FEDERAL COURT OF AUSTRALIA

Stuart v State of South Australia [2023] FCAFC 131

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| Appeal from: | *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 |
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| File numbers: | SAD 16 of 2022SAD 17 of 2022 |
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| Judgment of: | **RANGIAH, CHARLESWORTH AND O'BRYAN JJ** |
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| Date of judgment: | 14 August 2023 |
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| Catchwords: | **APPEAL AND NEW TRIAL – NATIVE TITLE** – appeal from orders made on overlapping native title determination applications – claims brought on behalf of the Arabana people and the Walka Wani people – trial judge finding the ancestors of the Arabana people occupied the overlap area at sovereignty – trial judge concluding the Arabana claim group did not presently possess native title rights and interests in the overlap area – trial judge concluding the Arabana people did not, by their traditional laws and customs, have a connection with the overlap area – whether the trial judge misconstrued or misapplied the definition of native title in s 223 of the *Native Title Act 1993* (Cth) – whether the orders or conclusions of the primary judge are inconsistent with a determination of native title in favour of the same claimants in an adjacent area – trial judge making a determination of native title in favour of the Walka Wani people – trial judge finding there to be a consensus among expert witnesses as to the existence and nature of native title rights and interests in a report of a joint conference of experts – whether the finding of a consensus was open on the material before the primary judge – whether there was a sufficient evidentiary basis for a determination describing the nature of the rights and interests possessed by all members of the Walka Wani claim group – where error affecting that finding justifies the setting aside of the native title determination – whether there is a proper basis to order a new trial  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) ss 27, 28*Native Title Act 1993* (Cth) ss 13, 51, 61, 67, 87, 87A, 94A, 223, 225*Aboriginal Lands Trust Act 1966* (SA)  |
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| Cases cited: | *AB (dec’d) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268; 300 ALR 193*Akiba v Queensland (No 3)* (2010) 204 FCR 1*Akiba v The Commonwealth* (2013) 250 CLR 209*Attorney-General (NT) v Ward* (2003) 134 FCR 16*Banjima People v Western Australia* (2015) 231 FCR 456*Bodney v Bennell* (2008) 167 FCR 84*CG v Western Australia* (2016) 240 FCR 466*Commonwealth v Akiba* (2012) 204 FCR 260*Dale v Western Australia* (2011) 191 FCR 521*De Rose v South Australia (No 2)* (2005) 145 FCR 290*De Rose v State of South Australia* (2003) 133 FCR 325*Dodd v State of South Australia* [2012] FCA 519*Drury v Western Australia* (2020) 267 FCR 203*Fortescue Metals Group v Warrie* (2019) 273 FCR 350*Fox v Percy* (2003) 214 CLR 118*Harvey v The King* [1901] AC 601*Hill v Clifford* [1907] 2 Ch 236*King on behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group v State of South Australia* [2011] FCA 1387*King on behalf of the Eringa Native Title Claim Group v State of South Australia* [2011] FCA 1386; 285 ALR 454*Lake Torrens Overlap Proceedings (No 3)* [2016] FCA 899*Lee v Lee* (2019) 266 CLR 129*Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474*Manado v Western Australia* (2018) 265 FCR 68*Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422*Nelson v Northern Territory* (2010) 190 FCR 344*Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442*Northern Territory v Griffiths* (2019) 269 CLR 1*R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327*Smirke on behalf of the Jurruru People v State of Western Australia (No 2)* [2020] FCA 1728*Starkey v South Australia* (2018) 261 FCR 183*Stuart v South Australia (No 3)* [2021] FCA 230*Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620*Warren v Coombes* (1979) 142 CLR 531*Western Australia v Sebastian* (2008) 173 FCR 1*Western Australia v Ward* (2002) 213 CLR 1*Wik Peoples v Queensland* (1994) 49 FCR 1*Worimi v Worimi Local Aboriginal Land Council* (2010) 181 FCR 320*Yankunytjatjara/Antakirinja Native Title Claim Group v The State of South Australia* [2006] FCA 1142 |
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| Division: | General Division |
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| Registry: | South Australia |
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| National Practice Area: | Native Title |
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|  |  |
| Date of hearing: | 16, 17 and 18 November 2022  |
|  |  |
| **SAD16/2022** |  |
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| Counsel for the First Respondent: | Mr T Golding KC with Mr W Ambrose |
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| Counsel for the Walka Wani Respondents: | Mr V Hughston SC with Ms T Jowett |
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| Solicitor for the Walka Wani Respondents: | South Australian Native Title Services Limited |
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| Counsel for Airservices Australia: | Airservices Australia did not appear |
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| Counsel for Douglas Gordon Lillecrapp: | Douglas Gordon Lillecrapp did not appear |
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| Counsel for Telstra Corporation Limited: | Telstra Corporation Limited did not appear |
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| Counsel for Douglas Gordon Lillecrapp: | Douglas Gordon Lillecrapp did not appear |
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| Counsel for Telstra Corporation Limited: | Telstra Corporation Limited did not appear |
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ORDERS

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|  | SAD 16 of 2022 |
|   |
| BETWEEN: | AARON STUART and others named in the Schedule of Parties AAppellant |
| AND: | STATE OF SOUTH AUSTRALIA and others named in the Schedule of Parties ARespondent |

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| order made by: | RANGIAH, CHARLESWORTH AND O'BRYAN JJ |
| DATE OF ORDER: | 14 AUGUST 2023 |

# THE COURT ORDERS THAT:

1. The following orders are set aside:

(a) paragraphs 2 and 3 of the orders made on 21 December 2021 in SAD 38/2013; and

(b) the orders and determination made on 23 December 2021 in SAD78/2013 and SAD220/2018.

2. In lieu thereof there be the following orders:

(a) the originating application in SAD78/2013 is dismissed.

(b) the originating application in SAD220/2018 is dismissed.

3. The appeal is otherwise dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | SAD 17 of 2022 |
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| BETWEEN: | STATE OF SOUTH AUSTRALIAAppellant |
| AND: | DEAN AH CHEE and others named in the Schedule of Parties BRespondent |

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| order made by: | RANGIAH, CHARLESWORTH AND O'BRYAN JJ |
| DATE OF ORDER: | 14 August 2023 |

THE COURT ORDERS THAT:

1. The appeal is allowed.

2. The following orders are set aside:

(a) paragraphs 2 and 3 of the orders made on 21 December 2021 in SAD 38/2013; and

(b) the orders and determination made on 23 December 2021 in SAD78/2013 and SAD220/2018.

3. In lieu thereof there be the following orders:

(a) the originating application in SAD78/2013 is dismissed.

(b) the originating application in SAD220/2018 is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RANGIAH AND CHARLESWORTH JJ

1 The appellants in these two appeals challenge orders resolving overlapping claims for determinations of native title. The claims relate to an area in the vicinity of the township of Oodnadatta in South Australia (Overlap Area).

2 The Overlap Area comprises about 150km2 of land situated about 160km south of the Northern Territory border.

3 The primary judge had before him three applications for a determination of native title, each made under s 61 of the *Native Title Act 1993* (Cth) (NT Act).

4 Action SAD 38/2013 was made on behalf of the Arabana people in respect of an area divided into parts named **Part 1** and **Part 2**. The boundaries of Part 2 coincide with the boundaries of the Overlap Area. A determination of native title was previously made in respect of Part 1 in *Stuart v South Australia (No 3)* [2021] FCA 230. The primary judge referred to the claim relating to the Part 2 area as the **Arabana Claim** and we will do the same.

5 Actions SAD 78/2013 and SAD 220/2018 were two applications filed five years apart on behalf the Walka Wani people, a composite group including Lower Southern Arrernte people (LSA) and Yankunytjatjara/Antakirinja people (also known as Luritja), (YA). Those two actions may be referred to together as the Walka Wani Claim. The land and waters covered by them coincide with the boundaries of the Overlap Area.

6 In these reasons the Arabana people and the Walka Wani people may at times be referred to simply as the Arabana and the Walka Wani.

7 The primary judge made orders pursuant to s 67 of the NT Act providing for the Arabana Claim and the Walka Wani Claim to be heard and determined in the same proceeding.

8 By an order made on 21 December 2021 the primary judge dismissed the Arabana Claim and made further orders requiring the parties to the Walka Wani Claim to confer with a view to providing the Court with minutes of order to give effect to reasons his Honour published on that day:  *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620.

9 On 23 December 2021, the primary judge made a determination of native title in SAD 78/2013 and SAD 220/2018 in favour of the Walka Wani (Determination).

10 The Arabana appeal from the orders dismissing the Arabana Claim and from the Determination made in favour of the Walka Wani (Arabana Appeal).

11 The **State** of South Australia appeals only from the Determination (State Appeal). It does not seek to disturb the order dismissing the Arabana Claim and actively opposes the Arabana Appeal.

12 The Walka Wani defended both appeals.

13 For the reasons given below we have concluded that the grounds of appeal impugning the order dismissing the Arabana Claim should be rejected, and that the grounds impugning the Determination should be upheld. It follows from those conclusions that the State Appeal will succeed, and the Arabana Appeal will succeed only in part. The orders giving effect to the Determination will be set aside.

# APPEAL FROM DISMISSAL OF THE ARABANA CLAIM

14 A determination of native title is a determination as to whether or not native title exists in a particular area and (relevantly) who the persons or each group of persons holding the common or group rights comprising the native title are, and the nature and extent of those rights in relation to the subject area:  NT Act, s 225.

15 Section 223 of the NT Act defines the expression “native title” and “native title rights and interests” as follows:

*Common law rights and interests*

(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 the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

*Hunting, gathering and fishing covered*

(2) Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests.

16 The rights and interests to which s 223 of the NT Act refers are rights and interests having their origin in Aboriginal law and custom existing at the time of sovereignty. The reference in s 223(1)(a) and (b) to the word “traditional” must be understood accordingly. As the High Court explained in *Members of the* ***Yorta Yorta*** *Aboriginal Community v Victoria* (2002) 214 CLR 422, (at [46]) the word “traditional”:

… conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are ‘traditional’ laws and customs.

17 Accordingly, the rights and interests that survived the assertion of sovereignty and acquisition of radical title by the British Crown are rights and interests in relation to land and waters owing their existence to the traditional laws acknowledged and the traditional customs observed by the Aboriginal people concerned:  *Yorta Yorta* (at [37]). The High Court continued (at [50]):

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 which 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 which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.

18 The High Court emphasised (at [33] – [35]) that all elements in s 223(1)(a), (b) and (c) must be given effect.

19 The “connection” referred to in s 223(1)(b) is one having its source in traditional laws and customs. As the Full Court observed in *Bodney v Bennell* (2008) 167 FCR 84, the concept of connection is multifaceted, the cases emphasising different aspects of it in different factual contexts (at [164]).

## The Arabana case at trial

20 Questions of extinguishment aside, the onus was upon the Arabana to establish their claim to the civil standard of proof:  *Lake Torrens Overlap Proceedings (No 3)* [2016] FCA 899, Mansfield J (at [92] – [98]).

21 By their originating application, the Arabana alleged that the present day claimants were descended from Aboriginal people who possessed native title rights and interests (NTRI) in the Overlap Area at sovereignty, and that those rights and interests were transmissible by descent in accordance with their laws and customs at the time of effective sovereignty (1872 – 1873) and therefore at sovereignty (1788). For the purposes of s 223(1)(b) and (c), they alleged that, by those same laws and customs, they presently have a connection with the Overlap Area and that the NTRI possessed by them were recognised by the common law of Australia.

## Surrounding determinations

22 The Overlap Area and its wider surrounds are depicted in maps referred to by the primary judge as Map 1 and Map 3, now contained in Schedule A to these reasons. It is irregularly shaped and comprises the township of Oodnadatta, a surrounding area known as the Oodnadatta Common, the Oodnadatta airport and an area of land held by the **Aboriginal Lands Trust** under the *Aboriginal Lands Trust Act 1966* (SA).

23 As can be seen from the maps, the Overlap Area is bounded by areas in respect of which determinations of native title have already been made.

24 Abutting its eastern and southern boundaries is a large area of land and waters subject to a determination made in 2012 by Finn J in ***Dodd*** *v State of South Australia* [2012] FCA 519. It will be referred to at times as the **2012 Arabana Determination**. It relates to 68,823km2 of land including a place known as Hookeys Hole in the north, about which much evidence was given at trial because of its very close proximity to the southern boundary of the Overlap Area.

25 The description of the claim group in the Arabana Claim is identical to the description of the persons who hold the NTRI recognised in the 2012 Arabana Determination. At trial, the claimants asserted materially the same NTRI in the Overlap Area as those determined to exist by Finn J in *Dodd*.

26 Evidence before the primary judge included a map drawn by senior Arabana men (among others) in 1996 depicting the extent of Arabana country then asserted by them, which included the Overlap Area.

27 The proceeding culminating in the 2012 Arabana Determination did not include the Overlap Area. According to the Arabana, the omission is explained by a wish to facilitate an intended transfer of land to the Aboriginal Lands Trust for lease to the Dunjiba Community Council, which transfer never took place.

28 Abutting the northern and western boundaries of the Overlap Area is an area subject to a determination of native title made in 2006 in favour of the YA people:  *Yankunytjatjara/Antakirinja Native Title Claim Group v The State of South Australia* [2006] FCA 1142. It will be referred to as the **2006 YA Determination**.

29 Immediately to the north and east of the area subject to the 2006 YA Determination lie two areas subject to determinations in *King on behalf of the Eringa Native Title Claim Group v State of South Australia* [2011] FCA 1386; 285 ALR 454(*Eringa No 1 Determination*) and *King on behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group v State of South Australia* [2011] FCA 1387 (*Eringa No 2 Determination*).

30 The *Eringa No 1 Determination* recognises the NTRI of members of the LSA and the YA peoples, a cohort that includes the same two groups that comprised the Walka Wani Claim group at first instance. The land subject to the *Eringa No 1 Determination* is approximately 25km north of the Overlap Area at its closest point. The *Eringa No 2 Determination* recognises the NTRI of the LSA, the YA and the Wangkangurru peoples and relates to land yet further to the north.

31 In advance of the trial, the Arabana filed an Amended Statement of Facts, Issues and Contentions (SFIC) by which they put forward the matters about which they would adduce evidence at trial. As to Arabana law and custom, the SFIC contained the following:

*Arabana law and custom*

35. The Arabana people acknowledge and observe a system of laws and customs under which they possess native title rights and interest in relation to the claimed areas.

36. That system of law and custom is both traditional and normative.

37. Central to those laws and customs are the traditional beliefs and practices of the Arabana people that connect them to their land, including the claimed area.

38. The Arabana use the term Ularaka to describe the body of knowledge custom and law often referred to as a ‘dreaming’.

39. Those Ularaka can be gender specific to particular sites, songs or simply stories of those sites and there are requirements about the telling or singing of that Ularaka. Members have responsibility for looking after the various Ularaka sites on their country.

40. This Ularaka is passed down in accordance with traditional law and custom from senior Arabana people to younger members in a manner consistent with Arabana law and custom.

41. The Ularaka relates to hundreds of sites within the broader Arabana country with particular significance relating to the Ularaka in relation to Kati Thanda, Lake Eyre, the Wabma Kadarbu Parks area, Lake Cadibarrawirracanna, sites on Finniss Springs station and Mound Spring sites.

42. In addition to Ularaka, Arabana people have strong spiritual beliefs firmly anchored in their laws and customs. They have a belief of a connection to their ancestral beings and other spiritual beings that they accept as being present in their life today. They believe that these spirits can impact on the present life of living people and that they must show respect to these ancestral beings. A failure to acknowledge and respect the ancestral beings can have serious consequences such as illness, mental distress, accident or misfortune.

32 The State admitted that the Arabana people continued to acknowledge and observe a system of laws and customs under which they possessed NTRI in the area subject to the 2012 Arabana Determination. However, it put the Arabana people to proof in respect of whether, by those traditional laws and customs the Arabana people held NTRI in the Overlap Area, and particularly on the matters pleaded at [36] and [37] in respect of connection. The State admitted the matters pleaded at [38] – [40], but only insofar as those paragraphs related to the area subject to the 2012 Arabana Determination.

## The conclusions of the primary judge

33 The primary judge concluded that the Arabana apical ancestors had NTRI in the Overlap Area at effective sovereignty (at [410], [537], [842]). In their closing submissions at trial, all parties accepted that conclusion to have been an “inevitable” conclusion on the ethnographic, anthropological and linguistic evidence (at [842]). There is no challenge by any party to that finding on either appeal.

34 As to the significance of the surrounding determinations, the primary judge said:

54 It was common ground that each of the 2006 Yankunytjatjara/Antakarinja Determination and the 2012 Arabana Determination had ‘determined as a fundamental matter, once and for all’ that NTRI existed in the areas to which those determinations related and that the NTRI were held by the Yankunytjatjara/Antakarinja People and the Arabana People respectively. This means that each has been recognised as a society or communal group of people holding rights and interests possessed under traditional law acknowledged and the traditional customs observed by them having a connection with the respective determination areas. These determinations and these recognitions cannot be called into question in the present proceedings – see *Lake Torrens Full Court* at [198]-[202], [401].

55 The same may be said with respect to the Eringa No 1 and Eringa No 2 Determinations. As the State submitted, each of these four determinations is to be taken to have established conclusively that the identified Aboriginal peoples held NTRI, as described in the determinations, with respect to each determination area ‘at sovereignty and [have] at all times since then’, so that the Court should not attach any weight to evidence which is directly inconsistent with those determined facts:  *Lake Torrens Full Court* at [198]-[201].

35 The primary judge had regard to a considerable body of historical evidence to the effect that there had been a progressive southward migration of the Arabana away from the Overlap Area (at [538] – [580]).

36 His Honour also had regard to the evidence of expert witnesses called by each party. Relevantly for these appeals, they were anthropologists Dr Scott Cane, Dr Belinda Liebelt and Mr Robert Graham (called by the Walka Wani), Dr Rodney Lucas (called by the Arabana), Dr Lee Sackett (called by the State), and an historian Mr Tom Gara (called by the State).

37 The Arabana called six lay witnesses. We will consider the relevant aspects of their evidence in the disposition of each argument on the appeal. The primary judge made the following observations by way of summary:

658 By way of brief summary of the evidence of the six Arabana witnesses, it can be said that none is presently a resident of Oodnadatta; two (Aaron Stuart and Leonie Warren) have lived there as permanent residents in the past, but the periods during which they did so were relatively short. For reasons which will become apparent, I think it probable that Aaron Stuart had had only one period of residence in Oodnadatta and that was attributable to him being stationed there as a Community Police Officer. With the exception of his involvement in a site clearance in 2004, Aaron Stuart does not seem otherwise to have been involved in the care of Arabana interests in the Overlap Area. The physical connections of the other witnesses to the Overlap Area have often occurred when they were passing through Oodnadatta (Sydney Strangways), when visiting relatives or friends, or when attending functions such as races and gymkhanas. There is, however, evidence of contemporary camping, hunting and gathering by Joanne and Leonie Warren, and to a lesser extent by Dr Arbon.

659 There is some, but by no means extensive, familiarity with Arabana law and culture, and some, but again not extensive, evidence of the passing on of that knowledge. There is relatively little evidence of actual protection of sites, of the teaching of law and culture in relation to particular sites or locations, of an intimate knowledge of the Overlap Area, and of attending to cultural responsibilities.

660 Aaron Stuart did know of the Arabana *Ularaka* and myths associated with Oodnadatta and I accept that he has been taught them by Laurie Stuart in particular. However, Aaron Stuart’s evidence did not convey a sense of being actually connected to the country through those *Ularaka*. Mr Strangways does know the *Ularaka*, but the knowledge by the other Arabana witnesses of them was limited.

38 His Honour set out the matters noted by Finn J in *Dodd* with respect to the continuing connection of the Arabana with the area to which that determination related (at [845]). He then made the following comments about the relevance of those matters to the resolution of the Arabana Claim in respect of the Overlap Area:

848 It is appropriate to commence by indicating my acceptance of the State’s submission that it is connection with the Overlap Area which must be established and not just connection with the wider region. However, that does not mean that one ignores the effect of the 2012 Arabana Determination. The Arabana obtained that Determination by satisfying the Court that, in contemporary Arabana law and custom, all Arabana country belongs to all Arabana generally. It is accordingly pertinent that the possession of NTRI under the traditional laws acknowledged and customs observed by the Arabana generally has been recognised.

849 Moreover, the Overlap Area is immediately adjacent to the area of the 2012 Arabana Determination and comprises a very small fraction of the overall area claimed by the Arabana as Arabana land. Its existence as a separate area is an artefact of colonial decisions (the proclamation of the town of Oodnadatta and the gazettal of the Common) which had no relationship with the bounds of Aboriginal country. This would make it natural for the Court to have regard to matters bearing on the Arabana connection in the larger area.

850 However, the same reasoning would apply, in substance, in relation to the claim of the Walka Wani, given the determinations over adjacent areas which they, or elements of them, have obtained.

39 The primary judge went on to observe that the Arabana had relied upon 10 matters that were said to establish the continuity of their connection with the Overlap Area in accordance with their traditional laws and customs. The first was reliance on the matters said to have been established by the 2012 Arabana Determination in respect of the adjacent area. On that subject, the primary judge said:

853 The Arabana relied on the matters established by the 2012 Arabana Determination in relation to the immediately adjacent land, including the finding that rights to Arabana country are held, under the Arabana system of law and custom, by Arabana society as a whole, with Arabana People and families having localised attachments, and that under Arabana rules, rights in land are based on filiation from known Arabana Persons.

854 I have accepted these matters but the requisite continuity of connection of the Arabana in the Overlap Area in accordance with traditional law and custom must be established by the evidence in these proceedings.

40 The primary judge went on to deal with the remaining nine matters in turn, many of which are now the subject of submissions on the Arabana Appeal, including evidence given by Arabana witnesses Mr Sydney Strangways and Mr Aaron Stuart. His Honour made further general observations about topics in respect of which he considered the evidence to be lacking, including:

912 Evidence of the matters to which Finn J referred in 2012 is lacking. There is a relative absence of knowledge of the Arabana normative rules relating to authority (several witnesses did not even claim [familiarity] with them); the evidence of the transition of Aboriginal law and custom to the younger members of the Arabana is limited (often, it seems, because they are not known); while Arabana place names are used, the Arabana moiety, kinship and totemic names are not; some of the Ularaka are not known, let alone passed on; and the continued engagement in traditional activities on the Overlap Area is not extensive.

913 There is of course a connection with the Overlap Area which arises from having been taught that it is Arabana country or from having been taught that one is Arabana and that Oodnadatta is Arabana country. It was connections of this kind which in the main were asserted by the Arabana witnesses. However, as indicated, the connection required by s 223 is a connection arising from the continuing acknowledgement of traditional laws and traditional customs observed by the claimant group.

914 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.

41 In the result, the primary judge was not satisfied that the Arabana had established that, by their traditional laws and customs, they had a connection with the land or waters in the Overlap Area. His Honour expressed that ultimate conclusion (at [916]):

… I am not satisfied that the Arabana have established the maintenance of their connection with the Overlap Area in accordance with the traditional laws acknowledged and traditional customs observed by them. Their claim must be dismissed.

42 As a consequence, the question of whether the NTRI were recognised by the common law of Australia did not arise for consideration. Had the primary judge found the requisite connection in s 223(1)(b) of the NT Act to have been established, the recognition of the NTRI by the common law of Australia would not have been a contentious issue.

## Issues arising on the appeal

43 By ground 1 of their Further Amended Notice of Appeal dated 9 May 2022 (Arabana NOA), the Arabana contend that the primary judge “erred in finding at [916] that the Arabana had not established the maintenance of their connection with the [Overlap Area] in accordance with the traditional laws acknowledged and traditional customs observed by them since effective sovereignty”. Nine **Particulars** to that ground are pressed.

44 Particulars 1, 2, 3, 4(a) and 4(b) allege that the primary judge misapplied s 223(1)(b) of the NT Act, including by finding that continuing connection required certain features to be proven or alternatively that the absence of those features weighed against a finding that connection had been maintained.

45 Particulars 4(c), 6, 8 and 9 impugn factual findings said to have been made other than in accordance with the evidence and established principle. They collectively assert that the primary judge erred in concluding that the evidence was insufficient to prove the Arabana Claim to the requisite standard.

46 Particulars 7 and 7A allege that the primary judge erred in failing to give effect to the “significance and probative force” of the 2012 Arabana Determination made by Finn J in *Dodd*.

47 Particular 5 is no longer pressed.

48 There is overlap between the three categories of alleged error. A central contention is that in concluding that the requisite connection in s 223(1)(b) was not proven, the primary judge asked himself the wrong question and so erred in concluding that the test for connection was not satisfied. More precisely, it is said that the primary judge erroneously emphasised the lack of evidence of connection manifested by the physical acknowledgement of traditional laws or physical observance of traditional customs occurring specifically within the geographical boundaries of the Overlap Area. It is submitted that the primary judge ought to have found that the 2012 Arabana Determination was sufficient in and of itself to compel the inference that the requisite connection with the Overlap Area existed and that that failure is a further manifestation of an erroneous construction or application of s 223(1)(b).

49 The Particulars otherwise raise allegations of error in factual findings, each of which must be considered independently as well as cumulatively.

## The role of this Court

50 The appeals are by way of rehearing:  *Federal Court of Australia Act 1976* (Cth), s 27. On such an appeal, the Court’s review of the primary judge’s findings of fact and inferences drawn from those facts are subject to the principles stated in *Fox v Percy* (2003) 214 CLR 118, *Warren v Coombes* (1979) 142 CLR 531 and more recently in *Lee v Lee* (2019) 266 CLR 129.

51 In *Banjima People v Western Australia* (2015) 231 FCR 456 it had been submitted that a trial judge in a native title proceeding had made findings that were against the weight of the evidence. The Full Court said that the contention confronted a fundamental difficulty (at [57]):

The primary judge heard substantial evidence on country. He alone saw the witnesses give their evidence and was able to weigh that evidence in the balance having seen the land to which the evidence referred as it was being given. He alone saw the performance of the anthropologists in concurrent session. The notion advanced by the State that the primary judge had no advantage compared to this Court in the weighing of the evidence overall is untenable. The State’s submissions fail to come to grips with the obvious significant advantage the primary judge enjoyed over this Court in respect of the overall weighing of the totality of the evidence, the need to establish error by the primary judge before appellate intervention could be justified, and the need to establish such error in circumstances such as the present by pointing to some finding contrary to ‘incontrovertible facts or uncontested testimony’, ‘glaringly improbable’ or ‘contrary to compelling inferences’ (*Fox v Percy* (2003) 214 CLR 118 at [28]-[29]).

52 The Full Court set out passages from the cases that reinforce over and again the need for appellate restraint in a proceeding of the present kind (at [58]). It is appropriate to repeat them here in full:

* *Moses v Western Australia* (2007) 160 FCR 148

[308] The difficulty faced by a party alleging an error in the fact finding process in a proceeding such as the present is formidable. The question whether the applicants for a native title determination have established the necessary degree of connection to land by traditional laws and customs is a matter of judgment involving an assessment of a wide array of evidence …

[309] Nevertheless, these circumstances, however challenging, do not alter the role of an appellate court, which was explained by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* (2003) 214 CLR 118 at [25] thus:

Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge’s reasons. Appellate courts are not excused from the task of ‘weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect’ (*Dearman v Dearman* (1908) 7 CLR 549 at 564, citing *The Glannibanta* (1876) 1 PD 283 at 287).

In *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458; 224 ALR 1 at [17], Kirby J (with whom Gleeson CJ agreed) explained some of the limitations on the appellate role inherent in the nature of the function as follows:

The ‘limitations’ introduced into the rehearing based on the record of the trial are those necessarily involved in that form of appellate procedure. Such limitations include those occasioned by the resolution of any conflicts at trial about witness credibility based on factors such as the demeanour or impression of witnesses; any disadvantages that may derive from considerations not adequately reflected in the recorded transcript of the trial; and matters arising from the advantages that a primary judge may enjoy in the opportunity to consider, and reflect upon, the entirety of the evidence as it is received at trial and to draw conclusions from the evidence, viewed as a whole.

(Footnotes omitted.)

* *Western Australia v Ward* (2000) 99 FCR 316

[222] In the course of presenting these submissions, the State has sought to challenge many specific findings on matters of detail as to the ancestry and connection of applicants and witnesses to parts of the claim area, and for this purpose the Court has been directed to short passages in the evidence of witnesses which appear to contradict particular findings. These aspects of the State’s submissions, in effect, invite the court to re-evaluate the mass of evidence received by the trial judge over the course of a very lengthy trial. Such a task would place an impossible burden on an appeal court. Numerous witnesses gave evidence at many sites of importance to the applicants …

* *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244

[202] His Honour’s finding that there was a period of time between 1788 and the date of the appellants’ claim during which the relevant community lost its character as a traditional Aboriginal community is not to be lightly disturbed on appeal to this Court. A finding that an indigenous community has lost its character as a traditional indigenous community involves the making of a judgment based on evidence touching on a multitude of factors. The hearing before his Honour was long and complex. As is mentioned in [95] above, evidence was taken from 201 witnesses and his Honour visited, and took evidence on, the claimed land on many occasions …

…

[204] Special difficulties which face an appeal court that is invited to re-evaluate evidence received by a trial judge in a case concerning a determination of native title were identified by Beaumont and von Doussa JJ in *State of Western Australia v Ward* at 377 [222]-[225]. It is likely that there were special difficulties in *Ward* that may not have been experienced in this case, or not experienced to the same extent. Nonetheless, considerable caution is appropriate before this Court infers that crucial evidence was not evaluated and necessary findings of fact were not made.

[205] In a case of this kind, the need for appellate caution adverted to by Lord Hoffmann in *Biogen Inc v Medeva plc* (1996) 36 IPR 438 at 452 is particularly strong. His Lordship there said:

The need for appellate caution in reversing the judge’s evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation.

