HIGH COURT OF AUSTRALIA

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Form 27D – Respondent's Submissions
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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

BETWEEN:

Aaron Stuart and others named in the Schedule
First Appellant

10

and

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

SECOND, THIRD, FOURTH AND FIFTH RESPONDENTS' SUBMISSIONS (WALKA WANI RESPONDENTS)

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Part I:

1. This submission is in a form suitable for publication on the internet.

Part II: ISSUES

2. The Walka Wani Respondents see the issues that the appeal presents somewhat differently from the Appellant. They are:

   (a) Did the trial judge misdirect himself as to the proper construction of s.223(1)(b) of the *Native Title Act 1993* (Cth) (**NTA**);

   (b) If so, did that misdirection bear in any relevant way on his rejection of the case presented by the Appellant at a factual level; and

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   (c) When a matter put in issue in a proceeding is whether connection has been maintained to a particular area, is there a need: (i) to examine the traditional laws and customs for s.223(1)(b) purposes *as they relate to that area*; and (ii) to demonstrate that connection *to that area* has been substantially maintained since sovereignty through the continued acknowledgment and observance of those laws and customs?

Part III:

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

Part IV: FACTS

4. The claim area is bounded by areas in respect of which determinations of native title have already been made (Full Court's Reasons (**F**)[23], CAB 292). The determination of native title made by consent in *Dodd v State of South Australia* [2012] FCA 519 (***Dodd***) abuts its eastern and southern boundaries (**Arabana Determination**) (F[24], CAB 292). The Walka Wani were not parties to the *Dodd* proceeding. Abutting the northern and western boundaries of the claim area is an area subject to a determination
10 made in favour of the Yankunytjatjara/Antakarinja People (**YA Determination**) (F[28], CAB 293). Some of the persons included in the Walka Wani claim group could point to the YA Determination as proof of a connection within the immediately adjacent area to which it related (F[58], CAB 302). The *Eringa (No.1) Determination* is immediately to the north and east of the YA Determination and approximately 25 km north of the claim area (F[30], CAB 293). It recognised the native title of the Yankunytjatjara/Antakarinja and Lower Southern Arrernte groups that comprise the Walka Wani claim group (F(*ibid*), CAB 293). The Walka Wani and the Arabana each opposed the other's native title claim.

5. The Walka Wani evidence of contemporary connection within the claim area was
20 generally not challenged (trial judge's reasons (**TJ**)[668], CAB 174). They have had a long-term inter-generational connection with the area over multiple generations (TJ[678], CAB 180). The trial judge said that if the resolution of the case turned only on the establishment of contemporary connection, the Walka Wani case would be strong (TJ(*ibid*), CAB 180). The critical issue for the Walka Wani was whether they had native title rights in the claim area *at effective sovereignty* (TJ[679], CAB 180). The trial judge found in favour of the Walka Wani on that issue and would have recognised their native title (TJ[986], CAB 249). That finding was reversed by the Full Court.

6. The trial judge said that the Arabana Determination determined as a fundamental matter, once and for all, that the Arabana are a *"society"* or communal group of people
30 holding rights and interests possessed under traditional laws acknowledged and traditional customs observed by them and having a connection with the Arabana Determination area (TJ[54], CAB 37-38; F[34], CAB 294 - cf Appellant's Submissions (**AS**)[29]-[30]). His Honour made no finding inconsistent with the Arabana

Determination (F[62], CAB 303). It was common ground at trial that the Arabana held native title rights and interests at effective sovereignty in the claim area (TJ[842], CAB 220).

7. The trial judge had regard to a body of evidence that weighed against the inference of connection that might otherwise have been drawn by reference to the Arabana Determination (F[92], CAB 313). Critically, that evidence included historical circumstances supporting a finding that the Arabana had moved generally south and east from the claim area progressively after sovereignty (F[35], [92], CAB 294, 313-314; TJ[538]-[539], CAB 149). The trial judge was aware that physical dislocation from the relevant land and waters did not necessarily make proof of connection in accordance with s.223(1)(b) impossible, but it was nonetheless a significant factual consideration against which the evidence of connection adduced by the Arabana fell to be assessed (F[92], [98(b),(c)], CAB 313-314, 316).

Part V: ARGUMENT

The identification of principles - AS[13]-[27]

8. This appeal relates to an application under the NTA for the recognition of rights that are defined in s.223(1) of that Act. The relevant starting point for determining the appeal is the Act: *Commonwealth v Yarmirr* (2001) 208 CLR 1 (***Yarmirr***) at [7], [15]; *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***) at [16], [25]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (***Yorta Yorta***) at [32].

9. As explained in the plurality judgment in *Yorta Yorta* at [33], the native title rights and interests defined in s.223(1) may be communal, group or individual rights and interests but they must be *"in relation to"* land or waters. They must have three characteristics. *First*, they are possessed under the traditional laws *acknowledged* and the traditional customs *observed* by the relevant peoples (*ibid*). *Second*, the rights and interests must have the characteristic that, by the traditional laws acknowledged and the traditional customs observed by those peoples, they must have a *"connection with"* the land and waters: *Yorta Yorta* at [34]. *Third*, the rights and interests must be *"recognised"* by the common law: *Yorta Yorta* at [35].

