

# **THE PUBLIC DOMAIN**

**Classifying Public Property – Achieving a  
Qualitative Leap in Protection and Governance**

**WHITE PAPER**





### **Message from the Minister Jason Azzopardi**

It is an uncontested fact that, as a nation, our greatest and most valuable asset is our human resource. We are endowed, indeed, with an industrious, highly capable workforce that has an ingrained strong work ethic.

A very close second in terms of value and substance is our nation's patrimony.

Government owns and administrates all the property in Malta which is not privately owned. It is a very safe calculation that the Government owns more than half of the land in Malta. In all probability, no other Government within the European Union owns so much of its country's territory. Consequently, the Government of this country carries a huge responsibility in administrating with the highest levels of good governance, transparency and accountability the land it owns.

The attached White Paper is the result of almost four years of intense work, study and consultation. Parallel to this, it is the result of our long term vision and strong commitment to safeguard our nation's patrimony

The attached Bill is being proposed and presented for public consultation. Government will be unilaterally creating restrictions for itself in the future administration of a special kind of property being designated as public domain for the first ever time. We are proposing that Government unilaterally binds itself to administer this public domain property as a fiduciary for present and future generations. Consequently, Government will be bound by a much higher, qualitatively deeper benchmark. We are preparing to significantly empower our citizens to a greater degree and subjecting Government to an unprecedented level of public and Parliamentary scrutiny. No Government will be able to transfer historical sites or sites connected to our national memory for disgraceful and ignoble activities at the stroke of a pen. Indeed, we are proposing that every property in the public domain that is to be transferred has to be declassified and this can only be done by a specific Act of Parliament.

On another level, this Bill will be providing for much greater clarity in the determination of the applicable legal regime governing the sea bed, thus making certain investments required for fish farm, wind farms and solar energy farms much more attractive.

The proposed Bill will see Government subjecting itself to the scrutiny of the House of Representatives in the future administration of this special property. Government will be binding itself to administrate it as a fiduciary for present and future generations. This Bill entails a paradigm shift. It is a bold and radical change for the better in the administration of public land. It is a quantum leap ahead in good governance.

It is yet another public profession of the fact that we care about our national heritage.

A handwritten signature in blue ink, appearing to read 'J. Azzopardi', written in a cursive style.



## The Public Domain

### Classifying Public Property – Achieving a Qualitative Leap in Protection and Governance

#### 1. The Context

1.0 *The Nation's Patrimony*: The Government owns and administers all the property in Malta which is not privately owned. Its sovereignty extends to the limits of the territorial waters and it administers national interests over areas of the seas even beyond that line. The perimeter of our islands is called **foreshore**<sup>1</sup> and the Government administers this as a special class of property for, with the seas which lap its shores, it is considered to be **public domain**<sup>2</sup>. It is that part of the nation's property which private interests traditionally cannot own, develop or trade and it is considered as *extra commercium*<sup>3</sup>.

The foreshore is that part of the island which everyone knows is public domain and it is there for the enjoyment of each and every one of us. It was created by nature which has the force to keep it exactly as it was created, the waves being the most effective tool! We have free public access, we can enjoy it without any interference. Unfortunately, but thankfully to a limited extent, this area of the public domain is occasionally encroached upon. The Government indeed permits such encroachment when it is in the public interest to do so. This is mostly without controversy, as the man in the street recognizes the legitimacy of such encroachment, as when a breakwater is constructed to protect an inner bay or harbour, or when a sea front promenade is created to allow for better public enjoyment of the coastal areas. The installation of fish-farms and wind-farms in areas within the territorial waters is generally understood and supported as something good and justifiable, albeit in need to be monitored and regulated to protect the seabed and surrounding habitats.

The grant of private rights on the foreshore has always been controversial. The public interest argument comes under focus and not all immediately agree that the public interest is served through concessions and grants over the foreshore. Yet they do happen regularly, principally in relation to beaches, ports and harbours but even in relation to some other areas. There seems to be few rules, aimed at protection of the rights of the general public, about concessions over these areas.

1.1 *Areas apart from the Foreshore and the Sea*: Beyond the foreshore, which we all recognise immediately as public domain, there are many other areas, inland, which many see as our common heritage, also as our public domain, but Maltese law does not cater for this in

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<sup>1</sup> Sometimes “sea shore”, as in the Disposal of Government Land Act (Cap 268, Laws of Malta) and in Maltese “*xatt il-bahar*”;

<sup>2</sup> This is the translation of the term “*demanju pubbliku*” used in Maltese court judgements and follows the concept as developed in Italian and French law and noted in translations into English of their Civil Code;

<sup>3</sup> This is the term used in articles 982, 1207, 1370, 1825 and others of the Civil Code (Cap 16, Laws of Malta) which means it cannot form the subject matter of a contract, it cannot be bought or sold or leased and private rights cannot be created over it;

any detail. Some are of obvious common utility such as public roads, public squares and all related access streets and alleys, even though they have no particular aesthetic value. Others are of high aesthetic, historical or cultural value such as bastions, fortifications and similar structures. That we need to protect these areas due to their special nature is obvious.

1.2 *Special Laws*<sup>4</sup>: We have, accordingly, over the past few years started to introduce special laws with specific focus to enable the Government, through its institutions and authorities, to regulate and protect these areas, which are unfortunately not necessarily well defined. There is today a massive amount of guidelines, rules, orders and notices of an administrative nature which all seek to protect our environment. It is impossible not to acknowledge that MEPA has made tremendous progress on this front but it is evident that more fundamental strategies to create legal clarity are needed to bring all these efforts to fruition. Prior to 1988 there existed some seminal legislation of the same type but it was evidently not adequate to protect areas of high sensitivity. Although the recent enhancement, in quality and quantity, of laws aiming to protect the cultural and historic heritage and the environment, is a step in the right direction, we need to take further steps in that direction.

The following legislative acts are, to select a few, relevant in this regard:

1. Environment Protection Act - Cap 435
2. Environment and Development Planning Act - Cap. 504
3. Cultural Heritage Act - Cap. 455

Each deal with the general issue or a specific part of it, each provide tools to protect what we intuitively, but not necessarily consistently, consider to be public domain. They do it in different ways, some stronger than others, some more open to being undermined than others. The dissipation of executive power in this regard is evident with different mandates being given under different laws to different bodies, often overlapping, sometimes contradictory and uncoordinated and sometimes even counterproductive. These are principally regulatory laws and achieve good results on the whole, but they do not address the fundamental issue of the legal classification of property in the public domain, although they implicitly point to it. It is only after property has been given the appropriate LEGAL STATUS<sup>5</sup> that one can then speak of developing a consistent and effective legal regime to govern it.

These special laws cater for the powers of the Government and its agencies to intervene and protect the public domain but do not address the simple fact that the Government owns and administers the public domain and regularly deals with this property under the rules which apply in the Civil Code to private ownership, which of its nature is

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<sup>4</sup> This is a term used to show that the law is not a Code of law but a statute addressing a specific issue or context;

<sup>5</sup> This is exactly the weakness of the current law, that we have no definition of what is “*extra commercium*” and so, while the foreshore clearly enjoys that legal status, many other areas of the same quality do not;

unrestricted<sup>6</sup>. Owning land in the public domain brings with it a set of important duties – all relating to the protection of the public domain in the public interest and for the benefit of this and future generations – but the law is silent on the matter.

The current law assumes, but does not state, that the Government is the fiduciary of present and future generations when owning and administering this property for the benefit of all. Being a fiduciary implies that the Government has, in relation to this kind of property, increased obligations and severely restricted rights.

1.3 *Private Property*: These special laws do not focus specifically on private ownership and rights when they relate to areas within the public domain. They are sometimes seen as unjustly encroaching on private rights of property because they restrict what a private owner can do with his property when it is of this kind. The perceived injustice emerges in a stronger manner due to the subjective nature of the decision as to whether some property or other qualifies as sensitive or especially important because of its historical, cultural or aesthetic value. In recent years, we have seen the emergence of several voluntary organisations with environmental and heritage purposes. These have offered their voluntary services in the management, preservation and protection of sensitive areas but the tools our law provides for the grant of such properties to them is weak and ambiguous as our law focuses on private transactions and not on fiduciary grants intended only to allow for the preservation of sensitive areas. We therefore treat a grant to voluntary organisations<sup>7</sup> exactly as we would treat a grant to a business venture with speculative intent, missing the fact that the very purpose of the environmental NGO would not even allow it to do anything with the property which is inconsistent with its nature or which would in any way threaten its integrity. A grant to an NGO does not make the NGO a private owner in the ordinary meaning of the word as that ownership has a statute-defined purpose. However, when property in the public domain is actually owned privately, we need some guidance on what ownership of this kind of land implies.

