BM & KC Micke

[redacted]

Kristina Crighton

Committee Clerk

Standing Committee on Public Admin istration

Legislative Council

Parliament House

PERTH WA 6000

Please find enclosed Submission to the Standing Committee on Public Administration, Inquiry into Property Rights pages 1 – 7;

Appendices 1 – 5:

ESA Map of [redacted]

Farming restrictions on ESAs;

[redacted]

Property Rights in Western Australia by Louise Staley;

Private Property Charter for Western Australia, Paper 2349, C Barnett.

Yours sincerely

Kay C. Micke

BM & KC Micke

24 July 2019

SUBMISSION TO THE STANDING COMMITTEE ON PUBLIC ADMINISTRATION

INQUIRY INTO PRIVATE PROPERTY RIGHTS

BRYON & KAY MICKE

[redacted]

SUBMISSION TO THE STANDING COMMITTEE ON PUBLIC ADMINISTRATION, JULY 2019

INQUIRY INTO PRIVATE PROPERTY RIGHTS

Legal recognition and the protection of the rights of private property owners is the foundation of our society and fundamental to our economy.

Effects to Our Enterprise

We own "Mindarra Springs", a 525ha property in the Shire of Gingin, where we have operated a sheep grazing enterprise since 1979 (40 years). Maps obtained from the Department of Parks and Wildlife demonstrate that approximately 50% of our total land area is classified as Conservation Category Wetlands and associated Environmentally Sensitive Area (ESA). This represents approximately 90% of our productive land area. (Appendix 1)

From our understanding of legislation pertaining to ESA, the clearing of vegetation by any means, including grazing by livestock, on ESA is not permitted. If we are correct in our understanding, our grazing enterprise is, since the designation of ESA, of doubtful legality and we are obliged by law to cease our current activities. Since it is not permissible to clear, as defined by clause 51A of the Environmental Protection Act 1986, ESA land, the use of this farm for any business enterprise is severely limited thus significantly devaluing it as an agricultural land asset. (Appendix 2)

We estimate that the decrease in property value is in the vicinity of $2.5 million. Current legislation specifically states that there is no compensation for loss of land value due to ESA classification. Thus, as we approach 75 years of age, we are confronted with a "walk-off" situation from everything that we have spent a life-time working towards to provide for our family.

We find it absurd that restrictions can be placed on permissible land use activities without taking into consideration the effects of continuous farming since 1904, *115 years.* The use of bulldozers to clear trees, the use of fire and fertiliser and seeding pasture to manipulate vegetation, the type of grazing methods employed, have all had a profound effect upon the vegetation now present and the visual appearance of the land. To simply lock this area up will not return it to its pre-agricultural state, nor enhance its ecological value.

Environmental Protection Act (1986), 51A (d) states clearing includes grazing of livestock. As our property has been continuously grazed by livestock for 115 years, including 40 years under our stewardship, it cannot, by definition, be regarded as uncleared and of any conservation value. It also has suffered from wildfire a number of times during this period of 115 years.

Should Government wish to refute this, GROUND TRUTHING MUST BE CARRIED OUT BY COMPETENT AGENTS at Government's expense.

Open waters and pasture grazing areas developed by us have encouraged habitation by numerous duck species and straw-necked ibis in considerable numbers. These birds have no doubt been responsible for introducing seed foreign to the district. Eg. Arum lily (crows), Afghan thistle, reed/rush species, bridal creeper and aquatic weeds – a new type apparently introduced in June 2019 (Ferny Azolla).

(a) ***recognises the fundamental propriety right of private property ownership that underpins the social and economic security of the community:***

The security of land tenure is one of the core foundations of any society, including ours. One does not have to look far to realise that private property ownership, whether it be in a rural or urban environment, is at the heart of a prosperous and stable society. When that security is put at risk, it creates uncertainty in so many ways – social, financial and psychological to name a few. Of utmost importance, current ESA legislation is risking the mental health and wellbeing of those with classified land holdings, including ours.

Depression and suicide in rural areas is real and more often than not associated with the uncertainty of the farming future. The somewhat 'secretive' classification of ESA on properties, without any notification or right to compensation, but instead the constant fear of prosecution, certainly fits this picture.

We have done, and currently do, suffer from the anxiety and stress driven insomnia effects of ESA legislation and we are not alone. Farmers are an introverted group and are even more so under the threat of current legislation. They are very reluctant to 'go public' as they feel that if they are identified, they will attract undue attention from authorities. At a meeting in Badgingarra in April 2014, it was estimated that 60% of attendees removed their name badges during question time. There is a feeling amongst farmers that if they 'lie low', the problem will go away and resolve itself. Instead, the uncertainty eats away at the core of the people affected (including us), relationships suffer and normal business activities such as farm succession planning and borrowing ability are challenged to the point of being stalled.

