FEDERAL COURT OF AUSTRALIA

Wagonga Local Aboriginal Land Council v Attorney General of New South Wales [2020] FCA 1113

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judge: | **JAGOT J** |
|  |  |
| Date of judgment: | 5 August 2020 |
|  |  |
| Catchwords: | **NATIVE TITLE** – non-claimant application seeking determination that native title does not exist in respect of certain land in New South Wales – application opposed by registered native title claim group applicant – whether applicant able to prove on balance of probabilities that native title does not exist in the land in question – where land in question is contained within larger native title claim – application granted  |
|  |  |
| Legislation: | *Aboriginal Land Rights Act 1983* (NSW) ss 36(9), 40(4), 42(1), 42G, 42G(2), 42G(3)(c)*Evidence Act 1995* (Cth) ss 72, 91, 140, 140(2)*Local Government Act 1919* (NSW) *Local Government Act 1993* (NSW)*Native Title Act 1993* (Cth) ss 23B(7), 23C(2)(a), 23D, 23E, 24OA, 61(1), 66, 67(1), 223, 223(1), 223(1)(a), 225, 226, 251D, 253*Native Title (New South Wales) Act 1994* (NSW) ss 20(2), 23B(7)  |
|  |  |
| Cases cited: | *Akiba v Queensland* [2010] FCA 643; (2010) 204 FCR 1 *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298*Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96*Mace v State of Queensland* [2019] FCAFC 233; (2019) 375 ALR 717*Mason v Tritton* (1994) 34 NSWLR 572*Worimi v Worimi Local Aboriginal Land Council* [2010] FCAFC 3; (2010) 181 FCR 320  |
|  |  |
| Date of hearing: | 16-17 March, 24 March-3 April and 15-16 April 2020 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Native Title |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 433 |
|  |  |
| Counsel for the Applicant: | A Butt |
|  |  |
| Solicitor for the Applicant: | Maddocks  |
|  |  |
| Counsel for the First Respondent: | E Lee |
|  |  |
| Solicitor for the First Respondent: | NSW Crown Solicitor’s Office  |
|  |  |
| Counsel for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Respondents: | T Jowett with C Gregory |
|  |  |
| Solicitor for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Respondents: | NTSCORP Limited |

ORDERS

|  |  |
| --- | --- |
|  | NSD 328 of 2017 |
|   |
| BETWEEN: | WAGONGA LOCAL ABORIGINAL LAND COUNCILApplicant |
| AND: | ATTORNEY GENERAL OF NEW SOUTH WALESFirst RespondentNTSCORP LIMITEDSecond RespondentAILEEN BLACKBURN (and others named in the Schedule)Third Respondent |

|  |  |
| --- | --- |
| JUDGE: | JAGOT J |
| DATE OF ORDER: | 5 AUGUST 2020 |

THE COURT DETERMINES THAT:

1. There is no native title in relation to the land known as 28 Costin Street, Narooma, being lot 923 in deposited plan 1094431.

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

REASONS FOR JUDGMENT

JAGOT J:

# THE APPLICATION

1 These reasons for judgment concern an application by the applicant (**WLALC**) under s 61(1) of the *Native Title Act 1993* (Cth) (the **NTA**) for a determination that there is no native title in the land known as the Isabel Street land at 28 Costin Street, Narooma, being lot 923 in deposited plan 1094431 (the **Isabel Street land**).

2 The Isabel Street land is owned in fee simple by WLALC. The Isabel Street land was transferred to WLALC as claimable Crown land under the *Aboriginal Land Rights Act 1983* (NSW) (the **ALRA**). By s 36(9) of the ALRA the transfer was subject to any native title rights and interests existing in relation to the Isabel Street land. Section 42(1) of the ALRA provides that:

An Aboriginal Land Council must not deal with land vested in it subject to native title rights and interests under section 36(9) or (9A) unless the land is the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act).

3 The Isabel Street land is also subject to a claimant application for a determination of native title claimed by the South Coast People. The South Coast People’s claim covers some 1.68 million hectares of land over the south coast of New South Wales and was registered on 3 August 2017. NTSCORP, the representative body for New South Wales under the NTA, and the applicant for the South Coast People’s claim were each joined as respondents to WLALC’s non-claimant application in December 2017 and April 2019 respectively. NTSCORP and the South Coast People respondents opposed WLALC’s application. The first respondent, the Attorney General of New South Wales (the **Attorney General**), neither consented to nor opposed WLALC’s application and confined his involvement to legal submissions.

4 Section 223(1) of the NTA provides that:

(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

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

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

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

5 A determination of native title, by s 225 of the NTA, is a determination whether or not native title exists in relation to a particular area and, if it does exist is a determination of:

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

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

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

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

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

6 Section 67(1) of the NTA provides as follows:

If 2 or more proceedings before the Federal Court relate to native title determination applications that cover (in whole or in part) the same area, the Court must make such order as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding.

7 On 6 May 2019 Perry J made the following order to enable WLALC’s non-claimant application to be heard and determined separately from the South Coast People’s claimant application by consent:

The parties are to liaise with the Registrar to confirm dates for the matter to be listed for a 4 day hearing.

8 On 16 April 2020, at the request of the Attorney General and for the avoidance of doubt, I also made orders enabling WLALC’s non-claimant application to be heard and determined separately from and in advance of the South Coast People’s claimant application.

9 For the reasons given below I am satisfied that WLALC has proved on the balance of probabilities that native title does not exist in relation to the Isabel Street land.

# APPROACH TO THE APPLICATION

10 The Full Court of the Federal Court recently considered non-claimant applications under the NTA in *Mace v State of Queensland* [2019] FCAFC 233; (2019) 375 ALR 717 (***Mace***). The following propositions are established in *Mace*, including principles established by an earlier decision of the Full Court in *Worimi v Worimi Local Aboriginal Land Council* [2010] FCAFC 3; (2010) 181 FCR 320 (***Worimi***):

(1) The special functions vested in an Aboriginal Land Council (**ALC**), such as WLALC, by the ALRA are not material to the question whether such a body, as a non-claimant applicant seeking a determination that there is no native title in relation to land, has discharged its onus of proof. As a non-claimant applicant, an ALC is in the same position as any other non-claimant applicant under the NTA: [12].

(2) The reason for a non-claimant application does not govern the Court’s approach to the exercise of the power: [42].

(3) Whether there is a contradictor to a non-claimant application or not, the legal question remains the same: has the applicant discharged its burden of proof that no native title exists in the area the subject of the non-claimant application: [44].

(4) The overriding proposition is that each case must be assessed on its own particular facts: [47].

(5) Relevant considerations will include the nature of the land and the tenure involved, the presence or absence of any present or previous native title claims and the nature and content of those claims, and any particular evidence adduced by the parties: [48].

(6) The Court must act on evidence, direct or indirect, which can be weighed against the case brought by the non-claimant applicant: [52].

(7) All issues are to be assessed on the usual standard of proof in civil litigation – proof on the balance of probabilities. A non-claimant applicant will either meet this standard or will not: [54].

(8) A non-claimant application does not involve any general inquiry into what native title rights and interests may have existed at sovereignty or any general inquiry into how those rights or interests may or may not have continued: [55].

(9) The provisions of the NTA are intended to facilitate all persons with a proper interest in an area of land taking steps to ensure that their interest is taken into account when the Court is making a native title determination with respect to that land. However, it is not necessary to employ evidentiary or adversarial presumptions to the task which may have been developed by the common law in different contexts from native title determinations: [56]. A better approach is to focus on what the evidence before the Court does establish, whether before or against the determination sought by the non-claimant applicant: [56]. Similarly common law maxims developed in different contexts are also of limited utility to the determination of a non-claimant application: [57]-[60].

(10) In a non-claimant application the applicant seeks a negative determination *in rem*. In this context recourse to common law maxims developed in different contexts may not be useful: [61].

(11) In a non-claimant application it is inappropriate to impose a specific evidential burden on a respondent such as the respondent need only make out a “prima facie” position. This would involve a gloss on the application of the usual burden and standard of proof which applies equally to claimant and non-claimant applications: [63].

(12) The question whether native title does not exist (in a non-claimant application) or does exist (in a claimant application) is to be decided according to the balance of probabilities by reference to the circumstances of each case and on the evidence adduced without recourse to maxims or presumptions originating in different adversarial contexts: [64]. In this regard it may be noted that in *Worimi* at [74] the point was made that a respondent to a non-claimant application is not subject to any onus of proof. The onus remains at all times on the applicant for the non-claimant application, in this case, WLALC.

(13) In a non-claimant application account needs to be taken of the gravity of a negative determination and its permanency in terms of its effect on native title rights and interests which are otherwise sought to be protected by the NTA: [66].

(14) No hard and fast rules can be laid down about what evidence might be required or might suffice for a non-claimant applicant to meet the required standard of proof: [68]. Given what is at stake and the fact that any determination affects property rights as against the whole world no prescriptive approaches or glosses on the statute should be imposed. The Court has a wide discretion whether or not to make a negative determination and the potential combination of considerations which may arise in any particular application cannot be predicted or turned into any kind of checklist: [72].

(15) If the burden of proof on a non-claimant application has been discharged it may be a rare case in which the discretion is exercised not to make a negative determination but in principle the discretion exists and the Court should not foreclose consideration of the question whether it is appropriate to make the order in all of the circumstances of the case: [73].

(16) The Court’s task is not to be more or less “stringent” depending on the kind of case before it but is to decide if the non-claimant applicant has discharged its burden of proof. In doing so the subject-matter of the non-claimant application and the consequences of a negative determination inform the requisite level of persuasion for a negative determination: [82].

(17) The principal evidence likely to impede the grant of a negative determination is evidence of an assertion of native title in the land the subject of the non-claimant application which is objectively arguable, not evidence of the potential for the assertion of native title. A representative body is best placed to assist Aboriginal and Torres Strait Islander peoples to provide such evidence. The quality of such evidence, rather than its extent, will be determinative: [97].

11 The non-claimant application in the present case is to be decided consistently with these propositions. Most importantly, the case is to be decided on the whole of the evidence which has been adduced. The question is whether, having regard to all of the evidence, WLALC has proved on the balance of probabilities that there is no native title in the land. In so deciding ss 72 and 140 of the *Evidence Act 1995* (Cth) (the **Evidence Act**) are also relevant. Those provisions are as follows:

**72**

The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

**140**

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

(a) the nature of the cause of action or defence; and

(b) the nature of the subject-matter of the proceeding; and

(c) the gravity of the matters alleged.

# THE ISABEL STREET LAND

12 I had the benefit of a view of the Isabel Street land and its surrounds. The Isabel Street land is some 17 hectares located within the urban area of Narooma. It is surrounded by industrial and residential development, with Narooma Golf Course abutting its eastern boundary. Before the Isabel Street land was transferred to WLALC in 2006 it was Crown land. The Isabel Street land is vacant and presents generally as a large island of bushland in an otherwise urban environment. The Isabel Street land contains some sewage and drainage infrastructure in the form of manholes and underground pipes. There has been some clearing of the vegetation to accommodate unmade rough tracks around the perimeter of and through the Isabel Street land. The Isabel Street land is steep in parts and contains gullies. I infer that during heavy rain water would run-off from the surrounding lands to the gully areas on the Isabel Street land. We observed an area of standing water on the Isabel Street land at a low point which appeared to be a ponding of run-off water. Long reeds or grasses were present on the periphery of this ponded area. There was some rubbish on the Isabel Street land such as an abandoned shopping trolley and other small areas of what appeared to be abandoned materials.

# THE APPLICATION

13 The non-claimant application was filed in March 2017. The application was notified in accordance with s 66 of the NTA including a period of public notification from 3 May to 2 August 2017. No person sought to be joined in the notification period. The South Coast People’s claimant application was filed three days after the notification period ended. Subsequently, as noted, NTSCORP and then the members of the applicant for the South Coast People’s claim were joined as respondents to the non-claimant application.

# THE APPLICANT’S EVIDENCE

## Aboriginal witnesses

14 WLALC called evidence from a number of Aboriginal people.

### Vivienne Mason

15 Vivienne Mason is the Chairperson of WLALC and a board member of the Gulaga and Biamanga joint boards of management with the NSW National Parks and Wildlife Service. She is a member of an advisory committee providing an Aboriginal perspective on the use and management of Batemans Marine Park and represents WLALC on the Eurobodalla Advisory Committee. She is registered as a traditional owner under the ALRA and is a member of the South Coast People’s claim. She had lived in Narooma for 38 years as at 2016 and continues to live there.

16 In her affidavit, Ms Mason stated that she had asked a number of people she considered Aboriginal elders in the community (Kevin Mason, Vickie Trindall, Bruce Ella, Ronald J Mason, Deanna Davison, Lynette Goodwin, and Lorraine Naylor) whether they were aware of Aboriginal people using the Isabel Street land for Aboriginal cultural purposes and other activities. They all answered “No”, with two (Kevin and Ronald Mason) recalling the use of the Isabel Street land as a tip.

17 Ms Mason said that to the best of her knowledge and belief the Isabel Street land had not been used as a camping place for the Aboriginal community and was not regarded by Aboriginal people in the area as significant. On 13 September 2014, WLALC resolved to sell the Isabel Street land having considered its cultural and heritage significance to Aboriginal persons. Attendees at this meeting of WLALC were Ms Mason, Bruce Ella, Heater May, Mary Moore, Victor Moore, Ronald G Mason, Vicki Trindall, Natalie Bateman, Keene Ballangarry, Ian Hoskins, Sharon Mason, Paul Trindall, Tammy Newton and Kevin Mason (Snr), all of whom I infer are Aboriginal people who are members of the South Coast People’s claim who are familiar with the Narooma area given their membership of WLALC. On 22 September 2016, WLALC resolved that:

1 within the knowledge of the members of WLALC, no traditional customs or laws are observed on the Land; and

2 the Land has no cultural or heritage significance to the members of WLALC.

18 Members of WLALC present for this resolution were Vivienne Mason, Bruce Ella, Ron J Mason, Mathew Brown, Kevin Mason (Snr), Jason Davison, Sharon Mason, Mary Moore, Victor Moore, Vicki Trindall and Victoria Moore.

19 Ms Mason attended a meeting of the Gulaga and Biamanga joint boards of management on 15 November 2016. She considered the following people at that meeting to be traditional owners who can speak of the history of the area (that is, Narooma) – Iris White, Maureen Davis, Michael Darcy, Bronwyn Smith, Cheryl Davison, Cathy Thomas, Ruth Hampton, Kathy Jones and Betty Solomon. Iris White, the Chairperson, asked the meeting if anyone had any knowledge of the Isabel Street land. Discussion took place and no one at the meeting stated awareness of any use of the Isabel Street land for cultural purposes by local Aboriginal people or stated awareness of any cultural or spiritual importance of the Isabel Street land. The minutes of the meeting of the Gulaga and Biamanga joint boards of management record:

Wagonga LALC has had a request from its lawyer re the property known as Isabel Street (but is actually in the Narooma industrial area) to ascertain whether local Aboriginal people have any knowledge or memories of cultural activities taking place on the property. Vivienne has been researching this for a considerable time by talking to local Elders and is now putting this question to Aboriginal owner members of the Biamanga and Gulaga National Parks Boards of Management.

This research is in relation to identifying any Native Title determinations that might impact of the development of the property, which is now a mandatory process for LALCs (it is very costly for LALCs to receive clearance from NSWALC.

The Chairperson asked members at the meeting if they had any knowledge relating to the site, but they could only remember the property/area as the ‘local tip” and could not recall any use for cultural purposes by local Aboriginal people and do not know of any cultural or spiritual importance of the land.

Members agreed that the attendance list (as above) and this section of notes can be given to Wagonga LALC.

20 Ms Mason was 71 years old in 2018. She was born in Sydney and grew up in La Perouse. She heard stories from the old people about Wallaga Lake, Tilba, Batemans Bay and the coastal towns in the Narooma region. All her old uncles and aunts passed on these stories. When she was four her family came to Bodalla to pick beans and had continued to come back to the Narooma area ever since before moving there permanently with her family in 1979. According to Ms Mason she knows this country very well having lived there for 40 years and been associated with all the elders and intimately connected with the land and waters of the area. She has walked over the Isabel Street land on a number of occasions after WLALC applied for its transfer to it. She said that she never felt, as a Koori, anything significant on the Isabel Street land. When she is on Koori significant land she instantly knows it but has never had this feeling on the Isabel Street land.

21 According to Ms Mason:

(1) she has never seen anything of significance on the Isabel Street land and is not aware of any ceremonies ever being conducted on the Isabel Street land or of any camping or hunting on the Isabel Street land;

(2) there is nowhere to fish on the Isabel Street land;

(3) the Isabel Street land slopes into a gully where water run-off collected;

(4) the Isabel Street land is surrounded by development;

(5) there is litter and junk scattered through the Isabel Street land;

(6) she has not seen any evidence of traditional use, like middens, nor evidence of traditional foods or medicine plants;

(7) she is not aware of any shells on the Isabel Street land which is inland and not on the coast;

(8) although she does weave for ceremonial purposes, there are not enough reeds on the Isabel Street land to use for basket weaving and she has never used reeds from the Isabel Street land for that purpose;

(9) cutting wood from the Isabel Street land is not a traditional practice;

(10) there are not many native cherry trees on the Isabel Street land and the ones that are there are not healthy as the Island Street land is “sick”. Ms Mason said native cherry trees grow everywhere in Narooma and are not special to the Isabel Street land;

(11) there is no freshwater creek on the Isabel Street land. Water on the Isabel Street land is run-off from the properties above;

(12) she is not aware of anyone coming to the Isabel Street land for fresh water;

(13) there are no fish or animals to hunt on the Isabel Street land and she has never heard of anyone catching or hunting any food on the Isabel Street land;

(14) there is no sign of people taking ochre from the Isabel Street land;

(15) although Burrawang, a native plant, is everywhere the old people never made damper from Burrawang seed because it is toxic and they had lost the knowledge of its proper preparation;

(16) she is not aware of any Garrara, which is used to make spears for fishing, on the Isabel Street land;

(17) she has never gone onto the Isabel Street land for medicinal plants to make bush medicine.

22 According to Ms Mason, Marilyn Campbell’s daughter, Cathy Thomas, was at the Gulaga and Biamanga joint boards of management meeting on 15 November 2016 and did not raise anything about the use of the Isabel Street land at that meeting. Ms Mason attended a meeting with the applicants for the South Coast People on 9 March 2018 and nothing was said about native title in relation to the Isabel Street land. The applicants said they did not oppose the non-claimant application but wanted a heritage study undertaken.

23 Ms Mason said she was very involved in the customs of her people and promoting their culture and heritage and that their traditions were very important to her. She is part of a dance group which performs nationally including singing in the Dhurga language which is the language of the Yuin people (the name of the South Coast People). She often does welcomes to country and smoking ceremonies and has been involved in a traditional fire burn with the assistance of the Rural Fire Service.

24 In 1997 she was an applicant for the Djiringanj native title claim. This claim was over a very large area of land including the Isabel Street land. Ms Mason said at the time of lodging that claim she had no knowledge of the Isabel Street land. According to Ms Mason all land is significant to Aboriginal people in some way but some places are more important than others. Some places lose connection, like the Isabel Street land. The Isabel Street land has sewage infrastructure on it and run-off which degrades its significance and is in an industrial area with businesses and development around it. In her oral evidence she confirmed her family connections covered nearly all of the South Coast. She agreed a Yuin person, a person with Yuin ancestry, could exercise rights in Yuin country under Yuin traditional laws and customs. She said that Aboriginal people from Wallaga Lake did not often come into Narooma as it was a racist town so they went to Moruya and Bodalla instead. When they were doing seasonal work they would camp at different places including places close to Narooma. She had never been to Little Lake which was east of the Isabel Street land on the golf course. To Ms Mason a culturally significant site could be a mythological site where there are stories, or midden sites which are culturally significant to them, because it is known to contain fragments of bones of the old people, or burial sites. She said it was Aboriginal people’s instincts and knowledge so they know if an area is significant. She had lived in Narooma for 47 years and from that time and her childhood visits she learnt a lot about the Narooma area and important places around it. She said she would be considered an elder with knowledge of the Narooma area by others outside her family. Other elders with such knowledge had passed away other than Deanna Davison who has been ill.

25 She agreed that in the Djiringanj native title claim, which covered Narooma, native title rights and interests were claimed including traditional activities such as fishing, manufacturing tools and artefacts, gathering of native plants, gathering of native foods and fruits, gathering items for medicine, and creation of traditional artwork. The claim also included the right under traditional laws and customs to transmit cultural knowledge to descendants. Ms Mason confirmed that she still had that right and observed it. She considered herself a custodian of Yuin land and said she went camping as an exercise of her traditional rights which also included the right to gather in social gatherings and have meetings. However, she would not go to the Isabel Street land for any traditional purposes because the Isabel Street land is sick. She explained:

…the trees are not growing properly. They’re – the look – they don’t look right to me. It maybe just my Aboriginal intuition. That water actually stunk. There’s a lot of weeds and stuff growing in there. I think it would be quite toxic. A lot of the rubbish that has been dumped over there, it sort of impacting on the land.

26 Ms Mason said she had never heard of any ceremonies being conducted on the Isabel Street land and until the Court proceeding had never heard of anyone camping on the Isabel Street land. She said it was not a suitable place for camping and believed she would know if people had been camping there, but not if they had simply been gathering bush foods from the Isabel Street land. She did not think people would have collected grasses from the Isabel Street land for weaving because there is not much grass there and it takes a lot of grass to weave a basket. Ms Mason said she had asked a lot of people about the Isabel Street land in her community but none of them knew it existed. Ms Mason agreed that she had said to the Gulaga and Biamanga joint boards of management meeting on 15 November 2016 that the Isabel Street land was in the Narooma industrial area when in fact it abutted that area. She thought she probably had a map of the Isabel Street land available but could not remember that far back to the meeting.

27 Ms Mason agreed that as she had aged she had acquired a lot of knowledge including about the Narooma area and that it was important for cultural knowledge to be passed on and she did so. She passed on her knowledge to members of her family, particularly the really important things she did not want everyone to know. It was possible other families knew things her family did not.

### Noel Butler

28 At the time of affirming his affidavit, Mr Butler was 69 years old and described himself as a Budawang elder of the Yuin nation. He said he was classed by his peers as a keeper of culture and stories and a teacher of culture in relation to the traditional laws and customs of the Yuin nation and the Dhurga language. He said his responsibility as a custodian was to look after his country and for education. He is directly responsible for looking after the land from north of Lake Conjola, down through to Durras Lake in the south and across to the Shoalhaven River in the west.

29 He said his family are renowned in the region and important knowledge holders. He was born in Batemans Bay and grew up along the South Coast including in a reserve at Ulladulla. He learnt traditional ways and the Dhurga language from his father who was a Yuin man. His family were down the coast at Mogo, Narooma and Nowra. His family moved up and down the coast from Huskisson and Tomerong in the north to Broulee in the south. They picked peas with family including family from Narooma. Several relations came from Narooma and he has been to Narooma many times in the last ten years. He does not have a great deal of personal knowledge about Narooma. He said:

Aboriginal people can't traditionally go into someone else's country without asking permission. When the white man came in and our systems on the South Coast were all broken up, our families were all moved, forced to move up north, forced to move down south, put on missions, given away and inter-married into other families and other countries. So Aboriginal systems started to dissipate, but there's still people, especially older women, who have all that history and culture and knowledge that was passed and shared on. Some people kept it, some people forgot it, some people are still learning it.

People who still have that cultural knowledge are very valuable to passing on Aboriginal traditional law and custom. I believe that for us to get that benefit they have to give it back to Aboriginal people for the benefit of everybody.

I am aware that Vivienne Mason and the Masons generally including Sharon and others, are still continuing on important cultural knowledge; particularly in Narooma. They take responsibility for their part of my land. They are the ones that I see year after year out there sharing the knowledge with others, supporting the community, involved in dancing and singing songs. To my knowledge and belief, they have the right of say in relation to the [Isabel Street] Land.

30 Mr Butler is a member of the South Coast People’s claim group. He left the first claim group meeting in 2016 as he believed the selection of representatives was not proper. He said:

On the correct cultural protocol, all you families need to go back and speak with your elders and families about who should be representative.

31 Mr Butler did not believe in native title or white man’s laws. He said all land is significant to Aboriginals in some way. He does not believe that the applicants for the South Coast People’s claim have sufficient traditional knowledge to speak for country. He said:

They are too young or not experienced enough and the appointment of the listed applicants did not follow traditional cultural protocol of contacting the elders of each family.

32 In his view Ron Mason, Vivienne Mason and others could speak for the Isabel Street land. He described Vivienne Mason and her daughter Sharon as indispensable knowledge holders of traditional laws and customs. He said:

One way to know who the most authentic elders in Narooma are is by observing the people teaching and practicing culture. The best example I know of that is Vivienne and Sharon Mason. They have the knowledge and are sharing it. If the others have it, I am not aware of them sharing it, teaching, participating. Not anything like Vivienne and Sharon Mason. They're the real people that are doing things in and around Narooma.

33 Mr Butler had never heard of the Isabel Street land until it came up as an issue for the South Coast People’s native title claim. He said:

I have no knowledge and have never heard of any camping, hunting, ceremonies, birthing, or gathering resources taking place on that Land.

I have never heard of anything like any of these activities taking place on the Land next to the golf course by Aboriginal people at all.

34 In oral evidence Mr Butler said that as a member of the Yuin nation he would have rights and interests outside of the Budawang clan area. He explained:

…we all come under the same law and ruling within our country, but different family groups of the – that’s the 13 different connected clan groups have a higher responsibility of their part of the country to make sure that the rules and the laws are adhered to, and the other people are watching over you to make sure that you don’t bugger it up.

35 He continued:

Well, today it’s pretty hard to live traditional lifestyle, but I still live on my cultural practices and my respect for country, and for people.

36 Nevertheless, there were rules he grew up with:

We lived – lived our culture. We lived and learnt the two-way system from my mum, who was Scottish, and my father, who’s Aboriginal. Because we have to fit in into today’s society, so we learned both ways.

37 He gave evidence in this exchange:

So if I was to say the rules and customs that came down through your father, who was an Aboriginal man, would you consider the rules and customs that he taught you to be traditional rules and customs? Absolutely. I mean, my dad was born in 1896, and they had all been jammed onto the missions and reserves, so they still grew up and lived a – a semi-traditional lifestyle.

Right. And so would he – all those rules and customs that he passed on to you, he would have learnt them, would you agree – he would have learnt them from his parents and grandparents as well? Well, he grew up with them. He grew up that way and learned – only the clever way, learned on how to exist in today’s society as well. And that’s what we’ve continued on.

And was your father a Budawang elder as well? He certainly was. He was born here at Ulladulla.

And he was born in Ulladulla. And did he – was he a Budawang elder because he was born in Ulladulla? You would have to ask him. He was a Budawang elder because he was told or he grew up as a Budawang elder from his parents, which are my grandmother and grandfather.

38 He explained that to be Budawang a person had to be a descendant of a Budawang person. He continued:

And when you say you’re a keeper of culture and stories, you would – you mean that you’re someone who has a deep knowledge of Yuin nation culture and stories. Is that correct? Definitely.

And you have that knowledge because they were passed to you by your elders? I have that because we ..... whole family

Right. So from your parents? From my parents, from my aunties, from my cousins, my uncles.

And can you tell me some of the names of your aunties and uncles that you learnt these things from? Well, Auntie Marge Timbry, my dad’s sister, younger sister. Uncle Tom Butler, my dad’s brother. Auntie Lil Nye, who’s another one of my dad’s sisters. Auntie May, Auntie May Simms. These are the women – Auntie Mint, who is Auntie Elizabeth. They all used to sit together on the beaches where we had our camps doing all the shell work, and we just listened to the stories. Those people were all taken from here and put on the mission in La Perouse.

39 He also gave this evidence:

I have the right to speak for any part of my country, except that I have a considerable amount of – a lot more knowledge on this part of the country because it’s my place to look after it. So all our sites – our massacre sites and art galleries and burial grounds; I know where they all are. I could take you to all of them, whereas some of the other people in the south probably couldn’t. They respect that when they come here, they get us to take them to these sites and same in turn I get the people from the south – the elders – to take us to sites down there, even though we have every right to go there.

Right. And when you say – when you talk about having the right to go there, you mean you have the right to do things that you’ve done traditionally, such as hunt and fish; is that right? And tell stories and do dances and whatever it is connected to the country are the same rights but I concentrate on – this my responsibility, on behalf of all the rest to share those stories or those dances or those sites with everybody else. It’s like sharing the whole workload.

Right. And so for example, you could – for example – go down to Narooma and fish along the coastline there and you would say that that was your right to do so as a Yuin person? 100 per cent. Absolutely, yes.

40 Mr Butler considered that any Yuin person could speak for Narooma if they have knowledge of it because it was part of Yuin country and “[w]e all come under the same law’. He gave this evidence:

So you agree that there’s a number of people or a number of families that have particular knowledge of the Narooma area? To my knowledge today, the people who are still practicing cultural protocols and cultural practices and sharing it with other people.

Yes. And you agree that there’s a number of people or families who are still practicing that cultural protocol? There are some, definitely.

Yes. And who are they? Well, the main ones that come to mind are the ones that I come across that we are asked to come and help when we assist with dance or songs or ceremony, are the ones who are still doing the same thing from country and that’s Vivienne Mason, her daughter, are two people who still perform and participate with us in other parts of country on sharing that cultural knowledge. And there are others as well, like Cheryl Davison, who’s still an artist and has a lot of significant knowledge. Ricky Campbell. They’re people who are still practicing those cultural values and sharing it with others.

41 Mr Butler accepted that there might be other people he did not know of who could also speak for Narooma but that he would know the people who were “continually practicing cultural protocols and practices”. For his part, he said:

Most things that I do I consider traditional. Like, my ceremonies, my language, my stories, my song and visiting and showing respect for my sites, and my ceremonies that I do, but that – that’s me.

42 Mr Butler was an applicant for another native title claim, the Walbunja claim, which included Narooma. In that claim native title was asserted over all of the Crown land within the claim area. He agreed that he asserted native title rights over all of Yuin country being the right to use that country. This evidence continued:

…if you went to a beach nearby to Narooma you would assert the right to fish off that beach, wouldn’t you? Certainly do, and I do that today.

Yes. And say you went to the bush scrub and you wanted to collect bush tucker, you would agree that you would assert that right in Yuin country as well, wouldn’t you? If I wanted to, if I knew that part of the country, it’s part of my country.

Yes. And, for example, you would agree that if you wanted to, say, collect wood, that would be something you could do as a Yuin person in Yuin country? It’s all within country. Everything in country, I have the same rights as other Yuin or Dhurga-speaking people.

Right. So, for example, you agree that you have the right to take resources? From where?

From Yuin country? Well, they’re my resources, aren’t they?

Yes. You would assert that they were your resources as a Yuin person, wouldn’t you? They are, yes.

So, for example, if someone, say, wanted to go and pick the Burrawang plant, you would assert that they could do that if they were a Yuin person, wouldn’t you? Of course they can.

And they could do that on Yuin country? Yes. Yes. If it’s native title. Today, it’s a different story.

And, say, the native cherry bush: they could do that, too, couldn’t they? Pick fruits off exocarpos? Of course they could. That’s food. That’s part of our food in our country.

Right. And say, for example, if they wanted to take the sap off particular trees to use that, they could do that too, couldn’t they? But anybody within country, if they’re Yuin person, only has to ask if you want to take food or something in someone else’s country.

Right. So – yes, and you would agree that those things can be done in and around Narooma, because Narooma is in the Yuin nation area, isn’t it? Of course it is. And I still do.

43 He did not agree that these rights extended to the Isabel Street land because that land was owned by the WLALC.

44 Mr Butler considered Vivienne Mason to have the most knowledge of traditional cultural protocols so as to be able to speak for the Narooma region.

### Ken Campbell

45 Mr Campbell is a Yuin man, who was 66 years of age in the year of affirming his affidavit, who has lived in Bermagui since 1999. Before that he lived at Wallaga Lake. His sister-in-law is Marilyn Campbell. He is a member of the South Coast People’s claim group. He does not consider the applicants for the South Coast People’s claim to be representative of the clans of the South Coast. He said that if Marilyn Campbell is doing anything on land in Narooma “it’s got nothing to do with a traditional connection. It’s just her doing it”. He said you “can get bush tucker and bush medicine everywhere here”.

46 Mr Campbell also responded to the affidavit of Owen Carriage. He said Mr Carriage’s affidavit was not true. Mr Carriage was from Batemans Bay not Narooma and does not speak for the Isabel Street land. Mr Campbell knew all the old fellas referred to by Mr Carriage. They were all his friends and most of them drank together. He worked with nearly all of them and knew them all for most of his life until they passed away at different times. Mr Campbell said that all his uncles, who are much broader than Mr Carriage mentioned, never said or did anything in the area of the Isabel Street land or Little Lake as Mr Carriage suggested. None of his uncles had ever told him anything about hunting, fishing or camping in the area of the Isabel Street land or Little Lake. He knew Julip Stewart who use to come to Wallaga all the time to fish. He had never heard of Julip taking bark from the trees at Isabel Street. He had never heard of Aboriginal people camping on the Isabel Street land or heard of the land at all in relation to fishing. Aboriginal people camped at Wallaga and other renowned places like Mystery Bay and Aragannu.

47 Mr Campbell said this case was about jealousy. According to him:

(1) every true Aboriginal knowledge holder in the region knows the Isabel Street land is not significant. None of the old people ever talked about the Isabel Street land and if it was significant the old people would have said so and protected it, but they never did;

(2) there is no fresh water on the Isabel Street land;

(3) the Isabel Street land is not known as a place for collecting bush tucker. There is bush tucker everywhere on the coast and he had never heard of the Isabel Street land as known or used for that;

(4) knowledge holders know that the Isabel Street land is not significant to Aboriginal people in the way Aboriginal people talk about significant land. The Isabel Street land is not like Mystery Bay, Aragunnu, Biamanga, Gulaga or Mumbullah Mountains. There are many other places which Aboriginal people look after and visit and take their kids too.

48 Mr Campbell blamed Marilyn Campbell for this case and Wally Stewart whom Mr Campbell had known for 50 years and who had never mentioned the Isabel Street land.

49 In oral evidence Mr Campbell confirmed that to be a Yuin person you had to be a descendant of a Yuin person. His ancestors were Yuin people from the Moruya/Nelligen area. Yuin people could speak for their country if their community accepted them as being able to speak. As I understood his evidence this meant that the Local Aboriginal Land Council would have to accept the person as being able to speak for country. He said his father and uncle hunted a lot of kangaroos anywhere on the South Coast and they were an important food source for a lot of Yuin people. He said Marilyn Campbell could talk about Wallaga Lake and Bermagui as she was a member of the land council and her family is from there. He agreed that he had native title over the area of the South Coast People’s claim which includes Narooma. With his Mum he had camped all up and down the coast. He did not know he was Yuin until he was about 18 or 19. Once he knew he was taught about Yuin country and that their camping places were in Yuin country. He gave this evidence:

So you were taught that you had a right to do that because you were a Yuin person. That’s right, isn’t it? Yes.

