IN THE HIGH COURT OF AUSTRALIA PERTH REGISTRY	IN THE HIGH COURT OF AUSTRALIA PERTH REGISTRY	IN THE HIGH COURT OF AUSTRALIA PERTH REGISTRY	IN THE HIGH COURT OF AUSTRALIA PERTH REGISTRY
No. P34 of 2019	*No. P35 of 2019*	*No. P36 of 2019*	*No. P37 of 2019*
APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA	APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA	APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA	APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA
BETWEEN	BETWEEN	BETWEEN	BETWEEN
STATE OF WESTERN AUSTRALIA Appellant	STATE OF WESTERN AUSTRALIA Appellant	COMMONWEALTH OF AUSTRALIA Appellant	COMMONWEALTH OF AUSTRALIA Appellant
and	and	and	and
ERNEST DAMIEN MANADO, CECILIA CHURNSIDE, ALEC DANN, BETTY DIXON, WALTER KOSTER AND PHILIP MCCARTHY ON BEHALF OF THE BINDUNBUR NATIVE TITLE GROUP First Respondent	RITA AUGUSTINE, ELIZABETH DIXON, CECILIA DJIAGWEEN, IGNATIUS PADDY AND ANTHONY WATSON ON BEHALF OF THE JABIRR JABIRR / NGUMBARL NATIVE TITLE CLAIM GROUP First Respondent	RITA AUGUSTINE, ELIZABETH DIXON, CECILIA DJIAGWEEN, IGNATIUS PADDY AND ANTHONY WATSON ON BEHALF OF THE JABIRR JABIRR / NGUMBARL NATIVE TITLE CLAIM GROUP First Respondent	ERNEST DAMIEN MANADO, CECILIA CHURNSIDE, ALEC DANN, BETTY DIXON, WALTER KOSTER AND PHILIP MCCARTHY ON BEHALF OF THE BINDUNBUR NATIVE TITLE GROUP First Respondent
COMMONWEALTH OF AUSTRALIA Second Respondent and Ors	COMMONWEALTH OF AUSTRALIA Second Respondent and Ors	STATE OF WESTERN AUSTRALIA Second Respondent and Ors	STATE OF WESTERN AUSTRALIA Second Respondent and Ors

SUBMISSIONS OF THE STATE OF WESTERN AUSTRALIA (APPELLANT IN P34/35 OF 2019; SECOND RESPONDENT IN P36/37 OF 2019)

Dated: 21 August 2019

Filed on behalf of: the State of Western Australia (Appellant in P34 and P35/2019; Second Respondent in P36 and P37 of 2019)

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The following defined terms are used in the submissions below:

"**Bindunbur Claimants**" means the first respondents;

"**Bindunbur Determination**" means the determination of native title for the Bindunbur Claimants;

"**Bindunbur Determination Area**" means the determination area for the Bindunbur Determination;

"Claimants" means the Bindunbur Claimants and the Jabirr Jabirr Claimants together;

"**coastal areas**" means the areas referred to in Paragraph 12(f) of Sch 7 of the Bindunbur Determination (1 JCAB pp 398-399), and paragraph 8(h) of Sch 6 of the Jabirr Jabirr Determination (1 JCAB pp 363-364), which are all areas below the statutory high water mark (defined in s.3(1) of the LA and LAA);

"Jabirr Jabirr Claimants" means the first respondents;

"Jabirr Jabirr Determination" means the determination of native title for the Jabirr Jabirr Claimants;

"Jabirr Jabirr Determination Area" means the determination area for the Jabirr Jabirr Determination;

"**LA**" means the *Land Act 1933* (WA);

"**LAA**" means the *Land Administration Act 1997* (WA);

"**NTA**" means the *Native Title Act 1993* (Cth);

"**TVA**" means the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA).

