FEDERAL COURT OF AUSTRALIA

Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia [2015] FCA 9

Citation:	Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia [2015] FCA 9
Parties:	**BARRY CROFT AND OTHERS (ON BEHALF OF THE BARNGARLA NATIVE TITLE CLAIM GROUP v STATE OF SOUTH AUSTRALIA AND OTHERS (see Schedule at Appendix B for full list of parties)**
File number:	SAD 6011 of 1998
Judge:	**MANSFIELD J**
Date of judgment:	22 January 2015
Catchwords:	**NATIVE TITLE** – application for determination of native title – whether applicant on behalf of claim group had established matters required by s 223 of *Native Title Act 1993* (Cth) over eastern portion of Eyre Peninsula – where State contended that there had been substantial interruption and then attempted renewal of traditional laws and customs – whether applicant established native title claim group at sovereignty had rights and interests in section of claim area south of Port Lincoln either solely or conjunctively or had established succession to that part of claim area under traditional laws and customs – whether applicant established native title claim group at sovereignty had rights and interests in areas of sea beyond areas accessible from low water mark without sea vessels – decision to recognise Barngarla people as holders of native title rights and interests but not including area south of Port Lincoln or sea areas not accessible without sea going vessels beyond low water mark – whether applicant established that native title rights and interests included right to trade in traditional resources found in proposed determination area
Legislation:	*Native Title Act 1993* (Cth) *Native Title Amendment Act 1998* (Cth) *Evidence Act 1995* (Cth) *An Act to enable his Majesty to establish a Court of Criminal Judicature on the Eastern Coast of New South Wales, and Parts adjacent* (Imp) 27 Geo III, c 2 *South Australia Act 1834* (Imp) 4 & 5 Wm IV, c 95 *Aborigines Act 1911* (SA)

Aborigines (Training for Children) Act 1923 (SA)
Aborigines Act 1924 (SA)
Welfare Act 1964 (SA)
Racial Discrimination Act 1976 (SA)
Equal Opportunity Act 1984 (SA)
Aboriginal Heritage Act 1988 (SA)

Cases cited:

Far West Coast Native Title Claim v State of South Australia (No 7) [2013] FCA 1285 referred to
McNamara on behalf of the Gawler Ranges People v State of South Australia [2011] FCA 1471 referred to
Starkey v State of South Australia [2014] FCA 924 referred to
Commonwealth of Australia v Yarmirr (2001) 208 CLR 1 cited
Western Australia v Ward (2002) 213 CLR 1 cited
Adnyamathanha No 1 Native Title Claim Group (No 2) v The State of South Australia [2009] FCA 359 referred to
McKenzie v South Australia (2005) 214 ALR 214 referred to
Kokatha People v South Australia [2007] FCA 1057 referred to
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422 applied
Akiba v Queensland (No 2) (2010) 270 ALR 564 cited
Bodney v Bennell (2008) 167 FCR 84 cited
Wyman on behalf of the Bidjara People v State of Queensland (No 2) [2013] FCA 1229 applied
Mabo v Queensland (No 2) (1992) 175 CLR 1 cited
Banjima People v State of Western Australia (No 2) [2013] FCA 868 referred to
Daniel v Western Australia [2003] FCA 666 referred to
Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9) [2007] referred to
De Rose v State of South Australia [2002] FCA 1342 referred to
Chapman v Luminis Pty Ltd (No 5) [2001] FCA 1106 referred to
Jango v Northern Territory of Australia [2006] FCA 318 referred to
Dale v Moses [2007] FCAFC 82 cited
Western Australia v Sebastian (2008) 173 FCR 1
AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4) [2012] FCA 1 cited

Date of hearing:

19-23 November 2012, Adelaide
26 November 2012, Winters Hill, Port Lincoln
27 November 2012, Pildappa Rock

	28 November 2012, Lake Umeewarra 29 November 2012, Whyalla 30 November 2011, Mt Laura 3-7 December 2012, Adelaide 10-11 December 2012, Adelaide 30-31 July 2013, Adelaide 1 August 2013, Adelaide 16-17 September 2013, Adelaide
Place:	Adelaide
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	843
Counsel for the Applicant:	G Hiley QC with T McAvoy and L Goodchild (19 November 2012 – 11 December 2012) D Rangiah SC with T McAvoy and L Goodchild (30 July 2013 – 17 September 2013) P Teitzel (26-30 November 2013, restricted evidence only)
Solicitor for the Applicant:	Teitzel & Partners
Counsel for the State of South Australia:	M Evans QC with D O'Leary and A Wells
Solicitor for the State of South Australia:	Crown Solicitor for South Australia
Counsel for the Commonwealth:	R Webb QC (19 November 2012 – 11 December 2012) N Kidson with S Davis (30 July 2013 – 17 September 2013)
Solicitor for the Commonwealth:	Australian Government Solicitor
Counsel for the Director of National Parks:	N Kidson with S Davis (17 and 19 September 2013)
Counsel for Director of National Parks:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY

GENERAL DIVISION **SAD 6011 of 1998**

BETWEEN:	**BARRY CROFT AND OTHERS ON BEHALF OF THE BARNGARLA NATIVE TITLE CLAIM GROUP** **Applicant**
AND:	**STATE OF SOUTH AUSTRALIA AND OTHERS** **First Respondent**

JUDGE:	**MANSFIELD J**
DATE:	**22 JANUARY 2015**
WHERE MADE:	**ADELAIDE**

TABLE OF CONTENTS

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **SAD 6011 of 1998**

BETWEEN:	**BARRY CROFT AND OTHERS ON BEHALF OF THE BARNGARLA NATIVE TITLE CLAIM GROUP** **Applicant**
AND:	**STATE OF SOUTH AUSTRALIA AND OTHERS** **First Respondent**

JUDGE:	**MANSFIELD J**
DATE:	**22 JANUARY 2015**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

1 This matter is an application for a determination of native title over certain lands and waters in the vicinity of the Eyre Peninsula in South Australia specified in Appendix A to these reasons (the claim area).

2 In broad terms, the claim area is now over the eastern half of the Eyre Peninsula, but extending in a broad finger north-west of Kyancutta. In the lower part of the Eyre Peninsula, it abuts the Naou Native Title Claim (SAD 6021 of 1998), and as it extends north and west it abuts the Wirangu No 2 Native Title Claim (SAD 6019 of 1998) on its southern side. At its western extremity it abuts the area recognised as the native title lands of the Far West Coast people: see *Far West Coast Native Title Claim v State of South Australia (No 7)* [2013] FCA 1285. Along its northern side running from its western extremity it abuts the southern boundary of the area recognised as the native title lands of the Gawler Ranges people: see *McNamara on behalf of the Gawler Ranges People v State of South Australia* [2011] FCA 1471.

3 At a point roughly north of Cowell, at the area known as Lake Gilles, the claim area extends northwards (abutting part of the eastern boundary of the native title lands of the Gawler Ranges people) to the southern boundary of the lands now recognised as the native title lands of the Kokatha Uwankara people: see *Starkey v State of South Australia* [2014] FCA 924, and it extends to the east abutting that boundary to the southern point of Lake Torrens. That part of the claim area, as the map Annexure A indicates, extends north-east again in a finger

shape to abut the southern boundaries of the Country of the Adnyamathanha People, and then it runs roughly south to Port Augusta and down the eastern boundary of the Spencer Gulf to a point roughly opposite Whyalla. That part of the claim area abuts the claim area of the Nukunu People Native Title Claim (SAD 6012 of 1998).

4 As can be seen, the claim area extends substantially over the waters of the Spencer Gulf along the eastern side of the Eyre Peninsula. In the vicinity of Port Lincoln, the claim area is more extensively into those waters, taking in the many islands and reefs in that vicinity. Along the eastern side of the Eyre Peninsula (below the line from about Port Germein to Port Bonython) to about Tumby Bay, the distance between the shoreline and the outer boundary of the claim area is about 15-20 km, and south of that around the southern end of the Eyre Peninsula the widest point between the shoreline and the external claim boundary is about 50-55 km.

5 There are no overlapping claims under the *Native Title Act 1993* (Cth) (NT Act), save for the area of Port Augusta itself. The Nukunu people claim also overlaps the boundaries of the Port Augusta Town Area, and it is described in detail and depicted in Attachments H and H1 to the application as ultimately amended. It is not necessary to address that overlapping area because it is agreed that, for the purposes of the present hearing and determination, the Court should exclude the Port Augusta Town Area. It is anticipated by the applicant, by the applicant in the Nukunu people claim, and by the native title representative body for South Australia, South Australian Native Title Services (SANTS) that that area will be the subject of some agreement, to be reflected in an Indigenous Land Use Agreement under the NT Act.

6 On 29 May 2012, I ordered that the issue of the existence of native title over the claim area be separated from the issue of whether any such native title found to exist has subsequently been extinguished. Evidence was led and argument heard on the issue of the existence of native title over 22 hearing days from November 2012 to September 2013. This judgment contains the reasons for my determination in relation to the claim.

7 The Commonwealth's interest, as reflected in its written submissions, was confined to whether – in the event that the Court accepted that the Barngarla people should be recognised as holding native title rights and interests over the claim area for the purposes of s 223(1) of the NT Act – such rights and interests extend over that part of the claim area which consists of land and waters below the high water mark in an area of sea adjacent to the eastern and southern coast of the Eyre Peninsula (the sea claim area).

8 The Commonwealth contends that it is not shown that, at the time of sovereignty, the Barngarla people possessed rights and interests under their traditional laws and customs over the land and waters on the sea claim area that extend beyond the intertidal zone (that is, between the high water mark and the low water mark) and adjacent waters (that is, the deeper waters that were able to be accessed from the adjacent shallower waters of the intertidal zone). It also contends that, in any event, the evidence does not show that any rights and interests in the sea claim area included (as asserted) a right to trade in marine resources. Finally, it says that, if any rights and interests in the sea claim area existed at sovereignty, if they were exclusive rights, they are not rights and interests recognised by the common law of Australia: cf *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1 at [99]-[100] (*Yarmirr*); *Western Australia v Ward* (2002) 213 CLR 1 at [388] (*WA v Ward*).

9 The only other entity to make written submissions was BHP Billiton Olympic Dam Corporation Pty Ltd, and then only to preserve its entitlement to participate in any subsequent hearing concerning issues of extinguishment and of non-native title rights and interests which should be provided for in any determination.

HISTORY OF THE BARNGARLA CLAIM

10 Like many native title determination applications, this matter has had a protracted history. The Barngarla Native Title Claim (Barngarla claim) was commenced on 4 April 1996 in the National Native Title Tribunal (NNTT). That original application encompassed a much greater area of land than the land that is presently claimed. The claim area extended much further north. It extended as far north-east as the town of Leigh Creek, and in the north-west, it encompassed Lake Gairdner and the town of Kingoonya, and was bordered by the Central Australian Railway as far north as Ingomar Homestead, about 70 kilometres south of Coober Pedy. In the south-east, the claim area extended past Port Augusta, as far east as Orroroo, and in the south, just north of Port Germein. In the west, the claim area extended to the western coast of the Eyre Peninsula up to Streaky Bay.

11 Upon the commencement of the *Native Title Amendment Act 1998* (Cth) on 30 September 1998, the claim converted into an application in this Court by virtue of the amendments to the NT Act contained within that Act. A year later, on 7 October 1999, the application was amended so as to reduce the size of the claim area. In the north, much of the original north-west portion of the claim area was not pursued. The north-western border now ran along the eastern side of Lake Gairdner, and then roughly followed the 136th parallel up to the original

northern-most boundary. That alteration removed the claim's overlap with the land which is recognised as the native title land of the Gawler Ranges people. It comprises a combined claim group of Wirangu, Kokatha and Barngarla people.

12 In the south-west, the boundary line was brought in from the western coast of the Eyre Peninsula to the Port Lincoln-Ceduna railway line. That alteration removed the claim's overlap with the Nauo Native Title Claim, which had been lodged on 17 November 1997, and the Wirangu No 2 Native Title Claim, which had been lodged on 28 August 1997.

13 The two excisions left the claim area with an irregular roughly finger shaped wedge extending out in its west. That shape has since remained unchanged in the present claim area.

14 On 14 September 2001, the size of the claim area was further reduced by O'Loughlin J's order that the Barngarla claim be struck out pursuant to s 84C of the NT Act in respect of Crown Lease Volume 962 Folio 34, being land the subject of a commercial lease granted to Caltex Petroleum Pty Ltd. That order was made with the consent of the applicant. The relevant land was only about two square kilometres in size and situated near Whyalla.

15 On 6 August 2002, the Court was notified that the NNTT had accepted the Barngarla claim for registration pursuant to s 190A of the NT Act. The NNTT noted in its reasons for decision that there were at that time eight native title determination applications whose claim area overlapped with that of the Barngarla claim, but that three of those overlaps were only "technical".

16 On 8 December 2003, the Court referred the claim to the NNTT for mediation. Two broad main areas of overlap emerged. The first area centred around the Lake Torrens area and concerned (at least initially) the claims of the Kokatha and Kuyani people (SAD 6013 of 1998 and SAD 6004 of 1998). The second area centred around the Flinders Ranges National Park and concerned two claims of the Adnyamathanha people (Adnyamathanha No 1 and Adnyamathanha No 2), and the claim of the Nukunu people referred to above. The Two Adnyamathanha claims subsequently are the subject of recognition in: *Adnyamathanha No 1 Native Title Claim Group (No 2) v The State of South Australia* [2009] FCA 359.

17 The NNTT, the State of South Australia (State) and the Aboriginal Legal Rights Movement (ALRM) (now SANTS) were attempting to resolve native title claims through a process known as the "state-wide ILUA process". The Barngarla claim became a part of that process, and specifically became a part of a strategy for resolution of native title claims called the

"Central Western South Australia Mediation Strategy". That Strategy was aimed, as far as the Barngarla claim was concerned, at resolving the Barngarla-Kokatha-Kuyani overlap. The Barngarla-Adnyamathanha-Nukunu overlap was dealt with in separate negotiations.

18 On 30 June 2004, the NNTT recommended that its mediation of the Barngarla claim cease to the extent that it concerned that part of the Barngarla claim which overlapped with the Kokatha and Kuyani native title claims, and that that part of the claim be listed for hearing. This recommendation was made mainly because an important meeting in 2004 at Spear Creek Caravan Park, near Port Augusta, and follow-up meetings, had been unsuccessful in resolving the groups' differences. The State opposed that recommendation, saying that the more appropriate course was to persevere with the "state-wide ILUA process". On 22 July 2004, the Court adopted the NNTT recommendation and ordered that that overlapping part of the Barngarla claim be removed from mediation.

19 Meanwhile, the NNTT reported at the same time that strong progress was being made on the resolution of the Adnyamathanha-Barngarla overlap, and that the Barngarla and Nukunu had agreed to negotiate their overlap, but would not be able to do so at that time because of insufficient funding available to ALRM.

20 On 13 October 2004, the Court ordered that the Kokatha-Barngarla overlap be referred back to mediation by the NNTT. That order was made because it had emerged that an in-principle agreement to share the area of the overlap might be able to be finalised.

21 On 27 January 2005, the Kuyani Native Title Claim was struck out by Finn J: *McKenzie v South Australia* (2005) 214 ALR 214. A second Kuyani Native Title Claim briefly emerged in early 2006, only to be discontinued several months later: *Kokatha People v South Australia* [2007] FCA 1057 at [9] per Finn J.

22 By this time, the Kokatha-Barngarla overlap had been affected by a third claim over the relevant land, the Arabanna Peoples Native Title Claim (SAD 6025 of 1998). On 15 April 2005, the Court referred the Arabana Peoples Native Title Claim to mediation by the NNTT, limited to that part of the claim which overlapped with the Kokatha and Barngarla claims. The consequent negotiations were not successful.

23 On 8 September 2005, the Court ordered that that part of the Barngarla claim that overlapped with the Kokatha and Arabana Peoples Native Title Claims was to be dealt with in a separate

"overlap proceeding". At that time, the NNTT had reported that there was a clear willingness for the Barngarla, Kokatha and Arabanna claimants to resolve the overlaps.

24 On 9 February 2006, the Court ordered that the ongoing NNTT mediation should focus on resolving overlaps between the Barngarla claim and the Adnyamathanha Peoples No 1 and No 2 Native Title Claims (SAD 6001 and 6002 of 1998 respectively). Negotiations between those groups had been on hold at the NNTT for several years, as the NNTT, ALRM and the State prioritised, inter alia, the Kokatha-Barngarla-Arabanna peoples overlap negotiations.

25 The Nukunu overlap area with the Barngarla claim also overlapped with the Dieri Native Title Claim (SAD 6017 of 1998) and the Arabanna Peoples Native Title Claim. Negotiations in regard to this overlap had not been successful. On 14 September 2006, it was ordered that that part of the Barngarla claim that overlapped the Nukunu, Dieri and Arabanna Peoples Native Title Claims should be removed from NNTT mediation.

26 On 1 July 2007, a resolution of the overlaps between the Barngarla and Arabanna Peoples Native Title Claims was finalised. The Barngarla Native Title Claim would withdraw its claim over the overlapping land.

27 Meanwhile, through 2006 and 2007, the NNTT mediation of the Barngarla overlaps with the two Adnyamathanha Peoples Native Title Claims, now collectively known as the "Adnyamathanha Peoples Proceeding", continued. An agreement was eventually reached in around December 2007, and resulted in the determinations referred to above.

28 In consequence of the above agreements with both the Adnyamathanha peoples and Arabanna peoples, on 30 May 2008, a further amended application was filed by the applicant. The new application further reduced the claim area, bringing in the claim area's north-eastern boundary to the eastern border of Lake Torrens.

29 A further agreement was reached on 14 December 2008 at a meeting at the Standpipe Hotel, Port Augusta, between the Barngarla, Kokatha and Kuyani peoples to pursue jointly a claim over Lake Torrens and the area to its west. That claim was lodged as the Kokatha Uwankara Native Title Claim on 18 June 2009, and in part has been resolved by the judgment referred to above, leaving its claim over the area of Lake Torrens unresolved.

30 On 13 July 2009, Finn J gave leave for the Barngarla claim to be further amended. The new application reduced the claim area yet further. That reduction was made in accordance with the 2008 agreement, and it abandoned the claim over the area that became the claim area of

the Kokatha Uwankara Native Title Claim. The new application removed a large part of the remaining northern part of the claim area. Lake Torrens and almost all the land west of it were taken from the claim area. The new northern-most border of the claim area was a line that ran roughly from the southern tip of Lake Torrens to the southern tip of Lake McFarlane. However, a small, roughly triangular-shaped piece of land in what had been the far north-western corner of the claim area was not abandoned. The claim area therefore now consisted of two separate pieces of land – the first encompassing the eastern side of the Eyre Peninsula and some land to the north-west and north-east; the second encompassing a small triangle far north of the first piece of land.

31 Further overlaps with the Adnyamathanha and Nukunu claims remained at this point unresolved. It was not until 2012 that an agreement was reached in respect of those overlaps. On 2 April 2012, the Barngarla applicants were again given leave to file an amended application. The new application brought in the eastern border of the claim area so that it now constituted a line roughly level with, and encompassing, the town of Port Augusta. On 31 January 2012, however, the Court noted that the town of Port Augusta constituted the remaining area of overlap with the Nukunu claim, but would be the subject of joint negotiations between the Barngarla and Nukunu claimants and the relevant respondents, with a view to resolving that part of the claim by way of an Indigenous Land Use Agreement rather than a determination of native title. As noted, it is agreed that this judgment will not deal with the overlapping claims over the area of the Port Augusta Town Area.

32 After the resolution of the Nukunu overlap, the Court ordered on 29 May 2012 that the Barngarla claim be listed for hearing, but on the basis that: “the issues of the existence of native title and the extinguishment thereof be separated, so that evidence as to the existence of native title be heard and a determination be made thereon before evidence is adduced and a determination made as to the extinguishment thereof.”

33 Finally, on 10 April 2013, a further amended application was lodged by the Barngarla applicant, pursuant to leave granted by the Court on 11 December 2012. That application reduced the claim area by abandoning the claim over the separate small triangle of land far to the north of the rest of the claim area. That small triangle is now the subject of another joint claim, the Kokatha Uwankara No 2 Native Title Claim (SAD 270 of 2012). Hence, the present judgment deals with the claim area as broadly described above, and includes a

decision on the whole of the claim as presently pursued by the Barngarla applicant on behalf of the Barngarla people, other than the Port Augusta Town Area.

THE BARNGARLA CLAIM AND THE HEARING

34 The present extent of the claimed lands and waters is set out on a map in Appendix A to these reasons, and described in broad terms above.

35 The description of the claim group contained in the present application cannot be said to be well-drafted. Nonetheless, it appears that the claim group consists of those people who "have a connection with the claim area in accordance with the traditional laws and customs of the Barngarla native title claim group" and who are biological descendants of the following asserted Barngarla apical ancestors:

- Percy Richards;
- Susie Richards;
- Maudie Blade;
- Bob Eyles;
- Harry Croft;
- Jack Stuart; and
- Arthur Davis and his sons Andrew, Jack, Stanley and Percy;

as well as those people who are "of Aboriginal descent" and have been "adopted into the [Barngarla] group by a custom of descent other than biological."

36 Anyone who is a member of the claim group in the Nukunu Native Title Claim (which still overlaps the Barngarla claim insofar as both claims concern the town of Port Augusta Town Area) is specifically excluded from the Barngarla claim group, but only "whilst that claim continues to overlap the Barngarla native title claim."

37 The native title rights and interests that the applicant alleges the claim group holds in respect of the claim area are as follows (as set out in the application as finally amended):

- the right to possess, occupy, use and enjoy the area;
- the right to make decisions about the use and enjoyment of the area;
- the right of access to the area;
- the right to control the access of others to the area;

- the right to use and enjoy resources of the area;
- the right to control the use and enjoyment by others of resources of the area;
- the right to trade in resources of the area;
- the right to receive a portion of any resources taken by others from the area;
- the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
- the right to maintain, protect and prevent the misuse of cultural knowledge associated with the area; and
- the right to conduct burial ceremonies on the area.

THE HEARING

38 The hearing of the issue of the existence of native title over the claim area proceeded over 22 hearing days from November 2012 to September 2013.

39 There were 21 lay witnesses called by the applicant over the hearing days from 19 November 2012 to 11 December 2012. They were: Howard Richards, Brandon McNamara Snr, Edith Burgoyne, Brandon McNamara Jr, Lynne Smith, Elizabeth Richards, Eric Paige, Linda Dare, Roddy Wingfield, Barry Croft, Simon Dare, Harry Dare, Dawn Taylor, Amanda Richards, Troy McNamara, Lorraine Briscoe, Maureen Atkinson, Yvonne Abdulla, Vera Richards, Rosalie Richards, Evelyn Dohnt, and Bill Lennon. Only two witnesses were not members of the claim group: Rosalie Richards and Bill Lennon.

40 Most witnesses gave evidence in the courtroom in Adelaide or, in some cases, Whyalla. On-country evidence was given by Elizabeth Richards, Brandon McNamara Snr and Howard Richards at Winters Hill and Caralue Bluff, by Howard Richards at Northside Hill, by Brandon McNamara Snr at Pildappa Rock, Turtle Rock, Waddikee Rock and Hummock Hill, by Eric Paige and Linda Dare at Lake Umeewarra, by Roddy Wingfield, Barry Croft and Brandon McNamara Snr at Fitzgerald Bay, by Barry Croft at Black Point and Iron Knob Cemetery, by Helen Smith and Edith Burgoyne at Pine Creek, by Eric Paige and Brandon McNamara Snr at Erappa, and by Eric Paige at Mt Laura.

41 Gender-restricted evidence was received from Brandon McNamara Snr, Howard Richards, Eric Paige, Bill Lennon, Elizabeth Richards, Linda Dare, Helen Smith, Edith Burgoyne, Yvonne Abdulla, Vera Richards and Rosalie Richards.

42 Apart from the oral evidence of the lay witnesses at the hearing, the applicant also relies on representations from deceased persons admissible pursuant to s 64 of the *Evidence Act 1995* (Cth) and received into evidence. Those deceased persons were: Ms Dare (recently deceased), Randolph Richards, Harry Eyles, Henry Croft, and Leroy Richards.

43 No lay witnesses were called by any party other than the applicant.

44 The Court received expert reports into evidence and heard oral evidence from the expert linguists Dr David Rose and Mr Kim McCaul, called by the applicant and the State respectively. The expert linguist reports relied on by the applicant are the reports of Dr Rose of 1 November 2012 (Rose 2012 Report), and 3 June 2013 (Rose 2013 Report). The State relies upon the expert linguist report of Mr McCaul of 24 June 2013 (McCaul Linguist Report).

45 The Court also received expert reports into evidence and heard oral evidence from the expert anthropologists Professor Peter Sutton, Dr Timothy Haines, Mr McCaul and Dr David Martin. The first two expert anthropologists were called by the applicant, the latter two by the State. The applicant relies upon the expert anthropologist reports of Dr Haines of 4 October 2012 (Haines 2012 Report) and 30 April 2013 (Haines 2013 Report), as well as that of Professor Sutton of 25 April 2013 (Sutton Report). The State relies upon the expert anthropologist reports of Mr McCaul of 26 October 2012 (McCaul 2012 Anthropology Report) and 22 May 2013 (McCaul 2013 Anthropology Report), and of Dr Martin of 2 November 2012 (Martin 2012 Report) and 20 May 2013 (Martin 2013 Report).

46 The oral evidence of each set of experts (that is, the linguists and the anthropologists) was given concurrently over four days, from 30 July 2013 to 2 August 2013.

47 Finally, oral submissions were made by the parties over two days, 16 and 17 September 2013. The oral submissions were supplemented by written submissions.

48 While there are many parties to this application, only the applicant, the State, and the Commonwealth were represented at the hearing.

THE ISSUES

49 The State submits that the evidence adduced by the applicant is incapable of satisfying the criteria required for a determination of native title under the NT Act in favour of the Barngarla people over any part of the claim area. Specifically, it submits that the applicant is

unable to establish the fact of continuity from sovereignty to the present day of a society "united in and by its acknowledgement and observance of a body of law and customs": *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 445 [49] (*Yorta Yorta*) per Gleeson CJ, Gummow and Hayne JJ (*Yorta Yorta*).

50 The State submits that the traditional laws and customs that are said to have "comprised" a Barngarla society at sovereignty are today either not acknowledged or observed, or if they are in some sense acknowledged or observed, the laws and customs either:

(a) are acknowledged or observed only as a result of a revival following substantial interruption or discontinuity;

(b) are acknowledged or observed in a form substantially different from the form in which they were acknowledged and observed at sovereignty; and/or

(c) do not perform a normative or regulative role in contemporary Barngarla relations and at best represent merely observable patterns of behaviour, but not rights or interests in relation to land.

51 The complex factual issue of whether there has been since sovereignty a continuous acknowledgment and observance of the traditional Barngarla laws and customs under which rights and interests in land and waters are possessed is the primary issue to be determined in these reasons. In the event that it is found that there has been such continuous acknowledgement and observance, then there are several further issues to be determined.

52 First, the State submits that in any event the Barngarla people never possessed, and do not today possess, native title rights or interests in respect of those parts of the claim area to the south and west of the town of Port Lincoln.

53 Second, the State made a short, undeveloped submission that in any event, the claimants have not maintained a connection by their laws and customs with particular mainland parts of the claim area.

54 Third, as noted, the Commonwealth submits that the applicant is unable to establish, at sovereignty:

(a) that the Barngarla people possessed rights and interests under their traditional laws and customs over that part of the claim area which consists of an area of sea adjacent to the east and south coast of the Eyre Peninsula that extends beyond the intertidal

zone (that is, the land and waters between the high water mark and the lowest astronomical tide) and adjacent waters (that is, deep waters accessible from the adjacent shallows of the intertidal zone); or

(b) that the Barngarla people possessed a right to trade in marine resources.

55 Fourth, also as noted, the Commonwealth submits that any rights and interests possessed by the Barngarla people over any seas cannot be exclusive rights as a matter of common law, even if they may have been exclusive rights at sovereignty.

THE LAW

56 To properly understand the State's position regarding the principal issue in this matter, the continuity of acknowledgement and observance of traditional Barngarla laws and customs giving rise to rights and interests in lands and waters, a brief exegesis of the relevant law is called for.

57 Section 225 of the NT Act relevantly states that:

> A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area … of land or waters …

58 Section 223(1) provides the definition of "native title" and "native title rights and interests":

> The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples … in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples …; and
>
> (b) the Aboriginal peoples …, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

59 The seminal judgment in *Yorta Yorta* established much of the relevant jurisprudence on the interpretation of s 223(1)(a). It is therefore necessary to address that judgment at some length.

60 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ discussed at length between [32]-[56] the elements of s 223(1)(a) of the NT Act. It is not really possible usefully to select a few

parts only of that analysis. The submissions referred, amongst other passages, to the following at [49] and [50]:

> Law and customs do not exist in a vacuum. … Law and custom arise out of, and, in important respects, go to define a particular society. In this context, "society" is to be understood as a body of persons united in and by its acknowledgement and observance of a body of law and customs. …
>
> To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have a continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.

61 It is clear that *Yorta Yorta* stands for the proposition that s 223(1)(a) requires proof of the continuous existence of a "society". Examination of the content of the definition of the terms "laws" and "customs" further elicited the following observations from the plurality at [41] and [42]:

> To speak of … rights and interests being possessed under, or rooted in, traditional law and traditional custom might provoke much jurisprudential debate about the difference between what HLA Hart referred to as "merely convergent habitual behaviour in a social group" and legal rules. …
>
> … the [NT Act] refers to traditional laws acknowledged *and* traditional customs observed. Taken as a whole, that expression, with its use of "and" rather than "or", obviates any need to distinguish between what is a matter of traditional *law* and what is a matter of traditional *custom*. Nonetheless, because the subject of consideration is rights or interests, the rules which together constitute the traditional laws acknowledged and traditional customs observed, and under which the rights or interests are said to be possessed, must be rules having normative content. Without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters.

62 This point, about the necessity of the existence of "rules having normative content" rather than merely "observable patterns of behaviour", was reiterated by their Honours when they came to address the use of the term "traditional" as a qualifier of the nouns "laws" and "customs" in s 223(1)(a) at [46] of the judgment:

> … "traditional" is a word apt to refer to a means of transmission of law or custom. A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the [NT Act], "traditional" carries with it two other elements in its meaning. First, it

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

The requirement of "normative rules" was commented upon by Finn J in *Akiba v Queensland (No 2)* (2010) 270 ALR 564 at 610 (*Akiba*) where his Honour clarified that a rule need not be informed by any spiritual or religious dimension in order to be normative:

> [In this case,] [u]nlike mainland Aboriginal cases, there is little in the laws and customs relied upon that has any informing spiritual dimension at all … Much appears simply utilitarian; much seems prosaic. … Yet it needs to be recognised that normative beliefs can be held about ordinary behaviour, as the fierce dispute over how properly to open soft boiled eggs in Swift's *Gulliver's Travels* suggests.

63 The plurality in *Yorta Yorta* referred to the second of the two other elements, the concept of the rights and interests being "possessed" at [47]:

> … [T]he reference to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed … is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title. (original emphasis)

64 That passage introduced the concept of "continuity" to native title jurisprudence. The "normative system" of laws and customs must have had a "continuous existence and vitality since sovereignty" in order for it to be able to be said that the laws or customs under which the rights and interests to the land exist are *traditional* laws or customs.

65 However, the plurality in *Yorta Yorta* at [83] went on to clarify that in order to have a "continuous existence and vitality", laws and customs need not necessarily have had an *unchanging* existence since sovereignty:

> … [S]ome change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim. Yet both change, and interruption in exercise, may, in a particular case, take on considerable significance in deciding the issues presented by an application for determination of native title. … The key question is whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests

> asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified?

66 The plurality made these further remarks on this important issue of the permissibility of change to and adaptation of traditional laws and customs at [87]:

> … acknowledgement and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the body of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated and defined the rights and interests which those peoples had and could exercise in relation to the land or waters concerned. They would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society.

67 It is important, and of particular relevance to the present case, to note their Honours' qualification at [89] to the above passage:

> In the proposition that acknowledgement and observance must have continued substantially uninterrupted, the qualification "substantially" is not unimportant. It is a qualification that must be made in order to recognise that proof of continuous acknowledgement and observance, over the many years that have elapsed since sovereignty, or traditions that are oral traditions is very difficult. It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgement and observance of the laws and customs.

68 In the same vein, Finn, Sundberg and Mansfield JJ held in *Bodney v Bennell* (2008) 167 FCR 84 at [120]-[121] (*Bodney*):

> … [W]hen determining whether rights and interests are traditional, the proper enquiry is whether they find their origin in pre-sovereignty law and custom, and not whether they are the same as those that existed at sovereignty. Clearly laws and customs can alter and develop after sovereignty, perhaps significantly, and still be traditional. …

> It may be that the true position is that what cannot be created after sovereignty are rights that impose a greater burden on the Crown's radical title. For example, in this proceeding, the evidence demonstrated that the claimants had never fished in the sea. The Crown's radical title over the sea was therefore not, at sovereignty, burdened by any native title rights to fish. If a practice of fishing in the sea had developed since sovereignty, no native title rights could attach to that practice since any such rights would constitute a greater burden on the radical title than existed at sovereignty. By definition such rights could not be traditional. On the other hand, where the Crown's radical title was burdened at sovereignty with a right to fish, a change in the number and identity of people whose rights so burden it does not necessarily mean that those current rights cannot be traditional.

69 Hence, it is clear that s 223(1)(a) will be fulfilled only where there is proof that a society acknowledges and observes rules under which rights and interests in land are possessed that have normative content and that find their real origins in the same pre-sovereignty society. The acknowledgement and observance of those normative rules must have continued substantially uninterrupted from the time of sovereignty. However, the qualification indicated by the use of the adverb "substantially" recognises both the difficulty of proving continuous acknowledgement and observance of oral traditions and the inevitability of change to the structures and practices of Aboriginal societies in the light of European settlement.

70 The focus in *Yorta Yorta* on the word "society" can give the impression that some inquiry, separate from the above inquiry into traditional laws and customs, must be conducted in order to establish whether a "society" exists. Jagot J in *Wyman on behalf of the Bidjara People v State of Queensland (No 2)* [2013] FCA 1229 at [469] observed that "for the purposes of the [NT Act], it is the continued acknowledgement and observance of pre-sovereignty laws and customs that enables it to be said that the relevant society itself has continued." That was not intended to indicate that the society which presently exists is a continuation of the society which existed pre-sovereignty.

71 The proper interpretation of s 223(1)(b) was discussed by the plurality in *Yorta Yorta* at [33]-[35]. It was also considered in *Bodney* by the Full Court at [165]-[179]. The Court set out five matters to be kept in mind when applying s 223(1)(b):

- First, the inquiry required by s 223(1)(b) is distinct from that required by s 223(1)(a), and they should not be "fused" or "confused". That is because "connection is not simply an incident of native title rights and interests … The required connection is not by the Aboriginal peoples' rights and interests. It is by their laws and customs."

- Second, because the laws and customs which provide the requisite connection are *traditional* laws and customs, the acknowledgement and observance of those laws and customs must have continued substantially uninterrupted and the connection itself must have been substantially maintained since the time of sovereignty.
- Third, the inquiry required by s 223(1)(b) involves two steps: (i) identification of the content of the traditional laws and customs; and (ii) characterisation of the effect of those laws as constituting a connection of the people with the land. It should be noted that connection can often be proven merely by proving continued acknowledgement and observance of traditional laws and customs, because those laws and customs presuppose or envisage direct connections with land or waters or link community members to each other and to the land in a complex of relationships. However, that will always depend on the particular content of the traditional laws and customs as established by the evidence.
- Fourth, to establish connection for the purposes of s 223(1)(b), the connection must involve a continuing internal and external assertion by the claimants of their traditional relationship to the country, as that relationship is defined by its laws and customs. That assertion may be expressed by physical presence on the relevant country, or by other means.
- Fifth, the inquiry required by s 223(1)(b) can have a "particular topographical focus" within the claim area – that is to say, it may be found that there is no evidence of sufficient connection with a particular part of the claim area, despite there being evidence of sufficient connection in other parts of the claim area.

72 It is to those matters, dictated by s 223(1)(a) and (b) as explained in *Yorta Yorta*, that consideration must now be given.

BARNGARLA SOCIETY AT SOVEREIGNTY

(A) Early European contact and conquest of the claim area

73 This brief account of early European contact with Aboriginal people in the claim area is primarily based on the submissions of the applicant and the State, and on the material to which they have referred.

74 In 1770, at least part of Australia was claimed for the Crown by Lt James Cook RN, who named the new territory New South Wales: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 77-78 per Deane and Gaudron JJ (*Mabo (No 2)*).

75 In 1788, New South Wales was established as a penal colony: *An Act to enable his Majesty to establish a Court of Criminal Judicature on the Eastern Coast of New South Wales, and Parts adjacent* (Imp) 27 Geo III, c 2. On 26 January 1788, Governor Phillip founded the colony of New South Wales. At this time, the colony of New South Wales encompassed all land to the east of the 135th meridian. Thus, most of the claim area fell within the colony of New South Wales (the 135th meridian intersects the claim area such that a very small portion of it lies to the west of the 135th meridian).

76 The first Europeans to set foot on the claim area appear to have been the crew of the English vessel *HMS Investigator*, captained by Matthew Flinders, in 1802. Flinders landed at the southern tip of the Eyre Peninsula, in a harbour he named Boston Bay, and which remains so named to the present day. He named the locality he landed at "Port Lincoln", after his native Lincolnshire, a name that also remains to the present day. Flinders wrote of hearing Aboriginal people calling in the Port Lincoln area, and of observing their bark huts and paths by the shore.

77 In the 1820s or thereabouts, there was a whaleboat crew of sealers stationed on Thistle Island, off the coast of the Eyre Peninsula and south-east of Port Lincoln. At some stage, the sealers took Aboriginal women from neighbouring areas. There is evidence to suggest that some of these women were from the Port Lincoln area. There are various other accounts from this time of sealers stationed on other islands such as Kangaroo Island and Saint Peter Island in the Great Australian Bight, taking women believed to be from the Port Lincoln area to be their "wives". There is some reference to the "wives" maintaining their hunting and gathering practices.

78 In 1825, the borders of the colony of New South Wales were expanded to encompass all land east of the 129th meridian by Letters Patent issued by the King: Letters Patent, 16 July 1825. The whole claim area now fell within the colony of New South Wales.

79 In 1836, another British colony was established in Australia, the colony of South Australia. It was established pursuant to the *South Australia Act 1834* (Imp) 4 & 5 Wm IV, c 95. The entire claim area now comprised part of the colony of South Australia.

80 In 1839, Governor Gawler proclaimed the whole of the Eyre Peninsula area as the "District of Port Lincoln". A settlement was established at Port Lincoln in that year, populated by a small number of European settlers. The first fulltime Protector of Aborigines, Dr Matthew Moorhouse, was appointed in 1839. In 1841, Moorhouse appointed Clamor Schürmann, a Lutheran missionary, as Deputy Protector of Aborigines for the District of Port Lincoln. In 1844 Schürmann published a vocabulary of the local Aboriginal language, which he called "Parnkalla". In 1846 he published a work on the life, manners and customs of the "Aboriginal tribes of Port Lincoln", by which apparently he meant both the "Parnkalla" tribe and the "Nauo" tribe (1846 article). The material suggests a significant Aboriginal population in the lower area of the Eyre Peninsula at that time.

81 From 1839-1840, over two journeys, Edward Eyre explored the peninsula that would eventually bear his name. Through these journeys he came into contact with Aboriginal people. Eyre in his Journal of Expeditions of Discovery (1845) asserted that the Aboriginal people he had come into contact with had a real concept of attachment to and interest in land.

82 Various reports from this time suggest that the claim area bore witness to a not insignificant amount of frontier violence between settlers and Aboriginal people. In the early 1840s, it appears that there had been a number of attacks by local Aboriginal people against pastoral outstations. A party of armed settlers took it upon themselves to carry out reprisal raids against the Aboriginal population. Not long afterwards, a military presence was established by the Governor to protect the settlers from the Aboriginals. The soldiers also carried out reprisal attacks. Schürmann lamented the indiscriminate nature of these raids, saying that the tribe responsible for the violence was the "Battara Yurarri", a division of the larger "Parnkalla" tribe, but that the military were carrying out reprisal attacks against the "Nauo" tribe. Through the 1840s and 1850s, many more recorded examples of violence between settlers and Aboriginal people in the claim area could be given. Through the same period, there are also records of diseases afflicting the local Aboriginal population, causing a high mortality rate. The settler pastoralists slowly established pastoral stations further and further north from Port Lincoln.

83 The contemporary records of the decades following in essence the first and progressive formalised settlement of the Eyre Peninsula by Europeans confirm a significant existing Aboriginal occupation and significant violence by Aboriginal people against those who were European settlers in the area and violent reprisals by the settlers, especially in the Port

Lincoln area. It is a fair inference to describe it as "frontier violence", as the applicant does in the submissions.

84 The material tends to support the same picture, perhaps with less violence, as the settlers took interest in land progressively to the north of Port Lincoln during those decades.

85 There can be little doubt that at sovereignty there were Aboriginal people living in the lower part of the Eyre Peninsular in significant numbers, and as the subsequent history shows, they were also living in the mid and upper areas of the Eyre Peninsula, as considered by the progressive exposure of settlers to them as the settlers' interests expanded geographically. That includes the Port Augusta area, where Port Augusta was established as a regional town centre in 1854.

86 In 1847, George French Angas also wrote on the Barngarla tribe, again referring to them as the "Parnkalla", as did Charles Wilhelmi in 1861. Both writings heavily rely, however, upon Schürmann's earlier writings.

(B) Existence of a Barngarla society and Identification of Barngarla laws and customs at sovereignty

87 The question of the existence of a Barngarla society and the identification of the Barngarla laws and customs as they stood at the time of the conquest of Australia by Europeans is a matter that can only be answered by reference to historical material and to the analysis of that material by the expert witnesses.

88 The question was principally addressed in the McCaul 2013 Anthropology Report and the Haines 2012 Report of 4 October 2012. The question was also the subject of comment in the reports of Professor Sutton and Dr Martin, and some matters of relevance to this question also arise from the linguist reports of both Dr Rose and Mr McCaul. In those circumstances, I have included reference to the reports and oral evidence of the expert witnesses. The question was dealt with at some length at the hearing of the expert evidence (the relevant part of the transcript being pages 1582-1652).

89 The historical material drawn upon can be broadly summarised as follows: there is, first, the writings of Clamor Schürmann, Lutheran missionary, who had substantial contact with the Barngarla people in the 1840s and wrote about their society and their language. Second, information can be garnered from various data collected by later anthropologists from Barngarla and non-Barngarla informants. Notable amongst this category of historical material

is the work of Norman Tindale. Third, inferences can be made from the work of anthropologists such as A.P. Elkin and A.W. Howitt about the organisation of the "Lakes Group" of Aboriginal tribes generally (of which the Barngarla are generally considered to be a part). It is noted that some attributes assigned to the "Lakes Group" tribes generally ought to be assigned to the Barngarla tribe specifically.

90 The various aspects of Barngarla society at sovereignty are set out under a number of different headings below. It must be noted that there is a great deal of artificiality in attempting to describe a society in this manner. Barngarla at-sovereignty society, like any society, is unlikely to be comprehensively encapsulated within a number of discrete modules with abstract headings such as "kinship system" and "land tenure system". Indeed, the attempt to explain Barngarla at-sovereignty society in these terms might well render it unrecognisable to its members. Nonetheless, for the purpose of these reasons, it is necessary to approach the task in this fashion.

Relevant date of sovereignty

91 As has been noted above, the British Empire claimed sovereignty over most of the claim area in 1788, and over the remaining western part of the claim area in 1825. Strictly speaking, those dates are therefore the relevant dates at which time the "traditional laws and customs" of the Barngarla people must be ascertained. That obviously presents evidentiary problems, because, as also noted above, there was no actual contact of any kind between Aboriginal people and in particular the Barngarla people and Europeans until 1802 at the very earliest, and there was no substantive contact and settlement of the claim area until the very late 1830s.

92 However, in this case it can be accepted that, in the absence of any evidence to the contrary, it is permissible to infer that the laws and customs and rights thereunder of the Barngarla people that were recorded to exist at or shortly after the time of substantive contact in the late 1830s, existed at the time of sovereignty: see, eg, *Banjima People v State of Western Australia (No 2)* [2013] FCA 868 per Barker J at [82] and *Daniel v Western Australia* [2003] FCA 666 per Nicholson J at [428].

Notion of the "Barngarla people" as a distinct society

93 It is clear and uncontentious that there existed at the time of sovereignty an identifiable group that called themselves the "Barngarla". (Martin T1584, l.37; Haines Report 1, p 10; T1755, l.10-12)

94 Schürmann described the word "Parnkalla" (as he renders it) in 1844 as the "national name of the native tribes inhabiting the eastern coast of Spencer's Gulf and the adjacent country." In 1846 article, he wrote:

> The Parnkalla dialect … is spoken by the tribe of the same name, inhabiting the eastern coast of [the Eyre] peninsula from Port Lincoln northward probably to as far as the head of the Spencer's Gulf.

95 It will be noted, of course, that Schürmann does not use the ambiguous word "tribe" with any precision. In the earlier quotation, he indicates that "Parnkalla" is a "nation" consisting of a number of "tribes", while in the latter quotation, "Parnkalla" is a single tribe. Despite the semantic imprecision, it is clear enough that there was a group known as "Parnkalla" on the Eyre Peninsula in the 1840s.

96 Professor Sutton summed up the general view amongst the experts on this topic when he stated:

> [T]he notion of a Barngarla self as a collective self, I think, certainly was there. At least, Schürmann's informants referred to Barngarla matta, and matta … is a collective noun which suggests "group", which suggests a norm for belonging and norms for excluding, so I think in essence that broad category of Barngarla can be assumed to have been there as a landed identity, a territorial identity, at sovereignty… (T1607, ll6-19)

Language of the Barngarla people

97 As indicated by Schürmann's above quotation, the Barngarla group was not united only in their identification under a common name. The Barngarla group also spoke a common Barngarla language.