* *Commonwealth v Yarmirr* (1999) 101 FCR 171

[637] Although there may have been little dispute as to the facts as the primary facts were not in dispute, there is nevertheless a need for appellate caution before a different view is taken of the trial judge’s evaluation of the facts. As was said by Lord Hoffmann (with the agreement of all other members of the House of Lords) in *Biogen Inc v Medeva Plc* [1997] RPC 1 at 145 …

…

[639] In the present case there is the added difficulty that the trial judge’s evaluation of the facts is premised upon a plethora of factors which influenced his understanding and impressions of:

* the evidence given by the Aboriginal witnesses at various locations;
* the extensive documentary material;
* the relationship between that evidence and material and the sites to which they relate.

[640] The above matters resulted in the trial judge in the present case being in a situation of unique advantage over an appellate Court in his evaluation of the facts. In these circumstances the respondents have an onerous task in persuading the appellate court that the trial judge has ‘failed to use or palpably misused his advantage’:  see *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479 and *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at 307; 160 ALR 588 at 589.

* *Yorta Yorta* (2002) 214 CLR 422

[63] …  At least to the extent that the primary judge’s inquiry was directed to ascertaining what were the traditional laws and customs of the peoples of the area *at the time of European settlement*, the criticism is not open. The assessment of what is the most reliable evidence about that subject was quintessentially a matter for the primary judge who heard the evidence that was given, and questions of whether there could be later modification to the laws and customs identified do not intrude upon it. His assessment of some evidence as more useful or more reliable than other evidence is not shown to have been flawed …

(Emphasis in original.)

53 In the present case, the primary judge heard evidence from 20 Aboriginal witnesses in three separate tranches of evidence at Oodnadatta and at various locations on country in and around the Overlap Area between 30 September and 3 October 2019, in Alice Springs between 8 and 11 October 2019, and in Adelaide between 14 and 23 October 2019. The Court sat at Adelaide between 19 and 23 October 2020 to receive into evidence the expert reports, and to hear their concurrent oral evidence. The parties made final submissions on 11 and 12 March 2021. The trial was recorded in more than 3,500 pages of transcript.

54 The fact finding task involved the weighing of multiple considerations in determining whether the requisite connection in s 223(1)(b) was proven. That was an highly evaluative task. As the primary judge correctly observed, any distinction between the qualitative and quantitative nature of the evidence in the performance of the task was unhelpful and illusory.

55 The case is one in which the need for appellant restraint is apparent, although on both appeals it remains necessary to consider the application of the above principles to each particular allegation of error.

## Significance of the 2012 Arabana Determination – Particulars 7 and 7A

56 By Particular 7A it is alleged that the primary judge erroneously negated the probative force of the 2012 Arabana Determination by wrongly concluding that inferences able to be drawn from it were equally able to be drawn in relation to the claim of the Walka Wani. There were three components to this argument.

57 First, it was submitted that there was a factual error in the conclusion that there existed a native title determination in favour of the Walka Wani in respect of any land or waters immediately adjacent to the Overlap Area. It is to be recalled that the 2006 YA Determination was not made in favour of the same persons who comprised the Walka Wani claim group:  the Walka Wani comprising an amalgam of YA and LSA. It is correct to say that LSA do not hold NTRI in any immediately adjacent land or waters. As the Arabana correctly submitted, the nearest area in which the Walka Wani as a composite group hold NTRI is the land subject to the *Eringa No 1 Determination*, some 25 km to the north.

58 The reasons of the primary judge at [850] (extracted at [38] above) nonetheless disclose that he was alive to the circumstance that Walka Wani claim group did not wholly equate with the persons who hold native title by virtue of the neighbouring 2006 YA Determination. So much is apparent from the phrase “or elements of them”. His Honour’s reasoning may be fairly understood as recognising that some persons included in the Walka Wani claim group could point to the 2006 YA Determination as proof of a connection within the immediately adjacent area to which it related. The primary judge should not be understood as concluding that the inference of connection with respect to the adjacent area was an inference able to be drawn with respect to any persons included in the description of the Walka Wani who are not native title holders there. The first aspect of the argument is therefore rejected.

59 Secondly, the primary judge is said to have erred by equating the force of the inference that might be drawn in favour of the Arabana to that which might be drawn in favour of the Walka Wani by reference to the respective adjacent determinations.

60 We accept that the language at [850] implicitly suggests that each of the 2012 Arabana Determination and the 2006 YA Determination was at least capable of informing the question of connection in respect of each respective claim group in the same way and with the same force. To that extent the reasoning is incorrect, given the earlier finding that it was the Arabana and not the Walka Wani who had established that their apical ancestors were in occupation of the Overlap Area at the time of effective sovereignty and that, at that time, they held NTRI there in accordance with their traditional laws and customs. However, as will be explained, we do not consider that error to have resulted in error in the assessment of the case of the Arabana on the question of connection, having regard to the reasons for judgment as a whole.

61 Thirdly, it was submitted that by equating the inferences available to be drawn in favour of the Arabana and the Walka Wani by reference to the immediately adjacent determinations, the primary judge effectively negated the probative force of the 2012 Arabana Determination altogether and for that reason refused to draw the compelling inferences that naturally ought to have been drawn from it.

62 That argument is without merit. On a proper reading of the reasons as a whole, the primary judge made no finding inconsistent with the 2012 Arabana Determination and indeed made a number of findings concerning the Overlap Area by a process of inference from the facts and circumstances persisting on the larger area of adjacent land to the south. The primary judge:

(1) set out the traditional laws and customs of the Arabana by which rights and interest in land are possessed;

(2) set out (at [845]) the matters noted by Finn J in *Dodd* concerning the continuing connection of the Arabana in respect of the area subject to the 2012 Arabana Determination including:

(a) the continued observance of normative rules relating to authority, the transition of Arabana names and kinship terms;

(b) maintenance of knowledge of the traditional dreaming stories (*Ularaka*) and the normative rules related to them*;*

(c) the continued residence of Arabana people in the area; and

(d) the Arabana claimant knowledge of the area and their continued engagement in traditional activities including hunting and gathering for food;

(3) expressly stated that whilst connection with the wider region is insufficient to establish NTRI in the Overlap Area, that did not mean that the 2012 Arabana Determination should be ignored (at [848]);

(4) acknowledged that the 2012 Arabana Determination has been obtained “by satisfying the Court that, in contemporary Arabana law and custom, all Arabana country belongs to all Arabana generally” (at [848]);

(5) said that it was pertinent that the possession of NTRI under the traditional laws acknowledged and customs observed by the Arabana generally had been recognised (at [848]);

(6) observed that the Overlap Area comprised a very small fraction of the overall area that had been claimed by the Arabana as Arabana land (at [849]);

(7) recognised that its existence as a separate area was an artefact of colonial decisions (particularly the establishment of the township of Oodnadatta) which bore no relationship with the boundaries of Aboriginal country and that this would make it natural for the Court to have regard to matters bearing on the Arabana connection in the larger area (at [849]); and

(8) expressly accepted a number of matters upon which the Arabana relied arising out of the 2012 Arabana Determination, including the finding that rights to Arabana country are held, under the Arabana system of law and custom, by Arabana society as a whole, with Arabana people and families having localised attachments, and that under Arabana rules, rights in land are based on filiation from known Arabana persons (at [853] – [854]).

63 As discussed below, the primary judge went on to have regard to a number of matters affecting the immediately adjacent area and made an assessment of their relevance to the Overlap Area in the context of the evidence as a whole. In our view, the misstatement of the beneficial evidentiary value of the 2006 YA Determination to the Walka Wani Claim was not causative of error in his Honour’s nuanced and thorough assessment of all of the evidence bearing on the Arabana’s asserted maintenance of connection with the Overlap Area. It is plain that the primary judge did not draw the singular inference from the 2012 Arabana Determination now urged on this appeal. However, his Honour’s reasons for not drawing that inference were not related to his earlier statement equating the availability of any such inference with that available to be drawn in favour of the Walka Wani.

64 By Particular 7 it is alleged that in undertaking his assessment of the evidence, the primary judge “erred in failing to appreciate and give effect to the significance and probative force” of the 2012 Arabana Determination. That broader argument must be rejected in light of our findings with respect of the remaining Particulars.

65 In oral submissions the argument went further:  it was said that the 2012 Arabana Determination was sufficient in and of itself to establish that the Arabana had maintained a connection with the Overlap Area in accordance with s 223(1)(b) of the NT Act and that the primary judge ought to have so found.

66 The submission that the 2012 Arabana Determination was sufficient evidence to establish the requisite connection with the Overlap Area was not advanced by the Arabana at any time in the course of the trial. Unsurprisingly, there is no discrete attention given to it in the reasons of the primary judge. The reasons reflect the manner in which the Arabana presented their case with respect to s 223(1)(b) of the NT Act at trial, that is, by reliance upon a multiplicity of factual matters that together were said to be sufficient to discharge their onus of proof. The 2012 Arabana Determination was but one of them.

67 Further still it was alleged that the conclusion of the primary judge with respect to the issues under s 223(1)(b) were precluded as a matter of law because they were said to be inconsistent with certain aspects of the 2012 Arabana Determination that were said to be legally binding. When pressed to identify which part of the reasons was affected by error of that kind, Counsel for the Arabana pointed to the following passages (together with [912] and [913] extracted earlier in these reasons):

907 Looked at more generally, a number of matters were absent from the Arabana evidence concerning connection. There is relatively little evidence of ritual associations with sites, or of ‘singing of country’, and no evidence of the storage of sacred objects on the Overlap Area. In the case of the Arabana witness with the most knowledge of original traditional law and custom (Mr Strangways), there is no evidence of him coming back to the Overlap Area to reconnect with it. His physical presence on the Overlap Area is confined to passage through it. He does not visit sites and it seems has not spent a night in Oodnadatta since the late 1950s or early 1960s. His acknowledgement of Arabana traditional law and observance of Arabana traditional custom in relation to the Overlap Area is now of a spiritual rather than practical kind.

908 The Court was not asked to hear gender restricted evidence from the Arabana and, even though Aaron Stuart had concerns about some of his evidence being heard by women, he did give evidence at one site without any objection to the presence of females and there was no evidence that gender specific division of knowledge is being taught within the Arabana People.

909 The Ularaka relating to the Overlap Area are not being taught to the younger generations. I note again that Aaron Stuart said that he had taught ‘a little bit, now and then’ to his own children. Leonie Warren acknowledged that she had not been taught any of the *Ularaka* relating to the Overlap Area and Joanne Warren was unsure about the details of several.

910 Much of this is explicable given the movement of the Arabana away from Oodnadatta to which I have referred earlier.

911 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.

(emphasis in original)

68 We do not otherwise consider the conclusions in those paragraphs to be contrary to any legal principle concerning the binding nature of the 2012 Arabana Determination. The relevant principles were briefly summarised by the primary judge at [54] (extracted at [34] above) by reference to what the Full Court said in ***Starkey*** *v South Australia* (2018) 261 FCR 183. As identified by Reeves J (with whom White J agreed at [401]), that statement of principle may be enlarged upon as follows:

(1) a native title determination is commonly described as a judgment *in rem* that is binding on all of the world:  *Starkey* (at [198]), and see *Wik Peoples v Queensland* (1994) 49 FCR 1 (at 8); ***Dale*** *v Western Australia* (2011) 191 FCR 521 (at [92]);

(2) the particular matters of which a native title determination dispose once and for all are to be ascertained according to the provisions of the NT Act, particularly s 223(1) and s 225:  *Starkey* (at [198]);

(3) section 225 requires that a determination of native title in relation to particular land and waters identify who holds the rights comprising the NTRI concerned, the nature and extent of those NTRI in relation to that area, the nature and extent of other interests in relation to that area, and the relationship between those two sets of rights:  *Starkey* (at [199]);

(4) the NTRI referred to in s 225 are those defined by s 223(1):  *Starkey* (at [200]);

(5) the traditional laws and customs from which those NTRI derive are fundamental to that definition:  *Starkey* (at [200]);

(6) the NTRI recognised in a determination are those having their origin in the traditional laws acknowledged and the traditional customs observed by the native title holders:  *Starkey* (at [200]);

(7) accordingly, one of the most fundamental matters disposed of once and for all in a determination is that the NTRI possessed in the area covered by the determination are of a traditional nature, that is, they are NTRI having pre-sovereignty origins:  *Starkey* (at [201]);

(8) in addition, to obtain a determination of native title the native title holders must establish that their connection with the area by those traditional laws and customs has been maintained:  *Starkey* (at [202]); and

(9) accordingly, the determination recognises as a fundamental matter that the NTRI possessed in relation to the area have “that intrinsic continuity element”:  *Starkey* (at [202]).

69 It is an abuse of process for a party to seek to re-litigate a fundamental matter expressly or necessarily encompassed within an earlier determination, and to do so may otherwise give rise to an issue estoppel:  *Dale* (at [90] – [93]), *CG v Western Australia* (2016) 240 FCR 466 (at [46]). In addition, a party to a native title determination application cannot lead evidence that is inconsistent with a conclusion upon which an existing native title determination is based:  *Starkey* (at [240]); *Smirke on behalf of the Jurruru People v State of Western Australia (No 2)* [2020] FCA 1728 (at [612] – [613]).

70 However, it remains that the factual matters essential to a valid determination of native title are geographically specific, so that, for example, an existing determination of the nature of NTRI held by a group over one area will not preclude a party from contending for a rights of a different nature over an adjacent area of land. As the Full Court said in  *Fortescue Metals Group v Warrie* (2019) 273 FCR 350 (at [112]):

The exercise of judicial power in *Daniel/Moses* created, to use the language in *Tomlinson* at [20], a ‘new charter by reference to which [the question of native title in the *Daniel*/*Moses* land and waters] is in future to be decided as between’ those who were parties to that claim, and a new charter *in rem*, in relation to that land and waters. That included a wide range of existing proprietary interest holders, as the *Moses* and *Daniel* determinations demonstrate, whose proprietary rights and interests were either adjusted, or preserved, upon the recognition of the Yindjibarndi People’s and the Ngarluma People’s native title in the *Daniel*/*Moses* land and waters. It also included a range of future proprietary interest holders who would be required to recognise the native title of the Yindjibarndi and Ngarluma Peoples, to the extent set out in the determination. However the ‘charter’ was **as to that land and waters**, and as to all existing and future interest holders in that land and waters. In terms of then existing proprietary interest holders, this did not include the appellant. The *Daniel*/*Moses* determinations ‘quelled’ the controversy about native title in relation to that land and waters. A determination under s 225 could not reach beyond the land and waters which were the subject of the claim, and any non-native title proprietary interests in that land and waters. Again, we do not accept this outcome has any automatic or inevitable impact on the claim to the *Warrie* land and waters, or on the myriad of (different) sets of persons who have, or may have in the future, proprietary interests in the *Warrie* claim area.

(emphasis in original)

71 An *in rem* order may otherwise serve as *prima facie* evidence of the facts that are essential to its validity:  *Harvey v The King* [1901] AC 601 (at 611); *Hill v* *Clifford* [1907] 2 Ch 236 (at 244 – 245).

72 The authorities summarised above are based on two distinct bodies of principle. The first is concerned with the implications of a determination of native title being a judgment *in rem* as it affects rights and interests in land. In that respect it is enforceable against all of the world. The second is concerned with the conduct of litigation and the consequences of issues being raised (or not) by the parties and resolved (or not) by the Court in an earlier proceeding.

73 With respect to the principles concerning judgments *in rem*, it will be necessary to identify those facts that are essential to the validity of the 2012 Arabana Determination and those that are not. In the performance of that task, care should be taken to distinguish between the orders that together comprise the determination (and the factual preconditions to their validity) and other facts that might be referred to in the published reasons for making the orders.

74 A determination of native title may be made under s 13 and s 61 of the NT Act, as was the case at first instance. Alternatively, a determination of native title may be made by consent under s 87 or s 87A of the NT Act, as was the case with respect to all of the consent determinations surrounding the Overlap Area.

75 Reasons for judgment delivered after a contested trial of the issues arising on a native title claimant application will contain factual findings, based on evidence and established to the civil standard of proof. Those findings may supply factual detail as to how the elements of the definition of native title were fulfilled in the particular case and may give rise to an issue estoppel or found an argument as to abuse of process as against parties to that action. The persons comprising the Walka Wani claim group were not party to the proceeding culminating in the orders in *Dodd* constituting the 2012 Arabana Determination. Such persons are of course bound by the 2012 Arabana Determination by virtue of its characterisation as a judgment *in rem*. But it is not correct to treat all factual matters referred to in the reasons for judgment in *Dodd* as having the same character.

76 Determinations of native title made by consent are, of course, judgments *in rem* having the same force as those made after a contested trial. However, it does not follow that all factual matters referred to in the reasons accompanying a consent determination necessarily have the status of a finding that may give rise to an issue estoppel or an abuse of process, nor that they are “findings” essential to the validity of the judgment. The factual matters essential to the validity of a consent determination must be determined by reference to the NT Act itself.

77 A determination of native title must set out details of the matters mentioned in s 225 (which defines the expression “determination of native title”):  NT Act, s 94A. Except in cases where the power under s 87 or s 87A is exercised, it is a precondition to the making of a determination that the Court be satisfied that all of the essential elements of a determination of native title are established on the evidence to the civil standard of proof. By contrast, the Court may make a determination of native title without conducting a hearing to resolve disputed questions of fact, if the criteria under s 87 or s 87A of the NT Act are met.

78 Section 87 applies if, at any stage of a proceeding after the end of a prescribed period the parties reach an agreement on the terms of the determination, the agreement is signed by all of the parties and the agreement is filed in the Court:  NT Act, s 87(1). The purpose of the power in s 87 is to give effect to the parties’ agreement without the need to conduct a trial to resolve substantive factual questions. As North J explained in *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474:

37 In this context, when the court is examining the appropriateness of an agreement, it is not required to examine whether the agreement is grounded on a factual basis which would satisfy the Court at a hearing of the application. The primary consideration of the Court is to determine whether there is an agreement and whether it was freely entered into on an informed basis:  *Nangkiriny v State of Western Australia* (2002) 117 FCR 6; [2002] FCA 660; *Ward v Western Australia* [2006] FCA 1848. Insofar as this latter consideration applies to a State party, it will require the Court to be satisfied that the State party has taken steps to satisfy itself that there is a credible basis for an application:  *Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229.  …

38 The power conferred by the Act on the Court to approve agreements is given in order to avoid lengthy hearings before the Court. The Act does not intend to substitute a trial, in effect, conducted by State parties for a trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application. The Act contemplates a more flexible process than is often undertaken in some cases.  …

79 See also *Nelson v Northern Territory* (2010) 190 FCR 344 (at [8] – [13])*.*

80 It is not uncommon for reasons accompanying a consent determination to set out some of the materials to which the State party has referred in discharging its responsibilities and the factual matters referred to in those materials. The reasons of Finn J in *Dodd* are illustrative (at [5]):

I have had the benefit of joint submissions filed by the applicant and the State. As will be seen they demonstrate why the State is satisfied that the agreed determination is an appropriate and proper one. The submission itself provides considerable reassurance to the court in the present application. I will refer to the material it traverses at some length, beginning with a description of the Determination area itself which is of no little significance to Australians generally.

81 However, the factual matters informing the State party’s position are not matters about which the Court has conducted a trial. The reasons in such cases should not be understood to contain “findings” of a kind to which the principles relating to issue estoppel or abuse of process might readily apply, other than findings to the effect that the essential preconditions for the making of a consent determination are met. In the exercise of the powers conferred by s 87 and s 87A the Court does not concern itself with a factual enquiry as to how the elements of the definition of native title are satisfied. Rather, the Court’s role is to satisfy itself that the draft determination put forward by the parties is one that sets out the matters referred to in s 225 of the NT Act, as required by s 94A. It is neither necessary nor appropriate in that legal context to make findings about (for example) the content of Aboriginal law and custom under which NTRI are possessed, nor as to how the requisite connection under s 223(1)(b) has been maintained, nor as to intermural matters concerning relationships between particular native title holders *vis a vis* each other in relation to the land and waters.

82 Accordingly, when it is said on this appeal that the findings of the primary judge were *impermissibly* inconsistent with the 2012 Arabana Determination, it is necessary to identify precisely what is meant by the submission. It should not be presumed that Finn J in *Dodd* enquired into the facts asserted by the applicant party in its dealings with the State, nor that his Honour made factual findings on the balance of probabilities. To the extent that Finn J’s reasons for judgment are expressed in language suggesting that “findings” had been made by the Court, for the most part the findings were not essential to the resolution of the application before him and do not enliven the principles summarised above with respect to judgment *in rem* on issue estoppel.

83 It was further submitted that the primary judge’s conclusion that connection in accordance with s 223(1)(b) had not been established necessarily involved a denial or contradiction of fundamental matters established in *Dodd* because it involved a rejection of the contention that the Arabana continue to be a society defined by their acknowledging a normative system of laws and observance of customs having continuing vitality today. In written submissions the Arabana articulated the “essential elements” of their recognition of native title in *Dodd* in the this way (at [13]):

The determination of native title in *Dodd* 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 Arabana 1 Determination area. Moreover, it determined (implicitly or expressly) inter alia:  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 ‘tradition’ in the relative sense; that the 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 Arabana 1 Determination.

84 It may be accepted that one of the matters disposed of once and for all by the 2012 Arabana Determination was that the NTRI described in that determination were of a traditional nature in the sense that they owed their existence to law and custom that existed pre-sovereignty and that had continued to be acknowledged and observed to the present day:  *Starkey* (at [201]). Also decided once and for all was the fact that traditional laws and customs that gave rise to a connection in the determination area had continued to exist, substantially uninterrupted, since sovereignty:  *Starkey* (at [202]). Those matters are essential for the validity of a determination of native title, whether made by consent or upon a contested trial. The reasons of the primary judge (at [54]) recorded a proper understanding of those matters.

85 As the High Court said in *Yorta Yorta* (at [50]) “if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality”. The 2012 Arabana Determination recognises that the Arabana acknowledge and observe traditional laws and customs, that is, laws and customs comprising a normative system.

86 The 2012 Arabana Determination recognised the essential fact that connection with the land and waters *subject to that Determination* has been maintained. All of that is accepted so far as it relates to the requirement of connection in s 223(1)(b) of the NT Act. All of it is geographically specific.

87 It was then submitted that the question of whether the Arabana have maintained a normative system that gives rise to NTRI since sovereignty was answered decisively in *Dodd* and that “there was nothing left to find” on that topic with respect to the Overlap Area. Again, that submission overstates the legal effect of the 2012 Arabana Determination.

88 The conclusion of the primary judge that the requisite connection with the Overlap Area had not been proven did not involve a denial that the Arabana are a group of Aboriginal people united in a body of traditional laws and customs that continues to have vitality today and that gives rise to NTRI in neighbouring land. The undeniable connection with the neighbouring land by those laws and customs did not constitute proof that the Arabana continued to maintain a connection with the Overlap Area by those same laws and customs. The primary judge had regard to the 2012 Arabana Determination as relevant, as identified earlier in these reasons. However, his Honour did not err in failing to find that it provided the complete answer to the disputed questions before him (noting that no such submission had been made).

89 It was then submitted that the failure of the primary judge adopted an erroneous “parcel by parcel” approach to the determination of NTRI in the Overlap Area. In that regard it was emphasised that the Overlap Area was but a small portion of a much larger region in respect of which the Arabana had claimed NTRI (and the only portion left to be determined) such that a parcel by parcel analysis was not called for. As we understand it, that argument was another way of asserting that the 2012 Arabana Determination was sufficient evidence in and of itself to compel the inference that the requisite connection had been maintained in the Overlap Area. It was also another way of saying that the primary judge erroneously confined his search for evidence of physical and tangible activities evidencing the acknowledgment of traditional laws or observance of traditional customs specifically within the boundaries of the Overlap Area. We do not accept either argument for reasons that will become clear in the disposition of the remaining Particulars.

90 The statement of the primary judge that it was necessary for the Arabana to adduce evidence going to the requirement for connection in the particular case was entirely orthodox and undoubtedly correct. If that constituted a “parcel by parcel” approach it may be because the Arabana commenced separate proceedings for native title over separate parcels of land, the Arabana Claim being one that was opposed by the State and tried by way of an adversarial process in which the rules of evidence applied. The Arabana were put to proof on all aspects of the Arabana Claim, so requiring that the test for connection be established with respect to the particular land and waters comprising the Overlap Area. Any failure to draw an inference of connection solely by reference to the matters determined conclusively in *Dodd* did not offend the principles stated in the authorities cautioning against a parcel by parcel approach.

91 The circumstances may be different in the case of a native title claimant application under the NT Act where there is no opposition in relation to any particular geographical aspect of it on the question of connection. In cases of that kind, for the purposes of s 223(1)(b), inferences concerning connection with respect to the whole of the claimed area may be readily drawn where they are reasonably available, and particularly where no defence case is erected against them. However, it is always open to a respondent in native title proceedings to defend the claim (including by reference to s 223(1)(b)) insofar as it relates to a part of the area to which the claim relates. When that occurs it is the duty of the trier of fact to consider the evidence as it relates to the discrete contested parcel.

92 Here, the primary judge had regard to a body of evidence that weighed against the inference of connection that might otherwise have been drawn by reference to the 2012 Arabana Determination. Critically, that evidence included historical circumstances supporting a finding that the Arabana had moved generally south and east from the Overlap Area progressively after sovereignty (at [539]). As discussed below, the primary judge was aware that physical dislocation from the relevant land and waters did not necessarily make proof of connection in accordance with s 223(1)(b) of the NT Act impossible, but it was nonetheless a significant factual consideration against which the evidence of connection adduced by the Arabana fell to be assessed.

93 Particulars 7 and 7A are accordingly rejected.

## Asserted error in the application of s 223(1)(b) – Particulars 1 to 4(b)

94 These particulars are expressed as follows:

1) The primary Judge erred in failing to approach the assessment of Arabana connection for the purposes of section 223(1)(b) of the *Native Title Act 1994* (Cth) (**NTA**) by identifying:

a. the content and nature of the Arabana claimants’ traditional laws and customs found to exist at effective sovereignty;

b. how, pursuant to those Arabana traditional laws and customs:

i. NTRI in land and waters arise; and

ii. how the Arabana connect to land and waters; and

c. whether connection in accordance with the traditional laws acknowledged and traditional customs observed had subsequently ceased to exist.

2) In circumstances where the primary Judge correctly found that ‘*the required connection with the land or waters is essentially spiritual*’ (at [51]) and that the Arabana witness Sydney Strangways:

a. was ‘a singularly impressive witness, being honest, knowledgeable, articulate, insightful and responsive to the questions ... I have confidence in accepting his evidence’ (at [603]);

b. has, a ‘deep cultural knowledge of Arabana culture and law and gave several instances of compliance with it’ (at [622]);

c. is the oldest Arabana person alive and engages in a lot of teaching (at [619]);

and

d. has a spiritual acknowledgement and observance of Arabana traditional law and custom in relation to the Claim Area (at [907 and [911]);

the primary Judge misapplied the test for connection in failing to find that the spiritual acknowledgement and observance of Arabana traditional law and custom in the Claim Area was sufficient in context to establish continuing connection.

3) The primary Judge erred in finding that continuing connection to the Claim Area required the following features, when there was no evidence that those features were an essential component of Arabana traditional law and custom; or, in the alternative, erred in finding that the absence of those features was relevant to, and weighed against, the maintenance of continuing connection by the Arabana:

a. the absence of Arabana initiation ceremonies since at least 1958 (at [882] and [904]) and failed to have regard to the evidence that was given, and not challenged, about the reasons for cessation of those ceremonies consistent with traditional law and custom;

b. absence of ritual associations with sites and storage of sacred objects on the Claim Area (at (907]);

c. absence of uninterrupted residence, proof of occupation or possession of the Claim Area (see findings at [856], [857], [896] and [907]);

d. lack of recent enforcement of control of access by others to enter the Claim Area (at [896]);

e. that teaching of *ularaka* concerning the Claim Area must be to persons with a connection to the Claim Area (at [874]);

f. that some *ularaka* are not known or passed on by some witnesses (at [912]).

4) The primary Judge erred in finding that contemporary activities, namely the holding of funerals and sorry business (at [882] and [904]); attendance at social activities including races, gymkhanas, and bronco brandings (at [905]); hunting and gathering of food (at [871]); and residing in Oodnadatta (at [863]) were not conducted in accordance with traditional law and custom, and erred in:

a. failing to apply the majority in *Member of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (***Yorta Yorta***) at [83] and accordingly consider whether any change to, or adaptation of Arabana traditional law and custom was nevertheless a continuation of the same body of traditional law and custom, adapted to modern circumstances;

b. making findings that were inconsistent with the findings of Finn J in the neighbouring Arabana Consent Determination in *Dodd v State of South Australia* [2012] FCA 519 (**Arabana 1**);

95 Common to all of the submissions on these grounds was a contention that the primary judge erroneously confined his analysis to a search for evidence of activities constituting acknowledgment of traditional laws and observance of traditional customs physically occurring in the Overlap Area and erroneously discounted or ignored evidence pertaining to the wider region of Arabana country. It is convenient to address that broader contention before turning to each of the Particulars.

96 The primary judge identified the test under s 223(1)(b) in terms that are not challenged as follows (at [51]):

Section 223(1)(b) requires expressly that the claimant group have a connection with the land or waters in question ‘by [the] laws and customs’, ie, by the traditional laws acknowledged and the traditional customs observed by the group:  *WA v Ward* at [64]; *Starkey on behalf of the Kokatha People v South Australia* [2018] FCAFC 36, (2018) 261 FCR 183 (*Lake Torrens Full Court*). This requires an identification of the content of the traditional laws and customs as they relate to the area in question and, secondly, the characterisation of the effect of those laws and customs as constituting a ‘connection’ of the peoples with the land or waters:  *ibid*; *Bodney v Bennell* [2008] FCAFC 63; (2008) 167 FCR 84 at [165]. The required connection with the land or waters is essentially spiritual:  *WA v Ward* at [14] (‘the spiritual or religious is translated into the legal’). Accordingly, s 223(1)(b) does not require that the connection be physical, although it may be of that kind:  *Western Australia v Graham (on behalf of the Ngadju People)* [2013] FCAFC 143; (2013) 305 ALR 452 at [37]. See also *Sampi v Western Australia* [2005] FCA 777 at [1079]. Further, the required connection is not by the Aboriginal People’s rights and interests:  it is by their laws and customs:  *Bodney v Bennell* at [165]. An applicant must establish that the connection has, in reality, been substantially maintained since the time of sovereignty:  *Bodney v Bennell* at [161], [179].