This is again a problem of definition. It is proposed that while the public domain nature of a private property will not render it *extra commercium*, as private rights are preserved by this Draft Bill, its proper classification will have benefits as the law can then refer to its proper status when establishing rules<sup>8</sup> of ownership, management and administration, enjoyment, use, taxation and so on which are sensitive to its nature. That will result in certainty and predictability in the application of law which is always an important goal. Having said this, the focus and priority of this legislative project is property which belongs to the Government and not that which belongs to private individuals. Indeed the

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<sup>6</sup> Ownership is the perpetual, unlimited and exclusive right to use a property, enjoy its fruits and to destroy it if one wishes to do so. This is clearly not the appropriate concept for property in the public domain where government ownership needs to be restricted by the rights of the public to enjoy it and the right to destroy it must be excluded;

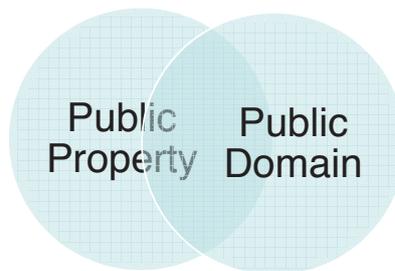
<sup>7</sup> Under article 4 of the Voluntary Organisations Act, grants by the Government should only be made to those voluntary organisations which are enrolled, thus ensuring that the adequate level of transparency and supervisory powers exist in its regard;

<sup>8</sup> A recent example of this is the rules introduced for the fiscal incentives to support the consolidation of ownership in properties which are “Scheduled”;

provisions protect private rights validly acquired on property in the public domain belonging to the Government.

1.4 The first aim of the proposal of the draft Bill entitled the **Civil Code (Amendment) Act, 2012**, which is attached to this White Paper, is to have a law relating to all Government property so as to enable the classification of State property as “public property” or as “property in the public domain”. That is the key to being able to establish a clear set of legal rules on the Government’s powers and duties when dealing with each class of the nation’s property. We have a lot of rules on public property but very few<sup>9</sup> on property in the public domain. This Bill starts to address the latter subject. It must be kept in mind that there is some overlap between the two types of property.

### Two Classes of Government Property



1.5 This legislative project will not only be of great interest to all those who administer government property, whether public property or public domain, but also to all persons who have titles and rights over such property as such titles and rights will, in the future, need to be registered in a public registry ensuring greater certainty and transparency. It also affects persons who own property which is given the status of public domain due to identified obligations which ensure that the status of such property is preserved. Property in the public domain may be subjected to private interests through grants subject to specified conditions and persons acquiring such rights ought to know the limitations which will exist on such grants when land is in the public domain. Non-governmental organisations may be the beneficiaries of such grants and administer such public domain property in the national interest.

1.6 This White Paper raises a few of the issues underlying the provisions of the Draft Bill. This Paper and the Draft Bill are being distributed for public consultation and all comments and suggestions are welcome. Written submissions should be sent to the Ministry no later than the 1<sup>st</sup> February 2013.

## 2. Definitions

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<sup>9</sup> See Disposal of Government Land Act, (Cap. 268, Laws of Malta);

2.0 As in all legal instruments it is necessary to define the subject matter being regulated. In our Civil Code we often do not find clear definitions but rely on the meanings attributable to concepts in Roman law, which is the source of many of its provisions.

2.1 The “foreshore” is one such example. Although it is a very old concept and there are many Court judgements, in Malta and other civil law countries, about it, we do not have a definition.

2.2 In **Clause 2(2)**, the draft Bill contemplates a **coastal perimeter** around the whole island and caters for both that part of the island which touches the sea and is susceptible to be covered by a wave, as well as the areas above cliffs and landmass, not affected by waves. The traditional concept of foreshore is intimately connected to the effect of waves and is necessarily at sea level. The concept coastal perimeter is more generic and catches the whole island coast, both that part of the coast at sea level and that part of the island elevated from the sea. The coastal perimeter is uninterrupted and, to establish some certainty in the concept, the Bill establishes a measurement of *15 metres* inwards from the shoreline all around the island. The coastal perimeter is partly foreshore and partly not. When it is foreshore specific rules can apply which may take it *beyond* 15 metres. When it is not foreshore than 15 metres is the maximum limit<sup>10</sup>.

2.3 This law then combines the various issues relating to the foreshore as established by case law and introduces a definition of “foreshore”. The foreshore is a minimum of 15 metres inwards from the shoreline, but if a wave covers more than that and restricts the use of the land as a result, then the foreshore *extends* to the reach of the largest waves. Of course with modern technology we often intervene to block the effect of the waves and that then ensures that the foreshore basically remains within the proposed 15 metres. If the foreshore is a beach then it extends to the limit of the beach.

2.4 It is evident that no definition can cover every situation and the Civil Code provisions will no doubt have to be interpreted by the administration and the Courts to be applied from case to case. It is clear that the shoreline is the base line for all measurement calculations and guidelines will need to be developed on the subject of the base lines to be used as a matter of course when considering the shoreline, which will undoubtedly provide challenges due to its physical contours. If straight lines are to be used to connect irregular contours, should we use 1 meter points, 10 meter points, 20 meter points or more? Or should we not seek such infinitesimal definition and allow the administration or the court to apply logical rules on a case by case basis? It is, however, evident that when it comes to registering such land in the Land Registry plans need to be prepared and architects will need specific rules to follow in this regard.

2.5 **Clause 2(3),(4)**: As ports and harbours pose specific contexts and challenges in this regard it was considered appropriate that they be excluded from these definitions and left to

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<sup>10</sup> Note should be made of a proposal that as the coastal perimeter is subject to erosion, the 15 metres can move inland from time to time. In this way the coastal perimeter never disappears and rights over that area, such as public access, are perpetually ensured;

be regulated by the special laws on ports and harbours, on quays, landing places and berths. The foreshore in ports is mostly developed for berthing of ships, pontoons are often connected to quays and dockyards are constructed for ship repair. These are areas which are the subject matter of the following laws and legislative development for these areas is better left to be focused upon as a separate subject:

- 1 Ports and Shipping Act (Cap. 352, Laws of Malta);
- 2 Small Ships Regulations (S. L. 499.52, Laws of Malta);
- 3 Authority for Transport in Malta Act (Cap. 499, Laws of Malta).

The areas within ports are also presumed to be public property, which means that Government can administer them in the normal manner in which it deals with its ordinary property. As we shall see this kind of property owned by the Government is not subject to particular rules which differ from the normally applicable civil law rules which apply to private individuals. The Government is the owner of all public property and can deal with it in any manner provided for in the Civil Code, subject only to special laws relating to public administration. Of particular relevance is the Disposal of Government Land Act, Cap. 268, Laws of Malta (the “**DGLA**”) which requires special procedures and sometimes consents for transfers or grants of land by the Government.

However, so as to ensure that the public interest rules which are reflected in the DGLA will also apply to property in the public domain, **which is even more sensitive**, the Bill proposes to extend the applicability of the DGLA to property in the public domain, beyond those parts which it already caters for. The effect of this proposal is that for property in the public domain to be disposed of (as defined in the DGLA) to private interests, including enrolled voluntary organisations, it will be necessary to follow the strict rules of the DGLA. This will ensure greater transparency and ultimately greater protection for the public.

It is to be noted, however, that there are other provisions of this Draft Bill relating to *the requirement of declassification as a precondition for any dealings relating to the public domain*. Declassification has to take place by an Act of Parliament, and therefore, before even contemplating the possibility of disposing of such property, such an Act of Parliament must first be passed.

It is not currently proposed that the DGLA be merged into the Third Schedule of the Civil Code by this Draft Bill, although it is clearly relevant as it relates to public property “belonging to or administered by the Government”. It may eventually be consolidated into the Third Schedule in accordance with policies favouring the consolidation of laws generally.

2.6 **Clause 3:** Article 327 of the Civil Code is being amended to establish a legal statement of the universe of the national patrimony which therefore consists of a combination of public property and public domain, being:

- public property: all things which the Government acquires in terms of ordinary law, by purchase, by donation, by succession or by expropriation and also extends to any vacant property which may have been privately owned but ceases to be so;

- public domain: all things which Government owns as a result of its sovereignty.

All things belonging to the Government are presumed to be public property unless they are public domain and public domain is the coastal perimeter, the internal waters (but not harbours or ports) and the seabed and sub-soil underlying the territorial seas, as well as their fruits and accessories. (Third Schedule, Article 4(1)).

