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	COMMONWEALTH OF AUSTRALIA Second Respondent	STATE OF WESTERN AUSTRALIA Second Respondent	STATE OF WESTERN AUSTRALIA Second Respondent

ORAL OUTLINE OF THE COMMONWEALTH

Filed on behalf of the Appellant in P36 and P37 of 2019 and Second Respondent in P34 and P35 of 2019, the Commonwealth of Australia

Address for service:
The Australian Government Solicitor
Level 42, MLC Centre, 19 Martin Place, Sydney NSW 2000
Sally.Davis@ags.gov.au

Date of document: 3 December 2019
File ref: 19005020
Telephone: 02 9581 7459
Email: Sally.Davis@ags.gov.au
Facsimile: 02 9581 7734
DX444 Sydney

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Facts (Commonwealth Submissions (CS) [8]-[16]

2. The Trial Judge (**TJ**) made determinations of native title in each set of appeals, recognising a mixture of exclusive and non-exclusive native title held by the Jabirr Jabirr/Ngumbarl and Bindunbur claim groups respectively: 1-CAB 335, 375. Exclusive native title was recognised in each determination over areas that included beaches.

10 3. The TJ included clauses in each determination to reflect the operation of s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (**TVA**), which was enacted in conformity with s 212(2) of the *Native Title Act 1993* (Cth) (**NTA**): 2nd TJ [20] (1-CAB 259); eg Jabirr Jabirr/Ngumbarl determination (1-CAB 338 [4], [5]-[6], [9] [10], 363 [h](iii)). On appeal, the Full Court removed those clauses: FFC [175] (2-CAB 513).

II. Construction and effect of s 212(2) of the NTA (Commonwealth ground 1)

4. The Full Court erred in requiring either "existing common law or statutory rights or interest" or public access "as a matter of fact" to trigger the operation of s 212(2): FFC [171] (2-CAB 512-3). In particular, it wrongly excluded the common law principle that
20 a person can do that which is not prohibited: FFC [158] (2-CAB 509).

5. Prior to *Mabo*, the absence of any prohibition imposed by the Crown was a sufficient basis for the public to access and enjoy beaches comprised of unallocated Crown land lawfully. After *Mabo*, the potential arose for someone other than the Crown (being the holders of exclusive native title) lawfully to exclude the public from beaches. Sections 212(2) of the NTA and s 14 of the TVA were directed to that possibility: **CS** [26]-[30]; Commonwealth Reply (**CR**) [6], [8].

6. The public access and enjoyment of beaches to which s 212(2) and s 14 refer could only have been based on the absence of prohibition, or possibly with respect to some beaches a statutory right. Except to the extent that it was incidental to the exercise of public rights
30 to fish or navigate, public access and enjoyment of beaches could never have been pursuant to a common law right because no such right existed: *R (on application of Newhaven Port and Properties) v East Sussex County Counsel* [2015] AC 1547 at [28]-

[33], [40], [43], [47], [50] (Lords Neuberger and Hodge), [106], [108], [115] (Lord Carnwath) (**D.25**). The text of s 212(2) is to be read in that context: **CS** [37]-[39].

7. **Textual considerations**:

   a. There is a crucial textual distinction between s 212(1) – expressly directed at "rights" and "ownership" – and s 212(2), which is not: **CS** [21]-[22].

   b. To the extent that First Respondents say s 212(2) covered public rights (to fish and navigate) (**RS** [43]-[44]), that is implausible given s 212(1)(c): **CR** [4].

   c. The language of s 212(2) is broad and uses neither defined nor technical terms. Its words should be given their ordinary meaning: **CS** [25]-[26].

10 d. Section 212(2)(d) and (e) should each be given work to do. Since a statutory public right to access and enjoy a beach would likely engage s 212(2)(e), s 212(2)(d) must include beaches where no such right existed.

8. **Extrinsic material:** The NTA is a mechanism for regulating competing public interests and reflects compromise. Part of that compromise was to confirm the (general) "principle" of public access to beaches. As the Full Court recognised, the EM to the 1993 Bill, and the 2nd reading speech from the Prime Minister, are uninformative (FFC [142], 2-CAB 506). The Senate debates (**E.20** at 5061-5065) are substantially more helpful, and demonstrate clear concern – both from the Government and the Opposition – that the
20 principle of public access be confirmed (apparently irrespective of the legal basis for any existing public access to any particular beach, or the extent of public use of that beach): **CS** [31]-[34], [45]-[47].

9. Confirmation under s 212(2) does not require the conferral of any "right" on the public. Confirmation does not extinguish native title (s 212(3)), but it limits or impairs native title to the extent necessary to prevent the exclusion of the public from the specified areas: *Explanatory Memorandum to the Native Title Amendment Bill 1997* (**E.31**): **CS** [27]-[29], [33], [39]-[41].

10. **Full Court's error**: The Full Court initially recognised the important distinction between ss 212(1) and (2) (FFC [139], 2-CAB 503). However, it then proceeded to analyse
30 s 212(2) through the prism that it applied only to "rights" that could be "vindicated": FFC [149] (2-CAB 507). The Full Court erroneously reasoned that s 212(2) could not apply to the freedom to do that which was not prohibited as this would create new rights: FFC

[158]-[159]. Its focus on the definition of "interests" seemingly led it to conflate the task of identifying what was confirmed by s 14 of the TVA with the separate question of what should be recorded in a determination. The Full Court's focus on "rights" was also inconsistent with its acceptance that s 14 could confirm public access that was proved to have existed in fact: FFC [170] (2-CAB 512): **CS** [35]-[47].

III. Recording of "interests" in the determination (Commonwealth ground 3)

11. After confirmation by s 14 of the TVA, the confirmed public access and enjoyment of beaches was a "privilege", and therefore an "interest" within s 253: *Mathieson v Burton* (1971) 124 CLR 1 at 12-13 (Windeyer J) (**C.18**). On that basis, it was an "other interest" within s 225(c) that was required to be included in the determinations: **CS** [49]-[51].

10

12. A wide interpretation of the definition of "interests" is required to give effect to the purpose of determinations under s 225 of the NTA, which operate *in rem* and are an important part in providing certainty as to the existence and inter-relationship between native title and other rights. Unless confirmed public access and enjoyment is recorded in determinations, they will be inaccurate or even misleading: **CS** [53], [57].

13. The conclusion that confirmed public access is an "interest" on the basis identified above is supported by both:

    a. Section 225(d): the determination needs to cover the relationship between various rights and interests (but only those in s 225(b) and (c)), "taking into account the effect of this Act": **CS** [55].

20

    b. Section 225(e): the determination is to set out "whether the native title rights and interests confer … use and enjoyment of that land or waters on the native title holders to the exclusion of all others". The operation of s 212(2) bears directly on that question: **CS** [58].

14. The Commonwealth does not press its alternative submission that the phrase "other interests" in s 225(c) excludes the definition of "interest" in s 253: see *Western Australia v Ward* (2002) 213 CLR 1 at [387].

30 Date: 3 December 2019

Stephen Donaghue **Nitra Kidson** **Cobey Taggart**