

DISTRICT COUNCIL OF LOXTON WAIKERIE

PROPOSED REMOVAL OF ATHEL PINES

SECTION 270 REVIEW

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Review pursuant to section 270 of the *Local Government Act 1999*

1. INTRODUCTION

1.1 By email dated 4 September 2020, Mr John Pick (the First Applicant), complained about a decision made by Mr David Beaton, the Chief Executive Officer (the CEO) of the District Council of Loxton Waikerie (the Council).

1.2 The decision complained of was the proposed removal of eight (8) *Tamarix aphylla* (Athel Pines) (the Trees) located on the Waikerie Riverfront (**Appendix 1**).

1.3 The decision of the CEO had been posted on the Council's Facebook page on Wednesday 2 September 2020. Further posts were made by the Council on Thursday 3 September 2020 (**Appendix 2**).

1.4 The First Applicant's email was copied to the Mayor, as well as to members of the public, including media representatives and stated, amongst other things:

The question must be asked does the CEO have the right to order the removal of trees without the direction or approval of the Council?

1.5 The First Applicant was also of the view that there was a 'lack of openness and consultation' in relation to the decision, in contravention of section 8 of the *Local Government Act 1999* (the Act).

1.6 Following which, by letter dated 5 September 2020 sent to the CEO, the Mayor and elected members, Ms Eva Sherriff (the Second Applicant), in her capacity as Chairperson of the Waikerie District Ratepayers' & Residents' Association (WDRRA), also complained about the decision of the CEO to remove the Trees (**Appendix 3**).

1.7 The Second Applicant submitted that the WDRRA was:

alarmed at this decision as previous advice by the CEO was that no major changes to the Eastern section of the Waikerie River Front would happen due to the community backlash at previous attempts.

1.8 The Second Applicant also stated that community consultation on the decision should take place.

1.9 This letter was followed by a further letter from the Second Applicant, also dated 5 September 2020 but emailed to the CEO, the Mayor and elected members on 7 September 2020. This second letter stated that WDRRA wished to:

lodge an appeal for the reprieve of the 8 Athel Pines Trees [sic] on the Waikerie Riverfront scheduled to be removed tomorrow (Tuesday, September 8).

1.10 It was said in this second letter that the request for an ‘*appeal*’ was made:

[t]o allow time for the community to be consulted pursuant to the Local Government Act and your own council policy on Community Consultation. (Appendix 4)

1.11 The Second Applicant’s request for an ‘*appeal*’ may, reasonably and appropriately, be considered as a request for an internal review of a Council decision in accordance with section 270 of the Act.

1.12 By email dated 7 September 2020, the CEO notified the Applicants that the Council intended to appoint an independent person to undertake the review, also confirming that ‘*[t]he trees will not be removed pending that review*’ (Appendix 5).

1.13 Our position is that the basis of both complaints may be considered as a request for a review of:

1.13.1 the decision of the CEO to remove the Trees; and

1.13.2 the absence of community consultation, in accordance with the Council’s *Community Engagement Policy*.

1.14 Taken together, it is reasonable to construe that the concerns articulated by the Applicants are that, in determining to remove the Trees, in the absence of community consultation, the CEO, on behalf of the Council, did not take into account, or did not sufficiently take into account, all relevant considerations.

1.15 If this were correct, the Council could then be said not to have been acting as a representative, informed and responsible decision maker in the interests of its community. Accordingly, the decision could be considered to be contrary to sections 6 and 8 of the Act.

1.16 As the applications for review arise from the same factual background, give rise to the same factual circumstances and relate to the same decision-making process, they will be considered concurrently in this single review.

2. THE SECTION 270 REVIEW PROCESS

2.1 The review process is guided by the Council’s *Internal Review of Council Decisions Policy and Procedure* (the Policy and Procedure) (Appendix 6), adopted in accordance with section 270 of the Act, as well as relevant principles of procedural fairness.

