HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

AARON STUART & ORS APPELLANTS

AND

STATE OF SOUTH AUSTRALIA & ORS RESPONDENTS

Stuart v South Australia
[2025] HCA 12
Date of Hearing: 6 & 7 November 2024
Date of Judgment: 9 April 2025
A1/2024

ORDER

1. *Appeal allowed.*

2. *Set aside order 3 of the orders of the Full Court of the Federal Court of Australia made on 14 August 2023, and in its place, it be ordered that order 1 of the orders made by the Federal Court of Australia on 21 December 2021 in relation to Action SAD 38/2013 be set aside.*

3. *The proceeding be remitted in accordance with the reasons of the High Court of Australia.*

4. *Each party bear its own costs of the appeal.*

On appeal from the Federal Court of Australia

Representation

S B Lloyd SC with A L Sibree and L J A Herweijer for the appellants (instructed by Camatta Lempens Pty Ltd)

T N Golding KC with W V Ambrose for the first respondent (instructed by Crown Solicitor's Office (SA))

V B Hughston SC with T L Jowett SC for the second to fifth respondents (instructed by South Australian Native Title Services Inc)

R J Webb KC for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

Submitting appearances for the sixth, seventh and eighth respondents

CATCHWORDS

Stuart v South Australia

Native title rights – Where Arabana people applied for determination of native title under *Native Title Act 1993* (Cth) – Where Arabana people held native title over area of land abutting claim area – Whether primary judge correctly construed and applied definition of "native title" in s 223(1) – Whether "connection" with land or waters for purposes of s 223(1)(b) must be established by physical acts of acknowledgment or observance – Relevance of native title determination in respect of land abutting claim area.

Words and phrases – "acknowledgment or observance", "by those laws and customs", "connection", "continuity", "cultural connection", "effective sovereignty", "land or waters", "native title", "native title rights and interests", "physical acts", "physical connection", "religious connection", "sovereignty", "spiritual connection", "traditional laws and customs".

Native Title Act 1993 (Cth), ss 13, 82, 86, 94A, 223, 225.

1 GAGELER CJ, GORDON, EDELMAN, GLEESON AND BEECH-JONES JJ. This appeal concerns a claim under the *Native Title Act 1993* (Cth) by the appellants, on behalf of Aboriginal people who both identify and are recognised as "Arabana"[1] ("the Arabana Applicants"). They claim that they hold native title over an area of approximately 150 km^2 in the vicinity of the township of Oodnadatta in South Australia ("the Overlap Area").[2]

2 In this Court, the Arabana Applicants contend, by their first ground of appeal, that a majority of the Full Court of the Federal Court erred in upholding the primary judge's approach to applying the definition of "native title" in s 223(1) of the *Native Title Act*. This ground of appeal should be upheld, and the appeal allowed.

3 To hold native title within the meaning of s 223(1) of the *Native Title Act*, the claimant Aboriginal peoples or Torres Strait Islanders must relevantly have rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed, by them (s 223(1)(a)); and they must have a connection with land (or waters) by those traditional laws and customs (s 223(1)(b)). As will be explained, while the primary judge correctly identified the principles to be applied, his Honour erred in his application of those principles by focussing on whether there were physical acts of acknowledgment and observance of traditional laws and customs in the Overlap Area which demonstrated "connection", rather than asking the broader question of whether the Arabana, by their traditional laws and customs, have a "connection" with the Overlap Area.

4 It was common ground that, if the appeal was to be allowed on this basis, the proceeding should be remitted to the Full Court of the Federal Court to consider whether a determination under s 225 of the *Native Title Act* should be made. As the matter is to be remitted for determination in accordance with these reasons, it is necessary for these reasons to deal with the facts and background in some detail.

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1 The Arabana are part of the Lakes Cultural Group, which the Arabana contend extends from South West Queensland to the Spencer Gulf in South Australia.

2 The phrase "Overlap Area" was adopted in the Court below because there were competing claims over the area. Only the Arabana Applicants now claim native title over the Overlap Area.

Background

5 The Overlap Area comprises the township of Oodnadatta, the Oodnadatta Common, the Oodnadatta Airport and an area held by the Aboriginal Lands Trust ("the ALT") established under the *Aboriginal Lands Trust Act 1966* (SA). Oodnadatta is about 160 km south of the Northern Territory border. The whole of the Overlap Area is bounded by areas in respect of which determinations of native title under the *Native Title Act* have been made in favour of a number of native title claim groups, including the Arabana.[3]

6 The Arabana first made a claim for land rights over a large area in the far north of South Australia by a writ filed in this Court on 22 May 1993. That claim included part of the Overlap Area. That proceeding was discontinued after the enactment of the *Native Title Act*. Then, in 1998, the Arabana lodged a claim that they hold native title under the *Native Title Act* over an area of approximately 68,823 km^2 abutting the eastern and southern boundaries of the Overlap Area. On 22 May 2012, the Federal Court made a determination for the purposes of s 225 of the *Native Title Act* in respect of that claim which recognised, apart from areas where native title had been extinguished,[4] the native title of the Arabana over the claimed area ("the 2012 Arabana Determination"). The Overlap Area was not included in that claim because the first respondent, the State of South Australia, had proposed to transfer much of the area to the ALT but this never eventuated.

7 Having obtained the 2012 Arabana Determination, on 1 March 2013, the Arabana Applicants lodged a claim under the *Native Title Act* ("the Arabana No 2 Application") that they hold native title in relation to the Overlap Area, an area abutting the area the subject of the 2012 Arabana Determination. The Arabana No 2 Application is the subject of this appeal.

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3 *Dodd v South Australia* [2012] FCA 519; *Yankunytjatjara/Antakarinja Native Title Claim Group v South Australia* [2006] FCA 1142. See also *King (on behalf of the Eringa Native Title Claim Group) v South Australia* (2011) 285 ALR 454; *King on behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group v South Australia* [2011] FCA 1387.

4 *Dodd* [2012] FCA 519 at [70].

8 On 12 April 2013, the Walka Wani[5] made a claim that they held native title over part of the Overlap Area, being the town of Oodnadatta, the Oodnadatta Airport, a racecourse and some land immediately surrounding those areas ("the Walka Wani No 1 Application"). On 14 September 2018, the Walka Wani then made a second claim over the remainder of the Overlap Area that was not covered by the Walka Wani No 1 Application ("the Walka Wani No 2 Application"). In combination, the areas which were the subject of the Walka Wani No 1 Application and the Walka Wani No 2 Application were exactly the same as the area the subject of the Arabana No 2 Application.

9 On 26 September 2018, the Federal Court ordered, pursuant to s 67 of the *Native Title Act*, that the Arabana No 2 Application, the Walka Wani No 1 Application and the Walka Wani No 2 Application be dealt with in one proceeding.

10 On 21 December 2021, the primary judge dismissed the Arabana No 2 Application on the basis that, while the forebears of the Arabana possessed native title rights and interests in the Overlap Area at sovereignty under the traditional laws acknowledged and customs observed by them,[6] his Honour was "not satisfied that the Arabana [had] established the maintenance of their connection with the Overlap Area in accordance with the traditional laws acknowledged and traditional customs observed by them".[7] His Honour concluded that the Walka Wani had non-exclusive native title rights and interests in the Overlap Area.[8]

11 The Arabana Applicants appealed to the Full Court of the Federal Court on two bases. The first ground of appeal was to the effect that the primary judge "erred in finding ... that the Arabana had not established the maintenance of their connection with the Claim Area". The second ground of appeal was to the effect that the primary judge "erred in finding ... that the [Walka Wani] possessed

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5 The Walka Wani comprise two groups: the Lower Southern Arrernte, who belong to the Arandic group of Aboriginal peoples, and the Yankunytjatjara/Antakarinja, who are Western Desert people.

6 *Stuart v South Australia (Oodnadatta Common Overlap Proceeding) [No 4]* ("*Stuart* (PJ)") [2021] FCA 1620 at [842].

7 *Stuart* (PJ) [2021] FCA 1620 at [916].

8 *Stuart* (PJ) [2021] FCA 1620 at [1051].

[native title rights and interests] in the Claim Area at effective sovereignty". In relation to the first ground, the Arabana Applicants submitted that the primary judge, having correctly found that the Overlap Area was "Arabana country" at the time of effective sovereignty,[9] and that the Arabana had native title rights and interests in the Overlap Area at effective sovereignty,[10] erred in finding that the Arabana had not established the maintenance of their connection with the Overlap Area.[11]

12 On 14 August 2023, the Full Court of the Federal Court (Rangiah, Charlesworth and O'Bryan JJ)[12] upheld the Arabana Applicants' second ground of appeal in relation to the Walka Wani No 1 Application and the Walka Wani No 2 Application and dismissed the Walka Wani claims for a determination of native title over the Overlap Area.[13] The Walka Wani did not seek special leave to appeal that part of the decision of the Full Court in this Court. The Arabana Applicants' first ground of appeal in relation to the Arabana No 2 Application was dismissed by majority (Rangiah and Charlesworth JJ, O'Bryan J dissenting).[14] That part of the decision is the subject of this appeal.

13 In this Court, the Arabana Applicants have two appeal grounds. First, they contend that the majority erred by failing to find that the primary judge had not correctly construed and applied the definition of native title in s 223(1) of the *Native Title Act* when dismissing the Arabana No 2 Application. Second, they contend that the Full Court erred by treating all aspects of the 2012 Arabana Determination as being geographically specific and, in particular, failing to find that the determination in the 2012 Arabana Determination that the Arabana continued to acknowledge and observe the traditional laws and customs of the Arabana at sovereignty was a determination that should have been applied to the Arabana in the Overlap Area.

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9 *Stuart* (PJ) [2021] FCA 1620 at [410], [537].

10 *Stuart* (PJ) [2021] FCA 1620 at [842].

11 *Stuart* (PJ) [2021] FCA 1620 at [916].

12 *Stuart v South Australia* ("*Stuart* (FC)") (2023) 299 FCR 507.

13 *Stuart* (FC) (2023) 299 FCR 507 at 579 [275]-[276]; see also 579-580 [278].

14 *Stuart* (FC) (2023) 299 FCR 507 at 549 [175], 580 [279], 602 [366].

14 In this Court, in addition to the Arabana Applicants and the first respondent (the State of South Australia), the second to fifth respondents (the Walka Wani respondents) filed written submissions and made oral submissions.[15] The Attorney-General of the Commonwealth of Australia ("the Commonwealth") intervened pursuant to s 84A(1) of the *Native Title Act* in relation to the proper construction of s 223(1) of the *Native Title Act* and in relation to the legal effect and significance of prior native title determinations made by consent.

15 By the hearing, the parties and the Commonwealth were largely in agreement about the proper construction of, and the legal principles to be applied in respect of s 223(1) of, the *Native Title Act*. The principal issue was whether the primary judge correctly applied s 223(1) of the *Native Title Act*, and those principles, when his Honour dismissed the Arabana No 2 Application. As these reasons will explain, the answer to that question is "no". The appeal should be allowed and the proceeding should be remitted to the Full Court of the Federal Court (or if the Full Court decides to remit it to a single judge of the Federal Court, for that Court) to consider whether to make a determination under s 225 of the *Native Title Act* that the Arabana hold native title rights and interests in relation to the Overlap Area and, if so, the nature and extent of those native title rights and interests.

16 It is necessary to address the proper construction of s 223 of the *Native Title Act*, and the legal principles underpinning the "connection inquiry" in s 223(1)(b), before turning to identify the findings made by the primary judge and then the way in which the primary judge erred in the application of those principles in considering the Arabana No 2 Application.

Native Title Act

17 An application for a determination of native title in relation to an area may be made to the Federal Court.[16] Section 225 of the *Native Title Act* then relevantly provides:

> "A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land or waters and, if it does exist, a determination of:

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15 The sixth, seventh and eighth respondents filed submitting appearances.

16 *Native Title Act*, s 13(1)(a).

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraph (b) and (c) (taking into account the effect of this Act); and

...

Note: The determination may deal with the matters in paragraphs (c) and (d) by referring to a particular kind or particular kinds of non-native title interests."

When the Federal Court makes a determination of native title, the Court order must set out the details of the matters in s 225.[17]

18 Section 223(1) of the *Native Title Act* defines the expression "native title" or "native title rights and interests"[18] relevantly 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

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17 *Native Title Act*, s 94A.

18 *Native Title Act*, s 223(2) states that "[w]ithout limiting sub-section (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests".

(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." (emphasis added)

The immediately relevant elements in the definition in s 223(1) of "native title" and "native title rights and interests" are based on this Court's decision in *Mabo v Queensland [No 2]*,[19] and have remained constant since the *Native Title Act* was passed.[20]

19 The question in any given case is a question of fact that requires not only the identification of the laws and customs said to be traditional laws and customs but, "no less importantly, the identification of the rights and interests in relation to land or waters which are possessed under *those* laws or customs".[21] The outcome of these inquiries may well depend on the same evidence as is used to establish connection of the relevant peoples with the land or waters because the connection required by s 223(1)(b) is a connection with the land or waters "by those laws and customs".[22] Thus, there are two inquiries required by s 223(1): first, identification of the traditional laws and customs and the identification of the rights and interests possessed under those traditional laws and customs and, second, identifying the connection with land or waters by those laws and customs.[23]

20 In *Members of the Yorta Yorta Aboriginal Community v Victoria*, the plurality explained the two inquiries in these terms:[24]

> "... account must no doubt be taken of the fact that both pars (a) and (b) of the definition of native title are cast in the *present tense*. The questions thus presented are about *present* possession of rights or interests and *present*

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19 (1992) 175 CLR 1. See also *Bodney v Bennell* (2008) 167 FCR 84 at 126 [163].

20 *Western Australia v Ward* (2002) 213 CLR 1 at 66 [17].

21 *Ward* (2002) 213 CLR 1 at 66 [18] (emphasis in original).

22 *Ward* (2002) 213 CLR 1 at 66 [18].

23 *Ward* (2002) 213 CLR 1 at 66 [18].

24 (2002) 214 CLR 422 at 455-456 [85]-[86] (emphasis added).

> connection of claimants with the land or waters. That is not to say, however, that the continuity of the chain of possession and the continuity of the connection is irrelevant.
>
> ... the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs."

21 The continuity in traditional laws and customs required for the laws and customs to fall within s 223(1)(a) was explained in these terms:[25]

> "... demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim. Yet both change, and interruption in exercise, may, in a particular case, take on considerable significance in deciding the issues presented by an application for determination of native title. The relevant criterion to be applied in deciding the significance of change to, or adaptation of, traditional law or custom is readily stated ... The key question is whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood ... ?"

That passage illustrates why it is necessary to identify the laws and customs at present for the purposes of s 223(1)(a), separately from the laws and customs at the time of sovereignty, because the specific or precise content of the laws and customs will not necessarily be the same as those at sovereignty.

22 The connection required by s 223(1)(b) is between Aboriginal peoples or Torres Strait Islanders and land or waters. Because the "connection" for the purposes of s 223(1)(b) is to be "by [the] laws and customs", it does not need to be a *physical* connection with the claim area. The nature of the "connection" will depend on the "laws and customs". That is, if the laws and customs

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25 *Yorta Yorta* (2002) 214 CLR 422 at 455 [83] (emphasis in original).

demonstrate that connection with the relevant land and waters is generally by undertaking physical acts of acknowledgment or observance within the area of those land and waters, then establishing a connection may depend on whether such acts were performed. But equally, if the laws and customs demonstrate that connection may be established other than by physical acts of acknowledgment or observance within the relevant area, then such acts may not be necessary to demonstrate "connection".

23 As the plurality explained in *Western Australia v Ward*:[26]

> "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."

As the passage explains, s 223(1)(a) and (b) are intrinsically linked: ascertaining "connection" for s 223(1)(b) requires identifying the content of the traditional laws and customs for s 223(1)(a). Subsequent decisions of the Federal Court applying this approach have explained how the absence of acts of physical acknowledgment or observance within the claim area does not preclude a conclusion that the native title claimants have a relevant "connection" to that area.[27]

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26 (2002) 213 CLR 1 at 85 [64].

27 See, eg, *Daniel v Western Australia* [2003] FCA 666 at [421]; *Neowarra v Western Australia* [2003] FCA 1402 at [353]; *De Rose v South Australia [No 2]* ("*De Rose (No 2)*") (2005) 145 FCR 290 at 306 [62]; *Starkey v South Australia* (2018) 261 FCR 183 at 214 [52]; *Blackburn v Wagonga Local Aboriginal Land Council* (2021) 287 FCR 1 at 46-47 [143].

24 The parties and the Commonwealth agreed that the Full Court of the Federal Court in *Bodney v Bennell*[28] correctly identified and explained the applicable principles. The Full Court said that:[29]

> "It is well accepted that an effect of European settlement on Aboriginal communities was often enough to render it impracticable for them to maintain a traditional presence on substantial parts of their respective lands. However, it is equally accepted in decisions of this Court that such impracticability does not necessarily mean that the surviving members of such a community have not substantially maintained their connection with their land ... It may have subsisted at a spiritual and/or cultural level ..."

