

Requesting non-disclosure directions under section 155 of *the Native Title Act 1993 (Cth)*

Non-disclosure directions

Parties to an inquiry before the Tribunal may wish to rely on evidence that is confidential or subject to cultural restrictions that limit its disclosure to people of a certain gender or status. Section 155 of the *Native Title Act 1993 (Cth)* provides that the Tribunal may direct that any evidence given before it (for example at a hearing) or the contents of any document produced to it, must not be disclosed or may only be disclosed in such a manner or to such persons as the Tribunal, through the presiding member, specifies. These directions are referred to as non-disclosure directions.

Making a request for non-disclosure directions

A request for non-disclosure directions must be made at least seven (7) days before the confidential or restricted evidence a party intends to give or produce is due to be received by the Tribunal. Where it is not possible in the circumstances to make such a request seven (7) days in advance, the request must be made as soon as practicable.

The request should be made to the relevant Practice Leader, Practice Officer or the presiding member. If the request is made to the Practice Leader/Practice Officer the request will be sent to the presiding member for consideration. The requesting party should provide information to the Tribunal in support of their request, including:

- 1) a copy or description of the documents in relation to which the proposed non-disclosure directions are sought, or a brief outline of the evidence to be given. If the confidential or restricted evidence relates to part of the document but not the whole document, the description should state clearly which part of the document is confidential or restricted. For example, setting out clearly which paragraph's, statements, annexures or attachments are confidential or restricted;
- 2) a brief explanation as to why the proposed directions are sought, including details of the confidential or sensitive nature of the restricted evidence; and
- 3) an outline of the proposed directions sought, together with draft directions for consideration by the Tribunal (see the template standard directions attached to this guide).

If the request relates to a document the party intends to produce, the document should be provided to the Tribunal in a sealed envelope marked 'confidential'. If the document may only be viewed by persons of a certain gender or status, this should also be clearly marked on the envelope as 'restricted'. If the member makes the non-disclosure directions then a copy of the confidential or restricted documents may be provided in such a manner or to such persons as directed by the member.

The requesting party may, but is under no obligation to, provide a copy of any document or an outline of the evidence to any of the other parties before the non-disclosure directions are made.

When a request for non-disclosure of a document is made electronically by email, a copy of the document should not be attached to the email due to a higher risk of inadvertent disclosure. Rather a description of such document should be provided, and the document should then be provided to the Tribunal in hardcopy, in a sealed envelope within two days of the request being made. Where it is not possible in the circumstances to provide the material within 2 days, the documents must be provided as soon as practicable.

If the non disclosure directions are not made in relation to some or all of the documents provided the Tribunal must return those documents not subject to the orders to the requesting party. Parties should note that a request for non-disclosure directions will not operate to suspend, postpone or vary any other directions on foot in relation to the matter.

What happens after the request is made?

After a request is received the Tribunal will seek the views of the other parties and give them an opportunity to be heard on the matter.

If required, the presiding member will hold a directions hearing as soon as possible to determine whether the proposed directions should be made. If the parties consent to the proposed directions, the member may, at their discretion, dispense with convening a directions hearing and make the directions sought in chambers.

If the request is successful and directions are made, a person must not disclose any evidence or material the subject of such directions. A contravention of any non-disclosure direction made by the Tribunal is a strict liability offence under section 176 of the Native Title Act 1993 (Cth). Parties should note that the making of non-disclosure directions does not prevent the Tribunal from stating in its determination any findings of fact upon which the decision is based. Further, in the event of an appeal or judicial review of the Tribunal's determination disclosure of the confidential or restricted evidence to the Federal Court of Australia may be required.

Standard Directions

A template for standard non-disclosure directions is attached to these guidelines. The Tribunal encourages parties to use the template when making a request.