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

CONSOLIDATED SUBMISSIONS OF THE COMMONWEALTH OF AUSTRALIA

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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Prepared by: Sally Davis

AGS Lawyer within the meaning of s 55I of the *Judiciary Act 1903*

Address for service:

The Australian Government Solicitor

Level 42, MLC Centre, 19 Martin Place, Sydney NSW 2000

Sally.Davis@ags.gov.au

Telephone: 02 9581 7459

Email: Sally.Davis@ags.gov.au

Facsimile: 02 9581 7734

DX444 Sydney

PART I: FORM OF SUBMISSIONS

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

PART II: ISSUES

2. Section 212(2) of the *Native Title Act 1993* (Cth) (**NTA**) provides that a law of the Commonwealth, a State or a Territory "may confirm any existing public access to and enjoyment of" areas including waterways, beds and banks or foreshores of waterways, coastal waters and beaches (for convenience, **beaches**). The State of Western Australia (**State**) enacted such a law in the form of s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (**TVA**).

3. The appeals brought by the Commonwealth of Australia (**Commonwealth**) and the State respectively raise two issues:

   3.1 First, in order for public access to and enjoyment of a beach to come within the confirmatory scope of s 212(2) of the NTA, is it necessary to establish that such access and enjoyment was either the subject of an existing common law or statutory right, or was "physically enjoyed" as a matter of fact? (Cth ground 1)

   3.2 Second, is public access to and enjoyment of a beach that has been confirmed pursuant to s 212(2) of the NTA and s 14 of the TVA required or permitted to be included in a determination of native title under s 225 of the NTA on the basis that it is:

      3.2.1 an "interest" within the meaning of s 253 of the NTA? (Cth ground 3; State grounds 2(a) and 3(a)); or

      3.2.2 an "other interest" within the meaning of s 225(c) of the NTA? (Cth ground 3; State grounds 2(b) and 3(b)); or

      3.2.3 a matter that can be included in a determination as a matter of discretion?

4. The Commonwealth's second ground of appeal is not pressed.

PART III: SECTION 78B NOTICE

5. The Commonwealth does not consider that any notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CITATION OF REASONS FOR JUDGMENT

6. First instance:
   6.1 Primary reasons: [2017] FCA 1367 (**TJ**) (**CAB 8**);
   6.2 Supplementary reasons: [2018] FCA 275 (**TJ2**) (**CAB 252**);
   6.3 Determinations: [2018] FCA 854 (**TJ3**) (**CAB 270**).

10 7. Full Court of the Federal Court (**Full Court**): (2018) 364 ALR 337; [2018] FCAFC 238 (**FFC**) (**CAB 452**)

PART V: FACTUAL BACKGROUND

8. On 2 May 2018, the primary judge made two determinations of native title (**CAB 334, 374**). Those determinations recognised that the members of the Jabirr Jabirr/Ngumbarl native title claim group (**Jabirr Jabirr native title holders**) and Bindunbur native title claim group (**Bindunbur native title holders**), respectively, possessed native title rights and interests in areas of land north of Broome in the Dampier Peninsula in Western Australia.

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9. Each determination recognised that the native title holders possessed exclusive native title rights and interests in relation to some parts of the determination areas, and non-exclusive native title rights and interests in relation to the balance (**CAB 338** at (4) and (5); **CAB 377-8** at (4) and (5)).[1]

10. Each determination also recognised — as "other interests" within the determination area for the purposes of s 225(c) of the NTA — public access to and enjoyment of particular waterways, beds and banks or foreshores of waterways, coastal waters and beaches (**public access clauses**) (**CAB 363** at (h); **CAB 398** at (f)).

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[1] Save for those parts of the determination areas where native title was determined not to exist because it had been wholly extinguished (**CAB 337** at (2); **CAB 377** at (2)).

11. The primary judge held that it was appropriate to include the public access clauses in the determinations on the basis that "existing" public access to and enjoyment of the areas described therein had been established, because the public had the ability to access and enjoy those areas in that there was no prohibition on them doing so (**CAB 501** at [131]).

12. A native title right comprising a right of exclusive possession was recognised to exist in parts of the areas identified in the public access clauses; in particular, those areas within the public access clauses which are landward of the high water mark as defined by the common law (**CAB 259-60** at [21] – [24]; **CAB 390-91** at (15) and (16)).

10 13. It was uncontentious before the primary judge that the common law high water mark is further seaward than the high water mark as defined in the *Land Administration Act 1997* (WA) (**statutory high water mark**) (**CAB 260** at [22]). In the Bindunbur determination, the public access clause included areas lying between the common law high water mark and the statutory high water mark (and the determination recognised exclusive possession native title in those areas), but did not include any areas landward of the statutory high water mark because other interests or dealings exist(ed) in that landward area (**CAB 258-60** at [17] – [23]). Accordingly, whether or not a beach (or other area within s 212(2) of the NTA) existed above the statutory high water mark in the Bindunbur determination area, that particular area was not included in the
20 Bindunbur public access clause.

