

# Party status—appeal proceedings

## *Bodney v Bennell* [2007] FCAFC 11

Finn J, 16 February 2007

### Issue

The question before the court in this case was whether a group of respondents holding pastoral interests should be granted leave to intervene in an appeal against a decision of Justice Wilcox in relation to native title in the Perth metropolitan area.

### Background

Wilcox J handed down his findings concerning native title to the Perth metropolitan area on 19 September 2006—see *Bennell v Western Australia* [2006] FCA 1243, (judgment on the separate proceeding, summarised in *Native Title Hot Spots Issue 21*). Prior to making that decision, his Honour had decided to deal with all the claimant applications that covered the Perth metropolitan area (including part of one known as the Single Noongar claim) in a separate proceeding. The State of Western Australia appealed against the judgment on the separate proceeding.

Although they were parties to the Single Noongar claim, the pastoralists seeking to intervene in the state's appeal were not parties to the separate proceeding. They sought leave to intervene in relation to one ground of the state's appeal, which alleged a denial of procedural fairness because (among other things):

- when the judge decided to constitute the separate proceeding, he effectively excluded certain respondents, including the pastoral interests;
- his Honour should have given those respondents an opportunity to become a party once he decided to determine the question of whether there was native title in the whole claim area, not just the Perth metropolitan area, in the separate proceeding.

The pastoralists, in support of their application to intervene, asserted they were denied the opportunity to adduce evidence in relation to, and to cross-examine on, matters in the separate proceeding that affected their interests in the wider Single Noongar claim area.

While Justice Finn was of the view that it was likely that the pastoralists' contribution would, in essence, parallel that of the state on the particular ground of appeal, he was prepared to grant leave to intervene, subject to certain conditions—at [8] to [9].

### Decision

Leave to intervene in relation to the relevant ground was given provided that:

- the pastoralists' legal advisers consulted with the state's legal advisers to determine whether filing of an outline of submissions would make a useful contribution to the appeal;
- if it such an outline was filed, it was no longer than five pages—at [11].