(b) the tenement was in an isolated location and was difficult to access;

(c) the nickel deposit was located between 50m and 150m underground;

(d) the deposit subsumed the greater part of the southern area of the tenement and potentially stretched into the contiguous tenement to the south;

(e) the only economically viable means of exploiting the deposit was by open cut mining; and

(f) exploiting the deposit by open cut mining was not possible without the acquisition of the contiguous tenements (the lease being too small to support infrastructure and overburden).

WMC further submitted that it was uneconomic for a company the size of WMC to mine the deposit having regard to the various factors listed above, but that it would be economic undertaking for a smaller entity. WMC had entered into an agreement for the sale of the tenement to Australian Mines Ltd (AML) pursuant to which AML were committed to expending a minimum $200,000 within the first 12 months.

AML gave evidence that it was ready to commence work on the tenement upon the resolution of the objection and plaint and that it was already in discussions with holders of contiguous tenements to address the present unworkability of the open cut option.

Van Blitterswyk's Case

Mr Van Blitterswyk contended that "unworkable" in the *Mining Act* related to the question of access due to flooding or adverse weather conditions. Further, Mr Van Blitterswyk was of the view that he would be in a position to work the ground or find investors to do so and that he had equipment available to him for this purpose.

Reasons for Decision

The Warden was of the view that the grounds for the exemption pursuant to s 102(2)(d) of the *Mining Act* were made out. The Warden accepted that the tenement was unworkable unless surrounding tenements were acquired.

The Warden made the following comment: "'Unworkable' in the Mining Act is not defined but, in my view should be understood to include the inability to exploit a tenement given the appropriate methodology adopted."

WONGATHA – A QUESTION OF FRAMING?*

Harrington-Smith v Western Australia (No 9) ([2007] FCA 31)

Introduction and Summary

The decision of his Honour Justice Lindgren in *Harrington-Smith v Western Australia (No 9)* ("*Wongatha*")[1] was delivered on 5 February 2007 at Kalgoorlie.

---

* Marshall McKenna, Hunt & Humphry.
With thanks to Melissa Watts, Associate and Jemimah Mills, articled clerk, both of Hunt and Humphry for their valuable contributions.

1 [2007] FCA 31.

The result, in simple terms is that the *Wongatha* application and all the native title applications that overlapped with it were dismissed.

The subject of this note is twofold:

- to briefly outline the basis of the decision;
- to comment on the consequences of the decision (beyond the obvious point that all or some parties are likely to appeal).

As to the latter point, it is suggested that:

1. Respondents to the native title applications may be able to appeal or cross appeal seeking a result that there be a determination of no native title in all or part of the area the subject of the dismissed applications.
2. All of the native title applicant groups whose claims overlapped with *Wongatha* may need to look at the question of whether the applications are properly authorised in order to avoid the same result, or to avoid an application for a strike out under section 84C of the *Native Title Act.*
3. The judgment is an invitation for further claims to be made over all or parts of the area the subject of *Wongatha* – the result of which is that it may be necessary for claim(s) over the area to be completely reheard in due course.
4. The future act regime under the *Native Title Act* must be complied with in relation to any claim within the area of Wongatha as his Honour's judgment does not conclude that there is no native title over the claim area – only that the claim groups asserting it are not the holder of the rights in question.

Background

The Wongatha claim was the lead claim for the Eastern Goldfields in Western Australia. That is, given the extensive overlaps in the region the Federal Court decided that the best way to proceed was to hear the whole of the Wongatha claim together with so much of other claims that overlapped with it.

The Cosmo Newberry claim was wholly within Wongatha. Six other native title applications overlapped with Wongatha, being the Mantjintjarra Ngalia, Koara, Wutha, Maduwongga, Ngalia Kutjungkatja 1 and Ngalia Kutjungkatja 2 Claims.

The judge recited some facts and figures about the proceedings the subject of the judgment at its commencement. The claim took 100 hearing days, involved approximately 17,000 pages of transcript and many thousands of pages of exhibits.

He did not mention that there a large number of lawyers and counsel involved – varying between half a dozen to almost 20 depending on the particular day of hearing, location and whether the evidence being given was gender restricted.

He also only mentioned in passing that the Commonwealth, late in the course of the proceedings, had made an application for a determination of no native title in order to provide a jurisdictional basis for a determination of no native title in the event that the applications for native title were not authorised and there was a jurisdictional problem because of that – which transpired to be the case.

The Decision

The judgment runs to in excess of 1000 pages (not counting a further 1500 odd pages of annexures. This note does not seek to summarise that judgment[2] – it would require rather more than the pages allocated to do that. Rather it seeks to highlight the issues that this author considers to be key. Those issues are:

1. All native title claims have been dismissed to the extent that they apply to the *Wongatha* claim area – largely on the basis that the rights asserted in the applications were on a "group" basis whereas the evidence suggested rights to be held on an "individual" or perhaps "small group" basis.