Put in different terms, establishing "connection" requires identifying the nature of the laws and customs by which that "connection" arises but proving that "connection" may not depend on evidence of physical acts of acknowledgment or observance in the claim area.

25 The Commonwealth invited the Court to, contrary to a submission put by South Australia, expressly endorse the statement of principles set out by O'Bryan J in the decision below.[30] The Court should do so. That statement is consistent with the principles set out above and, relevantly, emphasises that "connection" for the purposes of s 223(1)(b) need not be physical and may be spiritual.

26 South Australia contended that "spiritual" connection could only be sufficient if there were "explicable reasons" for not observing and practising the traditional laws and customs on the claim area, such as that the claimant group "cannot get access to the area" or "are intimidated". That submission cannot be accepted at the level of principle. There is no textual basis for reading "connection" in s 223(1)(b) of the *Native Title Act* as limited to "physical" connection unless

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28 (2008) 167 FCR 84.

29 *Bodney* (2008) 167 FCR 84 at 129 [172]. See also *Akiba v Queensland [No 3]* (2010) 204 FCR 1 at 138-139 [546]-[551]; *Croft (on behalf of the Barngarla Native Title Claim Group) v South Australia* (2015) 325 ALR 213 at 229-230 [71]; *Northern Territory v Griffiths* (2019) 269 CLR 1 at 38 [22]-[24]; *Malone (on behalf of the Clermont-Belyando Area Native Title Claim) v Queensland [No 5]* (2021) 397 ALR 397 at 445 [163], [166].

30 *Stuart* (FC) (2023) 299 FCR 507 at 583-584 [290].

there is some "explicable" reason for the connection to be other than physical. All that s 223(1)(b) requires is that there is "a connection"; a "spiritual" connection may be sufficient, without qualification.

Issues and approach

27 The primary judge's distillation of the applicable principles was consistent with the preceding summary.[31] As will be explained, however, the primary judge's reasoning did not sufficiently address the two inquiries required by s 223(1): the identification of the rights and interests possessed under traditional laws and customs of the Arabana and, then, the connection with the land by those traditional laws and customs of the Arabana.[32]

First inquiry – traditional laws and customs of the Arabana and underlying rights and interests

28 Adopting and adapting what was said by this Court in *Yorta Yorta*,[33] the first inquiry is about *present* possession of rights or interests which are possessed under traditional laws acknowledged and customs observed by the Arabana, recognising that some change to, or adaptation of, traditional law or custom is not necessarily fatal because the traditional laws and customs must be expressed at a level of generality appropriate to the rights and interests they reflect. As the following analysis, drawn from the reasons of the primary judge, reveals, in order to answer that first inquiry, it is necessary to consider Arabana society at effective sovereignty, Arabana country at effective sovereignty, the transformation of Arabana society and Arabana society's connection with Arabana country in order to make findings about the contemporary content of the traditional laws and customs of the Arabana.

Effective sovereignty and Arabana society

29 It was common ground that, although sovereignty was claimed in 1788, effective sovereignty had not occurred in the Overlap Area for a substantial time after 1788.[34] "Effective sovereignty" is a practical measure by which a court may

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31 *Stuart* (PJ) [2021] FCA 1620 at [51].

32 *Ward* (2002) 213 CLR 1 at 66 [18].

33 See [20] above.

34 *Stuart* (PJ) [2021] FCA 1620 at [64]-[65].

establish the position of Arabana society and the Overlap Area at the time of actual sovereignty.[35] The primary judge accepted the opinions of the experts called by the Arabana (Dr Lucas[36] and Dr Stockigt[37]) and the State (Dr Sackett[38] and Mr Gara[39]) "that effective sovereignty occurred ... in the period 1872-73".[40] It was also common ground that effective sovereignty did not mean that there was a collapse at that time of Aboriginal law and custom in the region.[41]

30 The primary judge accepted, as appropriate, the summary of the classical Arabana society as defined by the following "key features" of Arabana society set out by Finn J in the 2012 Arabana Determination, namely:[42]

> "(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 -
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> (a) a classificatory kin system which attributed kin terms to classes of relationships and in turn predicated normative behaviour between those classes of relationships;
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> (b) two exogamous matrilineal moieties known as *Mutherri* (*Matthurie*) and *Kararru* (*Kirirawa*) as well as by exogamous

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35 *Stuart* (PJ) [2021] FCA 1620 at [65].

36 An anthropologist.

37 A linguist.

38 An anthropologist.

39 An historian.

40 *Stuart* (PJ) [2021] FCA 1620 at [67]; see also [79].

41 *Stuart* (PJ) [2021] FCA 1620 at [81].

42 *Stuart* (PJ) [2021] FCA 1620 at [101], quoting *Dodd* [2012] FCA 519 at [35] (emphasis added).

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."

As the primary judge explained, the appropriateness of the summary by Finn J was "supported by the report of Dr Fergie and Dr Lucas prepared in 2011 in support of the then Arabana claim" (which resulted in the 2012 Arabana Determination) *and* the reports of Dr Lucas prepared in connection with "the present claim".[43]

31 Although the Federal Court is generally bound by the rules of evidence in native title proceedings,[44] s 86 of the *Native Title Act* expressly provides for the Federal Court to receive into evidence the transcript of evidence in any other proceedings before the Court and draw any conclusions of fact from that transcript that the Court thinks proper[45] and also adopt any decision or judgment of the Court.[46] As the primary judge explained, his Honour relied upon the reports prepared and relied upon for the 2012 Arabana Determination, the 2012 Arabana Determination and also the reports of Dr Lucas prepared in connection with the application – the Arabana No 2 Application – that was being determined.

32 The primary judge then referred to the subsequent report of Dr Lucas filed in the Arabana No 2 Application, which indicated that the Arabana Applicants

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43 *Stuart* (PJ) [2021] FCA 1620 at [101].

44 *Native Title Act*, s 82(1).

45 *Native Title Act*, s 86(1)(a).

46 *Native Title Act*, s 86(1)(c).

"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",[47] and quoted Dr Lucas' conclusion that:[48]

> "• 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;
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> • the applicants are descended from Arabana antecedents, according to principles of filiation recognisable as traditional or as having been derived from a traditional system;
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> • 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."

33 These propositions, derived from Dr Lucas' first report that he had filed in the Arabana No 2 Application, were then elaborated on by the primary judge in particular respects.[49]

34 First, 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. The primary judge explained that a "person's relationship with this patrifilially inherited complex of land, myth and *mura* is called *Ularaka*" and that the associated ceremonies had to be performed by men belonging to that *Ularaka* and thus owning it but that "they were assisted by their

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47 *Stuart* (PJ) [2021] FCA 1620 at [102]; *Dodd* [2012] FCA 519 at [26]-[29], [33].

48 *Stuart* (PJ) [2021] FCA 1620 at [103].

49 *Stuart* (PJ) [2021] FCA 1620 at [104]-[110].

sisters' sons (*Marduka*) who were referred to as 'bosses'".[50] Second, the term *Ularaka* also has the extended sense of referring to sites, associated stories, ceremonies and objects, all of which were inherited through men. Third, "[r]ights in country, in the form of estates, were also apportioned (and sometimes named) by way of *Ularaka*" and the "[f]athers' brothers (who usually shared the same *Ularaka* as a man's father) were the principal teachers of the knowledge".[51]

35 Fourth, Lakes Group people such as the Arabana are divided into matrilineal descent lines called *Mardu* which have associated with them a particular totemic species, such as the emu. Fifth, people are not permitted to marry someone from their own moiety but, as the moieties cross over the regional clan divisions, marriages were commonly between people of different local groups. Sixth, in addition to inheriting his father's *Ularaka*, a man also has secondary rights passed down from his mother in her *Ularaka*, its rituals and associated sites, known as *Abalga*. That is, men and women inherit *Ularaka* and *Abalga*.[52]

36 Seventh, Dr Lucas described the Arabana principles of traditional tenure involving a complex set of interactions between inheritance, knowledge and place. As the primary judge recorded, "[p]ersons may have unique and multiple rights arising from their birth place or from their mother's or father's mother's birthplace. Rights in land in Arabana society are found in the membership of particular groups of people and in the entailments of those groups in complementary relationships and responsibilities for country. People shared in their group's land and *Ularaka* by virtue of their membership in their father's patrifilial group (*pintara*) and their mother's *pintara* group (*Maduka*)."[53] Unlike the Western Desert people, the Arabana do not acquire "ownership" rights in land merely by being born on it or by acquiring ceremonial seniority. As the primary judge put it, "groupings of people linked by affiliation ... could be said to own and hold ritual responsibility for particular areas of land surrounding *Ularaka*/*pintara* sites".[54]

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50 *Stuart* (PJ) [2021] FCA 1620 at [105].

51 *Stuart* (PJ) [2021] FCA 1620 at [106].

52 *Stuart* (PJ) [2021] FCA 1620 at [107].

53 *Stuart* (PJ) [2021] FCA 1620 at [108].

54 *Stuart* (PJ) [2021] FCA 1620 at [109].

Overlap Area was Arabana country at effective sovereignty

37 Before the primary judge, it was common ground that, at effective sovereignty, the Arabana had native title rights and interests in the Overlap Area in accordance with the traditional laws acknowledged and the traditional customs observed by the Arabana.[55] In addition, the primary judge found that the conclusion that the Overlap Area was Arabana country at the time of effective sovereignty was "inevitable" and a "correct understanding of the position" having regard to the combined effect of the ethnographic-historical evidence, the linguistic evidence, the evidence of Sydney Strangways,[56] the evidence of migration, the evidence of custodianship, other sources and the anthropological evidence the primary judge reviewed and assessed.[57] The primary judge conducted a careful and detailed review of this evidence to support this conclusion.

Ethnographic-historical evidence

38 The primary judge concluded that the ethnographic-historical evidence "overwhelmingly"[58] and "strongly"[59] supported the conclusion that the Overlap Area was Arabana country at the time of effective sovereignty. The primary judge formed this view on the basis of the evidence of many people who had spent sustained periods in the region and who were familiar with the Arabana or the Arrernte,[60] including Giles,[61] Robert Hogarth,[62] Byrne,[63] Stirling,[64] Spencer

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55 *Stuart* (PJ) [2021] FCA 1620 at [842].

56 See [63]-[65] below.

57 *Stuart* (PJ) [2021] FCA 1620 at [842].

58 *Stuart* (PJ) [2021] FCA 1620 at [410].

59 *Stuart* (PJ) [2021] FCA 1620 at [414].

60 *Stuart* (PJ) [2021] FCA 1620 at [412].

61 *Stuart* (PJ) [2021] FCA 1620 at [126]-[127].

62 *Stuart* (PJ) [2021] FCA 1620 at [140]-[147].

63 *Stuart* (PJ) [2021] FCA 1620 at [176]-[181].

64 *Stuart* (PJ) [2021] FCA 1620 at [182]-[188].

and Gillen,[65] Tom Hogarth,[66] the Berndts,[67] TGH Strehlow,[68] Hercus[69] and Shaw and Gibson.[70] The primary judge also relied on the evidence of those who obtained information from a range of informants within the region,[71] including Howitt[72] and Mathews.[73]

39 In particular, his Honour placed "significant weight" on the works of TGH Strehlow and Hercus.[74] TGH Strehlow had conducted detailed anthropological fieldwork with the Arrernte people[75] and published a number of maps showing Arrernte boundaries[76] (which were consistent with the claim that the Overlap Area was Arabana country at the time of effective sovereignty). Hercus was "one of Australia's most senior and authoritative linguists" who "conducted extensive field work in the Oodnadatta region", with Arabana being "one of the principal languages on which she worked".[77] The primary judge surveyed her work, which showed the location of the languages she discussed,[78] and which indicated that Oodnadatta and its surrounds were within Arabana

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65 *Stuart* (PJ) [2021] FCA 1620 at [204]-[231].

66 *Stuart* (PJ) [2021] FCA 1620 at [232]-[240].

67 *Stuart* (PJ) [2021] FCA 1620 at [314]-[317].

68 *Stuart* (PJ) [2021] FCA 1620 at [318]-[324].

69 *Stuart* (PJ) [2021] FCA 1620 at [332]-[352].

70 *Stuart* (PJ) [2021] FCA 1620 at [361]-[365].

71 *Stuart* (PJ) [2021] FCA 1620 at [412].

72 *Stuart* (PJ) [2021] FCA 1620 at [163]-[175].

73 *Stuart* (PJ) [2021] FCA 1620 at [241]-[253].

74 *Stuart* (PJ) [2021] FCA 1620 at [376].

75 *Stuart* (PJ) [2021] FCA 1620 at [318].

76 *Stuart* (PJ) [2021] FCA 1620 at [319].

77 *Stuart* (PJ) [2021] FCA 1620 at [332].

78 *Stuart* (PJ) [2021] FCA 1620 at [333].

country.[79] The primary judge's view of the evidence was consistent with the opinion of the ethnographic-historical material taken by the Arabana's and South Australia's experts:[80] Dr Lucas (for the Arabana)[81] and Dr Sackett and Mr Gara (for South Australia).[82]

Linguistic evidence

40 The primary judge concluded that the weight of the linguistic evidence which his Honour accepted pointed to Arabana having been the language of the Overlap Area at effective sovereignty.[83] His Honour preferred the evidence of Dr Stockigt,[84] who was the Arabana's linguistic expert,[85] to that of Dr Black, who was the Walka Wani's linguistic expert.[86] The primary judge considered that Dr Stockigt had "undoubted expertise" in the specialised field of linguistics.[87] Among other things, Dr Stockigt had conducted linguistic fieldwork in Alice Springs with Mr Strangways, one of the Arabana's witnesses.[88] The primary judge described Dr Stockigt's opinions as "well researched" and "well-reasoned" and considered that "her evidence revealed a deep knowledge of the subject matter" and that she had "delved more deeply into source materials" than Dr Black.[89]

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79 *Stuart* (PJ) [2021] FCA 1620 at [342].

80 *Stuart* (PJ) [2021] FCA 1620 at [410].

81 *Stuart* (PJ) [2021] FCA 1620 at [86].

82 *Stuart* (PJ) [2021] FCA 1620 at [88].

83 *Stuart* (PJ) [2021] FCA 1620 at [537].

84 *Stuart* (PJ) [2021] FCA 1620 at [426].

85 *Stuart* (PJ) [2021] FCA 1620 at [416].

86 *Stuart* (PJ) [2021] FCA 1620 at [416].

87 *Stuart* (PJ) [2021] FCA 1620 at [416].

88 *Stuart* (PJ) [2021] FCA 1620 at [416].

89 *Stuart* (PJ) [2021] FCA 1620 at [426].

41 Having identified and examined vocabularies and word lists compiled by the early white explorers, ethnographers and anthropologists,[90] pastoral run sheets, maps and other sources,[91] Dr Stockigt "concluded 'beyond reasonable doubt' that at effective sovereignty ... Arabana language belonged to country to the south of the Macumba River, including the Overlap Area"[92] and "formed the opinion 'on the balance of probability' that the language belonging to Oodnadatta and the Overlap Area was Arabana".[93]

Evidence of migration

42 The primary judge accepted that there had been eastward and southward migrations of the Western Desert people and Arrernte people since effective sovereignty, and that this was generally consistent with the views of Dr Lucas, Dr Sackett, Dr Stockigt and Mr Gara that Oodnadatta and its immediate environs were within Arabana country at the time of effective sovereignty.[94]

Evidence of custodianship

43 The primary judge accepted the evidence of Mr Strangways about custodianship, noting that it was corroborated by Reginald Dodd's evidence and documentary evidence.[95] Mr Strangways gave evidence of the Arabana having made certain non-Arabana men custodians of their sacred sites, myths and sacred objects.[96] Mr Dodd gave evidence about the particular individuals who had become senior custodians of Arabana country and said that Arabana ceremonial objects had been taken to Oodnadatta and placed in their care.[97] The primary judge referred

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90 *Stuart* (PJ) [2021] FCA 1620 at [430], [432].

91 *Stuart* (PJ) [2021] FCA 1620 at [431], [441].

92 *Stuart* (PJ) [2021] FCA 1620 at [435].

93 *Stuart* (PJ) [2021] FCA 1620 at [437].

94 *Stuart* (PJ) [2021] FCA 1620 at [580].

95 *Stuart* (PJ) [2021] FCA 1620 at [680].

96 *Stuart* (PJ) [2021] FCA 1620 at [680], [682].

97 *Stuart* (PJ) [2021] FCA 1620 at [686].

to the work of Shaw and Gibson which supported Mr Strangways' and Mr Dodd's evidence.[98]

Anthropological evidence and other sources

44 Dr Lucas, Dr Sackett and Mr Gara considered that the Overlap Area was Arabana country at effective sovereignty.[99] They reached these conclusions after consideration of the ethnographic-historical evidence (referred to above), genealogies, materials concerning movements of Aboriginal peoples and other sources.[100] The primary judge considered the opinions of Dr Lucas and Dr Sackett, supported by the historical evidence of Mr Gara, the linguistic evidence, a map, and other evidence, to be "generally soundly based and reasoned" and accepted their opinions in preference to those of the Walka Wani anthropologists[101] (Dr Cane, Mr Graham and Dr Liebelt[102]).

