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	ALIA 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

FIRST RESPONDENTS' SUBMISSIONS IN NO P34 AND P35 OF 2019

Part I: Certification

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

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Part II: Issues

2 The statement of the first issue of the State of Western Australia ("**State**") in its submissions as appellant in this Court ("**State submission**" or "**WAS**"), begs the question: was there was *any existing* "public *access* to and *enjoyment* of" (where abbreviated, "**prescribed access**") to waterways, beds and banks or foreshores of waterways, coastal waters or beaches whether above or below statutory high water mark ("**prescribed places**") of the Bindunbur or Jabirr Jabirr Determination areas ("**determination areas**") on 1 January 1994 when sec 212 of the *Native Title Act 1993* (Cth) ("**NTA**") commenced, which was capable as such of being confirmed by sec 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) ("**TVA**")?

3 It becomes clear that the assumption behind the formulation of the State's first issue is that what has been confirmed was, and could only have been, the bare ability under the *Land Act 1933* (WA) ("**LA**") of members of the public to enter Crown land: WAS **[3]**. The assumption is not accepted by the first respondents and it remains the subject of contention in this case.

4 A prior question, fundamental but yet to be fully considered is: what is the meaning of the phrase "access to and enjoyment of", the operative phrase in two statutory provisions it is necessary to construe in this case, subsec 212(2) of the NTA and sec 14 of the TVA? This question is the subject of the first respondent's primary responsive argument at [17]-[28] below.

5 The prior question that was live in the proceeding before the trial judge was: on 1 January 1994, were the elements of prescribed access satisfied by the circumstance only of a state of affairs created by a statute then in force, in which a member of the public was able, to enter upon lands and waters which were then Crown lands and there, to undertake activities other than any of the range of activities that the statue had made offence: WAS **[31]**, cf **WAS [3]**? The first respondent contends that the answer to the question must be, "no".

6 The statement by the State of its second issue it also begs the same question as the first issue: WAS **[4]**. The first respondent says it would be preferable to state it as follows: if the answer to the question stated in [**5**] above is, "yes", what was the legal character of such prescribed access immediately prior to the commencement of sec 14 of the TVA and what was its legal character immediately after? Was such prescribed access at either material time an "interest" as defined in sec 253 of the NTA, and if not, is it appropriate to include reference to it as an "other interest" in a determination of native title pursuant to paras 225(c) and (d) of the NTA? The first respondent contends that whether or not confirmed, such prescribed access was

not an "interest" for the purposes of the NTA and it was correct to remove it from the determinations.

Part III: Notice under sec 78B of the *Judiciary Act 1903*

7 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Statement of material facts

8 Apart from the corrections and additional matters set out in the paragraphs that follow, the first respondent otherwise generally does not dispute the statement of facts set out in the State submission at **WAS [9]-[17]**.

10 **9** When subsec 212(2) of the NTA and sec 14 of the TVA commenced, subsec 212(3) of the NTA provided that any confirmation under the section does not "extinguish or impair" any native title rights. The words "or impair" were removed in 1998.

10 It is not the case, as stated in the definition of "coastal areas", that the places the subject of the appeals by the State are all below the statutory high-water mark: **WAS [12]** and also **WAS [30]**. Some of the places in issue in relation to the Jabirr Jabirr determination are, or are within, areas landward of the statutory high-water mark. These are places in relation to which the determination recognises that exclusive native title rights exist. The places are identified by reference to (unidentified) *parts* of identified parcels of unallocated Crown land, as "being those parts where there are" prescribed places {**1AB 363.42-52 [(h)(iii)]**}.

20 **11** The *Land Act 1933* (WA) as amended (**LA**), which was in force when subsec 212(2) of the NTA commenced, by sec 164 prohibited, by making it an offence to undertake any of a range of activities *on*, but did not wholly proscribe entry by the public to, "public lands". Public lands were defined in subsec 164(1) of the LA to include all "Crown Lands". In turn, by subsec 3(1) of the LA, Crown Lands was defined to include all lands between the statutory high water mark and low water mark, but not so as to include all coastal waters below the low water mark: **WAS [13]**.

12 The *Land Administration Act 1997* (WA) ("**LAA**"), which repealed and replaced the LA in 1998 after sec 14 of the TVA commenced, by sec 267 made it an offence to undertake any of range of activities *on* but did not wholly proscribe entry by the public to "Crown land".

30 "Crown land" was defined in subsec 3(1) and, when read with the definitions of "land" and "alienated land", included all land not held in freehold and extended to waters within the limits of the State and all coastal waters of the State. Thus, the extent of prescribed places in the determination areas was increased after sec 14 of the TVA commenced, beyond those to which the statutory situation created by the LA applied.