97 After concluding that the Overlap Area was Arabana country at sovereignty, the primary judge identified the principal issue as being whether the Arabana “have established that they have continued to possess the rights and interests in the Overlap Area under the traditional laws acknowledged and traditional customs observed by them and have thereby maintained connection with the Overlap Area” (at [843]). That formulation of the issue appears to encompass the elements in both s 223(1)(a) and (b) of the NT Act. At trial it was referred to by the parties “in shorthand as being whether the Arabana have established continued connection with the Overlap Area”.

98 The primary judge again summarised the principles in the following terms (at [847]):

The principles recognised in the authorities relating to the assessment of continued connection include:

(a) connection involves the continuing internal and external assertion by the claimant group of its traditional relationship to the country defined by its laws and customs:  *Sampi* at [1079]; *Bodney v Bennell* at [173];

(b) connection may be established by evidence of physical presence, but its absence is not fatal to the continuing connection:  *Bodney v Bennell* at [171]-[174];

(c) non-physical forms of connection may include spiritual, cultural, social and utilisation connections:  *Yanner* at [37]-[38]; *Ward FC* at [323]; *Akiba FC* at [172], [655];

(d) the assessment of connection requires, first, an identification of the content of the 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:  *WA v Ward* at [64];

(e) the connection need not be maintained in the same manner as it was at effective sovereignty. Account may be taken, amongst other things, of displacement and depopulation.

99 That statement of principle is in accordance with the authorities to which his Honour referred.

100 The primary judge again restated the question at [911], extracted at [67] above. Counsel for the Arabana submitted that the statement of the test in that passage is wrong because it does not accord with the statutory language in s 223(1)(b). It was submitted that the “rights must be possessed under the traditional laws acknowledged and the traditional customs observed *by* the Aboriginal people” (original emphasis) and that the rights “do not need to be possessed by the acknowledgement and observance of those laws and customs (whatever that might mean).” (original emphasis) It was submitted that the wrong emphasis introduced a geographic component to acts of acknowledgment and observance that is not a requirement of s 223(1)(b).

101 The language employed by the primary judge at [911] is not strictly in accordance with the language of s 223(1)(b) of the NT Act. That much of the Arabana’s submissions may be accepted.

102 However, the argument that his Honour's articulation of the issue involved an erroneous emphasis on a geographic component requiring acts of acknowledgement and observance physically within the boundaries of the Overlap Area cannot be sustained. Nor can it be said that the manner in which his Honour dealt with the evidence implicitly demonstrates error in the proper understanding or application of the law.

103 The task of the primary judge was not only to identify the existence of traditional laws and customs, but to identify whether the claimants were connected with the Overlap Area by those laws and customs. The passage at [911] does not focus the enquiry on activities physically occurring within the Overlap Area. It does, however, reflect a requirement that the laws and customs must be laws and customs that are acknowledged and observed in fact, as required by s 223(1)(a). To speak of that requirement is not to commit error. The phrase “those laws and customs” in s 223(1)(b) must be understood as a reference to the laws and customs referred to in s 223(1)(a), being traditional laws and customs that are acknowledged and observed in the present day. Counsel for the Arabana acknowledged that the concept of “continuity” is one that inheres in both s 223(1)(a) and s 223(1)(b), both being expressed in the present tense.

104 At the trial, the Arabana ran a case based 10 matters in or in relation to the Overlap Area that were said to evidence their connection. As will be seen, those factors asserted the connection largely by reference to tangible acts of acknowledgment and observance for the most part specifically relating to the Overlap Area. To that extent, the case presented at trial intermingled the issues arising under both s 223(1)(a) and s 223(1)(b). As Counsel for the Arabana acknowledged on the appeal, the primary judge was invited to evaluate the evidence going to all 10 of the matters that the Arabana themselves had asserted were relevant to the question of connection to the Overlap Area by their own laws and customs. So much is confirmed by his Honour’s observation (at [852]):

The Arabana submitted that 10 matters indicated the continuity of their connection with the Overlap Area in accordance with their traditional laws and customs. It is convenient to address these in turn.

105 Counsel for the Arabana could not point to any submission made at the trial to the effect that the primary judge could and should find the requisite connection to be established solely by reference to any one of the 10 factors, and it has not otherwise been shown that the primary judge mischaracterised the case presented to him. Counsel acknowledged that the factors were for the primary judge to consider and weigh. It is true that the primary judge did not consider the question of whether the evidence of the asserted spiritual connection (particularly that of Mr Strangways) was itself sufficient. However, for the purposes of this appeal it has not been shown that he was invited to do so. The reasons for judgment must be interpreted as rejecting the case presented at a factual level. To the extent that there is an intermingling in the judgment of the matters to be decided under s 223(1)(a) and s 223(1)(b) that does not disclose an error of law in the circumstances just described. Rather, it was a reflection of the manner in which the Arabana presented their case.

106 As Counsel for the State submitted, the reasons of the primary judge must be considered in the particular context of how the Arabana expressed their connection in their pleading, how they articulated it in their evidence and the submissions advanced or not advanced on that topic. That is critical because connection is a matter having a present day reality to the people claiming it. It was for the Arabana to demonstrate how the connection arose by their traditional laws and customs, which only they could explain. The State submitted that it was not open to the Arabana on this appeal to present an evidentiary case to the effect that assertion of a spiritual connection coupled with the assertion that the Overlap Area was Arabana country were themselves sufficient. The State submitted that the case presented on this appeal differed from that presented below. Those submissions should be accepted.

107 The reasons for judgment do not otherwise disclose that the primary judge asked himself the wrong question by limiting himself to a search for activities of acknowledgment and observance of traditional laws and customs occurring within the Overlap Area’s boundaries in any event. The reasons as a whole disclose that the primary judge correctly understood that the test for connection did not require proof of such activities and his Honour’s analysis of the evidence was not so constrained. That is not only made plain at [51] and [847] but also by the consideration given by the primary judge to matters such as knowledge of traditional laws and customs and the spiritual connection that may persist with respect to an area notwithstanding that a person may be absent from it.

### Particular 1:  the correct approach

108 Particular 1 asserts the manner in which the primary judge ought to have approached the fact finding task required by s 223 of the NT Act. As will become apparent in the disposition of Particular 2, that is precisely the approach taken by the primary judge.

### Particular 2:  sufficiency of the evidence of Mr Strangways

109 By Particular 2 it is alleged that the primary judge misapplied the test for connection in that he failed to find that the acknowledgment and observance of Arabana traditional laws and customs in the Overlap Area was sufficient, in context, to establish continuing connection, having particular regard to the evidence of Mr Strangways. The opening words to Particular 2 correctly identify that Mr Strangways was at the time of the trial the oldest Arabana person alive and that he engages in a lot of teaching (at [619]). The primary judge regarded Mr Strangways as “a singularly impressive witness, being honest, knowledgeable, articulate, insightful and responsive to the questions” (at [603]) and said that he had confidence in accepting his evidence. The primary judge concluded that Mr Strangways had a “deep cultural knowledge of Arabana culture and law and gave several instances of compliance with it” and that his “acknowledgment of Arabana traditional law and observance of Arabana traditional custom in relation to the Overlap Area is now of a spiritual rather than a practical kind” (at [907]). The primary judge said that 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” (at [911]).

110 Those findings must be understood in the context of the earlier observation that Mr Strangways had not come back to the Overlap Area to reconnect with it, that his physical presence on the Overlap Area was confined to passage through it and that he had not spent a night at Oodnadatta since the late 1950s or early 1960s. Accordingly, the finding that Mr Strangways would acknowledge and observe Arabana laws and customs *in* the Overlap Area must be understood as a finding as to his acknowledgment and observance of the laws and customs in relation to the land.

111 Read in context, the finding that Mr Strangways engages in a lot of teaching does not extend to a finding that he engages in teaching specific to the Overlap Area, as opposed to the content of Arabana laws and customs and their application in the wider region to the south recognised to be Arabana country.

112 The evidence of Mr Strangways is summarised to an extent in this passage from the written submissions:

His totem was the frog. It was associated with Hookey’s Hole (*Uthapuka*) (located in the Overlap Area):  T1481.11-18. Associated with his frog totem, he is under an **obligation** to ensure that *Uthapuka* (Hookey’s Hole) is not defiled or damaged:  T1482.7-8. He gave lengthy evidence about the Frog *Ularaka* (Dreaming story) related to Hookey’s Hole:  T 1411-1421. He also gave evidence about the Owl *Ularaka*, which is also related to Hookey’s Hole:  T1359-1365. He explained the importance of that location in Arabana law and culture:  T1427.1-14. He explained that it was a place where the Arabana mobs came together:  T1352.36-40. It was a main or central site for participation in ceremony:  T1359.21-24. He explained his ongoing connection with Hookey’s Hole and Oodnadatta Common:  T1559.39-1560.18. He gave evidence about being taught about the *Ularaka* and being told that Oodnadatta was in Arabana country:  T1401.43-T1402.46, T1403.39-1404.26. He gave evidence about other *Ularaka* that pass through the Overlap Area:  T1436.14-30, T1437.33-1441.11. He gave evidence about Mt O’Halloran (in the Overlap Area) and its importance to the Arabana Kangaroo story:  T1430.5-1434.36. He described *Ularaka* as a ‘*source of all laws and history*’ ‘*and is a map*’. If you know the *Ularaka* stories, ‘*you can traverse*’ the country. ‘*[I]t is a source of the laws that you live by*’:  T1425.38-1426.46. He gave evidence about teaching *Ularaka* and language to his children and family members, and others: T1547.28-1548.14; T1576.15-26.

(emphasis in original)

113 We have had regard to the transcript references referred to in that summary. It is unnecessary to extract them all here.

114 The primary judge set out the effect of Mr Strangways’ evidence at [603] – [622]. His Honour expressly accepted the evidence except where he otherwise indicated. Most of the evidence concerns Arabana laws and customs. Although not specifically relating to the Overlap Area, it may implicitly be understood as extending to it, at least by inference. At [618] the primary judge recorded evidence specific to the Overlap Area as follows:

Mr Strangways said that he had been told that Oodnadatta was Arabana country by many people, including by Ted Stuart, a Southern Arrernte man but who had taught him Arabana *Uralaka*, and by Tom Bagot. He gave evidence about a number of the Arabana *Uralaka* including the Owl *Uralaka*, the Kangaroo *Ularaka*, the *Urumbula Uralaka*, the Swallow Waterhole, and the *Thunpili Ularaka*. He said it was for Arabana people to protect sites by visiting them, by issuing permission to those other people who may wish to visit them and to keep other Aboriginal people away.

115 As can be seen, the primary judge accepted the evidence of Mr Strangways as to the content of Arabana traditional laws and customs, particularly as to matters giving rise to a spiritual connection to country. However, the evidence as a whole did not demonstrate that the Arabana people *in the present day* maintained connection with sites said to be of spiritual significance in the Overlap Area by, for example, visiting them. His Honour was correct to find that any connection with the Overlap Area asserted by the Arabana today was not one arising by acknowledgment and observance of the particular traditional laws and customs to which Mr Strangways referred (at [618]).

116 As to Mr Strangways’ own practices, the primary judge went on to say (at [621]):

It is fair to say that the actual contact which Mr Strangways has had with the Overlap Area has been limited. Since living in Alice Springs, it has been his practice to travel onto Arabana land three or four times per year but generally his visits to Oodnadatta have occurred when he passes through to his preferred camping spot at Algebuckina (which is within the area of the 2012 Arabana Determination). In the past, he did stop to see his friend (the deceased C Warren) but more recently has stopped only for refreshment. He does not stop at any sites of significance. That is to say, Mr Strangways did not give evidence of any specific continuing connection with the Overlap Area. That connection was left to inference from his connection to Arabana country more generally.

117 It was submitted that the primary judge later referred to Mr Strangways as “merely” having knowledge of the traditional laws and customs. That submission misstates the effect of the reasons for judgment considered as a whole. The primary judge was aware that Mr Strangways’ connection with Arabana country generally was a matter from which an inference may be drawn in respect of the Overlap Area. As discussed earlier in these reasons, he did not reject the surrounding context as irrelevant. His Honour’s reasons must be understood as including an inquiry into whether an inference as to connection with the Overlap Area should or should not be drawn from that wider context. In the result, it is plain enough that the primary judge did not consider evidence concerning the neighbouring land to be sufficient to support an inference in relation to the Overlap Area. There is no proper basis for this Court to interfere with that assessment, especially in light of the facts found at [621] and the highly evaluative nature of the task.

118 Mr Strangways’ asserted knowledge of any sites of spiritual significance was not supported by observance by Mr Strangways himself of any obligation to visit or protect any sites to which his own evidence related, and the evidence of the remaining Arabana witnesses disclosed no such activities being undertaken by any other Arabana person.

119 In addition, the primary judge held that the *Ularaka* relating to the Overlap Area were not being taught to younger generations. That finding must necessarily extend to the *Ularaka* recounted by Mr Strangways and recorded at [618] of the reasons. We reject a discrete challenge to that particular conclusion for reasons that will be given in due course. In light of that conclusion, the deep knowledge of Arabana traditional laws and customs possessed by Mr Strangways did not support a finding that the knowledge was held by the Arabana more generally. What was left then was connection in the form identified by the primary judge at [913], extracted at [40] above, being a connection arising from having been taught that the Overlap Area was Arabana country.

120 The contentions underpinning Particular 2 must be rejected. The evidence of Mr Strangways was plainly relevant, but the failure of the primary judge to find that it provided a complete answer when considered in conjunction with the 2012 Arabana Determination does not involve appealable error and should not be disturbed.

### Particular 3:  alleged erroneous search for essential features

121 Particular 3 is expressed as follows:

The primary Judge erred in finding that continuing connection to the Claim Area required the following features, when there was no evidence that those features were an essential component of Arabana traditional law and custom; or, in the alternative, erred in finding that the absence of those features was relevant to, and weighed against, the maintenance of continuing connection by the Arabana:

a. the absence of Arabana initiation ceremonies since at least 1958 (at (882] and [904]) and failed to have regard to the evidence that was given, and not challenged, about the reasons for cessation of those ceremonies consistent with traditional law and custom;

b. absence of ritual associations with sites and storage of sacred objects on the Claim Area (at [907]);

c. absence of uninterrupted residence, proof of occupation or possession of the Claim Area (see findings at [856], [857], [896] and [907]);

d. lack of recent enforcement of control of access by others to enter the Claim Area (at [896]);

e. that teaching of *ularaka* concerning the Claim Area must be to persons with a connection to the Claim Area (at [874]);

f. that some *ularaka* are not known or passed on by some witnesses (at [912]).

122 The short answer to this Particular is that the primary judge did not make findings of the kind attributed to him.

123 The reasons at [853] and [906] deal with 10 topics, nine of which focus principally on whether there were activities physically occurring on the land that evidenced the requisite connection. That comprehensive part of the reasons fairly reflects the presentation of the Arabana Claim addressing each of the matters upon which the Arabana themselves relied in their SFIC and in their closing submissions at trial. It does not involve an assumption that proof of any one or more of the factual matters relied upon was essential for connection to be established.

124 There was otherwise a lack of specificity in the submissions and evidence before this Court as to how connection with country arose by the traditional laws and customs of the Arabana people other than generalised statements that connection is essentially spiritual and need not be made manifest by physical activities on the land itself. The characterisation of a connection with an area as essentially spiritual does not mean that there need be no evidence adduced to prove the existence of the spiritual connection to the civil standard. In cases where an asserted spiritual connection is not supported by evidence of outward manifestation, it remains for the claimant party to show by other evidence that the connection with the specific land and waters exists, and that it arises *by* traditional laws and customs. Proof may be difficult to achieve, but it is critical, because a connection to a place may arise by reason of all manner of facts and circumstances unrelated to the body of traditional laws and customs that defines an Aboriginal group as a traditional society.

125 Our rejection of Particular 3 should be understood in light of our review of the primary judge’s findings forming the subject of the remaining Particulars. We will now explain why those findings are not affected by appealable error.

### Particulars 4(a) and (b):  activities not conducted in accordance with traditional laws and customs

126 Particular 4(a) alleges that the primary judge erred in finding that contemporary activities, namely the holding of funerals and sorry business and attendance at social activities including races, gymkhanas and bronco brandings, hunting and gathering of food and residing at Oodnadatta were not conducted in accordance with traditional laws and customs. It was submitted that the primary judge ought to have characterised those activities as involving an adaption to modern circumstances of the traditional laws and customs giving rise to a connection with the Overlap Area in accordance with the principles stated in *Yorta Yorta*.

127 Submissions in support of this Particular were to the effect that the primary judge referred to the “findings” of Finn J in *Dodd* with respect to the activities on the land subject to the 2012 Arabana Determination constituting a modern adaption of activities founded in traditional laws and customs. It was submitted that the primary judge erroneously disregarded those findings because they did not relate to the Overlap Area and that his Honour ought to have inferred that the activities undertaken on the Overlap Area were also undertaken in accordance with traditional laws and customs.

128 That submission fails to identify appealable error in the primary judge’s characterisation of the evidence before him. By way of illustration, the primary judge accepted that the social activities occurred but said that the evidence that those activities occurred as a manifestation of Arabana traditional laws and customs was “sparse” (at [905]). That characterisation of the evidence has not been shown to be wrong. Similarly, the primary judge said that there was no evidence that those Arabana who continued to live in Oodnadatta did so because they were Arabana, or that they continue to observe Arabana laws and customs, or that their manner of living derives from, is influenced by, or reflects an acknowledgment or observance of Arabana traditional laws and customs (at [863]). That observation has not been shown to be incorrect.

129 Submissions were otherwise to the effect that the primary judge was bound to infer that the activities were undertaken in accordance with traditional laws and customs giving rise to and otherwise evidencing NTRI in the Overlap Area because that circumstance must be assumed to exist in the neighbouring land subject to the 2012 Arabana Determination. However, the primary judge was not bound to draw the inference and the reasons make it plain why his Honour did not do so, including a finding (not challenged on this appeal) there had been a progressive moving away to the south and east from the Overlap Area by the Arabana since sovereignty.

130 Particular 4(b) otherwise alleges that the primary judge made findings that were inconsistent with the “findings” of Finn J in *Dodd*. That argument is to be considered in light of the principles discussed earlier.

131 It should first be observed that the primary judge made a number of findings that were consistent with the reasoning in *Dodd* in relation to the content of Arabana traditional laws and customs, because they found support in the expert evidence adduced at trial. His Honour found:

101 In the reasons supporting the 2012 Arabana Determination (*Dodd v South Australia* [2012] FCA 519 at [35]), Finn J gave the following summary of the key features of Arabana society. The appropriateness of that summary is supported by the report of Dr Fergie and Dr Lucas prepared in 2011 in support of the then Arabana claim and the reports of Lucas prepared in connection with the present claim. I accept it as appropriate:

(i) A system of kinship and marriage, underpinned by the practice of exogamy and the avoidance of incest, which was central to defining relationships between Arabana people, and between Arabana people and the land. This classical Arabana kinship system was characterised by -

(a) a classificatory kin system which attributed kin terms to classes of relationships and in turn predicated normative behaviour between those classes of relationships;

(b) two exogamous matrilineal moieties known as Mutherri (Matthurie) and Kararru (Kirirawa) as well as by exogamous totemic divisions which regulated marriage and were significant in some ceremonial responsibilities; and

(c) preferential marriage rules which were indicated in the classificatory kin system and which oriented marriage (and ceremonial) relationships;

(ii) division into small localised groups with particular association with certain areas within Arabana country. Some members of those smaller groups would come together for ceremony, trade and major decision making;

(iii) A distinct language comprising a number of closely related dialects; and

(iv) A male initiation process that included the Wilyaru ceremony.

…

104 Some elaboration of these propositions, derived from Lucas’ first report, follows.

105 In Arabana society, each man inherits a totemic name from his father, an area of country with which this totem and a culture hero were associated, a myth relating to the story of the culture hero and its travels, and a ceremony to ensure the propagation of the totem species. A person’s relationship with this patrifilially inherited complex of land, myth and *mura* is called *Ularaka*. The associated ceremonies had to be performed by men belonging to that *Ularaka* and thus owning it, but they were assisted by their sisters’ sons (*Marduka*) who were referred to as ‘bosses’.

106 The term *Ularaka* also has the extended sense of referring to sites, associated stories, ceremonies and objects, all of which are inherited through men. Rights in country, in the form of estates, were also apportioned (and sometimes named) by way of *Ularaka*. Fathers’ brothers (who usually shared the same *Ularaka* as a man’s father) were the principal teachers of the knowledge.

132 The submissions on this aspect of the appeal wrongly assumed that a conclusion that connection had not been proven in relation to the Overlap Area equated to a finding that Arabana traditional laws and customs (including as described in the above passage) had ceased to exist. As earlier explained, that submission misstates the effect of *Dodd*. The reasons of Finn J for making the 2012 Arabana Determination say nothing about whether the connection requirement in s 223 of the NT Act is fulfilled in relation to any place other than the land and waters subject to the 2012 Arabana Determination.

133 The conclusion of the primary judge that the Arabana had not proven their case in respect of continuing connection in relation to the Overlap Area means just that:  it is the outcome of an assessment of evidence adduced at a contested hearing to prove a disputed essential element of the claim. The Arabana’s submissions on this point went so far as to suggest that the existence of a determination of NTRI on neighbouring land meant that it was not open to the primary judge to dismiss the claim with respect to the Overlap Area on the basis of a failure to prove the requisite connection. The submission fails to respect the geographic limitations of the 2012 Arabana Determination identified above and oversimplifies the detailed and complex analysis undertaken by the primary judge of all of the evidence the Arabana themselves had adduced.

134 There is no error of the kind alleged.

## Impugned factual findings – Particulars 4(c), 6, 8 and 9

135 By the remaining Particulars, the Arabana challenge a multitude of factual findings as well as several asserted failures by the primary judge to draw inferences from the undisputed facts. The arguments on most of these Particulars mischaracterised the reasons of the primary judge, or the evidence, or both.

### Particulars 4(c) and 8: alleged errors concerning the evidence of Dr Lucas

136 Particular 4(c) is to the effect that the primary judge made a finding that was inconsistent with “the accepted evidence of Arabana witnesses and the evidence of Dr Lucas”. The “accepted evidence of Arabana witnesses” is not identified. The evidence of Dr Lucas is described in submissions as “unchallenged evidence that the rights and interests of the Arabana were the same in the Overlap Area as to the Arabana Determination”. It is not clear what is meant by “unchallenged” in the present context. The expert opinion relied upon went to a primary issue that was plainly in dispute and that was for the primary judge to determine on the evidence before him. His Honour was not obliged to accept the conclusory statement of Dr Lucas at face value. It cannot constitute appealable error to draw a conclusion involving a mixed question of fact and law merely because it is different from that drawn by an expert witness.

137 Particular 8 is expressed as follows:

The primary Judge erred in rejecting the evidence of Dr Lucas in relation to continuing Arabana connection (at [915]) in circumstances where:

a. The primary Judge accepted Dr Lucas as a ‘*sound witness*’ ([915]) whose evidence he accepted in preference to the expert witnesses called by the WW;

b. Dr Lucas’ evidence was rejected on the basis that ‘*the Court heard much more detailed evidence concerning the issue of Arabana connection than he obtained*’ (at [915]);

c. Dr Lucas had considered the transcript of evidence heard in the case and the documents in the tender book and was asked in evidence to express an opinion as to whether there was a continuity beyond 1909 of Arabana presence in Oodnadatta (at T3477.38). Dr Lucas provided evidence of Arabana families that were recorded and/or represented to be in Oodnadatta over the decades from the 1910s to post the 2000s (T3477.46-3479.9).

d. The primary Judge failed to consider the extent of Arabana connection evidence Dr Lucas obtained, to support his finding that it was ‘*less detailed*’ than the Court evidence; and

e. Failed to give any, or any sufficient, reasons for rejecting the expert evidence of Dr Lucas on this sole issue, whose opinions he otherwise accepted.

138 It may be accepted that the primary judge described the opinions of Dr Lucas is “soundly based and reasoned” and preferred them to most of the other anthropologists (at [794]). Notably, his Honour said the same of the opinions of the State’s expert, Dr Sackett.

139 The primary judge accepted the evidence of Dr Lucas on a number of topics:  at [79], [94], [142], [181], [282], [380], [140], [771] as he did that of Dr Sackett.

140 The primary judge was alive to the fact that his conclusion in relation to the question of connection involved a rejection of the opinion of Dr Lucas. His Honour said (at [915]):

I am conscious that a conclusion that the Arabana have not maintained connection with the Overlap Area is inconsistent with the opinion of Lucas, who I thought generally was a sound witness. However, the Court heard much more detailed evidence concerning the issue of Arabana connection then he obtained, and it is appropriate to act on the basis of that evidence, rather than his opinion.

141 It was submitted that the primary judge erred by describing the material before him as “more detailed” than the material before Dr Lucas, because Dr Lucas had based his report on information supplied by 13 informants whereas, the Court had heard evidence from only five of them and because Dr Lucas reiterated his opinion by reference to the evidence that had been adduced from Arabana lay witnesses at trial.

142 The reasons of the primary judge at [915] disclose a preference for the evidence adduced at trial over the informant material referred to in Dr Lucas’ report. It was plainly appropriate for the primary judge to base his findings on the evidence that had been given before him rather than on reports of accounts of persons who had not attended to give evidence at trial. The preference for the sworn testimony given before him plainly does not involve appealable error. His Honour’s reasons should otherwise be understood as referring to the detail of the evidence as a characteristic of its qualitative content. It has not been shown that his Honour erred in describing the content of the evidentiary material before him as being more detailed than that considered by Dr Lucas in the preparation of his report.

143 It was otherwise neither surprising nor impermissible for the primary judge to accept the evidence of an expert with respect to one topic but to reject it on another. To conclude otherwise would be to require a trial judge to adopt an all or nothing approach to evidence in the nature of expert opinion. The primary judge at [915] properly afforded respect to the expertise of Dr Lucas, but he was not bound to reason in the same fashion as the expert. Nor was the primary judge bound to afford the same weight to the informant material contained in Dr Lucas’ report as though it had the status of sworn testimony before him.

### Particulars 6 and 9:  challenge to discrete factual findings

144 Particular 6 is expressed as follows:

In circumstances where the primary Judge found *inter alia* that the Arabana had contemporary connection to the Claim Area by use of natural resources (at [865]); teaching of hunting and bush foods ([865]-[868]); teaching the *ularaka* of the Claim Area ([872]-[876]); protection of *ularaka* sites ([883]-[886]; knowledge of boundaries (at [903]); social connections (at [905]) and spiritual connection to the Claim Area (at [907]), the primary Judge erred in finding that the connection to the Claim Area found to exist at effective sovereignty had ceased to exist for the purpose of section 223(1)(b) NTA.

145 This Particular misstates the reasons of the primary judge. His Honour did not find “that the Arabana had contemporary connection with Claim Area”. Whether the Arabana had the connection required of s 223 of the NT Act was the subject of a detailed assessment of the evidence adduced by the Arabana on the topic. Particular 6 otherwise encapsulates seven further allegations of error contained in Particular 9, each of which should be rejected for the reasons that follow.

146 The argument in Particular 9(c) is not pressed.

147 The submissions in support of the remaining arguments largely make selective reference to evidence said to be supportive of the case as to connection, but fail to adequately address the limitations of that evidence identified by the primary judge or to address it in the context of the evidence as a whole.

148 Particular 9(a) concerns evidence relating to hunting and other uses of natural resources in the Overlap Area.

149 The primary judge dealt with that topic at [865] – [871]. Those passages are to be read in the context of the unchallenged summaries of the evidence of each lay witness at set out at [581] – [660].

150 The primary judge acknowledged the existence of evidence concerning the use of natural resources in the Overlap Area but said that it was “not extensive” (at [865]). That description could not be in error, given that the Arabana had themselves acknowledged that evidence of the use of natural resources was “only a ‘fragment’ of the evidence which would have been available in former times” (at [870]). The primary judge said that in some respects the evidence of lay witnesses Ms Leonie Warren, Ms Joanne Warren and Mr Stuart was the strongest evidence of physical connection by the Arabana.

151 The Arabana referred this Court to the evidence of Mr Stuart concerning gathering and camping. However, the primary judge (at [867]) noted the absence of evidence as to whether that activity continued after Mr Stuart completed a two year secondment to Oodnadatta as a community constable some 20 years prior. The evidence given by Ms Leonie Warren was that she had hunted and skinned kangaroo in the Overlap Area 25 years ago. She gave evidence that her children were taught to hunt by her brother. However, her brother was not called to give evidence and the primary judge drew an inference that his evidence would not have supported the Arabana’s case (at [657]). The primary judge observed that the children’s father was a Kokatha man who had also taught them to hunt (at [865]). Ms Leonie Warren did not know any Arabana stories about the animals she hunted. As the State submitted, the proper inference from her evidence is that she enjoyed camping and hunting in a manner consistent with non-Arabana people.

152 The Arabana otherwise referred to the evidence of other witnesses hunting or gathering. The instances referred to were neither recent nor frequent. Whilst Mr Strangways gave evidence with respect to traditional laws and customs as it related to the hunting of kangaroo, the primary judge concluded that his knowledge had not been transmitted to younger generations. His Honour said there was “limited” evidence that hunting was done in traditional ways or for traditional purposes (at [871]). The Arabana have not shown that characterisation to be incorrect by reference to the evidence adduced at trial.

153 Particular 9(b) is as follows:

b. With respect to learning respecting and teaching the *ularaka*, erred in finding that:

i. Dr Arbon did not give any evidence indicating awareness of the Arabana moiety systems or totems, or kinship system more generally (at [873]);

ii. Sydney Strangways did not give evidence that any of his teaching related to *ularaka* concerning the Claim Area or that it was to persons who have connection with the Claim Area (at [874]);

iii. Joanne Warren did not claim to have been taught about the *ularaka* (at [876]); and

iv. failed to have regard or give due weight to the evidence of Reginald Dodd with respect to learning, respecting and teaching the *ularaka* of the Claim Area.