Transformation of Arabana society

45 That there has been some transformation of the Arabana society and some change in the particular detail of its traditional laws and customs since sovereignty was not in dispute. The primary judge identified[103] the transformations of some of the detail of the Arabana traditional laws and customs that had occurred since sovereignty and then addressed those transformations by setting out parts of the evidence of Dr Lucas and Dr Sackett.[104] As explained, his Honour found their opinions were "generally soundly based and reasoned" and supported by other evidence.[105]

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98 *Stuart* (PJ) [2021] FCA 1620 at [690].

99 *Stuart* (PJ) [2021] FCA 1620 at [747], [750]; see also [772].

100 *Stuart* (PJ) [2021] FCA 1620 at [747].

101 *Stuart* (PJ) [2021] FCA 1620 at [794].

102 *Stuart* (PJ) [2021] FCA 1620 at [87].

103 *Stuart* (PJ) [2021] FCA 1620 at [103], [845].

104 *Stuart* (PJ) [2021] FCA 1620 at [773], [778], [794], [844].

105 See [44] above.

46 In relation to Dr Lucas, the primary judge stated that Dr Lucas "considered that the depopulation of the Arabana had made it 'demographically and practically impossible' for them to continue the exercise of [their] traditional rights and interests in the Overlap Area in their full traditional scope".[106] The primary judge then set out the following paragraphs of Dr Lucas' report:[107]

> "[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*

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106 *Stuart* (PJ) [2021] FCA 1620 at [773].

107 *Stuart* (PJ) [2021] FCA 1620 at [773] (emphasis added).

> *'country' as a whole. This, in my opinion, is the contemporary expression of underlying title*."

The primary judge recorded that Dr Sackett supported Dr Lucas' conclusion that the development Dr Lucas had described in [252] of his report was "but an adaptation to changed circumstances".[108]

47 The evidence before the primary judge also included the findings of Finn J in the 2012 Arabana Determination (not all referred to by the primary judge) where Finn J addressed the transformations in Arabana traditional laws and customs that had occurred since sovereignty:[109]

> "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.
>
> 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) o[f] incest, continues to be a fundamental principle in Arabana custom and law and is reflected in the normative system.*
>
> 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

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108 *Stuart* (PJ) [2021] FCA 1620 at [778].

109 *Dodd* [2012] FCA 519 at [36]-[41] (emphasis added).

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.

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.

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*.

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*."

48 As is apparent, the conclusions of Dr Lucas and Dr Sackett about the transformation of particular details of Arabana traditional laws and customs since sovereignty, while not all expressly referred to by the primary judge, mirrored the evidence that was referred to by the primary judge.[110] In particular, the primary judge, like Finn J in the 2012 Arabana Determination, accepted evidence that the Arabana recognise a collective right to what they understand to

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110 See [46] above.

be Arabana country as a whole, and that this is a contemporary expression of the entitlement of the descendants of Arabana to their land.[111]

Contemporary Arabana society's connection with Arabana country

49 In contrast to the detailed findings of Finn J made in the context of the 2012 Arabana Determination,[112] the primary judge did not make sufficient findings about the contemporary content of the traditional laws and customs of the Arabana. In sum, the primary judge identified the traditional laws acknowledged and customs observed by the Arabana at sovereignty,[113] that there had been a transformation of those laws and customs since sovereignty,[114] and that "the depopulation of the Arabana had made it 'demographically and practically impossible' for them to continue the exercise of [their] traditional rights and interests in the Overlap Area *in their full traditional scope*",[115] such that the contemporary laws and customs of the Arabana were an adaptation to changed circumstances.[116]

50 The primary judge importantly recognised that the contemporary laws and customs of the Arabana include a broader "underlying" title held by those who continue to identify as descendants of the Arabana, the collective right of the Arabana to Arabana land on the basis of filial connections (through men or women) to known ancestors whom they also believe to be Arabana who had rights in Arabana land, and that "Arabana people with specific kin-based identities connect with what they understand to be Arabana 'country' as a whole".[117]

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111 *Stuart* (PJ) [2021] FCA 1620 at [773]; cf *Dodd* [2012] FCA 519 at [40]-[41].

112 *Dodd* [2012] FCA 519 at [42], [45]-[50].

113 See [29]-[36] above.

114 See [45]-[46] above.

115 *Stuart* (PJ) [2021] FCA 1620 at [773] (emphasis added). See [46] above.

116 See [46] above.

117 See [46] above.

However, the primary judge did not make sufficient findings about the nature and content of the contemporary traditional laws and customs of the Arabana.[118]

Second inquiry – connection

51 The Arabana Applicants submitted that, although the primary judge stated the applicable principles concerning "connection" correctly in his Honour's reasons for decision,[119] the primary judge erred in reasoning to his conclusion that the Arabana had not maintained connection with the Overlap Area.[120] Those submissions should be accepted.

Error in application

52 In assessing the second inquiry in relation to the Arabana No 2 Application, the primary judge framed the inquiry as "whether ... the Arabana ... establish, in accordance with s 223(1)(b) of the [*Native Title Act*], that their [native title rights and interests] extend to the Overlap Area and if so, whether they have continued to be possessed by the current [Arabana society] in accordance with an acknowledgement of their ... traditional laws and *an* observance of their ... traditional customs".[121]

53 The proper approach to s 223(1)(b) is to ask whether there is a "connection" with the claim area "by [the] laws and customs" for the purposes of s 223(1)(a). This does not necessarily require that there be physical acts of *acknowledgment* or *observance in the claim area*. If, as here, the laws and customs include that the Arabana have a collective right to Arabana country, "connection" may arise from knowledge of the Overlap Area as Arabana country, together with "spiritual" or "cultural" connection to Arabana country that is not necessarily demonstrated by acts of "acknowledgment" or "observance".

54 Two aspects of the Arabana's case should be considered in this second inquiry: the lay evidence and the ten matters relied upon by the Arabana. Upon considering those two aspects, the primary judge found that it was

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118 See, eg, *Stuart* (FC) (2023) 299 FCR 507 at 595-596 [338]-[339], 598 [347], 599 [353], 599-600 [355], 600 [359], 601 [363].

119 *Stuart* (PJ) [2021] FCA 1620 at [50]-[51], [847].

120 *Stuart* (PJ) [2021] FCA 1620 at [916].

121 *Stuart* (PJ) [2021] FCA 1620 at [56] (emphasis added).

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 [was] fatal ... to the Arabana claim".[122]

Lay witnesses

55 Each of the lay witnesses identified people in Oodnadatta as Arabana, both in the past and presently.[123] The following description of the lay evidence is drawn from the reasons of the primary judge.

Aaron Stuart

56 Aaron Stuart,[124] the lead applicant, was born in 1968 in Port Augusta and said that he is an Arabana man through his father and grandfather. His grandfather, Laurie Stuart, was a senior Arabana man, being an Arabana Wilyaru, the highest level of initiation in the Arabana.[125] Mr Stuart gave evidence to the effect that the initiation of Arabana men ceased in the mid-1950s and neither he nor any of his contemporaries has been initiated.[126] Mr Stuart also gave evidence that as a child he visited Oodnadatta with his grandfather, camping on a claypan to the south of the town and that his grandfather taught him the law for Oodnadatta.[127] From when he was about 18 years old, when he lived in Oodnadatta for a couple of years, he said that there were people who identified as Arabana living in Oodnadatta; and that Nelly Stuart, Uncle Yundu Spider and Uncle Billy Bailes had spoken to him in Arabana.[128]

57 In relation to the extent of Arabana country, Mr Stuart gave evidence that his grandfather and his father had each given him accounts about the extent to

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122 *Stuart* (PJ) [2021] FCA 1620 at [914] (emphasis added).

123 *Stuart* (PJ) [2021] FCA 1620 at [661]. The evidence of Joanne Warren need not be considered.

124 *Stuart* (PJ) [2021] FCA 1620 at [582]-[602].

125 *Stuart* (PJ) [2021] FCA 1620 at [582].

126 *Stuart* (PJ) [2021] FCA 1620 at [591].

127 *Stuart* (PJ) [2021] FCA 1620 at [587].

128 *Stuart* (PJ) [2021] FCA 1620 at [588]-[590].

which Arabana country extended to the north;[129] Janet Bailes and Nelly Stuart had told him that Oodnadatta was Arabana country;[130] and Brian Marks (who represented the Arabana Wilyaru at a meeting in Pimba in 1984 or 1985 and whose father was an Arabana man) had described Oodnadatta to him as "Arabana *Wadlhu*", namely Arabana country.[131] His evidence was that "every Arabana person has rights to Arabana country and that one did not have to go through Wilyaru Law to have those rights".[132]

58 Mr Stuart gave evidence of an occasion in Oodnadatta on which his grandfather, Laurie Stuart, had growled at Uncle Clarrie and his brother Deannie who were wearing red headbands. Mr Stuart's evidence was that his grandfather said "you pull that off, you're in Arabana country, you're in Wilyaru country". Mr Stuart's evidence was that his grandfather had the right to say it because he was the Wilyaru man there. His grandfather explained that the red headbands – made of hair and ochre twined around – are worn only for ceremony and are not to be worn to intimidate or scare people. Mr Stuart said that Audrey Stuart had been present and had not challenged Laurie Stuart's statement concerning Oodnadatta being Arabana land.[133]

59 Mr Stuart also gave evidence that he was taught aspects of Arabana law by his grandfather, "but not at all levels". His grandfather had not told him about Wilyaru law which is "a high law ... very strong law" but had, shortly before his death, told him some aspects of the Wilyaru law, even though it was prohibited, so that the knowledge would not be lost. Mr Stuart's evidence was that despite not going through Wilyaru law himself, which the primary judge understood to be initiation, he had learnt it from his father, grandfather, uncles and aunties.[134] Mr Stuart's evidence was that his grandfather had taught him that Arabana law is Wilyaru law and that Wilyaru law is held by particular persons, that his grandfather was a person who could "point the bone" and that he had taught Mr Stuart

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129 *Stuart* (PJ) [2021] FCA 1620 at [593].

130 *Stuart* (PJ) [2021] FCA 1620 at [589].

131 *Stuart* (PJ) [2021] FCA 1620 at [595].

132 *Stuart* (PJ) [2021] FCA 1620 at [600].

133 *Stuart* (PJ) [2021] FCA 1620 at [601].

134 *Stuart* (PJ) [2021] FCA 1620 at [591].

the process. Mr Stuart's evidence was also that his grandfather had been opposed to him being initiated on Anangu Pitjantjatjara Yankunytjatjara Lands.[135]

60 In relation to the Arabana moiety system,[136] Mr Stuart said he had been taught by his father, his grandfather and his grandmothers on both sides. He identified the two moieties – *Kararru* and *Mathari* – describing himself as *Kararru* and his daughters as *Mathari*. Mr Stuart said that, after the birth of one of his granddaughters, he had buried a small piece of the umbilical cord the "other side [of] Alberga" as a means of "putting [his] female side from [his] daughter Beralda back into [his] land, like a ceremony". The primary judge recorded that the burial was not in the Overlap Area.[137]

61 Mr Stuart said that he had learnt of Arabana *Ularaka*[138] from his parents, grandparents, uncles and aunties. Mr Stuart declined to talk about a woman's *Ularaka*. He gave evidence about four *Ularaka* connected with Hookey's Hole – the turkey, *Warrakatti-Kari* (emu), *Yaltya* (the smaller frog) and *Tidnnamara* (the sand frog). He said that he had learnt the turkey *Ularaka* from his father and Nana Laurie, his grandfather, as well as the *Kadni* (frilled neck lizard) and *Karlta* (sleepy lizard) *Ularaka*. In addition, he described the Arabana *Thunpillil Ularaka* associated with Mount O'Halloran (*Kati Thunda*) and an *Ularaka Kuarkeriee* concerning two snakes.[139]

62 The primary judge regarded his evidence as "generally reliable".[140] However, the primary judge stated:[141]

> "However, he has lived in Oodnadatta for only relatively short periods, the longest as a Community Police Constable and that was over 20 years previously. While he gave evidence of the *Ularaka* he had been taught,

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135 *Stuart* (PJ) [2021] FCA 1620 at [596].

136 See [35] above.

137 *Stuart* (PJ) [2021] FCA 1620 at [592].

138 See [34] above.

139 *Stuart* (PJ) [2021] FCA 1620 at [597]-[598].

140 *Stuart* (PJ) [2021] FCA 1620 at [602].

141 *Stuart* (PJ) [2021] FCA 1620 at [602].

> he did not convey a sense of connectedness with the Overlap Area through these *Ularaka*. His evidence concerning use and protection of the Overlap Area was not extensive."

Each of those observations incorrectly focussed on whether there were physical acts of acknowledgment and observance of the traditional laws and customs in the Overlap Area, rather than connection of the Arabana by their traditional laws and customs with the Overlap Area. It would have been relevant to the assessment of "connection" that Mr Stuart had been told, including by his grandfather, that Oodnadatta was Arabana country, and that there was evidence of Mr Stuart's connection with traditional Arabana law and custom, including by reason of the fact he knew the Arabana moiety system and *Ularaka.* Whether Mr Stuart's evidence, properly assessed, demonstrated "connection" for the purposes of s 223(1)(b) is to be determined on remitter.

Sydney Strangways

63 Sydney Strangways said, and it was not disputed, that – having been born in July 1932[142] – he is the oldest Arabana person alive.[143] Mr Strangways gave evidence that he had been told that Oodnadatta was Arabana country by many people.[144] Between the ages of five and 12, he had gone with his family to Oodnadatta three to four times per year, staying for up to two weeks at a time and staying with his maternal aunt, who would take him and his siblings out to collect bush tucker.[145] He gave evidence about a number of matters related to Arabana law and custom, including that he had been taught Arabana law by his father and uncles who were Wilyaru men,[146] Arabana initiation ceremonies (which had taken place until the 1950s),[147] and he had been taught about Arabana *Ularaka*.[148] He gave

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142 *Stuart* (PJ) [2021] FCA 1620 at [603].

143 *Stuart* (PJ) [2021] FCA 1620 at [619].

144 *Stuart* (PJ) [2021] FCA 1620 at [618].

145 *Stuart* (PJ) [2021] FCA 1620 at [609].

146 *Stuart* (PJ) [2021] FCA 1620 at [611].

147 *Stuart* (PJ) [2021] FCA 1620 at [612], [614], [616].

148 *Stuart* (PJ) [2021] FCA 1620 at [618].

evidence about a number of the Arabana *Ularaka* including the owl *Ularaka*,[149] the Kangaroo *Ularaka*, the *Urumbula Ularaka*,[150] the Swallow Waterhole and the *Thunpili Ularaka*.[151] He also gave evidence about the Arabana moiety system, saying that it regulates Arabana society, how the Arabana interact socially as well as the rules of marriage.[152] He also described burial and Sorry Business rituals.[153]

64 Mr Strangways' evidence spanned four days of the trial.[154] The primary judge accepted Mr Strangways' evidence with "confidence", describing him as a "singularly impressive witness, being honest, knowledgeable, articulate, insightful and responsive to the questions".[155] His Honour said that Mr Strangways had a "good deal of knowledge concerning Arabana law and custom",[156] had "deep cultural knowledge of Arabana culture and law and gave several instances of his compliance with it"[157] and engaged "in a lot of teaching".[158]

65 However, the primary judge stated:[159]

> "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

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149 *Stuart* (PJ) [2021] FCA 1620 at [618]: the primary judge referred to the "Owl *Uralaka*".

150 *Stuart* (PJ) [2021] FCA 1620 at [618]: the primary judge referred to the "*Urumbula Uralaka*".

151 *Stuart* (PJ) [2021] FCA 1620 at [618].

152 *Stuart* (PJ) [2021] FCA 1620 at [617].

153 *Stuart* (PJ) [2021] FCA 1620 at [617].

154 *Stuart* (PJ) [2021] FCA 1620 at [603].

155 *Stuart* (PJ) [2021] FCA 1620 at [603].

156 *Stuart* (PJ) [2021] FCA 1620 at [613].

157 *Stuart* (PJ) [2021] FCA 1620 at [622].

158 *Stuart* (PJ) [2021] FCA 1620 at [619].

159 *Stuart* (PJ) [2021] FCA 1620 at [621].

> 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."

Again, those observations incorrectly focussed on whether there were physical acts of acknowledgment and observance of the traditional laws and customs in the Overlap Area, rather than connection of the Arabana by their traditional laws and customs with the Overlap Area. The latter question, which is to be determined on remitter, will take into account Mr Strangways' evidence about the connection of the Arabana, by their traditional laws and customs, with the Overlap Area.

