HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **Aaron Stuart** and others named in the Schedule
First Appellant

and

State of South Australia and others named in the Schedule
First Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification as to Form

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

Part II: Issues

2. This appeal concerns the determination of native title where emigration by the native title holders at sovereignty (the Arabana),[1] and their displacement by the immigration of other Aboriginal groups (the Lower Southern Arrernte and Yankunytjatjara/Antakirinja)[2] has fundamentally changed the relationship the Arabana has with the Overlap Area.[3] The questions for this Court are:

   2.1. whether contrary to the Arabana's submissions,[4] but consistent with the majority and dissenting judgment in the Full Court (O'Bryan J),[5] s 223(1)(b) of the *Native Title Act 1993* (Cth) (**NTA**) requires that connection be by traditional laws acknowledged and customs observed as described in *Members of the Yorta Yorta Aboriginal Community*

[1] Being a Lakes Cultural Group people as described in *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding) (No 4)* [2021] FCA 1620 (**TJ**) at [30]: Core Appeal Book (**CAB**) p 25.
[2] Being respectively Arandic and Western Desert Groups of people as described at TJ at [35]: CAB p 27.
[3] Being the area of Oodnadatta and the Oodnadatta Common: TJ at [2]-[5] CAB p 2-5.
[4] Arabana Written Submissions dated 27 March 2024 (**AWS**) at [3] and [51].
[5] *Stuart v State of South Australia* [2023] FCAFC131 (**FFCJ**) [103] (Rangiah and Charlesworth JJ); [290](a), [302], [364](e) (O'Bryan J): CAB pp 317, 379, 383 and 401.

v Victoria[6] and *Western Australia v Ward*?[7]

2.2. whether the trial judge's assessment of the Arabana case erred in its application of s 223(1)(b)? This requires an analysis of the trial judge's discussion of the evidence and findings made as to the relevant law and custom, including findings as to the absence of evidence of the content of that law and custom as it related to the matters relied on by the Arabana to establish connection. There were significant lacunas in the Arabana case both as to their law and custom and connection evidence that were dispositive;

2.3. the extent to which greater "*probative weight*"[8] ought have been given to the adjoining determination in *Dodd v State of South Australia* [2012] FCA 519 (***Dodd* / the Determination**)? In so framing appeal ground two, and despite accepting that a native title determination does not determine native title beyond its geographic limits,[9] the Arabana seek to extend beyond permissible bounds the inferences that may be drawn from *Dodd*.[10] Even those aspects of a determination that are not topographic,[11] nor site specific, remain tethered to the traditional country of a claimant group. It is only within the traditional geographic boundaries that a society exists as a group which acknowledges and observes the relevant traditional law and custom.[12] Otherwise the law and custom falls outside of s 223.[13] In this case, identifying law and custom as applying to country at large cannot, without more, support an extension of the Arabana's north-western boundary so as to take in the Overlap Area;[14] and

2.4. whether, on what basis and to what extent, the Arabana may in this Honourable Court be permitted to depart from the case pursued to date – being one based on contemporary engagement with and conduct and behaviour on or related to the Overlap Area[15] – to now pursue a case other than on those matters? Even if that

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[6] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (***Yorta Yorta***) at 440 [34], 456 [86] (Gleeson CJ, Gummow and Hayne JJ).
[7] *Western Australia v Ward* (2002) 218 CLR 1 (***Ward***) at 85 [64] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[8] AWS at [5].
[9] AWS at [81].
[10] See e.g. *Bodney v Bennell* (2008) 167 FCR 84 (***Bodney***) at 130 [175] (Finn, Sundberg and Mansfield JJ); *Lake Torrens Overlap Proceedings (No 3)* [2016] FCA 899 at [707] (Mansfield J).
[11] For example, descent of applicant group members from named apicals, rules as to kinship and marriage, and the teaching of dreaming stories.
[12] *Yorta Yorta* at 445 [48]-[50], 446 [53] (Gleeson CJ, Gummow and Hayne JJ).
[13] *Yorta Yorta* at 444 [46]-[47] (Gleeson CJ, Gummow and Hayne JJ).
[14] As to that boundary see TJ at [19] (Map 3): CAB p 266.
[15] As defined at TJ at [1]-[8]: CAB pp 18-20; FFCJ at [1] and [2]: CAB p 289.

opportunity could be justified, there is no utility in such an approach given the Arabana have not identified the content of the law and custom as it relates to the evidence called and tendered at trial to establish connection. Equally, they have not identified the law and custom which allegedly the trial judge ignored. The remittal O'Bryan J would have ordered, for which the Arabana now contend, lacks utility in the absence of a retrial, for which the Arabana do not contend.

Part III: s 78B of the Judiciary Act 1903 (Cth)

3. A notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Material Facts

4. As to the State's historical proposal, referred to at AWS [9], to lease the Overlap Area to a local Aboriginal organisation, the Dunjiba Community Council (**Dunjiba**), the Arabana supported that proposal and accordingly removed the Overlap Area from the claim which resulted in *Dodd.* Dunjiba comprised the actual residents of Oodnadatta. Many Arabana had migrated out of Oodnadatta from the late 19th century and during the 20th century.[16] Arabana support for the State's proposal recognised that Dunjiba was more representative of Oodnadatta residents, many of whom were not Arabana.[17]

Part V: Argument

Issue I: Section 223(1)(b) of the NTA

5. *Dodd*[18] determined that the Arabana society had rights and interests possessed under their traditional laws acknowledged, and the traditional customs observed, with respect to the Determination area.[19] The parties readily accepted that the rights claimed by the Arabana in these proceedings were those possessed under those same traditional laws acknowledged and the traditional customs observed as in *Dodd*.[20] The issue was whether by those laws acknowledged and customs observed, the Arabana had a connection to the Overlap Area within the meaning of sub-s (b),[21] being an area of less than 150km^2 located

[16] TJ at [538]-[580]: CAB p 149-158.
[17] TJ at [43]: CAB p 30.
[18] *Dodd v State of South Australia* [2012] FCA 519 (***Dodd***), being a consent determination entered into in 2011.
[19] The effect of that Determination was recognised by the trial judge at TJ [54]: CAB p 37; treatment of that Determination is discussed at FFCAJ [62]-[68] (Rangiah and Charlesworth JJ): CAB pp 303-306.
[20] FFCJ at [32]: CAB p 294, see also [54]: CAB p 302 (Rangiah and Charlesworth JJ).
[21] TJ at [54] and [56]: CAB pp 37 and 38; Arabana Written Closing Submissions at [18]: First Respondent Book of Further Materials (**FRBFM**) p 26.

at the boundary of multiple traditional normative systems.[22] The position is therefore not dissimilar to a situation where, on a single claim, a claimant group has rights and interests that are possessed under its law and custom, but there is a dispute as to whether connection has been maintained to the entirety of its traditional area.[23] The same issue would have arisen had the Overlap Area remained within the claim resulting in *Dodd*.