10. Although demonstrating some change to or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests will not *necessarily* be fatal to a native title claim, both change, and interruption in exercise, may, in a particular case, take on considerable significance in deciding the issues

presented by an application for a determination of native title: *Yorta Yorta* at [83]. Although s.223(1)(b) is not directed to how Aboriginal Peoples use or occupy land or waters, no doubt there may be cases where the way in which land and waters are used will reveal something about the kind of connection that exists under traditional law or custom with the land or waters concerned: *Ward* at [64].

11. Account must be taken of the fact that s.223(1)(a) and (b) are cast in the present tense. The questions thus presented are about *present* possession of rights and interests and *present* connection with the land or waters: *Yorta Yorta* at [85]. However, the continuity of the chain of possession and continuity of the connection is not irrelevant (*ibid*). The
10 rights and interests which are said now to be possessed must be rights and interests possessed under the traditional laws *acknowledged* and the traditional customs *observed* by the peoples in question and 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. In this context, "traditional" refers to the body of laws and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty: *Yorta Yorta* at [86]. For exactly the same reasons, acknowledgement and observance of *those* laws and customs must have continued substantially uninterrupted since sovereignty: *Yorta Yorta* at [87]. Continuity in the acknowledgement and observance of those laws and customs is essential: *Yorta Yorta* at [88]. Counsel for the
20 Arabana acknowledged before the Full Court that the concept of *"continuity"* is one that inheres in both ss.223(1)(a) and (b) (F[103], CAB 317).

12. The Appellant says that the relevant s.223(1)(a) enquiries are directed to the nature of the laws and customs of the *"society"* and about other features of that society and those enquiries are not geographically specific (AS[20]-[21]). That submission cannot be accepted. The opening words of s.223(1) contextualise what is said in both (a) and (b). Section 223(1)(a) is not directed to laws and customs in general, rather it is directed to those laws and customs under which rights and interests are possessed *"in relation to land or waters"*. It would be wrong to attempt to reformulate the statutory language when it is the words of the definition to which effect must be given: *Yorta Yorta* at [82].

30 13. In *Ward*, at [18], the majority said that whether s.223(1)(a) is satisfied presents a question of fact. It requires not only the identification of the 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 and customs (*ibid*). The two are

interconnected. The issue before the trial judge and the Full Court was not the existence of an Arabana society or of traditional laws and customs, so much was accepted (F[84]-[88], CAB 311-312). The issue was whether there had been continuity in the acknowledgment and observance of those traditional laws and customs by which the Arabana have (maintained) a connection with the claim area (F[103], CAB 317).

14. At AS[23], the Appellant accepts that s.223(1)(b) has a *"clear geographically specific element"*. Before the trial judge and the Full Court, the Appellant did not challenge the correctness of the reasoning in *Bodney v Bennell* (2008) 167 FCR 84 (***Bodney***) at [179], that where a matter put in issue in proceedings under the NTA, is whether *"connection"* has been maintained to a particular area, there is a need: (i) to examine the traditional laws and customs for s.223(1)(b) purposes *as they relate to that area*, and (ii) to demonstrate that connection *to that area* has, in reality, been substantially maintained since the time of sovereignty. See too *Wagonga Local Aboriginal Land Council v Attorney-General of New South Wales* [2020] FCA 1113 (***Wagonga***) at [390], [392], [396] (Jagot J) and, on appeal, *Blackburn v Wagonga Local Aboriginal Land Council* (2021) 287 FCR 1 at [83(d)], [145].

15. In response to AS[24], the trial judge noted at TJ[51], CAB 37, that the required connection with the land or waters is essentially spiritual, citing *Ward* at [14] and accordingly, s.223(1)(b) does not require that the connection be physical, although it may be of that kind: see too TJ[847(c)], CAB 221. Whether a native title claim group have a *"spiritual"* connection with land or waters and if so, the nature and the extent of that connection, will depend upon the evidence. It does not necessarily follow that because a group has been successful in demonstrating for the purposes of s.87 of the NTA that they have a present *"connection"* with part of what was, historically, their traditional country, they must therefore necessarily have the same present connection with other parts of their historical country. The majority were correct when they said that the factual matters essential to a determination of native title are geographically specific and whether a group who have had their native title rights and interests recognised have the same connection elsewhere, will depend upon the evidence that is adduced in relation to *that* area (F[70], CAB 307-308 citing *Fortescue Metals Group v Warrie* (2019) 273 FCR 350 (***Warrie***) at [112]; see too F[86], CAB 312).

16. In response to AS[25], the trial judge cited *Ward* at [64] when he said that s.223(1)(b) requires expressly that the claim group have a connection with the land or waters in

question *"by [the] laws and customs"*, that is, by the traditional laws acknowledged and the traditional customs observed by them (TJ[51], CAB 37). His Honour was well aware that 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 (TJ[51], [847(b),(c),(e)], CAB 37, 221-221). However, as the majority observed in *Ward* at [64], 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 the relevant peoples and the land or waters concerned.