Dr Veronica Arbon

66 Dr Arbon was 69 years old when she gave evidence. She is an Arabana woman born in Alice Springs who has had a substantial career in tertiary education. She obtained a PhD in 2007. Dr Arbon has never lived in Oodnadatta or on Arabana land. Her mother, Shirley Arbon, was an Arabana woman born in Oodnadatta in 1934. Dr Arbon's grandmother, Myra Hodgson, was also an Arabana woman. Her great-great grandmother was Lili Strangways, Mr Strangways' grandmother.[160]

67 Dr Arbon first visited Oodnadatta during a family holiday when she was aged 14 to 15 and her mother told her and her siblings then that Oodnadatta was Arabana country.[161] Dr Arbon next visited Oodnadatta in about 1998 when she was part of a family group who went to visit country and other family. Dr Arbon has made subsequent visits to Oodnadatta, in the order of 13 to 15, each for no more than one or two days. Her mother taught her about Arabana bush tucker and the children have also had similar training further north. Dr Arbon agreed that she had limited knowledge of the Arabana two moiety system but knew that the moieties were named *Mathari* and *Kararru*. She did not claim to have evidence about the Arabana kinship system more generally, for example, about the moiety

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160 *Stuart* (PJ) [2021] FCA 1620 at [623].

161 *Stuart* (PJ) [2021] FCA 1620 at [624].

sub-lines or totems, or of the animals associated with the totems. Nor did she claim knowledge of the principles by which the Arabana acquire interests in land.[162]

68 However, Dr Arbon had been actively involved in the revival of Arabana language over the last two or three years. She said that she had commenced pursuing learning Arabana about 25 years ago but had done so more actively in the last five years as part of the Mobile Language Team. Dr Arbon said that she had been taught that the Arabana claim heritage through the female line.[163]

69 The primary judge stated:[164]

> "Although Dr Arbon is clearly actively interested in Arabana language and culture, and she was an honest and reliable witness, I thought that her knowledge of Arabana traditional law and custom was limited, as was her knowledge of significant sites in and around Oodnadatta. It did not suggest a connection with the Overlap Area through acknowledgement and observance of traditional law and custom. It did suggest an attempt to establish connection with Oodnadatta, but with difficulty because of the absence of knowledge."

Those observations proceed on the basis it was necessary for the evidence to demonstrate "acknowledgement and observance" of traditional law and custom by acts taking place in Oodnadatta. For this reason, the fact that Dr Arbon had been told that Oodnadatta was Arabana country and her knowledge of Arabana bush tucker and language were not sufficiently considered as relevant to "connection".

Leonie Warren

70 Leonie Warren was born in Leigh Creek in November 1971. When she was still a baby, she was taken to live at Finniss Springs and remained there until she was four or five years old. Her family moved to Port Augusta when she was aged six or seven.[165]

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162 *Stuart* (PJ) [2021] FCA 1620 at [625].

163 *Stuart* (PJ) [2021] FCA 1620 at [626].

164 *Stuart* (PJ) [2021] FCA 1620 at [627].

165 *Stuart* (PJ) [2021] FCA 1620 at [640].

71 Ms Warren said that she first visited Oodnadatta when she was aged 14 or 15 when the family went to visit her brother Greg. As a teenager, she visited Oodnadatta three or four times. When she was 17 or 18, she moved with her partner, Stanley Wingfield (who identified with the Arabana and Kokatha), to live in Oodnadatta and did so for approximately six and a half years. She named Arabana people living in Oodnadatta at the time.[166]

72 Ms Warren said that she knows only a few words of Arabana but does recognise it when she hears it spoken. When Ms Warren was living in Oodnadatta, they occasionally camped in the area around Oodnadatta. The places at which they camped included Algebuckina, Alberga, around Hamilton, and on the claypan on the Oodnadatta Common. They would catch *kadnis* (lizards), perenties (a type of lizard) and kangaroo for food. A number of people – Nana Nel and Yundu Spider (Peter Amos's father) – used to say that Oodnadatta was Arabana country.[167]

73 Since leaving Oodnadatta, Ms Warren has returned three or four times a year, for funerals, to visit her brother or to attend the gymkhanas. Her children have been taught hunting by Greg Warren and others on the Oodnadatta Common.[168] Ms Warren described Arabana people living in Oodnadatta as including Bobby Warren and his family, Alan Warren and his family, Lyle Warren, Maxine Marks and her family and Christine Hunt and her family. Ms Warren also described collecting bush foods around Marree and Finniss Springs. She said that she loves camping and taking the children out to do so. She has been attending Arabana language courses. It is important to Ms Warren that the Arabana language be revived.[169]

74 The primary judge regarded Ms Warren as a truthful and reliable witness. However, his Honour appeared to dismiss her evidence as not demonstrating "connection" on the basis that "she had relatively little knowledge of Arabana traditional law and custom".[170] Again, at the very least, the matters his Honour took into account in assessing connection were incomplete. For example, it is not clear that the primary judge considered Ms Warren's evidence of hunting for lizards and

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166 *Stuart* (PJ) [2021] FCA 1620 at [641].

167 *Stuart* (PJ) [2021] FCA 1620 at [641]-[643].

168 *Stuart* (PJ) [2021] FCA 1620 at [645].

169 *Stuart* (PJ) [2021] FCA 1620 at [646].

170 *Stuart* (PJ) [2021] FCA 1620 at [647].

kangaroos in assessing whether she had a "connection" with the Overlap Area by law and custom.

Reginald Dodd

75 Mr Dodd was born in 1940 at Finniss Springs Mission Station. Mr Dodd regarded himself as Arabana because of his mother, his grandmother and his great grandmother.[171]

76 Mr Dodd referred to a large group of people travelling from the west attending a ceremony on Anna Creek Station in the 1960s which led to the cessation of Arabana initiations. When the decision was made to close down initiations, there were corroborees at Port Augusta, Marree and Curdimurka, and Arabana ceremonial objects were taken to Oodnadatta for care by custodians he identified as Tommy O'Donaghue, Jack Parrott, Tom Brady, Paddy Jones and Tommy Parrott.[172] Mr Dodd said that the Arabana law which applies in Oodnadatta and at Hookey's Hole is the same as that which applies at Marree and that it is the whole group of Arabana people within Arabana society who have rights to the whole of Arabana country.[173]

77 Although the primary judge regarded Mr Dodd as an honest and generally reliable witness, his Honour concluded that Mr Dodd's evidence "did not establish any strong continuing connection of the Arabana with the Overlap Area".[174] This finding appeared to be largely informed by the fact that "Mr Dodd agreed that he had not spent lengthy periods in Oodnadatta in the 1970s, 1980s and 1990s".[175] Again, Mr Dodd's evidence may still have been relevant to "connection" because he regarded Arabana law as applying in Oodnadatta and gave evidence that Arabana people within Arabana society have rights to the whole of Arabana country.

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171 *Stuart* (PJ) [2021] FCA 1620 at [648].

172 *Stuart* (PJ) [2021] FCA 1620 at [650].

173 *Stuart* (PJ) [2021] FCA 1620 at [652].

174 *Stuart* (PJ) [2021] FCA 1620 at [654].

175 *Stuart* (PJ) [2021] FCA 1620 at [653].

Primary judge's assessment of the matters relied upon by the Arabana Applicants[176]

78 The error in the approach adopted by the primary judge is readily explained by the nature of the ten matters relied upon by the Arabana Applicants, many of which focussed upon physical connection. However, that does not detract from the statutory task presented by s 223(1)(b).

79 South Australia contended that the Arabana Applicants could not succeed in this appeal because they were bound by their "forensic decisions" to rely on the ten matters. The majority of the Full Court below essentially accepted this argument. Their Honours accepted South Australia's submission to the Full Court that "the reasons of the primary judge must be considered in the particular context of how the Arabana expressed their connection in their pleading", stating that "it has not ... been shown that the primary judge mischaracterised the case presented to him" and that "[i]t was for the Arabana to demonstrate how the connection arose by their traditional laws and customs, which only they could explain".[177]

80 While the manner in which the Arabana Applicants framed their case may explain why the primary judge erred in the manner his Honour did, it cannot affect this Court's conclusion as to whether or not the primary judge erred. The ten matters are now to be considered.

(i) The matters established by the 2012 Arabana Determination

81 This is the second ground of appeal in this case. The 2012 Arabana Determination expressly determined: that native title exists in relation to the 2012 Determination Area[178] (save for specified exceptions as a result of extinguishment), an area abutting the eastern and southern boundaries of the Overlap Area (Order 2); under the relevant traditional laws and customs of the Arabana, the native title holders comprise those living Aboriginal people who both self-identify as Arabana and who are recognised as being Arabana by other Arabana people based on filiation (including by adoption) from an Arabana parent or grandparent or long term co-residence with Arabana people on Arabana country,

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176 *Stuart* (PJ) [2021] FCA 1620 at [852]-[906].

177 *Stuart* (FC) (2023) 299 FCR 507 at 533-534 [105]-[106].

178 *Dodd* [2012] FCA 519, Sch 1 to the Orders.

and who satisfy certain other requirements (Order 5); the nature and extent of the native title rights and interests of the Arabana in relation to the 2012 Determination Area (Orders 6 to 9); and that the native title rights and interests are subject to and exercisable in accordance with the traditional laws and customs of the native title holders (Order 9(a)).

82 The 2012 Arabana Determination was a consent determination made under s 87 of the *Native Title Act*.[179] Finn J explained why the requirements of s 223(1) were satisfied and, in doing so, expressed confidence in the basis on which the State had come to the view that there should be a determination of native title. In particular, Finn J considered that the State could properly accept: 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";[180] that there was "[s]ubstantial evidence" provided of the continuing connection of members of contemporary Arabana society by their laws and customs with a substantial part of the claim area through their laws and customs;[181] and ultimately, that the steps taken by the State to satisfy itself of the matters in s 223 as they related to the Arabana claim were "rigorous" and "could properly satisfy it that there was a credible basis for the Arabana's application".[182]

83 In that context, the primary judge's finding 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"[183] revealed two errors. First, the primary judge considered that the 2012 Arabana Determination could not be sufficient evidence of "connection", as it was not evidence of "connection" "in" the Overlap Area. Second, the primary judge did not consider the 2012 Arabana Determination to be "evidence in these proceedings".

84 On the first error, as explained, "connection" must be by laws and customs, so connection with an adjacent area may be evidence of connection "by laws and customs" where, as here, the laws and customs emphasise a collective right of all

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179 *Dodd* [2012] FCA 519 at [4].

180 *Dodd* [2012] FCA 519 at [41].

181 *Dodd* [2012] FCA 519 at [42].

182 *Dodd* [2012] FCA 519 at [59].

183 *Stuart* (PJ) [2021] FCA 1620 at [854].

Arabana people to Arabana land, and there is evidence that Oodnadatta is regarded by the Arabana as Arabana country.

85 On the second error, the 2012 Arabana Determination as well as evidence on which it was based were before the primary judge and were significant. As has been explained,[184] s 86 of the *Native Title Act* relevantly and expressly provides for the Federal Court to receive into evidence the transcript of evidence in any other proceedings before the Court and draw any conclusions of fact from that transcript that the Court thinks proper[185] and also to adopt any decision or judgment of the Court.[186] The 2012 Arabana Determination and the reports prepared and relied upon for that Determination were therefore evidence of and relevant to the question of connection.

(ii) The continuity of Arabana people living in Oodnadatta

86 In making his determination, the primary judge proceeded "on the basis that people who have resided in Oodnadatta and who were named as Arabana by Arabana [lay] witnesses and by [Dr] Lucas are, or were, Arabana".[187] However, the primary judge stated that there was "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".[188] His Honour referred to this as "an absence of physical presence".[189] As has been explained, his Honour did not make specific or detailed findings about contemporary Arabana law and custom. As the Arabana Applicants submitted, this was based on a premise that there were contemporary Arabana laws and customs that specified a "manner of living" for the Arabana to demonstrate connection by their laws and customs, when no such finding had been made. To the contrary, the Arabana Applicants made submissions before this Court that there was evidence of some witnesses to the effect that they felt connected to

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184 See [31] above.

185 *Native Title Act*, s 86(1)(a).

186 *Native Title Act*, s 86(1)(c).

187 *Stuart* (PJ) [2021] FCA 1620 at [862].

188 *Stuart* (PJ) [2021] FCA 1620 at [863].

189 *Stuart* (PJ) [2021] FCA 1620 at [864].

and comfortable living in Oodnadatta because it was their inherited country and, in that sense, their mere living in Oodnadatta showed their connection by their laws and customs. Accordingly, these findings erroneously assume the content of contemporary Arabana traditional laws and customs and then, separately and interrelatedly, incorrectly assume that there is a need for evidence of physical connection with the Overlap Area.

87 The primary judge's further finding that 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"[190] also assumes that connection by traditional law and custom requires the younger cohort to have familiarity with the principles in Arabana law and culture by which persons acquire rights and interests, when there was no finding by his Honour that this was essential or otherwise reflective of connection by Arabana traditional law and custom.

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

88 The primary judge found that there was "some evidence of the use of the natural resources of the Overlap Area in contemporary times but it was not extensive".[191] His Honour referred to the evidence of lay witnesses concerning camping in the Overlap Area and making use of the bush resources as well as the Dr Fergie and Dr Lucas report prepared for the 2012 Arabana Determination.[192] His Honour concluded this matter by stating that "[h]unting and gathering of food is a recognised [native title right and interest] but the evidence that this was done in traditional ways or for traditional purposes was limited. In some respects, the evidence of Leonie and Joanne Warren and of Aaron Stuart was the strongest evidence of continuing physical connection by Arabana People."[193]

89 Although his Honour acknowledged that there was evidence of physical connection by the Arabana, his Honour appeared to discount evidence of hunting and gathering of food in the Overlap Area as not demonstrating "connection" because there was limited evidence this was "done in traditional ways or for

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190 *Stuart* (PJ) [2021] FCA 1620 at [863].

191 *Stuart* (PJ) [2021] FCA 1620 at [865].

192 *Stuart* (PJ) [2021] FCA 1620 at [865]-[870].

193 *Stuart* (PJ) [2021] FCA 1620 at [871].

traditional purposes", notwithstanding that his Honour had made no finding that Arabana law and custom provided that hunting and gathering of food be done in some "traditional" way or for "traditional" purposes.

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

90 The primary judge identified the relevant evidence given by the lay Arabana witnesses[194] but did not consider various aspects of it persuasive for the purposes of s 223(1)(b). The error in the approach adopted by the primary judge is reflected in his Honour's summary of the evidence given by Mr Strangways, the witness whom he described as "singularly impressive".[195] His Honour said that "[Mr] 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".[196] Again, the primary judge erred in focussing on connection by physical acts of acknowledgment or observance in the Overlap Area.

(v) Protection of *Ularaka* sites

91 His Honour's reasons record that Aaron Stuart and others had engaged in the site clearance for a mining company in 2004 at a site in the Overlap Area and his Honour found that that site clearance could be regarded "as an activity directed to the protection of the *Ularaka*".[197] However, his Honour appeared to dismiss this evidence on the basis that "evidence of other activities by way of protection is sparse".[198] This suggests that the concern with physical acts of acknowledgment and observance may have led the primary judge to dismiss evidence of physical connection by laws and customs as insufficient when, taken with the other evidence of "connection" (including spiritual connection) identified above, this may have been sufficient to establish "connection" for the purposes of s 223(1)(b).

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194 *Stuart* (PJ) [2021] FCA 1620 at [872]-[876].

195 *Stuart* (PJ) [2021] FCA 1620 at [603].

196 *Stuart* (PJ) [2021] FCA 1620 at [874].

197 *Stuart* (PJ) [2021] FCA 1620 at [883].

198 *Stuart* (PJ) [2021] FCA 1620 at [884].

(vi) Continued acknowledgment and observance of other traditional laws and customs "in" the Overlap Area

92 The primary judge said, "Mr Strangways does wish to be buried in the Aboriginal way but that evidence was not linked to the Overlap Area."[199] Further, his Honour said that "Leonie Warren spoke of returning for the funeral of Yundu Spider and said that funerals were one of the reasons she returns to Oodnadatta from time to time". However, his Honour said she "did not give evidence that these funerals were conducted in a particular way so as to accord with Arabana traditional law and custom".[200] The primary judge's treatment of Mr Strangways' and Ms Warren's evidence reveals that his Honour erred either in requiring evidence of physical connection with the Overlap Area or assuming the content of Arabana law and custom. The mere fact that Ms Warren attended funerals in Oodnadatta may have been evidence of connection by laws and customs; there was no finding made by the primary judge that funerals had to be conducted in a particular way to evidence "connection" by Arabana law and custom.

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

93 The primary judge accepted that there was evidence of people in the Overlap Area identifying as Arabana.[201] The primary judge accepted that Mr Dodd went to Hookey's Hole from time to time to check on it from a cultural and environmental point of view.[202] However, his Honour did not give weight to this because he considered that these visits were "in connection with his activities in education in Aboriginal law and culture generally rather than with specific reference to the Arabana" and that "[o]therwise, the evidence of actual assertion of the traditional relationship with the Overlap Area was sparse".[203] Overall, the primary judge considered that evidence of "[p]ublic self-identification" by Arabana people as

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199 *Stuart* (PJ) [2021] FCA 1620 at [894].