2.2 As the decision, the subject of this review, was made by the CEO, on behalf of the Council, in accordance with clause 8.1 of the Policy and Procedure, Kelley Jones Lawyers was engaged, as an external, independent reviewer, to undertake the review of the decision and to prepare this Report for the consideration of the Council.

2.3 The purpose of this review is to determine whether the decision made by the CEO to remove the Trees from the Waikerie Riverfront, based on all of the available information, was:

2.3.1 a reasonable decision to make in the circumstances;

2.3.2 a decision open to be made on the facts before the CEO;

- 2.3.3 a decision made in the public interest; and
- 2.3.4 a decision not based on a flawed decision-making process.
- 2.4 In giving effect to the requirement to afford procedural fairness to the Applicants, a letter was sent on 10 September 2020, by email, to each, extending an invitation to provide any further information or submission, that they wished to be taken into account in the review.
- 2.5 The First Applicant provided a written submission, by email, on Wednesday 16 September 2020, supplemented by a further email of Thursday 17 September 2020 (**Appendix 7**).
- 2.6 These further submissions iterated the First Applicant's concerns regarding the lack of community consultation and referenced the Council's *Community Engagement Policy* (**Appendix 8**).
- 2.7 The Second Applicant provided further documents and correspondence to be taken into account, by a series of emails over Monday 14 September 2020 and Tuesday 15 September 2020. This included:
 - 2.7.1 the further letter from WDRRA dated 5 September 2020, requesting the opportunity to lodge an appeal against the decision (**Appendix 4**);
 - 2.7.2 Minutes of the Waikerie Delivers Committee (the Committee) meeting held on 8 January 2020 (**Appendix 9**);
 - 2.7.3 Minutes of the Committee meeting held on 5 February 2020 (**Appendix 10**);
 - 2.7.4 Minutes of the Committee meeting held on 4 March 2020 (**Appendix 11**);
 - 2.7.5 email correspondence between members of the Committee and the CEO (**Appendix 12**); and
 - 2.7.6 the Council's *Tree Management Policy* (**Appendix 13**).
- 2.8 In addition, the Second Applicant requested and was granted, an extension of time to provide an arborist report to inform the review.
- 2.9 By email dated Wednesday 30 September 2020, it was the First Applicant who provided a copy of a report prepared by Mr Daniel Tuckwell of project GREEN.
- 2.10 In that email, the First Applicant also noted that, at the WDRRA meeting held on Tuesday 29 September 2020, it had been resolved that:

WDRRA apply to Council to submit and [sic] application to Landscape SA for an exemption for the trees to be retained as per the independent arborists report from Project Green.
- 2.11 We are not aware of any such application or request having subsequently been made to the Council by WDRRA.
- 2.12 Also attached to the email was a document prepared on 29 September 2020, by Mr Bevan Thompson, regarding the history of the planting of the Trees.

- 2.13 A copy of the email from the First Applicant of 30 September 2020, the report prepared by project Green and the history prepared by Mr Thompson are **Appendix 14**.
- 2.14 As part of this review we also requested and received, copies of the additional information the CEO relied upon in making his decision to remove the Trees. Copies of this information are **Appendix 15**.
- 2.15 Having considered all relevant information available to the CEO at the time the decision was made, as well as the submissions of and the further information provided by the Applicants, this Report has been prepared for the consideration of the Council.
- 2.16 The objective of this Report is to assist the Council in making a determination to finalise the review process.
- 2.17 Accordingly, this Report sets out:
- 2.17.1 the background facts which have given rise to the applications for review;
 - 2.17.2 a summary of relevant information obtained during the course of the review;
 - 2.17.3 findings in relation to the issues raised by the Applicants and the appropriateness of the CEO decision; and
 - 2.17.4 the options now available to the Council.
- 2.18 The standard of proof that has been applied is that of the balance of probabilities. In determining whether that standard has been met, in accordance with the High Court decision in *Briginshaw v Briginshaw (1938) 60 CLR 336*, we have considered the nature of the allegations made and the consequence(s) if they were to be upheld.
- 2.19 For the avoidance of doubt, while it is noted that the Applicants have requested responses to certain questions regarding the potential removal of up to forty-eight (48) Athel Pines in the Waikerie Riverfront area and the past removal of Athel Pines in the Waikerie Riverfront area in late August 2020, these matters are outside of the scope of this review and are not dealt with in this Report.
- 2.20 This review is strictly limited to the decision of the CEO to remove the eight (8) Athel Pines along Leonard Norman Drive at Waikerie.