Part I: Certification for Internet Publication

1. We certify that this submission is in a form suitable for publication on the internet.

Part II: Concise Statement of Issues

2. The first issue concerns the legal nature of the existing public access to and enjoyment of waterways, and other similar areas, located upon Crown Land below the statutory "high water mark". The other similar areas are beds and banks or

foreshores of waterways, coastal waters or beaches. The statutory "high water mark" is defined in s.3(1) of the *Land Act* ("**LA**") and s.3(1) of the *Land Administration Act* ("**LAA**"). This issue is significant as the existing public access to and enjoyment of waterways was confirmed by s.14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act* ("**TVA**") in accordance with s.212(2) of the *Native Title Act* ("**NTA**"). The question is to identify precisely the legal nature of what was confirmed by these statutes.

3. The State contends that the existing public access to and enjoyment of waterways, and other similar areas, which was confirmed, is the absence of any prohibition preventing members of the public from accessing and enjoying these waterways, etc.

4. The second issue is whether the existing public access to and enjoyment of waterways, and other similar areas, located on unallocated Crown Land, which was confirmed by s.14 of the TVA in accordance with s.212(2) of the NTA, should be stated in a determination of native title made in accordance with s.225 of the NTA.

5. The State contends that the public access and enjoyment of waterways, etc, free of any prohibition is an interest of members of the public within one of the "other interests" referred to in s.225(c), and should be stated in a determination of native title.

Part III: Certification in respect of Section 78B Notice

6. The Appellant certifies that it considers that notice is not required pursuant to s.78B of the *Judiciary Act 1903* (Cth).

Part IV: Citation of Decisions Below

7. The first instance decision of the Federal Court of Australia (North J) is: [2017] FCA 1367. The supplementary decision of the Federal Court of Australia (North J) is: [2018] FCA 275. These decisions are not reported.

8. The decision of the Full Federal Court of Australia is: [2018] FCAFC 238. It is not reported.

Part V: Narrative Statement of Relevant Facts

9. Section 212(2) of the NTA came into effect on 1 January 1994. It relevantly provided that a law of the Commonwealth, a State or a Territory may confirm "any existing

public access to and enjoyment of: (a) waterways; or (b) beds and banks or foreshores of waterways; or (c) coastal waters; or (d) beaches."

10. Acting pursuant to this provision, the Parliament of Western Australia enacted s.14 of the TVA, which came into effect on 4 July 1995. It relevantly provided that "[e]xisting public access to and enjoyment of" certain places is "confirmed". The places to which this provision applied included: (a) waterways; or (b) beds and banks or foreshores of waterways; or (c) coastal waters; or (d) beaches.

11. The Bindunbur and Jabirr Jabirr Determination Areas are in the mid-Dampier Peninsula in Western Australia: Trial Judge's Reasons in [2017] FCA 1367 ("**TJ**"), [1] (Vol 1, Joint Core Appeal Book ("**1 JCAB**"), p 20).

12. The Determination Areas included certain reserves and other tenure which extended to the statutory high water mark defined in s.3(1) of the Western Australian LAA. The "coastal areas" referred to in paragraph 12(f) of Sch 7 of the Bindunbur Determination (1 JCAB pp 398-399) and paragraph 8(h) of Sch 6 of the Jabirr Jabirr Determination (1 JCAB pp 363-364) are below (ie seaward) of the statutory high water mark.

13. The statutory high water mark is the "ordinary high water mark at spring tides". All land below this statutory high water mark, including the beds and banks of tidal waters, is Crown land unless that land is inundated land or other alienated land: s.3(2) of the LAA. "Inundated land means alienated land that, through excavation of that land or other land, has become inundated by tidal waters": s.3(1) of the LAA. The position was effectively the same under s.3(1) and s.3(2) of the Western Australian LA in 1994, when the NTA came into effect.

