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Ms Kristina Crichton
Committee Clerk
Standing Committee on Public Administration
Parliament House
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Your ref:
Our ref: ALH/GAM 31503

By post and email

31 July 2019

Dear Ms Crichton,

Inquiry into private property rights – submission by Murray Delta Residents and Ratepayers Association

1. These submissions to the Inquiry into Private Property Rights by the Standing Committee on Public Administration are made on behalf of the Murray Delta Residents and Ratepayers Association (**MDRRA**).

2. The MDRRA is comprised of property owners who own residential lots (**Properties**) on the Cooleenup, Ballee and Yunderup Islands (**Islands**) in South Yunderup, within the Peel Inlet. The MDRRA's current membership represents 56% of landowners of the developed properties across the three Islands.

3. Under the *Shire of Murray Local Planning Scheme No 4* (**LPS 4**) the Properties are zoned 'Residential' with surrounding land zoned 'Regional Open Space'. Small pockets within the Regional Open Space are zoned 'Public Recreation/Conservation'. The LPS 4 scheme map also identifies Ballee Island as a place of landscape value.

4. The Properties are presently zoned 'Urban' under the Peel Region Scheme (**PRS**) and the surrounding area is reserved 'Regional Open Space.'

Executive Summary

5. The MDRRA submits that the Shire of Murray (**Shire**) and other state and federal agencies have taken a number of planning and environmental policy measures which have the effect of:

   (a) limiting the possible development, re-development, maintenance, use and tenure of Properties on the Islands;

   (b) devaluing the Properties on the Islands; and

   (c) discouraging prospective Island residents from settling or developing on the Islands.

6. The cumulative planning and environmental measures which the MDRRA submit have caused the above adverse effects include:

   (a) the proposed inclusion of the Islands in the Peel Regional Park;

   (b) the proposed inclusion of the Islands within an extended Ramsar wetland area;

   (c) the Dawesville Cut, which has increased tidal fluctuations around the Islands;

   (d) the requirement for Island residents to place notifications on certificates of title for the Properties to warn prospective purchasers that the property is in a 'vulnerable coastal area' and likely to be subject to erosion and flooding;

   (e) a coastal hazard risk management and adaptation plan (**CHRMAP**) along with planned or managed retreat guidelines, which seek to restrict prematurely the development potential of the Islands, to limit tenure of the Properties and to shift the burden of removing existing structures to private owners;

   (f) a report by the Commonwealth Scientific and Industrial Research Organisation (**CSIRO**), prepared for the Shire, which concludes that parts of the Islands will be permanently inundated as soon as 2030 and that mitigation strategies will prove to be ineffective;

   (g) the Shire's 2016 'Murray Delta Island Vulnerability Discussion Paper' (**Vulnerability Discussion Paper**), which makes a number of recommendations, including prohibiting all future development on the Islands;

   (h) a slavish application of the State Planning Policy 3.7 – Planning in Bushfire Prone Areas (**SPP3.7**) to proposed development on the Islands despite an independent bushfire planning report concluding that the bushfire threat on the Islands can be adequately managed; and

   (i) a stringent application of Floodplain Management Strategy, developed by GHD in 2010, to proposed development on the Islands.

7. While the MDRRA does not deny the reality of climate change, the equity and appropriateness of the policy measures and the veracity of the reports is questionable in their application to the Properties, particularly in regard to risk assessment over time.

8. Further, no agency has addressed the fundamental question of who should pay for the effects of the above measures.

9. Lastly, and fundamentally, the MDRRA believes there is insufficient meaningful and affordable recourse available to the MDRAA or other affected property owners to challenge and thereby test the Shire and planning and environment agencies on the above outlined processes, in particular their siloed thinking on the matter.

Proposed inclusion of the Islands in the Peel Regional Park

10. Since mid-1990 it has been proposed that the Islands form part of the Peel Regional Park. Landowners on the Islands were first notified of these proposals by the Western Australian Planning Commission (**WAPC**) in 1996.