6. As a result, most of the steps in the connection inquiry identified by O'Bryan J in the Full Federal Court Judgment (**FFCJ**) [364] did not arise for the trial judge. The traditional Arabana society continues to exist (items (a) and (b)), the content of Arabana law and custom that are acknowledged and observed today are those established by *Dodd* (item (c)), and the claimed rights and interests are possessed under that law and custom (item (d)). The only issue before the trial judge was (e).[24] The narrow focus on the relevant dispute, coupled with the manner in which the Arabana conducted their case, explains why step (d) is not the subject of express findings and the nature of the findings for the purposes of step (c).[25]

The construction of s 223(1)(b)

7. Section 223(1)(b) requires connection be *by* the traditional law and custom otherwise recognised under s 223(1)(a). Connection can therefore only be *by* that traditional law and custom if traditional law is acknowledged and custom observed with respect to the relevant land or waters. The proper approach to s 223(1)(b) of the NTA is as set out at TJ [51] and replicated at FFCJ [96]. His Honour's statement of the relevant principles has not been criticised.[26] It is entirely orthodox. The learned trial judge correctly recognised that:

   7.1. s 223(1)(b) requires that the claimant group have connection with the "*land or waters in question*", as native title claims are over defined geographic areas, and that connection be "'*by* [the] *laws and customs', i.e., by the traditional laws acknowledged and the traditional customs observed by the group'*" (emphasis added). So much is consistent with *Ward* where it is said that s 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*"

[22] TJ at [4]: CAB p 19. For a discussion of normative systems see *Yorta Yorta* at 442-442 [37]-[40], 442-443 [41]-[43], 456 [87]-[88] (Gleeson CJ, Gummow and Hayne JJ).
[23] See e.g. *Bodney* at 128 [167] and 131 [181] (Finn, Sundberg and Mansfield JJ).
[24] Wrongly referred to in the FFCJ as (a): CAB p 401.
[25] See paragraphs [22] to [29] below.
[26] Neither TJ [51] (CAB p 37) nor FFCJ [96] (CAB p 316) is referred to in the AWS.

(emphasis added).[27] The Arabana have not put in issue the correctness of that statement, which is consistent with *Yorta Yorta*,[28] more recently *Griffiths*[29] and multiple judgments of the Full Court, including *Bodney v Bennell*.[30] The requirement in sub-section (b) reflects Brennan J's judgment in *Mabo v State of Queensland (No 2)*,[31] with whom Mason CJ and McHugh J agreed, that traditional community title of a group will remain where the group has continued to acknowledge the laws and to observe the customs based on their traditions.[32] There is an inextricable link between laws and customs and the society that acknowledges and observes them.[33] If the society[34] ceases to, as a group, acknowledge and observe those laws and customs with respect to part of their traditional country then those "*laws and customs cease to have continued existence and vitality*"[35] within that area such that connection is lost and that body of laws is no longer productive of rights and interests in the land;[36]

7.2. s 223(1)(b) requires identification of the content of the traditional laws and customs as they relate to the area in question and the characterisation of the effect of those laws and customs as constituting a connection, that connection is "*essentially spiritual*" such that accordingly "*s 223(1)(b) does not require that the connection be physical, although it may be of that kind*". His Honour reiterated this point again at TJ [847](b) and (c) reflecting what was said by this Court in *Ward*.[37] His Honour was therefore alive to the nature of Aboriginal connection to land and that the connection inquiry is not an inquiry into how Aboriginal people "*use or occupy land or waters*";[38] and

7.3. the requisite connection is not by rights and interests but by the laws and customs of the relevant group. His Honour understood the distinction between the inquiries under placita (a) and (b) of s 223(1).[39] The trial judgment must properly be understood as

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[27] *Ward* at 85 [64] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[28] *Yorta Yorta* at 440 [34], 456 [86] (Gleeson CJ, Gummow and Hayne JJ).
[29] *Northern Territory v Griffiths* (2019) 269 CLR 1 at 38 [22] and [24], the latter quoting *Ward* at [18] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
[30] *Bodney* at 127 [165] (Finn, Sundberg and Mansfield JJ).
[31] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (***Mabo***).
[32] *Mabo* at pp 59-60, 70 (7) (Brennan J); as to the relevant of *Mabo* to the construction of s 223 of the NTA see *Ward* at 65 [16] and 66 [17] (Gleeson CJ, Gummow and Hayne JJ).
[33] *Yorta Yorta* at 447 [55] (Gleeson CJ, Gummow and Hayne JJ).
[34] *Yorta Yorta* at 445 [49] (Gleeson CJ, Gummow and Hayne JJ).
[35] *Yorta Yorta* at 445 [50] (Gleeson CJ, Gummow and Hayne JJ).
[36] *Yorta Yorta* at 446 [50], [53], [87]-[88] (Gleeson CJ, Gummow and Hayne JJ).
[37] *Ward* at 85 [64] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). His Honour also noted at TJ [847](e): CAB p 222 that connection need not be maintained in the same manner as at sovereignty.
[38] *Ward* at 85-86 [64] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[39] *Ward* at 66-67 [18]-[21] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

an assessment of the evidence as to acknowledgement and observance relied upon by the Arabana, being principally their ten matters as to connection.[40]

8. The trial judge therefore recognised the accepted meaning of, and approach to, s 223. Sub-s (1)(a) is concerned with the identification of the rights and interests possessed under traditional law and custom.[41] By contrast, s 223(1)(b) serves a distinct and separate purpose.[42] It is an additional requirement[43] for which the Arabana do not properly account given their reliance on law and custom existing at large.[44] It is more than an incident of a group having rights and interests under traditional laws acknowledged and customs observed.[45] It directs attention to "*the* [relevant] *land or waters*" (emphasis added), in contradistinction to the chapeau in s 223(1) which concerns land or waters generally,[46] and whether the Aboriginal group has maintained a continuous connection.[47] The distinction between sub-ss (a) and (b) is critical to identifying the maintenance and protection of the traditional rights and interests, with which the NTA is ultimately concerned. Sub-section (b) requires elucidation of the content of the laws and customs that bear upon the specific land or waters claimed, as opposed to cultural knowledge or spirituality in general.[48]

