HIGH COURT OF AUSTRALIA

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Details of Filing

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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' SUBMISSIONS

Part I: Certification as to form

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

Part II: Issues

2. This appeal concerns the connection that Aboriginal people have with their land and country, referred to in s 223(1)(b) of the *Native Title Act 1993* (Cth) (**NTA**). In particular, it concerns what principles are applicable to determining when native title rights and interests (**NTRI**) over a particular area of land have ceased to exist in circumstances where it has been found **both** that the native title claim group (or their ancestors) held rights over that area at sovereignty **and** that the same group continues to have a vital normative system that sustains connection by the same laws and customs over immediately adjoining land: in other words, where that society has been found to have lost NTRI otherwise than as a result of extinguishment. Three primary issues are raised by the appeal.

3. Is the test under s 223(1)(b) of the NTA satisfied by an analysis of whether the claim group has connection "in accordance with" laws and customs or "by the acknowledgement and observance of traditional laws and customs"? No. That analysis conflates the statutory criteria in ss 223(1)(a) and (b) of the NTA. Critically, s 223(1)(b) directs attention to whether the claim group has a connection with specific land or waters **by** the traditional laws and traditional customs of the relevant society. In reformulating the statutory test in an erroneous manner, the trial judge and the majority of the Full Court misdirected the enquiry

to whether specific conduct or behaviours of the Arabana are in conformity with traditional laws and customs.

4. Can s 223 be properly considered without an analysis of the content and nature of the laws and customs that are acknowledged and observed today? No. Such an analysis is an essential step in the statutory test under s 223, which requires that the content and nature of those laws and customs be identified in order to inform an assessment of whether the claimed rights and interests are possessed by the claim group under those laws and customs that are acknowledged and observed today (s 223(1)(a)), and whether the claim group have a connection to the area by those laws and customs that are acknowledged and observed today (s 223(1)(b)). The trial judge's failure to make findings as to the contemporary content and nature of Arabana's laws and customs resulted in a misapplication of the statutory test, and further errors in consideration of the evidence as identified in the dissenting reasons of O'Bryan J. The majority erred in considering that such an assessment had occurred.

5. Are all aspects expressly or necessarily determined by an adjoining consent determination (**CD)** geographically specific? No. In this case, a number of the necessary and express matters determined in the adjoining CD (including the nature of Arabana society, the laws and customs acknowledged and observed today, and the fact that those laws and customs are capable of generating rights and interests in land) were not geographic in nature. The majority, by concluding that they were all geographically specific, failed to find that the trial judge had erred in failing to give the CD the probative weight that it should have been given (J[86], CAB 312).

Part III: Certification as to Section 78B of the *Judiciary Act 1903.*

6. A notice under s 78B of the *Judiciary Act 1903* (Cth) is not necessary.

Part IV: Citations

7. The reasons of the trial judge are at *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 (**TJ**) (CAB 7-266). The reasons of the court below are at *Stuart v State of South Australia* [2023] FCAFC 131 (**J**) (CAB 283-406).

Part V: Facts

8. The Arabana first made a claim for native title rights over a large area in the far north of South Australia by a writ filed in the High Court of Australia on 22 May 1993. That

claim included an area of approximately 150km^2 in the vicinity of the township of Oodnadatta (**Overlap Area**), which is the subject of this appeal. It was subsequently discontinued in expectation of the enactment of the NTA (TJ[42], CAB 30).

9. In January 1998, the Applicants made a claim over an area of 68,823km^2 abutting but not including what is now the Overlap Area on its east and southern boundaries, which resulted in a consent determination of native title: ***Dodd*** *v State of South Australia* [2012] FCA 519. The Overlap Area was not included in that claim because the State had proposed an arrangement to lease much of that land to a local Aboriginal organisation, an arrangement that never transpired. On 1 March 2013, the Arabana made an application for a

10 determination of native title in respect of an area including the Overlap Area (TJ[43]-[44], CAB 30), the remaining part of their traditional country. Over the subsequent five years, two claims were made by the Walka Wani (**WW**) people, together comprising what is now the Overlap Area (TJ[980]-[982], CAB 248-249).

10. For reasons published on 21 December 2021, the trial judge found that, while the forebears of the Arabana appellants possessed NTRI, and the Overlap Area was "Arabana country", at sovereignty (TJ[410], CAB 122), the Arabana had "*failed to establish the maintenance of their connection in accordance with the traditional laws acknowledged and traditional customs observed by them*" (TJ[916], CAB 234). The trial judge accepted the WW application for native title.

20 11. Appeals by the Arabana (against both the rejection of the Arabana claim and acceptance of the WW claim) and by the State (against the acceptance of the WW claim) were heard on 16-18 November 2022. The Full Court by majority (O'Bryan J dissenting) dismissed the appeal of the rejection of the Arabana claim, and unanimously upheld the appeal in respect of the WW claim, ordering that the WW claim be dismissed (J[275]-[276], CAB 373). The WW have not sought to appeal against that decision.

Part VI: Argument

12. This appeal concerns the identification and application of the principles that govern when a society of persons who, at sovereignty, held NTRI can lose them otherwise than as a result of extinguishment.