13 Further, the range of activities that may be undertaken on Crown land under the LAA without committing an offence is different and arguably narrower than it was under the LA cf **WAS [31]**; and there is an additional list of activities that are prohibited under the *Land Administration (Land Management) Regulations 2006* (WA) ("**LAR**") as well as provisions empowering a wide range of "authorised persons" to grant, withhold, revoke and amend "permissions" in relation to the doing of something that is otherwise prohibited (reg 6 of the LAR) and who may direct a person to do something otherwise prohibited or to not do something otherwise permitted {reg 8 of the LAR}. So, the state of affairs of the public viz-a-viz Crown land is considerably different under the LAA regime than it was under the LA when the NTA commenced and when any existing prescribed access to prescribed places was confirmed.

14 While there may be no issue in the appeals concerning the extent of the public right to fish and the public right to navigate ("**public rights**"): **WAS [15]**, consideration of the existence of those rights is relevant to questions of construction and operation of subsec 212(2) of the NTA and sec 14 of the TVA, a consideration developed further, below at [24]-[28]. Similarly, it is relevant to consider whether if the Full Court was wrong to find that the state of affairs under the LA concerning entry by the public did not satisfy the elements of prescribed access, whether confirmation would have had the effect, or was intended as a matter of construction to have the effect, of abrogating the public rights.

15 While the trial judge required more specific identification in the Jabirr Jabirr determination of the geographical locations of some of the prescribed places, he did not require the specific identification of the geographical locations of the prescribed places that are part only of areas identified in the Jabirr Jabirr determination in Schedule 6 [8.(h)(iii)] {**1AB 363.42-364.15**}: **WAS [17]**.

16 Prescribed places that are the subject of the provisions in the determination of the trial judge {**1AB 363.12-364.15 [Sch 6 8.(h)], 1AB 398.20-50 [Sch 7 (12)(f)]**} that the appellant seeks to have reinstated following their removal by the Full Court {**2AB 518.34 [2], 2AB 521.34 [2]**} fall into three distinct geolegal categories:

(a) places landward of the common law high water mark (including places landward of the statutory high water mark) where: in most, exclusive native title rights exist; the public rights do not exist; access to those places as public lands was subject to the state of affairs created by the LA when any sec 14 TVA confirmation occurred;

(b) places seaward of the common law high water mark where: non-exclusive native title exists; the public rights ordinarily exist; and, to the extent they were public lands at

the time, access to those places as public lands was subject to the state of affairs created by the LA; and

(c) places seaward of the low water mark where: non-exclusive native title exists; the public rights ordinarily exist; and, to the extent they were not public lands when subsec 212(2) of the NTA commenced, access by the public was not subject to the state of affairs created by the LA.

Part V: Argument in answer to the argument of the appellants

Primary responsive argument

17 The Full Court was correct to remove the references in the determinations to certain places as being subject to confirmed public access and enjoyment pursuant to sec 14 of the TVA. In summary, the premises in the first respondents' argument are:

(a) sec 14 of the TVA applies only to confirm "public access to and enjoyment of" prescribed places if and where it existed on 1 January 1994 when subsec 212(2) of the NTA commenced;

(b) the state of affairs viz-a-viz the public and Crown land under the LA on 1 January **1994** was that certain offences *on* Crown land were created, *entry* onto Crown land was not prohibited, but *access* was neither facilitated nor guaranteed and may not be available from all directions or in all instances because of surrounding tenure or geographical or other barriers or restrictions;

(c) the elements of the TVA requirement for *public access to and enjoyment of* a place are not satisfied in the circumstances of (a) and (b), and in the absence of reliance on any existing common law or statutory right of prescribed access to prescribed places on the determination areas; and any evidence of fact said to constitute prescribed access, the appeal must fail;

(d) nor can those circumstances in any event amount to possession by the public of a right or interest or prescribed access sufficient (whether because of the definition of "interest" in sec 253 of the NTA or otherwise) to trigger the requirement in paras 225(c) and (d) of the NTA.

The state of affairs of Crown land and the public on 1 January 1994

18 The foundational question in this matter involves construction of the phrase in subsec 212(2) of the NTA and sec 14 of the TVA which conditions the confirmatory application of the TVA. That question is: was there, at 1 January 1994, "*any existing public access to and enjoyment of*" prescribed places in the determination areas.

19 The Full Court was correct to hold that this necessary condition for confirmation may be constituted by an appropriate state of affairs of law or demonstrated by physical facts; and that it was not constituted by reference to the state of affairs created by the LA alone {**1AB 312.28-513.20 [169]-[172]**}. All that has been established in this case is that at the relevant time the LA was in force and provided for offences *on* Crown land but did not prohibit *entry*. It would not matter if that situation could amount to a privilege, or otherwise to an "interest" within the definition in sec 253 of the NTA (which is denied), because that state of affairs under the LA alone plainly did not constitute existing public access to and enjoyment of prescribed places and therefore did not trigger any confirmation of that state of affairs by sec 14 of the TVA. No statutory or common law right or interest has been found to exist, and no facts about entry to or activities on Crown land have been relied upon to establish any confirmable prescribed access.