154 Further on the topic of teaching, Particular 9(e) alleges error in a finding at [908] that there was no evidence that gender specific division of knowledge is being taught within the Arabana people, and Particular 9(f) alleges error in the finding at [909] that the *Ularaka* relating to the Overlap Area is not being taught to younger generations.

155 The Particulars concerning teaching may be dealt with together.

156 The reasons of the primary judge concerning continuity of learning, and respect for and teaching of the *Ularaka* are expressed as follows:

***(iv) Continuity of learning, respecting and teaching the Ularaka***

872 The evidence on this topic was limited. Aaron Stuart said that, in respect of his own children, he had taught them the *Ularaka* ‘a little bit, now and then’. He also said that it is the role of an uncle or grandfather to teach the *Ularaka*, but did not say whether that had occurred in his family. He accepted that he himself had a responsibility to teach and said, with respect to his grandchildren, that he was ‘starting with just language’.

873 Dr Arbon said that she engages in some education of the children in her extended family but it is evident that she herself has only limited knowledge of the *Ularaka*. She has been engaged in the promotion of the learning of the Aboriginal language and it is reasonable to infer that some teaching of the *Ularaka* may be an incident of that, but my impression was that her knowledge of the Arabana *Ularak*a is limited. When asked about her teaching of her children and grandchildren of the frog story associated with Hookey’s Hole, she said only ‘I mention to them that it was a place to look after because it was a place where there was a story that belonged to Arabana’. She did not disclose knowledge of the details of the story or convey the content of which she was teaching her children. Dr Arbon did not give evidence of teaching her children the other *Ularaka*. A related matter is that she acknowledged that her knowledge of the Arabana two moiety system was ‘limited’ and she did not give any evidence indicating awareness of the Arabana moiety subleases or totems, or kinship system more generally.

874 Sydney Strangways gave evidence that he is involved in a lot of teaching but did not claim that any of that teaching related to *Ularaka* concerning the Overlap Area or that it was to persons who have connection with the Overlap Area.

875 Leonie Warren said that she had not been taught about *Ularaka* from around the Oodnadatta area. Nor had she been taught the Arabana moiety system. She did not give any evidence of learning, respecting or teaching the *Ularaka*.

876 Likewise, Joanne Warren did not claim to have been taught about the *Ularaka* or that she was herself teaching them. With respect to Arabana traditional law concerning kinship, she said only that she had been taught that ‘we can’t go and marry our own family, not a close family’. Her parents had not taught her about the moiety system, had not spoken about mathari and karraru, and she had not heard other Arabana people speaking about them. Joanne Warren did not give any evidence indicating awareness of the Arabana kinship totems.

157 Once again, the submissions on this topic involve a misstatement of the reasons of the primary judge. It is alleged that the primary judge found that Dr Arbon did not give any evidence indicating awareness of the Arabana moiety system. That is not what the primary judge said. The primary judge described Dr Arbon’s knowledge as “limited”. There is no error in that description given that Dr Arbon had herself described her knowledge in that way. Dr Arbon had always lived a great distance from the Overlap Area and she did not give evidence to the effect that kinship systems continued to be observed. The conclusion of the primary judge that Dr Arbon “did not give any evidence indicating an awareness of the Arabana moiety subleases or totems” is to be understood as restricted to that discrete topic. It does not involve a finding that Dr Arbon had no awareness of other aspects of moiety. Dr Arbon’s evidence was not otherwise directly related to kinship issues.

158 The Arabana refer to evidence of Mr Strangways to the effect that he had taught his sons about *Ularaka* that go through Oodnadatta and published written versions of it. We accept that the reasons of the primary judge at [874] involve error to the extent that they include an unqualified statement that Mr Strangways’ teaching did not relate at all to *Ularaka* concerning the Overlap Area. However, we do not consider that error to be of any real moment when considered in context. That is because the evidence on this topic does not indicate that the teaching referred to by Mr Strangways has been effective in transmitting knowledge of the *Ularaka* concerning the Overlap Area to members of the Arabana community who could testify as having received, understood and retained those teachings. As the primary judge observed, Mr Strangways himself had not visited the Overlap Area for some decades. It may therefore be inferred that the teaching of his sons did not take place there. On the evidence relied upon by the Arabana (including on this appeal), knowledge of the *Ularaka* among the lay witnesses other than Mr Strangways is properly described as fragmented and weak. Ms Joanne Warren had some awareness of the existence of stories but could not retell them. There is no error in the primary judge’s conclusion that she did not claim to have been taught about the *Ularaka*, as she had not explained how she came to have the limited awareness that she did.

159 The evidence of Mr Reginald Dodd was not directed to any particular place within the Overlap Area. He had some knowledge of the “small moon” story but he said that it was not connected to any particular place. The primary judge summarised the evidence of Mr Dodd at [648] – [654]. The effect of the evidence is that he had never lived in the Overlap Area but had visited there while working as a stockman or on the railways. In his evidence, Mr Dodd agreed that he had not spent lengthy periods in Oodnadatta in the 1970s, 1980s and 1990s (at [652]). The primary judge acknowledged that Mr Dodd had camped on the Oodnadatta Common when taking children on educational trips, but said that the children were Dieri as well as children from right across South Australia, not just Arabana.

160 The transcript of evidence shows that Mr Dodd referred to two forms of teaching children. They included tours involving children from across the South Australia, but also a single instance of a camp at Oodnadatta involving Aboriginal children. Mr Dodd said that those children were Arabana and Dieri children from the Marree community. The reasons of the primary judge do not refer to Arabana children involved in that particular camp and in that respect involve an omission. However, we do not consider that omission to be significant in light of his Honour’s consideration of the evidence as a whole. The instance of camping at Oodnadatta involving Arabana children was a single occasion of camping at Oodnadatta Common. Mr Dodd said that the teaching involved “the land and the story of the name Oodnadatta”, but no details were provided. There was no visit to Hookeys Hole. Mr Dodd otherwise referred to the teaching of children from across the State as a further instance of the kind of teaching that occurred at the Oodnadatta Common camp. Any failure by the primary judge to recognise that a single Oodnadatta Common camp included Arabana children as well as Dieri children is not an error that could give rise to a miscarriage of justice. It could not compel an inference that the teaching of the *Ularaka* was anything other than “limited” as his Honour otherwise correctly described it.

161 The conclusion that there was only limited evidence of teaching relating to the Overlap Area is reinforced by the “sparse” evidence of activities by way of protection of sites located there. A contention that the primary judge erred in describing the protection evidence in that way was not pressed on the appeal. The protection of sites was put forward as part of the Arabana case concerning connection and is plainly interconnected with issues such as teaching of *Ularaka*. The sparse evidence of protection of sites was one part of an interconnected issue considered by the primary judge as a whole. It reinforces our view that minor omissions of the kind identified above do not give rise to a miscarriage of justice warranting the grant of relief on the Arabana Appeal.

162 Particular 9(d) impugns a finding at [907] that there was no evidence of Mr Strangways coming back to the Overlap Area to connect with it. The submissions refer to evidence of Mr Strangways passing through Oodnadatta (and at times stopping in the township) on his way to other places. The passage of the reasons should be considered in full:

Looked at more generally, a number of matters were absent from the Arabana evidence concerning connection. There is relatively little evidence of ritual associations with sites, or of ‘singing of country’, and no evidence of the storage of sacred objects on the Overlap Area. In the case of the Arabana witness with the most knowledge of original traditional law and custom (Mr Strangways), there is no evidence of him coming back to the Overlap Area to reconnect with it. His physical presence on the Overlap Area is confined to passage through it. He does not visit sites and it seems has not spent a night in Oodnadatta since the late 1950s or early 1960s. His acknowledgement of Arabana traditional law and observance of Arabana traditional custom in relation to the Overlap Area is now of a spiritual rather than practical kind.

163 The material relied upon by the Arabana on this appeal does not demonstrate error in that passage. To the contrary, the evidence confirms that Mr Strangways passed through the Overlap Area on his way to other places. The evidence does not show that Mr Strangways returned to the Overlap Area “to reconnect with it”. In cross-examination, Mr Strangways himself described his connection as one involving an assertion of sovereignty and thoughts of Arabana ancestors living there. The primary judge was correct to find that the connection to the Overlap Area asserted by Mr Strangways did not involve physical visits for the purpose of reconnecting with it.

164 Counsel for the Arabana otherwise alleged that the primary judge erroneously adopted a “parcel by parcel” approach to the determination of native title by focussing on Mr Strangways’ physical absence from but one part of what was asserted to be Arabana country. As explained earlier in these reasons, the primary judge did not err in that way.

165 With respect to gender specific division of knowledge impugned by Particular 9(e), the Arabana assert that the primary judge erred in finding that there was no evidence that gender specific knowledge was being taught within the Arabana people. Again, the impugned finding must be understood in its proper context. The primary judge said (at [908]):

The Court was not asked to hear gender restricted evidence from the Arabana and, even though Aaron Stuart had concerns about some of his evidence being heard by women, he did give evidence at one site without any objection to the presence of females and there was no evidence that gender specific division of knowledge is being taught within the Arabana People.

166 The primary judge there acknowledged the concerns of Mr Stuart that his evidence might be heard by women. Earlier in his reasons, the primary judge summarised the evidence of Mr Stuart with respect to aspects of men’s law no longer observed. The primary judge observed (at [597]) that when giving evidence, Mr Stuart had declined to talk about “a woman’s *Ularaka*”. The conclusion of the primary judge at [908] must be understood in accordance with his Honour’s earlier findings. The conclusion is that there was no evidence that gender specific division of knowledge is presently *being taught* within the Arabana people. The finding does not discount that Mr Stuart might personally have knowledge that there exists a woman’s story. The finding is concerned with the interrelations between Arabana people and the present day transmission of knowledge among them specifically as it relates to the Overlap Area. So understood, it does not involve error.

167 Reliance was again placed on the content of the reasons in *Dodd* with respect to the transmission of knowledge among genders. However, as explained above, the primary judge was not obliged to receive the reasons in *Dodd* as evidence answering the question before him in relation to the Overlap Area. The primary judge was aware of the reasons in *Dodd* insofar as they related to connection (including teaching, authority and knowledge). Of those reasons, his Honour said:

845 In his reasons provided in connection with the 2012 Arabana Determination, Finn J noted the following matters concerning continuing connection by the Arabana with the claim area then under consideration:

[40] The evidence suggests that the classical system of landholding by localised groups based on patrafilial [sic] Ularaka (ie traditional stories) is no longer observed. Contemporary Arabana people consider that all of Arabana country belongs to Arabana people generally. Nevertheless, the evidence demonstrates that some individuals or families are recognised as having special knowledge of and responsibility for particular areas and their Ularaka, including related songs.

[41] In the context of negotiations for a consent determination, the State could properly accept that the changes in traditional rules of succession to country that accommodate both patrifilial and matrifilial descent, and succession to the country as a whole (as distinct from particular parts of the country) have their basis in traditional law and custom. For these purposes, the State accepts that the pre-sovereignty normative society has continued to exist throughout the period since sovereignty, notwithstanding an inevitable adaptation and evolution of the laws and customs of that society.

…

[46] It was the opinion of the experts, amply supported by the evidence, that contemporary connection to 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.

846 Finn J then went on to describe a number of matters bearing on the continued connection of the Arabana with the 2012 Determination area. These included the continued observance of normative rules relating to authority, the transition of Arabana traditional law and custom to younger members of the group, continued use of Arabana names and kinship terms, maintenance of knowledge of the traditional *Ularaka* and the normative rules related to those *Ularaka*, the continued residence of Arabana people in the claim area, the knowledge of the claimants of the area and their continued engagement in traditional activities including hunting and gathering for food.

168 The Arabana otherwise referred to evidence of Mr Stuart, not recorded in the reasons, that “it’s not my thing to know” a woman’s story or site. However Mr Stuart’s evidence does not preclude a finding that gender specific division of knowledge is not being taught within the Arabana people. Finally on this topic, the finding at [908] must be understood in the context of the passages that follow; including those extracted at [40] and [67] above.

169 We have already explained why there is no error in the conclusion that the *Ularaka* relating to the Overlap Area is not being taught to the younger generations. None of the grounds relating to the limited evidence concerning teaching more generally have merit.

170 Particular 9(g) takes issue with the conclusion at [911] concerning the absence of evidence of actual acknowledgement and observance of traditional laws and customs in relation to the Overlap Area. The submissions in support of that contention involved a repetition of the complaint that the primary judge erroneously searched for physical manifestation of connection. We have earlier explained why that argument cannot succeed. The submissions otherwise referred again to the evidence relating to teaching without grappling with its limitations or addressing the ultimate finding of the primary judge that the evidence was not sufficient to establish the case as to connection that the Arabana had advanced at trial.

171 Particular 9(h) concerns the evidence of custodianship. It is expressed as follows:

Having found at [878] that Arabana appointment of custodians can be regarded as an action in protection of Arabana sites, erred in finding:

i. that the Arabana, in order to demonstrate continuity of custodianship were required to ensure that current Lower Southern Arrernte or Antakarinja men are, in some *de facto* way, undertaking the roles of custodians in circumstances where the Arabana are now themselves protecting sites on and near the Claim Area.

172 The premise that the “Arabana are now themselves protecting sites on and near the [Overlap] Area” was not established at trial. As we have mentioned, the primary judge described evidence on the topic of the protection of sites as “sparse” and there is no challenge to that finding. The primary judge recorded and discussed that same evidence in the context of dealing with questions of custodianship (at [680] – [697]). His Honour accepted the Arabana evidence and rejected a critique of it erected by the Walka Wani (at [696]).

173 On the relationship between custodianship and connection, the primary judge later said (at [878]):

I made findings earlier about the Arabana appointment of custodians. Their conduct in doing so can be regarded as an action in protection of Arabana sites. However, the appointment of custodians appears to have occurred in the 1950s (i.e., putting to one side the probable earlier appointment of Yumpy Jack), more than 60 years ago. The custodians then appointed are long deceased. There was no evidence of the appointment of successor or replacement custodians or, apart from the conversation which Reg Dodd had with Tom Brady, evidence of continuing communications with custodians. There was no evidence that the Arabana are ensuring that current LSA or Antakarinja men are, in some *de facto* way, undertaking the roles of custodians. The evidence in the proceedings would make fanciful any suggestion that the present Walka Wani would understand themselves to be acting as custodians of the Arabana or acting on their behalf in the protection of sites in the Overlap Area.

174 In written submissions it was said that the primary judge had wrongly found that no custodian had been “operating since the 1950s”. That is not the effect of his Honour’s finding at [878]. The finding was that no custodian had been *appointed* since that time. The submissions otherwise repeated the evidence the primary judge had referred to and accepted. There is then a bare assertion that the primary judge erred in characterising the failure to appoint replacement custodians as a sign of loss of connection to the Overlap Area. There was no such error in that characterisation. As has been repeatedly emphasised, the primary judge must be understood as analysing the case that had been advanced by the Arabana themselves as to the maintenance of connection. In assessing that claim it was plainly relevant that there had been no replacement custodians appointed. The finding is plainly capable of supporting the conclusion of the primary judge that connection had not been maintained by custodianship as the Arabana had alleged.

## Conclusion

175 None of the grounds impugning the dismissal of the Arabana Claim have merit. It follows that the Arabana Appeal should be dismissed.

# APPEALS FROM ORDERS GRANTING THE WALKA WANI APPLICATION

176 To understand the issues on this aspect of the appeals it is necessary to first explain the case advanced by the Walka Wani at trial, the evidence adduced by the parties and the reasons of the primary judge for accepting it.

## The Walka Wani case at trial

177 As originally framed, the Walka Wani case was that the members of the Walka Wani claim group had the right to possess, occupy, use and enjoy the lands and waters in the Overlap Area as against the whole world, pursuant to their traditional laws and customs. The claim for exclusivity was subsequently abandoned.

178 The Walka Wani later amended their SFIC to allege that at sovereignty the Overlap Area fell within a broader transitional area between three neighbouring Aboriginal groups or societies, the LSA, YA (also referred to as Western Desert) and “Lakes Culture”, and was occupied and used as of right by each of those societies. By [4] of the SFIC it was alleged that the rights and interests in the Overlap Area that were possessed by members of those three societies “were shared or co-existed”. In addition, it was alleged that there was inter-marriage and consociation between members of the three societies “in particular the [LSA] and [YA] who shared important spiritual beliefs and ritual and ceremonial practices that included male initiation and the utilisation of sacred paraphernalia”. The Walka Wani’s evidentiary case and submissions drew no distinction between the LSA and the YA as constituent parts of the claim group. The case proceeded from the premise that all members of the Walka Wani claim group possessed NTRI in the Overlap Area owing their existence to the same normative system of traditional laws and customs. The Walka Wani sought a determination to the effect that all members of the claim group had NTRI of the same nature throughout the Overlap Area.

179 The NTRI claimed by the Walka Wani were described as follows:

(a) the right to access and move about the overlap area;

(b) the right to hunt and fish on the land and waters of the overlap area;

(c) the right to gather and use the natural resources of the overlap area such as food, medicinal plants, wild tobacco, timber, resin, ochre and feathers;

(d) the right to share and exchange the subsistence and other traditional resources of the overlap area;

(e) the right to use the natural water resources of the overlap area;

(f) the right to live, to camp and, for the purpose of exercising the native title rights and interests, to erect shelters on the overlap area;

(g) the right to cook on the overlap area and to light fires for domestic purposes;

(h) the right to engage and participate in cultural activities on the overlap area including those relating to births and deaths;

(i) the right to conduct ceremonies and hold meetings on the overlap area;

(j) the right to teach on the overlap area the physical and spiritual attributes of locations and sites within the overlap area;

(k) the right to visit, maintain and protect sites and places of cultural and religious significance to claim group members under their traditional laws and customs on the overlap area;

(l) the right to be accompanied on to the overlap area by those people who, though not members of the claim group, are:

(i) spouses of members of the claim group; or

(ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the overlap area; or

(iii) people who have rights in relation to the overlap area according to the traditional laws and customs acknowledged by the members of the claim group; and

(m) in relation to Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by members of the claim group, the right to speak for country and make decisions about the use and enjoyment of the overlap area by those Aboriginal persons.

## Reasons of the primary judge

180 At the commencement of his reasons the primary judge identified that the Walka Wani claim group was a composite of two groups, the LSA and the YA. His Honour observed that it was common ground that the Arrernte people (of which the LSA form a part) occupy a large area in central Australia extending north of Alice Springs, and that they belonged to a wider cultural group known as the Arandic. The primary judge identified the YA as Western Desert people.

181 In his examination of the early ethnographic and historic material, the primary judge said that early writers put the boundary between the Arabana and the LSA at the Alberga/Macumba Rivers, whilst others put the boundary at Oodnadatta (at [259]). The primary judge identified that there were Arrernte speaking people, or people associated with their traditional laws and customs, at locations south of Oodnadatta in the post-sovereignty period when the early writings were prepared. His Honour identified the presently relevant question as follows (at [261]):

Nevertheless, there does remain the question of how it was that Arrernte speaking people, or people associated with the four section system, were at locations south of Oodnadatta. There are a number of possible reasons, as Sackett pointed out:  marriage, ceremony or visiting a kinsperson and there are other explanations including early dislocation associated with, or consequent upon, the construction of the Overland Telegraph Line, trade, or general mobility. There is support in the evidence for each of these explanations. In particular, there is support for the view that the construction of the Overland Telegraph Line, and the route associated with it, led to considerable Aboriginal mobility up and down the Line. However, the presence of Arrernte speaking people may also be attributable to their exercise of ‘user’ rights, a concept which looms large in the resolution of the Walka Wani applications.

182 After concluding his review of the ethnographical-historical evidence, the primary judge made the finding that “the ethnographical-historical evidence overwhelmingly supports the conclusion that the Overlap Area was Arabana country at the time of effective sovereignty” (at [410]). However, his Honour also observed that the identification of the Overlap Area as Arabana country at effective sovereignty was not conclusive of the question whether the Walka Wani also had NTRI in it (at [414]).

183 The primary judge also comprehensively reviewed the linguistic evidence adduced at trial and found that “the weight of the linguistic evidence which I accept points to Arabana having been the language of the Overlap Area at effective sovereignty, and that Arrernte was the language of the country north of the Macumba and its western extension in the form of the Alberga” (at [537]).

184 Next, the primary judge observed (at [538]) that there was considerable evidence in the trial, and that it is a widely held (but not unanimous) view of anthropologists, that there had been a gradual south-easterly migration of the Yankunytjatjara/Antakarinja people and that, while this had been occurring before effective sovereignty, it accelerated thereafter. The evidence suggested that this migration had included movement into the Overlap Area and had prompted a southerly migration by the LSA. It also suggested a movement of the Arabana away from the Overlap Area. The causes of the general south-easterly movement included drought, the degradation of food and water sources, the establishment of ration depots as sources of food, the effect of disease, the “attractions” of the European settlements and employment opportunities. His Honour found (at [580]) that the “evidence of the eastward and southward migrations of the Western Desert people, but also of Arrernte people, is generally consistent with the views of Lucas, Sackett, Stockigt and Gara that Oodnadatta and its immediate environs were within Arabana country at the time of effective sovereignty and accounts in large measure for the presence of the Walka Wani since that time”; however, his Honour also noted that that “does not preclude them having been present for other reasons, such as marriage, trade or ceremony, or in the exercise of use rights”.

185 The primary judge summarised the evidence of the Walka Wani lay witnesses at [668] – [679]. Before summarising the evidence, the primary judge stated (at [672]) that the “real issue concerning the Walka Wani claim” was their connection with the Overlap Area at effective sovereignty in accordance with traditional laws and customs, and recorded that Walka Wani Counsel had appropriately acknowledged that it is difficult to rely solely on contemporary Aboriginal evidence in ascertaining the situation at effective sovereignty. On that basis, the primary judge said that it is appropriate to record the evidence of the Walka Wani witnesses in abbreviated form. The summary of that evidence shows that a number of the Yankunytjatjara lay witnesses gave evidence to the effect that they had been told by one or more of their elders that Oodnadatta and the surrounding area was Yankunytjatjara country, and a number of LSA lay witnesses gave evidence to the effect that they had been told by one or more of their elders that Oodnadatta and the surrounding area was LSA country. At the conclusion of the summary, the primary judge observed:

678 …  If the resolution of this case turned only on the establishment of contemporary connection to the Overlap Area, the Walka Wani case would be strong.  …

679 However, the evidence of post-sovereignty occupation and use is not sufficient by itself to satisfy the requirements of s 223 of the NT Act. The critical issue for the Walka Wani is whether they had the NTRI about which the witnesses spoke in the Overlap Area in accordance with their traditional laws and custom *at effective sovereignty*.

(emphasis in original)

186 The primary judge then reviewed the anthropological evidence. His Honour commenced with summarising the matters of agreement and disagreement among the expert witnesses. For the resolution of the issues arising on the appeal it is necessary to extract that summary in full:

***Matters of agreement and difference***

745 All of the anthropologists agreed that the Aboriginal people who occupied and possessed rights and interests in the claim area at effective sovereignty were the members of a society united in and by their acknowledgement and observance of a body of laws and customs under which they possessed those rights and interests in, and had a connection with, the land and waters of the claim area. They disagreed, however, as to the number of societies whose members did possess such rights and interests.

746 Cane, Graham and Liebelt considered that there were three societies in the Overlap Area at effective sovereignty, these being Lakes culture, Western Desert and Arandic. Each of those groups had rights and interests in the Overlap Area according to their traditional laws and customs.

747 Lucas, Sackett and Gara agreed that there were three societies in the *wider* region but did not accept that there had been a Western Desert society in the Overlap Area at the time of effective sovereignty. Each considered that the Overlap Area was Arabana country at effective sovereignty. They reached these conclusions after consideration of the ethnographic-historical evidence reviewed earlier in these reasons, genealogies (in the case of Lucas), the materials concerning movements of the Aboriginal peoples, and of the other sources to which reference has already been made.

748 All the anthropologists and Gara agreed that, at the edges of the regional societies (Lakes Culture, Western Desert and Arandic) the people had interacted by way of ceremony, marriage and trade. They also agreed that the ethnographic-historical evidence suggested stronger interactions between the Lakes and Arandic systems, and between the Arandic and Western Desert systems, than between all three. The anthropologists and Gara accepted that these interactions gave rise to use rights in the Overlap Area with respect to ceremony. They disagreed as to whether these rights were in the nature of ‘ownership’ rights. This is a matter to which I will return.

749 The anthropologists agreed that each system had different ways of attributing or defining rights to country, but Cane, Graham and Liebelt thought that they were similar and compatible. Lucas and Sackett disagreed with that view (Sackett at least with respect to compatibility).

750 Each of Lucas, Sackett and Gara said that the system of law and custom of the claim area at effective sovereignty was the Lakes Culture (Arabana) system, whereas Cane, Graham and Liebelt thought that the three systems converged with an ‘accommodation of beliefs and rights sharing’.

751 At the conference of experts, all the anthropologists and Gara expressed agreement with the proposition that members of the claim groups at effective sovereignty held rights and interests in the Overlap Area under the traditional laws and customs of the society or societies of which that person was a member. Some disagreement emerged at trial, however, as to the nature of the rights and interests so held.

(emphasis in original)

187 The primary judge noted that Dr Cane had participated in the joint conference and in the concurrent evidence without having provided an expert anthropological assessment directed specifically to the Overlap Area (at [770]). Accordingly, he placed little weight on the report containing Dr Cane’s opinions. The reasons of the primary judge then set out the opinions of the experts in some detail, some of which will be reproduced later in these reasons. The primary judge described the opinions of Dr Lucas and Dr Sackett to be generally soundly based and reasoned, and accepted those opinions in preference over the opinions of the Walka Wani anthropologists (at [794]). However, his Honour said that his general preference for the evidence of Dr Lucas and Dr Sackett was not conclusive of either the Arabana Claim or the Walka Wani Claim (at [794]).

188 The conclusion that the Arabana had NTRI in the Overlap Area at sovereignty in accordance with the traditional laws and customs observed by them is contained at [842]. As we have mentioned his Honour described that conclusion as being common ground between the parties and “inevitable”.

189 The primary judge’s assessment of the Walka Wani Claim begins at [917]. His Honour observed that the “critical issue bearing on the claim of the Walka Wani is whether they possessed, at effective sovereignty, rights and interests in the Overlap Area under the traditional laws acknowledged, and the traditional customs observed, by them and whether they were connected to the Overlap Area by the traditional laws and customs so acknowledged and observed”. That observation was repeated at [922].

190 The primary judge went on to say that there was a good deal of evidence (which he accepted) indicating that the Walka Wani did not have “ownership” of the Overlap Area at effective sovereignty (at [923]). That evidence included the 19th and 20th century ethno-historical evidence (including the historical expert evidence of Mr Gara), the linguistic evidence, the anthropological evidence of Dr Lucas and Dr Sackett, evidence of post-colonisation migration and evidence that members of the Walka Wani had come into custodianship of Arabana sacred objects, sites and myths. His Honour went on to consider whether the Walka Wani nonetheless had rights in the nature of “use” or “usufructuary” rights and, if so, whether they were properly to be described as NTRI, observing that:

927 None of Lucas, Sackett and Gara regarded the Overlap Area as an area of shared ‘ownership’. Lucas accepted that there were linkages between the three peoples facilitated by ceremony, trade and marriage which required the accommodation of different types of rights but said these did not extend to ‘ownership’. He considered that there was a shared zone with the Arrernte with respect only to ‘use rights’ and ceremony. Sackett and Gara’s views were similar but Sackett referred to the distinction between ‘core rights’ and ‘contingent rights’ and between ‘ownership’ and ‘user rights’.

928 The Walka Wani submitted that the ‘use rights and ceremony’ acknowledged by Lucas, Sackett and Gara are native title rights recognised by s 223(1) of the NT Act. Both the Arabana and State disputed that that was so.

191 Before addressing that issue, the primary judge observed (at [930]) that the ethnographic-historical evidence of a Yankunytjatjara/Antakarinja/Luritja presence in the Overlap Area at the date of effective sovereignty is almost non-existent and the linguistic evidence does not support such a presence. His Honour concluded (at [934]) that the Western Desert people, whether Yankunytjatjara, Luritja or Antakarinja, were not present in the Overlap Area at effective sovereignty in other than in a transient way and did not have NTRI in the Overlap Area other than, possibly, with respect to red ochre ceremony.

192 The primary judge discussed the principles concerning what may be referred to as “contingent” rights in relation to land. The authorities, summarised below, are to the effect that a “right” to occupy land or waters that is contingent upon the grant of permission required to be given in accordance with the traditional laws and customs of another Aboriginal group is not a right or interest that can fall within the defined phrase “native title rights and interests” in s 223 of the NT Act.

193 The primary judge recorded that the expert anthropologists recognised a general distinction between “core” rights and “use” rights in relation to land. The manner in which those terms were employed by the experts is the subject of dispute on these appeals. After extracting portions of oral evidence of Dr Lucas and Dr Sackett, the primary judge identified that “core” rights were likened to “ownership” whereas “use” rights were limited to “rights of use for particular purposes or particular occasions and may exist subject to some form of contingency” (at [945]).

194 The primary judge summarised the evidence of Dr Sackett on that distinction as follows (at [946]):

Sackett agreed that use rights in the Overlap Area were shared between more than one group. Although he referred to these as ‘rights’, Sackett seemed to suggest that their exercise was subject to request, or subject to a grant of permission, or acquired by some close relationship such as marriage, or subject to the person coming to know the country, or being taught by the core right holders, i.e, the contingency. Persons from outside their country can exercise use rights freely once they learn the protocols regarding the country and have permission, sometimes a standing permission, to use it. Sackett also said that it is only the core right holders who may make decisions about the country, or speak on behalf of the country. He added that neighbours ‘might well be able’ to access the country ‘quite freely’.