30 *The identification of principles*

13. In ***Mabo*** *v Queensland (No.2)* (1992) 175 CLR 1, Brennan J (with whom Mason CJ and McHugh J agreed) found that, upon the acquisition of sovereignty by the Imperial Crown, the law of England including the common law (so far as it was locally applicable)

was received into the Colony of New South Wales (38-39). The Crown was treated as having the radical title to all the land in the territory over which the Crown acquired sovereignty (48). This radical title was an essential precursor to maintaining the doctrine of tenure. Recognition by the common law of the Crown's radical title was "quite consistent" with recognition also of native title to land (50). That is, a mere change in sovereignty did not extinguish native title to land (57). "Native title" "… describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants" (57). Where a native title holding group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that group can be said to remain in existence. However, "when the tide of history has washed away *any* real acknowledgment of traditional law and *any* real observance of traditional customs, the foundation of native title has disappeared" (59-60, 70). This was equated with "the abandoning of laws and customs based on tradition". His Honour indicated that NTRI would be lost if the native title holders, "by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connexion with the land or on the death of the last of the members of the group or clan" (70).

14. With effect from 1 January 1994, s 10 of the NTA provided that native title is recognised and protected in accordance with the NTA. That is, the common law recognition of native title was henceforth supplemented by statutory recognition. It applied (at least) to native title that was extant at that time.

15. "Native title" is defined in s 223(1) of the NTA. The genesis of critical aspects of this definition were drawn from the reasons of Brennan J in *Mabo* (as summarised above): ***Bodney*** *v Bennell* (2008) 167 FCR 84 at [163].

16. The rights and interests referred to in the definition in s 223(1) find their origin in pre-sovereignty law and custom; they are not creatures of the NTA: *Members of the* ***Yorta*** *Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [45].

17. The fundamental premise on which s 223(1)(a) proceeds is that NTRI can be possessed under traditional laws and customs (*Yorta* [40]). It follows that the traditional laws and customs must have "normative content" and constitute a "normative system" (*Yorta* [37]-[40]). Moreover, NTRI originate in a normative system that pre-dates the

Crown's assertion of sovereignty. Following that event, the pre-existing normative system could not thereafter create new rights (*Yorta* [43]-[44]).

18. The reference in ss 223(1)(a) (and (b)) to the word "traditional" (vis *traditional* laws and *traditional* customs), not only refers to laws and customs that have "been passed from generation to generation of a society", but also conveys both an understanding of the age of the traditions (the normative rules of the pre-sovereignty society for the area concerned) and "that the normative system under which the rights and interests are possessed is a system that has had a continuous existence and vitality since sovereignty" (*Yorta* [46]-[46]).

19. To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group that acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group that acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality (*Yorta* [50]).

20. In this way, s 223(1)(a) gives rise to the following inquiries relevant to this appeal: (i) whether the claimant group (the society) has descended from the at-sovereignty rights holders; (ii) perhaps relatedly, whether the laws and customs of that society have been passed from generation to generation; (iii) whether the laws and customs are of a kind that constitutes a normative system (being one that created rights and interests in land and waters); and (iv) whether that normative system has ceased to exist at any time since sovereignty (the **relevant s 223(1)(a) inquiries**). (Section 223(1)(a) would also give rise to inquiries about the content of the rights and interests possessed by the claimants, which rights and interests might vary as between different localities. The content of the claimed NTRI was not in dispute in this case, so it is not addressed further here.)

21. It may be observed that the relevant s 223(1)(a) inquiries are directed to the nature of the laws and customs of the society and about other features of that society. The inquiries are not geographically specific. For example, whether the current claim group are descended from certain identified individuals (who are asserted to be proximate descendants of the at-sovereignty native title holders) has no geographical element. That is, the question whether person X is descended from person Y can be determined independently of knowing what portion of Y's at sovereignty native title area is being claimed.

22. Section 223(1)(b) directs attention to whether the claimant group (the society) has a connection with the claimed land or waters, being a connection **by** the traditional laws and traditional customs of the society. The word "traditional" carries a similar implication as it

does in s 223(1)(a). Thus, the connection must be **by** the body of laws and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty and that body or laws and customs must have continued "substantially uninterrupted since sovereignty" to have its "normative quality" (*Yorta* [86]-[89]).

23. This paragraph has a clear geographically specific element: a claimant group must show that they have had a connection to the claimed land and waters since sovereignty. Further, that connection must be by the normative system under which they possess rights in that land and waters.

24. The connection referred to in s 223(1)(b) has been said to be "essentially spiritual", in which the claim group, their "spirit ancestors" and the particular land and everything on it and in it "are organic parts of one indissoluble whole" (*Western Australia v* ***Ward*** (2002) 213 CLR 1 at [14]). While, for various practical reasons, native title claims may be made by a group over different parts of a claim group's country at different times, their connection to their land is not piecemeal but is an indissoluble whole.

25. In its terms, s 223(1)(b) is not directed to how Aboriginal peoples use or occupy land or waters. It requires consideration of whether, **by** the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a "connection" with the land or waters. That is, it requires first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a "connection" of the peoples with the land or waters in question. The absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection (*Ward* [64]).

