the Court has consistently exceeded its benchmark of eighty-five per cent, with the average over the five years being ninety per cent.

Time goal 2: Judgments to be delivered within three months
The Court has a goal of delivering reserved judgments within a period of three months. Success in meeting this goal depends upon the complexity of the case and the pressure of other business upon the Court. During 2010–11 the Court handed down 1740 judgments for 1061 court files (some files involve more than one judgment being delivered e.g. interlocutory decisions, and sometimes, one judgment will cover multiple files). The data indicates that eighty-one per cent of appeals (both full court and single judge) were delivered within three months and eighty per cent of judgments at first instance were delivered within three months of the date of being reserved.

Time goal 3: Disposition of migration appeals and related applications within three months
The *Migration Litigation Reform Act 2005* effectively gave the FMC almost all first instance jurisdiction in migration cases. Since December 2005, most matters commenced in the Federal Court from decisions arising under the Migration Act are appeals and related applications. The majority of these cases have been heard and determined by a single judge exercising the appellate jurisdiction of the Court.

Following the introduction of the amendments, the Court implemented a time goal of three months for the disposition of migration appeals and related applications. The Court introduced a number of initiatives to assist in achieving the goal, including special arrangements to ensure that all appeals and related applications were listed for hearing in the Full Court sitting periods as soon as possible

after filing. Additional administrative arrangements were also made to streamline the pre-hearing procedures.

The Court carefully monitors the achievement of the three month goal in order to ensure that there are no delays in migration appeals and related applications, and that delay was not an incentive to commencing appellate proceedings.

The Court continues to achieve the disposition target of three months for most of the migration appeals and related applications dealt with by a single judge or a Full Court. In the period covered by this report, 279 migration appeals and related applications from the FMC or the Court were disposed, with the average time from filing to final disposition being 110 days, and the median time from filing to final disposition being ninety-one days. The time taken to dispose of some matters was longer where hearings were adjourned pending the outcome of other decisions in the Court or the High Court.

Financial management and organisational performance

The Court's budget position continues to be impacted by the government's tight fiscal position. Permission for an operating loss of $1.7 million was sought for 2010–11 as costs continued to rise well in excess of increases to the Court's budget appropriation. During the financial year all expenditure was closely monitored on an ongoing basis to ensure that savings were achieved wherever possible. Two major issues, unrelated to the Court's normal operations, had a significant impact on the Court's end of year result. Firstly, as part of a three year cyclic review, the Court's assets were revalued by an independent assessor with significant write-downs eventuating particularly in relation to the Court's library materials. Secondly, as part of the major building refurbishment in Sydney, an asset write-down was required in relation to vacated temporary accommodation previously occupied by the Principal Registry. The Court's operating loss of $8.367 million is principally as a result of these technical accounting issues. Leaving these aside, the Court's loss would have been limited to approximately $250 000, a significantly better result than the original budget estimate.

In looking forward to the next three year budget cycle, the Court will continue to face limited funding increases and escalating costs. The efficiency dividend has also been increased. Due to the 'fixed' nature of forty-five per cent of the Court's costs (such as judges and their direct staff and the requirement for purpose built court accommodation) the Court's ability to reduce these costs is extremely limited. This means the impact of the efficiency dividend on the Court's remaining cost is almost doubled.

The Court is forecasting ongoing operating losses over the next three financial years. Whilst the Court is actively examining measures to bridge the forecast funding shortfall, the extent of savings previously realised in past years is now limiting further options. An independent consultant has been commissioned to conduct an organisational health check to ensure that all available strategies and savings measures are being considered.