200 *Stuart* (PJ) [2021] FCA 1620 at [895].

201 *Stuart* (PJ) [2021] FCA 1620 at [901].

202 *Stuart* (PJ) [2021] FCA 1620 at [902].

203 *Stuart* (PJ) [2021] FCA 1620 at [902].

Arabana in recent times was "sparse".[204] This reasoning revealed error because it was based on a premise that "connection" by contemporary Arabana law and custom could only be demonstrated by public self-identification as Arabana and/or that Mr Dodd visiting Oodnadatta itself could not be evidence of Arabana connection to the Overlap Area.

(viii) Knowledge of the boundaries of Arabana country

94 The primary judge accepted the Arabana Applicants' submission that the Arabana have a clear knowledge of the boundaries of their country and have regularly articulated and taught their children that Oodnadatta is Arabana country. The primary judge considered that this proposition was supported by a map marked at a meeting in 1996 at Marree as well as the evidence of some of the lay witnesses that they were told by their elders and others that Oodnadatta is Arabana country but found that there was "very little evidence concerning the witnesses' knowledge of the extent to which Arabana country extends to the west of Oodnadatta, ie to the western extent of the Overlap Area".[205] The making of the 1996 map, by a process of consultation among the senior men and the entry of their names or signatures on the map as evidence of their agreement as to the boundaries of Arabana land, and in a way which recognised the Overlap Area as within Arabana country, was addressed at length by the primary judge.[206]

95 The primary judge's consideration of this matter does not itself reveal error. However, it raises a question as to the primary judge's focus on physical acts of acknowledgment and observance in the Overlap Area in circumstances where his Honour accepted that Oodnadatta is Arabana country and that, under contemporary Arabana law and custom, there is a collective right of the Arabana to Arabana country as a whole.

(ix) Continuity of involvement in ceremonial life

96 The primary judge said that the evidence "does not support this claim of the Arabana" because Mr Strangways gave evidence that initiation ceremonial activity had been suspended or put into abeyance in the 1950s. His Honour recorded that "there was no evidence of other ceremonial activity in or in proximity

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204 *Stuart* (PJ) [2021] FCA 1620 at [901].

205 *Stuart* (PJ) [2021] FCA 1620 at [903].

206 *Stuart* (PJ) [2021] FCA 1620 at [698]-[744].

to the Overlap Area since then".[207] Again, his Honour's consideration of the evidence reveals a narrow focus on activity in the Overlap Area.

(x) Continuity of the Arabana's social connections with Oodnadatta

97 The primary judge accepted that there is "some evidence of Arabana People maintaining connections with Oodnadatta", including going there to "visit relatives" and "engage in social activities such as race meetings, bronco brandings and gymkhanas". However, his Honour considered that the evidence that this occurs as a manifestation of Arabana traditional law and custom was "sparse".[208] Consistent with this, later in his reasons, his Honour identified that "continued engagement in traditional activities on the Overlap Area is not extensive".[209] This reasoning was based on the premise that visits to the Overlap Area to engage in social activities did not demonstrate "connection" by traditional laws and customs. However, evidence from the Dr Fergie and Dr Lucas report in 2011, which was relied on for the purposes of the 2012 Arabana Determination, and which was before his Honour, was to the effect that social activities such as race meetings and bronco brandings *are* evidence of the contemporary Arabana society and a continued commitment to the system of custom and law. Finn J explained that "[i]n the opinion of the experts, these communal gatherings remain an important element of Arabana custom and law and provide an important context in which 'proper' Arabana behaviour is practised, monitored and transmitted between generations".[210]

"General" matters considered by the primary judge

98 The focus on the need for physical connection adopted by the primary judge is evident in the final section of the judgment that deals with the Arabana No 2 Application headed "General",[211] which commences with his Honour stating that

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207 *Stuart* (PJ) [2021] FCA 1620 at [904].

208 *Stuart* (PJ) [2021] FCA 1620 at [905].

209 *Stuart* (PJ) [2021] FCA 1620 at [912].

210 *Dodd* [2012] FCA 519 at [56].

211 *Stuart* (PJ) [2021] FCA 1620 at [907]-[915]; see also [916].

"[l]ooked at more generally, a number of matters were absent from the Arabana evidence concerning connection".[212]

99 The primary judge acknowledged that there was "of course a connection with the Overlap Area which arises from having been taught that ... one is Arabana and that Oodnadatta is Arabana country".[213] However, the broader context of the reasoning indicates his Honour did not regard this as sufficient because of his focus on the need for physical acts of acknowledgment or observance "in" the Overlap Area. The reasoning must also be read in the broader context of the primary judge having accepted that: the Arabana are a society that has continued to observe and acknowledge the pre-sovereignty laws and customs of the Arabana, under which native title rights and interests were and are still possessed and by which they have connection to the land and waters of the 2012 Determination Area;[214] the laws and customs of the Arabana, while different in some respects from their classical laws and customs, are still properly characterised as being "traditional" in the relevant sense;[215] the Arabana Applicants, as members of the Arabana, are the descendants and/or successors of the Arabana who at sovereignty held rights and interests in relation to the Overlap Area;[216] these laws and customs have been observed and acknowledged substantially uninterrupted since pre-sovereignty times by the Arabana (including their forebears);[217] and the laws and customs are of a kind that are capable of generating, and did generate, rights and interests in the land,[218] being rights and interests originally held by the Arabana at sovereignty and now held by the current members of the Arabana.[219]

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212 *Stuart* (PJ) [2021] FCA 1620 at [907].

213 *Stuart* (PJ) [2021] FCA 1620 at [913].

214 *Stuart* (PJ) [2021] FCA 1620 at [848].

215 *Stuart* (PJ) [2021] FCA 1620 at [773].

216 *Stuart* (PJ) [2021] FCA 1620 at [102], [842].

217 *Stuart* (PJ) [2021] FCA 1620 at [844]-[845].

218 *Stuart* (PJ) [2021] FCA 1620 at [103]-[110].

219 *Stuart* (PJ) [2021] FCA 1620 at [773], [842], [845].

100 In that context, the question was whether the Arabana's contemporary traditional laws and customs constitute a "connection" of the Arabana with the Overlap Area.

Conclusion and orders

101 For those reasons, ground one of the appeal should be allowed. It is therefore unnecessary to consider ground two of the appeal concerning the Full Court's treatment of the 2012 Arabana Determination.[220] As the above reasons reveal, the primary judge's incorrect application of s 223(1) of the *Native Title Act* affected his Honour's assessment of the significance of the 2012 Arabana Determination.

102 Order 3 of the Full Court of the Federal Court made on 14 August 2023 should be set aside and, in its place, it should be ordered that Order 1 of the orders made by the Federal Court of Australia on 21 December 2021 in relation to Action SAD 38/2013 be set aside.

103 The proceeding should be remitted to the Full Court of the Federal Court, or if the Full Court determines to remit it to a single judge of the Federal Court for that Court, to consider making a determination under s 225 of the *Native Title Act* as to whether the Arabana hold native title rights and interests in relation to the Overlap Area.

104 Each party will bear its own costs.[221]

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220 See [13] above.

221 cf *Native Title Act*, s 85A.

105 STEWARD J. Section 223(1) of the *Native Title Act 1993* (Cth) ("the NT Act") defines the meaning of "native title" and "native title rights and interests". Relevantly, one of the requirements of that definition is that "Aboriginal peoples or Torres Strait Islanders" have a "connection" with "land or waters" by their traditional laws and customs (s 223(1)(b)). An issue in this appeal is whether a spiritual, religious or cultural connection with land or waters satisfies s 223(1)(b). For the reasons which follow, a spiritual, religious or cultural connection with land is not the type of connection with which s 223(1)(b) is concerned. Rather, native title, as recognised by the common law of Australia, is concerned with physical connections to land or waters.

106 In this matter, the appellants (who are Arabana peoples) have nonetheless demonstrated that the trial judge,[222] and the majority of the Full Court of the Federal Court of Australia,[223] had erred in deciding whether a sufficient physical connection with what has been called the "Overlap Area" had been established. Accordingly, this matter must be remitted back to the Federal Court.

What is meant by a "connection" with "land or waters"

107 Section 223(1) commences by stating that "native title" (or "native title rights and interests") means communal, group or individual "rights and interests" of Aboriginal peoples or Torres Strait Islanders in relation to land or waters. The reference to "rights and interests" is to an ability to do physical things in relation to identified land or waters. It is a reference to "rights and interests" which may comprise, in some way, a lawful capacity to enter, occupy, use or control particular land or waters. That is what the common law recognises and protects. And the common law supplies remedies which are concerned with such physical uses of land or waters. That is also the concern of the statutory rights conferred by the NT Act.

108 Section 223(1) goes on to specify three attributes of "native title" (or "native title rights and interests"). The first, set out in s 223(1)(a), is that the "rights and interests" must be possessed "under" the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal peoples or Torres Strait Islanders. The second, set out in s 223(1)(b), is that the relevant Aboriginal peoples or Torres Strait Islanders must "have a connection" with the particular land or waters "by those laws and customs". The third, set out in s 223(1)(c), is that the "rights and interests" are "recognised" by the common law. In each case, the "rights and interests" are proprietary rights and interests. It is those "rights and interests"

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222 *Stuart v South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 ("*Stuart* (PJ)").

223 *Stuart v South Australia* (2023) 299 FCR 507 ("*Stuart* (AJ)").

which are the pivotal and defining feature of native title as recognised by the common law.

109 In *Western Australia v Ward*, Gleeson CJ, Gaudron, Gummow and Hayne JJ described the function of s 223(1)(b) in the following terms, but otherwise refrained from explaining what sort of "connection" is mandated by it:[224]

> "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. Whether there is a relevant connection depends, in the first instance, upon the content of traditional law and custom and, in the second, upon what is meant by 'connection' by those laws and customs. This latter question was not the subject of submissions in the present matters, the relevant contention being advanced in the absolute terms we have identified and without examination of the particular aspects of the relationship found below to have been sufficient."

110 Their Honours expressly did not decide whether a "spiritual connection" would suffice. Their Honours thus said:[225]

> "In particular, we need express no view on when a 'spiritual connection' with the land (an expression often used in the Western Australian submissions and apparently intended as meaning any form of asserted connection without evidence of continuing use or physical presence) will suffice."

111 As a matter of principle, it is difficult to accept that a spiritual, religious or cultural connection to particular land or waters, in the absence of any physical connection, could ever satisfy the requirements of s 223(1), concerned as that

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224 (2002) 213 CLR 1 at 85-86 [64] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

225 *Ward* (2002) 213 CLR 1 at 86 [64] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

provision is with the recognition and protection of actual manifest dealings with land or waters. There is nothing in the reasons of Brennan J in *Mabo v Queensland [No 2]* ("*Mabo [No 2]*"),[226] upon which s 223(1) is based,[227] which would support such a conclusion. That is not to deny that particular Indigenous Australians may hold very strong spiritual, religious or cultural links to identifiable land or waters. Writing in 1971, Blackburn J certainly considered that the fundamental feature of Indigenous Australians' relationship to land was that "whatever else it is, it is a religious relationship".[228] Whether that is still the case today, and whether it is true of all or part of a particular Indigenous Australian group, would be a matter for evidence. But it does not follow that this spiritual, religious or cultural relationship is what the common law recognises. Rather, the common law recognises and protects, amongst other things, the physical manifestations of such a spiritual, religious or cultural connection.

The language of s 223(1)

112 The foregoing is compelled by the language of s 223(1). As set out above, at its core, s 223(1) defines "native title" (and "native title rights and interests") by reference to "rights and interests". These need to be "in relation to" land or waters. No one has suggested that the "rights and interests" could be of a spiritual, religious or cultural nature and nothing else. Rather, and self-evidently, those "rights and interests" are, as Gleeson CJ, Gaudron, Gummow and Hayne JJ made clear in *Ward*, essentially "usufructuary in nature".[229] That observation coheres with the reasoning of Brennan J in *Mabo [No 2]*, where his Honour said the following:[230]

> "[N]ative title, being recognized by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal *and usufructuary in nature* and whether possessed by a community, a group or an individual".

113 For the purposes of s 223(1)(a), it is those usufructuary rights and interests which must be possessed under traditional laws and customs which are acknowledged and observed by the Aboriginal peoples or Torres Strait Islanders.

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226 (1992) 175 CLR 1.

227 *Ward* (2002) 213 CLR 1 at 65 [16] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

228 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167 per Blackburn J.

229 *Ward* (2002) 213 CLR 1 at 174 [331] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

230 (1992) 175 CLR 1 at 61 per Brennan J (emphasis added).

For the purposes of s 223(1)(b), it is "by" those laws and customs that relevant Indigenous Australians must have a connection with particular land or waters for the purposes of s 223(1). It is through an examination of the usufructuary rights and interests which are possessed and which are contained in, or comprised by, the traditional laws and customs that one seeks to discern a relevant connection with land or waters. That examination necessarily does not focus upon an examination of traditional spiritual, religious or cultural beliefs; they are not the type of "rights and interests" with which s 223(1) is concerned; those "rights and interests" are proprietary in nature, although they may otherwise well reflect strongly held underlying spiritual, religious or cultural beliefs.

114 It follows that the connection which is the subject of s 223(1)(b) is one that must manifest itself by the holding and exercise of usufructuary physical rights and interests over particular land or waters.

Callinan and McHugh JJ in Ward

115 Whilst there are certain decisions of the Full Federal Court which support a non-physical connection with land or waters being sufficient for the purpose of s 223(1)(b),[231] respectfully that proposition is not correct for the foregoing reasons. Such decisions are also inconsistent with the reasoning of Callinan J in *Ward*, who did – unlike Gleeson CJ, Gaudron, Gummow and Hayne JJ – address this issue. McHugh J agreed with Callinan J in *Ward*, save in one respect which is not relevant to the present matter.[232]

116 As to whether a "purely spiritual or religious connection" would suffice for the purposes of s 223(1)(b), Callinan J reasoned that the common law could only protect native title rights and interests that involved "physical presence on the land, and activities on the land associated with traditional social and cultural practices".[233] It did not protect aspects of any spiritual connection. His Honour thus said:[234]

> "In the light of these considerations, and the fact that s 223 is in terms designed largely to enact the common law as it was formulated in *Mabo [No 2]*, I do not think that a religious connection with the land, in the absence of an actual physical presence, can give rise to native title rights in

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231 See, eg, *Western Australia v Graham (on behalf of the Ngadju People)* (2013) 305 ALR 452 at 460 [37] per Jagot, Barker and Perry JJ.

232 *Ward* (2002) 213 CLR 1 at 240 [559] per McHugh J.

233 *Ward* (2002) 213 CLR 1 at 278 [650] per Callinan J, quoting *Western Australia v Ward* (2000) 99 FCR 316 at 348 [104] per Beaumont and von Doussa JJ.

234 *Ward* (2002) 213 CLR 1 at 278 [650] per Callinan J.

> relation to the land. In my opinion, it would be illogical to conclude that it did. To do so would be to accept that the mere handing down of ritual knowledge and the performance of traditional practices (so far as practicable) in an urban environment thousands of kilometres from the claimed area by Aborigines who perhaps had never seen the land (for several generations) could nonetheless form the basis of a connection enabling those Aborigines to exclude all others from that land. It follows that the reasoning of Beaumont and von Doussa JJ in this regard should not be accepted. There must be a continued physical presence on the land in controversy before the relevant connection can arise under s 223(1)(b) of the *Native Title Act*."

117 The foregoing reasoning is plainly correct.

118 It is also consistent with the conclusion of all of the judges in *Ward*, save for Kirby J in dissent, that a right to maintain, protect and prevent the misuse of cultural knowledge could not constitute native title. Gleeson CJ, Gaudron, Gummow and Hayne JJ said that such a possible right went "beyond the content of the definition in s 223(1)".[235]

119 Callinan J emphasised that the statutory context is of "rights and interests in or with respect to land, and not knowledge about or reverence for [land], no matter how culturally significant that knowledge or reverence might be to those who possess it".[236] Callinan J thus wrote:[237]

> "The existence of that cultural significance does not mean that the bare knowledge and reverence of themselves can constitute a native title right or interest in relation to land within the meaning of the Act. Physical presence is essential. The Full Court was therefore correct to hold that any rights to maintain, protect and prevent the misuse of cultural knowledge could not be the subject of the determination of native title."

120 Any contention that a "connection" might be capable of being established by reference to presently held spiritual, religious or cultural links, in the absence of any physical nexus with identified land or waters, might also involve practical problems of proof. How could such links be corroborated, if this was needed, in the absence of the continued physical exercise of usufructuary rights over land or

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235 *Ward* (2002) 213 CLR 1 at 84 [60] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

236 *Ward* (2002) 213 CLR 1 at 275 [644] per Callinan J.