17. The reasons of the courts below must be read in the light of the arguments presented to
10 those courts: *Yorta Yorta* at [21], [27], [30]. In his reasons for judgment, the trial judge dealt with the case which the claimants sought to make. The trial judge made critical findings of fact that the evidence did not demonstrate that the Arabana had continued to acknowledge and observe those traditional laws and customs by which they have a connection to the claim area (TJ[913]-[914], CAB 233). Evidence of the matters which Finn J had described in *Dodd* as *"bearing on the continued connection of the Arabana with the [Arabana] Determination area"* (TJ[846], CAB 221) was lacking (TJ[912], CAB 233). On those findings of fact, the Arabana claim to native title fails and their appeal should be dismissed.

The trial in context - AS[28]-[34]

20 18. In response to AS[30], it is submitted that as the majority stated at F[76], CAB 309, the factual matters essential to the validity of a consent determination of native title must be determined by reference to the NTA: *Yarmirr* at [7], [15]; *Ward* at [16], [25]; *Yorta Yorta* at [32]. See NTA ss.94A and 225. What the Arabana Determination determined is set out by the majority at F[84]-[86], CAB 311-312. Their Honours said that the reasons of the trial judge at TJ[54], CAB 37-38 recorded a proper understanding of those matters. In short, the Arabana Determination recognised the essential fact that connection with the land and waters *subject to that Determination* has been maintained (F[86], CAB 312). The conclusion of the trial judge that the requisite connection with the claim area had not been proven did not involve a denial that the Arabana are a group
30 of Aboriginal People united in a body of traditional laws and customs that continues to have vitality today and that gives rise to native title rights and interests in neighbouring land (F[88], CAB 312).

19. The Appellant says that the key Arabana claims at trial are summarised at TJ[57]; CAB 38-39 and that Items (a), (d) and (e) were not in dispute (AS[32]). That is correct for Items (a) and (e) but not for Item (d). Whether the Arabana acknowledged and observed traditional laws and customs under which they possessed rights and interests in and had a connection with, the claim area was very much in issue. The Appellant also says (*ibid*) that [57(g)] was accepted by the trial judge and refers to TJ[410]-[414], [537] (CAB 122, 149). That is incorrect. What the trial judge accepted at the paragraphs referenced was that the ethnographic-historical evidence and the linguistic evidence supported the Arabana claim as to the position at effective sovereignty, not the present position.

10 20. At AS[33], the Appellant says it is not clear what interest the (named) Walka Wani Respondents continue to have in these proceedings. What they and the members of the Walka Wani People whom they represent have, by way of an interest, is a strong historical and cultural connection to the claim area (TJ[668], [678], [829]-[838], CAB 174, 180, 217-219): *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

21. In response to AS[34] and [36], a statement of the principal issue in the Arabana claim is set out at TJ[843], CAB 220; F[97], CAB 316. The majority said that the formulation of the issue by the trial judge appears to encompass the elements of both s.223(1)(a) and (b) and note that at trial, it was referred to by the parties, *"in shorthand as being*
20 *whether the Arabana have established continued connection with the Overlap Area"* (TJ[843], CAB 220; F[97], CAB 316). The trial judge's statement of the principal issue at TJ[843] was not identified as an error in the Further Amended Notice of Appeal (**FANA**) (CAB 271-280).

Key findings and issues not contested on appeal - AS[35]

22. There was no issue that the Arabana possessed native title rights and interests in the claim area at effective sovereignty. The summary of Arabana mythology at TJ[815], CAB 215, must be read with TJ[846], [872]-[876], [878], [909], [912], CAB 221, 225-227, 232-233. The trial judge concluded that the *Ularaka* related to the claim area are not being taught to the younger generations (TJ[909], CAB 232). Some of the *Ularaka*
30 are not known, let alone passed on (TJ[912], CAB 233). Compare this with the summary of the Walka Wani mythology set out at TJ[829]-[837], CAB 217-219.

Principal question identified by trial judge - AS[36]

23. See [21] above.

Errors in trial judge's finding relied upon in this appeal - AS[37]-[47]

24. Ground 1 states that the Full Court majority erred by failing to find that the trial judge had failed correctly to construe and apply the definition of *"native title"* in s.223(1) of the NTA. Firstly, as to the trial judge's construction of s.223(1), it was not argued before the Full Court that there was an error in the trial judge's direction as to the relevant law (TJ[47]-[53], CAB 31-37) or in his statement of the relevant principles regarding the assessment of s.223(1)(b) *"connection"* (TJ[51], [847], CAB 37, 221; F[96]-[98], CAB 316). Reference has been made earlier herein (at [21]) to his Honour's description of the principal issue in the Arabana claim in terms that were not challenged in the FANA.

