SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
NATIONAL NATIVE TITLE TRIBUNAL

Question No. 192

Senator Ludwig provided the following written question at the hearing on 24 May 2007:

Mediation Stage
a) What is the average length of native title mediation that is conducted under the auspices of the NNTT?
b) Could you provide a breakdown of the lengths of time spent in this stage for all mediations begun and finalised in 00-01 to present?
c) How many mediations are successful, and how many are unsuccessful?
d) What resources does the NNTT provide for mediation?
i) How many mediators are available?
ii) What is their workload?
iii) How do these mediators typically assist in the mediations? What sort of functions do they perform?
e) Where there is no agreement after mediation:
It goes to the Federal Court who may either refer the claims back for mediation, or may hear a Native Title case.
i) In how many cases does the Federal Court refer it back to mediation and in how many cases does the Federal Court decide it itself?
ii) In cases in which the Federal Court refers it back to mediation, what are the reasons for this – given that mediation has failed the first time around?
iii) What is the time it takes the Federal Court to get around to making a decision to either refer back to mediation or make a determination.
f) Where there is agreement after mediation, is that automatically accepted by the Federal Court?
g) What is the time after the acceptance of the agreement to the registration of that agreement by the Court?

The answer to the honourable senator's question is as follows:

a) 42 months.

b) See table at Attachment A. Many native title claim groups or claimant applications are not ready for substantive mediation until long after the matter has been referred to the NNTT for mediation. Consequently the periods of actual mediation will often be shorter than the table indicates.

c) The aim of mediation is to allow the parties to agree to the terms of a native title determination and eliminate or limit matters that have to be dealt with by litigation: see section 86A of the *Native Title Act 1993*. One measure of success is the number of consent determinations where most if not all issues have been resolved though a process of mediated agreement. There have been 56 Federal Court decisions in relation to 62 claimant applications determined by consent. In some of these cases, the consent determination was made after the Court heard preliminary evidence or a trial had commenced. In the same period there have been 20 Court decisions in relation to 41 claimant applications determined by litigation. However, in many cases where a matter was concluded through litigation there was some resolution or reduction of issues through a mediation process. It is difficult to give a quantitative assessment of the proportion of issues in relation to a particular claim that are resolved in this way.

d)
i)The *Native Title Act 1993* prescribes that each mediation conference in relation to claimant applications must be presided over by a Tribunal member or consultant engaged by the Tribunal President. The NNTT currently has nine full time and two part time members. There are no consultants employed at present. Tribunal members are assisted by staff (including specialist geospatial, research and legal staff) to varying degrees in carrying out the mediation function.

ii) Members are responsible for a range of functions under the *Native Title Act 1993*, including the mediation of claimant applications. They are assisted by staff to varying degrees in performing those functions. The current workload is:

- Number of claims referred by the Federal Court for mediation 280
- Number of active future act mediations 79
- Number of active future act determinations 20
- Number of active future act objections 592
- Number of ILUAS where negotiation assistance is currently being provided 21

iii) Please refer to the attached extract (pages 16-23) at Attachment B from a paper by Graeme Neate, President of the NNTT, and Graham Fletcher, member of the NNTT, which explains the functions of members and how they assist parties: *Shifting lines in the sand; Meeting the challenges of native title mediation.* September 2006. The full paper can be viewed online at:
http://www.nntt.gov.au/metacard/files/ShiftingLines/IAMA%202006%20national%20conference.pdf

e) Where there is no agreement after mediation:
The Federal Court supervises the progress of mediation conducted by the NNTT in respect of claimant applications. The Federal Court has advised that usually it will only make an order to cease the mediation before the NNTT when it is asked to do so by the parties and /or the NNTT. As a supervisor of the mediation, the Court is not aware of the content of the mediation and as such must rely upon the information provided to it as to the likely prospect of success in mediation.

If the Court is advised that mediation has not been successful, the Court may order that mediation cease (see below) and may make orders programming the matter to trial (or for a procedure ancillary to the litigation process, for example a compulsory conference of the experts involved in the case, or the taking of some evidence with a view to reinvigorating the mediation).

A matter may be programmed to trial without the Court formally ordering that the mediation before the NNTT is to cease. This may occur where it is apparent that, as the matter progresses and the applicant's case becomes more clearly articulated through the litigation process, it would be fruitful for the NNTT mediation to recommence.

Ultimately the matter will be determined by the Court, if not by agreement then by a trial.

i) For the period January 1994 to April 2007 the Court has made 100 determinations of native title (excluding the determination of native title in respect of Mabo and Others v Queensland (No 2) (1992)).

Of these 100 determinations, 20 determinations were made as a result of litigation. Eight of these matters were referred to the Federal Court under section 74 of the original *Native Title Act 1993* (pre 1998 amendments). A section 74 referral informed the Court, in effect, that the NNTT had formally ceased the mediation and the matter was referred to the Court for a trial.

In the 12 other matters that proceeded to a litigated determination, orders to cease mediation were made in two, and one matter was set down for trial at the request of the parties and thus not referred to mediation. In the remaining nine matters, the possibility for mediation remained, notwithstanding that the matters were in litigation.

ii) The Court has stated on many occasions that the settlement of native title claims by agreement is to be welcomed. The Court has encouraged settlement because the parties can decide for themselves how best to institute an arrangement that reflects their respective rights and interests in a way that is appropriate and recognises the rights and interests of the other parties.

In this context, there is a view that, where mediation has stalled and a matter proceeds towards a litigated outcome, parties' behaviours and expectations change as the relative strength or weakness of a case becomes clearer. That gives rise to the opportunity for effective and focused mediation. In such circumstances, the Court supports the recommencement of the mediation. It is always open for the applicant or a respondent to request that the matter be referred for mediation to recommence or, where the mediation was never formally ceased, to request that mediation be reinvigorated.

iii) The resolution time is greatly dependent upon factors particular to the case involved such as the complexity of the tenure, the number of respondent parties, the nature of the legal and factual issues and the presence of intra or inter indigenous dispute. An example of the shortest resolution time for a matter in which the Court made an order that mediation cease and then determined the matter through litigation, is five months. An example of the longest resolution time is 72 months.

The Court's records show that in one case the Court ordered that mediation cease and subsequently referred the matter back to the NNTT for mediation. In that matter the Court referred it back to the NNTT nine months after the commencement of the litigation process.

f) The Federal Court has advised that, where the Court has been informed by the parties that an agreement has been reached and that the parties seek a determination of native title and the determination and supporting material is provided to the Court in final form, the Court has, to date, made the orders in the terms proposed by the parties.

The *Native Title Act 1993* provides that the Court may make orders giving effect to an agreement reached between the parties where the agreement relates to the proceeding or part of the proceedings without holding a hearing if it appears to the Court to be appropriate to do so. There are, however, certain pre-conditions where a determination is made under section 87 or section 87A. So far as section 87 is concerned, the Court must be satisfied that an order in or consistent with those terms would be within the power of the Court.

g) It is not possible to answer this question in full at present.
The Federal Court has advised that if the Senator's question goes to the time between when the Court was advised that agreement has been reached by the parties and the determination being made at a Court hearing, the data necessary to answer the question is not readily accessible and would need to be collated manually.

The Court usually advises the NNTT that a determination of native title has been made in relation to a matter within two working days of the determination being made. The NNTT has advised that the Registrar of the NNTT normally registers the determination within two working days.