

IN THE HIGH COURT OF AUSTRALIA
BRISBANE DISTRICT REGISTRY
ON APPEAL FROM THE FULL COURT
OF THE FEDERAL COURT OF AUSTRALIA

No B58 OF 2012

BETWEEN:

LEO AKIBA ON BEHALF OF THE TORRES STRAIT REGIONAL SEAS CLAIM GROUP

Appellant

And

COMMONWEALTH OF AUSTRALIA and others

Respondents

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WRITTEN SUBMISSIONS OF BIDDY BUNWARRIE AND OTHERS (NOMADS) ON BEHALF OF THE
WARRARN PEOPLE (INTERVENING)

PART I: CERTIFICATION AS TO FORM

1. These submissions are in a form suitable for publication on the Internet.

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PART II: BASIS OF INTERVENTION

2. The Nomads seek leave to intervene in support of the Appellant in respect of the "reciprocal rights issue".

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. The Nomads intend to appeal¹ the decision of Bennett J in *AB (deceased) (on behalf of the Ngarla People) v State of Western Australia (No 4)* [2012] FCA 1268 delivered on 21 November 2012 (*AB*) on grounds which will include the following:

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- (a) The learned trial judge erred in law in concluding that an interest by way of permission granted by the Ngarla people in accordance with traditional laws acknowledged and traditional customs observed by the Ngarla people to the Warrarn to access the land the

¹ Bennett J has delivered reasons for decision in *AB (deceased) (on behalf of the Ngarla People) v State of Western Australia (No 4)* [2012] FCA 1268 with an order that the parties consult as to a proposed Determination to give effect to the reasons and has sought further submissions relating to 'the divided rights' discussed in the reasons at [828]-[877]: see [856], [857], [937] and [933]. The Nomads are the Third Applicant in those proceedings.

Date of Document: 14 January 2013

Date of Filing: 30 January 2013

Filed on behalf of: Biddy Bunwarrie and Ors (Nomads) on behalf of the Warrarn People

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subject of the application for a determination of native title for various purposes is not a right or interest which is capable of being the subject of a determination of native title under the *Native Title Act 1993* (Cth).

4. A decision in this case on the “reciprocal rights issue” will effectively determine that issue in the Nomads appeal.

PART IV: LEGISLATIVE MATERIALS

5. See [75] of the Appellant’s Submissions and [17] of the Commonwealth’s Submissions.

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PART V: ARGUMENT

6. Bennett J in *AB* found as follows –

- (a) The permissions granted to the Warrarn by the Ngarla under Ngarla traditional laws and customs, such as to carry out their own rituals and customs in the area of the native title determination, are not rights and interests in land.²
- (b) Any rights and interests which the Warrarn possess are not rights and interests in relation to land within the meaning of s 223(1) of the *Native Title Act 1993* (Cth).³ They are status based rights or personal rights, dependent upon the native title of the Ngarla people.⁴
- (c) The rights that are possessed by the Ngarla include the right to permit another person to be present or to come on to land, which may be subject to conditions.⁵
- (d) The right to be accompanied by a spouse and the right to permit access for Law and cultural activities is by reason of, and bound up with, the traditional rights in the land.⁶
- (e) The right of the native title holder to open Law grounds and to give and withhold permission for the conduct of Law ceremonies on the land carries with it the right to permit, or be accompanied by, those persons who participate in those activities.⁷
- (f) The right to be accompanied by a spouse or person required for the performance or cultural activities is a right related to Ngarla land and is not dependent upon a relationship in the *Akiba (No 3)* sense.⁸
- (g) In utilising that right the recipient does not obtain a right in the land. What is granted to the recipient is a personal right.⁹

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7. In characterising the rights of the Warrarn as personal rights or status-based rights Justice Bennett¹⁰ relied on the discussion of those concepts by Keane CJ and Dowsett J in *Akiba (FC)*.¹¹

8. On behalf of the Warrarn, before Bennett J, it was submitted¹² and it is reiterated in this matter that it is erroneous to conclude that status-based rights are not capable of being ‘rights and interests in relation to land’ within the terms of s 223(1) of the *Native Title Act 1993* (Cth).

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² Bennett J in *AB* at [675], dot point 4.

³ Bennett J in *AB* at [570], [675], dot point 5

⁴ Bennett J in *AB* at [675], dot point 5.

⁵ Bennett J in *AB* at [876], dot point 2.

⁶ Bennett J in *AB* at [876], dot point 5.

⁷ Bennett J in *AB* at [876], dot point 5.

⁸ Bennett J in *AB* at [876], dot point 5.

⁹ Bennett J in *AB* at [876], dot point 5.

¹⁰ Bennett J in *AB* at [544]-[551].

¹¹ *Commonwealth v Akiba* (2010) 204 FCR 260, at [129]-[133]. Bennet J noted in *AB* at [551] that the rights claimed in that instance are not ‘reciprocal rights’ in the absence of any corresponding rights. Although Bennett J also noted at [543] that the granting of permission in relation to the conduct of or participation in Law ceremonies is based on reciprocal relationships between communities.

