



## HIGH COURT OF AUSTRALIA

18 March 2020

STATE OF WESTERN AUSTRALIA v MANADO & ORS; STATE OF WESTERN AUSTRALIA v AUGUSTINE & ORS; COMMONWEALTH OF AUSTRALIA v AUGUSTINE & ORS; COMMONWEALTH OF AUSTRALIA v MANADO & ORS  
[2020] HCA 9

Today the High Court unanimously allowed four appeals from a judgment of the Full Court of the Federal Court of Australia. The appeals concerned the confirmation of existing public access to and enjoyment of land or waters which are the subject of native title determinations under the *Native Title Act 1993* (Cth).

Section 212(2) of the *Native Title Act* relevantly reposes in the Commonwealth, a State or a Territory the authority to, by legislation, "confirm any existing public access to and enjoyment of" waterways, beds and banks or foreshores of waterways, coastal waters, or beaches ("beaches and foreshores"). Pursuant to s 212(2), the Parliament of Western Australia enacted s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) ("the Titles Validation Act"), which confirmed the ability of members of the public as of 1 January 1994 (being the date s 212(2) commenced) to access and enjoy beaches and foreshores.

Section 225(c) of the *Native Title Act* requires a determination of the existence of native title in relation to a particular area to include a determination of "the nature and extent of any other interests in relation to the determination area". Section 253 relevantly defines "interest" as including "any other right" or "privilege" over or in connection with land or waters. A judge of the Federal Court made two determinations of native title over land and waters in the Dampier Peninsula, Western Australia, which relevantly included areas of unallocated Crown land comprised of beaches and foreshores. In doing so, the judge recorded the existing public access to and enjoyment of these beaches and foreshores pursuant to the confirmation by s 14 of the Titles Validation Act, within the category of "Other Interests". The primary judge held that because public access to and enjoyment of the relevant land and waters was not proscribed, it was a "privilege" which, as confirmed by s 14 of the Titles Validation Act, fell within the definition of "interest" as defined in s 253 of the *Native Title Act*, and was accordingly within the category of "other interests" in relation to the determination areas within the meaning of s 225(c). On appeal, the Full Court held that the primary judge erred in the construction of these terms because the ability of the public to access and enjoy the beaches and foreshores was neither a "privilege" nor an "other interest".

By grant of special leave, the appellants appealed to the High Court. Allowing the appeals, the Court held that the confirmation of existing public access and enjoyment through legislation enacted in reliance on s 212(2) of the *Native Title Act* amounted to an "interest" in relation to land or waters within the meaning of the definition in s 253 of the *Native Title Act* and was therefore an "other interest" within the meaning of s 225(c) of that Act. The Justices reasoned differently as to whether this was because the "interest" was a "privilege" or a "right". The confirmation of existing public access to and enjoyment of beaches and foreshores pursuant to s 212(2) must therefore be recorded in a native title determination.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*