14. That was not the case for the Jabbir Jabirr determination. In that determination area, there were not other grants or interests which commenced from the statutory high water mark. As a result, the Jabirr Jabirr public access clause was not limited to areas that are seaward of the statutory high water mark (**CAB 363** at (h)(iii)).

15. On appeal, the Full Court held that there was no "existing public access to or enjoyment of" any area included in the public access clauses. That finding was made on the basis that, properly construed, the requirement in s 212(2) of the NTA for "existing public access to and enjoyment of" a beach meant that something more than a "mere ability or
30 liberty" to access the beach was required (**CAB 503, 512-13** at [137], [171]).

16. The Full Court further found that the public access clauses did not record "interests" for the purposes of the NTA and so were erroneously included in the determinations (**CAB 510-12** at [159] to [169]).

17. Consequently, the Full Court allowed the appeals and made orders requiring the public access clauses to be removed from the Determinations.

PART VI: ARGUMENT

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

18. The Full Court took a narrow approach to the construction of s 212(2) of the NTA, holding that the provision only applies in two ways:

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18.1 the public access must be the subject of an existing common law or statutory right or interest (as defined by s 253 of the NTA) at the time s 212(2) was enacted; or

18.2 the public access to and enjoyment of the relevant land or waters must have existed as a matter of fact in a physical sense, at the time s 212(2) was enacted (**CAB 512-3** at [170]-[171]).

19. The Commonwealth submits that the construction summarised above is erroneous. It is not supported by the text of the provision, and is contrary to its evident purpose (as is confirmed by the extrinsic materials).

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Consideration of statutory text and context

20. The task of statutory construction must begin with a consideration of the statutory text.[2] Three features of s 212(2) are salient in this regard.

21. **First**, the language used to describe the subject matter of potentially confirmatory laws differs markedly as between s 212(1) and s 212(2). The former is expressly directed to the confirmation of existing "rights" (the right of the Crown to ownership of natural resources; Crown rights to use, control and regulate the flow of water; and fishing

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2 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

access rights prevailing over public or private fishing rights). Moreover, the terminology of "rights" in s 212(1) is evidently used in this subsection in the sense of something that is legally enforceable.

22. In contrast, s 212(2) does not use the terminology of "rights" at all — it enables the confirmation of "existing public access to and enjoyment" of beaches. There is no warrant for reading the sub-section as if it contains text that is not used; all the more so when the text ("rights") is used elsewhere within the same section.[3] In short, nothing in the language of s 212(2) indicates a legislative intention to confine the subject matter of the provision to "rights", or indeed to any kind of *enforceable* interest.

10 23. **Secondly**, the existing public access that is referred to in s 212(2) is not, in terms, qualified by any requirement for *physical* access. This can be contrasted with other provisions in the NTA that, albeit in different (if somewhat analogous) contexts, expressly refer to "physical access" (s 44A) and "physical connection" (ss 62(1)(c), 190B(7) and 190D(2)).[4] That contrast indicates that, where Parliament intended to impose an actual *physical* element to a statutory requirement, it did so explicitly. That is particularly true when it is noticed that, while ss 44A, 62(1)(c), 190B(7) and 190D(2) were introduced by the 1998 amendments to the NTA,[5] and thus did not form part of the statutory scheme when s 212 was enacted, s 212 was itself amended by the same amending Act that introduced those provisions. That reveals that Parliament turned its
20 mind to the content of s 212 at a time when it was introducing express references to physical access into parts of the statutory scheme, but did not introduce any such requirement into s 212(2).

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3 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J, with whom Barwick CJ and Jacobs J agreed); *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452 (Hodges J), recently cited and applied in *Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151 at [53]-[55] (Lander J), [77] (Buchanan J); *Workpac Pty Ltd v Skene* (2018) 362 ALR 311 at [106] (Tracey, Bromberg and Rangiah JJ); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 357 ALR 510 at [3] (Allsop CJ); *Dionisatos (for Estate of Late Dionysatos) v Acron Formwork and Scaffolding Pty Ltd* (2015) 91 NSWLR 34 at [23] (Basten JA).

4 Section 44A provides for the creation of a right of access in a native title claimant over non-exclusive agricultural or pastoral leases, where *inter alia* "as at the end of 23 December 1996, the person ... must have regularly had *physical* access to the whole or part" of the lease. Sections 62(1)(c), 190B(7) and 190D(2)
30 deal with a requirement for registration test purposes that a member of the native title claim group has, or previously had, any "traditional *physical* connection" with any of the land or waters of the claim area.

