HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **Aaron Stuart** and others named in the Schedule
First Appellant

and

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

APPELLANTS' REPLY

Part I: Certification as to form

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

Part II:

2. At SS [6], the State acknowledges that the "content of Arabana law and custom that are acknowledged and observed today [in relation to the Overlap Area] are those established by *Dodd*". In *Dodd*, such laws and customs currently observed and acknowledged were sufficient to support connection. The State case is that something further was required for the Overlap Area. The Arabana case is that the continued acknowledgement and observance of the same traditional laws and customs by the Arabana is sufficient to maintain their connection by those laws and customs with the Overlap Area.

3. Re SS [7]-[10], O'Bryan J did not find error in the trial judge's summary of law at TJ[51] CAB 37; the errors arose in the understanding and application of the cases there summarised. The State distinguishes here between laws and customs that exist "at large" and "laws and customs that bear upon the specific land or waters claimed". The Arabana contend that they have connection to all Arabana country through their laws and customs including those that create a kinship system using Arabana language terms, have laws that admit persons through filiation, have rules that govern transmission of law and custom, and have *Ularaka* and normative rules related to them. These laws and customs apply to country claimed to be Arabana since sovereignty. As was shown in *Dodd*, these laws were sufficient to maintain a connection to the land. The evidence shows the Arabana have continued to press their rights including in the Overlap Area to other neighbouring Aboriginal groups (see 1996 Map, TJ[698]-[744] CAB 184-197; J[360]-[361] CAB 400). The Arabana do not claim their laws and customs can connect them to *any* land. They are not "at large". They are limited to the at-

sovereignty Arabana country, which has been held to include the Overlap Area. It is not necessary that there be unique law and custom that "bears upon" "specific land" within broader Arabana Country. The Arabana may lose connection with country if they ceased to consider that their laws and customs apply to it (for example, by not teaching young Arabana that it is Arabana country). There is no evidence of that here.

4. Re SS [11], *Bodney* does not say that s 223(1)(b) "requires evidence of actual acknowledgment and observance with respect to the land and waters" (emphasis added). This is the kind of submission that led the trial judge into error. It implicitly directs attention to physical acts undertaken in the claim area. In any event, evidence that the Arabana were taught by their parents and teach their children that the Overlap Area is part of Arabana country is a form of actual acknowledgment and observance of their laws and customs (see TJ[900] CAB 230). There is no need for conduct to be undertaken in each hectare of land claimed (or the like).

5. Re SS [12], the Arabana do not seek "simply" to infer connection to the Overlap Area from the surrounding country. It is common ground that this cannot be done. In this case, the Court found that there was Arabana connection with the Overlap Area at effective sovereignty. It had already been determined and was not disputed in this case that the Arabana normative system had continued substantially uninterrupted since sovereignty. In this context, the remaining question was whether something (other than extinguishment) occurred by which the Arabana have abandoned or lost that traditional connection with just the Overlap Area.

6. Re SS [13]-[14], this was not a case in which the trial judge had used shorthand expressions that did not replicate the statutory language. Even the majority judgment below did not characterise the case in this way. The trial judge repeatedly used language that misstated the test and, for reasons stated by O'Bryan J, that affected the decision materially. Stating statutory language correctly in a summary does not remove error when a different test is applied when considering the evidence.

7. The State's submissions, and the approach of the trial judge, see connection as involving acknowledgement and observance of laws and customs in a claim area; this must be shown "in fact". The Arabana accepts there must be a normative system of laws and customs that is sustained by their observance and acknowledgment but not that this requires specific acts in the claim area if the normative system can be shown to continue to exist in other ways (such as by acts done mostly in a different part of country). Saying that acknowledgement and observance is "intertwined" with laws and customs does not rebut the errors found by O'Bryan J.

8. Re SS [15], the Arabana did not rely upon the evidence of only two witnesses "to establish the acknowledgment and observance of law and custom by Arabana society". The Arabana relied also upon the expert evidence tendered in the *Dodd* determination (as well as expert evidence in the Overlap claim), on that determination itself and on other lay witnesses. It may be accepted that the State and the trial judge approached the case as if two witnesses is all the Arabana relied upon because they were focused on acts in the Overlap Area. But that only serves to reinforce and prove the errors the Arabana advance.

9. Re SS [17], it is wrong to say there is no material difference between the expression "in accordance with" and "by" (only the latter of which is used in the Act): see O'Bryan J at J[300] CAB 382-383. As to where this wrong construction led to error, see J[343], [350]-[355], [365] CAB 394-395, 396-398, 401. ("In accordance with" is not, in any event, shorthand for "by".)

10. Re SS [19], the Arabana case sensibly relied upon the *Dodd* determination and the expert evidence in support of it to explain historical and contemporary traditional laws and customs. The expert evidence in this respect was not contested. The ten matters were additional material pertaining to the Overlap Area in particular. The Arabana case relied upon all of that. Only aspects of the ten matters were contested.

11. Re SS [20], the trial judge did not make any findings that the evidence adduced by the Arabana, and derived from *Dodd*, was insufficient, or did not apply in the Overlap Area. As identified by O'Bryan J and submitted in AS [58]-[70], the trial judge failed to make the required findings as to content of Arabana traditional laws and customs observed and acknowledged by the Arabana today, which was necessary in order to determine whether they connect to the Overlap Area by those traditional laws and customs acknowledged and observed.

