

***Roberts v Western Australia* [2010] FCA 1483**

North J, 9 December 2010

Issue

The main issue was whether the Federal Court should appoint an expert to assist in the resolution of issues in relation to the native title claim group description in two claimant applications made on behalf of the Kariyarra people and, if so, what questions that expert should address.

Background

The Kariyarra applications (filed in 1998 and 2009 respectively) were thought to be capable of resolution by agreement but, during the negotiations, it became clear that there was no agreement in regard to whether the four families should be included in the claim group. As a result, the applicants and the State of Western Australia both proposed that the court appoint an expert anthropologist under O 34 r 2 of the *Federal Court Rules*, with the court to meet the expense of the appointment. The proposal was that the expert would report on 'specific questions concerning the connection of the group entitled to apply for a determination of native title'.

Appropriate case for expending court resources

Justice North considered as a preliminary question whether the case was of 'sufficient importance' to warrant expenditure of limited court resources to meet the costs associated with the appointment of such an expert. All of the parties who appeared before the court were of the view that it was appropriate in this case—at [3] to [6].

The next issue was 'the purpose ... to be served by commissioning the expert report'. Counsel for the Kariyarra (whose view was 'based on knowledge and experience from working with the community and should be accorded special weight') pointed out that the expert report might resolve the position in relation to at least some of the families and, if the matter went to trial and a number of the families were self-represented, the report was likely to be 'a valuable piece of evidence' that assisted in delineating the issues to be addressed and the questions for the court. Therefore, North J was satisfied that:

- this case was of 'such importance' that court resources should be devoted to meet 'the reasonable costs of an independent anthropological expert'; and
- there was likely to be 'value in the submission of such a report, if not to the parties, then for the purpose of a trial of the matter'—at [7] to [8].

Questions for the expert

It was agreed that both applications needed to be amended prior to any trial 'to reflect the proper constitution of the native title holding group'. The questions were:

- should this be done before or after the expert report was produced; and
- what was the scope of the question to be determined by the independent expert anthropologist?

North J found that the report should be provided 'before the applicant is called upon to amend their application'—at [11].

The scope of the questions to be put to the court expert as proposed on behalf of the applicants was narrower than that proposed by the state. The mining respondents contended for even broader questions going to all of the requirements of s. 225 of the *Native Title Act 1993* (Cwlth). His Honour preferred the applicants' position, having been persuaded by the argument that:

Adopting the wider proposal would involve duplication by requiring the expert to traverse ground already covered in previous research. The State has already accepted that this earlier research has demonstrated connection to some extent. Consequently, the issue to be determined is properly confined by the question posed in the draft minutes submitted by the applicant—at [15].

Decision

Orders were made that the applicants and the state confer with a view to agreeing upon a suitable anthropologist to be appointed as a court expert pursuant to O 34 r 2 of the FCR to report upon identified questions and then report to the court regarding any agreement reached.

Funding for trial

His Honour noted that the court intended that, at the very least, the issue of claim group composition would be set down for trial in the second half of 2011 if it was not resolved by agreement. Yamatji Marlpa Aboriginal Corporation (the relevant the representative body) filed an affidavit of its Chief Financial Officer setting out its financial circumstances and the process for obtaining funding for trial. His Honour commented that: 'No doubt, the funding bodies will take into account the importance attached to the case as expressed to the Court by the applicant, the State and BHP Billiton companies'—at [17].