14. The State did not lead evidence of specific instances of use, or specific places of use, of the coastal areas to demonstrate existing public access to these areas: TJ, [639] (1 JCAB p 219); Full Federal Court Reasons ("**FFC**"), [147], [173] (2 JCAB pp 506-507, 513). The State contended that s.14 of the TVA, in accordance with s.212(2) of the NTA, confirmed a legal privilege to access the coastal areas, and that it was unnecessary to define that privilege by reference to actual use.

15. The Bindunbur Claimants accepted that the public had a right to access and enjoy the coastal areas for the purpose of exercising the common law public right to fish and

to navigate. They proposed that the Bindunbur Determination should be limited to stating that the public had a right to access and enjoy the coastal areas for the purpose of exercising those rights only: Supplementary Reasons of the Trial Judge in [2018] FCA 275 ("**STJ**"), [18] (1 JCAB p 259). (There is no issue in the appeals concerning the extent of the public right to fish or the public right to navigate.)

16. The trial judge made the Bindunbur and Jabirr Jabirr Determinations in similar terms to each other. Paragraph 12(f) of Sch 7 of the Bindunbur Determination (1 JCAB pp 398-399), and paragraph 8(h) of Sch 6 of the Jabirr Jabirr Determination (1 JCAB pp 363-364), stated that the nature and extent of other interests in relation to the Determination Areas included, pursuant to s.14 of the TVA, public access and enjoyment of the coastal areas, being areas which are (a) waterways; or (b) beds and banks or foreshores of waterways; or (c) coastal waters; or (d) beaches. This adopted the State's position.

17. The form of determination adopted by the trial judge was a more detailed variant of the form of clauses used in many determinations made in the past. Most instances of this form of determination are found in consent determinations. The particular question raised in this case had not been previously decided. The greater detail required by the trial judge involved more specific identification of the geographical locations of public access locations. See TJ, [640]-[645] (1 JCAB p 219).

Part VI: Argument

A. Trial Judge's Decision

18. The trial judge reached his decision for the following reasons:

(a) given the width of the definition of "interest" in s.253 of the NTA, the public access referred to in s.14 of the TVA is likely to have been intended to fall within that definition: TJ, [644] (1 JCAB p 220);

(b) the ability of the public to access and enjoy coastal areas below the statutory high water mark, because access by the public to such areas is not proscribed, falls within the definition of an interest in s.253 of the NTA, because it is a privilege in relation to land and waters: STJ, [20] (1 JCAB p 259);

(c) the purpose of s.225(c) of the NTA is to require identification of the interests which must co-exist with the native title interests, and thereby to allow

notification to those concerned of the relationship between the two sets of interests so that people may regulate their conduct accordingly: TJ, [644] (1 JCAB p 220);

(d) it was sufficient for the purposes of complying with the requirements of s.225(c) to describe the nature of the interest by referring to public access, but it was also necessary to identify the place at which that public access was to be undertaken: TJ, [644] (1 JCAB p 220).

B. Full Court's Decision

19. The Claimants appealed against the form of the Bindunbur and Jabirr Jabirr Determinations, in so far as they contained paragraph 12(f) of Sch 7 of the Bindunbur Determination (1 JCAB pp 398-399) and paragraph 8(h) of Sch 6 of the Jabirr Jabirr Determination (1 JCAB pp 363-364).

20. Upon the appeal, the Claimants did not challenge the validity of s.14 of the TVA. Nor did the Claimants submit that s.14 of the TVA had no operative effect, as it did not confirm anything. Instead, they contended that s.225 of the NTA required that, in order for the public access confirmed by s.14 of the TVA to be referred to in a determination, the State needed to satisfy the Court that the public were possessed of an existing *right* of access to and enjoyment of the waterways, etc, in the area. Alternatively, they contended that the Court needed to be satisfied that, at the time the NTA commenced operation, the public in fact physically enjoyed access to identified areas. See FFC, [129] (2 JCAB p 501).