195 His Honour went on to observe that the Walka Wani lay witnesses had themselves recognised a distinction between those who were *Nguraritja* in relation to a place (equating in Western Desert terms to the traditional owners) and those who were not*.* He referred to the evidence of those who claimed to be responsible for protecting Western Desert *Tjukurrpa*, none of whom regarded themselves as *Nguraritja* for the area around Hookeys Hole immediately south of the Overlap Area. The primary judge said that he understood that evidence to include an acknowledgment that participation in ceremony does not, by itself, make the participant a traditional owner of the country or the site where the ceremony is carried out, but it did not involve a concession that they did not have any NTRI in the Overlap Area. He said that the evidence left open the question of whether a responsibility to protect the ceremony gives rise to a right or interest recognised by the NT Act (at [955]). He commenced his evaluation of the question as follows:

***Evaluation***

965 It is necessary to return again to the nature of the ‘use rights’ which Lucas, Sackett and Gara acknowledged the LSA to have in the Overlap Area at effective sovereignty. There was no suggestion that these were personal reciprocal rights of the kind discussed in *Akiba* and in *Ngarla*. Nor was it suggested that these use rights were limited to particular purposes or particular occasions or encompassed only some of the NTRI claimed by the Walka Wani in their two applications. It seemed to be accepted that these were use rights without limitation.

966 In the final submissions, counsel for the State submitted that the use rights of the Walka Wani were not a right in relation to land for the following reasons:

[I]t is not a right which arises from the connection in any real sense to the land. It’s a right that’s more generally and indirectly or indirectly related to the land which arises from the ceremony itself in the case of ceremonies, and in the case, for example, [of] Dreaming, the right to go to a site arises from that Dreaming story, but not from a relationship to the land, and in the case of hunting, *it’s a contingent right, contingent on the permission of the land holders to come onto the land* … [T]hat’s why we say they’re not core rights … because it’s only ownership rights in relation to land which are core … We get to the point on contingent right-holders, be it by marriage or otherwise, ie, *people who have permission* to come onto the claim area because they’re married don’t have rights in relation to the land … [people who have] use rights, are not right-holders who claim the country as their own *because their rights are contingent upon the permission of others*.

(Emphasis added)

967 The idea that the rights and interests which the LSA had in the Overlap Area at effective sovereignty were contingent because their exercise was subject to the permission of the Arabana faces the difficulty that there is relative absence of evidence that that was so. There was certainly no express evidence to that effect. There are, however, three matters from which it could possibly be inferred that the exercise of LSA of use rights was subject to permission, or at least control, by the Arabana.

196 The primary judge went on to consider three features of the evidence from which it could “possibly be inferred” that the exercise by LSA of “use” rights was subject to the permission or control of the Arabana. First, there was an historical account of conflict between Aboriginal “tribes” at Mt Margaret Station in 1870, involving invading “Macumba natives”. The primary judge said that the account suggested that the (presumably) Arabana situated at Mt Margaret Station considered themselves entitled to repel (presumably) LSA from the area. Second, the primary judge took into account evidence of Mr Strangways (which his Honour accepted) in which he have an account of the YA seeking permission from Arabana men to have a ceremony at Anna Creek. Mr Strangways also referred to Arabana men removing YA men from that area. The primary judge accepted that that evidence indicated that permission was recognised as being required, that it had been granted and then revoked. Of those factual events, the primary judge said (at [973]):

However, both Mt Margaret and Anna Creek are well south of Oodnadatta and, other than by a process of inference, it cannot be assumed that the same position applied in respect of the Overlap Area.

197 Third, the primary judge said that by starting with the proposition that the Arabana were “owners” of the Overlap Area it could be inferred that an incident of ownership was that they could grant permission to others to enter and engage in activities there and that their express, tacit or standing permission was required (at [974]). His Honour said that premise was problematic because the NT Act did not speak of “ownership” but rather of the possession of rights and interests. To say that a group had “ownership” was to invite questions as to the nature of the rights and interests encompassed by the word and, in particular, whether it encompassed an ability to exclude people who entered without permission, or otherwise had the consequence that other persons were not entitled to exercise some usufructuary right with respect to it. The primary judge cited *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 (at 358). His Honour continued:

976 **As I have said, the evidence did not support a view that non-Arabana were entering the Overlap Area** only with some form of permission. To the contrary, the ethnographic-historical evidence suggests relatively free and easy movement onto, and about, the Overlap Area. As noted earlier in these reasons, Hercus noted the acceptance by the Arabana that in the areas where the ‘cutting out’ of territory began or ceased, ‘the neighbouring people may ‘have a right’ in the area, that is, they may come there freely for ceremonies without this being considered an act of aggression’.

977 It is perhaps pertinent that the notion **that the exercise of rights and interests by the Walka Wani had been subject to the grant of permission by the Arabana did not emerge clearly until the anthropologists were giving concurrent evidence**. They, other than Sackett, had agreed that the Arabana and, at the least, the LSA, did possess rights and interests in, and had a connection with, the land and waters of the Overlap Area. That agreement was not expressed to be the subject of a qualification about permission. **Moreover, all the anthropologists and Gara had agreed that members of the claim groups had held rights and interests in the Overlap Area under the traditional laws and customs of the society or societies of which that person was a member. Again, this agreement had been given without qualification.** On my findings, the agreement is incorrect insofar as it included the Yankunytjatjara/Antakarinja but otherwise a ‘right’ possessed under the traditional laws acknowledged and customs observed of one people, but which can be exercised only with the permission of another People in accordance with their traditional laws and customs is a curious species of right.

978 The position may have been different if the proposition had been that entry onto, or use of the country, could be made by the Antakarinja/LSA only with the permission of the Arabana. In that event, one could say that the right to enter or use arose, and was possessed, by virtue of the permission, and not by the acknowledgement of the traditional laws and the observance of the traditional customs of the Antakarinja/LSA. But that is not the position on which the anthropologists agreed.

979 Sackett said that he regarded some of the elements of connection referred to in the evidence (ritual activity, hunting and gathering and so forth) as ‘[falling] under an umbrella of rights and interest and laws and customs, but it’s not in relationship to the possession of land … I make that distinction’. This seemed to be reflected in the submission of the State set out above. I note that s 223 of the NT Act is not concerned with the possession of land, but with the possession of rights and interests in relation to land. Moreover, with due respect to Sackett, his evidence did not make clear why the possession of a right to engage in ritual activity on land, or to hunt and gather on land, under traditional law and custom, is not a right in relation to land. Rights of these kinds are well recognised forms of NTRI – see s 223(2) of the NT Act.

(emphasis added)

198 In his concluding paragraphs on this issue the primary judge recognised the force in the Arabana’s submission that the Walka Wani had made no claim to possess NTRI in the Overlap Area until 2013 (notwithstanding decades of activity asserting NTRI in other areas that had been said by them to align with the extent of their interests), and so could only recently have come to regard it as Walka Wani country. The primary judge said that that history reinforced the need to closely scrutinise the Walka Wani Claim. However, he that it was “pertinent that, even despite their views about the ethnographic-historical evidence, the anthropologists recognised that the ancestors of the Walka Wani had use ‘rights’ in the Overlap Area at effective sovereignty, possessed under their traditional laws and customs” (at [983]). His Honour said that rejection of the Walka Wani Claim would involve rejection of those aspects of the anthropologists’ evidence. The primary judge concluded:

984 …  While there is much in the Walka Wani case which may be questioned (as the reasons above indicate), I consider that there is sufficient to warrant acceptance of the anthropologists’ opinions to the effect that the Walka Wani did have use rights, by virtue of their acknowledgement and observance of traditional law and custom over the Overlap Area at effective sovereignty.

985 In my view, these use rights were well recognised forms of NTRI for the purposes of the NT Act. I note again, that it was not suggested that the use rights did not encompass all the NTRI claimed by the Walka Wani in their applications.

## The orders appealed from

199 The Arabana and the State each appeal from the orders made on 23 December 2022 by which the Determination was made in favour of the Walka Wani based on the reasons for judgment just summarised.

200 The Determination identifies the “Native Title Holders” as follows:

5. The Native Title Holders are:

(a) all those Lower Southern Arrernte persons who have a traditional connection to the Determination Area, being all of those described in Schedule 4 who:

(i) identify as Lower Southern Arrernte; and

(ii) are recognised under the relevant traditional law and custom by other Native Title Holders as having rights and interests in the Determination Area; and

(b) all those Yankunytjatjara and/or Luritja persons who:

(i) have a spiritual connection to the Determination Area and the Tjukuma associated with it because in the case of each of them:

A. the Determination Area is his or her country of birth (also reckoned by the area where his or her mother lived during the pregnancy); or

B. he or she has had a long term association with the Determination Area such that he or she has traditional geographical and religious knowledge of that country; or

C. he or she has an affiliation to the Determination Area through a parent or grandparent with a connection to the Determination Area as specified in sub-paragraph (A) or (B) above,

including all of those described in Schedule 5 who identify as Yankunytjatjara or Luritja; and

(ii) are recognised under the relevant traditional law and custom by other Native Title Holders as having rights and interests in the Determination Area.

201 Schedules 4 and 5 describe the LSA and YA respectively by reference to apical ancestors from whom the present day native title holder are descended, so indicating that the determined NTRI are of such a nature as to be transmissible by descent in accordance with traditional laws and customs existing since sovereignty.

202 The nature of the rights and interests determined in the orders are in the same terms claimed by the Walka Wani (extracted at [179] above) including (at [6(m)]) a right to “speak for country and make decisions about the use and enjoyment of the Determination Area”.

## Issues arising on the appeals

203 The Arabana appeal from the Determination on multiple bases particularised in ground 2 of the Arabana NOA. The State’s amended notice of appeal (State ANOA) contains three grounds. There is a large degree of overlap in the grounds raised in each appeal and the submissions made in support of them. The arguments are very briefly summarised at [3] of the State’s written submissions. It alleges that the primary judge erred:

(1) in fact by failing to find that permission was required from the Arabana for non-Arabana to enter the Overlap Area when there was un-contradicted evidence supporting that conclusion (State ANOA, ground two at [3]);

(2) in fact by misinterpreting, and overstating the extent of a report of a joint conference of experts conducted prior to trial (Joint Report) (State ANOA, ground one at [2(ii)] and [3(iii)]; Arabana NOA, ground two at [3(b)]);

(3) as a consequence of (1) and (2) above, in law, in finding that the rights of the LSA were rights that gave rise to NTRI claimed by the Walka Wani and, specifically, that the particular usufructuary rights were NTRI within the meaning of s 223 of the NT Act (State ANOA, ground one at [1] – [3]; Arabana NOA, ground two);

(4) in law by denying procedural fairness to the Arabana and the State due to the failure to put the interpretation of the Joint Report to the relevant experts, and parties in closing submissions, when that misinterpretation is the only basis on which the Walka Wani Claim succeeded at trial (Arabana NOA, ground two at [3(c)] and [3(d)]);

(5) in law by not requiring the Walka Wani to establish that the subjective rights were both the consequence of a traditional LSA law and/or custom, and rights in relation to land, within the meaning of s 223 of the NT Act with respect to the Overlap Area (State ANOA, ground two);

(6) in fact and law by finding that a limited range of usufructuary rights of the LSA gave rise to all of the rights claimed by the Walka Wani (State ANOA, ground one at [4], ground three at [6(iii)]; Arabana NOA, ground two at [5]).

## Principles

204 The principles with respect to “reciprocity-based rights” are discussed by Finn J in *Akiba v Queensland (No 3)* (2010) 204 FCR 1 (*Akiba No 3*), and on appeal in *Commonwealth v Akiba* (2012) 204 FCR 260 and ***Akiba*** *v The Commonwealth* (2013) 250 CLR 209. The Full Court in ***Manado*** *v Western Australia* (2018) 265 FCR 68, conveniently summarised the effect of those judgments:

83 Finally, it is necessary to consider the decision of Finn J in *Akiba v Queensland (No 3)* (2010) 204 FCR 1 (*Akiba (No 3)*), and on appeal in *Commonwealth v Akiba* (2012) 204 FCR 260 (*Akiba FCAFC*) and *Akiba HC*.

84 The question relevantly in *Akiba (No 3)* was whether rights, which could be exercised in the country of ancestral occupation-based rights holders and arose from a ‘reciprocal relationship’ between a member of an ancestral occupation-based rights holding group (the host) and a person outside that group, were properly characterised as native title rights. At [508] of the decision at first instance, Finn J found that under the normative system of the Torres Strait Islanders, reciprocal rights and obligations could properly be described as rights and obligations that were recognised and expected to be honoured or discharged under Torres Strait Islander laws and customs. They were not mere privileges. Justice Finn also recognised that these rights could be passed down through the generations. However, while holding that these rights may provide a ‘passport’ to the host’s country and, with permission, may allow the reciprocal rights holder to undertake the same activities there as the host, Finn J held that the reciprocal rights were ‘relationship-based’ and, therefore, were properly characterised as personal rights as opposed to rights ‘in relation to’ land or waters within s 223(1) of the NTA (*Akiba (No 3)* at [507]-[508]).

85 The Full Court dismissed the cross-appeal against this finding in *Akiba FCAFC*. In their joint judgment at [130], Keane CJ and Dowsett J (Mansfield J relevantly agreeing at [148]) upheld the primary judge’s characterisation of the reciprocal rights. Their Honours held that, insofar as the reciprocal rights relate to land and waters, they are not held by reason of the putative holders’ *own* connection with the land and waters but rather were ‘dependent on the permission of other native title holders for their enjoyment’ and were mediated ‘through a personal relationship with a native title holder’ (*Akiba FCAFC* at [130]). As such, the majority accepted the anthropological description of the rights as ‘status based’ reciprocal rights, being rights in relation to the land and waters of another person, as opposed to occupation based rights to access and use land and water under traditional laws and customs such as those concerning descent from an original occupier of the land (at [131]). This characterisation of the reciprocal rights as rights of a personal character dependent on status and not rights in relation to the waters concerned for the purposes of s 223(1), was in turn upheld by the High Court:  see *Akiba HC* at [45] (French CJ and Crennan J) and at [47] (Hayne, Kiefel and Bell JJ).

86 The decisions of the trial judge and the Full Court in *Akiba*, confirmed by the High Court, provide clear examples of how not every identified ‘right’ or ‘interest’ arising under the laws or customs of Indigenous peoples will necessarily be found to be ‘in relation to’ land or waters. Close analysis is required of the asserted rights or interests in order properly to characterise them for the purposes of s 223(1). They also demonstrate that where the rights are held mediately by reason of a personal relationship only with a native title holder, who may grant or withhold permission, the rights cannot be said to be native title rights for the purposes of s 223 of the NTA.

(emphasis in original)

205 The nature of a “reciprocity-based right” is further explained in the reasons of Bennett J in *AB (dec’d) (on behalf of the* ***Ngarla*** *People) v Western Australia (No 4)* [2012] FCA 1268; 300 ALR 193, extracted by the primary judge at some length in his own reasons. It is convenient to reproduce some of those extracts here as they represent an agreed position between the parties as to the applicable principles. After summarising Finn J’s reasons in *Akiba No 3*, Bennett J said:

539 The state and the Ngarla contend that the purported licences and permissions given to the Warrarn are in the nature of ‘reciprocity-based rights’ identified by Finn J in *Akiba (No 3)*. The state says that the permissions rely on a particular relationship between a Ngarla and a non-Ngarla person and, accordingly, are more correctly characterised as rights in relation to persons, rather than rights in relation to land. The Ngarla acknowledge that the fact situation in this case is not identical to *Akiba (No 3)*, but say that the reasoning in that case compels the same conclusion here, that is, that the custom of granting a permission or licence to non-Ngarla persons does not give those persons a right in relation to the overlap area. To the extent that a person has a ‘right’ it is a right in relation to persons.

…

541 Personal rights, or reciprocity-based rights, arose in *Akiba (No 3)* out of particular relationships between people who share common principles of ‘respect, generosity and sharing, social and economic obligations and the personal nature of relationships’:  at [505]. The state says that what a particular person can expect of the other depends upon the particular situation and the closeness of the relationship and points out that a partner in reciprocity can be denied, revoked or withdrawn.

542 The state and the Ngarla contrast reciprocity-based rights with descent-based rights, which cannot be withdrawn or varied and the class of holders is not open-ended and indiscriminate. In contrast to the right from descent that cannot be withdrawn, the Ngarla say that the permission ‘right’ remains only as long as the permission remains. They say that any permission given in the past cannot constitute a current right in relation to land and that if the relationship sours, the right disappears.  …

543 The Ngarla also say that the granting of permission in relation to the conduct of participation in law ceremonies is based in reciprocal relationships between communities. Participation in law ceremonies is also based on a person having passed through the appropriate stages of the Law, which is personal to the individual and is not transmissible or assignable. Dr Smith refers to the communal nature of ceremonial activity in the Pilbara.

…

546 The Ngarla say that there is a distinction between the right to participate in the ceremonies themselves (which may not be a right in relation to land) and the right to make decisions as to where and when the ceremonies take place on particular land (which is a right in relation to land).

547 I agree. A right to say what can occur on land is a right in relation to land. The right to participate in ceremonies is a personal right, a status-based right in the *Akiba (No 3)* sense, and is not a right in relation to land. Permission to attend law ceremonies, generally given to all who wish to attend, does not amount to a grant of rights over the land. In the same way, the permission-based rights claimed by the Warrarn, such as the right to conduct rituals, to hunt and fish and to take materials from the land for the purposes of law ceremonies, are dependent upon the core rights of the Ngarla as traditional owners of that land. They are personal or status-based rights. The giving of permission to be ‘free’ in the country is a personal right that does not convey any interest in Ngarla land.

206 The primary judge also emphasised the judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Western Australia v* ***Ward***(2002) 213 CLR 1 (at [59]), their Honours there recognising that “[t]o some degree … respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land found in par (b) of the definition in s 223(1) of the [NT Act]”. However, in *Ward* no issue arose as to whether the asserted rights were reciprocity-based in the sense that they were dependent for their exercise on the grant of permission from persons otherwise possessing NTRI in the subject land.

207 As the primary judge observed, s 223(2) of the NT Act expressly provides that “rights and interests” in s 223(1) includes hunting, gathering, or fishing rights and interests. Such rights and interests may be described as usufructuary or “use rights” in the sense that they involve the exploitation of resources on or in the relevant land or waters. However, consistent with what the Full Court said in *Manado* (at [86]), whether a right constitutes a *native title* right or a *native title* interest is a different question requiring close analysis of the asserted right. In that analysis, a cautionary approach is required where lawyers or experts employ a phrase such as “use rights” in different contexts potentially conveying different meanings. A right to exploit or subsist from the resources of the relevant land will be a NTRI if and only if the statutory definition in s 223(1) is fulfilled. Section 223(2) of the NT Act does not provide otherwise.

208 The definition in s 223(1) of the NT Act will not be fulfilled in a case where the right to hunt, gather or fish is not a right arising under traditional laws and customs (as in the case of a statutory fishing licence granted to a non-Aboriginal person). In accordance with the above authorities, nor will it be fulfilled if the exercise of the right to hunt, gather or fish is subject to the express or tacit permission of other persons granted or withheld in accordance with their NTRI in the relevant land.

209 To speak in terms of a distinction between “core rights” and “use rights” is apt to confuse, because to describe something as a right presupposes that it can be done *as of right*. The word “use” otherwise denotes an activity without informing the question as to whether the activity may only be undertaken with the express or tacit permission of another.

210 The word “ownership” in this context may also be unhelpful if it is used to distinguish between NTRI and non-NTRI. As the primary judge explained, the word “ownership” does not appear in the NT Act. His Honour said (with respect, correctly) (at [918]):

As noted at the commencement of these reasons, the NT Act is not concerned with ‘ownership’ *per se* but with the possession of rights and interests of a particular kind (*Yorta Yorta* at [40]). One consequence of this is that there may be more than one group of Aboriginal people who have native title rights and interests in the one area:  *Drury* at [36] and [165]. Accordingly, the enquiry as to the NTRI claimed by the Walka Wani is not resolved only by an assessment of who it was who ‘owned’ the Overlap Area at effective sovereignty. The finding that a particular people were the ‘owner’ does not have the consequence that no other people could have had rights and interests in the Area. As I have noted, 19th and 20th Century ethnographers and anthropologists, whose writings were received in evidence and subjected to extensive analysis by the expert witnesses and in the parties’ submissions, may not have been alert to the distinction between ‘ownership’ in the common law sense, on the one hand, and the possession of rights and interests in the native title sense, on the other. It is also likely that some of the attempts at tribal mapping were influenced by common law notions of ownership.

211 It is well established that NTRI may exist in the same land or waters, being rights and interests owing their existence to the different laws and customs of different Aboriginal groups. That was the situation in ***Drury*** *v Western Australia* (2020) 267 FCR 203, to which the primary judge referred.

212 In light of the above principles, the questions that arose at trial were whether the Walka Wani (or any members of that claim group) held NTRI owing their existence to a traditional body of laws and customs that was different to that acknowledged and observed by the Arabana and that were not contingent on the permission of the Arabana for their existence or exercise.

213 It is convenient to turn first to the contention that the primary judge misinterpreted or overstated the effect of the Joint Report recording the outcome of the pre-trial of conference of experts on that issue.

## Arguments related to the Joint Report

214 Prior to trial, the primary judge made orders that a Registrar convene a joint conference of experts. The purpose of the conference was to identify, narrow or remove any differences in their opinions. For the purposes of the conference, the parties provided a series of propositions for the experts’ consideration and response. The conference took place on 9 and 10 July 2019.

215 The opinions expressed by the experts in respect of each proposition were then recorded by the Registrar in very brief terms in the Joint Report and each of them signed a copy of it. The Joint Report was before the primary judge at trial.

216 In addition, each of the experts authored separate reports containing their opinions with respect to critical matters in dispute, including the question of whether the Walka Wani possessed NTRI in the Overlap Area as claimed in their SFIC. Those reports formed the experts’ evidence-in-chief. The experts later gave concurrent oral evidence at the trial, including in relation to the responses to the propositions contained in the Joint Report.

217 The reasons of the primary judge refer to the existence of agreements between the experts. The State and the Arabana submit that certain agreements to which the primary judge referred could only have been agreements his Honour discerned from the Joint Report. That submission accords with the reasons considered as a whole and we accept it.

218 It is then submitted that the primary judge erred in interpreting the Joint Report to record the agreements he expressly or implicitly identified. The impugned findings are:

(1) the conclusion (at [977], extracted at [197] above) that anthropologists (other than Dr Sackett) agreed, that the LSA possessed rights and interests in and in relation to the Overlap Area, and such agreement was not subject to any qualification about permission;

(2) the conclusion (at [977]) that “all the anthropologists and Gara had agreed that members of the claim groups had held rights and interests in the Overlap Area under the traditional laws and customs of the society or societies of which that person was a member”;

(3) the consequential conclusion (at [983] – [984]) that rejection of the Walka Wani Claim would involve rejection of aspects of the anthropologists’ evidence recognising that “the ancestors of the Walka Wani had ‘use rights’ in the Overlap Area at effective sovereignty, possessed under their traditional law and customs” (at [983]).

219 The parties’ submissions with respect to the alleged error referred to a number of propositions and their responses in the Joint Report. It is necessary set out those propositions and the experts’ responses to them in full:

**Proposition 1 —**

**a. What is the date of European settlement in relation to the claim area? What is the date of effective sovereignty in relation to the claim area?**

**b. To what extent was the state of affairs in relation to Aboriginal people in the claim area just prior to sovereignty similar or dissimilar to what it was just prior to effective sovereignty?**

|  |  |  |
| --- | --- | --- |
| Mr Graham / Dr Cane/ Dr Liebelt | Dr Lucas / Dr Stockigt | Dr Sackett / Mr Gara |
| a. First contact is 1871-2 (overland telegraph line).Effective sovereignty is 1875-1885 due to establishment of pastoral stations as this impacted on the lives of Aboriginal people in the claim area (1875-1885). Aboriginal society does not collapse as soon as there is contact | a. Settlement is 1860-1861 due to establishment of stations to south of claim area such as Mount Margaret. But this had minimal impact on society.Effective sovereignty is 1872-73 due to establishment of police at pastoral stations (Peake and Charlotte Waters to the south and north of the claim area). | a. Effective sovereignty is 1872-73 due to the establishment and use of the overland telegraph line. There were hundreds of workers in area when line was constructed together with the repair and maintenance of the line as well as people travelling along the line. Significant overlanding of cattle and sheep at this time. The establishment of stations and arrival of police was ground this time also. |
| b. Prior to effective sovereignty there was minimal impact on the claim area.Effective sovereignty is determined by there being a meaningful impact on Aboriginal traditional law and custom caused by European settlement and the establishment of colonial law in the region.Effective sovereignty does not mean the effective collapse of Aboriginal law. | b. Prior to effective sovereignty there was minimal impact on the claim area.Effective sovereignty is determined by there being a meaningful impact on Aboriginal traditional law and custom caused by European settlement and the establishment of sovereign law in the region. Effective sovereignty does not mean the effective collapse of Aboriginal law. | b. Prior to effective sovereignty there was minimal impact on the claim area.1872-3 is the establishment of sovereign law in the region. However, it should not be thought that this brought a collapse to Aboriginal law and custom in the claim area. |

**Proposition 2 - At sovereignty and at effective sovereignty there were Aboriginal people in occupation of the claim area.**

|  |  |  |
| --- | --- | --- |
| Mr Graham / Dr Cane/ Dr Liebelt | Dr Lucas / Dr Stockigt | Dr Sackett / Mr Gara |
| Agree. | Agree. | Agree. |

**Proposition 3**

**a. The Aboriginal people who occupied and possessed rights and interests in the claim area at sovereignty and effective sovereignty were the members of a society united in and by their acknowledgment and observance of a body of laws and customs under which they possessed those rights and interests in and had a connection with, the land and waters of the claim area.**

**b. There was more than one such society whose members possessed rights and interests in and had a connection with the claim area.**

|  |  |  |
| --- | --- | --- |
| Mr Graham / Dr Cane/ Dr Liebelt | Dr Lucas / Dr Stockigt | Dr Sackett / Mr Gara |
| a. Agree. | a. Agree. | a. Agree. |
| b. There were three societies – Lakes Culture (Arabana) and Western Desert (Antakarinja) and Arandic (Lower Aranda) at effective sovereignty in the claim area and surrounding areas, and each group had rights and interests in the claim area according to their traditional laws and customs. Religion is foundational to the vitality of the traditional law and customs of the society.The maps near effective sovereignty are more definitive in their representation than maps in subsequent years. This is because the maps include place names, geographical points and lines to indicate areas and locations. | b. Agree there are three societies in the wider region, but do not accept there was a Western Desert society in the claim area at effective sovereignty.There are different methods of defining social and cultural boundaries in each of the three societies, including the differential operation of social organisational principles.Disagree with Graham, Cane and Liebelt’s point that the early maps are more definitive. | b. Agree there are three societies in the wider region, but do not accept the Western Desert society extended to the more immediate area of the claim at effective sovereignty.Disagree with Graham, Cane and Liebelt’s point that the early maps are more definitive. For example Siebert’s 1898 map places Oodnadatta ground 50kms too far west. |

**Proposition 3A:  At sovereignty and effective sovereignty there was more than one society in the claim area or wider region surrounding the claim area. Each of these had traditional laws and customs which were systemic for attributing ownership of country.**

|  |  |  |
| --- | --- | --- |
| Mr Graham / Dr Cane/ Dr Liebelt | Dr Lucas / Dr Stockigt | Dr Sackett / Mr Gara |
| Agree.Some of these laws and custom are similar or ‘conversant’. For example, birth, descent, elements of social organisation between the moiety system and the section system. | Agree.There are different ways of gaining ownership of country in each of these societies. Cross refer to section 3 of Dr Lucas’ report as to key principles in each system.Ways of naming societies and linguistic groups in the wider region have altered since effective sovereignty. | Agree with both. |

**Proposition 3B: At the edges of regional societies (here Lakes Culture, Western Desert and Arandic), people interacted by way of ceremony, marriage and trade.**

|  |  |  |
| --- | --- | --- |
| Mr Graham / Dr Cane/ Dr Liebelt | Dr Lucas / Dr Stockigt | Dr Sackett / Mr Gara |
| Agree.Ethno-historical evidence suggests stronger interaction between Lakes and Arandic, and Arandic and Western Desert systems than between all three. | Agree.Ethno-historical evidence suggests stronger interaction between Lakes and Arandic, and Arandic and Western Desert systems than between all three. | Agree.Ethno-historical evidence suggests stronger interaction between Lakes and Arandic, and Arandic and Western Desert systems than between all three. |

…

**Proposition 3D:  There are three systems operating in the claim area or wider region surrounding the claim area. Which one, if any or all, is the system of law and custom of the claim area at effective sovereignty?**

|  |  |  |
| --- | --- | --- |
| Mr Graham / Dr Cane/ Dr Liebelt | Dr Lucas / Dr Stockigt | Dr Sackett / Mr Gara |
| The three systems converge in the claim area.Where they converge, there is accommodation of beliefs and rights sharing. In the contemporary era, Kendibi is an example of this convergence. Hookeys Hole is a handover area between the groups. In a handover area, the associated area would include a foraging radius that allows human survival and relevant religious locations that require protection and maintenance.Weight of ethno-historical evidence at effective sovereignty favours and Antakarinja (meaning as per ethnography) and Lower Arandic presence in the claim area.Aboriginal placenames can be both transparent and opaque with regard to meaning in regard to one or more languages such that these names may, or may not, provide any indication of (societal) group attachment. | Lakes Culture system (ie Arabana). Weight of ethno-historical evidence indicates at effective sovereignty it was a Lakes Culture system of law and custom that gave rise to rights in land in the claim area.Placenames can signal Dreaming identities in the landscape. The mythology of each of the three societies (Lakes Culture, Arandic and Western Desert) can be instantiated at named places in the landscapes. | Lakes Culture system (ie Arabana). Weight of ethno-historical evidence indicates at effective sovereignty it was a Lakes Culture system of law and custom that gave rise to rights in land.Although not a linguist, Dr Sackett knows of instances of such instantiation as flagged by Lucas and Stockigt. |

**Proposition 4 — Please identify the society or societies referred to in your answer to proposition 3D above.**

|  |  |  |
| --- | --- | --- |
| Mr Graham / Dr Cane/ Dr Liebelt | Dr Lucas / Dr Stockigt | Dr Sackett / Mr Gara |
| There are three society at effective sovereignty.Cross reference map at Attachment 3. Yankunytjatjara/Antakarinja determination area is a transitional zone from Western Desert to Lakes culture (there are two laws operating). A key Western Desert myth (Red Ochre) starts at Hookeys Hole and passes through the claim area. Accept Arabana has an attachment to Hookeys Hole.Analysis provided in report is a site focused/religious narrative analysis (no boundary focused).Dreamings appear to merge with other Dreamings and there are shared Dreamings.Dr Cane notes that Western Desert are obliged under their laws and customs to maintain sites and perform rituals which are part of the suite of laws and customs underpinned by Aboriginal religious beliefs.Lower Aranda have sites in the claim area. These are elaborated in the Graham/Liebelt’s reports.There are three sites in the wider region surrounding the claim area that appear to be transitional: Kendibi (Antakarinja to Aranda); Maturanya (Yankunytjatjara/Antakarinja to Aranda and Wongkunuru); and Hookeys Hole (Yankunytjatjara/Aranda to Arabana.There is some evidence in the ethno-historic literature of an amalgamated Antakarinja (meaning as per ethnography) and Lower Arandic society (ie Matthews 1900). | There is one society at effective sovereignty (Arabana).From a Lakes Culture perspective, the fact that Western Desert people recognise a site at Hookeys Hole does not make that country Western Desert country.In relation to Western Desert, it appears to be new knowledge. Most place names look like they are descriptors of recent origin (place names don’t tell of mythology).No evidence in the ethno-historical records of an amalgamated Arandic/Western Desert society at effective sovereignty in the claim area. | There is one society at effective sovereignty (Lakes Culture).There are some Dreamings that characterise the Western Desert but these are not necessarily confined to the Western Desert. At times it is necessary to consider possible post contact extensions of Dreamings. Do these now go outside Western Desert country (new knowledge)?No evidence in the ethno-historical records of an amalgamated Arandic/Western Desert society at effective sovereignty in the claim area. |

**Proposition 5 - At effective sovereignty, the claim area was a shared or transitional zone for the societies identified in proposition 3 in which the relevant rights and interests were shared or coexisted.**

|  |  |  |
| --- | --- | --- |
| Mr Graham / Dr Cane/ Dr Liebelt | Dr Lucas / Dr Stockigt | Dr Sackett / Mr Gara |
| Shared zone for ownership, usage rights, ritual and ceremonies. There were linkages facilitated by ceremony, trade and marriage that required the accommodation of different types of rights in land.An area where members of several groups owned and had rights in close proximity. | Not a shared zone for ownership of country.There were linkages facilitated by ceremony, trade and marriage that required the accommodation of different types of rights apart from ownership.**A shared zone with Arandic but not Western Desert people for use rights and ceremony.** | Not shared area in case of ownership of country.**Shared area in case of use rights and ceremony.** |
| Rights co-exist where they are different and are shared where they are similar. If rights conflict, can be resolved through traditional mechanisms including mediation and punishment. |  |  |

(emphasis added)

…

**Proposition 7 - Did all or any of the members of the claim groups at sovereignty and effective sovereignty hold rights and interests in the claim area under the traditional laws and customs of the society (or societies) of which that person was a member?**

|  |  |  |
| --- | --- | --- |
| Mr Graham / Dr Cane/ Dr Liebelt | Dr Lucas / Dr Stockigt | Dr Sackett / Mr Gara |
| Yes | Yes | Yes |

220 It was submitted that it was not open to the primary judge to interpret the Joint Report as embodying an unqualified agreement that the LSA had use “rights” in the Overlap Area at effective sovereignty possessed under their own traditional laws and customs. The finding, it was submitted, involved a misreading of Proposition 7 because it ignores the words “or any” in the proposition wording and ignores other critical responses.

