SUBMISSION to:

The Standing Committee on Public Administration
Inquiry into Private Property Rights

From:

WA Land Compensation (Previously Ferguson Fforde & Ferguson Fforde Miller)
A valuation and real estate agency business that specialises in assessing, managing and negotiating land compensation claims on behalf of private land owners for over 20 years. To avoid conflict of interest, instructions are never taken from Government Authorities. The current partners are Frank Fforde & Robert Ferguson. Combined the partners have about 80 years valuation and property experience in both private and public spheres. Public employment has been at the Valuer General's Office, Main Roads WA and the Cities of Perth & Stirling.

This report submits that the House:

a) **Recognises the fundamental proprietary right of private property ownership that underpins the social and economic security of community.**

   We submit that it is becoming more evident that numerous policies, for the public's benefit, are being layered on top of private titles without compensation rights. For example Bush Forever, rare flora and wetland classifications, development buffers, natural and built heritage, "reservations" in structure plans etc.

b) **Recognises the threat to probity of the Torrens title system, which guarantees disclosure, and re-establishes the necessity for registration of all encumbrances that affect land including environmental sensitive areas bushfire-prone areas and implied easements for Western Power that currently sit behind the certificate of title.**

   We agree that all encumbrances should be shown on the Title. Implied easements from the Water Corporation should also be shown. If these encumbrances are to be placed on titles then, if the encumbrance affects the land value, compensation should be available.

   There are also public proposals that can linger for years that affect the value of private property. For example the proposed realignment of the freight railway line adjoining west of the Tonkin Hwy at Mundijong. Whilst a large area has recently been zoned Industrial in the MRS to the west of Tonkin, the proposed realignment route has been left zoned Rural. This route should be protected with a Planning Control Area (Sect 112 PDA) to protect land owner values and stopping further development. The PCA should be registered on title. Another example is the proposed Bindoon Bypass.

c) Asserts that fair and reasonable compensation must be paid to the owner of private property if the value of the property is diminished by a government encumbrance or resumption in order to derive a public benefit.

1.0 Land Administration Act:

We deal mainly with the Land Administration Act (LAA) compensation provisions. Our dealings are usually with Main Roads WA under this Act. We have few complaints with the way MRWA act. More owners whose properties are required for various public wants should have access to the LAA compensation provisions as they are basically fair.

However, as a result of recent Court cases that have created legal precedent, the Land Administration Act should be amended or funding should be available to test decisions in the High Court of Australia. Most private land owners do not have the financial resources to take this path. Eg the case of Tyler Merrick v MRWA where it was determined that loss in value to the remaining land was not available to an owner as a road separated the property in two.

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2.0 Planning & Development Act (PDA)

Our main concern is the lack of fairness in the administration of Planning and Development Act

Where some private land is reserved in town planning schemes, for the purposes stated in **a)**, and compensation is available, then these same policies etc should not be used by the Authority's valuers, planners etc for the reason land has a diminished value. Unfortunately, it is our experience, they do. These policies have to be disregarded so fair value is determined and paid.

It can take many years before land is eventually reserved in schemes. Eg the Bush Forever reservations were first proposed in Bushplan in 1998, but it took until 2010 to amend the Metropolitan Region Scheme, hence compensation rights. In this case, the delay blighted land values for 12 years. Sales during that period are then used by the Authority's valuers as evidence once the land is reserved. Advice from planners and environmental consultants often reflect the recommendations and policies implemented during the pending reservation period **(See Case Study 2 White)**.

Valuation principals derived from numerous Court cases direct that valuers should ignore the purpose of a reservation. Eg MRWA never argue that that land reserved for a highway for many years is a reason for a lower value. They disregard the

reservation (not only on the subject property) and consider the value as per its most likely zoning, if it had not been *part* of a proposed highway project. However when land is reserved for Bush Forever, the WA Planning Commission and their lawyers the State Solicitors Office (often referred to as the model litigant) instruct their experts not to ignore the Bush Forever MRS amendment in general, but only on the subject property.

As soon as these proposed public recommendations are publically known there should be Planning Control Areas implemented as per Section 112 PDA. A PCA extends for 5 years whilst Authorities confirm their requirements.

3. VALUER'S ROLE:

Valuers should give their own independent opinions. They should not need instructions from lawyers or Authorities on how to value. Following are extracts from Court cases that highlight what Courts expect of valuers

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Para 279 *"However it is the valuer who has to give the evidence and who must make the final decision as to the form that his or her valuation will take. It will be the valuer and not the legal advisors who is under oath in the witness box and bound to state his or her opinions honestly and the facts accurately. The lawyers are not the valuer's or indeed any experts' keepers. The Full Federal Court failed to recognise the different roles of the valuers and the appellants in this case and treated the appellants as if they were almost exclusively or exclusively the final arbiter of the way in which the property should be valued."*

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232 It follows that we have been unable to accept the opinion of any of the valuers who gave evidence at the trial. Consequently, and after much anxious consideration, we have come reluctantly to the conclusion that it will be necessary to order a retrial of the valuation issue. This is obviously a result which both parties would have preferred to avoid, given the sorry history of the matter and having regard to the additional costs and further delay such a course will entail. We share that view. However, we do not think it possible to do justice between the parties without a proper trial of the complex issues relating to the suitability of the Mount Lawley land for urbanisation and its environmental significance.

