claimed that geologist's evaluations of the potential of the tenement were ongoing and, as yet, an exploration program had not been implemented.

The Plaintiff's submissions

The defendants failed to appear or lead any evidence at the hearing. The Plaintiff submitted that:

- the defendants had no valid basis for seeking an exemption;
- there had been no significant expenditure on exploration of the tenement; and
- they were in breach of their exploration licence conditions.

The Plaintiff requested that the Warden follow the decision in *Nicholls v Roberts and Roberts*[5] and make a recommendation to the Minister that both the application for exemption be refused and the tenement forfeited.

Reasons for decision

Warden Calder held that a statutory declaration made in support of the application for exemption could, in the circumstances, be taken into account for the purposes of his recommendation to the Minister. Warden Calder had no evidence before him to suggest any significant expenditure on the tenement or any reason for lack of exploration. The Warden recommended to the Minister that the application for exemption be refused but withheld his recommendation concerning the plaint for forfeiture until the Minister's decision on the exemption application was published (in accordance with the usual practice).

AN UPDATE ON THE WONGATHA NATIVE TITLE CLAIM*

The Wongatha native title claim[6] *is the first of a number of native title claims to be heard in the Goldfields region of Western Australia. It is significant for a number of reasons, including that it overlaps with and will thus give an indication of the strength of other claims in the region. It will also provide a template for native title litigation in the Goldfields' region*

Background

The Wongatha native title claim is situated in the Eastern Goldfields' region of Western Australia. It is generally north and east of Kalgoorlie and encompasses the towns of Menzies, Leonora, Laverton and Cosmo Newberry (amongst others). It is a consolidation of in excess of 20 prior claims.[7] The extent of the claim can be viewed at the National Native Title Tribunal's web-site at "www.nntt.gov.au".

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5 *Nicholls v Roberts & Roberts* [2000] WAMW 10.

* Marshall McKenna, Partner, Hunt & Humphry.

6 Ron Harrington-Smith on behalf of the Wongatha People v The State of Western Australia and Ors, Federal Court Application No WAG 6005 of 1998.

7 The history of the consolidations, while very interesting, is beyond the scope of this paper.

The area initially the subject of the consolidated claim was approximately 184,000 square kilometres – approximately the area of the State of Victoria. Certain areas of the claim have now been excised to limit overlaps. Notwithstanding the excisions the claim still overlaps with the following claims: *Wutha* – WAG6064/98; *Koara* – WAG6008/98; *Mantjintjarra Ngalia* – WAG6069/98; *Ngalia Kutjungkatja* – W6011/00; *Maduwongga* – WAG0076/98; *Cosmo Newberry* – WAG144/98; and *Ngalia Kutjungkatja #2* – WAG 6001 of 2002.

The overlapping claims can be grouped into two categories. First, some of the overlapping claimant groups claim "shared" native title rights to the area subject of the overlap and might be described as "cooperative" claims. These are *Wutha*, *Koara* and *Mantjintjarra Ngalia*. Others claimant groups seek native title rights to the exclusion of other native title groups and thus might be characterised as "competing" overlapping claims. These are *Ngalia Kutjungkatja* and *Ngalia Kutjungkatja* #2, *Maduwongga* and *Cosmo Newberry*.

There are more than one hundred respondents to the claim, including the State, the Commonwealth, various local governments, various pastoralists and various mining interests. There were previously in excess of 500 respondents, but orders of the Court have reduced the participants to those persons who have a relevant interest in the claim area and who wish to participate (either actively or passively). Industry groups including the Pastoralist and Graziers Association, the Chamber of Mines and the Association of Mining and Exploration Companies are participating in the hearing either directly or indirectly on behalf of industry interests.

Mediation is being conducted in parallel with the litigation process, but it is beyond the scope of this article to speculate on what the outcome of the mediation process might be and/or when any outcome may crystalise.

The proceedings to date

The transcript in the proceedings presently amounts to slightly in excess of 12,000 pages (not including the sometimes extensive video directions hearings). This represents the evidence of in excess of 60 lay witnesses for the Wongatha applicants and overlapping native title claim groups taken over the course of 65 days in Kalgoorlie, Laverton, Leonora, Cosmo Newberry and various sites within the claim area. This portion of the case is now essentially finished, with the balance of the evidence of the applicants and overlapping native title claim groups being either expert testimony or evidence to support occupation of relevant portions of the claim area at the time the claims were made.[8]

It is not the intention of this article to summarise the evidence to date or to draw any conclusions from it. However, it is fair to say that extensive evidence has been given in relation to each claim by many witnesses as to the extent of their claim areas, the rights they may exercise there and elsewhere and the basis of those right. Some evidence has also been given by aboriginal persons from adjacent areas.