221 That submission should be accepted. Proposition 7 is unhelpfully broad in that a “yes” response may be a response referring to only certain members of the claim groups (plural) or to all or only some members of one claim group. There is no further proposition to identify *which* members of which claim group or claim groups the “yes” response refers to.

222 Whether the “yes” response of the experts may be fairly understood as an acknowledgment that the LSA had non-contingent rights and interests in the Overlap Area owing their existence to the traditional laws and customs acknowledged and observed by the LSA must depend upon the content of other responses informing that question.

223 The responses to Proposition 3D make it clear that there was no agreement between the experts that the traditional laws and customs of the LSA was a system of laws determining NTRI in the Overlap Area at sovereignty. The responses of Dr Lucas, Dr Sackett and Mr Gara that it was a “Lakes Culture” system of laws and customs that gave rise to rights in land in the Overlap Area. Given the wording of that proposition, the responses must be taken to deny that any other system of laws and customs (including that of the Walka Wani) gave rise to rights and interests in the land at sovereignty.

224 The position of Dr Lucas, Dr Sackett and Mr Gara with respect to that critical issue is reinforced by their responses to Proposition 4.

225 The experts’ responses to Proposition 5 must be interpreted in a manner that is consistent with their earlier responses. As such, the reference of Dr Sackett and Mr Gara to “use rights” ought not be understood as a reference to non-contingent rights owing their existence to the traditional laws and customs of the LSA, as those experts had earlier stated that there existed only one system of Aboriginal laws and customs giving rise to the NTRI in the Overlap Area at Sovereignty:  that of the Arabana. The use of the word “ownership” must be understood in the same context. The experts ought fairly to be understood as using that word to denote rights and interests in the land owing their existence to the only system of Aboriginal laws and customs identified by the experts as giving rise to rights and interest in the land at sovereignty:  the Arabana. We do not consider there to be any serious doubt about the meaning of the responses to those propositions.

226 Dr Sackett’s conceptualisation of “ownership” was in any event made plain in the course of concurrent oral evidence given at trial, discussed below.

227 The responses of Dr Lucas must be similarly understood insofar as they employ the word “ownership”. His reference to a “shared zone” must be understood in a manner consistent with his view that there existed only one system of laws and customs giving rise to rights and interests in the Overlap Area at sovereignty, that of the Arabana. The reference to “different types of right” cannot fairly be understood as embodying an opinion that the LSA had rights owing their existence to LSA traditional laws and customs and capable of existing independently (or despite the content of) the traditional laws and customs of the Arabana.

228 The responses of Dr Lucas, Dr Sackett and Mr Gara to Propositions 3, 3A and 3B do not assist the Walka Wani. The responses to 3(a) must be understood as an agreement only in relation to the Arabana as the relevant “Aboriginal people”, and the responses to 3(b) expressly relate to the wider region. Proposition 3A then contains the alternative “or wider region” and the responses must be so understood. Proposition 3B relates to the interactions between regional societies. The responses to Proposition 3B give no content to how those interactions occurred or the system of laws and customs that explained or enabled any of them within the Overlap Area itself.

229 The primary judge was correct to observe that the responses to Proposition 7 in the Joint Report did not contain an express qualification of the phrase “use rights” or “ownership” specifically by reference to the contingency of permission. However, the use by the experts of those phrases must be understood in the context to which we have referred, as well as in the context of detailed expert reports from which the intended meaning of those phrases must be divined. The consequence of the “agreement” discerned by the primary judge is that there existed two distinct sources of native title rights and interest existing in the same area at sovereignty in the sense discussed in *Drury.* The suggestion that Dr Lucas, Dr Sackett and Mr Gara embraced such an outcome finds no support in the Joint Report, nor in their written reports, nor in their oral evidence.

230 In the course of argument on the appeal, counsel for the Walka Wani took the Court to parts of the oral testimony of Dr Lucas and Dr Sackett in support of a contention that, during cross-examination, they had agreed with the proposition that the LSA possessed rights and interests in and in relation to the Overlap Area under LSA laws and customs. The first and principal difficulty with that submission is that the primary judge did not make any such finding arising from the oral testimony. The primary judge’s findings on this point were based on the Joint Report. The second difficulty with that submission is that the passages of oral testimony relied on by the Walka Wani do not demonstrate any such agreement on the part of Dr Lucas or Dr Sackett. The passages to which the Court was taken comprised snippets of testimony only, but when read in context the snippets provided no support for the contention advanced. There is no suggestion in the oral testimony that Dr Lucas or Dr Sackett altered the opinions expressed in their primary reports, and which are reflected in the responses to Propositions 3D, 4 and 5, that at the date of effective sovereignty there was one system of laws and customs that applied in the Overlap Area and that was Arabana. Dr Sackett stated expressly during cross-examination that in circumstances where at the date of effective sovereignty the Overlap Area was Arabana country and not Arrernte country, any use of the land by Arrernte would not be “as of right” but would be as “visitors using the country”.

231 After identifying what he said was an agreement, the primary judge (at [978]) went on to say that the “position may have been different if the proposition had been that entry onto, or use of the country, could be made by the Antakarinja/LSA only with the permission of the Arabana”. In that event, his Honour said, one could say that the right to enter or use the land arose by virtue of the permission and not by virtue of the acknowledgment and observance of Antakarinja/LSA traditional laws and customs. His Honour concluded that passage with the words “[b]ut that is not the position on which the anthropologists agreed”.

232 The State is correct in its submission that the primary judge interpreted the experts’ responses to the propositions (and particularly Proposition 7) to amount to an agreement that LSA had NTRI in the Overlap Area. The submission that the primary judge so misunderstood the Joint Report should be accepted. There is appealable error in that respect.

233 For the Walka Wani it was submitted that the arguments relied upon by the State and the Arabana related to findings of fact with which this Court should not interfere given the restraints on this Court’s task discussed earlier in these reasons. We do not accept that submission.

234 We have emphasised the nature of the task of the primary judge and the highly evaluative process undertaken at trial. However, the error identified in the present grounds of appeal do not fall within the class of error warranting appellate restraint. The error presently identified is one concerning the interpretation of the Joint Report prepared by expert witnesses for the assistance of the Court following their conferral. Such reports are commonly prepared and tendered in trials in accordance with the established practice of the Court in receiving expert evidence (see [7.4] – [7.11] of the Court’s Expert Evidence Practice Note). A joint reports is tendered in circumstances where the experts are called to give evidence and the experts’ primary reports, and oral testimony, are also received in evidence. A joint report is intended to assist the Court by containing a summary of the views of the experts and to state whether and to what extent an expert has modified their opinion following conferral with other experts. The arguments on the appeal are confined to the meaning of the responses contained in the Joint Report. It is this Court’s task to ascertain whether the inference of the existence of an agreement between the experts was one that was open to the primary judge to make on the basis of the document from which the agreement was inferred. Our conclusion is that the impugned findings at [977] and [983] – [984] were not open to the primary judge to make on the basis of the Joint Report.

235 The consequence of that finding will be discussed after consideration of the remaining arguments.

## Arguments concerning procedural fairness

236 Both the Arabana and the State contend that the interpretation placed on the Joint Report was not an interpretation advanced at trial by the Walka Wani, nor was it otherwise made known to them that the primary judge would adopt such an interpretation. Accordingly, it was submitted that the primary judge reasoned to judgment in a manner that had not been fairly foreshadowed to them. It is strictly unnecessary to consider that submission given the identification of substantive error concerning the interpretation and use of the Joint Report and our further conclusions as to the consequences of that error for the resolution of these appeals, discussed below.

237 If we are wrong about that, we would reject the submission that there was a breach of the rules of procedural fairness in connection with that issue.

238 We consider that the Walka Wani advanced an alternate case at trial alleging the existence of separate bundles of rights in the Overlap Area each meeting the description of NTRI, owing their existence to different systems of Aboriginal law and custom in the *Drury* sense. The other parties had a fair opportunity to adduce evidence and advance submissions to meet that case. The rules of procedural fairness did not require the primary judge to disclose the particular course of reasoning he might rightly or wrongly adopt in evaluating and interpreting each item of evidence upon which the parties relied. As discussed below, the experts were cross-examined on the question of whether the “use” rights referred to in the Joint Report were NTRI and by that means adduced evidence to support their express argument that the “use rights” were not rights and interests in relation to land.

## Arguments concerning onus of proof and findings of fact

239 The State’s second ground of appeal is expressed as follows:

5. Given his Honour’s finding that the claim area was Arabana country at sovereignty, and therefore that the system of traditional law and custom operating in the claim area at sovereignty was the Arabana system, his Honour erred in that he did not require the Walka Wani applicants to establish, at sovereignty, that:

i. the Arabana people gave permission, pursuant to their traditional law and custom, to the Walka Wani to exercise use rights in relation to the claim area; and

ii. such rights are native title rights and interest in relation to land within the meaning of s 223 of the *Native Title Act 1993* (Cth).

240 The State’s first ground of appeal otherwise includes an allegation that the primary judge erred in failing to find that the Walka Wani’s use rights in the Overlap Area at sovereignty were personal reciprocal rights of a kind described in *Ngarla* and *Akiba*. Both the State and the Arabana assert that the finding that the Walka Wani could possess rights in relation to land under their own system of traditional laws and custom was not supported by the evidence because it was inconsistent with the evidence of Dr Lucas and Dr Sackett.

241 It is convent to deal with these arguments together.

242 It is to be recalled that the Walka Wani presented a case that asserted that all members of the claim group possessed NTRI in accordance with their traditional laws and customs. The Determination appealed from is expressed in words reflecting the words of the Walka Wani originating application. The arguments of the State and the Arabana relate to the two constituent groups within the Walka Wani, namely the LSA and YA.

243 It is to be recalled that the YA engaged in ritual activities associated with Western Desert tradition and culture. The primary judge expressly concluded that “Western Desert people, whether Yankunytjatjara, Luritja or Antakarinja were not present in the Overlap Area at effective sovereignty in other than in a transient way and did not have NTRI in the Area other than, possibly, with respect to red ochre ceremony” (at [934]). That conclusion left open an inquiry as to whether the conduct of ritual activities associated with the red ochre ceremony gave rise to NTRI in the Overlap Area. The Determination ultimately defined the native title holders in terms that included all constituent members of the Walka Wani, both LSA and YA.

244 However, the reasons do not illuminate the evidentiary material upon which a discrete conclusion respecting the YA members of the Walka Wani claim group may have been based, other than reference to anthropological evidence touching on the subject of ceremony or ritual activities.

245 The onus was on the Walka Wani to prove the existence of the particular NTRI alleged on their application. The finding of the primary judge that the Overlap Area was not occupied by (relevantly) the YA at sovereignty other than in a transient way meant that the Walka Wani had to satisfy that burden in a way that accommodated that finding as well as the finding that there existed a different system of law giving rise to NTRI in the Overlap Area possessed by members of another Aboriginal society (the Arabana). That is the (now unchallenged) factual context in which the Walka Wani Claim fell to be determined. It was not for the Arabana to demonstrate that permission to access the Overlap Area was required. It was for the Walka Wani to demonstrate that it was not.

246 The primary judge did not point to the existence of any agreement among the anthropologists concerning the YA of the kind he rightly or wrongly identified in relation to the “user rights” of the LSA. It is unclear how the primary judge came to be satisfied that the Walka Wani had discharged its onus of proof with respect to the facts and circumstances existing *at sovereignty* and how those facts and circumstances supported a finding that NTRI relating to ceremony or ritual are *now* possessed by persons descended from the apical ancestors listed in Schedule 5 of the Determination. On this appeal the Walka Wani have not challenged the finding that at sovereignty Aboriginal people associated with Western Desert culture were not present in the Overlap Area other than in a transient way. They have not pointed to evidence capable of supporting the claim that the YA apical ancestors possessed NTRI at sovereignty that were capable of being transmitted by descent so as to now be enjoyed by the present day descendants of named apicals. It is especially unclear how such persons could possess NTRI of the nature referred to in [6(m)] of the Determination, namely a right to “speak for country”.

247 In defence of these appeals the Walka Wani submitted that the description of the claim group contained in its originating application (which now finds expression in the description for the “native title holders” in the Determination) is identical to the description of the native title holders in the determination made in the *Eringa No 1 Determination*. It was submitted that the recognition of the Walka Wani, so described, as a single Aboriginal “society” or as “the members of two inter-related and inter-penetrating societies” could not be called into question at first instance because of the *in rem* nature of the judgment constituting the *Eringa No 1 Determination*. The Walka Wani submitted that the assertion that the claim group as described constituted “the members of two inter-related and inter-penetrating societies” was not the subject of challenge before the primary judge. The submission, as we understood it, was that there was no basis for the Determination made by the primary judge to distinguish between the constituent elements of the claim group, such that the findings that the LSA held NTRI in the Overlap Area would warrant a determination naming the whole of the claim group as native title holders.

248 As the Full Court explained in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 (at [81]), NTRI may be possessed communally in the sense that there exists a normative system of laws and customs by which the intermural allocation of particular rights and interests within the boundaries of a determined area is subject to the content of those laws and customs. In the context of a claim asserting the existence at sovereignty of family based estate groups, the Full Court said, different members of an Aboriginal society may “employ differing arrays of rights within and outside their particular family or estate country” (citing *Attorney-General (NT) v Ward* (2003) 134 FCR 16 at [239]). The Full Court further explained (at [81]):

…  What this says, relevant to the present case, is that a composite community of estate holding groups may comprise a community which enjoys communal ownership of the native title rights and interests albeit that they may be intramural allocations between particular family or clan groups or other sub-sets of the community.

249 All of that may be accepted as a matter of principle. However, the onus remained on the Walka Wani to prove on the balance of probabilities that the particular persons falling within the claim group description held NTRI in the Overlap Area. That onus could not be discharged by reliance on a determination made in another place in which their NTRI had previously been recognised as held communally by those same people. The submissions of the Walka Wani in response to the grounds of appeal do not explain how a determination describing the native title holders in part by reference to YA apical ancestors could be sustained in light of the unchallenged finding that the YA were not present in the Overlap Area at sovereignty other than in a transient way and the absence of evidence that whatever rights were exercised by those ancestors were such as to be transmissible by descent. To describe the NTRI as “communal” does not overcome the fact that the primary judge made different factual findings about rights and interests held (or not as the case may be) by the LSA on the one hand and the YA on the other, including at sovereignty. The submission of the Walka Wani based on the *Eringa No 1 Determination* and concepts of communal rights and interests do not provide an answer to the arguments impugning the inclusion of the YA as “native title holders” in the Determination appealed from. The arguments and the grounds of appeal associated with this discrete issue should be upheld.

250 Finally on this topic, it is not correct to say that the composition of the Walka Wani claim group as members of two inter-related and inter-penetrating societies was not in dispute at first instance in the sense that it was not open to the primary judge to give separate consideration to the possession of NTRI by the LSA and YA as constitute elements of the asserted single society. It is apparent that the trial of the Walka Wani Claim proceeded from the basis that it was necessary to identify which Aboriginal persons were present in the Overlap Area at sovereignty, the body of traditional laws and customs observed by them and whether those laws and customs gave rise to NTRI at that time. The historical inquiry yielded different answers in relation to the LSA and the YA.

251 It was next submitted by the State and the Arabana that the primary judge reasoned to a conclusion that implicitly reversed the onus of proof. That was said to be evident from the emphasis the primary judge placed on the absence of evidence capable of supporting an inference that permission was required, rather than on evidence positively establishing that it was not.

252 The reasons for judgment do not disclose an error of that kind. It is true that the primary judge asked himself whether an inference could be drawn that the permission of the Arabana was required in order for the “user” rights to be exercised. However, that part of the reasoning should be understood in the context of reasons for judgment disposing of the Walka Wani Claim as a whole. The primary judge may be understood to have rejected a contention that the existence of NTRI possessed by the Arabana at sovereignty necessarily required an inference to be drawn about the content of Arabana traditional laws and customs concerning the presence of non-Arabana people on the relevant land.

253 The primary judge accepted evidence of factual events suggesting that the Arabana had historically repelled invaders from Anna Creek and Mt Margaret Station. His Honour should be understood to have discounted the weight to be afforded to that evidence when declining to draw the inference that the LSA required permission to exercise rights in the nature of “user rights”.

254 Consistent with the manner in which the Arabana Claim was decided, the primary judge did not readily draw inferences as to the content of Arabana laws and customs as it related to the Overlap Area from facts and circumstances appertaining to the land subject to the 2012 Arabana Determination. The weight to be afforded to that aspect of the evidence was for the primary judge to determine. It was plainly open to the primary judge to afford little weight to the evidence of Mr Strangways concerning disputes further south of the Overlap Area.

255 The possession of NTRI by the Arabana did not of itself necessitate an inference that non-Arabana people required permission to undertake activities in or in relation to the Overlap Area at sovereignty. As the primary judge correctly observed, there may exist NTRI owing their existence to different traditional laws and customs in relation to the same area. That was the “shared area” case maintained by the Walka Wani from the time that they amended their claim. Whatever be the evidentiary case of the Walka Wani on the question, it could not be answered by pointing only to the finding that the Arabana possessed NTRI there. The failure to draw such an inference does not, of itself, give rise to an error warranting appellate intervention.

256 The primary judge otherwise referred to historical material relevant to the question of whether “user rights” referred to by the anthropologists were exercisable at sovereignty without the permission of the Arabana. That included the observations the primary judge made as to the likely diffusion in the boundary between Arabana and the LSA, giving rise the prospect that there was a “shared” area. On that topic, the primary judge did not assume that the diffused boundary was situated in or on the Overlap Area. He explained (at [921]):

There is likely to have been some diffusion in the boundary between the Arabana and the LSA, wherever it was. This gives rise to the prospect that there was some area in which both had rights and interests of some character. However, the ethnographic-historical evidence is just as consistent with such a ‘shared’ area having been to the north and north-east of the Overlap Area, that is, closer to the Macumba which many of the early ethnographers thought was the boundary, with the consequence that the Overlap Area to its south was wholly Arabana. Thus, it is equally possible that the former ‘shared’ area is now the subject of the Yankunytjatjara/Antakarinja Determination and the Eringa No 1 Determination because the Arabana have since ceased to have the requisite connection with it. On such an understanding, it would not follow that the LSA or the Antakarinja had rights and interests in the area which is now the Overlap Area.

257 It is true that the primary judge observed that references by Dr Lucas and Dr Sackett to “user rights” were not accompanied by any suggestion that they were personal reciprocal rights of the kind discussed in *Akiba* and *Ngarla*. However, the observation is nothing more than that: a reference to there being a lack of detail furnished by the experts as to the anthropological basis for asserting that the rights were “contingent” in the sense discussed in the two authorities. The observation involved error. However, the circumstance that the primary judge embarked on a critical evaluation of evidence relied upon by the State and the Arabana on the question of permission does not, without more, indicate that the primary judge reversed the onus of proof.

258 The primary judge otherwise referred to ethno-historical evidence suggesting relatively free and easy movement onto and around the Overlap Area. There is reference (at [976]) to evidence of historian Ms Louise Hercus to the effect that there had been “acceptance by the Arabana that in the areas where the ‘cutting out’ of territory began or ceased, ‘the neighbouring people may ‘have a right’ in the area, that is, they may come there freely for ceremonies without this being considered an act of aggression’.”. That observation was obviously relevant, given the proximity of the Overlap Area to a native title determination made in favour of the LSA to the north. The primary judge may be understood to have afforded considerable weight to the ethno-historical record of apparently free movement, given that the focus was on the nature of the rights and interests possessed by the Walka Wani at sovereignty.

259 The evidence of Ms Hercus does not involve any acceptance by the Arabana about exactly where territory “cut out”. However, it did provide a further basis for the primary judge affording little weight to the evidence of Mr Strangways with respect to the aggressive repulsion of “invaders”, given that that activity had occurred significantly further to the south.

260 It is otherwise significant that the primary judge did not rely on the evidence of Ms Hercus in order to identify where the cutting out of territories occurred. His Honour did no more than to note the *possibility* that such a place fell within the Overlap Area, whilst saying that it was equally possible that any such “shared country” fell well north of it. To have done otherwise would have stretched the historical records beyond their natural limits.

## Arguments concerning the evidence of Dr Sackett

261 The primary judge was plainly aware that Dr Sackett had expressed an opinion that the “user” rights of the LSA in the Overlap Area were contingent in nature and that, for that reason, they did not constitute NTRI. Of that aspect of the evidence, his Honour said (at [979]):

Sackett said that he regarded some of the elements of connection referred to in the evidence (ritual activity, hunting and gathering and so forth) as ‘[falling] under an umbrella of rights and interest and laws and customs, but it’s not in relationship to the possession of land … I make that distinction’. This seemed to be reflected in the submission of the State set out above. I note that s 223 of the NT Act is not concerned with the possession of land, but with the possession of rights and interests in relation to land. Moreover, with due respect to Sackett, his evidence did not make clear why the possession of a right to engage in ritual activity on land, or to hunt and gather on land, under traditional law and custom, is not a right in relation to land. Rights of these kinds are well recognised forms of NTRI – see s 223(2) of the NT Act.

262 It is submitted (and we accept) that, the closing words of that passage do not fairly reflect the evidence of Dr Sackett, including evidence summarised by the primary judge earlier in his reasons as follows:

942 The anthropologists agreed that there is a general distinction between ‘core’ rights and ‘use’ rights in relation to land.

943 Sackett explained the distinction as follows:

Q: When you talked about people having the right to use country, the use of country, does that amount to having traditional rights and interests in the …?

A: Well *they would be of traditional kind* but they wouldn’t be *ownership* rights. Professor Sutton draws a distinction between core and contingent rights and interests. Core rights would be the small group of landholders and the contingent rights would apply to them and to others, so that they could use the country, use the waters and resources of the country but there would be others, the contingent right holders that would come in and use the country. For instance, if you had a situation of patrifiliation. The woman coming from elsewhere [who] marry the men of the group would have contingent rights and interests. They would be *exploiting the resources* of the country. They would not be considered to be *owners* of the country.

Q: When you say contingent rights and interest you mean contingent upon the marriage?

A: In that case, yes.

(Emphasis added)

944 Lucas gave evidence to similar effect:

I think Dr Sackett’s characterisation was both very clear and very concise. We can get much more complicated but I find that that working definition of *a distinction between ownership and use* in particular very useful. *Ownership* I would agree included things like control of access, the right to give permission for entry or access or use of an area, that that is entailed in traditional rights of ownership, and that *this is distinct from the right that people have to use and access the country* either for subsistence purposes or for ritual ceremonial purposes. I think it is a workable and fair distinction.

(Emphasis added)

945 As is apparent, ‘core’ rights are likened to ‘ownership’, whereas ‘use’ rights are limited to rights of use for particular purposes or particular occasions and may exist subject to some form of contingency.

263 Considered as a whole, Dr Sackett’s evidence must be understood to mean that the “user rights” of the LSA were not rights and interests in relation to land because their existence and exercise was conditional upon the permission of the Arabana as “owners” or “core right holders”. The distinction between core and contingent rights was emphasised by Dr Sackett and by the State in submissions for that reason. The reasoning of the primary judge at [979] further supports a conclusion that he proceeded on the erroneous assumption that Dr Sackett had agreed to a proposition that the LSA exercised user rights in the Overlap Area pursuant to LSA traditional laws and customs without reference to the Arabana. As we have said, Dr Sackett had not embraced such a finding, whether at the Joint Conference or otherwise.

264 On any view of the evidence, it was plain that the State and the Arabana had put the Walka Wani to proof on the question of whether the “user rights” referred to by the anthropologists in the Joint Report were NTRI as defined in s 223 of the NT Act. The focus of the primary judge was upon the perceived deficiencies of the material adduced by the State and the Arabana on that question. However, missing from the reasons for judgment is an analysis of any evidence adduced by the Walka Wani as to the nature of the “user rights” existing at sovereignty, the content of the traditional laws and customs under which they existed at that time, the existence of a connection with the Overlap Area by those traditional laws and customs, and the means by which any such rights or interests were transmissible by descent from the persons claimed in their originating application to be apical ancestors of the present day native title holders.

265 Whilst the reasoning does not disclose an erroneous reversal of the onus, it does involve a finding of the existence of NTRI to the present day that has insufficient support in the material to which his Honour referred. The submissions of the State and the Arabana are upheld in that more limited respect.

## Failure to have regard to additional evidence of Mr Strangways

266 The primary judge concluded that there was no express evidence to the effect that exercise of rights by the LSA in the Overlap Area was subject to permission. We have already explained why it was open to the primary judge to discount the weight to be afforded to Mr Strangways’ evidence concerning the incident at Anna Creek and the historical material concerning conflict at Mt Margaret Station. However, the statement that there was no express evidence to the effect that non-Arabana people did not require the permission of the Arabana to access resources or perform ceremony within the Overlap Area omits mention of the additional oral evidence given by Mr Strangways on that subject. That evidence was to the effect that Aboriginal people would come together for ceremonies in what he termed “tribal interaction” and that it had always been the case under Arabana laws and customs that Aboriginal people who were not Arabana required the permission of the Arabana to visit Hookeys Hole.

267 It will be recalled that the trial was conducted on the basis that Hookeys Hole was in such close proximity to the Overlap Area that it featured heavily at trial. The reasons of the primary judge confirm that Aboriginal laws and customs concerning Hookeys Hole was highly informative of the questions arising in the Overlap Area immediately to the north.

268 Mr Strangways also said that apart from authorised Arrernte custodians, non-Arabana Aboriginal people could not enter sites in the Overlap Area, “in no manner – no way, manner or form”. Later in his evidence he repeated that people who were not Arabana needed permission to go to Hookeys Hole, and that had always been the case under Arabana law. He repeated that non-Arabana Aboriginal people needed permission to go to Oodnadatta common. He said that permission to go to sites needed to be obtained from senior Arabana men. He said that permission was required to go to places that weren’t sacred. Mr Strangways said that people who were not Arabana in fact went to those places without permission, but under Arabana law they should still ask. Mr Strangways said that the Arabana exercise “utter sovereignty of countries that they own and ceremonial grounds would fall under that category”. He said that the expression “utter sovereignty” was a term taught to him by his Elders and that it equated to “utter ownership”. He said that if non-Arabana transgress Arabana sites the Arabana take a dim view. He later expressed some disinclination to respond to questions about non-Arabana ceremonies taking place at Hookeys Hole. He explained that he was not authorised to grant permission for others to access the area because he was not an initiated man but he later acceded to the proposition that ceremonies by non-Arabana groups should not be occurring there. He said that if senior Arabana men had been asked for permission they would have said no. It was not put to Mr Strangways that his knowledge about the requirement for permission derived from anything other than traditional Aboriginal laws and customs. It was therefore highly relevant to the position as it existed at sovereignty, notwithstanding the subsequent dislocation of the Arabana from the subject land and the findings with respect to present day connection.