25. The Appellant at AS[37] relies upon the dissenting judgment of O'Bryan J who said that the trial judge misstated the statutory test or paraphrased it in an *"unfortunate"* way that does not reflect the statutory language (F[296], CAB 382). O'Bryan J said that, *first*, rather than asking whether the Arabana have a connection with the claim area **by** their traditional laws and customs, the trial judge frequently asked whether the Arabana have a connection *"in accordance with"* their traditional laws and customs (F[300], CAB 382) (AS[40]). It is submitted that the trial judge used that expression because it was the expression used by the Arabana in presenting their case both at trial (TJ[852], CAB 222) and on appeal (F[43], CAB 297; FANA, Ground 1 and particulars (1)(c) and (4), CAB 272-273). Ground 1 asserts that the trial judge erred at TJ[916], CAB 234, in finding that the Arabana had not established the maintenance of their connection with the claim area *"in accordance with"* the traditional laws acknowledged and the traditional customs observed by them. The trial judge was well aware that s.223(1)(b) connection was *by* the traditional laws and customs acknowledged and observed by the group (TJ[51], [847(d)], [914], CAB 37, 221, 233).

26. O'Bryan J's *second* criticism of the trial judge's assessment is that it focused on evidence of *"acts"* (conduct or behaviour) of connection rather than by reference to the content and character of traditional laws and customs *"acknowledged and observed"* citing the language used in TJ[911], [913] and [914], CAB 233 (AS[42]; F[301]-[302], CAB 383). The correctness of those paragraphs was not challenged in the FANA. Counsel for the Arabana did, however, submit before the Full Court that the statement of the requirements of s.223(1) at TJ[911], CAB 233, was wrong because it does not

accord with the statutory language in s.223(1)(b) (F[100], CAB 317). It was submitted that the wrong emphasis in that passage introduced a geographic component to acts of acknowledgment and observance that is not a requirement of s.223(1)(b) (*supra*). The majority accepted that the language employed by the trial judge is not strictly in accordance with the language of s.223(1)(b) (F[101], CAB 317). However, they said that the argument that his Honour's articulation of the issue involved an erroneous emphasis on a geographic component requiring acts of acknowledgment and observance physically within the boundaries of the claim area cannot be sustained (F[102], CAB 317). They added that nor could it be said that the manner in which the trial judge dealt with the evidence implicitly demonstrates error in the proper understanding or application of the law (F(*ibid*)). The majority concluded, correctly, that the task of the trial judge was not only to identify the existence of traditional laws and customs but to identify whether the claimants were connected with the claim area by those laws and customs (F[103], CAB 317). In this respect, what the trial judge said at TJ[911], CAB 233, does not focus the enquiry on activities physically occurring within the claim area (*ibid*). It reflects the requirement that the laws and customs must be laws and customs that are acknowledged and observed in fact. The reference to *"those laws and customs"* in s.223(1)(b) must be understood as a reference to the laws and customs referred to in s.223(1)(a), being traditional laws and customs that are acknowledged and observed (*ibid*).

27. It is submitted that the trial judge's assessment included an assessment of evidence of *"acts"* of connection because that was the way in which the Arabana presented their case at trial (TJ[852], CAB 222; F[104]-[105], CAB 318; see below at [28]-[33]). See too FANA Ground 1(6) (CAB 274) in which the Arabana relied on evidence of *"acts"* of connection in asserting that the trial judge erred in finding that their connection to the claim area which existed at effective sovereignty, had ceased to exist for the purposes of s.223(1)(b) of the NTA. The majority note at F[66], CAB 305, that the trial judge's reasons reflect the manner in which the Arabana presented their case with respect to s.223(1)(b), that is, by reliance upon a multiplicity of factual matters that together were said to be sufficient to discharge their onus of proof.

The Arabana case at trial

28. Before the Full Court, the Arabana submitted that the trial judge ought to have found that the Arabana Determination was sufficient in and of itself to compel the inference

that the requisite connection with the claim area existed (F[48], CAB 298). That was not the case that was put before the trial judge. There, the Arabana submitted that there were 10 matters which indicated the continuity of their connection with the claim area (TJ[852], CAB 222; F[39], CAB 296). Counsel for the Arabana acknowledged on the appeal that the trial judge was invited to evaluate the evidence going to all 10 of these matters (F[104], [105], CAB 318). In the Arabana written submissions at trial (Appellant's Book of Further Material (**ABFM**)), 12[330]), it was submitted that because the Arabana Determination had already established certain things, what the Arabana needed to do to *"establish connection to the claim area by its traditional laws and customs is to* ***point to persuasive evidence of connection to the claim area****"*. The submissions then state at ABFM, 12[331] that continuity of Arabana connection with the claim area is *"readily established"* by the matters there listed, being the matters referred to by the trial judge at TJ[852], CAB 222.

29. The trial judge addressed each of the 10 matters relied upon by the Arabana to establish continuity of their connection with the claim area (TJ[853]-[906], CAB 223-232):

   (i) matters established by the Arabana Determination (TJ[853]-[854], CAB 223);

   (ii) continuity of Arabana living in Oodnadatta (TJ[855]-[864], CAB 223-224);

   (iii) continued use of the natural resources in the claim area (TJ[865]-[871], CAB 224-225);

   (iv) continuity of learning, respecting and teaching the *Ularaka* (TJ[872]-[876], CAB 225-226);

   (v) protection of *Ularaka* sites (TJ[877]-[892], CAB 226-229);

   (vi) continued acknowledgment and observance of other traditional laws and customs in the claim area (TJ[893]-[896], CAB 229-230);

   (vii) continuing assertion of traditional relationships to the claim area (TJ[897]-[902], CAB 229-231);

   (viii) knowledge of the boundaries of Arabana country (TJ[903], CAB 231);

   (ix) continuity of involvement in ceremonial life (TJ[904], CAB 231);

   (x) continuity of social connections with Oodnadatta (TJ[905]-[906], CAB 231-232).