**2.7 Private Rights:** This law is intended to apply to the future and is not intended to affect any private rights which were validly acquired prior to this law coming into force. Should there be any disputes relating to private rights, they shall be determined by the law applicable before the coming into force of this law. All new private rights granted over public domain after the coming into force of this law must respect the provisions laid down in the proposed Bill.

**2.8 Registration at the Relevant Registry:** Private rights over land in the public domain must be registered in the Land Registry or the Public Registry (as may be stated in regulations), if they are to be preserved and if they cannot be registered then they must be claimed in proceedings against the Government. This must take place not later than 10 years from the coming into force of this law or, as we shall see with reference to newly declared property in the public domain, not later than 10 years from the registration of a Public Domain Act.

Otherwise the public domain consisting of the coastal perimeter, the internal waters (but not harbours or ports) and the seabed and sub-soil underlying the territorial seas, as well as their fruits and accessories (Third Schedule, Article 4(1)) will be presumed to be free of such private rights.<sup>11</sup>

### **3. The Third Schedule, Civil Code**

**3.0** The Bill has two parts. The first part (Clauses 2-4) amends the Civil Code provisions and introduces transitory rules. The second part (Clause 5) introduces a Third Schedule to the Civil Code. The Schedule has been used to combine all the detailed provisions on property belonging to the Government, which, as has been outlined in article 327, consists of two portions: public property and public domain.

It would have been very cumbersome to introduce all these provisions of the Schedule into the part of the Code dealing with “Things” and only the general classification has been

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<sup>11</sup> Private rights over public property must be preserved according to the provisions of law applicable to the preservation of such rights and this Bill does not affect such matters;

retained in the main body of the Civil Code by means of article 327 itself. This was the style adopted to date and has been retained<sup>12</sup>.

3.1 The Schedule is now the most comprehensive set of rules on the status of government property and the related rules of law applicable to its acquisition, ownership, transfer and administration and the grant of private rights thereon.

3.2 Of course, it does not affect other laws of a public nature as may be applicable, such as the Constitution or the Financial Administration and Audit Act (Cap 174, Laws of Malta), the Public Administration Act (Cap. 497, Laws of Malta), the Public Registry Act (Cap 56, Laws of Malta), the Land Registration Act (Cap 296, Laws of Malta) and others.

THE DRAFT BILL:

**15 Articles**

- **Sub-Title I – Definitions, Preservation of Private Rights**
- **Sub-Title II – Of Things belonging to the Government, Public Property and Public Domain**
- **Sub-Title III – Of Public Domain**
- **Sub-Title IV – Disposal of Things in the Public Domain**
- **Sub-Title V – Concessions and Grants of Public Domain**
- **Sub-Title VI – Of Declassification of Public Domain**
- **Final article 15 – Ministerial powers to issue regulations, saving other laws.**

**4. Sub-Title I – Preliminary Issues: Definitions, Preservation of Private Rights**

4.0 The Schedule first addresses definitions used in this sector, such as “administrative act” of which we see many in practice. Most concessions on government property, including on public domain, take the form of concessions which are grants under public administrative law. These are subject to particular rules which generally already favour the Government and give weaker rights to the concessionaire. In the context of this project even these need to be addressed as when concessions are over land in the public domain we need to be more

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<sup>12</sup> Reference is made to Article 822 of the Italian Civil Code which was one of the sources inspiring the provisions of the Schedule. There are then special laws or even Codes on the different parts of the public domain, the maritime, valleys, mountains etc.

sensitive. On the other hand, concessions are often too weak a basis at law to allow a grantee to raise finance in relation to a project which may be important in the national interest, such as a wind farm. In the latter case we need to find ways to create legally enforceable rights over the areas granted so that finance can be raised and secured in full respect to the nature of the land itself.

4.1 The second preliminary aspect which is addressed is private rights which may validly exist over land in the public domain to date. It is not intended to upset such rights and it is not the purpose of this Bill to create any uncertainty as to title or rights of persons who currently enjoy such rights. Where, going forward, the aim is to deal with the grant of such rights in a very careful and coordinated manner so as to ensure that the public interest is well protected, it is a fact that several persons may have valid and enforceable rights over several parts of the public domain, accumulated over time, granted by specific laws or deeds entered into by the Government itself, as one cannot gain such rights through mere possession and prescription<sup>13</sup>. This state of law and fact needs to be respected without seeking in any way to legitimise the actions or claims of persons who are not entitled to them.

Reference is made to article 2 which seeks to protect legitimate private rights and comments are welcome on the concepts reflected in this article.

4.2 Private property is presumed not to be in the public domain but this does not mean that objective assessment of the nature of the private property may not show it to be of the same nature as property belonging to the Government which is in the public domain. This Bill again seeks to balance the public interest and private rights by stating that when such property is indeed private, it does not mean that the rights of ownership are unlimited and the owner may damage or destroy such property. The Bill suggests that a Public Domain Act may be passed in relation to private property without affecting private rights thereon and the owner may, in any case, be invited to enter into a new agreement with the Government (when original grantor) to reflect the protective principles reflected in the Schedule (see article 2(5) and (6)).

## **5. Sub-Title II – Of Things belonging to the Government – Public Property and Public Domain**

- **Public domain by NATURE and Public Domain by DECLARATION OF LAW**

5.0 Most property belonging to the Government will consist of public property and that is the legal presumption. Things which are public domain by nature, not public property, are the coastal perimeter, the internal waters (but not harbours or ports) and the seabed and sub-soil underlying the territorial seas, as well as their fruits and accessories. (Third Schedule, Article 4(1)). That is the state of the law today.

This Bill now opens up to the next step, the new quantum leap for the public domain.

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<sup>13</sup> See articles 2114 and 2115(2) of the Civil Code;

As stated in article 3(3)(b) and (4) there is now a new possibility of having public property declared to be public domain and once we have such a declaration of law in relation to such property, from then on that property will be added to the public domain and shall thereafter be treated as such. It will become *extra commercium* when owned by the Government.

#### 5.1 What property can be declared to be public domain?

The list of such property **belonging to the Government** appears in article 3(4) and consists of the following:

- (a) waterways, aqueducts, lakes, natural springs and valleys;
- (b) harbours, ports or parts thereof;
- (c) public roads, public squares, all streets, alleys and lanes and access routes, by whatever name called, to other public places, including those leading to the coastal perimeter or areas declared to be in the public domain in accordance with this Schedule;
- (d) woods, parks and other areas of ecological or environmental importance;
- (e) sites of cultural, social or historical importance including bastions, fortifications and other similar structures;
- (f) areas which serve the national security, such as airports;
- (g) the open countryside, including any cliff;
- (h) *res sacrae*, *res sanctae* and *res religiosae*;
- (i) movable things having cultural, social, archeological, artistic, ecological, environmental or historical importance, including collections of museums, art galleries, archives and libraries; and
- (j) generally things belonging to the Government which serve direct and immediate public and collective utility or which should be preserved for future generations because of their public nature, common social, historical or cultural nature, environmental importance or natural or strategic importance.

5.2 It is important to appreciate the extent of the possibilities which are being opened through this proposal. This refers to both land and movable things.

It refers to both public property and private property, except that with reference to private property such a declaration can only be made with reference to the property mentioned in paragraphs (a), (d), (e) and (g) and cannot affect private rights in a manner which would amount to expropriation of such rights. When such a declaration takes place with reference to private property it will have effect only in so far as the preservation of the

substance of such property will be achieved through the implementation of the new public domain obligations proposed by this Bill and no further.

The privately owned land will not become *extra commercium* UNLESS IT IS ACQUIRED BY THE GOVERNMENT and a private owner will therefore continue to enjoy ownership rights, will be able to sell and encumber such property and enjoy it to the exclusion of everyone else. The owner will not, however, be free to damage or destroy it and will be expected to enjoy his rights consistently with the special nature of the property he owns.

Owning public domain makes a private owner a guardian of important property and one is expected to act accordingly (see article 5(1)). Today this same result is achieved through the operation of the special laws mentioned in paragraph 1.2 above.

When land is granted to NGOs promoting the protection of the environment it would not be a problem to legally impose less restrictions as there are no private interests involved in enrolled voluntary organisations by their very definition, and so one could consider addressing land in the public domain over which an enrolled voluntary organisation has private law rights similarly to Government land rather than as private land.