26. The "connection" referred to in s 223(1)(b) is "something over and above and separate from" enjoyment in the sense of engaging in activity or use. The connection identifies and refers to a defining element in a view of life and living (*Northern Territory v* ***Griffiths*** (2019) 269 CLR 1 at [187]).

27. Physical presence on land could be relevant to connection but is not necessary to establish it. The "connection" referred to in s 223(1)(b) involves the continuing internal and external assertion by the group of its traditional relationship to the country, defined by its laws and customs (which may be expressed by physical presence or otherwise): *Sampi v Western Australia* [2005] FCA 777, French J at [1079]. Practical examples of sufficient connection in the *Ward* litigation were conveniently summarised by Sundberg J in *Neowarra v Western Australia* [2003] FCA 1402 at [350] (which included a continued assertion of a relationship over an island never visited).

The trial in context

28. As noted above, the Overlap Area, the subject of this appeal, is a relatively small area (150km^2) adjoining a very much larger area (68,000+ km^2) that is the subject of a determination that native title is held by the Arabana (see *Dodd*).

29. *Dodd* determined expressly: that native title existed in relation to the area there claimed (save for specified exceptions as a result of extinguishment) (Order 2); that, under the relevant traditional laws and customs of the Arabana people, the native title holders comprise those living Aboriginal people who both identify as Arabana and who are recognised as being Arabana by other Arabana people based *inter alia* on filiation (including by adoption) from an Arabana parent or grandparent and who meet certain other requirements (Order 5); the nature and extent of the NTRI (Order 6); and that the NTRI are subject to and exercisable in accordance with the traditional laws and customs of the native title holders (Order 9(a)).

30. The *Dodd* determination also *necessarily* determined that the Arabana held NTRI that met the requirements of s 223(1) of the NTA. In particular, it therefore determined that: the Arabana People were a society that has continued to observe and acknowledge the pre-sovereignty laws and customs of the Arabana People, under which NTRI were and are still possessed and by which they have connection to the land and waters of the *Dodd* determination area; the normative rules for membership of the Arabana People; that the laws and customs of the Arabana People, while different in some respects from the classical laws, are still properly characterised as being "traditional" in the relevant sense; that the claimant members of the Arabana People are the descendants and/or successors of the Arabana People who at sovereignty held rights and interests to the area; that these laws and customs have been observed and acknowledged substantially uninterrupted since pre-sovereignty times by the Arabana People (including their forebears); and that the laws and customs are of a kind that are capable of and did generate rights and interests in the land, being rights and interests originally held by the at-sovereignty Arabana and now held by the current members of the Arabana People. These are all essential elements to the positive finding of native title in the *Dodd* determination.

31. Of course, the *Dodd* determination did **not** determine that the Arabana had a connection by their laws and customs with the Overlap Area.

32. The key Arabana claims at trial are summarised at TJ[57] (CAB 38-39). Items (a), (d) and (e) were not in dispute even at the trial (TJ[29]-[32], [101], [846], CAB 25-26, 48, 221); Item (f) was contested at trial but has now been determined to be correct on the appeal

(J[232], [234], [249], [270]-[275], CAB 361-362, 365-366, 372-373) (and is no longer in contest). Item (g) was accepted by the trial judge (TJ[410]-[414], [537], CAB 122, 149). That leaves only items (b) and (c), which are interrelated. The trial judge accepted that the Overlap Area was Arabana country at sovereignty (that is, subject to Arabana NTRI) (TJ[842], CAB 220). The remaining issue was whether the Arabana had maintained their connection with that part of Arabana country comprised by the Overlap Area (as they had with the balance of Arabana country covered by the *Dodd* determination).

33. The key WW claims are summarised at TJ[58] (CAB 39**)**. This case has now been rejected and there is no appeal. It is not clear what interest the named WW respondents continue to have in these proceedings. What is of relevance (to show the ambit of the dispute at trial) is that the WW proceeding initially involved a claim that the Arabana never possessed NTRI in the Overlap Area (TJ[58(a) and (f)] CAB 39) (that claim was later amended to raise, in the alternative, that if the Arabana are found to have NTRI in the Overlap Area, they are shared NTRI, although the closing submissions made only passing reference to this (J[60] CAB 40)); and that, at sovereignty, the Overlap Area belonged to the two groups comprising the WW (a matter not accepted by the trial judge, who found that the Western Desert component of the WW were not present in the Overlap Area at effective sovereignty and did not have NTRI in the area) (TJ[934] CAB 237, J[242]-[250], CAB 363-366).

34. The trial judge saw the issues arising as principally concerning "matters of connection" (TJ[50], CAB 33-37). At TJ[56] (CAB 38), this "principal question" was posited as whether a claim group has established that their NTRI extended to the Overlap Area and, if so, whether those rights have continued to be possessed by the claim group "in accordance with" an acknowledgment of their traditional laws and an observance of their traditional customs. This formulation does not sit easily with the terms of s 223(1).

