HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

Matter No P34/2019

STATE OF WESTERN AUSTRALIA — APPELLANT

AND

ERNEST DAMIEN MANADO AND OTHERS ON BEHALF OF THE BINDUNBUR NATIVE TITLE CLAIM GROUP & ORS — RESPONDENTS

Matter No P35/2019

STATE OF WESTERN AUSTRALIA — APPELLANT

AND

RITA AUGUSTINE AND OTHERS ON BEHALF OF THE JABIRR JABIRR/NGUMBARL NATIVE TITLE CLAIM GROUP & ORS — RESPONDENTS

Matter No P36/2019

COMMONWEALTH OF AUSTRALIA — APPELLANT

AND

RITA AUGUSTINE AND OTHERS ON BEHALF OF THE JABIRR JABIRR/NGUMBARL NATIVE TITLE CLAIM GROUP & ORS — RESPONDENTS

Matter No P37/2019

COMMONWEALTH OF AUSTRALIA APPELLANT

AND

ERNEST DAMIEN MANADO AND OTHERS ON BEHALF OF THE BINDUNBUR NATIVE TITLE CLAIM GROUP & ORS RESPONDENTS

Western Australia v Manado
Western Australia v Augustine
Commonwealth of Australia v Augustine
Commonwealth of Australia v Manado
[2020] HCA 9
Date of Hearing: 3 December 2019
Date of Judgment: 18 March 2020
P34/2019, P35/2019, P36/2019 & P37/2019

ORDER

Matter No P34/2019

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 20 December 2018 and in their place order that the appeal to the Full Court be dismissed.*

3. *The appellant pay the first respondents' costs of the appeal to this Court.*

Matter No P35/2019

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 20 December 2018 and in their place order that the appeal to the Full Court be dismissed.*

3. *The appellant pay the first respondents' costs of the appeal to this Court.*

Matter No P36/2019

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 20 December 2018 and in their place order that the appeal to the Full Court be dismissed.*

3. *The appellant pay the first respondents' costs of the appeal to this Court.*

Matter No P37/2019

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 20 December 2018 and in their place order that the appeal to the Full Court be dismissed.*

3. *The appellant pay the first respondents' costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

S P Donaghue QC, Solicitor-General of the Commonwealth, with N Kidson and C I Taggart for the Commonwealth of Australia in each appeal (instructed by Australian Government Solicitor)

J A Thomson SC, Solicitor-General for the State of Western Australia, with G J Ranson for the State of Western Australia in each appeal (instructed by State Solicitor's Office (WA))

B W Walker QC with R W Blowes SC and A Romano for the first respondents in each appeal (instructed by Kimberly Land Council Regional Office Broome)

Submitting appearances for the third respondent in each appeal and the fifth respondent in P35/2019 and P36/2019

No appearance for the fourth to tenth respondents in P34/2019 and P37/2019 and the fourth respondent in P35/2019 and P36/2019

CATCHWORDS

Western Australia v Manado
Western Australia v Augustine
Commonwealth of Australia v Augustine
Commonwealth of Australia v Manado

Aboriginals – Native title to land and waters – Determinations of – Native title rights and interests – Where s 212(2) of *Native Title Act 1993* (Cth) provided that Commonwealth, State or Territory may by legislation confirm existing public access to and enjoyment of beaches and other categories of lands or waters – Where Parliament of Western Australia enacted legislation confirming public access and enjoyment pursuant to s 212(2) – Where s 225(c) of *Native Title Act* required that determination of native title rights and interests include nature and extent of "any other interests" in relation to determination area – Where s 253 of *Native Title Act* defined "interest" as including any other right or privilege over or in connection with land or waters – Whether s 225(c) required determination of native title to include reference to confirmation – Whether access and enjoyment capable of confirmation limited to legally enforceable rights and privileges – Whether act of confirmation through legislation enacted in reliance on s 212(2) gave rise to "right" or "privilege" amounting to "other interest" in relation to determination area.

Words and phrases – "confirmation", "confirmed access and enjoyment", "determination area", "determination of native title", "general expectation of public access", "interest", "lack of legal prohibition", "land or waters", "liberty", "native title", "nature and extent of any other interests", "ordinary meaning", "other interest", "principle of public access", "privilege", "public access and enjoyment", "right", "unallocated Crown land".

Coastal Waters (State Powers) Act 1980 (Cth), ss 4, 5.
Coastal Waters (State Title) Act 1980 (Cth), s 4.
Land Act 1933 (WA), ss 3, 164.
Land Administration Act 1997 (WA), ss 3, 267.
Native Title Act 1993 (Cth), ss 94A, 212, 225, 253.
Off-shore (Application of Laws) Act 1982 (WA), s 3.
Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA), s 14.

1 KIEFEL CJ, BELL, GAGELER, KEANE AND GORDON JJ. These appeals from a decision of the Full Court of the Federal Court of Australia (Barker, Perry and Charlesworth JJ)[1] on appeal from a decision of a single judge of that Court (North J)[2] turn on the construction of s 212(2) of the *Native Title Act 1993* (Cth). The circumstances giving rise to the appeals are set out in the reasons for judgment of Nettle J, with whose proposed orders allowing the appeals we agree.

2 The authority reposed in the legislature of an Australian polity by s 212(2) is, by legislation, to "confirm any existing public access to and enjoyment of" beaches and other categories of lands or waters which it specifies. The content of that authority is not to be found in juridical distinctions of the general law. The content is to be found in the ordinary meaning of the statutory language construed in a manner that best achieves the object that the Commonwealth Parliament sought to achieve in conferring the authority.

3 The object that the Commonwealth Parliament sought to achieve through the enactment of s 212(2) was spelt out in the course of debate on the Bill for the *Native Title Act* in the Senate. The object as there explained was to preserve the "principle" of "public access" to beaches notwithstanding the possibility that native title might exist in respect of a particular stretch of beach[3]. By implication, the object was in the same way to preserve the principle of public access to the other categories of lands and waters to which the authority relates notwithstanding the possibility that native title might exist in respect of a particular area of land or a particular expanse of water.

4 Faithful to that purpose, the Commonwealth Parliament eschewed the language of "rights" and spoke only in terms of "access" and "enjoyment" in the framing of s 212(2). That was in marked contrast to its employment of the language of "rights" in the framing of s 212(1). Just as "enjoyment" is evidently used in s 212(2) in the ordinary sense of that word to mean no more than an ability to experience the pleasure of the lands or waters to which reference is made (regardless of whether or not that ability is a matter of legal right), so "access" is used in the ordinary sense of that word to mean no more than an ability to enter

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1 *Manado v Western Australia* (2018) 265 FCR 68.

2 *Manado (on behalf of the Bindunbur Native Title Claim Group) v Western Australia* [2018] FCA 275.

3 Australia, Senate, *Parliamentary Debates* (Hansard), 17 December 1993 at 5063.

those lands or waters (regardless of whether or not that ability is a matter of legal right).

5 The description in the Explanatory Memorandum accompanying the Bill for the *Native Title Act*[4] of the authority as enabling a legislature to "confirm existing public rights of access" is not in conflict with that reading if the Explanatory Memorandum is understood to be cast not in the language of "Hohfeldian classification" but in the "language of everyday life"[5].

6 The authority reposed in the legislature of an Australian polity by s 212(2) of the *Native Title Act* is to enact legislation which gives formal endorsement to the principle of public access to and enjoyment of beaches and other specified categories of lands and waters within the territorial jurisdiction of that polity, including in the case of a State as that territorial jurisdiction has been expanded as a result of the implementation of the offshore constitutional settlement by the *Coastal Waters (State Title) Act 1980* (Cth) and the *Coastal Waters (State Powers) Act 1980* (Cth)[6]. The authority is available to be exercised by legislation expressed to confirm public access to and enjoyment of lands or waters within the territorial jurisdiction of the polity, irrespective of the extent to which public access or enjoyment of lands or waters within that territorial jurisdiction is or is not authorised by operation of positive law and irrespective of the extent to which public access or enjoyment has or has not been availed of in practice.

7 The statutory restriction of the authority to confirm "existing" public access and enjoyment operates to prevent a legislature from confirming any public access and enjoyment which was prohibited or excluded by operation of positive law at the time of enactment of the *Native Title Act* and at the time of exercise of the authority. An existing prohibition or exclusion of public access or enjoyment by operation of positive law might be the result of a regulatory prohibition[7], or it might

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4 Australia, House of Representatives, *Native Title Bill 1993*, Explanatory Memorandum, Part B at 71.