4. PANEL VALUERS:

Despite these cases, WAPC panel valuers continue to be constrained by their instructions. Valuers are selectively fed information from the WAPC. They want to keep their panel jobs. To maintain their independence valuers should, if required, obtain information from other experts eg planners, environmental experts *themselves*. By accepting selective information from the acquiring authority they are falling into the category of advocates and the advice provided by the acquiring authority is conflicted. By completing initial valuations without obtaining other expert advice and only obtaining it per the WAPC when there is a dispute is negligent. As a result private land owners often suffer not only financially but health wise. **(See Case Study No.1)**

In one Bush Forever case our client spent $8000 obtaining planning & environmental advice to assist the valuers. The WAPC specifically instructed their valuers not to accept any information from the owner or their representative. This is contrary to the Australian Property Institute's practice manual which encourages valuers to liaise with land owners whose properties are affected by Government reservations. In this particular case the WAPC valuers completed their valuations without input from other experts. They obtained the information per the SSO only when the dispute was taken to SAT, but all WAPC experts were still constrained by their instructions.

If the Government cannot afford to pay fair prices, then they should not reserve properties for Bush Forever. These owners should be able to develop their properties the same as their neighbours who have previously destroyed the natural environment and rewarded with higher zonings. Or if the public are hell bent on preserving environmental "gems" then a reward over and above their neighbour's value, should be paid to the owners who have preserved bush.

Western Australian Planning Commission v Southregal Pty Ltd [2017] HCA 7

"Town planning (WA) *– Compensation – Where land reserved for public purpose under planning scheme – Where s 173 of Planning and Development Act 2005 (WA) makes provision for landowner to be compensated where land injuriously affected by making or amendment of planning scheme – Where, under s 177, compensation not payable until land first sold after reservation or responsible authority refuses development application or grants application on unacceptable conditions – Where landowners purchased land affected by planning scheme after date of reservation – Where purchasers applied to develop land and were refused – Whether purchasers entitled to compensation."*

As the synopsis of this case says, the case concerned whether the purchaser of land subject to a reservation has a right to claim compensation. Both the Supreme Court of WA & the Court of Appeal said that Southregal, although a subsequent buyer, had a claim as a result of a development application (DA) being refused. The HCA disagreed and ruled that only the original owner had right to claim. The PDA should be amended to make it clear whether a subsequent owner should have the right to claim. The way the Act is written (Sect 177(2)(b)) it would seem the Supreme Court's interpretation should have been correct. If such an owner does not have a right then there will be many properties with significant reservations that will fall into disrepair and slums created. Eg Stirling Hwy where many developed properties have significant reservation since 1963 (the advent of the MRS). Many owners who

have purchased properties affected by reservations are unaware of the reservation as it is not shown on the Title (refer also to **b)**).

It concerns us that the WAPC, per the State Solicitors Office, have read more into this case than what the ruling was about. They now say that one can only claim compensation once, despite not receiving any compensation. They say that if an owner withdraws a compensation claim, then they no longer have the right to claim. This is despite the WAPC advising the Australian Property Institute, after the Southregal case, that owners could come back and claim again. Sect 187 of the PDA says an owner can **withdraw and the WAPC's *"election has no effect".*** Maybe the Act should be amended to make it clear that one can withdraw if compensation has not been paid and another claim made at a later date. The latest WAPC/SSO argument is a corruption of the law that deprives land owners a right to claim. (**See Case Study No.1)**

5. LITIGATION COST:

Notwithstanding that arguments can be taken to Courts, the majority of land owners do not have the financial capacity to take Court action. **Case Study No.1**, attached, demonstrates the lengths the WAPC will take rather than pay fair compensation. Whether disputes are in arbitration, SAT or Supreme Court, lawyers embark on the same expensive process that is out of the capacity of most land owners. The Board of Valuers is a relatively cheap way of resolving valuation disputes. Experienced valuers can cut to the chase and make valuation determinations at a fraction of the cost lawyers build up. We are aware of legal land compensation disputes which have cost owners between $1m and $10m

However if arbitrators or the Board of Valuers (BOV) are intimidated by the influence of the WAPC and lawyers, then that system will also fail. See **Case Study No.1**. If arbitrators and the BOV's independence can be ensured then this an excellent way to resolve valuation disputes.

Whilst the current legal process is in place, private property owners have very little compensation rights. It seems that the present system is set up for the benefit of the Authorities and lawyers and to avoid the payment of fair compensation.