Key findings on issues not contested on appeal

35. The ethnographic-historical evidence "overwhelmingly" supported the conclusion that the Overlap Area was Arabana country at the time of effective sovereignty (1870s) (TJ[410], CAB 122). The linguistic evidence did not support a view that there were Western Desert place names in the Overlap Area at effective sovereignty (TJ[457], CAB 133). The weight of that evidence (which was accepted) pointed to Arabana having been the language of the Overlap Area at effective sovereignty (TJ[537], CAB 149). The expert evidence advanced on behalf of the Arabana and the State was preferred to that advanced on behalf of WW (TJ

[794], CAB 209). The Court set out a brief summary of the Arabana mythology "relating to the Overlap Area", noting that on the view his Honour took, it was not necessary to record them "in detail" (TJ[815]ff, CAB 215). By the time of final submissions, it was common ground that the Arabana had NTRI at effective sovereignty in the Overlap Area and his Honour considered that this was the "correct understanding of the position" (TJ[842], CAB 220).

Principal question identified by trial judge

36. At TJ[843] (CAB 220), his Honour characterised the principal question on the Arabana claim as whether the Arabana have established that they continued to possess the rights and interests in the Overlap Area under traditional laws acknowledged and traditional customs observed by them and have "thereby" maintained connection with the Overlap Area. This formulation erroneously merges elements in paragraphs (a) and (b) of s 223(1) of the NTA.

Errors in trial judge's finding relied upon in this appeal

37. This section identifies the errors identified by O'Bryan J, which are relied upon by the Arabana. It is submitted that the majority erred by failing to reach the same conclusions.

38. The trial judge "misdirected himself with respect to the statutory test for the recognition of native title" (J[281], CAB 375), comprising the error alleged in Ground 1, Particular 1 of the Arabana's Further Amended Notice of Appeal (**FANOA**) (CAB 272). This can be seen from the manner in which his Honour expressed the relevant enquiry as to connection and the way in which he analysed the evidence (J[281], CAB 375).

39. Justice O'Bryan observed that the "issue of continuity" arises from the requirement that the laws and customs of the claim group have the character of being "traditional" (J[292], CAB 380-381). His Honour acknowledged that the connection enquiry "can have" a topographic element and, where it is asserted that the connection by the laws and customs has not been maintained over a part of a claimant's traditional country, it is necessary to evaluate whether the connection has been maintained and this is done "by reference to the content and character of the traditional laws and customs that continue to be acknowledged and observed by the community concerned" (J[293], CAB 381).

40. His Honour considered that two aspects of the trial judge's reformulated statutory language revealed error. First, rather than asking whether the Arabana have a connection to their country (including relevantly the Overlap Area) **by** their traditional laws and customs acknowledged and observed, the trial judge "frequently" asked whether the Arabana have a

connection to the Overlap Area **in accordance with** their traditional laws and customs (J[300], CAB 382-383 (citing TJ[121], [418], the heading to [844], [854] and [916], CAB 220, 223, 234); having previously referred to other flawed paraphrases at J[295]-[296], CAB 381-382 (referring to TJ[56], CAB 38) and at J[297]-[298], CAB 382 (referring to TJ[911], CAB 233).

41. The proper statutory enquiry requires an identification of the content of traditional laws and customs and then characterisation of the effect of those laws and customs as constituting a connection of the people with the land or waters in question (J[300], CAB 382-383). The substituted test "suggests an enquiry as to whether specific conduct or behaviours of the Arabana are in conformity with traditional laws and customs" (J[300], CAB 382-383), which is not the same.

42. Secondly, O'Bryan J found that the trial judge's assessment was "expressly focused on evidence of 'acts' (conduct or behaviour) of connection", giving three examples of the trial judge using language to this effect (J[301], CAB 383, citing TJ[911], [913] and [914], CAB 233), rather than by reference to the content and character of traditional laws and customs acknowledged and observed by the claimant community (J[302], CAB 383).

43. The test was not only misstated by the trial judge at TJ[911], (CAB 233), the error was the subject of emphasis placed by his Honour in the original:

> *Section 223 requires not just that the traditional laws and customs be known but that rights in land in this case the Overlap Area, be possessed by the acknowledgement and observance respectively of those laws and customs. It is by that acknowledgement and observance that the connection with the Overlap Area must be shown. Knowledge of what used to be the case is insufficient. Mr Strangways plainly has knowledge of Arabana traditional law and custom, and he would acknowledge and observe Arabana law and custom in the Overlap Area. Aaron Stuart's evidence showed some knowledge of Arabana traditional law and customs but relatively little by way of actual acknowledgement and observance of them giving rise to a connection with the Overlap Area.*

44. In addition, at TJ[913] (CAB 233), the trial judge stated "the connection required by s 223 is a connection *arising from the continuing acknowledgement* of traditional laws and customs observed by the claimant group" (emphasis added). At TJ[914] (CAB 233), his Honour found that it is the "relative absence of *acknowledgement of* traditional law and *observance of* customs by which a connection by the Arabana to the Overlap Area is maintained which is, in my opinion, fatal to the Arabana claim" (emphasis added).

45. These statements materially depart from the language of s 223(1) of the NTA as it has been explained by this Court. The statements wrongly suggest that connection is not by the laws and customs but by their acknowledgement and observance.

