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

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Part I: CERTIFICATION AS TO FORM

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

Part II: BASIS OF INTERVENTION

2. The Attorney-General of the **Commonwealth** gave written notice that it intervenes in this proceeding pursuant to s 84A(1) of the ***Native Title Act*** *1993* (Cth) by Notice of Intervention dated 8 May 2024.

Part III: REASONS WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

Part IV: ISSUES

4. The Commonwealth intervenes to make submissions as to:

   4.1. the interpretation and application of s 223(1) of the *Native Title Act,* particularly the legal principles underpinning the 'connection' inquiry in s 223(1)(b) (relevant to Ground 1); and

   4.2. relatedly, the legal effect and significance of prior native title determinations made by consent and the use that may be made of them in subsequent native title proceedings (relevant to Ground 2).

5. To be clear, the Commonwealth does not make submissions as to any factual matters arising in the appeal and, as such does not support any party although its submissions on the legal significance of prior consent determinations relevant to Ground 2 are consistent with the positions of the First Respondent and the Second, Third, Fourth and Fifth Respondents.

Issue 1: Section 223(1)(b) of the Native Title Act and 'connection'

6. That each of the parties express the issue/s on appeal relating to s 223(1)(b) of the *Native Title Act* differently suggests that legal principles as to the 'connection' inquiry require further elucidation by the High Court: see Appellants' Submissions filed 28 March 2024 (**AS**), [3]-[4]; First Respondent's Submissions filed 26 April 2024 (**FRS**), [2.1]-[2.2]; Walka Wani Respondents' Submissions filed 26 April 2024 (**WWS**), [2(a)-(b)].

7. For the Commonwealth, the point at issue is the proper interpretation of s 223(1)(b) of the *Native Title Act.* It seeks from this Court elucidation (or confirmation) of the legal principles to be applied in determining whether Aboriginal peoples or Torres Strait Islanders have a 'connection' to land and waters by traditional laws and customs, for the purpose of deciding whether or not rights and interests held by those persons under traditional laws and customs are native title rights and interests as described in s 223(1) of the *Native Title Act.*

8. Section 223(1) of the *Native Title Act* relevantly provides (underlining added):

> (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, <u>by those laws and customs, have a connection with the land or waters</u>…

9. On the plain words of the section, therefore, three criteria must be satisfied in order to have a 'connection' for the purposes of s 223(1)(b):

9.1. The *first* is that there must be a 'connection' with the land or waters.

9.2. The *second* is that the 'connection' must be held by the particular Aboriginal persons or Torres Strait Islanders who possess the rights and interests that are referred to in s 223(1)(a).

9.3. The *third* is that the connection must be 'by' those laws and customs that are referred to in s 223(1)(a).

Exposition of the requirements of s 223(1)(b) in the cases

10. A majority of the High Court in *Western Australia v Ward* (2002) 213 CLR 1 (***Ward HC***) recognised that s 223(1)(a) and (b) of the *Native Title Act* are based upon certain remarks of Brennan J in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (***Mabo [No 2]***) at p. 70, also pp. 59-60.

11. Whilst in *Mabo [No 2]* Brennan J did not expatiate on the nature of the 'connexion' that he had in mind, his Honour explained in an earlier case that 'connexion', in the context of Aboriginal relationships with land, did not consist of the communal holding of rights but entailed spiritual affiliations and spiritual responsibility of the group for land and sites on the land: see *The Queen v Toohey; Ex parte Meneling Station Pty Ltd* (1981) 158 CLR 327 at p. 358: see also 356-7.

12. In *Ward HC* the majority, whilst not expounding in detail what the 'connection' requirement in s 223(1) entails (the question of what is meant by 'connection by those laws and customs' having not been argued) nevertheless said (at [64]) that s 223(1)(b) connection does not necessarily mean physical presence:

> In its terms, s 223(1)(b) is not directed to how Aboriginal peoples use or occupy land or waters. Section 223(1)(b) 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. No doubt there may be cases where the way in which land or waters are used will reveal something about the kind of connection that exists under traditional law or custom between Aboriginal peoples and the land or waters concerned. But 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.

13. In the joint judgment in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (***Yorta Yorta HC*)** (at [33]-[35]) it was emphasised that all of the elements in s 223(1)(a), (b) and (c) must be given effect; in relation to s 223(1)(b) it was said that 'the connection to be identified is one whose source is traditional law and custom'.

14. Since *Ward HC* and *Yorta Yorta HC* considerable attention has been given in the Full Court of the Federal Court to the 'connection' requirement in s 223(1)(b).

15. In *De Rose v South Australia* (2003) 133 FCR 325 (***De Rose No 1*)** (at [305]) the Full Court observed that: '[a]t first glance, it may not be evident what para (b) of s 223(1) adds to para (a)'. In *Northern Territory v Alyawarr* (2005) 145 FCR 442 (at [87]) the Full Court observed that the drafting of s 223(1)(b) is 'opaque'. This is because 'the word "connection" is taken from a judgment and appears to have been applied in the statute somewhat out of context'.