3. THE DECISION TO REMOVE THE TREES

- 3.1 There are a number of Council actions and decisions which pre-date the CEO decision to remove the Trees, but which are relevant to the decision the subject of this review.
- 3.2 The background is, therefore, set out in full, because it informs the basis of the review and the findings made.
- 3.3 The Committee was established under section 41 of the Act in April 2017, following the adoption of the Waikerie Prosperity Strategy (the Strategy).
- 3.4 The objective in establishing the Committee is to bring together community leaders and elected members to advise the Council on the implementation of the Strategy.

- 3.5 The Terms of Reference for the Committee provide for its functions, which include not only to undertake certain functions in relation to the Strategy, but also, to provide advice to the Council regarding the use and development of public open spaces (**Appendix 16**).
- 3.6 The Council has, recently, resolved to progress The Waikerie Riverfront Revitalisation and Trails Masterplan Project (the Project), in partnership with the Committee.
- 3.7 The Project has been designed to create:
- 3.7.1 a lawned Amphitheatre event space with raised wall seating;
 - 3.7.2 a water play zone connected to water front sandy beach;
 - 3.7.3 public shelter, barbeque and seating;
 - 3.7.4 wayfinding signage; and
 - 3.7.5 landscape planting, lawns and lighting.
- 3.8 The Council has allocated \$1 million to complete the Project and has been successful in obtaining a further \$400,000 from the 2019/2020 State Government Open Spaces and Places for People Grants Program, as well as other grant funding.
- 3.9 The total cost of the Project has been estimated at \$2.3 million, with the works expected to be completed in June 2021.
- 3.10 The location of the Trees is within the proposed Waikerie Riverfront Project and members of the Committee had been advised that the Trees may be a pest species.
- 3.11 Subsequently, at its meeting of 8 January 2020, the Committee resolved:
- That Council seeks clarification on the status of Athol Pines within the Waikerie Region as to whether they are pest plants (**Appendix 9**)*
- 3.12 This prompted the CEO to investigate this matter.
- 3.13 It is to be noted at this juncture that the CEO considered this matter when the *Natural Resources Management Act 2004* (NRM Act) was in force. This Act was repealed on 1 July 2020, when the *Landscape South Australia Act 2019* (the Landscape SA Act) commenced operation.
- 3.14 Following careful consideration of the available information, including that which is contained at **Appendix 15**, the CEO determined that the Trees, being Athel Pines, were a 'declared species' for the purposes of the NRM Act (as well as, subsequently, the Landscape SA Act) and, as they were within 100 metres of a water course, the control of the Trees required their removal.
- 3.15 In arriving at this decision, we note that under the *Declared Plant Policy* of the Department for Environment and Water (**Appendix 15**), the *Management Plan* for Athel Pine (the Plan), prepared under the NRM Act and in force as at that time, but not yet updated (being scheduled for review in 2020), provides as an *Outcome*:

Maintain integrity of watercourses and native vegetation by preventing invasion by athel pine.

3.16 Under *Objective*, it is stated '[r]emove existing athel pines from high risk sites as prioritised at regional level' and at *Declaration* 'it is declared for destruction within 100 metres of any watercourse'.

3.17 The Plan further notes at *Invasiveness* that:

Dispersal occurs by seed, which is produced in large numbers in favourable years but is very short-lived in the soil. A large infestation can develop suddenly when seed production coincides with a flood, which disperses the seed along watercourses and also provides a suitable habitat for establishment. Infestations of athel pine commonly expand by suckering from surface roots.