98 A Barngarla dictionary was composed by Schürmann in 1844 (1844 dictionary). It is obvious that that dictionary was based on the Barngarla language as spoken in the Port Lincoln area, where Schürmann resided. The question arose in the proceedings as to whether the Barngarla language consisted of a number of dialects at sovereignty.

99 Mr McCaul was of the opinion that "there is indicative evidence that there were distinct forms of speaking Barngarla – distinct dialects that were associated with particular parts of the country" at the time of sovereignty. Dr Rose did not completely agree with that assessment, saying that "within the Barngarla, while there … appear to have been shades of difference in the particular terms and sound[s] people might have used across the Barngarla language territory, there's no evidence of specific language dialectal communities or dialectal distinctions."

100 In my view, the disagreement here is a technical one, and one of little import so far as the application for a determination of native title is concerned. Both linguistic experts agreed that the Barngarla people all spoke the same language at the time of sovereignty. Both linguistic experts agreed that, as one would expect over such a large area of land and where modern modes of transport and communication did not exist, there were regional differences in the Barngarla language. The only disagreement was as to whether those differences amounted to distinct dialects of the Barngarla language or not. That question of nomenclature may be of interest from a linguistic perspective, but I do not regard it as relevant to the present proceeding. That is based upon an overview of the two linguist experts and the analysis below about whether there were separate and different societies or one society.

Sub-groups

101 It is agreed by the parties that at sovereignty, the Barngarla people were not a "unitary society", but were divided into some form of "sub-groups". By "sub-group", what is meant in broad terms is some sort of land-holding group of Barngarla people of a size less than the entire Barngarla population. There appears to be some difference, however, between the parties and the experts as to whether these "sub-groups" were akin to "estate groups" and "patriclans" that are recorded to exist in other so-called "Lakes Group" Aboriginal societies such as the Dieri, or whether the "sub-groups" that existed were wider "dialect groups".

102 There is a significant amount of conflicting evidence on the question of the existence of "sub-groups" amongst the Barngarla people at sovereignty.

103 Schürmann recorded in a letter in 1842 that:

> The Parnkalla [sic] tribe are spread over a [great] extent of country from Port Lincoln to the northward beyond Franklin Harbour and over the greater part of the interior country. They divide themselves again into two smaller tribes, viz. Wambirri yurarri, i.e. coast people and Battara yurarru, i.e. gum tree people, so called from their living in the interior country where the gum is plentiful. It is to be understood, however,

> that these tribes are not so entirely separated as not to mix occasionally, on the contrary they often visit each other in small numbers …

104 The Wambirri-Battara bifurcation of Barngarla society is also recorded in Schürmann's 1844 dictionary, but not in his 1846 article. In his 1844 dictionary, Schürmann also wrote at II:4-5 (and recognised at [39] of the Sutton 2013 Report):

> The natives of Port Lincoln have four distinct words in their language descriptive of the bearings of their Peninsular country, and totally unconnected with the directions of the heavens. They are: -
>
> iata, North East coast and country
> worrtatti, South East country
> wailbi, South West country
> wayalla, North Western, and Northern country
>
> They use entirely different words to express the directions of the winds.

105 Later in his 1844 dictionary, Schürmann at one point gives a telling example phrase at II:29:

> … *marruntu wanggatanna iata matta,* the north eastern people speak differently.

106 The Sutton 2013 Report at [41] notes that elsewhere, the word *matta*, translated as "people" above, means "tribe" or "nation".

107 Tindale (as recognised in the Haines 2012 Report at 28-29) recorded the following information about the Barngarla people's sub-divisions:

> … [T]he Banggala [sic] tribe was divided into several sections – and these are named: -
>
> Warta Banggala NE
> Wirangu Banggala West
> Malkari Banggala Sth West
>
> The Warta Banggala are the people of the eastern side of the Head of Spencers [Gulf] ranging north to beyond Parachilna but not to Beltana (except in modern times) and taking in Edeowie, Hookina, Hawker, Yarrah and Uno Bluff. They visited the other sections of the tribe for meetings, for trade and marriage.
>
> The Malkari Banggala ranged from Oakden Hills and Yeltacowie … south through Uno Bluff, Yudnapinna, Carriewerloo and Hesso; in "very ancient times" they came no further south, but since before the white man came, they have been moving further south.

108 Tindale elsewhere makes a somewhat cryptic mention of the existence of a group called the "Kaltadjula Banggala" who "went west to Streaky Bay indefinite", (Haines 2012 report at

p.29) and also mentions a "Nhawu Parnkala" (presumably Nauo-Barngarla) and "Kwiabi Parnkala", or "Kooapidna", or "Kooapudna" (McCaul 2012 Anthropology Report at [112]).

109 Charles Mountford, interviewing two Barngarla men, Percy and Walter Richards in 1944, recorded the Barngarla's country, but in doing so referred to two sets of (unnamed) "Bangala [sic] people" (Mountford 1944:2).

110 Hercus in 1999 identified three Barngarla dialects: Parnkalla, Pangkarla and Arra-Parnkalla (Hercus 1999: 12, McCaul 2012 Anthropology Report at [116]). By 2005, Hercus and Gara appeared to have refined this theory and introduced a hypothesis of identifiable sub-groups:

> Moonie Davis [a Barngarla man, said] that there were three Barngarla dialects, which he differentiated as Nyawa Barngarla, Banggarla [sic] and Arrabarngarla. The Banggarla, according to Moonie, lived in the southern Flinders Ranges and the country north of Port Augusta, and Arrabarngarla country was down the eastern side of Eyre Peninsula. (Gara & Hercus 2005: 93; McCaul 2012 Anthropology Report at [116])

111 Dr Haines, in his 2012 Report at p 30 maintains that the terms recorded by Tindale, "Warta Banggala" and "Malkari Banggala" do not relate to specific sub-groups, but are rather merely "geographic descriptors or locators, so that people visiting other regions of Barngarla territory would be able to place themselves in relation to their hosts". Dr Haines suggests that Schürmann's division of the Barngarla into two sub-groups in his 1842 letter was erroneous, and that is why the division is not mentioned in his 1846 article on the native tribes of Port Lincoln. Dr Rose comes to the same general conclusion in his 2012 Report at [22], [24] and [59], that these various groupings are merely geographical or dialectal indicators, not social units.

112 Mr McCaul expressed a different opinion in his 2012 Anthropology Report at [121]-[122]:

> I agree with Drs Haines and Rose that the precise nature of these groups is unclear, but I would not be inclined to dismiss their traditional significance as readily. …
>
> The traditional break up of larger "language communities" into localised dialect groups is well documented (e.g. Hercus 1994, for the Arabana, Howitt 1996 for the Dieri and Breen 2004 for the Yandruwandha). The ethnography on the issue from other groups suggests, in my opinion, that these localised dialectal groups were the primary land using and land owning group. … It is within such local groups that people would have received their primary socialisation and education about the land. Therefore, it is in my opinion incorrect to state that they had little social or political significance.

113 Professor Sutton, in turn, disagreed with McCaul's assessment in his Report at [47]-[49]:

> [The] labels for different segments of the Barngarla people discussed above] are not primary land-holding units … They are sub-regional ethnicities usually comprised of members of a plurality of descent groups who themselves severally hold land and waters collectively and in perpetuity but at a very small scale both geographically … and in terms of membership …
>
> In the absence of concrete evidence to the contrary I am … unable to agree with Mr McCaul when he writes … that 'localised dialect groups were the primary land using and land owning group'. In general [in Aboriginal Australia], with some well known exceptions, the primary land owning group was a descent group or clan … that had an enduring membership, while a land using group was [merely] a band of fellow-campers … [I]n a mobile hunter-gatherer society the two categories (of owners v users) are never likely to be the same. …
> To merge the two kinds of group is [a] fallacy …
>
> It is usually the descent groups or clans that are the most critical building blocks of the society when it comes to land ownership in classical Aboriginal Australia [with some exceptions]. The lands they own, their estates, are thus the usual building blocks for wider territorially-associated entities such as dialect groups and environmental typifier groups and groups defined in terms of the cardinal directions.

114 Dr Martin in his 2013 Report at [46] endorses Professor Sutton's opinion on this issue. The weight of the expert opinions thus clearly favours the view that the various labels applied to different segments of the Barngarla people that appear in the literature were not land-holding groups or primary social units. I am satisfied that the shared view of Dr Martin and Professor Sutton is the correct one. Mr McCaul did not forcefully press a contrary view during the concurrent evidence. I have made some general observations about the expert evidence later in these reasons.

115 That, however, does not dispose of the issue of the nature of Barngarla society at sovereignty. There remain two competing hypotheses: first, that the Barngarla society was a "unitary" society – that is to say, the primary land-holding unit was the entire society as a whole; second, that the primary land-holding units in Barngarla society were "estate groups" or "patriclans" – small groups of families attached to a relatively small area of land, similar to those that existed in many neighbouring Aboriginal groups.

116 Dr Haines held the former view in his 2012 Report, where at [51] he states:

> [T]he Barngarla were effectively a unitary society, with no real structural divisions apart from geographic indicators.

And at [47D] he says:

> It is my view that there was, at the time of sovereignty, a society of people with the ethonym … "Barngarla" … united by a body of laws and customs, who were co-

> resident on and circulated within a common territory of land and waters …

117 Dr Martin, on the other hand, holds the latter view. He wrote in his 2012 Report at [59] that Dr Haines' opinion "would appear to be manifestly inconsistent with the ethnography available to Dr Haines." The ethnography in question is the work of a number of early anthropologists such as A.W. Howitt, A.P. Elkin and Otto Seibert.

118 Howitt wrote in his 1904 work, *The Native Tribes of South-East Australia*, of the Lake Eyre group of Aboriginal tribes. He took the Dieri people as his "prototype" of that group of Aboriginal tribes, but asserted that all the Lake Eyre group tribes were similar societies, and that the "Parnkalla" tribe was a member of that group. Martin explains Howitt's theory of tribal organisation at [31] of his 2012 Report:

> Howitt saw the 'tribe' as a whole exclusively occupying a specified geographic area. This entity was divided into smaller and named groups living in a defined portion of the tribal country, and these again were subdivided until what Howitt saw as the basic residence unit was reached; one, or perhaps a few, families hunting and gathering on their own particular inherited area. The essential model is one of named clans linked together in regional associations.

119 Elkin, drawing upon Howitt inter alia, wrote a seminal paper for the *Oceania* journal in 1931 entitled "The Social Organisation of South Australian Tribes". In that paper, he coined the term '"Lakes Group" to describe the Lake Eyre group of tribes described by Howitt. Elkin describes a division of these tribes into, inter alia, "ceremonial clans" under a system he calls "patrilineal ceremonial totemism" at [58]:

> Each man inherits from his father a totem name[,] … a piece of country with which this totem and a Mura-mura [dreaming story] or culture-hero were associated in the past, a myth enshrining the story of this, and a ceremony the performance of which usually brings about an increase of the totemic species concerned… (Elkin 1931: 58)

120 It should be noted that Elkin is not certain that every tribe of the Lakes Group practised "patrilineal ceremonial totemism". Elkin notes at [57] that the kinds of totemism he describes, including patrilineal ceremonial totemism, existed "in the [Lakes Group] tribes around Lake Eyre and on the Cooper and Diamentina. [But] [i]t is now too late to decide whether they were all formerly present in the southern part of the area." It seems likely that Elkin meant to include the Barngarla people in his reference to the tribes of the "southern part of the [Lakes Group] area".

121 In any event, it is clear that both Elkin and Howitt are describing the existence of small land-holding groups existing within larger tribes that sound similar to the "estate groups" that are recorded to exist within many Aboriginal groups in Australia.

122 Once the views of Howitt and Elkin are considered, it is Dr Martin's opinion in his 2012 Report at [61] that:

> [T]he ethnographic record clearly indicates that in all probability (since they were recorded in other groups in the Lakes cultural region), there were Barngarla subgroups which were not simply environmental or geographic referents, but landed groups comprising clans with interests in particular areas … ([61], 2012 report)

123 Professor Sutton, as indicated in his Report at [47], generally supported that view. Dr Haines in the oral hearing admitted that he was willing to concede that, though he maintained there was a "paucity of evidence" to infer the existence of any land-holding group other than a "unitary society", "in all probability in each area [of Barngarla country] … there [were] people with a preponderance of rights, if you like, in their respective areas…" and that it is permissible to infer from evidence of the social organisation of neighbouring societies at sovereignty what the social organisation of Barngarla society was likely to have been at sovereignty. (T1645, 125-1646,120)

124 On the balance of probabilities, therefore, I think that Dr Martin's opinion ought to be accepted – that is, that at sovereignty, the Barngarla people were divided into small land-holding sub-groups, and were neither "unitary" in the sense, as Professor Sutton put it in oral evidence, that they were not "interspersed throughout each other's lives in a kind of 'flat universe'", (T1627, ll32-33) nor were they divided into dialect groups that formed some kind of separate social or political unit.

Land tenure system

125 The above finding of the probable existence of estate groups in at-sovereignty Barngarla society leads inexorably to considerations of land tenure.

126 There was little dispute between the parties as to the nature of the land tenure system of Barngarla society at sovereignty. There is very little direct evidence of the content of that system, but both the applicant and the State submitted that, in accordance with the opinions of the expert witnesses, it was permissible to make inferences about the Barngarla land tenure system from the observations of Siebert, Howitt and Elkin, inter alia, as to the land tenure

systems of other "Lakes Group" societies, in particular the Dieri (as noted in the McCaul 2012 Anthropology Report at [100].

127 There are two key questions to be asked in analysing the Barngarla system of land-holding: first, what kinds of rights or interests to land were recognised by the Barngarla? Second, how were those rights or interests acquired?

128 Turning first to the question of the nature of the rights or interests in land recognised by the Barngarla, it is agreed between the parties that the rights of Barngarla at-sovereignty people to land are collective rights, at least within the estate group. Mr McCaul summarised the general view in oral evidence thus:

> It's clear that [rights to land under the at-sovereignty Barngarla land tenure system] were held by more than the individual, but … if we are to assume [the existence of] some form of ... descent-based local group … then the rights of the members of that group in their own lands would not be the same as the rights that they would hold across other parts of Barngarla lands … They would be held differently as to ritual status, gender and so forth. … [So rights to land would have been] differentiated but held by groups or aggregates of people rather than by individuals, yes. (T1612, l6)

129 Next, it is not contentious that Barngarla rights to land were at sovereignty inalienable. Professor Sutton stated in his Report at [34]:

> … Barngarla country, under the rules of its people, is nowhere described as a chattel that can be marketed or gifted but is, at least by implication, inalienable.

130 Now turning to the second question: how were rights in land acquired in the at-sovereignty Barngarla land tenure system? Howitt, after explaining the system of estate groups, or "patriclans", that has been described in the section on "sub-groups" above, goes on to say at 34:

> These groups have a local perpetuation through the sons, who inherit the hunting grounds of their fathers.

131 Elkin, writing several decades later, is also clear that the inheritance of rights is patrilineal. That is of course made explicit in his appellation for the system: "patrilineal ceremonial totemism". In a passage on estate groups already quoted in the "sub-groups" section, Elkin refers to men "inheriting" a "piece of country" from their fathers.

132 Further, Otto Siebert explains the Dieri land tenure system in a similar vein at 48:

> Every person inherits from his father a particular association to a mura-mura …

> [E]very person also inherits a place, which is considered the home of the mura-mura; this place can be a larger or smaller district, which is regarded as the possession of the respective person. A father will describe to his children the country thus belonging to them with words such as:
>
> > 'This your country. My mura-mura created it. My mura-mura lived here.' …
>
> This through the father inherited relationship to the mura-mura and everything that comes with it is called pintara. …

133 So it is very clear that so far as Elkin, Howitt and Siebert observed, the Dieri land tenure system was patrilineal. Dieri society is considered a "Lakes Group" society, as is Barngarla society. Martin notes that Barngarla society is considered a "Lakes Group" society primarily because there is evidence that at sovereignty it shared a common moiety system with other Lakes Group societies. But there is very little direct evidence that Barngarla society shared the land tenure system the Dieri called *pintara*. In oral evidence, Mr McCaul drew attention to some scant direct evidence to support that inference:

> …[W]e do have in the 1930s A.P. Elkin and Tindale recording both … matriary [sic] and patriary [sic] totems for four or five Barngarla individuals and again in 1965 or so Luise Hercus is recording Stanley Davis [a Barngarla man] talking about totem and … what his totem is. And so I would from that infer that it was an important feature of Barngarla society in the past. (T1604, ll5-10)

134 Elkin recorded the following details from conversations with Barngarla informants about the Barngarla land tenure system at 59:

> … I found that the Wailpi and Yadliaura [tribes now commonly referred to collectively as the Adnyamathanha people] used to have the [Dieri] *pintara* type of totem which they called *budlanda*, and that the present Pankala [sic] men knew all about this form of totemism and though that *budlanda* ceremonies must have been performed by the Pankala in the past, though not in their own time. One Pankala informant said that the local term for *budlanda* was *wibma*, that his *wibma* was the same as his father's, and that it included a Mura-mura myth.

135 In any event, the parties agree in their written submissions that a system essentially the same as Elkin's patrilineal ceremonial totemism operated in Barngarla society at sovereignty. I so find.

136 That finding leads to a further issue: the Dieri concept of *pintara* was complemented by the Dieri concept of *maduka*. While under *pintara*, people gained primary rights to land through their father, under *maduka*, people gained "secondary" rights to land through their mother.

137 There was general agreement that this part of the Dieri land tenure system was also part of the Barngarla land tenure system at sovereignty. For instance, Mr McCaul wrote in his 2012 Anthropology Report at [100]:

> In my opinion, based on the limited information that we have, it is a plausible hypothesis that the traditional Barngarla system of land tenure looked very similar to that of the Dieri, i.e. people had primary rights and responsibilities for specific sites through their father and secondary rights and responsibilities to sites through their mother.

138 Elkin described *maduka*, at 59, thus:

> It is almost the same as the *pintara* type except for the rule of descent and the somewhat inferior position of the totemite to the totem, its myth and ritual. … The relation of the two totems is as follows: in addition to inheriting the *pintara* from his father, a man also inherits his mother's and mother's brother's *pintara* which then becomes his *maduka* … This means that he learns the myth and ritual of the mother's brother's *pintara*, and may visit the sacred site and assist in the ritual … His children do not inherit his *maduka*.

139 I find that the Barngarla people's land tenure system at sovereignty recognised some form of "secondary rights" in land similar to the "*maduka* type" of the Dieri.

Totems

140 As can be seen, "totems" were an important part of the Dieri *pintara* and *maduka* systems. Despite this, Dr Haines did not believe that totems were likely to have been "much of an issue" within the Barngarla society at sovereignty. While he admits that Elkin and other anthropologists did speak of totems as being part of the Lakes Group cultural bloc's traditions, he notes that Schürmann completely neglects to mention them. Dr Haines opined:

> "I think the fact that they're not mentioned [by Schurmann] really leads me to believe that in fact they weren't quite as much of an issue [in Barngarla society] at sovereignty as perhaps they were in the more northly [sic] … societies [e.g. the Dieri]." (T1597)

141 Dr Martin disagreed. He emphasised the important role of "totemic institutions" in other Lakes Group societies (and non-Lakes Group societies), saying that:

> …while I fully accept … that there is not the direct evidence [of totems], I find it difficult to conceive of an Aboriginal system existing in any region, but specifically in this region, where totemic affiliations were … of [only] incidental worth ... Because, that's not the logic of these … religiously informed systems. … [I]n my view, it is most likely that – albeit potentially somewhat differently from other Lakes [G]roup societies, and in all likelihood quite differently from nearby Western Desert societies, totemic institutions were at the heart of aspects of religious life, of personal

identity and of group identity. (T1603)

142 Mr McCaul and Professor Sutton agreed with Dr Martin and, importantly, Mr McCaul noted that in fact Elkin in the 1930s and Hercus in the 1960s had recorded totems for Barngarla people. (T1604)

143 I would therefore find on the balance of probabilities that totemic institutions did exist in some form within the Barngarla society at sovereignty.

Kinship system

144 The ethnographers Elkin, Schürmann and Tindale all recorded kinship terms used by Barngarla people. While they recorded those terms in varying detail, all three ethnographers' recordings are broadly consistent. Dr Haines, in his first report, set out their findings in a table which I reproduce here (with slight modification of the table in the Haines 2012 Report at 38-39):

Relationship	Elkin's recorded kinship term	Schürmann's recorded kinship term	Tindale's recorded kinship term
father's father	ngoali		ngoali
father's mother	ŋapula		
mother's father	windja		ngoali
mother's mother	kanyni	kadyinni	kanjinni
father	bapi	pappi	
mother	ŋami	ŋammi, ŋammaityu	
mother's brother	ŋamana	ngammana	ŋamana
father's sister	ŋapadi		
elder brother	yunga		
younger brother	natdjaba	ngaityaba	
wife	ŋapula	karteti, yuŋara	artie
wife's father	ŋamana		biŋga
wife's mother		yumarri	
wife's sister			ŋapula
brother-in-law		muntyanta	
husband		yerdli	
father-in-law	yaru		
mother's brother's son	windja		
sister	yaka ŋalubapa	yakka	jăka
son	panangyi		
sister's daughter	yakala		jakala
sister's son	yakala		jakali
daughter	panaŋyi	ŋappirti	baŋanjii
son's son	ngoali	kadyinni	
sister's son's child	windja		

(Haines first report, pp.38-39)

249 It can be seen that Elkin provided the most Barngarla kinship terms, while Schürmann, who had by the far the most contact with Barngarla people, records significantly less. According to Dr Haines, Elkin noted this and reflected that Schürmann, like other early writers on South Australian Aboriginal people, "had no idea of the importance of kinship in Aboriginal social organisation; [he was] content to record a few relationship terms and to describe various marriage and other social customs without suspecting [their association] with kinship." (1938: 419; A2, p.37) However, Professor Sutton criticised Elkin for merely providing a list of terms, without providing any detailed analysis of behavioural norms dictated by those terms (T1653, ll 25-26).

250 Another important recorded aspect of the Barngarla kinship system at sovereignty was "moieties". Moieties existed in many classical Aboriginal societies. In Barngarla society, there were two moieties – "mattiri" and "karraru" (as Schürmann spells them). In his 1846 article at 222, Schürmann says the moiety division "seems to have remained among them from time immemorial, and has for its object the regulation of marriages." (1846:222) Originally, there was a dispute amongst the expert witnesses as to whether the moiety division had disappeared prior to sovereignty. Dr Haines maintained in his 2012 Report that it had done so. He has now resiled from that view, and so the experts unanimously agree that Barngarla society had moieties at the time of sovereignty (AS, [256]).

251 There is ample evidence of the existence of moieties in Barngarla society – not only does Schürmann record their existence in 1846, but anthropologists with the Board of Anthropological Research's 1937 expedition to Nepabunna spoke to nine "Bangala" informants at Nepabunna who were all able to tell the anthropologists whether they were "kararu/kararo" or "matari" (as those anthropologists variously spelt it). As noted in the Sutton Report at [63], Tindale, visiting Port Augusta in 1939, was able to speak to three "Panggala" informants who also told him their moiety.

252 Schürmann gives some detail as to how the moiety system functioned in his 1846 article at 222:

> [Marriage is not] allowed within either of [the two] classes]; but only between the two; so that if a husband be Mattiri, his wife must be Karraru, and *vice versa*. The distinction is kept up by the children taking invariably the appellation of that class to which their mother belongs. There is not an instance of two Mattiri or Karraru being married, although they do not seem to consider less virtuous connections between

> parties of the same class incestuous.

253 However, it is generally understood that in other Aboriginal societies with moieties, the moiety system has much greater significance in the society's social organisation than just the regulation of marriage. Later anthropologists such as Elkin found this to be the case in other Lakes Group societies:

> The moiety organization functions in initiation and burial ceremonies, in marriage, in a system of adjusting differences, called *kopara*, in various secret matters, and in camping arrangements.

254 Dr Haines states that his opinion from the evidence as to kinship is that the Barngarla people did have a kinship system at sovereignty, but that its "primary aim" was limited to "distinguishing marriageable partners from those who were considered to be too close, in a consanguineal sense…" (A2, [61]-[62])

255 An initial comment that may be made about that opinion is that the Barngarla moiety system as described by Schürmann does not in fact prohibit marriage between partners who are "too close, in a consanguineal sense", because there is theoretically no moiety-related reason why a father and daughter cannot marry, as they will always have different moieties.

256 Moreover, Dr Martin vigorously disagreed with Dr Haines' assessment in his 2012 Report on the following grounds:

> [Dr Haines' assertion that] Barngarla [kinship] institutions [served] an essentially biological purpose is … without any ethnographic or other evidence to substantiate it. … [It is] completely inconsistent with anthropological understandings of kinship which recognise it as a fundamentally important institution in Aboriginal societies of social, economic and political importance. (2012 report, [46]-[47])

257 The obvious implication is that Dr Martin believes that the kinship system was of fundamental importance to the at-sovereignty Barngarla society (though he does not state that belief explicitly). Professor Sutton also considered that the Barngarla kinship system would have been likely to have been of fundamental importance to the at-sovereignty society. At the oral hearing, he said:

> I will make a preliminary comment about the degree of importance of kinship terms … The terms are not names of individuals, … but they're category terms, and what they do is group people together. In that sense they subdivide one's genealogical kin in a particular way in each culture and … Aboriginal people traditionally subdivide kin in a way that's rather different from that of European languages and thinking. Along with those distinctive ways of categorising people as being the same or similar

> usually go a brace of norms of behaviour between kin and those norms are affected by the degree of distance between the pairs of people involved. For example, it's a very common rule that an older brother must not talk to his younger sister once they have reached reproductive age. … [H]e must show complete disinterest in her in a formal way, and that's considered the proper behaviour.

258 And later, Sutton opined that a kinship system is "always in any society" constituted of "rules for organising relationships between people under norms, … and not just a classification system, but it carries with it norms of relating." (T1606, ll 44-46)

259 Dr Haines disagreed with the general tenor of Sutton and Martin's comments in his 2013 Report at [32]-[33]:

> … [A]ny attempt to shoehorn kin relations as they might have been observed elsewhere into some imagined concept of Barngarla pre-contact … society is entirely misplaced. … I do not deny … that kinship is important to the Barngarla, but to isolate it as "a fundamentally important institution" is, to my mind, [wrong].

260 In my respectful opinion, this part of Dr Haines' report demonstrated some confusion about whether the kinship system that was being said to be a "fundamentally important institution" was the present-day one, or the one at sovereignty. Dr Martin and Professor Sutton argued that the Barngarla kinship system would have been fundamentally important to the at-sovereignty society, not the present day one. But Dr Haines, particularly in his 2013 Report at [33], goes on to argue that while kinship plays a role in Barngarla society, it is not "institutional", and it sounds very much like Dr Haines is drawing upon his own experience conducting fieldwork with the present-day Barngarla people in making that observation.

261 In any event, at the oral hearing, Dr Haines appeared to disavow to some extent his above-expressed view as to the importance of kinship in at-sovereignty Barngarla society. He stated that: "I [agree] with Professor Sutton, of course, that kinship is a critical dimension of Aboriginal life…" (T1655, lines 44-45) In the context of the passage, it appears that Dr Haines is referring to Barngarla life, not merely Aboriginal life in general.

262 In conclusion, the evidence of the at-sovereignty kinship system cannot be said to be great. What can be said is that it existed, that it was complex, and that, given its importance in other like Aboriginal societies, it more likely than not played an important role in the regulation of conduct and the laying down of normative rules in the Barngarla society, perhaps incorporating, but going beyond, the mere prevention of incest.

263 One caveat should be expressed to that very general conclusion. Mr McCaul claims in his 2013 Anthropology Report that Schürmann stated that:

> …all [Barngarla] people are referred to by relationship terms, (Schürmann 1846:222) reflecting a widely recorded preference in traditional Aboriginal societies for address by kin term rather than name and for the inclusiveness of the traditional classificatory system of people within ones [sic] social universe as relations.

264 That seems to overstate the position somewhat. Mr McCaul's reference to Schürmann appears to be a reference to the following statement in the 1846 article at 222:

> … friendship among the natives assumes always the forms and names of relationship, which renders it almost impossible to find out the difference between real or merely adopted relatives.

265 So far as I can see, all Schürmann is saying here is that Barngarla people use (nominally) biological relationship terms to describe their relationships to those who are merely friends, such that if Schürmann asked what two people's relationship was, he could not determine from the answer whether the relationship was one of friendship or biology. He is not saying that "all people are referred to by relationship terms … rather than [their] name."

266 However, this observation of Schürmann does support the notion that at sovereignty, all relationships in Barngarla society were described in terms of kin, whether that kin relationship was "biological" or "classificatory".

267 As to kinship-related norms, a question arose as to whether there were ever a norm requiring Barngarla people to marry non-Barngarla people. Professor Sutton concluded that, while such marriages may well have been commonplace at sovereignty, it was unlikely that marrying outside the Barngarla group was considered a normative imperative. (T1710)

268 Another posited kinship-related norm is a rule against incest, an "incest taboo". As has been noted, one could not marry within one's moiety, but that rule did not in itself prevent all forms of incest. Professor Sutton believed that such a taboo could be presumed to have existed in Barngarla society at sovereignty, as it is an element of almost every human society. (T1610) It is worth also noting that the work of Elkin gives indicative support for such a view, as he speaks of prohibitions against cross-cousin marriage in some Lakes Group societies (the Barngarla moiety system does not necessarily prohibit marriages between first cousins). However, at one point, Elkin does refer to cross-cousin marriage when discussing

Wailpi (Adnyamathanha) and Pankala (Barngarla) kinship terms, perhaps suggesting that the Barngarla did permit cross-cousin marriage. (Elkin, Social Organisation, 55-57)

269 Another potential kinship-related norm is respect for one's elders. Schürmann observes in his 1846 article at 226 that:

> Considerable deference … is shown to the old men by the younger generation, proceeding, perhaps, partly from the respect which superior age and experience inspire, but greatly increased and kept up by the superstitious awe of certain mysterious rites, known only to the grown-up men …

270 It is easy to imagine that the deference shown by young men to old men may have not only stemmed from those factors about which Schürmann speculates in the above passage, but also from some normative rule that formed part of the kinship system. In any event, it is clear enough that respect for one's elders formed a part of the Barngarla society at sovereignty. That was not in dispute at the hearing in this matter.

Initiation

271 Schürmann spells out the process of the male initiation rites of the Barngarla in detail in his 1846 article at 226-234. In summary, there were three degrees of initiation through which each male youth must pass. The first initiation took place at about the age of 15.

272 Women and children were excluded from the ceremony. At the ceremony, initiated men gave the initiates a number of precepts for his future conduct. Upon the ceremony's completion, the initiate assumed the title of *warrara*. Children were prohibited from approaching the spot where a *warrara* had been "made" (i.e. where the *warrara* ceremony had been conducted).

273 The second initiation took place at about the age of 16 or 17. The second initiation ceremony involved significant events. The title *pardnapa* was bestowed upon the initiate after this ceremony had been completed.

274 The third initiation involved the making of incisions, called *manka*, on the back of the initiate, while the men chanted an ancient incantation. The initiated men would then give advice to the initiate for the proper regulation of the initiate's future conduct. The initiate would become a *wilyalkinyi* upon completion of the ceremony.

275 Schürmann's account of Barngarla initiation was not questioned by any expert. It should be noted that it is broadly consistent with the initiation rituals of other Lakes Group societies, particularly the Adnyamathanha.

276 What was the subject of discussion amongst the experts was the significance of Barngarla initiation rites. In his 2012 Report, Dr Haines describes the initiation rites at sovereignty merely as representing "the culmination of a period of growth and development in all young men which was important in conveying ritual status to them but of itself served no purpose that could not be achieved by an equivalent ritual borrowed from elsewhere" at [147] and "a matter merely of becoming adult" at [262] and "just a ceremony … which could be replaced by other ceremonies while retaining the same end: the passage to adulthood within the law" at [164].

277 In his 2012 Report, Dr Martin rejected that characterisation as "teleological" at [99] and "manifestly wrong" at [94] and went on to say at [98]:

> [I]n my opinion, [the Barngarla initiation rites] have a range of features which indicate that the rituals were in and of themselves accorded high significance by Barngarla people. These involved ritual restrictions especially but not only those around gender; verbal taboos; the use of secret-sacred objects; the use of blood-letting and blood itself (of ritual significance) across all stages including anointing initiates' bodies; the permanent marking of their bodies by means of circumcision, subincision, and cicatrization; and also the use of ornaments, hairstyles, and the granting of particular personal names to mark the ritual status the initiate had attained.

278 Dr Martin further noted at [97], drawing upon writings by Berndt, that "[o]n the basis of what is known of such rituals in contiguous areas, [initiation ceremonies] … emphasised the acquisition of religious knowledge. They concerned the gradual revelation of such information and its meaning over a period of several years."

279 Professor Sutton's view seemed to fall somewhere between Dr Martin and Dr Haines. On the subject of the importance of initiation rites to the Barngarla people, he opined in his Report at [31] that:

> … [T]here are a number of other aspects of societal norms that are far more fundamental to the lawful relation of Aboriginal people to country as property than initiations ...

280 On the whole of the material, I find that at sovereignty the initiation rites were probably of more importance than merely a "rite of passage" to mark the transition to adulthood. The nature of the rites was significant and formalised, and it seems more likely that the initiation rites also served as an important means of transmission of cultural, and social knowledge or more accurately eligibility to be the recipient of more confined cultural and social knowledge.

281 A final issue that arises is the involvement of other Aboriginal groups in Barngarla initiation ceremonies. In his 1846 article at 229, Schürmann notes that in the *pardnapa* ceremony, the second initiatory stage, the circumciser of the initiate is usually "a visitor from a distance" (1846:229). Mr McCaul comments in his 2013 Anthropology Report at [91]:

> How far this distance is, e.g. whether it would be Barngarla people from the head of Spencer Gulf or the inland regions, or whether it would be members of other tribes, is not explained by Schurmann. My hypothesis on the basis of information from other areas would be that these ceremonies are likely to have brought together members of various language groups.

282 Dr Haines also commented in oral evidence:

> I have mentioned in my report a theory that I have that the proximity between Barngarla and … the Western Desert people in traditional times was a ceremonial one and this extended, of course, to initiation as well. So one would find, for instance, that as Schurmann noted, Kokatha visited Barngarla for ceremonial purposes. He didn't go into detail, but one would assume, also, that it would be logical for the Barngarla, then, to visit the Kokatha also in their country, particularly, of course, in the Gawler Ranges… (T1660 ll36-45)

283 I cannot locate this theory of Barngarla and Western Desert people sharing responsibility for initiation developed in either of Haines' reports. Neither can I find any passage of Schürmann where he states that the Kokatha visited the Barngarla for ceremonial purposes.

284 However, given the unambiguous mention by Schürmann of the involvement of (admittedly unspecified) outsiders in Barngarla initiation ceremonies, I accept that it is probable that Barngarla initiation ceremonies at sovereignty probably involved some non-Barngarla people. The making of that finding is assisted by a 1905 police report that "the Streaky Bay tribe, the Fowlers Bay tribe, and the Franklin Harbor and Cocatha tribes" had gathered in Port Augusta, awaiting the arrival of other groups from Port Pirie and Coward Springs, before proceeding to a big initiation ceremony that was to take place north of Port Augusta. Based on modern opinions on Aboriginal divisions, this ceremony would therefore have at least included Barngarla, Wirangu, Kokatha, Nukunu and Arabana people. That seems clear evidence that as early as 1905, initiation ceremonies contained at least some shared elements between "tribes".

Stories and beliefs

285 Some stories and beliefs of the Barngarla people are outlined by Schürmann in a section of his 1846 article entitled "Superstitions and Traditions".

286 Schürmann noted that the Barngarla had many supernatural beliefs, more than those he recorded. The ones he did record were as follows, at 237-238:

(a) belief in a monster named Marralye, a man who assumes the shape and power of a bird;

(b) belief in beings called Puskabidnis, violent giant men armed with waddis;

(c) belief in the power of fellow Barngarla people to cause the death or illness of others by means of "a peculiar manipulation during the night, described as a poking with the fingers in the side of the [victim] …";

(d) belief in the power of other tribes, in particular the Kokatha, to produce "excessive rain", "insufferable heat and drought", and plagues, along with a belief that it is possible to counter such powers by the recitation of certain chants; and

(e) belief that the "appearance of a comet or any natural phenomenon in the heavens" is an omen of impending death.

287 So far as stories are concerned, Schürmann gives a few examples:

(a) The story of Pulyallana, a man whose two wives both ran from him. He searched for them for a long time, finally finding them and killing them at Cape Catastrophe, where they turned to stone, together with their children, and now stand as rocks and islands in that area. Pulyallana was raised into the sky at a place now known as Point Sir Isaac, where in his anger at his wives, he now creates thunder and lightning. It is probably that this is in fact a Nauo story, given that Schürmann does not positively ascribe it to either the Nauo or Barngarla, but all the events of the story take place in areas Schürmann regarded as Nauo country (including Point Sir Isaac, which is close to Coffin Bay, an area that is uncontroversially Nauo country), and Schürmann comments that Pulyallana has "given names to many localities in the southern and western parts of this district, which they retain to this day." Schürmann identified the southern and western parts of the Port Lincoln district as Nauo.

(b) The story of Kupirri, a giant red kangaroo who terrorised the local people in ancient times. Two renowned hunters, Pilla and Indya, tracked Kupirri from near Port Lincoln along a range stretching north. They caught him, and, finding him asleep, attacked. Their spears became blunt before they could kill him, sparking a fight between Pilla and Indya. They attacked each other, before resolving their differences and finally killing Kupirri. They found all Kupirri's victims in his stomach, resurrected them, and

cooked Kupirri. Pilla and Indya then became the opossum and native cat, the scars of their wounds from their fight giving those animals their distinctive markings. The locality of this story suggests it is a Barngarla story.

(c) The story of Marnpi and Tatta, two ancestors who, faced with a great fire coming from the ocean, decided to bury the fire. In so doing, they created the sand hills between Coffin and Sleaford Bays. Again, the locality of this story suggests it may be a Nauo story. Schürmann is silent on the issue.

(d) The story of Welu, a curlew bird warrior whose "amours" were "foiled" by the Nauo people. In retribution, Welu tried to kill all the Nauo. He killed all the men except two, Karatantya and Yangkunu, identified with two species of hawk, who climbed up a tree to escape. Welu tried to climb after them, but the two men broke the branch he was standing on, sending him to the ground, where a "native dog seized and killed him." It is unclear whether this is a Nauo or Barngarla story. The Nauo are specifically mentioned, but the word "welu" is identified by Schürmann in his 1844 dictionary as a Barngarla word for the curlew bird. No location for the story's events is given (but it would presumably be Nauo country, given it involves an attack on the Nauo).

(e) The story of Ibirri and Waka, male and female lizards, who are said to have "divided the sexes in the human species". This leads to a tradition by which women kill male lizards, and men, female lizards.

288 The significance of these stories within Barngarla society is not something upon which Schürmann reflects. It is tempting to speculate that at least some of these stories were *mura-mura* stories of a kind found elsewhere in the Lakes Group that associated a particular ancestor with a particular place.

289 Apart from the above accounts of Schürmann, there is some other limited evidence of Barngarla stories at sovereignty. They are as follows:

(a) The story of the Seven Sisters, a dreaming story common to many Aboriginal groups, was recorded in a Barngarla context by Luise Hercus in 1965 from a Barngarla informant, Stanley Davis, who told of the seven sisters being chased by seven boys, saying "That's the old story handed down … That's according to … what the Aborigines believe, what the Barngarlas believe." (Hercus 1966:39:34) Similarly, Professor Tindale recorded, from a Western Desert perspective, that the Seven Sisters

story went into "Pangkala" territory in 1959. (R1.3, [168]) Several anthropologists in the 1980s and 1990s also recorded a Seven Sisters story from Phyllis Croft, a Barngarla woman. In this version, the seven sisters were chased by a "Moon man". Ms Croft was able to give considerable detail about the sisters' and Moon man's travails around the claim area. It is clear that the anthropologists, particularly Potter and Jacobs, considered that this story was a Barngarla story. Potter and Jacobs (1981:15) note:

> Ms Croft's version of the Seven Sisters … differs from that current among more northern groups, which generally see the women as being pursued by a promiscuous man, often identified as Orion. The Moon is sometimes associated with them, but less benevolently than in the version told to us.

(b) The Urumbula story, a well-recorded "songline", traverses all of central Australia, up to the Gulf of Carpentaria, and down to near Port Augusta. The Urumbula story appears to be chiefly an Arrernte story, or at least it is the Arrernte who have retained the most of the story and associated songs, which were recorded by the anthropologist TGH Strehlow in the 1940s. The story tells of the travels of native cat ancestors, searching for the source of objects that had fallen from the sky. It was only at a place near Port Augusta that the native cat ancestors found a giant pole (known as "Amewara", a close approximation of "Umeewarra", the name of a lake near Port Augusta) standing in the sea, so tall that it touched the sky. The native cat ancestors took the pole from the local totemic ancestors and carried it to central Australia. The Urumbula story has been recorded by various anthropologists – generally, a group only knows those parts of the story that occur on its country. Given that part of the story lies in Barngarla country, it is likely that Barngarla people knew something of this story. Ethno-musicologist Cath Ellis obtained detailed information about the story at Port Augusta in the 1960s, but did not record the identity of her informants.

Burials and associated beliefs and practices

290 Schürmann provides some detail on traditional Barngarla burial customs in his 1846 article at 248:

> [Burial is] described by [Port Lincoln Aboriginal people] as attended with many ceremonies, which are, however, sometimes dispensed with, as was the case with an old man, the only person I have seen buried. A pit about five feet in depth, and only four feet in length, was dug. On the bottom some dry grass was spread, and on this the body was laid with legs bent upwards. The head was placed towards the west, a custom that I am informed is always observed, and is founded in their belief that the

> soul goes to an island in the east. The body is covered with a kangaroo skin, and strong sticks are placed lengthways over the mouth of the grave, one end being stuck in the earth a little below the surface, and the other resting on the opposite edge of the grave. On these the earth is put so as to leave a vacuum between them and the body and to form a mound of earth over the grave. A few branches or bushes thrown carelessly round the mound complete the simple ceremony.

291 As Mr McCaul noted in his 2013 Anthropological Report at [73], "this account needs to be qualified by the fact that it was the only funeral [Schürmann] attended and that it was apparently atypical for its lack of songs or mourning ceremonies."

292 Schürmann added the following about mourning customs in his 1846 article at 247:

> [The community] lament [the deceased individual's] decease for weeks and even months after the event; very frequently in the evening, one person will suddenly break out in slow and sorrowful cadences, gradually inducing all the others to follow his example. (Schurmann 1846:247)

293 Further, Schürmann specifically refers to name avoidance of deceased people being a practice amongst the Barngarla at 247-248:

> Never upon any account is the name of [a] deceased [person] mentioned again for many years [following his or her death], not from any superstition, but for the professed reason that their mournful feelings may not be excited … If a death occurs amongst them in the bush, it is with great difficulty that the name of the deceased can be ascertained.

294 Finally, Angas (drawing on comments of Schürmann) notes that it is a Barngarla belief that the soul, upon death, goes to an island to the west, towards the Great Australian Bight. (Angas 1847: 108)

295 Dr Haines commented in his 2012 Report at [98] that:

> [I]t is my interpretation from what [Schurmann, Angas and Wilhelm] have given us, together with my reading of the more generalised assessments of such customs from Australia in general (eg Tonkinson's [observations], Elkin 1938, Spencer 1927) that death was ritualised and normalised by the Barngarla in pre-settlement society as a part of life requiring community recognition and participation; that burial of the physical remains of an individual was a necessary and systematic act taking place on the country and within the community and that the spirit had a continued existence following the demise of the physical body.

296 That broad-brush statement did not appear to be contentious.

Hunting, fishing and gathering resources

297 Schürmann provides accounts of Barngarla people fishing and hunting and foraging, as one would expect. Further, a large number of native plants would be gathered by Barngarla people, predominantly women.

298 Hunting was carried out by men with spears or waddies. Sometimes tactics would be employed, such as one hunter causing a distraction, while another strikes; a group of hunters chasing animals to a spot where other hunters are hidden; a hunter running after a kangaroo until it is too tired to go on; or a hunter smoking out an animal hiding in a hole. Schürmann mentions a complex set of hand signals used by Barngarla hunters to communicate silently while hunting. "Tamed native dogs" were also used by Barngarla people to assist with their hunting. When hunting, the hunters would utter charms in order to, according to Schürmann, weaken the animal being hunted.

299 Schürmann states that fishing was only carried out with spears, not with nets or hooks. No mention is made of the existence of any canoes or other watercraft. Sometimes, according to Schürmann, whole schools of small fish were driven onto the shore by teams of Barngarla people using large branches of tea trees. Other times, certain kinds of fish attracted to light were caught at night by lighting torches from long pieces of bark on the shore.

300 All meat and fish were, according to Schürmann, roasted on the fire – small animals were generally thrown on the fire whole, while larger animals such as kangaroos would be skinned and cut into joints. When the fur was well-singed (if the animal was unskinned), the animal is taken off the fire and generally given to the women and children first. Schürmann attests to a range of eating customs – only men can eat adult male animals, only women can eat adult female animals, and only children can eat young animals. The "kangaroo-rat" (this appears to be the animal presently known as Mitchell's hopping mouse) is the only animal exempt from this custom. The wallaby and particular species of bandicoot should be avoided by young men and women because it will cause discoloured beards and premature menstruation respectively. The goanna and lizard should be eaten by girls to accelerate maturity, and snakes by women to promote fertility.

