Party status — person asserting a traditional connection

Davis-Hurst v Minister for Land and Water Conservation (NSW) [2003] FCA 541

Branson J, 4 June 2003

Issue
The issue here was whether a person seeking to be joined as a respondent to a claimant application had an interest that may be affected by a determination in the proceedings as required under s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA).

Background
The two claimant applications relevant to these proceedings were made by Patricia Davis-Hurst on behalf of the Kattang People of the Manning Valley over an area known as Saltwater. The person seeking to be joined to the proceedings, Keith Kemp, argued (among other things) that:

- the group represented by Ms Davis-Hurst was a 'cognitive illusion' and that there had been a failure to properly identify the traditional owners of Saltwater;
- while some or all of the Kattang people may be the traditional owners of Saltwater, this was because their ancestors were, like his, Pirripaayi people—at [11] to [15].

Mr Kemp indicated to the court that, if he became a party to the proceedings, then he would seek (among other things) to have the two claimant applications struck out. His concerns included that any determination in favour of Ms Davis-Hurst and her group would:

- give formal recognition to a version of history that does not recognise the Pirripaayi people as the traditional owners of Saltwater;
- give an unwarranted appearance of legitimacy to laws and customs that he claims may be of relatively recent origin;
- adversely affect his ability to share the knowledge he has acquired about the Pirripaayi people and his capacity to keep alive Pirripaayi language and customary laws—see [15] to [19].

The court considered that the issues raised by Mr Kemp revealed two underlying concerns that were relevant to the making of any determination of native title. The first was in relation to the identity of the persons making up the group holding the common or group rights comprising native title and the second related to the identification of the traditional laws and customs under which that title is held: see s. 225(a). Justice Branson noted that the nature of the 'interest' required to give a person the right to be joined as a party to native title proceedings need not be a proprietary interest but must be:

- greater than that of a member of the general public;

- genuine;
- not indirect, remote or lacking substance; and
- an interest that may be affected by any determination—at [6], quoting *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1 at 6 to 8.

Decision

Her Honour found that any impact a determination in the proceedings may have on Mr Kemp's interests in establishing and maintaining the integrity of his own research and disseminating his knowledge of Pirripaayi language and culture was too indirect to warrant joinder—at [26].

However, his interest as a descendant of the Pirripaayi people in seeking to avoid a determination that discounted the traditional connection that he asserted his people had with Saltwater went to the heart of s. 225(a), which requires that a determination of native title must identify the persons, or each group of persons, holding the common or group rights comprising the native title. An interest of this kind can be clearly defined and is capable of being affected in a demonstrable way by a determination in relation to the relevant proceedings—at [27].

Her Honour ordered that Mr Kemp be joined as a respondent to the proceedings because it would not be in the interests of justice to refuse his application. However, in making that order, the court noted that it was regrettable that the application for joinder was determined long after the filing of the claimant application and at a time when there were well advanced Indigenous Land Use Agreement negotiations taking place between the present parties—at [28].