5.3 Most of this property is owned by the Government and so a declaration making any of the above property public domain means that the Government will henceforth deal with this property in accordance with the Schedule. The Government will be unilaterally creating restrictions for itself in the future administration of this special property and will be binding itself to administer it as a fiduciary for the present and future generations. Of course, the Government always administers its public property in this way but, as will be seen below, with public domain there is a different legal regime, different from that relating to public property. The focus is not only good administration and accountability, as happens with freely transferable and developable public property, but public enjoyment, such as through free and unrestricted access for personal enjoyment and the preservation for future generations (articles 4(10) and 4(11)). Zones earmarked as zones of national importance should be priority areas to be declared public domain.

5.4 How is public property of the type in the above list declared to be public domain?

As stated in article 4(2), this is done by means of an Act of Parliament called a **Public Domain Act** (“PDA”). The article then states what a PDA must contain. The contents seek to ensure that the proper focus on the decision and its implications is made by the House of Representatives when passing such a law.

Most of the requirements are established to ensure that the property in question can be registered at the Lands Registry for public notice and to ensure suitable transparency. The substantive importance of the declarations, however, relates to any restrictions on public enjoyment which may exist, as those undermine the basic assumption that public domain property is freely accessible by the public, is open to enjoyment by the public and third parties have no rights on it. The land registration system ensures that all matters which go

against the assumption appear from a public register, and what appears in the public register is basically what the House of Representatives is recording for registration when passing such as law. It is hoped that such approach will eliminate much of the controversial speculation which takes place in relation to such property, exposing often irresolvable clashes between public rights and private interests. It will not be within a Minister's power to declare a particular area to be public domain or to give grants over public domain property. This is now only possible through an act of Parliament ensuring transparency and good governance.

Of course private rights can always be registered so as to preserve such rights as exist, even after a PDA, but the Bill is establishing a ten year period for private rights to be so registered, failing which such rights shall no longer be considered to arise.

#### 5.5 What happens after a PDA is enacted?

Article 4(5): When property is declared to be public domain it is no longer public property and so it becomes *extra commercium*, which means it cannot be dealt in, cannot be sold, cannot be encumbered by hypothecs or other charges, third parties cannot be given private rights, and so on. The Draft Bill then provides that such property may of course be subject to administrative decisions or grants but for that to happen the property must be **declassified** by another act of Parliament, which is the reverse concept, to some extent, as will be explained below.

Should any private rights be granted over public domain property the grant will NOT be valid.

Article 4(8): public domain property becomes subject to public domain obligations and remains so even when declassified. This shows the impacts of a PDA declaration which is irreversible to a large extent, because once property is declared public domain it is always public domain. Declassification, as we shall see, allows for certain grants and other acts but never changes *the nature* of the property. Consequently even if private rights are granted over declassified public domain, the private grantee will still be bound to protect and preserve the property and operate it consistently with its nature.

Article 4(10)-(14): these articles outline the public domain obligations in further detail and propose an action Government may take against those who breach them.

#### 5.6 Registration in Land or Public Registry

This law introduces a high level of transparency and legal certainty by requiring registration of any private rights over the public domain, the enactment of a PDA, any declassification, any grant of any private rights and so on. The public ought to know when property is public domain from a public search as the legal implications of this are very serious, as serious as they are now. Unfortunately today we lack a system of registration so it is very difficult to know where one stands. Given the important economic decisions people take when dealing in property, it is no longer acceptable that persons are not fully aware of

the status of property which may affect their rights. This applies to buyers, lessees, banks financing projects and others who may have interests in the property.

## **6. Concessions, Grants, and Transfers of Public Domain**

6.0 Government is always dealing in its property, selling, acquiring, giving servitudes, leases, concessions and so on.

This is where the DGLA comes in and it is being extended to public domain by article 6.

6.1 Article 7 outlines the rules applicable to concessions by administrative act. These are very common and the purpose of this article is to confirm that the Government may continue to do so without the need of a declassification due to their temporary nature; however, when they are to be granted over public domain then they need to respect the nature of such property and therefore they need to be less of a burden on such land. The following conditions shall be implied, that the grant is:

- (a) personal to the grantee thereof and shall not be assignable nor shall it be capable of division and when the grant is made to a legal organisation or a trust which has shareholders or beneficiaries, as the case may be such shareholders or beneficiaries shall be subject to the same conditions together with the legal organisation or trust during the duration of such grant;
- (b) revocable by the granting authority upon written notice;
- (c) subject to public domain obligations and conditions as outlined in this Schedule; and
- (d) initially granted for not more than 10 years, and when renewed, for not more than 10 years at a time.

6.2 Article 8 then addresses contractual grants by the Government under private law. These are subject to PRIOR declassification. A review of this article demonstrates how restricted a grant must be in substance. In effect what the Bill is proposing for grants of public domain land is a double requirement in terms of administrative compliance:

- the first is that the property be declassified so that from public domain, which cannot be granted or encumbered, it becomes public domain land *which can be granted or encumbered*;
- the second is that *after it is declassified*, should Government decide to grant it to third parties or encumber it in any way, then it must observe the provisions of the DGLA and other public service laws.

BOTH are the subject of scrutiny by the House of Representatives for declassification can only be carried out by a Declassification Act and a grant, except when exempted from the

DGLA by its own provisions, may require public tenders, public auctions or the approval by resolution of the House.

6.3 Article 9 then deals with reversion to the public domain after the temporary grant ends.

## **7. Declassification Acts**

7.0 Sub-title VI regulates Declassification Acts (“DA”) and Article 11 establishes the basic content of such laws. These too need to be registered at the Land Registry.

Just like a grant can be terminated, so can a declassification and when a declassification terminates the property reverts to its original public domain status and must be returned to the state it was prior to any grant.

It is to be noted that a Declassification Act is required even for the Government to take any part of the property declared to be public domain, back to the status of public property, which can then be administered in the normal course of public administration. The Declassification Act will need to focus on public interest issues even for such a step.

## **8. Reclamation**

8.0 The Bill proposes to address reclamation to some extent because reclamation is necessary over the public domain as it stands today, as reclamation affects the seabed. We do not have any laws on reclamation from a private law angle, although we have several which would apply from an environmental angle.

Article 14 applies the provisions of the Bill and basically demands that the area to be reclaimed be declassified first. As declassification is by Act of Parliament, this means that there will be public notice and debate on such sensitive interventions and the proposal will need to be articulated in some detail as required in article 11(2).

Reclamation obliterates a part of the foreshore and the seabed, hence the sensitivity, but by operation of this law a new foreshore will be created – the perimeter of the reclaimed land.

The non-foreshore part of the reclaimed land will however immediately fall within the classification of public property which then means that the Government owns it and will be able to sell or grant it on emphyteusis or lease as it sees necessary and appropriate.

## **Conclusion**

This Bill is important as it has many dimensions.

It is of *environmental relevance* because it seeks to give greater legal force and recognition to the nature of property in the public domain by imposing obligations over its owners, particularly when the owner is the Government. Government, as owner of the public domain is a fiduciary of the public interest in the enjoyment and preservation of the special land. Anything occurring to such land as is owned by the Government needs to be as public and as transparent as possible. The involvement of Parliament in PDA's, in DA's and in many of the proposed grants, is an important step forward from the point of view of transparency and accountability, which are implicit in any fiduciary obligations.

It is important from the angle of *good governance* of public property, especially that property which constitutes the public domain which is much more sensitive. Registration of its status and all rights and decisions relating to it ensures that people can verify what is happening to this land in a simple manner through the Land Registry. Different priorities need to come to bear when the Government deals with its public property as opposed to its public domain. The first is an economically relevant portfolio and will require one set of skills and priorities. The second is an environmental and fiduciary portfolio and the priority is the protection of the rights of enjoyment by the public and the interests of future generations, without any economic agenda. Of course sometimes one meets a public enjoyment agenda by permitting commercialization of some important property as that creates the economic means to restore the very property, saving it from destruction by the elements, but good governance principles will need to apply to how this is addressed and the Bill's proposal of declassification is the means to achieve such balance in a sensitive and transparent manner.

It is of *economic relevance* as well. In an era where we need fish farms to help protect the fish stock in the seas around us, where we need wind and maybe wave farms to produce energy and where we need to raise substantial funds to finance the acquisition and development of facilities in the sea and even over the land, it is important to be able to create valid and clear legal rights in relation to all areas within the national patrimony. Under current law, for example, it is not possible to create security over areas in the sea or to grant an emphyteusis over an area in the sea. This Bill now provides for a DA which will allow Parliament to transparently permit the declassification of a part of the sea area which then permits the grant of legal rights over that area in a legally valid and effective manner. This will ensure legal certainty which is critical to such transactions, making Malta a more attractive legal system for such transactions.