9. Both elements of the inquiry are significant. Although each may be established by the same evidence, each being sourced in the traditional laws acknowledged and the traditional customs observed,[49] that ought not obscure their respective relevant purposes.[50] Connection requires, first, the identification of the content of the traditional laws and customs and, then, the characterisation of the effect of those laws as constituting the relevant connection of the people with the land.[51] The mere establishment of traditional law and custom at large is therefore insufficient. The effect of those laws is determined

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[40] TJ from [852] to [906]: CAB pp 222-232; FFCJ at [66], [104]-[105], [123] (Rangiah and Charlesworth JJ): CAB pp 305, 318, 323.
[41] *Ward* at 66 [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bodney* at 127 [165] (Finn, Sundberg and Mansfield JJ).
[42] *Ward* at 66 [18]-[19] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bodney* at 127 [165] and 131 [181] (Finn, Sundberg and Mansfield JJ).
[43] *Yorta Yorta* at 440-441 [33]-[35] (Gleeson CJ, Gummow and Hayne JJ).
[44] See e.g. AWS at [3], [51] and [84].
[45] *Bodney* at 127 [165] (Finn, Sundberg and Mansfield JJ).
[46] Noting the difference between "*in relation to land or waters*" in s 223(1) and "*have a connection with the land or waters*" in s 223(1)(b) (emphasis added).
[47] *Yorta Yorta* at 444-446 [47]-[53] (Gleeson CJ, Gummow and Hayne JJ).
[48] *Ward* at 66 [18]-[19] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[49] See e.g. the FFCJ at [103] (Rangiah and Charlesworth JJ): CAB p 317.
[50] *Ward* at 66 [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bodney* at [165] (Finn, Sundberg and Mansfield JJ).
[51] *Bodney* at 128 [169] (Finn, Sundberg and Mansfield JJ); *Ward* at 85-86 [64] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

under sub-s (1)(b) which "*requires consideration of whether, by the traditional laws acknowledged and traditional customs observed by the peoples concerned, they have a "connection" with the land or waters*".[52]

10. Such connection can only be "*by*" the laws and customs referred to in sub-s (1) if those laws and customs are acknowledged and observed with respect to the area of land actually claimed.[53] Otherwise, the normative system has no vitality or continuing reality to the relevant land or waters.[54] It is only by continued acknowledgement and observance that connection can be found to have occurred "*substantially uninterrupted*" from sovereignty, and answer the description of traditional.[55] As recognised in *Yorta Yorta*, if a society out of which law and custom arises ceases to exist as a group which acknowledges and observes its laws and customs, those laws and customs cease to have an existence and vitality. For connection to be maintained it is necessary for a society to maintain the acknowledgment and observance with respect to all of its lands. Only then can the radical title of the Crown be said to be, continually, burdened by native title.[56]

The factual question underlying s 223

11. The construction set out above does not necessarily mean that ongoing physical presence is required.[57] Nor does it mean that evidence of connection, which may take a non-physical form,[58] had to actually occur within the Overlap Area nor that particular acts or behaviours were required (except in so far as such behaviours are expressed by the relevant law and custom). Sub-section 223(1)(b) requires, as submitted by the Arabana,[59] more than mere enjoyment by activity and use and more than mere knowledge as to the content of law and custom or as to what historically occurred.[60] It requires evidence of actual acknowledgement and observance with respect to the land and waters.[61] Therefore,

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[52] *Ward* at 85-86 [64] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); see also *Yorta Yorta* at [34] (Gleeson CJ, Gummow and Hayne JJ).
[53] So much is reflected in the O'Bryan J's reasons at [290](a): CAB pp 379 and [364](e): CAB pp 400-401 noting the error in the reasons where what ought be sub-paragraph (e) is sub-paragraph (a).
[54] *Yorta Yorta* at 445 [50] (Gleeson CJ, Gummow and Hayne JJ).
[55] *Yorta Yorta* at 456-457 [86]-[89] (Gleeson CJ, Gummow and Hayne JJ).
[56] *Mabo* at 52 (Brennan J); *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 51 [47] (Gleeson CJ, Gummow and Hayne JJ); *Yorta Yorta* at 441 [37]-[38], 456 [88] (Gleeson CJ, Gummow and Hayne JJ).
[57] Although evidence, or lack of evidence, as to same is likely significant. Where there is such presence it must have a "*continuing reality to the claimants and ... the evidence of how this is manifest is of no little importance*": *Bodney* at 129 [171] (Finn, Sundberg and Mansfield JJ).
[58] The trial judge made findings as to this type of connection at TJ [897]-[903]: CAB pp 230-231.
[59] AWS at [26].
[60] *Yorta Yorta* at 445 [50] (Gleeson CJ, Gummow and Hayne JJ).
[61] *Bodney* at 131 [179] (Finn, Sundberg and Mansfield JJ).

whether s 223 is established is a factual question directed to whether or not a claimant group has maintained connection *by* the laws and customs referred to in sub-section (a).[62]

12. In applying s 223(1)(b), the law and custom relied on, the nature of the claim area and the asserted basis of connection will be significant. Where the area, like here, is surrounded by determinations recognising non-exclusive native title, is not inaccessible, and has been the subject of Aboriginal emigration and immigration since sovereignty, contested evidence as to connection must relate to the claim area, although need not necessarily be within it. It cannot simply be inferred from connection to the surrounding country. Otherwise the connection will not be to the claimed land or waters[63] and there would be no proper basis to extend the relevant boundary. Further, where the area claimed is particularly small (here less than 150 km^2) and is surrounded by multiple traditional normative systems there is greater need for the evidence to specifically relate one normative system to that area. Where connection to a particular part of a group's wider country is in issue, the Court must for the purposes of s 223(1)(b) determine how the traditional laws and customs relate to that area to determine whether connection to that area has been maintained since the time of sovereignty.[64] So much was made clear in *Bodney*[65] (which the Arabana do not contend was wrongly decided) and is reflected by the majority at FFCJ [103].[66] It is unsurprising then that the Arabana advanced a geographically specific case featuring "*tangible acts of acknowledgment and observance … specifically relating to the Overlap Area*".[67]

Issue II: The trial judge properly understood and applied s 223(1)(b)

13. The Arabana must establish that the trial judge, contrary to the majority below, actually laboured under a misunderstanding when evaluating the evidence. It is not sufficient to point to some shorthand expressions used which do not identically replicate s 223. Further, they must identify how any asserted error is appropriate for appellate intervention[68] and that they ought otherwise be granted the limited further hearing they now seek.

