CHAPTER 2
The year in review

Image of Court room 1 in Sydney provided by www.zoomproductions.com.au

2.1 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 2009–10 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.

2.2 SIGNIFICANT ISSUES AND DEVELOPMENTS

Retirement of Chief Justice Black and Appointment of Chief Justice Keane

On 19 March 2010 a ceremonial sitting of the Federal Court was held in Melbourne to mark the retirement of the Honourable Michael Black AC who was Chief Justice of the Federal Court from 1 January 1991 to 21 March 2010. His many achievements included:

- the introduction of the individual docket system where judges have control of matters from beginning to end
- pioneering the use of technology in areas such as videoconferencing and eServices which incorporates all the Court's online services
- the management of native title matters including 'on country' hearings providing the best possible environment for indigenous witnesses
- the introduction of national fast track procedures designed to reduce costs by limiting discovery and avoiding lengthy interlocutory disputes; and
- his contributions to enhancing court architecture in Australia by ensuring concepts of light, space and accessibility were incorporated into new and refurbished Commonwealth Law Court buildings.

Chief Justice Keane was sworn in as the Court's third Chief Justice on 22 March 2010 at a ceremony at the Federal Court in Brisbane. Prior to his appointment to the Court he was a judge of the Queensland Court of Appeal.

At the swearing-in ceremony, the Attorney-General, the Hon Robert McClelland MP, noted that the new Chief Justice assumed the role at an exciting time in the Court's development and commented: 'with the many virtues that your Honour brings to this office, I have absolute confidence that this court will have strong and effective leadership in the years ahead'.

Case Management Reforms

During the reporting year important changes were made to the Federal Court of Australia Act by the *Access to Justice (Civil Litigation Reforms) Act 2009* and the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009*. The legislation gave effect to most of the case management and other reforms proposed by the Court following discussions with the legal profession in 2008.

As a result of these changes, the Federal Court of Australia Act now states that the overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of

disputes: (a) according to law; and (b) as quickly, inexpensively and efficiently as possible. The amendments also included provisions to enhance the Court's capacity to actively manage the conduct of proceedings that come before it and changes to streamline the appeals process which allow greater case management of appeals by the Court. These reforms will help achieve the Court's commitment to an effective and accessible system of justice where people are able to resolve their disputes quickly, efficiently and fairly.

eServices strategy

The Federal Court's eServices strategy centres on the use of contemporary technology to improve efficiency and increase accessibility to the Court.

In 2009–10 the Court continued to deliver on its commitment to create an environment where actions which are commenced electronically, are managed electronically. Much has been accomplished as a result of the implementation of a number of key components of this strategy including:

- improved access to court services through on-line delivery
- reduced need to attend at court or registry counter
- increased service availability
- the potential to reduce the costs of litigation
- reduced reliance on the printing and photocopying of documents.

A key component of the strategy is eLodgment. This application enables any member of the public, whether a practitioner, law firm, corporation or self represented litigant to electronically lodge documents with the Federal Court or the Federal Magistrates Court.

By May 2010 eLodgment was made available to all Court users, following a limited live release in late 2009 which allowed the Court and some frequent users to test the new system for functionality and usability. The success of the limited live release resulted in the Court releasing eLodgment more broadly.

eLodgment allows a litigant to commence an action electronically. Documents relating to existing matters may also be lodged via eLodgment. The lodged documents remain accessible to the lodging party via eLodgment and litigants can monitor the progress of their lodgments, as well as review the processed documents, through their Lodgment History. They can also access the sealed electronic versions of the documents should they require them for service.

The approach to the full release of eLodgment was staged in order to manage the workload impact on registries and ensure that litigants were confident with the application. As part of the implementation, many information sessions and demonstrations of eLodgment were held. These public demonstrations were well attended and great interest in eLodgment and the Court's intention to ultimately provide more on-line services was evident. At the end of June 2010 there were over 550 registered users of eLodgment.

Since the release of the application 1260 documents have been lodged electronically, with the majority of these being filings in the Federal Court.

Native Title Review of Caseload and Priority Setting

On 18 September 2009 the *Native Title Amendment Act 2009* (Cth) came into force. The amendments to the *Native Title Act 1993* (Cth) (NTA) were significant in a number of respects, in that they empowered the Court to:

- refer a matter to a mediator, other than the National Native Title Tribunal 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, in the Second Reading Speech for the new legislation, 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'.

The amendments to the Act gave clear responsibility to the Court for managing all aspects of native title proceedings, including, as noted, the opportunity to refer a matter to mediation before a person or body other than to the National Native Title Tribunal or a Registrar of the Court. During the reporting period the Court's Native Title Practice Committee met on many occasions to focus on the amendments and to put in place a number of practice initiatives to ensure – to the extent that it can - that resolution of native title cases can be achieved more easily and delivered in a more timely, effective and efficient fashion.

In considering how to improve the time it takes to resolve a native title case, the Committee recognised that it was not possible for all pending cases to be intensively managed at the same time by the Court and the parties. The Committee decided there was a need to prioritise cases across each State and within the area of each native title representative body or service provider: organisations whose primary role is to represent native title claimants within a designated region of Australia.

The process of deciding the order in which the Court will deal with pending cases involves numerous factors and the Committee 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 user forums and associated Committees have provided an opportunity for more focussed consideration of this, and related, issues.

The criteria used to determine priorities include whether the case involves a matter of 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 level of future act activity, the views of the parties, the level of preparedness of the Applicant (that is, the extent of evidence gathered and issues identified) and the age of the case.

The Court will soon publish a priority list of native title cases. It is expected that, over time, the list will evolve and be updated. The Committee will maintain an oversight of all pending cases through the Court's usual case conferences, directions hearings or callovers.