46. Justice O'Bryan found that the trial judge failed to consider the content and nature of the laws and customs of the Arabana that are acknowledged and observed today; and whether the claimed rights and interests in the Overlap Area are possessed by the Arabana under those laws and customs that are acknowledged and observed today, both of which are required to determine the question of whether the Arabana have a connection to the Overlap Area by those laws and customs that are acknowledged and observed today for the purpose of s 223(1) (J[338]-[339], CAB 393-394).

47. His Honour identified multiple instances where the reformulated test led to the trial judge not addressing the correct issues: J[343], [345], [346], [347], [350], [352], [353], [355], [356], [357], [358], [359], [361], [362], [363] (CAB 394-400). Each paragraph identifies a unique error flowing from the misconstruction of s 223(1) of the NTA.

The approach of the majority of the court below in relation to this ground

48. The majority in the court did not expend much ink on Particular 1 of Ground 1 (J[108] CAB 49-50), notwithstanding its centrality to the reasons of O'Bryan J.

49. Their Honours addressed one instance of the misstatement of s 223(1) relied upon by the Arabana (see J[100]-[101], CAB 317, referring to TJ[911], CAB 233) and acknowledged that the language employed "is not strictly in accordance with the language of s 223(1)(b)" of the NTA.

50. Theirs Honours referred to the Arabana having submitted that the error of construction by the trial judge led his Honour to "focus the enquiry on activities physically occurring within the Overlap Area" (J[103], CAB 317). But their Honours rejected the submission that any error had led to a "wrong emphasis" on "a geographic component to acts of acknowledgment and observance" (J[100], CAB 317).

51. At J[103] (CAB 317), the majority appears to explain the error as correctly stating what is required by s 223(1)(a). There are two answers to this. In context, the trial judge was clearly addressing the *connection* assessment in s 223(1)(b). Secondly, it is not a correct reflection of what s 223(1)(a) involves. That provision requires that NTRI be possessed under traditional laws acknowledged and traditional customs observed by the claim group: it does not say there **must** be acts of acknowledgment or observance in the particular claim area ("within the Overlap Area"). Rather, the rights must be possessed under the laws and customs and the connection to the claimed land must be by the laws and customs; not by the acts of acknowledgment or observance of them undertaken in the claim area. Such acts may be relevant but are not necessary to establish connection.

52. The majority also characterised the Arabana case at trial as being "based" on "10 matters in or in relation to the Overlap Area" so as to evidence their connection (J[104], CAB 318). Moreover, that the Arabana case was reliant on "all 10 of the matters" and having not expressly (in terms) submitted that connection could have been established "solely by reference to any one of the 10 factors" (J[104]-[105], CAB 318). Further, their Honours said that the trial judge had not been "invited" to consider whether the evidence of spiritual connection was itself sufficient (J[105], CAB 318). To the extent that it be relevant, the Arabana written submissions on connection at trial are set out at [323] (AFM 8). They set out principles concerning connection, including that the Court needed first to identify the content of traditional laws and customs and then characterise whether their effect is to constitute a connection (at [324.2] AFM 8). A submission was made that connection "may be by physical connection or otherwise" (at [324.4] AFM 8) and other forms of connection could include "spiritual connection, cultural connection, social connection, ancestral connection…" (at [324.5] AFM 8). The submissions then identify the content of at sovereignty and current traditional laws and customs (setting out a table that identified changes that had occurred) (at [325]-[328] AFM 8-11). Reliance was expressly placed on the evidence tendered in the *Dodd* determination (also tendered in this case) and the findings in *Dodd* (at [330] AFM 12). It was against that background that the "10 matters" were identified and developed (at [331]ff AFM 12). While there is an "and" at the end of the list of ten matters, there is certainly no contention that all ten needed to be established. In this way, the Arabana supported their connection case by relying upon the evidence of their connection to country by their laws and customs (which provided the basis for the *Dodd* determination) and then supplemented that with some further evidence as to how these laws and customs also pertained to (created connection with) the Overlap Area.

53. At J[108] (CAB 319) , the majority implicitly concludes that the trial judge did undertake the two step approach to determining connection stated by this Court in *Ward* at [64]. Their Honours do not in terms identify where the trial judge made findings about the current content of Arabana laws and customs (which O'Bryan J found had not been undertaken). The majority erred. The trial judge considered at-sovereignty Arabana laws and customs but **not** the evidence about current laws and customs by which connection to land is achieved (and was found to be sufficient in the *Dodd* determination to maintain continuity of connection to all the other Arabana country).

54. The majority state that the trial judge's compliance with this requirement is apparent from their disposition of Particular 2. The complaint in Particular 2 was that the trial judge

had misapplied the test for connection in failing to find that Mr Strangways' spiritual acknowledgement and observance of Arabana traditional law and custom in the claim area was sufficient to establish continuing connection. The Arabana argued in the context of this ground that that the trial judge had erred by looking for evidence of "actual acknowledgement and observance" of laws and customs giving rise to connection in the Overlap Area.

