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

FIRST RESPONDENTS' SUBMISSIONS IN NO P36 AND P37 OF 2019

Part I: Certification

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

HIGH COURT OF AUSTRALIA
FILED
13 SEP 2019
THE REGISTRY SYDNEY

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Part II: Issues

2 The first ground of appeal in the notices of appeal of the Commonwealth of Australia ("**Commonwealth**") raises two questions about the construction of subsec 212(2) of the *Native Title Act 1993* (Cth) ("**NTA**"): {**2AB 691-694 [1], 2AB 743-747 [1]**}.

3 The first question apparently remains in dispute and the first respondents understand that what is in dispute specifically is the question: if a *right* of "public *access* to and *enjoyment* of" (where abbreviated, "**prescribed access**") to waterways, beds and banks or foreshores of waterways, coastal waters or beaches ("**prescribed places**") of the Bindunbur and Jabirr Jabirr determination areas ("**determination areas**") existed on 1 January 1994 when the NTA commenced, would subsec 212(2) of the NTA *permit* confirmation of it by sec 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) ("**TVA**")? That understanding is derived from the Commonwealth submission in this Court ("**Commonwealth submission**" or "**CS**"), at **CS [3]**, **[38]**.

4 Neither the trial judge nor the Full Court have ruled that there could not be confirmation of such a right, and in relation to the determination areas, no common law or statutory right of prescribed access was identified or sought to be established by either appellant {**2AB 513.21-26 [173]**}. The question apparently remains in dispute because notwithstanding the Commonwealth submission, which accepts that there is no common law or statutory "right" of prescribed access to beaches **CS [38]**, that nothing in the language of subsec 212(2) indicates a legislative intention to "confine" the subject matter to "rights" **CS [22], [24]** and that the nature and extent of the public's "rights" over the foreshores is a difficult and to some extent unresolved issue **CS [39]**. Despite those statements the Commonwealth submission contends that subsec 212(2) of the NTA "cannot have been intended to permit Parliaments to *confirm* such a right": **CS [38]** (italics in original). The purpose of the contention appears to be to eliminate from the field, a significant competitor for the Commonwealth's (and the State's) preferred construction of subsec 212(2) of the NTA. This submission will return to these matters below at [31], [36]-[39], [43]-[44].

5 The second question that arises on the first ground of appeal is: can it be said (and if so in what circumstances) that there was prescribed access in relation to prescribed places for the purposes of subsec 212(2) of the NTA and sec 14 of the TVA where *physical* access to and enjoyment of a prescribed place existed as a matter of fact, or as a matter evidenced by fact? The first respondents contend that this question is not ripe for final resolution in this case.

6 Neither appellant sought to establish prescribed access by evidence of physical facts, it was not relied on by the trial judge and the brief mention of it by the Full Court was not

necessary for the disposal of the appeal {**2AB 503.13 [137(2)], 512.38-513.27 [170]-[173]**}. The Full Court noted that unexplored questions remain about the nature, extent, basis and quality of the entry onto and activities of members of the public on a prescribed place that might be required to satisfy the elements of prescribed access {**2AB 513.18-20 [172]**} and; it is possible that evidence of physical facts could be led in support of an interest or right of prescribed access based, for example, on a grant, custom and usage, prescription, acquiescence, adverse possession, a particular legal status or the existence or assumption of a duty on the part of the Crown: see [31] below. The Full Court's answer to this question also stands in the way of the Commonwealth's preferred construction of subsec 212(2) of the NTA.

10 **7** The single issue that arises directly in the circumstances of this case is not one that is expressly raised in the grounds of appeal of the Commonwealth. That issue is: does subsec 212(2) of the NTA and sec 14 of the TVA operate to confirm, as prescribed access to prescribed places on the determination areas, without more, a state of affair as at 1 January 1994 under a statute then in force, in which a member of the public was then able to enter on lands and waters which were then Crown lands and there to undertake activities other than any of the range of activities which the statue had made an offence? The first respondents contend for an answer in the negative.

8 There is, however, a prior question: what is the meaning of the phrase "access to and enjoyment of"? The phrase accumulates the requirements of two concepts known to property
20 law. The question involves consideration of whether the phrase itself (apart from the absence of words such as "right" or "interest") involves that a class of people with no *right* to access and enjoy or, no basis for claiming access and enjoyment *as of right*, and no other demonstrated legal or *physical* relationship to or connection with the prescribed places in issue, could be a class properly said to have had "existing access to and enjoyment of" a prescribed place. In particular, is the phrase satisfied where members of the public have only the bare ability or liberty to enter Crown land because entry is not proscribed.

9 The first respondents contend that there can be no prescribed access in such circumstances.

10 The second ground of appeal is not pressed. The third ground of appeal of the
30 Commonwealth {**2AB 691-694 [3], 2AB 743-747 [3]**} and second issue identified in the Commonwealth submissions raises the question: can prescribed access to prescribed places that has been confirmed where the prescribed access is not itself an "interest" within the meaning of sec 253 of the NTA be mentioned in a determination of native title **CS [3.2]**?

11 The first respondents contend that confirmed prescribed access can be an interest only if it was an interest apart from confirmation; that "interest" in para 225(c) of the NTA is to be given the same meaning as in sec 253; and that only "interests" as defined in sec 253 can be recorded in a determination as "other interests". Unless what has been claimed as prescribed access in this case is held to satisfy the requirement of prescribed access and to have been confirmed, the question is not ripe for resolution. If the question requires an answer the first respondents' answer is that confirmation of an ability cannot create an interest or lead to a reference in a determination of native title to it as such, or at all; but it may be recorded on the national native title register pursuant to subsec 193(3) of the NTA: see [65] below.

