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

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

Dated: 8 October 2019
Filed on behalf of: the State of Western Australia (Appellant in P34 and P35/2019; Second Respondent in P36 and P37 of 2019)
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Part I: Certification for Internet Publication

1. We certify that this submission is in a form suitable for publication on the internet.

Part II: Outline of Argument in Reply

2. **Coastal Areas:** The Bindunbur claim concerns coastal areas seaward of reserves which extend down to the statutory high water mark. See STJ [17], [21]-[22] (1 JCAB pp 259-260); paragraph 12(f) of Sch 7 of the Bindunbur Determination (1 JCAB pp 363-364). Generally, all areas below the statutory high water mark are unallocated Crown land: WA's Submissions dated 21 August 2019 ("**WAS**") [13].

3. The Jabirr Jabirr claim also relates only to unallocated Crown land: STJ [24] (1 JCAB p 260). The State accepts that this claim covers coastal areas which include some unallocated Crown land which is landward of the statutory high water mark. This is pointed out in the first respondents' submissions in P34/35 of 2019 ("**FRS**") [10]. To that extent, the State accepts that a small factual correction to WAS [12], is required. Nevertheless, the legal issues remain the same, as the waterways etc are only upon unallocated Crown land.

4. **Areas below Low Water Mark**: The first respondents submit that all land seaward of the low water mark was not Crown land under the LA when the NTA was enacted: FRS [11], [34]. A similar submission is made in their submissions in P36/37 of 2019 [17].

5. The definition of "Crown Lands" in s.3(1) of the LA expressly includes, for the purposes of granting special purpose leases for use of the land under ss.116 and 118 of the LA, "all lands below low water mark on the seashore and on the banks of tidal waters and all lands being the beds of water courses." That definition was deemed always to have applied by s.3(2). (Section 118 was repealed in 1978, but related to quarrying.) In other words, under the LA, there was no proscription upon access to the Crown's radical title below the low water mark unless special purpose leases were granted which would regulate activities upon the leased area. The land below the low water mark was still unallocated Crown land.

6. To the extent that, when the NTA was enacted, title to any land below the low water mark was outside the operation of the LA (considered by itself), such land was in any event expressly vested in WA by s.4 of the ***Coastal Waters (State Title) Act 1980*** (Cth). It was still unallocated Crown land to which the Crown had radical title. By s.3(1)(a) of the ***Off-Shore (Application of Laws) Act 1982*** **(WA)**, it was declared 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 WA. See ***Commonwealth v Yarmirr*** [2001] HCA 56; (2001) 208 CLR 1 at [34]-[35], [60]-[76].

7. **The irrelevance of "three distinct geolegal categories"**: FRS [16] distinguishes between "three distinct geolegal categories" of land, as categories (a), (b) and (c). However, all land in these categories is unallocated Crown land. Public access to, and enjoyment of, each category is only possible to the extent that the public is able to access and enjoy this land without statutory proscription (by the LAA or, formerly, by the LA). It is that access to, and enjoyment of, the land which is in issue in the present proceedings.

8. Category (a) is differentiated from categories (b) and (c) by whether native title rights are exclusive or non-exclusive. However, the confirmation provided by s.212 applies as against "any native title rights and interests": s.212(3). The operation of s.212(2) does not depend upon the distinction between exclusive and non-exclusive rights.

9. Categories (b) and (c) are differentiated by whether the LA applied below the low water mark. Again, this is not relevant, as explained in paragraphs [4]-[6] above. The confirming effect of s.212 applies to the extent that the public had the ability (subject to any applicable statutory proscription) to access and enjoy unallocated Crown land.

10. **No unwarranted assumption:** In FRS [3], the first respondents submit that the State has made the unwarranted assumption that: "what has been confirmed was, and could only have been, the bare ability under the *Land Act 1933* (WA) ... of members of the public to enter Crown land ... ". The first respondents further submit that this assumption is "not accepted" and "remains the subject of contention in this case".

