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

FIRST RESPONDENTS' OUTLINE OF ADDRESS

Part I: Certification

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

Part II: Outline of argument

2 The cases are limited to the contention that there was existing public access to and enjoyment of beaches &c, confirmed by sec 14 of the TVA, and that this was an "other interest" to be recorded under sec 225 of the NTA. No facts were alleged or proved or

Filed on behalf of the first respondents in P36 and P37 of 2019
ADDRESS FOR SERVICE:
Kimberley Land Council
11 Gregory Street
Broome WA 6725

Telephone: 08 9194 0100
Email: alex.romano@klc.org.au
Facsimile: 08 9193 6279
Ref: Alexander Romano

found of any conduct indicative of or referable to such access and enjoyment. No common law public right was advanced let alone by refutation of the understanding of *Blundell* (1821) 5 B & Ald 268 illustrated in *Newhaven Port* [2015] UKSC 7: **FRSWA [19], [52]-[57]; FRSCTH [6], [20]**.

3 The word "any" in subsec 212(2) prevents that provision from creating by assumptions or otherwise, the relevant access and enjoyment. The notion conveyed by the phrase "may confirm" denies the capacity of sec 14 of the TVA to create the relevant access and enjoyment or to add anything beyond what is entailed in legislative confirmation. Subsec 212(3) of the NTA may be seen as detracting from the relevant access and enjoyment so far as extinguishing native title rights and interests are concerned: **FRSWA [21], [42]-[46]; FRSCTH [22], [31]-[32]**.

4 The device of near imitation by sec 14 of the TVA of the wording in subsec 212(2) of the NTA prevents any identification by reference to actual conduct, rights or particular areas of land and waters, of the relevant access and enjoyment. The requisite quality of the relevant access and enjoyment "existing" before being confirmed is not demonstrated in these cases factually, legally or by the confirming legislation: **FRSWA [47]-[49]; FRSCTH [31]-[32]**

5 This state of affairs provides no foundation for any "interest" within the meaning of sec 253 of the NTA. The cases throw up no previously recognized common law public right. The only statutory matter relied on by the appellants amounts to non-prohibition in crown lands legislation of entry (the same legislation prohibiting a wide range of conduct that would ordinarily fall within the concept of "enjoyment") cf *Brown v Tasmania* (2017) 261 CLR 328 at [189]: **FRSWA [50]-[52]; FRSCTH [24]-[29] [55]-[63].**

6 Any existing public access to and enjoyment of beaches etc. would by definition be available to everyone and is thus not a "privilege" within the meaning of "interest" in sec 225. Nor is it a "privilege" to experience in common with everyone an absence of prohibition on entry, or for that matter the freedom to choose any form of conduct not forbidden: **FRSWA [34]-[40], [50]-[57]; FRSCTH [51]-[54]**

7 The common law has provided for general public rights affecting the native title rights and interests in these cases, being of public fishing and navigation. Nothing like those recognized rights exists in the common law with respect to public access to and enjoyment of beaches etc: **FRSWA [19], [22], [56]; FRSCTH [40]-[50]**

8 The better view is that the combined effect of the words "confirm", "existing", "public", "access", and "enjoyment" means that a right is necessary. Rights are readily confirmed by statute; indeterminate past conduct not so. Rights are readily able to be held as "existing"; the conduct of different people in different places in the past not so. It is common ground that "access" and "enjoyment" should be understood as being lawful, in which case a legal state of affairs authorizing conduct by way of access and conduct by way of enjoyment should exist when any such conduct occurs. The common law provides that authority or right in relation to public fishing and navigation, and in theory statutes could have done so in relation to beaches etc. Without a common law right and with no statutory authority (as opposed to lack of prohibition, or by way of sufferance) there is only the effect of confirmation by sec 14 of the TVA – which cannot of itself create an interest to be recorded for the purposes of s225 of the NTA. There having been no demonstration in these cases of any such conduct, let alone right, there is nothing appropriate to be recorded: **FRSWA [20]-[28], [43]; FRSCTH [31]-[35], [40]-[50].**

Dated: 3 December 2019

Bret Walker