30. The trial judge accepted that the Arabana Determination had established that rights to Arabana country in the adjacent land are held under the Arabana system of law and custom, by Arabana society as a whole, but consistent with the case that the Arabana chose to present, the requisite continuity of connection with the claim area must be established by the evidence in the proceedings before him (TJ[853]-[854], CAB 223; F[39], [90], CAB 296, 313). See too TJ[54], CAB 37-38; F[34], CAB 294-295.

31. His Honour noted at TJ[897], CAB 230, that the Arabana submitted that the forms of continuing connection including, living on the claim area, respecting, teaching and protecting the *Ularaka* for the claim area and involvement in Arabana ceremonial and social rites, involved an implicit assertion by the Arabana of their traditional relationship to the claim area. He said that one may accept that activities of that kind have this character, but the actual evidence of these activities is limited (TJ[898], CAB 230). This is a key finding rejecting important aspects of the case presented by the Arabana at a factual level. The evidence led from the (6) Arabana lay witnesses to support the case on connection was far from impressive. The evidence of each witness is summarised at TJ[582]-[654], CAB 158-171. The correctness of those summarises was not challenged in the FANA. Then at TJ[658]-[660], CAB 172-173, the trial judge briefly summarised the collective evidence of the Arabana lay witnesses. Again, the correctness of that summary was not challenged in the FANA.

32. The trial judge said that there is of course a connection with the claim area which arises from having been taught that it is Arabana country (TJ[913], CAB 233). It was connections of this kind which in the main were asserted by the Arabana witnesses (TJ(*ibid*), CAB 233). However, the connection required by s.223 is a connection arising from the continuing acknowledgment of traditional laws and customs observed by the claimant group (TJ(*ibid*), CAB 233); see too earlier herein at [9], [11] and [16]). In a critical finding rejecting the case presented by the Arabana at a factual level, the trial judge at TJ[914], CAB 233, said that the relative absence of acknowledgment of traditional law and observance of customs by which a connection by the Arabana to the claim area is maintained, was fatal to the Arabana claim (TJ[914], CAB 233; F[40], CAB 296-297).

33. The hearing before the trial judge was lengthy and protracted. He heard evidence from 20 Aboriginal witnesses in 3 separate tranches of evidence at Oodnadatta and at various locations on-country in and around the claim area, in Alice Springs and in Adelaide

(F[53], CAB 301). The Court later sat at Adelaide to receive into evidence the expert reports and to hear the concurrent expert evidence (F(*ibid*), CAB 301-302). The trial was recorded in more than 3,500 pages of transcript (F(*ibid*)). At F[54], CAB 302, the majority noted that the fact-finding task which confronted the trial judge involved the weighing of multiple considerations in determining whether the requisite connection in s.223(1)(b) was proven and that was *"an highly evaluative task"*. As regards the Arabana claim, that task was to evaluate the case which the Arabana presented at trial. His Honour carried out that evaluation and rejected the case presented at a factual level (F[105], CAB 318).

10 **The approach of the majority in relation to this ground - AS[48]-[57]**

34. In response to AS[48]-[51], it is submitted that in dealing more generally with the asserted errors in Particulars 1, 2, 4(b), the majority first noted at F[96], CAB 316, that the trial judge identified the test under s.223(1)(b) at TJ[51], CAB 37 in terms that were not challenged. We repeat the submissions made earlier herein at [21] and [26].

35. The majority at J[98], CAB 316-317, set out the trial judge's summary of the relevant principles relating to the assessment of continued connection (at TJ[847], CAB 221-222) in terms which were not the subject of appeal. Those principles included a recognition that the absence of physical presence is not fatal to a continuing connection and that non-physical forms of connection may include "spiritual connection". Whilst
20 acknowledging that the language used by the primary judge at TJ[911], CAB 233, is not strictly in accordance with the language of s.223(1)(b), the majority said that the argument that his articulation of the issue involved an erroneous emphasis on a geographic component requiring acts of acknowledgment and observance physically within the boundaries of the claim area cannot be sustained J[101]-[102], CAB 317.

36. At F[103], CAB 317, the majority said that the passage at TJ[911], CAB 233 does not focus the inquiry on activities physically occurring within the claim area but does reflect a requirement that the laws and customs must be ones that are acknowledged and observed in fact, as required by s.223(1)(a). To speak of that requirement is not an error because the phrase, *"those laws and customs"*, in s.223(1)(b) must be understood as a
30 reference to the laws and customs referred to in s.223(1)(a), being traditional laws and customs that *are* acknowledged and observed in the present day (F[103], CAB 317).