5 *Native Title Amendment Act 1998* (Cth), No. 97 of 1998.

24. Drawing the first and second textual and contextual features together, in the absence of any reference in the section to "rights", or to "physical" access and enjoyment, the natural and preferable reading of the text of s 212(2) of the NTA is that the reference to any "existing public access to and enjoyment of" beaches should be understood as meaning – or, at a minimum, including – access and enjoyment that was *available* to the public, in the sense that members of the public could *lawfully* access and enjoy the beaches (whether or not in the exercise of a legal right to do so).

25. **Thirdly**, a law made in accordance with s 212(2) operates to "confirm" any existing public access to and enjoyment of beaches. The term "confirm" is not defined and should be given its ordinary meaning, which relevantly includes:[6]

> 1. to make certain or sure; corroborate; verify: this confirmed my suspicions.
> 2. to make valid or binding by some formal or legal act; sanction; ratify: to confirm an agreement. ...
> 4. to make firm or more firm; add strength to; settle or establish firmly ...

26. Read in that light, the purpose of s 212(2) is clear: it was to allow the Commonwealth, State and Territory Parliaments to pass confirmatory laws to ensure that the ability of the public to access and enjoy beaches was the same as it had previously been understood to be, unaffected by the possibility that native title existed over those beaches. That confirmation of "existing public access" was in the broadest of terms, and was not dependent on the existence of any legal right to such access, or proof of existing physical access to a particular beach as a matter of fact.

27. There is then a further question as to the *mechanics* of the provision. Section 212 does not prescribe the effect of confirmation except in negative terms — namely, that confirmation does not extinguish any native title rights and interests and does not affect statutory rights available to Aboriginal peoples and Torres Strait Islanders (s 212(3)).[7] It cannot be supposed, however, that Parliament intended a confirmation to lack positive legal consequences. When the NTA (and thus s 212) was enacted, the only conception of the terms upon which the common law of Australia may recognise native title was

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6 Macquarie Dictionary (online at 10 August 2019), "confirm".

7 For example, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

the declaration made in *Mabo (No 2)* that the Meriam people were "entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Island."[8] Since its commencement, the NTA has expressly contemplated that equivalent rights may be determined to exist in favour of other Indigenous peoples.[9] In those circumstances, Parliament must be taken to have intended that preserving "existing public access" to beaches would, at times, constrain at least the *exercise* of native title rights to the extent that the exercise of those rights would otherwise have limited such access and enjoyment by members of the public. If it did not have that effect, it would lack any discernible purpose.

28. Achieving the statutory purpose identified above does not require members of the public to have, or be afforded, a "right" of access of a kind that did not previously exist. It requires only that *native title holders* are subject to a constraint on the exercise of their native title rights as against members of the public – and then, only to the extent necessary to ensure that existing public access and enjoyment is preserved. There is nothing unusual about the NTA operating directly on native title rights in this way. Indeed, that is precisely how the NTA usually deals with acts that affect native title (such as "past acts", "previous exclusive possession acts" and "future acts").[10] In each case, the NTA provides for the validity of the act, and, if valid, prescribes the effect of the act on native title.[11] Put another way, the NTA does not validate an act, or enable a valid act to be done, and then leave it to the common law to determine whether the act extinguishes or otherwise affects native title. Instead, it prescribes categories of acts, and if an act falls within a particular category, it dictates the effect of that act on native title.

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8 (1992) 175 CLR 1 at 76.

9 Section 225 was repealed and replaced by the 1998 amendments. Nevertheless, as originally enacted, s 225(b)(ii) required a determination to state whether the native title rights and interests conferred possession, occupation, use and enjoyment of the land and waters on its holders to the exclusion of all others. Cf. s 225(e) as it stands today.

10 NTA, s 228 (definition of past act), s 23B (definition of previous exclusive possession act), s 233 (definition of future act).

11 NTA, s 15 (effect of past acts), s 23C (effect of previous exclusive possession acts), s 24MD (one example of the effect of a future act). See also Overview of Act, s 4.

29. Read in that context, s 212 should be understood as operating so that a confirmatory law made in accordance with s 212(2) affects native title (without extinguishing it) by imposing a constraint upon the exercise of native title rights to the extent that is necessary to preserve existing public access and enjoyment of beaches. Nothing in the statutory language that gives rise to that constraint suggests that the existence or extent of the constraint turns on demonstration of a pre-existing right to access a particular beach, or proof of previous physical access (of some unspecified kind by unspecified persons over an unspecified period[12]). No such limit on the operation of the subsection should be implied.