11. The proposal to include the Islands in the Peel Regional Park were set out in the Peel Region Infrastructure Plan 2007 – 2027 (**Infrastructure Plan**).[1] The Infrastructure Plan noted that the 'Park [was] still in the planning stage, although some land is already in State ownership. Further land has been identified for purchase, and other areas may be managed through a custodial arrangement with local residents.'[2]

12. These proposals have not yet been implemented, in part, due to the Properties on the Island remaining in private ownership. These private landowners oppose the Islands becoming part of the Peel Regional Park. The Shire has recognised that it therefore may be necessary to compulsorily take or reserve the Properties for a public purpose, in order to bring Islands within the Peel Regional Park.[3] Nothing has happened in this regard.

13. The desire to establish the Peel Regional Park was more recently raised in the Strategic Assessment of the Perth and Peel Regions (**SAPPR**). SAPPR noted that a requirement for '170,000 ha of new and expanded conservation reserves in Perth and Peel regions and immediate surrounds, including the... establishment of Peel Regional Park.'[4] The status of SAPPR is now uncertain and its seems unlikely that it will achieve anything except the negative achievement of greater uncertainty.

Extension of the Peel-Yalgorup Ramsar wetland area over the Islands

14. In 2008, the Shire's current Director of Planning and Sustainability, nominated the Islands to be included in a proposed extension of the Peel-Yargorup System Ramsar Wetland Site (**Ramsar Site**). This extension was proposed again in 2016 by the Peel-Harvey Catchment Council. The inclusion of the Islands within the Ramsar Site has not yet been formalised but is currently being progressed by the Department of Biodiversity Conservation and Attractions (**DBCA**).

15. Ramsar wetlands are categorised as a 'matter of national environmental significance' under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). An action that will have, or is likely to have, a significant impact on the Ramsar Site will be subject to environmental impact assessment under the EPBC Act. An action includes a proposed development, meaning that future developments on the Islands would possibly be subject to a Commonwealth environmental impact assessment.

16. It is an offence to take action that will result in a significant impact to a Ramsar wetland. If the Ramsar Site is extended to include the Islands Property owners may be prohibited from upgrading wastewater treatment systems. Aerobic Treatment Units

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[1] Peel Region Infrastructure Plan 2007 – 2027, page 28.
[2] Peel Region Infrastructure Plan 2007 – 2027, page 38.
[3] Shire of Murray, *Murray Delta Island Area – Vulnerability Discussion Paper* (May 2016) 19 – 20.
[4] Government of Western Australia, 'Strategic Assessment of the Perth and Peel Regions – Draft Action Plan G: State Environmental Objectives and Commitments' (December 2015) 5.

(**ATU**) are suitable for areas with a high ground water level and Property owners on the Island may look to upgrade current septic tanks to ATUs in the future.

17. The Islands and the Properties are designated as 'conservation category wetland' in the geomorphic wetland maps held by the DBCA. Conservation category wetlands are also classified as environmentally sensitive areas for the purposes of the *Environmental Protection Act 1986* (WA). The MDRRA submit that no further level of protection or re-classification, as a Ramsar Site or otherwise, is necessary in order to ensure adequate wetland protection, given that multiple layers of protection already exist.

Shire's publication of Property Enquiry Brochures

18. Since 2014, the Shire has contributed to the devaluation of the Properties through the publication of Property Enquiry Brochures (**Brochures**), which the Shire has provided to parties who have been interested in purchasing a property on one of the Islands. The Brochures include the:

    (a) 2014 Brochure for vacant properties in Culeenup Street on Cooleenup Island, which states that the lots on Culeenup Street require a detailed coastal hazard risk management and adaptation planning assessment be undertaken prior to any development being considered. The provisions of State Planning Policy 2.6 '*are likely to recommend* against any development on the properties' [emphasis added]. Further, the entirety of the lots are classified as a Conservation Category Wetland 'which generally precludes development';

    (b) 2016 Brochure for Lot 13 Murray Terrace, Cooleenup Island, which states that the property is in a conservation category wetland and that development would *not be supported by the Shire or the Department of Parks and Wildlife* [emphasis added]. Further, the property is likely to be impacted by coastal erosion and inundation over the next 100 years; and

    (c) 2019 Brochure for 69 Yunderup Terrace, which states that the property is located within the floodway of the Murray River and is *likely* to be subject to future sea level rise [emphasis added]. In the future it is anticipated that periods of 'exacerbated flooding' will occur, which may ultimately impact the development potential.