Construction of "any existing public access to and enjoyment of"

20 ***Meaning of "existing"***. The finding of the Full Court that "existing" for the purposes of subsec 212(2) of the NTA and sec 14 of the TVA must at least mean existing when sec 212 was enacted, namely 1 January 1994 {**2AB 502.35-46 [135]**}. That is not challenged **WAS [4]**.

21 ***Meaning of "any existing"***. The phrase appears in sec 212(2) of the NTA but the word "any" does not appear in sec 14 of the TVA. It is clear enough that the TVA could not confirm something that did not exist and so must be read as if the word appears in the TVA provision. Its absence from the TVA plainly did not broaden the scope of what could be confirmed. Nor does it indicate that the precondition for confirmation would necessarily be satisfied *at all*, or that it could only be satisfied by something that applied indiscriminately to *all* prescribed places. The inclusion of the word "any", in the NTA, cannot be taken to lessen the effect of the cumulative elements "public access to" and "enjoyment of". Specifically, "any" cannot be taken to suggest that any situation, however bare, in which a member of the public may enter and undertake limited non-prohibited activities on Crown land will suffice. Nor does it render irrelevant, consideration of the legal basis for, or the nature or extent and location of, what had in fact been done by members of the public on a prescribed area.

22 ***Meaning of "access".*** The ordinary meaning of "access" in relation to land or property is "way, means or opportunity of approach or entry": Macquarie Dictionary Online, Macmillan Publishers Australia, 2019. The Collins English Dictionary 2019 (Online) defines "access" similarly as "the act of approaching or entering", "the right or privilege to approach, reach, enter, or make use of something" and as "a way or means of approach or entry". The Australian Law Dictionary (3rd edition) (Online) 2018 defines "access (property law)" firstly as a "statutory or common law right to go onto property for any of a wide range of particular

purposes, established through case law or by statute. Examples occur in mining." The word thus, ordinarily, is not so concerned with entry per se, or with remaining on or use of an area as it is with the means by which approach and entry are possible. The LA does not prohibit *entry*, but it does not provide *access*, let alone *enjoyment*.

23 ***Meaning of "enjoyment"***. The ordinary meaning of "enjoyment" is "1. the possession, use, or occupancy of anything with satisfaction or pleasure. 2. a particular form or source of pleasure. 3. *Law* the exercise of a right: *the enjoyment of an estate*": Macquarie Dictionary Online, Macmillan Publishers Australia, 2019. "Enjoyment", in relation to land, is something that cannot without misfeasance be unreasonably diminished or interfered with: *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 at 650.3 (per Lord Westbury LC), 651.8 (per Lord Cranworth) and 653.8 (per Lord Wensleydale), 11 ER 1483; *Hargrave v Goldman* (1963) 110 CLR 40 at 59.5, 62.4 (per Windeyer J). "Enjoyment" thus is only available where entry is associated with a relationship to the area, ordinarily a relationship of 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. A member of the public on Crown land under the LA had no basis for enjoyment of it and would not have been able to sustain any action to protect enjoyment.

24 ***Meaning of "access to and enjoyment of"***. The operative phrase is a composite one, involving cumulative elements of precondition for any confirmatory application of sec 14 of the TVA. The phrase is clearly enough more restrictive than the word "access" on its own. For the condition to be satisfied, there must be an existing means by which the area in question may be entered and, as well, an existing relationship capable of permitting and sustaining the protection of "enjoyment" of the area itself by the person who may enter.

25 Neither appellant has engaged with the meaning of "access" or "enjoyment" let alone their cumulative effect in a phrase. Rather, they have assumed that non-proscription of entry will satisfy both words and the phrase in which they both appear.

26 The LA did not facilitate or provide "access to" Crown land. It did not make Crown land available for public access or create any ability for members of the public to access Crown land areas. Rather, it merely provided for offences "*on*" Crown land: sec 164 of the LA and did not prohibit entry. As such, the LA was silent as to "access" and merely contemplated that where access was otherwise available, members of the public may avail themselves of that access to physically enter and remain but not so as commit an offence. In that sense, the LA did not create any "ability" for public access to Crown lands, though there may be "liberty" to enter when and where physical access is in fact possible.