30. Applying that construction of s 212(2) and (3) of the NTA, by enacting s 14 of the TVA, the State confirmed, and thereby ensured, the continuing ability of members of the public lawfully to access and enjoy beaches in Western Australia, including those within the Bindunbur and Jabirr Jabirr determination areas. By reason of that confirmation, whilst native title is not extinguished to any extent, neither the Bindunbur nor the Jabirr Jabirr native title holders are at liberty to exercise their exclusive native title rights in a way that would prevent public access to and enjoyment of beaches within the determination areas.

31. ***Extrinsic materials*:** The relevant extrinsic materials confirm the above analysis of the purpose of s 212(2) and (3) of the NTA.[13] As the Full Court observed, in the second reading speech of then Prime Minister Paul Keating on the *Native Title Bill 1993* (Cth) the (albeit brief) mention of this aspect of the bill was focused on "access" per se, and not on existing "rights" of access (**CAB 505-6** at [142]-[143]).

32. To the same effect Senator Gareth Evans, who had the carriage of the bill on behalf of the Government in the Senate, said that in enacting what was to become s 212(2), the

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12 See *R (on the application of Newhaven Port and Properties Ltd) v East Sussex County Council* [2015] All ER 991 at [43], questioning whether a right to use the foreshore for bathing could be claimed by a fluctuating group of people such as the inhabitants of a neighbourhood or locality. See also *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 at 474 (Harman LJ) and 479 (Winn LJ).

13 See *Acts Interpretation Act 1901* (Cth) s 15AB(1)(a). Alternatively, the same material is relevant to determining the meaning of the provision if its meaning is thought to be ambiguous or obscure: s 15AB(1)(b)(i).

"principle of public access"[14] would override the possible existence of native title on a particular stretch of beach. He also said that the Government's policy priority was to preserve "coastal access"; and that, "as a matter of public policy", public access to beaches was to be given primacy over native title rights and interests.[15] The clear intention was that there be a restriction on the "enjoyment" of native title rights and interests in relation to beaches, because enjoyment of those areas "has to be shared with the public in the context of public access".[16]

33. Subsequently, and consistently with the above, when s 212(3) was amended in 1998 to remove the words "or impair" from the phrase "extinguish or impair any native title" (**CAB 500** at [124]-[125]),[17] the Explanatory Memorandum explained that:[18]

> The Bill removes the reference to 'impair' in subsection 212(3) because 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.

34. All of these references confirm the legislative intention that the public's access to and enjoyment of beaches was to prevail over any native title rights and interests that may exist. There is no suggestion in the extrinsic material that such public access was to be preserved only if a common law or statutory right of access could be demonstrated, or if established physical access could be proved. Instead, at a much higher level of generality, as a matter of public policy public access to beaches was to be preserved unaffected by native title, that representing part of the balance between competing interests that was struck by the Parliament at the time of enacting the NTA.

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14 As the Full Court acknowledged, Senator Evans' reference to "the 'principle of public access' does not obviously engage a 'rights' discourse": (**CAB 506 at [145]**).

15 Commonwealth, *Parliamentary Debates*, Senate, 17 December 1993, 5063 and 5065.

16 Commonwealth, *Parliamentary Debates*, Senate, 17 December 1993, 5065.

17 The terms of an amending enactment can throw light on the intention of an earlier ambiguous enactment: *Grain Elevators Board (Vic) v Dunmunkle Corp* (1946) 73 CLR 70 at 86 (Dixon J); *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 254-255 (Dawson J); *Cook v Benson* (2003) 214 CLR 370 at 394 (Kirby J).

18 Explanatory Memorandum to the Native Title Bill 1997 at [24.26] (p 262).

The errors of the Full Court's approach

35. ***Existing common law or statutory right or interest:*** Dealing firstly with the Full Court's holding that one of the (only) two ways in which s 212(2) applies is where public access is shown to be the subject of an existing common law or statutory right or interest (**CAB 512-3** at [171(1)]), the Full Court acknowledged that textual considerations were against construing s 212(2) as referring to existing *rights* to access and enjoy beaches (**CAB 503-4** at [139]). It also accepted that the extrinsic materials "did not obviously engage a 'rights' discourse" (**CAB 505-6** at [142]-[145]). Yet, despite finding no support for a "rights based" construction of s 212(2) in either the statutory text or the extrinsic materials, the Full Court proceeded to deal with virtually every aspect of the construction arguments through the prism of *rights*. Thus:

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35.1 The Full Court rejected the proposition that the State could establish "existing public access" by focusing on "the activities undertaken by people, not [on] rights held by them" (**CAB 47** at [147]), on the basis that the State "could point to no common law or general law right or interest that conferred, on a member of the public, the *right* to access and enjoy unallocated Crown land, including beaches" (**CAB 47** at [148]).