3.18 Under *Impacts* it is stated that:

Athel pines form a dense canopy that provides inferior habitat for wildlife and inhibits the regeneration of native plants.

Like other Tamarix species, athel pines have deep roots that tap soil water and can lower the water table to the extent of causing small springs to dry up. To the extent that this water is saline, they extract the salt and excrete it through glands on the leaves. This process tends to increase the salinity of the surface soil and eliminate less salt-tolerant plants from the site.

In addition to displacing native vegetation, infestations along watercourses trap sediments, which reduce channel capacity as they accumulate. In time, the infestations can change the direction of streams and modify riparian landforms.

3.19 That is, not only are Athel Pines a declared pest species, but dispersal occurs by seed, with large infestations developing suddenly in flood, as well as by suckering from surface roots. Athel Pines also have deep roots that can tap soil water, resulting in a lowering of the water table and an increase in the salinity of the surface soil.

3.20 This information was and is also consistent with that which is contained in the information distributed by the NSW Government (**Appendix 15**).

3.21 Accordingly, at its meeting on 5 February 2020, in response to a question without notice, the CEO confirmed that the Trees were recognised as a:

*Pest plant under the Natural Resources Management Act 2004¹ [the CEO] advised that he would provide the legislation relating to the treatment of the Athel Pines, in essence council is required to remove and replace the pines as part of the Riverfront Redevelopment. (**Appendix 10**)*

4. NOTIFICATION OF DECISION

4.1 Subsequently, on Wednesday 2 September 2020 at 11:30pm, the Council posted on its Facebook page that the Trees were to be removed on 7 September 2020. The post was accompanied by a photograph of the Trees (**Appendix 2**).

¹ This being the Act in force as at that time

- 4.2 This post stated in full as follows:

Athel Pines to be removed.

Council wishes to advise the community that the Athel Pines along Leonard Norman Drive at Waikerie will be removed next week (7 September 2020).

These trees were planted with good intent however they are prescribed as 'pest plants'. While they would not have to be removed generally, they are specifically prohibited from being within 100 metres of a water course. As the Athel Pines are within 100 metres of the River Murray, they will need to be removed.

This area will be replanted with more appropriate species of trees as part of the Riverfront Development.

- 4.3 The Council responded to a comment made, stating '[t]his is the reason the Athel Pines need to be removed', which was accompanied by a screenshot obtained from the webpage of the Department of Agriculture, Water and the Environment (Cth) which provided:

Athel pines can reproduce by dropping seeds, or more commonly, by revegetation of plant parts. Although athel pine seeds die quickly if not kept moist, they are easily dispersed by both wind and water and may also be spread by animals. A single tree can produce thousands of seeds every year.

- 4.4 Following which, at 4:44 pm on Thursday 3 September 2020 (**Appendix 2**), the Council posted further, an explanation of the legal framework under which the CEO's decision had been made.

- 4.5 Copies of Gazette notices, published by the Minister for Environment and Water (the Minister), both under the NRM Act, as well as the Landscape SA Act, were included with this post.

- 4.6 This post also clarified, at the request of the Committee (**Appendix 12**), that the decision was not a decision of the Committee but, rather, the Council (through the CEO), 'as the land manager', and further stated:

Generally there is support within the Waikerie community for both them staying or being replaced [the Trees] and if it was not required to be removed then that would have been a different conversation about the merits of being removed or retained via public consultation.

- 4.7 Later that evening, at 11:15 pm, the Council again posted on its Facebook page confirming the decision to remove the Trees and discussing the investment in and improvement of, the Waikerie Riverfront and other environs.

- 4.8 It was noted in this post 'I know some of you have enquired regarding state governments preferred action on Athel Pines and been told they recommend removal near a water course.' (**Appendix 2**).

- 4.9 Importantly in this regard and as reported on abc.net.au on 9 September 2020 (**Appendix 17**), Murraylands and Riverland Landscape Board District Manager Hannah Spronk confirmed:

We haven't been approached by council directly about this matter, but the declared area [of concern with athel pines] is if they're within 100 metres of a watercourse

...