19. These Brochures make strong and inappropriate claims about the development potential on the Islands, the future impacts of sea level rise and storm surges on the Islands and the planned conservation protections for the Islands. These claims have been made despite there being:

    (a) limited available data on storm severity or frequency and sea level rise in the Murray Delta and in the vicinity of the Islands; and

    (b) no conservation reservations or zonings in the planning framework over the Islands.

20. Further, in regard to the statements in 18(a) - 18(c) above, the Shire cannot speak on behalf of the State agencies mentioned and have not produced any evidence to show that those agencies held the views claimed by the Shire. In any event, it would be

inappropriate for those agencies to express a view on the matter mentioned without considering a specific proposal and the evidence relating to it.

Dawesville Cut and Associated Works

21. The Dawesville Cut was completed in 1994 and is managed by the Department of Transport **(DoT)**. It was constructed to provide for increased tidal flushing from the Indian Ocean to improve the environmental health of the waterbodies in the Peel Inlet. The Islands are located approximately 30km north-east of the Dawesville Cut.

22. A 1998 report addressed the changes in environmental quality of the Peel Inlet. It stated that the tidal fluctuations in the Peel Inlet had increased to about half of oceanic levels, leading to increased tidal flushing.[5] A 2003 report by the WA Environmental Protection Authority has corroborated this fact[6], as well as a 2009 report by Damara WA Pty Ltd, a seashore engineering firm.[7] Increased tidal flushing has increased the Peel Inlet's susceptibility to its banks and shorelines being displaced.[8]

23. The Dawesville Cut will likely contribute to the erosion and storm surge events predicted to have an impact on the Islands in the future.

24. The damage caused by the Dawesville Cut is the responsibility of the DoT and the Shire. Those agencies failed to take measures to mitigate the exacerbated effects of sea level rise and storm surge that the Dawesville Cut has had on the Peel Inlet and the Islands.

Application of the State Planning Policy 2.6 – State Coastal Planning Policy

25. The State Planning Policy No. 2.6 State Coastal Planning Policy (**SPP 2.6**) was first released in 2003 and applies to the entirety of the Western Australian coastline, including the Islands.[9] The purpose of SPP 2.6 is to control effectively coastal hazard risk management and adaptation strategies to protect and enhance coastal values.

26. Clause 5.5.(ii) of SPP 2.6 provides that when a coastal hazard risk has been identified, it should be disclosed to those likely to be affected. This includes a requirement for a notification to be placed on title to warn prospective purchasers of the coastal hazard risk.

27. Some landowners on the Islands have been required to lodge a notification on title stating that their property is in a 'vulnerable coastal area' and are 'likely to be subject to coastal erosion and/or inundation over the next 100 years'. The MDRRA is

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[5] D.A. Lord and Associates, *Dawesville Channel monitoring program: Technical review prepared for the Water and Rivers Commission* (1998).

[6] Environmental Protection Authority, *Peel Inlet and Harvey Estuary System Management Strategy: Progress and Compliance by the Proponents with the Environmental Conditions set by the Minister for the Environment in 1989, 1991, and 1993* (January 2003) 46.

[7] Damara WA Pty Ltd, *Mandurah Region, Development in flood prone areas, review of available information and existing policies* (October 2009).

[8] Water Research Laboratory, *Estuaries and climate change: Technical Monograph prepared for the National Climate Change Adaptation Research Facility* (2016) 9.

[9] Replaced by *State Planning Policy No. 2.6 State Coastal Planning Policy* gazetted on 30 July 2013.

concerned that these notifications on title are a premature planning control which is being used to devalue the Properties and to disincentivise prospective purchasers.

28. Given the grave consequences, it is remarkable that no independent evidence has been obtained to support the Shire's inferences as to how this policy and its models apply to the present circumstances.