10 **Part III: Notice under sec 78B of the Judiciary Act 1903**

12 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Statement of material facts

13 Apart from the matters raised, and the additional matters set out, in the paragraphs that follow, the first respondents generally do not dispute the statement of facts set out the submissions of the Commonwealth at **CS [8]-[17]**.

14 Further to **CS [10]**, the identification of places of confirmed public access and enjoyment in the Jabirr Jabirr determination above the common law high water mark, where exclusive native title was determined to exist, was by reference to (unidentified) *parts* of identified parcels
20 of unallocated Crown land, "being those parts where there are" prescribed places {**1AB 363.42-52 [(h)(iii)]**}

15 The holding of the trial judge, and the account of that holding by the Full Court, is overstated in **CS [11]**. What the trial judge said {**1AB 259.41-42 [20]**}and what the Full Court referred to {**2AB 50.40-50 [131]**} was that there was an "ability of the public to *access and enjoy* coastal areas because *access* is not proscribed" [italics added]. Whether the public may *enjoy* a place simply because entry is not proscribed is a live issue.

16 Further to **CS [13]**, it was the *Land Act 1933* (WA) as amended **(LA)**, which was in force when subsec 212(2) of the NTA commenced. By sec 164, the LA prohibited, by making it an offence to undertake any of, a range of activities on, but did not wholly proscribe entry by the
30 public on "public lands". Public lands were defined in subsec 164(1) of the LA as all Crown Lands and "lands reserved for or dedicated to any public purpose". That being so, "public lands" could include places where the public could enter by, or as of, right as well as areas where entry was merely not prohibited. In that context it is relevant to consider whether Parliament in enacting the LA, intended to equate "access to and enjoyment of" with the mere

creation or non-creation of offences *on* crown land. Clearly it did not. Nor can such an intention be retrospectively imputed.

17 All of the prescribed places in question in this case are unallocated Crown land, but at the time the NTA commenced, places seaward of the low water mark were not Crown land (though they became such when the *Land Administration Act 1997* (WA) ("**LAA**") replaced the LA). One place in the Jabirr Jabirr determination area now covered by CT 2040/398 granted on 6 July 1995, was unallocated Crown land when the NTA (and the TVA) commenced. Native title was determined not to exist in that area because of the grant.

Part V: Argument in answer to the argument of the appellants

Primary responsive argument

18 The Full Court was correct to remove the references in the determinations to certain places as being subject to confirmed public access and enjoyment pursuant to sec 14 of the TVA. In summary, the premises in the first respondents' argument is:

(a) sec 14 of the TVA applies only to confirm "public access to and enjoyment of" prescribed places if and where it existed on 1 January 1994 when subsec 212(2) of the NTA commenced;

(b) the state of affairs concerning the public and Crown land under the LA on 1 January 1994 was that certain offences *on* Crown land were created, *entry* to Crown land was not prohibited, but *access* was neither facilitated nor guaranteed and may not be available from all directions or in all instances because of surrounding tenure or geographical or other barriers or restrictions;

(c) the elements of the TVA requirement for *public access to and enjoyment of* a place are not satisfied in the circumstances of (a) and (b), and in the absence of reliance on any existing common law or statutory right of prescribed access to prescribed places on the determination areas; and any evidence of fact said to constitute prescribed access, the appeal must fail;

(d) nor can those circumstances in any event amount to possession by the public of a right or interest of prescribed access sufficient (whether because of the definition of "interest" in sec 253 of the NTA or otherwise) to trigger the requirement in paras 225(c) and (d) of the NTA.

The state of affairs of Crown land and the public on 1 January 1994

19 The foundational question in this matter involves construction of the phrase in subsec 212(2) of the NTA and sec 14 of the TVA which conditions the confirmatory application

of the TVA. That question is, was there, at 1 January 1994, "*any existing public access to and enjoyment of*" prescribed places of the determination areas.

20 The Full Court was correct to hold that this necessary condition for confirmation could only be constituted by an appropriate state of affairs of law or demonstrated by physical facts, and that it could not be constituted by reference to the state of affairs created by the LA alone {**1AB 312.28-513.20 [169]-[172]**}. All that has been established in this case is that at the relevant time the LA was in force and provided for offences *on* Crown land but did not prohibit *entry*. It would not matter if that situation could amount to a privilege, or otherwise to an "interest" within the definition in sec 253 of the NTA (which is denied), because that state of affairs under the LA alone plainly did not constitute existing public access to and enjoyment of prescribed places and therefore did not trigger any confirmation of the state of affairs by sec 14 of the TVA. No statutory or common law right or interest has been found to exist other than the public rights seaward of the common law high water mark, and no facts about entry or activities on Crown land have been relied upon to establish any confirmable prescribed access.

Construction of "any existing public access to and enjoyment of"

21 ***Meaning of "existing"***. The finding of the Full Court that "existing" for the purposes of subsec 212(2) of the NTA and sec 14 of the TVA means existing when sec 212 was enacted, namely 1 January 1994 {**2AB 502.35-46 [135]**}. That is not challenged **CS [4]**.

22 ***Meaning of "any existing"***. The phrase appears in sec 212(2) of the NTA but the word "any" does not appear in sec 14 of the TVA. It is clear enough that the TVA could not confirm something that did not exist and so must be read as if the word appears in the TVA provision. Its absence from the TVA plainly did not broaden the scope of what could be confirmed. Nor does it indicate that the precondition for confirmation would necessarily be satisfied *at all*, or that it could only be satisfied by something that applied indiscriminately to *all* prescribed places. The inclusion of the word "any", in the NTA, cannot be taken to lessen the effect of the cumulative elements "public access to" and "enjoyment of". For example, "any" cannot be taken to suggest that any situation, however bare, in which a member of the public may enter and undertake limited non-prohibited activities on Crown land will suffice. Nor does it render irrelevant consideration of the legal basis for, or the nature or extent and location of, what had in fact been done by a member of the public in a prescribed area.