269 This Court was not taken to evidence contradicting Mr Strangways’ understanding of the content of Arabana traditional laws and customs, relating to the requirement for permission and the apparently related concept of utter sovereignty as it applied in the Overlap Area and *in rem* close proximity at Hookeys Hole. His evidence accords with the opinions of Dr Sackett with respect to the distinction between core rights and rights that can only be exercised with the permission of the core right holders. It is not inconsistent with the evidence of Walka Wani witnesses and the use of the word *Nguraritja* to describe the Arabana as traditional owners, and it said something about the rights of such owners to grant or withhold permission to others to access the country in accordance with Mr Strangways knowledge of traditional laws and customs.

270 The primary judge was accordingly incorrect in his conclusion that there was no express evidence concerning the requirement that non-Arabana people obtain permission to enter the Overlap Area under Arabana traditional laws and customs, including for purposes relating to ritual activity.

271 On that basis and in light of the error earlier identified concerning the Joint Report we are satisfied that the primary judge erred in reaching his state of satisfaction that Walka Wani had established that the subject rights were rights in relation to land within the meaning of s 223 of the NT Act. It is not necessary to characterise the error as a reversal of the onus of proof. It is sufficient to find that there was an insufficient evidentiary foundation to establish the Walka Wani Claim to the requisite standard.

## The nature of the determined NTRI

272 As we have mentioned, the Determination describes the NTRI to include (at [6(m)]) a right to “speak for country”. Counsel for the Walka Wani acknowledged that rights to that extent and of that nature would encompass “a right to control access, or a right to determine use and the like”.

273 Counsel described that aspect of the Determination as “anomalous”. The Walka Wani did not maintain any argument that the recognition of such a right found support in the reasons for judgment that were otherwise favourable to the Walka Wani (and in particular to the LSA members of the composite claim group).

274 In addition, for the reasons given above, we consider that there is an absence of findings in the written reasons for judgment to support a determination of native title under the NT Act describing the particular NTRI as found. As we have said, the identification of an agreement among anthropologists as to the existence of “user rights” says little about what those rights entailed at sovereignty. Moreover, the Walka Wani did not demonstrate that such rights were transmissible by descent in accordance with LSA traditional laws and customs such that they could be possessed by the present day people defined as descendants of apical ancestors named in the Determination.

## Relief

275 There will be orders on the State’s Appeal and the Arabana Appeal setting aside the orders and determination of the primary judge made on 23 December 2021 in SAD78/2013 and SAD220/2018 and the procedural orders in [2] and [3] of the orders made on 21 December 2021 in SAD38/2013.

276 Those orders will be substituted with orders dismissing the two actions comprising the Walka Wani Claim.

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| I certify that the preceding two hundred and seventy-six (276) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Rangiah and Charlesworth. |

Associate:

Dated: 14 August 2023

REASONS FOR JUDGMENT

O’BRYAN J:

## Introduction

277 I have had the considerable advantage of reading the draft reasons for judgment of Rangiah and Charlesworth JJ. I gratefully adopt their Honour’s description of the background facts, the reasons of the primary judge and the grounds of appeal. I also adopt their Honour’s abbreviations.

278 In relation to the State Appeal concerning the Walka Wani Determination and the Arabana Appeal in so far as it concerns the Walka Wani Determination, I agree with their Honour’s reasoning, conclusion and proposed orders. There is nothing I wish to add.

279 In relation to the Arabana Appeal in so far as it concerns the dismissal of the Arabana Claim, I have arrived at a different conclusion to Rangiah and Charlesworth JJ and consider that the appeal should be allowed. For the most part, I agree with the reasoning expressed by their Honours in relation to the various particulars to ground 1 of the Arabana’s further amended notice of appeal. The basis on which I would allow the appeal is relatively confined and relates to the first particular to ground 1 which is expressed as follows:

The primary Judge erred in failing to approach the assessment of Arabana connection for the purposes of section 223(1)(b) of the *Native Title Act 1994* (Cth) (**NTA**) by identifying :

a. the content and nature of the Arabana claimants' traditional laws and customs found to exist at effective sovereignty;

b. how, pursuant to those Arabana traditional laws and customs:

i. NTRI in land and waters arise; and

ii. how the Arabana connect to land and waters; and

c. whether connection in accordance with the traditional laws acknowledged and traditional customs observed had subsequently ceased to exist.

280 It can be observed that the chapeau to the first particular focusses on the “connection” element of the definition of native title in paragraph (b) of s 223(1) of the Act. As discussed below, the reasons of the primary judge also have a primary, almost exclusive, focus on the “connection” element of the definition. The primary judge formulated the primary question for determination on the Arabana Claim as whether the Arabana had demonstrated “continued connection” to the Overlap Area (see at [56] and [843]), and his Honour’s ultimate conclusion was that he was “not satisfied that the Arabana have established the maintenance of their connection with the Overlap Area in accordance with the traditional laws acknowledged and traditional customs observed by them” (at [916]). It is not entirely clear why his Honour’s reasons have that focus, but there are indications from both his Honour’s reasons and the submissions of the parties that the focus on “continued connection” resulted from the manner in which the case was argued by the parties at trial.

281 In support of the first particular to ground 1 of the further amended notice of appeal, the Arabana contend that the primary judge failed to properly address the issues that arise from the statutory definition of native title and also misstated the requirements of the statutory definition, which led his Honour into error. Having carefully reviewed his Honour’s reasons, I respectfully consider that the Arabana’s contention must be accepted. There are a number of difficulties with the primary judge’s approach to the enquiry required by s 223(1), including particularly the primary judge’s almost exclusive focus on the “connection” element of the definition and the manner in which the primary judge expressed the relevant enquiry and analysed the evidence. The cumulative effect of numerous problems, discussed below, is that I am persuaded that the primary judge misdirected himself with respect to the statutory test for the recognition of native title. It is on this point, and only this point, that I respectfully depart from the contrary conclusion reached by Rangiah and Charlesworth JJ.

282 Under s 28 of the *Federal Court of Australia Act 1976* (Cth), the Court may, in the exercise of its appellate jurisdiction (amongst other things):

(a) affirm, reverse or vary the judgment appealed from;

(b) give such judgment, or make such order, as, in all the circumstances, it thinks fit, or refuse to make an order; or

(c) set aside the judgment appealed from, in whole or in part, and remit the proceeding to the court from which the appeal was brought for further hearing and determination, subject to such directions as the Court thinks fit.

283 It follows from my conclusions regarding error that I would set aside the order of the primary judge dismissing the Arabana Claim. I would not, however, make a determination of native title in favour of the Arabana. The presentation of the appeal did not afford a proper opportunity to re-assess the totality of the evidence adduced at trial in order to reach a conclusion whether the Arabana hold native title in the Overlap Area. The determination of the Arabana Claim requires further consideration on the basis of the totality of the evidence adduced at trial and in light of the findings made by the primary judge that have not been upset on this appeal. In the ordinary course, an order would be made remitting the matter to the primary judge for reconsideration in light of the reasons of this Court. That is not possible in this case because the primary judge has retired. It would not be appropriate to remit the matter to a different judge of the Court. Rather, the appropriate course is similar to that followed by the Full Court in analogous circumstances in *De Rose v State of South Australia* (2003) 133 FCR 325 (***De Rose***). That is, the parties should be afforded an opportunity to make further written and oral submissions with respect to the determination of the Arabana Claim by reference to this Court’s reasons for judgment, the primary judge’s findings with respect to lay and expert evidence (so far as they are consistent with this Court’s reasons for judgment), and any aspect of the evidence admitted at trial to which the parties wish to direct the Court’s attention (cf *De Rose* at [412]).

284 To address the Arabana’s contentions with respect to the first particular of ground 1 of the further amended notice of appeal, it is necessary to begin with the statutory definition of “native title” in s 223(1) of the Act and then consider the primary judge’s approach to the enquiry required by s 223.

## The definition of native title

285 Section 223(1) relevantly defines the expressions “native title” and “native title rights and interests” in the same manner as follows:

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 the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

286 As observed by the majority in *The State of Western Australia v Ward* (2002) 213 CLR 1 (***Ward***) (at [17]), the definition contains the following elements:

(a) first, the rights and interests may be communal, group or individual;

(b) second, the rights and interests must be in relation to land or waters;

(c) third, the rights and interests are those possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders;

(d) fourth, by those laws and customs (in other words, the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders under which the rights and interests are possessed), the Aboriginal peoples or Torres Strait Islanders have a connection with the land or waters; and

(e) fifth, the rights and interests are recognised by the common law of Australia.

287 Each of those elements of the definition has been the subject of detailed explication in the authorities. The primary judge explained the concepts embodied in the definition by reference to the established authorities. His Honour’s explanation at [50]-[52] was not the subject of any material complaint on the appeal. The issues raised by the first particular to ground 1 of the further amended notice of appeal concern the third and fourth elements of the definition. It should be noted at the outset that those elements require that the relevant rights and interests and the necessary connection must both be sourced in the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders.

288 As the primary judge explained (at [50]), primarily by reference to the principles established by the High Court majority in *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422 (***Yorta Yorta***):

(a) The phrase “traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders” in s 223(1)(a) is a reference to laws and customs having a normative content, being a body or system of normative rules that existed before the assertion of British sovereignty (*Yorta Yorta* at [38]-[40] and [46]). To speak of rights and interests possessed under an identified body of laws and customs is to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs (*Yorta Yorta* at [50]). Laws and customs and the society which acknowledges and observes them are inextricably linked (*Yorta Yorta* at [55]).

(b) A “traditional” law or custom is one which has its origins in the normative rules of the relevant Aboriginal or Torres Strait Islander society that existed before the assertion of British sovereignty and which has been passed from generation to generation in the society, usually by word of mouth and common practice (*Yorta Yorta* at [46]). The reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty (*Yorta Yorta* at [47]).

(c) That is not to say that account cannot be taken of any alteration to, or development of, traditional laws and customs that occurred after sovereignty, but s 223(1)(a) requires that the rights and interests find their origin in pre-sovereignty laws and customs (*Yorta Yorta* at [44]). The fact that there has been some change to, or adaptation of, traditional laws or customs in the period between the assertion of British sovereignty and the present day will not necessarily be fatal to a native title claim, provided the laws and customs can still be seen to be traditional (*Yorta Yorta* at [83]).

(d) Further, the fact that there has been some interruption of enjoyment or exercise of native title rights or interests is also not fatal to a native title claim. Section 223(1)(a) concerns the present possession of rights and interests, not their exercise, and s 223(1)(b) is concerned with the present existence of a relevant connection between the claimants and the land or waters (*Yorta Yorta* at [84]). Nevertheless, acknowledgment and observance of the laws and customs must have continued substantially uninterrupted since sovereignty. Otherwise, the laws and customs acknowledged and observed now could not properly be described as the traditional laws and customs of the peoples concerned (*Yorta Yorta* at [87]).

289 In *Yorta Yorta*, the majority recognised that Aboriginal and Torres Strait Islander societies have experienced profound changes by reason of European settlement, causing inevitable changes to the structures and practices of those societies (at [89]). The laws and customs acknowledged and observed by an Aboriginal or Torres Strait Islander society will not cease to be traditional merely because the laws and customs have had to change or adapt in response to changed circumstances caused by European settlement. However, it remains necessary to demonstrate that “that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs” (at [89]). In assessing the extent of changes or adaptations made to pre-sovereignty laws and customs, difficult questions of fact and degree may emerge (at [82]). Subsequently, in *Bodney v Bennell* (2008) 167 FCR 84 (***Bodney***) (at [120]), the Full Federal Court observed that:

In accordance with *Yorta Yorta* *HC* 214 CLR 422, when determining whether rights and interests are traditional, the proper enquiry is whether they find their origin in pre‑sovereignty law and custom, and not whether they are the same as those that existed at sovereignty. Clearly laws and customs can alter and develop after sovereignty, perhaps significantly, and still be traditional.

290 The primary judge explained (at [51]) the “connection” element of the definition in s 223(1)(b) primarily by reference to the statements of principle of the High Court majority in *Ward* and the Full Federal Court in *Bodney*. The following principles emerge from those decisions:

(a) Paragraphs (a) and (b) of s 223(1) involve two inquiries: in the one case for the rights and interests possessed under traditional laws and customs and, in the other, for connection with land or waters by those laws and customs (*Ward* at [18] and *Bodney* at [165]). Each element is sourced in the traditional laws acknowledged and the traditional customs observed by the claimants in question (*Bodney* at [165]). The connection required by paragraph (b) is not by the claimants’ rights and interests in the land or waters in question, but by their laws and customs acknowledged and observed (*Bodney* at [165]).

(b) The connection which Aboriginal and Torres Strait Islander peoples have with “country” is essentially spiritual: *Ward* at [14]. The majority in *Ward* further explained (at [64]):

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.

(c) As the required connection of the claimants to the land or waters in question is by the traditional laws and customs acknowledged and observed, it is necessary to show that the acknowledgment and observance of the laws and customs must have continued substantially uninterrupted from the time of the assertion of British sovereignty in the sense explained in *Yorta* *Yorta* (*Bodney* at [168], [179]).

(d) In *Bodney*, the Full Court cited with approval (at [166]) the earlier observation of the Full Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 (***Alyawarr***) at [111] that connection “involves the relationship of the relevant community to its country defined by laws and customs which it acknowledges and observes”. The laws and customs themselves characteristically will presuppose or envisage direct connections with land or waters or will, if acknowledged and observed, link community members to each other and to the land or waters in a complex of relationships (*Bodney* at [169]). Further, laws and customs that connect claimants to land or waters need not be exclusively ones that give the claimants rights and interests in the land or waters (*Bodney* at [169]).

(e) Connection to land or waters may have subsisted at a spiritual and/or cultural level notwithstanding that the claimants have not been able to maintain a presence on substantial parts of their traditional lands or waters (*Bodney* at [172]).

291 In understanding the different enquiries required by paragraphs (a) and (b) of s 223(1), regard should also be had to the statements of the High Court plurality (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) in *Northern Territory v Griffiths* (2019) 269 CLR 1. In the context of considering the criteria for determining compensation to native title holders for loss, diminution or impairment of their native title rights and interests under s 51 of the Act, the plurality observed (at [23]) in respect of paragraphs (a) and (b) of s 223(1):

The first and second of those characteristics – that native title is a bundle of rights and interests possessed under traditional laws and customs and that, by those laws and customs, Aboriginal peoples have a connection with the land or waters – reflect that native title rights and interests have a physical or material aspect (the right to do something in relation to land or waters) and a cultural or spiritual aspect (the connection with the land or waters).

292 As discussed below, a principal focus of the primary judge’s reasons with respect to the Arabana Claim is whether the Arabana have demonstrated “continuity of connection” with the Overlap Area. The phrase “continuity of connection” is not statutory language. However, it has been adopted in many cases as a paraphrase or a shorthand description of the statutory requirement that the claimants must show a connection with the relevant land or waters by their traditional laws and customs. The issue of continuity arises from the requirement that the laws and customs that are claimed to found native title are “traditional”. As determined by the High Court in *Yorta Yorta*, a “traditional” law or custom is one which has its origins in the normative rules of the relevant Aboriginal and Torres Strait Islander society that existed before the assertion of British sovereignty, and the acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Thus the question of “continuity” principally concerns the laws and customs acknowledged and observed by the claimants.

293 As observed in *Bodney* (at [175]-[176]), the connection enquiry can have a particular topographic focus. It is possible that an Aboriginal or Torres Strait Islander community might continue to acknowledge and observe their traditional laws and customs, but do so only in respect of part of their traditional country. If native title in a specific area of land is put in issue, it will be necessary to evaluate whether connection to that area, by traditional laws and customs, has been maintained. That question must be answered, though, by reference to the content and character of the traditional laws and customs that continue to be acknowledged and observed by the community concerned.

294 In some cases, a finding that traditional laws and customs confer rights and responsibilities on a community or person in respect of land or waters may also establish that the community or person is connected to their country in a way that satisfies s 223(1)(b): *De Rose* at [305] and *De Rose v South Australia (No 2)* (2005) 145 FCR 290 (***De Rose No 2***) at [113]. As noted earlier, s 223(1)(b) is not directed to how Aboriginal peoples use or occupy land or waters (*Ward* at [64]) and connection may still be substantially maintained with land at a spiritual and/or cultural level notwithstanding a community’s physical absence from that land (*Bodney* at [172]; *De Rose No 2* at [62]-[64]). As stated by the Full Federal Court in *Worimi v Worimi Local Aboriginal Land Council* (2010) 181 FCR 320 at [87]:

It is self-evident that a community or group of Aboriginal persons may have an ongoing connection with land, even though their access to, or use of, that land is restricted or spasmodic; that connection may be mainly spiritual rather than physical; it may have evolved over time to a less specific use of all or many parts of that land; it may not involve physical access to each and every part of the land …

## The primary judge’s reasons

### The principal question

295 After referring to the native title determinations that are geographically proximate to the Overlap Area (the 2006 Yankunytjatjara/Antakarinja Determination, the 2012 Arabana Determination and the Eringa No 1 and Eringa No 2 Determinations), the primary judge stated (at [56]) that:

… the principal question on each application is whether either or both the Arabana and the Walka Wani establish, in accordance with s 223(1)(b) of the NT Act, that their NTRI [native title rights and interests] extend to the Overlap Area and if so, whether they have continued to be possessed by the current societies in accordance with an acknowledgement of their respective traditional laws and an observance of their respective traditional customs.

296 Respectfully, it is unclear why the primary judge referred to paragraph (b) of s 223(1) to the exclusion of paragraph (a). Both elements had to be satisfied in relation to the Overlap Area. It is possible that his Honour intended to refer to s 223(1) generally. In any event, the statement is an unfortunate paraphrase of the statutory language, seemingly based on paragraph (a) of s 223(1) (by the use of the word “possessed”) but employing a phrase (in accordance with an acknowledgement of traditional laws and an observance of traditional customs) that does not reflect the statutory language and which has an uncertain meaning.

297 The paraphrase employed by the primary judge at [56] is echoed in a concluding paragraph concerning the Arabana Claim. At [911], the primary judge stated (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.

298 It is apparent that the above statement concerns paragraph (a) of s 223(1). Ultimately, the primary judge made no finding with respect to the satisfaction of paragraph (a) in respect of the Arabana Claim (and the paragraph barely featured in his Honour’s reasons). However, and as submitted by the Arabana, the above statement is also an ambiguous reformulation of paragraph (a) of s 223(1) which requires that the claimed rights and interests be possessed under the traditional laws and customs acknowledged and observed respectively, not possessed by the acknowledgement and observance respectively of those laws and customs. It is not clear what the latter expression means, but it is not the statutory language and has real potential to misdirect the statutory enquiry.

299 Despite the above passing references to paragraph (a) of s 223(1), the principal, and almost exclusive, focus of the primary judge’s reasons was on the question of “continuing connection” of the Arabana with the Overlap Area. Further, in addressing that question, the primary judge reformulated the statutory language in two ways which, respectfully, indicate an erroneous approach to the statutory enquiry.

300 First, rather than ask whether the Arabana have a connection to the Overlap Area *by* their traditional laws and customs acknowledged and observed, the primary judge frequently asked whether the Arabana have a connection to the Overlap Area *in accordance with* their traditional laws and customs (see at [121], [418], the heading to [844], [854] and [916]). The preposition “by” has a wide range of meanings, but in the context of paragraph (b) of s 223(1) it means “through the agency or efficacy of” (Macquarie Dictionary). Paragraph (b) of s 223(1) is concerned with the effect of the traditional laws and customs acknowledged and observed by the Aboriginal persons or Torres Strait Islanders. As stated in *Ward* at [64], the relevant enquiry 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. In contrast, the prepositional phrase “in accordance with” means in conformity with. To ask whether the Arabana have a connection to the Overlap Area in accordance with traditional laws and customs suggests an enquiry as to whether specific conduct or behaviours of the Arabana are in conformity with traditional laws and customs. That is not the enquiry required by paragraph (b).

301 Second and relatedly, the primary judge’s assessment of connection was expressly focussed on evidence of “acts” (conduct or behaviours) of connection. In the concluding paragraphs with respect to the assessment of the Arabana Claim, the primary judge stated that:

(a) it is “*by the acknowledgement and observance* of traditional laws and customs that the connection with the Overlap Area must be shown” (at [911], emphasis added);

(b) “the connection required by s 223 is a connection *arising from the continuing acknowledgement* of traditional laws and traditional customs observed by the claimant group” (at [913], emphasis added); and

(c) 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” (at [914], emphasis added).

302 Respectfully, those statements reformulate paragraph (b) of s 223(1) in an erroneous manner. Connection is not established by acts (conduct or behaviours) of acknowledgement and observance of traditional laws and customs. Connection is established by reference to the content and character of traditional laws and customs acknowledged and observed by the claimant community.

303 The above discussion of the manner in which the primary judge restated the statutory definition is not an exercise in semantics. Reformulation of the statutory language may result in a false enquiry and erroneous analysis. The “connection” requirement of the statutory definition must be determined by reference to the content of the traditional laws acknowledged and traditional customs observed by the claimants, not by reference to the existence or non-existence of particular behaviours or other facts and circumstances which may have no particular significance under traditional laws and customs that have continued to be acknowledged and observed. An example of this form of error is given in *De Rose* (at [303]-[329]).

304 Evidence of the beliefs, conduct and behaviours of the Arabana community is, of course, relevant to the question whether the Arabana have continued to acknowledge and observe traditional laws and customs that found native title. An assessment of all such evidence, including the evidentiary effect of the 2012 Arabana Determination in respect of adjacent land, is a necessary exercise in evaluating the Arabana Claim. But that assessment informs the identification and characterisation of the laws and customs acknowledged and observed by the Arabana as a society, and a determination whether the laws and customs are traditional, as explained in *Yorta Yorta*. Once that assessment and determination has been made, the further questions under s 223(1) must be considered: whether the Arabana possess the claimed rights and interests in the Overlap Area under those laws and customs and whether the Arabana have a connection to the Overlap Area by those laws and customs. Respectfully, the primary judge’s principal, and almost exclusive, focus on the question of “continuing connection” and his Honour’s reformulation of the statutory language concerning connection involved error.

305 Further examination of the primary judge’s approach follows.

### The traditional laws and customs of the Arabana

306 At [101]-[110], the primary judge made findings concerning the “Arabana society”. Although the findings refer to the “Arabana society”, consistently with *Yorta Yorta* the findings can be understood as findings concerning the traditional laws and customs acknowledged and observed respectively by the Arabana people. It is apparent from [101] that the findings were based on the combined effect of the 2012 Arabana Determination, the report of Dr Fergie and Dr Lucas prepared in 2011 in support of the claim recognised in the 2012 Arabana Determination, and the reports of Dr Lucas prepared in connection with the Arabana Claim the subject of this appeal (at [101]).

307 Although not stated expressly by the primary judge, the findings at [101]-[110] appear to be confined to the laws and customs of the Arabana as at the date of sovereignty. At [101], the primary judge sets out the “key features of Arabana society” as found by Finn J in the 2012 Arabana Determination (as recorded in *Dodd v State of South Australia* [2012] FCA 519 (***Dodd***) at [35]) which were as follows:

(i) A system of kinship and marriage, underpinned by the practice of exogamy and the avoidance of incest, which was central to defining relationships between Arabana people, and between Arabana people and the land. This classical Arabana kinship system was characterised by –

(a) a classificatory kin system which attributed kin terms to classes of relationships and in turn predicated normative behaviour between those classes of relationships;

(b) two exogamous matrilineal moieties known as Mutherri (Matthurie) and Kararru (Kirirawa) as well as by exogamous totemic divisions which regulated marriage and were significant in some ceremonial responsibilities; and

(c) preferential marriage rules which were indicated in the classificatory kin system and which oriented marriage (and ceremonial) relationships;

(ii) division into small localised groups with particular association with certain areas within Arabana country. Some members of those smaller groups would come together for ceremony, trade and major decision making;

(iii) A distinct language comprising a number of closely related dialects; and

(iv) A male initiation process that included the Wilyaru ceremony.

308 It is apparent from *Dodd* [35] that the above statement described classical Arabana society at the time of sovereignty. At *Dodd* [36]-[41], Finn J described the transformations in Arabana traditional laws and customs that had occurred since sovereignty:

36 The Evidence indicates that there has clearly been some transformation in some of the characteristics of the “classical” Arabana society as described above since sovereignty. The traditional customs and laws concerning social organisation and group membership have transformed since settlement, as a consequence of the demographic pressures of radical depopulation and displacement from estates. Similarly, classical marriage rules (such as the requirement that marriage partners be of the opposite matrilineal moieties and the regulation of marriage by reference to totemism) are no longer observed or even remembered by younger claimants.

37 However, it is the opinion of the experts that

… the Arabana system of kinship and marriage has … evolved since sovereignty in ways that are founded in and consistent with the classical system. Kinship relations, and their normative expression, continue to structure all aspects of Arabana life. Exogamy, and its consequence the offence (or taboo) or incest, continues to be a fundamental principle in Arabana custom and law and is reflected in the normative system.

38 The Evidence supports the opinion of the experts that the classificatory kinship system remains a key feature of contemporary Arabana custom and law. This was also apparent to the State officers who participated in the field trip. Under this system, terms (both in Aboriginal English and the Arabana language) equivalent to brother/sister, daughter/son, aunt/uncle and grandparent/grandchild are extended to include wider ranges of collateral relatives. Siblings, first cousins and second cousins in English kin terminology, for example, are all “classified” as brother/sister in Arabana kinship terminology and are addressed as such.

39 In the opinion of the experts, the kinship classifications bring with them normative obligations and expected behaviours, such as responsibility, nurturing, discipline and teaching from the older relatives to the younger, as well as respect from the younger to the older. There was evidence of other normative behaviours predicated on kinship, including the practice of children being “brought up” by relatives (generally classificatory parents or grandparents) other than their biological parents, the obligations of a man’s wife towards his (classificatory) brothers, and the view that (classificatory) sisters can share their husbands.

40 The evidence suggests that the classical system of landholding by localised groups based on patrafilial Ularaka (ie traditional stories) is no longer observed. Contemporary Arabana people consider that all of Arabana country belongs to Arabana people generally. Nevertheless, the evidence demonstrates that some individuals or families are recognised as having special knowledge of and responsibility for particular areas and their Ularaka, including related songs.

41 In the context of negotiations for a consent determination, the State could properly accept that the changes in traditional rules of succession to country that accommodate both patrifilial and matrifilial descent, and succession to the country as a whole (as distinct from particular parts of the country) have their basis in traditional law and custom. For these purposes, the State accepts that the pre-sovereignty normative society has continued to exist throughout the period since sovereignty, notwithstanding an inevitable adaptation and evolution of the laws and customs of that society.

309 The above transformations of Arabana traditional laws and customs were not referred to in the primary judge’s findings at [101]-[110], but were referred to (in part) at [845]. At [105]-[108], the primary judge referred to aspects of the evidence of Dr Lucas, but that evidence also appears to relate to the position at sovereignty, not the present day. For example, the marriage rules based on moieties, described at [107], are no longer observed; so too rights in land, described at [108] and [109], are no longer based on membership of particular groups within Arabana society with responsibility for particular areas of land.

310 Later in the reasons, the primary judge sets out parts of the further evidence of Dr Lucas and Dr Sackett with respect to transformations of Arabana traditional laws and customs that had occurred since sovereignty. His Honour recorded the following:

773 With respect to the last of these points, Lucas considered that the depopulation of the Arabana had made it “demographically and practically impossible” for them to continue the exercise of traditional rights and interests in the Overlap Area in their full traditional scope. He continued:

[251] In my opinion it is likely that the surviving Lakes Aboriginal population (including Arabana, Wangkangurru and Dieri groups) was progressively insufficient to ensure the persistence of ularaka and marduka relations (both as structures of everyday social life and as the basis of ritual groupings that were their expression). Traditionally, the presence of each was necessary for telling the stories, singing the songs, using the objects and doing ceremony for land (which ultimately sustained the relationship amongst all these integral elements). The extinction or non-viability of either ularaka or marduka groups likely threatened the particular ‘proximate title’ relationship of each to particular estates of land defined in terms of their ularaka identity (see Sutton 2005:116). Rituals requiring the complementarity of ularaka and marduka roles (and therefore the expression of each in terms of rights and responsibilities) ceased with depopulation and the increasing presence of non- Aboriginal people (pastoral workers, fettlers, etc.) throughout the region.

[252] With smaller numbers of people coming together at limited sites (Oodnadatta, Anna Creek, Finniss Springs, Gudnumpanha, Marree, etc.) and the separation of small local groups from their ritual centres, it seems probable that landed interests devolved into a broader ‘underlying’ title held by those survivors who continued to identify as descendants of Arabana people (see Sutton 2003: 116-18). What these subsequent generation people emphasise is the collective right of Arabana people to Arabana land, on the basis of filial connections (through men or through women) to known ancestors who they also believe to be Arabana people who had rights in Arabana land. Arabana people with specific kin-based identities connect with what they understand to be Arabana ‘country’ as a whole. This, in my opinion, is the contemporary expression of underlying title.

…

778 Sackett supported Lucas’ conclusion that the development he described in [252] of his report was “but an adaption to changed circumstances”.

311 At [794], the primary judge found that “the opinions of Lucas and Sackett were generally soundly based and reasoned” and that they were “supported by the historical evidence of Gara, the linguistic evidence, the 1996 Map and the other matters reviewed above”. His Honour accepted their opinions “in preference to those of Graham and Liebelt, and to the extent necessary, those of Cane”.