35.2 The Full Court rejected the proposition that the public had any "right, entitlement or interest" to roam across or enjoy unallocated Crown land, established by custom or convention or otherwise, because the law did not enable any such asserted interest "to be *vindicated*" (**CAB 507** at [149]).

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35.3 The Full Court referred to the kinds of *rights* held by members of the public as discussed in the judgment of Windeyer J in *Council of the Municipality of Randwick v Rutledge*,[19] and said that nothing in *Rutledge* was consistent with the recognition by Australian law of "a general *public right* to enter and enjoy unallocated Crown land" (**CAB 507-9** at [150], [153], [156]).

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[19] (1959) 102 CLR 54.

35.4 The Full Court said there was no convention, custom or expectation under Australian law that the general public had a *right* to enter and enjoy unallocated Crown land (**CAB 509** at [156]).

36. The Full Court went on to hold that, by enacting s 212(2), Parliament could not have intended to enable an "ill-defined custom or convention" that members of the public may "access and enjoy places such as those found in the determinations" (ie beaches and coastal waters) to be *converted* into an "interest" within the meaning of s 253. The Full Court said that to so hold would be "to stretch the general language and statements made in the Parliament during the passage of the Bill *too far*", and that "explicit language" would be needed showing a "clear and plain intent" to create a "broad *new right*" that would constrain the exercise of existing native title rights and interests. "Such an intent is not demonstrated by the *general and loose language of confirmation* used in s 212(2)." (**CAB 509** at [157]-[158]).

37. There are four central errors in the above reasoning.

38. *First*, once it is recognised that there is no common law or statutory *right* to access beaches,[20] it necessarily follows that s 212(2) cannot have been intended to permit Parliaments to *confirm* such a right. That immediately highlights that the Full Court's focus on the absence of such a right was misconceived.

39. Despite the absence of any statutory or common law right to access beaches, the assumption upon which Parliament evidently proceeded in enacting s 212(2) was that it was meaningful to speak of "existing public access" to beaches. From a factual perspective, that is hardly surprising, for the existence of widespread public access to beaches in Australia is obvious. Nevertheless, from a legal perspective, the nature and extent of the public's rights over the foreshore is a difficult and to some extent unresolved issue.[21] That should, however, have been treated as immaterial, for nothing

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20 *R (On the Application of Newhaven Port and Properties Ltd) v East Sussex County Council* [2015] All ER 991 at [31], [33], [35], [40], [47], [50] (the absence of such a right being conceded).

21 Indeed, the difficulty and importance of the matter led the Supreme Court to leave the matter open in *R (on the application of Newhaven Port and Properties Ltd) v East Sussex County Council* [2015] All ER 991 at [29] and [46]-[51] (Lord Neuberger and Lord Hodge, Lady Hale and Lord Sumption agreeing). See also *Blundell v Catterall* (1821) 5 B & Ald 268 at 300 (Holroyd J), 306-307 (Bayley J) and 314-315 (Abbott

in the text or context of s 212(2) suggests that Parliament intended the confirmation of public access to beaches to depend upon the resolution of difficult and unresolved questions of law.

40. Parliament having enacted s 212(2) in terms that referred to "existing public access to and enjoyment of ... beaches", the task for the Full Court was to ascertain the meaning of that statutory language, bearing in mind that the words fell to be construed in a context where neither the common law nor statute recognised a right to access beaches of a kind that could be "vindicated". In interpreting s 212(2) within that context, the Full Court should have recognised that it is a feature of the NTA that it dictates the effect on native title of various different categories of acts and interests, and that it does so in a way that may or may not correspond to what would have been the result at common law. Thus, in some cases the NTA prescribes a greater level of extinguishment than would have occurred at common law;[22] while in other cases, the burden of extinguishment is removed by application of the non-extinguishment principle, but the ability to enforce the native title rights is suspended. The important point is that, in all cases, the effect of the NTA on native title reflects policy choices made by the Parliament. The Full Court's task was to identify and give effect to those policy choices, even if that involved legal consequences that would not have arisen prior to the enactment of the NTA. As such, the Full Court was wrong to find that s 212(2) could not operate upon "an ill-defined custom or convention reflecting an 'aspect of Australian life'" (**CAB 509** at [158]). It was plainly open to the Parliament to prioritise public access to beaches over native title, and that was the evident purpose and effect of s 212(2). In that regard, it is significant that the Full Court never identified what it considered the purpose of s 212(2) to be. Had it done so, it may not have found it so difficult to discern a legislative intention to put the ability of members of the public to

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CJ); *Mace v Philcox* (1864) 15 CBNS 600 at 614; *Brinckman v Matley* [1904] 2 Ch 313; *Behrens v Richards* [1905] 2 Ch 614 at 619-620 (Buckley J); *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 at 469, 472 (Harman LJ), 476 (Russell LJ), 485 (Winn LJ). For Australian authorities discussing and applying this line of authorities see, eg, *NSWAboriginal Land Council v Minister administering the Crown Lands Act* [2008] NSWLEC 35, particularly at [40] (Jagot J); *Gumana v Northern Territory* (2005) 141 FCR 457 at [60]-[64] (Selway J); *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534 at [80] (Barrett J).

