

Opinion

Introduction

1. I have been asked to advise on a number of matters associated with the proposed *Ralph's Bay Area (Clarification) Bill* 26 of 2006.

Original Order included the inter-tidal zone within the conservation area

2. The original order (*Order 28 of 1982* made under the *Crown Lands Act 1976*) that created the conservation area defined it as 'six hectares or thereabouts' in lot 23 of a sealed plan (S.P.D. 1002) registered in the Office of the Recorder of Titles '**together with land between lot 23 and low water mark on Ralphs Bay** as the same is shown surrounded by a heavy black line on the plan attached hereto (P.F. 10435)¹.
3. It is clear from the above, and from the subsequent public comments of the then Minister (Hon G D Adams), that the reservation did, was intended to, and was legally effective to, include the extensive mudflats to the seaward side of the beach to the low water mark.
4. The mudflats are the most environmentally sensitive parts of and have the highest conservation values of the area of land that was reserved.

Bill would remove over 90% of protected area

5. The *Ralph's Bay Area (Clarification) Bill* 26 of 2006, if enacted, would remove the inter-tidal zone, a large area of land with an ambulatory border to low water mark, from the Ralphs Bay conservation area.
6. It would also remove a small additional area, now contended to have been added by mistake to the conservation area in 1998. That additional land is said to be private land and to have been added to the conservation area by inadvertent error.
7. Had the *Ralph's Bay Area (Clarification) Bill* 26 of 2006 merely proposed removing that small area the *Bill* might raise some minor issues of process—but none of principle.
8. However, the proposed removal of conservation area status of the large protected area of land extending to low water mark will result in a substantial derogation from the original reservation made under the *Crown Lands Act 1976* and will have material legal and environmental consequences—including with respect to Commonwealth interests pursuant to the RFA agreements and legislation.
9. More than 90% of the conservation area will be excised. Less than 10% will remain.

¹ Emphasis added by the writer.

Not necessary to ‘clarify’ the conservation area—an area agreed by both Commonwealth and State governments

10. The removal of the inter-tidal zone is not required to ‘clarify’ the extent of the conservation area—the extent of the conservation area to low water mark is clearly shown on existing state and Commonwealth maps.
11. The extent of the Ralphs Bay Conservation Area (as continued under the Tasmanian RFA legislation² and as agreed between Tasmania and the Commonwealth) is shown on the attached colour map printed from the Commonwealth’s database of significant locations published for the purposes of the *EPBC Act* (Commonwealth).
12. The Commonwealth database records that the area is of significance to 26 threatened species and 20 migratory species.
13. The inter-tidal area far exceeds in size and significance the husk of the conservation area proposed to be retained. The attached map shows that more than 90% of the protected area will lose its status.

Bill not required to allow Walker Corporation’s proposal to be assessed as a project of state significance

14. Removal of the inter-tidal zone’s conservation area status is not needed to permit the proposed Walker Corporation development to be assessed (or approved) as a project of state significance under the *State Policies and Projects Act 1993*.
15. Section 19 of *State Policies and Projects Act 1993* completely overrides the provisions of any Act or planning scheme that would otherwise prohibit such a development or that would require any consent by the state agency responsible for management of the conservation area.

Ulterior motive

16. That the *Ralph’s Bay Area (Clarification) Bill 2006* has been drafted to remove reference to the area of land to low water mark must therefore be for an un-stated and ulterior motive—because getting rid of the inter-tidal zone’s status as a conservation area is neither legally necessary to permit the Commission to assess any proposed project of state significance nor is it consistent with the purposes of the establishment of the Ralphs Bay conservation area.
17. All that may be speculated as to possible ulterior reasons are that:

² *Regional Forest Agreement (Land Classification) Act 1998* Schedule 9 item 31. Note the alteration of status effected under the *RFA Act 1988* was explained as merely a ‘name change’

- state agencies formerly responsible for the management of the conservation area will no longer have an ‘interest’ under section 21 of the *State Policies and Projects Act 1993* in the inter-tidal zone requiring the Commission to seek their views in relation to the proposed project of state significance;
- those state agencies may be instructed, or choose, not to provide evidence as to the conservation values of the inter-tidal zone on the grounds that they will no longer have responsibility for its management;
- even if they are not instructed to not provide evidence and choose to do so, it is possible that legal objection may be taken to the Commission receiving such information (see first dot point above); and,
- the political advantage in removing the inter-tidal zone’s legal status as a conservation area in this way (confusing it as a required ‘clarification’) is that it may minimise the inherent political awkwardness facing those who support a proposal for digging canals and a building housing estate in a conservation area.

Effect of removal permanent

18. Of course, the excision of the area is not merely for the time needed to allow the assessment of the proposed Walker Corporation development. If it were it would be equally objectionable—but as drafted the *Bill* is, if anything, worse, because, if enacted, it will have an ongoing permanent effect.
19. Assuming that that Walker Corporation’s proposal is going to be assessed as a project of state significance, even if the report of the Commission recommends against that development Ralphs Bay’s status as a conservation area will have been permanently degraded if the *Bill* is enacted in its present form.

Conclusion

20. If restricted to the excision of the small area of the conservation area said to have been added in error in 1998 the above objections do not apply.
21. However, there is no demonstrated need for, the provisions of the *Ralph’s Bay Area (Clarification) Bill 26* of 2006 as currently drafted. There are substantial reasons of legal principle to object to it.

Duncan Kerr SC

Hobart 1 September 2006.