CASE STUDY No.1 PRESTAGE

1972	Mr & Mrs Prestage purchased a Southern River property as part of their Superannuation
1993	State Planning Commission proposed whole property be rezoned to urban
2000	Bush Forever recommended whole property be reserved in the Metropolitan Regional Scheme (MRS) for public conservation. The property was 85% cleared at this date.
9/2002	Mr Prestage made a submission and presentation to the Standing Committee on Public Administration and Finance Land Enquiry re this property
2010	Property reserved in MRS which gave the owners a compensation right. A 10yr! process.
2013	Owners claimed compensation due to a Development Application being refused. WAPC offered **$1.65m based on a Rural zoning despite adjoining land being developed as residential**
2014	Application to State Administrative Tribunal (SAT) to resolve dispute. At this time the vegetation had regrown.
1/2015	Mr Prestage *died.*
2/2015	Mrs Prestage withdrew her SAT application on doctor's advice.
3/2015	The SSO/WAPC sought $40,000 costs against Mrs Prestage who at the time was in hospital
5/2015	The cost application was refused by SAT
7/2015	To avoid stress and costs, owner submitted a Notice of Intention to Sell to the Board of Valuers (BOV). The Act says the BOV valuation is **FINAL. The owner was prepared to accept the BOV decision.**
9/2015	The BOV determined the value of the property unaffected by the reservation at **$6.235m. (About $1m/ha) Valuation based on Urban zoning similar to adjoin land.**
1/2016	Because the WAPC did not provided a minimum price, property put up for sale per Expressions of Interest expiring 1/3/16. Two 'for sale' signs were placed on the property. No expressions were received. The signs have been stolen. The whole property affected by the reservation, is a liability to the owners. It has NO VALUE affected by the reservation.
2/2016	WAPC sought a Supreme Court Judicial Review of their Board's decision. The SSO argued that their own BOV should have given the WAPC notice of a hearing. Unlike the owner they are not prepared to accept the BOV decision.
2/2016	High Court of Australia in WAPC v Southregal said that only the owner of land at the date of reservation had rights to claim compensation under the Planning and Development Act.

CASE STUDY No.1 Prestage Cont.

8/2016	Supreme Court dismissed the WAPC's application
5/2017	Mrs Prestage *died*
8/2017	Hearing in the WA Supreme Court of Appeal as a result of the WAPC appeal against SCWA decision. The Chief Justice asked the WAPC's counsel whether he was arguing "the bleedingly obvious"
8/2017	City of Gosnells give executors notice to remove other people's rubbish (car tyres etc)
8/2017	The Australian Property Institute advised all members, as a result of the Southregal case, that they had received WAPC advice that if an owner withdrew a claim for compensation, then that owner's compensation rights would **NOT BE FORFEITED.**
12/2017	SSO advise that because Mrs Prestage withdrew her claim, after the death of her husband, that WAPC contend that Mrs Prestage had "EXHAUSTED" her right to compensation. Her only right was to negotiate. They offered $2.2m. They requested the Appeal Court to delay making their judgement.
1/2018	The WAPC's offer was rejected as we believe their own Board had made a determination at $6.235m
1/2018	Through the SSO, the WAPC stated that ***"any valuation made by the Board was IRRELEVANT."***
1/2018	Through the SSO, the WAPC stated that they *"will adhere to that position regardless whether the Court of Appeal upholds or dismisses the appeal"*
8/2018	The Appeal was dismissed.
2/2019	WAPC sought leave to appeal to the High Court of Australia and failed
2019	In the hands of lawyers

CASE STUDY No.2 White & Others

Item	Details
1937	Subject lot subdivided from of a larger property purchased by Grandmother. Other lots have been subdivided off over the years and houses built for family members
1954	Clearing started. No permits were required until 2006
1991	Clearing finished
1998	About 40ha of the 49ha property *proposed* to be reserved in MRS for Bush Forever. This part of the original holding was left uncleared as it was mostly a sand hill and had limited market gardening potential. Cattle had grazed the bush areas until Bush Forever. Commercial sand pits are in close proximity.
2010	The WAPC's 2010 "Outer Metropolitan and Peel Regional Strategy" shows the property as Urban Expansion 2011-15
2010	The 40ha part was officially reserved in the MRS as Parks & Recreation/Bush Forever. A 12 year process to reserve the land in the MRS.
4/2012	A Development Application to expand vegetable garden was refused as a result of the reservation. Compensation was claimed.
2012	WAPC elect to pay compensation rather than acquire. They offer no compensation.
12/2014	Owner's valuer obtains information from Landform Research, (environmentalists & geologists) estimate sand supplies as 2.7m cubic metres worth $7.5m
2/2013	WA Land Compensation advised that if the reservation did not exist and the property could be fully developed, like adjoining land, and the sand could be progressively sold, that the property would have been worth in excess of $15m at the date of valuation (2012)
2014	Arbitration sought
2014	Owners try to appoint another arbitrator as the recommended arbitrator's competence was of concern due to a recent history of failure to make decisions within a reasonable time. He was also a former employee of the SSO and therefore there may have been a conflict. The SSO/WAPC would not agree. The arbitration continued.
5/2014	The WAPC tried to thwart the arbitration by arguing Sect 177(3)(b), that the development application that sparked the claim was not made in good faith. A Preliminary Hearing was convened for this issue to be resolved. The WAPC's application was dismissed. **THIS SECTION OF THE ACT SHOULD BE DELETED**. It took the arbitrator 12 months to resolve this issue.
2017	Glenn Miller Property Consultants asses the value on a similar basis also at $15m