27 The LA did not provide any public access to an area of Crown land surrounded by a freehold estate, for example. Rather, in such a case, the owner of an adjoining freehold may have access or may provide access to others by granting permission to cross the freehold, but such access would not have been "public access". Similarly, the LA did not provide land access to Crown lands above the common law high water mark. In the Bindunbur determination, for example, the presence of aboriginal reserve over most of the area would preclude public access from the landward side to the prescribed areas seaward of the reserve boundaries. However, such lands may be accessed from adjoining seaward areas but only by exercise of the public rights. Similarly, for much of the coastline in the Jabirr Jabirr determination area, but in that determination area, it may (or may not) be possible to access those parts of some areas that are prescribed places, from a public road that adjoins the areas. The LA did not provide the access in such cases. Rather any access was provided by the status of adjoining areas. Further the LA did not provide access to Crown land inaccessible because of geographical barriers or any legal restraints on access to particular areas. Any *ability* of the public to *access* such areas would depend upon factors other than the LA, which only contemplates *entry*. In the circumstances, where the LA alone is relied on to have triggered confirmation by sec 14 of the TVA, a case by case examination of the areas would be required to ascertain if public access was possible.

28 In conclusion, the LA, when the NTA commenced, did not provide public access to prescribed places or any ability to enter. Nor did it provide a situation capable of sustaining public enjoyment of prescribed places. All that the LA provided was a non-prohibition of entry and restrictions on use. It is clear that that situation did not constitute "public access to and enjoyment of" prescribed places in the determination areas and the Full Court was correct to find in the circumstances of this case that there was nothing that warranted the inclusion by the trial judge as "other interests", the items of the determinations that the Full Court removed.

A. Further response to argument about the trial judge's decision (WAS [18])

29 In the first decision of the trial judge on this issue what he said "is likely to fall within the definition" of "interest" in sec 253 of the NTA was, "the public access referred to in s 14 of the TVA": {**1AB 220.19-22 [644]** and see **WAS [18(a)]**. That is to say, any "existing public access to and enjoyment of" prescribed places was likely to have been intended to fall within the statutory definition of "interest". He did not say at that point that the state of affairs under the LA amounted to such public access to and enjoyment of prescribed places. The trial judge did not turn his attention to the meaning or content of the phrase that identifies both the precondition to and the intended object of confirmation. Rather, he moved on without explanation to a conclusion in his second decision in which he 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": {**1AB 259.39-43 [20]** and see **WAS [18(b)]**.

B. Further response to arguments about the Full Court's decision (WAS [19]-[28])

30 Other than as set out in the paragraphs that follow or as appears from the arguments in answer to the appeal arguments, the first respondent need not respond specifically to appellant's account of the proceeding in and decision of the Full Court and relies on the record of that proceeding and decision.

31 To be clear, it is correct that on appeal the claimants did not claim that sec 14 of the TVA could never have operative effect: **WAS [20]**. However, the claimants did claim that the section had no operative effect in the circumstances of this case; there having been a failure to demonstrate the existence, when the NTA commenced, of anything properly characterisable as "public access to and enjoyment of" any of the prescribed places within the determination areas - whether as a matter of law or fact or on the way the State had put its case. Further, the claimants acknowledged that there may be some application to the public rights commensurate with their geographical and purposive limitations: {**2AB 493.38-41 [18]**}, and appeal grounds 1-4 {**2AB 497.20-45 [1]-[4]**}.

32 It is not necessary to stay long to consider in this Court exactly how the statement of the Full Court that, if public access to and enjoyment of prescribed places was established as a matter of physical fact, then that public access and enjoyment of those places would be an "other interest" for the purposes of para 225(c) of the NTA: see **WAS [27]**, quoting from {**2AB 512.41-45 [170]**}. The statement of the Full Court was obiter, was not, need not have been, and could not have been, fully explored in this case because no relevant evidence was presented and any possibility of sec 14 of the TVA being triggered by physical fact was eschewed by the appellant. In an appropriate case, questions might arise about whether and how evidence of physical fact might establish "public access to and enjoyment of" a place, or whether the physical facts in and of themselves could satisfy the requirement or whether they might evidence the existence of, or as a corpus of fact constitute, an identifiable or legally recognisable relationship of certain persons, or the public generally, with an area. Such matters are not ripe for determination in this case.

33 For the same reasons, it is to overread the decision of the Full Court to suggest that it *necessarily* involves an acknowledgement that sec 225 of the NTA uses the word "interest" in a wider sense than in sec 253: see **WAS [28]**. Further, the Full Court appeared tentative in its statement, introducing it with, "we accept that in its terms, s 212 does seem to contemplate", and later pointing out that in a case involving evidence of physical facts that "questions of fact

and degree would be involved": see {**2AB 512.39, 513.18-19 [170], [172]**}. The respondents would accept as a matter of possibility that after full consideration in an appropriate case, "public access to and enjoyment of" a place established as at the relevant date on the basis of evidence by physical fact in particular circumstances may satisfy the definition of "interest" in sec 253. Particular circumstances may involve, for example, questions and evidence about any grant, custom and usage, prescription, acquiescence, adverse possession, any particular status of a place, the arising or assumption of a duty on the part of the Crown and like situations. That such a case may involve difficult questions about the law of the foreshore and of the sea does not mean that Parliament was not aware of that state of the law or that it did not intend the development of the law to run its course.