So you would say that as a Yuin person, you could do things such as hunting, as well. You would agree with that, wouldn’t you? Yes, in a certain way

Yes, and you could do that as a traditional right under your traditional laws as a Yuin person. You would agree with that, wouldn’t you? Yes, there were certain rights.

And those things such as hunting and camping, those things and the way that you do those things. That has been passed down to you by your elders, hasn’t it? That’s right.

…

So for example, if someone wanted to take wild cherries from trees in Yuin country, they could do that, couldn’t they? If they weren’t Council, they should.

Right, and that’s something that they’ve done – that Yuin people have done for a long time, haven’t they? Yes

So for example, if someone said that they wanted to pick the Burrawang plant. Have you ever heard of the Burrawang plant? Yes.

If someone said that they wanted to pick the Burrawang plant, that’s something they could do as a Yuin person, in Yuin country. That’s right, isn’t it? That’s right.

…

…if, for example, Marilyn learned to pick Burrawang plants from an elder, then her picking of that plant would have a traditional connection, wouldn’t it? Look, I can’t see why anyone can’t pick a Burrawang plant, it’s reasonably doable. No one – I think anyone could pick the Burrawang plant.

All right. So what about, for example, picking reeds. Do you know people who pick reeds in order to do weaving? Yes, ..... and ..... used to do it.

Right, and they would go and pick those reeds, wouldn’t they, to do that? Yes, they would pick their reeds down in that area, as well as ..... I know that.

And you would agree that that’s something that they’ve learned from their elders to do? Yes.

And you agree that they could do that because of their connection to that country? If they’re Yuin people and they’re picking it but not from the Land Council, I don’t see a problem with it.

Right. So – but you would agree that that’s something that they’ve learned, like the picking of those resources is something that they’ve learned from their elders? Well, we did.

Right. So – okay. So if someone, for example, went to the land at Isabel Street and picked something like a reed in order to make a basket or some other artefact, you would agree that there was a traditional connection in them doing that, wouldn’t you? I don’t see a problem with it as long as they .....

Right? .....

You would also agree though that they have a right to do that as a Yuin person, wouldn’t you? Yes. If they had ..... let the land council know what they’re doing

Right. And you say they have to let the land council know what they’re doing because the land council owns the land; is that right? That’s right.

50 He said if land was not owned by a Land Council then “we can’t do nothing”, except you could go to the beach and take things which he considered to be different altogether. Yuin people had a right to go to the beaches and take things from them.

51 He said he had not read Mr Carriage’s affidavit but had been told what was in his affidavit and he did not agree with it. To his knowledge what Mr Carriage was saying was not true. A lot of people around Wallaga Lake and Narooma had been talking about Mr Carriage’s affidavit. Mr Campbell did not remember Mr Carriage being around Wallaga Lake and he was not from that area. The Carriages were from the Ulladulla area. No Carriages lived on Wallaga Lake but they might have visited. Mr Carriage was not associated with George Julip Stewart or Uncle Binny when he was a child but he might have known them later. But Mr Campbell knew they had never camped down in the area of the Isabel Street land. He had last been on the Isabell Street land about 20 years ago.

### Deanne Davison

52 Ms Davison described herself as an elder of the Aboriginal community of the South Coast area. Ms Davison is a member of the South Coast People’s claim group. In May 2018, the date of her affidavit, she was 79 years old. She was born and raised in Nowra. Her father was born at Wallaga Lake. When she married she went to La Perouse. She later came down to the South Coast area for a few years, eventually moving to Wallaga Lake for about 30 to 40 years. Her father told her lots of stories about his childhood and about fishing around Wallaga Lake. She said she knew the Isabel Street land which used to have a tip over the back of it. There is a creek that goes down to the beach and comes out at the golf club. She said her memory was not perfect these days but she knew of sacred sites in the Narooma area. In truth, she said, all land is sacred in some way to Aboriginals but she did not remember the Isabel Street land being an area where ceremonies or other cultural activities had taken place. She said if a place was really sacred you would know. She had never heard of the Isabel Street land being sacred. She said that “we know where we can camp and not and where we can fish or hunt and not”. She did not know anyone doing those things on the Isabel Street land. She had not heard anyone say that the Isabel Street land has cultural significance.

### Bruce Ella

53 Mr Ella was 53 years old in May 2018 and the Deputy Chairperson of the WLALC. Mr Ella is a member of the South Coast People’s claim group being a Yuin person descended from Yuin persons.

54 Vivienne Mason, his sister, had asked him whether he was ever told about cultural happenings on parts of the Isabel Street land and he replied he did not know and had not seen or been told of any significance of that area. He was not aware of the Isabel Street land having any cultural or heritage significance. He said that since he was young he had been taught by elders about places of importance and sites of significance in Narooma. He was taught about burial sites, midden sites, sacred trees, scarred trees, tool sites, mapping sites, hunting, fishing, camping and everything cultural. He said he knew of places in Narooma and all along the South Coast. None are on the Isabel Street land. He had spoken to a number of elders about the Isabel Street land over the last three years and no one knows of anything significant on it. He had spoken to Merv Penrith (now deceased), Michael Darcy, Ron Mason, Kevin Mason, and Norm Patten who are the most senior people he knows. He had never been told not to go on the Isabel Street land, had never heard of anyone performing ceremony there, and had never seen any remnants of anything in there. In oral evidence Mr Ella said he had stepped down from his position as Deputy Chairperson of WLALC as he had moved to Tasmania but was still a member of the board. Before moving to Tasmania he had lived in Narooma and had done so for most of his life. His family were from that area. They went bean picking at Bodalla and his whole family would spend a lot of time in the area. Both his parents were Yuin people. He gave this evidence about his parents and others:

And so did they start teaching you when you were younger about where your country was?---Yes. At an early age I was shown – not just by my mother and father, by my uncles and my aunties – a lot of significant places along the South Coast which the Yuin Nation stems from Broken Bay all the way down to Mallacoota. So it’s one big nation. That’s why we call it Yuin Nation. So I’m quite familiar with all the coastal areas from the mountains to the sea.

55 He agreed he asserted rights as a Yuin person in Yuin country including the right to practice cultural rights, cultural heritage, fishing, hunting, gathering, storytelling, everything that his law allowed him to do, which excluded birthing rites. He said some things were able to be discussed only by women and others were specific to men such as initiation. There were also rules about hunting and fishing. He said:

Yes, there is certain – certain areas which – it prevents me to go in there by myself unless I’m going in there with an elder who would have the right of passage going. A lot of my elders have passed away now so a lot of that information has gone, but in certain areas where if it was – especially women’s area, that was one area I cannot go. I’ve known 35 – 30-odd years of doing this for the Land Council, been a part of the Land Council for 37 years. I know nearly every – every aspect of the Southeast Coast. And there’s certain areas which I can go and like I said, there’s areas where I can’t go, and I know there’s one place where I can’t go on the Gulaga Mountain which is a birthing spot. Now, a lot of our birthing areas is – is not allowed by a man.

56 Other than those areas he could not go he asserted the right as a Yuin person to do such things as hunting and gathering on Yuin land. He said that the rights of landholders had to be respected, however, and a lot of traditional hunting and gathering places had died out for this reason. He would look for spots where he had the right as,

a cultural person – a right as an Indigenous Australian, you know, to go sit where my ancestors sat and fish and ate and provided.

57 He was shown these places by his elders when he was a child. He was taught where he could and could not go. This was knowledge which had been passed down from generation to generation. He said there would not be burial sites on the Isabel Street land as traditional burial sites were always in sand. There were no records of scarred or sacred trees on the Isabel Street land and you would not want to camp on it. The Isabel Street land was an area you would not want to go as an Indigenous person as you would not go camping where you could be attacked. He thought there had been five or six surveys of the Isabel Street land including by the applicants for the South Coast People’s claim who had said they were going to do a survey. If there was anything significant on the Isabel Street land he believed he would know about it. He had been told about a reed being on the Isabel Street land that could be used for weaving but had never seen it. He said people still used reeds for weaving, a skill that had been passed down under traditional laws and customs of the Yuin, but not reeds from the Isabel Street land. He agreed that Yuin people could pick reeds for weaving on Yuin country provided it was not private land.

58 Mr Ella gave this evidence:

Well, to the best of my knowledge, the people who had been a part of my growing up, they’re teaching my culture, one has passed away and the other moved to Penrith, and he was one of my senior, senior advisors on all things cultural within the Yuin – Yuin land, Yuin nation, and then Ronnie Mason, Normie Hatten [sic Patten], you know. These people had always told me that there was – there’s nothing significant in that area when this was brought up. And we – we ..... just going to turn around and say, “Let’s go to do this.” We have to go into depth and ask our elders about things. A lot of them now are passed away, so we can’t ask them about, you know, to come here to court.

59 Mr Ella agreed he had asked Norm Patten about the land and that Mr Patten was not a Yuin person but a Gunaikurnai man. He agreed that Mr Patten did not speak for Yuin country but said he had done more surveys of Yuin country than anyone. He also said Mr Patten had grown up on this country and his father was from this country.

60 He gave this evidence:

And you would agree that throughout the Yuin Nation, different people hold different levels of knowledge? Maybe.

Well, not everyone knows the same thing about Yuin traditional law and custom, for example. That’s right, isn’t it? That’s right.

And as you keep growing older you can learn more things. That’s right, isn’t it? Well, it depends on who’s teaching you.

Right. So you might have an older person who is teaching you who is very knowledgeable?---Yes.

And it’s important that you are taught by older people who are very knowledgeable. That’s right, isn’t it?---Yes, that’s right. That’s right.

Yes. And would – so for example you would accept that Owen Carriage was an elder. You would accept that, wouldn’t you? No. He’s only a year older than me.

Well, he’s in his 60s, isn’t he? He’s what, five years older than me.

So if I was to say 67, how many years older than you is that? Five – 17 years.

So he would have a fair bit more knowledge than you. You would agree with that, wouldn’t you? Not really.

But you would accept that ? ..... can I answer that?

Yes? Has he lived on Yuin land for the last 67 years? Has he worked for Yuin people in the last 67 years? Has he done anything cultural with the Yuin people in the last 67 years?

Are you saying that he hasn’t? No.

But you would agree, wouldn’t you, that for someone of his age it’s important to respect his knowledge and his understanding? No, because he’s not my elder. Carriage isn’t Yuin. They’re Gunaikurnai as well.

### Patricia Ellis

61 Ms Ellis was 62 years old when she made her affidavit in September 2019. She is a Yuin person who has been doing cultural tours through her own company for 40 years and is an Aboriginal consultant and language teacher. She was the Chairperson of the Eurobodalla Aboriginal Advisory Committee and held other positions providing cultural information and support. For 11 years she was the joint management co-ordinator employed by the NSW National Parks and Wildlife Service to co-ordinate the Gulaga and Biamanga boards of management. She is a speaker of the traditional Dhurga language. She learnt Dhurga words when she was growing up and with her brother and sister had worked to revive the language. She has been teaching the language since 2004. In 2019 she was nominated as the Aboriginal elder of the year for Eurobodalla Shire Council for her contributions to the community. She is a member of the South Coast People’s claim group.

62 She belongs to the Brinja Yuin people of Moruya, being one of the 13 major tribal groups making up the Yuin people of the South Coast. Yuin people traditionally spoke four languages of which Dhurga is one. The others are Dharawal, Djiringanj and Dhawa. The Brinja Yuin people have custody of the land from Moruya River to the Wagonga Inlet, out to the second row of the Great Dividing Range and east to the ocean. Ms Ellis said she had detailed cultural knowledge about Gulaga and Biamanga Mountains including knowledge of stories. Her knowledge of traditional law and custom was primarily taught to her by her grandmother and other knowledgeable old people including relatives and friends. The old people patiently shared their knowledge by explaining social structures and lore, retelling stories, and showing techniques in the creation of numerous tools, weapons and utensils. Those who had a connection with Narooma would include Pam Flanders, Ted and Ann Thomas, and John Mumbler.

63 Local research in the Historical Society shows that all local Aboriginal people were herded on to the William Benson reserve near Moruya in the 1890s. It is well documented that when the farmers wanted that land they then moved all the Aboriginal people to Wallaga Lake which was gazetted in 1891 for the use and protection of Aboriginal people. In or around 1897 all Aboriginal people within a 100 mile radius from Narooma, Braidwood, Araluen, up to Ulladulla and as far down as Bega were herded onto the Wallaga Lake Reserve. After this, Aboriginal people had little if any access to traditional country from which they were taken including Narooma and needed permission to leave and return to the reserves including Wallaga Lake Reserve. The forcible displacement of people had a devastating effect on Aboriginal people as they could not carry out the functions inherited by being born Aboriginal such as initiations and ceremonies. The tribes were also all mixed together totally different from how it was before European contact. Further, it was against the law to practice traditional Aboriginal activities such as ceremonies and hunting.

64 Ms Ellis believes that after this, certain lands turned into dead zones and to this day the energy is not there. When she walks out in the bush in certain areas she feels really welcome and other times she feels like she should not be there. She believes there cannot be that connection of energy with land on which Aboriginal people have not been able to live. She is not suggesting all land between Ulladulla and Bega lost its significance as every centimetre of Australia is important to some extent to Aboriginal people. However, land can lose importance/connection when it is denigrated, eroded, destroyed, or urbanised and it does not look and feel the same and has a different energy, darker and void of good energy. If land is very close to industrial businesses or houses that can be inconsistent with a place maintaining its significance or importance.

65 Ms Ellis is not aware of any efforts to maintain the Isabel Street land. She is familiar with it as she worked from the National Parks and Wildlife depot about 100 to 200 metres from the Isabel Street land between 2000 and 2010. Throughout all that time she never had any feeling that the Isabel Street land was of significance to Aboriginal people. The area is too industrialised.

66 Ms Ellis said Aboriginal people tend not to want to do traditional/ceremonial activities in the view of white people. The presence of industrial business and houses around the Isabel Street land tends against it having significance to Aboriginal people. She has never walked on the Isabel Street land as it did not look inviting to her as a Koori person and she was not attracted to go on the Isabel Street land and had no need to do so.

67 To Ms Ellis’s knowledge the Isabel Street land had historically and still today had been used for the illegal dumping of rubbish. This would have damaged the quality of resources/food on the Isabel Street land. She had never heard of any camping on the Isabel Street land. To camp a person needs shelter from the wind, food and fresh water. To her knowledge none of that applies to the Isabel Street land although she believed there were some stagnant water pools on the land which is not good for camping. She has had conversations over the years with many elders who can speak for the land including Lionel Mongta, Mervyn Penrith, Vivienne Mason, John Mumbler, Ted Thomas, Anne Thomas and Aunty Shirley Foster, all of whom had now died except Vivienne Mason and Aunty Shirley Foster. In all those discussions she had never heard of any significance of the Isabel Street land or any use of it for traditional activities. There are no recorded sites on the Isabel Street land and no oral accounts of any significant cultural events occurring in that area. She had heard the Isabel Street land had erosion and kids on trail bikes had been riding on it. She expected that she would know if the Isabel Street land had any significant sites on it. She is known up and down the coast for significant sites and things of cultural significance and no one ever approached her about anything to do with the Isabel Street land.

68 Ms Ellis believes WLALC is a good representation of the local community and its board members possess cultural knowledge which gives it authority in Koori traditions. Ms Ellis believes Vivienne Mason and others (I infer involved with WLALC) have the right to speak for country because they belong to the country and know the history and culture and contribute to the local community.

69 Ms Ellis said she had never heard of any traditional activities taking place on the Isabel Street land and believed it was a gully which gets all the run off from the development around it. To her knowledge the Isabel Street land has no cultural significance to local Aboriginal people.

70 In oral evidence Ms Ellis said she did not believe any of Mr Carriage’s affidavit which she had read. She explained:

I guess in the first instance I know the [Isabel Street] land that he’s talking about has no cultural significance to Aboriginal people. I’ve been – I’ve had a lot of conversations with people about that particular land over the years, and from my knowledge there is nothing of cultural significance there. I don’t believe that – I find it hard to believe that all of the people who he claims to have gone there with have passed and you can say anything when there’s nobody to verify what you’re saying.

71 She said she knew of the people mentioned in Mr Carriage’s affidavit, Uncle Ernie, Barry, George, Jimmy and Stanley and Bob and Pop, and had never heard of them walking from Wallaga Lake to Narooma to access hunting and fishing spots. She said that, contrary to Mr Carriage’s affidavit, Little Lake has always been too brackish to spearfish. She said she had never heard of any of the activities being asserted by Mr Carriage before his affidavit. She did not believe Mr Carriage had camped on the Isabel Street land with his family and elders. She said:

The [Isabel Street] land doesn’t really accommodate good camping ground. It is a gully that is – gets the run-off from all surrounding land and – anybody who collects any kind of traditional foods and resources wouldn’t collect it from there because it would be polluted. And camping in that area, I – I don’t understand why anyone would camp in that area. It’s not as good as lots of other places that are close by.

…

…it’s not a good place to camp. The fresh water is brackish; it gets all the run-off from surrounds. To my knowledge, that place has been used as a dump. Usually people go in there and clean out the old Woolworths trollies that have been dumped down there by kids. BMX bikes go through there; it’s mountainous. There’s cliffs. It’s not flat land.

72 She said most Aboriginal people camped at Corunna, which is just a little bit south and down on the flats on the other side of the Wagonga Inlet and that there were lots of places to camp other than the Isabel Street land. She did not believe the Isabel Street land was a traditional camping area and said she had worked in her culture for enough years to know that none of Mr Carriage’s assertions about the Isabel Street land were true. The foods to which he referred can be collected anywhere along the coast and she knew of no one who collected bush tucker from the Isabel Street land. She said thousands of other Aboriginal people could speak for the land as knowledge was not exclusive to one person or one family. There are lots of knowledgeable Aboriginal people most of whom assure that the Isabel Street land is not a site of significance to Aboriginal people.

73 Ms Ellis said she lived just south of Moruya but part of her family are traditional Narooma people. She said:

I have knowledge of most of the sites from pretty much – yes – pretty much Eden up to around Ulladulla. I have some knowledge of sites between Ulladulla and Kempsey, but I have more knowledge of sites in Kempsey as well, because that’s where my grandmother spent most of her life, and I have the knowledge that was passed to me by her. But we have always been South Coast people. My ancestry goes back through the Chapmans, it goes back through the Bolloways. My great-grandmother Rosa – everybody who belongs to country down here has to relate back to the Bolloways or the Pietys, and I relate back to both. I would not be on the register of Aboriginal owners if that wasn’t the case.

…

…my traditional tribal group borders on the Narooma tribal group. Our boundary of the Brinja-Yuin people of Moruya stops at Wagonga inlet. And the Wagonga inlet people’s boundary stops down the other side of Bega. They have quite a big country. They are Djiringanj people. We are Brinja-Yuin people. But we share – share borders. And even though we are different tribal groups, they are still like our – in your way of thinking, it would be like our first cousins.

74 Ms Ellis confirmed that she could speak for Mystery Bay as a traditional owner who was descended from an ancestor who came from that area. She said:

Mystery Bay is pretty significant. It’s actually quite significant to Aboriginal people and a lot of Aboriginal people still camp there, because that was a traditional campground.

75 Ms Ellis explained:

Sites of significance can be anything from middens to knapping sites to places where people collected resources, but they’re not sacred in the sense that that’s where our ancestral being created certain – or did some act or there was some event or the land – or the landform was created by our ancestral beings; they’re significant sites. They’re akin to what churches are to other people. A significant site is anywhere that Aboriginal people have been and they’ve left evidence of their occupation.

76 Ms Ellis believed she had a traditional right to fish along the coast but that the fisheries law had stopped that from happening. The same applied to traditional rights to hunt. She also believed she had a traditional right to take fresh water and wood from land provided it was not privately owned. She explained:

I don’t imagine that people said that in so many words. It was just an accepted thing that we needed the wood for fires. The role of women and children – well, I know it sounds menial – but everybody had a role in the camp and women and children were responsible for setting up the camps while the men hunted, but that’s not to say that women’s jobs were any – were menial, it was everyone had a role, even young boys up until they went through initiation had to do – had to collect wood and water and bring it back to the camp for the whole camp. Everybody had a responsibility and still even today, when we camp, those responsibilities still hold.

…

I didn’t have to be told that’s what the ancestors did, because it was just – it was common knowledge. It was accepted it was a part of our life. It didn’t have to be communicated that that’s what everybody did. We know that’s what everybody did from our stories.

77 Ms Ellis explained that there were 13 tribal groups of the South Coast. Specifically:

The Aboriginal people who lived in Sydney are called the Dharawal People. The Aboriginal people from Wollongong were called the Illari the people from Nowra are the Wodi Wodi. The people from Orient Point were called the Jerrinja. The people from Wandandian were called the Wandiwandian People, which means Valley of Lost Lovers. The people from Ulladulla are the Murramarang People. The Braidwood people are Munkata Yuin. The Araluen People are called Alleluen. The Batemans Bay people are Walbunja. The Mogo People are Walbunja all the way to Moruya River. Moruya to Narooma, Wodonga Inlet are the Brinja-Yuin. The Wallaga to Bega people are the Jerrinja. The people who live at Bermagui, who are now extinct, because they were all massacred, were called the Wathargal or Wallagadan. Both of those words mean “little people” and that’s because those people were only like around four foot tall. And the people down at Eden are called Dharawa. There’s four different languages spoken on the coast. The Dharawal is spoken from Sydney down to Nowra. Dhurga, the language that I speak, is spoken from Nowra down to Narooma. From Narooma to Bega, they speak Djiringanj. And down in Bega, they speak Dharawa.

78 She had been taught this by her elders. She said:

My grandmother was Ursula Rose Connell. She was a very, very cultural woman. Ann Thomas and Ted Thomas, I hung around with them a lot when I was younger, and that can be verified. Ann Thomas was my mother’s best friend. I learnt a lot of stuff my mother. I’ve learnt from Alison and John Mumbler, who I was related to through the Donovan side of my family. Pam Flanders, who was – she was a Thomas before she married a Flanders, who lived on Wallaga Lake. And I’m not just claiming this. All of these people I’ve spoken of have passed, but I also learnt from another people today who haven’t passed. Shirley Foster being one. I had to lot to do with Mervyn Penrith, who was her husband. I had a lot to do with Eddie Foster, who was Pam Flanders’ husband. I had – I still do have a lot to do with Aunty Dot, who is Deanna Davison. Sheree Buchert.

79 She had been taught that the land of the 13 tribal groups:

…starts out at Botany Bay at La Perouse. It goes inward to Campbelltown. It follows the second row of the mountain range down past the Victorian border to a point where it lines up directly west of Cape Howe Island; that is Yuin Country.

80 She had been taught this by:

Lionel Mongta, who passed away not very long ago; Mary Mongta, his wife; Mervyn Penrith; a lot of the Campbells actually. The Campbells. I’ve – I was one of those kids that loved to hand [sic] around the old people and it’s as simple as that. And every time there was an elders council meeting, I was able to get myself invited to those meetings in some capacity. But, in addition to that, I used to work for the Far South Coast Regional Land Council and I worked as a research officer and it was my job to interview old people before they passed. And there’s a collection in the Australian institute of Aboriginal and Torres Strait Islander Studies called the Brinja-Yuin Collection. I did that with Vivian Mason from [Wagonga] Land Council. Both of us were employed as field officers. And the oldest people I remember recording at the time was Aunty Muriel Chapman, who used to be a Button – her name was Muriel Button – and she was 92 years old. So a lot of the information we recorded, I have retained that knowledge and, in addition to that, sometimes they didn’t want knowledge recorded, so they told me to turn the tape off and they would tell me other stuff that they didn’t want recorded.

81 Ms Ellis further explained:

Because I am a girl and I was – would have done that – everybody in an Aboriginal group learns that from their mothers and grandmothers and sisters and aunties. That’s the role of the women to teach everybody about bush food and gathering techniques. And it’s only when boys get to a certain age that the men take notice of them and they take them off and they do men’s business with them.

82 The boys learnt from the women until they were 9 or 10 years old. She also said:

* men wouldn’t have taught them how to use a fishing line. Men fish with spears traditionally; women fish with fishing lines;
* contrary to what that other affidavit [of Mr Carriage] says, the women dive for the lobsters in my family but there’s no law that says only women can dive for lobsters, and there’s no law that says only men can
* Aboriginal people would treat fishing nets with the bark off the Geebung to make them dark in colour;

83 Ms Ellis said there was a difference between land that was sacred to all Aboriginal people and land that was significant to individual Aboriginals because of a personal connection with that land. She considered her family had a connection with all the land along the coast but that it was the community that made things sacred or significant or not. She did not consider that (personal) historical connections should override traditional community connections.

84 When she worked at the National Parks and Wildlife depot she would walk along the edge of the treeline and would look into the Isabel Street land and was horrified at the rubbish that was being dumped on the land. She said it was a real valley in the land and steep with rock outcrops. She recalled seeing Burrawang plants on the Isabel Street land. She said:

The Aboriginal people traditionally – the women would actually cover their hands in the latex substance, then they would collect the Burrawang seeds and put them into dilly bags and leave them in running water for three to five days. And then once the fish start nibbling on the actual Burrawang seeds then it’s fit for human consumption and at that time it would be roasted and crushed and made into damper. And it was a staple part of our diet. A lot of Aboriginal women know how to do that, but a lot are reluctant to do it because we don’t want to poison ourselves.

85 She had been taught this by her grandmother and all the old women who taught her as she was growing up.

86 She had not seen black wattle gum or native cherry trees on the Isabel Street land. She said, “the three plants that are mentioned, you can get them anywhere and they’re a better quality in lots of other places”.

87 She said that she would not take bush tucker from the side of the road because it has been polluted by the traffic. She had not collected bush foods from the Isabell Street land. She did not think it would be of superior quality to what you would find away from human occupation. She said:

If I’m collecting resources, I will go into the bush where there’s no traffic and there’s no influence from modern development.

88 Ms Ellis said:

I believe that if people have knowledge of bush food that they will source it where it better quality. It doesn’t make sense to – to settle for lesser quality.

89 Ms Ellis said she undertook smoking ceremonies before taking people onto her country. This exchange occurred:

So when we have a smoking ceremony we talk about how the smoke lifts peoples energies and it helps people to be more open to learning new things, and it’s also about cleansing negative energies.

And would – would you do a smoking ceremony as well to protect people while they’re on country because they’re strangers and the spirits don’t know them? We do a smoking ceremony on – on the initial contact, and we’ll do a smoking ceremony when they leave. But if there is women’s business or men’s business, there’s also different kinds of smoking ceremonies associated with that.

And so just getting back to that question, would the smoking ceremony have – have anything to do with spirits going home with people and leaving country with those stranger people? Yes.

So could you just talk about that a little bit more? If you do a smoking ceremony when you come into country, that makes the negative energies – that you leave it outside of what you’re going to do for the next few days. And then you’re smoked when you leave to protect you on your way home. It’s wallawarni. It means “safe journey”, “protect your soul”. “I hope your soul has a safe journey.”

And do you know of anyone who has been a stranger, gone on to Yuin country, hasn’t been smoked, has gone home and had some problems? Absolutely. When I worked at National Parks, I was responsible for taking home, to country, spiritual remains and different artefactual material that people took. And then they found that they had bad luck or – or strange things happened, so they brought them back to National Parks, and I was responsible a lot of the time for taking them back where they got them from.

Right. And ? I’ve taken lots of Aboriginal women’s skeletal remains back to country.

And does that help the spirits, then, when you do that? I know it might sound weird, but yes.

### Roslyn Field

90 Ms Field was 65 years old in 2018. She is a Walbunja community elder, Walbunja being the name of a clan within the Yuin nation. Ms Field is the sister of Vivienne Mason. She is a member of the South Coast People’s claim group.

91 Ms Field said she had been coming to Narooma and Bodalla as a family since she was a child visiting relatives and picking which was the main occupation Aboriginal people had on the South Coast apart from timber mills.

92 Ms Field recalled Vivienne Mason raising the Isabel Street land at a meeting of the Biamanga and Gulaga joint boards of management asking of there was any cultural significance of the Isabel Street land. No one said the Isabel Street land had any cultural significance. She had never heard of there being any cultural significance to the Isabel Street land.

93 In her oral evidence Ms Field said Walbunja was one of the 12 or 13 clans of the Yuin covering the area of Narooma and to the north of Narooma. She agreed that traditionally only Walbunja people could speak for the Walbunja area but that the custom had become more blurred since invasion. Her personal view was that:

… anything within the Walbunja area I would defer to Walbunja people, just same as down a bit further south, peoples on Djiringanj land - land - I would probably defer to Djiringanj people.

94 Ms Field considered that her native title rights would extend to the whole of the South Coast claim area because of her lines of descent. In her childhood they had spent most of their time travelling up and down the coast hearing stories. She said some people might consider it remnants because for a long time Aboriginal culture had to go underground and Aboriginal people were not encouraged to maintain their language and culture but stories were passed on by elders, as well as cultural things like shell work. As a Yuin person she considered she could go anywhere in Yuin country “within certain restrictions”. Yuin country extended from the Shoalhaven to the Victorian border. There were areas she had been told by her elders no to go like Pippi Beach and she had never been there. She explained that:

…in a lot of cases they would say, “Don’t go there. You can go there. You can’t go there. Don’t – you can’t catch that fish” or, you know, different things like that. You just, as a child, just soaked up information like a sponge.

95 She said that as a Yuin person she would be entitled to fish unless it was a marine park or some other government regulation prohibited it. She knew Glasshouse Rocks as a good fishing and diving spot. She knew as number of Yuin people who fished and dived there. She said that they were entitled to do so and she was “a very strong believer in Aboriginal fishing rights”. Glasshouse Rocks was near to the Isabel Street land and she would assert the right to fish and dive at Glasshouse Rocks. She said a Walbunja person should be entitled to fish at Little Lake depending on the land tenure there. She has also picked native fruit and had been told about those by her grandmother, mother and sisters. She said that her entitlement to do so nowadays was complicated by land tenure but if she was allowed to access the land she would feel entitled to do so to collect native fruits. Depending on the tenure, a Walbunja person could collect native fruits from the land. She knew of Burrawang seed but had never collected it herself as it was poisonous and had to be prepared a certain way. She considered that she had an unbroken connection to the whole of the South Coast. She asserted that connection to the entire South Coast, and not only places of particular significance. She said all land has significance but particular sites have additional significance. She agreed that when she asserted rights as a Walbunja person she could do so anywhere in Walbunja country.

96 She recalled the meeting of the Gulaga and Biamanga joint boards of management where Vivienne had asked members of the boards about the significance of the Isabel Street land to Aboriginal people. She thought it probable that Vivienne had a map with her.

97 Ms Field did not know of any person who went onto the Isabel Street land. She said she did not know everything but as the joint management co-ordinator for the Gulaga and Biamanga joint boards of management for five years she had never heard of anyone saying the Isabel Street land had significance.

### Shirley Foster

98 Ms Foster was 83 years old in 2018 and from Wallaga Lake. She is a member of the South Coast People’s claim. She was a member of the Merrimans Local Aboriginal Land Council and is a traditional elder of the Yuin people. Merv Penrith (now deceased) was her partner for 30 years and was also from Wallaga. She was born in Bega and moved to Wallaga when she was 14. She went back and forth to Bega but moved to Wallaga permanently in 1966. She knows Narooma very well especially the sites of significance to Koori people. Mystery Bay is a site of significance as is Gulaga Mountain. There are also some burial sites in the area. Ms Foster had never heard of any burial or significant sites on the Isabel Street land or of anything like that. Her father was a traditional elder. He knew where all the significant sites were in this area. The same is true of her son Warren Foster. If there was a significant site at the Isabel Street land they would have said so. They never did. She did not know anyone who has said there is Koori significance in the Isabel Street land. The only knowledge she has of the use of the Isabel Street land is of kids riding bikes and motorbikes through it. In her oral evidence Ms Foster said she would call Wallaga her traditional country. She could speak for that country. Her mother was Gunai Kurnai and her father Yuin. She learnt about both countries from her family. She could also speak for Gunai Kurnai country. She said she classes herself as a Gunai Kurnai and Yuin woman. She asserted native title rights in Gunai Kurnai country. Her father was born in Batemans Bay and the family travelled all up and down the coast where he worked in sawmills. He would not sit and talk because he was working. She learnt about Yuin country from her partner Merv Penrith who was a Yuin man. She asserted rights to do things on Yuin country as a Yuin person. She said she could do food gathering like getting seafood, oysters and shellfish called bimbullas (cockles). She said she could do this at Narooma as of right as a Yuin person provided the area was not the subject of a lease.

99 Ms Foster knew of Glasshouse Rocks which was Yuin country. She agreed that Yuin people could fish there because they were Yuin. She had not heard of Little Lake. She was aware of Fosters Bay but had never been there. She had been to Isabel Street but not onto the land. She agreed she could go onto the Isabel Street land as of right as a Yuin person provided it was not owned by white people. She said she thought she had the right to go into any bush on Yuin country that was not private property. She could also collect things from such land such as Burrawang plants. She had been taught by her elders to collect bush foods. She would also be able to take ochre, grasses and wood from the land. She could do so because the land was Yuin country and she was a Yuin person.

100 When asked about sites of significance in Isabel Street Ms Foster said:

What’s there going to be in Isabel Street? Isabel Street is a built-up area, come on.

101 She explained:

Sites of significance is a place where the old, old people may have gathered, but the younger people these days, they don’t gather there. I mean, people my age, they’ve never – to my knowledge hasn’t gathered there, but that’s me.

102 She said no one had camped on the Isabel Street land to her knowledge.

### Lynette Goodwin

103 Ms Goodwin was 65 years old in 2018 and a community elder of the Yuin nation. Her father was a Yuin elder and her mother a Wiradjuri woman. She is a member of the South Coast People’s claim.

104 Gulaga and Biamanga Mountains are places of major significance to the Yuin nation which spans from La Perouse to the Victorian border. Gulaga Mountain is a women’s site where there is a healing rock, a women’s fertility rock and where rituals occurred in the past and Biamanga Mountain is a men’s site where men’s ceremonies took place in the past.

105 Ms Goodwin was born in Narrandera and moved to La Perouse as a young child. Throughout her childhood her family would come to the Narooma and Bodalla area for seasonal picking. She has known this area intimately all her life. Her father always told her cultural stories about the South Coast and their connections to it. According to Ms Goodwin, every family has their designated story tellers. Her father was one and her sister Deidre Martin is another one, as she knows lots of stories.