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	The WAPC/SSO argue that the land had no up zoning value as the vegetation is so good that a clearing permit would never have been granted. This was despite that during the family's ownership, a clearing permit had not been required. It was only because of the public desire to preserve vegetation that it is now reserved. Valuation principles say that the purpose of the reservation should be ignored. There is nothing exceptional about this vegetation other than it was in excellent condition. If the WAPC argument is correct ie assuming the land can no longer be cleared, then there is no compensation for properties reserved for Parks & Recreation/Bush Forever.
2016	Similar land nearby had received a clearing permit. There are many areas throughout the Metropolitan Area where developers have been able to clear Urban zoned land for development.
2014	Owner engaged a lawyer
2017	Lawyer subsequently instructs the owner's valuers to reassess the value of the property based on reports he has obtained. He specifically instructs the owner's valuers *not to confer* with the other experts. **Any developer who purchases land would have the planning, environmental, engineering and valuer experts conferring. It seems extraordinary that a lawyer would not follow industry/market procedure when trying to determine a property's potential and value.**
2017	One of the owners' valuers withdrew his report as his opinion conflicted with the lawyers instructions and he disagreed with the expert advice provided by the lawyer.
2017	Both parties lawyers agreed to drop the added value of the sand supplies contrary to both owner's valuers' opinions.
12/2018	The arbitrator gave his reasons for his decision.
7/2019	**No arbitration award has been given**
	The law either needs to be changed or Government policies created to ensure owners who have retained bush areas should be rewarded rather than penalised. In this case the penalty was a $7.5m loss in value plus legal fees of $1.6m. Apparently the WAPC are trying to recover $80,000 of their costs from the land owner. It seems extremely unfair that the law can reward adjoining and nearby owners who have destroyed the natural environment with higher zonings and values
	Dispute resolution should be more accessible to owners. Lawyers building up such fees demonstrates that alternative dispute mechanisms are required. Maybe valuation disputes should be determined by valuers who are not influenced by the WAPC. Any question of law should be resolved at the WAPC's expense. They are responsible for the problem

CASE STUDY No.3

In a case that went before Chief Justice Wayne Martin, the SSO/WAPC argued that reserved land should be valued on the basis of its zoning at the date it was reserved not at the date of valuation. Following is an extract from the Court hearing:

> **MARTIN CJ:** - - - wouldn't the sterilisation of the land from rezoning be something attributable to the reservation, to use your words, and so therefore why wouldn't you exclude that from consideration?
>
> **RUSSELL, MR:** He has assessed value on the basis of the underlying zoning of rural, looking at whatever development potential which he says having regard to the environmental considerations is nil.
>
> **MARTIN CJ:** But doesn't that illustrate the somewhat fanciful nature of the exercise which you say the section required? Because it seems inconceivable that the outcome of proper and orderly planning for the suburb of Malaga would have left a parcel of rural use in the middle of all this industrial land by 2008. It's just - it would make a nonsense of the planning process.

The WAPC per the SSO's Mr Russell contended that when assessing compensation under the Planning and Development Act, that one lifts the reservation and goes back to the zoning before reservation. In this case they went back to 1970's and concluded it was Rural. This was despite that all surrounding land had been developed as Industrial at the date of valuation/claim in 2008. In 1970 all of the surrounding land was zoned Rural.

Again the valuers were apart, not because of their independent opinions but because of their instructions.

Unfortunately this case was resolved by consent and no ruling was made. Despite the Chief Justice's criticism, the WAPC/SSO continue to argue the same way on other cases.

RECOMMENDATIONS

1. Valuation disputes should be resolved by valuers not lawyers

2. The Board of Valuers (BOV) should be given more scope to resolve PDA valuation disputes.

3. The BOV should not be controlled by the WAPC.

4. The BOV's role could be expanded to determine other land compensation disputes.

5. Where land is partly reserved in a Town Planning Scheme and an owner issues a Notice of Intention to Sell to the BOV, the PDA needs to be amended to show that the BOV must value the whole property, not just the reserved part as the WAPC/BOV now instruct. An owner cant just sell just the reserved land he/she can only sell the whole.

