# *Roe v Western Australia (No 2)* [2011] FCA 102

**Gilmour J, 15 February 2011**

**Issue**

The Federal Court was asked to make an order under s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA) to replace the current applicant for the Goolarabooloo/Jabirr Jabirr (GJJ) claimant application. Joseph Roe, one of the two people who would be replaced, challenged to the validity of the GJJ claim group meeting that resolved to seek replacement of the applicant and the right of some of those comprising the proposed replacement applicant to be members of the GJJ claim group. The court did not accept these objections and exercises its discretion to replace the applicant. Mr Roe's application for leave to appeal was dismissed in *Roe v Western Australia* [2011] FCA 421, summarised in *Native Title Hot Spots* Issue 34.

**Background**

The GJJ claim is the only registered claimant application in relation to an area that is subject to several notices of compulsory acquisition issued by the State of Western Australia. These were issued in connection with the proposed Browse liquefied natural gas project at James Price Point on the Dampier Peninsula north of Broome. Therefore, those who are the applicant for the GJJ application are also the registered native title claimant (RNTC) for the area subject to the notices. The RNTC is entitled to procedural rights under the future act regime found in Pt 2, Div 3 of the NTA, including (in respect of some areas affected by the notices of acquisition) the right to negotiate.

However, the relationship between the persons who jointly comprised the 'current applicant' for the GJJ application (Mr Roe and Cyril Shaw) had become unworkable, rendering them incapable of discharging their duties and functions as the applicant (in the proceedings before the court) and the RNTC (in the future act matters). Mr Shaw consented to being replaced but Mr Roe did not. On 3 August 2010, a meeting of the native title claim group resolved to replace the current applicant and authorised six people to be the replacement applicant (the 3 August meeting). The meeting voted 112 for and 37 against replacing Mr Roe and Mr Shaw with six other people (i.e. the replacement applicant), with the vote for including Mr Roe in the replacement applicant was 109 against and 7 for. The replacement applicant then applied under s. 66B(1) for an order under s. 66B(2) that the current applicant be replaced (the s. 66B application).

The six people comprising the replacement applicant are also the people comprising the applicant in a claimant application made on behalf of the Jabirr Jabirr People which wholly overlaps the GJJ claim.

Mr Roe submitted that the court should not make the order sought under s. 66B(2) because the replacement applicant:

- had failed to show that those who resolved at the 3 August meeting to replace the current applicant were members of the GJJ claim group;
- had a conflict of interest and duty because the replacement applicant was constituted by the same people who comprise the applicant in the Jabirr Jabirr People's competing, overlapping application.

**Status of those who voted to replace the applicant**

Justice Gilmour was satisfied on the evidence that:

- the representative body for the area, Kimberly Land Council Aboriginal Corporation (KLC) had taken 'considerable steps to identify and record the details of the members of the GJJ claim group';
- 'as a whole', the GJJ claim group list was 'created and maintained' by the KLC in a 'competent manner' and the list was 'sufficiently accurate and reliable in the present context';
- on the evidence, all those who attended the 3 August 2010 meeting and voted were members of the GJJ claim group for the purposes of s. 66B of the NTA—at [42], [50],[112].

**Discretion under s. 66B(2)**

Mr Roe submitted that the replacement applicant had a conflict of interest because it was comprised of the same six persons who are jointly the applicant for the Jabirr Jabirr claim. In his view, the court should dismiss the GJJ application on the ground that:

> [T]here is now no commonality of interest as between the Goolarabooloo peoples and the Jabirr Jabirr peoples in vindicating the common or group rights and interests claimed in the substantive application on behalf of the descendants of the apical ancestors listed in the GJJ ... application—at [120].

Gilmour J noted that:

- the Jabirr Jabirr applicant was authorised by the Jabirr Jabirr claim group to do 'all that they could to have the GJJ claim dismissed' but, despite this, did not accept Mr Roe's open offer to dismiss the GJJ claim made twice in December 2010;
- importantly, the Jabirr Jabirr claim is unregistered and 'cannot be registered' because of s. 190C(3), i.e. it covers the same area as the GJJ application and 'has in common some of the same native title claimants';
- as the Jabirr Jabirr claim is unregistered, the Jabirr Jabirr claimants 'currently have no procedural rights under the NTA';
- it was likely this would also be the case if a Goolarabooloo family claim was lodged, i.e. it would not be registered—at [115] and [117].

Mr Roe accepted dismissal of the GJJ application would mean the loss of all procedural rights currently available under the NTA but pointed to 'other avenues ... to protect the interests of the respective claimant groups', e.g. a challenge to the validity of the compulsory acquisition notices.

His Honour noted that the replacement applicant did not 'downplay' the fact that the s. 66B application reflected a contest between competing groups within the claim group. However, Gilmour J held (among other things) that:

- it would be premature to conclude that there was no commonality of interest between the competing claim groups, i.e. GJJ and Jabirr Jabirr;
- the rights and interests of all of the Goolarabooloo and Jabirr Jabirr claimants would be dealt with by way of evidence in the substantive native title proceedings;
- a motion was passed at the 3 August meeting that any agreement affecting the GJJ claim area must not be made unless authorised by the GJJ claim group, which includes Mr Roe and his family—at [134], [137], [139] to [141].

**Decision**

Justice Gilmour held that the discretion under s. 66B(2) should be exercised in favour of the replacement applicant, subject to the undertaking and concession made in these proceedings that there would be no overlap between the 'joint applicant' for the GJJ and the Jabirr Jabirr claim—at [142] and [156].

As a result, the order was that only three of those authorised to be the replacement applicant replace Mr Roe and Mr Shaw. This was permissible because it was the six who constituted the replacement applicant who were authorised 'or such of them who remain ready willing and able to act in respect of the GJJ claim in the future'. His Honour took this to mean that:

> [I]f any member authorised to act in respect of the GJJ claim became, for whatever reason, unable or unwilling to act then the remaining members would constitute the duly authorised applicant without the need for further authorisation by the claim group'—at [149].