No "right" of public access for purposes of s.253

21. The Full Court held that the State had not established that public access to the coastal areas was a positive *right* in connection with land or waters, for the public "to roam on and enjoy the beaches and other places mentioned in" s.212(2) of the NTA: FFC, [157]-[158] (2 JCAB p 509). The Court said that the common law did not recognise any right, entitlement or interest to "roam across, let alone enjoy, unallocated Crown land whether above or below the common law or statutory high water mark": FFC, [149] (2 JCAB p 507). Similarly, the Court said that Australian law did not recognise "a general public right to enter and enjoy unallocated Crown land": FFC, [156] (2 JCAB p 509). The Court also said that there was no custom, convention or

expectation that the general public had a right to enter and enjoy unallocated Crown land: FFC, [149], [156] (2 JCAB pp 507, 509).

22. These observations were made about a right, entitlement or interest "in the sense of enabling such an asserted 'interest' to be vindicated". See FFC, [149] (2 JCAB p 507). In other words, public access to the coastal areas was not a positive *right* in connection with land or waters, because it could not be "vindicated". The Court considered that the *ability* of the public to access unallocated Crown land was different to the *right* of the public to use a "public reserve", which had been dedicated for public use or public purposes: ***Council of Municipality of Randwick v Rutledge and Others*** [1959] HCA 63; (1959) 102 CLR 54. See FFC, [151]-[156] (2 JCAB pp 508-509).

23. Further, the Court considered that, properly construed, s.212(2) did not intend to permit a confirming law to be made which converted an absence of a prohibition against public access to coastal areas into a positive right of public access to coastal areas. The Court did not consider that the Commonwealth Parliament intended, "by s 212 and a confirmatory State or Territory law, to permit the conversion of an ill-defined custom or convention reflecting an 'aspect of Australian life' that members of the public may access and enjoy any unallocated Crown land because there is no law preventing them from doing so, into an 'interest' as defined by s 253 of the NTA for the purposes of identifying other interests in a native title determination": FFC, [158] (2 JCAB p 509).

No "privilege" of public access for purposes of s.253

24. The Full Court then said that it did not consider that "a mere ability or liberty can be described as a "privilege" so as to fall within para (b) of the definition of "interest" in s.253, as the primary judge found": FFC, [159] (2 JCAB p 510).

25. The Full Court held that the concept of "interest" was wide, but not unlimited: FFC, [160] (2 JCAB p 510). The ordinary meaning of "privilege" was something which was not, of its nature, available to all. As well, the particular interest qualifying as a "privilege" must be invested, given or authorised. See FFC, [162]-[163] (2 JCAB pp 510-511). There was no statutory purpose for departing from this ordinary meaning in construing s.253, which defined the word "interest" for various statutory provisions in addition to s.225. Properly construed, therefore, a "privilege" for the

purposes of s.253 "encompasses an identified advantage that a person (including possibly a member of the public) possesses at common law or statute." See FFC, [167]-[168] (2 JCAB pp 511-512).

26. The ability, liberty or expectation of the public to enter upon unallocated Crown land was not a "privilege" for the purposes of s.253. Nothing was invested, given or authorised in any relevant sense. No right, advantage or immunity beyond the common advantages of other members of the public could be identified. See FFC, [168]-[169] (2 JCAB p 512). As a result, the Full Court held that the trial judge erred in including paragraph 12(f) of Sch 7 of the Bindunbur Determination (1 JCAB pp 398-399) and paragraph 8(h) of Sch 6 of the Jabirr Jabirr Determination (1 JCAB pp 363-364). The basis of this error was said to be the trial judge's conclusion that the public access to the coastal areas, which had been confirmed by s.14 of the TVA, was a privilege within the meaning of "interest", as defined in s.253 and as used in s.225(c). See FFC, [174]-[175] (2 JCAB p 513).