16. Nonetheless, the Full Court in *De Rose No 1* (at [306]), relying on comments made by a majority of the High Court in *Ward (HC),* observed that the distinction between paragraphs (a) and (b) of s 223(1) can be 'critical to the resolution of a particular case'.

17. In *De Rose No 1* the Full Court said (at [313]):

> In our view, s 223(1)(b) of the NTA required the primary Judge to identify the content of the traditional laws and customs observed, of the Western Desert Bloc and to inquire whether the effect of those laws and customs constituted a 'connection' between the appellants and the claim area. If the traditional laws and customs of the Western Desert Bloc continued to recognise Peter De Rose, for example, as Nguraritja for the claim area notwithstanding his 'failure' for a significant time to observe his responsibilities in relation to sites on the land, that would be powerful indication that the effect of those laws and customs was to constitute a connection between Peter De Rose and the claim area. That would be so because Peter De Rose, by the traditional laws acknowledged, and traditional customs observed, of the Western Desert Bloc had rights and responsibilities in relation to the claim area.

18. This reasoning tends to the conclusion that any kind of activity (or lack of activity) by native title claimants need not be relevant (or, at least, directly relevant) to the connection requirement in s 223(1)(b). For s 223(1)(b) connection exists or ceases to

exist by the operation of traditional laws and customs themselves, independent of things done or not done 'on the ground' by the native title claimants. The Full Court was not required to develop this line of reasoning much further in *De Rose v South Australia (No 2)* (2005) 145 FCR 290 (***De Rose No 2***) because, by that stage, s 223(1)(b) connection was no longer a significant issue between the parties (at [24], [109]). However, the Full Court in *De Rose No 2* did seem to think the conferral on an Aboriginal person, by operation of the traditional laws observed, of rights and obligations in relation to land and waters is enough to constitute a 'connection' for the purposes of s 223(1)(b) (at [111]-[113]). Such connection may exist even if the person in question fails to exercise his or her rights or fails to fulfil his or her obligations.

19. In short, connection is a function of the (acknowledged) traditional laws, rather than a function of actual compliance with those laws. That approach accords with the legislative requirement that the connection be 'by' traditional laws and customs.

20. The most recent Full Court consideration of s223(1)(b) was in *Bodney v Bennell* (2008) 167 FCR 84. In that case the Full Court (at [164]) referred to the 'connection concept' as 'multifaceted' with 'aspects of it being emphasised in differing factual concepts'. Nevertheless, the Court went on to note the following five matters:

    20.1. *First,* that it is indisputable that the inquiries in s 223(1)(a) and (b) are distinct; one relating to rights and interests in land or waters and the other to connection with that land or those waters. It was emphasised that 'connection' is not simply an incident of native title rights and interests …' and that the 'required connection is not by the Aboriginal peoples' rights and interests. It is by their laws and customs': (at [165]).

    20.2. *Secondly,* continuity of acknowledgment and observance of traditional laws and customs which provide the connection must have continued 'substantially uninterrupted' since sovereignty: (at [168]).

    20.3. *Thirdly,* the connection inquiry requires both the identification of the content of the traditional laws and customs and the characterization of the effect of those laws as constituting a connection of the people with the land. As to the second element, the laws and customs that connect people to the land are 'by no means exclusively ones that [give] them rights and interests in that land': (at [169]).

    20.4. *Fourthly,* as well as characterising the laws and customs that connect people with land, it must be demonstrated, by their actions and acknowledgment, that the

connection itself has a 'continuing reality': (at [171]-[172]). That is, a requirement of connection 'involves the continuing internal and external assertion by [a claimant community] of its traditional relationship to the country defined by its laws and customs … which may be expressed by its physical presence there or otherwise': (at [174] referring to *Sampi v Western Australia* [2005] FCA 777 at [1079] and *Neowarra v Western Australia* [2003] FCA 1402 at [353]).

20.5. .*Fifthly,* the connection inquiry can have a particular topographic focus: (at [175]. For example, the evidence may show that connection in a particular area of a claim has not been maintained; or, by contrast, connection to a 'vacant estate' may be established by assertion of the relevant relationship to country of the relevant People as a whole: (at [176]).

21. Although the legal principles with respect to the connection requirement in s 223(1)(b) has been the subject of consideration by the Full Court, most recently in *Bodney v Bennell* (2008) 167 FCR 84 and have been further developed by the Full Court since *Ward HC* and *Yorta Yorta HC*, those principles have not yet been authoritatively settled in the High Court.

22. Justice O'Bryan (in dissent) in this matter sets out, correctly in the Commonwealth's submission, the principles as developed through the cases in *Stuart v South Australia* (2023) 299 FCR 507 (**FFCJ**) at [290]; Core Appeal Book (**CAB**) p 379.

23. It is the legal principles, there expounded, that the Commonwealth invites this Court to endorse as an authoritative statement of the principles relevant to the connection inquiry in s 223(1)(b) of the *Native Title Act.*

24. The underlying question in this appeal is whether the primary judge correctly applied those principles in *Stuart v South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 (**TJ**) or whether he misdirected himself as to the connection inquiry in s 223(1)(b).