237 *Ward* (2002) 213 CLR 1 at 275 [644] per Callinan J.

waters? It is the continuous exercise of such proprietary rights that demonstrates the kind of connection which the law protects.

The Arabana's physical connections to the Overlap Area

121 The appellants did not confine their contentions concerning their connection with the Overlap Area to spiritual, religious or cultural matters. Rather, they relied upon mostly physical manifestations of connection which reflected spiritual, religious or cultural ties with the Overlap Area. The extent to which those physical links are sufficient to constitute a connection for the purpose of s 223(1)(b) is a matter of characterisation. In particular, it is a matter of characterisation in the context of history; in the context of the practices and beliefs of the Arabana people; and in the context of the physical nature of the land or waters in question. In that respect, I very respectfully disagree with the trial judge's reasoning on this matter as well as that of the majority of the Full Federal Court. But that reflects a difference of opinion about how one should go about characterising the Arabana's claimed links with the Overlap Area.

Four contextual matters

122 In that respect, four contextual matters should be noted.

123 First, the Overlap Area is a relatively very small parcel of land that forms part of a much larger claim of native title made by the Arabana people over land in South Australia. Save for the Overlap Area, that land was the subject of a successful consent determination made by the Federal Court (Finn J) in 2012: *Dodd v South Australia*.[238] The Overlap Area comprises only approximately 0.2% of that larger claim.[239]

124 Second, it was accepted that at effective sovereignty the Overlap Area was Arabana land.[240] Thus, it formed part of the original claim for land rights made by the Arabana people in 1993. That claim was then discontinued following the enactment of the NT Act.[241] A new claim was then made in 1998 for native title. That claim excluded the Overlap Area because South Australia had indicated that it intended to transfer the Oodnadatta Common (within the Overlap Area) to an Aboriginal Land Trust, which in turn proposed to lease that land to the Dunjiba Community Council (being the council comprised of the residents in Oodnadatta). The Arabana, recognising that the Dunjiba were by then more representative of

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238 [2012] FCA 519.

239 *Stuart* (AJ) (2023) 299 FCR 507 at 594-595 [333] per O'Bryan J.

240 *Stuart* (PJ) [2021] FCA 1620 at [842] per White J.

241 *Stuart* (PJ) [2021] FCA 1620 at [42] per White J.

Oodnadatta's residents, did not wish to oppose that transfer. For whatever reason, however, that transfer never took place.[242]

125 Third, the land which comprises the entire claim, including the Overlap Area, is largely arid in nature, save for the town of Oodnadatta itself. In *Dodd*, Finn J described the land the subject of that native title claim in these terms:[243]

> "The land is largely arid. Natural springs occur throughout the determination area as an outflow of pressurised water from the artesian basin below. The majority of springs form mounds of deposited sediment and carbonated material, of varying width and height, and some springs are soaks which spread out over the land without enclosing banks. These mound springs and soaks supported Aboriginal occupation of this area pre-sovereignty and form an integral part of the Arabana cultural landscape."

126 The largely arid nature of the land is important in determining the sufficiency of physical uses of the land that will support a finding that a connection has been maintained for the purposes of s 223(1)(b).

127 The fourth and final contextual feature, which largely contributed to the conclusion of the trial judge and that of the majority of the Full Federal Court, is that since effective sovereignty, the Western Desert and Arrernte people have migrated into the Oodnadatta region coupled with "the movement away from Oodnadatta of many Arabana".[244] The causes of this movement included disease, and the safety, rations and employment provided by the stations at Anna Creek, Stuart's Creek and Finniss Springs.[245] The issue for characterisation is whether this movement southwards and eastwards away from the Overlap Area was sufficient to extinguish the Arabana's traditional connection with that parcel of land.

The issue for determination

128 The trial judge stated that the issue for determination, and thus for characterisation, was "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".[246] In that respect the

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242 *Stuart* (PJ) [2021] FCA 1620 at [43] per White J.

243 *Dodd* [2012] FCA 519 at [6] per Finn J.

244 *Stuart* (PJ) [2021] FCA 1620 at [561] per White J.

245 *Stuart* (PJ) [2021] FCA 1620 at [561] per White J.

246 *Stuart* (PJ) [2021] FCA 1620 at [843] per White J.

Arabana relied on 10 matters which it was submitted indicated the continuity of their connection with the Overlap Area in accordance with their traditional laws and customs (described below).[247] Analysing those 10 matters, the trial judge concluded that 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".[248]

129 With respect, the error of characterisation made by the trial judge was to state the issue of "connection" as being essentially confined to the Overlap Area. In the context of the Arabana's accepted title to 99.8% of its country, that narrow approach was mistaken. The better view is that the issue for determination is whether the diminished nature of the Arabana's links to the Overlap Area constituted the extinguishment of their connection to that parcel of land. That issue can only here be determined in a context which includes that this parcel had previously only formed a very small part of accepted traditional Arabana country. For that purpose, it would be wrong to require, in an application of s 223(1)(b), substantial connections throughout, and right across, a country which is largely arid in nature. Inferentially, within the entire Arabana claimed area, those connections, of necessity, may be stronger or weaker depending on a range of factors. But a claim for native title is not necessarily defeated in part, given the nature of the land in question, where in that part the connections are only weak. It is sufficient if there is a connection or connections with a substantial part of the claim area. This was what Finn J found in *Dodd* as follows:[249]

> "Substantial evidence was provided of the continuing connection of members of contemporary Arabana society by their laws and customs with a substantial part of the claim area through their laws and customs ... 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."[250]

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247 *Stuart* (PJ) [2021] FCA 1620 at [852] per White J.

248 *Stuart* (PJ) [2021] FCA 1620 at [914] per White J.

249 *Dodd* [2012] FCA 519 at [42], [46] per Finn J.

250 The concept of the Arabana's Ularaka is set out in the reasons of Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ at [34]-[36].

130 Ostensibly, the consent finding set out above, concerning "a substantial part of the claim area",[251] might have applied equally to the Overlap Area as it did to the 99.8% of the land accepted as Arabana country in 2012.

131 The same error of focussing on the quality of the claimed physical connection to the Overlap Area, without proper regard to the greater part of the now accepted Arabana claim for native title, was, with great respect, made by the majority of the Full Federal Court below. That majority thus reasoned as follows:[252]

> "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)."

The 10 matters

132 The 10 matters relied upon by the Arabana bear this out when taken in totality. In general terms, the trial judge relevantly described the Arabana claim in these terms:[253]

> "(a) they are the same group of people who were recognised in the 2012 Arabana Determination and that they form part of a group of societies known as the 'Lakes Cultural Group', which extends from South-west Queensland to Spencer Gulf in South Australia;
>
> (b) from both the date of sovereignty and effective sovereignty, the Overlap Area has been wholly within their 'traditional country' and it was not shared country;
>
> (c) the claimants in their application, who are the descendants or successors of the native title holders at sovereignty, have continued

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251 *Dodd* [2012] FCA 519 at [42] per Finn J.

252 *Stuart* (AJ) (2023) 299 FCR 507 at 529 [88] per Rangiah and Charlesworth JJ.

253 *Stuart* (PJ) [2021] FCA 1620 at [57] per White J.

to occupy the Overlap Area since those times, and continue to acknowledge and observe the traditional laws and customs connected to the Overlap Area;

(d) the traditional laws and customs are the same as those recognised in the 2012 Arabana Determination;

(e) the [native title rights and interests] which they claim are non-exclusive rights;

...

(g) the preponderance of the reliable anthropological and ethnographic evidence supports their claims."

133 The first of the 10 matters was confirmed in the 2012 judgment in *Dodd*.[254] But its relevance was dismissed because it did not include the specific land comprising the Overlap Area. Thus, the trial judge said about it:[255]

> "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."

134 With respect, the foregoing impermissibly downplayed the importance and relevance of what was decided in *Dodd*.

135 The second of the 10 matters relied upon was the continuity of the Arabana people living in Oodnadatta.[256] This link is weak. There did not appear to be many such people living in Oodnadatta, but the trial judge did accept that "people who have resided in Oodnadatta and who were named as Arabana by Arabana witnesses ... are, or were, Arabana".[257] However, there was no evidence that presently these people resided in Oodnadatta "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".[258] With respect, that observation illustrates the

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254 *Stuart* (PJ) [2021] FCA 1620 at [853]-[854] per White J.

255 *Stuart* (PJ) [2021] FCA 1620 at [854] per White J.

256 *Stuart* (PJ) [2021] FCA 1620 at [855]-[864] per White J.

257 *Stuart* (PJ) [2021] FCA 1620 at [862] per White J.

258 *Stuart* (PJ) [2021] FCA 1620 at [863] per White J.

incorrectly narrow approach of the trial judge. What should have been asked is not why such people live specifically in Oodnadatta, but why they more generally live in traditional Arabana country. The trial judge was otherwise correct to conclude that connection is not lost simply because a person feels precluded from remaining on their country.[259]

136 The third of the 10 matters was continued use of the natural resources in the Overlap Area.[260] The trial judge found that there was some evidence of this, but that it was "limited".[261] Nonetheless, his Honour accepted the account of a number of Arabana witnesses who camped and hunted in the Overlap Area, and another who ate "bush tucker".[262] The Arabana otherwise agreed that this evidence of the use of natural resources was "only a fragment" of what would have been available in former times.[263] The establishment of the township of Oodnadatta and the railway to Alice Springs may in part explain the diminution in use of natural resources, together with the issue of migration. However, whilst evidence of the use of natural resources was limited, such usage has nonetheless continued. The question is whether, when considered as part of the entire Arabana claim, it can be concluded that native title to this small part has been extinguished because usage had reduced greatly.

137 The fourth of the 10 matters concerned continuity of learning, respecting and teaching the Ularaka.[264] The Ularaka comprises the dreaming, knowledge, stories, songs, ceremonies, and traditions of the Arabana people. Once again, the trial judge found that evidence about this was "limited".[265] But the evidence he limited himself to was the teaching of Ularaka "concerning the Overlap Area".[266] With great respect, that inquiry was too confined. The question should have been whether there was continuity of the teaching of Ularaka across the Arabana's traditional country, including the Overlap Area, or whether there had been a

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259 *Stuart* (PJ) [2021] FCA 1620 at [864] per White J.

260 *Stuart* (PJ) [2021] FCA 1620 at [865]-[871] per White J.

261 *Stuart* (PJ) [2021] FCA 1620 at [865]-[871] per White J.

262 *Stuart* (PJ) [2021] FCA 1620 at [868] per White J.

263 *Stuart* (PJ) [2021] FCA 1620 at [870] per White J.

264 *Stuart* (PJ) [2021] FCA 1620 at [872]-[876] per White J.

265 *Stuart* (PJ) [2021] FCA 1620 at [872] per White J.

266 *Stuart* (PJ) [2021] FCA 1620 at [874] per White J.

distinct cessation of such teaching in the Overlap Area, in contrast to the rest of the Arabana land. In that respect Finn J accepted the following in 2012:[267]

> "A number of Ularaka, many of which have previously been recorded by earlier researchers, is in evidence. The Evidence indicates considerable contemporary knowledge by members of the claim group of the 'Ularaka', that the 'Ularaka' has been a feature of Arabana law and custom since a time prior to sovereignty, and that the contemporary knowledge and practices of members of the claim group indicates the evolution of these traditions in a manner consistent with Arabana law and custom."

138 In any event, there was evidence about continuing and important Ularaka immediately south of the Overlap Area, namely Hookey's Hole. Thus, the trial judge recorded:[268]

> "[An Arabana witness] gave evidence of the *Ularaka* associated with Hookey's Hole involving the turkey, sand frog, river frog and emu. He said that he had learnt the turkey *Ularaka* (for which he did not give an Aboriginal name) from his father and grandfather, Nana Laurie. He also said that he had learnt the *Kadni* (frilled neck lizard) and *Karlta* (sleepy lizard) *Ularaka* from his father and Nana Laurie. In addition, [the Arabana witness] described the Arabana *Thunpillil Ularaka* associated with Mount O'Halloran (for which he said the Arabana name is *Kati Thunda* and an *Ularaka Kuarkeriee* concerning two snakes."

139 The fifth of the 10 matters concerned the protection of Ularaka sites.[269] This was addressed by the trial judge in a number of sub-topics. The first of these sub-topics concerned the appointment of custodians to protect Arabana sites. However, any such custodians had long been deceased.[270] So much may be accepted, but the trial judge also observed that Arabana sacred objects are otherwise no longer retained "in or about the Overlap Area".[271] This is, again, too narrow an observation; it would not necessarily be fatal to the Arabana claims over the Overlap Area if sacred objects are otherwise kept on the larger portion of Arabana land.

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267 *Dodd* [2012] FCA 519 at [50] per Finn J.

268 *Stuart* (PJ) [2021] FCA 1620 at [598] per White J.

269 *Stuart* (PJ) [2021] FCA 1620 at [877]-[892] per White J.

270 *Stuart* (PJ) [2021] FCA 1620 at [878] per White J.

271 *Stuart* (PJ) [2021] FCA 1620 at [879] per White J.

140 The next sub-topic concerned the holding of ceremonies. It was conceded that there is an absence of evidence of ceremonies in the Overlap Area.[272] However, that evidence should have been considered in the context of the Arabana land in total. In that respect, Finn J accepted the following in *Dodd*:[273]

> "Whilst Wilyaru and other ceremonies no longer occur on Arabana land, Evidence shows that Arabana people still meet regularly on country for important communal events such as annual reunions, funerals and special birthdays, as well as rodeos, races and bronco brandings. In the opinion of the experts, these communal gatherings remain an important element of Arabana custom and law and provide an important context in which 'proper' Arabana behaviour is practised, monitored and transmitted between generations. It provides a forum in which membership of Arabana society is activated, maintained and policed."

141 The next sub-topic concerned site inspections and monitoring. Again, evidence about this concerning the Overlap Area was "sparse",[274] but not non-existent. One Arabana witness gave evidence of site clearing for a mining company at a site on the Overlap Area which was "directed to the protection of the *Ularaka*".[275] This evidence should have been considered in the context of the finding of Finn J in *Dodd* set out above.

142 Another sub-topic concerned the dissemination and teaching of appropriate site information and the keeping of certain information confidential. Again, the evidence about this concerning the Overlap Area was very limited.[276] However, it still should have been evaluated in the light of the following finding by Finn J in *Dodd*:[277]

> "There is substantial evidence that senior members of the group are familiar with the traditional Ularaka and the normative rules related to those Ularaka, such as the gender specific sites, the songs with which various sites are associated, and requirements as to when and by whom and in whose

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272 *Stuart* (PJ) [2021] FCA 1620 at [882] per White J.

273 *Dodd* [2012] FCA 519 at [56] per Finn J.

274 *Stuart* (PJ) [2021] FCA 1620 at [884] per White J.

275 *Stuart* (PJ) [2021] FCA 1620 at [883] per White J.

276 *Stuart* (PJ) [2021] FCA 1620 at [888] per White J.

277 *Dodd* [2012] FCA 519 at [49] per Finn J.

presence those songs can be sung, as well as the responsibility for looking after significant sites."

143 The other sub-topics considered by the trial judge under this fifth matter did not demonstrate any other connection with the Overlap Area.

144 The sixth of the 10 matters was whether there had been continued acknowledgement and observance of other traditional laws and customs in the Overlap Area.[278] This included attendance at funerals; only one witness said they had returned to Oodnadatta for this purpose. Another gave evidence of participation in "Sorry Business" as a young man in the Overlap Area. Another matter considered here by the trial judge concerned control over important Arabana sites. However, there was very little evidence about the need for permission to visit particular sites within the Overlap Area. One witness simply said that a non-Arabana person needed permission to visit two particular sites, but this was not apparently enforced.[279] But, again, whilst this evidence was thin, it nonetheless should have been evaluated in the context of the findings in *Dodd*, which did, for example, refer to the holding of funerals on Arabana land[280] and to the protection of sites.[281]

145 The seventh of the 10 matters concerned the continuing internal and external association of traditional relationships to the Overlap Area.[282] The trial judge accepted that the previously mentioned connections involved an "implicit assertion by the Arabana of their traditional relationship to the Overlap Area"[283] but that, again, actual evidence of this was "limited".[284] This included teaching children that the Oodnadatta region is Arabana country, a matter which had been explained to a number of Arabana witnesses by their parents.[285] Otherwise it was noted that only one witness had visited Hookey's Hole to check it for cultural and environmental purposes, but that these visits were in connection with his activities in education in Aboriginal law and culture generally rather than with specific

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278 *Stuart* (PJ) [2021] FCA 1620 at [893]-[896] per White J.

279 *Stuart* (PJ) [2021] FCA 1620 at [896] per White J.

280 *Dodd* [2012] FCA 519 at [56] per Finn J.

281 *Dodd* [2012] FCA 519 at [58] per Finn J.

282 *Stuart* (PJ) [2021] FCA 1620 at [897]-[902] per White J.