No interest based upon physical use established

27. The Full Court observed that s.212(2) does not use the language of "rights" or "interests": FFC, [139] (2 JCAB pp 503-504). The Full Court contemplated, at FFC, [170] (2 JCAB p 512), that if public access to and enjoyment of the places referred to in s.212(2) was established:

> "as a matter of fact in a physical sense when s 212(2) was enacted and a State has enacted confirmatory legislation such as s 14 of the TVA, then that public access and enjoyment of places in question is an "other interest" for the purposes of a determination in accordance with s 225(c) of the NTA".

However, no evidence of actual physical use had been led in this case, and so this method of demonstrating an "interest" for the purposes of s.225(c) was not established: FFC, [173] (2 JCAB p 513).

28. The Full Court did not say that public access established by actual use was an "interest" in relation to land or waters within the meaning of s.253; only that it was

an "interest" contemplated by s.225(c). In this respect, the Full Court implicitly acknowledged that s.225 uses the word "interest" in a wider sense than s.253.

C. Appeal Arguments

29. The radical title to land in Western Australia acquired by the Crown did not encompass absolute beneficial ownership of the land. The Crown's radical title gave it the power to create rights of ownership in itself, or dispose of rights of ownership in favour of others: ***NSW Aboriginal Land Council v Minister Administering the Crown Lands Act*** [2016] HCA 50; (2016) 260 CLR 232 at [60], ***Mabo v Queensland (No 2)*** [1992] HCA 23; (1992) 175 CLR 1 at 15, 48-51, 86-87.

10 30. As the coastal areas consist of land below the statutory high water mark, in which no person has been granted any proprietary estate or interest, these areas are unallocated Crown land: s.3(2) of the LAA. The same position applied in WA when the NTA came into operation on 1 January 1994, by reason of the definition of "high water mark" in s.3(1) of the LA, and having regard to s.3(2) of the LA. The Crown has radical title to that land.

31. The State has exercised its statutory right to proscribe activities which may occur upon unallocated Crown land. In 1994, when the NTA came into effect, s.164 of the LA proscribed activities which could occur on "public lands", which were defined as any Crown lands or lands reserved for or dedicated to any public purpose. Section
20 164(2) provided that a person must not, without lawful authority reside on public lands; erect any structure on, over or under any public lands; clear, cultivate or enclose any public lands; remove or cause to be removed from any public lands anything of whatever kind, whether growing on or in, or being in, on or under or forming part of, any public lands; deposit or cause to be deposited, or leave or cause to be left, on any public lands any rubbish, litter, refuse, disused vehicle, noxious waste, or other similar matter, except in a place or receptacle provided for that purpose; or bore or sink any well for water or construct or excavate any dam or other means of water catchment or storage on any public lands. Similar provision is made in s.267 of the LAA. Subject to these proscribed activities, there is no prohibition

against a person accessing and enjoying unallocated Crown land, including the coastal areas.

32. Consequently, in 1994 when the NTA came into force, a member of the public had the ability to access and enjoy (subject to the proscribed activities) unallocated Crown land. The Full Court accepted that this was properly described as an "ability" or "liberty", but not as a "right" or a "privilege": FFC, [149], [156]-[159], [169] (2 JCAB pp 507, 509-510, 512).

33. The essential reason why the Full Court held that the ability or liberty of the public to access the coastal areas was not a "right" was because the asserted interest could not be "vindicated": FFC, [149] (2 JCAB p 507). The Full Court did not explain the notion of vindication.

34. However, it appears that the Court considered that the public did not have any "right", as the public could not enforce that right against any person to exclude that person from the coastal areas. That relies upon a conception of a "right" as necessarily having a correlative duty, in the sense explained by W N Hohfeld in "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 30.

35. The Full Court held that the ability or liberty of the public to access the coastal areas was not a "privilege" as nothing was invested, given or authorised in any relevant sense which gave one member of the public any legal right, advantage or immunity over anyone else: FFC, [168]-[169] (2 JCAB p 512). In other words, the Full Court considered that a "privilege" only existed if a person was conferred with a special legal status compared to others, as distinct from a general "ability" or "liberty" to undertake a certain activity.