301 There was no dispute about the accuracy of this account. The only issue of contention that arises with regard to this topic is the use of fish traps by Barngarla people. Dr Haines asserts, in his 2012 Report at [97], that Barngarla people did use fish traps, referencing Sarah Martin's study of fish traps "all along the coast of the Eyre Peninsula". The State submits that

there is "no positive evidence adduced to support the view that [fish traps] were used by Barngarla people or indeed were Barngarla in origin." I do not accept that submission. Dr Martin's Report notes that Aboriginal fish traps were found "all along the coast of the Eyre Peninsula", including on shores that were agreed by all parties and their experts to be Barngarla country at sovereignty (for instance, Fitzgerald Bay, which was Barngarla country prior to sovereignty – even if the speculative theory of Barngarla migration down the Eyre Peninsula were accepted). As such, it is reasonable to make the inference that Dr Haines made, that these fish traps are Barngarla fish traps, and that Barngarla people must have used fish traps at sovereignty.

Trade

302 There is very scant evidence to support the notion that the Barngarla traded with other societies at sovereignty. The applicant argued in its submissions that "the right to trade" was a right that Barngarla people had under their traditional laws and customs merely "[c]ontingent upon their ownership of their country at sovereignty".

303 Professor Sutton provided some support for that submission, stating in oral evidence:

> [S]haring is … a dutiful right. Exchanges – [generally in classical Aboriginal Australia] the whole society was riddled with forms of exchange of one kind or another. You could make a fair assumption that that happened [in the case of the Barngarla]. I think what is lacking here is – and I haven't looked up the work of Marun [sic] … who took an interest in trade in the wider region of the west coast of South Australia to check, nor McCarthy's large paper on Australian trade from, I think, the 1930s, but I don't recall any evidence as to do with trade in the early --- [Professor Sutton was here interrupted, presumably the final word would have been "ethnography" or some word to that effect]. (T1619 l42-46; T1620 l1-2)

304 Dr Haines claimed in oral evidence that Schürmann had recorded "trading between the Barngarla of the peninsula, and … presumably the northern section of Barngarla, because that's where Kokatha is, for trade, which is where they generally went to get ochre." (T1662, l36-39)

305 Earlier in the oral evidence he had also referred to an unspecified historical source that recorded "trade with the north, in ochre and so forth, but … [only] a few words." (T1620, l4-5) However, so far as I can see, no mention of any ochre trade with the north is made in Schürmann's writing.

306 In Dr Haines' 2012 Report, he wrote as follows about trading at [407]:

> McBryde (1997) points to the relationships established through trading arrangements between Aboriginals from as far apart as the Western Australian Pilbara and Parachilna, where they came for red ochre to Pukatu, which means "heart" in the Pankala [sic] language …

307 Dr Haines admitted in oral evidence that "Pukatu" was not in the Barngarla claim area. Further, the word "pukatu" does not mean anything in Barngarla according to Schürmann's 1844 dictionary.

308 In his 2012 Report at [408], Dr Haines also relates an account by an Adnyamathanha man (the father of a Barngarla man) of red ochre being traded at Parachilna in the Flinders Ranges to people from Broome and Wyndham in Western Australia. Parachilna is not in the Barngarla claim area. In my view, there is no evidence sufficient to conclude that any trade occurred between the Barngarla and other groups at sovereignty. There may have been some exchange of some items, having regard to the evidence of the geographic intersection of tribes at the "borders" of their traditional lands, and in the light of the evidence of shared ceremonies. However, I do not think it is correct to take the step of concluding that the Barngarla society at sovereignty had as one of its traditional laws and customs the bartering of items of value to them for other items from other tribal groups.

Songs and ceremonies

309 According to Elkin, increase ceremonies were practised among the Dieri and other groups and were the responsibility of the "*pintara* man", who had a patrilineal link to the site and story. Schürmann did not record any of these kinds of ceremonies among the Barngarla people. As to songs, there is very little evidence of any songs used for ceremonial purposes at sovereignty. Schürmann does provide an account of Barngarla people's love for singing, but it is recorded under the heading of "Amusements" and it is made clear that the singing was, at least as far as Schürmann understood it, entirely recreational without any religious or cultural significance.

Custom relating to naming of children

310 Schürmann indicates that the Barngarla had a system of naming their children in his 1846 article at 224:

> The Aborigines have a simple method of naming their children derived from the successive number of births by each mother. For instance: the first-born child, if a male, is named Piri; if a female, Kartanya. The second, if a boy, Warri; if a girl Warruyu, and so on to the number of six or seven names for either sex.

General Comment

311 That evidence is discussed in some detail later in these reasons. However, it is appropriate to record my view on the basis of it that there was, at sovereignty, a group of people known as the Barngarla people who were bound together by language and by their traditional law and customs, passed on from generation to generation. Those traditional laws and customs operated as a normative system. They reflect in a general way the claimed native title rights and interests which the present Barngarla people now claim, except for the asserted right to trade.

312 In addition, however, I note that that material does not demonstrate any sophisticated practices of the Barngarla people at settlement relating to the use of the sea beyond areas physically proximate to the low water mark without the use of any seagoing forms of transport. Again, that is a matter discussed later in these reasons.

(C) Subsequent European development of the claim area

313 Before examining the present-day Barngarla society, it is instructive to set out, as far as it is possible, the context and background to the Barngarla people's lives in the intervening years between "effective sovereignty" and the present day. By "effective sovereignty", I mean the period from which the claim area was progressively exposed to European settlement. This section has been adapted from the submissions of the applicant and State, and is largely uncontentious. Only documentary evidence was proffered in relation to this issue.

314 Provision of rations to Aboriginal people began to occur in the claim area from the 1840s onwards. At first, only flour and blankets were distributed from Port Lincoln, and there were no other ration stations in the claim area.

315 1846 saw the establishment of the first pastoral lease in the vicinity of Port Augusta, at Mount Remarkable (outside the claim area). Further pastoral leases were soon established in the area. Aboriginal people were often employed by the pastoralists.

316 In 1850, Poonindie Mission was established to the north of Port Lincoln by Anglican Archdeacon Mathew Hale. Its first inhabitants were eleven Aboriginal people from Adelaide. Schürmann sent children from Port Lincoln to Poonindie. Later, adults from Port Lincoln were also sent to Poonindie. Poonindie had a troubled history, and it was closed in 1894. When it was closed, the inhabitants were sent to other missions such as Point Pearce

(established in 1868) on the western side of the Yorke Peninsula or left to "fend for themselves" in the Eyre Peninsula region.

317 In 1854, Port Augusta was established as a regional town centre. The government-appointed "Sub-Protectors" encouraged Aboriginal women in the claim area to travel to Port Augusta so that their children could be born within access to medical services. The town also became the place where Aboriginal persons charged with crimes would be brought to stand trial. At around this time, disease was said to be causing a high mortality rate amongst the Port Lincoln Aboriginal population, and the Governor had directed that medical care be given to all sick Aboriginal people. By 1860, there were three ration depots in (or near) the claim area – at Port Lincoln, Franklin Harbour, and Venus Bay, along with the Poonindie Mission. They gave food and clothing to Aboriginal people, and were generally run by Sub-Protectors or police. A drought in South Australia from 1864 to 1866 is said to have exacerbated the displacement of Aboriginal people from their traditional lands that European settlement had set in motion.

318 As noted, in 1868, the Point Pearce Mission was established on the Yorke Peninsula. It is clear that many Aboriginal people from the Eyre Peninsula resided at this mission at various times.

319 From about the 1860s onwards, the history of the Aboriginal people of the Eyre Peninsula becomes yet more difficult to trace. Ronald Berndt, looking back on this period in 1985, writes that:

> By the 1860-70s, most of the local Eyre Peninsula Aborigines who remained in this area were established in fringe camps and/or working for European settlers.

320 There are occasional mentions in various newspapers in various parts of the claim area of Aboriginal people moving around the claim area in groups, and occasionally there are accounts of Aboriginal people charged with a crime. The State highlights some relevant excerpts from local newspapers from the 1880s through to the 1910s which mention Aboriginal people living in or passing through Port Lincoln, Streaky Bay, Franklin Harbour, and the Gawler Ranges. One of the references, from 1893, refers to a "good many Aboriginals" meeting in Port Lincoln for ceremonial purposes. It was around this time that many of the apical ancestors to this claim were born. "King Arthur" Davis, for instance, was said to be born in 1890.

321 The *Aborigines Act 1911* (SA) gave the "Chief Protector of Aborigines" "supreme power" over Aboriginal people and permitted police to arrest Aboriginal people without warrants. The State notes a number of reports of the deaths of the "last" Aboriginal of Port Lincoln from around the 1910s and 1920s. The *Register* reported the passing of a Port Lincoln Aboriginal woman, "Judy", on 20 September 1912. It noted that while only a few years ago the "Port Lincoln tribe" numbered in the hundreds, upon the death of Judy, "now only two remain". In 1921, the anthropologist Herbert Basedow reported that there was only one member of the "local tribe" at Port Lincoln surviving, a woman named Fanny Agars. In 1922, Ms Agars passed away. The *Advertiser* referred to Ms Agars on 28 November 1922 as "the last of the Port Lincoln tribe". The *Register* referred to her on 13 November 1922 as "generally regarded as the last of the tribe which inhabited the southern end of the [Eyre] Peninsula" and on 14 November 1922 as "the sole surviving lubra [Aboriginal woman] of the Port Lincoln tribe." On 2 July 1926, the *Register* again announced the end of the "Port Lincoln tribe" when it reported that Ms Agars' son, Jim Stanley, had committed suicide. The *Register* recorded this event as "a pathetic termination to the old Port Lincoln tribe of blacks."

322 The *Aborigines (Training for Children) Act 1923* (SA) and its successor, the *Aborigines Act 1924* (SA) gave the Chief Protector the power to remove Aboriginal children to an institution for training purposes against the will of their family.

323 In 1937, the Umeewarra Mission, just outside Port Augusta, was established. At about the same time (1937-1939), anthropologist Norman Tindale conducted genealogical research at, inter alia, Point Pearce Mission and Koonibba Mission (established in 1901 near Ceduna), which indicated that Barngarla people were living at both those missions. He also visited Aboriginal camps at Port Augusta and found Barngarla people living there too. The State notes that through the late 1930s and early 1940s, documentary evidence suggests that Kokatha and Wirangu people from Koonibba Mission (situated just to the west of the claim area) left that mission seeking work, which led to at least some settling within the claim area, in particular at Port Lincoln. The Aboriginal population of Port Lincoln subsequently increased, and by 1947 a Lutheran minister at Port Lincoln told the Aborigines Protection Board that there were 50 to 60 Aboriginal people in his "spiritual care", and that "with few exceptions they hail from the Koonibba Mission Station and are here in search of casual employment." However, there is evidence that Lizzie Richards, a Barngarla woman not from Koonibba, resided at Port Lincoln at this time.

324 Through the 1940s and 1950s, newspapers within or near the claim area regularly contained reports of court appearances by and convictions of Aboriginal people in relation to liquor offences and other criminal charges, as well as reports of Aboriginal people participating in various local sports. Some of these Aboriginal people are relatives or ancestors of the present-day Barngarla claimants. Photographs obtained by Muriel Wingfield also depict many relatives of present-day claimants living on various parts of the claim area such as Iron Knob, Minnipa, Port Augusta and Whyalla. In 1944 ethnologist Charles Mountford interviewed the Barngarla man Percy Richards, an apical ancestor of the Barngarla people, who was living in Nepabunna.

325 The *Welfare Act 1964* (SA) led to the establishment of the Aboriginal Affairs Board to manage South Australia's Aboriginal people. However, further changes in Aboriginal affairs quickly followed with the granting of the right to vote to Aboriginal people in 1967 and the establishment of a Commonwealth Department of Aboriginal Affairs in 1968. In the early 1970s, the South Australian government transferred management of certain "Aboriginal lands" to the Aboriginal Lands Trust, which delegated the management of former missions to councils of elected Aboriginal residents. The ensuing decades have seen the introduction of legislation such as the *Racial Discrimination Act 1976* (SA), *Equal Opportunity Act 1984* (SA), and *Aboriginal Heritage Act 1988* (SA), all of which have had an effect on the lives of Aboriginal people in South Australia.

326 The claim area has a relatively high Aboriginal population, and in recent years there has been a proliferation of Aboriginal organisations within the claim area. Those organisations include the Port Lincoln Aboriginal Community Council, the Nunyara Aboriginal Health Service, based in Whyalla and named for the Barngarla word for "restored to health" (as recorded in Schürmann's 1844 dictionary), the Pika Wiya Health Service Aboriginal Corporation, based in Port Augusta and named for the Western Desert words for "no sickness", the Barngarla Aboriginal Consultative Council, created in 1998, the Barngarla Management Committee, and the Whyallina Heritage Aboriginal Corporation in Whyalla.

327 This record of early European contact with Aboriginal people in the claim area is necessarily fragmentary, but it is sufficient to indicate the considerable difficulties faced by Aboriginal people in the claim area at that time.

General Comments

328 In my view, that material supports the conclusion that in the period between effective sovereignty and the present day, the Barngarla tribe as it existed at sovereignty has continued to exist, and the present claim group is the continuation of the original Barngarla people.

329 That conclusion is drawn having regard to the challenges that European settlement presented to the Barngarla tribal people. Those challenges include introduced disease and displacement. Particularly, in the region of Port Lincoln, those challenges – as media reports indicate – really confronted the ongoing survival of Barngarla people and their ongoing relationship with that land. I have discussed that issue later in these reasons. However, despite those media reports, I think it is clear that a group of people known as Barngarla people have continued to exist, and (as I later find) have continued to exist as a society bound together by the traditional laws and customs which existed at sovereignty. Inevitably, the exposure to European settlement and the benefits of better social and health systems and education and, of course, increased mobility has meant that those traditional laws and customs have evolved in response to those societal pressures or opportunities. But I do not think the consequence is that the laws and customs which now bind the Barngarla people (the present claim group) as no longer traditional. Indeed, it would be a little ironic, if not sad, that the changes induced by European society might have simply destroyed the traditional laws and customs binding the societal group that existed at settlement, or the society at all, however well meaning were the changes or the policies underlying them. I have reached that view despite recognised difficulty of identifying the full extent of the normative system which existed at settlement, and despite the fact that some of the normative rules and practices which existed or may have existed at sovereignty are no longer practised or known. I have also reached that view, cognisant of the alternative thesis put forward by the State that whatever Barngarla society existed at settlement no longer exists because there has been no continuity of the normative rules and customs which bound that society together, because European settlement and its consequences over time during the twentieth century simply caused that society to cease to exist as a group bound by their pre-settlement normative system of rules and customs. That is, accepting as I do, the genuineness of the evidence adduced by the applicant on behalf of the Barngarla people as a claim group (subject to the comments in the next section of these reasons), I do not find that their evidence reflects only an attempt to recreate a society which had ceased to exist and to re-establish a set of

normative rules and customs and more generally a relationship to country which, for some period – the twentieth century, no longer existed.

330 It is appropriate in the light of those findings to refer in more detail to the evidence given orally.

THE WITNESSES

331 The evidence of two witnesses was of principal importance in this case. Those witnesses were Howard Richards and Brandon McNamara Snr.

Howard Richards

332 Howard Richards was born in Port Lincoln on 15 November 1951. He is the son of Elva Richards and a Norwegian man. Elva Richards was the daughter of Fred and Elizabeth Richards Snr. Fred Richards was identified by Howard Richards as a Wirangu man. Elizabeth Richards Snr's maiden name was Eyles. Howard Richards identified Elizabeth Richards Snr as a Barngarla woman. Her father (Howard's great-grandfather) was Bob Eyles, and her mother was Susie Richards, a Barngarla woman.

333 Howard Richards said he spent much of his childhood at Mallee Park in Port Lincoln, and also in Kimba. When he was about 14, he and his brothers and sisters were taken from his family by a government officer to Port Lincoln, where they were transported to Adelaide. Howard was sent first to Windanna Remand Centre, then to Glandore Home for Boys. When he was about 17, he was able to leave the boys home to work. He worked in Adelaide and Meadows before getting a job in Elliston, where he was able to see his family again. Howard later spent time in Western Australia where he met and married a Western Australian Aboriginal woman, Isabel Sambo, with whom he had five children. Howard later lived variously at Port Lincoln, Kimba and Kalgoorlie. He now lives at Ikkata Farm, which is apparently roughly 20 km northwest out of Port Lincoln.

Brandon McNamara Snr

334 Brandon McNamara Snr was born on 1 December 1945 at Umeewarra Mission near Port Augusta. His parents were Victor McNamara and Jean McNamara (nee Glennie). He was one of twelve children. Brandon identifies his father as "Barngarla-Wirangu", that is, Barngarla on one side and Wirangu on the other. Brandon's mother Jean was the daughter of Susie Richards (a Barngarla woman) and Arthur Glennie (a Wirangu man). Brandon spent his childhood living at Mt Ive Station (just outside the claim area, in the Gawler Ranges) and

then at Minnipa (just inside the western part of the claim area). Later in life, he has lived in Whyalla and in Fregon (in the Anangu Pitjantjatjara-Yankunytjatjara Lands (APY Lands)). Brandon McNamara now lives in the town of Port Lincoln.

Lizzie Richards' family witnesses

335 Three other witnesses were, like Howard Richards, descended from Fred and Elizabeth Richards Snr (and through Lizzie Richards, to the apical ancestors Susie Richards and Bob Eyles):

Elizabeth Richards Jnr

336 Elizabeth Richards Jnr was born on 16 August 1961 in Port Lincoln. Her parents were Vera Richards Snr and an Arthur Smith-Yates. Vera Richards Snr was the daughter of Fred and Elizabeth Richards Snr (Elizabeth Richards Snr, nee Eyles, was a Barngarla woman). She is therefore Howard Richards' first cousin. Like Howard, Elizabeth was taken from her family, though much younger, when she was about 5. She was taken by boat from Port Lincoln to Adelaide. There, she was fostered out. She returned home to Port Lincoln when she was 13. Apart from that interlude, she has lived at Port Lincoln most of her life, and currently lives there.

Evelyn Dohnt

337 Evelyn Dohnt was born on 18 May 1983 in Adelaide to Frederick Agius and Sharon Dohnt (née Richards).Sharon Dohnt is the daughter of Vera Richards Snr, who is in turn the daughter of Fred and Elizabeth Richards. So Evelyn is Elizabeth Richards' niece. Evelyn Dohnt was brought up by foster parents, and so was unaware of her Barngarla ancestry. She discovered this ancestry through a chance meeting at her work in Aboriginal health with a daughter of Howard Richards. She met her biological family at a family reunion in 2005, and has since moved to Port Lincoln.

Vera Richards Jnr

338 Vera Richards Jnr was born on 12 June 1982 in Port Lincoln. Her parents were Brenton Richards and Devina Sambo. Brenton Richards was the son of Vera Richards Snr, who was the daughter of Fred and Elizabeth Richards. Vera Richards Jnr is therefore Evelyn Dohnt's first cousin and Elizabeth Richards' niece. Vera has spent most of her life in Port Lincoln, except for a few years living in Kalgoorlie, and a few years in Alice Springs. She presently lives in Port Lincoln.

McNamara family witnesses

339 Four close relatives of Brandon McNamara Snr gave evidence:

Edith Burgoyne

340 Edith Burgoyne is a sister of Brandon McNamara Snr. She was born on 19 January 1947 at Iron Knob in the bush. Edith grew up at Iron Knob, then Mt Ive Station, then Minnipa. She identifies as a Barngarla woman.

Lynne Smith

341 Lynne (Helen) Smith is another sister of Brandon McNamara Snr. She was born on 21 April 1956 in Wudinna (within the claim area). She lived in Minnipa, then Kimba. She married Keith Smith at age 20. They lived at Port Lincoln, a place called "Wirrulla", Minnipa and Whyalla, but mainly at Whyalla. Keith Smith passed away in 2010.

Brandon McNamara Jnr

342 Brandon McNamara Jnr is Brandon McNamara Snr's son. He was born on 18 April 1972 at Port Lincoln. His mother was a Wirangu woman, but he identifies as Barngarla, through his father. Brandon grew up in Port Lincoln before moving to Kalgoorlie with his first wife Marcia Coleman, with whom he had a daughter. Brandon then married Robyn Forbes, a Kuyani woman who grew up in Port Augusta. They are now separated, and Brandon presently lives in Whyalla.

Troy McNamara

343 Troy McNamara is the son of Elliott McNamara and Doreen Wanganeen. Elliott McNamara was Brandon McNamara Snr's brother, so Troy is Brandon Snr's nephew (and Lynne's and Edith's nephew). Troy works with an Aboriginal mining company at Iron Knob and in Perth.

"King Arthur" Davis' family witnesses

344 Another prominent family from which a number of Barngarla-identifying witnesses were drawn was the Dare family. All four of the Dare witnesses could trace their ancestry back to the apical ancestor Arthur "King Arthur" Davis through Percy Davis. The witness Eric Paige could also trace his ancestry back to "King Arthur", through his father Andrew Davis.

Maureen Atkinson

345 Maureen Atkinson (nee Dare) was born in Whyalla on 27 December 1944. Her parents were Bob and Edna Dare (nee Davis). Edna Davis was the granddaughter of Susie Richards and Bob Eyles (through her mother Dolly Davis (nee Eyles)). Maureen grew up mainly at Iron Knob and Port Augusta. She was taken by the government and placed at Umeewarra Mission. Later in life, she was placed with a farming family at Melrose (outside the claim area) as a domestic. She then attended Bible College, where she met her husband, and they eventually settled back in Port Augusta.

Simon Dare

346 Simon Dare was born on 6 September 1947 at Port Augusta. His parents were Robert Dare and Edna Davis, so he is Maureen Atkinson's brother. Simon Dare identifies as a Barngarla man. Simon lived in Port Augusta and at nearby Umeewarra Mission as a child. He would also often go to Iron Knob.

Harold (Harry) Dare

347 Harry Dare was born on 28 October 1953 at Port Augusta. He is Maureen Atkinson's and Simon Dare's brother. Harry Dare identifies as a Barngarla man. He was taken to Umeewarra Mission when very young, and then when he was three years old, he was taken to a boys' home in Adelaide. When he was 15 he left Adelaide to attend school in Whyalla, and then work there. He currently works at Roxby Downs, which he regards as Barngarla country.

The late Ms Dare

348 Ms Dare was born on 17 July 1950 at Port Augusta. She is a sister of Maureen Atkinson, Harry and Simon Dare. When she was about five she was taken from her family by the government and placed in Adelaide institutions and foster homes over about nine years. She then returned to Port Augusta to her family. Since then, she lived in Kimba, Whyalla, Iron Knob, Andamooka and Port Lincoln, and then settled in Port Augusta. Ms Dare passed away before the hearing of this matter, but her affidavit was received into evidence.

Linda Dare

349 Linda Dare was born on 15 July 1969 in Brisbane to her parents Hank Chapman and Ms Dare. Her mother is a sister of Maureen Atkinson and Simon and Harry Dare, so Linda Dare is their niece. From about the age of two, Linda Dare lived at Umeewarra Mission. At some stage when she was still very young, she was put into a foster home in Adelaide. When

she was about five, she returned to her mother who was then living in Broken Hill. They then moved to Port Augusta, and then to Melbourne. When Linda Dare was about 15, she returned to Port Augusta, where she has lived ever since.

Eric Paige

350 Eric Paige was born on Witchelina Station (in the APY lands) on 8 September 1950. His parents were Andrew Davis and Ivy Page. Andrew Davis was a son of Arthur Davis, an apical ancestor of this claim (Andrew Davis is himself also an apical ancestor). Thus, Eric Paige is the first cousin once removed of Maureen Atkinson, Harry and Simon Dare. When Eric was young his family moved to Marree and later he worked at Innamincka Station (near the Queensland-South Australia border), Marree, Finniss Springs Station, Stuart Creek and on the railways along the Nullarbor Plain (all outside the claim area). He would visit Port Augusta to see family. At some point, Eric Paige changed the spelling of his surname from "Page" to "Paige". He was married for 40 years and for that time lived mainly in Alice Springs. In 2006 he moved to Port Augusta, but often travelled to Ernabella (in the APY lands). He remains resident in Port Augusta.

Percy Richards' family witnesses

351 Five witnesses were descended from (or married to descendants of) the apical ancestor Percy Richards:

Lorraine Briscoe

352 Lorraine Briscoe was born on 21 August 1954 on Leigh Creek (not in the claim area). Her mother was Grace Coulthard, who was not a Barngarla woman. Her father was Andrew Richards, the son of Percy Richards, who is identified as a Barngarla man, and who was the brother of Susie Richards and the son of Dick Richards, all Barngarla people. Lorraine is therefore a distant cousin of Howard Richards (to be precise, she is Howard's third cousin once removed). Lorraine attended school in Leigh Creek, Nepabunna and Port Augusta (of which only Port Augusta is within the claim area).

Randolph Richards

353 Randolph Richards was born in 1951 at Hawker (outside the claim area). He was a brother of Lorraine Briscoe. He grew up in the Wilpena Pound area. He lived in Port Augusta at the time he made his affidavit which has been received as evidence in this proceeding. Randolph passed away before the hearing of this matter.

Leroy Richards

354 Leroy Richards was born at Leigh Creek (outside the claim area) on 11 September 1952. Leroy identified as both Adnyamathanha and Barngarla. Leroy was the brother of Lorraine Briscoe, and thus the grandson of Percy Richards. Leroy lived at Nepabunna, Blinman, Parachilna, Hawker, Copley and then Berri with his wife Rosalie. Leroy passed away before the hearing of this matter, but his affidavit was received into evidence.

Rosalie Richards

355 Rosalie Richards (née Sluggett) was born on 11 April 1951. She eventually became a teacher and then a principal at Nepabunna. There she met Leroy Richards, who she subsequently married. After their marriage, Leroy and Rosalie remained at Nepabunna, then moved to Winkie in the Riverland region of South Australia (outside the claim area). They would make regular trips many times a year to Leroy's country, particularly the Flinders Ranges.

Amanda Richards

356 Amanda Richards was born in Berri (not within the claim area) on 29 March 1989. She is the daughter of Leroy and Rosalie Richards. She identifies as both Adnyamathanha and Barngarla. Amanda Richards presently lives in Adelaide as a student.

Other Richards-Eyles family witnesses

357 Two descendants of Archie Eyles, son of Susie Richards and Bob Eyles, gave evidence:

Yvonne Abdullah

358 Yvonne Abdullah (née Eyles) was born in Wudinna on 14 July 1947. Her parents were Archie and Zena Eyles (née Dare). Yvonne Abdullah grew up in Iron Knob. After school, Yvonne worked at Nonning Station (in the Gawler Ranges).

Roddy Wingfield

359 Roddy Wingfield was born in Whyalla on 10 September 1962. His parents were Muriel Eyles and Donald Wingfield. Muriel Eyles's parents were Archie and Zena Eyles (nee Dare). Archie Eyles' parents were Susie Richards and Bob Eyles. Roddy Wingfield is therefore Yvonne Abdullah's nephew. He spent his first years in Iron Knob, then moved to Whyalla. After school, he travelled around Australia working but for the last 20 years he has been living in Whyalla.

360 One descendant of Ada Eyles, daughter of Susie Richards and Bob Eyles, gave evidence:

Dawn Taylor

361 Dawn Taylor was born on 25 November 1960 in Kimba. Her parents were Roma and Leslie Taylor. Leslie Taylor was a white man. Roma Taylor was the daughter of George Reid, a Kokatha man, and Ada Reid (nee Eyles), a Barngarla woman. Ada Reid was a daughter of Susie Richards and Bob Eyles. Dawn Taylor grew up mainly in Kimba, also spending some time at Umeewarra Mission. She identifies as a Barngarla woman.

362 One descendant of Burt Eyles, son of Susie Richards and Bob Eyles, made an affidavit that was received into evidence, having passed away before the hearing of this matter:

Harry Eyles

363 Harry Eyles was born on 14 March 1944 in Whyalla. He grew up on Mt Ive Station, then the Middleback Ranges Station, attending school at Iron Knob and Whyalla.

Croft family witnesses

364 Evidence was received from two members of the Croft family – one as a witness (Barry), and one in the form of an affidavit, the deponent having passed away before the hearing (Henry):

Barry Croft

365 Barry Croft was born on 11 June 1952 at Whyalla. His parents were Harry and Phyllis Croft (née Hart). Harry Croft is an apical ancestor of this claim. Barry spent most of his childhood at Iron Knob. He presently lives in Whyalla.

Henry Croft

366 Henry Croft was born on 17 November 1954 at Port Augusta. He was a brother of Barry Croft. He grew up mainly in Iron Knob and then Whyalla.

Bill Lennon

367 Bill Lennon is an Antakirinja Yankunytjatjara man. He was born somewhere near Oodnadatta 76 years ago. As a child he lived at Umeewarra Mission with many Barngarla people. As a young man he worked at Lincoln Gap Station (within the claim area) and regularly visited Iron Knob and the Gawler Ranges. The Eyles brothers (Archie and Bert) put him through Barngarla wilyaru law such that Bill Lennon, though principally an Antakirinja Yankunytjatjara man (who has gone through Western Desert wati law), is also accepted as a Barngarla man. Bill Lennon now lives at Mt Willoughby Station (not in the claim area).

368 I have discussed the content of their evidence in the next section of these reasons. It also addresses the couple of matters where the State specifically raised the credibility of certain aspects of the evidence of a witness or witnesses.

CURRENT BARNGARLA SOCIETY

Notion of the "Barngarla people" as a distinct society

369 The evidence strongly suggested that all the Barngarla witnesses had a definite notion of the "Barngarla people" as a distinct society. That this notion was accurate was more or less a tacit assumption in all the evidence. All witnesses understood questions from counsel about whether a particular person was Barngarla or not, or whether particular parts of country were Barngarla or not. Examples can be given from, amongst many others, the evidence of Troy McNamara (T1078) and of Vera Richards (T1242). Perhaps the most explicit vocalisation of this generally tacit assumption was given by Maureen Atkinson:

> … I've had some speaking engagements, and I introduce myself as a Barngarla woman. … [I do that] [b]ecause I am. It's important for me to know who I am. … I just feel part of, you know, my area, Barngarla area. … [It] means something for me, sir, to know who I am and to feel that. (T1150-T1151)

Language of the Barngarla people

370 A number of Barngarla lay witnesses claimed to have spoken Barngarla when they were younger, to have known people who spoke Barngarla, and heard them speak Barngarla, or, in some isolated cases, to still be able to speak some Barngarla.

371 First, a number of lay witnesses claimed to have spoken Barngarla as a child, but now forgotten it, generally because of forced removal from their childhood homes. They included Simon Dare, Maureen Atkinson, Elizabeth Richards Jnr, and Lynne Smith (though Ms Smith only claimed to have spoken some Barngarla words as a child). (eg T1131-1132)

372 However, Simon Dare, under cross-examination, was not able to give the Barngarla word for "mother", "father", or "Port Augusta" (the town in which he grew up). Further, Lynne Smith identified a number of words, such as the words for emu and kangaroo, as Barngarla words that in fact appear to be Western Desert words. She said she "knew" they were Barngarla words because she "spoke it all my life." (T943) Maureen Atkinson suggested that Kokatha language was the same as Barngarla language (T1156). Kokatha "language" is generally considered to be a Western Desert dialect.

373 Second, many lay witnesses claimed to have known deceased people who spoke Barngarla. Linda Dare said her recently deceased mother was the only person she knew of who knew Barngarla. (T608)

374 Howard and Elizabeth Richards both said that Lizzie Richards Snr (their grandmother) could speak Barngarla. Howard Richards also said that his mother Elva Richards could speak Barngarla.

375 The late Henry Croft, in his summary of evidence, stated: "I consider that my mother [Phyllis Croft] was the last person to be able to speak the Barngarla language fluently." He says his mother died in 1993.

376 Yvonne Abdullah gave evidence that her father Archie Eyles could speak 13 Aboriginal languages, but she did not know if Barngarla was amongst them. Lorraine Briscoe said that Archie Eyles could speak Barngarla.

377 Simon Dare claimed that Stanley "Moonie" Davis, Jack Davis, "Rossie" Davis and "Budda" Davis all spoke Barngarla. That is partially corroborated by Lorraine Briscoe, who also said that Stanley "Moonie" Davis could speak Barngarla.

378 Third, Randolph Richards claimed he could speak Barngarla "in part" in his affidavit, while his brother Leroy Richards implied in his affidavit that he could at least at some stage understand Barngarla, because he said his father spoke to him in Barngarla, and his wife Rosalie gave evidence that Leroy could speak Barngarla until his death in 2003. Rosalie Richards said:

> [Leroy] said that he spoke both Adnyamathanha and Barngarla. He said they were very similar languages, and that most of the vocabulary was the same. Often they would have different initial sounds, like he would say "varlu" is the Adnyamathanha term for meat; "barlu" was the … Barngarla term for meat, for instance. He … used Adnyamathanha terms when he was in Adnyamathanha country, and … Barngarla terms when … in Barngarla country, and he was quite strict in adhering to that. (T1274, ll 39-46)

379 That evidence is strengthened by the fact that it broadly accords with Schürmann's 1844 dictionary, which records *paru* as the Barngarla term for meat (keeping in mind that Schürmann wrote Barngarla as "Parnkalla"). Amanda Richards said she had heard Leroy and Randolph Richards speak Barngarla, along with unidentified cousins of hers and "other Barngarla people" whose names she could not recall. Ms Richards' explanation of how she knew the language was Barngarla was somewhat equivocal:

> *MR O'LEARY:* Could you be mistaken in recognising and … identifying it as Barngarla and it might be a different language?
>
> …
>
> *AMANDA RICHARDS:* I guess when the words are the same, are similar, it could be either of [Barngarla language or Adnyamathanha language], but I have seen that two Barngarla people talking together and they were speaking in their language. If it is the same as Adnyamathanha, then I guess it is the same as Adnyamathanha.
>
> *MR O'LEARY:* How did you know it was Barngarla; that's all I'm trying to find out?
>
> *AMANDA RICHARDS:* Well, just like the pronunciation differences and also the Barngarla people talking it. (T1072)

380 Randolph and Leroy's sister, Lorraine Briscoe gave evidence that she did "not really" know anything about the Barngarla language and that "Dad never hardly spoke Barngarla", except with Andrew Davis, Stanley "Moonie" Davis, and Archie Eyles (and perhaps some others). Maureen Atkinson also said that she still spoke some Barngarla words, saying "even some of the words I say now, you know, people say, 'Oh that's Barngarla'".

381 Fourth, as to current use of Barngarla words by the claimants, the applicant draws attention to a number of words used by the claimant lay witnesses in an annexure to its submissions. Some of them are explicitly claimed to be Barngarla words by the lay witnesses; others are not. None of them appear in Schürmann's 1844 dictionary (or, if they do, they mean something quite different from what the witness asserted they meant). Many of them are Western Desert words. To give one example, Brandon McNamara Snr claimed that *walga* means "eagle" or "policeman" in Barngarla. In fact, *walga* means those things in Western Desert language. The word *walga* does appear in Schürmann's 1844 dictionary, but is translated as "bag, protuberance, the protruding part of anything". Schürmann gives *willu* or *willullu* as eagle. Another example, also concerning Brandon McNamara Snr, is Mr McNamara's claim that the town name of "Wudinna" derives from *wati ina*, meaning "man standing there". He implied that *wati ina* was Barngarla. However, *wati* is a Western Desert word for man (the Barngarla word for man is *yura*), and *ina* has not previously been recorded to be a Barngarla word. (McCaul 2013 report, [229])

382 However, Amanda Richards gave the following evidence (not explicitly relied upon by the applicant):

> *MR HILEY:* What does [your three-year-old daughter] call you?
>
> *AMANDA RICHARDS:* She calls me Mum, and Ngami as well.

> *MR HILEY:* Okay. And what does she call your sister Rebecca?
>
> *AMANDA RICHARDS:* Also Ngalami, which means Big Mum.
>
> …
>
> *MR HILEY:* Okay. Big Mum. What else does that mean?
>
> *AMANDA RICHARDS:* It's like auntie, because [Rebecca's] older than me, and ngala is bit [presumably a typographical error, should read "big"], and ngami is mum, so just combine the two, ngalami.
>
> *MR HILEY:* And those words, do you know what language they are?
>
> *AMANDA RICHARDS:* They're both Adnyamathanha and Barngarla. (T1040 l39-T1041 l5)

383 Schürmann's 1844 dictionary records "ngammi" as meaning mother, and "ngalla" meaning "much, plenty, many". So Ms Richards, Rebecca Richards, and Ms Richards' young daughter do currently use at least two Barngarla words.

384 Another Barngarla word was used by Rosalie Richards. She referred in evidence to a bearded dragon lizard as *kadnu.* Schürmann records *kadno* as the term for "a yellow striped species of lizard". While bearded dragons are not known for having yellow stripes, it is certainly a very close match.

385 The lay witnesses did use place names for different parts of the claim area, many of which are obviously Aboriginal and thus probably Barngarla in origin. An example is the town of Kyancutta, which Dr Rose said was a Barngarla word. However, the lay witnesses' references to possible Barngarla place names should not be overstated. Many of the lay witnesses came from the southern part of the Eyre Peninsula, but of the 55 place names from the southern Eyre Peninsula that Dr Rose identified as possibly Barngarla in origin, very few were ever used by the claimant witnesses in evidence. Wanna, on Sleaford Bay, was mentioned briefly by two witnesses, Evelyn Dohnt and Vera Richards. Tulka, south of Port Lincoln, was mentioned by Howard Richards.

386 A final matter should be mentioned: there was evidence given by the lay witnesses of a programme being run by Professor Ghil'ad Zuckermann of the University of Adelaide that aims to revive (or "replenish" or "retrieve") the Barngarla language. It appears that Barngarla people, including some witnesses, such as Elizabeth Richards, Vera, and Evelyn Dohnt, have

attended Professor Zuckermann's classes. Professor Zuckermann's classes draw upon Schürmann's 1844 dictionary.

Sub-groups

387 The weight of the evidence suggested that there is presently some form of sub-group extant in current Barngarla society. However, the evidence of the various witnesses as to the exact nature of those sub-groups was not always consistent. Generally, the witnesses said that different people "took responsibility" for different parts of Barngarla country. Perhaps the most explicit attempt to describe this 'system' of sub-groups that has developed was made by Roddy Wingfield:

> … [C]ertain families were told certain things of certain parts of – of different parts of the country to look after. So nobody can talk about certain parts where other families are. It's like the Richards down in Lincoln, they worry about what's around Lincoln and us mob here we worry about the Gawler Ranges and around here. … (T714, l12-20)

388 Howard Richards, for instance, said it was his responsibility "to do anything to do with cultural heritage or land and sea within the vicinity of [the Port Lincoln] area" and that he has a "right to speak for that area." Mr Richards indicated that his "jurisdiction", so to speak, extends "[a]s far as Whyalla and Kimba", and that "I do give some of [my] responsibility to members of my family."

389 Mr Richards suggested that his authority over the Port Lincoln area was something that had been passed down in his family:

> *MR EVANS:* If … non-Barngarla [people] come … into Port Lincoln … do they need to ask permission of anybody to come there?
>
> *HOWARD RICHARDS:* … [F]rom my memory … all I've known – all the time that I was at [Port Lincoln as a child], strangers that come to that area came to my grandfather and grandmother. And they put them up and look after them, and then they left.
>
> *MR EVANS:* What about now?
>
> *HOWARD RICHARDS:* … I'm … carrying on what … my grandparents [did] … and that anything to do with cultural area, traditional land or sea – they come to me. (T363, l40-T364, l4)

390 Mr Richards' evidence on this topic was broadly corroborated by Brandon McNamara Snr, Roddy Wingfield, Eric Paige and Elizabeth Richards (T1229, l28-34). However, a minority

of witnesses (Edith Burgoyne and Brandon McNamara Jnr) appeared to suggest that in fact Brandon McNamara Snr shared responsibility for the Port Lincoln area with Howard Richards. On the whole, though, the evidence fairly consistently indicated that Howard Richards had responsibility for the Port Lincoln area.

391 The Gawler Ranges, Iron Knob, and Whyalla area was consistently designated as Brandon McNamara Snr's primary responsibility, or the responsibility of the McNamara family more broadly, though there was some inconsistent evidence, particularly regarding the margins of that area. Mr McNamara himself said "I look after Whyalla, Iron Knob and the [Gawler] Ranges and other areas." (The transcript incorrectly refers to "the Bora Ranges" – there is no such place – that is clearly a misheard transcription of "the Gawler Ranges".) He also said he "looks after" the Wudinna area. Brandon McNamara Jnr also appeared to agree (although his answer was somewhat opaque) that the Minnipa area (close to Wudinna and the Gawler Ranges) and the Whyalla area were his family's responsibility, and thus principally his father's responsibility. Eric Paige also agreed that the Gawler Ranges and Iron Knob area, at least, was Brandon McNamara Snr's primary responsibility . Howard Richards described the country over which Brandon McNamara Snr has responsibility as being the country "… towards Whyalla to Kimba to Minnipa, right through all that area to the Gawler Ranges…" It appears that Howard Richards regards Whyalla and Kimba as the "border" between his and Mr McNamara's "jurisdictions" because, as mentioned above, Mr Richards identifies his own responsibilities as extending "[a]s far as Whyalla and Kimba". Bill Lennon (who does not principally identify as Barngarla) stated that Brandon McNamara Snr is responsible for Iron Knob. Edith Burgoyne's evidence was consistence with the hypothesis that Brandon McNamara Snr's family has responsibility for the Whyalla area:

> *MS GOODCHILD:* So if people come to Whyalla, for example, and wanted to … put through a road or do some digging, to whom do you think or do you know they would go to seek permission from Barngarla people?
>
> *EDITH BURGOYNE:* Well, I live in Whyalla and we've got Lynne Smith there as well … she's my sister. And my nephew lives in Whyalla Brandon Junior. (T227 l46-T228 l5)

392 Edith Burgoyne, Lynne Smith and Brandon McNamara Jnr are all immediate relatives of Brandon McNamara Snr. Brandon McNamara Snr also said that Edith Burgoyne and Lynne Smith "look after the Gawler Ranges area and Iron Knob, parts of Whyalla with the other women…"

393 However, Brandon McNamara Snr does not regard himself as the sole "caretaker" of all this country (though it seems many of the other witnesses mentioned above do):

> *HIS HONOUR:* What do the Eyles look after?
>
> *BRANDON MCNAMARA SNR:* Well, they would be Whyalla and Iron Knob too.
>
> *HIS HONOUR:* So they share that with you, do they?
>
> *BRANDON MCNAMARA SNR:* Yes, but I look after men's stories and most of them … haven't been through men's business but there's women there that looks after women's stuff … (T148, ll21-28)

394 A little earlier in the transcript, Mr McNamara makes further comments on this issue which are a little opaque, but appear to suggest that he also shares responsibility for the Iron Knob area with the Reids and Wingfields, as well as mentioning the Eyles again. Brandon McNamara Jnr also appeared to state that Iron Knob was the responsibility of "Reids, Wingfields, Dares…"

395 Also, unlike Mr Richards, Mr McNamara does not appear to regard the Kimba area as either his responsibility or Mr Richards' responsibility. He stated that the "Kimba area" is the responsibility of "[t]he Reids and Taylors and all that."

396 Moreover, Roddy Wingfield said in evidence taken at Whyalla Courthouse: "[U]s mob here we worry about the Gawler Ranges and around here [that is, presumably, Whyalla]." It is not clear who "us mob" is, but it is certainly not the McNamara family, as Mr Wingfield is only distantly related to them.

397 Finally, Port Augusta and its vicinity were said by the witnesses to be the responsibility of the Dares, Davises, and Eric Paige.:

> *MR HILEY:* … And then what about up in the Port Augusta area, up towards north?
>
> *HOWARD RICHARDS:* More or less the Dares/Davis family share. You have got Simon [Dare] and Harry [Dare] and then you have got Eric [Paige] and then further north, yes, as well, yes. (T77 ll4-8)

398 Eric Paige agreed that he, Harry Dare and Simon Dare generally took responsibility for the "Port Augusta area". Brandon McNamara Snr also broadly corroborated this account of responsibility, saying that Port Augusta and the northern area "right to Roxby Downs" is the responsibility of Eric Paige and the Dare family.

399 The rationale for this modern division into a form of "sub-groups" is somewhat obscure. Howard Richards gives a variety of justifications for his having the area of responsibility he has. Principally, it is because (he asserts) the Barngarla community and the Barngarla Native Title Management Committee have authorised him to speak for and take charge of the land in his area of responsibility. They gave Mr Richards that authorisation because "I grew up there" and because "I am a man" (by which I infer Mr Richards means he is an initiated man). He later again mentions that he respects the "position" of Barngarla people "wherever we grew up". Brandon McNamara Snr seemed to support that notion when he said: "Howard lived [in the Port Lincoln area] all his life, … so I wouldn't interfere with his area, you know." Mr McNamara's own experience is broadly consistent with the "wherever we grew up" thesis. Though he was born in Port Augusta, and now lives in Port Lincoln, he spent most of his formative years in the Gawler Ranges, Minnipa, and Whyalla – all areas he is now said to have responsibility for.

400 Helen Smith gave a possibly different rationale for the division, saying simply "If you know the knowledge of your country, then you're entitled to speak for it." Roddy Wingfield appeared to suggest yet another rationale, that of an arbitrary division decided at some past point: "Certain families were told certain things of … different parts of the country to look after."

401 It is worth mentioning two other matters that bear on this issue. First, Simon Dare at one stage suggested a hypothesis that is inconsistent with the above notion of "sub-groups". He claimed that his great-grandfather, "King Arthur" Davis was not just "the boss" of the "Port Augusta area" – as had been suggested by counsel for the applicant – but in fact "the boss" for the "whole lot of Barngarla area". The oral evidence then continued thus:

> *MR HILEY:* Okay. And who's boss today?
>
> *SIMON DARE:* Oh, well, they say it runs in a line, so I must be next.
>
> …
>
> *MR HILEY:* Okay. So you say "they" say that; what do you say?
>
> *SIMON DARE:* Bring it on. (T735, ll16-26)

402 No other witness suggested that Simon Dare was the "boss" for all Barngarla country. That suggestion would in fact run counter to all the evidence given by the other witnesses. This hypothesis is only posited by Mr Dare, who, as the State pointed out, for a long time

identified as Kokatha rather than Barngarla. I do not accept that Mr Dare's evidence is correct.