23 ***Meaning of "access".*** The ordinary meaning of "access" in relation to land or property is "way, means or opportunity of approach or entry": Macquarie Dictionary Online, Macmillan Publishers Australia, 2019. The Collins English Dictionary 2019 (Online) defines "access" similarly as "the act of approaching or entering", "the right or privilege to approach, reach,

enter, or make use of something" and as "a way or means of approach or entry". The Australian Law Dictionary (3rd edition) (Online) 2018 defines "access (property law)" firstly as a "statutory or common law right to go onto property for any of a wide range of particular purposes, established through case law or by statute. Examples occur in mining." The word thus, ordinarily is not so concerned with entry per se, or with remaining on or use of an area as it is with the means by which approach and entry are possible. The LA does not prohibit *entry*, but it does not provide *access,* let alone *enjoyment*.

24 ***Meaning of "enjoyment"***. The ordinary meaning of "enjoyment" is "1. the possession, use, or occupancy of anything with satisfaction or pleasure. 2. a particular form or source of pleasure. 3. *Law* the exercise of a right: *the enjoyment of an estate*": Macquarie Dictionary Online, Macmillan Publishers Australia, 2019. "Enjoyment", in relation to land is something that cannot without misfeasance be unreasonably diminished or interfered with: *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 at 650.3 (per Lord Westbury LC), 651.8 (per Lord Cranworth) and 653.8 (per Lord Wensleydale), 11 ER 1483; *Hargrave v Goldman* (1963) 110 CLR 40 at 59.5, 62.4 (per Windeyer J). "Enjoyment" thus is available only where entry is associated with a relationship to the area, ordinarily a relationship of right, title or interest such as would warrant the enjoyer taking pleasure in the area itself and the person's relationship to it; and as would sustain an action for its protection. A member of the public on Crown land under the LA had no basis for enjoyment of it and would not have been able to sustain any action to protect enjoyment. On that basis alone, the state of affairs under the LA could not have qualified for confirmation by sec 14 of the TVA.

25 ***Meaning of "access to and enjoyment of"***. The operative phrase is a composite one, involving cumulative elements of precondition for any confirmatory application of sec 14 of the TVA. The phrase is clearly enough more restrictive than the word "access" on its own. For the condition to be satisfied, there must be an existing means by which the area in question may be entered and, as well, an existing relationship capable of permitting and sustaining the protection of "enjoyment" of the area itself by the person who may enter.

26 Neither appellant has confronted the meaning of "access" or "enjoyment" let alone their cumulative effect. Rather, they have assumed that non-proscription of entry will satisfy both words and the phrase in which they both appear.

27 The LA did not facilitate or provide "access to" Crown land. It did not make Crown land available for public access or create any ability for members of the public to access Crown land areas. Rather, it merely provided for offences "*on*" Crown land: sec 164 of the LA; and did not prohibit entry. As such, the LA was silent as to "access" and merely contemplated that where

access was otherwise available, members of the public may avail themselves of that access to physically enter and remain but not so as commit an offence. In that sense, the LA did not create any "ability" for public access to Crown lands, though there may be "liberty" to enter where access is in fact available.

28 The LA did not provide any public access to an area of Crown land surrounded by a freehold estate, for example. Rather, in such a case, the owner of an adjoining freehold may have access or may provide access to others by granting permission to cross the freehold but such access would not have been "public access". Similarly, the LA did not provide land access to Crown lands above the common law high water mark. In the Bindunbur determination, for example, the presence of aboriginal reserve over most of the area would preclude public access from the landward side to the prescribed areas seaward of the reserve boundaries. However, such lands may be accessed from adjoining seaward areas but only by exercise of the public rights. Similarly, for much of the coastline in the Jabirr Jabirr determination area but in that determination area, it may (or may not) be possible to access those parts of some areas that are prescribed places, from a public road that adjoins the areas. The LA did not provide the access in such cases. Rather any access was provided by the status of adjoining areas. Further the LA did not provide access to Crown land inaccessible because of geographical barriers or any legal restraints on access to particular areas. Any *ability* of the public to *access* such areas would depend upon factors other than the LA, which only contemplates *entry*. In the circumstances, where the LA alone is relied on to have triggered confirmation by sec 14 of the TVA, a case by case examination of the areas would be required to ascertain if public access was possible.

29 In conclusion, the LA, when the NTA commenced, did not provide public access to prescribed places or any ability to enter. Nor did it provide a situation capable of sustaining public enjoyment of prescribed places. All that the LA provided was a non-prohibition of entry and restrictions on the use of any Crown lands. It is clear that that situation did not constitute "public access to and enjoyment of" prescribed places in the determination areas and the Full Court was correct to find in the circumstances of this case that there was nothing that warranted the inclusion by the trial judge as "other interests", the items of the determinations that the Full Court removed.

Further response to argument of the "first issue" of the Commonwealth - Confirmatory scope of subsec 212(2) of the NTA (CS [18]-[19])

30 The construction of subsec 212(2) of the NTA by the Full Court is not erroneous: contra **CS [19]**. It is amply supported by the text of the provision and is consistent with any purpose that may be gleaned from extrinsic materials.