Of course, one has to grant only such rights as are strictly necessary for such purposes and Article 13 lays down the principle that such grants give rights of use but do not extend to the fruits and accessories of such areas. So a lender enforcing rights in case of default of a borrower gains no more than a title to use the area within the sea for exactly the same purpose as the borrower, subject to the same conditions.

It is ultimately of *great social relevance* because we are taking the very important step of establishing a method to define areas in the Maltese Islands as public domain, which means that those areas are declared to be accessible to all for public enjoyment and no one can hinder such enjoyment except as expressly provided for in the law or as is publicly

registered in the relevant register. The establishment of areas as public domain areas is of immense significance in our efforts to preserve the beautiful areas in our country for future generations, to preserve the areas of historical and cultural importance for our children and their children, as our common heritage.

Of course, as in all things, we have sought to create a balance between the public interest and private rights and between the acquisition of the public domain status and its possible declassification, in the event a limited grant needs to be made in relation to it in the public interest.

## **COMMENTS**

All comments and proposals are to be sent by not later than the 1<sup>st</sup> February 2013 to the:

Ministry for Fair Competition, Small Business and Consumers,  
Cavalier House,  
Old Mint Street,  
Valletta, VLT 2000.

or by sending an email to: [publicdomain.mfcc@gov.mt](mailto:publicdomain.mfcc@gov.mt)

One can download the white paper through the Website of the Government Property Division: [www.gpd.gov.mt](http://www.gpd.gov.mt)

I assent.

(L.S.)

GEORGE ABELA  
President

2012

**A BILL  
entitled**

*AN ACT to amend the provisions of the Civil Code (Cap. 16) relating to the law of things, defining the rules on the coastal perimeter and the foreshore, classifying property in ownership of the Government, defining and introducing rules on the concept of the public domain and rules on duties and limitations on the Government in its administration of property in the public domain, regulating the designation and declassification procedures and effects in relation to the public domain, introducing rules on the registration of property in the public domain and addressing the impacts of the amendments on private rights and on other existing cultural, environmental and other special laws affecting Government property.*

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same, as follows:-

**1.** The short title of this Act is the Civil Code (Amendment) Act, 2012, and this Act shall be read and construed as one with the Civil Code, hereinafter referred to as “the Code”. Short Title.

**2.** Article 311 of the Code shall be renumbered article 311(1) and new sub-articles shall be added as follows: Amendment to article 311 of the Code.

“(2) The “coastal perimeter” is that part of the land

which lies fifteen metres from the shoreline inwards, whether it is foreshore, landmass or cliff or is a combination of them and, where the foreshore extends beyond fifteen metres, to the limit of the foreshore.

The “foreshore” is that part of the coastal perimeter, including where it exceeds 15 metres, which is normally covered by water due to the action of the waves and the use of which is restricted by this fact. The foreshore extends up to the reach of the largest wave and, even if it lies beyond the reach of the waves, to the limits of any beach.

In this sub-article:

(a) a “beach” is that part of the land contiguous to the shoreline, irrespective of how far inland it extends, which is of its nature or characteristics destined for public use in accordance with its nature;

(b) a “landmass” or a “cliff” is that part of the coastal perimeter which is elevated from the sea, is not accessible from the sea and, or is not subject to being covered by any wave; and

(c) the “shoreline” is the land contour which is constantly in direct contact with the sea; provided that when the shoreline changes due to erosion or collapse, the baseline for calculation of the coastal perimeter shall be adjusted accordingly from time to time.

(3) Any private titles and rights to the foreshore shall be registered in the relevant registry in accordance with applicable law prior to the lapse of ten years from the designated date.

(4) Quays, wharfs and other constructions in harbours, ports, landing places and yachting centres for the berthing of ships, yachts and other vessels used in navigation, or of aircraft, or for the attachment thereto of pontoons, floating quays, or for dockyards, roads and access paths, or other similar structures in such areas, shall be regulated by the provisions of special laws governing such things and the terms “quays”, “harbours”, “ports”, “yachting centres” and other related terms shall have the meanings assigned to them by such special laws.

(5) Although contiguous to the sea, such quays and other constructions and the areas within harbours and ports:

(a) shall be considered to be public property, saving private titles and rights thereon; and

(b) shall not be considered to be part of the coastal perimeter for the purpose of this Code until such time as any part of such areas, belonging to the Government, are declared and registered as land in the public domain, saving private titles and rights thereon, as provided for in the Third Schedule to this Code.

(6) In this article:

(a) the term “designated date” shall be that established by the Minister responsible for Lands by means of a legal notice issued for such purpose under the Public Registry Act (Cap. 56, Laws of Malta) and, or the Land Registration Act (Cap 296, Laws of Malta) and, or any other applicable law;

(b) the term “public domain” shall have the meaning given to it in the Third Schedule to this Code;

(c) the term “public property” shall have the meaning given to it in article 327 of this Code; and

(d) “relevant registry” means the Public Registry or the Land Registry or any successor registry.”

**3.** Article 327 of the Code shall be deleted and substituted by the following new article forming part of a new Title IIA of Part I of Book Second of the Code:

Deletion of article 327 and insertion of new sub-title IIA.

#### “Title IIA

#### OF PROPERTY BELONGING TO THE GOVERNMENT

327. (1) The Government is the owner of:

(a) all things which it acquires pursuant to the provisions of this Code or any other special law, herein referred to as “public property”; and

(b) all things forming part of the public domain, which it holds as a result of its sovereignty, herein referred to as “public domain”.

(2) Vacant property belongs to the Government.

(3) Property belonging to the Government may be subject to private rights in the manner and to the extent stated in this Code and other special laws.”

Transitory provisions.

**4.** (1) Where private titles or rights are claimed in any civil or administrative proceedings, commenced at any time prior to the coming into force of this Act, in relation to land in the public domain, such private titles or rights shall be determined in accordance with the law applicable prior to the coming into force of this Act until they are finally determined by the relevant court or tribunal or by any agreement between the parties.

(2) Where any private titles or rights over land considered to be in the public domain belonging to the Government are not registered or preserved in accordance with the Public Registry Act (Cap. 56, Laws of Malta), the Land Registration Act (Cap 296, Laws of Malta) or any other applicable law having such effect, or are not claimed in any proceedings as stated in sub-article (1) commenced not later than ten years from the designated date, such titles or rights shall be presumed to be mere encroachments to the extent they are being tolerated or shall not be considered to exist as a matter of law or to otherwise lapse.

The amendments introduced by this Act shall apply to all the land in the public domain, saving titles or rights which are so registered or preserved.

(3) The “designated date” shall be that established by the Minister responsible for Lands by means of a legal notice issued for such purpose under the Public Registry Act (Cap. 56, Laws of Malta) and, or the Land Registration Act (Cap. 296, Laws of Malta) and, or any other applicable law.

(4) The provisions of article 311 shall apply, in accordance with their terms, with effect from the 1st January, 2013 to anything done on or after such date over the coastal perimeter or land in the public domain, as defined in this Code.

New Schedule.

**5.** Following the Second Schedule to the Civil Code there

shall be inserted a new Third Schedule with Titles and Sub-Titles and with the names and provisions as follows:

## “THIRD SCHEDULE

### **Title I**

#### PRELIMINARY

##### Sub-Title I

#### DEFINITIONS, PRESERVATION OF PRIVATE RIGHTS

#### **Definitions.**

1. In this Schedule:

(i) “administrative act” includes licences, permits, concessions, authorisations or encroachments, grants which are made under tolerance or other precarious title and any other licence which may be issued by the Government in terms of regulations which may be issued from time to time, and different departments or entities within the term “Government” shall be treated as distinct persons;

(ii) the “Code” shall mean the provisions of the Civil Code apart from this Schedule;

(iii) “designated date” shall be the date of the coming into force of this Schedule;

(iv) “Government” shall include all departments and agencies of Government, all local councils, all statutory authorities and corporations and all organisations controlled by the Government;

(v) “land” in this Schedule shall include the seabed and the sub-soil;

(vi) “private rights” are those titles or rights which arise under any law or agreement and which, if subject to registration or preservation according to applicable law, are so registered or preserved in the

manner and within the time required by applicable law;

(vii) “relevant date” means the 1st January, 2013;

(viii) “relevant registry” means the Public Registry or the Land Registry or any successor registry;

(ix) “special law” means acts of parliament or regulations and other acts constituting law other than the provisions of the Code which deal with particular matters relevant to any provisions of this Schedule.

### **Existing private rights.**

2. (1) Land in the public domain which is subject to private rights, in virtue of laws enacted or agreements validly entered into prior to the relevant date shall continue to be subject to the terms and conditions of such laws or agreements until such land is, if ever, acquired by the Government free from such private rights.