12. Re SS [22], this paragraph serves to show that the State (and the trial judge) did not ask whether the Arabana normative system, under which the at-sovereignty rights and interests were possessed, had continued to be observed and acknowledged by the Arabana people as a society. Rather, they considered that, in the context where many Arabana people had moved from this area, what was required were acts of acknowledgment and observance specific to this area. While the Arabana relied upon some such acts, its case did not require them; it required the continuation of the Arabana normative system.

13. Re SS [25], the Arabana led significant and extensive evidence, by both lay witnesses and in the anthropological material, as to *Ularaka* relevant to the Overlap Area. The trial judge referred to the lay evidence on mythology but, for reasons which are not explained, took the

view that it was not necessary to record them in detail: TJ[815] CAB 215. The Arabana led extensive anthropological evidence as to the significance of *Ularaka*, supported by the relevant findings in *Dodd*, at [50], that contemporary observance of *Ularaka* is in a manner consistent with Arabana law and custom; see also final trial submissions at [330.6] that *Dodd* established knowledge of traditional *Ularaka* and the normative rules related to those *Ularaka* and associated sites still being taught and observed (AFM 12). Re SS [35], the Arabana case was not advanced on the basis that *Ularaka* alone was enough to establish s 223(1)(b). The Arabana relied upon all of its evidence relating to its traditional laws and customs applying to Arabana country. The area specific *Ularaka* evidence showed that senior witnesses maintained knowledge of the *Ularaka* for the Overlap Area.

14. Re SS [20]-[29], much of these submissions summarise aspects of the trial judge's findings. They fail to address the manner in which O'Bryan J found that the error in the test affected the analysis and the weight that these matters might have borne had the correct test been applied.

15. Re SS [30], to say that the Arabana pleaded case does not say it is based on "Arabana law at large" is to misunderstand the whole process. Native title rights must be possessed under a normative system of the Arabana society: that is presumably what the State refers to as "Arabana law at large". Obviously, the Arabana would and did rely upon all of its laws and customs (which is why it tendered its expert evidence from *Dodd* and relied upon *Dodd*). It was never the Arabana case that it could show connection to the Overlap Area only by reference to special laws pertaining to that area. The passages quoted from the "Form 1" and described as the Arabana's "pleaded case" were responsive to particular questions in the form. The first of which asked for "activities" carried out in the claim area. The second asked for "traditional physical connection" with the claim area, and not even for the purposes of the application (but for the registration test). None of this supports the alleged narrow focus asserted. It was clear in the submissions advanced at trial that the Arabana relied upon all of its traditional laws and customs and observance thereof found and accepted in *Dodd*.

16. Re SS [31], the Arabana did not say that its case was limited to the ten matters as suggested. Neither the questions asked by the court below nor the comments made at J[104]-[105] CAB 318 support such a statement. The trial judge was invited to consider those ten matters, amongst other evidence cited in the trial submissions. The trial judge was not told that connection could be established by any one factor alone. That is because the Arabana's case was and is that connection should be judged in light of what was found and determined in

Dodd as to Arabana laws and customs as well as the matters advanced as relevant to the Overlap Area in particular.

17. Re SS [41]-[42], the Arabana made clear in the court below that, if the wrong view of s 223(1)(b) had not been adopted, the fact that their society has been held to have maintained a normative system since sovereignty, that system is capable of supporting rights and interests in the Arabana land at sovereignty, that the Overlap Area was Arabana land at sovereignty, and that the Arabana have continued to be connected to that land (including by asserting that it is their land internally to their members and externally and retaining and conveying *Ularaka*) is sufficient for a positive determination. Given the form of the preferred orders of O'Bryan J and the likelihood that this Court would not want to spend time dealing with every evidentiary dispute, those orders seemed and seem appropriate to do justice in this case.

18. The Walka Wani respondents are four members of the WW claim group who were joined to the Arabana claim when they had a competing claim for native title. Their claim has been dismissed and there is no appeal. The four respondents no longer have a basis to be parties in this proceeding. At [20], they do not answer clearly what interest they have in these proceedings, except as to cite generally a "strong historical and cultural connection to the area", referring in generalised terms to *Byron* and *Onus*. Yet, they have not identified any interests that are not "indirect, remote or lacking substance" (*Byron,* at 7-8). Interests must be capable of clear definition and be of such a character that they may be affected in a demonstrable way by a determination in relation to the application (Ibid). Nor is it apparent that they will be "specifically affected" by a determination of non-exclusive native title in favour of the Arabana (*Onus*, at [27]).

19. As to the submissions of the Attorney-General (Cth) at [35] (and Issue 2 more generally), the Arabana do not contend that matters determined or agreed in a consent determination "simply apply as if they were findings for another area". The Arabana's case is that non-geographically specific matters expressly determined or necessarily implied in a native title determination are at least weighty and probative matters that justify identical findings in a later claim by the same claim group over an adjoining area that is found to have been subject to that group's native title rights and interests at sovereignty.

Dated: 17 May 2024

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Annexure

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the particular statutes and statutory instruments referred to in the Appellants' submissions are as follows:

No.	Description	Version	Provisions
1.	*Native Title Act 1993* (Cth)	Current (Compilation 49 18 October 2023 to present)	Section 223

Schedule

Appellants

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

10 **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

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Interveners

Intervener	Attorney-General of the Commonwealth of Australia