106 Ms Goodwin has had direct knowledge of the Isabel Street land since she was in her 40s. When she camped at Mystery Bay she would buy blocks of ice from a house on Payne Street which is near the Isabel Street land. She did not have any knowledge of anything of cultural significance about that area because it was never discussed or contemplated at all. If something was important there of cultural heritage or knowledge she said they would have known about it.

107 She recalled the issue being raised at the Biamanga board of management meeting in late December 2016. The Biamanga and Gulaga boards unanimously confirmed that there was no cultural significance to the Isabel Street land. At those meetings there was a combination of knowledge holders of traditional law and custom which extends not only to Narooma but to the whole region. She described those boards as a “packed house” of Aboriginal knowledge. Ms Goodwin stated that there was no debate as no one disagreed with the decisions. In oral evidence Ms Goodwin said she was Vivienne Mason’s first cousin. Her father and Vivienne Mason’s mother were brother and sister raised at La Perouse. She was also raised at La Perouse with Vivienne. She later moved around with her husband who was in the military. They retired to Narooma five years ago. When they were living away from the area they always maintained their connection with it and would return for holidays camping at Mummaga Lake and Brou Lake north of Narooma. She considered that area as part of her traditional country. She could speak for that area and the two mountains. She said there were sites all up and down the South Coast about which she had traditional knowledge she had been told. She agreed other Aboriginal people might not know what she did and she did not know everything either. Her family would go pippying and shell collecting. She talks to her ancestors all the time. The old people used to do that as well. It was important to connect to the spirits of the country. That is why she moved back to the area. Her brothers all fished the area. Everyone had a role on food production and food is shared when camping. If there was any issue about traditional land she would speak to the elders about it as everyone would have to be involved.

108 Ms Goodwin described the meeting of the Gulaga and Biamanga joint boards of management about the Isabel Street land. She said:

Well, there was – you know, there was discussion because there was a lot of knowledge holders there really, and awesome knowledge holders there. And sort of like Mickydo, Michael Darcy, he – he was great. And so, the discussion happened and then I must say that this was only registered – it was the Aboriginal owners’ meeting because we have other people on the Board as well that are not Aboriginal. And so, this was just an Aboriginal owner meeting, and they all voted that – that there was of no significance for Isabel Street.

109 There were people at the meeting who could speak for Narooma. She said:

…there’s Lorraine Naylor and there’s Michael Darcy, and there’s also Betty – Betty Solomon, and there’s – Kathy Jones has a really good knowledge of it because, as I said, she was on the negotiating panel…

… Iris White… Cheryl Davidson, and Cheryl Davidson is more so the – through her family because each family have knowledge holders, and I must say my sister [Deidre Martin] is one of those knowledge holders also…[as] there are particular people in each family that are the knowledge bearers… And Iris will – will tell you that Cheryl is the knowledge holder, even though Iris has a lot of knowledge, but Cheryl is the bearer.

110 She explained that her sister, Deidre Martin, was the knowledge bearer of her family as her father would tell Deidre all the stories and give her more information as time went on. Every family had different versions of the same story about sites but it did not mean one was right and the other wrong. She said the Yuin connection extended from La Perouse to the Victorian border.

111 She knew the Isabel Street land and had been there. Vivienne Mason had made her aware of the Isabel Street land. When Vivienne raised the Isabel Street land at the joint boards of management meeting most of the people were aware where the Isabel Street land was. Its location was pointed out to them and a lot of them knew it. They said stuff about what they knew of it and it was agreed that there was no great significance on that land. The topic discussed was the cultural significance of the Isabel Street land. She explained significant sites as follows:

I would say of significant sites, like, for example, Gulaga Mountain has these big bolder rocks and they – because it’s a woman’s site, and there is there – there’s a healing rock, and also there’s a fertility rock there, that’s – that’s one example. And Biamanga has a great significant site of where there were men’s ceremony and initiations taking place at Biamanga. So, that’s the significant sites is what I would say.

112 She believed she had rights to go pippying on Pebbly Beach as did her family because they were descended from ancestors of that area who had a connection with that area as she did. The same with hunting in that area, as well as bush medicines.

### Susan Heycox

113 Ms Heycox was 60 years old in 2018 and said she was a custodian of the local area and the Yuin nation who was well known in the Stewart family and the whole Southern Region. She was born in Bega and had lived in Narooma since 1960. She is a member of the South Coast People’s claim group.

114 Her mother was of the Gunnai people and her father was a Stewart of the Yuin nation. He was a fisherman. He regularly fished at places like Corunna Lake near Mystery Bay, Wallaga Lake near Gulaga, Brou Lake near Turros and Mummaga/Dalmeny Lake. She said her elder people have always transitioned between Victoria and New South Wales including in the Narooma area. She learnt about Koori culture in the Narooma area from her family, her parents, siblings and aunties and uncles. They are the mob and they pass knowledge from generation to generation. Her knowledge comes from both the Gunnai people and the Yuin people. Norman Patten is her brother but from a different father.

115 She and her family had always camped in the Narooma area all the way down into Victoria. Camping was a part of her childhood. She still camps at Mystery Bay. There used to be some Aboriginal people camping at Smyth’s Oval a long time ago. She knows where the Isabel Street land is but has not been there. She has never heard of anyone saying that they have been involved in cultural activities at the Isabel Street land. To the best of her awareness she does not know of anyone saying the Isabel Street land has any Koori significance and in her opinion it is not a significant site. In oral evidence Ms Heycox said her father was George Julip Stewart who was born in 1919. She knew Little Lake. In response to what Mr Carriage had said in his affidavit about fishing with her father at Little Lake she said it was not known to her that her father fished at Little Lake. She said:

Just in regards to my father, I have fished – done a lot of fishing with my father, as he has took his children with him. And they were places of Wallaga Lake, Brou Lake, Tuross Lake, even Tilba Lake. Just down the road here. Wallaga, Tilba, Corunna Lake, Brou Lake and Tuross Lake.

116 In response to what Mr Carriage had said about her father taking the bark from trees in the Isabel Street land which he would boil up to cure his nets she said:

I don’t have any recollection of it, right. I’m not familiar with the land, and up until now ..... with that. But I don’t have no recollection. And it’s not in my affidavit, but my recollection of doing anything with the nets, as I got older, was helping him make nets. And also soaking them in tar.

… That was done on our property at Narooma, which we still have today. And boiling tar. Tar stiffens up the nets. Yes. And then he let them dry, and that’s how it was done. But I do not have any recollection of taking bark off trees and doing whatever supposedly had to be done to treat nets… if we were using bark it would be to light fires wherever we were camping on riverbanks… To light a fire to cook a meal, or for heating. Not for boiling – not for boiling. Not for boiling up a whatever, a container, and I’ve never seen a net put in a container. And not for – and anyway, my father didn’t carry nets with him wherever he went, his netting was left here in Narooma on our property…

…it’s 57 McMillan Road, Narooma, which was bought in 1960. The property – the property consisted of where he made his nets. Where he has stretched his nets for over on the lake at Narooma. And, yes. And as far as I – my knowledge is, right down to the edge of ..... , is – is he wanted to stiffen up his nets to make them secure to put into the lake. He used tar, as in the tar from a road – making a road. Yes. Not – not – I don’t recall anything to do with bark, or how would you go about even boiling up bark or doing anything with bark. I do not have any knowledge of him doing that.

…

Yes? I don’t recall anything of gathering bark to do anything to those nets.

And when you say you don’t have any recollection of him gathering bark, do you mean in the Narooma area or anywhere? Anywhere.

Okay? No. I mean, there’s a – there’s a difference, right. As I said yesterday, there’s a difference. Our family was a traditional Aboriginal family. We’re transitional. Even though we were home-based in Narooma, we were transitional, and the only way we gathered bark, or wood or anything was when we moved to places to work in bean paddocks.

Yes? Or potato picking in seasonal work when fishing – when he wasn’t fishing. And that’s when we used to gather wood just to use for an open fireplace. That’s it.

117 Ms Heycox had attended meetings for the South Coast People’s claim and described the claim group as the custodians of the Yuin nation which extended from La Perouse to the Victorian border and west over the Clyde Mountain to the eastern side of the ranges. The claim covered the Narooma area. She confirmed she was born in Bega but had been brought to Narooma when she was two and Narooma had remained her home town since then. Her father was born in 1919 in Sydney but was from the South Coast. Her brother Norm Patten was born of the same mother but a different father but had lived here most of his life even though he was not Yuin. She said:

…he’s not Yuin. He has lived in Yuin Nation, brought up in Yuin Nation, but he has got – his father was – Norman’s father was actually a Yorta man from Cummeragunja, but our mother was Gunai, and that’s how we put it in – in our cultural play of speaking about family.

118 Her father was brought up by Snapper Carriage who was related to Owen Carriage, perhaps being a great uncle or grandfather to Owen Carriage. Her father was the oldest raised by Snapper Carriage. He was known as the oldest brother of the family but he took the Stewart rather than the Carriage surname. She said old people only tell you what they want to tell you. An older sister of her mother had told her things that she had never told the other 26 or so nephews and nieces. She agreed that it was possible her father had taught her brother things he had not taught her. She said her father had taken them fishing,

down to Wallaga Lake and places while he set the nets in the boat or, yes, go in the boat with him, row the boat out, we would have to set net – you know, fall over the back of the boat and then pick it up the next day.

119 She said also:

…we used to sell Christmastime cooked prawns and fish at the front of our house while he went out to clean his nets out and reset the boat up to go out again that night.

120 Ms Heycox explained that when walking with her brothers and sisters they would see an elderly man who used to camp at the edge of the oval (Smyth’s Oval) but she did not know if he was Yuin. She said her father was a lake fisherman but she found it unlikely he had fished in Little Lake when other lakes were so big and given the amount of fish he used to catch but accepted it was hypothetically possible. Her father would take fish with him to give to people, sharing food being a traditional thing Yuin people still did today. She agreed that sharing food had been passed down the generations. The old people had taught her that you were Yuin if you were born into a Yuin bloodline. Her brother Wally Stewart was passionate about fishing rights. She said:

… fishing rights are down to the fact that being Aboriginal people, we should be able to go and eat food out of the water and get food out of the water without having to go – to be incarcerated for getting a certain amount of food.

121 She continued:

I’ve been brought up with it. It’s been – I’ve been brought up with it. I’ve grown up with it. I’ve been growing up with this and so was our family, and not only we’re fishing, we’re living off the land and been working in – as in transitional, as I told you, in bean paddocks and on riverbanks as well as – you know what I mean? It’s just something that we’ve had to – that our parents had to survive.

122 Her family did not hunt and collect native foods, however. It was possible this had occurred when she was a child at Wallaga Lake but she was not aware of it happening today. She did not know if Yuin people might have hunting rights today but thought they could probably collect wood for personal use. As to the Isabel Street land she said:

I’ve never been taught that there’s anything of Aboriginal on the land or nobody has told me there’s anything on the land or there’s – there’s a burial site there, or there’s artefacts there, or – I don’t know. Yes. I’m just saying – what I’m saying off now is if there’s anything on the land, I will do something about it, but if there’s not anything there, I don’t know about it.

123 She also said:

I would say everywhere we travel down the south coast there would have to be some sort of sites of Aboriginal people’s middens, eating sites, camping sites, probably even burial sites.

124 She explained “Koori significance” as:

…there are places where our people have travelled, where our people have camped, right, throughout the – what do you call it, centuries or however many years ago and those sites – some of these sites are still there, but some people don’t like to let people know where they are either. Yes. Now – but I know that ..... know that down at – past Wallaga Lake that they found a midden – did find a midden site. Down near Camel Rock ..... down the – yes – they – it’s just my personal opinion is, I think, people – Aboriginal people can now keep culture with culture – can’t put the word out that much more – and I think Land Council is keen to look after the culture of what’s in the community out there.

125 She said Owen Carriage was her first cousin. This exchange occurred:

So if Owen spent some time with your dad and was helping him prepare fishing nets that had been treated with bark, that’s possible, isn’t it? Yes. It’s possible. Yes.

…

If Owen Carriage says that he walked from Wallaga Lake when he was about six or seven with a group of old men from his family – for example, a man called Ben Parsons who is his grandfather – and camped around Little Lake and on the land the subject of these proceedings, that’s possible, isn’t it? Yes. Yes. It is possible, because, as I said, ..... traditional ..... walking. Our people walked and transitional – we did it transitionally in our family for seasonal ..... so there is nothing to stop anybody from walking from one place to another place, to another place, whether it’s gathering food, hunting, fishing or camping.

### Terence Hill

126 Mr Hill was 59 years old in 2018. He is a Yuin man and a member of the South Coast People’s claim. He said Yuin people were really clan groups and a person could only be an elder for their own clan. Further, the traditional practices for how one became an elder have largely gone. He did not see people being initiated these days and holding knowledge. People turned 50 and claimed they were elders rather than it being based on contributions to the Aboriginal cause or community. He thought this case was a product of power struggles in the community because it was dysfunctional. He said contemporary Aboriginal society had lost knowledge and practice of traditional arrangements. He said his kinship and cultural ties were Yuin and they had been given to him through his bloodline and it did not matter where a person grew up. He said all Aboriginal people were displaced people as they had rounded all of them up and put them on missions and reserves. He is Yuin through his mother. He was born and raised in Sydney but frequently came to Narooma for visits or to continue his connection with country. He acquired knowledge about the local landscape and cultural practices on the South Coast from his grandmother and uncles on his mother’s side. He learnt a lot of things about camping and was told about areas to go and not to go.

127 Mr Hill said he did not recall any stories about the Isabel Street land being a site of cultural significance in relation to ceremony or birth or even a camping site. He said the truth is all land and water in Australia is significant to Aboriginal people but there were places of higher significance where Aboriginal people strive to continue their traditional activities and connection. He was not aware of any higher significance of the Isabel Street land or any traditional activities in relation to it and it had never been mentioned to him in discussions with his grandparents, aunties and uncles. He thought the applicants for the South Coast People’s claim were not representing true knowledge that may exist within clan groupings.

128 He said he had never heard of anyone going onto the Isabel Street land for resources like reeds, native cherry tree, ochre, medicine plants or Burrawang and that these were available everywhere around Narooma. He did not consider Aileen Blackburn or Marilyn Campbell to have traditional knowledge about land in Narooma. He did not believe their evidence was true. He thought Ron and Vivienne Mason were in a better position than Aileen Blackburn or Marilyn Campbell to assess traditional law and custom relating to the Isabel Street land and thought Ron Mason has a very good grasp of Aboriginal traditional law and custom in and around Narooma and the region. Ron Mason was close to Mervyn Penrith and Ted Thomas who were responsible for gaining protection of culturally significant sites such as Gulaga and Biamanga and were established Yuin knowledge holders of the South Coast region. Ron Mason also gained knowledge from Percy Mumbler. He believed that if the Isabel Street land was culturally significant it would have been raised before this case but never had been. He said that the history of displacement and dismantling of traditional structures of Aboriginal people has caused Aboriginal people to struggle with what is appropriate about what stories genuinely apply to lands and who has the stories. In oral evidence Mr Hill confirmed he was the Chief Executive Officer of the Merrimans Local Aboriginal Land Council the area of which was south of Mystery Bay but that he lived in Narooma. He agreed he asserted native title rights in the South Coast People’s claim by reason of his descent from a family member from that area. He said he asserted such rights over the entire South Coast including the Isabel Street land as part of the total claim. He said his grandparents, aunties and uncles had taught him about the clans of the South Coast. The rights he asserted included going on to land for traditional purposes, including hunting and gathering. He said:

… all land is important to Aboriginal people, you know. We’ve always claimed that. We’ve always claimed sovereignty…

129 He explained:

You know, it’s more around the general use of areas, and in terms of Aboriginal cultural practices, there were sites of significance where ceremonies, spirituality and business was done, and there were other general sites. And that’s what I believe this site could be, of a general nature.

MR GREGORY: So you would agree that Isabel Street is a site of general nature?

TERRY HILL: Yes.

MR GREGORY: Well, you’d agree, wouldn’t you, that as a Native Title holder, you’d still be entitled to assert rights in an area of a general nature?

TERRY HILL: Yes. As I said, all the land is important to us.

130 He continued:

…here we have a situation where we’ve got the site that’s not a significant or ceremonial site, but this site can be used for the - for the well-being of the - of the community. You know, we live in an area where there is very little industry, very little job opportunity, and we’re suffering through opportunity to improve lives for people, you know, whether that’s employment or health, and this is an opportunity. I see this as an opportunity where the things can be created, that people can take that opportunity and improve their lifestyles and their position in society…

… it’s about distinguishing that Native Title on solely that piece of land, not the whole title, not the whole claim, so that the local community and the surrounding community can gain some benefit…

…

Wagonga wants to develop the land, and like any landholder or owner, they want to provide some improvement and opportunity. You know, it’s not just about Wagonga and its benefits; it’s the broader benefit for the community. You know, if this goes ahead, you know, that we look at how many jobs it’s going to provide, the sustainable - sustainable income, so looking - going into the future there’s something sustainable.

131 Mr Hill agreed he would assert native title all around the Isabel Street land. He gave evidence that at a meeting a member of the applicant group for the South Coast People’s claim said that this proceeding could jeopardise the whole of the claim which he did not wish to do. He said there were no culturally significant sites on the Isabel Street land and it had never been mentioned but he still asserted it was his country and he had rights there. When asked what percentage of Australia he would say should be subject to native title rights Mr Hill answered “all of it”.

### Ronald Mason

132 Mr Mason was 73 years old in 2018 and described himself as an elder of the Yuin nation. He said he had lived in Narooma nearly all his life. He is a member of the South Coast People’s claim group. He grew up around Narooma then went to Sydney for 10 years before moving back to Narooma when he was 32 and had lived there ever since. He used to go past the Isabel Street land when he was a child to go fishing near Glasshouse Rocks. When he was about 8 years old a tip was put on the southern part of the Isabel Street land but it stopped being used as a tip in the late 1960s. Now the Isabel Street land is bush adjoining industrial land. He often goes to check the Isabel Street land as people dump rubbish on it which they clear up. He said he grew up when all the old people were alive who handed down information about sacred sites and no one ever mentioned anything about the Isabel Street land to him. He had cut wood on the Isabel Street land and had never seen anything of significance on it.

133 Mr Mason said the older people like Uncle Teddy Thomas died when Mr Mason was about 16. Others who handed down knowledge were Merv Penrith and Bing Mumbler. They were elders and passed a lot of stuff down. Mr Mason benefited from their knowledge and the knowledge of his mother. When WLALC considered the Isabel Street land in late 2016 Mr Mason was present. He said the members of WLALC did not know of any significance of the Isabel Street land or traditional laws or customs relating to it. They used to drive past the Isabel Street land when he was a kid to go fishing. They thought of it as a tip but nothing of any significance about the Isabel Street land had ever been mentioned. Mystery Bay was different. It is a significant place. So is Potato Point at Bodalla. There are a few other places where people would camp and fish. He had never seen camping on the Isabel Street land or any religious ceremonies on the Isabel Street land. He said he knew the area really well, all along the coast. No one had ever said anything to him about the Isabel Street land and if anyone had known he would have known. He said the people opposing the application are young people who do not know anything about the Isabel Street land.

134 He said his family were brought up in Bodalla and they picked seasonal stuff. They lived out at Wallaga Lake for a while at the reserve. His Nanna lived there and he got to know all the old fellas there. He used to talk to Bing Mumbla. His family used to stay with Amy Hoskins and those fellas, real old people. His grandmother was a medicine woman and handed lots down to his mother. He learnt knowledge from Merv Penrith, Uncle Teddy Thomas and Bing Mumbla. He learnt fishing from them. The old fellas were trying to revive corroborees to teach the young but it never happened. This was in the 1950s when it could not be done because of the prejudice and everything was controlled. They could not do Koori stuff but they used to still talk about it.

135 Mr Mason said he had knowledge of traditional law and custom around Narooma. He knew important places no one else did. This was taught to him by Bing Mumbla. None of the applicant group for the South Coast People’s claim knew this information. When he was a kid he sat in the bush all the time. He used to regularly hunt kangaroos, rabbits and fish. He was taught this. He said that Aboriginal people talk about places of more or less importance and the Isabel Street land is not a significant place. There are cliffs on the golf course which are significant. The Isabel Street land is not a site of importance to the Koori community. There is nowhere to fish on the Isabel Street land. The businesses and houses are right there. According to Mr Mason, Aboriginal people don’t like to conduct traditional ceremonies in the view of white people and would not and do not conduct them on the Isabel Street land.

136 Mr Mason did not believe the affidavit of Mr Carriage as Mr Mason was not aware of any activities as referred to by Mr Carriage occurring on the Isabel Street land. Mr Mason said Mr Carriage was from Ulladulla which is about an hour and a half north of the Isabel Street land by car. Mr Mason said he knew many of the elders whom Mr Carriage claims to have joined on walks from Wallaga to Narooma including Pop Bim, Uncle George, Uncle Earnie, Uncle Bugs (Stanley), Uncle Dinny and Uncle Stanley. He knew George Stewart as Julip Stewart and Uncle Earnie as Earnie Briely. They were both professional fishermen and not once did they mention the Isabel Street land to Mr Mason.

137 Mr Mason said he could not understand why Julip Stewart would be walking from Wallaga to Narooma at this time as he lived in the town down near the football oval. He said Mr Carriage may have dived and fished at Glasshouse Rocks to the south east of the Isabel Street land (not the south west as Mr Carriage said) but could not have carried out those activities on the Isabel Street land.

138 Mr Carriage also incorrectly identifies Little Lake as to the west of the Isabel Street land. Mr Mason said Uncle Julip was a professional fisherman and fished in the ocean and off the beaches and would not have fished in Little Lake. He had never heard of anyone fishing or catching prawns in Little Lake. If Uncle Julip had fished in that area he would have done it where the lake meets the ocean where fish are plentiful.

139 Mr Mason said that Mr Carriage was wrong that there are freshwater sources on the north and south sides of the Isabel Street land. Dams have been constructed around the Isabel Street land but there are no freshwater springs on the Isabel Street land. Mr Carriage referred to camping on the Isabel Street land. No one had ever told Mr Mason about Aboriginal people camping on the Isabel Street land. Aboriginal people would camp behind the football oval and very rarely went into Narooma at those times as it was very prejudiced. Mr Mason said the Isabel Street land had never been a camping spot for Aboriginal people and it was not safe for traditional cultural practices to be carried out there. He said that they used to camp down on the beach where they were protected from the southerly and easterly winds and they do not need to go to the Isabel Street land to get that protection.

140 Mr Mason said it was not true that old Aboriginal men from Wallaga would get drink from Narooma. Aboriginal elders from Wallaga would go to Tilba Tilba instead which is only a short distance from Wallaga.

141 Mr Mason said that fishermen such as Uncle Julip would collect bark from trees when building nets but the iron bark required could be found anywhere. Mr Mason had never heard of Julip Stewart taking bark from the Isabel Street land as detailed by Mr Carriage.

142 Mr Mason did not believe Mr Carriage could have been 13 or 14 years old when the tip was put in down at Glasshouse Rocks Road but would have been an infant or not alive at that time as it happened when Mr Mason was 8 years old.

143 Mr Mason had never heard of anyone going on the Isabel Street land for bush tucker and regardless he stated that there is wattle gum and bush tucker everywhere not just on the Isabel Street land.

144 Mr Mason did not consider Mr Carriage to be a knowledge holder. Mr Mason said he knew the area really well and used to speak to the great knowledge holders who benefited from the knowledge of Ted Thomas, Merv Penrith and Bing Mumbla who had never said anything about the Isabel Street land being of significance. In oral evidence Mr Mason confirmed he was a member of the South Coast People’s claim group. His father’s side of the family was from La Perouse and his mother’s side from Monaro up in the mountains about an hour’s drive from Narooma. He had been involved with WLALC for a very long time. He was married to Vivienne Mason the current chair of WLALC. He knew the South Coast claim went from the Victorian border to Sydney. He said since he came back to Narooma he had done a lot of fishing which he had a licence to do. He said the question whether a Yuin person had a right to fish in waters within Yuin country was untested and as things stood you needed a fishing licence. He used to dive at Glasshouse Rocks for abalone and lobsters, which his father had taught him how to do, but back in those days the women did the diving. He agreed that when doing so people are not allowed to take too much and have to leave some for people coming later. He had hunted around the Narooma area in the past when he was young. They used to hunt kangaroo, possums, porcupines and goannas and eels and go spearing mullet. They also took ducks. His father taught him how to hunt and old Bing Mumbler and a few other old blokes. Bing Mumbler was a strong influence on Mr Mason growing up. He was interested in what Bing Mumbler had taught. He taught his children what he had been taught. His mother was a medicine woman as was his grandmother. You could go anywhere in the bush to get bush medicines which were secret to his family. He no longer collected ochre although one of his daughters did for traditional dancing she was taught by her mother, Vivienne Mason. Vivienne had been taught the dances by her mother who was a Yuin woman. He ate wild cherries which were plentiful around Narooma. His mother had showed him they were safe to eat. All the old people would eat them. He was aware of the Burrawang plant but had never seen or heard of anyone taking the seeds which he believed were poison. That was common knowledge like the wild cherries.

145 Mr Mason believed Yuin people should be able to take periwinkles off the rocks at the beaches around Narooma and to collect pippies, dive for abalone and lobster, go fishing and collect oysters but was not sure if they were allowed to do so. He had collected oysters and periwinkles and stuff and shared the food with some of the real old people as his family taught him that and it was part of their tradition. When growing up he lived and camped with other Yuin people and they all shared food. He camped with his family up and down the coast, moving around doing seasonal work. When they were not working his father and uncles would get seafood and share it with the rest of the mob. They would stay with his grandmother at Wallaga Lake.

146 His son had tried to defend proceedings for taking too much catch by relying on native title rights but he lost the case. A lot of people in the area believed that Yuin people had a right to fish in Yuin country including Mr Mason. Mr Mason thought that right related to fishing off the beach not from boats. When he had a fishing boat he had a licence.

147 He explained significant sites as follows:

Well, a significant site means to me is a burial ground, somewhere - but probably right along the coast is probably significant but just the - just middens and all that sort of stuff but, you know, significant ones means traditional sites, things like that.

MS JOWETT: Would that include, say, scar trees as well?

RONALD MASON: Yes, it would, yeah.

MS JOWETT: And what about some artefacts, if people found artefacts would that be a significant - - -

RONALD MASON: Well, you find artefacts everywhere, you know. You find them up the river here in low tide, like the water’s up high now but there’s a lot in the water.

MS JOWETT: And so you’re saying just here at the water, what, the Wagonga Inlet?

RONALD MASON: Inlet, yeah.

MS JOWETT: So is that a significant site for that reason?

RONALD MASON: Well, it is but most days it’s under water, you know.

148 There were some very significant places of which Mr Mason was aware. Elders had told him about these places. He had told his family and a couple of people about them. He did not know if land which did not have significance could have native title rights relating to it. He explained that that some people could not be trusted with information about significant sites. He agreed there might be other significant sites around Narooma which he did not know about, but he thought he had a fair idea about all the significant sites and would be surprised if there was one he did not know about. He agreed he was just one knowledge holder and there could be others and that they could know about sites he did not know about. He agreed Mystery Bay was a significant site for all Yuin people. He agreed that when Aboriginal heritage was discovered during building works WLALC would be contacted to supervise the works and it upset him when the heritage was not preserved.

149 He agreed he had been an applicant on a native title claim which had included Narooma and the Isabel Street land. It was a blanket claim and he could not recall what had happened to it. The claim was initially by Mr Mason and his wife Vivienne Mason but was amended to include a number of elders as applicants.

150 Mr Mason said back when Mr Carriage was talking about in his affidavit Aboriginal people would not have carried out traditional practices on the Isabel Street land because it was in the town with white people around. They would have done traditional practices away from the town and instead do it around Wallaga or over near Gulaga Mountain. Due to prejudice at the time (the late 1950s) it would not have been a good idea to do any dancing or ceremonies near Narooma. People camped near the football oval where his family had camped with other Yuin people but they would not do dancing or ceremonies there as it was in the town. Dancing and ceremonies would have been done in secret near Gulaga. When they were camping at the football oval they would go to Wagonga inlet to catch seafood.

151 Mr Mason said Aboriginal men would not come into Narooma for alcohol as it was a prejudiced town back then and instead they went to Tilba just down the road from Wallaga Lake. He said Julip Stewart was married to his mother’s sister and he had been fishing with him a few times. They treated their nets with bark from the ironbark tree. They had been taught to tan their nets by white fellas. It was a common thing which was done everywhere. He agreed the tip was located where there was now industrial development and extended onto the Isabel Street land. WLALC had previous proposals to develop the Isabel Street land which had not come to fruition.

152 Mr Mason said he would use freshwater if he needed to just like anyone else and had collected wood including from trees that had fallen over on the Isabel Street land. His brother had also collected wood from the Isabel Street land. Other people from town had also taken wood from the Isabel Street land. Mr Mason used to patrol the Isabel Street land to protect the trees from being cut down.

### Cheryl Moreton

153 Ms Morton is the Chief Executive Officer of WLALC. She is an Aboriginal person but not a Yuin woman. She moved to Eurobodalla in 1984. She visited her mother in Narooma since 1984 and her mother had never mentioned the Isabel Street land. She said WLALC considered developing the Isabel Street land from 2014. In that same year Steven Freeman, an Aboriginal archaeologist, did a four day sites identification and training management course with WLALC and Bodalla Local Aboriginal Land Council. Some of the people who did the course from WLALC did a walkover of the Isabel Street land and said it had no cultural significance. Ms Moreton had been to the Isabel Street land three times. She described it as hilly with no clear spaces as it is all bush. She did not believe any middens would be on the Isabel Street land. No one had spoken to her about the Isabel Street land being of any significance and she was not aware of anyone going on to the Isabel Street land for cultural purposes. She said that when she went to Gulaga Mountain she went to go up the left side but stopped as she knew where she can and cannot go. She never got that feeling with the Isabel Street land. In oral evidence Ms Moreton said she was the chairperson of Bodalla Local Aboriginal Land Council. She could be a member of the Bodalla Local Aboriginal Land Council although she was connected to the Yuggera tribe at Brisbane and the Goenpul tribe at Stradbroke Island and the Bundjalung People up in Tweed Heads. Her family had moved down to the South Coast for seasonal work at first and in the end they decided to stay. She stayed in Sydney until 1984 but used to visit her mother who had moved down about 15 years before 1984.

154 Ms Moreton confirmed that the current board members of WLALC were Vivienne Mason, Lynette Goodwin, Ashweeni Mason, Sharon Mason, and Bruce Ella. Vivienne Mason was the chair and Lynette Goodwin the deputy chair. Ms Moreton had never heard of any policy under which an Aboriginal person had to get the permission of WLALC to collect bush foods or go hunting on Crown land in the area of WLALC.

### Lorraine Naylor

155 Ms Naylor was 65 years old in 2018. She is a Yuin woman who has lived at Wallaga Lake all her life. She is a member of the South Coast People’s claim group. Her mother, a Yuin woman, had also lived at Wallaga Lake. She said the Yuin extend from Sydney to the Victorian border. She is on the board of the Gulaga National Park board of directors. She said that she used to walk down Isabel Street with her brothers when she was a child as it was a short cut to get to the tip where they would look for things. She saw the Isabel Street land. It was bush. No one ever told her the Isabel Street land was used for any Aboriginal activities. She said, “[w]hen you’re growing up people would tell you that sort of thing, but no one had ever mentioned that area”. The only site of significance she knows in Narooma is Mystery Bay where there are a lot of middens. She knew sites of significance because they would be taken there by the old folk and told stories of the places. They used to go up to Gulaga Mountain with the old people. There are sacred sites there and it is a women’s mountain.

### Norman Patten

156 Mr Patten was 66 years old in 2018. He said he was aware of significant sites in the area since he was a child, including Loaders Point about 4 km from the Isabel Street land where Aboriginal people used to camp. There are also two burial sites in the opposite direction to Loaders Point from the Isabel Street land. He said the Isabel Street land was not a significant area. People might have transited through the Isabel Street land but it is not a camping, eating or fishing site. Another significant site is at the mouth of Wagonga Inlet. According to Mr Patten, everybody knows these sites are significant. He said the land and weather tell you nothing happened on the Isabel Street land. He had lived in Narooma all his life and knowledge was passed down to him by elders. There was a significant area for eating and hunting on one side of Smyth’s Oval. He said when you get a picture of where the Kooris slept and danced you could see they were different areas to the Isabel Street land and if the Isabel Street land was used at all it would have just been to walk through it. It is hard rocky terrain and a low hill which means the wind can come up it. No one would eat and sleep there. He grew up in a big family and the old people picked him to tell things and from age 5 or 6 he was told things by the old people like Julip Stewart who was Mr Patten’s stepfather and others.

157 Mr Patten was born in Orbost and moved to the area when he was 5 years old and had lived around Narooma since then. Based on the knowledge passed down to him he had always known where he should and should not go and what is important. He taught this to his grandkids. His sisters and he had grown up with this knowledge. He said,

[y]ou wouldn’t camp on the [Isabel Street] land because it was too cold. People would have camped at Loaders Point behind the dunes and around Apex Park or down near Smyth’s Oval, out of the wind. They would camp away from the ocean breeze.

158 He had visited the Isabel Street land when he was a kid and walked through it. When you walk somewhere you can feel if you shouldn’t go through there. He knows when a place is a sacred site and he does not feel that when he walks through the Isabel Street land. He said based on his knowledge he has no doubt that the Isabel Street land is not significant as an eating, sleeping or burial site and the Isabel Street land is not a place of Koori significance. In oral evidence Mr Patten said he was Brabulung which was part of the Gunaikurnai through his mother and his father was Yorta Yorta. He moved with his mother and stepfather Julip Stewart to the Narooma area when he was 5 years old. He fished with his stepfather who told them where to fish and where to walk and not to walk. He had learnt from his stepfather and old people who came from this country. He agreed Yuin people could speak for the Narooma area under traditional laws passed down from elders. He said Loaders Point was a sacred site as it was a burial place. He said it was a sacred site for the Yuin people which he was not as he did not come from Yuin country. Mr Patten felt uncomfortable giving evidence about land which was not his country as if he did so he might be harmed spiritually which was the way he grew up. The spirits could make you sick and he had been miserable since having been served with a subpoena to give evidence. He said Apex Park was two miles from the Isabel Street land and the Isabel Street land was surrounded by Apex Park, Loaders Point and Glasshouse Rocks which were all places Yuin people camped or fished and which were important to Yuin people. He agreed the Isabel Street land would be Yuin people’s land.

### Clive Freeman

159 Mr Freeman is 37 years old and a Yuin man. He was born in Nowra and grew up in Wreck Bay. Apart from moving to Wollongong for 6 years to complete a Bachelors degree in Science he has continued to live in and maintain connections with Wreck Bay, Narooma and Wallaga being areas he has lived in and visited his whole life. He is a member of the South Coast People’s claim group.