C. Further response to the State appeal arguments (WAS [29]-[37])

34 It has already been noted both that some of the prescribed places mentioned in the Jabirr Jabirr determination extend landward of the statutory high water mark; and that after the NTA and TVA came into operation, by the definitions of "Crown land" and "land" in the LAA the status of Crown land was extended to places seaward of the low water mark to areas not previously the subject of the state of affairs of the public viz-a-viz Crown land under the LA: contra **WAS [30]**. Thus, the ability or liberty relied on in the State submission as constituting prescribed access, did not extend to the latter areas when the sec 14 TVA confirmation occurred.

35 When subsec 212(2) of the NTA was enacted, all Crown lands and "lands reserved for or dedicated to any public purpose" were defined as "public lands". All of these lands were the subject of the "Offences on public lands" provisions of sec 164 of the LA but there was no proscription against entry: **WAS [31]**. The reference to reserved and dedicated lands is significant because the LA at the relevant time contemplated the establishment or existence of particular places that were likely the subject to *rights* of entry by the public or at least entry *as of right* by the public. The first respondents do not say that the status of itself of such places would necessarily satisfy the requirements for confirmation by sec 14 of the TVA but there is no apparent reason to think that Parliament intended to preclude (by not expressly referring to rights in subsec 212(2) of the NTA or sec 14 of the TVA) such places from confirmation simply because the public may have *rights* of access.

36 It is said that, "Subject to these proscribed activities [in sec 164 of the LA], there is no prohibition against a person accessing *and enjoying* unallocated Crown land, including the coastal areas" (italics added): **WAS [31]**. The submission fails to take account of the ordinary meaning or content of "enjoying" or on what basis it might be said that members of the public may relevantly "enjoy" a place to which they have no greater relationship than they are not

prohibited from entry. The State submission does not anywhere consider the content of the operative phrase "public access to and enjoyment of" public lands. Rather the thrust of the State argument appears to depend on ignoring the presence and meaning of "enjoyment" and its role in the operative phrase. On the basis of the argument at [24]-[28] above, the first respondents contend that "enjoyment" of, let alone "public access to and enjoyment of" a place is simply not available to a member of the public on the basis only that entry is not proscribed.

37 The contention that the Full Court accepted that an ability or liberty to both "access" and "enjoy" arose from the non-proscription of entry under the LA, goes at least one step too far: **WAS [32]** and see also **WAS [40]**. The relevant statement of the Full Court was that, "there appears no basis upon which it can be said that the law recognises … any right, entitlement or interest to roam across, *let alone enjoy,* unallocated Crown land": {**2AB 507.38 [149]**} cited in **WAS [32]**. Nor is there, in the other paragraphs of the Full Court decision cited, any support for a conclusion that the Full Court regarded the state of affairs under sec 164 of the LA as one that contemplated both public entry onto and public *enjoyment* of Crown lands. The Full Court was not collapsing "access" and "enjoyment" or dealing with an "ability" or "liberty", when it was rejecting contentions about the creation of a right to roam and the conversion of a convention into an interest {**2AB 509.19-47 [157]-[158]**}. Similarly, when it was rejecting the proposition that a mere ability or liberty can be described as a "privilege", the Full Court was not accepting that the public were able or at liberty to "enjoy" Crown land under the LA: {**2AB 510.8-10 [159]**}. Finally, the absence of any such acceptance is starkly illustrated in the conclusion of the court which pointedly omits reference to *enjoyment* when it referred to, "an ability or liberty of the public to *enter* upon unallocated Crown land": {**2AB 512.28-30 [169]**}.

38 What the Full Court rejected as an *interest* because it could not be *vindicated* was not the ability or liberty of the public to enter Crown land but the existence of any right, entitlement or interest to roam across unallocated Crown land: contra **WAS [33]**, {**2AB 507.38-39 [149]**}. The court rejected the "mere ability or liberty" as a *privilege* on the basis of its construction of secs 212 and 253 of the NTA and sec 14 of the TVA as not operating to "create", or permit the "conversion" of a custom or convention to, a right, from something that had no prior existence as a right. There was no reference to any notion of vindication in that context: contra **WAS [33]** and see {**2AB 509.20-510.11 [157]-[159]**}.

