HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	A1/2024
File Title:	Stuart & Ors v. State of South Australia & Ors
Registry:	Adelaide
Document filed:	Form 27F - Appellants' Outline of oral argument
Filing party:	Appellants
Date filed:	06 Nov 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

Aaron Stuart and others named in the Schedule
First Appellant

and

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

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Propositions

Ground 1: Approach to s 223 NTA

2. Overview of relationship between claims: TJ[3], [4], [17], Map 3, [37], [842] (CAB 220). Overview of history of Arabana claim: TJ[9], [29]-[32], [42]-[44] . Overview of principal question on each application: TJ[54]-[56]. First indicia of erroneous construction: TJ[56]. Overview of key conclusions on expert evidence: TJ[409]-[411] (CAB 122), [537], [580]. References to relevant lay evidence: TJ[627], [654], [658]-[667]. Overview of evidence pertaining to 1996 Map: TJ [741]. Key aspects of anthropological evidence: TJ[772]-[773], [794]. Key aspects of *Dodd determination*: [36]-[41](JBA 1902).

3. Close review of aspects of "Assessment of Arabana Claim" section of judgment: TJ [842]-[916] (CAB 220-234). Identification of instances revealing error of construction of s 223(1)(b), including references to relevant portions of reasons of O'Bryan J.

4. The trial judge erred in approaching the statutory test under s223 of the NTA by an analysis of whether the Arabana has connection "in accordance with" laws and customs or "by the acknowledgment and observance of traditional laws and customs": TJ[843], heading above [844] (CAB 220); [911], [913], [914] (CAB 233). That analysis conflated the statutory criteria in ss223(1)(a) and (b) of the NTA and misdirected the enquiry to whether specific conduct or behaviours of the Arabana are in conformity with traditional laws and customs (Appellant Submissions (**AS**) [3], [37]-[47]). There is an important difference between a connection *by* traditional laws and customs as required by s233 and a connection "*in accordance with*" traditional laws and customs. The former is directed at the effect of the laws and customs which must be identified, whilst the latter is directed

toward whether specific conduct or behaviours are in conformity with traditional laws and customs: O'Bryan J at J[300] (CAB 382-383); AS [41], [45]: Appellants' Reply (**AR**) [9].

5. The trial judge was looking for a connection arising from acts of acknowledgement and observance on or pertaining to the Overlap Area (**OA**), which is not what s223(1)(b) requires, as identified by O'Bryan J at J[297]-[304] (CAB 382-384); AS[42].

6. The trial judge failed to identify, first, the content and nature of traditional laws and customs and secondly, the characterisation of the effect of those laws and customs as constituting a "connection" of the Arabana with the OA, in accordance with *Western Australia v Ward* at [64], AS [46]-[47]. The trial Judge failed to make findings as to the content and nature of contemporary laws and customs: O'Bryan J at J[306]-[319] (CAB 384-389); AS [53], [58]-[70].

Application of the errors - The 10 matters identified by the Arabana

7. These errors are apparent from the way in which the trial judge considered the 10 matters put forward by the Arabana as evidence of connection by their laws and customs. In its submissions at trial, the Arabana identified the content of traditional laws and customs as established in *Dodd* and that they were the same as for all Arabana country including the OA. This proposition was not contested at trial: AS [61]. The submissions referred to 10 matters to assist in the identification of traditional laws and customs (Appellants' Book of Further Material at [323]-[330]). There was no suggestion that every single one needed to be established, contrary to the reasoning of the majority in the Court below: AS [52].

8. The trial judge's treatment of some of these factors applied a test that was erroneously directed at whether acts of acknowledgement or observance complied with traditional laws and customs, which is not the correct test pursuant to s223(1)(b); involved assumptions about the content of traditional law and custom in the absence of specific findings; and in some instances was erroneously limited to people within the OA rather than the claim group more broadly: O'Bryan J at J[346]-[363] (CAB 396-400); AS [71]-[78].

9. Having found that there did exist a connection which arises from having been taught that the OA is Arabana country (TJ[913], CAB 233), the trial judge dismissed the sufficiency of that connection on the basis that it needed to arise "*from the continuing acknowledgment of traditional laws and traditional customs observed by the claimant group*" which was a further reformulation of the error: AS [44].

The reasons of the majority on Ground 1.1 in the court below

10. Whilst acknowledging that the test articulated by the trial judge in J[911] was not strictly in accordance with the statutory language of s223(1)(b) (J[101] CAB 317), the majority erred in failing to find this misstatement was productive of error for the reasons identified by O'Bryan J, and failed to explain the trial judge's erroneous formulations of the test at TJ[913] or [914]; AS [49]-[51]. The majority embraced the approach of the trial judge.

Ground 2

11. A consent determination is a judgment *in rem.* It is an abuse of process for a party to seek to re-litigate a matter expressly encompassed within an earlier determination and may give rise to an issue estoppel, as occurred in *Wyman v State of Queensland* [2016] FCA 777 (provided separately to the Court). In this way, a native tile determination in one area can have a direct impact in another area.

12. The trial judge negated or wrongly diminished the probative force of the determination in *Dodd* by concluding that the inferences to be drawn from it were able to be drawn equally in relation to the Walka Wani (**WW**) claim. The majority in the Court below acknowledged that the trial judge had incorrectly implied that the two prior determinations should have the same force (J[60] CAB 303) but did not consider it had resulted in error because, in respect of the *Dodd* determination, "*all of it is geographically specific*": J[86] (CAB 312); AS [80].

13. The majority erred in finding that all matters established in *Dodd* were geographically specific. A number of matters established by that determination are not geographically specific and were relevant, weighty and probative in respect of connection with the OA by the same laws and customs: AS [81]-[84].

14. If the *Dodd* determination had been given its proper weight and not diminished for the erroneous reason accepted by the court below, the Court should have found that the Arabana were connected to the OA by their traditional laws and customs: AS [86]; AR [19].

Dated: 5 November 2024

Stephen Lloyd

Schedule

Appellants

Second Appellant	Joanne Warren
Third Appellant	Greg Warren (Snr)
Fourth Appellant	Peter Watts

Walka Wani Respondents

Second Respondent	Dean Ah Chee
Third Respondent	Audrey Stewart
Fourth Respondent	Huey Tjami
Fifth Respondent	Christine Lennon

Other Respondents

Sixth Respondent	Airservices Australia
Seventh Respondent	Douglas Gordon Lillecrapp
Eighth Respondent	Telstra Corporation Limited ABN 33 051 775 556

Interveners

Intervener	Attorney-General of the Commonwealth of Australia