2. His Honour decided that all claims lack authorisation, meaning that the overlapping claims are vulnerable to strike out on that basis.

3. He proceeded on the basis that the Western Desert Cultural Bloc ("WDCB") could be a relevant society but did not have to reach a conclusion on this point.

4. The western boundary of the WDCB relevantly falls along a line travelling north/south through Menzies and Lake Darlot, meaning that in the context of the case, those claims affecting land to the West of that line could not succeed.[3]

Dismissal

The Wongatha and Cosmo Newberry claims were dismissed. All other claims where dismissed to the extent that they overlapped with Wongatha – the limitation being because the judge is only empowered to deal with those claims to the extent of the overlap, the balance of those claims being the responsibility of the judges to whom they have been allocated.

The consequences of dismissal of the application are dealt with below.

As discussed below, the judge's findings on this topic may be vulnerable to appeal by respondents. There is a basis upon which the judge could have (and arguably should have) determined that there is no native title in the portion of the claim area that lies westward of the WDCB.

Authorisation

His Honour held that all of the applications before him by claimant groups for a finding of native title were not authorised.

He further held that the consequence of that is that he lacked jurisdiction to determine the claims other than by dismissing them.

There is some debate as to the question of authorisation and its consequence. That is, it is not necessarily the case that a lack of authorisation renders the Federal Court of jurisdiction. Further, the Commonwealth's application for a determination of no native title affords a jurisdictional basis at least for a determination of no native title in areas where that finding is justified. It transpires,

---

2 In accordance with Federal Court practice, the judgement was accompanied by a summary prepared by his Honour, which can be viewed at the commencement of the judgement on the Austlii website – http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/31.html.

3 Somewhat anomalously, he decided that the claims lying west of the line should thus be dismissed, but I think that there are good grounds to assert that he ought to have determined that there was no native title west of that line (see below).

however, that there are other reasons for dismissing the applications insofar as they lie within the area of the WDCB, being the characterisation of the right holding groups (see below). However, that reasoning does not appear to apply to the claims over the area that lies east of the WDCB.

Individual Basis of Claimed Rights

His Honour's analysis of the way in which rights are held discloses a basis upon which he considered that the matters ought to be dismissed rather than determined negatively.

All of the claim groups relied on "multiple pathways" to claim interests in land.[4] More accurately, each individual within each claim group asserted different aspects of their life history as a basis for their association with particular areas of land. Those pathways included (albeit not in all cases) birth in a particular area, one's parents being associated with that area, growing up or working in an area, having traditional knowledge of an area, and/or being associated with dreaming site or tracks associated with an area.

The judge held that: "all Claim groups led evidence directed to showing as many pathways of connection to country of the witnesses they called as possible, without close regard to the Claim group's Form 1 or [Points of Claim]."

Put another way, the evidence did not coincide with the pleadings.

He concluded that the individual rights claimed did not support the claims to communal rights that were asserted and that is one of the bases upon which the claims were dismissed. His Honour also expressed some doubt as to whether the kind of individual and labile connection(s) to country cited could fit within the scope of the *Native Title Act*.

Further, his Honour held that the traditional law and custom of the Western Desert involved a traditional connection with an "estate" defined by reference to *Tjukurr* sites and tracks, and the connection between the individual and an area so defined. In contrast, the subject matter of the "my country" claims made are areas defined by reference to multiple pathways of connection between the individual and land (which included but were not limited to the question of "estate". That distinction would itself be a proper basis for dismissal of the claim due to there being a lack of continuity in observance of laws and customs in relation to the definition of the areas asserted to be "my country" by individuals.

The Western Desert Cultural Bloc

His Honour expressly doubted whether the WDCB was properly described as a society with a system of norms, as discussed in *Yorta Yorta HCA*.[5] His decision, however, proceeds on the assumption that it is, and that it was in existence in 1829 and there has been continuity of observance of laws and customs since that time.

---

4 The Maduwongga and Ngalia Kutjungkatja No 1 and No 2 claims purported to be organised along an "inheritance model" but his Honour recognised (as is the case) that the evidence in those claims also exposed questions of "my country" relations to land on a person by person basis. In any event, his Honour held the basis of claim asserted in the Points of Claim filed in each of the Maduwongga and Ngalia Kutjungkatja No 1 and No 2 claims (ie descent from a cognatic ancestor without more) was not in accordance with traditional laws and customs.

5 *Members of the Yorta Yorta Aboriginal community v Victoria* (2002) 214 CLR 422.