5 cf *Brown v Tasmania* (2017) 261 CLR 328 at 386 [189].

6 *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 358-359; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 56-57 [63].

7 See, eg, s 164(2) of the *Land Act 1933* (WA); s 267(2) of the *Land Administration Act 1997* (WA).

be the result of the grant or creation of a proprietary interest. To the extent there was no such prohibition or grant, there was existing public access and enjoyment which could be confirmed by legislation made pursuant to s 212(2). The word "any" serves to ensure that, within the limits set by existing public access and enjoyment, a legislature has free rein to determine for itself how far its confirmation of the principle of public access to and enjoyment of beaches or other categories of lands or waters within its territorial jurisdiction is to extend.

8 The statutory consequence of an exercise of the authority reposed by s 212(2) is not to extinguish any native title rights or interests, although it may be to constrain the exercise of such native title rights or interests as may exist in relation to particular land or water. Section 212(3) makes that clear. Legislative endorsement of the principle will operate, for example, to provide a member of the public with a statutory defence to a claim for tortious infringement of a native title right[8].

9 By reason of confirmation of public access and enjoyment through legislation enacted in reliance on s 212(2) operating to constrain the exercise of such native title rights or interests as may exist in relation to particular land or water, the act of confirmation itself gives rise to a "right" or "privilege" so as to amount to an "interest" in relation to land or water within the meaning of the definition in s 253 of the *Native Title Act*. That is so whether or not public access to or enjoyment of a particular category of lands or waters, or of a particular area of land or a particular expanse of water, might independently meet the description of an "interest" in relation to land or water within the meaning of the definition in s 253.

10 Section 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) makes full use of the authority conferred by s 212(2) of the *Native Title Act* to confirm public access to and enjoyment of beaches and other categories of lands and waters within the territorial jurisdiction of Western Australia. The confirmation operates by force of s 212(2) of the *Native Title Act* to create an interest in any land or water within that territorial jurisdiction in relation to which native title exists. Where native title is determined to exist in relation to a particular area of land or water, the determination of native title is accordingly required by s 225(c) of the *Native Title Act* to include reference to the confirmation.

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8 See *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 49 [42].

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Gageler J
Keane J
Gordon J

11 North J was accordingly correct to include reference to public access and enjoyment in the native title determinations. The Full Court was wrong to delete those references.

12 NETTLE J. This matter concerns four appeals from a judgment of the Full Court of the Federal Court of Australia. The ultimate question is whether the ability of members of the public to access and enjoy that part of unallocated Crown land comprised of waterways, beds and banks or foreshores of waterways, coastal waters or beaches in the mid-Dampier Peninsula, Western Australia (hereafter, collectively, "the foreshore"), as that ability existed on 1 January 1994[9], was validly recorded, pursuant to s 225(c) of the *Native Title Act 1993* (Cth), in two native title determinations ("the determinations") made in respect of large areas of land and waters located north of Broome in the Dampier Peninsula ("the determination areas"). For the reasons which follow, the question should be answered affirmatively.

Relevant statutory provisions

13 Section 3(1) of the *Land Act 1933* (WA), as in force on 1 January 1994, provided, so far as is relevant, that:

> "'Crown Lands' means and includes [subject to an inapplicable exception] all lands of the Crown vested in Her Majesty, except land which is, for the time being, reserved for or dedicated to any public purpose, or granted or lawfully contracted to be granted in fee simple or with the right of purchase under this Act or any Act hereby repealed, and includes all lands between high and low water mark on the seashore and on the banks of tidal waters".

And that:

> "'High Water Mark,' when applied to tidal waters, means the ordinary high water at spring tides".

14 Section 164(1) of the *Land Act*, as in force on 1 January 1994, relevantly provided that:

> "'public lands' means any Crown lands or lands reserved for or dedicated to any public purpose".

15 Section 164(2) of the *Land Act*, as in force on 1 January 1994, provided in substance 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;

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9 The date of commencement of s 212(2) of the *Native Title Act 1993* (Cth).

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.

16 Section 4 of the *Coastal Waters (State Title) Act 1980* (Cth), as in force on 1 January 1994, provided in substance that by force of that Act there was vested in the State of Western Australia the same right and title to the property in the sea-bed beneath the coastal waters of the State, as extending on the commencement date of that Act[10], and the same rights in respect of the space (including space occupied by water) above that sea-bed, as would belong to the State if that sea-bed were the sea-bed beneath waters of the sea within the limits of the State. Thus, the "proprietary rights and title which [the State of Western Australia] had previously believed [itself] to have over and in" the land below the low water mark to a point three nautical miles seaward – but which, as this Court held in *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*")[11], had been vested in the Commonwealth – were "return[ed] to" and vested in the State of Western Australia as unallocated Crown land[12].

17 Section 3 of the *Off-shore (Application of Laws) Act 1982* (WA), as in force on 1 January 1994 and as it continues to be, provides, so far as is relevant, that the provisions of every law of the State shall be taken to have effect in and in relation to the coastal waters of the State, including the sea-bed and subsoil beneath and the airspace above the coastal waters of the State, as if those waters were part of Western Australia. Thus, the provisions of the *Land Act* were made to apply to the land below the low water mark to a point three nautical miles seaward.

18 Section 3(1) of the *Land Administration Act 1997* (WA), which came into force after 1 January 1994, provides, so far as is relevant, that:

> "***alienated land*** means land held in freehold;
>
> ...
>
> ***Crown land***, subject to subsections (2), (3), (4) and (5), means all land, except for alienated land;
>
> ...

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10 The Act commenced operation on 14 February 1983.

11 (1975) 135 CLR 337.

12 *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 358 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; see also *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 56-57 [62]-[64] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

inundated land means alienated land that, through the excavation of that land or other land, has become inundated by tidal waters;

land means –

(a) all land within the limits of the State; and

(b) all marine and other waters within the limits of the State; and

(c) all coastal waters of the State as defined by section 3(1) of the *Coastal Waters (State Powers) Act 1980* of the Commonwealth; and

(d) the sea-bed and subsoil beneath, and all islands and structures within, the waters referred to in paragraphs (b) and (c)".

19 Section 3(2) of the *Land Administration Act* provides that all land below high water mark, including the beds and banks of tidal waters, is Crown land unless that land is inundated land or other alienated land.

20 Section 267 of the *Land Administration Act* proscribes certain activities on Crown land in similar fashion to s 164 of the *Land Act*.

21 Section 212 of the *Native Title Act* provides that:

"**Confirmation of ownership of natural resources, access to beaches etc**

Confirmation of ownership of natural resources etc

(1) Subject to this Act, a law of the Commonwealth, a State or Territory may confirm:

(a) any existing ownership of natural resources by the Crown in right of the Commonwealth, the State or the Territory, as the case may be; or

(b) any existing right of the Crown in that capacity to use, control and regulate the flow of water; or

(c) that any existing fishing access rights prevail over any other public or private fishing rights.

Confirmation of access to beaches etc

(2) 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; or

(da) stock-routes; or

(e) areas that were public places at the end of 31 December 1993.

Effect of confirmation

(3) Any confirmation under this section does not extinguish any native title rights and interests and does not affect any conferral of land or waters, or an interest in land or waters, under a law that confers benefits only on Aboriginal peoples or Torres Strait Islanders."

22 Pursuant to s 212(2) of the *Native Title Act*, the Parliament of Western Australia enacted s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) ("the Titles Validation Act"), which came into force on 4 July 1995. It provides:

"**Confirmation of access to certain places (s 212(2) NTA)**

Existing public access to and enjoyment of the following places is confirmed –

(a) waterways;

(b) beds and banks or foreshores of waterways;

(c) coastal waters;

(d) beaches;

(da) stock routes;

(e) areas that were public places at the end of 31 December 1993."

23 Section 225 of the *Native Title Act* provides, so far as is relevant, in substance that a determination of native title is a determination of whether or not native title exists in relation to a particular area of land or waters (the

"determination area") and, if it does exist, a determination, inter alia, of the nature and extent of *any other interests in relation to the determination area*[13].

