

## Party status — native title service provider

### ***Brierley v Minister for Land and Water Conservation*(NSW) [2002] FCA 1209**

Emmett J, 13 September 2002

#### **Issue**

The New South Wales Aboriginal Land Council (NSWALC) made application for leave to withdraw as a party and New South Wales Native Title Services Limited (NSWNTS) made application to be joined as a respondent to two claimant applications. NSWNTS was not a representative body but, rather, was funded under 203FE of the *Native Title Act 1993* (Cwlth) (NTA) to perform the functions of such a body. One party opposed joinder on the basis that NSWNTS was not properly performing the functions for which it was funded to perform.

#### **Background**

In *Munn v Queensland* [2002] FCA 78 at [16], Justice Emmett expressed some reservations concerning the court's power to join a body in these circumstances:

The Act clearly contemplates that a representative body may be a party to a proceeding, but only if it notifies the Federal Court in writing within the time specified in s 84(3)(b). The Act evinces a policy that, if the persons named within s 84(3) does not notify the Court, then it is only a more limited class of persons who may be joined as parties pursuant to s 84(5), namely only persons whose interests may be affected.

His Honour noted that the court had expressed some concern as to the ambiguity of the legislation concerning joinder in other matters, referring to *Walker v Western Australia* [2002] FCA 869; *Woodridge v Minister for Land and Water Conservation* [2002] FCA 1109; *Simms v Minister for Land and Water Conservation* [2002] FCA 15; and *Gale v NSW Minister for Land and Water Conservation* [2002] FCA 972.

While noting that ss. 84(3)(a)(i) and 66(3)(a)(ii) made it 'tolerably clear' that a representative body would be a party to proceedings, Emmett J commented that there may be 'a hiatus in the legislative scheme insofar as the Act does not expressly provide for joinder of a new representative party' — at [3].

After expressing further misgivings about whether or not the 'interests' NSWNTS had identified (i.e. discharging its responsibilities to identify persons who may hold native title and consulting with indigenous communities that might be affected by matters with which it was dealing, referring to s. 203BJ) fell within the scope of s. 84(5), his Honour decided it would not be 'clearly erroneous' to conclude that they did and so followed the decisions in the matters noted above.

#### **Consulting with the objector**

In response to the objector's submission that NSWNTS was not properly discharging its responsibilities and should not be joined at this stage, Emmett J said that, if this was the case, then it was a matter that should be addressed only after NSWNTS was joined as a party, at which point NTS would be subject to regulation by the court. A failure by NTS to discharge its responsibilities adequately may be a ground for 'concluding that it no longer had an interest in the proceeding'. His Honour expressed the 'earnest hope' that the objector would be consulted in an appropriate fashion by NSWNTS in connection with the continuing mediation of this matter. The National Native Title Tribunal must report no later than 31 January 2003 as to the progress of the mediation of these two claims.

**Decision**

Pursuant to s. 84(5), NSWNTS was joined as a party to proceeding and NSWALS granted leave to withdraw as a party pursuant to s. 84(7).