403 Second, there was some very limited evidence to support the notion that the sub-groups identified by Tindale (mentioned above) persist. Linda Dare referred to the "Wartabarngarlas" (incorrectly transcribed as "Wartafarngarlas"). She appears to state that the Warta Barngarla tribe was in 1975 absorbed into the Aboriginal identity known as "Adnyamathanha". Similarly, Simon Dare identified Leroy and Randolph Richards as being "Warta-Barngarla". However, Leroy and Randolph Richards do not refer to themselves as such in their affidavits.

404 Another sub-group identified by Tindale and Hercus and Gara, Nauo Barngarla, was mentioned by the lay witnesses. However, there is scope for confusion because the native title determination application before this Court now known as the Nauo Native Title Claim (proceeding number SAD 6021 of 1998) was, from its initial filing on 17 November 1997 up until 2 April 2012, known as the Nauo-Barngarla Native Title Claim, not because it concerned that putative sub-group of the Barngarla, but because it was a joint claim by the Nauo and Barngarla people at that time. References to "Nauo-Barngarla" by Troy McNamara are clearly references to that native title claim rather than any Barngarla subgroup.

405 The following exchange between counsel for the applicant and Howard Richards may be a reference to the Nauo-Barngarla sub-group rather than the native title claim:

> *MR HILEY:* That word Nauo, does it have a meaning?
>
> *HOWARD RICHARDS:* They say it has. Nauo is a native cat. Native cat.
>
> *MR HILEY:* Okay. So have you heard of the expression "Nauo Barngarla"?
>
> *HOWARD RICHARDS:* Nauo Barngarla, yes. Native cat. Barngarla. Talking … probably about their totem. (T112, ll30-34)

406 Schürmann does not record "nauo" or a similar-sounding word as meaning "native cat". "Nauo" appears in his dictionary only as "the national name of the native tribes inhabiting the country about Coffin's Bay".

407 Brandon McNamara Snr does appear to refer to the Nauo-Barngarla sub-group at one point in his evidence, but makes clear that he knows of it because he "[looked] back in the history books".

408 Finally, Lynne Smith claimed her husband was "Kooapidna", and asserted that the "Kooapidna" were an Aboriginal group distinct from the Barngarla with a country distinct from the Barngarla.

Land tenure system

409 Much of the evidence about the nature of Barngarla people's rights to land has been explored or at least touched upon in the above section on sub-groups.

410 One point that was made by a number of Barngarla witnesses is that a consequence of Barngarla people's rights to Barngarla country is that Aboriginal people generally require permission from the Barngarla to go about Barngarla country, and certainly to do anything related to Aboriginal culture. An example of a breach of this norm is the erection of a sign at Mount Wudinna that refers to the Kokatha people. Brandon McNamara Snr said about that:

> [Kokatha] come here. They didn't ask Barngarla permission can they put a sign in there representing … their name … They didn't ask Barngarla. They done that without permission … from the Barngarla People. … [T]o me, they got no rights to put a [Kokatha] sign in – alongside of a Barngarla man [this is presumably a reference to the belief that Mount Wudinna is connected to the Barngarla "man" story].

411 Dawn Taylor suggested that the exercise of this right was differentiated according to locality. She said that permission was needed from the relevant local Barngarla people for Barngarla people from one region of Barngarla country to travel to another part of Barngarla country. Roddy Wingfield suggested that the exercise of this right was also differentiated according to ritual status. He said that permission was needed from Barngarla lawmen to visit some regions of Barngarla country, even if one was Barngarla.

412 Another incident of Barngarla people's rights in respect of Barngarla country is the right to conduct "welcome to country" ceremonies and to "speak for country" in heritage matters and more generally, which also necessarily encompasses a responsibility to protect Barngarla country. Elizabeth Richards and Howard Richards gave evidence of having conducted "welcome to country" ceremonies. Vera Richards gave evidence that her young son had also conducted such a ceremony at his school.

413 Examples in the evidence of Barngarla people speaking for country were plentiful. Howard Richards has been involved in protecting Aboriginal fish traps in the area from development of the Port Lincoln marina with the late Brenton Richards. Together, they saved some fish

traps from destruction and had them put in a museum. He has also been involved in many cultural heritage surveys for various purposes (he guessed about one hundred) all over the Barngarla claim area, from Port Lincoln to the Gawler Ranges area. Brandon McNamara Snr has similarly done very many such surveys, as has (according to Harry Dare) Harry Dare, Simon Dare, Eric Paige, Les Taylor, the late Ms Dare, Patricia Dare, Maureen Atkinson, Linda Dare, Leonie Miller (identified as a Barngarla woman by Dr Haines) and others. Dawn Taylor also said she had done "just a few" heritage site clearance surveys around Kimba, Whyalla and Iron Knob with Lynne Smith and Eileen Wingfield. Troy McNamara has also been on some clearance surveys. Brandon McNamara Snr notes that it is the "elder" members of the Barngarla people such as himself who decide who will go on such surveys, having regard to who has knowledge about particular country.

414 It must be mentioned that it is clear that non-Barngarla people sometimes go on cultural heritage surveys on Barngarla country. Bill Lennon gave evidence that he had been on such surveys. When asked why he could participate despite not being Barngarla, he gave the following somewhat opaque reply:

> Because … most of the stories, you know, the story of the different group, and so … you know, till now. But – and so people ask me – like, other group ask me to … and want me to go and help them tell the story and protect the *munda* – the land.

415 There was other evidence of non-Barngarla people going on cultural heritage surveys, including the Western Desert woman Martha Edwards. There were also some Barngarla-descended people whose affiliation is unclear, such as Jeannie and Debra Miller and Fabian Peel.

416 Amanda Richards gave evidence of going on a "site recording survey" with archaeologists and her father Leroy Richards, recording sites of Barngarla cultural significance.

417 A means through which Barngarla people exercise a right to speak for country is the Barngarla Management Committee. Howard Richards explained this committee's constitution:

> … [There is a] family rep [on the Committee for each Barngarla family] whether they're from the Eyles, Wingfields, Crofts, Reids, Richards. Two lots of Richards, from the Flinders. McNamaras, all sit on the management, and we got representation from people from the Davis and Dare family that sits on there. It is people that represent it from the whole of the country that sits on our management. (T110)

418 There was no direct evidence as to whether the current Barngarla claimants regard their rights to land as "inalienable". There was, however, a clear implicit understanding amongst the witnesses that the nature of the rights Barngarla people have to land is not such that those rights are able to be alienated.

419 Turning to the means of acquiring such rights, it is clear that one gains rights to land principally merely by being a Barngarla person. That was most explicitly explained by Edith Burgoyne:

> *MS GOODCHILD:* … If they identify as Barngarla, what does that mean?
>
> *EDITH BURGOYNE:* That they can go to meetings and say their [sic] Barngarla, and they can tell people, "I'm Barngarla. I can come to meetings and I can go on clearances," or just go out on trips with the other Barngarla People." (T225)

420 In other words, being a Barngarla person grants one certain rights over the land constituting Barngarla country that one does not otherwise possess. That observation begs the question: how does one become a Barngarla person?

421 There was quite consistent evidence from the lay witnesses to the effect that one becomes a Barngarla person by having a Barngarla mother or father (or sometimes a Barngarla grandparent), and then choosing to identify as Barngarla, rather than choosing to identify as the non-Barngarla parent's Aboriginal identity (if the other parent is Aboriginal and not Barngarla).

422 Edith Burgoyne, for instance, explained this principle as one common within "Aboriginal culture":

> …[I]n Aboriginal culture, you can either go, you know, like your mother's way or your father's way. Some people go both ways, but most youngest, they go their mother's way. (T225)

423 That is a fairly typical explanation, similar explanations having been given by many witnesses. It is idiomatic only in its suggestion that there is a norm for people to follow their mother's line. In context, I think Ms Burgoyne quite clearly only means to say that more Aboriginal people tend to choose to "go their mother's way", but they are completely free to choose to go either way, or perhaps "both ways".

424 The suggestion that Aboriginal people can go "both ways" was supported by some witnesses, but not all. Howard Richards said that his children "can take both [sides of the family's Aboriginal identities]":

> …[T]heir mother's side if they're over in West Australia [where Mr Richards' wife is from], or they can take their father's country when they come back this way, back into Barngarla country. (T95)

425 Mr Richards thus suggests that, while his children can in a sense "take both sides", they can only adopt one particular Aboriginal identity at a time, though that identity may change depending on their location.

426 Similarly, Eric Paige's evidence suggested he did not believe some final decision needed to be made about which Aboriginal identity he was:

> *ERIC PAIGE:* … I can go to my mother's side, which is Arabunna and Barngarla, or I can go on my father's side, which is Yankunytjatjara or Antakirinja.
>
> *MR HILEY:* And when you say you can go to any of those sides, have you decided on a side?
>
> *ERIC PAIGE:* Yes, I think I will go with my mother's side at the moment. Yes. … That's the Barngarla side. (T966-T967)

427 However, Brandon McNamara Snr appeared to believe that Barngarla people were not free to "take both sides". If they chose to be a Barngarla person, he appeared to understand that they were not also some other Aboriginal identity. The weight of the evidence from the lay witnesses supports Brandon McNamara Snr's view (see the evidence of Roddy Wingfield, Harry Dare, Dawn Taylor and Troy McNamara). Howard Richards, elsewhere in his evidence, does appear to suggest that being a Barngarla person requires choosing to be a Barngarla person rather than simply choosing to "take both sides". Even Eric Paige's evidence quoted above does not suggest he believes he can simultaneously belong to many Aboriginal identities, but only that a choice in favour of one Aboriginal identity may be later reneged upon.

428 The reasons behind the choice to be Barngarla rather than some other Aboriginal identity appear to be entirely up to the person in question (see, eg, the evidence of Roddy Wingfield, Harry Dare and Dawn Taylor).

Totems

429 The concept of 'totems' received a considerable amount of attention from the lay witnesses.

430 Brandon McNamara Snr knew that his totem was the wedge-tailed eagle (which he called the *walga*) and the Malleefowl. He said the eagle was the totem of the Gawler Ranges. He was told this by Bert and Archie Eyles when he was a teenager at Iron Knob, and has told his own son, Brandon Jnr, that the eagle is his totem.

431 Mr McNamara explained that anyone who is Barngarla and who lives in the Gawler Ranges has the eagle as their totem. The significance of the totem is that it "give[s] you an authority" in relation to the land. It also means you are not allowed to kill or eat the animal that is your totem.

432 Eric Paige said that the totem for the area around Lake Gairdner was the Malleefowl, and knew that that was the McNamaras' totem. However, Mr Paige also said that the Malleefowl is the totem of anyone who has been through the law because the stripes on a Malleefowl's back represent cuts made on men in initiation ceremonies.

433 Edith Burgoyne was able to identify the eagle totem with the Gawler Ranges, but acknowledged she did not understand the significance of totems. Yvonne Abdullah thought that totems were generally birds, and that she thought hers was a bird she called the "winged brinjitta". She understood that knowing one's totem permitted one to go to particular sacred sites. Evelyn Dohnt knew that everyone had a totem, but did not want to say more than that.

434 Howard Richards also knew little about totems. Leroy Richards told him that his totem was the bilby. But he never found out from Leroy what the significance of that fact was, except that he must not eat bilbies, and that if he ever saw a dead bilby, he must "cry for it" and bury it. Amanda Richards said that Leroy and Randolph Richards' totem was the lesser bilby, and that her and Rebecca Richards' totem was the greater bilby. She did not understand how one determined their totem. She said that her totem's significance was that she could not eat it or hunt it and "we have to look after that animal and make sure that it's not overly hunted and things like that…" She told a story told by her father, of a dead bilby found by old women on Adnyamathanha country, who cried over it and buried it, calling it their sister. Rosalie Richards agreed that Leroy's totem was the lesser bilby. She added that the totem of Percy Richards (Leroy's grandfather) was the stick-nest rat. She did not understand how one determined one's totem either, but appeared to indicate, as did some other witnesses, that it

bore some connection with one's moiety. She also said it was connected to one's conception site and the totemic affiliations of one's ancestors.

435 Linda Dare identified her totem as the sleepy lizard. Elizabeth Richards said that her mother Vera Richards Snr (now deceased) told her when she was a child at Port Lincoln, and dolphins swam with her, that the dolphin was her totem. Vera Richards Jnr said her father Brenton Richards' totem was the whale, but she didn't know why.

Kinship system

436 Little evidence was given by the witnesses about moieties or kinship terms.

Kinship terms

437 There was widespread use of the word *djamu* or *tjamu* for one's grandfather and his brothers. Generally, a grandmother and her sisters were "nanna". *Djamu* or *tjamu* is the Western Desert word for grandfather. Alternatively, grandchildren and grandparents alike often used the reciprocal term "grannies" to refer to one another.

438 There was also widespread use of the term "auntie" or "uncle" in relation to people who were not, in Western terms, one's auntie or uncle. Similarly, witnesses called men "brother" and women "sister" (or *didja* or *dja*) even when they were cousins or other more distant relations.

439 There were three instances of male witnesses referring to the practice of those men who were initiated in the same ceremony calling each other *ngunnagoos* (or *ngunnanoos* or *ngullingoos*) (as transcribed). As noted in the McCaul 2013 Linguistics Report at [63], the Western Desert term for "a man who has passed through the law in the same ceremony as yourself" is *ngalungku*.

440 Amanda Richards said that she called her mother *ngami*, and that Ms Richards' own daughter calls her *ngami*. She also said that her daughter calls her sister, Rebecca (her daughter's aunty), *ngalami,* which means "big mum", apparently appropriate because Rebecca is older than Amanda. All those words are Barngarla words or adaptations of Barngarla words. "Ngami" or a very close substitute is recorded as the kinship term for mother by both Schürmann and Elkin. Amanda Richards also said she called her father *wapi* and her sister *yaka*. Rosalie Richards also mentioned that Leroy Richards called his sisters *yacka*. *Vapi* is the Adnyamathanha word for father, while the Barngarla word for uncle is *bapi* or *pappi*.

Yaka or *yakka* is the Adnyamathanha and Barngarla word for sister. It is recorded as Barngarla by Schürmann, Elkin and Tindale.

Kinship norms

441 The only clear rule that arose on the evidence of the Barngarla witnesses relating to relations between kin was the rule that one ought not to marry a relative, and, in some cases, that one ought to marry outside the Barngarla group altogether. Howard Richards said he deduced from the fact that his grandmother was Barngarla but his grandfather was Wirangu that "[Barngarla people] marry outside the family…" However, he himself was told not only to marry outside the family, but indeed to marry interstate: "[My uncles and aunties] said, 'Well, you can't go anywhere in these areas because … you got relations everywhere. So it would be far better if you go interstate.'" Elizabeth Richards similarly explained the rule, saying: "My mother told me that I had to leave Port Lincoln, because I couldn't marry nobody in my own town." Vera Richards said that Barngarla people generally married people from "different countries" now, and had "adopted the white man's thing where you can't marry your auntie's children or your uncle's children."

442 Many other witnesses, such as Brandon McNamara Jnr, Troy McNamara, Dawn Taylor, Maureen Atkinson and Helen Smith, however, expressed the rule in a more limited way, saying the rule only related to not marrying cousins (although including distant cousins and, sometimes, other relatives, such that it probably more or less amounted to not marrying any Barngarla people). In contrast, Yvonne Abdullah said that since the cessation of a custom of promising wives, which cessation occurred in her aunties' generation, there are now no rules about who you can marry. Barry Croft largely agreed with Ms Abdullah, and said that "since [the old] days, some [Barngarla people] might have married, you know, their relations because the law stopped in 1940s, you see."

Moieties

443 Edith Burgoyne said she had heard of moieties, but was not asked whether or not she had one herself. Howard Richards had also heard of moieties from, inter alia, Leroy Richards. He was asked if he knew his own moiety and appeared to indicate he did not:

> … [I]f you grow up on the coast, a lot of the stuff wasn't passed on to us, and so for whatever reason we don't know, but we can understand that there was a lot of reasons why that wasn't passed on, because … they weren't allowed to talk about it because of … the church and … the police …, and they just try to stop us from practising our culture… (T356)

444 Mr Richards later said that he intends one day to work out what his children's moieties are. Eric Paige also knew vaguely of moieties, but nothing specific. Vera Richards had a slightly more sophisticated knowledge of moieties. She knew the Barngarla had "two different skin groups", one which started with M. She knew that "you've got to marry the opposite".

445 At Lake Umeewarra, Linda Dare gave evidence that hills near the lake formed the shape of two heads connected together. She said that:

> … we call that Kauaru [Karraru] Matheri [Mattiri]. That is our totem. So that's the north and south wind. So I'm Kauaru [Karraru]. … I've got to follow my mother's line so it's automatically taken from the mother's line, you go down. So … my kids will be Kauaru [Karraru] and their partner will be Matheri [Mattiri]. It's a totem that's been handed down generation to generation. (T593)

446 So Ms Dare was able to identify her moiety and describe the principles governing how one obtains a moiety in the same terms those noted by Schürmann in his 1846 article. It appears from this and other evidence of Ms Dare that she regards "moiety" and "totem" as synonyms. It is not clear, however, how Ms Dare understands the shapes in the hills to tie in with the moiety concept. Later, Ms Dare suggested that when one marries a Karraru or a Mattiri, one becomes the other moiety. However, a later comment perhaps contradicts that:

> …[E]veryone that's Kauaru [Karraru], my brothers and sisters. … [While] [e]veryone that's Matheri [Mattiri], I can pick a partner from there kind of thing. (T604)

447 Ms Dare learnt her moiety after hearing that her husband, an Adnyamathanha man, had an Adnyamathanha moiety, mattiri (Adnyamathanha and Barngarla moieties are the same). She asked her mother Ms Dare "Have we got that?" She "showed me in the genealogies where I come in, you know, in that line." Fortuitously, Linda Dare was karraru because Susie Richards (her great-great-grandmother) was karraru, and that moiety had been passed down to her progeny in an unbroken line. Linda Dare said that if she had married the wrong moiety "I would have got told off."

448 Ms Dare went on to note that the moiety system is not an effective way to avoid in-breeding, because, technically, it would permit her husband to sleep with their daughter. Ms Dare has always been told that one must marry outside of one's tribe.

449 Linda Dare's evidence is corroborated by the witness statement of her mother, Ms Dare, tendered by the applicant. In that witness statement, Ms Dare states that:

> I am fully aware that we [i.e. the Barngarla people] have two moieties Mathari and Kararru. My daughter and her partner are of different moieties so they continue with tradition. Their children are also aware of their moieties in respect to their Barngarla and Kuyani heritage. ([21])

450 Amanda Richards gave a very similar account of the moiety system to that of Ms Dare. She understood how one obtains a moiety, and what effect one's moiety has upon who one may marry. She also had a similar idea to Ms Dare about the moieties coming from a landmark, though she referred to a different landmark. She referred to two peaks at Yourambulla, just south of Hawker, as representing "two men who came from the north – came from Adnyamathanha land and Barngarla land, and gave us our two kinships, Mathari [Mattiri] and Garrarru [Karraru]." Ms Richards said she was mattiri and her father was karraru. It is worth noting that that evidence is consistent with Ms Dare's, because it means that Percy Richards, Amanda Richards' Barngarla great-grandfather, must have been karraru. Percy Richards was the brother of Susie Richards, who Ms Dare said was karraru (and must have been karraru in order for Linda Dare to be karraru). Siblings must always be of the same moiety under the Barngarla moiety system.

451 Rosalie Richards generally corroborated Amanda Richards' evidence on the above matters. She also mentioned that her husband Leroy Richards insisted that the pallbearers at his brother Randolph's funeral all be of the same moiety as Randolph. Further, she stated that if two people of the same moiety marry, their children will have no moiety, and that this can render them a "non-person" and she knows of such a person who was isolated by the rest of their society on account of their lack of a moiety. Ms Richards also suggested another function of one's moiety is that "it helps determine what totems you have." She did not explain how it helps in that regard. She then explained how Leroy Richards was "Yalpu moiety", the *yalpu* being the greater bilby. It appears that this must be an error, and Ms Richards must have intended to say that Mr Richards' *totem* was the greater bilby, as Ms Richards had already stated that Mr Richards' moiety was karruru, and explained that one's moiety can only be mattiri or karruru. Moreover, in subsequent evidence she refers only to animal totems, not moieties.

Respect for elders

452 Brandon McNamara Snr addressed the question of respect for elders directly:

> [I was taught to] [a]lways respect the elders. You're not supposed to call them names or anything, but a lot of people older than you, you call them uncles and aunties. … It doesn't matter who they are. … [And] old [women] are still your nanna … and … old man is your djamu or your grandfather. It doesn't matter who they are, just respect. … You're not allowed to back answer them. … [If you do,] [y]ou might get a hit across the ears somewhere.

453 Mr McNamara went on to say that this is something he has taught his own children. Dawn Taylor agreed that she had been taught to respect one's elders by her mother and grandmother, and that she had taught her own children to do the same. Troy McNamara gave evidence to the same effect.

454 Howard Richards said one of his motivations for going through the law was that he considered it a sign of respect for his "grandfather and my [djamus] and my old people." He also spoke of the importance to him of knowing that he had "kept my obedience to my grandfather" by not going to places his grandfather had told him not to go to until he was initiated.

Custom relating to naming of children

455 There was some evidence of continuity of the custom recorded by Schürmann of naming children according to their gender and order of birth.

456 In his summary of evidence, the late Henry Croft claimed that his "Aboriginal name" is "Gnarlia" (or alternatively spelled subsequently, "Ngalia"), that it means "baby emu", and that this name "is always given to the seventh child in a family". There are a number of very close approximations to this word in Schürmann's 1844 dictionary (*nalya*, *ngaltya*, *ngalla*, *ngala*, *ngalu*), but none of them mean "baby emu" or similar. Schürmann does not record what the traditional Barngarla name for the seventh male child is. But of course, as has been noted, Schürmann does record that a practice of always giving the same name to children of the same ordinal number in a family did exist. So Henry Croft's evidence on this point is suggestive of some continuity, in that his description of the practice of naming children in accordance with their ordinal number is consistent with the description given by Schürmann in 1846.

457 Various witnesses attested to the fact that Stanley Davis, a now deceased son of "King Arthur" Davis (an apical ancestor), was known as "Moonie" amongst Barngarla people. Eric Paige said: "[E]veryone … called him Moonie. … That's the third brother down, I think, it means." Again, Schürmann does not tell us what the third male Barngarla name was, but

again, the practice described by Eric Paige is consistent with that described by Schürmann shortly after effective sovereignty.

458 The applicant goes further than this in the submissions, adding that:

> It is understood that the name for the fourth male child was Muni, as in Stanley 'Moonie' Davis. Each child also received the name of the place where it was born. In his interview with Luise Hercus in 1965, Moonie Davis said that before the Europeans came he would have been named Moonie Wyacca. He was born near Wyacca, which is close [to] Warrakimbo. (AS, [264])

459 Unfortunately there is no evidence of this interview before me. Moreover, the assertion that the name for the fourth male child was Muni is not supported by any evidence that has been drawn to my attention.

Initiation

460 There was a strong focus in the lay evidence upon initiation ceremonies. Seven Barngarla witnesses were initiated men: Howard Richards, Brandon McNamara Snr, Brandon McNamara Jnr, Troy McNamara, Simon Dare, Harry Dare, and Eric Paige. The applicant submitted that other Barngarla initiated men included: David Paige, Nigel Burgoyne, Russell Taylor, and Adam McNamara. All were initiated in northern South Australia or the southern Northern Territory (Fregon and Mimili in the APY lands, Coober Pedy in South Australia, and Areyonga in the Northern Territory were the main locations mentioned, all on Western Desert cultural bloc country).

Motivation

461 It is clear that not every male of Barngarla descent goes through the law. There is an element of choice involved. Howard Richards explained his motivation for becoming initiated:

> …[F]or me take that step as an Aboriginal person, to be a man, it's what I wanted to do… It was my decision for me as a person. … To be able to speak as a Barngarla person in my own right … And the day that I die, … then I go out …. as a man for my country. That I speak for my country. (T108, ll18-22)

462 Similarly, Troy McNamara explained that he went through the law "because we need to try and learn … a bit more about culture and who we are and where we come from. … No one told us we had to do it." Brandon McNamara Jnr gave an almost identical explanation of his motivation, although he also suggested that his father had told him he should go through the law.

463 Eric Paige said he went through the law because men in the APY lands, where he was then living and working as a preacher, said he must do so in order for them to let him preach to the community.

464 Counsel for the State asked if the apparent individual decision to go through the law had to be sanctioned by elders:

> *MR EVANS:* … [I]s there anyone or any group of men who are Barngarla men who have the right to say, "No, this boy can't go through the law."?
>
> *ERIC PAIGE:* No, I don't think any of them will say that these days because they want people to go through, you know, to identify their countries and that, so that more people will know about their country, you know. (T1004, ll22-26)

Content of the ceremonies

465 Most of the evidence about the content of the initiation ceremonies was restricted evidence. A few general points can, however, be made.

466 The initiation ceremonies that the witnesses participated in tended to go on for some time and involve a considerable amount of travelling. Harry Dare said that he spent a month in Mimili "prior to going through the law" and then travelled from Mimili to Kings Canyon, and then to Areyonga where "the damage was done." Simon Dare, who went through the law at the same time as Harry Dare, gave a less detailed but broadly consistent account of the ceremony.

467 Howard Richards said that there are three stages of initiation. (T337) It appears that one gains the status of "wati" or "lawman" after passing through the first stage, and then the subsequent stages simply give one greater seniority and authority, and perhaps access to greater knowledge.

468 "Painting up" is said to be part of modern initiation ceremonies (T341). Women are present, at least in some parts of the first stage of the initiation, though they are not generally Barngarla women.

469 Eric Paige gave evidence in open Court that modern initiation ceremonies involve having one's tooth knocked out. Mr Paige has a tooth missing from the left-hand side of his mouth from his own initiation. He said that whether a tooth on the right-hand or left-hand side of one's mouth is knocked out denotes which side of your family you identify with:

> There's the right-hand side mob or the left-hand side mob, you know. When you go to ceremony, you sit down with the left-hand side mob. I do. If I'm the right tooth

> knocked out, I will go and sit down on the right-hand side. (T980, ll9-35)

470 It seems that the initiation ceremonies themselves, at least, do not involve the transferral of much traditional knowledge. That was most forcefully expressed by Harry Dare, who said:

> … [W]hen I went up there, I was told that I was going to be ... given all this information about … country [Mr Dare clarified in a subsequent question that he here means Barngarla country] and all that, but none of that was forthcoming. So to me it was a joke that I even went there … (T904, ll21-27)

471 Similarly, Simon Dare said he "didn't learn much" about stories or customs as part of going through the law.

472 However, Eric Paige gave evidence to the contrary:

> There's a level [of men's business] that you go, you can learn, you know, all about your country and, you know, the main points in your country, the rock holes, the waterholes and sand and hills and things, rocky outcrop, you learn all that in grade 1, 2, 3 and 4. … And then after that, … that's when you learn all the evil things, you know, like killing and paybacks and things like that, witchcraft. (T981, ll15-21)

Connection with Barngarla society

473 It became clear from the evidence that the initiation ceremonies conducted on Western Desert country by Western Desert men are not specifically tailored to the particular Aboriginal identity of the participants. It appears that there is a standard ceremony that is conducted, and that men of different Aboriginal identities will often be initiated in the same ceremony. (eg, Harry Dare's evidence). Nonetheless, there was certainly also an understanding amongst most witnesses that Aboriginal men go through the law in a particular Aboriginal identity. They do not go through the law simply as an Aboriginal man.

474 Brandon McNamara Snr explained that, while Brandon McNamara Jnr, Troy McNamara, Nigel Burgoyne and Adam McNamara went through the law "[o]n the Barngarla side", Lynne Smith's sons went through the law "… on their father's side, like, Coober Pedy side, you know. … Like, Coober Pedy is Antakirinja side. … They can also come on Barngarla side, but they're more … to Coober Pedy side. … [Because they have an Antakirinja father and a Barngarla mother] they can choose which side, but they have already chosen the other [i.e. Antakirinja] side."

475 Counsel for the applicant questioned Mr McNamara further on this idea:

> *MR HILEY:* Okay. But in the way [Lynne Smith's sons] went through the law, was it

> a different law that they went through [to the one that Brandon McNamara Snr went through]?
>
> *BRANDON MCNAMARA SNR:* No, no. No, the same law. ... No different, but it's just who you represent. … Who your family want to represent. (T172, ll1-12)

476 In a similar vein, Eric Paige conceded that "there's no Barngarla ceremony no more", but insisted that "the [Barngarla] law is still there…" Howard Richards said that when singing occurs at initiation ceremonies, there are no Barngarla songs, but said that "hopefully, in time, that will come back."

477 Bill Lennon confirmed in his evidence that men from different groups all get told the same stories in Western Desert initiation ceremonies, but said:

> *BILL LENNON:* Well, it's the same story that comes from the Western Desert, so wherever it's told, [it] … fits in with every group, you know, different groups.
>
> *MR EVANS:* I thought, even though it's the same story coming down or travelling around, on particular country for particular people there are special sites for that story to stop. How do they learn about that?
>
> *BILL LENNON:* Well, … if the Kokatha or the Barngarlas know those stories of, I mean, … some local things … that's not in another group – country, you know, they should be told by the local group. (T1471, l42-T1472, l5)

478 The idea of there being the "same story" shared by Barngarla and Western Desert people (and other groups) was somewhat supported by some evidence of Howard Richards, who referred to there being "one law" shared by different groups, and said about the people "up north":

> …it's like they're custodians or caretakers of [the law]. It doesn't die out. The language … it's still there. So they know who I am. They know where I come from. They … acknowledge me as a Barngarla… (T319)

479 While most witnesses appeared to believe they had "gone through Barngarla law" so long as they went through the Western Desert law ceremony "as Barngarla", Simon Dare very clearly had quite a different understanding. It was clear in cross-examination from a number of answers he gave, and a number of questions he did not understand, that he was not familiar with the idea of going through the law "as" a particular Aboriginal identity. When counsel for the State asked Mr Dare if he had "gone through Barngarla law", Mr Dare answered: "No. I had to go up to Areyonga." Mr Dare appeared to regard the fact that he had gone through law at Areyonga as determinative of the question whether he went through Barngarla law. That is a view that differs from other witnesses. More explicitly, Mr Dare later said:

> … [U]p there [i.e. in the Western Desert region] we weren't Barngarla or Kokatha… we were just men that want to go through. That's what it was. … [W]e all went through the same way [regardless of Aboriginal identity.] (T785 l6-T786 l13)

480 More generally, Mr Dare also offered the opinion that the current, Western Desert-operated law is different from traditional Barngarla law:

> … [W]hat I, you know, really think is, about their law, up there [i.e. in the Western Desert region], that's different from Barngarla law down here. … Because Barngarla law … had finished by then [i.e. presumably by the time of Mr Dare's initiation]. … [T]he people that … knew the thing, you know, threw weight around and that, they said that Barngarla law was too cruel, too much blood in it. … So they made … my people … give it up. (T762, ll1-21)

481 There follows a confusing exchange where counsel for the applicant asks Mr Dare who exactly decided to make Barngarla people give up their law. Mr Dare appears to say that it was white lawmakers, as well as churches.

482 Howard Richards appeared to suggest in evidence that the location of his initiation ceremony, though it occurred at Ten Mile Creek camp, near Coober Pedy, which is not Barngarla country, had some particular significance to Barngarla people: "…[T]he particular area was associated to the story line that connected to this country, the Barngarla country."

483 When counsel for the applicant pursued this comment, Mr Richards was unable to explain what he meant by it:

> *MR HILEY:* … [Y]ou said that you [went through the law] at a particular area that was associated with the storyline for Barngarla country. Are you able to tell us what that story line was?
>
> *HOWARD RICHARDS:* Well, it is just that story – travels – the same – you can't talk about it. It is restricted. But from what I know, the old people tell me, when my uncle went – they grabbed him and took him up to Coober Pedy and then they let him go from there. (T108, ll 38-43)

484 Mr Richards also added: "The day that I went through … was when they started that line again back in Coober Pedy. Further north we went after." It is worth noting that no other witness went through the law at the Ten Mile Creek camp near Coober Pedy.

Status of an initiated man

485 Most witnesses said that an initiated man is known as a *wati*. *Wati* is the Western Desert word for an initiated man. Bill Lennon stated that initiated men gain the right to wear a red headband as a "badge" to indicate to others their status, and in fact, when pressed, expressed

it as a requirement of being a *wati*. Howard Richards agreed that initiated men had a right to wear a red headband, but said he only did so "when I go for [law] business."

486 One aspect of being an initiated man seems to be that one is able, or perhaps has a duty, to assist in future initiation ceremonies, whether or not the men being initiated are Barngarla. Howard Richards has returned to northern areas for initiation ceremonies a few times, as has Brandon McNamara Snr and Eric Paige.

487 Being initiated, according to Brandon McNamara Snr, also eventually gives one the authority to teach traditional knowledge, and at first the ability to learn traditional knowledge from other initiated men:

> I can teach … anybody, teach them things out in the bush and that. … Initiated men, and that, I can teach them things. … Every summer time we go out bush and camping and – yeah. … Teaching and learning and keep the traditional going. (T174, ll15-28)

488 Similarly, Eric Paige said: "…[W]hen you become a *wati*, you've got certain rights then, yes, to learn stories and that, you know."

489 Indeed, Brandon McNamara Snr said in evidence that he had only learnt more about the highly-restricted Barngarla "man story":

> … when I went through law myself. … People from the north told me. I've been learning and they've been down Port Augusta and I've actually taken them right around to Port Lincoln to Streaky Bay and they say, "Yes, you're right … what your uncles told you a long time ago. Yes, that's right. That's the Barngarla storyline." (T139)

490 Similarly, Howard Richards gave evidence in restricted session that he learnt the "man story" more fully only after he went through the law. Indeed, he appeared to say that he never heard the name of the man [word redacted from publication], until he was initiated. It seems he had read the name in anthropological literature but "that didn't have the same impact as it would after going through the law and knowing the full impact of what they were actually talking about."

491 Eric Paige elaborated on the process of transmission of knowledge to initiated men:

> …[B]ecause they watis, … [t]hey can learn the stories – the law is in the story, so that [sic] can learn all that and – yes. … I tell all my family [Barngarla stories], yes, Harry and Simon, Brandon and Howard. They are the … initiated men, see, so I share the stories with them. (T982, ll22-39)

492 He also said:

> … [T]hat's what they [Western Desert men] do any ceremony time too they'll tell you the story you know if they can tell that story they'll tell it to you there. (T579)

493 Mr Paige also suggested that different stories are revealed once a man passes different "levels" of initiation.

494 Harry Dare was under the impression that he would learn traditional knowledge either as part of the initiation ceremony, which did not occur (see above), or subsequently as an initiated man. That apparently did not occur either:

> …[E]ven now the people who were responsible for me [going through the law] have never spoken to me about anything regarding, you know, like, my country. So they haven't informed me, which is their obligation to do. I feel a bit betrayed by them. (T904, ll21-27)

495 Simon Dare was asked about whether he acquired any traditional knowledge regarding "Barngarla country or Barngarla customs" after he became an initiated man. Mr Dare replied: "Not really, because by that time all my old people had died…"

496 Troy McNamara also said that being a *wati* entitles one to be told more about Barngarla stories, but admitted that he had not yet been told more. He said that "the thing about it, though, you've got to go through certain parts of law to learn certain parts of that dreaming." Mr McNamara expressed his desire to go through further stages of men's business so that he could be told more Barngarla stories.

497 Brandon McNamara Snr gave evidence that there were Barngarla ceremonies (other than initiation ceremonies) that were "attached to the W[Rest of word redacted] story" and that only initiated men could participate in. They used to happen in Port Augusta, before Mr McNamara Snr was an initiated man and could participate, but now all the people who used to conduct those ceremonies are deceased.

498 Howard Richards also attested to a feeling of being "more in tune with the country that you live in" as a result of becoming an initiated man. Related to that is Bill Lennon's evidence that the "reason why boys got to be put through the law" is so they can take "authority to take care of the land."

Historical initiations or other ceremonies

499 Simon Dare gave evidence that Andrew Davis was "one of the people who took over Barngarla country" in the past. Counsel for the applicant asked where Mr Davis conducted "law business". Mr Dare answered that he had been told some time in the 1980s that Mr Davis had conducted initiation ceremonies in Marree (outside the claim area) at some earlier period.

500 Simon Dare also said that he remembered early in his childhood witnessing a large gathering of Aboriginal people outside the "Old Reserve" where he lived, which is part of Umeewarra Mission near Port Augusta, in some sand hills. Mr Dare was only a child and he "was told to stay away". Later, when he was about 16, he witnessed another ceremony in the same location. His brother, Malcolm, had sworn at their mother. She "went and told the old men, and they grabbed [Malcolm]. And they put him through [the law business]." Strangely, it appears that the ceremony involved simultaneously both punishing Malcolm, and putting him through the law. Mr Dare was able to provide a few details of the ceremony:

> … [W]hen they got him out there, they chucked him up in the air then … they didn't catch him, but he fell on his back and they just kept on doing that … all the time to him, because he'd been abusive to my mother.

501 This occurred for, Mr Dare guessed, "an hour or more." The ceremony in total, though, went for "about two weeks."

502 Maureen Atkinson, Simon Dare's sister, gave very similar evidence about ceremonies in the sand hills near Umeewarra Mission generally (although did not tell the specific story about her brother Malcolm). She thinks those ceremonies happened regularly up until the time she was taken from her home at age 16, in the mid-1950s. She characterised the ceremonies as "corroborrees" or "men's business".

503 Eric Paige gave evidence about staying with family at Umeewarra Mission as a child. While he was there, "they was catching young fellas and taking them for the ceremony." As a child, he was not allowed at the ceremony, but he saw parts of it "[f]rom my sister's tin shed – house. Looking through the hole and I could see it happening…" Like Mr Dare, Mr Paige saw men being thrown up into the air – in this case, Mr Paige's uncle, Maxie Witcham, a Barngarla man. Some years later, Mr Paige's father told Mr Paige that they had been putting Maxie and two other men through the law. The throwing had been part of "getting him ready for the initiation…"

504 Bill Lennon spent some of his childhood at Umeewarra Mission outside of Port Augusta. He too reported there being ceremonies there, but also said because he was a child he was banned from witnessing them. Nonetheless, he did say the following:

> … When I was in the [Umeewarra] mission home everybody was pretty active at that, you know, law … Aboriginal law. A lot of them come into the –even to the church in – you know, red, covered in ochre and stuff. … [That happened] all the time I was in the mission home … (T1449, ll15-33)

505 Mr Dare gave evidence of another occasion in his childhood when he was at Iron Knob and there was a very large gathering of Aboriginal people – "The hills was black with people." – and Mr Dare was told that "[t]hey was all travelling through … for the law business…"

506 Bill Lennon stated that he had attended a "ceremony … for somebody going through the law" in 1951 at Iron Knob (within the claim area). He said probably about five or six men went through the first stage of the law at that ceremony. The men involved were from the Kokatha, Barngarla and Wirangu groups. Mr Lennon guessed that maybe two of the initiates were Barngarla men. He acknowledged in cross-examination that the representatives of all the groups present went through the same law and were told the same stories.

507 Howard Richards stated that as a child he remembers "law people" visiting the area (Mallee Park in Port Lincoln), passing through. The children would not be allowed to see them. He did not know what their purpose in being in Port Lincoln was. Edith Burgoyne had similar memories from her childhood at Minnipa, of Aboriginal men she did not know passing through at certain times of the year. Her mother told her they were on their way to ceremonies. Her parents also told her that these men would stop in Wudinna to conduct ceremonies there. When she was older, and working in Wudinna Hospital, she was told not to go out late at night because of these ceremonies conducted near Wudinna. Roddy Wingfield gave very similar evidence from his own childhood in Whyalla. He thought the travelling men were "probably … the people [his grandfather Archie Eyles] went through the law with… [T]hey sort of pass and relay messages [by travelling around the country], so probably just keep one another updated on what's happening."

508 Howard Richards also gave evidence in restricted session (but now agreed by the parties to be admitted into evidence without restriction, with some redactions) that Fred Richards, Archie Eyles and perhaps "Uncle Onnie" (though the latter is doubtful) were all lawmen for the Barngarla, despite Fred Richards being a Wirangu man. He thought that Archie Eyles had

gone through the law "up north". However, he acknowledged that at the time of his own initiation, the only extant Barngarla lawman was Brandon McNamara Snr.

509 Finally, Rosalie Richards gave evidence about Angorichina Station (outside the claim area, near Blinman):

> Angorichina Station … has particular significance because it was … [where] there were a lot of Barngarla camps, and also … it's where Percy Richards [a Barngarla man and Leroy Richards' grandfather] was put through the wilyaru law. His wilyaru ground called Yundawata was near Angorichina Springs. I haven't been there … because it's not permissible for women to go to those places, but it's just near Angorichina Springs. My husband though[t] that was in the early 1900s that Percy Richards was put through that law there near Angorichina Springs and his [Malkara] I have been to, which is near Blinman. … Malkara … is the first stage initiation ground. … And at those sites there is a trench which is created by the women. They dance in a line by shuffling their feet, so much that they actually create a trench, which is quite narrow but quite long, and my husband has taken me to the site where his grandfather's malkara was. His father has shown him that. … (T1289, ll9-40)

510 As to the ceremony in which Percy Richards was initiated, Ms Richards said that Leroy Richards told her "lots of detail about the ceremony … and the people who were there." She went on:

> [P]eople … came from Nepabunna for that ceremony. … [O]ne of those was his [maternal] grandfather, Jack Coulthard, and his wife, … Alice McKenzie … [T]hey had to wait for the people to come from Nepabunna. They also had to wait for people to come from Whyalla for that ceremony. … [Jack Coulthard] had an important role in the ceremony. … Alice McKenzie … [also] had to play a part in that ceremony, and I'm not quite sure in what relationship, but women certainly had a part in the ceremonies, and so [she] was important. … [T]hey were not able to speak for a long time after that because of the avoidance issues … [N]ot until the whole thing had been finished for quite some time could they actually speak to each other. … You had to avoid certain people in terms of traditional law, that, you know, you couldn't necessarily speak to them, you know, … if they had a part in your – in the law … (T1290, l11-T1291, l10)

Women's initiation

511 There was very little evidence about equivalent women's initiation rituals. The only evidence was that of Linda Dare, who stated that her daughter "became a woman" on the Umeewarra Mission by doing "her song and dance there" when she was ten years old, in a ceremony that lasted for about four hours at sunset attended only by women. She further explained:

> So she's gone from a little girl into a woman now, and she's making her – making – there's different levels that you've got to do to go through womanhood. (T591, l17-T593, l4)

512 No other witness spoke of a woman's initiation rite. Howard Richards said that there was no "process of the women becoming senior people or law people within the women."

Stories and beliefs

513 A number of stories were spoken about in the lay witness evidence, in varying detail. The most detailed evidence related to the Seven Sisters story, the Wilyaru man story, the whale story, and the eagle story. The only story that emerged from the lay witness evidence that has a direct correlation with a Barngarla story recorded at effective sovereignty by Schürmann was the Marnpi and Tatta story.

Seven Sisters story

514 The Seven Sisters story is a story common to many Aboriginal groups in Australia (see, eg, *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 per Lindgren J at [688]; *De Rose v State of South Australia* [2002] FCA 1342 per O'Loughlin J at [72]-[74]; *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 per von Doussa J at [455]; and *Jango v Northern Territory of Australia* [2006] FCA 318 per Sackville J at [357] for past discussion of this story and the wide range of Aboriginal groups who know it).

515 Generally, the story concerns seven sisters running away from a usually lecherous man. The stars of the Pleiades constellation are generally regarded as representing the seven sisters. The Barngarla lay witness evidence was generally consistent with the wider Seven Sisters story, including the notion that the seven sisters are the Pleiades constellation. Several witnesses acknowledged that they were aware that other groups had their own versions of the Seven Sisters story.

516 The main witnesses who spoke about the Seven Sisters story were Linda Dare, Edith Burgoyne, Vera Richards and Eric Paige. Each agreed that the seven sisters had travelled extensively around Barngarla country while being chased by a man. The identity of the man, and the itinerary of the seven sisters, was the subject of some difference between witnesses, although most of the differing evidence was not necessarily inconsistent, even if it wasn't corroborative either. The following is based on the open evidence, but during evidence in confidence (for women only) there was considerably more detail.

517 Edith Burgoyne said that, in relation to Barngarla country, she had been told by old ladies (including her mother, a Barngarla woman, and a "Mrs Crombie" and "Mrs Edwards) when

she was about 12, that the seven sisters travelled from the Whyalla foreshore to Iron Knob, around the side of Iron Knob to Pine Creek, and then up through the Gawler Ranges, before coming back down to Port Lincoln. They were being chased by a man, and as they went, they would try to cover their tracks. There are parts of the story, according to Ms Burgoyne, which cannot be said in front of men, and she has never done so. Ms Burgoyne has passed on the Seven Sisters story to her own daughter. Ms Burgoyne gave further detail about the Seven Sisters story in restricted evidence with Lynne Smith taken at Pine Creek.

518 Eric Paige claimed to have been told of the Seven Sisters story, as it applied to Barngarla country, by men from the APY lands about ten years ago. He said that he was aware that parts of the story are "woman's only", but that he nonetheless knew those parts "because it was shared to me up there [presumably the APY lands] because they told me "You got to take some of these stories to your sisters" because there's no-one down there who knows them … So they gave me the stories and … we pass it on to … our sisters down here, the woman folks." Mr Paige went on to explain that he had only passed on to Barngarla women parts of what he had been told by the Western Desert men, and in fact he had only told anything at all to two Barngarla women, Ms Dare (recently deceased), and Patricia Dare (her sister).