Statutory text and context **(CS [20]-[30])**

31 The first respondents rely on the primary responsive argument above. Further, it may be accepted that the difference in sec 212 of the NTA between subsec 212(1) and subsec 212(2), namely the express reference in subsec 212(1) to "rights" and the absence of such reference in subsec 212(2) is significant but it does not entail that rights of prescribed access are precluded from conformation: **CS [22]**. It is not pressed by the first respondents that only such a "right" (or only some such kind of enforceable interest) could meet the requirements for confirmation. Similarly, the absence of express reference in the requirement for "physical" access or enjoyment merely leaves open the possibility that the requirement may be satisfied by some reference to evidence of facts: **CS [23]**. Inherently, or in order to be meaningful at all, "existing public access to and enjoyment of" a prescribed place must be discernible as a matter of law, or mixed fact and law. None of these possibilities are expressly included in the text, so none are implicitly excluded. The consequence of the absence of express reference in the text to either "rights" of, or "physical", access is not that only something other than either may satisfy the necessary condition, but rather that at least both possibilities remain open, as the Commonwealth appears to accept: **CS [24]**.

32 The text of subsec 212(2), at least requires something beyond bare liberty to enter an area and there engage in a limited range of activities. The Full Court did not need to resolve whether the requirement might be satisfied as a matter purely of fact as no evidence was led that would enable full, or any, consideration of the question or whether matters of mixed fact and law might come within the purview of the sub-section. Nor is it necessary for this Court to determine such questions in this case.

33 ***Meaning of "confirm"***. It may be accepted that "confirm" has the ordinary meanings attributed to it in **CS [25]**, but the application of the different meanings will have different consequences under the NTA. If something that did not affect native title prior to confirmation, did so after confirmation, then there will be certain consequences under the NTA; the confirmation will be an act affecting native title (though one not expressly dealt with in the scheme of the categories of past, intermediate period or future acts). However, none of the identified meanings would support that something that was not existing as an "interest" within the meaning of sec 253 of the NTA could become an "interest" by virtue of confirmation. An argument of the Commonwealth to the contrary at **CS 51**} will be dealt with later.

34 Applying an ordinary meaning of "confirm" does not make clear, or support the proposition, that the purpose of subsec 212(2) of the NTA was to allow confirmatory laws to ensure "the ability of" public to access and enjoy prescribed places (under the state of affairs

created by the LA): cf **CS [26]**. Rather, as the text plainly states, it was to ensure that an existing situation (if any) of *public access to and enjoyment of* a prescribed place could continue. The word "ability" does not appear in the text any more than the word "right" or "physical" and in the case of the latter two words, Parliament could easily have made it clear that it intended to cover abilities. However, the formula of words that conditions confirmation precludes any implication of an intention to include bare abilities of the kind now contended for by the State and the Commonwealth. Confirmation of the situation under the LA could not ensure an ability to access a prescribed place where access was not available or was impossible apart from confirmation. It might ensure an ability to enter and to undertake certain activities if that was sufficient trigger confirmation, but it was not. Only *public access to and enjoyment of* a prescribed place (if any) could be confirmed.

35 The effect of any "confirmation" on native title will depend upon the legal character of what was confirmed. If prescribed access existed pursuant to a common law or statutory right, it may have precluded the recognition of an inconsistent native title right in any event; or if any extinguishing effect of it was required to be disregarded by sec 47B of the NTA, then by sec 14 TVA confirmation, the exercise of the native title rights would be subject to the confirmed right. If non-exclusive, non-rights based prescribed access and non-exclusive native title rights were involved, there may be little discernible effect of confirmation on native title. This is not the case to examine all such possibilities. However, nothing in the text of context of subsec 212(2) of the NTA suggests that a particular construction is to be preferred merely because it would ensure that confirmation did not lack positive legal consequences. In particular, nothing suggests a construction is to be preferred that would ensure the mere theoretical possibility of public access to and enjoyment of all prescribed places everywhere in WA, whether or not any actual public access to and enjoyment of an area existed on 1 January 1994. To regard an "ability" under the LA to enter prescribed places, as prescribed access would have a universal legal effect on native title in relation to prescribed places; at great expense to value, exercise and enjoyment of (particularly exclusive) native title, which is not at all evident as the statutory purpose: contra **CS [27]-[30]**. Further, that the structure of the NTA includes a scheme of categories of acts affecting native title and provides a set of legal consequences of each of those categories on native title, is no basis for suggesting that subsec 212(2) is not unusual in the NTA, or that it contemplates that in all cases, prescribed access exists merely because of the LA and that confirmation has therefore occurred everywhere with precisely the same consequences for native title regardless of geographical and legal circumstances of a particular

prescribed place and regardless of there has been any history of actual public entry on and enjoyment of the place.

Extrinsic materials **(CS [31]-[34])**

36 The Commonwealth submission makes reference to extrinsic material notwithstanding its submission that the purpose of subsec 212(2) "is clear": **CS [26]**, cf **CS [31]**. It is not accepted that relevant extrinsic materials confirm the Commonwealth's analysis of the purpose of subsec 212(2) and (3) of the NTA: contra **CS [31]**. In particular it is not accepted that the reference in the second reading speech of Prime Minister Keating to "existing access to beaches, waterways and other recreation areas" is such that the express words of the statute, "existing access to and enjoyment of" may be disregarded. The fact that he did not mention "rights" in that context is merely consistent with the absence of the word in the statute. In any event, it is not said that the word "rights" is to be inserted in the provision by implication. Its absence merely leaves open the possibility that "rights" fitting the description of prescribed access could be confirmed and that the description may be satisfied by physical access that evidences a legal basis (not the mere absence of a prohibition on entry) for the presence or activities of a member of the public on Crown land. The Full Court is not to be taken to have decided otherwise: {**2AB 505.42-506.10 [142]-[143], [170]-[172]**}.