9. Most native title rights have a status base, for example, native title rights based on descent are accorded because of a relationship of the individual members of the current native title claimant group to ancestors and the status of an individual as a descendent of a particular ancestor.
10. The 'reciprocal rights' of Torres Strait Islanders, the permitted rights possessed by the Warrarn and descent-based rights, in each instance, arise from a triangular or three-pointed relationship.
11. They necessarily comprise a relationship between –
- (a) one class of persons and another; and
 - (b) a relationship between those two classes of persons and land or waters.
12. In the case of Torres Strait Islanders there is a three-way relationship is between two occupiers of neighbouring islands and their surrounding waters, as two points of the triangle and the waters as the third point of the triangle.
13. The *Akiba* and *AB* cases both illustrate the triangular relationship between current living occupiers, their ancestors and the land, giving rise to a descent-based connection to land.
14. In addition, in the *AB* case, there is the three way relationship between the Ngarla occupiers of the land, the permitted Warrarn users of the land and the land and the three –way relationship between the Ngarla occupiers, their non-Ngarla spouse and the land.
15. The fact that the right in an individual is personal to the individual and is not assignable¹³ does not make it any less a right 'in relation to land' if the right is a right to be exercised in relation to land.¹⁴
16. In the same sense a descent based right is also personal to each individual. That right is not transmissible to any other person.¹⁵ The right of the ancestor is not given to a descendent. The descendent has his or her own right to land arising out of the relationship he or she has with an ancestor. Each person has his or her own right arising out that individual's status as a descendent of certain ancestors.
17. This Court in *Mabo v Queensland (No 2)* made it clear that assignability or 'alienability' of an interest does not determine whether the interest is an interest capable of being recognised as a native title interest in land.¹⁶ Deane and Gaudron JJ¹⁷ expressed the view that native title is a 'personal right', 'can approach the rights flowing from full ownership', but should be accepted as 'sui generis'. Toohey J¹⁸ expressed the view that an inquiry as to whether a title is 'personal and usufructuary' or 'proprietary' for the purpose of determining whether it is susceptible to extinguishment by the Crown is 'fruitless'.
18. An issue of uncertainty as to the rights arising from reciprocal rights was taken into account by Finn J in *Akiba (No 3)*¹⁹ and the Full Court in *Akiba (FC)*²⁰ as not supporting the accommodation of such rights within the scheme of the NTA. That position was noted and followed by Bennett J in

¹² See Bennett J at [540].

¹³ See *AB* at [543], [547], [548], [664], [665].

¹⁴ In *AB* at [471] Bennett J says that the right of the Ngarla to grant permission does not result in a grant of 'rights over Ngarla country'. This conclusion appears to be related to the evidence referred to by Bennett J at [467] to [470] that the granting of permission to open a Law ground, conduct ceremonies or live at Strelley Station and look after the Law did not result in the Ngarla giving way their rights in the land.

¹⁵ Contra Bennett J in *AB* at [678], dot point 3.

¹⁶ *Mabo v Queensland (No 2)* (1991-1992) 175 CLR 1, per Brennan J at 51, 60, 70, Deane and Gaudron JJ at 88, 110

¹⁷ At 88-9, 110.

¹⁸ At 194-5.

¹⁹ *Akiba v Queensland (No 3)* (2001) 205 FCR 1, at [510].

²⁰ *Commonwealth v Akiba* (2010) 204 FCR 260, at [133].

*AB*²¹ in relation to the 'permissions' or 'licences' claimed by the Warrarn. On behalf of the Warrarn it was pointed out²² and is reiterated in this matter that the 'permission' rights have sufficient limits upon them to provide adequate certainty to accommodate them within the regime of the NTA. Those limits include that –


- (a) The permission is definable by the terms of the permission in each instance;
- (b) The permission to do anything on the land in question is limited by the title which the donor has;
- (c) The permission is limited by the normative system within which it exists; and
- (d) The permission can only be granted within that system.

10 19. In addition, it is to be noted that in the case of rights being based on the status of an individual as a descendent, the evidence in *AB*,²³ as in other cases, is that an individual has the right to choose from time to time during the course of his or her lifetime which of the several descent-based connection he or she may have, ranging over more than one generation of predecessors in a cognatic descent-based system, in determining which rights he or she may claim or exercise from time to time. The consequence is that the element of descent does not always have quite the degree of immutability which was ascribed to it by Keane CJ and Dowsett J in *Akiba (FC)*²⁴.

20 **PART V: ORAL ARGUMENT**

20. It is estimated that 5 minutes will be required for the presentation of the argument for the Nomads.

Dated:

 14 January 2013

G M G McIntyre SC

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P Sheiner

²¹ At [568]-[570].

²² As noted by

²³ See *AB* at [128], [137], [765]-[768]

²⁴ *Akiba (FC)* At [131]; quoted in *AB* at [544].