14. In addition to what his Honour said at TJ [51] and [847],[69] the trial judge also correctly

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[62] *Yorta Yorta* at 456 [86] (Gleeson CJ, Gummow and Hayne JJ).
[63] *Native Title Act 1993* (Cth) s 223(1)(b).
[64] *Bodney* at 131 [179] (Finn, Sundberg and Mansfield JJ).
[65] *Bodney* at 131 [179] (Finn, Sundberg and Mansfield JJ).
[66] CAB p 317 (Rangiah and Charlesworth JJ).
[67] FFCJ at [104]: CAB p 318.
[68] See e.g. FFCJ at [52]-[55] (Rangiah and Charlesworth JJ): CAB pp 299-302.
[69] CAB p 37, CAB pp 221-222.

stated his task at TJ [917],[70] albeit in relation to the Walka Wani. It would be unusual and surprising if, having repeatedly stated his task correctly, his Honour then misunderstood the task when applying sub-s (b) to the Arabana case. What the trial judge said at [911][71] must be considered in that context. As recognised by all members in the Full Court,[72] the inversion of traditional laws and customs and rights and interests in that paragraph does not strictly reflect the language in sub-s (a)[73] although it does reflect the language in *Yorta Yorta*.[74] However, as sub-s (a) was never in issue, that error cannot be material,[75] noting that sub-s (b) requires a discrete inquiry. Nor does TJ [911] suggest a focus on physical activities in the Overlap Area.[76] Further, O'Bryan J's criticisms at FFCJ [301][77] overlook that in s 223(1) law and custom and acknowledgement and observance are intertwined. Neither is given precedence and there is no textual basis for prioritising one over the other. The balance of TJ [911], properly reflects that laws and customs in both sub-s (a) and (b) are laws and customs that must be acknowledged and observed in fact.[78] As set out at [7] to [12] above, it was no error for his Honour to look for, but find lacking, evidence of acknowledgement of law and observance of custom in relation to the Overlap Area. The Arabana's submission at [45], that the trial judge's statements "*wrongly suggest that connection is not by the laws and customs but by their acknowledgement and observance*" ought be rejected. It fails to appreciate the recognised interrelationship between sub-ss (a) and (b). It is inconsistent with O'Bryan J's dissent[79] on which the Arabana otherwise rely.

15. Notably, in [911] the trial judge stated that "… [k]*nowledge of what used to be the case is insufficient. Mr Strangways plainly has knowledge of Arabana traditional law and custom … Aaron Stuart's evidence showed some knowledge of Arabana traditional law and customs but relatively little by way of acknowledgement and observance of them giving rise to a connection with the Overlap Area.*" He further found at [912][80] an absence of traditional law and custom, as had been found in *Dodd*, acknowledged and observed in the Overlap Area. Mere knowledge of law and custom by two witnesses, and in the case of

[70] CAB p 234.
[71] CAB p 233.
[72] FFCJ at [101]: CAB p 317 (Rangiah and Charlesworth JJ), [298]: CAB p 382 (O'Bryan J).
[73] See e.g. AWS at [43].
[74] See e.g. *Yorta Yorta* at 445 [49], [50], 446 [51], [52], 456 [87], [89], 457 [92] and 458 [96] (Gleeson CJ, Gummow and Hayne JJ); see also *Ward* at 71 [32] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[75] See paragraph 5 above.
[76] FFCJ at [103] (Rangiah and Charlesworth JJ): CAB p 317.
[77] CAB p 93.
[78] FFCJ at [103] (Rangiah and Charlesworth JJ): CAB p 317.
[79] See FFCJ [364] at (c) and (e): CAB p 401.
[80] CAB p 233.

Mr Stuart limited knowledge, is not enough to establish the acknowledgement and observance of law and custom by the Arabana society.[81] From [911] to [914],[82] or elsewhere, His Honour does not say that contemporary acknowledgement and observance required particular behaviour. Rather his Honour was commenting on the absence of contemporary evidence. As found by the majority, his Honour's language reflects the requirement that laws and customs be acknowledged and observed in fact.[83] It is consistent with the notion that law and custom, particularly that of a non-physical kind, can be acknowledged and observed absent specific acts,[84] depending on the content of the law and custom. That his Honour was not looking for particular behaviour or conduct is confirmed by his summary of principles at TJ [51] and [847].[85]

16. In assessing the trial judge's evaluative judgment, as the majority did below, it is necessary to examine the trial judgment as a whole.[86] His Honour never limited himself to a search for the existence or non-existence of behaviours or other particular facts and circumstances occurring within the Overlap Area.[87] So much is clear from his Honour's distillation of the ten connection matters relied upon by the Arabana as discussed at [22] to [29] below and his recognition that spiritual connection may persist notwithstanding an individual's absence.[88] In the context of animosity between the Arabana and the Walka Wani, the trial judge accepted that connection is not simply lost because a person "*feels precluded from remaining on their country*".[89]

17. There was no material error by the trial judge using the language "*in accordance with*" instead of "*by*" in reference to s 223(1)(b).[90] It was language used by the Arabana themselves.[91] It reflects that, under the Arabana law and custom, connection required conduct in accordance with that law and custom.[92] In the alternative and in any event, whilst it does not slavishly adopt the statutory language, connection "*in accordance with*"

[81] Particularly given the basis on which the Arabana opened and conducted its case: see paragraph 30 below.
[82] CAB p 233.
[83] FFCJ at [103]: CAB p 317 (Rangiah and Charlesworth JJ).
[84] See in particular TJ at [913]: CAB p 233.
[85] CAB pp 37 and 221.
[86] FFCJ at [94]-[107]: CAB pp 314-319 (Rangiah and Charlesworth JJ).
[87] Cf AWS at [50] and [76]; O'Bryan J at [303]: CAB pp 383-384.
[88] FFCJ at [107]: CAB p 319 (Rangiah and Charlesworth JJ) in which their Honours must be referring to [51], [847], [864], and [907] of the TJ: CAB pp 37, 221, 224, and 232.
[89] TJ at [864]: CAB p 224.
[90] AWS at [40]
[91] Arabana Form 1 at Schedule F: FRBFM p 7; Arabana Amended Statement of Facts, Issues and Contentions (**Arabana SFIC**) at [31.2]: FRBFM pp 12 and 13; Arabana Outline of Submissions at [53.b] and [54.a]: FRBFM p 23; Appellant's Book of Further Materials (**AFM**) p 11 Table 1, item 8.
[92] AFM p 11 Table 1, item 8.

traditional law and custom merely reformulates "*by those laws and customs*".[93] It is a distinction without a difference. Connection can only be through the agency of the efficacy of the law and custom[94] if it is in conformity, or in line, with[95] that law and custom. Otherwise, the basis for the asserted connection would be something other than the law and custom recognised under s 223(1)(a).