6. Arbitration should not include lawyers but only valuers.

7. Authorities should not have panel valuers. Valuers should be qualified and recommended by the Australian Property Institute on a rolling basis. If valuers do not believe they can provide an independent valuation based on the requirements of the legislation, then they should exclude themselves from the work. It has been proven in court that a valuer saying he valued based on his instructions is unacceptable.

8. Authorities should foot the legal cost of resolving valuation legal issues. Maybe the Law Society could recommend whether a legal issue was worthy of a Court case. The WAPC should not make this determination or any other Authority.

9. Planning Control Areas (Sect 112 PDA) should be declared once a public proposal is made. Delays of over 10 years (eg the Bush Forever reservation) that affects land values are unacceptable in a modern democratic society.

10. Section 241 (7) of the Land Administration Act should be amended. *Fee Simple* should be replaced with *any interest* in land. That would then include easement interests for pipelines & power lines.

11. The environmental authorities should be unable to classify privately owned land and detrimentally affect its value unless there are compensation implications. At present it is open slather especially in farming areas.

12. Similarly Heritage classifications should also have compensation implications.

13. In lieu of paying compensation under the Planning and Development Act for Bush Forever reservations there could be Negotiated Planning Solutions (NPS) and/or cash compensation. The public purse could then be protected. Solutions should not be the prerogative of the WAPC an independent body should resolve the solution. Eg part bush allowed to be cleared and developed with a bonus zoning. Other part given up free or with part cash.

14. Land reserved in Structure Plans should have compensation rights similar to reservations in Town Planning Schemes.

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Despite these cases, WAPC panel valuers continue to be constrained by their instructions. Valuers are selectively fed information from the WAPC. They want to keep their panel jobs. To maintain their independence valuers should, if required, obtain information from other experts eg planners, environmental experts *themselves*. By accepting selective information from the acquiring authority they are falling into the category of advocates and the advice provided by the acquiring authority is conflicted. By completing initial valuations without obtaining other expert advice and only obtaining it per the WAPC when there is a dispute is negligent. As a result private land owners often suffer not only financially but health wise. **(See Case Study No.1)**

In one Bush Forever case our client spent $8000 obtaining planning & environmental advice to assist the valuers. The WAPC specifically instructed their valuers not to accept any information from the owner or their representative. This is contrary to the Australian Property Institute's practice manual which encourages valuers to liaise with land owners whose properties are affected by Government reservations. In this particular case the WAPC valuers completed their valuations without input from other experts. They obtained the information per the SSO only when the dispute was taken to SAT, but all WAPC experts were still constrained by their instructions.

If the Government cannot afford to pay fair prices, then they should not reserve properties for Bush Forever. These owners should be able to develop their properties the same as their neighbours who have previously destroyed the natural environment and rewarded with higher zonings. Or if the public are hell bent on preserving environmental "gems" then a reward over and above their neighbour's value, should be paid to the owners who have preserved bush.

Western Australian Planning Commission v Southregal Pty Ltd [2017] HCA 7

"Town planning (WA) *– Compensation – Where land reserved for public purpose under planning scheme – Where s 173 of Planning and Development Act 2005 (WA) makes provision for landowner to be compensated where land injuriously affected by making or amendment of planning scheme – Where, under s 177, compensation not payable until land first sold after reservation or responsible authority refuses development application or grants application on unacceptable conditions – Where landowners purchased land affected by planning scheme after date of reservation – Where purchasers applied to develop land and were refused – Whether purchasers entitled to compensation."*

As the synopsis of this case says, the case concerned whether the purchaser of land subject to a reservation has a right to claim compensation. Both the Supreme Court of WA & the Court of Appeal said that Southregal, although a subsequent buyer, had a claim as a result of a development application (DA) being refused. The HCA disagreed and ruled that only the original owner had right to claim. The PDA should be amended to make it clear whether a subsequent owner should have the right to claim. The way the Act is written (Sect 177(2)(b)) it would seem the Supreme Court's interpretation should have been correct. If such an owner does not have a right then there will be many properties with significant reservations that will fall into disrepair and slums created. Eg Stirling Hwy where many developed properties have significant reservation since 1963 (the advent of the MRS). Many owners who

have purchased properties affected by reservations are unaware of the reservation as it is not shown on the Title (refer also to **b)**).