24 Section 253 of the *Native Title Act* provides, so far as is relevant, that, unless the contrary intention appears:

> "***interest***, in relation to land or waters, means:
>
> (a) a legal or equitable estate or interest in the land or waters; or
>
> (b) any other right (including a right under an option and a right of redemption), charge, power or *privilege* over, or in connection with:
>
> (i) the land or waters; or
>
> (ii) an estate or interest in the land or waters; or
>
> (c) a restriction on the use of the land or waters, whether or not annexed to other land or waters." (emphasis added)

Proceedings at first instance

25 At first instance, the primary judge (North J) held[14] that, because public access to and enjoyment of the foreshore was not proscribed, the public's ability to access and enjoy it constituted a privilege in relation to land and waters, which, as confirmed by s 14 of the Titles Validation Act pursuant to s 212(2) of the *Native Title Act*, fell within the definition of "interest" in s 253 of the *Native Title Act*, and, therefore, fell within the category "other interests" in relation to the determination areas within the meaning of s 225(c) of the *Native Title Act*.

26 The primary judge further held[15] that, since "the purpose of s 225(c) of [the *Native Title Act*] is to require identification of the interests which must coexist 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", the amount of detail required to be included in the specification of those interests in the native title determinations should be

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13 *Native Title Act 1993* (Cth), s 225(c).

14 *Manado (on behalf of the Bindunbur Native Title Claim Group) v Western Australia* [2018] FCA 275 at [20].

15 *Manado (on behalf of the Bindunbur Native Title Claim Group) v Western Australia* [2017] FCA 1367 at [644].

sufficient to satisfy the purpose of "giv[ing] notice of other interests to those entitled to exercise them" – in this case, members of the public.

27 In the result, his Honour included in a schedule to each of the determinations a clause recognising, as an "other interest" for the purpose of s 225(c) of the *Native Title Act*, "public access to and enjoyment of" identified areas of unallocated Crown land "being areas which are ... waterways; ... beds and banks or foreshores of waterways; ... coastal waters; or ... beaches".

Proceedings before the Full Court

28 The first respondents in this Court appealed to the Full Court of the Federal Court (Barker, Perry and Charlesworth JJ), who held[16] that the primary judge erred in the construction of "privilege" in the definition of "interest" in s 253 of the *Native Title Act* and, thus, or in addition, in the construction of "other interests" in s 225(c), because the ability of the public to access and enjoy the foreshore was neither a "privilege" nor an "other interest" as those terms are used in ss 225(c) and 253 of the Act.

29 In so concluding, the Full Court acknowledged[17] that s 212(2) of the *Native Title Act* is drafted "in different and more unusual terms" from s 212(1), in that "[i]t does not use the language of 'rights' or 'interests'"; "appears to have a different purpose"; and "is not expressly limited to empowering the confirmation of any existing 'rights' of the public in the places mentioned in subs (2)", but stated[18], nevertheless, that they considered that the meaning of s 212(2) "is ambiguous or obscure". Their Honours then posited[19] what they perceived to be the three alternative constructional choices to which the ambiguity gave rise:

> "Is s 212 a provision which merely seeks to ensure through 'confirmation' that any existing general law 'rights' of the public to access and enjoyment of such places as relevantly waterways, beds and banks or foreshores of waterways, coastal waters and beaches may continue to be enjoyed notwithstanding a determination that native title exists over such places? Or is s 212 only, or also, intended to confirm public access to and enjoyment of such places whenever such access or enjoyment is shown to have existed in fact at the relevant time? Or is s 212, as the State contends, intended to

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16 *Manado v Western Australia* (2018) 265 FCR 68 at 104-105 [131]-[134], 111 [159].

17 *Manado v Western Australia* (2018) 265 FCR 68 at 106 [139].

18 *Manado v Western Australia* (2018) 265 FCR 68 at 106 [140].

19 *Manado v Western Australia* (2018) 265 FCR 68 at 106 [140].

> recognise an ability or liberty of a member of the public to access and enjoy unallocated Crown land by custom or convention or by reason of an expectation that they can do so in the absence of any prohibition on such access and enjoyment?"

30 The Full Court answered that question, in substance, that, upon its proper construction, s 212(2) extended to each of the first and second possibilities but not the third. Their Honours excluded[20] the third because, in their view, the ability of the public to access and enjoy the foreshore was not a *privilege* in the sense of the "ordinary literal meaning" of the word, and because "no statutory purpose has been identified for departing from the ordinary meaning of the word 'privilege' in the context of the definition of 'interest' in s 253" of the *Native Title Act*.

31 The Full Court considered[21] that the essence of a "privilege", according to its "ordinary meanings", is an advantage "which is not, of its very nature, available to all". The Full Court founded that view, in part, on one of the definitions of "privilege" in the *Macquarie Dictionary Online* – "a right or immunity enjoyed by a person [or persons] beyond the common advantages of others"[22] – and, in part, on the decision of Madgwick J in *Kanak v Minister for Land and Water Conservation*[23] – that an interest greater than that of a member of the general public is required to meet the definition of "interest" in s 253, having regard, among other things, to what Madgwick J considered[24] would be the unmanageable consequences which would flow if any member of the general public could be an applicant for a native title determination under s 61 of the *Native Title Act* merely because all members of the public may, as such, have some right of access to use the land in question[25].

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20 *Manado v Western Australia* (2018) 265 FCR 68 at 111 [161], 112 [167].

21 *Manado v Western Australia* (2018) 265 FCR 68 at 111 [162].

22 *Manado v Western Australia* (2018) 265 FCR 68 at 112 [164].

23 (2000) 106 FCR 31.

24 *Kanak v Minister for Land and Water Conservation* (2000) 106 FCR 31 at 45 [35].

25 *Manado v Western Australia* (2018) 265 FCR 68 at 112 [167], citing *Kanak v Minister for Land and Water Conservation* (2000) 106 FCR 31 at 45-46 [35]-[37] per Madgwick J.

32 In rejecting submissions on behalf of the State of Western Australia that the extrinsic materials bespoke a plainly contrary conclusion, the Full Court stated[26] that:

> "To attribute to the Parliament an intention, 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 [*Native Title Act*] for the purposes of identifying other interests in a native title determination, is to stretch the general language and statements made in the Parliament during the passage of the Bill too far. The creation of such a public access and enjoyment interest that is acknowledged to have the capacity to 'impair' native title (even if not to extinguish it) requires explicit language to that end. In circumstances such as these, a 'clear and plain intent' to create a broad new right to access and enjoy places such as those found in the determinations, where no such right has previously existed, and so will constrain the exercise of existing native title rights and interests, needs to be demonstrated[27]. Such an intent is not demonstrated by the general and loose language of confirmation used in s 212(2)."

33 On that basis, the Full Court concluded[28] that there are but two ways in which s 212(2) applies in circumstances such as the present:

> "(1) First, a public access interest may arise where it is shown to be the subject of an existing common law or statutory right or interest (as defined by s 253 of the [*Native Title Act*]) at the time that s 212(2) of the [*Native Title Act*] was enacted.
>
> (2) Second, the public access interest may be shown to be a relevant interest where a person asserting an 'existing public access to and enjoyment of' land or waters of the type mentioned in s 212(2) establishes that public access and enjoyment, as a matter of fact, existed at the time of the enactment of s 212(2)."

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26 *Manado v Western Australia* (2018) 265 FCR 68 at 110-111 [158].

27 See *Western Australia v Ward* (2002) 213 CLR 1 at 89 [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64 per Brennan J (Mason CJ and McHugh J agreeing at 15), 114 per Deane and Gaudron JJ, 193 per Toohey J.

28 *Manado v Western Australia* (2018) 265 FCR 68 at 113 [171].

The appellants' contentions

34 Before this Court, the State of Western Australia contended, as it did below, that, because members of the public were not as at 1 January 1994 prohibited by law from accessing and enjoying the foreshore, except to the limited extent proscribed by s 164 of the *Land Act*, there was "existing public access to and enjoyment of" the foreshore, within the meaning of s 212(2) of the *Native Title Act* and s 14 of the Titles Validation Act; that ability to access and enjoy the foreshore was a "privilege" in accordance with common legal usage, even prior to its confirmation by s 14 of the Titles Validation Act; it was, therefore, an "interest" within the meaning of s 253 of the *Native Title Act*; it was for that reason an "other interest" within the meaning of s 225(c) of the *Native Title Act*; and, therefore, the primary judge was correct to include the description of it which his Honour did in the determinations.

35 With one exception, the Commonwealth contended to similar effect. Although it did not "seek to dissuade" the Court from acceptance of the proposition that the public's ability to access and enjoy the foreshore was a privilege *prior* to its confirmation by s 14 of the Titles Validation Act, the Commonwealth contended that, on the assumption that the public's ability to access and enjoy the foreshores *had* been validly confirmed under that section, "whether or not an 'interest' existed *before* that confirmation, it necessarily existed *after* confirmation because of the constraints on the exercise of native title rights brought about by the confirmation" (emphasis in original). Thus, the Commonwealth contended, "whether or not there was a privilege beforehand does not alter the legal answer".