37 Senator Evans' statements in Hansard as set out by the Full Court {**2AB 506.16-12 [144]**} does not assist the Commonwealth's argument as there is no indication of what the phrase "the principle of public access" might mean and no indication that the prescribed access requirement of subsec 212(2) of the NTA was to be interpreted otherwise by reference to its own text. The application of a "principle", though of a general nature, may require case by case consideration. In any event, it cannot be taken to mean that Parliament intended native title is to be impaired over the whole of every prescribed area where it exists. If it were otherwise, exclusive native title could be robbed of its essential characteristic over large areas where there has never, in fact, as of right, or by right, been any public access, let alone enjoyment. It does not follow from the fact that the operation of the provision may lead to a constraint on the enjoyment of native title, that the provision should be construed so that there must always be an effect on the enjoyment of the native title: contra **CS [32]**. The removal of "impair" from subsec 212(3) of the NTA in 1998 (after any confirmation by the TVA occurred) does not require otherwise. Rather, as the Explanatory Memorandum, as set out at **CS [33]**, explained, the removal was because confirmation of access "may" technically impair the enjoyment of native title in some respects. Such material does not indicate a clear and plain legislative intention to impair native title in every circumstance in which confirmation of prescribed access may occur: contra

CS[34]. Nor does it imply that an expansive meaning is to be given to the concept of prescribed access as would achieve some impairment of native title wherever a prescribed place exists. The Appellant's arguments contend for a narrow construction of the provisions but one that will have the broadest possible application; an application that will inevitably be positive for public access and negative for native title, irrespective of legal, geographical, historical and other factual circumstances affecting a particular prescribed place, and all without the inconvenience to the Crown of having to lead any evidence: see {**2AB 506-507 [147]**}. To accept the arguments would be to accept that Parliament intended to radically rewrite and clarify the difficult and unresolved law of the foreshore of the sea: see {**2AB 507 [149], 509 [157]**} and **CS [39]**.

38 It is noted that in identifying extrinsic material, the CS makes no mention that:

(a) the House of Representatives Native Title Bill 1993 Explanatory Memorandum Part B pp 71.2 and 72.2 included the statement:

> There is also power to confirm existing public *rights* of access to places like beaches and parks" and "... governments can confirm existing public *rights* of access to places such as waterways and their beds and banks or foreshores, beaches, coastal waters and other places to which the public has *right* of access on 31 December 1993" (talics added);

(b) when sec 14 of the TVA was amended so as to take advantage of the amendments to sub-secs 212(2) and (3) of the NTA in 1988, amendments to the TVA included replacement of the long title, but so as to retain the following:

> An Act to make provision in relation to native title as permitted by the Native Title Act 1993 of the Commonwealth, namely—
>
> ...
>
> - under section 212 of that Act, to confirm certain *rights* relating to natural resources and public access. (Italics added); and

(c) in an official publication by the Commonwealth entitled *Mabo, Outline of Proposed Legislation on Native Title*, Commonwealth of Australia, September 1993 at 6 [18] it was stated:

> The Bill will provide that the Commonwealth, a State or Territory is able to confirm any existing public right of access to and enjoyment of [prescribed places].

39 Such references support a construction that at least does not exclude the possibility of confirming rights of public access to and enjoyment of prescribed places. Nor do they lend support for the view that mere non-proscription of entry under the LA was intended to be sufficient to meet the trigger of confirmation.

The Full Court's approach

40 ***Existing common law or statutory right or interest*** **(CS [35]-[43]).** It may be accepted that the Full Court acknowledged that sub-secs 212(1) and (2) are drafted differently, but the Court's view was not that the expression subsec 212(2) *could not* be satisfied by existing *rights*, only that it is "not expressly *limited* to" empowering the confirmation of existing rights: contra **CS [35]**. The gravamen of the criticism of the Full Court that it proceeded to deal with the construction arguments through the "prism of *rights*", is not clear and in any event provides no logical basis for an argument that it led to error: contra **CS [35]**. The Full Court, having moved on from consideration of extrinsic materials, expressly considered a "broad construction, *as opposed to* a rights based construction" (italics added): At {**2AB 506.35-40 [146]**}.

41 The reason that the Full Court in considering whether the *fact* of prescribed access could be established by *evidence* returned to mention of "rights", was to deal with the arguments put by the State in support of the decision of the trial judge; which arguments included that prescribed access under subsec 212(2), while concerned with *activities* undertaken by people not with *rights* held by them, could not be established by the *fact of use* but only by an *ability* to access prescribed places, and by the existence of a "longstanding custom or convention or expectation"; which were said to amount to an "interest" in those areas for the purposes of para 225(c) of the NTA: see {**2AB 492 .25-29 [109], 506.42-507.33 [147]-[148]**}, **CS [35.1]**.

42 The Full Court held that it had not been shown any basis for concluding that there is any custom, convention or expectation that affects the areas in question *in this case* {**2AB 507.30-33 [149]**}. The Court then considered relevant authority, before concluding that there is no general public right to enter and enjoy Crown land; nor any interest by ancient custom; let alone any 'convention, custom or "expectation"' under Australian law {**2AB 507.45-509.18 [150]-[156]**}, **CS [35.3]-[35.4]**. It is important that these conclusions were that no public right, interest, convention, custom or expectation *existed* in Australian law. That is strictly the end of any consideration of whether any such thing could be confirmed; as only that which is *existing* can be confirmed pursuant subsec 212(2) of the NTA. Thus, the further consideration by the Full Court, as to whether Parliament may have intended by enacting subsec 212(2) of the NTA that any such thing should be *created* or given capacity to impair native title, eg, by the *conversion* of an ill-defined custom or convention into an interest, was strictly not necessary but serves to put beyond doubt the correctness of differing from the trial judge and rejecting the arguments of the Commonwealth and State below {**2AB 509.19-48 [157]**}, **CS [36]**.