37. In response to AS[52], the majority at F[104]-[105], CAB 318 described the case run by the Arabana at trial as based on 10 matters which were said to evidence connection

specifically to the claim area. At F[105], CAB 318, they deal with the Arabana's contentions of an asserted spiritual connection. They note that it had not been shown that the trial judge was invited to consider whether the evidence of an asserted spiritual connection (particularly that of Mr Strangways) was itself sufficient (F[105], CAB 318). See too earlier herein at [15]. The majority said that to the extent that there is an intermingling in the judgment of the matters to be decided under s.223(1)(a) and (b), this reflected the manner in which the Arabana presented their case (F(*ibid*), CAB 318). Further, the reasons, as a whole, disclose that the trial judge correctly understood that the test for connection did not require proof of physical activities and his analysis of
10 the evidence was not so constrained as seen at TJ[51], CAB 37 and [847] (J[107], CAB 319).

38. The Appellant submits at AS[53], that the majority *implicitly* concludes at F[108], CAB 319, that the trial judge did undertake the 2-step approach in *Ward* at [64] when determining connection. It says that the majority did not in terms identify where the trial judge made findings about the current content of Arabana laws and customs (which O'Bryan J found had not been undertaken). The majority is said to have erred because the trial judge considered at sovereignty Arabana laws and customs but he did **not** consider the evidence about current laws and customs by which connection to land is achieved (and was found to be sufficient in the Arabana Determination to maintain
20 continuity of connection to all other Arabana country). This submission is addressed at [40]-[43] below.

39. The Appellant submits at AS[54]-[57], that the majority incorrectly embraced the trial judge's view of connection by looking for evidence of *"**actual** acknowledgment and observance"* of laws and customs and focused on acts (conduct or behaviour) of connection in the claim area (*ibid*). Further, the Appellant says that the trial judge did not consider the nature of the laws and customs and whether the claimed rights and interests are possessed under those laws and customs that are acknowledged and observed today. That submission is incorrect and was addressed by the trial judge at TJ[101]-[109], [844]-[848], [912]-[914], CAB 48-50, 220-222, 233 (see [40]-[43]
30 below).

Failure to make findings as to the content of traditional laws and customs - AS[58]-[70]

40. At AS[46] and [60], the Appellant notes that O'Bryan J found that the trial judge failed to making findings as the content and nature of the traditional laws and customs that

are *currently* acknowledged and observed by the Arabana (F[338]-[339], CAB 393-394). The majority found, however, that the trial judge did set out the traditional laws and customs of the Arabana by which rights and interests in land are possessed (F[62(1)], CAB 303). In this respect, the trial judge said that he accepted the summary of the key features of Arabana society set out in the reasons of Finn J supporting the Arabana Determination (TJ[101], CAB 48). Then at TJ[102]-[109], CAB 48-50, he set out further details of the Arabana traditional laws and customs taken from the evidence of Dr Lucas, the Arabana expert anthropologist. Extracts from Finn J's reasons identifying those matters relevant to the continuing connection by the Arabana with the
10 Arabana Determination area are set out at TJ[845], CAB 220-221.

41. At TJ[846], CAB 221, the trial judge refers to a number of matters (laws and customs) which Finn J described as bearing on the continued connection of the Arabana with the Arabana Determination area. These included the continued observance of normative rules relating to authority, the transmission of Arabana traditional law and custom to younger members of the group, continued use of Arabana names and kinship terms, maintenance of knowledge of the traditional *Ularaka* and the normative rules related to those *Ularaka*, the continued residence of Arabana people in the claim area, the knowledge of the claimants of the area and their continued engagement in traditional activities including hunting and gathering for food.

20 42. After setting out those details of the laws and customs by which the Arabana had maintained connection with the Arabana Determination area, the trial judge then proceeded (at TJ[853]-[906], CAB 223-232) to consider, in turn, each of the 10 matters which the Arabana submitted indicated the continuity of their connection with the claim area (TJ[852], CAB 222). Having done that, his Honour said that a number of matters were absent from the Arabana evidence concerning connection (TJ[907], CAB 232). In particular (at TJ[912], CAB 233), he said that evidence of the matters to which Finn J referred in making the Arabana Determination is lacking.

43. The trial judge said that there is a relative absence of knowledge of the Arabana normative rules relating to authority; evidence of the transmission of Aboriginal law
30 and custom to younger Arabana is limited (often because they are not known), Arabana moiety, kinship and totemic names are not used; some of the *Ularaka* are not known, let alone passed on and the continued engagement in traditional activities on the claim area is not extensive (TJ[912], CAB 233). These are all matters which Finn J had

described as having a bearing on the continued connection of the Arabana to the 2012 Determination area (TJ[846], CAB 221). His Honour said that it is the relative absence of acknowledgment of traditional law and observance of customs by which a connection by the Arabana to the claim area is maintained which was, in his opinion, fatal to the Arabana claim (TJ[914], CAB 233; and see earlier herein at [31]-[33]).