His Honour made the point that it appeared that the various applicants have thought that the issue(s) of definition of society by reference to the WDCB were concluded in their favour by *De Rose FCAFC*. He concluded that they were not. Rather, in his view, they raise issues of fact to be determined on the evidence adduced in *this* case. His Honour's view was that the facts in Wongatha more closely accord with a passage from *Alyawarr-FC*[6] than with *de Rose*:

> "If, … the society identified as the repository of the traditional laws and customs is *a cultural bloc whose members are dispersed in groups over a large arid or semi-arid area an inference of communal ownership of native title rights and interests derived from its laws and customs may be difficult if not impossible to draw*. In *De Rose v South Australia (No 2)* [2005] FCAFC 110 the Court held that a native title determination could be made in favour of individuals or small groups who held native title rights under the traditional laws and customs of a society or community of which they are part. That was identified as the Western Desert Bloc. It was not necessary that the native title holders constituted a society or community in their own right. Each case will, of course, depend upon its own facts." (His Honour's emphasis.)

A further issue was the extent to which the WDCB covered the claim area. All of the claims in one way or another relied on the WDCB as a relevant body of laws and customs. His Honour held that the WDCB covers roughly the eastern two thirds of the claim area. It followed, in his Honour's view, that the claims to the area to the west of the WDCB area (ie west of Menzies/Lake Darlot) must fail. This includes the Maduwongga claim, and most of the Koara and Wutha claims.

It may be that an alternative course was open to his Honour in regard to that part of the claim group. The WDCB was put forward as the relevant system of laws and customs. Absent proof of a system of laws and customs a claim must at least fail. However, in the context that all interested parties must be inferred to have had an opportunity to participate, there seems to be no reason why that part of the land west of the WDCB ought not to have been disposed of on the basis that:

(a) those persons who asserted native title rights and interests in that area expressly relied on their adherence to the laws and customs of the WDCB;

(b) they failed to establish continuity of such laws and customs (or society if the WDCB is properly characterised as such) to that part of the claim area as lies west of the boundary decided by his Honour; and

(c) it follows from those facts that a determination of no native title is appropriate for that part of the claim area.

To the extent that the judge declined jurisdiction on the basis of lack of authorisation, it must not be forgotten that the judge also had before him an application by the Commonwealth for a determination of no native title. His Honour, however, briefly considered that application in his conclusion. It appears that he has dismissed the applications for native title on the basis that the applicants in each of them failed to make out their case. This is a course similar to that taken in *Jango v Northern Territory of Australia (No 6)*[7] by Sackville J.

---

6 *Northern Territory v Alyawarr, Kaytetye, Warumunga, Wakaya Native Title Claim Group* (2005) 145 FCR 442.

7 [2006] FCA 465.

With respect, this is plainly an appropriate course for those areas lying east of the western boundary of the WDCB – there it is clear that the case put did not accord with the facts as found and the claim failed. If those claims were framed differently, there might be a different result.

However, west of that line, it is difficult to see the basis upon which the claims could succeed. In those circumstances, it may be that the appropriate outcome is for there to be a determination of no native title over some but not all off the claim area.

Consequences

The consequences of the decision include:

(a) there has been no resolution of the question of native title in relation to the *Wongatha* claim area;

(b) the overlapping claims are vulnerable to strike out under section 84C of the *Native Title Act*;

(c) the question of future acts in relation to the claim area is likely to be somewhat "muddy" for a considerable time; and

(d) what is to become of the Commonwealth's application for a determination of no native title.

No Resolution

The significance of an outcome of "dismissal" is that no "authorised determination of native title" has been made. Under the *Native Title Act*, finality is achieved by such a determination, which must be to the effect that there is either (a) native title rights and interests in relation to land and waters or (b) there is not. Once such a determination is made, it can only be re-agitated by leave of the court and in limited circumstances as set out in section 13 of the *Native Title Act*.

A dismissal is obviously not a determination that there are native title rights and interests in relation to the land and waters the subject of the application(s). It is, however, not a determination that there are *no* native title rights and interests in relation to the land and waters the subject of the application(s).

That means that the land and waters the subject of the Wongatha application (and overlapping applications) is open to have further native title claims made in relation to it. The result does not permanently resolve any issue other than whether the claim groups that sought native title are entitled to it. Subject to any appeal, the decision of his Honour conclusively determines that they are not.

Enforcing that using doctrines of Res Judicata, Issue Estoppel, Anshun Estoppel and/or abuse of process will, however, be potentially complex, particularly given his Honour's findings as to authorisation. An obvious but difficult issue is whether the purported members of the claims groups bound by the decision if the registered native title claimants were not authorised to bring the application underlying it?

