

# Extension of time to comply with Tribunal directions—confidential information

## Velickovic/Western Australia/International Goldfields Ltd [2005] NNTTA 7

Sumner DP, 23 February 2005

### Issue

Can the issue of confidentiality be raised as a basis for an extension of time to comply with the Tribunal's directions?

### Background

In the course of an inquiry into an expedited procedure objection application, the native title party raised concerns regarding the confidentiality of material submitted to the Tribunal, in particular affidavits—at [11].

The concern was raised on 22 February 2005 as a reason for non-compliance with directions requiring the native title party to provide a statement of contentions, documentary evidence and witness statements by 21 February 2005—at [10].

The Tribunal noted the original directions of 31 August 2004 advised the parties that an objection may be dismissed pursuant to s. 148(b) of the *Native Title Act* 1993 (Cwlth) (NTA) for, among other things, a failure to comply with a direction of the Tribunal. The directions also require that documents containing information of a confidential nature should be submitted separately in a sealed envelope with details given of the documents supplied, and their intended use by the Tribunal—at [5].

### Confidentiality of evidence before the Tribunal

In explaining their concern, the native title party referred to an incident of a copy of an affidavit being released by the Tribunal to a third party. The Tribunal understood the document in question was a copy of a Tribunal determination which contained details of an affidavit submitted as evidence. The native title party expressed the view that it now wished to formulate its affidavits and contentions in a way to ensure confidentiality was maintained and this would be time consuming as additional consultation was required. The native title party's representative had instructions not to file the documents until the issue of protection of confidential information was sorted out—at [12].

The Tribunal did not accept the native title party's reasons for requesting a further extension of time to comply with the directions. The Tribunal referred to the provisions of the NTA with regard to:

- the right to negotiate hearings being public unless there is a direction for a private hearing (ss. 154(1) and (3));

- in making such a direction the Tribunal must have due regard to the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders as the case may be (s. 154(4)); and
- directions may be made requiring any evidence given before the Tribunal or contents of any document produced to it not be disclosed etc. (s. 155).

Both the Tribunal and the Federal Court have enunciated principles on the making of confidentiality orders. In this matter, no requests for confidentiality orders were sought. Nor were any documents submitted using the confidential information procedure. The Tribunal found no basis in the native title party's correspondence on which a further extension of time to comply should be granted—at [13].

### **Dismissal for failure to comply with directions**

The Tribunal considered one of the factors to be taken into account in the use of the power to dismiss under s. 148(b) is the previous conduct of the objector, such as previous failures to comply with directions. The Tribunal noted that since May 2004 it had dismissed a number of objection applications lodged by the Widji people where native title compliance was an issue—at [14].

### **Decision**

The Tribunal was satisfied that the native title party had failed to proceed within a reasonable time with its objection application and failed to comply with the directions of the Tribunal and dismissed the application under s. 148(b).