43 The Commonwealth contends for four central errors in the reasoning of the Full Court at this point **CS [38]** and following}. It is said firstly, that the Full Court's focus on the absence

of a common law or statutory right of prescribed access to prescribed places was misconceived **CS [38]**. That can hardly be so, given the obvious correctness of the proposition that while subsec 212(2) does not *include* the word "right", it does not thereby impliedly *preclude* the confirmation of rights. That the court did not find that a general common law or statutory right of prescribed access to beaches existed does not entail that subsec 212(2) cannot have intended to permit Parliament to confirm any prescribed access that did amount to a "right" in a particular place: contra **CS [38]**. It cannot be said that there is no common law right of access to beaches. No party contended that the public rights to fish and to navigate did not exist (where not previously abrogated). Though the public rights are limited geographically and by reference to their respective purposes, they are rights which, within those limits, may be described as public access to and enjoyment of prescribed places. It is to be born in mind when construing subsec 212(2) of the NTA and sec 14 of the TVA that they were enacted at a time when questions about the existence of native title rights in areas where the public rights exist had not been settled by this Court; as the Full Court noted at {**2AB 503.30-40 [138**]}.

44 The existence alone of the public rights would make it meaningful to speak of "existing public access to and enjoyment of" certain prescribed places: contra **CS [39]**. Parliament was not ignorant of the public rights when it enacted subsec 212(2).

45 It is said that "from a factual perspective … the existence of widespread public access to beaches in Australia is obvious" **CS [39]**. The gravamen and relevance of that assertion is not clear. Nor does the assertion distinguish between beaches that are unallocated Crown land and those that may be reserves for public use or other kinds of public places, so it would not be helpful in answering questions about prescribed access to any particular beach or other prescribed area, though it would suggest that a case by case examination is required: because "widespread" falls short of universal. However, the assertion may be ignored because it is made without any basis in evidence or authority. Further, it is not "public access" that is in issue here, it is "existing public access to and enjoyment of" certain places that is in issue.

46 It is then said, in apparent tension with previous statements, that the nature and extent of the public's rights over the foreshore is a difficult and unresolved issue **CS 11.25-27 [39]**, cf **CS [38], [39]** (first sentence)}. It may be accepted that the legal and factual relationship of the public to beaches involves varied and complex circumstances and issues, including issues to do with native title. However, the presence of such a situation provides no indication that Parliament intended by subsec 212(2) that where any rights of prescribed access are found to exist they are not to be confirmed. That resolution of a question about whether a particular right at a particular place existed, for example, by prescription or grant, may be difficult or to

some extent unresolved, does not suggest there was no intention to confirm it. In that sense there are "principles of public access to beaches" that may be investigated for application to particular prescribed places. What Parliament cannot be taken to have intended in a context focused on the recognition and protection of native title was that all such questions, because they may be difficult or to some extent unresolved, would be overridden and that subsec 212(2) of the NTA would permit States and Territories to simply rely on their existing Crown lands legislation and confirm *en masse* everything suggestive of an ability or liberty of a member of the public to enter Crown land. Such an approach would be indiscriminate and universally adverse to the interests of native title holders. In any event, the operative phrase "existing public access to and enjoyment of" precludes any suggestion that Parliament intended to adopt such an approach. For such reasons, the Full Court was not wrong to find that subsec 212(2) could not operate upon "an ill-defined custom or convention reflecting an 'aspect of Australian life'" as supportive of such an approach **CS 12.18-21 [40]**. The Full Court also held that it had been shown no basis for concluding that such custom or convention *existed* {**2AB 509.41-42 [149]**}.

47 It may be open to the Parliament to prioritise public access to beaches over native title universally, but it did not do so, as the Full Court correctly decided. The text of the provisions in question do not evince such a purpose. The text of subsec 212(2) of the NTA speaks of "any existing" prescribed access, something that may not be universal, something which has a knowable reality; not something that merely speaks of a possibility of entry, or of an "ability to" enter, which is what the State and Commonwealth contend for. Why it is said the Full Court may not have found it so difficult to discern a legislative intention in terms of the latter is not explained: **CS [40]**. A mere "ability to access" cannot satisfy the express requirement of "existing public access to and enjoyment of". The express policy choice of the Parliament is that the States and Territories be permitted to legislate to confirm any existing public access to and enjoyment of prescribed places without extinguishing native title.

48 It is said second, by reference to the statement of Senator Evans, which the Full Court set out at {**2AB 505.15-20 [144]**}, that there is "no uncertainty" as to what Parliament sought to achieve by enacting subsec 212(2): **CS [41]**. The submission does not pause to explain how the phrase "principle of access to beaches" might leave no uncertainty, or what meaning could be attributed to it. Nor does the submission explain why the words of the statute do not simply follow the Senator's statement if they are so clear.

49 Thirdly, it is said that the Full Court fell into error because it collapsed the question of the proper construction of subsec 212(2) of the NTA and sec 14 of the TVA with the question of

whether confirmed prescribed access should be recorded in a determination because of para 225(c) of the NTA **CS 42]**. However, the first consideration by the Full Court was the consideration of the construction of subsec 212(2) apart from the requirements of para 225(c): {**2AB 502.35-509.19 [135]-[156]**}. Only then did the Full Court turn to consideration of whether or not that which was said to be confirmed, was an "interest" as defined in s 253 of the NTA: {**2AB 509.20-512.38 [157]-[169]**}.