Coastal Hazard Risk Management and Adaptation Planning

29. In August 2017, the DPLH released draft Planned or Managed Retreat Guidelines to complement the CHRMAP processes under SPP 2.6 (**CHRMAP Guidelines**). The CHRMAP Guidelines state that 'the adaptation option of planned or managed retreat is often the most efficient, effective and equitable response to coastal hazards.'[10] The guidelines demonstrate a sustained effort by the DPLH to legitimise a planned or managed retreat policy involving a 'reduction or cessation of private land use'[11] through the implementation of policy mechanisms.

30. In 2018, the Shire announced it was developing a CHRMAP for the Shire to address coastal and riverine hazards. The scope of works for the Shire's CHRMAP states that planning instruments, 'such as regional and local planning schemes, local planning policies and structure plans are used to respond to erosion and inundation hazard risks, where relevant within the Shire'.[12] It has also been proposed that LPS 4 be amended and replaced with a new local planning scheme which provides for special control areas to be declared. These special control areas are proposed to 'rezone land to include specific building or development controls, possibly time or event based.'[13] To date, no new local planning scheme or policy has been prepared or advertised for public comment.

2010 GHD Floodplain Development Strategy

31. In 2010 GHD, an engineering consultancy firm, developed a Floodplain Development Strategy for the Department of Water (**GHD 2010 Strategy**). The GHD 2010 Strategy considered the coexistence of storm surge and river flooding in the Shire. It has been used as a guide by the Department of Water for developing its policies regarding private land use and development along the Murray River and the Murray Delta.

32. The GHD 2010 Strategy was dismissed by the Shire in arriving at the position that the Islands are at short-term risk of unacceptable inundation due to sea level rise and storm surges during flood events.

33. The MDRRA are concerned by the Shire's dismissal of the 2010 GHD Strategy because:

[10] Department of Planning, Lands and Heritage, *Draft Planned or Managed Retreat Guidelines* (August 2017) 1.
[11] Department of Planning, Lands and Heritage, *Draft Planned or Managed Retreat Guidelines* (August 2017) 2.
[12] Shire of Murray, *Coastal Hazard Risk Management Adaptation Plan: Scope of Works* (22 November 2018) 12.
[13] Shire of Murray, *Coastal Hazard Risk Management Adaptation Plan: Scope of Works* (22 November 2018) 12.

(a) it confirmed lower peak water levels in 2010 than a 1984 study previously undertaken by the Public Works Department of WA titled 'Murray River Flood Study'[14];

(b) it confirmed that 'increased storminess' could result in increased storm surges but the likelihood and magnitude of any change is currently not well understood[15]; and

(c) it recommended that proposed development within the floodway should be considered based on its merits.[16]

34. The Shire has dismissed these conclusions and instead relied on the contrary findings in the 2014 CSIRO Report – Flood impact mitigation scenario simulations (**CSIRO Report**). In doing so, the Shire has relied on the CSIRO Report to support its position that the Islands will be vulnerable to major flooding events in the future.

2014 CSIRO Report – Flood impact mitigation scenario simulations

35. In December 2014 the CSIRO prepared the CSIRO Report which concluded that by 2030 some of the Properties on the Islands will be inundated, including undeveloped lots. By 2070 Ballee Island and Cooleenup Island were predicted to be totally inundated. Yunderup Island was predicted to be inundated by 2100.

36. The CSIRO Report found that mitigation options will prove 'ineffective from a cost/benefit perspective due to the scale and extent of flooding'. Further, a combination of sea level rise and more frequent and severe storm surges place the Murray Delta region at 'high risk'.

37. These conclusions are questionable given that the CSIRO Report is deficient in the following ways:

(a) it is based on a single non-storm, unexplained tidal event on 16 May 2003, the highest water level recorded over the 24 hours on 16 May 2003 and was used to make predictions for future sea level rise;

(b) the tidal data from 16 May 2003 was gathered using only one measurement point in the entire Peel Inlet;

(c) the report was prepared 11 years after the event;

(d) the predictions were extrapolated from one recorded tidal event;

(e) it states that mitigation options will prove ineffective and does not provide any evidence or reasons for this position; and

(f) a disclaimer states that the CSIRO Report comprises 'general statements', that information 'may be incomplete or unable to be used in any specific situation'

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[14] Public Works Department of Western Australia, *Murray River Flood Study* (1984).