22 For example, a mining lease that provided for the construction of a town and which is validated by the NTA, will extinguish native title in the area of the town (s 245(3) and s 23B(2)(c)(vii)). A mining lease at common law is unlikely to have this effect: *Western Australia v Brown* (2014) 253 CLR 507.

access beaches beyond the reach of native title holders, irrespective of the legal foundation of that access.

41. *Secondly*, whilst the Full Court rejected the proposition that the extrinsic materials evidenced a legislative intention to create a "new right", their Honours did not offer any account as to how the Parliamentary statements *should* be understood. With respect to the Full Court, the extrinsic materials plainly confirm that Parliament was "determined, as a matter of public policy, to preserve that principle of access to beaches."[23] There is no uncertainty as to what Parliament sought to achieve by enacting s 212(2).

42. *Thirdly*, the Full Court's reference to the "conversion of an ill-defined custom or convention" into an "interest" as defined by s 253 illustrates that the Court collapsed the question of the proper interpretation and operation of s 212(2) of the NTA (and s 14 of the TVA) into the *separate, and subsequent,* question of whether and how any public right or access to beaches and coastal waters should be recorded in a native title determination under s 225(c). The elision of those questions may well account for the persistent "rights based" language used by the Full Court in describing the operation of s 212(2), despite the absence of any textual or contextual support for it, because the Court appears to have attempted to conceptualise the effect of s 212(2) by reference to the definition of "interest" in s 253 of the NTA.

43. *Fourthly*, when the Full Court came to consider the situation of demonstrated physical access to a beach at the relevant time (discussed immediately below), it held that the effect of confirmation by s 14 of the TVA would be that the existing physical access and enjoyment *would* be an "other interest" for the purposes of a determination and s 225(c) of the NTA (**CAB 512** at [170]). In so holding, the Full Court correctly acknowledged that a law passed in accordance with s 212(2) to confirm existing public access *can* operate to create an "interest" within the meaning of s 225(c) that did not previously exist. Yet that was the very possibility that was earlier rejected outright by the Full Court (see paragraph 36 above). The Full Court's reasoning therefore contains irreconcilable internal contradictions.

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[23] Commonwealth, Parliamentary Debates, Senate, 17 December 1993, 5063.

44. ***Existing access in a physical sense:*** As foreshadowed above, the second way in which the Full Court held that s 212(2) applies is if public access and enjoyment to a beach is established as a matter of fact in a physical sense (**CAB 512-513** at [170]-[171]).

45. The textual arguments against this construction are addressed in paragraph 23 above. Otherwise, the sole basis identified by the Full Court in support of this asserted operation of s 212(2) is a statement made by Senator Evans during the Senate debate of the *Native Title Bill 1993* (Cth) (which is reproduced at **CAB 506** at [143], but repeated here for convenience):

> On the question of beaches, the 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.

46. The Full Court relied on this passage as evidencing an "understanding that there were, at the time of the Bill, 'particular' beaches to which the public actually and physically enjoyed access – existing public access – which the Bill proposed should continue" (**CAB 506** at [145]).

47. With great respect to the Full Court, there is no correspondence between what the Full Court took from Senator Evans' remark and what he actually said. Senator Evans was referring to the possible existence of *native title* in a particular beach, not to *public access* to a particular beach. He was making the point that, even if native title was found to exist with respect to "a particular stretch of beach", that native title would be overridden by the "principle of public access". He said nothing to suggest that the operation of that "principle of public access" depended on proof of "existing public access" in a physical sense. Nor does the context suggest any such limitation was intended, for Senator Evans was responding to a general question about "ensuring public access to beaches, even if native title was granted in respect of that area".[24] In context, the "principle of public access" to which Senator Evans referred was evidently conceived as a principle of general application, as was confirmed by the Senator's

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[24] Commonwealth, Parliamentary Debates, Senate, 17 December 1993, 5062 (Senator Alston).

subsequent observation that "We are determined, *as a matter of public policy*, to preserve that principle of access to beaches."[25]

48. ***Conclusion***: The Full Court's construction of "existing public access to and enjoyment of" in s 212(2) is not supported by the statutory language, the broader statutory context, or the extrinsic materials. Properly construed, the effect of s 212(2) and s 14 of the TVA was to confirm that – irrespective of its prior legal foundation – public access to beaches was not limited by native title.