*For any athel pine, on any landholder's property, close to any watercourse, we work with the landholder to control them and **our end goal is usually removal.***
(our emphasis)

4.10 From 1 July 2020, the Murraylands and Riverland Landscape Board was and is, the Board responsible for administering the Landscape SA Act in the Council area.

5. THE LEGISLATIVE FRAMEWORK

5.1 Accordingly, the reasonableness of the decision made, is to be considered in light of the statutory framework in place at the time it was made.

5.2 At 8 January 2020, section 174 of the NRM Act provided that the Minister could, by notice in the Gazette, declare that provisions of the NRM Act apply to specified plants in specified declared areas.

5.3 Section 182(2) of the NRM Act provided that an owner of land within a control area for a class of animals or plants to which the subsection applied, must control and keep controlled all animals or plants of that class on that land.

5.4 By way of Gazette notice, initially published on 15 January 2015, varied by further Gazette notice published on 9 February 2017, the Minister declared Athel Pine within 100 metres of a watercourse in the whole of the State, to be a species to which section 186(2) of the NRM Act applied. (**Appendix 2**)

5.5 'Control' in relation to a particular class of plant under section 3 the NRM Act meant any of the following:

- destroy the plants;
- reduce or inhibit the propagation of the plants;
- prevent the spread of the plants;
- undertake any other prescribed action,

as far as reasonably achievable.

5.6 Following which, on 1 July 2020, the Landscape SA Act commenced and the NRM Act was repealed. However, the legislative scheme pertaining to Athel Pines was replicated under the Landscape SA Act.

5.7 Under section 185 of the Landscape SA Act, the Minister, may, by notice in the Gazette, declare that provisions of the Landscape SA Act apply to specified plants in specified declared areas.

5.8 Section 192(2) of the Landscape SA Act provides:

Subject to this section, an owner of land within a declared area for a class of animals or plants to which this subsection applies must control and keep controlled all animals or plants of that class on that land.

- 5.9 By way of Gazette notice published on 23 July 2020, the Minister declared Athel Pine within 100 metres of a watercourse in the whole of the State, to be a species to which section 192(2) of the Landscape SA Act applied. (**Appendix 18**)
- 5.10 This recent declaration is consistent with that which had been made by the Minister in respect of Athel Pines under the repealed NRM Act.
- 5.11 'Control' in relation to a particular class of plant under section 3 the Landscape SA Act continues to mean any of the following:
- destroy the plants;
 - reduce or inhibit the propagation of the plants;
 - prevent the spread of the plants;
 - undertake any other prescribed action,
- as far as reasonably achievable.
- 5.12 That is, section 3 of the Landscape SA Act (as its predecessor section under the NRM Act did) continues to provide that a number of options are open to the land owner in relation to 'controlling' a class of plants, not just limited to destruction.
- 5.13 The exception to this, is that which is provided for under section 192(3)(a) of the Landscape SA Act. This subsection provides that an owner of land within a declared area for a class of plants, must take any measures prescribed by the regulations or specified by a relevant authority **in the prescribed manner** for the control of the plants of that class on that land.
- 5.14 '*Relevant authority*' for the purposes of this section means the regional landscape board for the relevant area, the Chief Executive, or an authorised officer.
- 5.15 Regulation 25 of the *Landscape South Australia (General) Regulations* provides that the Chief Executive of the Department for Environment can **prescribe the manner** in which the control of a certain class of plant is to occur. The Chief Executive has not made a declaration in relation to Athel Pines.
- 5.16 Accordingly, 'control' of the Trees for the purposes of section 192, falls for consideration under section 3 of the Landscape SA Act (formerly section 3 of the NRM Act), meaning that destruction is not the only control option available.
- 5.17 The information provided to us shows that the CEO had regard, not only to the Landscape SA Act in making his decision regarding the Trees, but also, to the various relevant publications and information provided by both the Department for Environment and Water, as well as its NSW and Commonwealth counterparts and took all of this and the environmental imperatives into account.