283 *Stuart* (PJ) [2021] FCA 1620 at [897] per White J.

284 *Stuart* (PJ) [2021] FCA 1620 at [898] per White J.

285 *Stuart* (PJ) [2021] FCA 1620 at [900] per White J.

reference to the Arabana.[286] But again, this evidence should have been considered in the light of Finn J's findings in *Dodd*.

146 The eighth of the 10 matters concerned knowledge of the boundaries of Arabana country.[287] The Arabana contended that they had always considered the Overlap Area as being part of Arabana land. They relied upon a map made in 1996 which reflected this. This map had been prepared by senior Arabana, Yankunytjatjara, Kokatha, Southern Arrernte and Lower Southern Arrernte men for the purposes of the native title claim then proposed by the Arabana.[288] The trial judge found:[289]

> "It is to be expected that the extent of the knowledge held by each of the senior men as to the boundary of Arabana country varied, according to their own experience and interest. Nevertheless, their very seniority and their senior membership of peoples who lived in close proximity to the Arabana suggest that it was likely that they had, at least, general knowledge of the bounds of Arabana country. It is also appropriate to take into account that each was informed of the purpose of making the markings on the Map and (I find) were aware that it was intended for use in an application for native title."

147 The foregoing was said to be only "some evidence" of the Arabana people's knowledge of the boundaries of their country, with the trial judge doubting claims for the land west of Oodnadatta.[290] With great respect, in a case about the boundaries of native title, this map is more than "some evidence".

148 The ninth of the 10 matters addressed the fact that ceremonial life did not take place on the Overlap Area.[291] But that finding should have been considered together with the finding by Finn J, set out above, about the Arabana people who still meet regularly on country for important communal events such as annual reunions, funerals and special birthdays, as well as rodeos, races and bronco brandings.

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286 *Stuart* (PJ) [2021] FCA 1620 at [902] per White J.

287 *Stuart* (PJ) [2021] FCA 1620 at [903] per White J.

288 *Stuart* (PJ) [2021] FCA 1620 at [698] per White J.

289 *Stuart* (PJ) [2021] FCA 1620 at [728] per White J.

290 *Stuart* (PJ) [2021] FCA 1620 at [903] per White J.

291 *Stuart* (PJ) [2021] FCA 1620 at [904] per White J.

149 The final of the 10 matters concerned the continuity of Arabana people's social connections with Oodnadatta.[292] The trial judge accepted that Arabana people visit the town to meet relatives and on social occasions. However, the evidence that this occurs as a manifestation of Arabana law and custom was said to be "sparse".[293] But Finn J found in *Dodd* that these social occasions, whilst not derived from traditional Arabana customs, such as rodeos, were nonetheless important to Arabana culture. As noted above, experts in *Dodd* agreed that these events provide "a forum in which membership of Arabana society is activated, maintained and policed".[294]

What follows from the 10 matters

150 This appeal exemplifies the grave difficulties that arise from a determination of the exact boundaries of native title in the context of an arid country, a nomadic existence and necessary immigration of peoples over time.

151 If the Overlap Area claim were a distinct and independent application for native title, divorced from any other claim, then the reasoning of the trial judge would be plainly correct. The Arabana's physical connections with this small parcel of land are indeed limited and would not have justified a determination of native title. But, for the foregoing reasons, that is not the correct analysis. The Overlap Area claim should more properly be seen as part of the original claims made in 1993 and 1998 over Arabana land and in the broader context of Arabana history, including the agreed boundaries drawn on the 1996 map and, above all, in light of the consent determination in *Dodd*. The quality of the limited connections found by the trial judge should have been evaluated in that context. In that respect, it may well be found that the limited or weak connections with the Overlap Area can be seen as being equivalent to what are no doubt other parts of the accepted Arabana land which also exhibit links which are equally limited or weak. It may be that when aggregated with the larger Arabana land, it still can be said of the Overlap Area, as Finn J said in *Dodd*, that there remains a substantial connection with a part of the claimed area.

152 I agree with Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ that this proceeding should be remitted to the Full Court of the Federal Court, or if the Full Court so determines remitted to a single judge of the Federal Court, for that Court to consider making a determination under s 225 of the NT Act that the

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292 *Stuart* (PJ) [2021] FCA 1620 at [905]-[906] per White J.

293 *Stuart* (PJ) [2021] FCA 1620 at [905] per White J.

294 *Dodd* [2012] FCA 519 at [56] per Finn J.

Arabana hold native title rights and interests in relation to the Overlap Area. I also agree with their Honours that each party should bear their own costs.

JAGOT J.

Preliminary observations

153 Aboriginal peoples and Torres Strait Islanders claiming native title rights and interests in relation to land or waters must navigate the narrow channel between the Scylla of establishing their connection with the land or waters by their traditional laws and customs at the time of the British acquisition of sovereignty over Australia in 1788 and the Charybdis of establishing the continuity of their connection with the land or waters by those traditional laws and customs at the time of determination of their claim. When two different groups of Aboriginal peoples claim native title rights and interests in relation to the same land or waters, the greatest risk is the foundering of both claims.

154 In this case, the claim of the Walka Wani Group[295] foundered on the requirement of establishing their connection with the land by their traditional laws and customs at the time of sovereignty. In contrast, the claim of the Arabana People foundered on the requirement of establishing the continuity of their connection with the land by their traditional laws and customs at the time of determination of their claim. The Arabana People alone applied for and obtained special leave to appeal to this Court. Accordingly, the order of the Full Court of the Federal Court of Australia dismissing the claim of the Walka Wani Group remains unchallenged in this Court. The challenge is solely that of the Arabana People to the Full Court's order dismissing their appeal against the primary judge's dismissal of their claim.[296] As will be explained, the Arabana People's challenge should succeed.

155 To understand the circumstances confronting the primary judge and the Full Court it is necessary to identify that there was no dispute before them about the meaning of ss 223(1) and 225 of the *Native Title Act 1993* (Cth) ("Native Title Act"). It is convenient to set those provisions out immediately as they dictated the outcome of the claims of both the Arabana People and the Walka Wani Group and dictate the outcome of this appeal in favour of the Arabana People. The provisions are in these terms:

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295 As will be explained, the Walka Wani Group is a native title claim group which comprises two sub-groups of Aboriginal peoples: the Lower Southern Arrernte and the Yankunytjatjara/Antakarinja Peoples.

296 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 and *Stuart v State of South Australia* (2023) 299 FCR 507.

"**223 Native title**

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."

"**225 Determination of native title**

A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land or waters and, if it does exist, a determination of:

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others."

156 The parties proceeded below on the basis that for either the Arabana People or the Walka Wani Group to obtain a determination that their claimed native title existed in relation to the claimed land they had to establish, first, their connection with the claimed land by their traditional laws and customs at the time of

sovereignty and, second, the continuity of their connection with the claimed land by those traditional laws and customs at the time of determination of their claim. The Arabana People, having failed before the primary judge, again failed before the Full Court on the second requirement. The Walka Wani Group, having succeeded before the primary judge, failed before the Full Court on the first requirement.

157 As will be explained, the case confronting the courts below involved the operation of the "tide of history"[297] in which there were undoubted significant effects on the Arabana People and the Walka Wani Group from European settlement, but also, based on the primary judge's unchallenged findings, significant effects on both the Arabana People and the Walka Wani Group from environmental pressures before and after European settlement — particularly drought — causing a substantial southward migration of the ancestors of members of the Walka Wani Group towards and into the traditional country of the Arabana People.

158 To understand why the primary judge erred in his approach to the claim of the Arabana People it is necessary to provide some further details of the legal context in which their claim was to be determined.

From absolute ownership to radical title

159 The recognition of native title rights and interests at common law resulting from this Court's decision in *Mabo v Queensland [No 2]*[298] and subsequently under the Native Title Act is rooted in the specific history of the British colonisation and settlement of Australia. As social, economic, political, and demographic pressures evolved in Great Britain over the 18th and 19th centuries, British people (and people from other parts of Europe), either unwillingly (in the case of British convicts) or willingly, made their way to "the colonies" including Australia in increasing numbers. As Brennan J observed in *Mabo [No 2]*, "English colonists were, in the eye of the common law, entitled to live under the common law of England which Blackstone described as their 'birthright'".[299] *Mabo [No 2]* rejected the earlier common law "theory that the Crown acquired absolute beneficial ownership of land" deemed to be *terra nullius* (or uninhabited land) as an incident of its acquisition of sovereignty over that land.[300] *Mabo [No 2]* did so in part to ensure the equality of all Australians before the law, in part to cease the

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297 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 60.

298 (1992) 175 CLR 1.

299 (1992) 175 CLR 1 at 35.

300 (1992) 175 CLR 1 at 58.

perpetuation of injustice that the earlier common law theory had inflicted on the indigenous inhabitants of Australia, and in part to "bring the law into conformity with Australian history".[301] In describing that history, as Brennan J put it:[302]

> "The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists."

160 By this, his Honour meant several things. First, that the British acquisition of sovereignty over the territories of Australia in 1788 established political control over those territories but sovereignty did not carry with it absolute or "beneficial" ownership of land within those territories. Instead, on sovereignty, the Crown acquired a radical title to those lands — a title that co-exists with the rights and interests of the indigenous inhabitants as they existed at sovereignty and insofar as the common law could recognise those rights and interests. Second, that this radical title gave the Crown "supreme legal authority in and over a territory ... to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne".[303] Third, that the exercise of this supreme legal authority of the Crown in respect of land within its Australian territories did not occur instantaneously in 1788 by the establishment of one colony at Sydney and associated declarations, but occurred over time in response to British (and European) occupation of greater and greater areas of land and as a result of which the indigenous inhabitants were progressively displaced from land over which they had previously exercised dominion in accordance with their own laws and customs.[304]

Intersecting laws at sovereignty and thereafter

161 A consequence of the analysis described above is that the common law's capacity to recognise native title rights and interests in relation to land is confined.

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301 (1992) 175 CLR 1 at 58.

302 (1992) 175 CLR 1 at 58.

303 (1992) 175 CLR 1 at 48.

304 (1992) 175 CLR 1 at 68-69.

162 As explained in *Commonwealth of Australia v Yunupingu*:[305]

> "Native title is 'not an institution of the common law'. That is to say, 'native title rights and interests are not created by and do not derive from the common law'. ...
>
> 'Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'. 'The nature and incidents of native title' are 'ascertained as a matter of fact by reference to those laws and customs'. The underlying existence of the traditional laws and customs ascertained as a matter of fact is accordingly 'a *necessary* [but not a sufficient] pre-requisite for native title'."

163 In *Members of the Yorta Yorta Aboriginal Community v Victoria*, Gleeson CJ, Gummow and Hayne JJ put it this way:[306]

> "... recognition by the common law is a requirement that emphasises the fact that there is an intersection between legal systems and that *the intersection occurred at the time of sovereignty*. The native title rights and interests which are the subject of the Act [the Native Title Act] are those which existed at sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are 'recognised' in the common law."

164 Accordingly, and again as said in *Yorta Yorta*, while "both pars (a) and (b) of the definition of native title [in s 223(1)] are cast in the present tense" and "[t]he questions thus presented are about *present* possession of rights or interests and *present* connection of claimants with the land or waters",[307] it:[308]

> "... is important to bear steadily in mind that the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional

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305 *Commonwealth of Australia v Yunupingu* [2025] HCA 6 at [58]-[59], quoting *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 59; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 51 [48]; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58; *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46] (emphasis in original) (footnotes omitted).

306 (2002) 214 CLR 422 at 453-454 [77] (emphasis added).

307 (2002) 214 CLR 422 at 455-456 [85] (emphasis added).

308 (2002) 214 CLR 422 at 456 [86] (emphasis added).

customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, *'traditional' in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty*."

165 Specifically:[309]

"*... acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed now could not properly be described as the traditional laws and customs of the peoples concerned.* That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the body of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated and defined the rights and interests which those peoples had and could exercise in relation to the land or waters concerned. ...

... continuity in acknowledgment and observance of the normative rules [ie the traditional laws and customs] in which the claimed rights and interests are said to find their foundations before sovereignty is essential because it is the normative quality of those rules which rendered the Crown's radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title.

In the proposition that acknowledgment and observance must have continued substantially uninterrupted, the qualification 'substantially' is not unimportant. It is a qualification that must be made in order to recognise that proof of continuous acknowledgment and observance, over the many years that have elapsed since sovereignty, of traditions that are oral traditions is very difficult. It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other,

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309 (2002) 214 CLR 422 at 456-457 [87]-[89] (emphasis added).

different, society. *To that end it must be shown 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.*"

166 This reflects Brennan J's observation in *Mabo [No 2]* that:[310]

"Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, *the communal native title survives* to be enjoyed by the members *according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed*."

167 It therefore follows that:[311]

"... demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim. Yet both change, and interruption in exercise, may, in a particular case, take on considerable significance in deciding the issues presented by an application for determination of native title. The relevant criterion to be applied in deciding the significance of change to, or adaptation of, traditional law or custom is readily stated (though its application to particular facts may well be difficult). *The key question is whether the law and custom can still be seen to be traditional law and traditional custom.* Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified?"

The competing claims in this proceeding

168 The Arabana People are part of what is known as the Lakes Cultural Group, a culturally distinct grouping of Aboriginal peoples which extends from south-west

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310 (1992) 175 CLR 1 at 61 (emphasis added).

311 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 455 [83] (emphasis in original).

Queensland to Spencer Gulf in South Australia.[312] The Walka Wani Group comprises two sub-groups: the Lower Southern Arrernte and Yankunytjatjara/Antakarinja Peoples. The Lower Southern Arrernte belong to the Arandic group of Aboriginal peoples.[313] The Yankunytjatjara/Antakarinja, in contrast, are "Western Desert Bloc" peoples.[314] The "Western Desert Bloc" refers to the Aboriginal peoples of the Western Desert, which is a vast area in central Australia extending from the northern part of what is now the State of South Australia across much of the Northern Territory and Western Australia.

169 The claimed land is referred to as the Overlap Area. It is a small area of less than 150 km^2 comprising the township of Oodnadatta Common, the Oodnadatta Airport, and an area held by the Aboriginal Land Trust under the *Aboriginal Land Trust Act 1966* (SA). A determination that native title exists was made over areas to the north, to the south and to the east of the Overlap Area in respect of the native title of the Arabana People in 2012[315] (the "2012 Arabana Determination"). A determination that native title exists was made over areas to the west and north of the Overlap Area in respect of the native title of the Yankunytjatjara/Antakarinja People in 2006[316] (the "2006 Yankunytjatjara/Antakarinja Determination"). Two determinations that native title exist were made in 2011 over areas to the north and north-east and to the north-west of the Overlap Area in respect of the native title of the Lower Southern Arrernte and Yankunytjatjara/Antakarinja Peoples[317] (the "Eringa No 1 Determination") and the Lower Southern Arrernte, the Luritja/Yankunytjatjara and the Wangkangurru Peoples[318] (the "Eringa No 2 Determination").

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312 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [30], [57(a)].

313 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [35].

314 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [35].

315 *Dodd v State of South Australia* [2012] FCA 519.

316 *Yankunytjatjara/Antakarinja Native Title Claim Group v State of South Australia* [2006] FCA 1142.

317 *King on behalf of the Eringa Native Title Claim Group v State of South Australia* [2011] FCA 1386.

318 *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.

The primary judge's key findings

170 The historical reality that the displacement of many Aboriginal peoples from their traditional lands resulted not from the British acquisition of sovereignty over Australia in 1788 but from the fact of subsequent occupation and use of those lands and associated grants by the Crown of rights in those lands to Europeans is reflected in the primary judge's reasons. The primary judge recorded that it was "common ground that the relevant date for sovereignty is 1788. It was also common ground that effective sovereignty had not occurred in the Overlap Area for a substantial time after 1788".[319] By "effective sovereignty" the primary judge meant the time at which European people regularly encountered and recorded evidence of the occupation or use of land by Aboriginal people. Although that date might have been many decades after 1788, without evidence to the contrary, the generally available inference is that the patterns of Aboriginal peoples' occupation and use of land from 1788 to the time of "effective sovereignty" remained largely the same.[320] Consistently with this approach, the primary judge recorded that "[a]ll parties accepted that the Court may draw the inference that the position at sovereignty was the same as it was at effective sovereignty".[321]

171 The primary judge found that "effective sovereignty" did not occur in the Overlap Area until 1872–1873. At that time the Peake and Charlotte Waters pastoral stations were established to the south and north of the Overlap Area and the construction of the Overland Telegraph Line between 1870 and 1872 brought hundreds of workers to the area, as well as people travelling along the Line, leading to the first sustained contact between the Aboriginal peoples of the area and European peoples.[322] The primary judge recorded that it was "common ground that effective sovereignty does not mean that there was a collapse at that time of Aboriginal law and custom in the region".[323]

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319 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [64].

320 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [65].

321 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [80].

322 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [67].

323 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [81].