Second issue: The content of a determination of native title

Section 253 – Interest

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49. It is uncontroversial that an "interest" as defined in s 253 of the NTA will also be an "interest" for the purposes of s 225(c). As a consequence, if the State's appeal grounds 2(a) and 3(a) are upheld, there will be no need for the Court to deal with the State's appeal grounds 2(b) and 3(b) or the Commonwealth's appeal ground 3.

50. The Commonwealth agrees that the public access and enjoyment of beaches in these cases come within the definition of "interest" in s 253, albeit for different reasons to those advanced by the State (at least at the special leave stage). As the Commonwealth reads the Full Court's reasons, its conclusion that no "privilege" existed, so as to fall within paragraph (b) of the definition of "interest" in s 253, was premised on its

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conclusion that s 212(2) of the NTA and s 14 of the TVA had *not* operated to confirm the "mere ability or liberty" of the public to access beaches (**CAB 509-10, 512-13** at [158]-[159], [170]-[171]).

51. If the Full Court was wrong in that respect (for the reasons advanced above), and s 212(2) of the NTA and s 14 of the TVA *did* operate to confirm the "existing public access" to beaches irrespective of whether that access was shown to be the subject of an existing common law or statutory right or interest, or whether that access was established as a matter of fact, it is but a short step to conclude that the Full Court erred in failing to find that there was an "interest" within s 253 of the NTA. That follows

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[25] Commonwealth, Parliamentary Debates, Senate, 17 December 1993, 5063 (emphasis added).

because, 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. Specifically, as discussed in paragraphs 28 to 29 above, the effect of confirmation under s 212(2) of the NTA and s 14 of the TVA was to confer an immunity upon members of the public against enforcement of the native title rights to the extent necessary to preserve the continued public access and enjoyment.[26] That is, at least, an "other right" or "privilege" within the definition in s 253.

Section 225(c) – "other interests"

52. Alternatively, if public access and enjoyment that is confirmed by s 14 of the TVA is *not* an "interest" as defined in s 253, a further issue arises as to whether such confirmed public access is nonetheless an "other interest" for the purposes of s 225(c). If so, meaning that the State's appeal grounds 2(b) and 3(b) are upheld, there will then be no need for the Court to deal separately with the Commonwealth's appeal ground 3, as the Commonwealth agrees that the public access and enjoyment of beaches in these cases are "other interests" for the purposes of s 225(c).

53. A determination of native title is the primary mechanism through which the NTA provides for the enforcement of native title. Once made, such a determination operates *in rem*.[27] Rights recognised by or under the determination are enforceable in the ordinary law courts. As Selway J observed in *Gumana v Northern Territory*,[28] the determination provides the "desired certainty" as to the existence and incidents of native title. In particular, it provides certainty as to the effect and relationship of native title *with other rights and interests in the land.* Given the requirement of certainty, the relevant determination must be detailed and specific, and must "exhaustively indicate the determined incidents" of native title.

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26 cf. *Mathieson v Burton* (1971) 124 CLR 1 at 12.

27 *Dale v Western Australia* (2011) 191 FCR 521 at [92] (Moore, North and Mansfield JJ), citing *Wik Peoples v Queensland* (1994) 49 FCR 1; *CG (dec'd) (on behalf of Badimia People) v Western Australia* (2016) 240 FCR 466 at [46] and [66] (North, Mansfield, Jagot and Mortimer JJ, Reeves J agreeing); *Western Australia v Ward* (2000) 99 FCR 316 at [190] (Beaumont and von Doussa JJ). See also *Munn v Queensland* [2002] FCA 486 at [7]-[8] (Emmett J); *Kokatha v South Australia* [2007] FCA 1057 at [33] (Finn J).

28 *Gumana v Northern Territory* (2005) 141 FCR 457 at [127], [130]-[132] (upheld on appeal in relation to native title issues: *Gumana v Northern Territory* (2007) 158 FCR 349).

54. If the Court finds that s 14 of the TVA has operated in these cases, the native title rights of the Bindunbur and Jabirr Jabirr native title holders are subject to constraints on the exercise of their native title rights with respect to any beaches within the determination areas that the primary judge had included within the public access clauses. In circumstances where exclusive possession native title rights have been recognised in certain of those areas (see paragraph 12 above), the determinations will be inaccurate (at best) or misleading (at worst) to the extent that they fail to reflect those constraints. In those circumstances, even if the public access and enjoyment confirmed by s 14 of the TVA is *not* an "interest" as defined in s 253, there remain strong reasons for construing s 225(c) as having wider import and encompassing interests of the kind in question (that is, interests that directly affect native title). That construction is available because the definition of "interest" in s 253 operates only unless the contrary intention appears. The different contexts in which the term "interest" appears within the NTA, and the tension between a broad meaning being suitable for one purpose (such as for s 225) yet unsuitable for another (such as for s 61), confirms that the word is not invariably used in the NTA with its s 253 meaning.[29] In the specific context of s 225(c), a broad reading of "other interests" best facilitates the purpose of a determination of native title identified above.