Strike Out?

His Honour held that each of the applications lacked authorisation.

There were different reasons given for each of the different claims.

This has the consequence that in each of the overlapping claims there is a real question of whether they are authorised; or put more accurately, whether the docket judge for each of those matters will reach the same conclusion as Lindgren J, if the same material were put before him.[8]

It is not clear whether any party to the overlapping claims will bring such an application. It may be that such action would precipitate the kind of reformulation of claims that his Honour foreshadowed (ie individual or small group claims). It will, undoubtedly have an impact on the applicability of the right to negotiate if existing claims are struck out.

Future Acts

There is a real question of "what now" in relation to the applicability of procedural rights.

Oral application was made for a stay at the time of delivery of the judgment. His Honour made orders not staying his decision but directing the Federal Court Registrar not to communicate the result of the case to the Native Title Registrar pursuant to section 189A of the *Native Title Act* for 14 days[9] on the basis that the "practicalities" of the situation rendered that a just result. The practicalities are that the Applicants have foreshadowed an application for a stay and an appeal – albeit that in relation to the appeal they have foreshadowed that they will seek 60 days (rather than the usual 21) within which to file and serve any notice of appeal.

As at the date of writing this, it is expected that formal application will be made by way of notice of motion but one has not yet been made on the part of any applicant.

Once the dismissal of the applications (or parts of them, as appropriate) is notified to the Native Title Register, the claims will cease to be registered. There is a difficult question of whether the dismissal effectively disbands the relevant groups so as to render it impossible for them to remain "negotiating parties" to future act negotiations that are already on foot that is beyond the scope of this paper to address.

Commonwealth's Application

His Honour did not dispose of the Commonwealth's application for a determination of no native title. It may have been preferable if he had dismissed it as more fulsome reasons would presumably have been given. As it is, that application has been stood over.

It appears that his Honour's inclination is to dismiss it on the basis that he is not satisfied that there is no native title in the claim area (albeit that he is plainly not satisfied that there is). However, he flagged that the Commonwealth is at liberty to have its non-claimant application listed for the making of directions or such orders as may be appropriate. As at the date of writing no application has been made by the Commonwealth for the listing of its application.

---

8 The author notes that the docket judges for each of the other matters have been allocated and are male; hence the lack of gender non-specific terminology.

9 That is, by 19 February 2007.

Conclusions

The court has in a sense made a non-decision. The case subject to appeal conclusively determines the proposition that the claims on foot in the proceeding were not authorised. It is (highly) persuasive authority that the claims could not be made out in any event.[10]

However, the decision does suggest that the appropriate level of claim is on the basis of "individual" or "small group" rights (as opposed to the communal level at which the failed applications were pitched). As is well known, Wongatha was a consolidation of a number of previous overlapping claims over parts of the area. It may be that the direction the judge is pointing is back to a series of smaller claims.

Of course, his Honour has also raised some very fundamental questions. His decision leaves open the issue of whether *any* claim can be formulated for this region. Under section 13 and section 67, the *Native Title Act* requires all claims to be heard and determined at one time. Practically, that means that it is impossible to determine native title on the basis of individual rights that may change over time and which might be held by a number of persons.

Perhaps the problem is one of framing the claims to reflect both the evidence and the requirements of the *Native Title Act*. Or perhaps (as hinted at by his Honour in his summary of the decision), the only solution is political.

NEW ZEALAND

CROWN MINERALS – PETROLEUM EXPLORATION – PERMIT SCHEME[*]

Bounty Oil & Gas NL v Attorney-General (unreported, High Court, Wellington, 27 June 2006, CIV 2005-485-2054, AP 2006-485-15, Mackenzie J)

Appeal against revocation of exploration permit – Validity of notices challenged – Assertion that permit conditions met – Court asked to quash revocation notices

Background

Bounty was one of the holders of a petroleum exploration permit in the Great South Basin. The permit obliged its holders to carry out a specific work programme within stipulated time frames. Bounty was unable to meet the specified time deadlines. The Ministry issued revocation notices under section 39 of the *Crown Minerals Act 1991*.

Nature of the High Court Hearing

The case was brought under Rule 718 of the High Court Rules. Termed "Appeal to be a rehearing"[1] the Rule allows the court to come to its own conclusions, based on the material put before the decision maker, and any further evidence which has been admitted. Mackenzie J

---

10 It appears that his Honour's *ratio* is that the claims are not authorised. It follows that if he is correct in that conclusion, the balance of his decision is *obiter*.

* Bryan Gundersen, Partner, Kensington Swan and Josef Bartos, Intern, Kensington Swan.

1 *McGechan on Procedure* paras HR718.01-718.04.