25. Relevantly, the Commonwealth notes that the principal question asked by the primary judge in respect of Arabana connection with the Overlap Area was in the following terms (TJ at [56]; CAB p 38):

> whether … the Arabana … establish, in accordance with s 223(1)(b) of the NT Act, that their NTRI extend to the Overlap Area and if so, whether

> they have continued to be possessed by the current societ[y] in accordance with an acknowledgement of their …traditional laws and an observance of their … traditional customs.

26. As pointed out by O'Bryan J (in dissent), s 223(1)(b) does not refer to acknowledgment of traditional laws and observance of traditional customs; rather, that is the language of s 223(1)(a): FFCJ at [296]; CAB p 382. This 'confusion' continues at TJ [911]; CAB 233 where the primary judge states (emphasis in 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.

27. The majority acknowledged that the above language 'is not strictly in accordance with the language of s 223(1)(b)' (FFCJ at [101]; CAB p 317) but did not go further and consider the relevance of the 'misstatement' which appears to conflate the operation of s 223(1)(a) and s 223(1)(b).

28. Section 223(1)(a) requires that 'rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed' by the Aboriginal people or Torres Strait Islanders whereas s 223(1)(b) requires that those people, 'by those laws and customs, have a connection with land and waters'.

29. For determination of native title, each of the elements of s 223(1) has work to do. To ask the question about connection in s 223(1)(b) by reference to acknowledgment and observance of traditional laws and customs without identifying the content of those laws and customs and characterising as constituting a connection (see [20.3] above) is to conflate the operation of ss 223(1)(a) and (b).

30. The Commonwealth otherwise makes no submissions as to the primary judge's analysis of the evidence and his findings.

Issue 2: Significance of prior consent determinations

31. Issue 2, as it arises in this case, concerns the probative significance of the adjoining consent determination in ***Dodd*** *v South Australia* [2012] FCA 519.

32. At the heart of the Appellant's approach to this issue is its reliance on the consent determination in *Dodd* as the basis for a finding that a native title determination could (or should) extend to the adjoining claim area and that the Arabana in whose favour the consent determination was made possess native title rights and interests in an adjoining claim area in accordance with the acknowledgment of their traditional laws and the observance of their traditional customs.

33. The determination in *Dodd* was made by consent pursuant to s 87 of the *Native Title Act*. It is not a determination made following a trial where the evidence is tested on the balance of probabilities.

34. The primary consideration of the Court in exercising its discretion to make an order under s 87 of the *Native Title Act* is 'to determine whether there is an agreement and whether it was freely entered into on an informed basis. It follows that the critical issue is whether the existence of a free and informed agreement is founded in fact, not whether the matters dealt with in the agreement, specifically the existence of native title, are founded in fact'. See *Nelson v Northern Territory of Australia* [2010] FCA 1343, [3]-[11] (citing *Lovett v Victoria* [2007] FCA 474, [37]).

35. The agreement reached between parties must include the essential matters underpinning a determination of native title for that area. Matters agreed to support a consent determination for an area do not simply apply as if they were findings for another area. This is so, even if the area is adjacent and the claim group is described in the same manner. To be clear, a consent determination of native title determines matters for the area to which it applies and nothing more.

36. A consent determination of native title determines two matters *in rem:*

    36.1. the existence of native title in the area of the determination; and

    36.2. the identity of the persons or group/s of persons holding native title in that area.

    See *Malone v Queensland (No 5)* [2021] FCA 1639, [256].

37. The limit of the inquiry required under s 87 of the *Native Title Act* means the Court, in a contested proceeding, should only determine the existence of native title 'based on the issues raised in the pleadings, the evidence properly adduced at trial and the relevant facts established on the balance of probabilities': see *Malone v Queensland (No 5)* [2021] FCA 1639, [256]: see also *Smirke on behalf of the Jurruru People v State of Western Australia (No 2*) [2020] FCA 1728, [13]; *Drill on behalf of the*

Purnululu Native Title Claim Group v State of Western Australia [2020] FCA 1510, [13].

38. There may be areas where the proximity of a particular native title holding group under their traditional laws and customs enables it to be inferred that they are the holders of native title rights and interests in adjacent country, in the absence of any competing claims or contrary evidence: see *Lake Torrens Overlap Proceedings (No 3)* [2016] FCA 899, [707].

39. But where there is a contested hearing as to the existence of native title 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.

Part V: ESTIMATE OF TIME

40. It is estimated that oral argument will take no more than 30 minutes.

Dated: 10 May 2024

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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

ANNEXURE TO THE COMMONWEALTH'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, the Commonwealth sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provision(s)
1.	*Native Title Act 1993* (Cth)	Current (compilation No. 49, 18 October 2023 to present)	ss 84A, 87, 223

Schedule

Appellants

Second Appellant	Joanne Warren
Third Appellant	GregWarren (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