(2) Nothing in this Schedule shall affect private rights over land in the public domain except and only to the extent that:

(i) when the land was acquired from the Government or otherwise, it was subject to express reservations;

or

(ii) the land is subject to reasonably implied restrictions on use or enjoyment attributable to its specific public domain nature; Provided that for the avoidance of doubt, private rights shall continue to be fully enjoyed and shall only be subject to reasonable limitations which arise from the public domain nature of the particular land, keeping in view its particular characteristics, uses and functions and the public utility it provides;

or

(iii) by virtue of the owner’s consent, until withdrawn, the land has been made available for public

utility;

or

(iv) the law as it stood prior to the relevant date so provides;

or

(v) the land was granted by the Government on mere encroachment and such concession is withdrawn.

(3) Private rights granted by the Government by means of any written instrument prior to the relevant date shall be governed by the terms of such instrument and applicable law and any limitations on the capacity of the Government to make such grant due to the public domain nature of the subject matter shall not affect the validity of such instrument.

(4) Subject to sub-article (3), nothing in this Schedule shall operate so as to:

(i) grant or recognise private rights or entitlements over land in the public domain to any person who, as of the relevant date, does not have valid and enforceable title, possession or other rights to land in the public domain;

(ii) impinge on the Government's right to pursue any or all legal remedies and, or to exercise any or all of its powers under current law in relation to any person claiming any right to land in the public domain where such claim is not recognised as valid by the Government;

(iii) affect the operation of articles 2114 and 2115(2) of this Code relating to the non-applicability of the provisions on prescription against things which are extra commercium or with regard to rights or actions of the Government.

(5) Privately owned land shall be presumed not to be in the public domain unless it is property of the type referred to in sub-article (1) of article 4 or is the subject of a Public

Domain Act as defined in sub-article (2) of article 4.

(6) If the continuing exercise of private rights, as are preserved by this article, materially endangers land in the public domain as aforesaid or where the exercise of such rights is in material conflict with the principles established in this Schedule in so far as the use of such land and its future preservation are concerned, apart from enforcing any agreement or applicable law in that regard, it shall be lawful for the Government to request amendment to any grant, concession or other agreement with the holder of such rights to ensure the respect of the provisions of this Schedule.

Notwithstanding the terms of any agreement, the court shall have the power to issue orders, as appropriate, on the use and future preservation of the property in question for the duration of the agreement.

## Sub-Title II

### OF THINGS BELONGING TO THE GOVERNMENT PUBLIC PROPERTY AND PUBLIC DOMAIN

#### **Presumptions.**

3. (1) Things belonging to the Government shall be presumed to be public property.

(2) Things in the public domain shall be presumed to belong to the Government unless they are privately owed.

(3) Things shall be considered to be in the public domain, if:

(a) they are of the type referred to in sub-article (1) of article 4;

or

(b) after the relevant date, they are the subject of a declaration, made in terms of sub-article (2) of article 4, and, where possible, are registered in accordance with applicable law.

(4) The things, and their fruits and accessories, belonging to the Government which may be the subject of a declaration that they form part of the public domain are the following:

(a) waterways, aqueducts, lakes, natural springs and valleys;

(b) harbours, ports or parts thereof;

(c) public roads, public squares, all streets, alleys and lanes and access routes, by whatever name called, to other public places, including those leading to the coastal perimeter or areas declared to be in the public domain in accordance with this Schedule;

(d) woods, parks and other areas of ecological or environmental importance;

(e) sites of cultural, social or historical importance including bastions, fortifications and other similar structures;

(f) areas which serve the national security, such as airports;

(g) the open countryside, including any cliff which does not constitute part of the coastal perimeter;

(h) *res sacrae*, *res sanctae* and *res religiosae*;

(i) movable things having cultural, social, archeological, artistic, ecological, environmental or historical importance, including collections of museums, art galleries, archives and libraries; and

(j) generally things belonging to the Government which serve direct and immediate public and collective utility or which should be preserved for future generations because of their public nature, common social, historical or cultural nature, environmental importance or natural or strategic importance.

(5) Any such declaration shall be subject to any private rights which may exist over such property.

(6) The property of the type referred to in subparagraphs (a), (d), (e) and (g) which is privately owned may also be the subject of a declaration that they form part of the public domain.

### Sub-Title III

#### OF PUBLIC DOMAIN

##### **Things in the public domain.**

4. (1) The following things, and their fruits and accessories, shall be considered as property in the public domain by virtue of this Schedule and without the need of any further declaration, registration or other formality:

(a) the coastal perimeter;

(b) internal waters such as bays, coves and other areas which lie between the coastal perimeter and the baselines from which the territorial waters are measured and the relative seabed and subsoil and the overlying water-column and its airspace provided they are not harbours or ports;

and

(c) the seabed and subsoil underlying the territorial seas beyond the baselines from which the territorial waters are measured and the relative seabed and subsoil and the overlying water-column and its airspace.

(2) The Government may, from time to time, declare by means of an Act of Parliament (hereafter a "Public Domain Act") any property of the type referred to in sub-articles (4) or (6), as the case may be, of article 3 as property forming part of the public domain. In the case of immovables such Act shall be effective from the date on which the declaration is registered in the relevant registry.

(3) Every Public Domain Act shall, as a minimum:

(a) identify the property, its fruits and

accessories;

(b) identify any Government powers or third party titles or rights which shall continue to be enjoyed over the thing, and the manner in which they are to be exercised or enjoyed, notwithstanding the declaration;

(c) identify special laws or provisions thereof, if any, which restrict the public access or enjoyment of such property in accordance with this Schedule and which shall continue to apply to such property notwithstanding the declaration;

and

(d) where applicable, be accompanied by a plan or general map, based on the official map of the Land Registry, identifying the property and the accessories which are affected by such declaration.

(4) All Public Domain Acts shall be registered in the relevant registry by the Minister responsible for Lands within 30 days of the coming into force of the Act of Parliament by which a declaration contemplated by this article is made.

(5) Saving private rights and any concessions which may validly exist, things in the public domain belonging to the Government shall be extra commercium unless they are declassified in accordance with the provisions of Sub-Title VI of this Title, in which case they shall no longer be treated as extra commercium but only to the extent and for the purposes mentioned in the relevant Declassification Act.

Provided that things which have been declared to be in the public domain by a Public Domain Act which are privately owned shall not be considered as being extra commercium and they may continue to be subject to transactions in accordance with the Code or any other applicable law even if not declassified.

(6) Things in the public domain belonging to the Government which have been declassified as provided for in this Title may be subject to concessions or private rights in accordance with this Schedule.

(7) The acquisition of any right by any private interest over any thing in the public domain belonging to the Government which is not declassified, other than by concession under article 7, shall be ipso iure null and void.

(8) Things in the public domain shall be subject to public domain obligations, even when declassified, and no acquirer may plead good faith so as to acquire free from such obligations.

(9) Actions and remedies enjoyed by the general public shall only be those provided under public law.

(10) The principal obligation, which burdens an owner of a thing in the public domain, whether owned by the Government or by a voluntary organisation or by a private interest is to preserve its substance with regard both to matter and to form.

(11) Without prejudice to any private rights thereon, or as otherwise expressly stated in any Declassification Act, things in the public domain belonging to the Government are also subject to a burden being the utility derived by the general public and which is enjoyed by every person on mere sufferance. Public utility includes collective rights such as public access, use, public enjoyment of the fruits and accessories, accommodation to necessities of trade, transit and communication or recreation and any other use and subject to such restrictions as may be prescribed by regulations made from time to time requiring a thing in the public domain to be subject to such burden.

(12) Without prejudice to any private rights thereon, or as otherwise expressly stated in any Declassification Act, nothing in the preceding sub-articles shall imply that any person may, in or over land in the public domain:

(a) drive or ride any vehicle except over paths which prevent damage to such property;

(b) light any fire or do any act which is likely to cause a fire;

(c) wilfully damage anything thereon or therein;

(d) wilfully injure, remove or destroy any plant, shrub, tree or root or any part thereof;

(e) affix or write any advertisement, bill, placard or notice;

(f) deposit any rubbish or leave any litter;

(g) engage in riotous, disorderly or indecent conduct; or

(h) wilfully disturb, annoy or obstruct any person engaged in any lawful activity.