It concerns us that the WAPC, per the State Solicitors Office, have read more into this case than what the ruling was about. They now say that one can only claim compensation once, despite not receiving any compensation. They say that if an owner withdraws a compensation claim, then they no longer have the right to claim. This is despite the WAPC advising the Australian Property Institute, after the Southregal case, that owners could come back and claim again. Sect 187 of the PDA says an owner can **withdraw and the WAPC's *"election has no effect".*** Maybe the Act should be amended to make it clear that one can withdraw if compensation has not been paid and another claim made at a later date. The latest WAPC/SSO argument is a corruption of the law that deprives land owners a right to claim. (**See Case Study No.1)**

5. LITIGATION COST:

Notwithstanding that arguments can be taken to Courts, the majority of land owners do not have the financial capacity to take Court action. **Case Study No.1**, attached, demonstrates the lengths the WAPC will take rather than pay fair compensation. Whether disputes are in arbitration, SAT or Supreme Court, lawyers embark on the same expensive process that is out of the capacity of most land owners. The Board of Valuers is a relatively cheap way of resolving valuation disputes. Experienced valuers can cut to the chase and make valuation determinations at a fraction of the cost lawyers build up. We are aware of legal land compensation disputes which have cost owners between $1m and $10m

However if arbitrators or the Board of Valuers (BOV) are intimidated by the influence of the WAPC and lawyers, then that system will also fail. See **Case Study No.1**. If arbitrators and the BOV's independence can be ensured then this an excellent way to resolve valuation disputes.

Whilst the current legal process is in place, private property owners have very little compensation rights. It seems that the present system is set up for the benefit of the Authorities and lawyers and to avoid the payment of fair compensation.

CASE STUDY No.1 PRESTAGE

1972	Mr & Mrs Prestage purchased a Southern River property as part of their Superannuation
1993	State Planning Commission proposed whole property be rezoned to urban
2000	Bush Forever recommended whole property be reserved in the Metropolitan Regional Scheme (MRS) for public conservation. The property was 85% cleared at this date.
9/2002	Mr Prestage made a submission and presentation to the Standing Committee on Public Administration and Finance Land Enquiry re this property
2010	Property reserved in MRS which gave the owners a compensation right. A 10yr! process.
2013	Owners claimed compensation due to a Development Application being refused. WAPC offered **$1.65m based on a Rural zoning despite adjoining land being developed as residential**
2014	Application to State Administrative Tribunal (SAT) to resolve dispute. At this time the vegetation had regrown.
1/2015	Mr Prestage *died.*
2/2015	Mrs Prestage withdrew her SAT application on doctor's advice.
3/2015	The SSO/WAPC sought $40,000 costs against Mrs Prestage who at the time was in hospital
5/2015	The cost application was refused by SAT
7/2015	To avoid stress and costs, owner submitted a Notice of Intention to Sell to the Board of Valuers (BOV). The Act says the BOV valuation is **FINAL. The owner was prepared to accept the BOV decision.**
9/2015	The BOV determined the value of the property unaffected by the reservation at **$6.235m. (About $1m/ha) Valuation based on Urban zoning similar to adjoin land.**
1/2016	Because the WAPC did not provided a minimum price, property put up for sale per Expressions of Interest expiring 1/3/16. Two 'for sale' signs were placed on the property. No expressions were received. The signs have been stolen. The whole property affected by the reservation, is a liability to the owners. It has NO VALUE affected by the reservation.
2/2016	WAPC sought a Supreme Court Judicial Review of their Board's decision. The SSO argued that their own BOV should have given the WAPC notice of a hearing. Unlike the owner they are not prepared to accept the BOV decision.
2/2016	High Court of Australia in WAPC v Southregal said that only the owner of land at the date of reservation had rights to claim compensation under the Planning and Development Act.

CASE STUDY No.1 Prestage Cont.

8/2016	Supreme Court dismissed the WAPC's application
5/2017	Mrs Prestage *died*
8/2017	Hearing in the WA Supreme Court of Appeal as a result of the WAPC appeal against SCWA decision. The Chief Justice asked the WAPC's counsel whether he was arguing "the bleedingly obvious"
8/2017	City of Gosnells give executors notice to remove other people's rubbish (car tyres etc)
8/2017	The Australian Property Institute advised all members, as a result of the Southregal case, that they had received WAPC advice that if an owner withdrew a claim for compensation, then that owner's compensation rights would **NOT BE FORFEITED.**
12/2017	SSO advise that because Mrs Prestage withdrew her claim, after the death of her husband, that WAPC contend that Mrs Prestage had "EXHAUSTED" her right to compensation. Her only right was to negotiate. They offered $2.2m. They requested the Appeal Court to delay making their judgement.
1/2018	The WAPC's offer was rejected as we believe their own Board had made a determination at $6.235m
1/2018	Through the SSO, the WAPC stated that ***"any valuation made by the Board was IRRELEVANT."***
1/2018	Through the SSO, the WAPC stated that they *"will adhere to that position regardless whether the Court of Appeal upholds or dismisses the appeal"*
8/2018	The Appeal was dismissed.
2/2019	WAPC sought leave to appeal to the High Court of Australia and failed
2019	In the hands of lawyers