55. The majority dispose of this Ground by finding that the lack of specific evidence about activities in the Overlap Area meant the trial judge was correct to find that connection with the Overlap Area "was not one arising by acknowledgment and observance of the particular traditional laws and customs" to which Mr Strangways had referred (J[115], CAB 321). The majority observed that, for example: Mr Strangways' evidence as to teaching younger generations did not extend to "teaching specific to the Overlap Area" as opposed to the content of Arabana laws and customs more generally (J[111], CAB 320); "most of the evidence concerns Arabana laws and customs"; not "specifically relating to the Overlap Area" but "extending to it"; the evidence as a whole did not show that the Arabana maintained connection "with sites said to be of spiritual significance in the Overlap Area by, for example, visiting them" (J[115], CAB 321); and Mr Strangways' asserted knowledge of any sites of spiritual significance was not supported by *observance* by Mr Strangways himself of any obligation to visit and protect any sites to which his own evidence related (J[118], CAB 322).

56. In this way, the majority embraced a view of connection that was essentially the same as the trial judge (which was, we submit correctly, found to be flawed by O'Bryan J). It is a view that is focussed on acts (conduct or behaviour) of connection, rather than by reference to the content and character of traditional laws and customs acknowledged and observed by the claimant community (J[301]-[302], CAB 383).

57. The Arabana contend that the correct approach to s 223(1) is set out by the six steps identified by O'Bryan J at J[338] (CAB 393). As observed by his Honour, the fourth of those steps as to the content and nature of the laws and customs of the Arabana was not addressed by the trial judge in a detailed or methodical way; and the fifth as to whether the claimed rights and interests are possessed under those laws and customs that are acknowledged and observed today is not addressed at all. As a result, the trial judge's analysis of the final step, whether the Arabana have maintained a connection to the Overlap Area by those laws and customs that are observed today, miscarried (J[340], CAB 394).

Failure to make findings as to content of traditional laws and customs observed by the Arabana today

58. An area of disagreement between the members of the court below was whether the trial judge had made findings about the current Arabana laws and customs. We address that matter in more detail here.

59. The trial judge was required to determine whether the normative system of the Arabana who held native title in the Overlap Area at the time of sovereignty was a system that has had a continuous existence and vitality since sovereignty – "in other words, whether the acknowledgment and observance of the laws and customs has continued substantially uninterrupted since sovereignty" (O'Bryan J at [324], CAB 390).

60. As found by O'Bryan J, the findings of the trial judge were "confined to the laws and customs of the Arabana as at the date of sovereignty" (J[307], CAB 384-385) and the trial judge made "no finding" as to the content and nature of the traditional laws acknowledged and traditional customs *currently* observed by the Arabana (J[298] CAB 382).

61. At trial, the Arabana relied upon all the evidence pertaining to the content of traditional laws and customs advanced in the *Dodd* determination, and there was unchallenged evidence that the rights and interests of the Arabana were the same in the Overlap Area as in the *Dodd* Determination: Reginald Dodd at trial T197.30-39, T213.14-45**,** Lucas Report at [339].

62. The evidence adduced in *Dodd* and undisputed in these proceedings was that the key classical elements of Arabana laws and customs that continue to be observed involved: a system of kinship rules; Arabana language names and terms are still maintained; native title rights are passed by filiation from known Arabana persons; normative rules relating to authority including gender specific divisions of knowledge and rules that govern the transmission of law and custom to younger generations; and knowledge of traditional *Ularaka* (*Dodd* at [35]).

63. In *Dodd* [36]-[41], Finn J described the transformations in Arabana traditional law and customs that had occurred since sovereignty (see J[308], CAB 385-386). Those included the fact that: traditional laws and customs concerning social organisation and group membership have transformed since settlement as a consequence of radical depopulation and displacement from estates ([36]); classical marriage rules are no longer observed or even remembered by younger claimants ([37]); the classical system of landholding by localised grouped based on patrafilial *Ularaka* is no longer observed ([40]). The changes in traditional rules of succession were accepted as having a basis in traditional law and custom,

and Finn J accepted that the pre-sovereignty normative society has continued to exist, notwithstanding an inevitable adaptation and evolution of the laws and customs of that society (at [41]). (This acceptance is a necessary finding for the consent determination.)

64. Those transformations were not referred to in the trial judge's findings at TJ[101]-[110] (CAB 48-50) (addressing the Arabana society), but were referred to in part at TJ[845] (CAB 220-221) (addressing changes only to succession of country from localised groups to country as a whole): see O'Bryan J at J[309] (CAB 386). The trial judge referred to the finding in *Dodd* at [46] that contemporary connection to Arabana country by Arabana people continues to be governed by laws and customs including those which go to authority, gender and knowledge of the physical and cultural geography of the claim area, including *Ularaka* (TJ[845], CAB 220-221, see J[312], CAB 387), and described Finn J's description of "a number of matters bearing on the continued connection of the Arabana with the 2012 determination area" (at [846], CAB 221).

65. As observed by O'Bryan J, the trial judge's description of these findings as concerning "continuing connection" is not apt (J[315], CAB 388). Further, that the observations made by Finn J with respect to traditional laws and customs were more extensive than those made by the trial judge, "bespeaks error in the proper approach to the enquiry required by s 223(1)" (J[316], CAB 388).

