

Party status

Connelly v Queensland [2009] FCA 1181

Dowsett J, 11 August 2009

Issue

In this case, the court joined Queensland South Native Title Services Ltd (QSNTS), which had formerly represented the applicant in the Mitakoodi and Mayi People #1 claimant application, as a respondent to that claim pursuant to s. 85(4) of the *Native Title Act 1993* (Cwlth) (the NTA). The applicant unsuccessfully opposed the motion for joinder.

Background

Subsection 84(5) provides that:

The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.

While the court referred to QSNTS as a 'representative body', it is actually a body funded under s. 203FE(1) to perform the functions of representative body, colloquially known as a 'native title service provider' (NTSP).

The applicant for the Mitakoodi and Mayi People resisted joinder on the grounds that QSNTS had no immediately apparent role to perform and there was a risk of a conflict because QSNTS previously acted for the applicant and may have confidential information in its possession.

Justice Dowsett took the view that, while it was unlikely that there was 'any significant amount of confidential information' given the limited progress of the matter, the court was in any case 'willing to rely upon the professionalism of the relevant legal advisers and employees' of QSNTS 'in order to avoid any problem in that regard'. As to its role in the proceedings, the court was satisfied this would be 'determined by its responsibilities' under the NTA and that there was 'no doubt' that QSNTS would 'participate in the proceedings only in a constructive way, and in a way designed to serve the public interest and the interests of indigenous people generally' — at [2] to [3].

Decision

Dowsett J decided to join QSNTS because:

[G]iven the close involvement which ... [QSNTS] has in the claims in the [relevant] ... area ... it will be of assistance to the Court, and in the interests of justice if it becomes a party to these proceedings. It will also assist in other respects, having regard to the various functions which are conferred upon it by the Act—at [1].

Comment

The court's justification for joining QSNTS is of interest for at least two reasons.

Firstly (with respect), whether or not it would assist the court is not relevant to s. 84(5). The question is whether the court is satisfied 'the person's interests may be affected by a determination in the proceedings'. On the unusual nature of this requirement, see *Woodridge v Minister for Land and Water Conservation (NSW)* (2002) 122 FCR 190. In this case, the court gave no express consideration as to whether QSNTS had interests that may be so affected. It may be implicit in the decision that the discharge of responsibilities under the NTA satisfies s. 84(5), a conclusion reached reluctantly in *Brierley v Minister for Land & Water Conservation (NSW)* [2002] FCA 1209 (*Brierley*). However, the case law on s. 84(5) and representative bodies (or NTSPs) is not clear. Such bodies have a statutory right to party status 'by force of' ss. 66(3)(a)(ii) and 84(3)(a)(i) only if they notify the court within the prescribed period. If not, they must satisfy the requirements of s. 84(5). This is seen as engendering ambiguity as to the proper exercise of the court's discretion under s. 84(5), an ambiguity usually resolved on policy grounds or the particular facts of the case. In addition to *Brierley*, see *Munn v Queensland* [2002] FCA 78, *Woodridge v Minister for Land and Water Conservation (NSW)* [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.

Secondly (again, with respect), whether 'it is in the interests of justice' to join QSNTS is a reference to s. 84(5) as it now stands i.e. following an amendment made by item 5 of Schedule 2, Part 1 of *Native Title Amendment Act 2007* (Cwlth). However, item 78 of Schedule 2, Part 2 of that Act states the amendment applies 'in relation to a proceeding that commences on or after' 15 April 2007, apparently to ensure that:

The amended provisions ... do not apply to persons who apply to become a party after the commencing date where the proceedings were instituted before the commencement date ... [because] it would be unjust to apply different tests for joinder—Explanatory Memorandum to the Native Title Amendment Bill 2006 at [4.340].

Since the proceedings to which QSNTS sought to be joined commenced in 1998, it seems its application should have been determined in the light of s. 84(5) as it stood prior to amendment, when the interests of justice were not specifically mentioned.