[15] GHD, *Floodplain Development Strategy: Murray Drainage and Water Management Plan and Associated Studies* (September 2010) 64.

[16] GHD, *Floodplain Development Strategy: Murray Drainage and Water Management Plan and Associated Studies* (September 2010) xii.

and that 'no reliance or actions must therefore be made on that information without seeking prior expert professional, scientific and technical advice'.

38. In any event, the CSIRO Report predicts that sea level rise by 2030 would have a 'minimal' impact on Yunderup Island and Ballee Island and Cooleenup Island would experience a 20 to 40cm rise in sea level.

39. The projected degree of sea level rise in the CSIRO Report is refuted by the 2015 'Shire of Murray and Sea Level Rise in Canals Report' by MP Rogers (**MP Rogers Report**). The MP Rogers Report focussed on the canal estates in South Yunderup, which are located to the south and proximate to the Islands.

40. The MP Rogers Report concluded that sea levels in south-west Western Australia are projected to rise by 0.15m by 2030-3035; 0.4m by 2070; and 0.9m by 2100. These measurements do not suggest that there is a 'high risk' level of flooding in the Murray Delta region. The MP Rogers Report further concludes that the predicted 'decrease in mean rainfall and minor increase in rainfall severity is unlikely to increase the flooding severity adjacent to the canal estates'.[17]

41. Despite the deficiencies of the CSIRO Report, and the counter findings of the MP Rogers Report in respect of sea level rise, the CSIRO Report has been used by the Shire as a basis for:

    (a) the Vulnerability Discussion Paper;

    (b) a 2016 planning information sheet which was circulated to Island property owners, which states that 'should no action be taken in response to the information available, it is anticipated that the permanent inundation (flooding) of island lots in the longer term will ultimately result in homes becoming uninhabitable and effluent systems to fail;'

    (c) requiring a notification on title for Lot 37 Murray Terrace, Cooleenup Island which states 'Vulnerable Coastal Area – this lot is located in an area likely to be subject to coastal erosion and inundation over the next 100 years;'[18] and

    (d) recommending refusal of a development application for Lot 5 Murray Terrace, Cooleenup Island, pending the outcomes of a meeting between the Shire and a range of government departments in September 2017.[19]

42. The MDRRA is concerned that the Shire is using the CSIRO Report as the foundation for its planning decisions in respect of the Islands, despite the CSIRO Report specifically stating that no reliance should be placed on the information in the report in the absence of additional expert scientific and technical advice.

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[17] M P Rogers & Associates, *Shire of Murray - Canal Scheme Planning Policy Coastal Engineering Review* (12 May 2015) 31.

[18] Letter from Shire of Murray to Kevin McDonnell of 5 October 2016 granting planning approval for Lot 37 Murray Terrace, Cooleenup Island.

[19] Shire of Murray *Ordinary Council Minutes* (24 August 2017) 18.

43. It is fundamental to note that the Shire's position on appropriate adaptation responses has, and continues to, occur in the absence of sustained monitoring in and around the Islands using multiple gauges.

44. The MDRRA submit that independent and ongoing monitoring of tidal fluctuations, sea level rise and erosion must be undertaken on and around the Islands. Data accumulated over a substantial number of years is required to inform future sea level rise predictions and future planning decisions for the Islands.[20] Data should be collected by using tidal gauges, known as 'data loggers', which are designed to automatically record water levels at set and re-occurring times.

Murray Delta Island Vulnerability Discussion Paper

45. The Shire prepared the Vulnerability Discussion Paper in May 2016. This is the only document prepared by the Shire to date which specifically addresses the risk of sea level rise and future planned and managed retreat for the Islands.