66. In contrast, Finn J's analysis proceeded in an "orthodox manner", culminating in a consideration of whether the rights and interests claimed by the Arabana were possessed under traditional laws and customs acknowledged and observed (J[315], CAB 388).

67. Relevant observations in *Dodd* on the question of contemporary connection to the 2012 determination area, included the fact that "Whilst Arabana language is only spoken by some senior members of the claim group, Arabana names are still used to refer to places and sites within Arabana country. Similarly, Arabana kinship terms are still used" ([48]); senior members of the group are familiar with the traditional *Ularaka* and the normative rules related to *Ularaka* ([49]*;* whilst the need for bush tucker has diminished, a number of claimants continue to access the natural resource of the claim area ([55]); and, whilst *Wilyaru* and other ceremonies no longer occur on Arabana land, "Arabana people still meet regularly on country for important communal events such as annual reunions, funerals and special birthdays, as well as rodeos, races and bronco brandings" which remain an important element of Arabana traditional law and custom through which proper behaviour is practiced and transmitted between generations ([56]). Those matters represent an orthodox assessment as to the traditional laws and customs that are acknowledged and observed by the

Arabana *today*, and how *by* those laws and customs, the Arabana have a contemporary connection with the land or waters. That analysis is to be contrasted with the trial judge's analysis of the Arabana evidence on connection, which was made absent findings as to the content of contemporary laws and customs.

68. Ultimately, although the trial judge took into account, and accepted as evidence, the findings of Finn J in *Dodd,* "they ultimately formed no part of his Honour's assessment of the Arabana's claim to native title in the Overlap Area" (J[319], CAB 389).

69. Contrary to the finding of O'Bryan J, the majority erroneously considered that the trial judge had "set out the traditional laws and customs of the Arabana by which rights and interests in land **are** possessed' (emphasis added) (J[62](1), CAB 303). No specific paragraph is referred to in support of this proposition.

70. Assuming it to be a reference to the trial judge's recitation of the laws and customs of the Arabana at sovereignty (J[101]-[110], CAB 317-320), those findings fail to consider the transformations identified by Finn J in *Dodd* at [36]-[41] and the trial judge failed to consider the contemporary position for the reasons identified by O'Bryan J. The majority do not deal at all with O'Bryan J's reasoning in that respect, and their finding that the trial judge considered the contemporary position is unsupported by the reasons and the trial judge's consideration of the evidence.

Effect of the errors

71. Justice O'Bryan identified specific errors in respect of the 10 specific topics that were advanced by the Arabana, concluding that the trial judge had erred in the approach taken by directing the assessment to acts (conduct or behaviours) of acknowledgement and observance of traditional laws and customs by which the requirement of connection was to be addressed (J[346], CAB 396).

72. The critical issue is for what purpose and in what manner were the 10 matters assessed (J[346], CAB 396). (We have addressed above the role of the 10 topics in the broader Arabana submissions concerning connection, see [52] above.) Evidence of beliefs, conduct and behaviours of the Arabana community is relevant to the question of whether the Arabana have continued to acknowledge and observe traditional laws and customs that found native title. It is relevant that these submissions were put in a context in which the trial judge had not yet found that the Overlap Area was Arabana country at sovereignty. There was no suggestion that any or all of these matters were *necessary* in order to make out the test in s 223(1).

73. However, the trial judge approached assessment of the 10 matters solely through a lens of "continuing connection" by reference to the nature and extent of conduct and behaviour related in some manner to traditional laws and customs (J[347], CAB 396). This was not the correct enquiry and led to an erroneous assessment of the evidence as identified by O'Bryan J at J[349]-[363], (CAB 396-400).

74. All categories of evidence assessed by the trial judge were, as found by O'Bryan J, misdirected by reason of a failure to make findings in respect to the traditional laws and customs currently observed by the Arabana.

75. That error gave rise to further miscarriages in the trial judge's treatment of the evidence. In respect of some categories, the trial judge's assessment was erroneously limited to people within the Overlap Area, as distinct from the claim group more broadly: see, for example, in relation to continuity of Arabana people living in Oodnadatta J[352], (CAB 397-398); continuity of learning, respecting and teaching the Ularaka J[356], (CAB 398-399); and knowledge of boundaries J[361], (CAB 400).

76. In others, the assessment was erroneously directed to the extent of conduct and behaviour within the Overlap Area related to traditional law and customs: see, for example, protection of Ularaka sites (J[357], CAB 399); continued acknowledgment and observance of other traditional laws and customs in the Overlap Area (J[358], CAB 399); and continuing internal and external assertion of traditional relationships (J[359], CAB 399).

77. In others, the specific matters assessed by the trial judge had, as their premise, assumptions about the content of Arabana law and customs that were not the subject of any findings (J[365], CAB 401): see, for example, in relation to "manner of living" (J[353], CAB 398); hunting and gathering (J[355], CAB 398); continuing internal and external assertion of traditional relationships (J[359], CAB 399); continuity of social connections (J[363], CAB 400).