CASE STUDY No.2 White & Others

Item	Details
1937	Subject lot subdivided from of a larger property purchased by Grandmother. Other lots have been subdivided off over the years and houses built for family members
1954	Clearing started. No permits were required until 2006
1991	Clearing finished
1998	About 40ha of the 49ha property *proposed* to be reserved in MRS for Bush Forever. This part of the original holding was left uncleared as it was mostly a sand hill and had limited market gardening potential. Cattle had grazed the bush areas until Bush Forever. Commercial sand pits are in close proximity.
2010	The WAPC's 2010 "Outer Metropolitan and Peel Regional Strategy" shows the property as Urban Expansion 2011-15
2010	The 40ha part was officially reserved in the MRS as Parks & Recreation/Bush Forever. A 12 year process to reserve the land in the MRS.
4/2012	A Development Application to expand vegetable garden was refused as a result of the reservation. Compensation was claimed.
2012	WAPC elect to pay compensation rather than acquire. They offer no compensation.
12/2014	Owner's valuer obtains information from Landform Research, (environmentalists & geologists) estimate sand supplies as 2.7m cubic metres worth $7.5m
2/2013	WA Land Compensation advised that if the reservation did not exist and the property could be fully developed, like adjoining land, and the sand could be progressively sold, that the property would have been worth in excess of $15m at the date of valuation (2012)
2014	Arbitration sought
2014	Owners try to appoint another arbitrator as the recommended arbitrator's competence was of concern due to a recent history of failure to make decisions within a reasonable time. He was also a former employee of the SSO and therefore there may have been a conflict. The SSO/WAPC would not agree. The arbitration continued.
5/2014	The WAPC tried to thwart the arbitration by arguing Sect 177(3)(b), that the development application that sparked the claim was not made in good faith. A Preliminary Hearing was convened for this issue to be resolved. The WAPC's application was dismissed. **THIS SECTION OF THE ACT SHOULD BE DELETED**. It took the arbitrator 12 months to resolve this issue.
2017	Glenn Miller Property Consultants asses the value on a similar basis also at $15m

CASE STUDY No.2 White & Others

Item	Details
	The WAPC/SSO argue that the land had no up zoning value as the vegetation is so good that a clearing permit would never have been granted. This was despite that during the family's ownership, a clearing permit had not been required. It was only because of the public desire to preserve vegetation that it is now reserved. Valuation principles say that the purpose of the reservation should be ignored. There is nothing exceptional about this vegetation other than it was in excellent condition. If the WAPC argument is correct ie assuming the land can no longer be cleared, then there is no compensation for properties reserved for Parks & Recreation/Bush Forever.
2016	Similar land nearby had received a clearing permit. There are many areas throughout the Metropolitan Area where developers have been able to clear Urban zoned land for development.
2014	Owner engaged a lawyer
2017	Lawyer subsequently instructs the owner's valuers to reassess the value of the property based on reports he has obtained. He specifically instructs the owner's valuers *not to confer* with the other experts. **Any developer who purchases land would have the planning, environmental, engineering and valuer experts conferring. It seems extraordinary that a lawyer would not follow industry/market procedure when trying to determine a property's potential and value.**
2017	One of the owners' valuers withdrew his report as his opinion conflicted with the lawyers instructions and he disagreed with the expert advice provided by the lawyer.
2017	Both parties lawyers agreed to drop the added value of the sand supplies contrary to both owner's valuers' opinions.
12/2018	The arbitrator gave his reasons for his decision.
7/2019	**No arbitration award has been given**
	The law either needs to be changed or Government policies created to ensure owners who have retained bush areas should be rewarded rather than penalised. In this case the penalty was a $7.5m loss in value plus legal fees of $1.6m. Apparently the WAPC are trying to recover $80,000 of their costs from the land owner. It seems extremely unfair that the law can reward adjoining and nearby owners who have destroyed the natural environment with higher zonings and values
	Dispute resolution should be more accessible to owners. Lawyers building up such fees demonstrates that alternative dispute mechanisms are required. Maybe valuation disputes should be determined by valuers who are not influenced by the WAPC. Any question of law should be resolved at the WAPC's expense. They are responsible for the problem

CASE STUDY No.3

In a case that went before Chief Justice Wayne Martin, the SSO/WAPC argued that reserved land should be valued on the basis of its zoning at the date it was reserved not at the date of valuation. Following is an extract from the Court hearing:

> **MARTIN CJ:** - - - wouldn't the sterilisation of the land from rezoning be something attributable to the reservation, to use your words, and so therefore why wouldn't you exclude that from consideration?
>
> **RUSSELL, MR:** He has assessed value on the basis of the underlying zoning of rural, looking at whatever development potential which he says having regard to the environmental considerations is nil.
>
> **MARTIN CJ:** But doesn't that illustrate the somewhat fanciful nature of the exercise which you say the section required? Because it seems inconceivable that the outcome of proper and orderly planning for the suburb of Malaga would have left a parcel of rural use in the middle of all this industrial land by 2008. It's just - it would make a nonsense of the planning process.