18. That does not, as postulated by O'Bryan J,[96] impermissibly direct attention at particular conduct or behaviour. Rather, it requires analysis of the content of the law and custom acknowledged and observed to determine what is required to have connection by that law and custom. That is a question of fact to be determined in every case noting in this case how the Arabana articulated their law and custom and their evidence at trial.[97]

The conduct of the Arabana case and Arabana traditional law and custom

19. The trial judge's findings as to the content of contemporary Arabana law and custom, and whether the Arabana have maintained connection by that law and custom, reflects how the Arabana conducted their case which had a geographic focus. The Arabana principally identified their law and custom by reference to *Dodd* and, more precisely by reference to "*Table 1*" annexed to the Arabana's trial submissions which identified the findings in *Dodd* as to law and custom relied upon.[98] The Arabana might have, but did not – with the exception of Mr Strangways – led evidence as to the content of law and custom from Arabana witnesses.[99] The absence of such evidence either generally or by reference to the ten connection matters, and the generality in which *Dodd* is expressed, prevented the trial judge from relating the ten connection matters to relevant law and custom.

The trial judge made appropriate findings as to the relevant Arabana law and custom

20. Contrary to the suggestion of the Arabana[100] and O'Bryan J's finding at [298], the trial judge did determine the content of Arabana traditional law and custom. It is as set out at

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[93] *Native Title Act 1993* (Cth) s 223(1)(b)
[94] Being the meaning of "*by*" as described by O'Bryan J at FFCJ [300]: CAB pp 382-383.
[95] *Macquarie Dictionary* (online edition as at 26 April 2024) "*accordance*" (defs 1 and 2) and "*in accordance with*" (def 3).
[96] FFCJ at [300]-[302]: CAB pp 382-383 (O'Bryan J).
[97] See paragraph 12 above.
[98] Being Table 1 contained at AFM at p 8 [327] and pp 9-11 (Table 1); T3178L35-L46 (Mr Collett, Arabana closing address): FRBFM p 28.
[99] O'Bryan J identifies *Dodd* as providing the content of the law and custom, not the evidence of individual witnesses: FFCJ at [306]-[319] (O'Bryan J) CAB pp 384-389.
[100] AWS at [46] and [60].

TJ [101] to [108], [618], [844] to [846], [853] and [905].[101] That law and custom was both geographically[102] and non-geographically[103] specific. His Honour made findings as to the content of the geographically specific rights, including that Arabana people had to protect and visit sites.[104] He did so by reference to the evidence of Sydney Strangways, the most senior Arabana elder.[105] He found that whilst Mr Strangways said it was for the Arabana to manage permission to access sites neither he nor any other Arabana witness had done so for many years.[106] That evidence is not addressed by O'Bryan J[107] nor in the AWS.

21. Those findings are not inadequate[108] because of an apparent failure to account for the adaptation and change referred to in *Dodd*.[109] Nor could any such failure be material given that his Honour did not find that the failure to maintain classical law and custom was determinative of connection. Nor ought O'Bryan J's dismissal of these findings as only concerning the historical position be accepted. TJ [845] to [846][110] refers to the relevant matters of Arabana law and custom said to give rise to contemporary connection in *Dodd*. That contemporary law and custom has a geographic element.[111] Individuals or families, under law and custom, are recognised as having special knowledge of, and responsibility for, particular areas and their *Ularaka*, and that "*contemporary connection to country … continues to be governed by laws and customs, including those which go to … knowledge of the physical and cultural geography of the claim area, including Ularaka*".[112]

22. Further, the Arabana have not set out how any alleged inadequacy in findings affect his Honour's assessment of the ten connection matters. There was little evidence of witnesses relating law and custom to their relationship with the Overlap Area, either personally or as

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[101] See also FFCJ at [62] and the parts of the trial judgement referred to therein: CAB pp 303-304 (Rangiah and Charlesworth JJ). Further, his Honour set out the *Ularaka*, at TJ [815] to [828]: CAB pp 215-217 relevant to important sites under Arabana law and custom, particularly Hookey's Hole. The balance of the sites were outside the Overlap Area, for example the Alberga River (TJ [817]: CAB p 215) and Lake Eyre (TJ [819]: CAB pp 215-216).
[102] TJ at [101] (ii), [105] and [108]: CAB pp 48-49; [845] and [846]: CAB p 220-221; [905] (see the extract of [256] of the experts' opinion): CAB p 232.
[103] TJ at [101] and [107]: CAB pp 48-49; TJ [846] CAB p 221.
[104] TJ at [618]: CAB p 165; quoted by the majority at FFCJ [114] (Rangiah and Charlesworth JJ): CAB pp 320-321.
[105] FFCJ at [109] and those parts of the TJ referred to therein (Rangiah and Charlesworth JJ): CAB p 319.
[106] TJ at [896]: CAB pp 229-230.
[107] He otherwise joined the majority in their disposition of particular two of the Arabana appeal: FFCJ at [279]: CAB p 374.
[108] Cf AWS at [63]-[64].
[109] *Dodd* at [36]-[41] (Finn J).
[110] CAB pp 220-221.
[111] *Dodd* at [40], [46], [47], [49], [53]-[55], [57] and [58].
[112] TJ at [845] quoting *Dodd* at [46]: CAB pp 220-221.

a People. Rather, the content of law and custom, beyond that set out in *Dodd* and Mr Strangways' evidence, was left to be inferred from the ten categories of connection. Factually, Arabana law and custom at large was insufficient given the historical migration of Arabana people out of the claim area, their displacement by other Aboriginal people,[113] the content of Aboriginal law and custom as revealed in *Dodd* and his Honour's analysis of the ten matters, beyond that Determination, as discussed immediately below.

23. The Arabana relied on the continuity of Arabana people living in Oodnadatta (item (ii)) and use of natural resources in the Overlap area (item (iii)).[114] The trial judge referred to the limited number of Arabana people who lived in Oodnadatta and found that there was "*no evidence*" that they did 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*".[115] Likewise, his Honour found that evidence[116] that hunting or gathering was undertaken in "*traditional ways or for traditional purposes was limited*".[117] Both findings are directed to the lack of Arabana evidence as to the relevant, specific law and custom.