One significant aspect of the hearing of evidence from members of the overlapping claim groups is that the decision in Wongatha will have two effects. First, it will resolve which persons have what

[8] This evidence will ultimately be used in support of a submission that any extinguishment ought to be disregarded over relevant areas due to the provisions of section 47, 47A or 47B of the Native Title Act.

native title rights and interests in the claim area. Second, it will give an indication of the merits of the overlapping claims. This is particularly so as potential attacks on the credit of particular witnesses have been foreshadowed.

The balance of the proceedings

Following extensive argument form the parties as to the shape of the further proceedings, the Court has fixed 6 weeks commencing 4 August 2003 for the balance of the evidence in the proceedings including:

- Any outstanding cross-examination of witnesses in respect of whom leave to recall has been given;
- Tender of the applicants' (and presumably the overlapping claim groups') documentary evidence;
- Non-native title claim group respondents' evidence on the establishment of native title;
- All parties' expert evidence (including all cross examination and re-examination);
- All extinguishment evidence (ie documentary evidence of tenure and oral and documentary evidence of occupation by non-indigenous interests (such as pastoralists and mining interests).
- Any evidence of occupation by the applicants or overlapping claim groups for the purposes of sections 47, 47A or 47B of the Native Title Act.

The two noteworthy matters in this regard are the length of time allocated and the orders governing the giving of expert evidence.

The judge has allocated 6 weeks for the balance of the hearing. It has already comprised a total of 13 weeks. Assuming that closing submissions require a further week, the case will exceed 100 hearing days!

Of more practical significance is the manner in which the Court has ordered that the expert evidence be heard. The judge refers to the proposed methodology as "the hot tub". Experts in each discipline are obliged to meet in the absence of orders and prepare a list of topics upon which they agree and a list of matters upon which they disagree. Further, at trial, all experts in the same discipline will be sworn and effectively give evidence at the same time. That is, while each expert will be examined and cross-examined sequentially (as is the normal case) each other expert will have an opportunity to opine about the opinions given and to ask questions of the expert giving evidence. This methodology has been used in other types of cases to assist in the resolution of competing experts (such as economists in Trade Practices matters). This case, to the best of the writer's knowledge, will be the first time the methodology has been used in a native title matter.

In light of the above, the expectation is that the hearing of evidence in this matter will conclude on or about 12 September 2003. There are presently no directions programming the balance of the proceedings.

It is, however, to be expected in a case of this magnitude, that each of the parties will require at least some months to prepare for final submissions. Accordingly, it is unlikely that the closing submissions will be concluded until late this year or early 2004. The process of writing native title judgements is obviously a long one given the vast amount of material applicable. Thus, it is to be

expected that a decision will not be delivered until the middle of 2004 and it may well be longer in its gestation.

Where to next?

As noted above, the *Wongatha* claim is the first hearing to proceed in the Goldfields' region. There are a number of other cases that are presently being case managed with a view to hearing dates being allocated.

Presently, the expectation is that the other Goldfields' cases will be heard in the following order: *Central West Goldfields* WAG 68 and 6216/1998 and part WAG 76/1997, 2 and 6243/1998; *Koara* WAG 6008/1998 and part WAG 43, 6040, 6050, 6059 and 6132/1998; *Mantjintjarra Ngalia* WAG 6069/1998 and WAG 6001/2002; *Central East Goldfields* WAG 70/1998 and part WAG 76/1997 and 6170 & 6243/1998; *Wutha* WAG 6064/1998 and part WAG 43 & 6132/1998; *Ngadju and Ngadjungarra* WAG 6020 and 6221/1998; and *Nullabor* WAG 6162/1998.[9] The consolidated *South West Area 3* claim WAG 6097 and part 6130, 6221 and 6181/1998 has recently been case managed as part of the Goldfields' claims rather than with the "South West" claims. It remains to be seen where that case will placed amongst the other cases.

Mediation is ongoing in relation to all claims – at least in the sense that the Court has referred each matter to mediation. It is to be hoped that a decision in *Wongatha* will assist in the mediation of other claims – but that will, of course, depend on the terms of the decision.

The Court is convening a joint case management conference in relation to the above claims on an approximately biannual basis with a view to overseeing their progress to hearing in an orderly manner, including monitoring the progress in the mediation process. It has been recognised that the hearing of the various cases needs to be staggered to ensure that the relevant parties have the resources to participate in the claims (ie access to relevant experts, experienced counsel and finances, all of which are finite commodities). At the time of writing, no date for a further joint case management conference has been set. While it was initially expected to be convened in February or March, due to the logistical difficulties, it may not be convened until after March.

Conclusion

The above is a recitation of the time that the *Wongatha* claim has taken thusfar. This case illustrates that native title claims require an extremely long time to resolve through the litigation process. It is likely that the resolution of the claims in the Goldfields will not be resolved for some years yet.

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[9] Details of these claims can be obtained form the National Native Title Tribunal via its web-site, referred to above.