NATIVE TITLE INSTITUTIONAL REFORMS

By Louise Anderson, Federal Court of Australia

The Australian Government recently announced a number of key native title institutional reforms focused on improving the efficiency of the native title system and assisting the Federal Court to strengthen its ability to achieve native title outcomes.

Under the reforms, native title claims mediation and Indigenous land use agreement (ILUA) negotiations related to native title claims mediation will, over time, cease to be undertaken in the National Native Title Tribunal (NNTT) and be taken up by the Federal Court:

The government has stated its expectation that most native title matters will cease to be mediated in the NNTT as of 1 July 2012 but some matters — for example, those that are close to resolution — are likely to remain with the NNTT for mediation, including any assistance with ILUA negotiations until finalised.

All of the NNTT's other statutory functions will remain with the NNTT after 1 July 2012, including:

- ILUA negotiations not related to native title claims mediation
- future acts functions
- maintenance of various registers
- application of the registration test.

Since 1 July the court's key priority in respect of the mediation workload has been to maintain the impetus and progress of existing mediation of cases in the priority list.

To achieve this the court has sought the views of the applicant and respondents in the majority of cases in mediation and put in place a mediation or case management strategy. This process of review considers what case will continue to be the subject of mediation, when mediation (or other form of ADR) should occur, and whether the mediation should continue with the NNTT or be referred to a registrar or external mediator, or cease.

Such an assessment takes place through callovers and review hearings, as well as before Registrars in case management conferences in order for the court to be fully apprised of the nature of the extant issues and to propose an approach to resolve these, including a timetable.

The initial focus of judges and registrars has been on the requirements over the six months from July to December 2012. However, the court's Native Title Committee has noted that there is a need to develop a plan for the future. It is important for the court to continue to identify priority cases and publish these with the indicative resolution dates but it is equally important for it to develop a longer term plan to allow for a balanced approach to allocation of resources.

The transfer of the responsibility for the mediation of claims from the NNTT to the Federal court complements various legislative changes that have occurred to the court's responsibilities over recent years. These changes include the 2009 amendments to the *Native Title Act 1993* (Cth), which empowered the Federal Court to, amongst other things, refer a claim to 'an appropriate person or body for mediation', including a Registrar of the Court, the tribunal or another individual or body.

Also in 2009, amendments were made to the *Federal Court of Australia Act 1976* (Cth) to make clear that the court has both responsibility and authority to actively manage cases. The changes also placed similar responsibilities on parties and their legal representatives, including all parties involved in native title claims. Of significance are ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth), which makes 'the overarching purpose of the civil practice and procedure' of the court the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible and requires parties to act consistently with this purpose.

The mediation reforms, along with the other changes to native title in recent years, offer an opportunity for all parties to resolve native title claims, and the court looks forward to working with all parties involved in native title to achieve long-awaited results.

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