50 Fourthly, it is said that the Full Court's reasoning contains irreconcilable internal contradictions **CS [43]**. Only one thing is pointed to as involving such a contradiction and it is to the court's tentative and obiter conclusion at {**2AB 512.39-45 [170]**} that subsec 212(2) of the NTA "does seem to contemplate" that where public access to and enjoyment of a prescribed place existed as a matter of fact in a physical sense" then that would be an "other interest" for the purposes of para 225(c) of the NTA. It is said that by this, the court correctly acknowledged that a law passed in accordance with subsec 212(2) "*can* operate to *create* an interest." However, the Full Court did not state or imply that. What the Court said is that sec 212 does seem to contemplate that demonstrated prescribed access, existing as a matter of fact, is an "interest". It did not say that that it was not an interest before being confirmed but was only an interest after. By reference to **CS 36]**, the asserted "irreconcilable internal contradiction" in the decision of the Full Court is said to arise because the court had earlier rejected the possibility that *confirmation* could *create* an interest. However, what the court had earlier rejected was that Parliament had intended to permit the *creation* of a right to roam on or enjoy beaches or the *conversion* of an ill-defined custom or convention into an interest "where no such right has previously existed" {**2AB 509.19-48 [157]-[158]**}.

51 ***Existing access in a physical sense*** **(CS [44]-[47])**. The argument of the Commonwealth appears to be that because subsec 212(2) of the NTA does not expressly refer to either *rights of* or *physical* access, Parliament intended to preclude both possibilities **CS [44]** read with **CS [23]**. Conveniently, that would leave as the only possibility, something that involved neither rights of nor actual physical entry to a prescribed place; namely the possibilities argued for by the State and Commonwealth parties; an ability or liberty to access, or a custom, convention or expectation of access. As argued at [36]-[39] above, by omitting express reference to rights and physical access, the clear enough indication is that Parliament intended to leave the possibilities open so that case by case consideration could be given in the circumstances prevailing in any given place and that consideration could be given, as in this case, to the possibility that neither a right of, nor actual physical prescribed access is required.

52 As to what may be made of the statement of Senator Evans the reference to "a particular stretch of beach" is open to the understanding that it conditions both the reference to the existence of native title and the reference to the "principle of public access". A "principle" is necessarily a general statement, but it may nevertheless require application on a case by case basis. The statement of Senator Evans referred to does not expressly or by implication preclude it being a reference to a principle of that kind, namely a principle that wherever 'public access' exists, it will override any native title that also exists in that location. Just prior to the statement reproduced in {**2AB 506.16-19 [144]**} and **CS [45]** and see **CS [46]**. Senator Evans had also said:

> There is a very clear and explicit intention that the Commonwealth itself or states and territories; as the case may be, act to preserve these *rights* of public access. To the extent that that might intrude *on some bits and pieces of native title in some locations*, I think it is overwhelmingly likely that, if the point were ever made about the role of the Racial Discrimination Act in that respect, a court would hold that that is a reasonable restriction on the enjoyment of the native title in question - the fact that it has to be shared with the public in the context of public access. (Italics added) (Commonwealth, Parliamentary Debates, Senate, 17 December 1993, 5064-5065 (Senator Evans))

53 In the context of these statements, Senator Evans is not to be taken to suggest the existence of a general truth that the public is entitled to access and enjoy all proposed prescribed places. Such a thing would have an existence apart from government policy and if reference to it was intended, the text of the provisions could have said so, and at least the word "any" removed. **CS [45]** and {**2AB 506,16-35 [144]-[145]**}. Just as the word "*rights*" could have been included if that that was what Parliament intended to protect; just as a reference to *physical* access and enjoyment could have been included (as the Commonwealth has contended), so Parliament could have expressly stated that what it intended to protect against the exercise of native title rights, was the bare *ability* to enter Crown lands.

54 *Conclusion* **CS [48]**. The conclusion that the effect of subsec 212(2) of the NTA and sec 14 of the TVA was to confirm that "irrespective of its legal foundation", public access to beaches was not limited by native title, sits in tension with the balance of the argument. It involves an acknowledgement that prescribed access may have different prior legal foundations. At least a common law or statutory rights based foundation and a factual foundation would require prescribed access to be identified on a case by case, place by place basis.

Further response to argument of the "second issue" of the Commonwealth – content of the determination of native title

***Section 253 – "interest"* (CS [49]-[51])**

55 It is accepted that something that is an interest as defined in sec 253 of the NTA will be an interest for the purposes of para 225(c): **CS [49]**.

56 The Full Court held that the ability or liberty to enter upon unallocated Crown land for which the State contended in this case, or the "expectation" said to underpin the exercise of that liberty could not be characterised as a "privilege" and was therefore not an "interest" for the purposes of sec 253 or para 225(c) of the NTA: {**2AB 512.28-30 [169], 513.28-32 [174]**}.

10 **57** The Full Court did not expressly reason to or state a conclusion about whether the requirement of "existing public access to and enjoyment of" prescribed places in the determination areas was met by the matters relied on by the State but it is entailed in the absence of reference to those matters in the Full Court's identification of the ways in which subsec 212(2) may apply and in its allowing of the appeal, that it did not regard the requirement has having been met. Thus, rather than basing its decision on the absence of *creation* of an interest by confirmation under sec 14 of the TVA, the Full Court's decision was that there was no "interest" because the ability, liberty and expectation relied on by the State, firstly were not in any event "interests"; and second, because they did not constitute prescribed access so as to be confirmed (whether as an interest or otherwise): see {**2AB 512.38-513.36 [170]-[175]**},

20 contra **CS [50]**.

58 The argument in **CS [51]** fails: firstly, for want of a missing premise. For sec 14 of the TVA to operate to confirm something as prescribed access "irrespective of" whether it was the subject of a common law or statutory right or interest, or whether established as a matter of fact, does not entail that what the State in this case put forward as having been confirmed (the ability or liberty to enter upon unallocated Crown land or the "expectation" said to underpin the exercise of that liberty) must satisfy the requirement of "existing public access to and enjoyment of" the prescribed places.