46. As explained above, the Vulnerability Discussion Paper is predominately based on the CSIRO Report. The Vulnerability Discussion Paper has made a number of recommendations which could have serious consequences for landowners on the Islands in the near future, despite inundation of the Islands supposedly not occurring until 2100. These recommendations include:

    (a) various forms of 'managed retreat' including the purchase of existing residential, undeveloped lots to remove any further potential for the Islands to be utilised for residential purposes;

    (b) implementing stringent effluent management controls, including by way of approval conditions, which may result in dwellings on the Islands no longer being habitable if effluent systems do not meet the critical separation distance to ground water levels in accordance with the Shire's 2018 Health Local Law (**Health Local Law**);

    (c) amending LPS 4 to prohibit all future residential development on 'residential' zoned lots on the Islands;

    (d) reserving all undeveloped lots on the Islands for public purposes and thereby preventing their future development; or

    (e) implementing restricted approval periods which allow landowners to develop land on the Islands, albeit with a limited approval period and eventually requiring the removal of the development.

47. The MDRRA is concerned that these recommendations are premature given that complete inundation of the Islands has been predicted not to occur until 2100. The MDRRA is concerned that these recommendations are a further way of devaluing the Properties and restricting their future uses.

[20] David T. Pugh, *Tides, Surges and Mean Sea-Level* (John Wiley & Sons Ltd , 1987) 16.

State Planning Policy 3.7 – Planning in Bushfire Prone Areas

48. As noted in the terms of the reference, private property rights have been restricted as a result of the strict application of bush fire protection measures, including State Planning Policy 3.7 – Planning in Bushfire Prone Areas (**SPP 3.7**) and the associated Guidelines for Planning in Bushfire Prone Areas (**Guidelines**).

49. SPP 3.7 and the Guidelines have been interpreted very stringently. Recent authorities from the State Administrative Tribunal (**Tribunal**) have made it clear that there must be exceptional, cogent reasons for a planning authority to depart from the requirements of SPP 3.7.[21]

Application of SPP 3.7 to property on the Islands

50. The Shire has also slavishly applied SPP 3.7 to proposed development on the Islands.[22] The Shire has commented to the MDRRA that the residential properties on the Island would likely have a Bushfire Assessment Level (**BAL**) rating of BAL-40 or BAL-FZ (fire zone). These ratings mean that that the Properties have been classified to have 'very high' or 'extreme' levels of bushfire risk. Further, the Shire found that vehicular access is not possible to the island and therefore satisfying the vehicular access requirements under SPP3.7 would prove difficult.

Independent Bushfire Planning and Development Report

51. The Shire's position not to issue development approvals on the Islands due to bushfire risk goes against the tenor of an independent bushfire planning and development report which was prepared for the Shire by Lush Fire and Planning in March 2018 (**Fire Report**).

52. The Fire Report found that development can occur on the Islands, though it did acknowledge the literal application of SPP3.7 and the Guidelines may well result in the vacant lots on the Island being unsuitable for development. The report agreed a BAL-40 or BAL-FZ rating may be appropriate and there are no direct access routes to the Island.

53. The Fire Report stated the Islands have long been recognised as suitable for development. Having regard to this, bushfire risk management for new development could be facilitated. This conclusion in the Fire Report was drawn because:

    (a) access and egress issues can be addressed by an overall emergency evacuation plan, which is reinforced by individual bushfire survival plans;

    (b) development of remaining lots on the Island is not an unacceptable increase in the threat of bushfire when compared to the overall existing development. This is because there are appropriate measures which can be used to manage this risk, having special attention to the preservation of life;

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[21] *Bennett v Western Australian Planning Commission* [2018] WASAT 32; *Boynton v Western Australian Planning Commission* [2018] WASAT 60.

[22] For example, a development application for Lot 5 Murray Terrace, Cooleenup Island, lodged by Jens Jorgensen, was refused by the Shire on 24 August 2017 on bushfire risk grounds.

(c) development and other planning applications should focus on the proposed development rather than the existing conditions. The standard conditions of approval to be adopted for development approvals should require the owner to prepare a bushfire survival plan as distinct from an overall evacuation plan; and

(d) any future dwellings can be constructed to a high BAL rating.

54. The MDRRA submit that SPP 3.7 has been applied inflexibly by the Shire to restrict future development on the Islands despite the Fire Report recommending that bushfire risks on the Island can be managed.

Replacement of septic tanks on the Island in accordance with the Health Local Law

55. The Shire has communicated concerns to the MDRRA about inundation of the Islands and how this would affect the 52 septic tanks currently on the Islands and the possibility of their contents leaking into the Murray Delta. Should sea levels rise to a level where inundation caused leakage from the septic tanks then the Health Local Law is likely to be breached.