11. Before the trial judge, the Bindunbur first respondents contended that "the public was able to access and enjoy the contested areas only because there was no proscription preventing such access or enjoyment": STJ [19] (1 JCAB p 259). The Jabirr Jabirr claimants raised the same issues: STJ [24] (1 JCAB p 260). In other words, the position submitted by the first respondents at trial is identical to the assumption which the State is now criticized for making. At trial, the first respondents then acted on this basis, and "contended that the ability of the public to access and enjoy those coastal areas by reason of the absence of any proscription does not fall within the definition of an other interest": STJ [19] (1 JCAB p 259).

12. The trial judge found that: "The ability of the public to access and enjoy the area seaward of the statutory high water mark is the relevant other interest": STJ [22] (1 JCAB p 260). The reference to "ability" in this finding was a reference to: "The ability of the public to

access and enjoy coastal areas because access is not proscribed": STJ [20] (1 JCAB p 259).

13. No doubt the submissions of the first respondents at trial are why the trial judge "equated an ability to access areas because access was not proscribed with an ability to 'access and enjoy' and to the conclusion that it is 'an interest because it is a privilege'": FRS [29]. No proper complaint can now be made about that, contrary to FRS [29].

14. The first respondents adopted the same position in the Full Federal Court appeal as at trial. Each of appeal grounds 2, 3 and 4 (2 JCAB pp 419, 427-228) was based upon the existence of "an ability of the public to access and enjoy a place ... because access is not proscribed" (ground 3).

15. The error which the Full Court held had been made by the trial judge was that he had construed s.212 of the NTA "as enabling an ability of or liberty in the public to access unallocated Crown land that answers the description of land and waters as mentioned in subs (2), as an 'interest' for the purposes of s 253 of the NTA and thus amongst the other interests in each determination": FFC [174] (2 JCAB p 513). The Full Federal Court did not say that there had been any error by the trial judge in identifying the existence of an ability of the public to access and enjoy coastal areas because access is not proscribed.

16. It was due to these matters that the State submitted, at WAS [40], that the existence of public access and enjoyment to waterways etc as an ability or liberty has never been seriously or substantively challenged by the first respondents. That was correct, contrary to FRS [43].

17. The first respondents now seek to challenge the existence of public access and enjoyment to waterways etc as an ability or liberty. To do so, they say that the public never had any ability or liberty to enter unallocated Crown land, but nevertheless the public did so as a matter of "*sufferance*" of the Crown: FRS [43]. Permissible entry onto unallocated Crown land under *sufferance* is apparently different to *non-proscribed* entry upon such land. The precise distinction is never elaborated by the first respondents. In substance, there is none.

18. The submissions at FRS [37] and [42] need to be considered in the context described above. In FRS [37], the first respondents say that the Full Court did not conclude that it "regarded the state of affairs under sec 164 of the LA as one that contemplated both public entry onto and public *enjoyment* of Crown land." As explained, the way in which the first respondents conducted the trial and formulated their appeal grounds did not put in issue that there was "an ability of the public to access and enjoy a place ... because access is not proscribed". However, having concluded that the public's ability or liberty to access the coastal areas was not confirmed by s.212 of the NTA and s.14 of the TVA,

no question of enjoyment pursuant to that ability or liberty separately arises. That explains why the statements of the Full Federal Court at FFC [169], [174] (2 JCAB pp 512, 513) relate only to access and not to enjoyment.

19. In any event, the State's submissions do not make the assumption suggested. The State develops submissions to show that what has been confirmed was the bare or non-proscribed ability of the public to enter unallocated Crown land: WAS [29]-[31].

20. **Proper construction of "existing public access to and enjoyment" of waterways:** The proper construction of this phrase was never in issue below. Neither the trial judge nor the Full Federal Court addressed any contention, or said, that the ability of the public to access and enjoy coastal areas was not (and could not be) confirmed by s.14 of the TVA, because that ability was not access or enjoyment of a type upon which s.14 of the TVA could operate due to the proper construction of the phrase "public access and enjoyment". Contrary to FRS [44], the proper construction of s.212(2) was not distinctly raised by appeal grounds 1-4 in the Full Federal Court. Hence, in WAS [41], the State correctly submitted that confirmation of the ability or liberty of members of the public to access and enjoy coastal areas, by s.14 of the TVA (made pursuant to s.212(2) of the NTA), was never substantially challenged.