160 Mr Freeman’s grandfather was Harold Freeman who was a serious knowledge holder of the Yuin people covering the Narooma region and all sides of it. His grandfather’s father was also a knowledge holder of the Yuin nation. His grandfather’s brother Maxy Harrison was a knowledge holder for the South Coast for Wallaga and Gulaga. He is one of the last elders in his family line apart from his two older sisters, nana Shirley Harrison and nana Marg who are also important knowledge holders.

161 Mr Freeman and his sister were taken to Narooma throughout their lives every year by their grandfathers and other family members who all know about traditional law and custom in Narooma including the Isabel Street land. They were taken up to Gulaga Mountain and Biamanga lots of times. He had been to the men’s site and his sister to the women’s site and were told stories of country there. As they grew older they have continued to do these things. Their family members taught then about the ways of parents and country including fishing, hunting and gathering. Uncle Ronald Mason is Mr Freeman’s mother’s first cousin. Aunty Vivienne Mason and Uncle Ron Mason are knowledge holders who have spent their life in Narooma and have been taught about the area and know the songlines and the stories. Aunty Vivienne and Uncle Ron have taught their children and the Freemans these things. They also taught Mr Freeman and his sister general South Coast history, which included knowledge about the animals, spears, shellfish, fish, stories and songlines.

162 In all the time he has been going to Narooma to spend time with family he has never been taken to the Isabel Street land but has been in its vicinity. He had never heard of anything about the Isabel Street land or around there relating to Aboriginal activities. No one had ever taken him camping on the Isabel Street land. He knows where the Isabel Street land is and says it is not culturally significant. He had never been hunting of the Isabel Street land or heard of anyone doing so. When they go to Narooma the food that would sustain them is seafood, oysters, muttonfish and mussels and none of that is on the Isabel Street land. He had never heard about birthing sites or any ceremony on the Isabel Street land or heard of it as a camp site. To him, the Isabel Street land is just a “general bit of Narooma”.

163 He said he had a strong family connection to the area and holds the stories close to his heart. He now speaks for his father and grandfather who are gone and has their voice. That is the law according to what they were taught. He could not talk about his father’s or grandfather’s history if they were still alive, but now they are gone, he has to be the one to talk for them.

164 He did not know of any cultural significance of the Isabel Sreet land and had not had anything passed down to him about the Isabel Street land. The Isabel Street land is urban landscape. Mr Freeman said they would not have gone to a place like that when visiting Narooma. Their cultural values and heritage is not the sort of thing they want to showcase or display for “whitefellas”. When they have gone to places in Narooma for cultural knowledge they are taken out to bush and not to an urban area. A lot of their cultural values are done in secret. He does not think of the significant places by their “whitefella names” but by their Aboriginal names as this was how he was taught. The Isabel Street land does not have an Aboriginal name and is not their ancestor.In oral evidence Mr Freeman described the Yuin nation as extending from La Perouse down to Lakes Entrance near the Victorian border divided by two Aboriginal languages, the Gulaga and the Dharawal. Both his parents were connected to the Yuin nation. They were taught by his parents, aunts and uncles, and grandparents that they were Yuin if descended from or adopted by a Yuin person. They were also taught about the laws and customs of the Yuin by his extended family. They were taught about bush foods and medicines, stories of country and the connections they have with each other and extended families and their roles and responsibilities for protecting the environment. This knowledge was intergenerational even if changed a bit by colonisation. They had been taught that being adopted by the Yuin made a person Yuin which involved becoming a member of a family and becoming recognised as a part of that particular nation and community.

165 Mr Freeman agreed a Yuin person had a right to take resources from Yuin country. They also had a right to fish in Yuin country and he understood the grant of native title would recognise the things they had been doing all their lives. He described this as:

… a continuation of things we’ve already done, and we continue to do. Gathering natural resources is things we’ve done. It’s things we were taught. It’s things that we continue to do. Interacting with those cultural landscape features are things we’ve done, we’ve continued to do, and native title will just recognise those particular things.

166 He continued:

… there are resources in the mangroves that we take to – to make boomerangs with. There’s resources in the mountains, Sally Wattles and other resources that we take to be able to make particular nullas and shields and spears and there’s particular barks – stringy barks and others that we take to make other resources, yes, and we have done that.

…

We continue to do that, and we actually put some of those on display for education in places like the Australian Museum, National Museum, National Gallery.

167 He described other things also displayed as:

Shellfish hooks, Aboriginal technologies, intergenerational information that we think is important for other people to recognise still exists, as a promotional thing for cultural continuity.

…

Bark and reed.

…

Bush foods and medicines.

168 As to the latter he said:

We continually consume those, and we also own a catering company that utilises those bush foods and medicines as well. So we share that as well.

169 He knew of the Burrawang plant and said that the leaching technology to be able to consume Burrawang is quite complex. He said that process had been recorded in the first encounters with Aboriginal people and knowledge of it had been passed down from generation to generation. He agreed certain types pf barks were used to tan fishing nets to stop them from rotting. He said the rights Yuin had to country were given to them by their predecessors. He said:

So we don’t just go onto any old land and grab any old resource. We’re not that nomadic Aboriginal person that everybody has been talking about. We have customs and cultures and a religion and a connection to country that’s quite complex.

…

… so places that hold significance to be able to take those resources from are places that are still bound into the customs, cultures and traditions of Aboriginal people who continue to take those natural resources.

170 Mr Freeman explained as follows:

So do you think that there’s probably particular places on Yuin country that particular people have been introduced to that other people within the Yuin Nation might not know about? Yes. That’s correct. And that may also be because of personal family choices and not want to interact. It’s also because of prosecution. It’s also because of colonisation, depending in the family circumstances.

… Some families in our country have been taken away under the Stolen Generation procedures as well. So what other people have access to, not everybody does by virtue of the fact that Aboriginal culture has been outlawed in this country under multiple legislative frameworks and government policies.

171 He agreed there was a differential spread of knowledge amongst Aboriginal people.

172 He explained significant places in these terms:

They become significant by multiple reasons, if you’re talking about being able to go to the afterlife. If you’re talking about being able to be created. About getting children. About healing yourself. About particular different spiritual interactions.

173 Significance, he said, was an important, complex and unique concept concerning “the cultural protocols and cultural connections and religions that connect that space with us as human beings”. He said:

I believe we belong to the land. I don’t believe the land belongs to us. So that’s a big, unique difference when we’re talking in this context, because we have significant places that are on that country that we have responsibility for caring for. Yes.

174 With respect to the Isabel Street land he explained:

It doesn't hold that significance. To us it doesn't have that oral histories in our family line. It doesn't have that particular story of creation. It doesn't have that - those particular initiations based upon it, and it isn't somewhere that has been an ongoing part of connecting people to country. So it's - its significance - it's not significant to me because it hasn't been utilised for me to interact with country. So no.

175 When asked if nevertheless the Isabel Street land might be significant for other Yuin people Mr Freeman said:

Well, if it was important for that, when we were brought down to that place or throughout our life the other extended families who say that it's so important would have ensured and made sure - because we're all one big family. This is something that needs to be spoken about. If it's - if we were taken down there and we were going on somewhere that was wrong - it's about cultural respect. The other members of the community who knew that that was a wrong area to go into would stop those other families from having interactions, and the significance would be spoken about and shared, and what I'm saying to you - if it was - if that was a significant place, the extended family and extended countrymen would have done that for us, but they haven't, and they didn't do that in my whole life, and that's the foundation by which I say that place holds no significance. Because even family members that had other knowledge about places like Gulaga, Biamanga, Nagiuga, all them different areas, they all participated, whether they were our family, extended family or not, in giving us that cultural knowledge, ensuring that we got what we needed whilst we were down there visiting, because we descend from those people as well. So that's the cultural customs I talk about.

…

So what I'm saying is if that place was significant, it would have been taught to people, and it hasn't been. It hasn't been taught to us, and we've been down there our whole lives, and our families still live in Narooma and in and around that area, so

…

And I don't say this to take away from anybody else or to say that some of that knowledge may have been hidden in families for any particular reason, because I don't know about that sort of stuff, but what I'm saying is that that information would have been shared. It would have - just would have been shared.

176 He said:

I simply can't answer on behalf of anybody else. I can only answer on what I've been taught and the cultural protocols that - that I've been raised with, and the situation for us is that that place has not been introduced to us as natural resources. We weren't shown about - we weren't shown any natural resources on there in all the times we were down there. We haven't been taking any resources from the property, and as far as our family is concerned it holds no significance.

177 He said he would not take resources from the Isabel Street land as he had not been taught it is a place to gather resources. He said that similarly there were places on the South Coast he had been taught to catch fish and not to catch fish from as a part of traditional law and custom. As he put it:

There's bad magic in some areas that we’re not allowed to interact with, and that just is what it is.

178 He said that their interaction with country was done in accordance with laws, customs, and traditions. For his part, he said:

I know where to go. I know the customs and traditions and laws around that. I know how to access those resources. If it’s to get – but to make any kind of implement, yes, I do know where those areas are, and I have access to them. If it’s to get abalone or lobsters or pipis, I know where those areas are, and I continue to do those sorts of things. I know where to get the particular medicines from. I know where the high country medicine gardens are that have been there in place for thousands of years. I know where they are. I know how to get those medicine. And I have been doing that all my life and so have my parents, and so have their parents and so have their parents. And so what I'm saying is I do know where they are, yes.

179 He agreed that as a Yuin person he would respect his elders. He gave this evidence:

And you would agree that if an elder, say, who was – what – a generation above you or two generations, maybe in their 60s, if they talked about a place where they got resources, you would respect that knowledge, wouldn't you? Well, everyone gets their resources from wherever – from wherever they’ve been taught, so I don't – I'm not here to question anybody else. I'm just here to talk about what I do ..... challenge anybody else. That's their truth. That's what they believe. That's their – that’s in accordance with what they’ve been taught. So, yes, I don't disrespect or disassociate anybody else’s place of gathering. No.

So you agree with me that there’s places of gathering that other people might know that you don’t know? Yes, of course. Of course there is.

I thought just before, Mr Freeman, that you said you know every single place on the South Coast to gather resources? Now, let me correct you because you mustn't have heard me correctly. I said I know where to get the natural resources for myself and my family, and I do that in accordance with what cultural laws and customs and traditions have been given to me and the interactions with the country that have been given to me. So, yes, I know where they all are for the circumstances of me and my family. So that’s the correction.

All right. Thank you ? I don't say that on behalf of everybody else. I say that on behalf of me and my family. So that's the correction.

Sorry, Mr Freeman. I got that wrong. That's my fault. So you would then respect an elder of the Yuin Nation if they said that they were in their lifetime camping on and taking resources from a particular piece of land that you weren't aware of? You ? Yes.

 would respect that knowledge, wouldn't you? Yes, of course. Everyone respects that knowledge.

180 Mr Freeman agreed there were elders who had more knowledge than him and from whom he could learn more and that not everyone had the same level of knowledge.

### Hika Tarawa Te-Kowhai

181 Mr Te-Kowhai is 37 years old and is a member of the Murrin and Yuin nations. He is a member of the South Coast People’s claim group. He said that he was giving evidence that the Isabel Street land was not significant to the Yuin and “is not native title country”. He said he had visited the Isabel Street land many times and the Isabel Street land is not known among traditional knowledge holders as significant to South Coast Peoples. The Isabel Street land, he said, is not used or thought of in that sense and any connection with the land was also interfered with by Aboriginal people migrating away from the land in the late 1700s or forcibly being taken to reserves around the turn of the last century. He knew this due to his work as a cultural heritage officer.

182 Mr Te-Kowhai was born in Moruya and moved to Victoria for school until he returned to Moruya aged 24. He had learnt the history, knowledge and cultural practices of the South Coast People from his earliest days. He has been involved in the study and occupation of indigenous heritage and Murrin South Coast heritage for 22 years. By “Murrin” he means the descendants of the 13 wives that occupy the territory between the Hawkesbury River in the north, the Snowy River in the south, and the base of the western escarpment of the Great Dividing Range in the west. The Yuin, Walbunja or Dgiringanj are all sub-groups of the Murrin people. He is Walbunja through his mother.

183 Many elders had passed down traditional knowledge to him including Nan Coop, Uncle Guboo Ted Thomas, Bing Mumbla and Merv Penrith and many others. Uncle Guboo Ted Thomas was a mentor to Merv Penrith to whom he passed on his teachings and was one of the greatest knowledge holders. These elders taught Mr Te-Kowhai testaments involving cultural stories including the great testament of Bundalloo and how the 13 wives created the 13 tribes of the South Coast. He had also undertaken a lot of research which expanded his knowledge. Since 2009 he has owned an Aboriginal cultural heritage business and is its Chief Executive Officer and Chief Heritage Officer and is a registered Cultural Heritage Knowledge Holder. He is related to Vivienne Mason and applicants for the South Coast People’s claim.

184 The elders and traditional knowledge holders had taught Mr Te-Kowhai that in a general sense all land is important to some degree but this does not mean that it is significant. Significant land is land used by the people for activities which form a part of their social structure. Uncle Guboo Ted Thomas had taught that Aboriginal occupation of their territory was disrupted by colonisation with Aboriginal people being pushed to the mountains and to the south. Because of this neither Uncle Guboo Ted Thomas, Percy Bing Mumbla, Mervyn Penrith nor any other traditional knowledge holders had taught him that the Isabel Street land was of any significance. Mystery Bay and Batemans Bay are different as they are significant to the descendants of the apical ancestors of the South Coast People’s claim and are areas where the people did and still do camp and fish.

185 From 1997 Mr Te-Kowhai took Murrin people to sites of significance along the South Coast reinforcing the teachings of Uncle Guboo Ted Thomas, Percy Bing Mumbla, Mervyn Penrith and many others. He said he knew the area very well and no custodians or traditional knowledge holders had ever said anything to him about the Isabel Street land being of South Coast significance. He considered that there was no ongoing connection to the Isabel Street land. While Aboriginal people occupied the area at sovereignty they had not done so for the last couple of centuries and so as to avoid confrontation they receded from Narooma to the mountains and further down the South Coast. From 1840 to 1860 they slowly started to approach the Narooma territory and engage with the white occupants. In the late 1870s they started moving to Aboriginal reserves such as Wallaga Lake and others. Many remained in reserves for a substantial part of the twentieth century. He had lived in Wallaga Lake Reserve from 1998 to 2000 with, amongst others, Merv Penrith and none of his elders had taught him the Isabel Street land was significant to his people. As a result, the Isabel Street land has not been used or occupied by Aboriginal people at any point from occupation to the modern day.

186 Mr Te-Kowhai did not regard the applicants for the South Coast People’s claim to be proper traditional knowledge holders or representatives of the South Coast People. He regarded Vivienne and Ron Mason as renowned traditional knowledge holders of the Narooma region who had also taught him about the area.He explained that Owen Carriage is his wife’s uncle. Mr Te-Kowhai had never heard of any of the activities described by Mr Carriage in relation to the Isabel Street land. Mr Te-Kowhai said he was well aware of the legacy of the elders referred to in Mr Carriage’s affidavit including Uncle Bugs (Stanley) who was Mr Te-Kowhai’s foster father. Mr Te-Kowhai said if the Isabel Street land had been an important place Uncle Bugs would have taken him to it but uncle Bugs had never mentioned the Isabel Street land. Nan Coop is not mentioned in Mr Carriage’s affidavit but she was an elder who also never mentioned the Isabel Street land. Mr Te-Kowhai had never heard of anyone fishing or hunting for prawns in Little Lake and believed he would have heard if this had occurred. He said that there are known fishing spots in Narooma and Little Lake is not one of them. He said there is no freshwater on the Isabel Street land or natural springs there. He did not believe Aboriginal people would have camped on the Isabel Street land as there was a strict permit system in the 1960s that prevented Aboriginal people from freely roaming as they had been forced into reserves and could not camp randomly on vacant lots like the Isabel Street land. The Isabel Street land is between the golf course and businesses and as such would not have had Aboriginal activities carried out on it. Mr Te-Kowhai had never heard of Uncle Julip taking bark from the Isabel Street land. Further, there is bush tucker all over the South Coast and he had never heard of the Isabel Street land being used to gather bush tucker.

187 In Mr Te-Kowhai’s view Mr Carriage’s evidence of activities on the Isabel Street land was inconsistent with the compulsory displacement of Aboriginal people into reserves and the forced prevention of them practising culture so that in places like Narooma the traditional connection with the land which existed in the long past had been lost.In oral evidence Mr Te-Kowhai confirmed his mother was a Yuin person by descent from her parents. Her family travelled up and down the South Coast to see family, for natural resources, for work and for a whole range of things. They had permission to travel from the Aboriginal Protection Board. They mostly travelled from La Perouse to Mogo. The South Coast was their traditional country as Yuin people and they had the right to collect supplies from the land under Yuin traditional laws and customs. He had been told these things by his grandfather and grandmother and extended family. He explained:

There is a particular way in which indigenous people, my people, specifically my people here on the South Coast, receive the oral knowledge and the historical testament beyond our people. It’s not always the same. It’s always open to challenges and debates. But where we find or where specifically I find an oral statement that is consistent records that are held by the colonial and early state governments, then it’s my – and when I take that information to particular elders, primarily male elders but sometimes female elders, I ask for their opinion. They understand that. Only some of the time, they say that’s correct. And 20 per cent of the time, they say that’s not correct.

188 He agreed that Yuin people could hunt on Yuin country provided they did so in accordance with traditional laws and customs but thought those laws and customs were not necessarily strictly adhered to today. The same applied to collecting reeds, and taking fish or abalone. He agreed that Yuin people still collected bush cherries and had heard of the Burrawang plant and knew some people still collected it. He thought that about 500 Yuin people out of about 10,000 strictly adhered to traditional laws and customs and others did not strictly adhere. He was aware of wattle trees on the Isabel Street land but not bush cherries. He said he was not aware of natural springs or a constant flow of fresh water on the Isabel Street land unless there was heavy rain.

189 He agreed that a Yuin person could fish off Glasshouse Rocks as that was Yuin country if the traditional laws and customs allowed it.

190 He said that he had the right to comment on what an elder said provided he had permission from the head males of his clan. He explained:

… the whole governing of the society is patriarchal, so I would – I’ve spoken to my Uncle Basil, I’ve spoken to my brother ..... I’ve spoken to my Uncle Buster and I recently spoke to my two particular principal – primary principal elders, which is my great – my grandfather, but he is my grandmother’s brother, before he passed away last year, but, most importantly, Uncle Richard Archibald, because he is of a different generation. So he belongs to a generation that is very rare amongst our society. That is to say that his grandfather was born way back as far as 1830, so, you know, there’s also a generational level of eldership and there’s also an age level of eldership, but so long as I could have the confidence and they give me the rights, of which they do, to speak of particular things that I have knowledge of, then I can particularly ask particular questions of individuals that make statements only if I have, you know, a relationship and I have knowledge to the contrary of that particular individual.

191 He said he did not need specific permission from his elders to challenge Mr Carriage’s affidavit given the body of knowledge he had acquired over his life from elders. He was sure he knew more about traditional laws and customs than some Yuin people older than him, in their 60s. He explained:

…you would need to, you know, be clear and direct of the particular individual that you’re referring to, particular individual uncles and aunties and brothers and sisters younger and older and even elders, that I might know more than – than they would. But then it all depends on – on the two bodies of knowledges. So we have two bodies – we carry two bodies of knowledge. We carry the body of knowledge and information that – that is to the benefit or the consequence of Europeans coming to my people’s country and – and we won’t get into it, and the stolen generation and all the massacres. Forget about that. But you understand what I’m saying. Then we have the body and – and the body of information and the body of knowledge that is orally handed down that one experiences via certain events and circumstances and – and experiences that one would – one would experience in their life or – or observe in their life. So you’ve got to understand, there’s two different ..... of information here. So in relation to – as I said to you earlier on, the best thing that we – we tried – we tend to do today, it must all – is that we try to ensure that there is a consistency, which there always is without it being disputed, between the body of knowledge and – and information in the sense of the oral, and that in respect and in relation to the Europeans that have recorded information about us from today all the way back as far as 1788. So to answer your question, Mr Gregory, there are particular uncles and aunties and brothers and sisters and first cousins and second, third, fourth, fifth, sixth, whatever you may want to say in relation to those particular lines of – of extended family members that I may know more than them than they would know more than me in relation to those two bodies of information acknowledge. But again, unless you give me particular – and you’re being clear and direct of what particular individual, I – I can’t put them all into one bunch…

192 He did not agree that Mr Carriage was an elder of the Yuin people. He was certain Mr Carriage had developed a lot of knowledge in relation to some traditional laws and customs but he could not say more. He said that he did not have to accept that Mr Carriage had walked with elders from Wallaga Lake because whatever body of knowledge Mr Carriage has, in accordance with traditional law and custom, has to be passed on to his family and Mr Te-Kowhai was a member of Mr Carriage’s family, being married to his niece. He also said:

…to walk from Wallaga Lake to Narooma in the 1950s, as I understand, one would need a permit from the Aboriginal Protection Board, particularly to even leave Wallaga Lake. As the very general public of the Commonwealth of Australia knows and of the states and the territories, they were very restricted. We couldn’t just get up and walk anywhere we wanted to. And, yes, I appreciate that the distance of Narooma and Wallaga Lake is less than, in some case – in one case, you know, depending on what direction, 20 kilometres – I think, you know, the – you need to – to understand that it would have been very difficult to – to leave the mission, you know, without the – the – the manager not knowing or the manager knowing and – and – because if anything happened along the way, well, then the manager could be held liable.

193 He continued:

…if the permit allowed them to camp, which I – and I very rarely believe that that would have been the case. Secondly, where they camped, and, thirdly, the supplies that one would need. Because back in them days it – it was very – as I understand from my own experience from listening to people like Uncle Owen and Uncle Basil and Uncle Wally and – and Uncle Les and – you know, it was a very racist time back then, and so that’s to say that I wouldn’t want to hear it two different ways, but, you know, the best – the best source of safety and protection that they have always had, particularly in the 1950s, was with the protection and safety of the mission manager. So for, you know, a bunch of black fellows to be getting up out of Wallaga and walking off into the wilderness without a permit, I think, is very unlikely.

194 He explained:

Well, Uncle Owen has, you know, said a great many things to me, you know, about his past and when he was young, particularly when he lived at Nerrigundah, particularly when he – he went to Kurranarri and when nan and pop – his mother and father – would travel up and down the coast, but he never mentioned to me – and even if it’s for purposes of convenience, he never mentioned to me anything in relation to walking from Wallaga Lake to Narooma.

195 While he accepted the fact that Mr Carriage had not mentioned the event did not necessarily mean it did not happen he said:

…the one thing that we can’t do is be very secretive, and secrets and privacy doesn’t exist in the traditional – or in the body of the tradition and in the body of the customs. Otherwise, there would be no body of custom or no body of tradition… when one is out and about in exercise and enjoyment of the traditions and the customs that is not to be kept a secret. That is not to be kept a custom – a private matter for one particular individual. The individual does not own that body of right. The individual is part of a skeleton – a skeletal organ and arrangement of – which is the people. So, you know, I know there’s this European sense of looking at it, that he doesn’t have to tell anybody. If it’s in relation specifically to cultural – or the – or what manifests from our culture, and our customs and traditions, he is, strictly in accordance with the traditional laws and customs, required to give that information, otherwise how are the younger ones meant to learn what the older ones have done before them.

196 He continued:

… yes, I wouldn’t be aware when Uncle Owen has gone out camping or walked from Wallaga Lake to Narooma, but I can assure you that no one can make the claim unless it forms part of the people’s body of knowledge. Unless we are aware of that, it’s just – this stuff is totally irrelevant to the body of knowledge of our people and our society in relation to our culture: what we manifest from those traditions and customs.

197 He returned again to this matter of the sharing of knowledge, giving this evidence:

So you couldn’t say that what Owen was saying is incorrect. You couldn’t say that, could you? Over? No, I – I can’t say that, and – and – and I wouldn’t say that, Mr Gregory. But to – again to assist you, Mr Gregory, it is a strict requirement in order for culture, as my people like to say it, or for the purposes of – of – of – of this particular matter, traditions and custom to continue to exist, it is a strict requirement that particular things are – are narrated, not back to particular individuals but back to the body of knowledge and information of the people, otherwise we would never know who we are and the things that we can and we can’t do or the things that we have or we haven’t done. So just to assist you, Mr Gregory, unless it’s in relation to what he stated in his affidavit or if it’s in relation – and if that relates to what has personally happened as a result of enjoying and exercising the rights of – all normal Australians do at that particular time, as opposed to – to continuing the traditions and customs of our people, I think you need to – to distinguish – because in relation to all the exercises and the privileges and pleasures that – every Australian enjoys that particular time irregardless of how the law was, no. But in relation to the customs and – and the traditions that were – that were maintained and preserved and continued at that particular point in time I would know and is correct.

198 He said the events in Mr Carriage’s affidavit were not held in the body of knowledge and information that is shared amongst the Yuin people as part of the continuation of their traditional laws and customs. He did not agree that there could be anything other than the one body of shared knowledge constituting the traditional laws and customs of the Yuin people. While some people may have learnt more about the traditional laws and customs of the Yuin people than others there was only one set of traditional laws and customs. As he put it:

It is a law that we must strictly all hold, maintain and preserve the consistent body of knowledge of the traditions and customs of the society.

199 He did not accept there was any source of freshwater on the Isabel Street land saying that the slopes on the land meant run-off from rain would pond at the lowest point on the land. He said he would know if there was a source of fresh water on the Isabel Street land because of his involvement in the Aboriginal culture and heritage industry.

## Non-Aboriginal witnesses

200 WLALC called evidence from a number of non-Aboriginal people.

### Michelle Baillie

201 Ms Baillie owns The Tree Motel on the Princes Highway at Narooma. She and her husband bought the hotel in May 2018 and have lived in it since. The motel is close to the north-west of the Isabel Street land. She has frequently driven past the Isabel Street land since she lived in Narooma. She has never seen any Aboriginal people on the Isabel Street land but accepted it was possible that Aboriginal people had collected bush tucker or bush medicines from the Isabel Street land without her knowing. She had never heard of any such activities taking place.

### Troy Beecham

202 Mr Beecham has owned the Narooma Fitness Centre for three years. The Isabel Street land abuts his property. He has also played golf at the Narooma golf course which abuts the Isabel Street land. He has never seen Aboriginal people on the Isabel Street land or heard of Aboriginal activities taking place on the Isabel Street land.

### Garry Bennett

203 Mr Bennett is the owner of Narooma Boat and General Storage which abuts the Isabel Street land. He has been working on his premises for about 34 years. He used to run through the land in the 1980s about once or twice a week. He was also a director of the Narooma Golf Club. He has never seen or heard about any activities on the Isabel Street land involving Aboriginals. He has seen people using chainsaws to cut wood on the Isabel Street land but did not notice these people to be Aboriginals.

### Dominic Connaughton

204 Mr Connaughton is the Chief Executive Officer of the Narooma Golf Club and had held that position for 9 years, moving to Narooma for the job. He said that the golf club had existed since the 1930s with nine holes. The rear 9 holes were developed in the 1960s. The 13th hole abuts the Isabel Street land. He regularly played the golf course. He had never seen any activities taking place on the Isabel Street land and had not seen water on the Isabel Street land. He only went onto the Isabel Street land to retrieve golf balls. He was not aware of any information about Aboriginal use of the Isabel Street land.

205 In oral evidence he said that he had probably only gone about 10 metres into the Isabel Street land to retrieve his golf ball. He believed there would be run-off of water onto the Isabel Street land. He agreed he would not know if activities were being carried out on the Isabel Street land because he could see into it to only a limited extent.

### Chris Isaac

206 Mr Isaac is the owner of Christensens Fencing and lived at his work property from February 2019 until September 2019. That property adjoins the Isabel Street land. He is aware of rubbish dumping on the Isabel Street land. He fenced a section of another business which backs onto the Isabel Street land. In the time he has lived and worked on the property he has never seen people on the Isabel Street land or heard talk about the Isabel Street land being a place where any indigenous activities occur. He had heard of indigenous activities at places like Mystery Bay.

207 In oral evidence he agreed he had not been into the Isabel Street land. He would “not have a clue” if Aboriginal people were going onto the Isabel Street land for bush foods or bush medicines.

### Raymond Lauder

208 Mr Lauder lives at Costin Street about 150 to 200 metres from the junction of Isabel Street with the Isabel Street land. He was 85 years old in 2019. He had never seen an Aboriginal person on the Isabel Street land and was not aware of any Aboriginal person engaging in activities on the Isabel Street land. He had walked through the Isabel Street land on many occasions. The only other people he saw were school children walking along the perimeter of the Isabel Street land.

209 In oral evidence he said the back of his house had a view of the Isabel Street land which slopes quite steeply away to a dam outside of the Isabel Street land which collects run-off. He had heard the odd trail bike on the Isabel Street land but never seen another person on it during his walks. He agreed it was possible other people had been on the Isabel Street land but he had not seen them. From the back of his house he looked a few hundred metres into the Isabel Street land but could not see the whole of it. He used to walk on the Isabel Street land two to three times a week. He agreed there was a waterhole on the Isabel Street land which filled when it rained with run-off from the industrial area. He did not know of any freshwater source on the Isabel Street land.

### Melissa Moore

210 Ms Moore works at Woolworths Narooma which is near the Isabel Street land. She used to attend the Narooma fitness centre which adjoins the Isabel Street land. She would also drive past the Isabel Street land. She had never seen or heard of any activities on the Isabel Street land involving Aboriginal people or seen or heard that the Isabel Street land is used for any purpose. She agreed in oral evidence that she was not focused on the Isabel Street land when she saw it and could not see very far into the bush. She had never seen anyone on the Isabel Street land but agreed it was certainly possible people walked on the Isabel Street land.

### Peter Rowe

211 Mr Rowe grew up in Narooma. He is the owner of PR Engineering which adjoins the Isabel Street land. He knows the Isabel Street land well. He used to walk through it to get to town for about 6 years when he was in high school 15 years ago. He still uses the Isabel Street land as a shortcut on occasions. The only Aboriginal people he had seen on the Isabel Street land were some school mates of his who also used it as a shortcut with him. He has never seen any Aboriginal activities on the Isabel Street land. He said there is no permanent water source on the Isabel Street land, just some run-off. The Isabel Street land has fire trails on it which he would use when he walked across the Isabel Street land. He was not aware of any camping on the Isabel Street land but knew of other Aboriginal camp areas.

212 In oral evidence he said his business had abutted the Isabel Street land for about 3 years. The Isabel Street land was behind his business to the north. From his workshop he could not see more than 20 to 30 metres and could only see further into the Isabel Street land when he was outside. He would not be paying attention to the Isabel Street land when working but had walked through it recently. He had never seen anyone on the Isabel Street land when he was on it but had seen schoolkids walking through it as a shortcut and people walking their dogs. There could have been joggers on the Isabel Street land which he had not seen.

### Christopher Young

213 Mr Young is the owner of Chris Young’s Joinery which adjoins the Isabel Street land. He had owned the joinery since about 1975. He has sometimes accessed the Isabel Street land when going to the golf course or when playing golf. He has never seen or heard of any Aboriginal people doing traditional activities on the Isabel Street land. He is not aware of any water source on the Isabel Street land.

214 In oral evidence Mr Young said he recalled a rubbish tip near the golf course. He would have morning tea out the side of his business and could see the Isabel Street land from there. He walked through the Isabel Street land sometimes as a shortcut. He considered the bush on the Isabel Street land to be a fire hazard.

### Elizabeth Sivell

215 Ms Sivell, solicitor, made a number of affidavits annexing documents concerning the notification of WLALC’s non-claimant application, as well as documents from the Eurobodalla Shire Council about sewage infrastructure on the Isabel Street land. WLALC relied on those annexures to contend that native title had been extinguished by the presence of a public work on the Isabel Street land, being the sewage infrastructure. The issue of partial extinguishment of native title on the Isabel Street land is discussed in a separate section below.

# THE RESPONDENTS’ EVIDENCE

216 The second to fourteenth respondents called evidence from a number of Aboriginal people.

## Aboriginal witnesses

### Aileen Blackburn (nee Mongta)

217 Ms Blackburn is an applicant for the South Coast People’s claim. She was born in Sydney in 1957 and as a child moved up and down the South Coast with her parents. She has relatives up and down the South Coast including in Narooma. She is a Yuin person through her mother and her father is Monero Ngarigo. Her extended family told her stories about the South Coast and their connection to the area in and around the Isabel Street land. They camped in the bush opposite Mystery Bay, in Bodalla and Wallaga Lake. Her father’s uncle and cousins all lived at Wallaga Lake and when they visited there the manager would make her father sign a book. They camped and fished all summer and did seasonal picking work. Her family were saw millers, seasonal pickers, fishermen and campers.

218 Based on the knowledge passed on to her by her mother and family Ms Blackburn said that Yuin country needed to be viewed through a “whole of landscape” approach which closely links the land, sand, water, trees, soil, shells, grasses, bush medicine, vegetables, fruits, animals and birds with their laws and customs. Her Nan Mavis had told her the area around the Isabel Street land had changed quite a bit and there used to be a waterway which went from the golf course to Corunna Lake which is around 5 kilometres to the south towards Mystery Bay. The area generally is where Nan Mavis’s family camped, fished, walked and later travelled by buggy to Wallaga Lake and Tilba to visit family. Nan Mavis and Ms Blackburn’s mother told her about the area because they travelled collecting shells from many beaches all the way along the South Coast including Narooma and had knowledge of the coastal pathways and places of significance. They used the shells to produce items of cultural significance and art works.

219 Ms Blackburn said she had spoken to a number of other South Coast Aboriginal people whom she knew to be people with connection to the area in and around the Isabel Street land. She spoke to an elderly Aboriginal man who is a member of the South Coast People’s claim following a “Sorry Day” function at Narooma who told her that all the land along the coast between Potato Point (about 25 kilometres north of Narooma) and Mystery Bay is a part of the trails of the Yuin people. She did not ask this man his name as that would not have been appropriate on that occasion but he told her there were men’s and women’s places along that trail. The rest was unspoken due to cultural protocol but Ms Blackburn understood him to be passing down knowledge of the Isabel Street land and surrounds for future reference and protection of the Isabel Street land. She said she was also passed knowledge by her Uncle Lionel Mongta who was a senior man with knowledge of the area. She said that these discussions and stories, combined in context of the way oral history is handed down and taking into account responsibilities associated with it, she feels comfortable about voicing and has the obligation to assert the cultural values of the Isabel Street land.