The first respondents' contentions

36 The first respondents contended to the contrary that the Full Court were correct in holding that, as there was no "existing common law or statutory right of prescribed access to prescribed places on the determination areas", nor "any evidence of fact said to constitute prescribed access", the ability of the public to access and enjoy the foreshore was not such as to be capable of confirmation by s 14 of the Titles Validation Act in accordance with s 212(2) of the *Native Title Act*; that the ability of the public to access and enjoy the foreshore was not a "privilege" within the meaning of s 253 of the *Native Title Act*; and, consequently, that that ability was neither an "interest" for the purpose of s 253 of the *Native Title Act* nor, if there were a difference, an "other interest" capable of being recorded in the determinations under s 225(c).

37 Alternatively, it was contended that, if the public's ability to access and enjoy the foreshore were an "interest" within the meaning of s 253, it was not an "other interest" within the meaning of s 225(c), or at least that there was no necessity for the purpose of this matter to determine, and this Court should not now decide, whether the ability of the public to access and enjoy the foreshore was an "other interest" within the meaning of s 225(c) of the *Native Title Act*.

The nature of the public's ability to access and enjoy the foreshore

38 There is a substantial body of English authority for the proposition that members of the public have no legal right, as such, to "bathe in the sea, and to pass over the sea-shore for that purpose"[29]. These authorities suggest that such rights as the public has "to use the foreshore ... are limited to access for navigation and fishing"[30]. Until now, that authority has not been seriously questioned in this country[31] and no party to this matter suggested that it should not be followed. It is not disputed, however, that, as at 1 January 1994, members of the public were not prohibited from accessing and enjoying the foreshore, whatever their purpose, provided they did not there commit any of the acts then proscribed by s 164 of the *Land Act*, and now proscribed by s 267 of the *Land Administration Act*.

39 No doubt, in the absence of a legally enforceable right of access and enjoyment, the public's ability to access and enjoy the foreshore could have been revoked by legislation or delegated legislation, or, perhaps, even by an officer of the State exercising executive power. But until and unless that occurred, the public had what amounted in effect to the tacit permission of the State to access and enjoy

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29 *Blundell v Catterall* (1821) 5 B & Ald 268 at 288 per Holroyd J [106 ER 1190 at 1197]; *Mace v Philcox* (1864) 15 CB (NS) 600 [143 ER 920]; *Earl of Ilchester v Raishleigh* (1889) 61 LT 477; *Llandudno Urban District Council v Woods* [1899] 2 Ch 705 at 708-709 per Cozens-Hardy J; *Brinckman v Matley* [1904] 2 Ch 313 at 315-316 per Buckley J; *Williams-Ellis v Cobb* [1935] 1 KB 310 at 320-321 per Lord Wright; *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547 at 1570-1575 [32]-[51] per Lord Neuberger of Abbotsbury PSC.

30 *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547 at 1574 [47] per Lord Neuberger of Abbotsbury PSC; see also, as to the common law rights to fish and of navigation in tidal waters, *Malcomson v O'Dea* (1863) 10 HLC 593 at 618 per Willes J [11 ER 1155 at 1165-1166], applied in *Neill v Duke of Devonshire* (1882) 8 App Cas 135 at 138 per Lord Selborne LC; *Gann v Free Fishers of Whitstable* (1865) 11 HLC 192 at 207-210 per Lord Westbury LC [11 ER 1305 at 1312]; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139 at 166 per Parker J; *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153 at 170-171 per Viscount Haldane LC.

31 See, eg, *Seas and Submerged Lands Case* (1975) 135 CLR 337 at 421 per Stephen J, 489 per Jacobs J; *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 329-330 per Brennan J; *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533 at 593 per Olney J; *The Commonwealth v Yarmirr* (1999) 101 FCR 171 at 222-225 [205]-[219] per Beaumont and von Doussa JJ; *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534 at 555-556 [78]-[79] per Barrett J.

the foreshore otherwise than as proscribed by s 164 of the *Land Act*[32]. That remained the case as at 1 January 1994 and as at the date of commencement of s 14 of the Titles Validation Act.

Confirmation of existing public access to and enjoyment of foreshore

40 As has been seen, s 212(2) of the *Native Title Act* authorises a State or Territory to "confirm any existing public access to and enjoyment of ... waterways [or] beds and banks or foreshores of waterways". And as the Full Court observed[33], the terms in which s 212(2) is expressed stand in marked contrast to the terms used in s 212(1) to describe the rights and interests that may be confirmed under s 212(1), namely, "existing *ownership* of", "any existing *right* of" and "any existing ... access *rights*". Of course, the nature of rights and obligations under legislation will not always be "disposed of by nomenclature"[34]. But the stark textual differences between sub-ss (1) and (2) – which were passed into law by the same enactment and together constitute the two substantive limbs of a single provision – cannot be ignored. In this case, at least prima facie, they imply that s 212(2) is directed to a broader notion of access and enjoyment than legally enforceable rights.

41 That implication is fortified by the fact that, in Australia, beyond rights of access associated with the rights to navigate and fish, the public has few legally enforceable rights of access and enjoyment in relation to foreshores. Although some foreshores are closed to the public, as, for example, is the case with beaches adjacent to some airports, harbours and defence establishments[35], and some are dedicated to public purposes[36] (thereby conferring on the public a statutory *jus*

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32 *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547 at 1577 [58] per Lord Neuberger of Abbotsbury PSC.

33 *Manado v Western Australia* (2018) 265 FCR 68 at 106 [139].

34 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 117 per Toohey J. See also *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 192 per Windeyer J; *Western Australia v Ward* (2002) 213 CLR 1 at 187 [387] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

35 See, eg, *Defence Act 1903* (Cth), Pt VIA Divs 1 and 7; *Maritime Transport and Offshore Facilities Security Regulations 2003* (Cth), Pt 6.

36 For example, Bondi Beach, in Sydney, New South Wales, was resumed from private owners in 1882 and dedicated as a public reserve.

spatiandi or right to wander at large over the public place[37]), the bulk of foreshore in Australia is unallocated Crown land which, though perhaps "reserved" from grant or sale[38], "did not pass from the control of the Crown"[39]. The public's access to and enjoyment of those beaches, otherwise than where such access or enjoyment is an incident of the right to navigate or fish, depends on nothing more than the tacit, revocable permission of the Crown. That being so, it is not realistic to suppose that it is the purpose of the *Native Title Act* to limit the ability of State and Territory parliaments to confirm public access to beds, banks, and foreshores of waterways and beaches referred to in s 212(2)(b) and (d) to the relatively few in respect of which there may be legally enforceable rights of access and enjoyment. Nor can it be that s 212(2)(b) and (d) were meant to be confined to the relatively few that have been dedicated to public purposes; if only because, as public places, they would be covered by s 212(2)(e) and, so, if s 212(2)(b) and (d) were so confined, it would render those provisions otiose.

42 The implication of a broader conception of access and enjoyment than a legally enforceable right is also strongly supported by the extrinsic materials. For example, in the Senate debates regarding an amendment proposed to be made to the *Native Title Act* for the purpose of clarifying its relationship with the *Racial Discrimination Act 1975* (Cth), Senator Evans stated[40] as follows:

> "On the question of beaches, the [Native Title] bill specifically provides that, notwithstanding the possible existence of native title so far as a particular stretch of beach is concerned, the principle of public access shall override that. It is not inconceivable that that might possibly be construed as being a discriminatory act against Aboriginal people in breach of the [*Racial Discrimination Act*]."

43 Senator Evans then "remind[ed] Senator Tambling of the terms of [cl] 197(2) [s 212(2) of the *Native Title Act*, as enacted] of the bill" and read that provision[41]. The Senator continued[42]:

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37 See *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 74 per Windeyer J, citing *Attorney-General v Antrobus* (1905) 2 Ch 188.

38 *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71-72 per Windeyer J.

39 *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 74 per Windeyer J.

40 Australia, Senate, *Parliamentary Debates* (Hansard), 17 December 1993 at 5063.

41 Australia, Senate, *Parliamentary Debates* (Hansard), 17 December 1993 at 5064.

42 Australia, Senate, *Parliamentary Debates* (Hansard), 17 December 1993 at 5064-5065.

> "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.
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> ...
>
> I am not entirely clear on what the relevance of the [Resource Assessment Commission] report would be, given clear policy decision by the government to preserve coastal access and so on in the way I have just described as is set out in the bill."

