



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

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet Publication: This outline of submissions is suitable for publication.

Part II: Propositions to be Advanced in Oral Argument

Appeal ground one: the trial judge properly carried out the evaluative task before him

1. Whether the Arabana satisfied s 223(1)(b) of the NTA with respect to the 150 km² Overlap Area (OA) is a narrow factual question. Notwithstanding O'Bryan J's focus on other steps in the s 223 enquiry (FFCJ [296], [298], [364]: CAB 382, 401), the only live issue was "*whether the Arabana have a connection to the Overlap Area by those laws and customs that are acknowledged and observed today*": FFCJ [364] CAB 401; FRWS [5]-[6]; FRBFM 26 [18]. That question arose due to movement of Arabana people out of the OA: FRWS [4], [22].
- 10 2. The traditional laws and customs (TLCs), acknowledged and observed, by which the Arabana say they possess rights or interests within the meaning of s 223(1)(a):
 - 2.1. were as identified in *Dodd v SA* [2012] FCA 519 (**Dodd**) and accepted by White J (TJ [618], [844]-[846], [853] and [905]: CAB 165, 220-221, 223, 231-232; FRWS [20]-[21]) at the Arabana's invitation: T3178L36-46: FRBFM 28; ABFM 8-11. It was unnecessary for his Honour to make further findings either as to the relevant TLCs or as to s 223(1)(a) specifically: cf FFCJ [296], [298]: CAB 382. The Arabana cannot now criticise White J for not adopting an alternative approach never put by them at trial; and
 - 2.2. are characterised by a close relationship with land involving acts of acknowledgement and observance which are concerned with that land: FRWS [21], [30]-[31], [35]; TJ [845]-
 20 [846]: CAB 220-221; *Dodd* [40], [46], [47], [48], [49], [53], [55], [56], [57], and [58]. The Arabana case centred on the expression of beliefs, acts and behaviour: Arabana SFIC (FRBFM 11ff) [31.1]-[31.3], [39], [51]-[58].
3. White J's task was to identify how those TLCs related to the 10 matters postulated by the Arabana for the purposes of s 223(1)(b), those 10 matters being the summation of the Arabana's evidence led to assert continuing connection: FRWS [31]; FFCJ [104]-[105]: CAB 318. The assessment of those matters:
 - 3.1. involved a factual, evaluative inquiry determined by reference to the content of the TLCs acknowledged and observed: FRWS [15] and [32]; see FFCJ [303]: CAB 383-384. In
 30 conducting its case by reference to the 10 matters, the Arabana expressed that they were the significant matters in determining connection by reference to their TLC: FRWS [31]; FFCJ [106]: CAB 318-319. It was for the Arabana to relate those matters to the asserted TLCs. His Honour did not divorce evidence of conduct and behaviour from law and custom, but rather was attempting to relate the evidence of acts and behaviour adduced to the nature and content of the TLCs: cf AWS [42]-[45]. Those TLCs, for example:
 - 3.1.1. refer to the Arabana people having a physical connection with land and accessing areas for traditional purposes: TJ [845](40)-[846]: CAB 220-221; *Dodd*, see [2.2]

above. The limited evidence adduced did not explain how Arabana people living in or accessing the OA was referable to TLCs: FRWS [23]-[24]; TJ [863]: CAB 224;

3.1.2.require transmission of knowledge: FRWS [25]; TJ [845]-[846]: CAB 220-221; *Dodd* [48], [57]. Such TLCs referable to the OA were lacking: [872]-[876]: CAB 225-226; and

3.1.3.require the protection and maintenance of sites: FRWS [26]; TJ [618], [845]: CAB 165, 221; *Dodd* [49], [58]. Again his Honour attempted to relate such TLCs to the OA but the contemporary evidence was insufficient: FRWS [26]; TJ [877]-[892]: CAB 226-229. Likewise, rules about permission to access sites are now historical: FRWS [27]; TJ [896]: CAB 229;

3.2. required the Arabana to establish the content of the TLCs as they bear upon the specific land claimed: FRWS [8]. At [124] the Full Court correctly found that such elucidation was absent from the evidence: CAB 323. The enquiry requires more than mere consideration by the Arabana that their TLCs apply to the OA: cf AR [3];

3.3. could and did (to the extent adduced by the Arabana) involve evidence of continuing connection of a non-physical kind: FRWS [11], [35]. Where belief and spirituality is relied on by an applicant to establish connection by non-physical means that must be supported by evidence: FRWS [36]-[37]; FFCJ [124]: CAB 323. The Arabana case focussed on activities and behaviour physically on or related to the OA: FRWS [30]-[31]. To the extent that non-physical connection was asserted, that evidence was considered: TJ [872], [888], [897]-[899], [901], [903], [913]: CAB 225, 228, 230, 231. 233; and

3.4. was not limited to acknowledgement and observance within the OA. White J had regard to such evidence: TJ [872], [888], [897]-[899], [901], [903]: CAB 225, 228, 230, 231.