56. Section 2.2 of the Health Local Law provides that each dwelling on the Islands shall have a secure, efficient and proper drainage of the building to a sewer or an approved apparatus for the treatment of sewage, which is approved by the local government.

57. The MDRRA has been advised that it is possible to replace the existing septic tanks with aerobic treatment units (**ATU**). ATUs are self-contained sewage treatment systems which are suitable for areas with a high ground water level. To date, four ATUs have been installed on the Islands.

58. Under section 2.2(3) of the Health Local Law the installation of ATUs requires approval from the Shire. The MDRRA is concerned that the Shire may withhold its approval for the replacement of septic tanks with ATUs as a further method of limiting the future development on the Islands and to force existing residents to relocate if their septic tanks become inundated.

Property Rights and Compensation

59. In his article[23] *The Tasmanian Dam Case and Setting Aside Private Land for Environmental Protection: Who Should Bear the Cost?* Glen McLeod examined some of the fundamental legal issues arising from setting aside private land for the protection of the natural environment, by the use of laws, policy measures and administrative practice (**environmental and planning measures**).

60. Glen McLeod identified as the primary questions: '...what are the limits of valid regulation of privately owned land, where the objective is to protect the environment? At what point does regulation become so inconsistent with the nature of private property that it effectively constitutes a regulatory taking? If that happens, can the law

[23] Glen McLeod, 'The Tasmanian Dam Case and Setting Aside Private Land for Environmental Protection: Who Should Bear the Cost?' 6 *The Western Australian Jurist* 125.

require the State to pay the owner *just* compensation, assuming that there is no other avenue of compensation?'[24]

61. It was argued by McLeod that '...the combined effects of environmental and planning measures can now sterilise the economic value of land, outside of the established statutory means of claiming compensation. At a fundamental level, this opens up a wide range of philosophical, ethical, economic and legal issues.'[25]

62. It was also argued by McLeod that the Constitutional requirement of 'just terms' in a Commonwealth Acquisition law, is a manifestation of a fundamental right of the kind reflected in the Universal Declaration on Human Rights[26], with an ancestry that goes back at least to the Magna Carta of 1215.[27]

63. McLeod noted that references to the Magna Carta persist in leading High Court Cases concerning the Commonwealth's power to appropriate land and in Western Australia, the Magna Carta, still forms part of the State's law, according to the State's Law Reform Commission.[28] The part still in force contains a requirement that the State will not take the property except by 'due process of law'. The long tradition in English common law, which invests in the citizen some property rights, was received into and forms part of the common law of Western Australia. Can these fundamental rights protect the citizen from regulatory takings for environmental purposes without the payment of just compensation?

64. Glen McLeod notes that in a number of cases the High Court has grappled with the question of when do environmental and planning measures become an acquisition of property. The High Court cases deal with the questions of whether legislation provides for an acquisition of property, and if so, was it on just terms.

65. The application of concomitant principles under state law requires a resort to more fundamental common law principles which arguably underlie the operation of the Commonwealth and State law.

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[24] Ibid.

[25] The Law Reform Commission of Western Australia *United Kingdom Statutes in Force in Western Australia* Project No. 75 Report (1994) 6, 21, 27 (LRC UK Statutes Report) 1.9. In particular Chapter 29 of that Magna Carta applies, enacted in 1297 by Act 25 Edward I; and enhanced by 28 Edward III in 1354. The 1354 Statute added a requirement that land may only be taken by 'due process of law', which is a component of and possibly the progenitor of the 'just terms' guarantee in the Commonwealth Constitution. See also Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 140.

[26] The Hon. I. Callinan AC QC, 'For the Sake of Our Heritage, The Buck Must Stop Somewhere' *The Australian*, 3 January 2008, 10.

[27] Ibid. See also his dicta in *Commonwealth v Western Australia* (1999) 196 CLR 392, 488, [282] (Callinan J).