Effect of errors - AS[71]-[78]

44. In this section of the AS, the Appellant again seeks to downplay the significance of the case it ran at trial, namely that there were 10 matters that *"indicated the continuity of their connection with the [claim area] in accordance with their traditional laws and* 10 *customs"* (TJ[852], CAB 222). The Appellant now says that those submissions were put in a context in which the trial judge had not yet found that the claim area was Arabana country at sovereignty and that there was no suggestion that any or all of these matters were *necessary* in order to make out the test in s.223(1) (AS[72]). That submission cannot be accepted. That was not the way that the Arabana case was run at trial. The Arabana case was that there were 10 matters that "indicated the *continuity* of their connection with [the claim area]" (TJ[852], CAB 222). Further, as the trial judge stated at TJ[842], CAB 220, it was common ground in the final submissions of all parties that the Arabana had possessed native title rights and interests at effective sovereignty in the claim area.

20 **Significance of prior consent determination - AS[79]-[86]**

45. Ground 2 asserts that the Full Court erred by treating all aspects of the Arabana Determination as being geographically specific. In particular, it failed to find that the determination that the Arabana continued to acknowledge and observe traditional laws and customs under which they possessed rights and interests in relation to the Arabana Determination area, was a determination as to the present claim group *"that should have been applied in the context of this small adjoining claim area"* (CAB 452). It is submitted in response that the majority did not err when they said that the factual matters essential to a valid determination of native title are geographically specific (F[70],[86], CAB 307-308, 312). As stated in *Ward* at [19], the issue which arises under 30 s.223(1)(b) is whether by the traditional laws and customs *"there is 'a connection with' the land or waters in question"*. See too *Bodney* at [175]-[176], [179]; *Wagonga* at [83(d)], [145]; *Warrie* at [112], (quoted at F[70], CAB 308). Both the definition of a determination of native title in s.225 and the definition of native title in s.223 are

geographically specific. See too earlier herein at [14].

46. Section 81 of the NTA confers jurisdiction on the Federal Court to hear and determine applications that relate to native title. An application may be made to that Court for a determination of native title "in relation to an area *for which there is no approved determination of native title*" (ss.13, 61(1)). While s.13(1) permits multiple overlapping applications to be made over the same land or waters, s.67 requires that those applications are dealt with in the same proceeding. Once an approved determination of native title has been made, there can be no further native title application made over that determination area (s.61A(1)) and the Federal Court cannot hear another
10 application or make any other determination of native title, *"in relation to that area"* (s.68).

47. An *"approved determination of native title"* is defined in s.253. It is a *"recognition of the content of a set of existing rights, over a specific area of land and waters"*: *Warrie* at [80] (Jagot and Mortimer JJ). Section 94A provides that an order in which the Court makes a determination of native title *"must set out details of the matters mentioned in s.225"*. Important consequences flow under the NTA where an approved determination of native title is made. Those consequences are intended to provide for certainty as to the existence and content of both native title and non-native title, rights and interests in the area covered by the determination (see s.225(a)-(e)).

20 48. The geographic specificity of a determination of native title is also apparent from the description of the information which an application for a determination of native title must contain. Subsection 62(1)(b) states that a *"claimant application"* must contain the details specified in subsection (2). Those details include information that enables the boundaries of the area covered by the application to be identified (a), a map showing the boundaries (b) and details and results of searches carried out to determine the existence of any non-native title rights and interests in the area covered by the application (c).

49. The NTA makes provision to ensure that all those who may have an interest in the area covered by an application are notified of the application and have an opportunity to be
30 joined as a party to proceedings in relation to the application. If an application is filed, the Federal Court must provide the Native Title Registrar with a copy of that application as soon as possible (s.63). The Registrar must then, as soon as reasonably practicable, give a copy of the application to the relevant State or Territory Minister and to the

representative Aboriginal / Torres Strait Islander bodies, *"for the area covered by the application"* (s.66(2), (2A)). The Registrar must also give notice containing details of the application to the persons or bodies identified in s.66(3)(a) and must notify the public *"in the determined way"* (s.66(3)(d)). Any of the persons covered by any of s.66(3)(a)(i)-(vii) and who notifies the Federal Court in writing that they want to be a party to the proceeding, will be joined as a party (s.84(3)). They include the Commonwealth Minister and others who might be thought to have an interest in, *"any of the area covered by the application"*.

50. The Federal Court also has power to join any other person whose interests *"may be affected by a determination in the proceedings"* (s.84(5)). Section 86 of the NTA confers a discretion on the Federal Court to adopt any finding, decision or judgment made in any other proceedings (s.86(1)(a)(i),(c)). Any Court asked to exercise that discretion would have to take into account any opposition by those with an interest in the land or waters concerned: *Wilson on behalf of the Bandjalang People v Department of Land and Water Conservation* (2003) 126 FCR 500 at [31] (Hely J); *McLennan on behalf of the Jangga People #3 v State of Queensland* [2023] FCAFC 191 (***McLennan***) at [43] (Perry J). No application of that kind was made to the trial judge. The proposition that an approved native title determination was intended to operate *in rem*, resolving the status of the land and waters with respect to the determination area as against all the world, is well established: *McLennan* at [26] (Perry J).