4. White J's approach to the 10 Arabana connection matters reveals no error as to s 223(1). The chapeau to s 223(1) identifies the character of the rights, being those "*in relation to land*", sub-s (1)(a) identifies the traditional nature of the rights and interests being those TLCs acknowledged and observed, whilst sub-s (1)(b) is concerned with connection "*with the [particular] land or waters claimed*": FRWS [8]. The Arabana's divorcing of s 223(1)(a) from (b), limiting acknowledgment and observance to sub-s (1)(b), (AWS [45]) ignores:

4.1. the text of s 223(1) when read as a whole. The TLCs referred to in s 223(1)(b) are those acknowledged and observed under s 223(1)(a);

4.2. *Yorta Yorta v Victoria* (2002) 214 CLR 422 at [34] and [86], *WA v Ward* (2002) 213 CLR 1 at [18] and [64] and *NT v Griffiths* (2019) 269 CLR 1 at [22]: FRWS [7.1]; and

4.3. the Full Court's decisions in *DeRose v SA (No 1)* (2003) 133 FCR 325 at [305]-[307], *Bodney v Bennell* (2008) 167 FCR 84 at [165], [167], [169], [171] and [175] and *Blackburn v Wagonga* (2021) 287 FCR 1 at [83](d) and [145]: FRWS [7.1].

5. The Arabana (and O'Bryan J) mischaracterise White J's assessment of the 10 matters. They draw illusory distinctions. For example:

5.1. White J's reference to connection "*in accordance with*" (TJ [916]: CAB 234) is consistent with the meaning of "*by*". It connotes no more than that connection must be *through* TLCs (although that does not necessarily require strict compliance with TLCs): FRWS [17]-[18]. In any event, the phrase "*in accordance with*" appears in the preamble to the NTA, ss 62(2)(e)(iii) and 238(5) (*Wyman v Qld* [2016] FCA 777, [9]-[10]) and was used by the Arabana: FRWS [17] fn 91; 2-5RWS [25]. It is language used in the authorities: see e.g. *Blackburn v Wagonga* (2012) 287 FCR 1, [95] and [155]; and

10 5.2. it was no error for White J to refer to 'continuity of connection': AWS [39]. The Arabana also referred to "*continuity*" of connection: ABFM 12 [331]. That phrase is an orthodox recognition that s 223(1)(b) connection must exist since sovereignty. Such language involves no error where White J properly explained (FRWS [13]-14) and executed (TJ [845]-[916]: CAB 220-234) the enquiry.

Appeal ground two: the proper use of an adjoining determination

6. The Full Court correctly found the factual matters essential to determination of native title are geographically specific: FFJ [70]; FRWS [40]. Native title is over clearly bounded land or waters expressed as a determination area: NTA ss 62(1)(b), 225 and 253 (definition of "*approved determination of native title*"). The adjoining determination provides a basis from
20 which appropriate inferences can be drawn: FRWS [39]-[40].

Relief

7. Notwithstanding the effect of *Dodd* contended for by the Arabana, they nevertheless accept that a remittal, on the limited terms postulated by O'Bryan J, is necessary should this Court accept either ground of appeal: AR [17]. In doing so, they:


7.1. implicitly accept that *Dodd* does not fill the lacunae in their case; and

7.2. seek to reagitate how their 10 matters relate to the TLCs recognised in *Dodd*. They seek to pivot to a connection case based on non-physical acts. It is too late to embark on such a new endeavour: FRWS [41]-[42]; and

30 7.3. fail to identify a body of evidence that was ignored or not properly considered by White J. The rehearing sought is therefore of no practical utility: RWS [41]-[42].

Dated 6 November 2024


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TN Golding KC


.....
WV Ambrose

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
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