220 Ms Blackburn described that basket weaving was a part of her traditional laws and customs and she had been taught by her mother. Living in the bush and on country they had the opportunity to participate in a range of cultural practices including basket weaving, food gathering, fishing and diving. She explained that you have to have connection through your elders and ancestors to a particular bit of country as a stepping stone before you can get the materials you need for weaving and other crafts. Through her connection with her mother, her family have this connection to the land in and around Isabel Street which gave them the ability to gather materials for weaving as well as other crafts.

221 Ms Blackburn said the Isabel Street land is an area a lot of South Coast People drive past and frequent today and in the past in order to avoid police stations in town on the main Princes Highway. This is before the old industrial area in Narooma existed. They would sometimes pull up in the area including the area to the north of the golf course and wander around in the bush. She said she could only speak for her family but because of her family’s connections to the South Coast People’s claim area they can continue to access the Isabel Street land to practice their culture and future generations can nurture this knowledge which is not exclusive to her family but is inclusive of all other South Coast families.

222 Today they still undertake basket weaving on a regular basis but access to many traditional camp sites and natural materials are now restricted which is why it is important to hold on to area where reeds are still growing such as the Isabel Street land. Weaving is closely linked with various cultural protocols and diplomacy such as kinship ties, elders’ transmission of knowledge, gender ties, speaking for country and passing down knowledge. For example, one person cannot copy another weaver’s techniques without consent and you cannot just go and collect materials in someone else’s backyard without consent from the right people who know that country. Weaving is not just about grasses; it’s about connection to land and to each other. It is an unspoken part of their culture because they want to protect it. It is for these reasons and others that lands such as the Isabel Street land, which have known weaving materials, are very significant to them as South Coast Aboriginal people and their future generations.In oral evidence Ms Blackburn confirmed that Wally Stewart was another applicant for the South Coast People’s claim and an elder of the Yuin people. He is a cultural fisherman. His father was George Julip Stewart who was also a renowned South Coast fisherman. Ms Blackburn expected that his father had taught Wally about fishing and she knew Wally was an advocate for indigenous fishing rights. She also knew that Wally lived in Narooma but not where he lived. She agreed that her knowledge of Narooma was not street-specific. She did not accept that Wally Stewart’s knowledge about the area would be better than hers because each clan had different knowledge. She did agree he would know more about men’s business concerning cultural activities in Narooma than she would. She knew John Brierley was an applicant for the South Coast People’s claim and that he lives in Moruya about a 34 minute drive from the Isabel Street land. Mr Brierley was also a fisherman. Cathy Thomas was also an applicant for the South Coast People’s claim but she did not know if she lived in Isabel Street. She was aware Cathy Thomas was a knowledge holder of the region and would expect her mother, Marilyn Campbell, had passed down knowledge to her. She agreed that Mystery Bay is a very important place for Koori people with traditional and contemporary camping sites. It was a known site of Aboriginal camping in the past and today. She said each clan had specific stories about their connection to Mystery Bay, explaining:

Some stories have different degrees of significance. Some are restricted specific to some families. They might be, as I said, women or men’s business. They can’t all just be shared like a storybook.

223 Ms Blackburn agreed that it is common knowledge among Koori people on the South Coast that Mystery Bay is a place of significance. So too with Gulaga which has both men’s and women’s business areas. There are stories that relate to Gulaga. She agreed that these places where rituals and camping goes on are significant to Aboriginal people as the oral history and tangible and intangible culture connects the people to the country. Oral history is the knowledge that is “handed down from respected elders to parents and grandparents and – and then handed out to selected members of the family”. She explained:

… that’s what our culture is – is founded on oral histories. We’re not – we don’t learn culture from books. We don’t write our stories. We sing, dance and record them. We keep them alive in other ways.

224 She recalled the meeting on 3 and 4 March 2018 between WLALC and the applicants for the South Coast People’s claim. She disagreed with Vivienne Mason’s evidence that the applicants did not say anything at the meeting about native title in relation to the Isabel Street land. She said they did not object to what WLALC proposed subject to a comprehensive cultural heritage assessment being conducted but there was definitely a discussion about native title rights on that country. She denied that she had not known where the Isabel Street land was when a visit to the Isabel Street land with Vivienne Mason was arranged. She said it was not like she had been past the Isabel Street land only once in her life as it was “part of where I am” as she was frequently on the South Coast. She agreed that when preparing her affidavit she understood it was important to try to identify every traditional use of the Isabel Street land. She said she had camped at the bottom of the hill for the golf club in Ballangarry but that was not in her affidavit. This was on what she described as the “outer boundary of the Isabel [Street] land” but she agreed it was not on the Isabel Street land. She said, however, her ancestors had “contacts” with the Isabel Street land. She then clarified that where she camped was at Bulengella Lake. She agreed that Mystery Bay and Bodalla were traditional camping areas. She did not agree that if there had been traditional camping areas in Narooma she would have put that in her affidavit as she did not feel the need to name every traditional camping area. When asked why she had not included a map of where her Nan Mavis had camped she said the map would have to be of the whole South Coast. She agreed that she did not assert that her Nan Mavis collected shells from the Isabel Street land or that her father had cut wood from the Isabel Street land.

225 Ms Blackburn said she would not name the elderly man who had spoken to her in her affidavit for cultural reasons. She was asked if she agreed that the Isabel Street land was not on the coast and answered:

From an Aboriginal lands, it’s coastal land. The South Coast refers to Aboriginal land; water and land. 10,000 years ago the Ice Age happened. The water came up. What are you – what are you actually saying? From a white man’s point of view, you’re saying Isabel is not coastal. But from an Aboriginal ..... we say that’s coastal land.

…

We’re coastal people. We are salt water people. That’s coastal land.

226 She agreed that the coast trail the elderly man had referred to was about 35 kilometres in length from Potato Point to Mystery Bay (Narooma being between the two) which she described as “very small”, continuing:

Most ancestral trails and salt lines go from state to state. They are quite extensive. They can go up to the mountains. They can go interstate within that white man’s borders. Our trails …are long.

227 She agreed she had been told that there were men’s and women’s places along this trail. When asked about Biamanga being a traditional men’s initiation site she said:

I don’t discuss men’s business. I’m an Aboriginal woman. I know women’s business stronger that – I prefer not to discuss men’s business.

228 She agreed Gulaga is a women’s mountain. She accepted that she did not say if the Isabel Street land was a men’s or women’s site but not that she would have said so if she knew, saying omissions did not mean that things did not exist. She said that the elderly man had been unwell for some time and wanted to ensure that the story he told her as a recognised elder was given to her family. She said:

He freely gave it. He singled – he approached me and told me this story. He wanted to ensure that that knowledge from – from himself – he said, as a recognised elder, was – he wanted to make sure that that was kept going within – in our people.

229 Ms Blackburn agreed that she did not use the Isabel Street land to gather resources but said she had relatives in town that do but agreed that was not mentioned in her affidavit. She agreed that she had not mentioned activities that occurred on the Isabel Street land but said from a cultural lands perspective, the Isabel Street land was part of the South Coast area. She said it was in an area linked to their cultural trails but people had tended to stay away from it in recent years due to an Independent Commission Against Corruption investigation in relation to the Isabel Street land and questions about who owned it. She said her ancestors had used the Isabel Street land, not her. She expanded on the information given to her by the elderly man saying:

He recognised that weaving and he specifically came over and said, “Please make sure my story is told and I’m going to tell you this, where our old people got the grass from, right at the foothills of the golf course through that waterway”, and he said that’s where they used to camp. He just reaffirmed what my nan had always told me, because we never travelled through Narooma on the Princes Highway because of the police station. We took the back road. We go down the hill, Ballangarry, up past the golf club, Blue Water Road and come back out down the – on the flats, because many of Koori’s – we weren’t the only ones. We didn’t have good cars and we had big families, but they tried to avoid the attention of the police, as you know. Our people weren’t welcome in towns. We were fringe dwellers and – so we camped outside of the main – like, the – the townships. It doesn’t mean we didn’t have cultural connection or association to those areas in those towns. But because of the protection ... welfare policies, we were made fringe dwellers.

### Marilyn Campbell

230 Ms Campbell is a Yuin woman who is an applicant for the South Coast People’s claim group. She had affirmed an affidavit in support of the South Coast People’s claim and an affidavit in this non-claimant application proceeding. She lives near the Isabel Street land on Isabel Street.

231 In her affidavit in support of the South Coast People’s claim Ms Campbell said she was a Pickalla through her father and she was born in Bega, spent some time in Orbost Victoria and came to Narooma in year 10 at high school as she wanted to learn about her father’s people. She has seven children and 29 grandchildren. She explained that one of the South Coast People’s most important stories was about Mumbulla (Biamanga) Mountain and Gulaga Mountain. She explained this dreamtime story. She said South Coast country goes from Wollongong to the Victorian border and the areas she was most connected with are the Bermagui and Wallaga Lake areas including Mystery Bay and Aragunnu which was her family’s country. She explained that Aragunnu was a women’s place. She described Aragunnu as a sacred place and explained her connection to that area. She said she protected that area.

232 Ms Campbell explained that if she was fishing outside her country she had to get permission from the elders of that area. She said South Coast People all knew each other’s fishing areas and shared them but that they did not go to another person’s area and take everything in one go. She said they all respected one another’s space and only took what they needed to feed their families.

233 She said they knew who was a South Coast traditional owner because of their family connection to South Coast country; to be a South Coast person you needed to have ancestors who come from the area. She explained her family’s totem and its significance to her. She referred to their language, Dhurga, and why it was important for the language to be spoken. She explained that she did welcomes to country as a way of making sure that people do not take any bad spirits away with them. She explained the smoking ceremony using the cherry tree and the gum tree and its spiritual significance. She referred to ceremonial dace and singing and the use of ochre. She explained that she threw abalone shells back into the ocean to thank the spirits. She explained how people knew when it was the right time to fish and her fishing practices and the seafood that was part of her diet as well as other activities of hunting for kangaroos. She explained that her old people had told her only to take enough fish to feed her family and the community and nothing got wasted. She explained how information was passed on orally including about bush foods and bush medicines, camping, weaving and language. She explained how they bartered seafood with the Barkandji for boomerang knees and didgeridoos. She said:

I’m a traditional owner of South Coast country, in particular for all of the area from Mystery Bay to Aragunnu. My family and I have been using that land for many years in accordance with our own practices. We can use it in the ways we want to use it.

234 In her affidavit in this proceeding Ms Campbell said that the laws and customs she had described in her first affidavit apply to how they as South Coast People treat their country including the Isabel Street land. She said that because of those stories and their knowledge they have rights and obligations in respect of the Isabel Street land and have to protect it for future generations.

235 She said she knew the Isabel Street land very well because she lives in Isabel Street less than 100 metres from the Isabel Street land. Her daughter, Cathy Thomas, lives even closer to the Isabel Street land. She said that they would go to the Isabel Street land and cut and collect wood for their fire and for the making of artefacts. During those trips if they had the grandchildren with them they get a feed of bush tucker – the cherries from the native cherry tree. Ms Campbell said that the Isabel Street land has a freshwater creek running though it from south to north. Freshwater sources are very important to her people as ancestors would have used it for drinking and camped near it. From the Isabel Street land her ancestors would have walked to Wallaga Lake and the Isabel Street land is one of the only freshwater sources close to the ocean. The next closest source is over 10 kilometres away at a site they call Two Sisters. As that is a fair distance her ancestors would have stopped to get water at the Isabel Street land. The Isabel Street land is less than 500 metres from the coast at Glasshouse Rocks and just south of that is Handkerchief Beach and less than a kilometre away is Shark Point. She teaches her grandchildren, “to get a feed of mutton fish and get periwinkles and learn how to swim all along that coast”. From the coast they fish from the rocks and collect bait. They teach their grandchildren how to fish as their ancestors have done and how they had been taught by their parents, grandparents and great grandparents. She said there are not many places on the coast where they can get freshwater so the Isabel Street land is very important to them and always has been.

236 She said there are seams of ochre on the Isabel Street land. They use ochre for many things in artworks and for ceremonies, and as a sunscreen. There is also charcoal on the Isabel Street land from burnt trees and that is very important to them as a medicine and for cleaning teeth. There are native cherry trees on the Isabel Street land which bloom in the summer. Her grandchildren love eating them. The Burrawang plant is on the Isabel Street land. Her mother taught her how to make flour from the Burrawang plant. She learnt to grind the seed into a pulp with rocks and put it into a dilly bag and then put the bag into a stream for two weeks to get the poison out and then you can use it to make damper.

237 She said that near the creek on the north-east side of the Isabel Street land there are heaps of reeds. The reeds only grow where there is freshwater and South Coast People need the reeds to make the dilly bags they use to carry food. Cheryl Davis collects reeds around the Narooma area and taught Ms Campbell and her daughter, Cathy, how to make dilly bags out of the reeds. They use the mud from the creeks, like the one on the Isabel Street land, to treat stings. Near the creek on Isabel Street there are a number of a certain type of tree they make spears from. Those trees only grow by the water where the ground is moist. Her husband, who is a member of the South Coast People’s claim group, makes spears. There are also ferns on the Isabel Street land which her mother had taught her could be used to treat stings and she still uses them for that purpose and has taught her children and grandchildren how to do this.

238 She said they had to protect these things as it was their responsibility to their kids and the next generations of South Coast People and without land and natural resources they could not hand down their knowledge. In oral evidence Ms Campbell agreed it was important for her in her first affidavit in support of the South Coast People’s native title claim to describe the rights and the interests of the South Coast People fully and in detail and that she had legal assistance to prepare that affidavit. She agreed she had talked about the areas where she personally used land in accordance with traditional practices. She accepted that the area she said had particular significance to her, from Mystery Bay to Aragunnu did not include Narooma but said the whole native title claim area was her country. She agreed, however, that some places were more important than others and she was more connected to some places than others and it would be fair to say Mystery Bay to Aragunnu were such places. She said she was a protector of Aragunnu and they would camp there for months at a time but Mystery Bay was also important. She agreed she had not mentioned the Isabel Street land in this first affidavit and had not said that Narooma was a significant place. She said, however, she could speak for Narooma as her apical ancestors come from Narooma.

239 Ms Campbell agreed that she was not an applicant on the earlier Djiringanj claim. Of the named applicants on that claim she agreed that Iris White was a knowledgeable person on traditional law and custom, as was John Brierley a fisherman but she could not speak for other families as it was disrespectful. She agreed she had moved to Narooma in 2006 but that her daughter had lived there before her.

240 She agreed that in her second affidavit, the affidavit filed in this case, it was important to describe any asserted traditional use of the Isabel Street land in full detail and she had legal assistance in drafting that affidavit. She said:

… when I refer to ancestors, I refer to my mother, my father, my grandfathers and my grandmothers, because they’re all passed on, and my brothers and sisters. I’m the only one left out of my family. So when I refer to ancestors, that’s what I refer to.

241 She agreed she had not given any time frame for when her ancestors would have been using the Isabel Street land.

242 She agreed that she had not drunk water from the Isabel Street land but said she would if she needed to do so. She agreed that freshwater was closer to the Isabel Street land than she had said in her affidavit at Shark Point no more than five kilometres away. She agreed that if people had hunted animals on the Isabel Street land it would not have been very hard to find them to give evidence. She agreed that she had not mentioned fishing at the Isabel Street land but referred to diving at Shark Point which she described as part of Narooma coastline. She also referred to fishing at Little Lake which she described as “part of the [Isabel Street] land there” while accepting it was not on the Isabel Street land. She agreed that the distance from the Isabel Street land to Glasshouse Rocks was 1.2 kilometres and not 500 metres as she had said. She disagreed that when she was talking about collecting wood and native cherries from the Isabel Street land she was saying that she had carried out these activities only in 2006, saying they still did it today. She denied by saying that “we would go” to do these things on the Isabel Street land in her affidavit she meant that they did so only in the past. She said:

It’s just a – it’s a way of Aboriginal speaking. It’s broken English to you because I’m Aboriginal.

…

…we still collect firewood there. We still get the cherries. We practice our stuff today with our grandchildren.

243 She agreed that she had not said in her affidavit that anyone collects reeds from the Isabel Street land. When it was put to her that she had not said she used the mud from the Isabel Street land she said:

The reason why I’ve stated what I’ve stated is because all of the stuff that I collect is on Isabel Street. That’s close to me and then I don’t got to get in a car and drive down the road to find some other, you know, bush medicines or bush tucker. That’s the reason why I have made this statement.

244 It was put to her that as she had said only that there were certain types of trees spears were made from on the Isabel Street land she was not saying that they made spears from the trees on the Isabel Street land as her second affidavit was speaking hypothetically. She said:

No. Because we collect the spears from the freshwater creek.

…

Because they’re saplings – young – and the only place that they’re collected is near the freshwater.

…

Because there is freshwater there. Because I’m telling you that’s the only place where you can get them specific spears… There is no running water on the land but there is freshwater there… It’s freshwater from the rain.

…

Well, we still practice it today. I told you that. We do utilise that land at Isabel Street for those specific saplings.

245 She also said:

Well, I do go to Isabel Street and get the ochre, yes.

246 She agreed that she had specifically said in her first affidavit that she got ochre at Aragunnu but did not accept that this meant she did not get ochre from the Isabel Street land. This exchange occurred:

I’m suggesting the reason you did not put it in your first affidavit is because you do not get ochre at Isabel Street. Is that right or wrong? No, that’s wrong.

So why did you not put it in the first affidavit if you were trying to put all the detail of your traditional activities that are relevant to the South Coast claim in the affidavit? I can’t answer your question, because I think you’re confused. Because my first statement is not about the native – it’s about the Native Title claim on the whole South Coast.

…

The reason you did not put, in your first affidavit, that you gather ochre at Isabel Street is because you don’t actually do it. Do you agree with that? No, I don’t agree with that.

But you did put things that were important to you relating to traditional law and customs, you say in the first affidavit, didn’t you? I’m talking about the Native Title – the whole Native Title claim.

247 She did not accept that her second affidavit did not say she used charcoal from the Isabel Street land insisting that she did in fact use charcoal from that land. She also said that she collected Burrawang from the Isabel Street land in this exchange:

MR BUTT: I’m suggesting that if you did use Burrawang on the Isabel Street land you would have said so, wouldn’t you? And I do state that I do use it.

…

There – I will read the words:

*There’s also a plant we call Burrawang on Isabel Street. Annexed to this affidavit and marked is a photo in front of a burnt Burrawang.*

You would agree that, there, you have not said that you use Burrawang on Isabel Street, wouldn’t you? I’m – I’m – I’m stating – I’m saying that I know how to use that plant. It was handed down to me from my mother

248 She agreed that she had not described the Isabel Street land as sacred as she had for Aragunnu. She accepted that there was a history of dumping rubbish on the Isabel Street land. She said, however, that the bush medicines and bush tucker she spoke about were sacred to her. She agreed that bush medicines grew all over the South Coast. She agreed that her second affidavit was the first time she had ever voiced her concerns about the Isabel Street land.

### Leslie Simon

249 Mr Simon affirmed an affidavit in support of the South Coast People’s native title claim which was read as evidence in this proceeding. Mr Simon said he was a South Coast man who was authorised to bring the application. His country was around the Moruya area and Batemans Bay. He was born in 1956 in Sydney. He was a South Coast person through his mother. He was taken back to Batemans Bay when he was three and grew up there. He recalled that his family and others all travelled up and down the South Coast for work, particularly fishing and diving. He described sites in the claim area associated with Dreamtime stories. He described South Coast country as extending from Bundeena to Eden and that his family’s closest connection was with the area around Batemans Bay down to the Narooma Inlet. He was taught the most about this area from his old people. He described his elders and what they had taught him and how he now taught his children what he had been taught.

250 He said that people are South Coast People because of their bloodline. They are connected to the country through their ancestors having come from that country. He described Koori beliefs including about looking after country. He described the rules about marriage. He described the system for totems and their significance. He said he had been taught about men’s initiation sites. He described their language and their burial practices and their beliefs about spirits. He described ceremonies, and practices of hunting and gathering and preparing food. He described traditional whaling. He described the consequences if a person broke the lore. He described getting bush tucker. In oral evidence Mr Simon agreed he did not mention the Isabel Street land in his affidavit. He said that his affidavit related to the whole claim area which included that land. He agreed that John Brierley and Wally Stewart were fishermen, living in Moruya and Narooma respectively, both being much closer to the Isabel Street land than Mr Simon’s home in Batehaven. He said he thought Wally Stewart would know about cultural fishing areas in Narooma. He agreed that his affidavit did not mention traditional sites or activities in Narooma. He agreed that he had said in the 1950s, old Aboriginal people living on the South Coast could not pass on Koori culture to other Aboriginal people. He said he thought that people were able to hunt and gather but not to hold ceremonies such as corroborees. He also said that they were not allowed traditional dress as “they were trying to turn them into white people”. He said this was fairly widespread across the South Coast saying:

I think it was fairly widespread. They put us all on a mission. They put all my ancestors on a mission, mate, and told them not to speak their language. Told them they’ve got to do this, and they’ve got to do that. So you know, they were – they were directed not to even speak about their culture. They got into trouble for it.

251 He agreed that he had uncles who were imprisoned for speaking Dhurga and that people were taken from all over the South Coast and put in missions the main one being at Wallaga Lake.

252 He said he would describe his country as the Walbunja country which goes down past Narooma and that Moruya and Batemans Bay are part of his country. He agreed the people on the boards for Gulaga and Biamanga were knowledge holders for that region and were appointed because of the quality of their knowledge for that area. He agreed Iris White and Vivienne Mason were knowledge holders, as well as Michael Darcy, Cheryl Davison, Cathy Thomas, and Ruth Hampton. This evidence was given:

Then the chairperson asked members of the meeting if they had any knowledge relating to the site, but they could only remember the property or area as the local tip and could not recall any use for cultural purposes by local Aboriginal people and did not know of any cultural or spiritual importance of the land. You would agree that this is knowledgeable elders of the region giving their view of the land? Yes, but I would question what was there before the tip.

Well, you would agree that this is the view that they’ve given? That would be their view.

Yes. If there was something that someone knew about that in a significant sense, you would have expected that they would have raised it, wouldn’t you? You would.

### Owen Carriage

253 Mr Carriage is a member of the South Coast People’s claim group and is the chair of the Batemans Bay Local Aboriginal Land Council. He said he knows the Isabel Street land very well and can speak for that land as he was born and bred on the surrounding country, as were his ancestors and he has camped, hunted and gathered throughout that area all his life.

254 Mr Carriage said his connection to the South Coast People comes from both his mother and father. His mother’s father was a South Coast man born at Wallaga Lake and lived there nearly all his life. His father’s parents were also both South Coast People. Mr Carriage was born at Milton and lived in Ulladulla with his father’s parents. They lived near other families and fished with them. This is where he began to learn hunting and gathering of salt water food, what to eat and what to avoid. When he was 4 or 5 they moved to Wallaga Lake mission to live with his mother’s father George Bimmi Parsons (Pop Bim). When he was 12 they moved to Stony Creek near Narooma but he would go back and stay with Pop Bim. His grandparents taught him about bush foods they could and could not eat. They moved a lot as his father would follow work at saw mills and bean picking so they travelled all up and down the South Coast from Bega to Nowra. His mother also wanted to make sure they could not be taken away and kept them safe by moving around. As Wallaga Lake was a designated Aboriginal mission it was a safe place for them to be. He had always stayed in the South Coast area as that is his traditional country. They always stayed close to the coast as that is their main source of food.

255 His uncles from his mother’s side and Pop Bim would often walk from Wallaga Lake to Narooma to access hunting and fishing spots along the way, particularly during summer. He can still point out the places they would stop and hunt and gather food. One place was Mystery Bay which is sacred ground. He was told where sacred ground was and burial sites and middens along that trail. He would join these men on their trips from when he was around 6 or 7 years old. As they travelled they camped at various spots along the way including the Isabel Street land. The walk would take two to three days. They would do these trips to collect seafood which they would take back to Wallaga Lake. They would regularly visit Glasshouse Rocks on these trips which was and still is a very important place for catching seafood. He was shown how to collect lobsters and other seafood there. He said they also got seafood from Little Lake and Uncle George (Julip) Stewart used to put his nets down there catching mainly mullet and bream. They also used to spear fish there and mostly got prawns from there because it was clean and clear and not too deep. Over at Forsters Bay they would get bimbulas and oysters.

256 He said he knew the Isabel Street land very well because he had camped there with his family on these trips at least three or four times but his elders would have done it much more than that. There was freshwater to the north and south sides of the Isabel Street land they would access. When they were camping on the Isabel Street land they were taught lore and respect for it. They talked about men’s business, the spirit world and the Bugeenj or kadiche man. Bugeenj is the one white men call the “bone pointer” but they knew they were safe from his because they were not breaking the lore. They were taught about his powers and if you break the lore the Bugeenj will get you.

257 During those times Aboriginal people were not allowed in the towns such as Narooma without permits so they would always camp on the outskirts in the bushland at the Isabel Street land. The publican at the time used to know some of the elders and sold them alcohol at the back of the hotel which is on the top of the hill in Narooma. If the weather got too heavy they would retreat back into the bush at the Isabel Street land to get cover from the rain and the winds. There would often be old fellas from Wallaga who would also be camping at the Isabel Street land. They would typically go into town to get something to drink and then retreat back to the camp on the outskirts. Because it was close to Forsters Bay, Little Lake and Glasshouse Rocks the Isabel Street land was their main camping spot when they went to Narooma and provided good shelter. He also remembered that Uncle George (Julip) Stewart used to take bark from certain trees on the Isabel Street land which he would boil and then use the water to cure his nets which would dye them and stop them rotting. He remembered being told by Uncle Ernie and others that the bushland at Isabel Street was somewhere their elders had camped and was a traditional camping area. As he got older he realised the significance of the Isabel Street land as a place where their ancestors had camped. The fact their old people have always camped there makes it an important place for them. It makes sense – the lakes in the area and the coast very close by give them easy access to seafood.

258 Mr Carriage said he remembered when the tip went in at Glasshouse Rocks Road when he was 13 or 14 and how his Pop Bim and Uncle Ernie were angry about them damaging their country. He said the Isabel Street land is still an important place for South Coast People as it is traditional camping site and hunting and gathering area which should be left as bushland out of respect for their ancestors’ connection to that area.

259 Mr Carriage said their walks to Narooma solved the problem of limited access to white folks’ food as they were not welcome in shops and only his mother’s mother, Jess, was allowed in the Tilba shop. Not even Pop Bim was allowed. They often collected bush tucker on their walks. The Isabel Street land has Wondarma (a fruit from a vine), bush cherries and wattle gum which they ate as children like a bush lolly. There is also bush medicine around the Isabel Street land which he is reluctant to expose to white men as they will come in to exploit it.

260 When he was growing up Uncle Ernie, the eldest son of Pop Bim, was his main cultural teacher. He taught him hunting and gathering and cultural laws. He was taught respect for animals and marine life. He had five uncles on his Mum’s side who taught him a lot of the traditions of his people as he lived with them at Wallaga Lake, travelled with them and saw them frequently. They taught him how to spear fish and prawns. He still spears fish today at 66 years of age. By custom women tend to go for pippies, conks, periwinkles and things in pools on the edge of the ocean. The women also tend to use hand lines and it is rarer for them to dive for seafood. It has always been divided like that traditionally.

261 He was taught by elders it is fine to go to midden sites of which there are many. It is acceptable to go there and sit and throw your stuff down after you have cooked your seafood. There are hundreds if not thousands of significant sites in the South Coast People’s claim area including in and around the Isabel Street land. Some sites are registered but others they prefer not to disclose in order to protect those sites. He was also taught not to go into some areas, like burial sites, without permission. Their elders taught them where not to go. The reason not to go into an area is that it is a traditional burial ground or initiation ground. There are also sacred sites like painting on rocks in caves or marked trees known as scarred trees. They were not allowed to go to some specific areas where scarred trees are. He has taught his children not to go to these places. Spiritual beings reside in these places. You could bring bad luck on your family by visiting. It could bring devastation to your family or yourself. These areas are still watched and monitored by the keepers of these areas who are South Coast People with knowledge of these sites which is kept very secret because of fear of damage which “would be what white fellas would call sacrilege”.In oral evidence Mr Carriage agreed he was born in Milton which is a drive of about one hour and fifty minutes north from Narooma. He said to him the entire South Coast is the surrounding area to the Isabel Street land. He confirmed he then lived in Ulladulla which is near to Milton. Then he moved to Wallaga Lake at 5 or 6 which is about twenty kilometres south of Narooma. He lived there until he was 12. He moved to Stony Creek south of Bodalla but would return to Wallaga Lake. He had never lived in Narooma. He agreed that none of his ancestors had been born or lived in Narooma except his father’s brother, Uncle Julip. He agreed that he had not referred in his affidavit to anyone who was still alive who had the experiences he talked about at the Isabel Street land and Little Lake. He gave evidence in this exchange:

Now, would you – you would accept, wouldn’t you, that if you were camping there while you were a child, obviously, that, if it was important, you would have shared the knowledge of those sites on with people, wouldn’t you? I did and I have. I still do.

Right. But you would accept that no one who you shared that with has come forward to give evidence in this case, have they? I don’t know. I’m not sure of that, Mr Butt.

262 Mr Carriage did not accept Ronald Mason was a person with knowledge of cultural fishing around Narooma as he did not come to the South Coast until the 1980s. He also said:

Unfortunately, Hikka [sic Hika Tarawa Te-Kowhai] wasn’t around in my younger years, in my period. Hikka is a descendant of my cousin, who had passed away, and Hikka, he would not have known of what had happened in that area, and even Wallaga Lake, for that matter.

263 He agreed, however, that he had shared quite a lot of knowledge with Mr Te-Kowhai but continued:

And as a cultural man, sometimes you cannot really, really sit down one person and tell them the whole lot about the South Coast. There’s too much area to cover, and there’s so much detail to go in there, spiritually and law, and I – if I missed parts with Hikka, he never asked me about some of those issues, and I do apologise to him that there are some points in our history that I did not bring to his attention, and that’s out of old age, and I do apologise to him personally for that.

264 This exchange then occurred:

Well, so you’re aware, Sue Heycox, his daughter, has given evidence and she says she’s never heard of any of these – any cultural activities at all in the Little Lake or Isabel Street area, so you’re aware. Same with Norm Patten has also given evidence, and he says that there’s no significant sites and it’s not a – no Koori activities, to his knowledge, ever occurred on Isabel Street area. You would accept, wouldn’t you, that it’s likely that George Stewart would have passed down his knowledge of that to his children, wouldn’t he – wouldn’t you? Well, I could look at it from another point of view, Mr Butt, that it’s lore that he may have been dealing with. And men’s lore, you don’t pass it on to females. Men’s lore in regards to the other cousin, he’s a Gunaikurnai man from Victoria, and he’s not allowed on certain lands, and I would suggest that Uncle George warned him not to go near Isabel Street land because it is significant. It’s a spiritual land, and that’s one of the reasons why I suggest that Uncle Dulip [sic Julip] would have told some of his boys not to go on that land as Gunaikurnai people. You can’t do that, l-o-r-e, in another country.

Well, you would accept that if he told him not to go on that land then he would know that there’s something significant on that land to not go on there, wouldn’t you? He would know nothing about the land other than he had been forbidden by Uncle Dulip [sic Julip]. L-o-r-e, don’t go into that land.

Yes. He ? And as a Gunaikurnai boy

Yes? he wouldn’t have been allowed on it.

So you would accept that if he had been told that he is not allowed on that land, he would know that it’s an important place, but he wouldn’t know the detail of what makes it important. Correct? Matter of interpretation. Had Uncle Dulip [sic Julip] gave him all the details, he would have come to a decision. Again, lore, he wouldn’t want anything to do with it. So that’s – it’s – again, it’s – it’s handing our knowledge and lore about certain land, and I – I would suggest that Uncle Dulip [sic Julip] would have told him not to go there or even speak of it, for that matter, because it’s, again, spiritual. And also, the ..... is the – is the ..... man. You break the law, you pay the consequences of that, and I have witnessed that myself.

It sounds like you’ve confirmed that if he told him not to go there, it’s because it’s spiritual, so he would at least know he’s not allowed to go there, and the reason is it’s an important place that he is not allowed to go to. That’s what I understood that you’ve said? That is correct. But then, lore says he cannot even talk of that land or speak of it, because it’s not his. It’s not his country.

Yes. But he would have to know ? They’re not allowed to

He would have to know that he’s not allowed to go there. Can I ask you, you’re aware that Norm Patten lived in the Narooma area for roughly 60 years. Do you know that? I do know that. Yes.

And you’re aware that another one of George Dulip Stewart’s children is Wally Stewart? That’s correct.

You would consider him a Yuin man, wouldn’t you? Again, there’s a – stepbrothers. Wally’s got bloodline to the country.

Yes. I’m just talking about Wally? Norm doesn’t.

Just talking about Wally now? Yes.

So you would agree that Wally is a Yuin man, wouldn’t you? I certainly do.

So you would agree that it’s – you would expect that George Dulip [sic - Julip] Stewart would have passed down knowledge about fishing and camping areas to Wally, wouldn’t you? I would suggest so. Yes.

So you would expect that if this area was significant, Wally would know about it, wouldn’t you? Yes.

Okay. Just a moment. I’m just – now, you’re a cousin of the late Allan Carriage. Is that correct? That’s correct.

Am I right that he passed away roughly a year ago? Correct. Yes.

You would be aware that he was one of the named applicant members of the South Coast claim. Do you know that? That’s correct.

Now, you would expect – you – did you share your knowledge about this with him? He did know. I spoke to him about it on numerous occasions. He has asked questions not only about that particular area. He asked a lot of questions about every area on the South Coast that I knew of. I shared the lot with him. Yes. I did.

But are you aware that he never gave any evidence on this issue in this case? I’m not aware that he has given any evidence at all because he has

Right? passed away. Whether he passed it on the evidence in the past

Yes? I’m not sure.

265 When asked, he doubted that Smyth’s Oval was used as a camping area as he had never been told that. He also doubted that Apex Park had been used for camping. He said that if Norman Patten had camped there it would not have been a hunting and gathering camp, that close to the town. He agreed Uncle Guboo Ted Thomas was a knowledge holder but still did not accept that there was camping on Smyth’s Oval. He said the Isabel Street land was the main camping spot in Narooma. He said:

What historical records do you have? I mean, we didn’t write historical records. It was all verbal. It was all language and, again, one of the reasons why the old fellows, my grandfather and Uncle Ernie stopped there because there was lots of food. There was fish. There are prawns and over in Foster Bay there was ..... oysters and – and one of the main things they did camp there for too as well was to get access to flagon of wine at Lynch’s Hotel on top of the hill and they did go there and they bought their bottle of wine at the back of the hotel and they brought it back to Lubert Street and drank that wine and

Yes? It will stay with me forever what they did.