- 5.18 In addition, the land on which the Trees are located is Crown land, dedicated under the care, control and management of the council for recreation purposes pursuant to the *Crown Land Management Act 2009*.
- 5.19 In response to a query from the President of the WDRRA, the Department for Environment and Water confirmed that the Trees are located on Crown land and that the Council '*has obtained or is seeking all appropriate approvals, authorities and/or permits required to carry out the works proposed in the Riverfront Master Plan*' and that '*[t]he proposal to remove the Athel Pines **would not** require consent from the Department for Environment and Water to occur*' (our emphasis) (**Appendix 15**).
- 5.20 In all of these circumstances, we find that it was (and is) open for the CEO to determine to remove the Trees in the circumstances of this matter, a decision which is not unreasonable or unsupportable, based on all of the available information that was considered.
- 5.21 We also note that a review, conducted under section 270 of the Act, as a merits review, enables the reviewer to take into account information that was not before the original decision maker at the time the decision, the subject of the complaint or application for review, was made.
- 5.22 In this regard, the Department for Water and Environment, having since been notified of the proposal to remove the Trees, has confirmed by way of letter dated 21 September 2020 that this proposal does not require its consent (**Appendix 15**).
- 5.23 Following notification of the CEO's decision on 2 September 2020, the subsequent views of the Murraylands and Riverland Landscape Board are also relevant, insofar as it provided, on 9 September 2020:
- For any athel pine, on any landholder's property, close to any watercourse, we work with the landholder to control them **and our end goal is usually removal.***
- 5.24 Further, Mr Tuckwell of project GREEN has, similarly, stated under '*Legislative Status*' that the Trees are a '*prescribed*' plant and '*declared*' for destruction within 100 metres of the waters edge, and:
- [t]o vary a control order of the type that applies to the subject trees species, an application needs to be made to the Murraylands and Riverland Landscape Board.*
- 5.25 Mr Tuckwell also noted that the Trees have an expected life span from 15 to 40 years and, as the Trees were planted circa 1957, they are over 60 years old. That is, the Trees are already some 20 years past their expected lifespan.
- 5.26 The CEO also advised that, independently, he researched and considered the options for control of Athel Pines and, having done so, reasonably concluded that control, or the ability to prevent the further spread or propagation of the Trees, could only responsibly, reasonably and effectively be achieved by removal.
- 5.27 All of which provides support for the decision of the CEO to remove the trees.
- 5.28 However, for the purposes of this review, that is not the end of the consideration of this matter as in making the decision to remove the Trees, the Applicants consider

the circumstances of this matter required the CEO to, firstly, undertake public consultation.

6. PUBLIC CONSULTATION REQUIREMENTS

6.1 The Applicants have suggested that the Council's *Tree Management Policy* applies in the circumstances.

6.2 However, the intent of the *Tree Management Policy* is:

*... to provide guidance in relation to general planting, maintenance and, if necessary, the removal of trees (and vegetation) on council managed land and roads and **within the scope of relevant legislation***

without otherwise specifying any other procedure to be undertaken in the removal of trees. (our emphasis)

6.3 The provisions under the *Tree Management Policy* must, regardless of what it states, be read and considered, in conjunction with the relevant legislation.⁷

6.4 With regards then to the Council's *Community Engagement Policy* (the Policy) (**Appendix 8**), this was last reviewed on 15 July 2015² and has been adopted in accordance with the Council's obligations under section 50 of the Act.

6.5 The Policy differentiates, as all do, between public consultation which must occur (mandatory consultation), as a matter of law and that which may occur, at the discretion of the Council (discretionary consultation). Clause 2.1 of the Policy outlines the Council's mandatory (*specified*) *consultation requirements*, which includes:

2.1 Under the Local Government Act, Council is required to undertake particular types of levels of consultation (as a minimum) in relation to the following:

- ...
- *Planting vegetation where it will have a significant impact on resident, the proprietors or nearby residents (Section.232)*
 - **Proposing to remove trees** and road construction projects (our emphasis)

For details of the specific requirements under these sections, refer to the specified sections of the Local Government Act.