24. There was no error in that approach. His Honour accepted that connection is not lost merely due to an absence of physical presence.[118] In making those findings he was not ignoring that the relevant question is connection by the Arabana people as a whole.[119] Rather, he was observing that the individual witnesses did not greatly contribute to whether the Arabana people have connection. His Honour was right to refer to the absence of traditional content.[120] As found in *Dodd*, activities of residence, and hunting and gathering, have a traditional element under Arabana law and custom[121] but which was not addressed in evidence here. Further, as extracted at TJ [845],[122] *Dodd* further established that the Arabana's contemporary connection to country continues to be governed by laws and customs, including those relating to authority, gender and knowledge of the physical and cultural geography of Arabana country. The matters relied on by the Arabana had to be

[113] TJ at [538]-[561]: CAB pp 149-154; FFCJ at [184] (Rangiah and Charlesworth JJ): CAB pp 339-340.
[114] CAB pp 223-225.
[115] TJ at [863]: CAB p 224.
[116] Such little that there was: TJ at [865] to [870]: CAB pp 224-225.
[117] TJ at [871]: CAB p 225.
[118] TJ at [864]: CAB p 224.
[119] Cf FFCJ at [352] (O'Bryan J): CAB pp 397-398.
[120] Cf FFCJ at [352]-[353] and [355] (O'Bryan J): CAB pp 397-398.
[121] *Dodd* at [53]-[55], see also [57]-[58] (Finn J).
[122] CAB p 220-221.

referable to that law and custom. Evidence of activities in isolation is insufficient to establish connection. That is especially so given the countervailing evidence suggesting that residence in Oodnadatta was for other purposes.[123]

25. The Arabana also relied on the continuity of learning, respecting and teaching *Ularaka* (item (iv)).[124] His Honour was concerned by the limited evidence on this topic[125] and the lack of knowledge shown by particular Arabana witnesses as to *Ularaka* related to the Overlap Area.[126] His Honour's discussion of this topic shows he understood that evidence of connection need not involve conduct or behaviour within the Overlap Area itself.[127] The findings in *Dodd* extracted at TJ [845], and referred to at TJ [846],[128] underscore the significance of *Ularaka*, the importance of transmission[129] of Arabana law and custom to younger Arabana, and the maintenance of knowledge of *Ularaka* and related normative rules.[130] The Arabana therefore identified the relevant law and custom, but did not adduce sufficient evidence as to the specific content of the law and custom within the Overlap Area and how it bore upon the connection matters relied upon.[131]

26. Reliance was also placed on site protection (item (v)).[132] Evidence relied on either related to the historical position (the appointment of custodians, ceremonies at Hookey's Hole and the exclusion of persons from Arabana country),[133] or was sparse in so far as it concerned teaching site information and undertaking site inspections and monitoring. For example, Mr Stuart referred to an isolated occasion as a young man[134] when he responded to a general complaint by his uncle about the activities of cattle at Hookey's Hole. The uncle did not identify any specific sites and Mr Stuart has not taught[135] any details about sites to his own children or grandchildren. Reg Dodd relayed how he had helped fence Hookey's Hole, but whether it related to traditional law and custom, as opposed to simply paid employment, was left unclear.[136] Lack of detail of this nature ultimately frustrated the

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[123] Namely, availability of housing and employment opportunities: TJ at [863]: CAB p 224.
[124] CAB pp 225-226.
[125] TJ at [872]: CAB p 225.
[126] TJ at [874]: CAB p 226.
[127] Cf FFCJ at [300] and [346] (O'Bryan J): CAB pp 382 and 396.
[128] CAB pp 220-221.
[129] The trial judge says "*transition*", but plainly means "*transmission*".
[130] Being a reference to *Dodd* at [48] to [50] (Finn J).
[131] See FFCJ at [356]: CAB pp 398-399 (O'Bryan J).
[132] CAB pp 266-299.
[133] TJ at [680]-[697]: CAB pp 180-184 (Custodians); TJ at [892]: CAB p 229 (exclusion); TJ at [620]: CAB p 166 (ceremonies at Hookey's Hole).
[134] Mr Stuart was born in 1968: TJ at [582]: CAB p 158.
[135] TJ [885]: CAB p 228.
[136] TJ at [886]: CAB p 228.

process of relating evidence on this topic to any underlying law and custom, noting that Arabana law recognises that particular people have responsibility for different areas.[137]

27. As to the continued acknowledgement and observance of other traditional laws and customs in the Overlap Area (item (vi)) and involvement in ceremonial life (item (ix)),[138] being two further examples of the Arabana relying on conduct within or proximate to the Overlap Area, the Arabana relied on three categories of conduct. These were the continuation of initiation ceremonies until the 1950s, Arabana Sorry Business and funerals, and the giving of permission to access sites.[139] Clearly, the cessation of initiation in the 1950s does not establish connection. His Honour found an absence of evidence as to the other two matters.[140] His Honour found, by reference to the evidence of Sydney Strangways, that it "*was for the Arabana people to protect sites by visiting them and issuing permission*" for others to attend,[141] showing his Honour making specific findings as to law and custom where such evidence was adduced.[142] The Arabana no longer seek to impose such requirements.[143]

28. In considering the limited evidence as to continued internal and external assertions of traditional relationships to the Overlap Area (item (vii)), and knowledge of boundaries (item (viii)), his Honour expressly accepted that respecting and teaching *Ularaka* involved an implicit assertion as to the traditional relationship with the Overlap Area,[144] and implicitly accepted that teaching, self-identification as Arabana and acknowledging boundaries were matters of connection.[145] Whilst such matters do not necessarily involve conduct within the Overlap Area evidence of such matters was limited.[146]

29. Finally, as to continuity of social connections with Oodnadatta (item (x)), as extracted at TJ [905][147] the trial judge set out the content of the law and custom as to how attendance at social events[148] was said by the Arabana experts in *Dodd* to be by law and custom. In so doing his Honour found that contemporary Arbana law and custom regulates social

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[137] TJ at [845]: CAB p 220-221; see also *Dodd* at [49] and the reference to "*looking after significant sites*".
[138] CAB pp 229-231.
[139] TJ at [893]: CAB p 229.
[140] TJ at [894]-[895] (Sorry Business), [898] (permission): CAB pp 229-230.
[141] TJ at [618]: CAB p 165.
[142] Cf FFCJ at [358] (O'Bryan J): CAB p 399.
[143] TJ at [896]: CAB pp 229-230.
[144] TJ [897]-[898]: CAB p 230.
[145] TJ [899]-[901], [903] CAB pp 230-231.
[146] TJ at [897]-[898] and [901]: CAB pp 230-231.
[147] CAB pp 905-906.
[148] Such as races, gymkhanas, bronco brandings, reunions and anniversaries and so forth

connection and requires particular behaviour.[149] However, there was no evidence here as to the acknowledgement and observance of such requirements.[150]