519 Mr Paige demonstrated some knowledge of the Seven Sisters story. He knew of a "sacred site" related to the Seven Sisters story a few kilometres north of Lake Umeewarra, where he said ceremonies related to the Seven Sisters story used to be performed. He identified a rocky outcrop at Errappa View (near Iron Knob) as the seven sisters, and a nearby hill as being a man stalking them. Brandon McNamara Snr gave similar evidence on this discrete point. Mr Paige said that the Seven Sisters story had been running from the man all the way from the western coast of Western Australia "across to here [i.e. the Eyre Peninsula]." He said they made that journey three times, before they went to Hummock Hill in Whyalla, and then followed a creek running out of Whyalla to Iron Knob, where they went round the side of Iron Knob, then "they come around here somehow" to Errappa View, where they saw the man represented by the hill watching them, and they ran away again, further west, following a creek again. But the man followed them and caught the youngest sister and raped her. The creek where this occurred is now full of red "ore" (perhaps ochre was intended), representing the woman's blood. The other six sisters were very sad and fled south, Mr Paige thinks. Mr Paige said they then went to a place transcribed as "Buckaboo". That may be Buckleboo, a place within the claim area, and close to Pine Creek and the Gawler Ranges, which is where

Ms Burgoyne said the seven sisters went after Iron Knob. However, it is slightly north of Iron Knob, not south. At "Buckaboo" there are six big boulders that represent the six remaining sisters. From "Buckaboo", the six mourning sisters ascended into the heavens and became the Pleiades constellation (T868-T871). There are many similarities between Mr Paige's and Ms Burgoyne's stories, but also some significant differences.

520 Linda Dare said she learnt the Seven Sisters story from her mother, Ms Dare (to whom Mr Paige says he told the Seven Sisters story, transferred from Western Desert men), as well as "Edie King, Marcia Edwards, Eileen Crombie … [a]nd a few of the other family members." It seems likely that Marcia Edwards and Eileen Crombie are the Mrs Edwards and Mrs Crombie who shared the story with Edith Burgoyne. Ms Dare knew of a site behind the hospital at Port Augusta where there are seven rocks, representing the seven sisters sitting down. The same site is, Ms Dare said, a "birthing area where the women used to go and give birth to their children." At Lake Umeewarra, Ms Dare spoke of that lake's significance to the Seven Sisters story. She said the seven sisters sat in the lake to hide themselves from the man (who she called "wati" or "Ngaru"). The trees in the area, Ms Dare said, marked the man's footsteps as he searched for them, "so if you see the different way the trees are [situated], you could actually see where his footprints are going…" Ms Dare also gave some evidence about a "little friend" of the man who helped him search for the seven sisters and is also represented by trees at Lake Umeewarra. Ms Dare's evidence on this "little friend" was somewhat open to interpretation, but it appears she was saying that the quandong trees represent the "little friend":

> …[The man's little] friend is something that distract, like … he would be a beautiful tree so then the women could go to that tree and try and take the fruit off the tree. … [But] the older sister would say, "Don't go near that tree because the fact is if you go to that tree, the man will take you and do things to you." … [S]o the big sister had all the knowledge, whereas the little sisters were a bit, as we call tjulbidi, silly, because, you know, they always get up to mischief, and they'd actually try … to go for something really beautiful like a … beautiful tree.
>
> … [But] the older sister would always tell them not to go near … those things, so they'd actually … sit … not under beautiful tree …, a shady one, but under a scrub tree where there was no leaves on it because it wouldn't be him [presumably, the 'little friend'], … [he'd be] a beautiful tree or … the [quandong] tree …, and he would actually try and grab one of the sisters and take them. (T594)

521 Further, Ms Dare spoke of a "Barngarla woman in the hills" adjacent to Lake Umeewarra. It was clear that Ms Dare regarded the Barngarla woman in the hills as one of the seven sisters. She pointed out the breasts and head of the woman in the hills, and her raised belly button,

which she said indicated she had just given birth. She also pointed out the penis of the man in the hills, indicating, she said, that the woman had become pregnant because the man had caught her and raped her.

522 From Lake Umeewarra, Ms Dare said the seven sisters headed to Yorkey Crossing (just north of Port Augusta), and then up to Roxby Downs, before coming back down to Whyalla. That account of their travels is different but not necessarily inconsistent with that of Mr Paige and Ms Burgoyne. Ms Dare gave further evidence about the Seven Sisters story in restricted evidence taken at Lake Umeewarra.

523 Vera Richards said that her father, Brenton Richards, told her of the seven sisters story, as well as her "Auntie Lizzie" Richards. She said it was "commonly known within the family." Vera Richards stated that the cliffs at Sleaford Bay were a site associated with the Seven Sisters story. She said there are footprints in the cliffs, little ones and big ones. The little ones are those of the sisters, dancing on the cliffs. The big ones are those of the man, chasing the sisters. She also said that at Wanna (near Port Lincoln) there are sand dunes where it is said the man lay under the sand dunes, hiding from the sisters in an attempt to catch them. Wanna is now a fertility place, she said. Elizabeth Richards gave evidence that there was a fertility place at Sleaford Bay, which suggests that one of Elizabeth or Vera may have been confused as to which of Wanna and Sleaford Bay was the fertility place.

524 Finally, Vera Richards told a story about a whale, who she seemed to be identified with the man who chases the seven sisters (who she sometimes called the "Moon man"). The whale (or Moon man) chased the seven sisters along the coast from "Adelaide way" all the way to Port Lincoln, "carving" the modern-day coastline as he went. The "ladies" (presumably the seven sisters) would jump onto islands (presumably the islands in the Spencer Gulf, though it is not really clear) to dance and avoid the whale/Moon man. Ms Richards said the Barngarla name for the whale was "numina", but that other groups, like the Mirning, also knew about the whale and had other names for it. Vera Richards gave some further detail regarding the Seven Sisters story and its connection to places around Port Lincoln in restricted evidence.

525 Lynne Smith said that her mother (Jean Glennie, a Barngarla woman, also Edith Burgoyne's mother) told her the Seven Sisters story. Ms Smith identified a site on the foreshore at Whyalla where there is a rock as being where the seven sisters at one time hid from the "wati man", who was represented, she said, by Hummock Hill in Whyalla. She said that Iron Knob was a significant place for the Seven Sisters story, but did not give any detail as to why. She

gave an itinerary that was quite different from the other witnesses. At first, she simply said the seven sisters started at Whyalla, and finished at Iron Knob. When pressed, it became apparent Ms Smith was only talking about the Barngarla part of the story. She said she knew that the seven sisters dreaming "went all over Australia". She said it went to Arno Bay (near Cowell), then to Kimba, then to Port Lincoln. Those places are all within the claim area and Barngarla country, but Ms Smith did not seem to regard them as part of her part of the story, because she did not grow up around those areas. Ms Smith also mentioned the seven sisters going to Lake Gilles and Pine Creek. Ms Smith gave further detail of the Seven Sisters story in restricted evidence with Ms Burgoyne taken at Pine Creek.

526 Yvonne Abdullah also knew of the seven sisters story. She said she was taught it by her "Auntie" Phyllis Croft when she was about 12. She gave evidence about the Seven Sisters story and its presence in the landscape around Iron Knob and Corunna Station in restricted evidence. She also mentioned that there were significant sites relating to the seven sisters in the Flinders Ranges and at Whyalla, Port Augusta and Port Lincoln. Rosalie Richards also gave evidence about the Seven Sisters story and sites in relation to it around Quorn (just outside the claim area) in restricted evidence.

The "man" story

527 Much of the "man" story is highly restricted, including (generally) the name of the man the subject of the story. It is thus not possible to fully summarise the evidence about this story in this judgment. There appears to be some interconnection between the "man" and the seven sisters. On a number of occasions, the "man" is identified with the man who chases the seven sisters.

528 Very often, the man was referred to with an adjective beginning with a "W" placed before the word "man". That full name cannot be referred to in the judgment, as it is restricted for cultural reasons. Therefore, where necessary, I will use the term "W man" to indicate that I am referring to the man's full name. Sometimes, there was also reference to a man with another adjective placed before the word "man". This adjective began with a "B". That full name can also not be referred to in the judgment for cultural reasons. Where necessary, I will use the term "B man" to indicate that this title was used by a witness.

529 Brandon McNamara Snr talked about the "man" story. He said the man travelled from Iron Knob to Iron Baron, to Iron Duke and then straight past Cowell, down to Elbow Hill and Port Lincoln (in particular Winters Hill), then "right around" to Streaky Bay, before going all the

way up to Roxby Downs, the Flinders Ranges, down to Hawker, Orroroo, Mambray Creek, and then back to Whyalla. Mr McNamara also mentioned that, presumably in another part of the man's journey, he went from Arno Bay to Caralue Bluff, to Mount Wudinna and Wudinna itself, the hills around Minnipa including Charter Rock and Eagle Rock, and then Wirrulla. He also mentioned that the man story was connected to Mount Laura, Corunna Hill and Hummock Hill in Whyalla. He went as far in open evidence as to agree that "Iron Knob is the man", and to say that a kangaroo was involved in part of the story. When at Winters Hill, he also identified Winters Hill as being the "W[rest of word redacted] man" the subject of the story. As for Elbow Hill, Mr McNamara said that it was so named because it represented the man lying on his elbow, watching the seven sisters, who are represented by nearby sand hills. There were a number of other hills around Port Lincoln that Mr McNamara identified as having been created by the "W man". In restricted evidence he also gave an account of a story relating to the man and Boston Island.

530 Howard Richards told parts of the man story in restricted evidence. All that can be said of it is that part of it related to two dogs. He distinguished between the "W man" and the "B man". The "B man" was the one who chased the seven sisters. The "W man" was another story. He acknowledged, however, that "some would say that [they are] the same person but from what I understand … they are two different stories." He also acknowledged that Mr McNamara would be able to talk more about the "W man" than Mr Richards could. In later evidence, however, Mr Richards did agree that the "W man" and the "B man" were the same. When Eric Paige was asked about the "B man", he said he had never heard of him. He only knew the "W man".

531 In any event, Howard Richards gave evidence very similar to that which Mr McNamara had given about the "W man", but Mr Richards generally ascribed it to the "B man" instead. But Mr Richards also identified some parts of the landscape visible from Winters Hill as relating to the "B man" story that Mr McNamara had not identified as part of the "W man" story. He also spoke to an extent about the "W man", identifying some parts of the landscape with the "W man" that Mr McNamara had not so identified. Mr Richards was able to give evidence about how certain parts of the landscape at Caralue Bluff fitted in with the man story. As noted above, Mr McNamara had spoken of Caralue Bluff as being important to the man story.

532 Eric Paige gave a fairly detailed account of the man story in restricted evidence. He identified Mount Laura as being the "man" lying down. That was consistent with

Mr McNamara's evidence that Mount Laura was an important "W man" site. According to Mr Paige, the man in Mt Laura is looking towards Iron Knob and feeling sad because Iron Knob (which is also connected to the man) has been disfigured by mining. Mr Paige added another aspect to the man story – he said the man had gone to Roxby Downs and "dug himself down there and he has died. And that's what they're digging out now, the uranium from that … man."

533 Brandon McNamara Snr said his two uncles had first told him the man story at Iron Knob when he was a teenager. In contrast, Howard Richards appeared at several points to say that he had got most of his knowledge about the man story from people up north after being initiated, but he also said that Ted Roberts told him parts of the story. Ted Roberts was not Barngarla or Western Desert, but was from a "next door neighbour" group (it appears that Mr Roberts is either Wirangu or Kokatha: *Far West Coast Native Title Claim v South Australia (No 7)* [2013] FCA 1285 at [2], [8]). Eric Paige had first heard the "W man" story at Roxby Downs when doing a heritage clearance with a group that included the late Ms Dare, Howard Richards and Brandon McNamara Snr, but it appears that he was mainly told the story by a Western Desert man known only as "Winless". He had first heard the "W" word when he went through the law. Mr Paige said that he had passed parts of the man story on to Brandon McNamara Snr and Howard Richards, although they did not mention Mr Paige as a source of their knowledge of the man story, and in fact, as noted, Mr Paige first heard about the man story from Mr Richards and Mr McNamara on a heritage clearance. Mr McNamara Snr says he has told his son the man story, though when Mr McNamara Jnr was asked about dreaming stories, he only made vague mention of "a Barngarla dreaming … that commences … at Iron Knob … and Iron Baron …" before saying: "But the stories – you're going to need my father."

534 Mr McNamara was adamant that the name of the man could not be said in the presence of women. Similarly, Mr Richards felt that there would be grave consequences if a woman was told of the man story:

> I may get sick, my children may get sick. It'll come back on me in other ways if they [he later clarified that by "they" he meant the men who put him through the law] hear that I'm [telling] other people [the stories] then I'll be in trouble and even to the point where they may require me to go and take punishment whether it's a spear in the leg or whatever. (T460)

535 Mr Paige was also quite firm in saying that "no women's allowed" to hear the "man" story or the "W" word: "[E]ven the men up there [on the APY lands] … they whisper that name you know."

Eagle story

536 Brandon McNamara Snr was the main proponent of the eagle story. Initially, when asked whether there was an eagle story, Mr McNamara replied "Not really." However, he then added:

> Well, one of the stories, that he come, flew down from Port Augusta down to … Adelaide, and he landed, the eagle on the hill out here somewhere, the eagle on the hill … [A]nd he went, flew to just out from Minnipa. There's a big rock there. I forgot the name of it but that's the Eagle Hill there too. It has got a funny name, I can't think of it. There's another eagle on the hill down at Port Lincoln, the same eagle story. … There's an eagle, a big stone arrangement other side of Port Lincoln. [That] is the eagle there. (T145-146)

537 It is clear that the "big rock" outside Minnipa is Pildappa Rock, a very large rock that forms a shape that quite closely resembles a large bird. The Court later went to hear further evidence from Brandon McNamara Snr at this rock. There, Mr McNamara gave a slightly different account of the eagle's travels:

> This [i.e. Pildappa Rock] is where the Eagle landed, through to his flight from the Gawler Ranges right around the Barngarla boundaries, Gawler Ranges, Streaky Bay, back to here and down south to Port Lincoln, up to Whyalla, Gawler Ranges, Port Augusta, down to … Eagle on the Hill at Adelaide, and back again, on its patrolling area of the whole of the Barngarla country and just patrol.
>
> "Walga" means "Eagle" and we also call a policeman Walga too, because of the – of "patrol". Police do patrolling and the Eagle in the sky do … patrolling. (T466-467)

538 In restricted evidence, Mr McNamara also identified a hill near Winters Hill at Port Lincoln as being associated with the eagle story, and gave similar evidence about the eagle story to that given above in open evidence.

539 Howard Richards knew of an "eagle story" connected to Northside Hill near Port Lincoln. He told some details of and pointed out significant landmarks associated with the eagle story in restricted evidence at Northside Hill.

540 Mr McNamara said he learned about the eagle from Archie and Bert Eyles, Barngarla men who were his mother's half-brothers, as a teenager. He said he has passed it on to Brandon McNamara Jnr, but Mr McNamara Jnr did not mention it in his evidence. Mr Richards said

he had learnt the story from his grandfather Fred Richards, a Wirangu man, and more recently another non-Barngarla man and Western Desert men, whose names are restricted at least in this context.

Whale stories

541 There were several mentions of stories involving whales. One has already been mentioned in relation to the Seven Sisters story.

542 Brandon McNamara Snr told a story that he said was a Barngarla story about a whale and a seal at Hummock Hill in Whyalla. The whale lived on land, and the seal lived in the sea. They met at the shoreline, and decided to swap places. The whale got diarrhoea from the different food he had to eat in the sea. The islands around the Eyre Peninsula were formed from the whale's droppings. The seal turned into a wombat on land, and travelled towards the Gawler Ranges and the Nullarbor. He also had stomach problems, and so it seems to be suggested that he might have created the Gawler Ranges and the Nullarbor with his droppings. To this day, Mr McNamara said, the whale still waves to the land, trying to get the seal or wombat's attention and organise a swap back to their original positions. Hummock Hill in Whyalla apparently represents the whale. Bill Lennon told a similar story in restricted evidence.

Marnpi and Tatta

543 Vera Richards was able to give evidence about the Marnpi and Tatta story (albeit only after being led):

> *MS GOODCHILD:* … Is there any other stories that you remember dad telling you that you can talk about in front of everybody?
>
> *VERA RICHARDS:* Not really.
>
> *MS GOODCHILD:* Remember anything about a bronzewing pidgeon story?
>
> *VERA RICHARDS:* Yes, and that's a – it's [M]arnpi and tutter [Tatta]. … The bat and the bronzewing pidgeon, and that was out at Coffin Bay sand dune. There was a big fire, and [M]arnpi and [Tatta] put that fire out, but they covered it with all the sand. And that's how Coffin Bay sand dunes come about. (T1250)

544 Ms Richards said her father, Brenton Richards, first told her that story when she was a child and they were atop Winters Hill on a clear day, and they could see the sand dunes in question. She heard it from her father on a number of subsequent occasions. She has told this story to her eldest son, who is 11. No other witness mentioned the Marnpi and Tatta story.

Urumbula story

545 Eric Paige gave a fairly standard account of the Urumbula story in evidence. He linked the story with the Port Augusta hospital, saying that that was the site where there was a big pole going up to the Milky Way, from which red paper had been dropping and then blowing into Alice Springs. The man then headed back to Alice Springs via the Flinders Ranges only after he had picked some women from Port Augusta to take with him. Mr Paige said he was told the Urumbula story by a Western Desert man named "Malbango".

546 Rosalie Richards also mentioned that she knew Lake Umeewarra had something to do with the "native cat dreaming". The ancestral beings in the Urumbula story are often identified as native cats. She had been told about this by Leroy Richards.

Two snakes story

547 A number of witnesses made mention of a story involving two snakes. Harry Dare was asked whether there were any stories that "help set out the … Barngarla boundaries". He said the only one he knew was about two snakes. He didn't know it well, but he knew two snakes had "come down on the eastern or western, and made that country there." Eric Paige and Simon Dare had told him about this story, and he assumes they learnt it from old Western Desert men.

548 Simon Dare mentioned that there was a snake story connected to Caralue Bluff, but said "I don't know much about it." Eric Paige discussed the snake story in a little detail in restricted evidence. He said it is definitely a Barngarla story, but that he learnt it from old Western Desert men. He said he had not told it to Howard Richards or Brandon McNamara Snr, saying "I wouldn't share it with them."

549 Howard Richards was aware of the snake story, and spoke of it a little in restricted evidence, but without giving any real details of it. Barry Croft mentioned a snake story that went "right through the Fitzgerald Bay area right through into Port Augusta."

550 Amanda Richards said there was a creation story about Wilpena Pound (other than the one she told in detail, mentioned below), featuring two snakes that "sort of curled around" to form Wilpena Pound, with St Mary's Peak (within Wilpena Pound) being the head of the female snake. Ms Richards acknowledged she did not know the story well, and she knew there were other parts to the story, including, she thought, people who got eaten by the snakes. She was told the story by her father Leroy Richards as a child, and since her father's

passing, her mother Rosalie Richards has told her about it. Rosalie Richards mentioned snake stories a few times, once in relation to Lake Umeewarra, another time in relation to a "giant serpent" who would travel underground between springs to the east of Lake Torrens, and yet another time in relation to the southern part of Lake Torrens.

Two women story

551 Eric Paige briefly explained a story about "two women" that he had been told by old Western Desert men. He said that two women had travelled from Elcho Island in the Arafura Sea (in Arnhem Land, Northern Territory) down to Red Banks (a place within the claim area near Port Augusta), then down to Port Lincoln, then back north, travelling underground, before they came out from under the ground at Lake Umeewarra, before going north to the Flinders Ranges and back up towards the Arafura Sea. It must be noted that the two women's travels share more than a passing resemblance to the travels of the protagonists in the Urumbula story, and Mr Paige told it immediately after telling the Urumbula story.

Flinders Ranges Richards story

552 Amanda Richards and Rosalie Richards told a story about Wilpena Pound (outside the claim area) which they characterised as a Barngarla story. No other witness mentioned the story. The story concerns "Kalianarra" or "Alyanarra", a gecko, and "Kadnu" or "Adnu", a bearded dragon or perhaps a sleepy lizard, two ancestral beings. They came across some "marakuli", which both witnesses described as mythical marsupial lions, who had eaten some people at a campsite. Kalianarra and Kadnu hid in a tree and threw stones at the marakuli, killing them. Some of their blood formed Pukatu ochre mine. Some of their bodies formed red sandhills in the vicinity of Wilpena Pound. Their scratching their claws against the ground as they died caused "scratch marks" in the side of Wilpena Pound which are still visible. Both witnesses told more or less identical versions of the story. Amanda Richards added that the story can only be told in daylight hours, because at night it might stir up the spirits of the marakuli. Rosalie Richards added that after the encounter with the marakuli, the two ancestral beings walked on westwards across Lake Torrens to its far side. The two beings started to sink in the lake. The gecko let the sleepy lizard climb on its shoulders to jump to the western side of Lake Torrens. The gecko then returned to the eastern side. This explains why the sleepy lizard lives on both sides of Lake Torrens, but the gecko is only found on its eastern side. Both witnesses learnt this story from Leroy Richards. Amanda Richards said Leroy would tell them it in Barngarla language. No other witness mentioned this story.

Other stories

553 There were a number of stories mentioned in passing without detail by Brandon McNamara Snr, including a possum story, a sleepy lizard story, and an emu story. No other witness mentioned these stories.

Beliefs

554 It was quite a widespread belief amongst the Barngarla witnesses that spirits (often identified with the Western Desert word *mamu*) resided at sacred places and if one went there without taking necessary precautions, one would get sick. For example, Roddy Wingfield fell ill in about 1972 when he was a child during a school trip to Mount Laura. His grandfather heard of this, and he said that this had happened because of "tribal stuff in the hill or something". Mr Wingfield doesn't really know what the "tribal stuff" was but guesses it was "probably some sort of artefact". His grandfather "had it removed", and he has not fallen sick visiting Mount Laura since. This example is somewhat atypical in that generally it was not understood that removing artefacts from a sacred site removes the spirits from that site.

555 A common precaution against spirits was the practice of "smoking". Brandon McNamara Snr, for instance, said that when he went to a Barngarla "real sacred place", he would light a fire and "smoke" himself – that is, "stand in the smoke, turn around and round…" This would keep any spirits at bay. At the same time, he would sing a song in his head, telling the spirits "we are Barngarla law men and we come to visit the sacred site, and we're not going to destroy or touch anything…" This is something that Mr McNamara said "all tribal people" do. Linda Dare detailed a very similar smoking ceremony that she participated in upon visiting a sacred place associated with the Seven Sisters dreaming.

556 Mr McNamara spoke of a similar custom he observes when visiting Mount Wudinna (although he did not explicitly state that it kept spirits at bay), where he must say a phrase, transcribed in the transcript as "Wayi wati, nguna wati Barngarla, gnarla wati Barngarla", and which he said was Barngarla language and translated as "Hello Barngarla man, I'm Barngarla man, and I've come to say 'hello'." Upon leaving, he says "Wayi balyala", which he partly translated as "See you later." *Wati* is, as has been previously observed, a Western Desert word. *Wai* is an informal Western Desert greeting.

557 Howard Richards told a story from when he was a child of being told by elders to throw dirt at a whirly-whirly coming towards him. He did so, and the whirly-whirly changed direction

and moved away from Mr Richards. Mr Richards was told that the whirly-whirly contained a spirit. The same practice, he said, is still used and taught today. Yvonne Abdullah thought that whirly-whirlies were the spirits of "loved ones that has passed on". She did not mention any custom of throwing dirt at them.

558 Other isolated beliefs included Yvonne Abdullah's understanding that sleeping around Lake Gilles was unwise because "little fire men" would make one's eyes go red, and possibly render one blind. She said her sister's eyes had gone red from sleeping there once. Amanda Richards feared telling stories about "marakuli" at night because "you sort of stir up their spirits, and you don't want them running around."

559 If one did fall foul of spirits, numerous witnesses said that one could be cured by a *ngangkari*, a Western Desert word explained by the witnesses as being a "healing man" or "Aboriginal doctor". *Ngangkari* have the power to heal people who have been afflicted by spirits. As Edith Burgoyne put it: "whitefellas doctors, they can't see [the spirits] in you. You keep getting sick and sick. The only people that can fix you up is *ngangkari*."

560 While Brandon McNamara Snr said he only really learned about *ngangkari* when he went up to the APY lands, Edith Burgoyne said there were *ngangkari* in Port Augusta and Adelaide. She knew of three ladies who lived in Port Augusta who had come to her house when she had a problem. Linda Dare gave an account of a *ngangkari* she knows, the Arrernte-Warlpiri woman, Edie King, who healed her mother:

> … [Edie King] was at the back of my mother's house, and she was doing my mother, because her – as she calls her, her spirit was turned on its side, but then when Edie King done her, she moved her spirit back properly… (T1369)

Burials and associated beliefs and practices

Name avoidance

561 Lizzie Richards gave the following evidence on the issue of avoidance of the names of deceased persons:

> *MS GOODCHILD:* … [I]s there anything that you can say about the law about when people pass away and saying a person's name?
>
> *LIZZIE RICHARDS:* Ginga.
>
> *MS GOODCHILD:* What do you mean by ginga?
>
> *LIZZIE RICHARDS:* The person that has passed on, and we use …. Like, my niece just

> passed away on Sunday. … [S]he was named after me, Elizabeth. So now I have asked my children not to call me Elizabeth no more. They will call me Auntie Lizzie, mumma Lizzie.

562 The lay witness evidence is broadly consistent with this, in that there is only one case of someone (Howard Richards) apparently calling Lizzie Richards by her full name, while there were many cases of her being called Lizzie by the lay witnesses (for instance, Evelyn Dohnt, Vera Richards, Lynne Smith, and Howard Richards).

563 Edith Burgoyne stated unequivocally in evidence that "we're not allowed to use people's names once they've passed away." Similarly, Linda Dare asked that counsel refer to her recently deceased mother simply as "my mum."

564 However, the State submits that "[t]here were many examples of Barngarla [claimant witnesses] naming people who had died including those who had died recently such as Ms … Dare." In his 2013 Anthropology Report at [82], Mr McCaul also opined in his report that there was "frequent naming of deceased people in court evidence…"

565 Two examples are given: both Eric Paige and Simon Dare used Ms Dare's first name in evidence. Harry Dare, Troy McNamara, Lorraine Briscoe, Maureen Atkinson and Rosalie Richards all also used Ms Dare's first name.

566 Moreover, Amanda Richards, when asked by counsel for the applicant if he could use her deceased father's name, agreed that he could. Admittedly, however, Ms Richards' father died ten years ago, so it may simply be that sufficient time has passed for his name to be able to be used once again. There were other occasions where witnesses were willing to say the name of deceased relatives or friends (e.g. Elizabeth Richards in regard to Leanne Nash).

567 Counsel asked Howard Richards about this apparent inconsistency in restricted evidence. The relevant passage has, after conferral between the parties, been partially admitted into evidence, with one redaction:

> *MR EVANS:* Just one question in relation to the use of names of people who have passed away. Sometimes it seems as if somebody who's deceased their full name can be used in … open court. There has been evidence of names of people used in full. Other times it seems that you don't use the Christian name; you just [use] Mr somebody. And other times you won't mention the name at all. Is there a rule or something in relation to when you can and when you can't use the names of people who've passed away?
>
> *HOWARD RICHARDS:* Yes. As I say, some of them are, say, Gumuna – Gumuna, [Here follows four lines of redacted transcript, with note – "Identifies deceased individual"] But further down our way we would probably "ginga" and they know

> that person has passed on, so… (T343)

568 Mr McCaul reviewed the unredacted response of Mr Richards to the above question and summarised its effect in his 2013 Anthropology Report at [81]:

> It would seem from this statement that Barngarla today are more relaxed about stating the names of deceased people, but that they respect the practices of the Pitjantjatjara and other northern [i.e. Western Desert] people by avoiding stating names of deceased people from those communities.

569 Having reviewed the unredacted transcript, I agree that that is a reasonable interpretation of Mr Richards' unredacted response.

Funerals, burials and associated rituals and beliefs

570 There was some evidence on modern-day Barngarla funerals and burials. As to funerals, Roddy Wingfield gave evidence that he had attended Brenton Richards' funeral (a senior Barngarla man) and the funeral of a nephew called "Phillipo Dadlah", both in Port Lincoln, in the last three years. Counsel for the State asked about the nature of Mr Dadlah's funeral:

> *MR EVANS:* And what sort of funeral was it? Was it a church – just a normal funeral in a ---
>
> *RODERICK WINGFIELD:* Just a normal funeral. (T711, ll 33-36)

571 Mr Wingfield was not asked about Brenton Richards' funeral.

572 Brandon McNamara Snr was asked by counsel for the State whether there was "any particular ceremony attached to [his parents'] burial". Mr McNamara replied in the negative and said it was "just a normal burial." He said it was attended by people from "everywhere … Ceduna, Whyalla, Adelaide", including other Barngarla people such as the "McNamaras, the Richards, the Eyles, the Dares, the Winfields [sic]."

573 The State contended that Eric Paige had in evidence said that he had presided over traditional Christian church funerals in his role as a pastor. That is true, but he was clearly speaking about his time in the APY lands, not in Barngarla country, so the evidence is of little relevance.

574 Yvonne Abdullah gave evidence about funerals that occurred when she was a child. She said children were not allowed at funerals when she was young, "but we used to hear the wailing

of our grandmother and mother and sisters…" She later elaborated: "[Women] would do the wailing before [the funeral] … if they got the news of someone passed away."

575 Elizabeth Richards said that when she was in Alice Springs, she saw "old women were chucking dirt over them[selves] … And I knew straightaway that there was a death in the community." Counsel for the applicant enquired:

> *MS GOODCHILD:* Have you seen that sort of behaviour down in your country around where you grew up?
>
> *ELIZABETH RICHARDS:* Yes, sometimes they do.
>
> *MS GOODCHILD:* Yes …. In your hands and ---?
>
> *ELIZABETH RICHARDS:* Yes.
>
> *MS GOODCHILD:* ---throwing it over your head?
>
> *ELIZABETH RICHARDS:* Yes. Or sometimes, they would hit themselves, you know. It's just a way of grieving. (T1228, ll32-38)

576 Ms Richards was asked about "sorry camps" by counsel for the applicant. She gave one account of a "sorry camp" held in July 2012 for her "sister girl" Leanne Nash (her cousin), but made clear that that was only because Ms Nash "had a lot to do with the old girls up in Yalata, traditional ladies. So that's why they came home to our homelands and they held a Sorry Camp."

577 As to burials, there was very little evidence. Rosalie Richards suggested that "it's important to be buried in your country." She said her husband Leroy had wanted to be buried in the Wilpena Pound area, but did not have the necessary approvals, and thus was instead buried in Copley (just north of Leigh Creek).

578 Howard Richards similarly said that "we bring them [i.e. deceased Barngarla people] home." He said he wishes to be buried in Port Lincoln when he passes away. That is where his grandparents, mother, and uncles and aunties are all buried. When asked why he wished to be buried there, Mr Richards replied "Well I wouldn't want to get buried anywhere else."

579 Other evidence was consistent with the hypothesis that Barngarla people are buried on country, although it was also generally consistent with the hypothesis that Barngarla people are simply buried near where they passed away. For instance, Howard Richards talked about how his uncle Lionel died as a boy from an injury sustained while riding a horse in the

Gawler Ranges, and that Lionel was subsequently buried in the Gawler Ranges. Howard Richards' mother died while making a journey from Western Australia, where she had resided for the past year or so, to Port Lincoln, where she had resided previously and intended to reside again. She was buried at Port Lincoln, rather than her place of death, which was a place called "Milguru", apparently in Western Australia. Brandon McNamara Snr said his parents were buried at a cemetery outside of Wudinna. Wudinna is within Barngarla country, and is also relatively close to Minnipa and Mt Ive Station, where, according to Mr McNamara's evidence, his parents had spent much of their later life. Barry Croft said that his father was buried at Iron Knob cemetery. Iron Knob is also on Barngarla country, and is also where Mr Croft said his father spent much of his later life. Harry Dare attended his brother Malcolm's funeral when he was 21. Malcolm was buried in Port Augusta. The Dares all grew up in or near Port Augusta. However, Harry Eyles in his affidavit said that during his youth (around the 1950s), "when Barngarla people died, they were often buried in the Port Augusta cemetery…" (apparently regardless of birthplace).

580 Linda Dare said that "[m]y hair is supposed to be buried with my mother [Ms Dare, who recently passed away], but I will be burning it." Linda Dare had not done so yet, because she was waiting for two of her aunties, Maureen Atkinson and another unnamed aunty, to cut her hair for her, as that is the "traditional way" it is done. It is a little unclear what the precise nature of this ritual is. In later evidence, Ms Dare clarified that she intended to dig a "little hole" at the site of her mother's grave, and bury the hair there. It was unclear whether this was part of the hair-burning ritual, or an alternative to it. One interpretation would be that Ms Dare's hair was supposed to have been buried with her mother, but because she was not able to have her hair cut by her aunties in time for the burial, she will now burn the hair and bury it near her mother in a "little hole" instead.

581 Linda Dare also mentioned the ritual of "smoking out" the house of the deceased, which Ms Dare performed in her mother's house when she passed away, "so her spirit would be gone." Harry Eyles in his affidavit said that during his youth (around the 1950s), Barngarla people's homes and possessions were routinely smoked.

582 Another ritual was mentioned by Yvonne Abdullah. She said that she was taught:

> …if we were walking past an area where we know [a deceased person] had been or maybe they passed away, we would have to pick up the dirt and throw it so the spirits wouldn't follow us, throw it towards where they passed away. (T1191, ll14-21)

583 Rosalie Richards gave evidence about a belief of her late husband, Leroy Richards, in regard to a place transcribed as "Willapa" (probably Willipa, east of Hawker):

> …[H]e said … that there [is] … a conception site [there] and the babies' spirits actually live in that vicinity, and he saw the protection of those sites are really important for the continuation of the Barngarla People because … without that site with the babies' spirits, there would be no more Barngarla People, and that needed to be protected. He said that at night times you could hear the babies crying and, in fact, he told my daughters when we camped one time we went through to Yunta, he was saying that he could hear the babies crying in the night. Women used to look after that site. They would care for the preservation of the spirits because that was really critical for the future of the people. (T1299, ll19-37)

584 While this belief was not directly related to death, it evinces a belief in "spirits". However, in his 2013 Anthropology Report at [78], Mr McCaul stated that he was involved in a "recording" of "what I assume is the same site" with a group of Aboriginal people who identify as "Kuyani-Adnyamathanha" and regard the site as "part of [their] cultural heritage".

Hunting, fishing and gathering resources

585 There was a very great deal of evidence of current claimants hunting, fishing and gathering resources within and outside the claim area (the hunting and gathering resources was mainly outside the claim area, in the Gawler Ranges, the eastern area of which, at least, is acknowledged to be Barngarla country: see *McNamara on behalf of the Gawler Ranges People v State of South Australia* [2011] FCA 1471 per Mansfield J at [31]).

Hunting

586 Howard Richards, Brandon McNamara Snr, Edith Burgoyne, Lynne Smith, Dawn Taylor, Maureen Atkinson, Yvonne Abdullah, Barry Croft, Brandon McNamara Jnr, and Troy McNamara all gave evidence that their families would (and, at least in some cases, still do) hunt kangaroo in the Gawler Ranges (which is predominantly outside the claim area). Barry Croft also gave evidence of hunting kangaroos near Port Augusta and Corunna Station, both within the claim area, and Eric Paige also spoke of hunting near Port Augusta, as well as Bookaloo, Pimba, Beltana, and Uro Bluff (the last place being within the claim area). He said his sons had also hunted in the Port Augusta area and Uro Bluff, as well as near Hawker, Warrakimbo, and Caralue Bluff (all except Hawker and part of Warrakimbo station are within the claim area). Dawn Taylor said that two of her sons hunt for kangaroo around Ceduna and around Whyalla (the latter being within the claim area). Simon Dare said he went hunting in the 1960s and 1970s at Yadlamalka (within the claim area). Evelyn Dohnt

said that she had gone hunting at Wanna (in Lincoln National Park, within the claim area), and Vera Richards also said she had been hunting for sleepy lizards at various spots around the Port Lincoln area.

587 Most witnesses gave evidence of also hunting wombat, perentie, sleepy lizards ("galda" or "kalta"), and sometimes rabbits and emus.) Mr McNamara Snr also said he hunted the topknot pigeon (a native Australian pigeon), and "wild turkey" (this is probably a reference to the native Australian bustard bird, commonly known as the "bush turkey").

588 Most commonly, the witnesses and their families hunted with guns. However, Yvonne Abdullah said that when she was young, the men "didn't have guns, just wadoos." Presumably "wadoos" are spears. Dawn Taylor said sleepy lizards were killed by "[getting] a stick or a rock and [hitting] them on the head." Yvonne Abdullah said that her family would catch sleepy lizards merely by stepping on them, "[grabbing] it around the neck and just got it up against a fence post."

589 Mr McNamara Jnr goes hunting as often as once a month with Troy McNamara and others. Dawn Taylor said her sons learnt to hunt and cook kangaroos from their uncles, Brandon McNamara Snr, "Dingle" Smith, and Ken Smith, and that they do so very often.

590 Many of the witnesses suggested a gender-based delineation of hunting roles, but sometimes the exact bounds of the delineation varied. Ms Smith's evidence on this point was a little unclear. She said that "catching the wombat and the emu" was a "man's job", but that "I can go and shoot the kangaroo, but I can't clean it … that's a man's job." However, it seemed from other parts of Ms Smith's evidence that generally, hunting kangaroo was a man's job, too:

> *LYNNE SMITH:* … [W]hen you go camping, the men go and get their bush tucker. The women go and make the fire, get the feed and everything ready, and make sure the camp is all set up and make the damper and things. I'm going back to them days, but now it's still the same.
>
> *MS WELLS:* Yes. And the men went off and got the bush tucker?
>
> *LYNNE SMITH:* Yes, the meat.
>
> *MS WELLS:* Yes, so that was the roo; is that right?
>
> *LYNNE SMITH:* Kangaroo, wombat or whatever. (T946, ll11-23)

591 However, that evidence is hard to square with Ms Smith's further evidence shortly afterwards:

> *MS WELLS:* And why did you [get a gun licence]?
>
> *LYNNE SMITH:* To go out bush and shoot my meat.
>
> *MS WELLS:* So you're allowed to do that now?
>
> *LYNNE SMITH:* Well, I've done it all my life. … (T947, ll15-17)

592 Ms Burgoyne also gave evidence that cooking kangaroo is the "men's job". But she also gave evidence that her mother taught her how to cook lizards, so the preparation of meat generally is evidently not the "men's job" according to Ms Burgoyne. Ms Taylor said that making the fire, setting up camp, and cooking the food was "the woman's job … That's what I was told when I was growing up. My mum used to always say it's a woman's job to do this and do that…" Ms Atkinson also stated that the men "always … caught the kangaroo" but expressed this simply as an observation, rather than a rule. Ms Atkinson also stated that her mother would generally prepare and cook kangaroo, not the men. Eric Paige disagreed. He said that Barngarla women are free to hunt or fish as they please on Barngarla country.

593 Barry Croft gave an entirely different rule as to who was allowed to hunt, saying that, at least when he was young, "[o]nly the traditional people were allowed to [hunt]."

594 Howard Richards said that to cook kangaroo, "you make a fire and you singe it, and then you prepare it and … cook it in the ashes." Brandon McNamara Snr broadly agreed: "…[Y]ou … make a big fire and take the stomach out and burn the fur off and cook it in the coals and ashes. That's the Aboriginal traditional way." Under cross-examination he added more detail:

> *BRANDON MCNAMARA SNR:* Take the intestines out, tip the kangaroo upside to get the blood out, it runs through and then you get a piece of stick and you thread it through the – open up the stomach, thread it through and after you singe [the fur] off you put it in the coals or a hole. You put some ashes over it, some dirt after you singe it and cook the traditional way. … And the other way is kill it, skin it and cut it up. And take it home and put it in the freezer. …
>
> *MR O'LEARY:* And the second way is not the traditional way?
>
> *BRANDON MCNAMARA SNR:* No. That's just taking it home, yes. (T210 l43-T211 l12)

595 Mr McNamara said he learnt this method from his father, and "Uncles" Archie and Bert Eyles when he was young, and has since passed it onto his children. Wombat, Mr McNamara

said, is cooked the same way. Mr McNamara's evidence on these points was corroborated quite closely by the evidence of Edith Burgoyne, Lynne Smith, Maureen Atkinson, Barry Croft, and Evelyn Dohnt.

596 Brandon McNamara Jnr described a different way of cooking kangaroo as his preferred method:

> …[I]f you got a kangaroo, you probably just hang him on the tree, gut him, skin him, and then cut him up. Maybe make a fire, cut some meat off. … [I]f we get a few kangas we will chuck them in the esky and bring them back home and put him in the freezer … (T283, ll37-42)

597 Similarly, Troy McNamara said he prepared kangaroo that he had hunted by "[skinning] it and [cutting] it up" and then "[cooking] it on a barbecue plate" with coals underneath it.

598 However, in cross-examination, when speaking of how to cook wombat, Mr McNamara Jnr did describe a method similar to the "traditional" way of cooking identified by Mr McNamara Snr (although he did not describe the method as the "traditional" way, but seemed to regard it only as one way amongst several equally valid methods).

599 It is generally considered normal amongst the witnesses to share the spoils of one's hunting with family and friends. Troy McNamara expressed it as being "the right thing to do". When asked by counsel for the applicant what he meant by that, Mr McNamara explained:

> I suppose, as you were growing up, like, you were always … told to respect the elders, and as a kid going out hunting – when you would come back you would see your parents hand out food to other people. So while you're going there, you come back and do the same thing. (T1088, ll15-19)

600 Similarly, Maureen Atkinson expressed the sharing imperative as being part of the culture: "… [I]t was always share. Aboriginal culture is sharing all the time …"

601 A number of the witnesses also felt it was important not to hunt more than can be eaten or shared. Troy McNamara gave evidence that he has "never" seen anyone leave an animal that has been killed, unless its meat was for some reason spoiled. He also said it was important only to hunt "what you're going to shoot or what you're going to eat. Not to go out and just shoot for fun like some people do."

Gathering resources

602 Howard Richards gave evidence about gathering Malleefowl eggs and quandongs in the Gawler Ranges as a child with his family and the Reid family. Mr Richards recalled that "Djamu" George "Tjunnee" Reid told him that one must not take all the Malleefowl eggs, but leave some in the nest "so they keep coming back every year." Mr Richards has passed this advice on to this own children.

603 Brandon McNamara said that he and his family would collect from the bush in the Gawler Ranges quandongs, and other bush fruits like "wild oranges" and "wild pears". "It doesn't taste really Woolies way," Mr McNamara observed, "but it's the bush style; you survive on it." Edith Burgoyne gave evidence of collecting quandongs and "wild tomatoes" with her mother, the second of which Ms Burgoyne described as "like yams", and which she also called "Junga Junga" and "snotty gobbles". Lynne Smith gave evidence of being taught to pick "little red berries" by her mother while camping at the Gawler Ranges. Yvonne Abdullah said she would pick a fruit which she called "genumi". Vera Richards said she was taught to gather quandongs. Barry Croft also spoke of collecting quandongs, as well as the "pigface" plant (a common name for a native plant that produces edible leaves and fruit).

604 Ms Burgoyne's mother also taught her how to make damper, from flour and water, in the ashes. Ms Smith also mentioned making damper in the ashes while camping in the Gawler Ranges, but added that "now, you would chuck it in a camp oven." Evelyn Dohnt gave evidence that "Aunty Lizzy" (presumably Elizabeth Richards) made damper while camping at Wanna (within the claim area). Vera Richards said that she and "the aunties" would make damper when they went camping. She identified, inter alia, "Lizzy", presumably Elizabeth Richards, and "Sharon", presumably Sharon Dohnt.

605 Maureen Atkinson said her family would collect witchetty grubs (which she called "bardis") when camping, as did Yvonne Abdullah (who also called them "bardis").

606 A number of witnesses gave accounts of collecting and using bush medicine. Vera Richards identified tea trees and eucalyptus as bush medicines. Other witnesses were able to describe in detail particular plants, how the medicine is made from those plants, and the benefits of that medicine. None were able, however, to name the plants they were referring to. For instance, Linda Dare said she would pick plants "with the pink on it, and it has got a little white basin kind of thing … and then you just take [it] … with the leaves and everything, you

can just cook them all up … with the emu fat or kangaroo fat, and you make it like a cream." She said she used this medicine on her son as a mosquito repellent and as a skin cream.

607 Edith Burgoyne learnt to use bush medicine from her mother and aunts in Minnipa, and also from an old lady in Mimili. She said there was a certain bush she could identify, which she would go out and get, and then "dry it out, put it in a pot, pour olive oil over it, and I strain it. I've got all my jars lined up on the table outside." She said it could be used as a moisturiser, for aches and pains, and for head lice. She also gave an account of a man who had used it to make his hair grow back, and a non-Aboriginal woman who had used it (on Ms Burgoyne's recommendation) to get her young daughter to sleep in her own bed. Brandon McNamara Snr (who is, it will be recalled, Edith Burgoyne's brother) gave an account of what sounded like the same medicine, saying that "Edith and all them used to do all that."

Fishing

608 A number of witnesses gave evidence as to fishing. The main witnesses who spoke in depth upon the subject were Howard Richards, Roddy Wingfield, Barry Croft, and Dawn Taylor.