44 In light of these considerations, the preferable construction of s 212(2) appears to be that it was designed to extend to the ability of members of the public to access and enjoy the foreshore comprised of no more than the lack of prohibition by the State of that access and enjoyment otherwise than as proscribed by s 164 of the *Land Act*.

45 Contrary to the reasoning of the Full Court, there is no reason, either, to suppose a statutory intent to confine the operation of s 212(2) to existing public access to and enjoyment of the foreshore that was in fact in active use by members of the public in the period prior to 1 January 1994. The *Native Title Act* does not refer to use in fact as such, nor does it provide any means of determining the amount, period, frequency or continuity of the use that would be required if use in fact were requisite. Hence, there would be no way of saying whether it would be sufficient to prove that one member of the public had accessed and enjoyed the foreshore or necessary to show that some greater number of members of the public had done so. There would be no means of divining whether it would be sufficient to prove access and enjoyment exercised on 31 December 1993 or necessary to prove exercise of access and enjoyment on a number of days over an extended period of time. It was submitted for the first respondents that proof of access and enjoyment sufficient to establish an easement by prescription according to the doctrine of lost modern grant, or an analogous doctrine, would or might be sufficient. But given that the doctrine of lost modern grant does not operate at all

in some States or Territories[43] or as against the Crown in some others[44], and in any event has been much criticised[45], the idea that Parliament contemplated proof of something like it in order to bring existing public access and enjoyment within s 212(2) presents as most improbable.

46 To say so is not to ignore that the public's ability to access and enjoy the foreshore before its confirmation under s 14 of the Titles Validation Act, in accordance with s 212(2) of the *Native Title Act*, may to some extent have infringed the native title rights and interests in the area[46]. On one view, that might be thought to support the view that the access and enjoyment contemplated by s 212(2) is limited to legal rights of access and enjoyment sufficient to have prevailed over, and so pro tanto extinguished, the relevant native title rights and interests[47]. But for the reasons already expressed, comparison of the text of s 212(2) with the text of s 212(1), the fact, as is demonstrated by the extrinsic materials, that s 212(2) is

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43 See, eg, *Land Titles Act 1980* (Tas), s 138I(2); *Property Law Act 1974* (Qld), s 198A; see also, as to the questionable status of the doctrine in the Northern Territory, Burns, "The Future of Prescriptive Easements in Australia and England" (2007) 31 *Melbourne University Law Review* 3 at 27-28.

44 See, eg, *Conveyancing Act 1919* (NSW), s 178.

45 *Angus v Dalton* (1877) 3 QBD 85 at 94 per Lush J; *Earl De la Warr v Miles* (1881) 17 Ch D 535 at 590-591 per Brett LJ; *Wheaton v Maple & Co* [1893] 3 Ch 48 at 67 per Lopes LJ; *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283 at 299 per Griffith CJ (Barton and O'Connor JJ agreeing); *Williams v State Transit Authority (NSW)* (2004) 60 NSWLR 286 at 300 [129] per Mason P; Victorian Law Reform Commission, *Easements and Covenants*, Final Report 22 (2010) at 54-55 [4.85]-[4.88]; Burns, "The Future of Prescriptive Easements in Australia and England" (2007) 31 *Melbourne University Law Review* 3 at 34-38.

46 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 112-113 per Deane and Gaudron JJ; cf *Western Australia v Ward* (2002) 213 CLR 1 at 89 [77]-[78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

47 See and compare *Mabo v Queensland* (1988) 166 CLR 186 at 213-214 per Brennan, Toohey and Gaudron JJ; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64 per Brennan J (Mason CJ and McHugh J agreeing at 15), 195 per Toohey J; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 422-423 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Wik* (1996) 187 CLR 1 at 168-169 per Gummow J; *Western Australia v Ward* (2002) 213 CLR 1 at 89 [77]-[78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Queensland v Congoo* (2015) 256 CLR 239 at 264-266 [32]-[37] per French CJ and Keane J, 286-287 [109] per Kiefel J, 301 [159] per Gageler J.

the product of a "clear policy decision by the government to preserve coastal *access*" (emphasis added), the fact, as has been noticed, that there are relatively few instances of legal rights of access and enjoyment in respect of unallocated Crown land foreshore, and the fact that it is necessarily implicit in the text of s 212(3) that the types of access and enjoyment capable of confirmation pursuant to s 212(2) need not be of a kind sufficient to have extinguished native title rights and interests, "manifest[s] clearly and plainly"[48] Parliament's intention that "existing public access ... and enjoyment" in s 212(2) encompasses something broader than legal rights. In effect, Parliament proceeded on the basis that, although the public's access to and enjoyment of the foreshore – before confirmation under s 14 of the Titles Validation Act – may have impaired native title rights and interests, at least as they came to be understood as a result of *Mabo v Queensland [No 2]*[49], the process of transition from pre-*Mabo* ignorance to post-*Mabo* recognition of native title rights and interests, and their implementation in accordance with the *Native Title Act*, necessitated the striking of a legislative balance that would accommodate the public's previously assumed liberty to access and enjoy the foreshore while giving statutory effect and protection to native title[50].

47 Finally on this aspect of the matter it is to be observed that, as originally enacted, s 212(3) of the *Native Title Act* provided that "[a]ny confirmation under this section does not extinguish or impair any native title rights and interests". In 1998 that was amended by deletion of the words "or impair" because it was recognised that, although confirmation of access would not extinguish native title, it "may technically impair the enjoyment of native title in some respects"[51]. That is a further indication[52] that the kind of access and enjoyment contemplated as capable of confirmation was something less than legally enforceable rights and privileges, which would have extinguished native title.

48 It is to be concluded that s 212(2) of the *Native Title Act* was enacted on the basis that confirmation of existing access and enjoyment pursuant to s 212(2) has the effect that such existing access to and enjoyment of foreshore, even if comprised of no more than the lack of prohibition by the State, thereby acquires

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48 *Native Title Act Case* (1995) 183 CLR 373 at 423 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

49 (1992) 175 CLR 1.

50 See *Fejo v Northern Territory* (1998) 195 CLR 96 at 138 [76] per Kirby J.

51 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 233 [24.26].

52 See and compare *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 254-255 per Dawson J.

sufficient legal status to co-exist with, and in that sense, but to that extent only, impair, otherwise applicable native title rights and interests.

Is confirmed access and enjoyment an "other interest" within the meaning of s 225(c)?

49 As has been seen, s 225(c) of the *Native Title Act* requires that a determination of native title include a "determination" of the nature and extent of the native title rights and interests in relation to the determination area; a "determination" of the nature and extent of any other interests in relation to the determination area; and a specification of the relationship between the two, "taking into account the effect of this Act".

50 Plainly enough, as the primary judge discerned, the object of the provision is to ensure that a native title determination includes a comprehensive specification of the nature of the rights and interests that the native title confers on the native title holders in relation to the determination area; the nature of such other rights and interests as co-exist with the native title rights and interests in relation to the determination area; and how each affects the other taking into account the effects of the Act, thereby providing "desired certainty as to the existence and incidents of native title"[53] to the native title holders and others with rights and interests in relation to the determination area.

51 As has been explained, any public access to and enjoyment of the foreshore within a native title determination area which existed as at 1 January 1994, and which has been confirmed by State or Territory legislation in accordance with s 212(2) of the *Native Title Act*, will, to some extent, necessarily impair the native title rights and interests in the determination area. That being so, it would make no sense if s 225(c) applied only to such confirmed access to and enjoyment of the foreshore as was comprised of a legally enforceable right of access and enjoyment. To omit confirmed access and enjoyment that results from the lack of proscription would be productive of ignorance and increased risk of disputation as to the rights and interests of the public and the native title holders. That would run counter to the purpose of s 225(c).

52 As was held in *Western Australia v Ward*[54], however, "[s] 225(c), and its requirement that there be a determination of 'the nature and extent of any other interests in relation to the determination area', must be understood in the light of the definition of 'interest' contained in s 253". Thus, the question is whether the public's confirmed ability to access and enjoy the foreshore the result of lack of

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53 *Gumana v Northern Territory* (2005) 141 FCR 457 at 495 [131] per Selway J.

54 (2002) 213 CLR 1 at 187 [387] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (emphasis omitted).

legal proscription is capable of being described as an "interest" within the meaning of s 253.