The focus of the Arabana case was activities and conduct in the Overlap Area

30. The Arabana case focused on activity in the Overlap Area. Law and custom will characteristically presuppose direct, physical connection with land or waters and will, if acknowledged and observed, link community members to the land or waters.[151] It is no answer to the trial judge's findings at TJ [815] to [915][152] for the Arabana to criticise his Honour's reference to activities and conduct in and around the Overlap Area.[153] His Honour was merely adjudicating the case pleaded, the evidence adduced, and the submissions made, by the Arabana. The Arabana attempted to satisfy the broad evaluative inquiry required by sub-s (b) by focussing on evidence of conduct. The Arabana Form 1 does not plead a connection case based on Arabana law at large. Their pleaded case was that Arabana continue to "*possess, occupy, use and enjoy*" the Overlap Area by, *inter alia*, living, camping, traveling through, hunting and gathering, maintaining and protecting and caring for sites, and meeting in, trading in resources of and working in the Overlap Area.[154] They pleaded a "*physical connection*" from carrying out those activities specifically in the Overlap Area.[155] This is consistent with the Arabana's amended Statement of Facts, Issues and Contentions[156] which asserts rights tethered to physical aspects of the Overlap Area.[157] The Arabana written opening was consistent with its pleaded case.[158] It is too late now to embark on some new approach because the pleaded approach failed.

31. The Arabana accepted in the Full Court that the ten connection matters properly reflect their case.[159] As the majority of the Full Court found, "*those factors asserted the connection largely by reference to tangible acts of acknowledgement and observance specifically relating to the Overlap Area*".[160] Those were matters for the trial judge to

[149] A finding which is not considered by O'Bryan J: FFCJ at [363]: CAB p 400.
[150] TJ at [905]; CAB pp 231-232.
[151] *Bodney* at 128 [169] (Finn, Sundberg and Mansfield JJ) cited by O'Bryan J in FFCJ at [290]: CAB pp 379-380.
[152] CAB pp 215-233.
[153] AWS at [75]-[78].
[154] Arabana Form 1, Schedule G: FRBFM p 8.
[155] Arabana Form 1, Schedule M: FRBFM p 9.
[156] SFIC at [44]-[57]: FRBFM pp 13-17.
[157] See e.g. SFIC at [60.10]: FRBFM p 18.
[158] See Arabana Outline of Submissions at [34]-[38], [39]-[42]: FRBFM pp 21-22.
[159] FFCJ at [104] and [105] (Rangiah and Charlesworth JJ): CAB p 318.
[160] FFCJ at [104] (Rangiah and Charlesworth JJ): CAB p 318.

consider and weigh.[161] More fundamentally, how the Arabana framed its case was itself a contemporary expression of the content of Arabana law and custom.[162]

32. The Arabana's contention now appears to be that the trial judge erred in requiring the Arabana to establish all ten connection matters.[163] Properly construed the trial judge did not require each matter to be established. Rather, his Honour undertook an evaluative judgment in which cumulatively the Arabana failed to satisfy s 223(1)(b). In any event, given the trial judge largely found insufficient evidence was adduced to establish any of those ten matters it is unclear how any such error is material.[164] Rather, deference ought be given to the evaluative exercise undertaken by the trial judge in the course of the multifaceted connection inquiry which was both quantitative and qualitative. That inquiry occurred in a trial involving 20 Aboriginal witnesses giving evidence over a period of 18 sitting days plus five days of concurrent expert evidence from eight expert witnesses across three disciplines, and over 3,500 pages of transcript.[165] Both the nature of the enquiry and the trial itself gives rise to a particular need for appellate caution.[166] Much of his Honour's findings turn on his assessment of witnesses as is clear from TJ [602], [621], [627], [654], [660] and [863].

33. The evidence of Sydney Strangways, the most senior Arabana witness, is particularly significant in assessing the Arabana case.[167] Contrary to AWS [54], the evaluation of Sydney Strangways' evidence[168] by the trial judge and the Full Court reflects, not a focus on conduct and behaviour, but rather the Arabana's failure to establish that his considerable knowledge translated to connection of the Arabana People[169] This highly evaluative task turned on the trial judge's consideration of the evidence in combination with, and in contrast to, *Dodd*.[170]

Non-physical forms of connection alone are, in this case, insufficient

34. The Full Court in *Bodney* appropriately recognised that where a claim group has been

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[161] FFCJ at [105] (Rangiah and Charlesworth JJ): CAB p 318.
[162] FFCJ at [106] (Rangiah and Charlesworth JJ): CAB pp 318-319.
[163] AWS at [52].
[164] A summary as to how the Arabana identified those 10 matters is found at [331] of their written closing submissions at trial: AFM p 12.
[165] FFCJ at [53] (Rangiah and Charlesworth JJ): CAB pp 301-302.
[166] See FFCJ at [50] to [55] (Rangiah and Charlesworth JJ) and the authorities cited therein: CAB pp 298-302.
[167] TJ at [622]: CAB p 166.
[168] As to his status amongst the Arabana see FFCJ at [109] (Rangiah and Charlesworth JJ): CAB pp 319-320.
[169] See TJ at [611], [618] and [913]: CAB pp 164, 165 and 233; FFCJ at [115] (Rangiah and Charlesworth JJ): CAB p 321.
[170] TJ at [907], [912]: CAB p 232; FFCJ at [117] and [120] (Rangiah and Charlesworth JJ): CAB pp 321-322.

removed from "*substantial parts*" of its traditional land it "*does not necessarily mean*" that connection has been lost from the land from which they have been excluded.[171] Connection may subsist at a cultural or spiritual level.[172] Given the statements at TJ [51] and [847](b) and (c), it could not be said that his Honour thought otherwise.

35. Before the Full Court, the Arabana correctly conceded that the trial judge was never invited to consider whether non-physical[173] connection alone was sufficient.[174] Whilst there are sporadic references in the AWS to spiritual connection,[175] that was never the focus of the Arabana case. So much is clear from the content of contemporary Arabana traditional law and custom, as identified below and again in this Court.[176]

36. It may be otherwise in other cases such as where areas are inhospitable or inaccessible, either practically or for some other reason grounded in traditional law and custom, none of which apply in the present case.[177] The Overlap Area has at all times been accessible[178] and adjoins determined Arabana land. In any event, as found by the Full Court, reference to a spiritual (or non-physical) connection must be supported by evidence so as to ascertain whether the asserted connection is actually related to the relevant body of law and custom.[179]

37. It is axiomatic that the relationship Aboriginal people have with their land is spiritual,[180] but sub-s (b) requires the identification of the aspect of the law and custom by which any asserted spiritual element connects the society to land. Bare spirituality is not a substitute for connection by law and custom and the inquiry required by sub-s (b).