[28] The Law Reform Commission of Western Australia *United Kingdom Statutes in Force in Western Australia* Project No. 75 Report (1994) 6, 21, 27 (LRC UK Statutes Report) 1.9. In particular Chapter 29 of that Magna Carta applies, enacted in 1297 by Act 25 Edward I; and enhanced by 28 Edward III in 1354. The 1354 Statute added a requirement that land may only be taken by 'due process of law', which is a component of and possibly the progenitor of the 'just terms' guarantee in the Commonwealth Constitution. See also Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 140.

66. Western Australia has a distinguished analysis of the common law in *Della-Vedova v State Planning Commission and the SEC.*[29] In that case, Pidgeon J (at first instance, which was upheld and approved on appeal) said:

> 'The common law is that if land is taken there is a right to compensation (*A-G v De Keyser's Royal Hotel* [1920] AC 508). The principles and method of compensation is determined by the Public Works Act which embraces the common law principles making it unnecessary in normal circumstances to consider them in compensation claims. The common law provides that where the statute authorising the taking does not provide a special tribunal to assess the amount of compensation it can be claimed in an action: (*Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* (supra) at 752 and *Bentley v Manchester Sheffield and Lincolnshire Railway Co* [1891] 3 Ch 222)'.

67. Later in his judgment he applied the common law in coming to his decision.[30]

68. The principle which can be derived from the analysis of Pidgeon J in the Compensation Court,[31] is that the State cannot take property without compensating the owner of the property, on just terms, unless by statute Parliament specifically and clearly provides to the contrary. This is a fundamental right entrenched in the common law of the State and arguably forms part of its unwritten Constitution.

69. The common foundation of the above principles is the principle in the Magna Carta and the Universal Declaration on Human Rights, to quote former Justice Callinan of the High Court:

> 'Acquisition on just terms is synonymous...with acquisition according to justice and that means justice as administered by a court or tribunal fully and properly equipped to adjudicate on all matters and not subject to a truncated review or appellate process.'[32]

Conclusion

70. The MDRRA submit that environmental and planning policies and mechanisms which have, or were intended to, restrict development on the Islands have not been used for the policy's or mechanism's dominant purpose.

71. Rather, the MDRRA contend that the:

    (a) proposed expansion of the Ramsar Site;

    (b) Property Enquiry Brochures;

    (c) application of SPP 2.6;

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[29] *Batista Della-Vedova & Ors. v State Planning Commission; Batista Della- Vedova & Ors. v State Energy Commission* (1998), unreported decision of the Compensation Court of Western Australia: 22 December 1988; BCC8800828 and relevantly approved and quoted in *R v Compensation Court of Western Australia; ex parte State Planning Commission & Anor; re Della-Vedova* (1990) 2 WAR 242, 253 (Wallace J) (unanimous judgment of Full Court of Supreme Court of Western Australia).

[30] *R v Compensation Court ex parte State Planning Commission Re Della-Vedova (Supra)* (1990) 2 WAR 242, 253 (Wallace J).

[31] The Compensation Court's jurisdiction was subsumed by the State Administrative Tribunal in 2005.

[32] *Commonwealth v Western Australia* (1999) 196 CLR 392, 491 [291], [292].

(d) preparation of a draft CHRMAP and the associated Planned and Managed Retreat Guidelines;

(e) reliance on the CSIRO Report and resultant preparation of the Vulnerability Discussion Paper,

(f) strict application of SPP 3.7; and

(g) Local Health Law

have been used to devalue the Properties.

72. The MDRRA is concerned that the State will then acquire the Properties at a reduced price sometime in the future to be incorporated into the Peel Regional Park and that they will not receive just compensation.

73. The law should be reformed to address these concerns, in particular to enable land owners to claim compensation where a variety of measures combine to effectively take land. A suggested approach to dealing with taking and compensation has been proposed by Glen McLeod in his article *The Tasmanian Dam Case and Setting Aside Private Land for Environmental Protection: Who Should Bear the Cost?*[33]

If you have any questions or wish to discuss the above, please let us know.

Yours sincerely,

Glen McLeod
Principal
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[33] Glen McLeod, 'The Tasmanian Dam Case and Setting Aside Private Land for Environmental Protection: Who Should Bear the Cost?' 6 *The Western Australian Jurist* 125, 166.