39 The idea of a right or interest as a claim the law recognises by enabling it to be vindicated, is not expressly a feature of the analysis of rights by W N Hohfeld in "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 ("**Hohfeld**"). Vindication is about the legal recognition and enforceability of a "right", not about the

identification of "right" as a fundamental jural relation. The State submission confuses the two. Something that the law does not recognise and cannot be enforced is not to be confused with something that has no correlative of duty, though the notions may overlap. Recognition and enforceability (vindication) in real world jurisprudence trump Hohfeld. A 'right' to roam over unallocated Crown land cannot be vindicated because it is not recognised. A mere ability or liberty to enter Crown land under the LA was not enforceable and could not be vindicated. It therefore cannot be recognised a right. Equally, a mere ability or liberty to enter Crown land would not pass the Hohfeld test as a right; as there is no corresponding duty on the Crown to ensure or protect entry: contra **WAS [34]**. In response to the later arguments of the State, the same reasoning can be applied to reject any equation of mere ability or liberty with a privilege or an interest.

40 The Full Court was correct also, to regard a "privilege" as involving something "invested, given or authorised" and as something giving some members of the public a right, advantage or immunity over others, for the reasons given below at [47]-[51] when responding to **WAS [45]**: see **WAS [35]**.

41 It is unremarkable that the Full Court might hold that an access *right* established by physical use might be an "other interest" for the purposes of para 225(c) of the NTA: **WAS [36]**.

***Effect of sec 14 of the TVA* (WAS [38]-[44])**

42 As noted earlier, the State submission does not engage with the content or meaning of the phrase "existing public access to and enjoyment of" in sec 14 of the TVA. Rather, the State submission assumes the phrase to be satisfied by the only thing it has consistently relied on in the case; the state of affairs created by the LA in which entry to Crown land was not proscribed. The State submission does not explain its references to that state of affairs as the ability to access *and enjoy* unallocated Crown land: see **WAS [40]** and paras [35]-[38] above responding to **WAS [31]-[32]**. Nor did the Full Court accept in any of the paragraphs of the judgement cited for such acceptance, that both access *and enjoyment* were involved in the ability or liberty relating to unallocated Crown land. Specifically, the Full Court expressed the view that, 'there is no basis upon which an ability or liberty of the public to *enter* upon unallocated Crown lands … could be characterised as a "privilege"' (italics added): {**2AB 512.28-30 [169]**}, contra **WAS [40]**.

43 It is not the case that "the existence of public access and enjoyment of prescribed places as an "ability" or "liberty" has never been seriously or substantively challenged by claimants: **WAS [40]**. Rather, the claimants have accepted that the state of affairs viz-a-viz the public and Crown land under the LA may be regarded as providing an "ability" of a member of the public

to *enter* Crown land, and that it may be characterised as entry at the *sufferance* of the Crown but they have consistently challenged any suggestion that the state of affairs created by the LA involves the existence of *public access to and enjoyment of* prescribed places.

44 Similarly, and contrary to the State submission, the claimants have substantially challenged and consistently denied that sec 14 of the TVA operated to confirm any "ability" or "liberty" of members of the public to access and enjoy prescribed places on Crown land: see grounds of appeal 1-4 {**2AB 497.20-45 [1]-[4]**}, contra **WAS [41]**.

45 While the claimants may accept that any confirmation effected by sec 14 of the TVA does not strengthen that which has been confirmed, or transform or convert it into a positive legal right (if it was not a positive legal right immediately prior to confirmation), they do not accept that sec 14 of the TVA had any application to, or confirmatory effect on, the state of affairs created by the LA, in particular on any ability or liberty to enter prescribed places resulting from non-proscription: **WAS [42]**. What it might mean to "confirm the absence of any [statutory] prohibition" is not explained. It cannot operate as a fetter on the power of the Parliament to refrain from introducing a prohibition or otherwise amending its legislation as it sees fit.

46 If what is meant is that confirmation of any existing public access to and enjoyment of a prescribed area would have the effect that native title holders could not exercise a native title right to exclude others, so much may be accepted; but the assumption of the argument, that a mere absence of a statutory prohibition on entry is something that would have been confirmed, is false: **WAS [43], [44]**. It is perhaps an understatement to argue that a construction of subsec 212(2) of the NTA that would view a bare ability to enter a prescribed area as having been confirmed as "public access to and enjoyment of" such an area pursuant to the NTA, would have to explain why Parliament intended that a bare ability to enter should be so enlarged by confirmation. It would also have to explain why Parliament so intended, irrespective of whether there was any historical actual or future potential use, irrespective of any inaccessibility of an area, irrespective of whether there was any legal capacity for enjoyment, irrespective of the indiscriminate and universal application of such confirmation, irrespective of the critical and permanent negation and practical extinguishment (where exclusive native title rights were later recognised) of any ability to exercise a right to exclude, and irrespective of the absence of clear and plain language that could have expressly produced such a result. Yet this is the effect of the arguments of the appellants in this Court. Such arguments clearly enough seek to stretch the language of subsec 212(2) of the NTA and the general language and statements made in Parliament too far.

