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

SUBMISSIONS OF THE COMMONWEALTH OF AUSTRALIA IN REPLY TO THE FIRST RESPONDENTS

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

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PART I: FORM OF SUBMISSIONS

1. This reply is in a form suitable for publication on the internet.

PART II: ARGUMENT

First issue: The confirmatory scope of s 212(2)

2. The Commonwealth's case is that the statutory requirements for confirmation in s 212(2) of the NTA[1] are met if, when the NTA commenced, "public access to and enjoyment of" beaches was available, in the sense that members of the public could lawfully access and enjoy the beaches: **CS [24]**.[2] Confirmation does not depend on whether the juridical foundation for such access and enjoyment was a legal *right* (which in an unknown number of cases it might be, if for example statutory rights exist in respect of a particular beach), or whether it was the common law principle that a person can do that which is not prohibited (the absence of such a prohibition with respect to unallocated Crown land, including beaches, appearing in this case from s 164 of the *Land Act 1933* (WA), as in force when the NTA commenced). The First Respondents fail to respond to that case. Instead, they repeatedly and wrongly characterise the Commonwealth's construction as not permitting confirmation of a *right* of "public access to and enjoyment of" beaches, if such a right existed: **RS [3]-[4]**; repeated at **[31], [39], [40], [43], [46], [51], [54]**.

3. The First Respondents purport to accept that the absence of an express reference to "rights" in s 212(2) is significant, and assert that they do not press a case that only a *right* of access to and enjoyment of beaches could meet the requirements for confirmation: **RS [8], [22]-[28], [31]**; cf **RS [38] and [52]**). Yet they simultaneously contend that the meaning of the words "access to and enjoyment of" in s 212(2) is such that the statutory expression can *only* be satisfied where access and enjoyment is by, or as of, *right*. Their path to that result is by treating "access" and "enjoyment" as "concepts known to property law" (**RS [8]**), and ascribing to "enjoyment" a technical meaning that is said to connote "a right, title or interest such as would warrant the enjoyer taking pleasure in the area itself and the person's relationship to it; and as would sustain an action for its protection" (**RS [24]-[25]**). That construction should be rejected. The authorities cited by the First Respondents do not establish that "enjoyment" is a term of art,[3] or that it has the meaning or implication

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1 These submissions adopt the abbreviations used in the Commonwealth's Consolidated Submissions (**CS**).

2 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564, cited in *Gumana v Northern Territory* (2005) 141 FCR 457 at 480 (Selway J).

3 As opposed to, for example, "quiet enjoyment". See also *Webb v McCracken* (1906) 3 CLR 1018 at 1023-24, 1026 (Griffiths CJ, Barton J concurring), 1027-28 (O'Connor J).

attributed to it.[4] Even if they did (which is denied), the same textual and contextual factors referred to in **CS [21]-[22]** militate against the word being construed in this way, as do the extrinsic materials discussed in **CS [31]-[33]**.[5]

4. The First Respondents' emphasis on the possibility of Parliament confirming a "right" of public "access and enjoyment" is hollow, absent the identification of a legal "right" held by "the public" (particularly with respect to unallocated Crown land below the mean high water mark, which is plainly a critical part of a beach in terms of public access and enjoyment, and where statutory rights are unlikely) of a kind that would satisfy their definition of "enjoyment" in **RS [24]-[25]**. The only example offered, being the right to fish and navigate, is a distinct right,[6] as is confirmed by its separate treatment in s 212(1)(c): cf **RS [43]-[44]**. Unless a right that satisfies the criteria in **RS [24]-[25]** can be shown to exist, then on the First Respondents' construction the enactment of s 212(2) would have been an elaborate charade. Parliament would have purported to confirm public access to and enjoyment of beaches only where there was a "right" to such access and enjoyment (**RS [25]**), when actually no such right exists (**RS [42]**). Yet, despite that consequence, the First Respondents submit that the absence of any "general public right" to enter and enjoy Crown land is "the end of any consideration of whether any such thing could be confirmed; as only that which is *existing* can be confirmed pursuant to s 212(2)" (**RS [42]**). The practical effect of that construction is to write s 212(2) out of the NTA.