36. The Full Court also held that, while the term "interest" in s.225(c) could extend to an access right which was established by physical use, it did not extend to a general "ability" or "liberty" to undertake a certain activity.

37. The Full Court's reasoning on the meaning of "right", "privilege" and "interest" involve the proper construction of these terms in ss.225 and 253 of the NTA. For reasons set out below, the proper construction of each of these terms provide three

different routes for allowing the appeal. These routes will each be addressed after referring to the effect of s.14 of the TVA.

The Effect of s.14 of the TVA

38. Section 14 of the TVA, in combination with s.212(2) of the NTA, confirms "existing public access to and enjoyment" of waterways, etc.

39. Properly construed, the "existing public access to and enjoyment" of waterways means the public access and enjoyment of waterways, etc, which was available to the public prior to the enactment of the NTA, without taking into account any native title rights and interests. That is evident from s.212(3). This subsection treats native title rights and interests separately from, and provides for their interaction with, what is confirmed.

40. As explained at paragraphs [29]-[32] above, when the NTA came into force, a member of the public had the ability to access and enjoy (subject to the proscribed activities) unallocated Crown land, and the Full Court accepted that this was properly described as an "ability" or "liberty", but not as a "right" or a "privilege": FFC, [149], [156]-[159], [169] (2 JCAB pp 507, 509-510, 512). The existence of public access and enjoyment to waterways etc as an "ability" or "liberty" has never been seriously or substantively challenged by the Claimants.

41. Hence, what was confirmed by s.14 of the TVA, in combination with s.212(2) of the NTA, was the ability or liberty of members of the public to access and enjoy waterways, etc, on unallocated Crown land without prohibition. This ability or liberty was what existed on 1 January 1994, when the NTA came into force. Again, there has never been any substantial challenge by the Claimants that s.14 of the TVA, in combination with s.212(2) of the NTA, had some effect, at least to the extent that it confirmed the existence of the "ability" or "liberty" members of the public to access and enjoy waterways, etc, on unallocated Crown land without prohibition.

42. This confirmation does not in any way strengthen the ability or liberty to access and enjoy waterways, etc, by transforming the ability or liberty into a positive legal entitlement of public access and enjoyment. The confirmation of the ability or liberty means that it continues to exist, but by reason of s.212(3) of the NTA, the ability or liberty does not extinguish any separate native title rights and interests. The effect of

confirming the ability or liberty of members of the public to access and enjoy the coastal areas is to confirm the absence of any prohibition which prevents members of the public from exercising the public access to and enjoyment of coastal areas.

43. In other words, native title rights cannot be exercised in a way which creates a prohibition, because the plain legislative intention of the NTA is to preserve the situation where members of the public are not subject to any prohibition which arises from the operation of the native title rights recognised under the NTA.

44. This is quite different from an argument that the confirmation of the ability or liberty of the public to access and enjoy coastal areas creates a positive legal entitlement which permits members of the public to say that this is paramount to any native title rights and interests which operate in the area. This way of putting it effectively involves the transformation of the ability or liberty into a positive "right". The State does not advance that argument. The State submits that s.212(2) simply ensures that the public's access and enjoyment, which is based upon an absence of any prohibition, remains effective and is not diminished by any rights conferred upon claimants under the NTA.

Proper Construction of "Right" **(WA Appeal Grounds 2(a), 3(a))**

45. The use of the word "right" in the definition of "interest" in s.253 does not necessarily carry with it the implication that it means a right associated with a correlative duty. In ***Mathieson v Burton*** (1971) 124 CLR 1 at 12, Windeyer J could not see why an immunity, or exemption from legal consequences, should not be called a right or privilege. He did not consider that the statute under consideration in that case needed to be construed "in an exercise in analytical jurisprudence, or with the classification, expressed in terms of correlatives and opposites, that delights and attracts both disciples and critics to Hohfeld."