609 Howard Richards gave evidence of fishing frequently, as a child in particular, around the Port Lincoln area, "particularly round the Billy Lights area, all around Murray Point" (Billy Lights Point and Murray Point are the two points of a small peninsula at the northern end of Port Lincoln Proper Bay), and "all the way, right up" the eastern coast of the Eyre Peninsula "to Tumby Bay, Cowell", and also on the western coast at Venus Bay (outside the claim area). Mr Richards said he and his family would "collect periwinkles or we go diving for scallops or we go fishing by using modern-day handlines and whatever …"

610 In his evidence, Mr Richards was asked about "another kind of fishing that you used to do". He explained:

> … [W]e used to go out to Dutton Bay [near Coffin Bay] [and] the Tulka area [on Port Lincoln Proper Bay] but mainly at Dutton Bay. We would go floundering [i.e. fishing for flounder] and for cat fish. … We [would] make our own little version of crabbing net to the extent what they did in the old days. But, you know, batteries and lights and tubes and put the batteries on it and you have you little flash lights and you wander around at night when there is no moon and no stars. … What we catch, we have a fire on the side and … what we don't eat we take home to the families. … Yes, that's ... when I used to learn it. And then I passed it on to my children. They can do the same. … (T77, l41-T78, l7; also see T363, ll8-18)

611 That description is broadly similar to the practice recounted by Schürmann of Barngarla people drawing fish into the shallows by waving torches of bark at night. Mr Richards goes

on to say that he was taught the "good … areas" to do this by "elders", and he has passed that on to his children. Dutton Bay is not in the claim area, but Mr Richards regards it as Barngarla country.

612 Mr Richards also gave evidence about his involvement in speaking for Barngarla people on issues to do with fisheries regulation. He said that restrictions on fishing for shellfish was "restricting [Barngarla people] from doing what we've been doing for as long as we could remember" and went on to say:

> It's important for us to be heard because if anything that impacts on us stopping from collecting shellfish and what we've been doing all along, and as long as I can remember as kids, yes. (T80, ll3-5)

613 At Fitzgerald Bay, Roddy Wingfield gave evidence that he and his family would "usually go out and chase up the crabs and that and razor fish." Razor fish are a type of shellfish found in South Australian waters.) Mr Wingfield would catch crabs by "[putting] a bit of prongs on the end of a stick or a broom and tie them together and just use it like that like a little spear." Mr Wingfield would walk in the water with this instrument, and catch crabs either by seeing them on the bottom of the sand, or by digging into the sand to find them. Once caught, Mr Wingfield would cook the crabs by "[putting] it in a drum and put them in salt water and boil them over the fire … [o]n the beach." His fathers and uncles taught him this method. Apart from the crabs and razor fish, Mr Wingfield also fished for whiting at Fitzgerald Bay. He admitted he had not been camping (and thus hunting or fishing, presumably) at Fitzgerald Bay for "15 odd years …, maybe even a bit longer", though he said his brother Donald Wingfield and others camped at Fitzgerald Bay only last year.

614 Barry Croft corroborated all of these points of Mr Wingfield's evidence. He and his family would also go crabbing and fishing for whiting at Fitzgerald Bay, and they would catch crabs with the same implements, in the same way that Mr Wingfield explained. (T634-645) Mr Croft said the best time to catch crabs was at high tide:

> … [B]efore high tide the crabs were on the move, when they were coming in to feed, and you would probably stand up in water to waist height, and then, as the tide go out, the crabs would start to move, yes. And that's how we catch them. (T1410, ll39-42)

615 The fish and crabs they caught would generally be grilled and eaten on the beach. Mr Croft said he last fished and crabbed at Fitzgerald Bay about three years ago, but that he still goes

crabbing elsewhere "every now and then" and that other members of his family come to Fitzgerald Bay more regularly, including his nephew who "come out usually three or four times a month".

616 Mr Croft also gave evidence of having gone fishing and crabbing with his family at Port Germein (just outside the claim area, on land presently the subject of the Nukunu Native Title Claim, though Mr Croft says he thinks it is traditionally Barngarla country).

617 As to the method of fishing Mr Croft utilises, he said that "in the old days we used to go out and throw the line out...", but that "later on" he would fish "probably in the dingy or something like that."

618 Dawn Taylor stated that she ate fish, periwinkles, 'wunimars' and crabs, and that she and her family would obtain these from Fitzgerald Bay and around Whyalla, and also Cowell, Port Lincoln and Tumby Bay. 'Wunimars' are apparently "the same as periwinkles". The last time she went to Fitzgerald Bay was only a few weeks ago, but she didn't catch anything. She hasn't been to Cowell, Port Lincoln or Tumby Bay to fish for a few years. To fish, Ms Taylor would use fishing rods. Periwinkles would simply be pulled off of rocks, while "wunimars" required "a knife to cut them off the rock." Razor fish also "need knives", but you are "not allowed to do that no more." Crabs would be caught with "[n]ets, or sometimes [the men] will go out and rake or spear them." Ms Taylor would then sometimes cook the fish at home, and sometimes on the beach "on the coals, in a pot or frying pan, if we've got it."

619 Apart from the above four witnesses, a number of other witnesses made some mention of their fishing habits. Troy McNamara said that often at Port Lincoln amongst his family and friends "there would be a bit of fishing going on, but I wasn't that much of a fisherman." Eric Paige gave evidence of going fishing in a boat at Blanche Harbour (between Port Augusta and Whyalla). Maureen Atkinson gave evidence of having gone crabbing and fishing with other children from Umeewarra Mission as a child "nearly all the holidays, except for the Christmas holidays." The fishing and crabbing appeared to have occurred around Blanche Harbour. Elizabeth Richards also mentioned in her evidence that she would go fishing when young, but did not specify any details.

620 Brandon McNamara Snr said that he and others used to go fishing at Port Lincoln, Streaky Bay, Venus Bay and Port Kenny. Streaky Bay, Port Kenny and Venus Bay are within the land claimed in the Nauo Native Title Claim, although Mr McNamara said they were part of

Barngarla country. Edith Burgoyne said that when she was young she and her family would fish with fishing lines at Port Kenny and Venus Bay. (T242; ll3-7) Lynne Smith gave evidence that she and her family did not go fishing on their visits to Port Lincoln when she was a child, but seemed to say that she and her family would "get crabs" at Venus Bay.

621 Vera Richards named a number of beaches around the Port Lincoln area where she and her family would go camping and fishing. She also mentioned fishing "off the jetty" at Billy Lights Point. Ms Richards said she did not go fishing "so much", but her brothers and her children would go fishing regularly. Her brothers and children would bring the fish home for her to clean. Linda Dare stated that her family goes fishing often "on the old jetty" at Red Banks, (a place near Port Augusta) and also at Port Naley (it is unclear where this is) and Port Lincoln, though she herself "hates fishing".

622 Finally, Howard Richards and Barry Croft both spoke of "fish traps", an (apparently) historical Barngarla method of fishing. When asked how people fished "in the olden days in that area", Mr Richards mentioned fish traps. Mr Richards has been involved in protecting remaining fish traps constructed in earlier times by local Aboriginal people (and therefore presumably Barngarla people) from modern development. Mr Richards was asked if he had ever used a fish trap and gave the following reply:

> *HOWARD RICHARDS:* … [W]e are living in different times so I think the traps where you catch fish is normally when you play as kids. I mean, for the high tide/low tide. There are still the traps but it is not as prominent back in them days as it was back in the old days because a lot of us … over time … have deteriorated and so we never sort of maintained those. I mean – because of the fact that – where you live. I mean, most of our people are, you know, from the sea coast and over time life impacted on us to … stop us from doing a lot of things. …
>
> *MR HILEY:* Okay. Do you know how the traps worked?
>
> *HOWARD RICHARDS:* Well, it's all to do with the high tide and low tide. (T77, ll27-37)

623 Mr Richards' answer is difficult to interpret, but he appears to say that he did use some form of fish traps when he was younger, but perhaps not the traditional form of fish trap.

624 At Black Point, Barry Croft also gave evidence about fish traps, saying that "[t]hey used to have fish traps up around this area …" He proceeded to give an account of how the fish traps worked. He admitted, however, that he had not ever seen a fish trap, but that his mother,

Phyllis Croft "done a lot of fish traps not only just here but right through to Port Lincoln as well…". Phyllis Croft died in 1993.

Trade

625 There was no real evidence of trade with other Aboriginal groups amongst the Barngarla witnesses. Amanda Richards gave evidence about what her father Leroy Richards told her about trading in ochre that used to occur between the Barngarla and other groups. Ms Richards said that her father told her that ochre was still taken from the Pukatu ochre mine (and thus presumably traded) in her father's lifetime. However, she said that this did not happen anymore, as far as she knew. Rosalie Richards also spoke about ochre trading, but also only in the past tense.

Songs and ceremonies

626 There was extremely limited evidence from the Barngarla witnesses of songs and ceremonies (other than those relating to initiation) occurring on Barngarla country. While there were isolated accounts by the lay witnesses of having heard someone sing in the past, the only substantial evidence was proffered by Linda Dare.

627 Linda Dare gave evidence of having danced in a number of ceremonies and gatherings at the Port Augusta foreshore and around Lake Umeewarra. She identified an "Umeewarra dance" and a "Seven Sisters dance". Ms Dare said her mother had taught her the dances, but she also mentioned that she learnt the dances simply by watching others do them. She said that she had "done all my dancing … out here on Barngarla country." She said the dances were not done for any "special occasion", but merely to enjoy the dances for their own sake. The dances are performed naked or in just a skirt. The women will be "painted up" for the dances, with specific markings relating to specific dances. Ms Dare knows how to "paint up" women for the two dances in the correct fashion. She learnt this from her mother, who learnt it from "her nana … my great grandma", who she acknowledged was a "Kokatha woman" but who, Ms Dare said, "knew it was Barngarla country". She said the dances are not to be known by the men, although she later admitted she had done the dances in front of men. Ms Dare says she has done the dancing ever since she moved back to Port Augusta when she was 15 (28 years ago).

628 Counsel for the State put it to Ms Dare that the dance was not a Barngarla dance:

> *MS WELLS:* … [I]t's not a particular Barngarla dance, other women from other

> places are doing it too?
>
> *LINDA DARE:* Other women would do theirs – it's – because they know it's on Barngarla country, they would do the Seven Sisters or the Umeewarra dance. If I was on their country, I'd be doing the Honey Ant dance or something else, what their – their dance.
>
> *MS WELLS:* So they're allowed to do the dances that you do?
>
> *LINDA DARE:* Yes. Well, they would do it on our country. They've always done – like in Roxby Downs we've done the Seven Sisters' dance. (T601)

629 Ms Dare thus appears to accept that the dance is known and performed by non-Barngarla people, but also appears to maintain that the dance is Barngarla, and relates exclusively to Barngarla country.

630 Ms Dare went on to say that there is singing that goes with the Umeewarra and Seven Sisters dances, but that the "old ladies" do the singing, not her, and that they sing in "their language", by which it was clear she meant the Western Desert language. She said that her mother knew the songs for the dance in Barngarla language. She also said that an Arrernte-Warlpiri woman named Edie King (who is still alive) sang (and sings) the songs in Barngarla language. She said that her mother told her that Edie King "holds our [i.e. Barngarla] stories." She also said that her own daughter could sing the songs "in language". It is unclear whether she meant "in Barngarla language".

631 Ms Dare also gave evidence about her daughter participating in a ceremony where "[s]he done her song and dance" at Umeewarra in order to "[become] a woman". That ceremony was attended by women of various Aboriginal identities, including Barngarla women and Western Desert women. It appears that it was initiated by Western Desert women. The ceremony was called *inma* (a Western Desert word for ceremony). Ms Dare said she had also "done my *inma*" when she was a teenager. She explained that "*Inma* is like your – you're doing your traditional dancing and you're learning … your culture."

632 Vera Richards gave an account of having met some old Aboriginal women from Central Australia in Sydney at an indigenous women's conference. The old women had specifically asked for her to see them. They did a dance and sang a song with her which they said was her dance and her song. Ms Richards has not done the dance or sang the song since. Rosalie Richards gave evidence of Leroy Richards having sung songs on Barngarla country.

EXPERT EVIDENCE ON CURRENT BARNGARLA SOCIETY

Hearsay

633 Dr Haines' 2012 Report is based in part on his own communications and fieldwork with claimants, including both claimants who appeared as witnesses in this trial, and other claimants who did not. In assessing that report, the State submitted (at [220] of its submissions) that the discussion of Olney J in *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 562-563 was relevant. However, that discussion was largely predicated on s 82(3) of the NT Act as then in force. It provided that the Court is not bound by the rules of evidence in a native title determination application. That section has now been repealed. Section 82(1) of the NT Act currently stipulates that the Court is bound by the rules of evidence unless it orders otherwise.

634 The only hearsay objections made by the State to Dr Haines' 2012 Report relate to evidence of personal communications between Dr Haines and Rosalie Richards. Rosalie Richards was called at the trial, which means that the exceptions to the hearsay rule provided by ss 63(2) and 64(2) of the *Evidence Act 1995* (Cth) do not apply. In those circumstances, the State's objections must be upheld. I have not relied on the relevant paragraphs of Dr Haines' report. However, the information she provided to him, to the extent that it is relevant and itself probative and was given in her own evidence, proves matters on which the Court (and Dr Haines) can rely.

Notion of the "Barngarla people" as a distinct society

635 It is evident that the notion of the Barngarla people as a distinct society persists to the present day amongst the claimants. Professor Sutton said in oral evidence that the notion of the "Barngarla *matta*", the Barngarla as a "group" or "territorial identity":

> …can be assumed to have been there … at sovereignty, and to have come down and been passed down in an unbroken line, at least in some families … [T]he overlap of generations makes it much easier to assume that the Barngarla landed identity has been a continuous one at that broad level. (T1607, lines 12-19)

636 That general position appeared to be uncontentious amongst the experts.

Language of the Barngarla people

637 The expert witnesses agreed, upon surveying the evidence of the lay witnesses who were members of the claim group, that the language used by the contemporary claimants is best

described as "a South Australian variety of Aboriginal English." (Rose, T1548, line 41; McCaul, T1551, lines 28-31)

638 The experts also agreed that there were fluent Barngarla speakers extant until relevantly recently, perhaps as late as 1993. Mr McCaul acknowledged that on his impression of the lay witness evidence and knowledge of academic material, the late Phyllis Croft and Harry Croft (husband and wife) were "fluent or good" Barngarla speakers, and that the Davis brothers were recorded speaking Barngarla in the 1960s. (T1554) Ms Croft did not die until 1993. The State, however, contends that the Davis brothers spoke Kokatha, their mother's language, not Barngarla.

639 Dr Rose largely agreed with Mr McCaul's observations and stated that:

> …it's significant that there were people speaking Barngarla up until the early 20th century [in fact, the evidence suggests people were speaking Barngarla well past that point in time] because the current claimants are descendants of those people and that's the direct link between their membership, [with] the language community. (T1554)

640 However, Dr Rose and Mr McCaul, the two linguists, had some disagreement as to the extent to which Barngarla words are used by the claimants within their version of Aboriginal English. Mr McCaul emphasised the fact that many of the words used by the claimants in evidence that they claimed were Barngarla words were in fact words from other Aboriginal languages, generally the Western Desert language. (e.g. T1551, lines 46-47; T1552, line 1)

641 Dr Rose, while accepting that Western Desert and other Aboriginal words were mistakenly identified as Barngarla words by the claimants, also nonetheless claimed that some Barngarla words were used by some claimants. (T1548, lines 45-47; T1549, lines 1-5) It appears, however, that Dr Rose is referring more or less exclusively to use of Barngarla place names by claimants. (T1549, T1553) As has been seen, very few Barngarla words (other than place names) were known or used by the claimants.

642 In any event, Mr McCaul disputed the assertion that the lay witnesses used many indigenous place names for places within Barngarla country:

> …[M]ost of the language that came out in place based evidence was Pitjantjatjara, you know, by … the men who, obviously, had learnt both the language and about the land in that way. [Presumably by "that way" Mr McCaul means "from Pitjantjatjara people".]
> …
> …[M]ost of the places [where the Court heard on-country evidence] … [had]

> European names … and there was a couple of instances … where the names obviously have an Aboriginal origin … [but] the interpretation that is given to those place names today is based on a Western Desert etymology … as opposed to [an interpretation based upon] the Barngarla meaning of the words. (T1551-T1552)

643 It may be accepted that Mr McCaul's characterisation is largely correct. In any event, even if more than a few place names of probable Barngarla origin were used by the claimant lay witnesses, that would be only weak evidence of continuity because, as counsel for the State put to Dr Rose in cross-examination, non-Barngarla people also use those placenames. (T1563, l 8-10) Dr Rose argued that the key distinction was that Barngarla people would have heard the placename "from their parents and families", indicating continuity, while non-Barngarla people merely "[got] it from a map." (T1563, line 19-23) That may be true, but there is no real evidence to support that assumption. Perhaps Barngarla people also got those place names from maps.

644 As for the significance of continuity of language to continuity of a society more generally, Mr McCaul stated in his 2013 Linguistics Report at [228]:

> …[K]knowledge of a language can potentially be a significant marker of cultural continuity. However, I do not see the absence of language, nor indeed the adoption of another Aboriginal language as necessarily indicative of an absence of cultural continuity in other areas, including those relating to the maintenance of laws and customs relevant to land ownership.

Sub-groups

645 There is much overlap between this issue and the issue of the land tenure system. Dr Haines, on the basis of his own field work with claimants, summarised the contemporary associations of families with areas within Barngarla territory as follows:

- The (Dick) Richards and Davis descendants (Dares and Eric Paige) predominated in the northern Barngarla region;
- The Eyles and Glennie-related families (McNamaras, Roddy Wingfield, Yvonne Abdullah) predominated in the central Barngarla region;
- The Fred Richards descendants (Howard Richards, Elizabeth Richards, Evelyn Dohnt, Vera Richards) have tended to predominate in the southern Barngarla region.

646 He expressed the opinion in oral evidence that "it seems that … those groups were … fairly enduring …", by which he meant that the groups were not a very recent invention, but go back at least a generation. (T1706) Dr Haines went on to say that "all I can say, with respect

to the current families, is that I know that they feel that they're of the place. I know that their genealogies go back as far as I have mentioned." (T1707) I asked Dr Haines whether there was any evidence to indicate a normative structure in existence, say, a century ago, by which, for example, the Richards family now would have been the family accountable for the southern part of the Barngarla country. Dr Haines was only able to make a vague reference to dreaming stories and knowledge of fish traps, from which I was unable to draw an affirmative conclusion. (T1707-T1708)

647 Dr Martin sought the assistance of the Crown Solicitors Office to cross-reference Dr Haines' broad division of Barngarla families against government records of Aboriginal people living in the claim area over the years. The results of that work were "not compelling, but [constitute] indicative support for what Dr Haines is proposing." (T1700) Dr Martin also agreed that the lay evidence "shows, I think quite clearly, that Barngarla people themselves do see particular families as being associated with particular areas." (T1701)

648 Dr Martin said that he had detected a "recognition" amongst the Barngarla people that they must respect the rights of different family groups to "speak for" particular parts of Barngarla country. (T1701) Elsewhere, he spoke of there being a "normative force" to the acceptance by Barngarla people of, for example, the southern Richards, to "speak about" the southern Barngarla country. (T1698) This issue is explored further below, under the heading "Land tenure system".

649 I asked Professor Sutton whether the cognatic "sub-groups" that now exist over Barngarla country were consistent with what probably happened at the time of sovereignty. He replied that he could think of "inconsistencies as well as consistencies…" (T1695) Professor Sutton went on to say that there was little evidence either way as to whether the family groups that had now established themselves in certain areas had a long history of contact with that area or not. However, he noted that, on the limited evidence that did exist, it seemed that "at least some families have not moved away permanently and come back to the region, but in fact have hung in there. And that is … a form of continuity." (T1696)

650 However, Dr Martin ultimately concluded that, in terms of the current distribution of groups within Barngarla country, "it is very hard, on the evidence that I have, to see any direct nexus between what would have [existed] … at sovereignty …, and the current ... situation." (T1703) That was because Dr Martin concluded that:

> …[B]irthplaces of significant forebears, including significant living upper generation people, do seem to be the basis on which the descent groups, the [cognatic] groups as more or less corporate entities, assert rights. … [M]y working hypothesis is [that the division into these groups] is something which has arisen through historical exigency post-colonisation, [and] is perhaps to be understood as an incorporation of elements which did not have their origins in Barngarla society… (T1704)

651 That opinion was arguably supported by Professor Sutton's opinion that the probable Barngarla at-sovereignty estate groups had disappeared in the face of colonisation and the survivors had "succeeded" to the "whole" Barngarla country through a process of "conjoint succession":

> …[I]t's my view that they've been through the … process … whereby the remnants of the colonial impact – the survivors have basically taken conjoint responsibility and succeeded to the whole lot of Barngarla country. (T1714)

Land tenure system

652 All the experts agreed that the system for obtaining rights to Barngarla country was one that could be described as "cognatic descent" – that is, one chooses the Aboriginal identity one is to assume (and thus in which country one will obtain rights), from the several identities that one is descended from. For instance, Dr Martin said:

> It's quite clear that, from the descent lines that both Professor Sutton and I refer to, that the original sets of ancestors are male. You then start to see … combinations of male and female linkages. It's the classic cognatic descent. One might expect that as you get further down these descent lines that choice has been exercised. The … anthropological question … is, what's underlying [that choice]? Now, … as best I could determine it, … the individual choices by people seem to me to be largely … idiosyncratic. (T1697)

653 Dr Martin was concerned about whether choice was idiosyncratic or otherwise because, in his opinion:

> … [C]hoice [i.e. a system where one's rights in land flow from one's choice as to which parent's rights to 'inherit'] can potentially be understood anthropologically as an adaptive mechanism in the face of major demographic and other impacts on an Aboriginal society, but in order to establish this there needs to be an adequate ethnographic basis in order to establish the principles by which these choices are being exercised as well as their normative character." (R1.7, [54], also see T1697 and R1.6, [82])

654 Despite saying that Barngarla people's individual choices to be Barngarla people were "largely idiosyncratic", Dr Martin went on to suggest that "some elements" guiding people's choices were "not simply arbitrary". Dr Martin identified one's place of residence and place

of birth as possibly important factors in determining one's choice to be Barngarla or not, but they generally appeared to be only "indicative" factors, rather than "definitive" ones. (T1697, T1699) Dr Martin's conclusion was that "by and large", Barngarla people's choice to be a Barngarla person does not have a "strongly normative character" (T1697) and is not governed by "widespread and systematic principles." (R1.7, [60])

655 However:

> …[W]hile the exercise of choice itself could not be seen as largely reflecting normative bases for those choices, [what] … in all likelihood, is normative [is] that these individual choices did not have social force unless they're acquiesced to, agreed to be given legitimacy by the group concerned. … I think we can assume from indirect evidence that the way in which people recognise each other, the way in which people recognise the southern Richards, Howard Richards, for example, as … having a legitimate right to speak about looking after and so forth, southern country, suggests that there is a normative force to that acceptance. (T1698)

656 That is, while it cannot be said that there are any "definitive" norms governing how people choose their descent path, once that choice is made, it must be accepted by the existing members of the Barngarla society, and once that acceptance is given, the person's rights are respected and have a "normative force". Thus, Dr Martin's overall conclusion, as provided in his 2013 Report, was as follows:

> It is my opinion that the centrality to Barngarla identity of socially legitimated claims of descent from recognised Barngarla ancestors is a principle which exhibits continuity with the past. Choice as an intrinsic principle does not owe its origins to classical Barngarla society, but could (depending on the ethnographic facts adduced) be seen as an adaptive mechanism which has developed in response to demographic and other factors. … [W]hile the bases on which Barngarla individuals make their choices do seem to be idiosyncratic, they do need to be legitimated within a jural public [and] that adds a normative element to the process, in my view.

657 Professor Sutton noted that, while at sovereignty, Barngarla people may have ideally inherited rights biologically rather than through "cognatic relationships", he observed generally in relation to like Aboriginal groups that "[t]here always were cognatic relationships, as well as unilineal ones [i.e. strict patrifilial or matrifilial descent], in [societies] where we know there were unilineal groups." (T1694)

658 Professor Sutton regarded the system of cognatic descent as an adaptation in accordance with traditional law and custom, because the essential principle of the land tenure system, rights predicated on descent, had "remained unaltered since sovereignty". (A47, [35])

659 Dr Haines in his expert report explains the concept of "families of polity", a concept proposed by Professor Sutton in his 2003 work, *Native Title in Australia: An Ethnographic Perspective*. The term "families of polity" is essentially a shorthand way to describe the structure of many modern Aboriginal societies, an aspect of which commonly is a system of cognatic descent. Dr Haines approvingly quotes Professor Sutton's opinion in that work that cognatic descent groups within "families of polity" can be seen as "transformations of classical forms rather than a complete departure from these forms". He then concludes that Barngarla society falls within the "families of polity model", and so Sutton's opinion is applicable.

660 Dr Martin criticised this reasoning as not constituting "a defensible anthropological argument concerning continuity of Barngarla landed groups." (R1.6, [79]) He argues that Dr Haines needed to assess the Barngarla land tenure system at sovereignty, and the Barngarla land tenure system now, and come to his own conclusion about whether the current system is a "transformation" or a "departure". Instead, Dr Haines has simply determined that the present Barngarla society fulfils Professor Sutton's definition of a "family of polity", and then applied Professor Sutton's opinion that such "families of polity" "can be" transformations rather than departures from classical forms, as if Professor Sutton had said that all families of polity *must be* transformations rather than departures from classical forms. In Dr Martin's experience, "family of polity" systems can evolve from many different types of at-sovereignty societies. Some of those evolutions may be "transformations", others "departures". They must be assessed on a case-by-case basis.

661 Mr McCaul offered only a provisional opinion on whether the present Barngarla land tenure system is one which is in accordance with traditional laws and customs:

> In my opinion [the Barngarla at-sovereignty land tenure] system does lend itself to an evolution towards a process of cognatic association with broader areas of land, as population decline makes the maintenance of specific ceremonial responsibilities untenable and as knowledge of the location and significance of sites is lost. But I do not think one can simply assume that what people are doing today is the result of such an evolution. The question requires more careful analysis and additional ethnographic information. (R1.2, [101], also see R1.2, [176]-[180])

662 As to the nature of the rights held by Barngarla people, Dr Martin said:

> In terms of how people talk as Barngarla people about what is the nature – what does being associated with the Port Lincoln and the southern region mean or what does it mean to be from Iron Knob? The kinds of language that I gleaned from the transcript – people used terms such as "speaking about". He has a right to speak about this

> country, to "look after" was an extremely common term, to "care for" – there's a number of terms like this which I say I think can be reasonably glossed as a form of custodianship. (T1701)

663 It is worth mentioning that an understanding of one's rights to land as a form of "custodianship" also suggests that there is an understanding that those rights are not alienable. The notion of custodianship necessarily involves a notion that one has a responsibility to the past and future "owners" of the land.

664 Dr Martin identifies these notions of custodianship, and in particular, the respect and deference shown to those with the recognised right to "speak for" particular country in respect of that country, as "a distinctively Aboriginal repertoire of ways of talking about the nexus between people and country…" (T1702)

Kinship system

665 Professor Sutton emphasised the importance of kinship systems in classical Australian Aboriginal societies generally, saying that in kinship-based societies, such as he believes the Barngarla society was at sovereignty, the kinship system is "probably the most important unifying system of social order and social structure and social relationships." He went on to add that "a shift in [the kinship system] is a great deal more significant, in my view, than a shift in initiation or a shift in the scale of the land associated grouping from, maybe, micro to macro. I think [the kinship system] lies at the heart of the question of continuity." (T1655) All the other experts broadly agreed with Professor Sutton. (T1655, T1656, T1657) It was put to Professor Sutton in cross-examination by counsel for the State that the most critical "strand" of continuity is kinship. Professor Sutton answered:

> No. I wouldn't say it stands alone. It's right up the top … with the nature of the estate in land and waters which are – I won't go over [it], but the key words are inalienability and collective sharing of interests, and so on. It's up there with those. (T1733)

666 As to the Barngarla kinship system, Professor Sutton wrote in his report:

> …[T]here has been a shift towards Western Desert and/or European ways of classifying kin, but some essentially traditional principles have probably survived including the principle of the equivalence of siblings …, and the reciprocal nature of grandkin terms that recognises members of alternate generations (grandkin, "grannies") as being in some important sense "the same". Of course these are also present in Western Desert [kinship] systems. (A47, [70])

667 In oral evidence, he said in relation to the kinship system, that "in terms of continuit[y], it's this area that's probably the weakest." (T1654) However, he then went on to add:

> … [W]hat has been continuous … has been things like the incest taboo, things like the fact that marriage is not unrestricted, even beyond the nuclear family, the fact that kinship remains of vital importance to people, that funerals attract large numbers of people - they're not just people who blow in, [but will] normally [be] relations. And it's the expression of the duties of the relation to be at the funeral of the kinsperson…
>
> [And] I think there's a bit of [lay witness] evidence … which suggests that people are very conscious of genealogical distance. In fact, there is – now I'm sure when I think about it – because people talk about marrying too close and so on. That is a classical value in kinship, and it crosses over with familiarity. … [Y]es, that's a classical principle adapted in this case to the use of European names. … [So] [t]here's another brick in the wall of continuity in that area. (T1655, T1657-1658)

668 On the "incest taboo", Professor Sutton also said:

> …[T]here is clearly an incest rule in every human society, perhaps apart from the Egyptian royal family of 3000 years ago. Now, that is not a naturally occurring phenomenon. That is learned and taught. So there is an absolute continuity here between what can be presumed at sovereignty and what can be presumed now as a rule or a law. (T1610)

669 Overall, Professor Sutton was willing to say that "… [Barngarla society] was [a kinship-based society] at sovereignty, and very significantly I think, remains, actually, among the claimants in terms of how they express their interest in the transcript." (T1655)

670 Mr McCaul offered the following opinion in his Report:

> Overall it is my view that the performance of the kinship system, in the sense of the use of Barngarla kin terms to refer to people in ones [sic] social universe, has undergone significant modification caused by the loss of language and core social structures, such as a moiety system in which more finely differentiated kin terms were logical. However, it is also my tentative view that some of the fundamental principles of the traditional kinship system continue, including the application of kin terms to people who are not, in a European sense, kin, and the focus on the importance of kin in defining ones [sic] social universe. (R1.3, [65])

671 Mr McCaul added the following useful comments in oral evidence:

> …[O]ne of the fundamental principles of the kinship-based society of which Barngarla is one, … was that everybody was a relation, ... whether it was biological or classificatory, … everybody was classified in some way as a relation … And we … know that … the specific way in which this happened … doesn't feature any more today, but what does seem to feature – although I'm … not 100 per cent sure – is that all the Barngarla claimants – I think, based on the transcript – consider each other as relations, so that aspect has endured … [S]o we could say that there's still a kinship-based society today, but the way that plays out, obviously the way it's expressed, is

> different. People use English words largely, but not in a way that [Western societies] would necessarily classify people as cousins or uncles or aunties or whatever. … [But] the rules that used to exist around that [kinship system], … [such as] avoidance rules or obligation rules, I don't think we have any evidence around that. So … there are certain features [of the kinship system] that are clearly persistent and one would say have continuity, and then other aspects of that [system] which seem to have changed. (T1657)

672 Dr Haines agreed that there had been a "significant reduction in kinship terminology [use] amongst the Barngarla", but said that "the [showing of] respect that's due to different types of kin" had been maintained, such that "the terminology has changed but the relationships are still broadly there, in my view." (T1655)

673 Dr Martin said he agreed with Dr Haines in that "expected behaviour or norms of behaviour as between different categories of kin … will have changed and secularised to some degree, but nonetheless it is kinship which provides this foundation." (T1656)

Initiation

674 Dr Martin said that his understanding of the lay evidence was that:

> …all initiations … for perfectly understandable reasons … [are now] conducted in the north [i.e. the Western Desert region] … [and] are being conducted by Western Desert ritual specialists. And … they're being done on a relatively small subset of young Barngarla men. (T1668)

675 He went on to say that it was clear that only Barngarla men who chose to be initiated were now initiated. He said that the "factors underlying" that choice to be initiated, and the "normativity" of that choice, would be important to the question of whether modern initiation ceremonies can be said to have continuity with at-sovereignty Barngarla initiation ceremonies, but that "we don't seem to have the evidence around that to come to any informed view". (T1668) Nonetheless, Dr Martin offered a "hypothesis", based on analogy with observations he had made in his work in north-west Queensland, that "the initiation is done as a matter of choice by particular young … Aboriginal men … as a way of marking themselves out in terms of their specifically Aboriginal identity rather than their Barngarla identity as distinctively Aboriginal men." (T1668)

676 Dr Martin concluded that:

> I don't think the evidence suggests a strong inference can be drawn that the practice of initiatory law is a fundamental component of the contemporary Barngarla system by which Barngarla people, as individuals, but more importantly, collectively, are connected to Barngarla country. (T1668-9)

677 Mr McCaul did not consider "the transmission of knowledge to the current generation of Barngarla men to be the same kind of process as the traditional reciprocity of ceremonies where groups exchanged ceremonies in the course of … several years." (T1674) He noted in relation to this point that sometimes the choice to go through the initiation ceremony was entirely serendipitous, giving an example of one witness who happened to be working in the Western Desert area, who Western Desert men discovered was Barngarla and said "Oh, we know certain things that might be relevant to you." (This appears to be a reference to Eric Paige) (T1675) Mr McCaul went on to add:

> I'm not even sure [it can be said to be] a revival … because ... I didn't hear any evidence that Barngarla people are actually saying that they are going to be conducting ceremonies themselves in their own right, but there appears to have been [instead] … a re-tapping into those structures that allow people to have access to that religious knowledge of land is how I would phrase it. (T1676-1677)

678 In the same vein, Mr McCaul in his report opined that "[i]t would appear that the initiated Barngarla men are … being integrated into the common moral community of the Western Desert…" (R1.3, [107])

679 However, Mr McCaul considered that:

> …the status … of being an initiated man … is something that seems to have continued. The significance of that and … the sense of the importance of having gone through those ceremonies – to be able to speak about religious matters of land, is something that has persisted. And that persisted in the '80s during the heritage surveys, where [Barngarla] people didn't have initiated men, [and] that caused awkwardness. So there was an awareness of the need for that, but there was the absence of [initiated] men at that time, and it's very clear from the evidence in this matter … that the reason certain men were able to speak about certain things was precisely because they were initiated. (T1676)

680 After he gave that evidence, Mr McCaul agreed with my proposition that some nuanced, detailed knowledge of Barngarla lore has been lost as a result of the cessation of the traditional Barngarla initiation ceremonies on Barngarla country, but that the concept of the existential relationship to the land and the progressive deepening (over the course of a lifetime) of knowledge and understanding about the land had not been lost as a result of that. (T1677)

681 In his report, Mr McCaul had also concluded that:

> It is … arguable that there is a certain continuity …, in the sense that the information

> obtained by Barngarla men during ceremony is both specific to their traditional country and could probably be traced back to Barngarla ancestors. There is also no doubt a parallel between the traditional Barngarla requirement to pass through initiations to achieve social manhood and the contemporary discourse among claimants in which males are classified as men or not depending on whether they have been initiated. (R1.3, [99])

682 Leading on from that evidence, Mr McCaul and I shared this exchange in oral evidence:

> *MR MCCAUL:* … [M]y understanding of the evidence is that, yes, Barngarla men, senior ceremony men, transmitted information to men who now would no longer be alive but who themselves transmitted it to other men who now hold it on the APY lands, and so when Barngarla men go through [initiation] ceremony, it appears that they are privy to that.
>
> *HIS HONOUR:* … [W]hy isn't that traditional passing on of knowledge?
>
> *MR MCCAUL:* Well, I mean, I would consider that to be traditional passing on of knowledge. It has been orally transmitted across the generations. (T1678)

683 In cross-examination, counsel for the State noted that the last certain records of Barngarla law ceremonies were from the 1940s or 1950s, and that the next recorded initiation of Barngarla men occurred in the Western Desert in the 1990s. It was put to Professor Sutton that that gap was "significant" in terms of "continuity". Professor Sutton answered:

> It can be significant to the continuity of the learning of the verses of songs because if the people who know them are not singing them and singing them with progressively younger people, then the transmission is probably not going to happen. (T1732)

Stories and beliefs

684 The expert evidence on the lay evidence of dreaming stories was in-depth and informative. Mr McCaul, in particular, gave detailed evidence about the stories told in the lay witness evidence. The most important stories were, of course, the man story, and the Seven Sisters story.

The W man story

685 In relation specifically to the Barngarla "W man" story, Mr McCaul noted the high level of concern the lay witnesses showed for keeping most of the story restricted from women and the uninitiated. Mr McCaul concluded that this restriction of the story made the "W man" story:

> …the one that goes most strongly to the question of normativity. … [M]y opinion would be that the normative aspects surrounding this particular story could be said to owe their origin to Barngarla society at sovereignty. There is some evidence about how sensitive some of the claimants' ancestors were about anything to do with this

> particular business, and the evidence about the restrictions regarding this story from Hercus are suggestive that similar restrictions would have applied in this area. Consequently, the cultural concerns claimants hold about this story are likely to be consistent with those of their ancestors. (R1.3, [154])

686 However, Mr McCaul notes that in the 1980s and 1990s, anthropologists working with the Barngarla did not record this story. However, many of those researchers were female and worked mainly with a female informant, Phyllis Croft. Mr McCaul says the story has only appeared "after the current generation of men were initiated on the APY Lands" and it is clear that the story has been "obtained from outsiders". Mr McCaul admits that all of this is consistent with the hypothesis that past Barngarla men passed on stories to Western Desert outsiders, who have then passed it back to newly-initiated Barngarla men. However, Mr McCaul notes that some 1990s researchers did work with male informants, who did not mention this story, and that Phyllis Croft was entrusted with other men-only stories, but also did not mention this story. For that reason, Mr McCaul concludes that "it would be my view that the contemporary focus on this story reflects a cultural revival of this particular creation narrative." (R1.3, [157])

687 Professor Sutton noted that the evidence regarding the man story was not as detailed as "very full versions of these kinds of stories", that he, presumably, had encountered in other Aboriginal groups. In those sorts of stories, there would be an event that happened at each place the story goes to, while the "man story" often just consisted of a list of places where the story goes, without a lot of detail as to what happened at each place. Professor Sutton opined that "I can't say that I've seen rich mythological accounts in this case." (T1721)

688 Professor Sutton spoke in oral evidence about dreaming stories shared between different groups. He said that there were many examples in Aboriginal Australia of an Aboriginal group holding 'songlines' that go far outside their own country, and into country that the group freely acknowledges is not their country. He noted that often the stories that one group may have about sites not on their country will differ markedly from the stories that the group whose country it is has about those sites. In the face of colonisation, Professor Sutton speculated that:

> …[One group] might hold the law [N.B. probably should have been transcribed as 'lore'] in common with another group and that group then is decimated [by the effects of colonisation] … and then might well use your knowledge as a restorative source. But I just put in a caveat about the idea that what people in the [Western Desert] might know about the coast, their ancestors probably never having ever seen it, might well be not a copy of what was held locally at the coast but [rather, the

> Western Desert people's] understanding of it. So I just put that in as a warning about it, but we don't have evidence as to, for example, the language, if it's identifiable, of the songs that the Barngarla men have been taught in the Western Desert… (T1680)

689 In fact, as the State points out, the evidence suggested that no songs were taught to Barngarla men in Barngarla language, but only in Western Desert language. (Subs, [111], [130], T1105, 290, 998-9)

690 Perhaps somewhat confirming Professor Sutton's general evidence about different groups holding different stories about the same site, Mr McCaul referred to a heritage clearance survey written about by a John Morton where there was a variation between what Phyllis Croft, the principal Barngarla informant, and other Barngarla and Kokatha informants said about a story associated with the Iron Knob site and what Western Desert men said about it. The dispute, however, was quite a minor one. It concerned details of the Seven Sisters story, namely whether the man in that story was associated with the Moon or not (the Barngarla people asserted that he was) (note that several lay Barngarla witnesses in this proceeding also referred to the man as the Moon), and whether the seven sisters themselves were "emu women" or not (the Barngarla people asserted that they were). (R1.3, [124])

Seven Sisters story

691 Mr McCaul said that the Seven Sisters story is "clearly significant to the claimants", and that unlike the man story, "it appears that at least aspects of it have been passed on by the claimants' ancestors, although some of the contemporary understanding of it seems to have been shaped by Western Desert people." (R1.3, [167]) He concluded that "I would not consider that the Seven Sisters story needed to be revived. I believe it has always been known in some form by Barngarla people." (R1.3, [169]) In oral evidence, he said "the evidence suggests that this story has always been held by Barngarla claimants and their ancestors." (T1689)

692 Reflecting on the fact that aspects of the Barngarla Seven Sisters story appear to have changed over the years, the fact that Tindale in 1959 recorded that Western Desert people and Barngarla people shared a seven sisters story, and the fact that Aboriginal people are known (even in classical times) to constantly innovate their dreaming stories through cultural exchange, Mr McCaul concluded:

> From an anthropological point of view, the present dynamic between Barngarla and Western Desert people could … be considered as representing a cultural continuity, even if the cultural exchange in this relationship is perhaps somewhat one-sided.

(R1.3, [169])

693 Professor Sutton substantially agreed. When addressing Barngarla stories in oral evidence, he said: "…[T]he richer material seems to [be] the [Seven Sisters story] evidence … where the richness tends to be the number of places to which it went." (T1721) He observed in relation to Barngarla stories in general that "continuities do seem to me to be present", and mentioned that that was particularly the case in relation to the seven sisters story. (T1687)

Stories generally

694 Professor Sutton suggested that the lay evidence indicated:

> …shared norms of awe and respect for the stories …, and these reflected a value of the land as a map of its past spiritual history, as it were. I didn't get any sense that people … regard these stories as now being reduced to secular just-so stories or myths, there was an attitude of truth expressed. How much that has been from childhood or not, I wouldn't venture an opinion, but it does seem to be shared across a range of witnesses in which case it's relevant to the question of the sharing of norms that bind people together. (T1687)

695 More generally, Professor Sutton concluded:

> I think the evidence overall [about stories] suggest[s] that what we're seeing is the survival of some remnant knowledge rather than the cornucopia that … one [would] expect there to [have been] at 1788, nevertheless the continuities do seem to me to be present, particularly in the Seven Sisters [story]… On the face of what I have seen, there are a range of people who clearly have a commitment to a traditional view of the world in which sacred narratives are important. (T1687, T1721)

696 Professor Sutton gave a caveat to the above views that he had not seen the witnesses give evidence in person, but had merely read the transcript, and that that meant "I can't really form a very clear opinion about … the depth of religious sincerity [of the witnesses]."

697 In cross-examination, counsel for the State suggested to Professor Sutton that the "attitude of respect" for stories that Professor Sutton had noticed amongst the lay witnesses might emanate only from the claimants' "collective appreciation or affection for that historical way of seeing the world." Professor Sutton said that if there was "systematic evidence as to sanctions in the breach [of the norm of being respectful about stories]", then his answer would be "no". In the absence of such evidence, Professor Sutton still thought "it is possible … to have some pretty highly shared, highly emotionally infused values that are normative, as it were, but where there is no obvious apparatus for punishing you if you get it wrong." (T1722) Professor Sutton agreed with counsel for the State that he did not have all the

evidence as to whether or not there were such sanctions, and so could not offer an opinion on that question. (T1723)

698 Dr Haines gave similar evidence when he spoke of the importance:

> … not just [of] the capacity [of the claimants] to relate the stories, but the way in which people are visibly affected by the attack, as they see it, on the landscape [in cases such as Iron Knob, where the landscape has been altered as a result of European activity]. And this comes out … quite commonly in [heritage clearance] surveys …, [where] people are obviously physically upset and emotionally upset by the notion that their land should be dug up or there should be severance … of the story in one particular place. (T1686)

699 Mr McCaul pointed to the differential knowledge of stories held by different family groups as "arguably a continuity" from the at-sovereignty society. (T1690)

700 As to Vera Richards' recital of the Marnpi and Tatta story, Mr McCaul wrote that "[t]his appears to be a case of the maintenance of a highly localised story in one family group." (R1.3, [173])

701 Dr Martin did not have any comments on this issue except to refer to his "brief commentary" on the subject of stories and sites in his first report. The only part of that report that specifically deals with stories and sites is a few paragraphs on the issue of "shared" dreaming tracks that cover more than one language group's country. Essentially, those paragraphs agree with an opinion of Dr Haines on this issue, to the effect that knowledge of the mythology and ritual associated with a dreaming track does not equate to "ownership" of the relevant land the track runs through. (R1.6, [90]-[91])

Burials and associated beliefs and practices

702 In regard to name avoidance of deceased people, Mr McCaul, in his 2013 Anthropology Report at [82], concluded in his report that there has been "a significant relaxation of the rule of name avoidance, the maintenance of which appears to be more idiosyncratic rather than a shared cultural norm." (McCaul 2013 Anthro Report [82]) Dr Haines agreed that there "doesn't seem to be a common view of when to avoid and when not to avoid." But he emphasised the fact that individual claimants continue to have "firm views" about this matter. (T1663)

703 In regard to funerals and burials, Dr Haines gave evidence in his report that had not emerged from the lay witness evidence. In his report, Dr Haines asserts, presumably based on his

fieldwork, that "large attendances of all major families [at Barngarla funerals] is the custom." He goes on to give an account of a 2011 Port Lincoln funeral he attended, which was attended by "families from all over Barngarla country and beyond", and he gives an account of a "more recent" Port Augusta funeral where "almost 200 Barngarla people" were in attendance. (A2, [302]-[304]) He also said that Maureen Atkinson, though she lives outside the claim area, returns regularly for funerals. (A2, [402])

704 Mr McCaul concluded in relation to funerals that: "…[T]here is little [evidence] to suggest that funerals among Barngarla people today represent much in the way of cultural continuity." (R1.3 [74])

705 Dr Haines disagreed, saying that "the same awe … - the same lamentations" that existed at funerals in Schürmann's day persist today. (T1682) He also noted, apparently on the basis of his report, that Barngarla funerals are "still fairly large affairs" and involve large numbers of extended family, and that this indicates that "a focus is still given to funerals, more or less in the same way it was back in historical times." (T1662-T1663) He also said that he had attended a funeral that was held at Umeewarra Mission (perhaps the one at Port Augusta he referred to in his report). He said that the decision to hold the funeral in "country on which people grew up" and the decision to hold the funeral in a place "separate … from Western society" was a "small indication" of continuity. (T1682)

706 Dr Martin partially agreed with Dr Haines, saying that some of the features Dr Haines had noted above about Barngarla funerals were:

> …strong evidence of the kinds of distinctive … Aboriginal ways and, perhaps, even distinctive Barngarla ways, albeit with adaptations, that people deal with death and the role of kin in funerals is fundamentally different … [from] Anglo-Saxon funerals … But the question I would be asking is … "And how does this relate to landedness [and] to connection with country." Now … I'm in no position to say there are no such connections but I am not aware of evidence of those connections. (T1670)

707 As has been noted above under the heading of "Kinship system", Professor Sutton also pointed to the large numbers of people who attend funerals as a continuity perhaps related to kinship.