59 Second, the argument would fail even if the missing premise was overlooked. Confirmation of an existing ability or liberty to enter Crown land would not have changed the

30 legal character of the ability or liberty, or conferred anything let alone an immunity, right or privilege. In this context, *Mathieson v Burton* (1971) 124 CLR 1 at 12 per Windeyer J is relied on, apparently for the proposition that an immunity against enforcement of a native title right can be right or a privilege: **CS [51] fn 26**}. However, the proposition is not supported by that authority. Windeyer J, was rejecting an argument that a "like right" to continue in possession

of premises, which was available to the child of a deceased person, should be characterised not as a right but merely as an immunity, or exemption.

60 Specifically, to the extent that an ability or liberty to enter a prescribed place in this case was confirmed (which is denied), it was confirmed prior to the recognition (and thereby prior to the enforceability) of the native title rights recognised in the determinations. Accordingly, such confirmation, in Hohfeldian terms, involved no negation of any liability, disability or legal duty on any member of the public as against anyone (including the Crown or the yet to be recognised native title holders) in relation to the place. Thus, such confirmation would not have conferred on the public any immunity, privilege or right.

Paragraph 225(c) – "other interests" **(CS [52]-[55])**

61 It may be accepted that a determination of native title is the primary mechanism by which the NTA provides for the recognition and enforcement of native title, that once made it operates *in rem*, or that in the circumstances a high degree of certainty is desirable: see **CS [52]-[53]**. However, certainty is not provided by inaccuracy. In relation to a determination of native title, mischaracterisation of the legal status of things referred to in a determination would be the antithesis of certainty. Certainty does not require something that is not an "interest" for the purposes of the NTA be referred to as such in a determination, whether as a native title right or interest or as an "other interest". Further, the standards for certainty of the description of the nature and extent of other interests are no less than those for describing the nature and extent of the native title rights and interests. So far as a determination must "exhaustively indicate the determined incidents" of native title (*Gumana v NT* (2005) 141 FCR 457, 459 [132]), so must it indicate fully and accurately the nature and extent of the "other interests" and the relationship between the two sets of interests. Because the determination operates *in rem*, including as to the characterization of prescribed access confirmed under sec 14 of the TVA, the requirement for certainty must apply equally to references to confirmed prescribed access interests as applies to the descriptions of the nature and extent of the native title rights.

62 The first respondents do not accept, if any prescribed access existed in relation to prescribed places on the determination areas (which is denied), or was confirmed by operation of sec 14 of the TVA (which is also denied) and as so confirmed is not an "interest" within the meaning of sec 253 of the NTA, that it should nevertheless be recorded as an "interest" for the purposes of para 225(c) of the NTA. To do so would be inaccurate and misleading, whereas, for reasons given below, it need not be inaccurate or misleading to not record it as an interest: contra **CS [54]**. Further, it could lead to a false description of the relationship between the native

title rights and the things that were confirmed, thus artificially creating tensions or false inconsistencies with the native title.

63 The first respondents accept that any contrary intention appears: see **CS [54]**. No contrary intention appearing ought to be regarded as countenancing such a result. While the Commonwealth contends that it would be misleading and inaccurate to not include reference to something that would subject the native title to constraints; on the other hand, it contends there are "strong reasons" for calling something an "interest" in a determination which would thereby give a legal status as against the whole world (and exaggerate an adverse effect on native title) which it would not otherwise have. To adopt such an approach would be to raise a fiction to discriminate against native title holders. The considerations mentioned in **CS [55]** does not advance the argument. Paragraph 225(d) of the NTA, again, can only apply in the context of an existing "interest". How one might describe the relationship between native title rights and interests and an other "interest" which is not an interest is not explained. There is no relationship to identify or describe.

Paragraph 225(d) – discretion **(CS [56]-[58])**

64 The final and further alternative argument of the Commonwealth would only arise in the event that this Court were to hold that the state of affairs created by the LA concerning the public and Crown land in truth constituted "existing public access to and enjoyment of" prescribed places on the determination areas and that it was confirmed as such but not as having constituted an "interest" for the purposes of the NTA. This is the question set out at **CS [3.2.3]**.

65 If the question requires an answer, the present form of the determinations, and native title determinations generally already sufficiently address the matter; as native title and its exercise are (and are generally expressed in native title determinations to be) subject to the laws of the State and the Commonwealth [including the NTA and the TVA] and including the common law. It may be appropriate and sufficient if anything further is required, for the Native Title Registrar to include reference to the situation as established in any given case, as "other details about the determination or decision" pursuant to subsec 193(3) of the NTA.

66 Unless this Court finds that there was confirmation of prescribed access to the prescribed places on the determination areas and that what was confirmed was, immediately prior to confirmation, an interest as defined in sec 253 of the NTA, the orders sought by the appellants should not be made.

Part VI: Time estimate

67 The respondent would seek no more than 2 hours for the presentation of the respondent's oral argument.

13th September 2019

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ANNEXURE – LIST OF PARTICULAR CONSTITUTIONAL PROVISIONS, STATUES AND STATUTORY INSTRUMENTS REFERRED TO IN THE SUBMISSIONS

Constitutional provisions, statues and statutory instrument	**Version**	**Submission Reference**
*Native Title Act 1993 (*Cth)	As enacted	sec 212, 225, 253
*Native Title Act 1993 (*Cth)	Compilation No. 43 (22 June 2017)	sec 47B, 193, 212, 225, 253
Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)	As enacted	sec 14
Land Act 1933 (WA)	Version 6-00-00 (Reprint 6: 2 May 1985)	sec 164
Land Administration Act 1997 (WA)	Version 07-00-00 (Reprint 7: 6 October 2017)	sec 267