5. The First Respondents' repeated assertion that the "ability", "bare ability" or "bare liberty to enter an area and there engage in a limited range of activities" is not enough to constitute "public access to and enjoyment of" a beach is just that – an assertion: cf **RS [8], [32], [34], [35], [47]**. In fact, a "bare ability" of that kind is sufficient to enable members of the public to walk, run, sit and lie on the beaches; play games on the beaches; and go for a swim, surf or paddle — in other words, to "access" and "enjoy" those beaches in accordance with the ordinary meaning of those words. Section 212(2) should be construed accordingly.

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4 *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 is a nuisance case brought by a property owner in respect of damage to trees on his estate from vapours emanating from a copper smelter. There was no consideration of the meaning of "enjoyment" in a direct sense. The passages cited from *Hargrave v Goldman* (1963) 110 CLR 40 simply refer to the definition of nuisance as "unlawful interference with a person's use or enjoyment of land" - but neither "use" nor "enjoyment" are ascribed technical meanings.

5 If it is unclear whether a word has been used in its ordinary or in a special sense, regard may be had to extrinsic materials to determine the matter: *Screen Australia v EME Productions No 1 Pty Ltd* (2012) 200 FCR 282 at [48] (Keane CJ, Finn and Gilmour JJ).

6 The public rights to fish and navigate do not extend landward of the intertidal zone: *Harper v Minister for Sea and Fisheries* (1989) 168 CLR 314 at 229-30 (Brennan J); *Commonwealth v Yarmirr* (1999) 101 FCR 171 at [201], [213]-[219] (Beaumont and von Doussa JJ). Consequently, they do not provide an explanation for the inclusion of "beaches" in s 212(2). Further, these rights are confined to *tidal* waters, whereas s 212(2) includes non-tidal waters.

6. Contrary to **RS [27]-[28]**, that is not to submit that the *Land Act 1933* (WA) "provided" or "created" an ability for members of the public to access beaches. It is simply to recognise that the *Land Act* allows the public lawfully to enter and remain on a beach, and while there to engage in any activities that are not expressly proscribed, subject to some positive step being taken by the Crown to remove or regulate that ability. Importantly, however, the legal foundation for public access to and enjoyment of beaches just identified means that the recognition of native title changed the position because thereafter, in addition to the Crown, holders of exclusive native title over beaches would also have been entitled to exclude the public from those beaches. It was the fragile foundation of the public's access to beaches that created the need for confirmation of that "existing public access". By enacting s 212(2), Parliament addressed that issue generally, favouring "the principle of public access" over the possibility that native title holders might exclude the public from beaches. Interestingly, the need for s 212(2) would have been much less apparent on the First Respondents' construction, for where there was a positive *right* to "access and enjoyment" that may well have prevailed over inconsistent native title rights.

7. Parliament could confirm "existing public access" at that general level, notwithstanding possible impediments to access to some beaches arising from geographical barriers or from tenure in surrounding areas (**RS [28]**), because public access to a beach will always be possible at least from the seaward side. In any case, the First Respondents did not contend in the courts below that it was necessary to establish the physical ability to access a beach before it could be the subject of a confirmatory law (cf **RS[18(b)], [28]; CAB 259-260 [18]-[19], [21], [24]**). The factual assertions in **RS [28]** were not advanced before the trial judge, are controversial, and should not be permitted to be raised for the first time in this Court.

8. The effect of confirmation on native title will depend upon the nature and extent of any extant native title, rather than the legal character of what was confirmed: cf **RS [35]**.[7] The point is that Parliament must have been aware of the potential for exclusive native title to be recognised over at least some beaches, and the purpose of s 212(2) is to regulate the exercise of native title vis-à-vis the public in those circumstances. It is not the case that "all prescribed places everywhere in Western Australia" will be subject to a confirmation. The statutory requirement for *existing* public access and enjoyment when the NTA was enacted plainly anticipated that there would be beaches where the public did not have lawful access and enjoyment because, for example, the area had been put to another use (such as Reserve 51146 for harbour purposes in the south-eastern area of the Bindunbur determination: **CAB**

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7 In the first example in RS [35], confirmation had no effect on native title; in the second, the effect is brought about by s 47B, not confirmation; in the third, there is co-existence as there is no native title right to control access.

402). For the two reasons just stated, the effect of confirmation will not be "universal".