51. Consistent with the legislative preference for native title claims to be resolved through negotiation and agreement (see Preamble), s.87 provides that the Federal Court may make an order that is consistent with an agreement reached by the parties in relation to native title proceedings (or a part of the proceedings) and it may make a determination of native title without holding a hearing. While the discretion under s.87 must be exercised judicially, the parties to an agreement are not required to produce evidence as if in a trial. Consent determinations of native title will be made where the State has made a reasonable and rational assessment of the relevant material to which it has been given access and is satisfied that there is a *"credible or cogent basis"* to conclude that the requirements of s.223 are satisfied, whether or not that basis would constitute admissible evidence in contested litigation or would enable the Court to make findings about s.223 on the balance of probabilities: *Western Bundjalung People v Attorney-General of New South Wales* [2017] FCA 992 at [21]-[22] (Jagot J); *Widjabul Wia-Bal v Attorney-General of New South Wales* (2020) 274 FCR 577 at [51] (Reeves, Jagot and

Mortimer JJ). The NTA does not differentiate between the effect of a determination of native title which has been made by consent under s.87 or one made after a contested hearing and proved on the balance of probabilities. When the Federal Court makes a determination of native title by consent, it makes a determination of a special kind that reflects the exceptional nature of the legislation. It is not concerned with adjudicating common law rights: *McLennan* at [91] (Sarah C Derrington and Colvin JJ).

52. In response to AS[79]-[82], it is submitted that the issue before the trial judge and the Full Court was not the existence of an Arabana society or of traditional laws and customs. The issue was whether there had been the continued acknowledgment and observance of traditional laws and customs under which the Arabana have maintained a connection with the claim area. It was the same issue as to the maintenance of connection with a particular area of land which arose in *Wagonga* [2020] FCA 1113, Jagot J at [396] and see too at [390] and [392].

53. It is submitted that the majority gave due regard to the effect of the Arabana Determination when they said at F[84], CAB 311-312, that it may be accepted that one of the matters disposed of once and for all by the Arabana Determination was that the native title rights and interests described in that determination were of a traditional nature, owing their existence to law and custom that pre-existed sovereignty and that had continued to be acknowledged and observed to the present day. Also decided once and for all was the fact that traditional laws and customs that gave rise to a connection with the Arabana Determination area had continued to exist, substantially uninterrupted, since sovereignty (F(*ibid*), CAB 312). The majority said that the reasons of the trial judge (F[54], CAB 302) recorded a proper understanding of those matters (F(*ibid*), CAB 302).

54. The majority then said (F[86], CAB 312), that the Arabana Determination recognised the essential fact that connection with the land and waters *subject to that Determination* has been maintained, adding that all of it is geographically specific. At F[88], CAB 312, the majority correctly said that the conclusion of the trial judge that the requisite connection with the claim 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 native title in neighbouring land. They said that 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 claim area by those same laws and customs (F(*ibid*)). The majority said at F[88], CAB 312, that the trial judge did not err in failing to find that the Arabana Determination provided the complete answer to the questions before him *"(noting that no such submission had been made)"*. The majority had earlier observed at F[66], CAB 305, that the submission that the Arabana Determination was sufficient evidence to establish the requisite connection with the claim area was not advanced by the Arabana at any time in the course of the trial.

55. In further response to AS[80], the majority explain at F[38], CAB 302 that the reasons of the primary judge at TJ[850] and extracted at F[38], disclose that he was alive to the
10 circumstance that the Walka Wani claim group did not wholly equate with the persons who hold native title by virtue of the neighbouring YA Determination (F[58], CAB 302). They said that the primary judge's reasoning may be fairly understood as recognising that *some* persons included in the Walka Wani claim group could point to the YA Determination as proof of a connection within the immediately adjacent area to which it related (*ibid*). Further, although the majority accepted that the language used by the trial judge at TJ[850] implicitly suggests that the YA Determination was at least capable of informing the question of connection in the same way as the Arabana Determination, given his earlier finding that at effective sovereignty it was the Arabana who held the native title rights in the claim area, that error did not result in error in the
20 assessment of the case of the Arabana on connection having regard to the reasons for judgment as a whole (F[60], CAB 303). The majority concluded that on a proper reading of the reasons as a whole, the primary judge made no finding inconsistent with the Arabana Determination (F[62], CAB 303).

56. In response to AS[84], the Arabana Determination was a consent determination under s.87 of the NTA. It was not founded upon any judicial determination of the matters in s.223(1). Rather, it rested upon the agreement of the parties and the support of the State according to the jurisdiction afforded under the NTA. Second, the determination made by the Court was concerned with whether native title exists in relation to that particular area of land or waters and any findings made as part of that adjudication are
30 geographically confined. Third, if there had been a contested hearing, the Court would have been required to adjudicate whether the three elements in s.223(1) were satisfied. Fourth, the trial judge found that evidence of the matters to which Finn J referred in the Arabana Determination was lacking (TJ[912], CAB 233).

Part VI:

N/A

Part VII:

57. The Walka Wani Respondents expect to be less than 2 hours.

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Annexure

Statutes referred to in the Walka Wani Respondents' submissions:

Statute	Version
Native Title Act 1993 (Cth)	Current

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