HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

A1 of 2024

BETWEEN:

Aaron Stuart and others named in the Schedule
First Appellant

and

State of South Australia and others named in the Schedule
First Respondent

SECOND, THIRD, FOURTH AND FIFTH RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1: the construction and application of s.223(1)(a), (b)

2. The claim that gives rise to this appeal is made under the *Native Title Act, 1993* (Cth) (**NTA**) for rights that are defined in that Act: s.223(1). The definition mandates that the acknowledgment and observance of the traditional laws and customs under which the native title rights and interests are possessed and by which the relevant peoples have a connection with the land or waters, must have continued substantially uninterrupted since sovereignty: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (***Yorta Yorta***) at [33], [34], [86]-[88].

3. The native title rights and interests must be *"in relation to land or waters"*: *Yorta Yorta* at [33]. The majority was correct to say that the factual matters essential to a determination of native title are geographically specific: F [70], CAB 307-308; citing *Fortescue Metals Group v Warrie* (2019) 273 FCR 112 (***Warrie***), at [112], Jagot and Mortimer JJ; see too F [86], CAB 312. Contrary to the Appellant's Submissions (**AS**) at [21], s.223(1)(a) is geographically specific. The laws and customs that must be acknowledged and observed are not just any laws and customs. They are the laws and customs under which the rights and interests in relation to the relevant land or waters *"are possessed"*: *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***) at [18].

4. The Appellant accepts that s.223(1)(b) has a *"clear geographically specific element"*: AS at [3]. In the Courts below, it did not challenge the correctness of *Bodney v Bennell* (2008) 167 FCR 84 at [179], that where there is an issue as to whether connection has been maintained to a particular area, there is a need to demonstrate that connection to *that area* has in reality been maintained: see too *Ward* at [64]; *Wagonga Local Aboriginal Land Council v A-G (NSW)* [2020] FCA 1113 at [390], [392], [396], Jagot J; on appeal, *Blackburn v Wagonga Local Aboriginal Land Council* (2021) 287 FCR 1 at [83(d)], [145], Mortimer, Perry and O'Bryan JJ.

5. There was no challenge below to the trial judge's direction as to the relevant law on s.223(1) (TJ at [47]-[53], CAB 31-37) or more particularly, to his statement of the relevant principles regarding s.223(1)(b) connection (TJ at [51], [847], CAB 37, 221;

F at [96]-[99], CAB 316). His Honour was aware that connection under s.223(1)(b) is essentially spiritual and it does not require that the connection be physical: TJ at [51], CAB 37; TJ at [847(c)], CAB 221. The trial judge's reasons must be read in the light of the case that the Arabana advanced: *Yorta Yorta* at [21], [27], [30]; F at [66], CAB 305. In this respect, his assessment included an assessment of evidence of *"acts"* of connection because that was the way the Arabana presented their case at trial: TJ at [852], CAB 222; F at [66], [104]-[105], CAB 305, 318.

6. The Arabana also complain that the trial judge used the expression *"in accordance with"* traditional laws and customs rather than *"by"* traditional laws and customs. The trial judge used that expression because it was the expression used by the Arabana in presenting their case at trial: TJ at [852], CAB 222. The same expression was used by the Arabana on appeal to the Full Court: F at [43], CAB 297; Further Amended Notice of Appeal Ground 1 and see too Particulars (1)(c) and (4), CAB 272-273). His Honour was well aware that s.223(1)(b) connection is *"by"* the traditional laws and customs acknowledged and observed: TJ at [51], [847(d)], [914], CAB 37, 221, 233.

7. It must always be a matter of fact and degree as to whether a group has acknowledged and observed the traditional laws and customs *on which it relies* to establish possession of native title rights and interests: *De Rose v South Australia (No.2)* (2005) 145 FCR 290 at [64], Wilcox, Sackville and Merkel JJ; *Warrie* at [81], Jagot and Mortimer JJ.

8. In a critical finding rejecting the case presented at a factual level, the trial judge said that the relative absence of acknowledgment of traditional law and observance of customs *by which* a connection by the Arabana to the claim area is maintained, was fatal to the Arabana claim: TJ at [914], CAB 233; F at [40], CAB 296-297.

Ground 2: significance of prior consent determination

9. The Walka Wani claimants were not parties to the *Dodd* proceedings. They have had a strong physical and spiritual connection with the claim area over multiple generations: TJ at [668], [679], CAB 174, 180. Their interests are not *"indirect, remote or lacking substance"* (Appellant's Reply at [18]).

10. The *Dodd* Determination was not founded upon any judicial determination of the matters in s.223(1), rather it rested upon the agreement of the parties and the support of the State in concluding that there was a *"credible or cogent basis"* to conclude that the requirements of s.223(1) were satisfied: *Western Bundjalung v A-G (NSW)* [2017]

FCA 992 at [21]-[22], Jagot J; *Widjabul Wia-Bal v A-G (NSW)* (2020) 274 FCR 577 at [51], Reeves, Jagot and Mortimer JJ. Further, the NTA does not require the establishment of some overarching "*society*" that can only be described in one way and with which members of a claim group are forever fixed in relation to any other area over which they assert native title: *Warrie* at [105]- [107], Jagot and Mortimer JJ. All will depend on the evidence: *Warrie* at [81].

11. The trial judge made no findings that were inconsistent with the *Dodd* Determination: F at [62], CAB 303. He accepted that it had established that rights to Arabana country in the adjacent land are held under Arabana laws and customs: TJ at [54], [853], [854], CAB 37, 223. But consistent with the case that the Arabana chose to present, the requisite continuity of connection with the claim area must be established by the evidence in the proceedings before him: TJ at [854], CAB 223; F at [90], CAB 313.

12. An application for a determination of native title may be made "*in relation to an area for which there is no approved determination of native title*": s.13(1). An *"approved determination of native title"* is a recognition of the content of a set of existing rights over a specific area of land and waters: s.225(a)-(e); *Warrie* at [112].

13. The geographic specificity of a determination of native title is also apparent from the description of the information which the application must contain: ss.62(1)(b), (2)(a), (b), (c) and from the provisions which ensure that all those who may have an interest in the area covered by an application are notified and have an opportunity to be joined as a party to the proceedings: ss.63, 66(2), 66(2A), 66(3)(a), (d), 84(3), 84(5).

14. Section 86 confers a discretion on the Federal Court to adopt any finding, decision or judgment made in any other proceeding: s.86(1)(a)(i),(c). A Court asked to exercise that discretion would have to take into account any opposition by those with an interest in the land or waters concerned: *Wilson on behalf of the Bandjalang People v Department of Land & Water Conservation* (2003) 126 FCR 500 at [31], Hely J; *McLennan on behalf of the Jangga People #3 v State of Queensland* (2023) FCR 452 at [43], Perry J. No application of that kind was made to the trial judge.

Dated: 6 November 2024

Vance Hughston SC **Tina Jowett SC**