Hunting, fishing and gathering resources

708 Very little expert evidence was given on this issue. Dr Haines said in his 2013 Report that the lay witness evidence indicated that there was a traditional Barngarla method of preparing a

kangaroo that involved skinning the kangaroo prior to cooking. The traditional Western Desert method, on the other hand, was, according to the evidence of Bill Lennon, not to skin the kangaroo. (A48, [97]) It is true that Schürmann recorded that Barngarla people skinned the kangaroo prior to cooking. However, Dr Haines' characterisation of the evidence of contemporary Barngarla practices is wrong. Only a minority of Barngarla witnesses said they usually skinned kangaroos. Most adopted a method closely resembling the one described by Dr Haines as the traditional Western Desert method.

Trade

709 The experts did not discuss trade in the current Barngarla society, no doubt due to the paucity of evidence regarding its existence.

Songs and ceremonies

710 There was very little discussion from the experts on the issue of songs and ceremonies other than those related to men's initiation. That was again no doubt due to the fact that there was little lay evidence on that issue. Mr McCaul spoke briefly about such songs and ceremonies, and said that he understood they had been "held" by "traditional older women … from the APY lands or from Yalata", referring to Mrs Crombie and Mrs Edwards, who were referred to by, inter alia, Linda Dare in the lay evidence. (T1665)

General Conclusions

711 Professor Sutton offered this general opinion of the evidence:

> …[T]here are a number of other aspects of societal norms that are far more fundamental to the lawful relation of Aboriginal people to country as property than initiations or knowledge of mythology. These are the elementary planks in the people/place system of the society concerned. (A47, [31])

712 He goes on to specify the three such "elementary planks": "the communal nature of entitlements [to land], entitlements being in the first place acquired through descent, and the inalienability of country…" (A47, [35]) He states that on the basis of his reading of the relevant literature, the reports of Dr Haines, and "a substantial if edited portion of the lay evidence", "it is my opinion that these fundamental aspects of the nature of the rights-bearing entity and its relationship to the country it identifies with have remained unaltered since sovereignty in this case. This is notwithstanding a transformation from patrilineal totemic groups to cognatic families of polity, accompanied by a rise in significance of the linguistic group territorial identity." (A47, [35]) That can reasonably be regarded as an opinion that the

rights and interests of the Barngarla people in relation to the claimed land are possessed under the traditional law and customs of the Barngarla people.

713 Mr McCaul addressed Professor Sutton's conclusion in this regard. He said he "generally" agreed with the above opinion of Professor Sutton, but made a number of addenda:

> I would add to [the] list [of 'elementary planks'] the sense of obligation for looking after the land and the belief that the land can be dangerous if not respected (e.g. by the presence of men or women at sites associated with the other gender), both of which in my view were present among the claimants.
>
> In my view, however, one cannot simply consider seeming continuity of those cultural traits [i.e. the 'elementary planks'] in isolation from the significant change that has occurred in other domains. For example, in my view if the traditional perspective of land as inalienable is applied to land to which ones [sic] community did not have a traditional connection one is no longer maintaining a traditional system, but merely expressing certain values of the previous system in a manner that is inconsistent with the system itself.
>
> I am also more reluctant than Professor Sutton to dismiss the significance of initiation processes in this case. I agree … in principle … [that in Aboriginal societies] the absence of initiations [can be] … completely irrelevant to the normative relationship between people and land. In this case, however, it seems that for the claimants themselves the initiated status is foundational for full authority to speak for land. In that case I believe the significant lapse and revival of the process through another cultural group does carry some significance.
>
> … The … incorporation of cultural traits from the Western Desert community is arguably a natural process of cultural evolution in a colonial context. I express no view on how this is to be regarded from the perspective of native title law. (R1.3, [239]-[241])

CONSIDERATION

714 At the start of this section of the reasons, it is appropriate to make some observations about the reliability of the lay evidence. With two reservations, I have no hesitation in accepting the evidence given by each of the lay witnesses. I think that each gave evidence carefully, and honestly, and did not seek to make more of what that witness had been told or seen or experienced than was within that witness' own knowledge. Indeed, subject to the two matters I am about to mention, the State did not submit to the contrary. It was because of the integrity of the evidence that the State was able to submit that the lay evidence did not form more than a "patchwork of observable practices that lack the necessary normative characters required by the NT Act".

715 I also record my view that each of the expert witnesses gave evidence in an ostensibly genuine and thoughtful way, and of course truthfully reflecting that expert's views. The

benefit of the two sets of concurrent evidence, with the frank and firm but respectful exchange of views and reasons for those views, is very substantial.

716 In a section of restricted evidence at or in the vicinity of Turtle Rock, some evidence of Brandon McNamara Snr was challenged by counsel for the State as unreliable. I have not relied on that particular evidence. The State did not submit that the other evidence given by him was unreliable, and the particular evidence challenged – if I were to accept and rely on it – would make no difference to the outcome. The other witness whose evidence requires specific comment in this context is that of Simon Dare. I mention it simply to observe that I did not form the view that Simon Dare was as committed to the "ownership" of the claim as some of the other witnesses. By that, I mean to convey that I did not feel that he now has the same degree of deep connection with family and with the claim area as other witnesses patently had. That may simply be a consequence of his age or his life experiences or both. There may be other reasons. It means that I have not placed as much weight on his evidence as that of other witnesses.

717 Finally, before turning to my assessment of the evidence and my findings, I expand on some remarks made earlier in these reasons.

718 The present claim is an old one, having been commenced in 1996. It is not helpful to traverse why it has taken so long to come to trial. As the course of evidence has shown, some members of the claim group have passed on during the period it has been on foot. In two instances, there is a written (but not necessarily complete) record of what those witnesses might have said. But that evidence may not effectively convey all that might have been conveyed. Obviously, what others might have said is now speculative. I cannot draw factual inferences in favour of the applicant's claim simply by or from their having been part of the claim group. That may have been important evidence, especially when there is now little direct knowledge or recollection of ceremonial conduct on the claim area itself. As the State said, the evidence about traditional law and customs was "thin and light".

719 Over time, inevitably too, memories fade. There is also the risk that those now pursuing the claim have (with complete genuineness and integrity) attempted to reconstruct what previously existed, rather than to reflect on ongoing real continuity of the traditional laws and customs. That is, in effect, a strong aspect of the State's submissions. It is important to be mindful of that risk, and to assess the evidence given in the light of it. I have been cautious to do so.

720 Finally, in these introductory remarks to this section of my reasons, I refer to the historical facts that the Aboriginal community in the claim area, and no doubt elsewhere, was heavily diminished in the nineteenth and early twentieth century by introduced disease to which it was not naturally immune and to a degree by violence associated with European settlement. I have referred above to evidence on that aspect. During part of the twentieth century, too, the policy of government was to encourage the removal of some Aboriginal communities to mission stations remote from their traditional country, and to discourage the use of indigenous language and the preservation of cultural normative traditions and customs. As the State has noted, based on a report of information from Phyllis Croft, there was a "deliberate policy on the part of the last males of simply not passing [knowledge] on". The State graphically calls this the "trajectory of loss".

721 The State, of course, in the general public interest has the responsibility of ensuring that any claim over lands in South Australia under the NT Act should be tested, and if it is not satisfied that the claim should be accepted, of requiring the claim to be subject to proper proof. That is what has occurred in this matter, entirely properly, even though it appears that the "trajectory of loss" is to some degree at least a consequence of earlier governmental policies. My concern in this matter is to ensure, as I endeavour to do, to determine the factual contests on the basis of the available and admitted evidence, and then to apply the law to those factual findings. Even though I am aware that there are good reasons why the lay evidence of traditional laws and customs might be "thin and light", I cannot for that reason fill gaps in the evidence based on speculation. I can only act on the evidence that is before the Court. On the other hand, in doing so, the circumstances in which there has been or may have been a "trajectory of loss" of evidence means that I will not be adversely critical of the applicant for not having adduced different or more persuasive evidence of contemporary or relatively contemporary practice of normative traditional laws and customs. As I have indicated, the applicant's evidence has not sought to make more of what each witness can properly say than has been done.

722 With those observations, I turn to consider the evidence and the submissions to determine what findings I should make on this evidentiary material before the Court.

Continuity of traditional laws and customs

723 The State contends that "[t]he fundamental difficulty for the Applicant … is its inability to establish continuity of a society 'united in and by its acknowledgement and observance of a body of laws and customs.'"

724 The evidence led, the State submits, "indicates a radical interruption or discontinuity in the acknowledgement and observance of traditional laws and customs of Barngarla society." It will be recalled that the relevant case law establishes that in the context of s 223 of the NT Act, "traditional laws and customs" means, inter alia, laws and customs that have a normative character, and not merely laws and customs that amount only to "observable patterns of behaviour".

725 The applicant relies on the opinion of Professor Sutton that there are only three "elemental planks" that must be established to have persisted from the at-sovereignty Barngarla society to the present day in order to establish that the Barngarla people's rights and interests are possessed under traditional laws and customs. Those three "planks" are: the fact that rights possessed under Barngarla law and custom are communal rights rather than individual rights, the fact that rights under Barngarla law and custom are acquired by descent, and the fact that rights possessed under Barngarla law and custom are inalienable. Professor Sutton says it is clear on the evidence that each of those "planks" is present in the present-day Barngarla society, and as such, for the purposes of anthropology, it can be said that the rights held under present Barngarla laws and customs are rights held under traditional Barngarla laws and customs. (T1714; A47, [31]-[35])

726 In the alternative, however, the applicant submits that, if more "planks" of continuity must be proven, "[those] 'other' planks are largely still in existence and have continued to be so throughout time although varied to account for changing circumstances."

727 The State addressed Professor Sutton's argument in its oral submissions. Counsel for the State argued that, contrary to Professor Sutton's opinion, the kinship system is also an "elemental … plank of the continuity of the society and it is lacking." Counsel for the State went on to submit that the three "other elemental planks" referred to by Professor Sutton are "almost givens in applications by claim groups for native title rights. The inalienability of land is a given, that's a statutory requirement before one can make the claim that is the – it's not a chattel, it can't be gifted, it's a different sort of right that is being sought, they are collective rights."

728 In *Wyman on behalf of the Bidjara People v State of Queensland (No 2)* [2013] FCA 1229, Professor Sutton was also an expert witness, and made similar observations about the relevant society in that case. The State of Queensland made a similar argument to the State's above, submitting that the "elementary planks" (though that term was not used) are merely "fundamental incident[s] of any form of native title and not … evidence of the body of laws and customs which in fact regulated and defined the rights and interests which those peoples had…": [535]. At [536], Jagot J rejected that submission:

> *Yorta Yorta* … does not suggest a distinction between what might be described as basic or fundamental and other norms. Nor does it suggest that norms about rights and interests in land (such as the rights being communal and inalienable) are not themselves part of "the body of laws and customs which in fact regulated and defined the rights and interests which those peoples had and could exercise in relation to the land or waters concerned". The foundational nature of these norms should not be permitted to distract from the fact that they are both a fundamental incident of any form of native title and an important part of the traditional laws and customs of Aboriginal people, including the [relevant claim group].

729 I respectfully agree with her Honour's reasoning on this point.

730 Professor Sutton's conclusion on the evidence is correct. The evidence demonstrates that the claimants view the rights and interests that they possess under their laws and customs as inalienable and communal. That is uncontentious.

731 The evidence further demonstrates that those rights and interests are acquired through descent. It is agreed by all the experts that the system by which one's descent entitles one to particular rights has altered in two significant ways: first, Barngarla people now acquire rights to land through a system of "cognatic" descent, rather than acquiring "primary" rights through patrilineal descent and "secondary" rights through matrilineal descent; and second, the distinct area of Barngarla country in respect of which a Barngarla person possesses rights and interests used to be defined by reference to one's father's (or in the case of "secondary rights", one's mother's) totem, but it is now defined by the area with which the parent whom you choose to "follow" has become associated by birthplace or place of residence. Despite those adaptations, the system of acquiring rights in country is still very clearly one based on a principle of descent. All experts did agree that the system was essentially based on descent. Moreover, as described above, Dr Martin agreed that the centrality of "socially legitimated claims of descent from recognised Barngarla ancestors" in determining Barngarla identity was a characteristic of Barngarla society that demonstrated continuity with the past. Dr Haines reached the same conclusion (although his reasoning in reaching that conclusion

was the subject of what I find to be a sound criticism by Dr Martin, and as such I would not give Dr Haines' conclusion on this point weight if it were not supported by other expert witnesses). Mr McCaul also reached the same conclusion, albeit expressed only provisionally.

732 According to Professor Sutton, the continuity of the centrality of a principle of descent (along with the other two "elemental planks") is all that is required to be able to conclude that "fundamental aspects of the nature of the rights-bearing entity [i.e. the Barngarla society] and its relationship to the country it identifies with have remained unaltered since sovereignty in this case."

733 However, Mr McCaul opined that the three "planks" stipulated by Professor Sutton were insufficient, and that two more should be added: first, a sense of obligation on the part of Barngarla claimants to look after the relevant land; and second, a belief that the relevant land can be "dangerous" (that is, bad things will happen) if it is not respected (that is, for instance, if a woman enters a men's site).

734 Both those additional "planks" were, in Mr McCaul's opinion, present on his reading of the evidence. The evidence clearly indicates that the Barngarla claimants feel a sense of obligation to look after their country. That does not appear to be contentious. It was also clear on the evidence that Barngarla people do believe that sacred sites on the land can be "dangerous". However, if that belief relates to "sacred sites" that have no connection with traditional Barngarla law and custom, then its relevance as an indicator of continuity may be very weak. Thus, in order to determine whether this belief has a "traditional" basis, it is necessary to consider whether the dreaming stories that generally gave rise to ideas about sacred sites are "traditional" stories.

Stories

735 The State made detailed submissions on the existence or otherwise of traditional Barngarla stories. In relation to the Seven Sisters story, it admits that there is "some remnant knowledge" of it amongst the Barngarla people, and that it is open for me to infer that "such knowledge may have been transmitted from early generations of Barngarla people", with the caveat that the Barngarla dances, songs and ceremonies that presumably existed with the story in the past have been replaced by Western Desert songs and dances.

736 I accept that, on the balance of probabilities, the knowledge of the Barngarla witnesses as to the Seven Sisters story has been transmitted from early generations of Barngarla people. The knowledge is clearly not detailed and complete. It is obvious that there are gaps, and that at one time the stories would have been richer than they are now. However, there is still a not inconsiderable amount of knowledge held by Barngarla people (mainly women), generally linked to specific sites on Barngarla country. I was in particular impressed with what I consider were genuine and very real expressions of the belief in the Seven Sisters story and its nuances and significance during the restricted evidence given on country in a women only session. It reflected not only a strong current knowledge of, and belief in, that story but on what was described an inheritance or passing on of that story from ancestors.

737 In relation to the man story, the State submits that it has "only recently been revived with the current generation of Barngarla men going to the APY lands for initiation." As for other stories, such as the eagle story, the State similarly submits that the detail of those stories was "of Western Desert origin and Western Desert in emphasis", and submits that in any case, "very little detail" was given.

738 Absent from the State's above argument is any explanation of how the man story and eagle story came to be associated with particular sites on Barngarla country if they are Western Desert in origin. (Many of the other stories did not contain much specific geographical detail, and so there is no need for such an explanation in relation to them.) There was no suggestion that the witnesses had simply concocted those associations themselves, and I would have rejected such a suggestion had it been made. There was no suggestion that Western Desert people had concocted those associations when telling the stories to Barngarla people. There was no expert evidence proffered providing any explanation.

739 The applicant did proffer an explanation for the claimants' knowledge of sites on Barngarla land. The applicant submitted, in relation to the man story, that "the origin of [the story] is likely to be from senior Barngarla law men telling those stories to neighbouring law men in the regional ceremonies that are known to have been conducted. Those stories have been re-told to Barngarla men upon their reaching the appropriate level of initiation and seniority."

740 The State submits that the evidence adduced does not support this "custodianship" argument. I accept that there is a dearth of direct evidence which means I cannot make a positive finding that there was some traditional system of transmission of Barngarla knowledge agreed to by a past generation of Barngarla and Western Desert men involving the holding of knowledge

"on trust" in the Western Desert, to be passed back to future Barngarla generations. However, it must be acknowledged that there is evidence that "regional" initiation ceremonies (that is, initiation ceremonies involving several groups) are known to have been conducted since at least 1905. In those circumstances, it would not be at all surprising if some people other than Barngarla people were capable of holding and transferring Barngarla knowledge to others.

741 In any case, the fact of the current claimants' localised knowledge relating to the man story and eagle story remains. I am, in all the circumstances, willing to infer that this localised knowledge must at least have its roots in traditional Barngarla knowledge. Whether that knowledge has been passed down by Barngarla people, and for whatever reason the knowledge was not recorded by the Phyllis Croft-era anthropologists, or whether non-Barngarla people have assisted with the transmission of Barngarla knowledge, it is not now possible to say with certainty. However, on the balance of probabilities, I find that that explanation of the localised knowledge is more satisfactory than a finding that it has been "fabricated".

742 As such, the belief that sacred sites can be "dangerous" is a belief that has its origins in traditional Barngarla law and custom. It should be noted that the evidence suggests that this belief often now manifests itself in ways that may not have been familiar to at-sovereignty Barngarla people. In particular, "smoking" was commonly spoken of as a way to protect oneself from the dangers associated with sacred sites. That is a common practice amongst Western Desert people, but it is not recorded as a practice amongst Barngarla people at sovereignty. I do not think this fact weighs greatly against the applicant's case. As Mr McCaul opined, the important fact is the persistence of the belief about sacred sites, based as it is upon traditional Barngarla stories. I am satisfied that belief is not simply one re-created by enquiries through non-Barngarla resources, but it is one which has its roots in the continuity of traditional Barngarla laws and customs.

743 Mr McCaul's second criticism of Professor Sutton's "elementary planks" theory was that it wrongly looks to "seeming continuity of those cultural traits [i.e. the three "planks"] in isolation from the significant change that has occurred in other domains". To demonstrate his point, Mr McCaul describes a hypothetical situation where a Barngarla person has a right to land predicated on descent, where the right is regarded as inalienable and communal, but where the land is not land to which one's "community" had a "traditional connection". In such a situation, Mr McCaul asserts that "one is no longer maintaining a traditional system",

but according to Professor Sutton's thesis, such a right to land can be regarded as "traditional".

744 Mr McCaul's criticism could be interpreted broadly as a criticism that one needs to inspect all "domains" of Barngarla society at sovereignty, then compare each of those "domains" with what exists in the present-day society, and then "weigh up", as it were, those domains where there has been a rupture in continuity against those domains where there has not. Such an approach may or may not be a sound method of anthropological inquiry, but I do not consider it is a valid approach to the application of the relevant provisions of the NT Act. The task of this Court is to ascertain under which (if any) laws acknowledged and customs observed by the present-day Barngarla society do the claimants have rights and interests in the claimed land. Once ascertained, the Court must ask whether those laws and customs can be said to be "traditional laws" or "traditional customs". The question of whether a particular aspect of Barngarla society as it existed at sovereignty has been lost or retained is relevant only if that question helps determine whether the laws and customs of the present-day Barngarla society can be said to be "traditional". And the concept of traditional is one which should accommodate adaptation of those laws and customs with the evolution of the traditional Barngarla society, if that is found to have occurred.

745 However, turning to Mr McCaul's specific hypothetical, it must be observed that the hypothetical is in fact a description of what the experts believed has occurred in this case. The experts agreed that a process of "conjoint succession" has occurred. They also agreed that such a process was a "permissible" adaptation, such that it could not be seen as a departure from traditional laws and customs. So the fact that a person claims to have rights in land to which "ones [sic] community did not have a traditional connection" does not necessarily mean that "one is no longer maintaining a traditional system".

746 The final criticism made by Mr McCaul regarding Professor Sutton's thesis is that Professor Sutton too readily dismisses the significance of initiation practices to this case. Mr McCaul opined that the claimants regard "initiated status" as "foundational for full authority to speak for land." As such, Mr McCaul believes that "the significant lapse and revival of the [initiation] process through another cultural group does carry some significance."

747 Dr Martin disagreed with the suggestion that initiation practices are a "fundamental component" of the contemporary Barngarla land holding system. (T1668-T1669) However, I agree with Mr McCaul that it is clear on the evidence that there is an understanding amongst

present-day Barngarla people that one's status as an initiated man is at least relevant to one's degree of authority in respect of Barngarla land.

748 That fact does not present insuperable difficulties for the applicant's claim. As Mr McCaul says, it is only the "initiated status" that is "foundational for full authority to speak for land". Mr McCaul said in his oral evidence that he perceived "continuity" and "parallels" between the present and at sovereignty society's conferral of status upon initiated Barngarla men. The nature of initiations is not such that it is impossible to conceive that the traditional status of being an initiated man might continue while other elements of initiations, such as the content of, or the location of, the initiation ceremonies themselves, evolve or change. The evidence clearly establishes that Barngarla initiation ceremonies have evolved such that they no longer occur on Barngarla country, when, at sovereignty, they did occur on Barngarla country. The evidence also establishes, though less clearly, that the content of initiation ceremonies of Barngarla people contains, at best, only some very weak continuities with the content of such ceremonies at sovereignty. However, no expert expressed the opinion that the location and the content of initiation ceremonies formed an inextricable part of the traditional laws and customs under which the claimants' rights and interests in land are possessed. In any event, Mr McCaul said that the initiation process, even when taken as a whole, "arguably" exhibits a "certain continuity" because it forms part of the framework for the transmission of "information … specific to [Barngarla] traditional country and [which] could probably be traced back to Barngarla ancestors."

749 In my view, the evidence shows that, during the period of European settlement, the conduct of Barngarla initiation ceremonies evolved to be shared ceremonies with other Aboriginal groups, and more recently such ceremonies have been conducted on country that is not on the claim area. At no time has the traditional belief that initiation is a rite of passage to seniority, entitlement to respect, or acceptance of responsibility for country or parts of country, been lost. That also applies to the traditional belief that initiation establishes an entitlement to knowledge of certain aspects of traditional knowledge about songs and stories, ceremonies, and customs. It is certainly now the case that the detailed content of the knowledge itself has largely been lost. But I do not consider that that means that the status acquired by initiation and the authority and the responsibilities it carries has been lost and is now being re-created. I find that it reflects and represents a continuation of traditional Barngarla laws and customs. Nor do I accept that the fact that the initiation process or ceremony is now performed away from Barngarla country diminishes that conclusion. The intersection of Barngarla people

with adjoining groups of Aboriginal people and the period when (as discussed) population levels reduced and there was active discouragement of the performance of such ceremonies explains why communal initiation ceremonies occurred and still occur. I infer that, whoever now holds the knowledge of the nature of such ceremonies reflects and represents knowledge shared as the communal group ceremonies evolved. The evidence of those witnesses who are initiated confirms that there is an ongoing understanding of Barngarla elements of such ceremonies.

Kinship

750 As noted above, the State submitted that the "kinship system" ought to be regarded as an "elementary plank" of Barngarla society. In its written submissions, the State submits that the kinship system is "the most fundamental normative structure inherent to a rule-governed society". Its "absence" is "fundamental for the claimants' case because of the central role kinship plays in regulating social life." (It seems likely that the State meant to submit that kinship's absence is *fatal to* the claimants' case.)

751 I reject that submission. As has been noted above, the continued acknowledgement and observance of traditional laws and customs is relevant only insofar as those traditional laws and customs give rise to rights and interests in land and waters. That is made clear by, inter alia, Sackville J in *Jango v Northern Territory* [2006] FCA 318 at [395]:

> I have … found that [the claimants] have maintained their acknowledgment and observance of certain traditional laws and customs … [But that finding does] not necessarily mean that the applicants have established that [the claimants] acknowledge and observe rules relating to rights and interests in land that can be said to have a normative content. …

752 That is, the inquiry must not be directed merely to whether any traditional laws and customs are still acknowledged or observed, but rather, firstly, whether those particular rules relating to rights and interests in land are still acknowledged and observed, and second, whether those rules can be said to have a normative content.

753 The relevance of the kinship system to the claimants' alleged native title rights and interests has not been explained by the State. It is true that some expert witnesses stressed the importance of the kinship system to questions of continuity, but of course those witnesses were not speaking, and could not speak, of the importance of kinship to the legal questions I am bound to decide. No expert witness explained how the kinship system could be construed

as a law or custom under which rights and interests to lands and waters are possessed. As such, the traditional Barngarla kinship system's loss or otherwise is not relevant to the question I am required to determine.

754 In any event, a number of the expert witnesses' opinions, as extracted above, do not suggest that the kinship system has been completely lost. Mr McCaul believed that "we could say that there's still a kinship-based society today, but the way that plays out, … the way it's expressed, is different." Dr Haines believed that "[kinship] terminology has changed but the relationships are still broadly there…" Professor Sutton stated that "… [Barngarla society] was [a kinship-based society] at sovereignty, and very significantly … remains, … among the claimants …"

755 Despite this, the State submitted that there is "no evidence that the claimant witnesses were using Barngarla kinship terminology." I do not accept that is entirely correct. Amanda Richards gave evidence that her very young son calls her *ngami*, which she correctly identified as the Barngarla word for "mother", and that he refers to her sister Rebecca by an adaptation of a Barngarla word for "aunty". However, that was the only such specific evidence.

756 The applicant submits that the evidence indicates that "the contemporary form of Barngarla social organisation derives at least in part its substantial elements and the rules that govern it from society organisation pre-sovereignty. … [T]his kinship system is an observable organising principle of contemporary Barngarla society." In support of that submission, the applicant relies upon the "indicia of Barngarla continuity with regard to kinship" identified by Professor Sutton: the incest taboo, the fact that marriage is not unrestricted even beyond the nuclear family, the fact that "kinship remains of vital importance to people", the fact that funerals attract large numbers of people, and the expression of the duties of the relation to attend the funeral of the kinsperson. Those two latter matters are in fact, on my understanding of Professor Sutton's evidence, one matter. The large attendances at funerals are an indication that attending funerals is the duty of a relation to their kinsperson. In oral submissions, the applicant added that other indicia included respect for elders (mentioned by Professor Sutton) and Mr McCaul's view that all the Barngarla claimants consider each other relations.

757 Addressing these "indicia", it can be accepted that there was lay witness evidence to support the notion that Barngarla people, by and large, observe an incest taboo and/or a rule as to

marriage outside one's language group. It may be accepted that it is likely that the incest taboo's vitality, as Professor Sutton believed, demonstrates some continuity with the at-sovereignty society. There is no direct evidence of an incest taboo existing in the at-sovereignty Barngarla society, but, as Professor Sutton noted, it is a rule that is present in almost every human society, but nonetheless one that must be taught to each new generation.

758 There is also no evidence suggesting that the "exogeny" rule, that is, the rule that one must not marry other Barngarla people, existed in the Barngarla at-sovereignty society. Moreover there is no reason to infer that this rule would have existed at sovereignty. In fact, Professor Sutton opined that, while he thought it likely that marriages outside the Barngarla group were common at sovereignty, it would not have been a rule.

759 As to the assertion that "kinship remains of vital importance to people", that statement lacks any real content. It seems to be best regarded as a conclusion that might be drawn from the other "indicia" rather than an indication in its own right.

760 As to funerals, the only evidence that funerals attract large numbers of people came from Dr Haines' 2012 Report (and his oral evidence), not the lay witness evidence. That evidence suggested that large numbers of Barngarla people do (at least sometimes) attend Barngarla funerals. Both Professor Sutton and Dr Martin regarded that fact as suggestive of a persisting norm requiring kin to attend burials of other kin.

761 Turning to respect for elders, there was certainly evidence from the lay witnesses that such respect persists, and that it constitutes a normative rule. As Professor Sutton opined, that persistent norm can also be considered indicative of some continuity of the kinship system.

762 In respect of moieties, which are an important adjunct to any kinship system, the State submitted in oral submissions that only very slight evidence of moieties existed, and "even that part of what is left – which perhaps could be said in one way to appear traditional – was not traditional Barngarla but was rather Adnyamathanha or Western Desert…" Again, that is not really correct.

763 Linda Dare, Rosalie Richards and Amanda Richards all gave specific and detailed evidence about moieties. Contrary to the submission of the State, Linda Dare did not solely give evidence about moieties in relation to her Adnyamathanha husband. She also gave evidence that the late Ms Dare, her mother and a Barngarla woman, told her her moiety, albeit only after she asked her upon discovering that her Adnyamathanha partner had a moiety.

Moreover, both Rosalie Richards and Amanda Richards explicitly referred to "Garrarru" and "Mathari" as Barngarla moieties, not Adnyamathanha moieties, and, when pressed, were able to explain the difference (such as there are differences) between Barngarla and Adnyamathanha moieties. Edith Burgoyne had a remnant understanding of Barngarla moieties, though she did not say what her moiety was. Linda Dare and Rosalie Richards both gave evidence as to social sanctions that would apply if one married within one's moiety. It is probable that Rosalie Richards' anecdote about being isolated from one's people did not concern Barngarla people. It is unclear whether Linda Dare's statement that one would be "told off" if one married within one's moiety was in relation to Barngarla society, Adnyamathanha society, or both.

764 The State also submitted that Linda Dare and Rosalie and Amanda Richards' knowledge of moieties was "as observed by Professor Sutton, … gleaned by virtue of their interactions as, and/or with, Adnyamathanha people." There is no evidence to support that assertion. Professor Sutton did not make this observation. He merely observed that "It may be that people who have had continued interaction with Adnyamathanha have had more reason and opportunity to maintain a moiety system than those who have not." (A47, [63])

765 Despite the State's submission about the extent of the collapse of the Barngarla moiety system, the applicant does rightly admit that "it cannot be said that detailed knowledge of the matri-moiety system is widely held within the present day Barngarla people." That must be accepted. On the evidence, the only conclusion that can be reached is that the Barngarla moiety system has largely ceased to function in a real and meaningful sense.

766 In conclusion, despite the more or less complete collapse of the moiety system, it can be concluded that, as Professor Sutton opined, some not unimportant indicia of the Barngarla kinship system continue to the present day. Much of the substance of the kinship system has disappeared, but some identifiably traditional kinship-related norms do remain. So even if the kinship system was crucial to the legal question to be determined, as the State submits, there are still aspects of modern Barngarla laws and customs that find their root in the at-sovereignty Barngarla kinship system.

Totems

767 A final matter that needs to be addressed is the issue of totems. Nothing is known about specifically Barngarla totemic institutions and their purpose at sovereignty. However, if Barngarla totemic institutions resembled those in other "Lakes Group" societies, then it is

likely that Barngarla totemic institutions were of great significance in the Barngarla land tenure system and thus may be of relevance.

768 It is impossible to know how closely the remnant knowledge and beliefs about totems resemble those that existed at sovereignty. Moreover, the extent to which totemic institutions can be said to continue to the present day was not a question addressed by the experts in any detail. The applicant submitted on this issue that "the maintenance of knowledge about totemic affiliation has persisted to some small extent in the descendants of Andrew Richards (Leroy Richards, Amanda Richards). Other Barngarla people have identified some totemic affiliation although it is not possible to trace the origins of such affiliation to pre-sovereignty society." The State does not address the current Barngarla claimant's knowledge as to totems in its submissions.

769 It can be concluded that the extant knowledge about totems is very vague and incomplete. Brandon McNamara Snr, Howard Richards, Amanda Richards, and Rosalie Richards were the only witnesses who were able to explain that one must not eat and/or protect one's totem. However, none of them were very clear as to a totem's broader significance, or as to how one acquired a totem. All of these witnesses (and some other witnesses with less knowledge) learnt of totems from other Barngarla people, so it can be inferred that the very limited knowledge now possessed by the witnesses is the remnant of a traditional Barngarla system. However, today, the most that can be said is that some Barngarla people observe a normative rule that one must protect and refrain from eating their totem.

770 As noted, the State has not submitted that the loss of knowledge of totemic institutions is of great moment to the question to be decided. Similarly, the experts did not at all emphasise the loss (or otherwise) of knowledge about totemic institutions as being significant in relation to the question of the continuity of Barngarla laws and customs.

Language

771 The State contends that Barngarla language has not been spoken fluently within the Barngarla community since the 1960s. The applicant admits that "at present nobody can be said to speak [Barngarla] fluently", but asserts that "many living Barngarla people have varying levels of knowledge and use of Barngarla language and words."

772 It seems likely that there existed Barngarla speakers long after the 1960s. Phyllis Croft is said to have spoken Barngarla, and she died only in 1993. Leroy and Randolph Richards may

have spoken Barngarla, and Leroy Richards died only in 2003. At any rate, it is agreed by the parties, and it is clearly the case, that no-one now speaks Barngarla fluently.

773 The fact that Barngarla language is now being relearnt by some claimants, due to the work of Adelaide University academic Ghi'lad Zuckermann, is not evidence of continuity of the Barngarla language, although it is evidence of continuity of a notion of Barngarla identity, a notion that clearly existed amongst the Barngarla community at 1846, when Barngarla people told Schürmann of the "Barngarla matta", and which can thus be inferred to have existed at sovereignty.

774 Other than knowledge of the Barngarla language acquired through the Adelaide University programme, there was very limited evidence to support the applicant's assertion that current Barngarla claimants have "varying levels of knowledge and use of Barngarla language and words." It is true that Amanda and Rosalie Richards were able to correctly identify and use a small number of Barngarla words. No other witness was able to do the same. As such, it must be concluded that there is very little continuity of language use amongst the current Barngarla claimants.

775 However, as was noted by Dr Rose, the loss of the mere use of Barngarla words is not very strong evidence of the loss of the society that once spoke the Barngarla language.

Conclusion

776 In summary, I am satisfied that the requirements of s 223 of the NT Act have been satisfied by the claimants on this native title determination application. The laws and customs under which the claimants possess rights and interests in land are laws and customs with normative force that find their origins in the at-sovereignty Barngarla laws and customs, and those laws and customs have connected Barngarla people to their land since sovereignty. I therefore find that the claimants hold the native title rights and interests set out in the native title determination application (which have been set out above) in respect of the land and waters comprising the claim area (set out in Appendix A), subject to the exceptions explained below.

Whether native title rights and interests are possessed with respect to the land south of Port Lincoln

777 The second issue for determination on this application is whether it can be said that the area of land south of Port Lincoln was Barngarla country at the time of sovereignty, or whether it was instead the country of the neighbouring Nauo group.

778 The question of the geographical boundaries of particular Aboriginal groups at the time of sovereignty has been a vexed question in many native title proceedings. That is because, as was emphasised by the expert witnesses in this proceeding, Aboriginal cultural groupings are not akin to European "nation states" – that is to say, they are not, and were never, political entities, and so there was never any need for them to be geographically demarcated with the precision one expects of nation states.

779 The Nauo Native Title Claim (proceeding number SAD 6021 of 1998) presently claims a wedge of land in the south-western quarter of the Eyre Peninsula. The Nauo people have made no native title determination application over any of the Barngarla claim area. I am not willing to infer from that fact that none of the Barngarla claim area was Nauo country. As counsel for the State argued, the bare fact of an absence of a Nauo native title claim to any land in the Barngarla claim area in 2013 does not necessarily prove anything about the extent of Nauo country at sovereignty. There are many potential alternative explanations. It may be, for example, that the Nauo people have formed the view that their native title rights over their traditional land that lies within the Barngarla claim area have been subsequently extinguished, and so there is no utility in making a native title determination application in respect of that land, or it may be that the Nauo people have formed the view that in the intervening years of upheaval, the Nauo have not maintained their connection by traditional laws and customs to that part of what was nonetheless their at-sovereignty country.

780 It is necessary in determining this question to turn first to the earliest accounts of the geographical distribution of the Aboriginal tribes of the southern Eyre Peninsula, provided by Schürmann. Schürmann wrote in a letter in 18 May 1842, reproduced in the McCaul 2013 Anthropology Report at 7-8:

> The natives of Port Lincoln are divided into two principal tribes called in their own languages the one Nauo + the other Parnkallas. The former of these frequent the coast to the south and west of the settlement [of Port Lincoln] + live chiefly upon fish; they are generally speaking a strong race of people + often meet in comparatively large bodies … They differ considerably in dialect + custom from the other tribe [i.e. the Parnkalla tribe] + the males have the distinguishing mark of a small ring or circle engraved on each shoulder. The Parnkalla tribe are spread over a far greater extent of country from Port Lincoln to the northward beyond Franklin Harbour and over the greater part of the interior country. …

781 Schürmann also wrote on that same day:

> … there was a numerous party of natives assembled on the southern Coast of Port Lincoln Proper [the name of a bay immediately to the south of Port Lincoln] … From

> the fact that the place where this body of natives was collected is in the Nauo country, [and because of their appearance], I felt persuaded, that they could be no other than the Nauo tribe.

782 Further, in a letter of 19 August 1844, reproduced in the McCaul 2013 Anthropology Report at 8, Schürmann wrote:

> … Since being here I have come in contact with Aborigines of three, by their languages distinct, tribes, being the Parnkalla tribe which extends along the northern coast, northwards to the head of Spencer Gulf …; further the westerly living Nauo, …, and finally the northwesterly living Ngannityiddi [believed to be an alternative name for the group now commonly referred to as "Wirangu" (McCaul Report 2 p.10; Hercus and Simpson 2001:266)].

783 Finally, in his 1846 commentary, Schürmann observed:

> The Parnkalla … [inhabit] the eastern coast of [the Eyre] peninsula from Port Lincoln northward probably as far as the head of Spencer's Gulf. The Nauo [language] is spoken in the southern and western parts of this district …"

784 All of these excerpts tend to suggest that the Nauo people were, at least in the 1840s, the inhabitants of the land to the south of Port Lincoln. That much appeared to be accepted by Professor Sutton and Mr McCaul. Dr Martin was not asked to address this question. However, that hypothesis was disputed by Dr Haines. Dr Haines instead purportedly relies on other comments of Schürmann, stating in oral evidence that:

> …[T]here's also some detailed comment by Schürmann … about the ceremonies when two people [presumably, that is, the Nauo and Barngarla] meet: ceremonies, fights, whatever it might be. This … is in what I might call the interstitial area between Coffin Bay and Sleaford Bay. It's an area described by Schürmann [as], and indeed it is now, [consisting] of sand dunes. And in fact there's a Dreaming story of the creation of these sand dunes by Mantera [sic] and [Tatta] two birds, or bats, or whatever they might be …
>
> … [Those sand dunes are] an area between the two [groups] and logically, it would seem to me, that one could extrapolate that perhaps the Nauo and the Barngarla would treat that as a sort of meeting ground where they might meet for ceremonies, they might meet for exchanges, they might meet for fights. … [I]t's a pretty inhospitable sort of area: sand hills, swamps and so forth. So my thinking on the basis of all that evidence … is that the Nauo were historically probably confined to the western area, except when they came over to visit, and the early sources talk about the Nauo visiting Port Lincoln – not residing there – and the Barngarla were on the east coast.

785 This appears to be the only basis upon which Dr Haines makes his claim that Barngarla country extended south of Port Lincoln at the time of sovereignty. Dr Haines does not

extrapolate on exactly what ceremonies, exchanges and fights occurred between the Nauo and Barngarla at these sand hills in either of his tendered reports. Schürmann refers to the sand hills in question twice in his 1846 commentary on the Barngarla. Only one of those references is relevant for current purposes (the other is at p.240). It reads as follows:

> The [nondo] fruit, which is much prized by the natives, grows in abundance among the sandhills between Coffin and Sleaford Bays, where it every year attracts a large concourse of tribes, and generally gives occasion for a fight. As a proof how much this bean is valued it may be mentioned that the Kukata tribe, notorious for ferocity and witchcraft, often threaten to burn or otherwise destroy the nondo bushes in order to aggravate their adversaries. (217)

786 That quotation demonstrates that Dr Haines is correct in saying that tribes met at these sand hills for fights. However, my attention has not been drawn to any other writing of Schürmann that refers to any "exchanges" or "ceremonies" occurring at these sand hills, despite Dr Haines' suggestion that Schürmann makes "detailed comment" of such events occurring there. Moreover, Schürmann makes clear that the only reason a "large concourse" of tribes gathered at the sand hills and occasionally fought was because of the abundance of nondo beans there, not because it forms the boundary between the Nauo and Barngarla. Yet further, Schürmann does not mention that the Barngarla and the Nauo tribes are amongst the tribes present. The only tribe he specifically mentions is the "Kukata" (Kokatha). Admittedly, it is a reasonable inference to make that the Nauo and Barngarla tribes would have been present at this "concourse" of tribes at the sand hills, given their proximity. But even if we accept that inference, it is not at all clear why the presence of the Nauo, Barngarla and Kokatha at the sand hills to collect nondo beans and occasionally fight over them forms a sound basis for the further inference that the sand hills must have been the boundary between the Nauo and the Barngarla.

787 Such an inference is also not supported when one considers the repeated positive statements of Schürmann himself about the extent of Nauo country, which quite clearly places the boundary between Nauo and Barngarla country somewhere around the township of Port Lincoln. Dr Haines appeared to attempt to overcome this difficulty by drawing a distinction between the township of Port Lincoln and the peninsula of Port Lincoln, and asserting that Schürmann "refer[s] to the Port Lincoln peninsula as distinct from the Port Lincoln settlement". (T1637, 5-10) There are certainly passages of Schürmann's writing where he seems to use "Port Lincoln" to refer to an area of land other than merely the township of Port Lincoln. However, if that observation is meant to suggest that Schürmann was actually saying

that the Barngarla people were the dominant presence on the whole of the "Port Lincoln peninsula", rather than merely the township, that suggestion must be rejected. There is clear evidence to the contrary, most notably Schürmann's very specific declaration that the southern coast of Port Lincoln Proper Bay is Nauo country. Proper Bay is the bay immediately to the south of Port Lincoln and is to the north of the Lincoln National Park (the Jussieu Peninsula) at the south-eastern tip of the Eyre Peninsula. Sleaford Bay is on its southern side, so it appears that Schürmann did not regard the area south of the northern part of the Lincoln National Park as Barngarla country.

788 If Dr Haines' argument that the sand hills were the proper boundary between Nauo and Barngarla country is to be sustained, he would need to explain why Schürmann had not only failed to point out that the sand hills formed the Nauo-Barngarla boundary, but in fact formed and expressed a positive view inconsistent with that hypothesis. In the absence of any such explanation, I do not accept Dr Haines' view about the extent of Barngarla country at sovereignty.

789 It should be noted that Dr Rose suggests in his 2013 report that an assessment of place names is consistent with the Haines theory that the at-sovereignty Barngarla-Nauo border was at the Coffin Bay/Sleaford Bay sand hills. He states that "[o]n linguistic and geographical grounds, it is … more likely that the southern coast around Sleaford Bay was … traditionally Barngarla territory, rather than Nauo …" [22]

790 Dr Rose assesses a large number of Aboriginal place names around the Eyre Peninsula and concludes that they are all Barngarla names. Of those place names, about eleven relate to the land south of Port Lincoln within the claim area. Three of those eleven place names (Koodinga, Mikkira and Pillie) are merely names Dr Rose found on modern maps of the region. Their origin is unknown. Seven of them (Kannana, Kullipurra, Kuyabidni, Kallinyala, Kulinyalla, Punnu Mudla and Tannana) are place names that Schürmann recorded as being used by the local Aboriginal people. One (Tulka) is a placename that linguist-anthropologists Luise Hercus and J Simpson refer to in a study of the Nauo people. It appears that Hercus and Simpson obtained that placename from a modern map, not from a local Aboriginal informant.

791 Mr McCaul said in the McCaul Linguist Report that the place names other than those Schürmann recorded are unreliable: "At least we know that Schürmann had a refined ear for language, a consistent form of recording and worked directly with Barngarla and Nauo people. The origin and recording quality of other place names is much less certain."

(Linguistic report, p.10) For this reason, and because of lack of time, Mr McCaul provided no criticism of Dr Rose's assessment of the four relevant place names that merely come from modern maps (or from Hercus and Simpson). Of those four names, it seems to me that only one of Dr Rose's ascriptions of a Barngarla meaning is plausible. That name is the name "Pillie" for a limestone rock deposit on the south side of Port Lincoln. The rock is described in Wilhelmi's account of the Aboriginal people of the Port Lincoln area:

> They say there is a rock on the south side of Port Lincoln full of deep holes, an occurrence not uncommon in the limestone formations of this region, inhabited by a race of dead men, who come out in the night to eat ants' eggs … (Wilhelmi, 194)

792 "Peli" is a Barngarla word recorded by Schürmann as meaning both "the hardned [sic] paste found on the ant heaps …" and "the white of an egg". Given the above story relating to the Pillie rock, it does seem very plausible that the name may have its roots in this Barngarla word.