172 Based on a wealth of evidence, the primary judge found that:[324]

> "... the ethnographical-historical evidence overwhelmingly supports the conclusion that the Overlap Area was Arabana country at the time of effective sovereignty."

173 The primary judge also observed that:[325]

> "There was considerable evidence in the trial, and it is a widely held (but not unanimous) view of anthropologists that there has 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 [Lower Southern Arrernte]. 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."

174 The primary judge recorded evidence exposing the effects of both European settlement and the movement of the Yankunytjatjara/Antakarinja Peoples into the traditional area of the Lower Southern Arrernte and the associated movement of the Lower Southern Arrernte, and the Yankunytjatjara/Antakarinja Peoples, into the traditional area of the Arabana People. Insofar as the Arabana People are concerned the evidence included records as follows:

(a) **1896**: "[U]tter demoralization has set in amongst the Urrapunna [Arabana] and Arunta [Arrernte] where they come together, they were, during the construction of the Railway, in the hands and under the influence of something like 1500 Navvies … Many of them died from typhoid and other diseases and now they are setting aside their ancient tribal laws and marrying anyhow".[326]

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324 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [410].

325 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [538]-[539].

326 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [540].

(b) **1919**: Influenza had "almost completely annihilated resident [Aboriginal] groups".[327]

(c) **1937**: "The answer [to the significant depopulation of Aboriginal peoples] lies in the rapid and continuous drift of the natives from the Reserve within the last few years. One might be tempted to label it a flight or a rout rather than a mere drift".[328]

(d) **1939**: "The Aranda [Arrernte] system [of kinship] belongs to Central rather than South Australia, just as the southern branch of the Aranda tribe does. Some of its local groups apparently spread down the Finke[329] at some point time in the past, probably not very long ago. ... the Aluridja people [of the Western Desert Bloc] moving south, displaced a portion of the Arabana tribe from the Oodnadatta district, so in between these two movements of people, the Aranda spread down the Finke south of Horseshoe Bend and Charlotte Waters and so across into South Australia".[330]

(e) **1987**: "... there is both documentary (European) and oral (Aboriginal) evidence that the forefathers of many present day Oodnadatta residents gradually invaded the country from the west, forced by droughts and internecine conflicts".[331]

(f) **1989**: "The worst blow for the status of women's cultural knowledge in the Lake Eyre Basin was the arrival from about 1900 onwards of large numbers of people of Western Desert origin ...".[332]

(g) **1989**: "Since Basedow's day Antikarinya people have gradually taken over the Oodnadatta area, and in the 1960s there were many of them even in the heartland of Arabana country at Anna Creek. Today there is not one single

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327 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [541].

328 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [542].

329 The Finke River, north of the Overlap Area.

330 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [544].

331 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [551].

332 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [552].

person of predominantly Arabana descent at Oodnadatta and only one at Anna Creek. The majority of the remaining Arabana people live outside their own traditional country at Marree and Port Augusta".[333]

175 The primary judge also recorded that:[334]

> "Coupled with the migration of Western Desert and Arrernte people into the Oodnadatta region was the movement away from Oodnadatta of many Arabana. This seems to have been caused in part by the depredations of disease, especially the Spanish Flu in the early 1920s, the attraction of Anna Springs Station at which the Arabana seem to have been welcome, and the later establishment of Finniss Springs Station at the southern end of Lake Eyre by John Dunbar Warren in 1915 to which he had taken a number of Arabana. With respect to this movement, Lucas concluded his analysis of the population figures recorded by Basedow by saying that they suggested 'a retreat of Arabana from the northern extent of their country, towards to the safety, rations and employment provided by the stations at Anna Creek, Stuart's Creek and Finniss Springs'. Mr Strangways said that Finniss Springs Station had become the centre of the Arabana nation."

176 The primary judge recorded other relevant matters. First, the native title claim group for the Arabana People's claim to the Overlap Area is identical to the description of the Arabana People recognised in the 2012 Arabana Determination. Second, the native title rights and interests claimed by the Arabana People in relation to the Overlap Area "match those recognised in the 2012 Arabana Determination".[335]

The problems with the primary judge's analysis

177 The primary judge framed the relevant question in these terms:[336]

> "... whether either or both the Arabana and the Walka Wani establish, in accordance with s 223(1)(b) of the [Native Title Act], that their [native title rights and interests] extend to the Overlap Area and if so, whether they have

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333 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [554].

334 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [561].

335 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [30] and [32].

336 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [56].

> 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."

178 There would have been no problem with the primary judge having confined his inquiry to s 223(1)(b) of the Native Title Act in circumstances where the 2012 Arabana Determination had been made. The 2012 Arabana Determination necessarily determined that, at that time: (a) the Arabana People had native title rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed, by them; and (b) the Arabana People, by those laws and customs, have a connection with the land the subject of the 2012 Arabana Determination, being land to the immediate north, the south and the east of the Overlap Area. There being no suggestion of any material change to the circumstances of the Arabana People after 2012, the primary judge would have been correct to consider that the only issue for determination in respect of their claim was whether, as required by s 223(1)(b), the Arabana People had proved that by those laws and customs, they have a connection with the Overlap Area.

179 The primary judge's formulation of the relevant question, however, is an amalgam of both s 223(1)(a) and (b) of the Native Title Act. This framing of the question does not represent a mere one-off infelicity of phrasing, but the imposition on the Arabana People's claim of an incorrect conceptual framework.

180 The conceptual error involves the terms of s 223(1) of the Native Title Act and the fact of the 2012 Arabana Determination. The key circumstances are that: (1) the primary judge had found that at sovereignty the Arabana People had rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed, by them and, by those laws and customs, the Arabana People have a connection with the Overlap Area; (2) the 2012 Arabana Determination determined that the Arabana People have native title rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed, by them, and the Arabana People by those laws and customs have a connection with the land the subject of the 2012 Arabana Determination, being land to the immediate north, the south and the east of the Overlap Area; (3) the native title claim group for the Arabana People's claim to the Overlap Area is identical to the description of the Arabana People recognised in the 2012 Arabana Determination; and (4) the native title rights and interests claimed by the Arabana People in relation to the Overlap Area are the same as those in the 2012 Arabana Determination.

181 In these four critical circumstances, the relevant question was only that arising under s 223(1)(b) of the Native Title Act. That is, in these circumstances, the relevant question was not whether the Arabana People possessed native title rights and interests in accordance with an acknowledgement of their respective traditional laws and an observance of their respective traditional customs which extended to the Overlap Area; it was whether by the traditional laws and customs

determined by the 2012 Arabana Determination to be the traditional laws acknowledged, and the traditional customs observed, by the Arabana People by which the Arabana People did have a connection with the land to the north, south and east of the Overlap Area, they also had a connection to the Overlap Area.

182 The materiality of the conceptual error to the primary judge's reasoning is exposed in several ways.

183 First, the primary judge consistently focused on the need for proof of continued possession by the Arabana People of native title rights and interests "in accordance with an acknowledgement of their respective traditional laws and an observance of their respective traditional customs" in respect of the Overlap Area, not whether by the traditional laws and customs determined by the 2012 Arabana Determination to be the traditional laws acknowledged, and the traditional customs observed, by the Arabana People by which the Arabana People did have a connection with the land to the north, south and east of the Overlap Area, they also had a connection to the Overlap Area.[337]

184 Second, having found that the Overlap Area was Arabana country at the time of sovereignty — meaning that at that time the Arabana People had rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed, by them and that by those laws and customs, the Arabana People had a connection with the Overlap Area — the primary judge did not give effect to the true significance of the 2012 Arabana Determination. Instead, the primary judge considered the earlier determinations including those of the sub-groups within the Walka Wani Group together as meaning that facts fundamental to those determinations could not be called into question in the proceeding before his Honour.[338] So much may be accepted. But once the primary judge found that the Overlap Area was Arabana country at the time of sovereignty the 2012 Arabana Determination took on a unique significance. The primary judge said that while the 2012 Arabana Determination could not be ignored and it would be "natural for the Court to have regard to matters bearing on the Arabana connection in the larger area", the same reasoning would apply to the earlier determinations in favour of the sub-groups of the Walka Wani Group.[339] That is, the primary judge, having found the Overlap Area to be Arabana country at sovereignty, continued to treat

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337 Eg, *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [56], [843], [844], [911], [913], [914].

338 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [54]-[55].

339 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [849]-[850].

all of the earlier determinations relating to the land adjoining the Overlap Area as of equal and therefore of limited significance.

185 However, while those determinations may have started with equal significance, once it was found that the Overlap Area was Arabana country at the time of sovereignty: (a) the determinations in favour of the sub-groups of the Walka Wani Group in respect of adjoining land could have no relevance to the Arabana People's claim because the Overlap Area was not land to which any sub-groups of the Walka Wani Group had a connection by their traditional laws and customs at sovereignty. Rather, the determinations in favour of the sub-groups of the Walka Wani Group represented the south-eastern most geographical extent of their traditional country at sovereignty, the Overlap Area being outside of their traditional country at sovereignty; and (b) as explained, in respect of the Arabana People's claim, the relevant question narrowed to that under s 223(1)(b) in respect of the Overlap Area. This is why the Walka Wani Group's submission in this Court to the effect that the determinations in favour of the sub-groups comprising the Walka Wani Group continued to be of equal significance to the 2012 Arabana Determination in the determination of the Arabana People's claim is unsustainable. The primary judge's finding that the Overlap Area was Arabana country at the time of sovereignty (unchallenged before the Full Court[340]) meant that the issue before his Honour reduced to one of the substantial continuity of the connection of the Arabana People with the Overlap Area by the traditional laws and customs which the 2012 Arabana Determination had determined continued to be acknowledged and observed by them and by which they continued to have a connection with the land to the immediate north, south and east of the Overlap Area. If the primary judge had imposed this conceptual framework, as was necessary in the circumstances of this case, the evidence on which the Arabana People relied might have taken on an entirely different complexion from that perceived by the primary judge.

186 Third, the necessary conceptual framework in this case does not overlook the fact that the 2012 Arabana Determination did not relate to the Overlap Area. It is not to the point that all determinations of native title are geographically specific. Factual findings and inferences are to be made in all relevant circumstances. In this case, the four critical circumstances identified above gave the 2012 Arabana Determination a unique and weighty significance to the resolution of the Arabana People's claim in relation to the Overlap Area. It would be quite unrealistic to reason on the basis that those four critical circumstances were immaterial or unimportant to the factual findings and inferences which were reasonably open in respect of the only relevant question as to whether, by the laws and customs that the 2012 Arabana Determination determined to be the traditional laws acknowledged, and the traditional customs observed, by the Arabana People, by which the Arabana People did have a connection with the land to the north, south

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340 *Stuart v State of South Australia* (2023) 299 FCR 507 at 514 [33].

and east of the Overlap Area, they also had a connection to the Overlap Area. The primary judge recognised this when he observed that it would be "natural" given the 2012 Arabana Determination to reason from the Arabana People's established continuing connection to their other traditional country to their continuing connection with the Overlap Area.[341] His Honour did not so reason because of the equivalence he drew between the 2012 Arabana Determination and the determinations in favour of the sub-groups comprising the Walka Wani Group, an equivalence which could not be sustained after his Honour found that the Overlap Area was part of the traditional country at sovereignty of the Arabana People.

187 Fourth, once the limited scope of the correct question is identified, it is apparent that the conceptual error must have affected the primary judge's assessment of the evidence on which the Arabana People relied. Six Arabana people gave evidence and 13 Arabana people spoke to an anthropologist who gave evidence, Dr Lucas.[342] The primary judge, for example, described and drew inferences from the evidence of these witnesses as follows:

(a) Aaron Stuart's evidence "concerning use and protection of the Overlap Area was not extensive" and "did not convey a sense of connectedness with the Overlap Area"[343] — in circumstances where there was evidence from Aaron Stuart that: (i) he spoke Arabana in their home and was taught Arabana law and culture by his father Rex and grandfather Laurie;[344] (ii) Laurie Stuart taught him the law for Oodnadatta;[345] (iii) he had been told by Arabana people that Oodnadatta was Arabana country;[346] and (iv) there had been an occasion in Oodnadatta in which Laurie Stuart had growled at Uncle Clarrie and his brother Deannie who were wearing red headbands. He had said "you pull that off, you're in Arabana country, you're in Wilyaru [high and strong

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341 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [849]-[850].

342 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [581].

343 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [602].

344 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [585].

345 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [587].

346 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [589]-[590].

men's law connected with the initiation of men which had ceased in the 1950s or 1960s] country".[347]

(b) "[T]he actual contact which Mr [Sydney] Strangways has had with the Overlap Area has been limited ... 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"[348] — in circumstances where there was evidence from Sydney Strangways that: (i) between the ages of five and 12 (he was 87 at the time of the hearing before the primary judge), "he had gone with his family to Oodnadatta 3–4 times per year staying with Jack and Sarah Hele for up to two weeks or so at a time. Sarah Hele took in him and his siblings to collect bush tucker";[349] (ii) while living in Alice Springs, Mr Strangways would come to Arabana country two to three times per year, usually staying at Algebuckina;[350] (iii) he had been taught Arabana law by his father and uncles, who were Wilyaru men;[351] (iv) he described the Arabana moiety system, saying that it regulates Arabana society, how the Arabana interact socially as well as the rules of marriage. He described burial and Sorry Business rituals. He also gave several instances of his continued compliance with Arabana traditional law and custom;[352] and (v) he had been told that Oodnadatta was Arabana country by many people and 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.[353]

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347 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [601].

348 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [621].

349 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [609].

350 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [610].

351 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [611].

352 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [617].

353 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [618].

(c) Reginald Dodd's evidence "did not establish any strong continuing connection of the Arabana with the Overlap Area"[354] — in circumstances where there was evidence from Reginald Dodd that: (i) when Arabana initiations ceased in the 1960s Arabana ceremonial objects were taken to Oodnadatta for care by custodians;[355] (ii) he started going to Oodnadatta in the mid-1950s for race meetings. He also said that when he started working on the railways, he was told by old women in Oodnadatta that they were looking after the places of cultural significance to his mother, grandmother and great grandmother;[356] and (iii) the Arabana law which applies in Oodnadatta and at Hookey's Hole is the same as that which applies at Marree and that it is the whole group of Arabana people within Arabana society who have rights to the whole of Arabana country.[357]

188 Fifth, there was also evidence before the primary judge that the "whole of the Overlap Area is within the boundaries of the Arabana [that was] marked by the senior men on the 1996 Map"[358] and Dr 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"[359] but that they "continued their connection to the Overlap Area by their ongoing visits, the utilisation of resources as of right, and the teaching of cultural significance to younger generations".[360] In this latter regard, it is sufficient to refer to the observation in *Yorta Yorta* that while "the exercise of native title rights or interests may constitute powerful evidence of both

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354 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [654].

355 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [650].

356 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [651].

357 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [652].

358 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [715].

359 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [773].

360 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [779].

the existence of those rights and their content", the "statutory questions are directed to possession of the rights or interests, not their exercise".[361]

189 Sixth, the primary judge said that while he accepted what the 2012 Arabana Determination established "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", 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".[362] The whole of the evidence in relation to the 2012 Arabana Determination was tendered in the proceedings in relation to the Overlap Area.[363] This included an expert report of Dr Fergie and Dr Lucas which contained evidence of the importance of attendance at events on Arabana country for the observance, monitoring and transmission of Arabana traditional laws and customs including bronco branding and stock events in, amongst other places, Oodnadatta. Consistently with his Honour's approach to the other evidence, the primary judge considered that "the evidence that this occurs as a manifestation of Arabana traditional law and custom is sparse".[364] Other evidence capable of sustaining a finding of continued connection with the Overlap Area was similarly characterised by the primary judge as "not extensive",[365] "limited",[366] or "sparse".[367] Further, the primary judge said Mr Strangways' "acknowledgement of Arabana traditional law and observance of Arabana traditional custom in relation to the Overlap Area is now of a spiritual rather than

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361 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 455 [84]. See also *Western Australia v Ward* (2002) 213 CLR 1 at 85 [64].

362 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [853]-[854].

363 See Native Title Act, s 86.

364 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [905].

365 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [865].

366 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [898].

367 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [901].

practical kind".[368] The weight of these characterisations of the evidence indicates that the primary judge was searching for evidence of physical acts on the Overlap Area involving an acknowledgement of the Arabana People's traditional laws and an observance of their traditional customs. That is not what s 223(1) of the Native Title Act requires and, in the circumstances of this case, caused error in the primary judge's analysis of the significance of the 2012 Arabana Determination.

190 The reasoning of the majority in the Full Court (Rangiah and Charlesworth JJ), in contrast to that of O'Bryan J in dissent in respect of the appeal of the Arabana People, does not confront these problems with the reasoning of the primary judge and the conceptual error they expose. The majority also wrongly approached the case of the Arabana People as if they had to establish every matter on which they relied to establish their continuing connection with the Overlap Area.[369]

191 The orders identified by Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ should be made.

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368 *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 at [907].

369 *Stuart v State of South Australia* (2023) 299 FCR 507 at 533 [105].