53 Since the confirmed ability to access and enjoy the foreshore the result of lack of legal proscription is not "a legal or equitable estate or interest in the land or waters", or "any other right (including a right under an option and a right of redemption)", or a "charge" or "power", it can only be within the definition of "interest" in s 253 if capable of characterisation as a "privilege" within the meaning of that provision.

The meaning of "privilege"

54 The *Oxford English Dictionary* gives as one of ten suggested meanings of "privilege" a right, advantage, or immunity granted to or enjoyed by an individual, corporation of individuals, etc, beyond the usual rights or advantages of others. That accords with the Latin origin of the term[55]. A "privilege" in s 62 of the *Law of Property Act 1925* (UK) has likewise been held to mean some advantage to an individual or group of individuals, a right enjoyed by a few as opposed to a right enjoyed by all[56]. Accordingly, as the first respondents submitted, the notion of a "privilege" is not infrequently equated to some right, advantage or immunity enjoyed by some beyond the usual rights or advantages of others. But that is not the only meaning of "privilege". Jurisprudentially, a "privilege" may be conceived of in the wider and laxer sense of a liberty to do what would otherwise be prohibited[57]. As Professor Stone expressed[58] it, it is the kind of liberty that the law tolerates but does not support by imposing a duty on anyone else[59].

55 In ascertaining the meaning of the word "privilege" in s 253 of the *Native Title Act*, it is also necessary to bear steadily in mind that the task is one of statutory

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55 Privilegium: "a bill or law in favor of or against an individual (class)"; "an ordinance in favor of an individual, privilege, prerogative": Lewis, *A Latin Dictionary* (1879) at 1447.

56 *Le Strange v Pettefar* (1939) 161 LT 300 at 301 per Luxmoore LJ.

57 Salmond, *Jurisprudence*, 3rd ed (1910) at 193; Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 44-50; Williams, "The Concept of Legal Liberty" (1956) 56 *Columbia Law Review* 1129 at 1131-1132; see and compare Stone, *Legal System and Lawyers' Reasonings* (1964) at 156-157.

58 Stone, *Legal System and Lawyers' Reasonings* (1964) at 156-157.

59 See and compare *Quinn v Leathem* [1901] AC 495 at 534 per Lord Lindley.

construction, not Hohfeldian claim right analysis. The nature of the right, interest, obligation or liberty described by the word is not "disposed of by nomenclature"[60] and it is by no means unprecedented to find the terms "right" and "privilege" used in the "wider and laxer sense" in legislation[61]. "Privilege", being a protean term, takes its meaning from its context.

The meaning of "privilege" in s 253 of the *Native Title Act*

56 If the definition of "interest" in s 253 of the *Native Title Act* stood alone, it might be that "privilege" would be taken to mean some advantage in relation to land that is peculiar to an individual or group of individuals as opposed to members of the public generally. But s 253 of the *Native Title Act* does not stand alone, and it is not to be construed as if it did. Although a definitional provision, it is part of the *Native Title Act*, and, like all other provisions of an Act, it is to be construed in the context of the Act as a whole[62]. Just as the definition of "interest" and, therefore, the meaning of "privilege" in s 253 informs the meaning of the other provisions of the *Native Title Act* that refer to "interest" or "interests", such other provisions, bearing in mind their purpose and the mischief to which they are directed, inform the meaning of "interest" and, therefore, the meaning of "privilege" in s 253[63]. As McHugh J noticed[64] in *Kelly v The Queen*, "[n]othing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment".

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60 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 117 per Toohey J. See also *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 192 per Windeyer J; *Western Australia v Ward* (2002) 213 CLR 1 at 187 [387] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

61 See *Yorkshire Dyeware and Chemical Co Ltd v Melbourne & Metropolitan Board of Works* [1968] VR 277; *Boyce v Hughes* (1970) 72 SR (NSW) 54. See and compare *Eaton & Sons Pty Ltd v Warringah Shire Council* (1972) 129 CLR 270 at 293 per Stephen J.

62 *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 per Mason J; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

63 *Kelly v The Queen* (2004) 218 CLR 216 at 253 [102] per McHugh J; Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at [6.58].

64 (2004) 218 CLR 216 at 253 [103].

57 If "privilege" in the definition of "interest" in s 253 were confined to a privilege in the sense of some right, advantage or immunity enjoyed by some beyond the usual rights or advantages of others, it would exclude the ability of the public to access and enjoy the foreshore which exists as a result of the lack of legal prohibition from entering upon unallocated Crown land, validly confirmed by s 14 of the Titles Validation Act in accordance with s 212(2) of the *Native Title Act*[65]. In that event, the confirmed ability would not be within the description of "any other interests" in s 225(c), and so would not be recorded in the native title determinations to which it relates despite impairing the relevant native title rights. That this is so provides a strong indication that "other interests" in s 225(c) is a sufficiently broad concept to include the confirmed ability of the public to access and enjoy the foreshore. And in turn, that provides a strong indication that the confirmed ability is within the notion of a "privilege" in the definition of "interest" in s 253.

58 Given, then, that it is the duty of the Court to avoid, so far as the text of the Act permits, a construction inconsistent with the purpose of a provision and instead "look to see whether any other meaning produces a more reasonable result"[66], and, as has been seen, that one available, and not inapposite, meaning of "privilege" is of a liberty that the law tolerates but does not support by imposing a duty on anyone else, it should be concluded that "privilege" in the definition of "interest" in s 253 includes the confirmed ability of the public to access and enjoy the foreshore which exists as a result of the lack of legal prohibition on entering upon unallocated Crown land.

59 That is not necessarily to preclude the possibility of "interest" having a different meaning in some of the other provisions of the *Native Title Act*. For example, it might be, as was held in *Kanak*[67], that "interest" in s 61 of the *Native Title Act* has a more restricted meaning. But, for present purposes, it is unnecessary to decide whether that is so. It is sufficient for the determination of this matter that, for the reasons stated, existing public access to and enjoyment of unallocated Crown land foreshore comprised of a lack of proscription of access and enjoyment, if confirmed by State or Territory legislation in accordance with s 212(2) of the *Native Title Act*, is within the description of "any other interests in relation to the

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65 See [46]-[48] above.

66 *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574 per Gummow J, citing *AMP Inc v Utilux Pty Ltd* [1972] RPC 103 at 109 per Lord Reid; see also *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321 per Mason and Wilson JJ.

67 (2000) 106 FCR 31.

determination area" within the meaning of s 225(c), and thus must be recorded in a native title determination as the primary judge did.

Conclusion

60 It follows that each appeal should be allowed. In each matter the orders of the Full Court should be set aside and, in their place, it should be ordered that the appeal to the Full Court be dismissed. Pursuant to the undertaking given by the appellant in each appeal, the appellant in each appeal should pay the first respondents' costs of the appeal to this Court.

EDELMAN J.

Introduction

61 Section 212(2) of the *Native Title Act 1993* (Cth) provides that "[a] law of the Commonwealth, a State or a Territory may confirm any existing public access to and enjoyment of" various places: waterways; beds and banks or foreshores of waterways; coastal waters; beaches; stock-routes; and areas that were public places at the end of 31 December 1993, immediately before the *Native Title Act* came into operation. The principal issue on these appeals concerns what it is that can be confirmed by such a Commonwealth, State or Territory law.

62 The background to these appeals and the detail of the submissions of the parties are set out in the reasons of Nettle J. There was one matter that was common to the approach taken throughout this litigation by every party, by the primary judge, and by the Full Court of the Federal Court of Australia. That matter was that s 212(2) of the *Native Title Act* permits confirmation of an existing claim right, in the sense of a common law or statutory right of access to and enjoyment of the various areas conferred upon members of the public that can be vindicated by a legal claim and which is correlative to a duty upon others not to interfere with that right. The principal issue on these appeals is whether s 212(2) is confined to claim rights or is wider, including additional concepts or encompassing claim rights within a wider concept. This issue necessarily requires identification of the meaning of the subject matter that is to be confirmed by a law: "any existing public access to and enjoyment of" the public places referred to in s 212(2).

63 The narrowest approach to this subject matter was that of the native title claimants, the first respondents to these appeals, who submitted that s 212(2) is limited to confirmation of an existing claim right. A second, and broader, approach was taken by the Full Court of the Federal Court: the laws could also confirm existing access or enjoyment as a matter of fact[68]. A third, and still broader, approach was that of the Commonwealth, following the approach of the primary judge, that the confirmation was of an existing claim right or an existing liberty in the sense of "the absence of prohibition". A fourth, and the broadest, approach was that of the State of Western Australia, which argued that the confirmation was of any of an existing claim right, an existing liberty, or an existing factual state of affairs.

