**STATE OF WESTERN AUSTRALIA v MANADO & ORS (P34/2019)**
**STATE OF WESTERN AUSTRALIA v AUGUSTINE & ORS (P35/2019)**
**COMMONWEALTH OF AUSTRALIA v AUGUSTINE & ORS (P36/2019)**
**COMMONWEALTH OF AUSTRALIA v MANADO & ORS (P37/2019)**

Court appealed from: Full Court of the Federal Court of Australia
[2018] FCAFC 238

Date of judgment: 20 December 2018

Special leave granted: 21 June 2019

Section 212(2) of the *Native Title Act 1993* (Cth) ("the NTA") provides that a law of the Commonwealth, a State or a Territory may confirm "any existing public access to and enjoyment of: (a) waterways; or (b) beds and banks or foreshores of waterways; or (c) coastal waters; or (d) beaches." Acting pursuant to this provision, the Parliament of Western Australia enacted s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) ("the TVA"), which came into effect on 4 July 1995. It relevantly provided that "existing public access to and enjoyment of" (a) waterways; (b) beds and banks or foreshores of waterways; (c) coastal waters; or (d) beaches is "confirmed".

On 2 May 2018, in the Federal Court of Australia, North J made two determinations of native title which recognised that the members of the Jabirr Jabirr/Ngumbarl native title claim group and Bindunbur native title claim group (the Claimants) possessed native title rights and interests in areas of land north of Broome in the Dampier Peninsula in Western Australia. 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. 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')**.** North J 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.

The Claimants appealed against the form of each Determination. They contended that s 225 of the NTA required that, in order for the public access confirmed by s 14 of the TVA to be referred to in a determination, the State needed to satisfy the Court that the public were possessed of an existing *right* of access to and enjoyment of the waterways, etc, in the area. Alternatively, they contended that the Court needed to be satisfied that, at the time the NTA commenced operation, the public in fact physically enjoyed access to identified areas. The State contended that s 14 of the TVA, in accordance with s 212(2) of the NTA, confirmed a legal privilege to access the coastal areas, and that it was unnecessary to define that privilege by reference to actual use.

On appeal, the Full Court of the Federal Court (Barker, Perry and Charlesworth JJ) held that there were two ways in which s 212(2) applied in circumstances such as the present case: (1) first, 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 NTA) at the time that s 212(2) of the NTA was enacted; (2) second, the public access interest may be shown to be a relevant interest 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).

The Full Court found that in the present case, neither of these ways by which s 212(2) might apply was relied upon by the primary judge in making the impugned determinations. No demonstrated common law or statutory right of such access was identified. Nor did the State or any other respondent lead any evidence or otherwise attempt to prove at trial that public access to or the enjoyment of the places listed in the determinations actually and physically existed at material times. They therefore concluded that the primary judge erred in construing s 212 as enabling an ability of or liberty in the public to access unallocated Crown land that answers the description of land and waters 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. It followed that those parts of the two determinations that purport to determine other interests on the basis of s 14 of the TVA should be removed from the determinations.

The grounds of the appeals by the State of Western Australia include:

- The Full Federal Court erred in law in determining that the existing public access to and enjoyment of waterways, beds and banks or foreshores of waterways, coastal waters or beaches, as at 1 January 1994, which was confirmed by s 14 of the TVA in accordance with s 212(2) of the NTA, was not a right or privilege in connection with land or waters within the definition of "interest" in s 253 of the NTA.

The grounds of the appeals by the Commonwealth include:

- The Full Court erred in construing s 212(2) of the NTA as requiring the existence of a "right" or the fact of physical access to and enjoyment of a prescribed area before it will be said there was "existing public access to and enjoyment of" a prescribed area.