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

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ORAL OUTLINE OF SUBMISSIONS OF THE STATE OF WESTERN AUSTRALIA
(APPELLANT IN P34/35 OF 2019; SECOND RESPONDENT IN P36/37 OF 2019)

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

Three Critical Questions

2. **Question 1:** Leaving aside native title rights and interests, what legal rights or abilities does a member of the public have to access the places mentioned in s 212(2) (collectively "beaches and coastal waters")?

3. **Question 2:** To what extent does the *Native Title Act* recognise any legal rights or abilities identified in answer to question 1 as: (a) "interests" within s 253; (b) "other interests" within s 225(c); and/or (c) "existing public access to and enjoyment of" beaches and coastal waters within the meaning of s 212(2)?

4. **Question 3:** To what extent should any legal rights or abilities identified in answer to question 1 be stated in a native title determination for the purposes of s 225?

Five Factual Matters

5. **Unallocated Crown Land:** All relevant areas in this case are Unallocated Crown Land ("UCL"). In the Bindunbur Determination, the UCL is seaward of certain defined reserves. In the Jabirr Jabirr Determination, the UCL includes areas within certain defined parcels of land.

6. **Land Below Low Water Mark:** When the *Native Title Act* came into effect on 1 January 1994, land below the low water mark was UCL either because this was what was contemplated by the definition of "Crown Land" in the *Land Act*; or because of s 4 of the *Coastal Waters (State Title) Act 1980* (Cth).

7. **Land Between Low Water Mark and Common Law High Water Mark:** All this land was UCL when the *Native Title Act* came into force, for the same reasons as land below the Low Water Mark.

8. **Land Between Common Law and Statutory High Water Mark:** There is no relevant distinction between exclusive and non-exclusive native title rights in this area compared to below the common law high water mark. Section 212 of the *Native Title Act* and s 14 of the *Titles Validation Act* operate in respect of "any native title rights and interests": s 212(3).

9. **No Evidence of Physical User**: The State did not lead any positive evidence that the public had actually enjoyed specific parts of beaches, waterways or coastal areas within the determination area.

Legislative Matters

10. The *Land Act* applied when the *Native Title Act* came into force on **1 January 1994**. The *Titles Validation Act* came into effect on **4 July 1995**. The *Land Administration Act* replaced the *Land Act* on **30 March 1998**.

11. The *Land Act* and the *Land Administration Act* did not prohibit public access to UCL (including beaches and coastal waterways), but did proscribe certain activities being carried out on UCL. See s 164 of the *Land Act* and s 267 of the *Land Administration*

Act. Consequently, members of the public had the ability to access UCL and to enjoy that UCL, subject to proscribed activities.

Full Federal Court's Reasoning: [105] - [175] (2 JCAB, pages 490-513)

12. The Full Federal Court held that:

(a) 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: para [171](1); and

(b) a public access interest may be shown to be a relevant interest for the purposes of s 225(c) of the *Native Title Act* 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): paras [170] and [171](2).

13. The Court reached these conclusions by five steps of reasoning. The first three steps considered the proper construction of s 212(2), and what is meant by the phrase "public access to and enjoyment of" beaches, waterways and coastal waters. The Court concluded that the phrase was obscure and ambiguous: [140], and not much enlightened by reference to any extrinsic material: [141]-[145]. As a result, the Court analysed the terms "interest" in s 253, and "other interests" in s 225(c). These terms were considered as the fourth and fifth steps.

14. In the fourth step, the Court concluded that there was no support for "the recognition by Australian law of a general public right to enter and enjoy unallocated Crown land": [156]. Hence, there was no "right" within the definition of "interest" in s 253. In the fifth step, the Court concluded that a mere ability or liberty of the public to access beaches, coastal waters and waterways was also not within the meaning of the term "interest" in s 253.

15. The Court considered that the words "other interests" in s 225(c) were limited to a case where "a party can demonstrate that public access to and enjoyment of the places referred to in s 212(2) existed as a matter of fact in a physical sense when s 212(2) was enacted and a State has enacted confirmatory legislation": [170]. The explanation for the conclusion that s 225(c) uses the term "other interests" to denote physical user of beaches and other coastal areas, appeared to be connected with what was said in [145], that the extrinsic material did not "obviously engage a 'rights' discourse, but is consistent with 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".

First Critical Question: What types of public access could be recognised?

16. Three possible types of public access might be recognised: (a) an access "right" recognised by the common law or general law; (b) access which exists as a matter of

physical fact; or (c) a mere ability or liberty to access and enjoy an area, largely for leisure purposes, which has arisen through custom or convention or expectation, and has not been prescribed or abrogated by law. See FCAFC [137].

17. **The "sufferance" point:** The first respondents now seek to challenge the existence of public access and enjoyment to waterways and other places as an ability or liberty. To do so, they say that the public never had any ability or liberty to enter UCL, but nevertheless the public did so as a matter of "*sufferance*" of the Crown: see FRS [43]. However, permissible entry onto UCL under *sufferance* is no different to *non-proscribed* entry upon such land. There is no *sufferance* in the sense that the State has permitted an ongoing breach of a prohibition against public access and enjoyment of beaches and coastal waters, without sanctioning it. There is no prohibition.

Second Critical Question: What types of public access does NTA recognise?

18. Properly construed, the "existing public access to and enjoyment" of waterways referred to in s 212(2) means the public access and enjoyment of beaches and coastal waters, which was available to the public prior to the enactment of the NTA, without taking into account any native title rights and interests. This confirmed the existing ability of the public to access beaches and coastal waters without prohibition.

19. The terms "right" and "privilege" in the definition of "interest" in s 253 are defined by reference to land or waters. There is no need for a positive right enforceable against another person. An ability to access the land or waters is sufficient for there to be a "right" or "privilege". As well, in the context of accessing land, a "privilege" involves the ability to choose to enter the land, as opposed to being under any duty to do so. That does not require a person with a "privilege" to have an advantage over others.

20. The Full Court did not explain how or why s 225(c) should be construed so that public access established by physical use is an "other interest" and stands in a different position to public access based upon the general liberty or ability of the public to enter upon UCL. There is no textual justification for this. In fact, s 212(2) refers to <u>any</u> existing public access (however established), not just physical user.

Third Critical Question: What public access should be included in a determination?

21. If rights or abilities are recognised by the *Native Title Act*, they ought to be stated in a determination of native title. In other words, the construction of "interest" in s 253, and "other interests" in s 225(c), should be consistent with the rights and abilities recognised by the *Native Title Act*.

Dated: 3 December 2019

J A Thomson SC

G Ranson