The WAPC per the SSO's Mr Russell contended that when assessing compensation under the Planning and Development Act, that one lifts the reservation and goes back to the zoning before reservation. In this case they went back to 1970's and concluded it was Rural. This was despite that all surrounding land had been developed as Industrial at the date of valuation/claim in 2008. In 1970 all of the surrounding land was zoned Rural.

Again the valuers were apart, not because of their independent opinions but because of their instructions.

Unfortunately this case was resolved by consent and no ruling was made. Despite the Chief Justice's criticism, the WAPC/SSO continue to argue the same way on other cases.

RECOMMENDATIONS

1. Valuation disputes should be resolved by valuers not lawyers

2. The Board of Valuers (BOV) should be given more scope to resolve PDA valuation disputes.

3. The BOV should not be controlled by the WAPC.

4. The BOV's role could be expanded to determine other land compensation disputes.

5. Where land is partly reserved in a Town Planning Scheme and an owner issues a Notice of Intention to Sell to the BOV, the PDA needs to be amended to show that the BOV must value the whole property, not just the reserved part as the WAPC/BOV now instruct. An owner cant just sell just the reserved land he/she can only sell the whole.

6. Arbitration should not include lawyers but only valuers.

7. Authorities should not have panel valuers. Valuers should be qualified and recommended by the Australian Property Institute on a rolling basis. If valuers do not believe they can provide an independent valuation based on the requirements of the legislation, then they should exclude themselves from the work. It has been proven in court that a valuer saying he valued based on his instructions is unacceptable.

8. Authorities should foot the legal cost of resolving valuation legal issues. Maybe the Law Society could recommend whether a legal issue was worthy of a Court case. The WAPC should not make this determination or any other Authority.

9. Planning Control Areas (Sect 112 PDA) should be declared once a public proposal is made. Delays of over 10 years (eg the Bush Forever reservation) that affects land values are unacceptable in a modern democratic society.

10. Section 241 (7) of the Land Administration Act should be amended. *Fee Simple* should be replaced with *any interest* in land. That would then include easement interests for pipelines & power lines.

11. The environmental authorities should be unable to classify privately owned land and detrimentally affect its value unless there are compensation implications. At present it is open slather especially in farming areas.

12. Similarly Heritage classifications should also have compensation implications.

13. In lieu of paying compensation under the Planning and Development Act for Bush Forever reservations there could be Negotiated Planning Solutions (NPS) and/or cash compensation. The public purse could then be protected. Solutions should not be the prerogative of the WAPC an independent body should resolve the solution. Eg part bush allowed to be cleared and developed with a bonus zoning. Other part given up free or with part cash.

14. Land reserved in Structure Plans should have compensation rights similar to reservations in Town Planning Schemes.

CASE STUDY 5 -Murray Delta Islands, South Yunderup

	Owners of private land and improved properties (Approximately 58) accessed only via boat.
1994	Dawesville cut actioned by the State Government resulted in sea level rise, storm surge and related erosion issues.
1996	Letter received by property owners indicating their private properties were required for a Public Park and conservation.
2013/14	A strategy of avoid and retreat was developed by the Shire of Murray, which was withheld from landowners for over two years.
2014	Shire of Murray is using State Climate Change Policy in issuing brochures to prospective purchasers of island properties. This is occurring outside the Shire's own Property Inquiry system. This has, had the effect of blighting the properties and severely depreciating their value.
2015	Peel Regional Park remained a State objective, unbeknown to owners and was adopted in the Perth & Peel Green Growth Plan for 2050.
2017	Draft State Government Managed Retreat Policy (by DPLH) is now being tested in the proposed amended Local Planning Scheme of the Shire of Murray. It is proposed by the Shire to include Special Use Areas in the new Scheme together with appropriate wording to include SWPP 2.6 State Coastal Planning Policy in the Scheme to restrict use and development of the private properties on the islands. This will again severely reduce the property rights of the private owners.
	The effects of the actions taken and proposed is to create a quasi-reservation of the private property on the islands for eventual acquisition for a Park, without rights of compensation.
	The proposed SCA does not provide for compensation to the private owners.
	ACTION REQUIRED
	The private owners properties should be reserved in the new Local Planning Scheme and ultimately be shown in the Peel Region Scheme. It my understanding that this is what the Shire of Murray originally wanted. If the area required is unknown, then a Planning Control Area can be placed over the properties. Both options provide the owners with rights to compensation under the Planning and Development Act and advise prospective purchasers of the limitations on the use. They also provide under legal court precedent for the first step in blighting these properties for public purposes to be considered, so the value for acquisition of these properties is fair and not diminished by the policies and documentation imposed over time, used to restrict use of them.
	These properties are going to be used by the public and the public should fairly compensate the affected owners.
	This approach enables government to acquire the properties gradually with those owners who want to able to stay.