9. The First Respondents contend that the Commonwealth's construction should not be preferred because it will have a broad affect on the "value, exercise and enjoyment of (particularly) exclusive native title" (**RS [35], [37], [46]-[47], [53]**). The premise for that submission is that *exclusive* native title exists over *extensive* areas of beaches. That is precisely the possibility that Parliament sought to address by enacting s 212(2). The provision should be construed so as to give effect to Parliament's policy choice that access to and enjoyment of Australia's beaches is to be shared by all.

10. There is no basis for the submission that to accept the Commonweath's construction of s 212(2) would be to accept "that Parliament intended to radically rewrite and clarify the difficult and unresolved law of the foreshore of the sea": cf **RS [37]**. Section 212(2) does not alter, in any respect, the relationship between the public and the Crown in relation to beaches.

11. **Existing access in a physical sense (RS [5]-[6], [8], [31]-[32], [36], [50]-[54])**: The First Respondents contend that whether public access and enjoyment of a beach can be established as a matter of fact is not ripe for final resolution in this case (**RS [5]**). To the contrary, the Full Court's holding in relation to factual access is a critical aspect of its construction of s 212(2). The Full Court's statement at **CAB 512** [170] is neither "tentative" nor "obiter": cf **RS [50]**. Its finding that "existing public access and enjoyment" could be established as a matter of fact in a physical sense *and* that this would constitute an interest for the purpose of s 225(c) of the NTA is the basis for the Full Court's identification ("In our view, *therefore*") of factual access and enjoyment as one of two ways in which s 212(2) applies. While the First Respondents reject the proposition that the Court regarded confirmation as converting *factual access* into an "interest", they do not then identify the nature of the interest that purportedly existed prior to confirmation.

12. In fact, the whole tenor of the First Respondents' submissions is that the Full Court erred in finding that access and enjoyment could be established *purely* as a matter of fact (apparently because purely factual access will have occurred in the exercise of the "mere ability" to access beaches that is derided by the First Respondents). In an attempt to address this issue, the First Respondents seek to re-frame what the Full Court decided. Specifically they: seek to redefine the issue as whether physical access and enjoyment existed as a matter of fact "or as a matter *evidenced* by fact" (**RS [5]**); place a serious gloss over what the Full Court actually said at **CAB 513** [172], suggesting that physical facts might be led *in support of* an interest or right of access and enjoyment (not as themselves constituting public access and enjoyment) (**RS [6]**); submit that existing public access and enjoyment must be "discernible

as a matter of law, or mixed fact and law" (implicitly, *not* as a matter of pure fact) (**RS [31]**); and, most tellingly, submit that the description of public access and enjoyment *may* be satisfied by "physical access *that evidences a legal basis* (not the mere absence of a prohibition on entry) for the presence or activities of a member of the public on Crown land" (**RS [36]**). The attempt to reframe the Full Court's reasons by downplaying the significance of factual access confirms that – as a matter of substance – the First Respondents' contention is that *only* a legal right to access and enjoyment of a beach will engage s 212(2). For reasons already addressed, that leaves the provision effectively devoid of content.

Second issue: The content of a determination of native title

13. **Section 253:** As explained in **CS [27]-[29]**, s 14 of the TVA limits the exercise of any native title rights to the extent that the exercise of those rights would be inconsistent with the confirmed public access. That has the correlative practical effect of conferring upon the public a privilege or an immunity from the exercise of those native title rights . That is sufficient to fall within s 253. It is irrelevant that the confirmation of existing public access occurred prior to the making of the determination (cf **RS [60]**).

14. **Section 225(c) (RS [61]-[63]**: The inclusion of confirmed public access and enjoyment as an interest in a determination of native title would declare to the world the relationship *between* the public and the native title holders in relation to beaches, but it does not otherwise give the public's access and enjoyment "a legal status as against the whole world" (cf **RS [63]**). If the effect of a confirmatory law is to place constraints upon the exercise of native title rights – at least where those rights are exclusive, as in this case – it is difficult to see the rationale for excluding those constraints from the determination (together with details of the geographical extent of the constraints).

15. **Discretion:** It may be doubted whether constraints upon the exercise of native title rights imposed by a confirmatory law, which do not form part of the determination, can be characterised as "other details about *the determination*" within s 193(3) (cf **RS [65]**).

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