Issue III The weight to be given to the *Dodd* determination

38. The Arabana seek to elevate the probative significance of the adjoining Determination in *Dodd* to give it an operation and effect inconsistent with the NTA. It can be accepted that not all Arabana traditional law and custom as determined by *Dodd* is necessarily tied to

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[171] *Bodney* at 129 [172] (Finn, Sundberg and Mansfield JJ).
[172] *Yanner v Eaton* (1999) 201 CLR 531 at 373 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).
[173] Referred to in the Full Court as "spiritual".
[174] FFCJ at [105] (Rangiah and Charlesworth JJ): CAB p 318.
[175] AWS at [52].
[176] AFM at p 8 [327] and pp 9-11 (**Table 1**) items 2, 3, 4 and 8.
[177] Cf *Sampi v State of Western Australia* (2010) 266 ALR 537 at [133] (North & Mansfield JJ); *Neowarra v State of Western Australia* [2003] FCA 1402 at [353] (Sundberg J).
[178] So much was pleaded in the Arabana Form 1 at Schedule N: FRBFM p 9.
[179] FFCJ at [124] (Rangiah and Charlesworth JJ): CAB p 323.
[180] Cite *Ward* at 64 [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

particular locations.[181] However that, without more, does not establish that those matters satisfy s 223(1)(b) with respect to the Overlap Area.

39. *Dodd* establishes, for the purposes of s 225 of the NTA, the existence of native title within the area of the *Dodd* Determination and the identity of the group holding the rights in that land.[182] *Dodd* does provide a basis from which, in a trial about an adjoining area, appropriate inferences could be drawn where there is proper foundation to do so in the context of the evidence as a whole.[183] The trial judge was alive to such use.[184]

40. The Full Court was therefore correct to find that "*the factual matters essential to a valid determination of native title are geographically specific*".[185] Nothing raised by the Arabana undermines that orthodox statement. While the matters listed at AWS [82] are not necessarily tied to particular geographic locations, whether elements of the particular society, such as its kinship system, subsists over the relevant areas is a geographic question. Further, the area in which the Court must determine whether such traditional law and custom has continued is geographically delineated and bounded. Section 225 requires that boundaries be drawn and native title be determined with respect to particular land or waters. Whether stronger inferences could have been drawn either from the Determination or the underlying evidence which was adduced at trial, or whether such inferences negated the various lacunas the trial judge otherwise found in the Arabana case,[186] are matters of discretionary evaluation best left to the fact finder. Whilst this is a *Warren v Coombes*[187] appeal, as it also was in the Full Court, there is no basis to justify departing from the outcomes in the Full Court below.

Issue IV: Disposition

41. Notwithstanding that the Arabana's submissions are to the effect that further evidence of the Arabana is not required to establish connection and there is said to be a "*compelling*"

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[181] See AWS at [79] and [82].
[182] *Malone v State of Queensland (The Clermont-Belyando Area Native Title Claim) (No 5)* [2021] FCA 1639 at [265]-[267] (Reeves J); *McLennan on behalf of the Jangga People #3 v State of Queensland* [2023] FCAFC 191 at [34]-[37] (Perry J), [127] (Sarah C Derrington and Colvin JJ); FFCJ at [68] (Rangiah and Charlesworth JJ): CAB pp 310-311.
[183] *Starkey on behalf of the Kokatha People v State of South Australia* (2018) 261 FCR 183 at [80] (Reeves J, White J agreeing).
[184] TJ at [123], [848] and [849]: CAB pp 52-53, 221-222. Given the nature of the proceedings it would have been highly inappropriate for the trial judge to simply adopt *Dodd* under s 86(1)(c) of the NTA: cf AWS at [84].
[185] FFCJ at [70] (Rangiah and Charlesworth JJ): CAB pp 307-308; FFCJ at [279], [336] (O'Bryan J agreeing): CAB pp 374, 393.
[186] AWS at [85] and [86].
[187] (1979) 142 CLR 531 at 551-553 (Gibbs ACJ, Jacobs and Murphy JJ) cf a *Fox v Percy* (2003) 214 CLR 118 appeal; see generally *Minister for Immigration v SZVFW* (2018) 264 CLR 541 at 557 [35]-563 [49] (Gageler J).

case to adopt the findings of *Dodd* to the Overlap Area,[188] the Arabana do not contend that this Court can simply set aside the trial judge's orders and make a determination of native title. Rather, they seek the limited relief of a further hearing,[189] but this was not relief they sought in the Full Court.[190]

42. Consequentially, the Arabana implicitly accept that s 223(1)(b) has more work to do than they otherwise now contend. That reflects that the final step posited by O'Bryan J requires a factual inquiry.[191] Critically, that inquiry has already been undertaken. It was the trial in this matter. On that inquiry, or even if the inquiry required by *Yorta Yorta* at [34] and *Ward* at [64] was replaced with a broad and unconfined test as sought by the Arabana,[192] the Arabana have not identified what law and custom was allegedly ignored by the trial judge (especially given at trial the law and custom relied on is that contained at Table 1 to their trial submission)[193] or how the effect of that law and custom constitutes their connection to the Overlap Area. They have therefore not identified the material that could yield a different result.[194] Overwhelmingly, the trial judge's findings focus on the failure by the Arabana to adduce with specificity evidence as to their law and custom in so far as it was relevant to the ten Arabana connection matters. Absent challenge to those findings the same result must follow on any further hearing which is limited to submissions.

Part VI: Notice of Alternative Contention / Cross-Appeal: N/A

Part VII: Estimation of Time

43. The first respondent requests two hours for presentation of its oral argument.

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Todd Golding KC
Crown Advocate for South Australia
(08) 7322 7000
Todd.Golding@sa.gov.au

.....
Warwick Ambrose
Counsel – Crown Solicitor's Office
(08) 7322 7000
Warwick.Ambrose@sa.gov.au

Dated 26 April 2024

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[188] AWS at [85].
[189] Arabana Notice of Appeal 2(b): CAB p 453.
[190] Arabana Further Amended Notice of Appeal 2(c): CAB p279.
[191] FFCJ at [364](e) (O'Bryan J): CAB p 401.
[192] See AWS at [3] and [51].
[193] T3178L35-L46 (Mr Collett, Arabana closing address): FRBFM p 28.
[194] See paragraph 22 above.

Annexure

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the particular statutes and statutory instruments referred to in the First Respondent's submissions are as follows:

No.	Description	Version	Provisions
1.	*Native Title Act 1993* (Cth)	Compilation 47 25 September 2021 to 22 August 2023	Sections 86, 223 and 225

Schedule

Appellants

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

Walka Wani Respondents

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

Other Respondents

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