Proper construction of "right" in sec 253 of the NTA **(WAS [45]-[51])**

47 It is said that "right" in the definition of "interest" in sec 253 of the NTA does not necessarily carry with it the implication that it means a right associated with a correlative duty: **WAS [45]**. Much of the argument of the State thereafter depends upon rejection of the Hohfeldian conception of a "right". The State relies on *Mathieson v Burton* (1971) 124 CLR 1 at 12 per Windeyer J, for the general proposition that an immunity, or exemption from legal consequences can be right or privilege. However, that proposition is not supported by that authority. Windeyer J, was rejecting an argument that a "like right" to continue in possession of premises, which was available to the child of a deceased person, should be characterised not as a right but merely as an immunity, or exemption. In that case there was a statutory giving or investing of the "like right" or immunity, which is not comparable with the case here. Also, unlike the case here, the content of the "like-right" was in effect an entitlement to continuing possession of leased premises; something clearly characterisable as a right. An absence of a prohibition on entry by a member of the public onto Crown land is not comparable.

48 The assertion that the word "right" in the definition of "interest" in sec 253 of the NTA was intended to be something other than is usually understood by the word, is made without explanation or reference to authority or relevant extrinsic material. It is not explained how a right might be "defined by reference to land or waters" or otherwise than ultimately involving an obligation enforceable against another person: see **WAS [46]**. If something is not ultimately enforceable against another person it cannot, in property law, be a "right". If what is being put is that a bare ability to enter Crown land is a right *in rem* but not enforceable against a person, it makes no sense. A right *in rem* is enforceable against the whole world (of people): contra **WAS [47]-[48]**. The classic description of a right of exclusive possession is, after all, the right to possession, occupation, use and enjoyment as against the whole world.

49 It may be accepted that the purpose of subsec 212(2) of the NTA was to protect "any existing public access to and enjoyment of" of prescribed places. However, it does not follow that what was intended to be protected was anything less than that, and in particular it does not follow that what was intended to be protected was a bare ability or liberty of members of the public to enter Crown land. It would be surprising if it were otherwise given that such a situation would make access and enjoyment of prescribed places available to all whether or not ever availed of by anyone before 1 January 1994 and by persons or classes of persons who had never availed themselves of the opportunity at all; at great cost to native title rights and interests: **WAS [50]-[51]**. For the argument to succeed would be convenient for the State and the Commonwealth but it lacks merit.

***Proper construction of "privilege" in sec 253 of the NTA* (WAS [52]-[55])**

50 The contention that the term "privilege" in the definition of "interest" in sec 253 of the NTA is to be considered as something exercisable *in rem* rather than being something enforceable against another person has no greater force than the same contention made about the word "right". The submissions above about the latter contention are also relied on in answer to the arguments considered here.

51 The contention asserting that the "jurisprudential meaning of "privilege" is simply the negation or absence of a legal duty" relies on a misreading of Hohfeld's analysis of "privileges": **WAS [53]**. No authority is cited for the proposition but in Hohfeld's analysis of privileges and duties as opposites, an apparently similar sentence appears in Hohfeld, 32 at .7 of the page, which reads: "The privilege of entering is the negation of a duty to stay off". Significantly, Hohfeld does not refer to an *absence* of a legal duty. What Hohfeld went on to say was, "some caution is necessary at this point, for, always, when it is said that a given privilege is the mere negation of a duty, what is meant, of course, is a duty having a *content or tenor precisely opposite* to that of the privilege in question" (italics added). In the present cases, if the bare ability of the public to enter Crown land was a privilege, it would only have arisen because of a precise negation of a duty of the public to stay off Crown land. As the public has never been under a *duty* to stay off Crown land, any ability to enter Crown land does not involve the negation of a duty, only its absence. Contrary to the State's contention, Hohfeld does not suggest that privilege is the *absence* of a duty. The scheme of the LA clearly does not provide any negation of a duty to stay off Crown land, let alone the precise negation of any identified duty of the public. Nor does Hohfeld anywhere state that "the *dominant technical meaning* of ["privilege"] is simply the negation (*or absence*) of a legal duty." (Italics added) What Hohfeld actually said at 39 (at .6 of the page) was that the "*dominant* technical meaning of the term is, similarly, negation of *legal duty*" (italics in original, underlining added). Thus, the argument in **WAS [53]-[55]** cannot stand. The meaning of "privilege", as applied by the Full Court accords closely with the Hohfeldian analysis. It can be an "exemption" (which would involve the precise negation of a particular duty) and it may be "invested, given or authorised" (which would, again, involving the precise negation of a particular duty). It follows that a privilege will also be something "*enjoyed* by a person beyond the common advantages of others" (italics added): {**2AB 510.43-511.18 [162]-[165]**}. The absence of a duty to walk on the footpath on the left hand side of the road does not involve that it is a privilege to do so.