266 He rejected the proposition that he was confused about where they had camped, hunted and gathered but did say a lot of knowledge had passed with people who had died. He said he had described Glasshouse Rocks as about one kilometre south of the Isabel Street land as that is how he thought of it back then. He said:

I’m relying – I’m not lying – on my knowledge back then. We never used the word “Google” and we never used the word “east-west.” What we did use was knowledge of where land markings are. We did not use instruments – modern-day instruments to identify certain places. We used sight. And as sight- as it is, I will always remember the old fellows would say – you know, people would say “It’s south.” Same as you looking up towards Narooma. You would say “north.” This means very little to me, Mr Butt, to be quite honest. I could only tell you from what I’ve been taught. Looking at a map – Google – I could have corrected it, had I done it. But I’m only going by what I’ve been taught and told. And, to me, that is still south. To me.

267 He said he had speared prawns in Little Lake and hunted and gathered from all their camp sites on the Isabel Street land. He said he was still confused as to how Little Lake had been acquired for the golf course. This exchange occurred:

Would you accept that them acquiring it interfered with any traditional activities in that area? It certainly did. It virtually put a stop to the elders, myself and my uncles from visiting that land, along with the tip that was, eventually, put on that land and, also, sewerage that was put on that land.

But “that land” do you mean Isabel land? I’m talking about Isabel land.

268 He gave this evidence:

…we certainly got a lot of our food off Isabel Street. Food and medicine. From the Burrawang through to the gum tree, to those cherry trees. And, again, the abundance of that food is still on that land.

269 Mr Carriage agreed he had described Mystery Bay as “sacred”, Glasshouse Rocks as “very important” and the Isabel Street land as “important”. He said he was using his Aboriginal language and that Mystery Bay was a burial site where it was forbidden for some people to go without authority of the elders and the Isabel Street land was a learning site. He said:

The Isabel Street was a learning site for me. I was told law. I was told how to practice it, how to hunt and gather food from that Isabel Street and I still maintain that to this day, that it is a very – land of significance to us.

270 He agreed he had not referred to hunting on the Isabel Street land. He also agreed that he had not produced evidence that the Isabel Street land was a registered site of significance but said it was a camp site and a learning site. He said not all sites were registered and:

There are things we do not share to non-Indigenous peoples because of the reasons of what has happened in the past. And so, yes, there are sites there but we do not speak of it at times and we do not want to share it because we know what will happen. And it’s happened that many times that, as an elder in my community, I know of many, many, many sites, Mr Butt. I will not declare to the general public because I’m scared that they will be damaged and I know – I’ve witnessed, I’ve seen what happened to sites. They’ve been spray-painted, rocks thrown at it, walls broken, trees hit with axe, spray-painted. So I’m reluctant, at times, to expose those sites to the general public.

271 He rejected the proposition that there was no fresh water on the Isabel Street land saying he knew exactly where the main watering holes on that land were and that they always had fresh water there, and that they utilised the gullies on the land for fresh water to drink and bathe.

## Non-Aboriginal witnesses

### Alexander Chalmers

272 Mr Chalmers is a solicitor with NTSCORP responsible for the day-to-day conduct of the South Coast People’s native title claim. In his affidavit he explained that the South Coast People’s claim was filed on 3 August 2017. The claim was accepted for registration by the Registrar of the National Native Title Tribunal on 3 January 2017. In oral evidence Mr Chalmers did not accept that there was no correspondence identifying any specific native title rights and interests in the Isabel Street land, explaining:

Well, there’s a registered native title claim over the area. It – I wouldn’t have expected there to be correspondence asserting certain rights and interests. I mean, the whole – that meeting was called because our clients represented the South Coast People who asserted native title rights and interests in the claim area, which included Isabel Street, so that – the whole premise of that meeting was because our clients were asserting native title in that area.

…

… but the whole premise of the discussion was that, because our clients had a registered native title claim, they were asserting rights and interests in that area. I don’t have – I think it would have been somewhat redundant to explain that in a letter, but…

…

…the state of affairs at that time and at now is that they have a registered claim there. The context of these discussions was you had two Aboriginal parties. I had – I won’t go into my instructions other than to say I was told to treat the other party with respect and with a view that they were an Aboriginal party. If this was a property developer, a non-Indigenous property developer, it would be more likely that I would say more clearly that they assert native title rights and interests in the area. But as it was, we were corresponding with your client who, in fact, is also members – many of whom are members of the claim who are also asserting native title rights and interests in the area. So the context of this was we – I was instructed to at least attempt to find a non-litigated resolution to this matter. So, sort of – it’s – I think it’s clear in my correspondence that that was what we were trying to do. We weren’t trying to engage in legal points, as I say in my letter and to date, none of the applicant – no one I’ve ever spoken to has – well, sorry. None of the applicant have ever resiled or conceded that they don’t assert and hold native title rights in that area. This seemed to be somewhat – it seemed like, to me, a bit of an obvious point and not – it wasn’t going to the point of the – of trying to resolve this dispute. And it’s – I should point out the applicant just represent a very large claim group. The applicant don’t hold all the native title – sorry, all the knowledge about all the areas. They represent the broader claim group, so that was the – yes. Anyway…

273 Mr Chalmers agreed that he had not referred to native title rights and interests in the notice advertising the meeting of the South Coast People’s claim group to consider, amongst other things, WLALC’s non-claimant application. He said:

We’re writing to a claim group who are all authorised to claim, asserting Native Title in that land. Now, I wouldn’t have thought that I would put in that. You know, it’s their connection, and their rights and interest, and they know about that. It’s – it wouldn’t be for me to say, “You hold,” any more than to say, “You have a registered claim over that area.” It’s not for me to say, “You have – you assert specific rights.” I just don’t think that’s a relevant consideration, and it’s not something I would normally put in a notice. The notice is intended to give as much information as is necessary for people reading it to know whether or not it’s a meeting that they should intend, or they want to attend. And I don’t think a statement like the one you’re referring to would – is needed for that.

…

… they know the land a lot better than I do. It’s not for me to inform them about specific connection or association or knowledge of that land. That’s what they bring. I don’t tell them, as a lawyer. I tell them, “These are your rights, this is what has been asserted, and this is what was contemplated at the meeting, and this is what it will mean from a legal perspective.”

274 Mr Chalmers agreed that Wally Stewart was at the claim authorisation meeting and other meetings and said they had spoken to all members of the applicant group as to whether they wished to put on evidence. Mr Chalmers also confirmed that Wally Stewart was a member of WLALC at the time he was asked whether he wished to give evidence in this proceeding.

### Mishka Holt

275 Ms Holt is the principal solicitor of NTSCORP.

276 Ms Holt referred to a letter attached to WLALC’s non-claimant application from the Department of Primary Industry, Lands dated 15 October 2015 which states that from its investigation the Department had concluded that there are no acts that have occurred from Sch 1 of the NTA that would have extinguished native title.

277 Ms Holt also explained the process by which NTSCORP decides what assistance it can provide to Aboriginal persons about native title matters. It must be demonstrated that a native title claim satisfies a threshold test of legal merit before it will be considered for assistance. Legal merit will be considered to have been demonstrated if there is no obvious legal impediment to the bringing of a native title claim, it can be shown that the native title claim group constitutes a cohesive identifiable group which continues to acknowledge traditional laws and customs and it can be shown that the native title claim group has a continuing connection to the land and waters they wish to claim. NTSCORP formed the view that the South Coast People’s claim satisfied these merit criteria, with the assistance of Ms Holt and Dr Ken Lum, NTSCORP Manager Research.

278 In oral evidence Ms Holt did not dispute that the South Coast People’s claim was over 1.68 million hectares of land. No comprehensive tenure searching had yet been carried out. The claim asserts that:

The applicant did not yet have the details of any vacant Crown land occupied by the members of the native title claim group.

279 Ms Holt said:

The evidence provided in the form 1 is aimed at the prima facie considerations of the registration test. And in meeting what’s necessary for the application to be registered, it’s then the case that applicants go through the New South Wales state government’s credible evidence assessment process. And in the course of that, usually provide expert reports and a larger number of affidavits from men and women and from elders and young people and from a range of – of different areas to account for the size and the area of the claim and having evidence relevant to all of those areas.

280 Ms Holt, like Mr Chalmers, explained that not everything could be put in a notice of a meeting to consider WLALC’s non-claimant application. She said:

* What’s outlined there is specifically a description of the heads of agreement the people are being asked to consider.
* I mean, the notice goes to Native Title claimants, South Coast [P]eople who assert Native Title, and they’re well aware of the Native Title claim because they authorised it. And in doing so, they’re asserting that they hold Native Title in – in all of the area that’s subject to the application.
* I’ve had an opportunity to read that and I would agree, it doesn’t reference any specific native title rights or interests.

281 Ms Holt explained:

… I couldn’t say to you that we have comprehensive evidence about each and every parcel across the area. I’m aware, obviously, that this matter itself has resulted in specific information being given and views provided in relation to this specific parcel.

282 This exchange occurred:

Well, you’ve already agreed with me, I believe, that that is the case because you’ve accepted that you don’t have all the knowledge about occupation of all the area. And if that was the case, you would accept, wouldn’t you, that it was unnecessary to file any evidence in this case by NTS Corp for the South Coast People because it would have been sufficient to rely on the form 1, wouldn’t it? I don’t accept as a matter of law that occupation is a necessary requirement to establish that native title exists in an area.

283 This was followed by this exchange:

Well, I’m suggesting that when you don’t have information about all of the parcels, parcel by parcel, of the 1.68 million hectares, it’s possible that you don’t know everything about extinguishment and it’s possible that you don’t know everything about loss of connection? Look, I would accept that you can say that we don’t know every single thing about connection, but, as I said in my answer, we did have to – the South Coast People did have to satisfy that they had legal merit in order for NTS Corp to provide assistance, and we’ve had engagement over a large number of other matters, including defence of South Coast fisheries prosecutions and localised education workshops dating back, you know, more than a decade. And so I think there is a lot more information in relation to connection, but you specifically said occupation and I don’t accept at all that occupation is a requirement to establish native title.

284 Ms Holt also sad this about knowledge within Aboriginal communities:

I would say that it’s very hard to make generalisations about people’s knowledge. It can obviously vary between circumstances in families and information that’s shared in some families or by some elders with some individuals, so you certainly see modes of transfer of knowledge that can be between men and that can be between women. Sometimes there can be particular individuals in families who are chosen by an elder to receive knowledge. Sometimes, in fact, knowledge can be handed to a person who may be younger than an elder or, you know, that terminology commonly referred to as an elder but where they’re considered to be someone who can safeguard information or is capable of carrying out an elder’s wishes, so it may be perhaps that people who have knowledge may not necessarily be an elder, but may have been entrusted with that information, and I think there are many variables about people who hold knowledge. I think certainly someone’s age means that they have had more people that they’ve had contact with in the course of their life and often have been – had, you know, personalised contact with people who are – were alive at an earlier point in time, so certainly elders have a special place in terms of the knowledge they hold, but I don’t think that’s the sole category.

### Dr Fiona Skyring

285 Dr Skyring is a Senior Research Historian formerly employed by NTSCORP.

286 Dr Skyring provided an affidavit which explained the descent of Marilyn Campbell from apical ancestors of the South Coast People’s claim and the connection of those ancestors with the lands and waters in and around Narooma in the mid to late 1800s.

287 Dr Skyring also prepared an historical report in response to four questions as follows:

(a) what does the historical record establish is the approximate date of ‘effective sovereignty’ in the Non-claimant Application Area?

(b) does the historical record establish or provide evidence that the Non-claimant Application Area was used or occupied by Aboriginal People at the time of ‘effective sovereignty’ and were they likely to be those people contained in the claim group description contained at Appendix 4 of this brief?

(c) does the historical record establish or provide evidence that. From the time of ‘effective sovereignty’ in the Non-claimant Application Area, there were any:

(i) apical ancestors referred to in the claim group description contained at Appendix 4 of this brief;

(ii) or any other Aboriginal people;

who were living in the South Coast People’s Application area and used or occupied the Non-claimant Application Area.

(d) give an account of the settlement of the Non-claimant Application Area by non-Aboriginal people, including the nature of their use or occupation or the same and their impacts on Aboriginal People in the area.

288 Dr Skyring explained in her report that she had insufficient time to answer question (d).

289 The salient aspects of Dr Skyring’s report included:

(1) Until 1831 the Aboriginal inhabitants of the Wagonga Inlet area were undisturbed by the expanding settlement to the north.

(2) Wagonga Inlet first experienced white settlement in the 1840s at which time there were a large number of Aboriginals observed in the area.

(3) Even by the 1850s there was not extensive white settlement in the Wagonga Inlet area. Whites were hugely outnumbered by the hundreds of Aboriginal people in the area.

(4) Effective sovereignty of the Wagonga Inlet area did not occur until the late 1860s into the 1870s.

(5) Aboriginal people, who may be inferred to be South Coast People, have continued to use land in and around the Narooma area.

290 Dr Skyring does not give evidence about any specific connection - be it by occupation, use, presence of artefacts, story, myth or spiritual dimension - between South Coast People and the Isabel Street land.

# WLALC’S SUBMISSIONS

## Introduction

291 WLALC contended that it should be found that there is no native title in relation to the Isabel Street land for six reasons:

(1) the resolutions conveying an absence of native title in the land;

(2) the quantity and quality of primary evidence from Aboriginal knowledge holders supporting the same conclusion;

(3) the supporting evidence of non-Aboriginal witnesses;

(4) factors of white settlement and associated dispossession;

(5) the weakness of the South Coast’s People’s evidence; and

(6) the absence of evidence.

292 WLALC noted that there was no dispute about the power to make the order it sought and compliance with all procedural requirements, the non-claimant application having been notified from 3 May to 2 August 2017. No one applied to be joined during the notice period. NTSCORP was joined as a respondent on 4 December 2017 but always represented the South Coast People. The South Coast People joined on 10 April 2019.

293 The question is, has WLALC established on the balance of probabilities, on the whole of the evidence, that native title does not exist in relation to the Isabel Street land?

294 Section 223 of the NTA involves four basic elements for the existence of native title:

* A native title group holding native title rights and interests in relation to land or waters, in this case, the Land, being all the persons who according to their traditional laws and customs hold common or group rights and interests in relation to that Land;
* Those native title rights and interests must exist under the traditional laws acknowledged by and the traditional customs observed by that native title group;
* The laws and customs of the native title group must have a normative content deriving from that body of traditional laws and customs existing before sovereignty;
* The normative system of traditional laws and customs must have been observed continuously by that native title group as a whole.

295 The requirement for continuity requires substantially uninterrupted continuity: *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 at [87]; *Risk v Northern Territory* [2006] FCA 404 at [97(c)].

296 The focus of WLALC’s submissions was on the evidence of the alleged lack of continuity of acknowledgement and observance of traditional laws and customs giving rise to rights and interests in relation to the Isabel Street land. WLALC did not submit that there was no native title group that acknowledged and observed traditional laws and customs giving rise to native title rights and interests in relation to other land. Its case was that on the evidence it had established on the balance of probabilities that there was no continuity of acknowledgement and observance of traditional laws and customs giving rise to rights and interests in relation to the Isabel Street land.

## Resolutions

297 WLALC relied on its own resolutions and those of the Gulaga and Biamanga joint boards of management to the effect that the Isabel Street land is not of significance to Aboriginal people noting that:

(1) the 13 September 2014 resolution of WLALC involved 14 WLALC members;

(2) the 22 September 2014 resolution of WLALC involved 12 WLALC members;

(3) the 15 November 2016 resolution of the Gulaga and Biamanga joint boards of management involved 13 members including Cathy Thomas, the daughter of Marilyn Campbell, and no one could recall any use of the Isabel Street land for cultural purposes or any spiritual importance of the Isabel Street land; and

(4) 9 December 2016 there was a further confirmatory resolution of the Gulaga and Biamanga joint boards of management.

298 It was submitted that this evidence is crucial. According to WLALC:

(1) Lynnette Goodwin testified that the knowledge holders at the Gulaga and Biamanga joint boards of management meeting were “awesome knowledge holders.” In her affidavit, she had referred to “a ‘packed house’ of Aboriginal knowledge” and an absence of any debate about the Isabel Street land.

(2) Lorraine Naylor has lived in Narooma and gave evidence of having no knowledge of any use of the Isabel Street land for Aboriginal activities.

(3) Roslyn Field deposed that no one at the Gulaga and Biamanga joint boards of management meeting said they had any knowledge of any cultural significance attached to the Isabel Street land.

(4) Vivienne Mason said the Isabel Street land is not regarded by Aboriginal people as significant.

(5) Leslie Simon testified that the Gulaga and Biamanga joint boards of management members are knowledge holders for the area, including Iris White, Maureen Davis, Vivienne Mason, Michael Darcy, Cheryl Davison, Cathy Thomas and Ruth Hampton.

(6) The WLALC meetings were themselves attended by renowned knowledge holders of the Narooma region, including Vivienne Mason, Ron Mason, Bruce Ella, Sharon Mason and Jason Davison.

(7) At the meeting in March 2018 no specific native title rights or interests were asserted by the South Coast People members.

299 WLALC submitted that Ms Blackburn (who attended the March 2018 meeting) tried to claim as a “recent invention” that she did not support WLALC’s plans and had in fact asserted specific rights at the meeting. It was submitted her testimony was inconsistent with:

Mr Chalmers’ later testimony, and with: contemporaneous letters flowing between the lawyers; NTSCORP’s counsel’s statements at the 26 April 2018 hearing; and the Koori Mail advertisement of 30 January 2019 referring to the [Isabel Street] Land as “vacant” and being advertised for the purposes of an 86G [of the NTA] notice.

300 WLALC pointed out that:

(1) 29 different indigenous people were involved in the first three meetings;

(2) of those people, 7 are WLALC’s witnesses and 22 are non-WLALC witnesses;

(3) the resolutions individually and collectively show that the local community elders considered the Isabel Street land and determined that it has no significance in a Koori sense;

(4) the total number of indigenous people in the meetings and WLALC’s indigenous witnesses combined, equals 39 people;

(5) add WLALC’s non-Aboriginal witnesses (10), and the total number of people is 49; and

(6) “[w]hen this evidence is coupled with extinguishment on part of the [Isabel Street] Land plus factors of white interference, and an absence of evidence weighing in favour of any alleged native title, the conclusion is that the [Isabel Street] Land is not a place of significance to the local Aboriginal community and not native title country”.

301 According to WLALC the resolutions reflect an absence of any acknowledgment and observance of traditional laws and customs in the Isabel Street land which has continued substantially uninterrupted by each generation since sovereignty. Specifically, the resolutions show both an absence of connection in the physical sense in terms of use of the Isabel Street land and an absence of cultural and spiritual connection with the Isabel Street land.

## Primary evidence from Aboriginal knowledge holders

302 WLALC submitted that the evidence of so many primary knowledge holders of an absence of native title over the Isabel Street land is “precisely the evidence which the Court needs to make the determination”. It submitted that all of its evidence from Aboriginal knowledge holders supported the conclusion that there was no native title over the Isabel Street land and this was supported by the oral evidence.

303 WLALC provided the following examples of the evidence said to support its case.

### Shirley Foster

304 Ms Foster is an 85 year old traditional elder of the Yuin people from Wallaga Lake. Ms Foster and her late husband Merv Penrith are eminent knowledge holders referred to in evidence by numerous witnesses. She gave evidence including:

* Regarding the land at Isabel Street, to my knowledge, I have never heard of any burial sites or any significant sites or anything like that… I don’t know anyone who has said there is Koori significance in this land.
* There’s no connection with Kooris being together there… Isabel Street is a built-up area, come on…Sites of significance is a place where the old, old people may have gathered, but the younger people these days, they don’t gather there... people my age, they’ve never.

### Terry Hill

305 Mr Hill is a descendant of multiple apical ancestors of the Yuin nation who lives in Narooma. He gave evidence:

* don’t ever recall any stories when I was young or even in recent times about the site at Isabel Street being of cultural significance in relation to ceremony or birth or even a camping site…I am not aware of any higher significance of this Isabel street location, or any traditional activities at all in my time or prior.
* I’ve never heard of anyone going onto [the Land] for resources like reeds, native cherry trees, ochre, medicine plants, or Burrawang…I have never heard of the Land in recent times being used for hunting or as a water source.
* never heard any mention about significant sites at or around this Land… if there was…someone from the Aboriginal community, prior to this dispute, would have been raised the issue, but no one ever has…[the Land] is not known among the local aboriginal community in and around Narooma to be of any cultural significance.

### Ron Mason

306 Mr Mason is a 75 year old elder of the Yuin nation and renowned knowledge holder who has lived around the Narooma area most of his life. He learnt from eminent knowledge holders including Merv Penrith, Ted Thomas and Bing Mumbla. He said he would have known if the Isabel Street land had any significance and it was not of importance to the Koori community.

### Susan Heycox

307 Ms Heycox has lived in the Narooma area since 1960. She said that she has never heard of any person saying that they have been involved in cultural activities on the Isabel Street land. Nor did she know of anyone ever saying the Isabel Street land has any Koori significance.

### Bruce Ella

308 Mr Ella’s evidence “conveys his knowledge of, and broad consultations in relation to, the [Isabel Street] Land. He says [sic] there is no Aboriginal significance in this [Isabel Street] Land.”

309 WLALC submitted that the fact that some of the witnesses candidly gave evidence that all land is significant to Aboriginal people but some land has higher significance is not a concession of the existence of native title in relation to the Isabel Street land but a reflection of true feelings.

310 According to WLALC its evidence surpasses that of any prior case in terms of quality and quantity.

311 WLALC said its witnesses exhibit breadth in association, seniority and depth of knowledge including numerous members of WLALC, members of indigenous boards and leadership groups, members of the South Coast People claim group, siblings and other connections to the South Coast People claim group, and have broad ancestry.

312 WLALC submitted that the evidence of its witnesses was detailed and candid. The hypothetical questions put to a number of them as to whether they would assert native title in the Isabel Street land did not elicit useful evidence. The mere assertion of native title is not sufficient. The burden of proof on WLALC is on the balance of probabilities and not beyond reasonable doubt. Several WLALC witnesses were adamant that if the Isabel Street land was significant they would know about it. If it was significant there would be stories but they had heard none.

313 WLALC rejected all challenges to the credit of its witnesses. It submitted that:

The evidence indicates that it is overwhelmingly known and believed among local Aboriginal people that the [Isabel Street] Land is not significant in a Koori sense.

314 Implicit in WLALC’s submission was that the evidence about the significance of the Isabel Street land was evidence about the non-existence of traditional laws and customs by which the South Coast People continued to be connected to the land.

## Evidence of non-Aboriginal witnesses

315 All of these witnesses gave evidence that they have never seen, heard of, or otherwise known about, any indigenous activities (or use or occupation) occurring on the Isabel Street land. These witnesses work or live on all four sides of the Isabel Street land and have done so for decades. WLALC said that their evidence provides the Court with more probative evidence directed to the negative proposition, and more comfort to make the negative determination.

316 According to WLALC this evidence:

…reinforces the evidence of primary knowledge holders, community resolutions and factors of white intervention and dispossession…, supporting the conclusion that there is no native title in the [Isabel Street] Land… What remains entirely unchallenged (and could not be) is the notion that the witnesses - whose collective experiences cover all sides and parts of the [Isabel Street] Land over a prolonged timeframe - have never seen Aboriginal people on the [Isabel Street] Land doing anything that supports an inference of native title, nor have they heard of it, despite working or living on the [Isabel Street] Land’s perimeter often for decades or half a century plus or minus in two cases. Some witnesses also have ties with local Aboriginal people and know of Aboriginal activities which do occur in the region, but they do not occur at Isabel Street.

## White settlement and dispossession

317 According to WLALC the:

evidence of the effect of white settlement and dispossession of Aboriginal people of their land militate against a finding that any body of traditional law and customs has continued, as opposed to attenuated or transformed fragments of laws and customs (if any at all).

318 In oral submissions it was clarified that this submissions was confined to the relationship between traditional laws and customs and the Isabel Street land. In particular, it was submitted that the Isabel Street land is in an urban area, surrounded by development on all sides, was previously used for a tip and had experienced continued dumping of rubbish, has sewage infrastructure located on it, and is in an area from which there was forced displacement of and prejudice against Aboriginal people. All this tended, it was said, to a conclusion of substantial discontinuity of the acknowledgment and observance of traditional laws and customs in relation to the Isabel Street land.

319 It was submitted that the supporting evidence included the following.

### Ron Mason

Aboriginal people very rarely went into Narooma, it was a very prejudicial place in those times. Camping behind the football oval was a safe place free from the fear of being attacked. The [Isabel Street] Land, is not, and has never been, a camping spot for Aboriginal people.

### Patricia Ellis

The presence of industrial businesses and houses and development around the [Isabel Street] Land in this case to my observation and knowledge tends against it having significance to Aboriginal people. …The [Isabel Street] Land never looked inviting to me. As a Koori person I was not attracted to go on to it, and had no need to do so as a Koori person.

320 Further, after the forcible resettlement of Aboriginal people to the Wallaga Lake reserve:

Aboriginal people had little if any access to traditional country from which they were taken (including Narooma)… There can’t be connection where Aboriginal people have not been able to live….

### Noel Butler

321 Mr Butler’s evidence:

provided details of interference and prejudicial treatment by white Australians forcibly moving his family, and illustrating that he has practised culture to the extent he does not get ‘locked up’.

### Hika Te-Kowhai

322 Mr Te-Kowhai gave evidence that:

* The [Isabel Street] land ‘is not significant in a South Coast People sense and is not native title country…This all seems so unbelievable that I or others have to go to such lengths to prove what is known by the community, that this is not an important place for Aboriginal people in a Koori sense.’
* Aboriginal people in the area in and around the [Isabel Street] Land were moved to reserves in the late 1870s… this [Isabel Street] Land is one of those parts where any native title connection was lost.… the Carriage Affidavit is inconsistent with the compulsory displacement of Aboriginal people into reserves and the forced prevention of my people being able to practice culture, such as walking in the street holding spears, or being dressed in traditional clothing. All of this happened in Narooma.
* [T]o walk from Wallaga Lake to Narooma in the 1950s…one would need a permit from the Aboriginal Protection Board…they were very restricted.… it would have been very difficult…

### Clive Freeman

323 Mr Freeman gave evidence that:

The land at Isabel [Street] is urban landscape. We wouldn’t have gone to a place like that when visiting Narooma. And we still don’t do that. Our cultural values and heritage isn’t the sort of thing we want to showcase or display for whitefellas… Our cultural values, a lot of it is done in secret. It’s not done in the town. Isabel St[reet] is in the town.

### Susan Heycox

324 Ms Heycox gave evidence that she would not even think of stopping her car to walk around the Isabel Street land and it was just another block of land.

### Vivienne Mason

325 Ms Mason gave evidence that connection to land could be lost which is what had happened at the Isabel Street land.

### WLALC

326 WLALC submitted that the evidence of the South Coast People witnesses assisted WLALC’s case. As to Mr Carriage, his:

…oral evidence undermined any continuing connection in relation to the activities he deposed to (any connection always being denied) on 3-4 occasions when he was 5-6 or 11-12 years old, i.e. camping, fishing at Little Lake and resource gathering. Mr Carriage stated, first, that when the Golf Course acquired the land surrounding Little Lake (i.e. 60s/70s) this clearly interfered with traditional activities: ‘it virtually put a stop to elders and myself going on that land’… Second, he said that the tip was on the [Isabel Street] Land and both it and sewerage stopped access to Isabel Street. Accordingly, any acknowledgment and observance of laws and customs (if any) did not continue substantially uninterrupted.

### Leslie Simon

327 Mr Simon gave evidence that:

… Aboriginal people were historically moved all over the South Coast onto missions/reserves and ‘turned into white people’.

### Dr Fiona Skyring

328 Dr Skyring conceded that her report did not address the 20th century except for the 1990s.

## Weakness of South Coast People’s evidence

329 According to WLALC the evidence for the South Coast People has:

…fallen well short of proving that that there is a normative body of laws and customs in connection with the [Isabel Street] Land, the observance of which has been substantially maintained from the time of sovereignty to the present day, so as to cast sufficient doubt on the Applicant’s evidence.

330 The evidence of the South Coast People, submitted WLALC, was:

* vague, highly generalised, ‘historical’ or ‘hypothetical’;
* substantially uncorroborated, involving mere assertion without substance;
* focused on connection with other lands.

331 WLALC made the following submissions about the South Coast People’s evidence.

### Leslie Simon

332 Mr Simon did not mention the Isabel Street land in his affidavit and thus his evidence does not support a case for native title in relation to the Isabel Street land.

### Aileen Blackburn

333 Ms Blackburn gave clearly inadequate evidence lacking any assertion of personal use of the Isabel Street land and depending instead on a conversation with an unknown man. Ms Blackburn was also not from Narooma. WLALC said:

Ms Blackburn’s evidence does not cast genuine doubt on WLALC’s evidence. No uses of the [Isabel Street] Land are asserted by her, or by any named person. It is uncorroborated and reliant on an ‘unnamed man’. There were several ‘recent inventions’ concerning camping and Bomaderry (inconsistent with her lawyer and Ms Mason and related letters/transcript). Her evidence and quality of knowledge was expressly rejected by several WLALC witnesses.

### Owen Carriage

334 According to WLALC:

This affidavit was intended to establish a connection to the [Isabel Street] Land based on 3-4 acts of alleged camping at [the} Isabel St[reet Land] (unspecified where) and fishing at nearby Little Lake roughly 54-61 years ago and other unspecified ‘ancestral’ ties. The witness orally accepted that any ‘connection’ was ended by the Golf Course and tip/sewerage. He could not identify where the [Isabel Street] Land was by reference to Glasshouse Rocks, even when assisted by a map. His evidence relied on alleged events with ancestors who are all deceased, even though living offspring could have given evidence. The account is uncorroborated at the 11th hour. Mr Carriage is from Ulladulla/Batemans Bay. No ancestor of his was from Narooma except Julip Stewart (Wally’s father). His evidence never referred to any activity on any part of the [Isabel Street] Land, nor to any part of Little Lake, nor to any animal, nor to any other Narooma campsite. Mr Carriage referred to Mystery Bay and Glasshouse Rocks as ‘sacred’ or ‘very important,’ yet never described the [Isabel Street] Land in such terms. The evidence is contradicted, inconsistent with or rejected by 5 WLALC witnesses. It is totally inadequate.

### Marilyn Campbell

335 WLALC submitted:

The evidence is again insufficient. The witness testified that Mystery Bay to Aragunnu (which does not cover the [Isabel Street] Land) is ‘more important,’ or she is ‘more connected’ to it. In her 1st Affidavit, written before this dispute arose (while living in Narooma), Ms Campbell never mentioned Isabel Street once, nor says Narooma is significant, nor says she is connected to it, nor says she speaks for it. Ms Campbell accepted orally that she never refers to [the] Isabel Street [land] in her 2nd Affidavit as ‘sacre’ yet Aragunnu is ‘sacred’ because it is ‘more important’. Whereas Ms Campbell enthusiastically deposed that she has been ‘protecting Aragunnu for 30 years,’ this litigation is the first time she has sought to ‘protect’ the [Isabel Street] Land, despite living opposite it for 14 years and her daughter (Cathy Thomas) attending the 2016 Owner Board meeting which resolved that the [Isabel Street] Land was not significant. As to activities:

Camping: No personal assertion in 2nd Affidavit of camping on [te Isabel Street] Land at any time; a purely historical assertion relating to unnamed ancestors. No specific camping location given. No timing as to camping. Assertion of women camping was inconsistent with Mr Carriage’s ‘men’s business’ claim. Water: Witness accepted orally that she does not drink water on [the Isabel Street] Land. Suggested her ancestors did. Contrary to her affidavit, witness confirmed there’s no running water on [the Isabel Street] Land. Only alleged ‘freshwater’ is swampy area opposite Golf Course: ‘freshwater from the rain.’ Witness gets all drinking water at Aragunnu. Never mentioned water on [the Isabel Street] Land in 1st Affidavit. Hunting: No evidence of anyone who hunts on [the Isabel Street] Land. No animal specified. Fishing: confirmed nowhere to fish on [the Isabel Street] Land, never mentioned Little Lake in either affidavit, and Glasshouse Rocks not 500m away but over 1.2km as crow flies. Cherries: no present assertion of her taking cherries in 2nd Affidavit (after 2006). Poor explanation: ‘Aboriginal speaking.’ Ochre: no mention of taking ochre from [the Isabel Street] Land in 1st Affidavit despite living there. ‘Didn’t know’ why didn’t mention taking ochre 100m from house, but did mention taking at Aragunnu (50 min away). Charcoal: never says takes charcoal from [the Isabel Street] Land, nor when, how often, where. Yet knew Affidavit’s purpose was to give detail of traditional uses. Artefacts: no affidavit evidence linking artefacts to [the Isabel Street] Land. Reeds: accepted there is no evidence of anyone gathering reeds on [Isabel Street] Land. Cheryl Davis not applicable to [the Isabel Street]Land. Burrawang: no assertion in 2nd Affidavit whatsoever of gathering from [the] Isabel St[reet land]. Bush medicine / ferns / grass: it’s ‘all over South Coast.’ Witness specifically takes Narooma students to Aragunnu (50 min away) to teach about Lomandra grass – undermines any assertions in relation to grass on [Isabel Street] Land.

Ms Campbell’s evidence reflects either no uses of the [Isabel Street] Land at all or clearly insufficient use. Her 2nd affidavit speaks in vague, highly generalised, hypothetical or historical terms. Her appeal now to the [Isabel Street] Land’s importance is inconsistent with prior inaction, community resolutions, and correspondence during this proceeding. No other Campbell supported her account (nor Pickalla), including William Campbell who is ‘more senior’. By Ms Campbell’s admissions, other land is ‘more important’ to her or ‘more connected.’ The quality of her knowledge is expressly rejected by several WLALC witnesses.

### Dr Fiona Skyring

336 WLALC submitted that:

(1) Her report, which was directed to the question of use and occupation of the Isabel Street land, was substantially incomplete.

(2) There was no fair consideration of matters relevant to WLALC’s case.

(3) Dr Skyring was ‘presuming’ use and occupation in the absence of evidence, which is inadequate.

(4) This report was of insufficient forensic utility for present purposes.

337 According to WLALC the evidence for the South Coast People did not cast sufficient doubt on the evidence for WLALC so as to weigh against a determination that there was no native title in relation to the Isabel Street land. WLALC summarised its contentions as follows:

(1) No current use of the Isabel Street land was maintained except by Ms Campbell, and this pertained to vague, highly generalised assertions of resource gathering. Any actual camping, hunting, fishing, water use, ceremony, birthing etc, was not maintained.

(2) If any use does occur, it is insufficient use. The case law makes clear that minimalist uses are insufficient.

(3) With a clear break in continuity even accepted by Mr Carriage, and substantial unexplained time periods of no alleged use, any current use is not of the relevant group, or is not traditional.