Access and Fairness Survey

In August 2009 the Court conducted an access and fairness survey in each of its registries. The survey forms part of the Court's ongoing commitment to demonstrate accountability and improve the delivery of services by the Court.

The purpose of the survey was to gather feedback from court users on their experience of accessibility to the Court, together with their views about treatment in terms of fairness and courtesy. The survey is one of the suggested performance measurement tools to address two of

the areas for court excellence that are set out in the International Framework for Court Excellence. The framework has been developed by an international consortium including the United States Federal Judicial Centre, the United States National Centre for State Courts, the World Bank, the Courts of Singapore and the Australian Institute of Judicial Administration (AIJA). The framework is a quality performance measurement tool which includes values, concepts and mechanisms by which courts can voluntarily assess and improve the quality of justice and the efficiency of court administration.

The areas of court excellence surveyed are:

- client needs and satisfaction
- public trust and confidence

The survey is the first of its kind for any court in Australia. In particular, it asked for comments about how people felt they were treated (including by judicial officers) in terms of fairness. The survey results indicate that, in every registry across Australia, the Court operates in a very accessible and very fair manner. In the available ranking out of 5 the Court ranked, on average across Australia, 4.41 for access and 4.47 for fairness. Scores above 4 are considered to be in the 'excellent' category.

2.3 THE COURT'S PERFORMANCE

Workload

The Federal Court's registries provide registry services for the Federal Magistrates Court (FMC). During the year there were 3,642 actions commenced in the Court and 6,908 in the general federal law jurisdiction of the FMC, a total of 10,550. This represents a one per cent increase on the combined workload in 2008-09.

In 2009–10 the total number of filings in the Federal Court decreased by just under six per cent to 3,642. The majority of the decrease was in the Court's appellate jurisdiction, primarily migration appeals. In 2009–10, appellate proceedings filed in the Court concerning decisions under the Migration Act fell by twenty-six per cent and now comprise forty-six per cent of appeals and related actions, compared with fifty per cent in 2008–09. While the reasons for the drop in migration appeals are not clear, it is likely that the Court's procedures to streamline the preparation and conduct of these appeals and applications, which have resulted in reduced timeframes for their disposition, have had an impact. Further information about the management of migration appeals can be found in Chapter 3 on page 30. The workload in the Court's original jurisdiction decreased by one per cent in 2009–10.

Notwithstanding the reduction in Federal Court filings in 2009–10, the 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 5,885, compared with 9,857 this year.

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, 4,671 FMC bankruptcy matters which equates to ninety-two per cent of the FMC's bankruptcy 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 18 months of commencement

During the reporting year, the Court completed eighty-eight per cent of cases in less than eighteen months, compared with ninety per cent in the previous year. As shown in Figure 6.5 and Table 6.5 in Appendix 6 on page 122, 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-one 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 2009–10 the Court handed down 1,748 judgments for 1,550 court files (some files involve more than one judgment being delivered eg. intelocutory decisions and sometimes, one judgment will cover multiple files). The data indicates that seventy-nine per cent of appeals (both full court and single judge) were delivered within three months and seventy-eight 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.

Although not covered in previous Annual Reports, the Court has carefully monitored 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.

In the years since 2005 the Court has been successful in achieving 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, 438 migration appeals and related applications 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 days.

Assisted Dispute Resolution (ADR)

The Court's use of ADR, particularly mediation, continued during the reporting year with 476 matters referred to mediation, a decrease of almost nine per cent on 2008–09. This is, however, substantially higher (twenty-six per cent) than the average annual referral rate of 379 matters for the previous five years. Fifty-two per cent of mediated matters in 2009–10 were resolved in full at mediation. A further six per cent were resolved in part.

There is no comprehensive and comparative collection of statistics concerning ADR connected with Court proceedings. Scholars have called for such statistics and the Court has decided to commence collecting and reporting additional ADR statistics. These statistics can be found in Chapter 3 at page 33.

As part of the Individual Docket System (IDS) (refer to page 26 for an explanation of the IDS) and the Court's active case management approach, the use of ADR is considered when determining the most appropriate case management method for individual matters. Due to the nature of the Court's work, other case management tools may be more appropriate in some instances.

Financial management and organisational performance

During the reporting year the Court continued to achieve its objective of promptly, courteously and effectively deciding disputes according to law. It did so with an unceasing commitment to delivering innovative and excellent services. These achievements came within the context of a reduced budget and reduced operating staff as the Court was not quarantined from the effect of the global financial crisis.

The reduced operating budget challenged the Court to continue to meet the high standards it has set and that Court users continue to expect. Over the last two financial years reviews were undertaken and decisions made to achieve a balanced budget by 30 June 2010. The net result of this work was a fourteen per cent reduction in the Court's staffing numbers (full-time, part-time, ongoing and non-ongoing positions) from 422 at 30 June 2008 to 363 at 30 June 2010. This has been achieved with no reduction in the quality of the services provided both internally and externally. This report is an opportunity to publicly acknowledge the remarkable efforts made by judges and staff who readily understood the need to work differently, more innovatively and focus on achieving improvements in practice that deliver benefits both internally and to members of the legal profession, litigants, or members of the public.

As noted above, the Court's 2009–10 budget was predicated on the assumption that it would be a break even budget. Instead the Court achieved a $1.242m surplus in 2009–10. The surplus was primarily the result of the deferment of several projects including a Native Title ADR project and the acquisition of new computers and printers.

There have been major adjustments to the Court's annual recurrent funding for 2010–11, including the removal of depreciation funding, reduced funding for judicial officers and increased funding to cover rent increases. These changes have by and large been met by corresponding adjustments to projected expenditure for 2010–11. The carry forward of the projects deferred in 2009–10 and salary increases mean that the Court is budgeting for a small deficit of $628,000 in 2010–11.