46. The term "right" is used here in defining an "interest" in relation to land or waters. It is used in the context of a "right ... in connection with ...land or waters; or ... an estate or interest in land or waters; or ... a restriction on the use of the land or waters, whether or not annexed to other land or waters." Hence, the "right" which is

contemplated by Parliament is one which is defined by reference to land or waters, and is not expressly defined by an obligation enforceable against another person.

47. Although it has been said that all rights are really against persons (***WAPC v Temwood Holdings Pty Ltd*** [2004] HCA 63; (2004) 221 CLR 30 at [31]), the use of an express definition which is focused upon rights in, or in connection with, land or waters, emphasises that Parliament was concerned with access to the land or waters, and is not necessarily concerned only with Hohfeldian rights which are enforceable between individuals. A focus on access to land or waters is entirely understandable in the context of a statute which is concerned with recognising and reconciling native title rights and other interests.

48. In other words, the concept of "right" as defined in s.253 is something exercisable *in rem*, rather than enforceable against a person.

49. The existing ability or liberty of a member of the public to access and enjoy coastal areas is not a recognised estate or interest in land or waters. However, s.253 is not confined to rights in connection with a recognised estate or interest in the land or waters. It expressly extends to rights in connection with the land or waters, or in connection with a restriction on the use of the land or waters. That indicates the width of rights contemplated by s.253 and that it may apply to rights which are not recognised estates or interests in land or waters.

50. The existing public access to and enjoyment of coastal areas was a matter which Parliament considered should be capable of being protected by confirming laws. This is the whole purpose of s.212(2). The ability or liberty of the public to go onto and use the coastal areas was the primary way in which there was existing public access to and enjoyment of coastal areas when the NTA came into force. Nothing in the words of s.212(2) suggests that Parliament did not mean to protect that primary mode of public access and enjoyment, or that it intended to confine the protection only to existing public access to and enjoyment of coastal areas based upon actual physical use.

51. These considerations all indicate that the term "right" used in s.253 of the NTA should be construed as extending to the general ability or liberty of members of the public to go onto the coastal areas. They are against adopting the Hohfeldian

conception of "right", which was effectively the construction favoured by the Full Court.

Proper construction of "privilege" **(WA Appeal Grounds 2(a), 3(a))**

52. The points made about the proper construction of "right" for the purposes of s.253 apply with even more force to the width of the term "privilege". Moreover, as the privilege is exercisable *in rem*, over or in connection with land or an interest in land, it is different to a privilege enforceable against another person. There is no conceptual reason why a privilege which is exercisable against land only qualifies as a "privilege" if some person, or class of persons, can exercise the privilege against the land. The position may be different for personal privileges, eg a privilege or immunity from taxation, or to use a particular honorific title.

53. There is an additional matter. The Full Court's construction, that a "privilege" only exists if a person is conferred with a special legal status compared to others, as distinct from a general "ability" or "liberty" to undertake a certain activity, should be rejected in any event. The jurisprudential meaning of a "privilege" is simply the negation or absence of a legal duty. It does not require exceptionality compared to others.

54. Hohfeld himself pointed out that, while "privilege" can be used in the sense of a special or peculiar legal advantage, the dominant technical meaning of this term is simply the negation (or absence) of a legal duty. In other words, as the members of the public are not subject to any legal duty to stay off the coastal areas, they have the "privilege" of access to and enjoying these areas. In that sense, Hohfeld points out that a privilege is precisely the same as a liberty. See Hohfeld (1913) 23 *Yale Law Journal* 16 at 36-43. The Full Court did not adequately address this point, as it simply concluded that the ordinary meaning of "privilege" was to denote a special or peculiar legal advantage: FFC, [161]-[167] (2 JCAB pp 510-512).