(13) Unless it is contrary to law or the declared or apparent destination of the thing in the public domain prohibits it, or it is otherwise prohibited by the Government in accordance with law, things in the public domain belonging to the Government, or their fruits and accessories, may be used or enjoyed, on sufferance, in any amount necessary for an individual's own personal use or consumption. Where special laws require Government authorisation also for personal use or enjoyment of things in the public domain, such authorisation shall be a condition for public use and enjoyment.

(14) In addition to any rights or powers it may have under any law, licence, contract or otherwise, the Government may entertain any civil or administrative action against any person who damages, or by his actions threatens to damage, things in the public domain.

**Registration of private rights to things in the public domain.**

5. (1) When things in the public domain as defined in this Schedule are subject to private rights, they shall remain public domain and shall generally be burdened by public domain obligations which arise due to their nature, limited by such private rights in a manner consistent with their nature and subject to any applicable law.

(2) Any person enjoying an existing title to or right over land in the public domain shall register such title or right with reference to the specific land in accordance

with and subject to the provisions of the Public Registry Act (Cap. 56, Laws of Malta), the Land Registration Act (Cap. 296, Laws of Malta) or any other applicable law having such effect, prior to the lapse of ten years from:

(i) the designated date with reference to property referred to in sub-article (1) of article 4;

or

(ii) the date on which any Public Domain Act is registered in the relevant registry with reference to a specific land;

and subject to the right of the Government or any other person who may have an interest to contest such title or right in terms of any applicable law.

(3) Any person acquiring titles or rights over things in the public domain following declassification, shall register such title or right in accordance with and subject to the provisions of the Public Registry Act (Cap. 56, Laws of Malta), the Land Registration Act (Cap. 296, Laws of Malta) or any other applicable law having such effect within the period prescribed by law.

#### Sub-Title IV

### DISPOSAL OF THINGS IN THE PUBLIC DOMAIN

#### **Disposal of things in the public domain.**

6. (1) Apart from complying with the requirements established by this Schedule in relation to declassification the disposal of things forming part of the public domain shall comply with the provisions of the Disposal of Government Land Act (Cap. 268, Laws of Malta) or any regulations issued thereunder, to the extent and in the manner they so require.

(2) The term “disposal” shall have the meaning attributed to it by the said Act and the provisions of the said Act shall apply to public domain *mutatis mutandis*.

#### Sub-Title V

## CONCESSIONS AND GRANTS OF PUBLIC DOMAIN

### **Administrative Acts in relation to things in the public domain.**

7. (1) The Government may grant rights over any things in the public domain by an administrative act on condition that such things in the public domain must be used consistently with their nature.

(2) It shall not be necessary to declassify things in the public domain in order for them to be the subject of an administrative act.

(3) Subject to more detailed terms or conditions which may be prescribed by regulations issued by the Prime Minister from time to time regarding administrative acts, when an administrative act refers to things in the public domain, notwithstanding any provisions of any agreement to the contrary, such grant shall be:

(a) personal to the grantee thereof and shall not be assignable nor shall it be capable of division and when the grant is made to a legal organisation or a trust which has shareholders or beneficiaries, as the case may be such shareholders or beneficiaries shall be subject to the same conditions together with the legal organisation or trust during the duration of such grant;

(b) revocable by the granting authority upon written notice;

(c) subject to public domain obligations and conditions as outlined in this Schedule; and

(d) initially granted for not more than 10 years, and when renewed, for not more than 10 years at a time.

Provided that when the grant by the Government is made to an enrolled voluntary organisation the purposes of which reflect the same principles of this Schedule relating to the manner of administration of any property in the public domain, the conditions mentioned above may be modified or waived.

(4) Administrative acts granting rights over the public domain shall be registered in the relevant registry if their term exceeds 2 years. Such registration shall not give to the grantee any ownership or possessory rights and the rights remain as stated in the preceding sub-article and applicable law.

**Lawful grants to private interests over things in the public domain.**

8. (1) Saving any grant which is made pursuant to a special law which may expressly modify the conditions hereunder specified, when things in the public domain are the subject of a grant by the Government to private interests, the following conditions shall apply:

(a) except when the Declassification Act expressly authorises the declassification to be for an indefinite term because of its evident irreversibility, the grant shall be for a specified term not exceeding 100 years and shall be, as far as reasonable:

(i) proportionate to the nature of the interest or benefit to be gained by the general public and to the length of time during which such interest or benefit actually subsists;

(ii) sufficient to fulfil the authorised use;

(iii) inversely proportionate to the extent to which the general public is restricted access and use, so that the greater the restriction on public use, the shorter the period; and

(iv) inversely proportionate to the disruption of the public function the thing used to serve, so that the greater the disruption to public function of the thing, the shorter the period;

and in any case shall not exceed the term for which the thing was declassified;

(b) the purpose of the grant and subsequent use of the thing shall be exclusively that for which the thing was declassified;

(c) if reasonably possible, suitable alternatives are provided to the general public which has been deprived of the things it formerly used or enjoyed;

(d) except when the Declassification Act expressly authorises the declassification to be for an indefinite term because of its evident irreversibility, any constructions, improvements or alterations made to things in the public domain are to be removed on the lapse of the term, unless the Government approves the retention, for its own benefit or as it may consider in the public interest, of such constructions, improvements or alterations at the time of the declassification or any time thereafter;

(e) except when the Declassification Act expressly authorises modification of any thing in the public domain, any damages, destruction or modification or exploitation other than that expressly permitted, shall be made good at the expense of the grantee;

(f) unless expressly permitted by the Declassification Act, and in such case subject to the express conditions of the grant, the grant shall:

(i) be personal to the grantee thereof and shall not be assignable and when the grant is made to a legal organisation or a trust which has shareholders or beneficiaries, as the case may be such shareholders or beneficiaries shall be subject to the same conditions together with the legal organisation or trust during the duration of such grant;

(ii) not be capable of division; and

(iii) not be capable of being the subject of security in favour of a third party.

Provided that when the grant by the Government is made to an enrolled voluntary organisation the purposes of which reflect the same principles of this Schedule relating to the manner of administration of any property in the public domain, the conditions mentioned above may be modified or waived.

(2) The preceding sub-article shall be subject to the following additional rules of interpretation:

(a) should a grant be made for more than 100 years, it shall be valid only for 100 years;

(b) should the grant exceed the term stated in the Declassification Act, then the term of the grant shall be reduced ipso iure to the term stated in the Declassification Act;

(c) should the grant be made for a purpose not specified in the Declassification Act, than such grant shall be null and void and no rights whatsoever shall accrue to any party by virtue thereof.

(3) Nothing in this Schedule or any Declassification Act shall hinder the imposition by the Government of more onerous or restrictive conditions at the time of any grant or disposal of the relevant property in the public domain in order to better protect or preserve the public domain nature of the property.

#### **Reversion to public domain.**

9. (1) When a thing in the public domain has been subjected to private rights, on the termination, howsoever this occurs, of such private rights, such thing shall revert ipso iure to the public domain. On reversion, the thing shall be free from all rights and claims, both personal and real.

(2) Such reversion shall also occur following the expiration of the stated term or the impossibility or exhaustion of the purpose and use for which the thing was declassified or granted, as the case may be.

(3) Any thing which has, within the term of the original Declassification Act, reverted to public domain in accordance with this article may be re-granted for the remaining period of the original grant without a new declassification provided it is so re-granted within 12 months of the reversion.

(4) When a declassified thing reverts to the public domain after the lapse of the specified term of the

grant the Government shall seek to return the property into the public domain for at least 25 years before declassifying it again, unless with the support of a resolution of the House of Representatives.

(5) When immovable property in the public domain is declassified and the declassification is expressly declared to be indefinite in duration due to the irreversibility of the intended use permitted by declassification, reversion to public domain shall not take place and the property shall remain private or public free of any public domain obligations including those referred to in sub-article (10) of article 4.

#### Sub-Title VI

#### OF DECLASSIFICATION OF THE PUBLIC DOMAIN

##### **Declassification.**

10. (1) All things which are in the public domain, by nature or by operation of the law, can be designated to be available for:

(a) the use and administration of such property by the Government as public property;

or

(b) the grant of titles or rights in favour of private interests;

in accordance with the use to which the thing can lend itself, generally without permitting the permanent alteration of its nature. Such designations shall be for a purpose or purposes which are specifically defined, being in the public interest and shall be made by an Act of Parliament. Such things shall be referred to as declassified things.

(2) Following declassification, the declassified things shall still retain their nature as public domain and, to the extent not incompatible herewith, shall still be subject to the rules in this Schedule. Declassification, however, may impose restrictions on continuing public enjoyment to the extent that public administration or private use is subsequently permitted.