793 The other ascriptions of Barngarla meaning to place names from modern maps are largely unconvincing. "Tulka" is merely said to be a "name only". Hercus and Simpson say that "Tulka" is a Nauo word. Dr Rose says in his 2013 Report at [80] that their reasoning for that conclusion is merely that Barngarla words are unlikely to begin with "t". At [81], he counters that argument by pointing out that many Barngarla words begin with "t". That fact may disprove the hypothesis that "Tulka" is not a Barngarla word, but it certainly does not prove that it *is* a Barngarla word. "Koodinga" is said to come from the Barngarla for swan, "korti". That etymology seems very speculative. "Mikkira" is said to come from "meka", the Barngarla word for "bare or bald". Again, that seems only speculative.

794 Turning to the six place names originating from Schürmann, two of Dr Rose's suggested etymologies are convincing – those given for "Kuyabidni" and "Punnu Mudla". Kuyabidni is a body of intertidal water south of Port Lincoln now known as Sleaford Mere at about the western end of the Lincoln National Park. Dr Rose says it comes from the Barngarla "kuya", meaning fish, and "-bidni", meaning of. Mr McCaul comments that that etymology seems to be a direct correspondence. "Punnu Mudla" is now known as Kirton Point, a small peninsula of land within the township of Port Lincoln itself. "Punnu" is Barngarla for lagoon, and "mudla" means nose. Again, Mr McCaul comments that that etymology seems to be a direct correspondence.

795 Dr Rose's suggested etymologies for the other five place names, Kannana, Kullipurra, Kallinyala, Kulinyalla and Tannana, are not, in my view, convincing. "Kannana" is said to originate from "kanya", stone, and the suffix "-nga". Mr McCaul, however, asserts that this etymology cannot be so because Schürmann would not have confused the /n/ and /ny/ sound, a distinction of which he proved elsewhere to be cognisant. "Kullipurra" is said to come from "kulli" for "stunted she oak" and "purre" for hill. Mr McCaul disputes that "kulli" is Barngarla for "stunted she oak". He says it is "kullindi" or "kurdli bakka". That is what is recorded in Schürmann's dictionary. "Kallinyala", the Aboriginal name for the area of Port Lincoln, is said to originate merely from a proper noun, "kallinya", with a directional suffix "–(d)la", meaning "toward". It is not made clear why "kallinya" is a Barngarla proper noun, and cannot be a proper noun in some other language. The remarkably similar-sounding "Kulinyalla", the name for a place near Sleaford Bay, is said to come from the Barngarla "kulilyala", meaning "seed vessel of casuarina". Mr McCaul notes that this etymology requires one to assume Schürmann incorrectly recorded one of these terms, or that there is some linguistic variation in regard to the word for a seed vessel. Finally, "Tannana", a name for Sleaford Bay, is said to come from another proper noun, "tanna", with the suffix "-nga". Again, it is not clear why one ought to assume that "tanna" is a Barngarla proper noun, or why Schürmann would have again overlooked the /n/ and /ny/ sound distinction when recording "Tannana" (instead of "Tannanga").

796 In conclusion, there are three Barngarla etymologies for southern Aboriginal place names that appear plausible – "Pillie", "Kuyabidni" and "Punnu Mudla". Of course, the strength of all of this evidence is affected by the fact that this sort of placename analysis is very obviously greatly problematic. Mr McCaul, for instance, in his 2013 Linguistics Report at [37], questioned the worth of this exercise, noting that "in the absence of culturally knowledgeable informants the etymology of the place names advanced by Dr Rose will inevitably remain largely speculative." Moreover:

> Dr Rose does not explain the methodology he adopted in analysing the etymology of the placenames, but it appears to me that his approach essentially consisted of searching through Schürmann's dictionary to identified [sic] lexemes and morphemes that could match the recorded names. Given the circumstances I think this is really the only available methodology, but in my view it is reliable only in the exceptional circumstances of a precise match of terms … In all other instances there will remain varying degrees of uncertainty.

797 Professor Sutton, though not an expert linguist, also made valid points in oral evidence about the fallibility of placename analysis, making the obvious point that many European place names are not based on English words, or have no meaning in any language. There is no reason to think that Aboriginal place names are different, and will always have a meaning, and that that meaning will always be in the language of the local Aboriginal group, and not the language of a group from elsewhere.

798 An additional difficulty is the similarity between the Barngarla and Nauo languages. Mr McCaul in his capacity as a linguist noted in oral evidence that he was of the opinion that "one [cannot] distinguish between … Nauo and Barngarla place names … on linguistic data alone. … [T]here may be the odd anomaly, but just … taking places from maps and then trying to reinterpret them today, I don't think that we can get very far with that."

799 For those reasons, I am not willing to find that the Barngarla people's country extended south of the township of Port Lincoln, contrary to the repeated attestations of Schürmann, merely on the basis that there are three Aboriginal place names south of Port Lincoln that are plausibly based on Barngarla words.

800 In all the circumstances, I find that on the balance of probabilities, the boundary between Nauo and Barngarla country or more accurately the extent of Barngarla country lay somewhere around the vicinity of Port Lincoln, and that the lands to the south of Port Lincoln were possibly Nauo country, at least in the 1840s. I do not need to make a positive finding. I am not satisfied that the Barngarla country extended in any significant way south of Port Lincoln. It should be noted that in any event the applicant appeared to all but concede this point in closing submissions. (T1755-1756, lines 15-21)

Precise location of the boundary at the time of settlement

801 Schürmann does not identify with great precision the Nauo-Barngarla boundary at the time of settlement. Analyses of his various comments on the subject might sometimes suggest the township of Port Lincoln is within Nauo country, and other times within Barngarla country.

802 Mr McCaul noted in his 2013 Anthropology Report that Schürmann's writings taken as a whole suggest that "the dominant Aboriginal population at Port Lincoln was Barngarla, but [there was] significant fluidity between Nauo and Barngarla people around Port Lincoln in the 1840s" and that the Nauo and Barngarla residing in and near Port Lincoln enjoyed a "generally peaceful co-existence".

803 However, Mr McCaul's 2013 Anthropology Report also contains a list of references from various sources other than Schürmann as to the cultural identification of the Port Lincoln township area. There are six accounts of informants reporting Port Lincoln as being Nauo country – three come from RH Mathews in 1899, two from Tindale in the 1920s and 1930s, and one from Elkin in 1930. Mr McCaul finds only one account to the opposite effect – the account of an informant called "Cole" to Taplin in 1879 that Port Lincoln is "Parnkalla" country.

804 Moreover, Professor Sutton noted in his Report at 16 that:

> … [T]here is no necessary inference from a strong Barngarla occupational presence at the town and district of Port Lincoln in the 1840s as to it having undergone a shift of linguistic identity as country. Migration towards the new European centres by members of neighbouring Aboriginal groups in colonial times was commonplace.

805 That is, the dominant Barngarla presence in Port Lincoln may not indicate that the land upon which Port Lincoln stood was traditional Barngarla country, but merely that Barngarla people had migrated to Port Lincoln as it was the closest European centre. On the other hand, the 1840s was only at a time of early European settlement.

806 The problematic nature of drawing precise boundaries in native title claims has already been alluded to above. As Bartlett wrote in *Native Title in Australia* (2nd ed, 2004), and repeated by Nicholson J in *Daniel v Western Australia* [2003] FCA 666 at [113], "[t]he problems of proof dictate that boundaries need not be proven precisely or with absolute accuracy." Mr McCaul's assessment from all the evidence was that "… Nauo people held core rights in country just to the south and … across to the west of Port Lincoln …" (T1640, line 15) I agree with and endorse that assessment. As such, I find that the township of Port Lincoln was, at the time of settlement, Barngarla country. I do not need to make a finding about whether the Nauo People "occupied" the land to the south; I am simply not satisfied on the evidence that it was Barngarla country.

Whether the Nauo-Barngarla boundary at settlement was the same as that at sovereignty

807 I have concluded that from the time of early European settlement, Barngarla country is not shown to have encompassed the land south of Port Lincoln. As I have noted above, I am of the opinion that it is generally permissible to draw the inference that what existed at the time of early settlement also existed at the time of sovereignty, unless there is evidence to the

contrary. In this case, there is a suggestion of evidence existing to the contrary. It is necessary to assess that evidence.

808 A number of anthropologists have suggested that there was substantial migratory activity over the Eyre Peninsula and its surrounds around the time of sovereignty. This theory seems to have first been expressed by Norman Tindale, writing in 1974 and drawing upon information provided by various Aboriginal informants. Tindale situates the classical Barngarla-Nauo boundary at around Franklin Harbour and the town of Cowell, roughly 150 km northeast of Port Lincoln. Tindale asserts that there was a southerly migration of the Barngarla in the early years following sovereignty, reaching Port Lincoln at about Schürmann's time (Tindale, *Aboriginal Tribes of Australia*). Ronald M. Berndt, writing in the 1980s, endorses that theory. It appears that this theory, promulgated by Tindale, has its roots in the comments of a Susie Glennie, one of Tindale's informants in the 1930s, an Iron Knob resident, and according to Tindale "the last full blood who is wholly Bangala". Mr McCaul in his 2013 Anthropology Report at [31], drew attention to Tindale's field notes from his discussions with Glennie, which relevantly record that:

> … in very ancient times (app. several generations ago) [the Malkari Bangala] came no further south [than Hesso and Yudnapinna, localities about 50 km northwest of Port Augusta] but since before the white man came they have been moving further south. … At present + in historic times the Malkari [Bangala] extended to Kimba and Cowell, Iron Knob + Whyalla are also within their boundaries but were formally [sic] Njao [sic] territory. (McCaul 2013 anthro report [31])

809 Similarly, another Barngarla informant of Tindale's, Arthur Davis, apparently told Tindale that the Nauo "boundary came as far up the gulf as Cowell" at some unspecified past time. (Rose, p.8)

810 In the course of evidence, Professor Sutton put forward a hypothesis that is consistent with this theory. He suggested that European whalers recorded to have been living on Thistle Island and other islands near the southern tip of the Eyre Peninsula in the early 1800s may well have travelled to the mainland at some time and transmitted venereal diseases to the local Aboriginal population. Indeed, there is some evidence of raids for wives perpetrated by European whalers upon the Aboriginals of the southern Eyre Peninsula in the early 1800s (referred to in the Applicant's submissions). If the affected local population was the Nauo (which would seem more likely than not given that both Schürmann and Tindale agree that at least the southern tip of the Eyre Peninsula was Nauo country), that could have led to drastic

population loss amongst the Nauo, years before any white settlement was established on the Eyre Peninsula. Such population loss sustained from venereal diseases, Professor Sutton asserted in oral evidence, was very common amongst Aboriginal groups when they first came into contact with Europeans. That population loss would explain why there was an encroachment upon Nauo territory by the Barngarla shortly prior to substantive European contact. There simply were not as many Nauo people as there used to be, and the Barngarla people moved into the vacated land.

811 Other relevant evidence provides possible further support for this hypothesis, but is ultimately very inconclusive: a Wirangu informant told A.P. Elkin in 1930 that Franklin Harbour was "Naua" country, while in 1899 an informant named "J. Hiern" had told RH Mathews that Franklin Harbour (on which Cowell is located) was "Now" or "Nhow" country. Conversely, also in 1899, two other of Mathews' informants told him Franklin Harbour was "Parn Kalla" or "Barngarla" country, while yet another informant apparently said it was "Koodpudna" country (the Koodpudna, according to Mathews, were a sub-group of the Barngarla) (as noted in the McCaul 2012 Anthropology Report at [112]). Moreover, in the 1930s, another Tindale informant and an informant of Elkin both reported Cowell (the township on Franklin Harbour) as being Barngarla country (or close variations thereof) (as noted in the McCaul 2013 Anthropology Report at [27].

812 Thus, while prima facie this theory of migration sounds plausible, there is insufficient evidence to support it. Professor Sutton was happy to admit that his theory was not something he wanted to put "too much emphasis" upon and that it was really only "speculation", albeit speculation "informed by parallel experiences elsewhere." (T1634, lines 44-46) Dr Haines also characterised the theory as no more than speculation, and Mr McCaul expressed caution about the theory in his 2013 Anthropology Report at [29], saying that his "principal concern would be that the evidence on which it is based is unclear."

813 Having regard to those matters, in my view it should be accepted that, on the balance of probabilities, at the date of sovereignty, people who identified as belonging to the Barngarla grouping were the primary inhabitants of the entire claim area, including the area south of Franklin Harbour, but excepting the area south of Port Lincoln.

Conjoint succession

814 These findings do not dispose of the Barngarla people's claim to native title rights over the southern tip of the Eyre Peninsula. The applicant submitted that if, as acknowledged in

closing submissions, the southern tip of Eyre Peninsula was Nauo country at sovereignty, then I should "find that the Barngarla People obtained primary or core rights in that country through a licit process of succession if they did not already have it."

815 The question of whether it is permissible for a native title claim group to claim land that was not land to which their apical ancestors possessed any rights and interests to under their laws and customs is a question that has arisen in past cases but has not been authoritatively resolved.

816 In *Dale v Moses* [2007] FCAFC 82, the Full Court (Moore, North and Mansfield JJ) said at [120]:

> … The observations of … [Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta* at 443-444 [44]] do not establish a principle of the type apparently relied on by the appellants, namely that where the traditional laws and customs of one society provide for the transmission of rights and interests in land recognised by those laws and customs, then transmission to another society can be effected and the acquisition of the transferred rights in interest [sic] can ultimately be recognised as rights and interests of the transferee society for the purposes of the [NT Act]. The primary judge was probably correct in rejecting this contention. However it is not an issue which it is necessary for us to explore as the legal proposition, if correct, would only be engaged and operate in the appellants favour if certain matters of fact were established. In the present case, the required factual foundation is lacking in several important respects.

817 The required factual foundation was lacking because the trial judge failed to find on the evidence that (a) the appellants were a society for the purpose of the NT Act; (b) the traditional laws and customs in issue included a right of transmission; (c) there had in fact been a transmission: *Dale v Moses* [2007] FCAFC 82 at [121]. As such, the comments were obiter. A similar "succession" argument had been rejected by Nicholson J in *Daniel v Western Australia* [2003] FCA 666 at [383].

818 The issue again arose in *Western Australia v Sebastian* (2008) 173 FCR 1, before a slightly differently comprised Full Court (Branson, North and Mansfield JJ). Its comments on the issue were again ultimately only obiter dicta: [103].

819 In *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1, Bennett J at [578] described the effect of the Full Court's comments in *Sebastian* thus:

> … [the Full Court] inclined to the view that there could be succession between two societies. However, the succession between the two "societies" was in accordance with the common traditional laws and customs of the two clans and the Full Court was 'informed' by the closeness of the laws and customs finding, in effect, that there

was, relevantly, one society.

820 Ultimately, Bennett J concluded in the circumstances of that case at [579] that "I do not need to decide whether there are differences between *Dale v Moses* and *Sebastian*…"

821 In my opinion, there is no inconsistency between the views expressed in *Dale v Moses* and *Sebastian*. A society for the purposes of native title jurisprudence is merely a "body of persons united in and by its observance and acknowledgment of a body of law and customs": *Yorta Yorta* at [52] per Gleeson CJ, Gummow and Hayne JJ. If there are two groups that share a common or closely similar body of law and customs, then they are one "society" for the purposes of native title. It is certainly possible for one group within a single society, in respect of land formerly possessed by another group within that society, to have obtained rights and interests in that land which are rights and interests possessed under traditional laws and customs. There is no reason why a society's traditional laws and customs could not provide for such "transmission" or "succession" between groups in particular circumstances. However, if two groups' traditional laws and customs vary to an extent such that they cannot be considered one "society", then it is difficult to see how the "transmission" of one group's country to another group, or the 'succession' to one group's country by another group, could lead to the "transferee" group's obtaining rights and interests in the relevant land that could be said to be possessed under traditional laws and customs.

822 In this case, there was certainly evidence from the claimants that they regard the relevant land as Barngarla country. The fact that the Nauo Native Title Claim does not claim the relevant land suggests that Nauo people also regard the relevant land as Barngarla country. Those two facts taken together do suggest that there has been a "succession" to the southern Eyre Peninsula by Barngarla people. However, there is no evidence about the Nauo people's laws and customs at the present day or at sovereignty. So it is impossible to say whether the "succession" is, in the word of the applicant, "licit". That is, it is impossible to say whether the rights and interests now understood to be possessed by the Barngarla people are rights and interests possessed under laws and customs that can be said to be "traditional". As such, the applicant's "conjoint succession" argument cannot be sustained. It follows that the applicant has not proven on the balance of probabilities that the claim group hold native title rights and interests in respect of land to the south of the township of Port Lincoln.

823 It should be briefly noted that the applicant's contention that "succession" to another group's country is in accordance with Barngarla traditional law and custom does not contradict the

applicant's contention that Barngarla country is inalienable. The ideas of alienability and "succession" are distinct. The concept of alienability requires an alienor and an alienee. The concept of "succession" requires only a formerly populated country that has now become "vacant", and the subsequent 'moving in' of a neighbouring people.

Waters

824 The Commonwealth submitted that the claimants, if they have native title rights and interests at all, only have such rights in respect of the waters in the "intertidal zone" (the waters between the low water mark and the high water mark) and waters immediately adjacent to the intertidal zone. That submission must be accepted. The only evidence of at-sovereignty activity in respect of waters related to fishing without the use of watercraft (which it does not appear the Barngarla people possessed), by standing in the water or on the shore. The present-day evidence was of a similar nature. As such, there is no evidence to suggest that the claimants have native title rights and interests in respect of the waters beyond those waters adjacent to the intertidal zone.

Connection with particular areas of the claim area

The Spencer Gulf Islands

825 There is no evidence to suggest that the islands in the claim area were ever considered Barngarla "country". Dr Haines proffered the opinion at trial that the claim over the Spencer Gulf islands could be supported by reference to Barngarla dreaming stories that related to the Spencer Gulf. However, it is clear that Barngarla people do not possess rights and interests in land merely because a dreaming story mentions that land. Mr McCaul speculated that some islands may have been visited by Barngarla people by swimming or at low tide (as there is no evidence that the Barngarla ever possessed watercraft of any kind). However, Professor Sutton speculated that, given the lack of Barngarla watercraft, "It seems [the Barngarla] didn't get to those islands or occupy them…" (T1649) Given the lack of evidence of any Barngarla people having occupied the Spencer Gulf islands, I find that the claimants do not have any rights or interests in the Spencer Gulf islands.

Particular mainland areas

826 The State's written submissions made a brief and undeveloped submission regarding particular areas of the mainland part of the claim area, namely: the area "between Whyalla

and Cowell"; the area "between Cowell and Port Lincoln"; the area "between Whyalla and Kimba"; and the area "from Port Lincoln and Wudinna". (SS, [216])

827 The State submitted that "there is a paucity of evidence of resource use and stories (including ceremonies)" in those areas. If the import of that submission is that any determination of native title should "carve-out" those particular parts of the claim area, because of insufficient evidence in relation to certain activities or customs, I do not accept that submission.

828 It was very clear from the lay evidence that contemporary Barngarla people understand that the relevant areas are Barngarla country. It is also clear from Schürmann's records that the relevant areas were considered Barngarla country at sovereignty. More importantly, however, is the fact that in any case the State's submission on this point does not take account of all the evidence.

829 In respect of the area between Cowell and Port Lincoln, there is evidence that Howard Richards, Dawn Taylor and Troy McNamara fish variously at Tumby Bay, Arno Bay, and/or Port Neill. Further, Helen Smith said that the seven sisters went to Arno Bay and Brandon McNamara Snr said in open evidence that a men's dreaming story went through Arno Bay.

830 The area between Whyalla and Cowell is a relatively small area and there are no settlements of any note between the two towns. The only landmark of any note in this area is part of the Middleback Ranges, which were mentioned in male restricted evidence.

831 The Middleback Ranges also fall roughly within the area between Whyalla and Kimba, including that part of the Middleback Ranges that includes Iron Baron. Iron Baron was mentioned extensively in the evidence in relation to various stories. There is also evidence of claimants having lived on and around Middleback station, which also falls between Whyalla and Kimba.

832 Finally, the vaguely-defined "area from Port Lincoln and Wudinna", if taken to mean the land alongside the western border of the claim area from Port Lincoln to Wudinna, was also referred to in the lay evidence – Waddikee Rocks lie roughly between Port Lincoln and Wudinna, and there was extensive evidence about the eagle story relating to those rocks. Koongawa, right next to Waddikee Rocks, was said to be a women's site. Tooligie Hill, located more or less exactly halfway between Port Lincoln and Wudinna, was said by Howard Richards to be connected to a men's story.

833 Consequently, I am satisfied on the material that the applicant on behalf of the Barngarla People has established that they should be recognised as the proper people for the claim area save for the area to the South of Port Lincoln, and the Spencer Gulf Islands, and save for the "sea claim" areas being reduced to the intertidal waters along the eastern shoreline of Spencer Gulf southwards to Port Lincoln and along the western shoreline of Spencer Gulf from Port Augusta to the point where the claim area as depicted and described moves approximately westwards from the eastern side of Spencer Gulf, and waters immediately adjacent to the intertidal zone.

Character of rights possessed under traditional laws and customs

834 The specific native title rights and interests that the applicant claims have been set out at the beginning of this judgment. Subject to the below discussion, I am satisfied that each of those claimed native title rights prima facie exists, but reserving the question of whether such native title rights have been subsequently extinguished (as that question has been separated from the question of the prima facie existence of native title, as explained at the beginning of these reasons).

835 However, for present purposes, there are three problematic rights:

- the right to trade in resources of the area;
- the right to receive a portion of any resources taken by others from the area; and
- the right to maintain, protect and prevent the misuse of cultural knowledge associated with the area.

836 In respect of the first two rights, there is no evidence to support the alleged existence of those rights either at sovereignty or at the present day. As such, I do not find that the members of the claim group possess such rights in respect of the claim area.

837 In respect of the third right, it was held in *Western Australia v Ward* (2002) 191 ALR 1 at [57]-[60] that a "right to maintain, protect and prevent the misuse of cultural knowledge" was not a right "in relation to land or waters", as required by s 223 of the NT Act. I do not think the addition to that formulation of the words "associated with the area" alters the substance of the alleged right. Thus, I am bound by *Ward* to find that this right cannot be recognised under the NT Act.

838 Finally, the Commonwealth submitted that "to the extent that any rights and interests possessed by the Barngarla people over the land and waters in the sea claim area may have been exclusive rights at sovereignty (such as a right to control access), those rights are not recognised by the common law of Australia." That submission relies on the decision in *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [99]-[100] and *Western Australia v Ward* (2002) 191 ALR 1 at [388]. Those passages make clear that this issue is one relating to extinguishment of native title rights and interests. Extinguishment of native title rights that are found to exist *prima facie* is a question to be determined in a subsequent hearing. The Commonwealth's submission is therefore outside the scope of the question to be addressed in these reasons.

CONCLUSION

839 In view of my findings, it will be necessary:

(1) for the claim area which is to be recognised as the traditional country of the Barngarla people to be described consistent with my findings, and of course excluding also the Port Augusta Township area; and

(2) for the parties to consider how issues of extinguishment are to be addressed.

840 Accordingly, I will now fix, in consultation with the parties, a date for a directions hearing when those matters (and any other matters which require attention) can be addressed.

841 I do not at present make any orders based upon my findings. That is a matter which the parties may wish to take up. My starting sense is that, apart from putting in formal terms a document which reflects the above findings including the extent to which native title rights and interests as claimed are to be recognised, it is preferable to proceed as soon as appropriate to address the foreshadowed issues of extinguishment.

842 That document will have to describe the Barngarla people. I have not addressed that specifically in these reasons, save for describing early in the reasons the persons who gave evidence and their ancestors. That is simply because I did not discern that, if there is to be (subject to extinguishment) a recognition of the Barngarla people as holding the specified rights and interests in the claim area or part of it (as there is), there is any real issue about the claim group as described in the application itself. If there is such an issue, it can be raised at the next directions hearing.

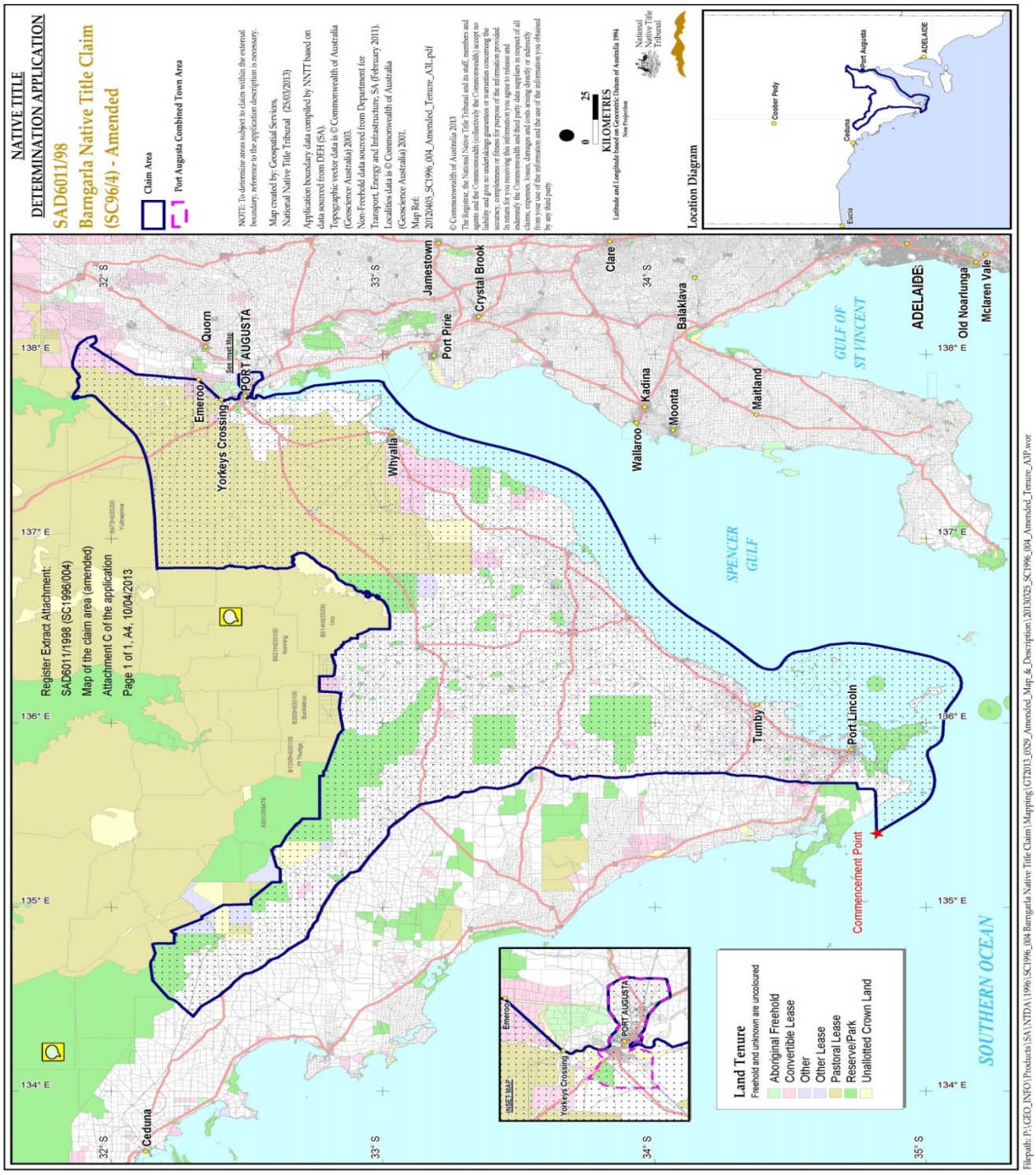
843 Finally, I record my appreciation for the considerable assistance of counsel and solicitors for the parties, both in the course of the evidence and oral submissions and in the written submissions. In a matter as factually complex as this, their assistance provided professionally and having regard to the best interests of their respective clients, has been invaluable.

I certify that the preceding eight hundred and forty-three (843) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate: 

Dated: 22 January 2015

APPENDIX A – MAP OF CLAIM AREA



APPENDIX B – Schedule of Parties

SAD 6011/1998

Federal Court of Australia

District Registry: South Australia

Division: General

NATIVE TITLE ACTION FILED BY BARNGARLA NATIVE TITLE CLAIM ON 30-SEP-1998

Applicant:	BARRY CROFT
Applicant:	LORRAINE DARE (DECEASED)
Applicant:	HOWARD RICHARDS
Applicant:	ELLIOTT MCNAMARA
Respondent:	STATE OF SOUTH AUSTRALIA
Respondent:	DISTRICT COUNCIL OF TUMBY BAY
Respondent:	DISTRICT COUNCIL OF LOWER EYRE PENINSULA
Respondent:	DISTRICT COUNCIL OF KIMBA
Respondent:	DISTRICT COUNCIL OF FRANKLIN HARBOUR
Respondent:	DISTRICT COUNCIL OF ELLISTON
Respondent:	DISTRICT COUNCIL OF CLEVE
Respondent:	CORPORATION OF THE CITY OF PORT AUGUSTA
Respondent:	CITY OF PORT LINCOLN
Respondent:	THE FLINDERS RANGES COUNCIL
Respondent:	DISTRICT COUNCIL OF MOUNT REMARKABLE
Respondent:	DISTRICT COUNCIL OF ORROROO/CARRIETON
Respondent:	DISTRICT COUNCIL OF STREAKY BAY
Respondent:	CORPORATION OF THE CITY OF WHYALLA
Respondent:	ADNYAMATHANHA PEOPLE
Respondent:	ARABUNNA PEOPLES NATIVE TITLE CLAIM GROUP
Respondent:	GERALDINE ANDERSON
Respondent:	RICHARD CHARLES REID

Respondent:	NUKUNU PEOPLES
Respondent:	ADNYAMATHANHA LAND COUNCIL INC
Respondent:	BUCKLEBOO NOMINEES PTY LTD
Respondent:	WILLIAM LEO BORROWS
Respondent:	ELSPETH MARY DOMAN
Respondent:	FREDERICK SPENCER HOWE DOMAN
Respondent:	THOMAS ALASTAIR DOMAN
Respondent:	STEPHEN HARRADINE
Respondent:	FRANCIS CAPOWIE PTY LTD
Respondent:	HELEN HARRADINE
Respondent:	JILLIAN MAXINE MICHAEL
Respondent:	KOKATHA LTD
Respondent:	BARRY HUTCHENS
Respondent:	DAVID JAMES MICHAEL
Respondent:	NONNING PASTORAL COMPANY PTY LTD
Respondent:	DARYL J STORR
Respondent:	CYNTHIA SAVAGE
Respondent:	ROBERT SAVAGE
Respondent:	ADELAIDE RESOURCES LTD
Respondent:	YAPOONA SPRINGS NOMINEES PTY LTD
Respondent:	BROKEN HILL PROPRIETARY COMPANY LIMITED
Respondent:	EPIC ENERGY SOUTH AUSTRALIA PTY LTD
Respondent:	GRAVITY CAPITAL LIMITED
Respondent:	THOMAS CHARLES HURLEY
Respondent:	JEFFREY FREEMAN
Respondent:	ONESTEEL MANUFACTURING PTY LTD
Respondent:	MALATA NOMINEES PTY LTD
Respondent:	DARYL KEITH AITCHISON
Respondent:	DAVID ALLPORT
Respondent:	ALLIANCE PETROLEUM AUSTRALIA PTY LTD
Respondent:	PETER G ANDERSON
Respondent:	BRIDGE OIL DEVELOPMENTS PTY LTD
Respondent:	REEF OIL PTY LTD

Respondent:	SANTOS (BOL) PTY LTD
Respondent:	SANTOS LTD
Respondent:	DELHI PETROLEUM PTY LTD
Respondent:	SANTOS PETROLEUM PTY LTD
Respondent:	ORIGIN ENERGY RESOURCES LIMITED
Respondent:	VAMGAS PTY LTD
Respondent:	BASIN OIL PTY LTD
Respondent:	JENNIFER BARWICK
Respondent:	ROBERT BAKER
Respondent:	PETER BARWICK
Respondent:	KENNETH ANDREWS
Respondent:	IAN HARRY BACKLER
Respondent:	DOROTHY BARWICK
Respondent:	STEPHANOS ATHANASOS
Respondent:	DAVID GORDON AYRES
Respondent:	DAVID BACKER
Respondent:	R W BAILEY
Respondent:	RICHARD J BAKER
Respondent:	BARKER FISHERIES PTY LTD
Respondent:	ADAM BARNES
Respondent:	BEN L BARNES
Respondent:	JARRAD BARNES
Respondent:	JEFFREY BARNES
Respondent:	DONALD ROY BARRAND
Respondent:	PETER BARRAND
Respondent:	ROBERT WILLIAM BARTSCH
Respondent:	STEWART JOHN BUTSON
Respondent:	RUSSELL EDWIN BOORD
Respondent:	ROBERT JOHN BUTSON
Respondent:	BASCOZ PTY LTD
Respondent:	MERVYN JOHN CAMP
Respondent:	CARINA ASSOCIATES PTY LTD
Respondent:	JOHN BOZANIC
Respondent:	LINDSAY DENE BOTT

Respondent:	RONALD A BATES
Respondent:	DAVID BECK
Respondent:	RANDALL J BENDER
Respondent:	DONALD M BLACK
Respondent:	ANTON BLASLOV
Respondent:	BOSTON BAY ROCK LOBSTERS PTY LTD
Respondent:	BARRY J BOWYER
Respondent:	FRANE BRALIC
Respondent:	IVAN BRALIC
Respondent:	ROBERT BRICE
Respondent:	DAVID BRYANT
Respondent:	LEWIS BRYANT
Respondent:	BARTHOLOMEW BRETT BUTSON
Respondent:	PAUL CUBELIC
Respondent:	CONSTRUCTION DIVERS PTY LTD
Respondent:	PETER S CLARKSON
Respondent:	CG SIMMS NOMINEES PTY LTD
Respondent:	GEOFFREY RUSSELL CUMMINGS
Respondent:	PAUL ALEXANDER CLAUGHTON
Respondent:	JOHN COLLINSON
Respondent:	ANDREW MICHAEL DYER
Respondent:	G V DIXON
Respondent:	COLIN DIGHTON
Respondent:	IAN DEGILIO
Respondent:	NORA DAVIES
Respondent:	PM DANIS
Respondent:	TONY D CUSTANCE
Respondent:	KATHRYN LOUISE CUNNINGHAM
Respondent:	A R DANIS
Respondent:	RUDOLF WILHELMUS DUURLAND
Respondent:	JEFFREY JOHN DALE
Respondent:	MALCOLM ETTRIDGE
Respondent:	DON EDMONDS
Respondent:	EYREWOOLF ENTERPRISES PTY LTD

Respondent:	FARSIDE FISHERIES
Respondent:	CHRISTOPHER FEWSTER
Respondent:	A FIGL
Respondent:	C E FIGL
Respondent:	PA FIGL
Respondent:	CRAIG FLETCHER
Respondent:	GRAHAM FORD
Respondent:	FROMAGER PTY LTD
Respondent:	DAVID EDWARDS
Respondent:	IAN FULLER
Respondent:	DAVID JOHN FOSTER
Respondent:	WAYNE JEFFREY GALPIN
Respondent:	CRAIG NEIL EDWARDS
Respondent:	TREVOR NORMAN EDWARDS
Respondent:	DAVID ENGE
Respondent:	DEBRA LEA FERGUSON
Respondent:	SHANE NEIL EDWARDS
Respondent:	GARRY NOEL EDWARDS
Respondent:	BARRY J EVANS
Respondent:	ANDREW GEERING
Respondent:	SHANNON MAUREEN GILL
Respondent:	DAVID FARADAY GILL
Respondent:	JUNE ROSEMARY GILL
Respondent:	JOSIP GOBIN
Respondent:	JOHN C HAAGMANS
Respondent:	MICHAEL JAMES GUBBIN
Respondent:	TREVOR GILMORE
Respondent:	AJKA GOBIN
Respondent:	LAURIE GOBIN
Respondent:	GRAND ABALONE NOMINEES PTY LTD
Respondent:	BRYAN ALLEN GREEN
Respondent:	H M POPE PTY LTD
Respondent:	ALAN R HALDANE
Respondent:	TREVLYN JOHN HAMMAT

Respondent:	LOVRE A GOBIN
Respondent:	TRENT GREGORY
Respondent:	DAVID WILLIAM HALL
Respondent:	TIMOTHY R HOLDER
Respondent:	N HOOD
Respondent:	ANDREW N HOGG
Respondent:	STEPHEN RAYMOND HEYES
Respondent:	GRAHAM FRANK HARROWFIELD
Respondent:	HERBERT NOEL HENDRY
Respondent:	STEPHEN B HINGE
Respondent:	BRIAN D JONES
Respondent:	VALDIS IEVINS
Respondent:	HUBERT BRIAN HURRELL
Respondent:	BARRY J HURRELL
Respondent:	RICHARD W HOWARD
Respondent:	PETER HICKMAN
Respondent:	WILLIAM JOHN HENDRY
Respondent:	PETER WAYNE HUTCHINSON
Respondent:	GJ HOOD
Respondent:	DENNIS HOLDER
Respondent:	SYLVIA HOLDER
Respondent:	ANN LUKIN
Respondent:	SIMON FREDERIC MANNERS
Respondent:	TONY KINGDON
Respondent:	KYM BRYAN MALLYON
Respondent:	MICHAEL ARTHUR LEECH
Respondent:	DAVID HALL LANGDON
Respondent:	DAVID JOHN KENNEDY
Respondent:	DARO KOLEGA
Respondent:	ALDO KOLEGA
Respondent:	KINNOCK PTY LTD
Respondent:	KINKAWOOKA PTY LTD
Respondent:	PAUL D MANNERS
Respondent:	ANTHONY PAUL MANNERS

Respondent:	ANTE LUKIN
Respondent:	CYNTHIA LEECH
Respondent:	LA CLOTURE FISHERIES PTY LTD
Respondent:	DEAN LUKIN
Respondent:	CRAIG LAWRIE
Respondent:	DAVID LAWRIE
Respondent:	PAUL MANTHORPE
Respondent:	PETER JOSEPH MARTIN
Respondent:	JOHN EDWARD MCGOVERN
Respondent:	TERRY J MORAN
Respondent:	STEPHEN MORIARTY
Respondent:	DONALD MARK NATTRASS
Respondent:	HAYDN JOHN O'BRIEN
Respondent:	TERRY K MANNERS
Respondent:	ARTHUR MARKELLOS
Respondent:	VICTOR J MARSHALL
Respondent:	RENO MARTINOVIC
Respondent:	JOHN THORNTON MCCARTHY
Respondent:	CRAIG DAVID MCCATHIE
Respondent:	EUGENE MONTGOMERY
Respondent:	K R MULLAN
Respondent:	DAVID B MUNDY
Respondent:	GUY MANTHORPE
Respondent:	T MCNAB
Respondent:	TA MCNAB
Respondent:	MD & RA LOWE PTY LTD
Respondent:	DAVID KEITH MULES
Respondent:	NAVAJO PTY LTD
Respondent:	OCEANIC OYSTERS
Respondent:	GEOFFREY OCTOMAN
Respondent:	MERVYN ALLAN PITTAWAY
Respondent:	ALLEN FRANCIS JAMES PITTAWAY
Respondent:	PETER PARISSOS
Respondent:	RAYMOND OTTEY

Respondent:	ALAN PAYNE
Respondent:	KIM A REDMAN
Respondent:	JENNIFER M PURTELL
Respondent:	BARRY POWER
Respondent:	LESLIE A POLKINGHORNE
Respondent:	MAX POLACCO
Respondent:	ROBERT TYRER PENNINGTON
Respondent:	ADAM DAVID OLDS
Respondent:	BRIAN POLLARD
Respondent:	TERRY PHILIP REHN
Respondent:	R MARTINOVIC (MANAGEMENT) PTY LTD
Respondent:	BOB PUGLISI
Respondent:	JOHN PASCULLI
Respondent:	ARMAND NEIL PALMER
Respondent:	KONSTANTINE PALEOLOGOUDIAS (CON PAUL)
Respondent:	COLLEEN OCTOMAN
Respondent:	PHILIP ROBINSON
Respondent:	BENEVENUTO R RIGONI
Respondent:	CHRISTOPHER JOHN ROYANS
Respondent:	RONALD PETER ROWE
Respondent:	ROGER SAUNDERS
Respondent:	MARK JAMES ROTHALL
Respondent:	WILLIAM PERCY RITTER
Respondent:	MARK ANTHONY RETSAS
Respondent:	C J ROGERS
Respondent:	S & Z LUKIN NOMINEES PTY LTD
Respondent:	JORDAN SARUNIC
Respondent:	JEFFREY F SCHMUCKER
Respondent:	ANDREW NAIRNE SCHULTZ
Respondent:	T SCHULTZ
Respondent:	D SCHULTZ
Respondent:	ANTHONY SCHUTZ
Respondent:	MARTIN RESNAIS
Respondent:	RIBARI PTY LTD

Respondent:	MILORAD RICOU
Respondent:	MATEO RICOV
Respondent:	JOSIP SANTIC
Respondent:	RODNEY SMITH
Respondent:	DARYL MARK SPENCER
Respondent:	RENE JOHN SPRUYT
Respondent:	ERIC WILLIAM STACEY
Respondent:	DAVID SHERRY
Respondent:	EDWARD THOMAS SMITH
Respondent:	COLIN ROY SIMMS
Respondent:	SOUTH AUSTRALIAN OYSTER HATCHERY PTY LTD
Respondent:	SPENCER GULF AQUACULTURE PTY LTD
Respondent:	GARY WILLIAM STEELE
Respondent:	DAVID SHERIDAN
Respondent:	SEAFOOD COUNCIL SA LTD
Respondent:	JOHN SPADAVECHIA
Respondent:	HELEN IVY SMITH
Respondent:	MICHAEL SLATTERY
Respondent:	DESMOND JOHN SLATTERY
Respondent:	TREVOR SMITH
Respondent:	SPENCER GULF PROPERTY PTY LTD
Respondent:	LAWRENCE JOHN VAHLBERG
Respondent:	RITA VALCIC
Respondent:	JEFFREY ROBERT SWINCER
Respondent:	TARAKAN PTY LTD
Respondent:	DARREN K TRESSIDER
Respondent:	MEGAN B TRESSIDER
Respondent:	TUNA BOAT OWNERS ASSOCIATION OF AUSTRALIA
Respondent:	BRIAN TURVEY
Respondent:	DEIDRE TURVEY
Respondent:	ERROL EDWARD TYRRELL
Respondent:	GEOFF TURNER

Respondent:	ANNE ELIZABETH TAPLEY
Respondent:	GRAHAM MARK TAPLEY
Respondent:	JOHN THEAKSTONE
Respondent:	LANCE LEON TYLEY
Respondent:	BRENTON SYMONS
Respondent:	T GARNAUT NOMINEES PTY LTD
Respondent:	DOMONIC TATTOLI
Respondent:	WAYNE JOHN TAYLOR
Respondent:	ROBERT THEAKSTONE
Respondent:	MICHAEL B TILLEY
Respondent:	BILL TSOUPAS
Respondent:	PETER DEAN VICKERS
Respondent:	B WALLER
Respondent:	WHITE POINTER FISHERIES
Respondent:	LEON CHARLES WRIGHT
Respondent:	LILIANA VITLOV
Respondent:	MICHAEL H WILDE
Respondent:	ALBERT THOMAS WHITTLE
Respondent:	GREGORY WARD
Respondent:	GRAHAM LESLIE WALDEN
Respondent:	JEFFERY PAUL WAIT
Respondent:	SOUTH AUSTRALIAN RECREATIONAL FISHING ADVISORY COUNCIL INC
Respondent:	MICHAEL CHARLES WHILLAS
Respondent:	WEST COAST ENTERPRISES PTY LTD
Respondent:	WELLMET PTY LTD
Respondent:	SCOTT WEAVER
Respondent:	W B MATTNER NOMINEES P/L
Respondent:	PETER ANTHONY WILLIAMSON
Respondent:	A H WOOD
Respondent:	PINUS MOTORS PTY LTD
Respondent:	JOPLIN PTY LTD
Respondent:	ST JOHN AMBULANCE AUSTRALIA SA INC

Respondent:	SOUTH AUSTRALIAN APIARISTS ASSOCIATION INC
Respondent:	ELECTRANET PTY LTD
Respondent:	GRISELDA SPRIGG (DECEASED)
Respondent:	MARGARET SPRIGG
Respondent:	EYRE REGIONAL DEVELOPMENT BOARD
Respondent:	SA AMBULANCE SERVICE
Respondent:	DOUGLAS P SPRIGG
Respondent:	BLINMAN PROGRESS ASSOC INC
Respondent:	TELSTRA CORPORATION LIMITED
Respondent:	DEAN JAMES BARNES
Respondent:	DEAN C WOODWARD
Respondent:	BHP BILLITON OLYMPIC DAM CORPORATION PTY LTD
Respondent:	SOUTH AUSTRALIAN NATIVE TITLE SERVICES LTD
Respondent:	WILDCATCH FISHERIES SA INC
Respondent:	WUDINNA DISTRICT COUNCIL
Respondent:	SALISBURY EXPLORATION PTY LTD ACN 125 935 613
Respondent:	AUSTRALIAN MARITIME SAFETY AUTHORITY
Respondent:	TASMAN RESOURCES LTD
Respondent:	COMMONWEALTH OF AUSTRALIA
Respondent:	UNALLA PASTORAL CO PTY LTD
Respondent:	PANDURRA PTY LTD
Respondent:	SAWERS SUPER PTY LTD ACN 125 550 923
Respondent:	RICHARD GILES MOULD
Respondent:	JULIE-ANN MOULD
Respondent:	WARTAKA PASTORAL CO PTY LTD ACN 052 501 621
Respondent:	SANTOS (NARNL COOPER) PTY LTD
Respondent:	SA POWER NETWORKS (FORMERLY KNOW AS ETSA UTILITIES)