55. Given the width of the definition of "interest" adopted in s.253, and the considerations mentioned in respect of the proper construction of "right", the wider meaning of "privilege" (as the negation or absence of a legal duty prohibiting access)

should have been adopted by the Full Court. This is precisely the point made by the trial judge at STJ, [20] (1 JCAB p 259).

Proper construction of "other interests" in s.225(c) **(WA Appeal Grounds 2(b), 3(b))**

56. As explained at paragraphs [27]-[28] above, the Full Court implicitly recognised that the term "other interests" in s.225(c) extended beyond what constituted an "interest" for the purposes of s.253. The Full Court accepted that existing public access to coastal areas, established by actual physical use, could generate an "other interest" for the purposes of s.225(c), even if it did not pass through the gateway of the definition of "interest" in s.253: FFC, [170]-[171] (2 JCAB pp 512-513).

57. Evidently, if the construction of "right" or "privilege" advanced by the State is adopted for the purposes of s.253, the undesirable consequence of having different meanings for the same word would be avoided. That supports the State's construction of "right" or "privilege".

58. However, if the Full Court's reasoning in respect of "right" or "privilege" in s.253 stands, the term "other interests" in s.225(c) extends to some further types of public access. The Full Court did not explain how or why s.225(c) should be construed to produce the result that public access established by physical use stands in a different position to public access based upon the general liberty or ability of the public to enter upon unallocated Crown land.

59. The Full Court did not say that it construed s.212(2) as only allowing confirmation of existing public access established by physical use. Nor would there have been any textual justification for doing so, as s.212(2) refers to <u>any</u> existing public access (however established).

60. The whole purpose of s.212(2) was to recognise a public ability to access and enjoy land which was confirmed by a <u>law</u> of the Commonwealth, State or Territory. It was not simply to recognise and confirm a public ability to access and enjoy land due to physical use. This provision does not limit its operation to any existing public access and enjoyment established by physical use.

61. Consideration of the purpose of s.225(c) has a further significance. An important, if not the dominant, purpose of s.225(c) is to allow those reading a determination to ascertain the particular statutory arrangements that affect native title rights and

interests in the application areas. The trial judge referred to this purpose at TJ, [733] (1 JCAB p 243), in respect of Commonwealth statutory regimes. This purpose means that a determination identifies all common law and statutory rights and interests which may be relevant to access to land and waters, and states how they interact. This wide purpose means that "other interests" in s.225(c) should extend to a general ability or liberty of the public to access and enjoy coastal areas.

Part VII: Orders Sought

62. The State seeks the following orders in appeal P 34/2019 and appeal P 35/2019:

(a) Appeal P 34/2019 and appeal P 35/2019 each be allowed.

(b) The orders of the Full Court in WAD 215/2018 and WAD 216/2018 made on 20 December 2018 be set aside.

(c) The determinations of native title made in WAD 357 /2013 and WAD 359/2013 on 2 May 2018 be amended to include that clause which was removed as a result of the Full Court's order dated 20 December 2018.

(d) The appellant pay the taxed costs of the first respondent in each of appeal P 34/2019 and appeal P 35/2019.

Part VIII: Estimate of Time

63. The estimate of hours required for the presentation of the Appellant's oral argument (including reply) is 2 hours.

Dated: 21 August 2019

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ANNEXURE OF STATUTORY PROVISIONS

Act	Version	Sections
Land Act 1933 (WA)	Version 06-00-00 (Reprint 6: 2 May 1985)	3 and 164
Land Administration Act 1997 (WA)	Version 07-00-00 (Reprint 7: 6 October 2017)	3 and 267
Titles (Validation) and Native Title (Effect of Past Acts) Act (WA)	As enacted	14
Native Title Act 1993 (Cth)	As enacted	212
Native Title Act 1993 (Cth)	Compilation 43 (22 June 2017)	212, 225 and 253 ("interest")