(4) This is linked, in no insignificant part, to white settlement and dispossession.

(5) There is no ‘presumption of continuity’.

(6) To the extent that any native title may exist in surrounding areas (and not the Isabel Street land), this is unavailing.

(7) Any suggestion that connection can be made out on ‘spiritual’ grounds (as opposed to physical ones) is denied as:

(a) the various resolutions militate against that conclusion;

(b) this is the first time any South Coast People’s member came forward to protect this land;

(c) none of the South Coast People’s affidavits refer to the Isabel Street land as ‘sacred’ or ‘very important,’ despite the fact that such references are used when describing other lands; and

(d) there is also no cogent evidence of stories associated with the Isabel Street land.

(8) There is considerable rejection of the South Coast People’s lay evidence by their siblings and other family members whose evidence was adduced by WLALC.

(9) The WLALC witnesses are clearly more senior overall, more engrained in the local area and community overall, and have given more particularised evidence about the Isabel Street land and its surrounds.

## Absence of evidence

338 WLALC submitted that the absence of evidence is particularly telling. Of all the people who could have come forward only three (sic – four) Aboriginal witnesses gave evidence and only two did so in decent time. Of the 13 South Coast People claim group applicants who joined as respondents on 10 April 2019 only three have given evidence.

339 According to WLALC, *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 applies to the present circumstances. It should be inferred that the evidence of the 10 other parties who are members of the applicant for the South Coast People’s claim would not have assisted the case. WLALC said this was especially so for:

(1) Wally Stewart, son of George Julip Stewart, sibling to Susan Heycox and Norman Patten, who lives a 12 minute walk from the Isabel Street land;

(2) John Brierley, who is a cultural fisherman from Moruya and a senior applicant;

(3) William Campbell who is the “more senior” compared to Marilyn Campbell; and

(4) Cathy Thomas who is the daughter of Ms Campbell who participated in the 2016 meeting which resolved that the Isabel Street land has no significance.

340 Otherwise, WLALC submitted:

(1) Registration of the South Coast People’s native title claim is an administrative act and is not proof of the existence of native title.

(2) The Djiringanj native title claim was over a large area of land and the applicants for that claim could have no knowledge of each and every parcel, as is the case for the South Coast People’s native title claim.

(3) None of the evidence of Mr Hill, Mr Te-Kowhai, Mr Mason or Ms Foster asserting that this case is really a personal feud was challenged.

341 Accordingly, WLALC submitted that the clear preponderance of the evidence was in its favour that there is no native title in relation to the Isabel Street land.

# SOUTH COAST PEOPLE’S SUBMISSIONS

342 The South Coast People applicant (which includes NTSCORP as their representative) made the following submissions:

(1) WLALC must satisfy the Court, on the balance of probabilities, that no native title exists in the Isabel Street land. In considering this issue the Court is to take into account the nature of the asserted claim, the subject matter of the proceeding and the gravity of the case alleged: s 140(2) of the *Evidence Act 1995* (Cth).

(2) The case for NTSCORP and the South Coast People is that they have adduced evidence to show that there exist traditional laws and customs in relation to the Isabel Street land that continue to be observed so that a connection with the Isabel Street land has been maintained and so as to cast sufficient doubt on the negative proposition that WLALC seeks to prove.

(3) All of the evidence is to be weighed according to the proof that it was in the power of one side to produce and in the power of the other side to have contradicted.

(4) A determination of no native title has serious consequences. In this case it will be the loss of 17 hectares of land over which the South Coast People claim native title. A negative determination is a determination *in rem* thereby requiring careful consideration of the weight of the evidence. In a case such as this the land in question should be considered in the larger context of the overall claim for native title.

(5) There has been no equivalent proceeding in which the Court has made a negative determination in respect of a non-claimant application where a registered native title claimant application exists. In *Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96 at [40] Gleeson, Gaudron, McHugh, Gummow, Hayne and Callinan JJ stated the importance of the status of a registered claim as follows:

Ordinarily, the fact that an applicant for an injunction is a registered native title claimant will suggest, if not demonstrate, that there is a claim to native title that is arguable (the Registrar being obliged to accept the application unless of the opinion that it is frivolous or vexatious or that prima facie the claim cannot be made out).

343 The South Coast People submitted further that many of WLALC’s Aboriginal witnesses themselves asserted rights and interests in the Isabel Street land. They referred to evidence that Yuin people had the right to take and use resources on the Isabel Street land including as follows:

Shirley Foster (right to take Burrawang plants, ochre, reeds/grass, wood); Ronald Mason (collect wood); Roslyn Field (pick native fruits off the land); Terence Hill (right to take and use resources) and Ken Campbell (pick reeds to make baskets and other other artefacts).

344 The South Coast People submitted that when considering the evidence the Isabel Street land cannot be viewed in isolation from the surrounding land and waters. They said:

(1) WLALC’s Aboriginal witnesses gave extensive evidence about places and sites on land and waters in all directions surrounding the Isabel Street land which are of cultural significance to South Coast People.

(2) When the evidence is considered in its entirety it is apparent that Narooma and the surrounding lands and waters are littered with culturally significant areas which South Coast People hold knowledge of, and maintain a connection to.

(3) When asked, a number of witnesses confirmed that the following places were part of Yuin or South Coast People’s traditional country, and no witnesses gave any evidence to the contrary, all being places in relative proximity to the Isabel Street land including:

(a) Forsters Bay;

(b) Smyth’s Oval;

(c) Glasshouse Rocks;

(d) Handkerchief Beach;

(e) Apex Park;

(f) Corunna Lake;

(g) Brou and Mummaga Lake;

(h) Mystery Bay;

(i) Gulaga Mountain;

(j) Potato Point;

(k) Wallaga Lake; and

(l) Mumbulla (Biamanga) Mountain.

345 The Aboriginal witnesses all gave evidence of traditional laws acknowledged by and the traditional customs observed by the South Coast People or the Yuin including:

(1) the existence of rights and obligations to maintain, protect and speak for cultural places and sites including:

(a) Patricia Ellis: asserts the right to speak for the Brinja-Yuin people’s country and also as a ‘traditional custodian’ she can speak for all the area around the Biamanga and Gulaga Mountains, and Mystery Bay because she is a traditional owner who is a descendant of an ancestor who came from that area originally, before European occupation of Australia.

(b) Noel Butler: stated he has the right to speak for all Yuin country which includes ‘the Shoalhaven River to the Snowy River in the south’, however he has considerably more knowledge about the Budawang country and it is his responsibility to look after it.

(c) Lynette Goodwin: gave evidence that Brou Lake and Mummuga Lake form part of her traditional country and said she can speak for Brou Lake and Mummuga Lake as well as Biamanga and Gulaga Mountains.

(d) Shirley Foster: gave evidence that Wallaga Lake is her traditional country and she can speak for that area.

(e) Bruce Ella: stated that he has been taught by his elders since he was a child about places of importance and sites of significance in Narooma and noted he knows of burial sites, midden sites, scarred trees and mapping sites in Narooma.

(f) Norman Patten: gave evidence that Yuin people only can speak for Yuin land as it is their traditional country and under laws passed down from elders only people descended from people in that area could speak for it.

(g) Clive Freeman: gave evidence that he was taught the laws and customs of the Yuin nation from his parents and extended family including “the connections we have with each other and the extended families and the roles and responsibilities of protecting the environment.”

(2) the right to access and take resources from land and waters surrounding the Isabel Street land, including:

(a) Ronald Mason: gave evidence that his family dived to collect abalone and lobster at Glasshouse Rocks; as a boy he hunted about 5km northwest of the land; his mother and grandmother collected bush medicines from bush around the Narooma area; his daughter and wife, get ochre for traditional dance and this knowledge was handed down to them from Ms Mason’s Yuin mother.

(b) Roslyn Field: gave evidence that she is entitled to go to beaches near Narooma and “anywhere around there” to collect shells and she is entitled to collect bush tucker in the Walbunja area (that includes Narooma).

(c) Terence Hill: gave evidence that he could go onto land for traditional purposes.

(d) Patricia Ellis: stated that as a traditional owner from the area around Narooma she has the right to fish and hunt along that coastline; was told by old people growing up that she had the right to hunt kangaroo because it was their country and they had ancestors from that area; her family have the right to get water from the Gulaga Mountain area; common knowledge that collecting wood and water were part of her ancestor’s way of life; extensive knowledge of bush foods and medicines.

(e) Noel Butler: gave evidence that as a Yuin person he is entitled to go to Narooma and hunt and fish along the coastline, tell stories and do dances.

(f) Ken Campbell: said he has the right to hunt in Yuin country and his elders taught him the way to do those things. He also gave evidence that he believes Yuin people can take wild cherries, pick the Burrawang plant and take reeds, including from the Isabel Street land if they let WLALC know.

(g) Clive Freeman: believes South Coast People or Yuin People have the right to go fishing at Narooma and he has done that often; takes resources such as mangroves to make boomerangs, nullas, shields and spears and stringy barks; and picks the Burrawang plant and leaches the plant before consuming it as has been passed down from generation to generation.

(h) Bruce Ella: said he has the right in Yuin country to “[p]ractise my cultural rights, my cultural heritage, fishing, hunting and gathering, story-telling.”

(i) Vivienne Mason: gave evidence about camping, prawning and fishing with her family at Corunna Lake; collecting bimbullas (cockles) at Forsters Bay (taught by Yuin woman Heather Pickalla); collecting bush medicine from bush around Narooma; gathering bracken fern and using it to make bedding; places around Narooma to obtain grasses for weaving; and ochre.

(3) the right to access and remain on and use land including the right to camp:

Vivienne Mason gave evidence about travelling and camping along the South Coast as a child. Mrs Mason also gave evidence about camping at Mummaga Lake, Dalmeny and Corunna Lake. Mrs Mason agreed that camping is a right she has under her traditional laws and customs.

346 The South Coast People gave evidence of native title rights and interests that continue to be asserted around Narooma and the South Coast and on the Isabel Street land.

347 The South Coast People submitted further:

(1) Riparian corridors and water pooling in a gully was apparent during the view of the Isabel Street land. The evidence of Mr Carriage and Ms Campbell about fresh water on the Isabel Street land should be accepted.

(2) Evidence of some dumping of rubbish on the Isabel Street land does not prove it was a former tip. The weight of the evidence suggests the tip was in the light industrial area to the south of the Isabel Street land.

(3) There was confusion amongst Aboriginal witnesses about ownership of the Isabel Street land and the role of WLALC and the intersection with native title rights and interests.

(4) The evidence of non-Aboriginal witnesses about their observations of the Isabel Street land does not prove lack of use before WLALC ownership or lack of use at the present day. None of the witnesses had or were focused on the Isabel Street land as a whole.

# ATTORNEY GENERAL’S SUBMISSIONS

348 The Attorney General made submissions confined to legal issues. The Attorney General did not otherwise contend that the case of one or other party should be accepted or rejected.

349 The Attorney General pointed out that:

(1) On 28 November 1994, the *Native Title (New South Wales) Act 1994* (NSW) (the **NSW NTA)** came into force. The NSW NTA amended s 36(9) of the ALRA by making all land transferred under that provision “subject to any native title rights and interests existing in relation to the lands immediately before the transfer”.

(2) In the second reading speech (NSW Hansard Legislative Assembly 20 April 1994), the Minister for Energy, and Minister for Local Government and Co-operatives said:

One of the main objects of the *Aboriginal Land Rights Act* is to compensate Aboriginal people for dispossession from their traditional lands. If that traditional connection has been maintained in a way which would sustain a claim for native title, then it is that claim which should have precedence. Where a claim under the Aboriginal Land Rights Act is granted, it will be granted subject to any native title which may exist in the land. It may be that at the time of the grant no claim is made, but at a later time native title in the land is shown to exist. If that is the case, the native title holders, as traditional holders of the land, should have precedence over the relevant Aboriginal land council. This procedure will allow grants under the *Aboriginal Land Rights Act* to be made without extensive inquiries having to be made about whether the grant would affect native title and thus offend the Commonwealth Act. However, to protect purchasers of land granted to a land council that is subject to native title interests that have not yet been identified, the *Aboriginal Land Rights Act* is further amended to provide that such land cannot be sold unless there is on foot an approved determination in respect of native title.

(3) Although the Isabel Street land was granted to WLALC on 18 May 1998, it was formally transferred on 7 March 2006. Accordingly, s 36(9) of the ALRA applies to the Isabel Street land, that is, it is subject to any native title rights and interests that existed immediately before the transfer.

(4) Section 42(1) of the ALRA requires that an Aboriginal Land Council must not deal with land granted to it under s 39(9) unless the land is the subject of an approved determination of native title.

(5) Section 42G of the ALRA requires that a Local Aboriginal Land Council obtain approval from the NSW Aboriginal Land Council. Section 42G(2) requires the NSW Aboriginal Land Council to consider whether “the dealing is, or is likely to be, contrary to the interests of the members of the Local Aboriginal Land Council or other Aboriginal persons within the area of that Council.” To determine whether a dealing is contrary to these interests, the statute lists a number of factors to consider including, under s 42G(3)(c) “whether the Local Aboriginal Land Council, … had proper regard to the cultural and heritage significance of the land to Aboriginal persons”.

(6) Section 40(4) of the ALRA defines “cultural and heritage significance to Aboriginal persons” as land being “… significant in terms of the traditions, observances, customs, beliefs or history of Aboriginal persons.”

(7) In *Mace* at [181] the Court observed that cultural significance is not the question posed by the NTA. There is no reference in s 223 of the NTA to cultural and heritage significance.

(8) As positive and negative determinations of native title have the same juridical character, it is submitted that the Court should not take into account the fact that there may be no cultural and heritage significance of the Isabel Street land and the Isabel Street land is not recorded on the Aboriginal Heritage Information Management System.

350 The Attorney General submitted that for WLALC to prove the negative proposition it needs to prove only one of the following:

(1) the rights and interests claimed in relation to the Isabel Street land are not possessed under the traditional laws acknowledged and traditional customs observed; or

(2) no connection to the Isabel Street land exists; or

(3) the rights and interests claimed in relation to the Isabel Street land are not recognised by the common law of Australia.

351 Further WLALC would succeed if it could prove that:

(1) there has been no transmission of traditional laws and customs;

(2) no native title rights and interests relate to the land the subject of the non-claimant application;

(3) the people who claim to hold native title are not descended from persons who held native title in that area at sovereignty;

(4) an indigenous society in that area never existed;

(5) the indigenous society at sovereignty never acknowledged or observed traditional laws and customs on or in the vicinity of the subject land; or

(6) the claimed rights and interests have been lost, abandoned, or otherwise ceased to exist.

# DISCUSSION

## Some aspects of the evidence

352 I do not accept the suggestion (assuming it was still pressed) that Ronald and Vivienne Mason were “cynically tailoring” their evidence to suit their circumstances or that their evidence was self-serving. I consider that they gave honest evidence which should be accepted. I also do not accept that Vivienne Mason might have misled the Gulaga and Biamanga boards of management on 15 November 2016. I find it difficult to accept that the attendees at the meeting were unaware of the location of the Isabel Street land which is a large bushland block in the township of Narooma not too far from Glasshouse Rocks, a location on the beach which the evidence indicates is of significance to the South Coast People. It was also not misleading for Ms Mason to say the Isabel Street land was in the industrial area given that it immediately abuts industrial development. It is the attendees who recalled the property/area being used as a tip and there is other evidence indicating that there was a tip on at least part of the Isabel Street land. I also do not accept that the attendees of the meetings would have expressed any opinion about their lack of knowledge of any cultural or spiritual importance of the Isabel Street land unless they knew its location and were familiar with it.

353 Further, I do not accept that Aileen Blackburn was giving evidence comprising a recent invention about the assertion of native title rights and interests at the meeting between representatives of the South Coast People and WLALC. It must be recalled that the South Coast People had made a native title claim over a large area which includes the Isabel Street land. By reason of that fact alone they asserted native title rights and interests in relation to the Isabel Street land. As Mr Chalmers said, in those circumstances, it was not necessary for that fact to be reiterated in discussions with WLALC. The submissions for WLALC about this issue, and Ms Blackburn’s evidence, fail to acknowledge the relevance and effect of the South Coast People’s registered native title claim which necessarily involves an assertion of the native title rights and interests identified in the application. Those rights and interests are identified as the communal rights of the South Coast People as a whole to possession, occupation, use and enjoyment of the lands and waters of the application area to the exclusion of all others or, where exclusive rights and interests cannot be recognised, to access, remain in and use the lands and waters for any purpose, to take resources from the lands and waters for any purpose, to maintain and protect objects of significance, and, in so doing, to be accompanied by others.

354 I also do not accept the suggestion that, by reason of inconsistency of language between her first and second affidavits, Ms Campbell was not telling the truth when she said she accessed the Isabel Street land to obtain wood, native cherries, charcoal, and ochre. Ms Campbell lives close to the Isabel Street land. It makes sense that she would use the Isabel Street land to collect bush tucker and bush medicine given how close she lives to the Isabel Street land. In any event, her evidence of the uses she makes of the Isabel Street land was convincing. While her affidavit in this proceeding about the Isabel Street land was far from clear as to her uses of that land, her oral evidence was clear and should be accepted.

355 I do not accept that Owen Carriage’s evidence should be given less weight than it otherwise might merely because it was served late, albeit with leave. Mr Carriage’s evidence, having been served with leave, should not be discounted merely because it emerged late in the course of the matter. I otherwise deal with Mr Carriage’s evidence below.

356 Further, I reject the submission (to the extent it was pressed) that evidence from some of the Aboriginal witnesses must be discounted or given no weight merely because the witness was related in some way to Vivienne or Ronald Mason. Many of those who gave evidence were related in some or other way including to members of the South Coast claimant applicant. This does not mean that the witnesses lacked independence or were doing otherwise than giving truthful evidence which is entitled to its full weight.

357 I also reject the submission that because it may be inferred that WLALC intends to sell or develop the Isabel Street land, the evidence adduced from members of WLALC and their relatives should not be given the weight to which it would otherwise be entitled. It may be accepted that these witnesses may have wished to see the potential commercial value of the Isabel Street land realised but, again, that does not mean that they were doing other than giving truthful evidence about the status of the Isabel Street land amongst South Coast People (noting that all of the Aboriginal witnesses other than Cheryl Moreton and Norman Patten were members of the South Coast People’s claim group).

## The concept of “significance”

358 It may immediately be acknowledged that the existence or otherwise of native title in relation to land does not depend on the land being of “significance” to Aboriginal people: *Mace* at [181]. The NTA does not contain a criterion of “significance” to Aboriginal people as a determinant of the existence or non-existence of native title. The criteria established by s 223 of the NTA which determine the existence of native title are the possession of rights and interests under traditional laws and customs acknowledged and observed by the relevant Aboriginal people (in this case the communal or group rights and interests of the South Coast People as claimed in their native title claimant application) where those people, by those traditional laws and customs, have a connection with the relevant land or waters.

359 In the present case, the relevant land is the Isabel Street land. As noted, the relevant Aboriginal people are the South Coast People as a group, as their claimant application claims rights and interests vested in that group as a whole.

360 It is apparent from the above summary of the evidence of the Aboriginal witnesses called by both WLALC and the South Coast People that frequent reference is made to the “significance” and “cultural” or traditional “significance” or “importance” of land to Aboriginal people. In my view, when consideration is given to the evidence as a whole, it is apparent that it would be wrong to dismiss this evidence as immaterial to the question whether there are rights and interests possessed by the South Coast People under their traditional laws and customs where, by those laws and customs, those people have a connection with the land. I reject the submissions to that effect by the respondents. Rather, I infer that when the Aboriginal witnesses were speaking of the “significance” of the land to Aboriginal people they were in fact referring to the existence or otherwise of a traditional connection to the land; that is, a connection to the land under traditional laws and customs. Land was described as “sacred”, “significant” or “important” because of continued traditional physical and/or spiritual connections to that land. By equal measure, land was described as of “no significance” or “not important” because of the lack of continued traditional physical and/or spiritual connections to that land. This meaning was made express in the evidence of Mr Freeman and Mr Te-Kowhai and I consider that, on proper analysis, it underlay the evidence given by all of the Aboriginal witnesses. Those called by WLALC considered there was no continued traditional physical and/or spiritual connections to the Isabel Street land. Hence, the Isabel Street land was “not significant”. Those called by the South Coast People applicant (which includes NTSCORP as their representative) considered there was continued traditional physical and/or spiritual connections to the Isabel Street land. Hence, the Isabel Street land was “significant”.

361 The fact that a number of the witnesses also spoke of “significant sites” (such as burials, middens, scarred trees and the like which may be registered under NSW heritage legislation) does not mean that when they said the Isabel Street land was of “no significance” their evidence was confined to the existence or otherwise of such sites. The witnesses spoke more broadly of the significance of the Isabel Street land to them as South Coast People and the reputation of the Isabel Street land amongst South Coast People. Because we are dealing with the existence or otherwise of the traditional laws and customs of a group of people, the South Coast People, the evidence of the reputation or status of the Isabel Street land amongst those people is critical.

362 These conclusions are apparent from the evidence taken as a whole but some examples will suffice.

363 The WLALC resolved that the Isabel Street land had no cultural or heritage significance to the members of the WLALC immediately after noting that they were unaware of any traditional customs or laws being observed on the Isabel Street land. It is clear that the concept of significance was being used to express a view about continued connection with the land under the traditional laws and customs of the South Coast People.

364 The Gulaga and Biamanga boards of management resolved that they could not recall any use of the Isabel Street land for cultural purposes by local Aboriginal people and did not know of any cultural or spiritual importance of the Isabel Street land. Use of land, and cultural and spiritual importance of land, are means of connection with land under traditional laws and customs. Again, the concept of the importance of land expresses a view about continued connection with the land under the traditional laws and customs of the South Coast People.

365 Ms Mason said that Aboriginal people by knowledge and instinct know if land is significant. By this I consider that she meant that they know if Aboriginal people are connected to the land in some way by their traditional laws and customs.

366 Mr Butler said that all land was significant to Aboriginal people in some way. By this I consider that he meant that Aboriginal people feel some sense of connection to their traditional lands irrespective of considerations made relevant by the NTA such as the continued existence of substantially uninterrupted traditional laws and customs and connection to land and waters by those laws and customs.

367 Deanne Davison also said all land was sacred in some way to Aboriginal people but said if a place was “really sacred” you would know as an Aboriginal person. By this I understand Ms Davison also to have meant that Aboriginal people continue to feel connected in some way to their traditional lands irrespective of the existence of any rights or interests arising under traditional laws and customs in connection with those lands.

368 Patricia Ellis made the same point - every centimetre of Australia is important to Aboriginal people to some extent. Ms Ellis nevertheless used the concept of a “dead zone” to describe land to which Aboriginal people no longer felt a connection because of the disruption of their traditional lives caused by European colonisation. She felt the Isabel Street land was not of significance to Aboriginal people. In the context of her evidence she must be understood to have meant that in her view Aboriginal people no longer felt connected to this land in any traditional sense.

369 Roslyn Field said all land has significance but particular areas have additional significance. She considered that she had an unbroken connection to the entire South Coast area but considered the Isabel Street land had no cultural significance. By this I understood her to mean that she felt no particular traditional connection to the Isabel Street land.

370 Terence Hill also spoke of all land and water in Australia being significant to Aboriginal people but that some areas were of higher significance. These latter areas were areas where Aboriginal people had strived to continue their traditional activities and connection. He considered the Isabel Street land was not such a place and that it thus had no cultural significance.

371 Hika Te-Kowhai had also been taught that all land is important to some degree but significant land is land used by the people for activities which form part of their social structure. He had never been told of the Isabel Street land having any significance and thus considered there was no ongoing traditional connection with the Isabel Street land.

372 Ken Campbell spoke of “traditional connection” to land and expressed the view that Ms Campbell’s activities on the Isabel Street land had nothing to do with such a traditional connection. He said the Isabel Street land was not significant and if it was he would have known about it from the old people and the Isabel Street land would have been protected. Again, this is a concept of significance which involves the notion of continued traditional connection with the land.

373 Shirley Foster spoke of sites of significance to Koori people. She considered the Isabel Street land had no significance particularly as it was in a built up area.

374 Lynette Goodwin considered the Isabel Street land had no cultural significance.

375 Susan Heycox said the Isabel Street land had no Koori significance. She described Koori significance as places where her people had travelled and camped.

376 Ronald Mason said no one had ever mentioned the Isabel Street land as having any significance and he considered it had no significance.

377 Cheryl Moreton said no one had talked to her about the Isabel Street land having any significance.

378 Lorraine Naylor said no one had ever talked to her about the Isabel Street land even though they used it as a short cut to get to the tip.

379 Norman Patten thought the Isabel Street land might be somewhere Aboriginal people merely walked through but did not camp or conduct ceremony on. He said the Isabel Street land had no Koori significance.

380 Clive Freeman considered the Isabel Street land to be just another bit of Narooma as he had not been told anything about it. He said that places of significance were those places still bound into the customs, cultures and traditions of Aboriginal people. He explained that “significance” was an important concept concerning the cultural protocols and cultural connections and religions that connected Aboriginal people with places. He described the Isabel Street land as not being an ongoing part of connecting people to country.

381 Aileen Blackburn considered the Isabel Street land was significant because it contained grasses and reeds which could be used for weaving and weaving was about connection to land and each other.

382 Marilyn Campbell considered that the Isabel Street land was “very important” to them and always had been.

383 Owen Carriage described the Isabel Street land as an important place and as significant as it was a traditional hunting and camping site.

384 I consider that all such descriptions of the status of the Isabel Street land are relevant to the question of the existence or otherwise of traditional laws and customs which involve a connection to the Isabel Street land.

385 Accordingly, I do not accept the submission that the evidence of the witnesses called by WLALC did not deal with the issue of the existence or not on native title in relation to the Isabel Street land. I do not accept that the evidence of the significance of the Isabel Street land or otherwise was irrelevant. As Mr Freeman said, on the evidence in the present case, it is apparent that the concept of the significance of land, to the South Coast People, is integral to their continued traditional connection with land. This is what I consider they meant when they spoke of land being of Koori significance or not.

386 Further, I do not accept that the various ways in which the Aboriginal witnesses described their status (such as registered traditional owners under the ALRA, custodians, elders) or described their understanding of the functions of WLALC and the effect of the ALRA and NTA undermines the cogency of their evidence about the relationship of the South Coast People with the Isabel Street land. It is unsurprising that many of the witnesses were confused about the interrelationship between the legislation and the functions of WLALC. They were nevertheless capable of speaking about the relationship of the South Coast People with the Isabel Street land. The confusion about legal rights and concepts in no way undermined the cogency of their evidence. As discussed above, the evidence adduced by WLALC, understood in the context of the evidence as a whole, was unequivocally to the effect that they did not believe the Isabel Street land was of significance in a Koori sense by which it must be understood that they did not consider there to be any traditional laws and customs by which the South Coast People had a present connection with the Isabel Street land. Further, and contrary to the submissions for the South Coast People and NTSCORP, I do not accept that the evidence from the Aboriginal witnesses called by WLALC failed to provide a basis for the assertion of traditional knowledge. It was apparent that all of the evidence involved knowledge (or, more to the point, the lack of knowledge) based on the oral tradition of younger people being taught about their culture by the telling of stories by older people, particularly (but not exclusively) by older family members. This is traditional knowledge.

387 It was submitted for the South Coast People and NTSCORP that the mere fact that a tract of land was not mentioned by an elder does not mean that native title does not exist in relation to that land. At the level of hypothesis, this proposition may be accepted. But in the present case what we have from WLALC is cogent evidence of a lack of shared or group knowledge of anything - be it use, artefact, story or otherwise – by which there remains current any connection with the Isabel Street land under traditional laws and customs acknowledged and observed by the South Coast People. The number of South Coast People from whom WLALC called evidence (be it direct or indirect), their age profiles, and their status by reputation as knowledge holders of the South Coast People, leads me to the conclusion that this is not a case of mere failure to mention any traditional connection with the Isabel Street land by elders. As discussed further below, the evidence adduced by WLALC leads to the inference of no continued acknowledgement and observance of any traditional law and custom by which there is a current connection with the land as required by s 223(1)(a) of the NTA.

## The assertion of rights and interests in Yuin country as a whole

388 It will be apparent from the discussion above that many of the Aboriginal witnesses, including a number of those called by WLALC, asserted rights and interests in the whole of the claim area including the Isabel Street land.

389 I do not consider that the evidence given by the Aboriginal witnesses called by WLALC to the effect that they could exercise rights under traditional laws and customs in relation to all of Yuin traditional country can be taken to indicate that the South Coast People by their traditional laws and customs continue to have a connection with all land and waters within the claim area including, in particular, the Isabel Street land. Taken as a whole the evidence indicates to the contrary. For example:

(1) Vivienne Mason said she would not go to the Isabel Street land for any traditional purposes because the Isabel Street land seemed sick to her;

(2) Noel Butler had never heard of any traditional activities taking place on the Isabel Street land at any time;

(3) Ken Campbell described Marilyn Campbell’s use of the Isabel Street land as having nothing to do with a traditional connection to the Isabel Street land. He too had never heard of any traditional activities taking place on the Isabel Street land nor of any stories relating to the Isabel Street land;

(4) Deanne Davison had never heard of the Isabel Street land as being sacred or it being an area where any traditional activities had taken place;

(5) Bruce Ella said he would know if there was any significance to the Isabel Street land but he did not;

(6) Patricia Ellis believed that after the forcible displacement of South Coast People from their land they lost connection to some of their land which became dead zones and that this explained why the Isabel Street land was not of significance to Aboriginal people;

(7) Roslyn Field had never heard of the Isabel Street land having any cultural significance;

(8) Shirley Foster said she would have known if the Isabel Street land had any significance from her father who was a traditional elder but had never heard of the Isabel Street land having Koori significance;

(9) Lynette Goodwin said that she had no knowledge of any cultural significance of the Isabel Street land because it had never been discussed or contemplated and if there was something important on the Isabel Street land (and, I infer, if the Isabel Street land was important) she would have known about it;

(10) Susan Heycox had never heard of the Isabel Street land having any Koori significance;

(11) Terence Hill was not aware of any traditional activities having taken place on the Isabel Street land and did not recall any stories about the Isabel Street land having any cultural significance and believed that if the Isabel Street land did have any significance it would have been raised before this case;

(12) Ronald Mason use to drive past the Isabel Street land when he was a kid but had never heard of anything about the Isabel Street land and that if anyone had known anything about the Isabel Street land he would have known about it;

(13) Lorraine Naylor used to use the Isabel Street land as a shortcut but no one had ever told her the Isabel Street land was used for any Aboriginal activities. If it had been she would have been told about it growing up;

(14) Norman Patten believed that nothing of Aboriginal significance had ever occurred on the Isabel Street land and if used at all by Aboriginal people would have been just to walk through to get to other sites;

(15) Clive Freeman had never heard anything about the Isabel Street land when growing up but had been taken to numerous significant sites and to him the Isabel Street land was just a general bit of Narooma; and

(16) Hika Te-Kowhai considered there was no traditional connection with the Isabel Street land due to the historical displacement and migration of Aboriginal peoples and that the Isabel Street land was not known to be significant amongst traditional knowledge holders.

390 The evidence that a number of the Aboriginal witnesses called by WLALC gave about the right to access and take resources from the Isabel Street land involved generalised assertions without any identification of a traditional law and custom giving rise to the asserted rights in question in relation to the Isabel Street land. The evidence appeared to be based on a belief that because the whole of the claim area is considered to be traditional Yuin country Yuin people must have the right to access and take resources from anywhere and everywhere in the claim area irrespective of the considerations made relevant by the NTA including substantial continuity of connection under traditional laws and customs with the land in question. The evidence of this apparent belief does not have the effect of displacing the evidence from the very same people that the Isabel Street land was of no significance in a Koori sense – evidence which speaks of substantial discontinuity of traditional connection with the Isabel Street land.

391 There is another important aspect to the evidence of the Aboriginal witnesses called by WLALC. A consistent theme of that evidence (as apparent from the summary above) is that none of the witnesses had been told anything about the Isabel Street land by their elders and, until this case, had never heard of anyone suggesting that this land had any significance in a Koori sense. The essence of traditional laws and customs is that they are handed down from generation to generation, the elder instructing the younger, by oral means. While the evidence disclosed that there would be variable levels of traditional knowledge amongst members of the group depending on numerous circumstances there must be a continued sufficient unity of belief amongst group members for it to be said that there remain traditional laws and customs which are acknowledged and observed by the group. The importance to the continuity of traditional laws and customs of the sharing of knowledge across the members of the group was stressed by many of the witnesses for WLALC. The evidence included the following:

(1) Vivienne Mason gave evidence that she had asked numerous people in her community about the Isabel Street land but none of them knew of it having any significance in circumstances where it was very important for knowledge to be passed on, a duty she considered important and which she fulfilled;

(2) Noel Butler considered it his responsibility to share knowledge such as stories and dances;

(3) Ken Campbell thought true knowledge holders knew that the Isabel Street land was of no significance and if it was of any significance the old people would have told them so;

(4) Patricia Ellis explained how old people shared their knowledge to ensure the continuity of traditional laws and customs and said they all just knew what their ancestors did from their stories;

(5) Lynette Goodwin said every family had its designated story tellers to whom knowledge is passed to;

(6) Clive Freeman said he held the stories of his father and grandfather and was now the keeper of those stories and explained how it was necessary for knowledge of culture to be shared and passed on; and

(7) Hika Te-Kowhai said there was a particular way knowledge was orally disseminated amongst his people and that traditional knowledge had to be passed on within a family, otherwise there would be no body of tradition. He said that it was a law that Yuin people must strictly all hold, maintain and preserve the consistent body of knowledge of the traditions and customs of the society.

## WLALC’s evidence

392 Taking the evidence adduced by WLALC as a whole I consider that the evidence proves, on the balance of probabilities, that the South Coast People by their traditional laws and customs do not have a continuing connection with the Isabel Street land. The unanimous evidence of the Aboriginal witnesses that the Isabel Street land has no significance, understood in the context of their evidence as a whole and what they meant by “significance”, demonstrates that insofar as the Isabel Street land is concerned there has been a profound discontinuity of connection. I consider that it is apparent from the evidence that there is a society, be it called Yuin or the South Coast People, which is unified in its acknowledgement and observance of certain traditional laws and customs which include the sharing of knowledge within a family and within the group more generally. The evidence also suggests that by those traditional laws and customs those people have a continuing connection with some land, including for example land such as Glasshouse Rocks. But when it comes to the Isabel Street land three matters stand out in WLALC’s evidence:

(1) the consistency of views that the Isabel Street land has no significance to them;

(2) the fact that the Aboriginal witnesses did not merely believe that the Isabel Street land was not significant, but also were adamant that they had never been told or heard of the Isabel Street land having any significance in circumstances where if it had any significance they insist they would have known about it; and

(3) the efforts made by Vivienne Mason in particular to ascertain the views of the wider community about the potential significance of the Isabel Street land which yielded the same result that none of those canvassed believed the Isabel Street land to be of any significance or had even heard of the Isabel Street land being of any significance.