64 With respect, I do not consider that any of these approaches is correct. The language of "existing public access to" in s 212(2) does not require a formal analysis of whether there exists a legal liberty of access. Nor, contrary to the

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68 *Manado v Western Australia* (2018) 265 FCR 68 at 113 [171].

approach of the Full Court of the Federal Court, and despite the ordinary, everyday language of the text, does s 212(2) require an analysis of existing factual access.

65 The existing public access to which the provision refers is concerned with general expectations by the public that existed on 1 January 1994 concerning access to and enjoyment of the various categories that can loosely be described (and were so described during the parliamentary debates) as "public places". Section 212(2) permits those general expectations, if they continue to exist, to be confirmed at any later time. A general expectation will exist where there is an existing common law or statutory right of public access to or enjoyment of the public place. It will also exist where there is a history of factual access to and enjoyment of the public place. In these respects the Full Court was correct. But general expectations are not so confined and s 212(2) was not intended to be so confined.

66 A consequential question on these appeals is whether the confirmation in s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) gives rise to "any other interest", within ss 225 and 253 of the *Native Title Act*, requiring the matters confirmed to be included in a native title determination. The answer is that once a law has legally confirmed the general expectations of the public then a legal liberty arises for public access to and enjoyment of the relevant area. That liberty is a "right ... in connection with ... the land or waters" within the meaning of s 253 of the *Native Title Act*.

The background, purpose, and context of s 212 of the *Native Title Act*

67 The course of the parliamentary debates concerning the provision that became s 212 of the *Native Title Act* reveals a concern about the recognition of native title preventing the public from undertaking the activities that they reasonably expect to be able to undertake in areas generally understood to be public places. In the parliamentary debates, Senator Macdonald spoke of it being "essential ... that existing rights of public access to and enjoyment of public places, including foreshores, beaches, national parks, recreation reserves, stock routes and the like, are secured for all Australians"[69]. The reference to "stock routes" reveals the genus as particular areas generally understood to be public places even if those areas had not been so prescribed within s 212(2)(e). At the time that Senator Macdonald spoke, stock-routes were not a category of the proposed s 212; they fell only within the residuary of "areas that were public places at the end of 31 December 1993". The 1998 amendments to the *Native Title Act*, which added

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69 Australia, Senate, *Parliamentary Debates* (Hansard), 15 December 1993 at 4635.

the specific category of stock-routes[70], did "not indicate any doubt that stock routes currently have full force and effect and that the rights to use them prevail over any native title rights"[71].

68 As to the specific category of beaches, which relevantly includes those beaches that had become part of the territorial jurisdiction of Western Australia[72], Senator Alston spoke of "ensuring public access to beaches, even if native title was granted"[73]. Senator Evans described public access as a matter of "principle"[74]:

> "[T]he bill specifically provides that, notwithstanding the possible existence of native title so far as a particular stretch of beach is concerned, the principle of public access shall override that. ... The only other issue I can think of which has any likely bite about it is the provision in the [*Native Title Act*] about beaches and guaranteeing public access. We are determined, as a matter of public policy, to preserve that principle of access to beaches."

69 In other words, public access to beaches generally would override native title rights over any particular stretch of beach. Senator Tambling also spoke of the "concern that affects all Australians with regard to the access to all of their beaches"[75] and the risk of "dispossession of beach areas right around Australia"[76].

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70 *Native Title Amendment Act 1998* (Cth), Sch 1, item 36.

71 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 233 [24.26].

72 *Coastal Waters (State Title) Act 1980* (Cth), s 4(1); *Coastal Waters (State Powers) Act 1980* (Cth), ss 4-5. See *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*") (1975) 135 CLR 337; *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 358-359; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 56-57 [63].

73 Australia, Senate, *Parliamentary Debates* (Hansard), 17 December 1993 at 5062.

74 Australia, Senate, *Parliamentary Debates* (Hansard), 17 December 1993 at 5063.

75 Australia, Senate, *Parliamentary Debates* (Hansard), 17 December 1993 at 5065.

76 Australia, Senate, *Parliamentary Debates* (Hansard), 17 December 1993 at 5064.

Senator Tambling spoke of the impact on "local community, on local government in those particular communities and, very specifically, on the tourist industry"[77].

The meaning of s 212(2) of the *Native Title Act*

70 Throughout the *Native Title Act*, there are references to "rights" with a broad range of meanings beyond merely references to claim rights[78]. The *Native Title Act* uses "rights" in a loose sense, encompassing freedoms from legal prohibition as well as claim rights. For example, native title "rights" can be exclusive, and hence claim rights, correlative to a duty to exclude others. But they can also be non-exclusive, in the nature of a privilege, as a liberty for a particular native title group to use land free from prohibitions that exist on others. The *Native Title Act* also recognises a "right" to be heard[79], a "right" to negotiate[80], a "right" to withdraw from proceedings[81], and a "right" to appear at hearings and conferences[82], and specifically denies a "right" for identified persons to become a party to the proceeding[83].

71 Section 212(1) of the *Native Title Act* permits confirmation of a number of "rights": "any existing ownership of natural resources", "any existing right of the Crown in that capacity to use, control and regulate the flow of water", and "any existing fishing access rights". In contrast, there is no reference to rights in s 212(2). This is unsurprising. For the reasons that Nettle J gives, if s 212(2) were confined to claim rights then the provision would be almost otiose[84]. But even if s 212(2) were concerned with liberties – that is, freedoms from legal prohibition, as submitted by the Commonwealth and Western Australia – then the provision

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77 Australia, Senate, *Parliamentary Debates* (Hansard), 17 December 1993 at 5064.

78 *Native Title Act 1993* (Cth), s 223(2); *Northern Territory v Griffiths* (2019) 93 ALJR 327 at 384 [256]; 364 ALR 208 at 277.

79 *Native Title Act*, ss 26A(6)(b), 26B(7)(b).

80 *Native Title Act*, s 25(2). Which is not intended to be a right of veto: see Australia, House of Representatives, *Native Title Bill 1993*, Explanatory Memorandum – Part B at 1.

81 *Native Title Act*, ss 84(6), 84(7).

82 *Native Title Act*, ss 89, 152.

83 *Native Title Act*, s 86BA(4).

84 Reasons of Nettle J at [40]-[41].

would have no operation in the very cases of exclusive native title in which it was contemplated that it would apply. That is because, on 31 December 1993, members of the public had no legal liberty to access or enjoy any of the public places mentioned if exclusive native title existed over those areas. Further, as Nettle J also explains, the prevailing legal understanding against which the *Native Title Act* was enacted was that any access to or enjoyment of the foreshore arose from the tacit tolerance of the State[85]. A tacit tolerance, not amounting to a licence, is not a legal liberty of action.

72 In contrast with a meaning based upon legal rights, the ordinary language of the text of s 212(2) of the *Native Title Act* is redolent of the fact of access. The ordinary understanding of "existing public access to and enjoyment of" the various public places is an existing access to and enjoyment of the relevant public places by the public as a matter of fact. However, on these appeals all parties other than Western Australia eschewed such a meaning of s 212(2). They were correct to do so for two reasons.

73 First, if s 212(2) were given a meaning that depended upon proof of facts then this would disconnect the provision from its purpose to legalise general expectations. As I have explained, the extrinsic materials reveal that the words of s 212(2) were not intended to protect abstract rights but were concerned with broad issues of "principle" based upon general expectations of access. Further, in the text of s 212(2), the use of "enjoyment of" in the compound phrase "access to and enjoyment of" directs attention to the reasons for a general expectation: an ability to enjoy those public places.

74 Secondly, unlike a requirement of factual access, a general expectation of public access to the foreshores of waterways or beaches is not limited by whether others had previously accessed those areas. Parliament is most unlikely to have intended an enquiry that would invite questions such as: Which areas of the waterways or beaches had been accessed previously? By how many people had those areas been accessed? For how long and how regularly? If those questions were asked, how would any member of the public know the answers?

75 There is some fluidity in the concept of general expectations of access to and enjoyment of the public places. But, as the extrinsic materials reveal, the assumption of Parliament was that this issue concerned matters of principle and would not require evidence. A general expectation of public access will usually exist in relation to all of the categories of public places, even where exclusive native title exists over the relevant area and even where access to the area is a matter of tacit tolerance by the State. On the other hand, no general expectation

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85 Reasons of Nettle J at [38]-[39].

will arise if public access to and enjoyment of the relevant public places is prohibited by a statute or regulation[86].

