

Expedited procedure — acceptance of Form 4 & application fee

Fisher/Queensland/ Kitchener Mining NL [2005] NNTTA 33

Sosso M, 5 May 2005

Issue

Where an applicant contends that the application fee for making an expedited procedure objection application to the National Native Title Tribunal under s. 75 is not payable, what factors are relevant in determining whether the period allowed for the supply of material to substantiate the assertion is reasonable?

Background

The Queensland Government issued a s. 29 notice on 8 December 2004 that included a statement that the government considered the act attracted the expedited procedure. Within the relevant period, the native title party (applicant for the Birri People native title application) lodged an expedited procedure objection application (Form 4). The application was not accompanied by the prescribed fee: see s. 76(d).

The *Native Title (Tribunal) Regulations 1993* prescribe the fee but also specify, among other things, the circumstances in which the fee is not payable. Subreg 8(b)(i) provides that a fee is not payable if the person liable to pay the fee is the holder of one of the following cards issued by the Department of Social Security:

- a health care card;
- a health benefit card;
- a pensioner concession card;
- a Commonwealth seniors health card.

An application for ‘relief from payment’ of the fee was made on the basis that ‘one or all of the persons liable to pay the fee fall within part (b) of that regulation’.

The closing date for lodgement of objection applications was 8 April 2005. No material supporting application for waiver of the fee was received by that date. The legal representative for those seeking waiver was contacted on 19 April 2005 and again on 27 April 2005 by Tribunal staff and documentation in support sought. Relevant information was then to be provided by 29 April 2005 but none had been received by the date of the member’s decision—at [11].

The Tribunal considered that two situations could arise where no fee was paid:

- the applicant does not contend that the fee is not payable;
- the applicant contends that the fee is properly waived.

In the former case, Member Sosso was of the view that:

- a failure to assert that the fee is not payable by a native title party does not result in any obligation being placed on the Tribunal to make enquiries or to do anything further other than submit to the presiding member the material to hand so that an acceptance decision can be promptly made;
- payment of the fee is mandatory and, unless the native title party has paid the fee or can rely upon the circumstances in the regulations, the objection application will not be accepted;
- in the latter case, the native title party is obliged to provide material to the Tribunal to substantiate the assertion;
- procedural fairness requires that the objector be given a reasonable time to submit the material and what is a reasonable time will depend upon the circumstances of each case—at [14].

The relevant factors identified included:

- the time elapsing between the lodging of the Form 4 and the conclusion of the four-month notification period;
- whether the native title party is legally represented;
- whether the native title party has previously lodged expedited procedure objection notices;
- whether the Tribunal has made contact with the native title party, either orally or in writing seeking the relevant documentation;
- the previous history of the native title party in dealing with such matters; and
- the practice of the Tribunal in the particular jurisdiction.

The member was of the view that, in the context of expedited procedure objection applications, decisions need to be made promptly.

Decision

The native title party failed to support its assertion that no fee was payable. Thus, the Tribunal proceeded on the basis that the fee was payable. No fee was paid and therefore the Form 4 was not accepted. Member Sosso stated that:

A native title party who assert that the prescribed fee is not payable should provide documentation supporting that assertion *either at the same time that the Form 4 is lodged or by the expiration of the notification period* (s. 32(3)). However, if supporting material is lodged after the closing date but before an acceptance decision is made, then the Tribunal will take that material into account—at [29], emphasis added.