(3) Declassifications cannot take place in relation to classes of things or the totality of such type of thing but can only be made with reference to specific things susceptible to individual designation and description.

(4) Declassified things belonging to the Government become capable of being the subject of a contract for the period of declassification and are rendered susceptible to real rights and charges and other encumbrances.

Provided that any real rights, charges and other encumbrances shall terminate ipso iure on the expiration of the contract term or on the lapse of the declassification period, whichever is the earlier.

(5) The modification or conversion of things in the public domain following declassification may be permitted by a Declassification Act on condition that such modification or conversion shall seek an outcome where the gain achieved by the general public is clear and unambiguous.

#### **Procedure for Declassification.**

11. (1) Declassification of things in the public domain shall be made by means of the issue of an Act of Parliament, hereinafter referred to as a “Declassification Act”.

(2) Every Declassification Act shall, as a minimum:

(a) identify the property, its fruits and accessories;

(b) identify the term, unless indefinite in scope in which case it shall state so, the purpose and the use for which declassification is taking place;

(c) declare what the projected existing or future public rights or benefits are to be and what suitable alternatives, if any, will be provided for any loss of use or enjoyment of the thing by the public;

(d) identify any known Government powers or third party rights which shall continue to be enjoyed over the thing notwithstanding the declassification,

provided that this is without prejudice the general powers of the Government under any law and to private titles or rights which may be registered within the time period prescribed by law;

(e) seek to identify special laws or provisions thereof, if any, which restrict the public access or enjoyment of such property in accordance with this Schedule and which shall continue to apply to such property notwithstanding the declassification;

and

(f) where applicable, be accompanied by a plan or general map, based on the official map of the Land Registry, identifying the property and its accessories which are affected by such declassification.

(3) All Declassification Acts shall be registered in the relevant registry by the Minister responsible for Lands within 30 days of the coming into force of the Act.

(4) Any grant made by the Government pursuant to a Declassification Act shall be registered in the relevant registry in accordance with applicable law.

(5) Any amendments or revocations made to Declassification Acts shall be registered by the Minister responsible for Lands in the relevant registry within 30 days from when such amendments or revocations are made.

**Termination of rights and of effects of declassification.**

12. (1) In the following cases:

(a) where the thing has reverted to its former public use without objection of the title or rights holder for a continuous period of two years;

(b) where it is used for a purpose which does not fall within the parameters for which the declassification was made;

(c) where the term for which it was declassified

expires;

(d) where there is a substantial breach of the terms of any grant, concession or an abuse of right;

the grantee shall be notified by judicial letter and, upon the lapse of thirty days from such notification, the thing shall revert to the public domain, unless such reversion is formally contested in a court, in which case the effects are suspended until the court decides the matter or the parties agree that compliance has been achieved; provided that during any such contestation the duty of the grantee to pay any agreed compensation and to perform all public domain obligations shall not be affected in any manner and in the event of breach *pendente lite*, the court shall, even without demand on the part of the Government, order the reversion to the public domain on the basis of such breach without the need to determine the issues under contestation.

(2) Where it is established by a final judgement of a court of civil or criminal jurisdiction that the declassification was the fruit of corruption, the declassification shall be invalid and all rights accruing to any person pursuant thereto shall be null and void.

(3) Any person formerly vested with title to or rights over a thing in the public domain shall, upon the events in the preceding sub-articles, *ipso iure* become a mere holder and shall have no further rights from the moment of notification and, without prejudice to any other rights competent at law, the Government shall have a right to register the reversion of the thing to the public domain in the relevant registry.

(4) Where the Government is notified that a third party will be granted or has lawfully been granted an interest dependant on the title or right of the person enjoying the title or right, if so authorised by the Declassification Act, the Government may agree to such terms intended for the protection of such third party rights in the event of default by the holder of the title or rights.

Provided that the third party shall not enjoy such protection if he consents to or participates in the breach giving rise to the default or does not otherwise act in good

faith when seeking protection under this article.

**Rights not to attach to accessories.**

13. (1) When third party rights are granted on declassified immovables, the rights shall attach only to the things fastened to the site and any improvements thereto as well as to its use but not to any fruits or accessories to such immovables unless expressly agreed.

(2) On termination of a grant of declassified things, the person who enjoyed the rights to the use and enjoyment of the things shall, at his expense, take all such action as is necessary to ensure that things which may have been constructed or fastened to the property shall be removed and the thing be restored to its condition prior to the declassification or to as near a condition as possible, such assessment to be made by the Government, unless the Government approves their retention in accordance with article 8(1)(d) of this Schedule or consents to their permanent modification or conversion in the Declassification Act.

(3) In the event that the thing is not restored to the appropriate condition, the Government shall have the power to clear the property of any constructions, fastening or any other thing whatsoever and shall have the power to administer and dispose of the same. Additionally, the Government shall enjoy a special privilege over such things and to any proceeds coming from the lease, operation or sale of such things. The Government shall be entitled to take from such proceeds any sum equivalent to the costs and expenses incurred in restoring the thing to its original condition but shall have no interest whatsoever in any excess proceeds which shall be kept on trust for the grantee.

Furthermore, subject to the terms of the grant, following the termination of a grant, the Government may, at its discretion, acquire any immovable thing remaining on the property upon payment of a fair price to the grantee or relevant owner of the immovable, such price to be determined by agreement or by the court in case of disagreement.

**Reclamation.**

14. (1) When property becomes part of the coastal

perimeter by human intervention, including excavation or development or conversion into a marina, promenade, breakwater or otherwise, it shall not thereby become public domain but shall be subject to:

(a) any special conditions which may be imposed in any Declassification Act or any permit for such intervention;

and

(b) any special laws which may be applicable to its development and use.

(2) When any part of the seabed is reclaimed, any Declassification Act shall expressly declare that the purpose of the declassification is the reclamation of the area, giving full description thereof, and

(a) the area so reclaimed shall no longer be considered to be public domain; and

(b) the coastal perimeter which is lost in the reclamation shall be substituted ipso iure by the new coastal perimeter emerging as a result of the reclamation.

### **Regulations.**

15. (1) The Prime Minister shall have the power to issue such regulations as may be necessary so as to better regulate the matters contained in this Schedule in relation to particular types of property falling within the public domain or generally or for the better functioning of the provisions of this Schedule including without prejudice to the foregoing:

(a) matters relating to registration of Acts, titles, rights and other matters referred to in this Schedule in the relevant registry;

(b) defining in further detail the things described in sub-article (4) of article 3 of this Schedule;

(c) establishing the methodology to determine the baselines for the calculation of the coastal perimeter;

(d) publication in the Gazette, the Government's website or otherwise of information in addition to that in the relevant registry;

(e) specifying the uses of things in the public domain, any public domain obligations and any public and private rights thereon, and any reservations and restrictions on such things so as to better achieve the purposes of any Public Domain Act or any Declassification Act;

(f) actions competent under this Schedule;

(g) the rights and remedies to protect private interests in any things affected by any process implementing the provisions of this Schedule;

(h) penalties and offences in relation to public domain things, including offences relating to the unauthorised occupation and use of things in public domain, deprivation of access or use by the public and related rights to damages and re-imbursement of any gains; and

(i) the interplay between the provisions of this Schedule, the provisions of the Code and the provisions of other special laws.

(2) Nothing in this Schedule shall affect the provisions of or anything done or which could be done under the:

(a) Petroleum (Production) Act (Cap 156, Laws of Malta);

(b) Disposal of Government Land Act (Cap 268, Laws of Malta);

(c) Land (Compulsory Eviction) Act (Cap 228, Laws of Malta);

(d) Authority for Transport in Malta Act (Cap 499, Laws of Malta);

(e) Environment Protection Act (Cap 435, Laws

of Malta);

(f) Environment and Development Planning Act (Cap. 504, Laws of Malta);

(g) Crimes Against the Environment Act (Cap. 522, Laws of Malta);

(h) Cultural Heritage Act (Cap. 445, Laws of Malta); and

(i) any regulations, guidelines or notices issued under any of the above;

and other special laws which may be designated by the Minister responsible for Lands by Notice in the Gazette, and such Minister may, from time to time, in consultation with the Minister designated in such laws, if different, issue regulations to establish the operation of any of the provisions of such special laws in the light of the provisions of this Schedule so as to ensure the achievement of the aims of this Schedule and such laws and the compatible application thereof.”

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### **Objects and Reasons**

The Objects of this Bill are to regulate the coastal perimeter and the foreshore and to classify property belonging to the Government, whether public property or public domain, to introduce rules on the administration of property in the public domain and rules regarding its declassification and the registration of all transactions and events relating thereto.