6.6 Whilst section 232 of the Act does provide, amongst other things, for circumstances where the Council must follow its community consultation policy for **planting** (or authorising the planting) of vegetation, the Act **is silent** about consultation requirements for the **removal** of trees.

6.7 That is, there is **no legal requirement** (no mandatory obligation) under the Act to undertake public consultation for the removal of any trees.

² We note that following the most recent Local Government General Elections in 2018, the Policy is due for review

- 6.8 This reference in Council's Community Engagement Policy is, therefore, misplaced and incorrect and it is not included within the discretionary public consultation provisions. In our view, the obligation upon the Council in these circumstances is that consideration of the need to publicly consult prior to the removal of trees, is a matter based on the facts and circumstances of any given case, as determined by the decision-maker.
- 6.9 This arises on the basis of Justice Blue's decision in *Coastal Ecology Protection Group Inv & Ors v City of Charles Sturt* [2017] SASC 136 ('the Coastal Park decision'). This decision turned on the validity and operation of the City of Charles Sturt's Public Consultation Policy, its Coastal Park Community Land Management Plan (CLMP) and the resolutions of that Council in relation to the path design.
- 6.10 In summary, Justice Blue found that whilst that council had followed the statutory public consultation requirements as set out under section 50 of the Act, its Public Consultation Policy required something further, in terms of discretionary consultation, which the council did not give effect to in making its decisions.
- 6.11 Following which, it was held that the decisions had been invalidly made, and the matter was returned the council for its re-consideration.

7. RELEVANT CONSIDERATIONS AND FINDINGS

- 7.1 Having carefully considered the above against the evidence received, we make the following findings in respect of each of the matters raised by the Applicants:
- 7.1.1 it **was open** for the CEO to determine, based on all available information at the time his decision was made, that 'control' of the Trees required removal in the circumstances of this matter, this decision not being unreasonable or unsupportable in the circumstances;
- 7.1.2 this decision was, subsequently, supported by the position of the Murraylands and Riverland Landscape Board, as well as Mr Tuckwell of project GREEN, an arborist engaged by the WDRRA;
- 7.1.3 additionally, the Department for Environment and Water, as 'owner' of the land on which the Trees are located, did not take any issue with the decision of the CEO, confirming by letter dated 21 September 2020 that '[t]he proposal to remove the Athel Pines would not require consent' from it (**Appendix 15**); and
- 7.1.4 it follows that as mandatory public consultation requirements did not exist and the issue was one of discretion, plus the environmental imperative to remove the Trees (as the only truly effective control measure available in the circumstances) for the purposes of achieving 'control' under the Landscape SA Act, was a reasonable and responsible decision of the CEO in all of the circumstances.

8. CONCLUSIONS & RECOMMENDATIONS

- 8.1 Taking the above into account, **we find** that it was open for the CEO to determine to remove the Trees in the particular circumstances of this matter. This was a decision which was not unreasonable or unsupportable in the circumstances and there was no requirement or obligation to undertake public consultation noting the environmental

imperatives that exist, including the limitation upon control options that might otherwise have been available in relation to other types of pest plant species.

- 8.2 That is, **we find** that it was a reasonable decision to make in the circumstances, a decision open to be made on the facts before the CEO, a decision made in the public interest and not based on a flawed process.
- 8.3 Further, **it cannot be said** that the actions and behaviours of any employee or elected member, have been in breach of their public officer obligations.
- 8.4 Finally, for the avoidance of doubt, this being an operational matter, we **do not** find that the CEO required any authority, whether by delegation or resolution, from the Council, as the governing body, to consider the issue of the removal of the Trees.
- 8.5 Irrespective of the manner in which the Council resolves to determine this matter, it is acknowledged that the Applicants and/or other residents have recourse to the Ombudsman if they remain dissatisfied.

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APPENDICES