Proper construction of "other interests" in para 225(c) of the NTA **(WAS [56]-[61])**

52 It is not accepted by the first respondents that the Full Court must be understood as having 'implicitly recognised that the term "other interests" in s.225(c) extended beyond what constituted an "interest" for the purposes of s 253': contra **WAS [56]**. It is not accepted for the reasons set out in [32] above responding to **WAS [27]**. In short, a finding based on evidence of physical facts, that there is "existing public access to and enjoyment of" a particular place, does not, without more, necessarily entail that the finding will be that an "interest" is *not* involved.

53 It may be accepted that adoption of the construction of the words, "right" and "privilege" as advanced by the State might avoid any need to attribute different meanings to "interest" in sec 253 and para 225(c) of the NTA, but it would say nothing about the merits of the State submission on that point. It also may be accepted that it is undesirable to attribute a different meaning to "interest" for the purposes of para 225(c): **WAS [57]-[61]**. No such difficulty arises where something is confirmed by sec 14 of the TVA that existed as an "interest" within definition in sec 253 of the NTA, because such a thing properly can be described as such for the purposes of para 225(c) of the NTA.

54 A supposed difficulty may arise in a case, if there is one, in which it is held that something that is not an "interest" for the purposes of sec 253 of the NTA is confirmed pursuant to subsec 212(2) of the NTA in relation to an area within in which native title is determined to exist. However, it would be wrong, in the view of the first respondents, to attribute to such a thing, a legal status, qualities and effect on native title that it does not have, solely for the purpose of public notification of its existence and confirmation. Just as the nature and extent of native title rights are to be described accurately and exhaustively, so must any "other interests". Any notification purposes of sec 225 of the NTA could not excuse a significant and substantive untruth. It is to be remembered also that once something is identified as an "other interest", para 225(d) requires the "relationship" between that thing, as an "interest", and the native title rights to be determined. Thus, the untruth would be compounded. If anything is to be formally notified about such a circumstance it is to be otherwise than by its false determination as an "interest".

55 In this case, unless it is held that the state of affairs under the LA as contended for by the State and the Commonwealth, as at 1 January 1994, constituted "existing public access to and enjoyment of" the prescribed places on the determination areas, and that it was confirmed as such by operation of sec 14 of the TVA, but not as an "interest" within the definition in sec 253

of the NTA, it will not be necessary to consider any questions about any necessity to, or the means of, properly recording or notifying it.

56 If the question requires an answer, the present form of the determinations, and native title determinations generally already sufficiently address the matter; as native title and its exercise are (and are generally expressed in native title determinations to be) subject to the laws of the State and the Commonwealth [including the NTA and the TVA] and the common law. It may be appropriate and sufficient if anything further than that be required; for the Native Title Register to include reference to the situation as established in the circumstances of the case in which it arises, as "other details about the determination or decision" pursuant to subsec 193(3) of the NTA.

57 Unless this Court finds that there was confirmation of prescribed access to the prescribed places on the determination areas and that what was confirmed was, immediately prior to confirmation, an interest as defined in sec 253 of the NTA, the orders sought by the appellants should not be made.

Part VI: Time estimate

58 The respondent would seek no more than 2 hours for the presentation of the respondent's oral argument, that is including that in P36 and P37 of 2019 as well.

13th September 2019

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ANNEXURE – LIST OF PARTICULAR CONSTITUTIONAL PROVISIONS, STATUES AND STATUTORY INSTRUMENTS REFERRED TO IN THE SUBMISSIONS

Constitutional provisions, statues and statutory instrument	**Version**	**Submission Reference**
*Native Title Act 1993 (*Cth)	As enacted	sec 212, 225, 253
*Native Title Act 1993 (*Cth)	Compilation No. 43 (22 June 2017)	sec 193, 212, 225, 253
Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)	As enacted	sec 14
Land Act 1933 (WA)	Version 6-00-00 (Reprint 6: 2 May 1985)	sec 3, 164
Land Administration Act 1997 (WA)	Version 07-00-00 (Reprint 7: 6 October 2017)	sec 3, 267
Land Administration (Land Management) Regulations 2006 (WA)	Version 01-b0-01 (As at 12 May 2018)	reg 6, 8