



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

**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA
(INTERVENER) OUTLINE OF ORAL SUBMISSIONS**

PART I: INTERNET PUBLICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

**Ground 1: Section 223(1)(b) of the *Native Title Act 1993* (Cth) and ‘connection’
(AG(Cth)S [6]-[30])**

2. The Attorney-General intervenes to seek from this Court elucidation (or confirmation) of the legal principles to be applied to the ‘connection’ inquiry under section 223(1)(b) of the *Native Title Act*.
3. The principles which the Attorney-General invites the Court to endorse as an authoritative statement of the principles relevant to the connection inquiry in section 223(1)(b) are set out by Justice O’Bryan (in dissent) at **CAB 379 [290]**.
4. The primary judge’s approach to the ‘connection’ inquiry contained various misstatements of the statutory definition of native title in section 223(1) and conflated the operation of ss 223(1)(a) and (b): see O’Bryan J at **CAB 394-5 [340]-[345]**.

5. While acknowledging the ‘misstatements’ the majority did not go further and consider the relevance of conflating the operation of ss 223(1)(a) and(b): Rangiah and Charlesworth JJ **CAB 317 [101]**.
6. There are three elements to section 223(1), (**JBA Vol 1 Tab 4 114**) each of which has work to do and must be answered.
7. For sections 223(1)(a) and (b) there must be both possession of rights and interests under traditional laws and customs **and** a connection with the land or waters claimed by those laws and customs.
8. That is to say, the two subsections operate in parallel: there are two aspects or the relationship of claimants and a claimed area: whether they have rights and interests as distinct from continuing connection. See *Western Australia v Ward* (2002) 213 CLR 1 (*Ward HC*) [64] **JBA Vol 5 Tab 16 1131**; also [18]-[19] **JBA Vol 5 Tab 16 1112**. See also *Northern Territory v Griffiths* (2019) 269 CLR 1 [23] **JBA Vol 4 Tab 12 800**.
9. The line of reasoning has been developed through cases in the Full Federal Court from *De Rose v South Australia* (2003) 133 FCR 325 [306], [313] **JBA Vol 6 Tab 21 1769-1771**; *De Rose v South Australia (No 2)* (2005) 145 FCR 290 [111]-[113] **JBA Vol 6 Tab 22 1824-1825**, to *Bodney v Bennell* (2008) 167 FCR 84 [164]-[176] **JBA Vol 6 Tab 19 1616-1619**.
10. The analysis in *Bodney v Bennell* informs the principles set out by O’Byrne J at **CAB 379 [290]** which the Attorney-General seeks the Court to confirm and endorse as the legal principles applying to the section 223(1)(b) connection inquiry.

Ground 2: Significance of prior consent determinations (AG(Cth)S [31]-[39])

11. There is a tension between determinations of native title by consent and litigated determinations of native title.
12. Both types of determinations are approved determinations of native title, binding parties to the claim and operating in rem.
13. The tension arises because a consent determination does not require the Court to make findings of fact underpinning the determination; rather its discretion is based upon finding that there is a free and informed agreement between parties.

14. The evidentiary foundation for such an inquiry is necessarily less than that required for a litigated hearing.
15. Where there is opposition to a determination of native title and the matter is litigated the Court must determine the existence of native title based upon material properly before it and on available inferences.
16. Where there is a contested hearing over a particular area, any inferences that may otherwise be drawn to extend native title into that area based upon a consent determination over adjoining country may be defeated by evidence to the contrary.

Dated: 6 November 2024



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R J Webb KC

Schedule

Appellants

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

Walka Wani Respondents

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

Other Respondents

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

Intervener

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| Intervener | Attorney-General of the Commonwealth of Australia |
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