55. The above submission is supported by s 225(d) of the NTA, which plays a critical role in ensuring that a determination provides the "desired certainty", by ensuring that the determination addresses the relationship between the rights and interests in the determination area. Section 225(d) applies only to the relationship between the rights and interests that are identified in accordance with s 225(b) and (c). For that reason, a narrow interpretation of s 225(c) limits the capacity of s 225(d) to achieve its purpose in promoting certainty. That would be particularly inappropriate in light of s 225(d), which requires the relationship between the native title rights and "other interests" in the determination area to be recorded "taking into account the effect" of the NTA. That language is properly understood as requiring a determination to address the direct effect of the NTA on native title rights that arises from s 212(2) (read with s 14 of the TVA).

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[29] *Kanak v Minister for Land and Water Conservation* (2000) 106 FCR 31 at 46 [37]-[38] (Madgwick J).

Section 225(c) – discretion

56. Finally, and in the further alternative, even if the public access and enjoyment confirmed by s 14 of the TVA is *not* an "other interest" within the meaning of s 225(c), that public access and enjoyment can be and should be included in a native title determination as a matter of discretion.

57. Once it is recognised that the operation of s 212(2) and (3) of the NTA (and s 14 of the TVA) do *not* depend upon whether the public access and enjoyment of beaches is an "interest" as defined in either s 225(c) or s 253, it follows that any confirmation pursuant to s 14 of the TVA limits native title rights, whether or not it is an "interest" or "other interest" within the meaning of ss 253 or 225(c). As such, the omission from a determination of native title of any reference to "existing public access" that has been confirmed pursuant to s 14 of the TVA (or equivalents) has clear potential to mislead. If the court making a native title determination can avoid that misleading effect, it is plainly desirable that it do so.

58. Whilst the focus in the courts below and in these appeals has been on s 225(c) and (d), the subject matter of those clauses is not divorced from the requirements in s 225(b) and (e) for a determination to set out the "nature and extent" of the native title rights and interests in relation to the determination area, and whether they confer possession, occupation, use and enjoyment of the land and waters to the "exclusion of all others". For the reasons set out in paragraphs 53-54 above, even if s 225(c) is construed so as not to *require* the inclusion of the public access and enjoyment of beaches as "other interests" in a determination, those paragraphs amply justify the inclusion in a determination of reference to any confirmed public access under s 14 of the TVA (and any equivalent provisions), as part of defining the "extent" of native title rights.

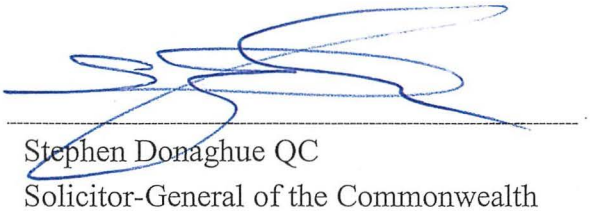
PART VII: ORDERS SOUGHT

59. The Commonwealth seeks orders in accordance with paragraph 3 of each of its Notices of Appeal in P36/2019 (**CAB 693**) and P37/2019 (**CAB 745-6**) respectively.

PART VIII: ORAL ADDRESS

60. The Commonwealth estimates that it will require up to 1 hour and 30 min for oral argument in chief.

Dated: 21 August 2019



Stephen Donaghue QC
Solicitor-General of the Commonwealth
T: 02 6141 4139
E: stephen.donaghue@ag.gov.au

Nitra Kidson
T: 07 3221 3785
E: nkidson@qldbar.asn.au

Cobey Taggart
T: 08 6244 5128
E: ctaggart@mchambers.com.au

Counsel for the Commonwealth of Australia

ANNEXURE OF STATUTORY PROVISIONS

Act	Version	Sections
Native Title Act 1993 (Cth)	As enacted	212, 225
Native Title Amendment Act 1998 (Cth)	As enacted	Schedule 1: p.135 (s 44A), p.151 (s 212), pp.174-5 (s 62(1)(c)), pp.228-32 (ss 190B, 190D)
Native Title Act 1993 (Cth)	Compilation No. 43 (22 June 2017)	4, 15, 23B, 23C, 24MD, 44A, 62(1)(c), 190B(7), 190D(2), 212, 225, 228, 233, 253 ("interest")
Acts Interpretation Act 1901 (Cth)	Compilation No. 36 (20 December 2018)	15AB
Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)	As enacted	14