76 The requirement in s 212(2) that the access to and enjoyment of the various public places must be "existing" requires the expectation to be existing at the time that the *Native Title Act* entered into force on 1 January 1994. But the need for "confirmation" of that expectation requires that it also be in existence at the time of confirmation. Hence, legislative or regulatory proscriptions of access after 1 January 1994 will prevent confirmation of the general expectation that existed at 1 January 1994.

77 The effect of confirmation of the general expectation is to legalise that expectation. The confirmation can operate to legalise "any", in the sense of "any aspect of the", general expectation by creating a legal liberty of access that is coextensive with the relevant aspect of the general expectation. Without the legal liberty a person might be able to be excluded from access including by the operation of exclusive native title rights[87]. The legal liberty is not a defence; it is a freedom of action which reduces the sphere within which a person could be excluded.

78 One difficulty with a confirmation operating to create a legal liberty from the exercise of native title rights is that when the *Native Title Act* was enacted, s 212(3) provided that any confirmation under s 212(2) "does not extinguish or impair any native title rights and interests". Section 212(3) was amended in 1998[88] so that the words "or impair" were removed. The reason for the removal of these words was that "the confirmation of ownership or access may technically impair the enjoyment of native title in some respects. For example, public access to a beach may in some cases impair unhindered enjoyment of native title by native title holders."[89]

The inclusion of a confirmation in a native title determination

79 Section 94A of the *Native Title Act* requires that "[a]n order in which the Federal Court makes a determination of native title must set out details of the

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86 For instance, *Land Act 1933* (WA), s 164(2); *Land Administration Act 1997* (WA), s 267(2).

87 *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 49 [42].

88 *Native Title Amendment Act*, Sch 1, item 38.

89 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 233 [24.26].

matters mentioned in section 225". The consequential issue that arises on these appeals is whether a confirmation by a law of the Commonwealth, a State or a Territory is a matter that is mentioned in s 225.

80 Section 225 of the *Native Title Act* refers to various matters to be determined in association with a determination that native title exists in relation to a particular area. One of those matters is "the nature and extent of any other interests in relation to the determination area". Relevantly for the "interest" referred to in s 225[90], s 253 defines "interest" in wide terms that include "any other right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with ... the land or waters".

81 The first respondents submitted that if a legal liberty were created by a legislative confirmation pursuant to s 212(2) of the *Native Title Act* then that liberty would not be a right, charge, power, or privilege in connection with the land or waters. Hence, the first respondents submitted, s 94A does not require a determination of native title to include the details of the liberty. In contrast, Western Australia and the Commonwealth submitted that a liberty created by confirmation was a "privilege" in connection with the land or waters and hence was a matter that must be set out in a determination of native title. Neither approach is correct. The correct analysis is the alternative approach taken by Western Australia: the liberty created by confirmation is a "right" within the broad, but loose, approach taken to "right" in the *Native Title Act* and described earlier in these reasons.

82 It might be said that this question is merely a matter of words. But, as Lord Macnaghten said in *Tailby v Official Receiver*[91], "most questions are". An inaccurate description of the concept that is created upon confirmation can have real consequences. If an erroneous meaning is given to a key concept such as "right" or "privilege" in one provision of legislation that is as tightly integrated as the *Native Title Act* then repercussions are likely to be experienced in relation to numerous other provisions.

83 The description by Western Australia and the Commonwealth of the liberty of any person to go to the beach as a "privilege" is contrary to both ordinary speech and legal use. In ordinary speech, a liberty that everyone has to act in a particular way is not a privilege. As Professor Williams wrote, "[w]hen I get up in the morning, dress, take breakfast, and so on, I am exercising liberties, because I do

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90 *Western Australia v Ward* (2002) 213 CLR 1 at 187 [387].

91 (1888) 13 App Cas 523 at 549.

not commit legal wrongs"[92]. It is not an ordinary use of speech to describe the exercise of such general liberties as a privilege.

84 The legal use of "privilege" follows ordinary understanding. To describe the liberty to eat breakfast as a privilege "not only runs counter to the popular use, but it departs from the technical legal use"[93]. The law is generally uninterested in the mundane classification of the nearly infinite range of actions that involve no prohibition. "[T]here is no entry of 'breakfast, liberty to eat', in the index to *Corpus Juris*."[94] A privilege in law is only those liberties that belong to a particular class of persons in particular circumstances. The essential idea of a legal privilege was described by Hunt J, in a passage quoted by Hohfeld[95], as "a peculiar benefit or advantage, of a special exemption from a burden falling upon others"[96]. Hence, parliamentary privilege from defamation exists for a person who falls within the class of members of Parliament, for whom "the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament"[97]. A privilege against self-incrimination exists for a person who falls within a class of those who have committed a criminal offence and for whom the compulsion to answer any question, or to produce any document or thing, "may tend to bring him into the peril and possibility of being

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92 Williams, "The Concept of Legal Liberty" (1956) 56 *Columbia Law Review* 1129 at 1129, republished in Summers (ed), *Essays in Legal Philosophy* (1968) 121 at 121.

93 Williams, "The Concept of Legal Liberty" (1956) 56 *Columbia Law Review* 1129 at 1132, republished in Summers (ed), *Essays in Legal Philosophy* (1968) 121 at 124.

94 Williams, "The Concept of Legal Liberty" (1956) 56 *Columbia Law Review* 1129 at 1130, republished in Summers (ed), *Essays in Legal Philosophy* (1968) 121 at 122.

95 Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 39, republished in Cook (ed), *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1923) 23 at 45.

96 *Humphrey v Pegues* (1872) 83 US 244 at 248. See also *Le Strange v Pettefar* (1939) 161 LTR 300 at 301: "something which is the subject of individual or class enjoyment as opposed to general enjoyment". Compare Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 36, republished in Cook (ed), *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1923) 23 at 42.

97 *Bill of Rights 1688* (1 W & M sess 2 c 2), Art 9 read with *Parliamentary Privileges Act 1987* (Cth), s 16(1). See also *Egan v Willis* (1998) 195 CLR 424 at 446-447 [28], 484 [121] and *Parliamentary Privileges Act*, s 16(3)-(4).

convicted as a criminal"[98]. A qualified privilege from defamation exists for a person who is in the class of those who have "a duty or interest to make the statement" where "the recipient of the statement has a corresponding duty or interest to receive it"[99].

85 The *Native Title Act* uses "privilege" in the same sense as its ordinary and legal usage, namely as a benefit or advantage that is peculiar or particular to a person or limited class. For instance, the *Native Title Act* refers to the privilege of a judge (s 112(1)(b)), the privilege of an assessor (s 112(2)(b)), and the privilege of legal advisors (ss 203DF(6), 203DF(7), 203DG(2), 203DG(3)). The reference to a privilege in s 253 cannot include the general liberty that every person has to have breakfast or to go to the beach.

86 In contrast with a characterisation as a "privilege", a general liberty to go to the beach falls comfortably within the broad, non-Hohfeldian use of "right" contained in the *Native Title Act* as discussed earlier in these reasons. That usage is an ordinary language use of "right". As Hohfeld observed, albeit critically, it is common both in law and in language generally to use "right" in this generic sense, which includes liberties as well as claim rights[100], and to include "that sphere of activity within which the law is content to leave me alone"[101]. It is in this sense that s 253 refers to a "right".

87 The conclusion that s 253 uses "right" in a broad sense that encompasses general liberties is fortified by a coextensive purpose of ss 212(2) and 253 to enhance certainty. The very certainty to which s 212(2) aspires, by enabling legislative confirmation of general expectations to create a liberty to access and enjoy, would be undermined if that liberty were not capable of inclusion in a native title determination.

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98 *Reid v Howard* (1995) 184 CLR 1 at 12, quoting *Sorby v The Commonwealth* (1983) 152 CLR 281 at 288. See also *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459 at 474 [53].

99 *Roberts v Bass* (2002) 212 CLR 1 at 26 [62]. See also the classes discussed in *Mann v O'Neill* (1997) 191 CLR 204 at 211-213.

100 Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 30, republished in Cook (ed), *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1923) 23 at 36. See, for instance, *Quinn v Leathem* [1901] AC 495 at 534.

101 Salmond, *Jurisprudence or the Theory of the Law* (1902) at 231. See also Fitzgerald, *Salmond on Jurisprudence*, 12th ed (1966) at 224-225 [42]; Kramer, *Where Law and Morality Meet* (2004) at 212.

Conclusion

88 The appeals should be allowed and orders made as proposed by Nettle J.