78. Those errors were a direct consequence of the erroneous reformulation of the statutory test in s 223(1) and a failure to make relevant findings as to the features of contemporary law and custom acknowledged and observed by the Arabana.

Significance of prior consent determination

79. In the court below, the Arabana contended that, in circumstances where the Court had reached a conclusion that the Overlap Area had been subject to NTRI at sovereignty held by the claim group's Arabana ancestors, the *Dodd* determination and its necessary and express findings (as to which see [29] and [30] above) were critically important to addressing the

remaining elements of native title. This was because, for example, it determined: the Arabana People comprise a society that has continued to observe and acknowledge the pre-sovereignty laws and customs of the Arabana People; that the Arabana laws and custom are "traditional" in the sense used in the NTA; that these laws and customs are of a kind that are capable of giving rise to NTRI; that these laws and customs are of a kind that can effect a connection with land and waters; and the composition and membership rules of the Arabana claim group.

80. Moreover, the Arabana contended that the trial judge had negated (or wrongly diminished) the probative force of the *Dodd* determination by wrongly concluding that the inference to be drawn from it were equally able to be drawn in relation to the WW claim (J[56], CAB 302). The majority accepted that the trial judge had "implicitly" suggested that the *Dodd* determination and a determination relevant to the WW claim could be used "in the same way and with the same force" (J[60], CAB 303). The majority further accepted that this was "incorrect" in circumstances where it was held that the Arabana and not the WW had occupied the Overlap Area at the time of effective sovereignty (J[60], CAB 303). However, their Honours did not consider that this error led to an error in the assessment of the Arabana's connection to the Overlap Area (J[60], CAB 303). This was essentially because the trial judge had made reference to and some use of the *Dodd* determination (J[62], CAB 303-304) and because their Honours considered that the "factual matters essential to a valid determination of native title are geographically specific" (J[70], CAB 307-308; "all of it is geographically specific" J[86], CAB 312).

81. It is not in dispute that a native title determination for one area does not determine the existence of native title in a different area. However, the Arabana contend that the matters expressly or necessarily determined by a native title determination are not **all** geographically specific: cf also ***McLennan*** *v Queensland* [2023] FCAFC 191 at [51], [74], [121].

82. For example, when asking whether the Arabana People comprise a society that has continued to observe and acknowledge the pre-sovereignty laws and customs of the Arabana People, this is a question about the current Arabana society (wherever individuals live or do not live). Whether the content of types of laws and customs create a relationship with land that amounts to a relevant "connection" and whether it gives rise to rights and interests is not necessarily geographically specific. For example, the existence of a kinship system that attaches different rights and obligations to land by reference to the nature of kin relationships can be analysed without identifying specific land.

83. This is not to deny that there are certain and essential geographically specific elements. There obviously needs to be a law or custom that a specific area is part of the indissoluble whole that includes the claim group: this is geographically specific (and essential). There can be different rights for different subgroups within the claim group for different areas (for example, there may be an area that men cannot enter upon). None of this denies that some key elements of native title are not inherently geographically specific.

84. Whether or not these non-geographically specific elements are binding in later native title proceedings involving the same claim group is not critical, the findings are at least weighty and probative and should not have been diminished in the manner done by the trial judge and approved by the court below. It is clear that the trial judge could have simply adopted all of the necessary or express findings concerned with connection from the *Dodd* determination as applicable to the Overlap Area: s 86(1)(c) of the NTA.

85. To do so may not be appropriate in a case where both a new claim area adjoins an area the subject to a prior determination **and** the Court is **not** satisfied that the claim group **ever** had a connection to the new claim area. However, when (as here) a court has found as a fact that the ancestors of the current claim group held NTRI in the new claim area at effective sovereignty, the case for adopting such findings becomes compelling. (Note, unlike in the present case, this was not the position in *McLennan*.)

86. The Arabana contend that the court below erred in concluding that all factual matters essential to a native title determination are geographically specific. Had the Court appreciated that some (indeed many) of the necessary findings are not geographically specific, the Court should have found that the trial judge erred in assessing the probative force of the *Dodd* determination (and its essential finding) in establishing connection in the Overlap Area.

Part VII: Orders

1. The appeal be allowed.
2. Order 3 of the Court below in SAD16/2022 be set aside and in lieu thereof order that:
    a. Order 1 made by White J on 21 December 2021 dismissing the Arabana Application in action SAD 38/2013 be set aside;
    b. The parties be afforded an opportunity to make further written and oral submissions with respect to the determination of the Arabana Application by reference to the reasons of the High Court, the primary judge's findings

with respect to lay[1] and expert evidence, and any aspect of the evidence admitted at trial to which the parties wish to direct the court's attention.

3. Each party bear its own costs of the appeal.

Part VIII

87. The Appellant expects to be 2 hours in chief and 15 minutes in reply.

Dated: 27 March 2024

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[1] In the Notice of Appeal (CAB 451) the word "law" should be "lay".

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)	As made (Act No 110 of 1993)	Section 10
2.	*Native Title Act 1993* (Cth)	Compilation 47 25 September 2021 to 22 August 2023	Section 86(1)(c)
3.	*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

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