312 At [844], the primary judge stated that, earlier in the reasons, he had “set out the traditional laws and customs of the Arabana by which rights and interests in land are possessed and it is unnecessary to repeat them”. Having regard to the foregoing, this must be a reference to the findings at [101]-[110], [773] and [778]. However, in the following paragraph, at [845], the primary judge recorded certain of the findings of Finn J which the primary judge described as “matters concerning continuing connection”. Those findings were those made in *Dodd* at [40] and [41] reproduced above, plus the finding at *Dodd* [46] which was as follows:

It was the opinion of the experts, amply supported by the evidence, that contemporary connection to 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.

313 The primary judge continued at [846] (emphasis in original):

Finn J then went on to describe a number of matters bearing on the continued connection of the Arabana with the 2012 Determination area. These included the continued observance of normative rules relating to authority, the transition of Arabana traditional law and custom to younger members of the group, continued use of Arabana names and kinship terms, maintenance of knowledge of the traditional *Ularaka* and the normative rules related to those *Ularaka*, the continued residence of Arabana people in the claim area, the knowledge of the claimants of the area and their continued engagement in traditional activities including hunting and gathering for food.

314 Two observations can be made at this point.

315 First, the description of the findings of Finn J as matters concerning “continuing connection” is not apt. The reasons of Finn J in *Dodd* proceed in an orthodox manner from a consideration of the existence of an Arabana “society” at the time of sovereignty (*Dodd* [26]-[29]), the relationship between the claim group’s society today and the Arabana society at sovereignty (*Dodd* [30]-[34]), whether there had been substantially uninterrupted observance of traditional laws and customs since sovereignty (*Dodd* [35]-[41]), whether there was continuing connection of members of contemporary Arabana society by their laws and customs with a substantial part of the claim area (*Dodd* [42]-[50]) and whether the rights and interests claimed by the Arabana were possessed under traditional laws and customs acknowledged and observed (*Dodd* [51]-[58]).

316 Second, and relatedly, it can be observed that the findings made by Finn J with respect to the traditional laws and customs of the Arabana in the context of the 2012 Arabana Determination (made by consent) were more extensive than those made by the primary judge. Respectfully, this bespeaks error in the proper approach to the enquiry required by s 223(1).

317 I consider it to be tolerably clear that the primary judge had regard to, and accepted as evidence on the Arabana Claim, the findings of Finn J in *Dodd* on the basis and to the extent that those findings concerned the existence of native title rights and interests in respect of the 2012 Arabana Determination area (but not the Overlap Area). At [54], the primary judge recorded that (emphasis in original):

It was common ground that each of the 2006 Yankunytjatjara/Antakarinja Determination and the 2012 Arabana Determination had “determined as a fundamental matter, once and for all” that NTRI existed in the areas to which those determinations related and that the NTRI were held by the Yankunytjatjara/Antakarinja People and the Arabana People respectively. This means that each has been recognised as a society or communal group of people holding rights and interests possessed under traditional law acknowledged and the traditional customs observed by them having a connection with the respective determination areas. These determinations and these recognitions cannot be called into question in the present proceedings – see *Lake Torrens Full Court* at [198]-[202], [401].

318 At [848], the primary judge recorded that, in *Dodd*, the Court was satisfied that, in contemporary Arabana law and custom, all Arabana country belongs to all Arabana generally. At [849], the primary judge took note of the fact that the Overlap Area is immediately adjacent to the area of the 2012 Arabana Determination and comprises a very small fraction of the overall area claimed by the Arabana as Arabana land. At [853]-[854], the primary judge recorded that he accepted that, in relation to the 2012 Arabana Determination area, rights to Arabana country are held, under the Arabana system of law and custom, by Arabana society as a whole and that rights in land are based on filiation from known Arabana persons.

319 However, although the primary judge took account of those matters, they ultimately formed no part of his Honour’s assessment of the Arabana’s claim to native title in the Overlap Area. As will be seen, the primary judge’s assessment of the Arabana Claim was solely through a lens of “continuing connection” to the Overlap Area. At [854], his Honour emphasised that while he accepted the effect of the 2012 Arabana Determination, “the requisite continuity of connection of the Arabana in the Overlap Area in accordance with traditional law and custom must be established by the evidence in these proceedings”.

### Rights and interests by descent

320 At [102]-[103], the primary judge also recorded that:

102 Earlier in these reasons, I identified the native title holders under the 2012 Arabana Determination. The report of Lucas indicates that the present claimants are descendants of the Arabana people who were found by the Court in 2012 to be native title holders according to the laws and customs of the Arabana.

103 Lucas concluded, at [270], that:

* the applicants are members of a society (‘Arabana’) that is defined by systematic principles of membership entailing normative prescriptions, this system being defined by way of recognised mechanisms of descent and filiation;
* the applicants are descended from Arabana antecedents, according to principles of filiation recognisable as traditional or as having been derived from a traditional system;
* this is a system by which identity as Arabana people is acknowledged by a body of persons united in their observation of law and custom (a ‘society’);
* this system allows identified families to be traced back to other families, local groups or key individuals in the ethnohistorical record; and
* this system articulates the relationship of people to places by way of inherited rights and interests that derive from, or are transformations of, the traditional system of land tenure.

321 In context, it appears that the primary judge accepted that evidence. I therefore take this to be a finding that the Arabana claimants in the present proceeding are the descendants of the native title holders under the 2012 Arabana Determination, are members of the same society and, as such, are entitled to rights and interests in Arabana land and waters under traditional laws and customs.

### Proof of connection

322 The primary judge introduced the major fact-finding section of his reasons with the statement (at [121]):

Each of the Arabana and the Walka Wani sought to establish their connection in accordance with traditional law and custom in the Overlap Area at effective sovereignty and since by a combination of forms of evidence, comprising:

(a) the ethnographic-historical evidence;

(b) linguistic evidence;

(c) evidence from the respective applicant groups;

(d) anthropological opinion; and

(e) miscellaneous sources.

323 It cannot be said that those categories of evidence, on which the primary judge made extensive findings, were directed only to the question of “connection” to the Overlap Area. The evidence concerned the questions:

(a) did any of the claimants hold native title rights and interests in the Overlap Area at the time of assertion of British sovereignty;

(b) if so, what was the nature and content of those rights and interests under the traditional laws acknowledged and traditional customs observed at that time; and

(c) did the claimants who held native title rights and interests in the Overlap Area at the time of assertion of British sovereignty continue to acknowledge and observe traditional laws and customs under which they possessed rights and interest in the Overlap Area and by which they have a connection with the Overlap Area.

324 Consistently with the principles explained in *Yorta Yorta*, question (c) requires consideration of whether the normative system of the claimants who held native title in the Overlap Area at the time of sovereignty is 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.

325 The orientation of the statutory enquiry is important. Consistently with the authorities summarised earlier, the foundational enquiry must be directed to identifying the traditional laws acknowledged and the traditional customs observed by Aboriginal persons and Torres Strait Islanders which form the normative rules of their community or society at sovereignty, and to examining whether and to what extent those laws and customs have continued to be acknowledged and observed respectively to the present day. If the laws and customs acknowledged and observed today can be recognised as “traditional” in the sense of having a sufficient continuity with pre-sovereignty laws and customs, it is then necessary to consider whether the Aboriginal persons and Torres Strait Islanders possess rights and interests in the land or waters under those laws and customs and whether they are connected with the land or waters by those laws and customs.

326 An enquiry which commences with the question of “connection”, and particularly “continuing connection”, creates the risk that the indicia of connection will not be based upon traditional laws and customs. As the authorities make clear, the statutory concept of connection of Aboriginal persons and Torres Strait Islanders with land and waters, by their traditional laws and customs, is fundamentally cultural and spiritual, not physical. The question of connection under paragraph (b) of s 223(1) cannot be answered apart from a consideration of the content of the traditional laws and customs acknowledged and observed by the Aboriginal persons and Torres Strait Islanders. It is by reference to the traditional laws and customs acknowledged and observed that connection is established or not established.

### Native title at the time of sovereignty

327 The primary judge made a number of findings to the effect that the evidence strongly supported the conclusion that the Overlap Area was Arabana country at the time of effective sovereignty.

328 At [410], the primary judge said:

In my view, and contrary to the opinion of Graham and Liebelt, the ethnographical‑historical evidence overwhelmingly supports the conclusion that the Overlap Area was Arabana country at the time of effective sovereignty. That is also the opinion of the ethnographic-historical material taken by Lucas, Sackett and Gara.

329 At [537], the primary judge found that “the weight of the linguistic evidence which I accept points to Arabana having been the language of the Overlap Area at effective sovereignty”.

330 At [772], the primary judge recorded the opinion of Dr Lucas that the Overlap Area was in Arabana country at effective sovereignty, and at [794] his Honour stated that the opinions of Lucas and Sackett were generally soundly based and reasoned and that he accepted their opinions in preference to those of Graham and Liebelt, and to the extent necessary, those of Cane.

331 Finally, at [842], his Honour stated that, in final submissions at trial, it was common ground that the Arabana had held native title in the Overlap Area at effective sovereignty in accordance with the traditional laws acknowledged and traditional customs observed by them. His Honour described that conclusion as inevitable having regard to, amongst other things, the combined effect of the ethnographic-historical evidence, the linguistic evidence, the evidence of Sydney Strangways, the evidence of migration, the evidence of custodianship and the anthropological evidence reviewed.

### The findings to this point

332 Pausing at this point, the following matters emphasised by the Arabana can be noted.

333 First, as can be seen from the maps in evidence, the Overlap Area is a relatively small area (comprising less than 150 km2) carved out of the north-western corner of the 2012 Arabana Determination Area (which is a much larger geographic area of approximately 68,823 km2). Thus, the Overlap Area comprises approximately 0.2% of the geographic area of the 2012 Arabana Determination.

334 Second, the primary judge accepted that the Arabana had not included the Overlap Area in their original native title claim (which resulted in the 2012 Arabana Determination) because they believed that a different accommodation of their rights and interest would be made by government action. The primary judge recorded (at [43]):

In 1998, the Arabana commenced the application for a determination of native title which resulted in the 2012 Arabana Determination. They did not include the Overlap Area in that claim because the State had previously indicated that it intended to transfer the Oodnadatta Common to the ALT [Aboriginal Land Trust] with a view to the ALT then providing a long term lease of the Common to the Dunjiba Community Council, this being the Council comprised of the residents in Oodnadatta. The Arabana recognised that, as many of the residents of Oodnadatta at the time were not Arabana, Dunjiba was more representative of its residents and they did not wish to create an impediment to the State transferring the land to the ALT. However, the transfer to Dunjiba did not proceed.

335 Third, the Arabana held native title in the Overlap Area as at the date of the assertion of British sovereignty. The Overlap Area was “Arabana country”.

336 Fourth, as a judicial determination *in rem*, the 2012 Arabana Determination is prima facie evidence in this proceeding of the findings that are essential to the validity of that determination. This would include the existence of an Arabana society that acknowledges traditional laws and observes traditional customs under which it possesses rights and interests in the land and waters of the 2012 Arabana Determination and is connected with the land and waters by those laws and customs.

337 Fifth, the Arabana claimants in the present proceeding are the descendants of the native title holders under the 2012 Arabana Determination and are members of the same society.

338 It can be accepted, as the primary judge found, that the above matters are not determinative of the Arabana claim to native title in respect of the Overlap Area. However, and as contended by the Arabana, the determination of their claim to native title in the Overlap Area in accordance with s 223(1) requires consideration of:

(a) whether at sovereignty there was an Arabana society “united in and by its acknowledgement and observance of a body of law and customs” giving the members of the society rights and interests in the Overlap Area;

(b) whether the Arabana society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs;

(c) whether the laws and customs acknowledged and observed by the Arabana society today can be seen to be traditional notwithstanding adaptations that may have been made as a result of the effects of European settlement on the society;

(d) the content and nature of the laws and customs of the Arabana that are acknowledged and observed today;

(e) 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; and

(f) whether the Arabana have a connection to the Overlap Area by those laws and customs that are acknowledged and observed today.

339 The primary judge’s findings to this point would provide affirmative answers to the questions in paragraphs (a) to (c). As already seen, the question in paragraph (d) is not addressed in a detailed or methodical way, and the question in paragraph (e) is not addressed at all. While the remainder of his Honour’s findings, discussed below, are directed to the question in paragraph (f), the failure to address fully and clearly the questions in paragraphs (d) and (e) creates difficulties with his Honour’s analysis of the “connection” issue.

### Assessment of the Arabana Claim

340 Under the heading “assessment of the Arabana claim”, the primary judge commenced with the finding (at [842]) that, at effective sovereignty, the Arabana held native title in the Overlap Area in accordance with the traditional laws acknowledged and traditional customs observed by them. His Honour then stated (at [843]):

This means that, for the purposes of assessing the Arabana claim, the principal issue is whether they have established that they have continued to possess the rights and interests in the Overlap Area under the traditional laws acknowledged and traditional customs observed by them and have thereby maintained connection with the Overlap Area. In the trial, the parties referred to this in shorthand as being whether the Arabana have established continued connection with the Overlap Area.

341 Again, with respect, that statement is an unfortunate paraphrase of the statutory definition in s 223(1). It is an amalgam or “fusion” (cf *Bodney* at [165]) of the two inquiries required by paragraphs (a) and (b) of s 223(1), suggesting that, by continuing to possess rights and interests in the Overlap Area under traditional laws acknowledged and traditional customs observed, the Arabana will have maintained connection with the Overlap Area. As observed by the Full Court in *Bodney* (at [165]), the required connection is not by the possession (or exercise) of rights or interests, it is by the laws and customs acknowledged and observed (albeit that, in a given case a finding that traditional laws and customs confer rights and responsibilities on a community or person in respect of land or waters may also establish that the community or person is connected to their country in a way that satisfies s 223(1)(b): *De Rose No 2* at [113]).

342 The parties apparently referred to this amalgamated enquiry by the shorthand “continued connection”. In the remainder of the analysis, the primary judge focussed exclusively on the question of “continuity of connection”.

343 The primary judge’s reasons at [844]-[846] have been referred to earlier when discussing the primary judge’s (limited) findings with respect to the traditional laws acknowledged and traditional customs observed by the Arabana. These paragraphs are preceded by the heading “*Have the Arabana maintained connection with the Overlap Area in accordance with the traditional laws acknowledged and traditional customs observed by them?*”. As noted earlier, the heading poses a question about connection, but in terms that differs from the statutory language. The reasons at [844]-[846] in fact concern the traditional laws and customs of the Arabana but, also as noted earlier, are far from a comprehensive description or analysis of those laws and customs. At [846], the primary judge summarised the findings of Finn J in *Dodd* with respect to matters “bearing on the continued connection of the Arabana with the 2012 Determination Area”. The purpose of that paragraph in his Honour’s reasons is not clear, but it appears that his Honour is seeking to draw a contrast between the “connection” findings made by Finn J in *Dodd* and the evidence in the present matter. The point remains that at no stage did the primary judge make comprehensive findings with respect to the traditional laws acknowledged and traditional customs observed by the Arabana and whether the Arabana held rights and interests in the Overlap Area under those laws and customs.

344 Next, the primary judge stated a number of principles with respect to the requirement of “connection” in paragraph (b) of s 223(1) as follows (at [847]):

The principles recognised in the authorities relating to the assessment of continued connection include:

(a) connection involves the continuing internal and external assertion by the claimant group of its traditional relationship to the country defined by its laws and customs: *Sampi* at [1079]; *Bodney v Bennell* at [173];

(b) connection may be established by evidence of physical presence, but its absence is not fatal to the continuing connection: *Bodney v Bennell* at [171]-[174];

(c) non-physical forms of connection may include spiritual, cultural, social and utilisation connections: *Yanner* at [37]-[38]; *Ward FC* at [323]; *Akiba FC* at [172], [655];

(d) the assessment of connection requires, first, an identification of the content of the 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: *WA v Ward* at [64];

(e) the connection need not be maintained in the same manner as it was at effective sovereignty. Account may be taken, amongst other things, of displacement and depopulation.

345 No criticism can be made about that statement of relevant principles. Respectfully, however, the primary judge’s discussion of the evidence does not accord with those principles. Most significantly, and as already noted, at no point did the primary judge seek to identify the content of the traditional laws and customs acknowledged and observed by the Arabana and to characterise the effect of those laws and customs as constituting a “connection” of the Arabana with the Overlap Area as per *Ward* at [64]. Whether any Arabana continue to live on land within the Overlap Area, and whether any activities undertaken within the Overlap Area can be described as being traditional (whatever that might mean), is in no sense determinative of the statutory question concerning connection.

346 After those introductory paragraphs, the primary judge assessed 10 matters relied upon by the Arabana. The primary judge cannot be criticised for assessing matters put forward by the Arabana. However, the critical issue is: for what purpose and in what manner were the 10 matters assessed? Having reviewed his Honour’s assessment, I respectfully consider that his Honour erred in the approach taken. His Honour’s assessment was directed to the question whether the evidence established acts (conduct or behaviours) of acknowledgement and observance of traditional laws and customs by which the requirement of “connection” was to be assessed. For the reasons given earlier, that is not the correct enquiry.

347 It should again be acknowledged that evidence of the beliefs, conduct and behaviours of the Arabana community is relevant to the question whether the Arabana have continued to acknowledge and observe traditional laws and customs that found native title, and specifically with respect to the Overlap Area. But that was not the issue being addressed by the primary judge when assessing the 10 matters. The reasons make clear that his Honour engaged in an exercise of assessing “continuing connection” by reference to the nature and extent of conduct and behaviour related in some manner to traditional laws and customs. His Honour did so without first making specific findings about the content of Arabana traditional laws and customs. Respectfully, his Honour’s reformulation of the statutory language concerning connection, and the exercise undertaken, involved error.

348 It is appropriate to make some specific observations about the primary judge’s findings (using the 10 headings adopted by the primary judge).

#### (i) The matters established for the 2012 Arabana Determination

349 The primary judge’s observations at [853]-[854] have been referred to earlier, but it is necessary to return to them at this stage. His Honour stated:

853 The Arabana relied on the matters established by the 2012 Arabana Determination in relation to the immediately adjacent land, including the finding that rights to Arabana country are held, under the Arabana system of law and custom, by Arabana society as a whole, with Arabana People and families having localised attachments, and that under Arabana rules, rights in land are based on filiation from known Arabana Persons.

854 I have accepted these matters but the requisite continuity of connection of the Arabana in the Overlap Area in accordance with traditional law and custom must be established by the evidence in these proceedings.

350 It can be seen that his Honour accepted the effect of the determination in *Dodd* with respect to the adjacent 2012 Arabana Determination area, but concluded that the “requisite continuity of connection of the Arabana in the Overlap Area in accordance with traditional law and custom must be established by the evidence in these proceedings”. Again, his Honour adopted the requirement that continuity of connection had to be established “in accordance with” the traditional laws and customs of the Arabana, a phrase which has an uncertain meaning, and again it should be observed that his Honour made no comprehensive findings about the traditional laws and customs acknowledged and observed by the Arabana.

#### (ii) The continuity of Arabana people living in Oodnadatta

351 Under this topic, the primary judge made the following findings (at [863]):

There is no evidence those Arabana who continue to live in Oodnadatta do so because they are Arabana, or that they continue to observe Arabana law and custom, or that their manner of living derives from, or is influenced by, or reflects an acknowledgement or observance of, Arabana traditional law and custom. For all the evidence indicates, their residence in Oodnadatta may be attributable to the availability there of housing, including publicly provided housing, or of employment opportunities. That is especially so in the case of more recent times, say, the last 20-30 years. The older Arabana, now deceased, may have lived in Oodnadatta because of, and in accordance with, Arabana traditional law and custom connecting them, and the rights and interests to which they gave rise, but there is relatively little evidence of that being so in more contemporary times. The younger cohort of Arabana witnesses did not indicate any familiarity with the principles in Arabana law and culture by which persons acquire rights and interests in Arabana land or with the secondary rights passed down from mothers.

352 The finding mixes together a number of matters. At the forefront is a finding that younger Arabana witnesses who live within the Overlap Area are not familiar with Arabana laws and customs, and there is a lack of evidence that older Arabana witnesses who live within the Overlap Area continue to observe Arabana laws and customs. Those findings concern the question whether the Arabana, as a community, continue to acknowledge traditional laws and observe traditional customs, but the primary judge makes no ultimate finding on that issue. Further, if a finding were to be made on that issue, it should be based on evidence concerning the Arabana community as a whole, including such evidence as is afforded by the 2012 Arabana Determination, and not merely the evidence of members of the community who live within the Overlap Area. If the Arabana community as a whole, including persons who live outside the Overlap Area, continue to acknowledge traditional laws and observe traditional customs and by those laws and customs have a connection with the Overlap Area (even if they do not live in that area), connection would be established. As the Full Federal Court observed in *Western Australia v Sebastian* (2008) 173 FCR 1 at [84]:

The body of laws and customs under which native title rights and interests are possessed by a group of persons does not require that each member of the group has precisely the same knowledge of those laws and customs or that each member of the group fully comprehends in precisely the same way as each other member of the group how those laws and customs operate.

353 The other principal finding is that there was a lack of evidence that the “manner of living” of the Arabana witnesses who live within the Overlap Area derives from, is influenced by, or reflects an acknowledgement or observance of, Arabana traditional laws and customs. It is unclear what his Honour meant by that finding. As his Honour did not make any clear findings with respect to Arabana laws and customs, it cannot be known how Arabana laws and customs might influence an Arabana person’s “manner of living” and it cannot be known whether the Arabana witnesses’ “manner of living” was or was not derived from or influenced by Arabana laws and customs.

#### (iii) Continued use of the natural resources in the Overlap Area

354 Under this topic, the primary judge found that:

(a) (at [865]) there was some evidence of the use of the natural resources of the Overlap Area in contemporary times but it was not extensive; and

(b) (at [871]) that while hunting and gathering of food is a recognised native title right or interest, the evidence that this was done in traditional ways or for traditional purposes was limited.

355 As submitted by the Arabana, the above findings appear to be premised on, or assume, a finding that Arabana traditional laws and customs required hunting and gathering of food to be undertaken in a “traditional way” (whatever that might mean) or that traditional laws and customs conferred a right to hunt and gather food only for traditional purposes (whatever that might mean). The primary judge made no findings about such matters. Further, connection arises by traditional laws and customs, not from the possession (or exercise) of rights under traditional laws and customs.

#### (iv) Continuity of learning, respecting and teaching the Ularaka

356 The primary judge found (at [872]) that the evidence on this topic was limited. Again, that finding concerns the question whether the Arabana, as a community, continue to acknowledge traditional laws and observe traditional customs, but the primary judge makes no ultimate finding on that issue. It must be accepted that there is the possibility that the Arabana continue to acknowledge and observe traditional laws and customs under which they hold rights and interests, and by which have a connection with, the 2012 Arabana Determination area but not the Overlap Area. But that question requires findings to be made with respect to the content and character of the traditional laws and customs that continue to be acknowledged and observed by the Arabana community. Respectfully, the primary judge’s findings were not directed to that issue.

#### (v) Protection of Ularaka sites

357 In broad terms, the primary judge found that there was little evidence of actions taken by the Arabana witnesses to protect Ularaka sites in the Overlap Area within more recent times (at [877]-[892]). Again, the primary judge’s assessment was directed to the extent of conduct and behaviour within the Overlap Area related to traditional laws and customs, which is not the statutory question with respect to “connection”.

#### (vi) Continued acknowledgement and observance of other traditional laws and customs in the Overlap Area

358 Under this heading, the primary judge discussed the evidence concerning three topics: the continuation of initiation ceremonies until the late 1950s; the observance of Arabana funerals and Sorry Business in Oodnadatta in recent times; and the giving of permission by Arabana people to go to Hookey’s Hole and the Oodnadatta Common (at [893]). His Honour’s findings were to the effect that the evidence was very limited. Again, the assessment was wrongly directed to the extent of conduct and behaviour within the Overlap Area related to traditional laws and customs as demonstrating connection.

#### (vii) Continuing internal and external assertion of traditional relationships to the Overlap Area

359 Under this topic, the primary judge discussed the evidence that Arabana elders continue to teach their children that Oodnadatta is part of Arabana country and Arabana people living in Oodnadatta identify as Arabana. The primary judge found that evidence of these actions was sparse (at [900]-[901]). The latter finding appears to be premised on, or assume, a finding that Arabana traditional laws and customs require a person to “identify” in some manner as Arabana. The primary judge made no findings about such matters. Again, the assessment was wrongly directed to the extent of conduct and behaviour within the Overlap Area related to traditional laws and customs as demonstrating connection.

#### (viii) Knowledge of the boundaries of Arabana country

360 Under this topic, the primary judge found (at [903]):

The Arabana submitted that they have a clear knowledge of the boundaries of their country and have regularly articulated and taught their children that Oodnadatta is Arabana country. The evidence concerning the making of the 1996 Map is some evidence supporting this proposition as does the evidence of Aaron Stuart, Reginal Dodds, and Joanne Warren that they were told by their elders and others that Oodnadatta is Arabana country. On the other hand, there is very little evidence concerning the witnesses’ knowledge of the extent to which Arabana country extends to the west of Oodnadatta, i.e, to the western extent of the Overlap Area.

361 It can be accepted that those findings, together with all other evidence adduced at trial and the evidentiary vale of the 2012 Arabana Determination, are relevant to the question whether the Arabana continue to acknowledge and observe traditional laws and customs under which they hold rights and interests and have a connection with the Overlap Area. But the proper focus of the enquiry is the continued acknowledgment and observance of traditional laws and customs. The primary judge did not directly address that question.

#### (ix) Continuity of involvement in ceremonial life

362 The primary judge found (at [904]) that there had been no ceremonial activity in or in proximity to the Overlap Area since the late 1950s. Again, it can be accepted that those findings are relevant to the question whether the Arabana continue to acknowledge and observe traditional laws and customs under which they hold rights and interests and have a connection with the Overlap Area. The primary judge did not directly address that question.

#### (x) Continuity of Arabana Peoples’ social connections with Oodnadatta

363 The primary judge accepted that there was some evidence of Arabana people maintaining connections with Oodnadatta, but found that the evidence that this occurred as a manifestation of Arabana traditional law and custom was sparse (at [905]). The finding appears to be premised on, or assume, a finding that Arabana traditional laws and customs regulate in some manner the maintenance of social connections. The primary judge made no findings about such matters.

## Conclusion

364 Respectfully, I consider that the primary judge’s assessment of the Arabana Claim involved errors of the kind stated in the first particular to ground 1 of the further amended notice of appeal by the Arabana. Having determined that, at sovereignty, there was an Arabana society “united in and by its acknowledgement and observance of a body of law and customs” giving the members of the society rights and interests in the Overlap Area, the primary judge erred in failing to approach the assessment of the Arabana Claim to native title in the Overlap Area by determining:

(a) whether the Arabana society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs;

(b) whether the laws and customs acknowledged and observed by the Arabana society today can be seen to be traditional notwithstanding adaptations that may have been made as a result of the effects of European settlement on the society;

(c) the content and nature of the laws and customs of the Arabana that are acknowledged and observed today;

(d) 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; and

(e) whether the Arabana have a connection to the Overlap Area by those laws and customs that are acknowledged and observed today.

365 Rather than make those determinations, the trial judge sought to assess whether the Arabana have a connection to the Overlap Area in accordance with their traditional laws and customs or by the acknowledgement and observance of traditional laws and customs. The assessment to which the primary judge’s findings were directed involved an erroneous reformulation of the statutory requirements to establish native title. The result was that the enquiry was misdirected. Further, a number of the specific matters assessed by the primary judge had as their premise assumptions about the content of Arabana traditional laws and customs which were not the subject of any findings.

366 As stated earlier, by reason of the errors identified above, I would set aside the order of the primary judge dismissing the Arabana Claim. However, I would not at this stage make a determination of native title in favour of the Arabana. The determination of the Arabana Claim requires further consideration on the basis of the totality of the evidence adduced at trial and in light of the findings made by the primary judge that have not been upset on this appeal. In my view, the appropriate course is to afford the parties an opportunity to make further written and oral submissions with respect to the determination of the Arabana Claim by reference to this Court’s reasons for judgment, the primary judge’s findings with respect to lay and expert evidence (so far as they are consistent with this Court’s reasons for judgment) and any aspect of the evidence admitted at trial to which the parties wish to direct the Court’s attention.

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| I certify that the preceding ninety (90) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan. |

Associate:

Dated: 7 August 2023

SCHEDULE OF PARTIES A

|  |  |
| --- | --- |
|  |  |
| Arabana Appellants |  |
| Appellant: | JOANNE WARREN |
| Appellant: | GREG WARREN (SNR) |
| Appellant: | PETER WATTS |
| Walka Wani Respondents |  |
| Respondent: | DEAN AH CHEE |
| Respondent: | AUDREY STEWART |
| Respondent: | HUEY TJAMI |
| Respondent: | CHRISTINE LENNON |
|  |  |
| **Other Respondents:** |  |
| Respondent: | AIRSERVICES AUSTRALIA |
| Respondent: | DOUGLAS GORDON LILLECRAPP |
| Respondent: | TELSTRA CORPORATION LIMITED |

SCHEDULE OF PARTIES B

|  |  |
| --- | --- |
|  |  |
| Walka Wani Respondents |  |
| Respondent: | AUDREY STEWART |
| Respondent: | HUEY TJAMI |
| Respondent: | CHRISTINE LENNON |
|  |  |
| Arabana Respondents |  |
| Respondent: | AARON STUART |
| Respondent: | JOANNE WARREN |
| Respondent: | GREG WARREN (SNR) |
| Respondent: | PETER WATTS |
|  |  |
| **Other Respondents:** |  |
| Respondent: | AIRSERVICES AUSTRALIA |
| Respondent: | DOUGLAS GORDON LILLECRAPP |
| Respondent: | TELSTRA CORPORATION LIMITED |

**SCHEDULE A**

**Map 1**



**Map 3**