393 In an oral society, where knowledge of traditional laws and customs is shared by oral means from generation to generation, the absence of any knowledge of the Aboriginal witnesses called by WLALC about the Isabel Street land having any significance to their people is indicative of a discontinuity of connection between themselves and the Isabel Street land under their traditional laws and customs. This discontinuity is explicable on the evidence. The Isabel Street land is in the township of Narooma from which Aboriginal people were forcibly displaced by encroaching European colonisation. Aboriginal people were forced into missions and subjected to a permit system to control their movements. Aboriginal people and their culture were subjected to forcible suppression. Aboriginal people were subjected to racism and thus avoided the Narooma township. The areas surrounding the Isabel Street land were subjected to urban encroachment by a tip, the rear nine holes of the golf course, and the industrial development.

394 For these reasons, if the totality of the evidence was that adduced by WLALC, including the oral evidence given by the witnesses they called, then I would be satisfied that, on the balance of probabilities, there was no native title in relation to the Isabel Street land because the South Coast People, by their traditional laws and customs, had not continued to have a connection with that land.

395 The evidence, however, is not confined to that adduced by WLALC. The evidence adduced by the South Coast People must also be considered.

## The South Coast People’s evidence

396 I accept the submission for the South Coast People and NTSCORP (which was not disputed by WLALC) that the evidence indicates that there is a group of people called the Yuin or the South Coast People who continue to be unified in their acknowledgement and observance of certain traditional laws and customs by which they have an ongoing connection with some areas of land. Those traditional laws and customs include the method of and need for the transmission of knowledge by elders to younger people (by the telling of stories), the need for permission to access and use certain land and the obligations to protect certain land. The issue in the present case is not the existence of a society or of traditional laws and customs. It is the continued acknowledgement and observance of traditional laws and customs by which there is a connection with the Isabel Street land. The evidence is to be considered in that context.

### Aileen Blackburn

397 Ms Blackburn’s evidence does not identify any use of the Isabel Street land by her or her family. Her evidence about past uses is ambiguous in its references to the area in and around Isabel Street. In particular, I infer that in the past the Isabel Street land would not have been an isolated piece of urban bushland. It would have been a part of a larger area of bushland including the land which now comprises the rear nine holes of the golf course and the industrial development. In my view, Ms Blackburn’s evidence should be understood as describing this area generally as one in which her family camped, fished and walked but I do not accept her evidence as proving that any of these activities took place on the Isabel Street land itself. Insofar as the activity of fishing is described, it must relate to the beaches and lakes which do not adjoin the Isabel Street land. Ms Blackburn’s evidence of having been told by an elderly Aboriginal man of the coastal trails of the Yuin people is vague. There is no information as to the identity of the man in question. There is no suggestion that the men’s and women’s places mentioned are on or in the vicinity of the Isabel Street land. The location of the trails themselves remains unclear. The Isabel Street land is not so close to the coast that it would readily be inferred that it formed part of any coastal trail.

398 The connection to the Isabel Street land which Ms Blackburn identified appears to be on two bases. The first basis is that the Isabel Street land contains reeds which can be used for weaving. Ms Blackburn did not suggest in her affidavit, however, that she or anyone she knew used the Isabel Street land to obtain reeds for weaving. In her oral evidence she said relatives of hers did use the Isabel Street land to gather resources but she gave no information about the identity of these relatives. The evidence remained at the level of mere assertion without any detail as to the identity of the relatives, what resources they gathered, when they did so or whether they continued to do so. It was also difficult to reconcile this part of Ms Blackburn’s evidence with her evidence that people stayed away from the Isabel Street land due to doubts about its status. The second basis is that the Isabel Street land was part of an area which South Coast People would drive past on their journeys up and down the coast and that they would stop and wander around in the bush in this area. Her evidence, however, did not enable it to be inferred that the bush in question was on the Isabel Street land.

399 I do not accept the characterisation of Ms Blackburn’s evidence as proposed by the South Coast People and NTSCORP. She does not say that the Isabel Street land was used as a pathway, water source and camping area by her grandmother. She refers to the land “in and around Isabel Street” and the “area generally” which is not specific to the Isabel Street land itself, particularly having regard to the fact that before the development of the golf course and the industrial area I infer the Isabel Street land would not have appeared as it does now – as an isolated piece of urban bushland surrounded by development – but would have been part of a larger area of bushland. Ms Blackburn’s evidence of her grandmother collecting shells cannot relate to the Isabel Street land which is located well back from the beach. Ms Blackburn refers to having spoken to people with a connection to the land “in and around Isabel Street” but provides no explanation of who these people are or what their connection is. She also does not say she was taught about grasses on the Isabel Street land used by South Coast People. She says that she was taught about weaving. She says that she has a connection through her mother with the land “in and around Isabel Street” because of weaving but does not say that she or her family in fact took (or continue to take) resources from the Isabel Street land. She says it is important to protect the Isabel Street land because it has grasses used for weaving on it but does not say, as is suggested, that she was taught this fact by her elders.

400 I do not consider this evidence a sufficient basis to infer that the South Coast People have a continuing connection to the Isabel Street land by their traditional laws and customs. Further, I do not consider that this evidence sufficiently undermines the weight of the evidence adduced by WLALC to the effect that the South Coast People no longer have a connection to the Isabel Street land by their traditional laws and customs, the Isabel Street land being of no significance to them in a traditional sense. The evidence of Ms Blackburn is too ambiguous, too vague and too general to have the effect of casting sufficient doubt on the evidence adduced by WLALC so as to undermine the effect of that evidence as discharging the WLALC’s burden of proof. If the Isabel Street land had the status attributed to it by Ms Blackburn amongst the South Coast People as a group unified to a sufficient extent in their acknowledgement and observance of traditional laws and customs then I consider the fact of that status would have been known to at least some of the Aboriginal witnesses called by WLALC. I do not consider their lack of knowledge to be a result of mere differences in knowledge of various members of the group. Their lack of knowledge, combined with the vagueness and generality of Ms Blackburn’s evidence, suggests the lack of acknowledgement and observance of traditional laws and customs by the South Coast People as a group by which there is a connection to the Isabel Street land.

### Marilyn Campbell

401 It is material that Ms Campbell’s first affidavit, which was made in support of the South Coast People’s native title claim, made no mention of the Isabel Street land, any activities she carried out on the Isabel Street land or, indeed, the Narooma area at all. The affidavit instead focused on her physical and spiritual connection with the land between Mystery Bay and Aragunnu, to the south of Narooma. In her second affidavit and oral evidence Ms Campbell gave evidence of activities she carried out on the Isabel Street land. As I have said, I accept that Ms Campbell was giving her evidence honestly. That evidence does not persuade me, however, that Ms Campbell’s activities evidence an ongoing connection with the Isabel Street land of the South Coast People under their traditional laws and customs for a number of reasons:

(1) As noted, in the context of her first affidavit, the purpose of which was to support the South Coast People’s native title claim and which was prepared with legal assistance from NTSCORP, it would have been important for Ms Campbell to identify all rights and interests under traditional laws and customs by which the South Coast People continued to be connected to land within the claim area. Ms Campbell identified such activities particularly in relation to the area from Mystery Bay to Aragunnu but made no mention of the Isabel Street land or the Narooma area in circumstances where she lives in close proximity to the Isabel Street land and does in fact use it as occasion demands to collect wood, native cherries, ochre and charcoal. This supports the observation of Ken Campbell that Ms Campbell’s activities on the Isabel Street land do not have their foundation in traditional laws and customs the normative content of which unifies the South Coast People. As Mr Campbell put it, “it’s just her doing it”.

(2) Traditional laws and customs which give rise to rights and interests in land must have normative content. They must establish behavioural norms in accordance with the recognised and acknowledged demands for conformity of a society: *Akiba v Queensland* [2010] FCA 643; (2010) 204 FCR 1at [171]-[173]. While the requirement for unity, like the requirement for continuity, is not absolute, it must be able to be said that the rights and interests possessed under the traditional laws and customs in connection with land are acknowledged and observed by the South Coast People. On the evidence in the current case:

(a) Ms Campbell and her immediate family, who live in close proximity to the Isabel Street land, are the only people making use of the Isabel Street land.

(b) No other member of the South Coast People claim group gave evidence of having any knowledge of the use Ms Campbell and her immediate family were making of the Isabel Street land. To the contrary, all of the WLALC witnesses asserted they were unaware of any Aboriginal person making use of the Isabel Street land.

(c) Ms Campbell explained her use of the Isabel Street land by noting that all the stuff she collects is from the Isabel Street land because it is close to her – or, as she put it, it is her “own backyard”. I infer that her use of the Isabel Street land is opportunistic in the sense that she uses it because of its physical proximity to her home, not in the exercise of rights and interests under traditional laws and customs acknowledged and observed by the South Coast People. By this I do not mean that opportunism and traditional connection are necessarily mutually exclusive. But on the evidence in the present case the opportunistic uses of the Isabel Street land by Ms Campbell do not evidence a continuing traditional connection of the South Coast People with the Isabel Street land.

(d) In contrast to her evidence about Aragunnu and other places Ms Campbell did not suggest that there were any particular stories or ceremonies or activities of her ancestors on or in the vicinity of the Isabel Street land, other than a generalised assertion that they would have camped there and walked from there to Wallaga Lake. Ms Campbell did not identify when these activities would have occurred and whether or not they were in the more recent or very distant past.

(e) I infer that Ms Campbell’s daughter, Cathy Thomas, who was at the meeting of the Gulaga and Biamanga joint boards of management, did not raise any issue about the Isabel Street land having significance by reason of her immediate family’s use of the Isabel Street land because the uses did not strike Ms Thomas as being of any cultural or spiritual significance, as opposed to opportunistic given the proximity of the Isabel Street land to where they live. Had Ms Thomas considered the activities to be an exercise of rights and interests under traditional laws and customs then it could have been expected she would have raised the issue at the meeting given that was the specific purpose of Ms Mason attending the meeting to inquire about any potential significance of the Isabel Street land.

402 The isolated nature of Ms Campbell’s activities in relation to the Isabel Street land (in the sense that she apparently had not informed anyone outside her immediate family of the uses she made of the Isabel Street land and that they were not known to anyone outside her immediate family), the fact that she made no mention of the Isabel Street land or the Narooma area in her first affidavit when identifying traditional activities, together with the fact that her daughter Cathy Thomas did not mention the activities when specifically asked about the Isabel Street land at the Gulaga and Biamanga joint boards of management meeting, support Ken Campbell’s characterisation of her activities on the Isabel Street land as not being the expression of any traditional connection of the South Cast People with the Isabel Street land.

### Leslie Simon

403 As noted, Mr Simon made no mention of the Isabel Street land or Narooma in his affidavit. His evidence provided support for the inference that the South Coast People were a group united in their acknowledgement and observance of traditional laws and customs, but nothing in his evidence suggested that by those laws and customs the group had continued to have a connection with the Isabel Street land.

### Owen Carriage

404 Mr Carriage’s evidence is to the effect that when he was six or seven (that is, in the 1950s) he camped on the Isabel Street land three or four times with his elders and they were taught lore and respect for it, involving men’s business, the spirit world and the Bugeenj or kadiche man who white people call the “bone pointer” from whom they were protected as they were not breaking the law. He said his elders would have camped more regularly on the Isabel Street land. He said Uncle Julip Stewart took bark from the trees on the Isabel Street land which he would boil up and then use to treat his fishing nets.

405 Mr Carriage was giving evidence about events that occurred sixty years ago when he was six or seven years old. I find it difficult to accept that Mr Carriage was able to recall the location of the camp sites used when he was a child of six or seven years, particularly given that the surrounding land (now used for industrial purposes and the rear nine holes of the golf course) had not been developed at the time of his camping activities. In other words, the land would not have appeared in the 1950s as it does today, as an isolated area of urban bushland surrounded by development, including the golf course. It may be inferred that the bushland in the 1950s was more widespread than is currently the case (or, indeed, has been the case since the development of the rear nine holes of the golf course in the 1960s and the industrial land in the 1970s). In these circumstances, I consider there must be real doubt about Mr Carriage’s capacity to identify the land on which he camped with his elders when he was six or seven years old. That activity, in my view, may or may not have taken place on the Isabel Street land, as opposed to somewhere in the vicinity of the Isabel Street land.

406 Irrespective of the quality of Mr Carriage’s recollections, given that none of the many Aboriginal people whose evidence was adduced by WLALC, nor any of the Aboriginal people to whom Vivienne Mason spoke about the Isabel Street land, had heard mention of any camping on the Isabel Street land, I am simply unable to accept Mr Carriage’s evidence of camping on the land or that his elders would have camped on the Isabel Street land on many more occasions. Nor can I accept that Mr Carriage was told by his Uncle Ernie and others that the Isabel Street land was a traditional camping area. Had the area been a regular camping spot for Aboriginal people at any time in the years before, during or after Mr Carriage’s childhood then it would be reasonable to expect that someone other than Mr Carriage would have been aware of that fact. The uniform lack of awareness of the matters asserted by Mr Carriage amongst the South Coast People, and the lack of evidence from those who would have been expected to have known about such activities such as Wally Stewart, the son of George Julip Stewart, leads to a number of inferences.

407 First, as I have said, Mr Carriage’s supposition that his elders would have camped on the Isabel Street land more than three or four times and that the Isabel Street land was a traditional camping site cannot be accepted. His further assertion in oral evidence that the Isabel Street land was the “main” camping area for Aboriginal people in Narooma also cannot be accepted. It is inconsistent with all of the other evidence of Aboriginal people who would be expected to know the main camping areas of their people. The fact that Mr Carriage was prepared to make this assertion in his oral evidence that the Isabel Street land was the main camping area for Aboriginal people, moreover, casts some doubt on the credibility of his evidence as a whole. It reinforces my view that the effect of his evidence, that he clearly recalled camping on the Isabel Street land and what he was told there when he was six or seven years old, stretches the bounds of credulity.

408 Second, given how doubtful it is that Mr Carriage would have been the only child with the elders on the occasions to which he has referred, it may be inferred that the events in question have not been seen by any other attendee as having the same significance as Mr Carriage has placed on them. Had they had such significance then it would be reasonable to expect that someone within the South Coast People would have come forward either to give evidence corroborating the evidence of Mr Carriage or to inform Vivienne Mason who was actively seeking information from her community about the Isabel Street land. The fact that no one has come forward about the Isabel Street land also tends to reinforce the view that Mr Carriage’s recollection may not be as accurate as he would believe as to the location of the events to which he referred.

409 Third, as was apparent from the evidence of Mr Te-Kowhai, Mr Carriage himself appears never to have mentioned these events to his family or to have suggested before this case that the Isabel Street land was of any significance as a result of the events to which he referred in his affidavit. While he said he had shared his knowledge of the Isabel Street land with others, as WLALC pointed out, no-one had come forward to Vivienne Mason or to give corroborating evidence. Mr Te-Kowhai, Mr Carriage’s relative by marriage, said he had been told “many things by Uncle Owen” but not anything about the use made of the Isabel Street land.

410 Further, I do not accept Mr Carriage’s other supposition that Uncle George Julip Stewart would have told Norman Patten not to go on the Isabel Street land as Mr Patten was not a Yuin person. If Mr Patten had been told anything to that effect then Mr Patten would have known the Isabel Street land to be of some significance to the Yuin, a proposition with which Mr Patten plainly disagreed. Mr Carriage’s willingness in his oral evidence to engage in this supposition about events of which he had no direct knowledge also tends to undermine the credibility of his evidence as a whole, and particularly about events that took place some six decades in the past when he was only six or seven years of age.

411 Further, Mr Carriage accepted, as I consider must be the case, that George Julip Stewart would have passed down to his own son, Wally Stewart, knowledge of fishing and camping areas in Narooma. Wally Stewart is the 7th respondent. The South Coast People did not call Wally Stewart to give evidence. While there was evidence that Wally Stewart was also a member of WLALC this does not alter the fact that he is a party to the proceeding whom it could be expected the South Coast People would have called to give evidence if the evidence would have supported the case. The fact they did not do so without any explanation supports the inference that Wally Stewart’s evidence would not have assisted the case of the South Coast People. This tends also to support the inference that Mr Carriage was not able to accurately identify the Isabel Street land as the land on which the events referred to in his affidavit took place.

412 Further, Mr Carriage gave evidence that “we certainly got a lot of our food off Isabel Street”. Given that his recollection is only to the effect that he camped on the Isabel Street land three or four times, this evidence strikes me as an exaggeration. Similarly, he gave evidence that he was told lore and how to practice it and how to hunt and gather food from Isabel Street. I consider it unlikely that a group of Aboriginal elders would have taught such things to Mr Carriage alone. There must have been other children or young men who were taught these things at the same time and in the same place as Mr Carriage. Had this occurred as Mr Carriage recollects I would have expected that the knowledge would have been far more widely disseminated than is obviously the case. As Mr Te-Kowhai said, in order for there to be a body of law and custom, knowledge must be disseminated. While I accept that the distribution of knowledge may be uneven and focused on family lines, this case (or Mr Carriage’s evidence) presents an extreme example. No one, apart from Mr Carriage, has suggested that there was camping, hunting and gathering on the Isabel Street land by elders in the 1950s who used the experience to teach men’s business to young males. Had the Isabel Street land truly been used for that purpose I find it inconceivable that the knowledge would be held by Mr Carriage alone and that there would be no corroborating evidence, even in the form of hearsay, about such events. The consistent evidence of the South Coast People called by WLALC that they had never heard of the Isabel Street land having any significance strongly suggests the lack of an ongoing traditional connection with the Isabel Street land (that is, a connection under traditional laws and customs).

413 Further, Mr Carriage gave evidence, which I do accept, that a lot of knowledge of the South Coast People had been lost. He also said the development of the golf course had virtually put a stop to anyone visiting the Isabel Street land. I would infer from this that the development of the rear nine holes of the golf course in the 1960s would have had a dramatic effect on the surrounding land by virtue of the clearing of trees which would have been necessary to enable that land to be used for golf. While Mr Carriage insisted the golf course development stopped the use of the Isabel Street land, it seems far more likely to me that it stopped the use of the golf course land which was itself Crown land. The Isabel Street land remained as unfenced bushland until some part of it was used as a tip. In this latter regard, I am unable to accept the suggestion (to the extent it was made) that the whole of the Isabel Street land was used as a tip. The view of the Isabel Street land did not support this inference. I accept some part of it, adjoining the industrial development, was used as a tip but its essential character as unfenced bushland remained. In any event, had the Isabel Street land truly been the “main” camp site in Narooma for Aboriginal people, then that circumstance could have continued irrespective of the golf course development as the Isabel Street land remained accessible and unfenced. It is obvious that no such use did continue. This fact also reinforces my view that Mr Carriage’s recollections about the uses made of the Isabel Street land when he was a child of six or seven are unreliable.

414 For these reasons I do not consider that Mr Carriage’s evidence undermines the effect of the evidence adduced by WLALC to the effect that there are not traditional laws and customs by which the South Coast People have a continuing connection to the Isabel Street land.

415 I have also considered the cumulative effect of the evidence adduced by the South Coast People, including the fact of registration of their native title claim, but remain of the view that it does not cast sufficient doubt on WLALC’s case that, on the balance of probabilities, there is no native title in relation to the Isabel Street land because there is no continuing connection with that land under the traditional laws and customs of the South Coast People.

416 As to the registered native title claim making the claim at least arguable, the fact that the claim is over such a vast area means that it can be given little weight when considering the issue of the traditional connection of the South Coast People over an individual parcel of land which finds no mention in the material supporting the claim. The same conclusion applies to the fact that NTSCORP has assessed the claimant application to have merit. Where, as here, the claimant application is over such a vast area and the assessment of merit related to the overall area and not individual lots, the fact that NTSCORP consider the claimant application to have merit says nothing in particular about the Isabel Street land.

417 I do not accept that the fact of the earlier Djiringanj native title claimant application should lead to any different conclusion. That claim was also over a large area of land. None of the evidence in support of that application related to the Isabel Street land specifically. There is no inconsistency between Vivienne Mason and Ronald Mason having been applicants for the Djiringanj native title claimant application (the area of which included the Isabel Street land) and having given evidence in this proceeding to the effect that they have. Native title claims are often made and registered over large areas without regard to individual lots. The evidence in support of the making of the Djiringanj native title claimant application does not relate to the Isabel Street land specifically. To the extent that Ms Mason said at the time that she believed native title had not been extinguished over any part of the claim area, it must be recognised that she was dealing with a large area of land and could not possibly have had knowledge of the status of each and every individual lot within the claim area. As I have said, the submission that Ms Mason and her husband have “cynically tailored their evidence” so that WLALC could obtain the benefit of its fee simply ownership of the Isabel Street land is rejected. I consider them both to have given truthful evidence.

418 Further, I do not accept that *Mason v Tritton* (1994) 34 NSWLR 572, in which the Mason’s son asserted a traditional right to take abalone in defence of a criminal prosecution, is material. Leaving aside s 91 of the Evidence Act (that evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding), the area in question concerned Dalmeny not Narooma and the Court did not accept the evidence of a traditional right to take abalone. The Isabel Street land is located inland and has no frontage to any area which might be the subject of fishing activities.

419 The South Coast People and NTSCORP referred to the observations in *Worimi* at [87] that:

It is self-evident that a community or group of Aboriginal persons may have an ongoing connection with land, even though their access to, or use of, that land is restricted or spasmodic; that connection may be mainly spiritual rather than physical; it may have evolved over time to a less specific use of all or many parts of that land; it may not involve physical access to each and every part of the land…At least in each contested non-claimant application for the determination of native title, it is necessary to bear in mind that the particular area of land in question may be part only of a larger area of land over which there may be existing native title rights and interests. That is a matter to be determined on the facts of each case.

420 These observations are material to the present case. I have considered the totality of the evidence. I have considered the location of the Isabel Street land and its relationship to its surrounds and to other areas where there is evidence which indicates an arguable case for continuity of connection (assisted by a view of the Isabel Street land and its surrounds). On the facts of the present case, however, I am persuaded to the requisite standard of the balance of probabilities of the lack of traditional laws and customs of the group known as the South Coast People or the Yuin by which there is a continuing connection to the Isabel Street land.

421 I otherwise accept the submissions for WLALC that:

(1) Material weight should be given to the various resolutions of WLALC and the Gulaga and Biamanga joint boards of management as:

(a) the attendees at the meetings were South Coast People;

(b) the meetings involved substantial numbers of South Coast People (29 members of the South Coast People in total);

(c) the attendees at the Gulaga and Biamanga joint boards of management meeting were described by Lynette Goodwin as “awesome knowledge holders”; and

(d) if any of the attendees had been aware of any continuing traditional connection of South Coast People with the Isabel Street land, be it by use, by culture or matters spiritual, it could be expected that they would have put Vivienne Mason on notice of that connection.

(2) Substantial weight should be given to the consistency of the evidence of the Aboriginal witnesses called by WLALC to the effect that they had never heard of the Isabel Street land having any significance to Aboriginal people. As explained, I consider that this must be understood as the witnesses explaining that they had not heard of, and were personally unaware of, any traditional connection of the South Coast People to the Isabel Street land.

(3) Substantial weight should be given to the dislocating effects of European colonisation of the Narooma area and the displacement of the local Aboriginal people to reserves, as well as the urban development in the vicinity of the Isabel Street land which took place in the 1960s (the golf course rear nine holes) and 1970s (the industrial development) which must have substantially changed the character of the area. These events gave rise to the circumstances by which the South Coast People, on the evidence, lost their traditional connections to some (but by no means all) lands in Narooma. On the whole of the evidence, the Isabel Street land is one area where traditional connection was not sustained, at least after the 1960s and the golf course development.

(4) The evidence adduced by the South Coast People is weak compared to that adduced by WLALC in that:

(a) neither of the two affidavits lodged in support of the native title claim referred to any land in the vicinity of the Isabel Street land;

(b) Ms Blackburn’s evidence is vague and generalised;

(c) Ms Campbell’s evidence of current use of the Isabel Street land stands alone and in the face of the evidence of all other Aboriginal witnesses who had never heard of any such uses until this case. Ms Campbell’s evidence, considered as a whole and given the location where she lives, does not support the inference that the use she makes of the Isabel Street land in an exercise of rights under traditional laws and customs acknowledged and observed by the South Coast People. This is also all the more so given that her daughter, Cathy Thomas, made no mention of the uses when the issue of the Isabel Street land was specifically raised at the meeting of the Gulaga and Biamanga joint boards of management;

(d) Mr Carriage’s evidence is problematic for the reasons identified above and, in any event, Mr Carriage has given evidence of events which prevented the maintenance of a continued traditional connection with the area in which the Isabel Street land is located, being the development of the golf course and the industrial development; and

(e) Dr Skyring’s evidence is of limited utility and, in my view, supports two matters only, being the fact of Aboriginal occupation of the claim area by the South Coast People at sovereignty and the descent of the South Coast People from those Aboriginal people. Dr Skyring’s evidence does not deal with the 20th century and its impact on the continuity of connection with the Isabel Street land.

(5) Given Wally Stewart is the son of George Julip Stewart, referred to in Mr Carriage’s evidence, the absence of any evidence from Wally Stewart leads to the inference that his evidence would not have assisted the South Coast People. The evidence that he was both a member of the South Coast People’s applicant group and of WLALC is not an adequate explanation for the fact that he did not give evidence given his status as a party to this proceeding. In circumstances where Mr Carriage’s evidence relates specifically to the activities of George Julip Stewart, the absence of evidence from Wally Stewart supports the conclusions I have reached above about the problematic nature of Mr Carriage’s evidence.

422 While I accept the submission for the South Coast People that consideration must be given to the gravity of a negative determination of native title, and have given weight to that factor in my evaluation of the evidence, I find the weight of the evidence adduced by WLALC sufficient to conclude that there has been proved a lack of any continuing connection with the Isabel Street land of the South Coast People under their traditional laws and customs. I do not accept the submission that the evidence adduced by WLALC can be discounted on the basis that there is a differential spread of knowledge amongst the South Coast People. The striking things about the present case are twofold. First, there is the consistency of the direct and indirect evidence adduced by WLALC from a large number of people to the effect that, amongst the South Coast People, the Isabel Street land is not seen as having any significance. Second, there is the relative paucity of the evidence adduced by the South Coast People in support of any continuing traditional connection of South Coast People to the Isabel Street land. There comes a point when a lack of unity of knowledge may reflect a substantial discontinuity in the acknowledgement and observance of traditional law and custom in relation to land. The wealth of evidence adduced by WLALC in the present case supports a conclusion of a loss of traditional connection with the Isabel Street land. That evidence is both credible and sufficient even when weighed with the evidence adduced for the South Coast People and NTSCORP: *Worimi* at [74].

423 The fact that the parties could not identify another case in which a non-claimant application has been made where there is an undetermined registered claimant application is not to the point. The case is to be determined on the evidence as presented. In particular, I do not accept that the evidence indicative of an arguable continuing traditional connection with other areas, including (arguably) Forsters Bay, Bill Smyth Oval and Glasshouse Rocks (which are relatively close to the Isabel Street land) and more distant locations such as Mystery Bay and Gulaga and Biamanga Mountains, can be taken as evidence of an ongoing traditional connection with the Isabel Street land given that it is an isolated piece of urban bushland surrounded by development on all sides (including the golf course). To be clear, the relevant issue on which this case turns is that of continuing traditional connection with the Isabel Street land. WLALC has not proved other negative propositions such as the non-existence of a group unified by their acknowledgement and observance of traditional laws and customs, or the lack of normative content of those traditional laws and customs, or the lack of substantial continuity of those traditional laws and customs, or that the group by those traditional laws and customs does not have an ongoing connection with some land. What it has proved on the balance of probabilities is that the South Coast People by their traditional laws and customs do not have a continuing connection with the Isabel Street land. That is sufficient for WLALC to succeed in its claim.

# THE SEWAGE INFRASTRUCTURE

424 Given my conclusions above that WLALC has proved that there is no native title in relation to the Isabel Street land the question whether native title has been extinguished over that part of the Isabel Street land occupied by the sewage infrastructure does not strictly arise. I nevertheless deal with that issue below.

## The legislation

425 Section 23C(2)(a) of the NTA provides that if an act is a previous exclusion possession act (**PEPA**) under s 23B(7) (which deals with public works) and is attributable to the Commonwealth then the act extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated and the extinguishment is taken to have happened when the construction or establishment of the public work began. A PEPA is defined in s 23B(7) as an act (defined in s 226) which is valid and consists of the construction or establishment of any public work that commenced to be constructed or established on or before 23 December 1996. “Public work” is defined in s 253 to mean, amongst other things, a building, or other structure (including a memorial), that is a fixture that is constructed or established by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities.

426 Section 23E provides that:

If a law of a State or Territory contains a provision to the same effect as section 23D or 23DA, the law of the State or Territory may make provision to the same effect as section 23C in respect of all or any previous exclusive possession acts attributable to the State or Territory.

427 Section 23D concerns the preservation of beneficial reservations and conditions. Section 23DA confirms the validity of certain uses of land or waters.

428 Section 20(2) of the NSW NTA provides that acts which are PEPAs under s 23B(7) of the NTA and are attributable to the State extinguish native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated and the extinguishment is taken to have happened when the construction or establishment of the public work began. “Public work” has the same meaning as it does in the NTA: s 10 NSW NTA.

## The evidence

429 The evidence consists of various plans and conversations with and correspondence from Eurobodalla Shire Council (the **Council**). The plans show a sewer main and eight manholes on the northern part of the Isabel Street land, a manhole on the west of the Isabel Street land, and a sewer line on the eastern part of the Isabel Street land. On my interpretation of the conversation, an officer of the Council informed Ms Sivell that the northern works were constructed in 2004/2005/2006 and the eastern works were constructed in 1978. Other plans produced by the Council indicate that there were construction works in 1978 but it appears those plans relate to the eastern part of the Isabel Street land. However, in another conversation a Council officer informed Ms Sivell that the sewage system had been constructed in 1978. Further correspondence from the Council states that the whole Narooma sewerage project started in 1969 and finished in 1980 and that the construction on the Isabel Street land was completed in 1979 not 1978. The accompanying plans do not show a construction date other than one plan which shows dates of 1979 and 2006 for what appears to be part only of the sewage works.

## Submissions

430 WLALC submitted that the evidence showed that the sewage works were a public work attributable to the Council which had been constructed in 1978 or 1979 and that, accordingly, native title had been extinguished over that part of the Isabel Street land on which the public work was constructed and the adjacent land as referred to in s 251D of the NTA which provides that:

In this Act, a reference to land or waters on which a public work is constructed, established or situated includes a reference to any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work.

431 For the South Coast People it was submitted that:

All the manholes and all the water mains in the northern part of the [Isabel Street] land, were built between 2004 and 2006 (2004 construction). NTSCORP submits that the construction was invalid, as there is no evidence it was authorised pursuant to legislative or executive fiat. Alternatively, it is submitted that if it was valid and the construction affected native title and a future act provision of the NTA applied to it, there is no evidence that any relevant procedural requirements were complied with, and this would invalidate the construction to the extent it affected native title. If that is incorrect and the construction was valid under a future act provision, it would be necessary to look at the relevant provisions to confirm whether the act extinguished native title or whether the non-extinguishment principle applied. Otherwise, it is submitted that under s 24OA of the NTA the construction was invalid to the extent it affected native title.

A water main in the eastern part of the [Isabel Street] Land was built in 1978 (1978 construction). The respondents submit that the construction was not a “public work”. If the construction affected native title at all, the construction was a category D past act to which the non-extinguishment principle applied.

## Discussion

432 WLALC bears the onus of proof in relation to the extinguishment of native title by reason of the construction of public works before 23 December 1996. There is conflicting evidence about the date of construction of the works on the northern part of the Isabel Street land (2004-2006 or 1979). Given the state of the evidence I am not satisfied on the balance of probabilities that the works on the northern part of the Isabel Street land were constructed before 23 December 1996. The evidence about the works on the eastern part of the Isabel Street land is consistently to the effect that it was constructed in 1978 or 1979. Otherwise:

(1) I do not accept the submission for the South Coast People that the works were not constructed with authority. They were constructed by the Council pursuant to its powers under the *Local Government Act 1919* (NSW) and the *Local Government Act 1993* (NSW).

(2) Section 24OA of the NTA concerning the invalidity of future acts is subject to provisions of the NTA providing otherwise and the provisions concerning public works are such provisions.

(3) On the evidence the public works provisions are engaged and native title would be validly extinguished in respect of the works on the eastern side of the Isabel Street land.

(4) The same cannot be said of the works on the northern side of the Isabel Street land as there is insufficient evidence from which it can be inferred that those works were constructed before 23 December 1996. WLALC has not proved that those works were valid and have the effect of extinguishing native title.

## CONCLUSIONS

433 WLALC has proved on the balance of probabilities that there is no native title in relation to the Isabel Street land. To the extent it was submitted that a determination should not be made in the exercise of the Court’s discretion, I disagree. WLALC is the owner of the Isabel Street land. It has applied for a negative determination. The fact that the Isabel Street land is part of the South Coast People’s claim has been considered in the context of the evidence as a whole. Orders were made that this proceeding be determined separately from and in advance of the South Coast People’s claim. Having proved its case to the requisite standard the negative determination should be made as sought by WLALC. The fact that this will mean that the South Coast People cannot obtain a determination that native title exists over the Isabel Street land as a result of their claimant application and will abrogate any rights they may have had to compensation may be accepted. But these matters do not outweigh the claim of WLALC to the negative determination in circumstances where WLALC has proved its case on the balance of probabilities. A determination will be made accordingly. Otherwise I should record that the legal representatives for WLALC acted on a pro bono basis for which the Court is grateful.

|  |
| --- |
| I certify that the preceding four hundred and thirty three (433) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot. |

Associate:

Dated: 5 August 2020

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  |  |
| Respondents |  |
| Fourth Respondent: | MARILYN PICKALLA CAMPBELL |
| Fifth Respondent: | GWENDA JARRETT |
| Sixth Respondent: | WILLIAM CAMPBELL |
| Seventh Respondent: | WALLY STEWART |
| Eighth Respondent: | JOHN BRIERLY |
| Ninth Respondent: | MARK TINELT |
| Tenth Respondent: | DEAN KELLY |
| Eleventh Respondent: | CATHY THOMAS |
| Twelfth Respondent: | LESLIE SIMON |
| Thirteenth Respondent: | TARESSA MONGTA |
| Fourteenth Respondent: | PAUL MCLEOD |