21. In any event, contrary to FRS [36] and [42], the State expressly sets out the proper construction and effect of the phrase "existing public access to and enjoyment of" waterways in s.212(2) of the NTA: WAS [39]-[44]. This phrase refers to whatever public access and enjoyment of waterways etc existed or was available to the public prior to the enactment of the NTA, but without taking into account the effect of any pre-existing native title rights and interests. The qualification is because the NTA itself gives effect to whatever pre-existing native title rights and interests may be established. This aspect of the construction of s.212(2), as set out in the WAS [39], has not been addressed by the first respondents.

22. In FRS [24], the first respondents submit that the phrase "access to and enjoyment of" is composite. The submission may be accepted to that extent. "Access" refers to the ability of a member of the public to go upon land. "Enjoyment" refers to what activities may be carried out upon the land. Read as a composite phrase, it refers to the ability of the public to go upon unallocated Crown land and carry out activities, to the extent that such access and activities are not proscribed by any applicable statutory regime, ie the LA or the LAA.

23. That is consistent with the State's submission that "what was confirmed by s.14 of the TVA, in combination with s.212(2) of the NTA, was the ability or liberty of members of the public to access and enjoy waterways, etc, on unallocated Crown land without

prohibition": WAS [41]. Contrary to FRS [36], the State does not ignore the presence and meaning of enjoyment in the operative phrase.

24. The first respondents claim that there is no "access" which may be confirmed by s.212(2) of s.14 of the TVA because the relevant statutory regimes did not "create any ability for members of the public to access Crown land areas": FRS [26]. In substance, that is an argument that s.212(2) should only be construed to permit a law to confirm a positive statutory right of access. However, section 212(2) avoids the use of the word "right", compared to s.212(1)(b) and (c). See FCAFC [139] (2 JCAB pp 503-504). As well, the first respondents do not identify any generally applicable statutory access rights which Parliament might have had in contemplation when enacting s.212(2).

25. The first respondents' argument about this aspect of construction should not be accepted as a matter of textual analysis. The evident purpose of s.212(2) was to confirm "any" public access and enjoyment which existed when the NTA came into effect. No limits were placed upon the type of public access and enjoyment confirmed. The submissions made in FRS [21]-[28] do not provide any satisfactory basis to limit the meaning of "any". These submissions wrongly confine the meaning of "access" and "enjoyment" to a positive statutory right to obtain access and enjoyment, and then give no effect to the confirmation of "any existing public access and enjoyment".

26. The first respondents say that it is necessary to explain, beyond analysis of the language adopted, the general intent of Parliament in confirming public access and enjoyment to waterways etc: FRS [46]. The general ability of the public to go onto Australian beaches and waterways was regarded as important and worthy of protection: Commonwealth's Consolidated Submissions [31]-[34].

27. **Proper Construction of "right", "privilege" and "interest":** As explained in WAS [47], [51], and [52], the State's primary position is against strictly applying any concept of Hohfeldian rights in interpreting "right" or "privilege" in s.253. The statutory definition in s.253 emphasizes that the right or privilege is "in connection with" land or waters, or an estate or interest in land or waters. Parliament was more concerned with defining the right or privilege by reference to its subject matter, rather than limiting it by reference to its jurisprudential nature. The State's position against applying Hohfeldian jurisprudence is consistent with the express approach of Windeyer J in ***Mathieson v Burton*** (1971) 124 CLR 1 at 12-13. It also avoids giving "interest" in s.225(c) a different meaning from its use in s.253, as accepted at FRS [53].

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ANNEXURE OF STATUTORY PROVISIONS

Act	Version	Sections
Coastal Waters (State Title) Act 1980 (Cth)	As enacted	4
Land Act 1933 (WA)	Version 06-00-00 (Reprint 6: 2 May 1985)	3 and 164
Native Title Act 1993 (Cth)	Compilation 43 (22 June 2017)	212 and 253 ("interest")
Off-Shore (Application of Laws) Act 1982 (WA)	Version 01-00-00 (Reprint 1: 16 May 2003)	3
Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)	As enacted	14