If ESA on our road, Red Gully Road, Gingin is enforced, it would make three farms unviable. This means the loss of three families and associated enterprise employees leading to a significant decline in:

- social interaction;
- mental health and well-being;
- local amenity;
- school bus availability;
- sporting participation;
- neighbourhood watch;
- road mail box delivery.

Environmental conservation has always been part of our charter as land owners. We have fenced off native vegetation; we chose not to clear land fence to fence as a market gardener

would have on similar land type, but instead left areas of remnant vegetation for native wildlife and birds; and we have successfully prevented wetlands from becoming saline. We continue to work at maintaining responsible environmental stewardship of our land holding by:

- Fire control: we maintain fire breaks on agricultural land. Fires can only be extinguished on pasture land, not in nature reserves. We are surrounded by government managed bushland where little attempt at fire prevention or reduction has been made in the past 10 years. (Appendix 3)

- Invasive wetland species: we have effective annual control programs in place for arum lilies, aquatic weeds and melons.

- Foxes: we successfully bait three times per year. This not only protects our own animals but also native fauna, particularly in the neighbouring nature reserves.

- Feral pigs: we are constantly on the lookout for feral pigs. Not only do they cause severe damage to wetlands, they pose a significant health risk to people and other animals. They carry potentially fatal transmissible diseases (e.g. *Leptospirosis*) and act as reservoir hosts to diseases such as foot and mouth and human influenza. We have destroyed twelve pigs in the past year. Eight of these were females which could lead to a population of 100 pigs in two years in 20 hectares of wetlands.

- Wingless grasshoppers: these severely damage any young green plants to the point of stripping every leaf and ringbarking them so they die. We have successfully controlled these without the use of chemicals by maintaining a flock of 70 guinea fowl.

Central to any successful rural community is support for the businesses and people in it. In 2001, we became founding contributors to the local branch of the Bendigo Bank. Since then, the branch has had a profound effect on local community amenities in Gingin and Lancelin through its $2.7 million contribution to the community. The prohibition of operation of sustainable agricultural enterprises such as ours in the Gingin Shire would have a significant impact on this community funding program.

Currently, as an active farmer in the district, we have cause to support the following:

- Red Gully Bushfire Brigade,
- local contract fertiliser spreader,
- livestock transporter,
- sheep management contractor,
- shearing teams,
- agricultural merchandise agents,
- local shire for on-farm road maintenance,
- local service providers (e.g. electrician, plumber, builder).

There is no doubt that without proprietary right of private property ownership, the Gingin Shire would be a much poorer community.

If our current land holding cannot be used for agricultural purposes, we would walk away from our environmental stewardship of the land. Firstly, we would have not have a financial income to pay for costs associated with it, and secondly, we would not have the motivation to maintain a landholding to the benefit of society that society has no intention of paying for under current legislation.

(b) recognises the threat to the probity of the Torrens title system, which guarantees disclosure, and re-establishes the necessity for registration of all encumbrances that affect land including environmentally sensitive areas, bushfire prone areas and implied easements for western Power that currently sit behind the certificate of title;

The Torrens Title System has proven to be unquestionably successful worldwide and there is no current evidence to suggest that to deviate from it would be for the greater good of society. We understand that it is necessary in a fair and just society to disclose encumbrances, including ESA, even though it potentially devalues our property. However, any potential encumbrance should be equally assessed on any, and all, similar land throughout the State without favour.

From perusal of maps, there appear to be some areas that have been completely overlooked for ESA classification. We consider that this makes for an unfair and inequitable piece of legislation. For example: Wetland mapping does not exist in the south-east of the Swan Coastal Plain nor in the area north of the Moore River, approximately 8km from our property. However, the property "Yathroo" located 25km north of the Moore River has large areas of vegetation identical to that found on ours. The available maps classify this as "not yet assessed". Further to this, a drive north of the Dandaragan town site will reveal a considerable amount of country with so called riparian vegetation. ie. reeds, paper bark and Eucalyptus rudis. If it is so necessary to classify areas of the Gingin Shire as "highest priority wetlands", one has to question why similar country in the Dandaragan Shire has been identified, but not assessed, in the last 15 years.

If we are concerned about wetlands, they must be of value to the community in an equitable manner. One has difficulty in understanding why the wetlands in the Gingin Shire have much more apparent significant value than those in other areas, such as the Peel – Mandurah area, Dandaragan Shire and the Metropolitan area where developers seem to have no problem filling wetlands/damplands for residential and commercial purposes. Examples of the above include Gwelup, Ellenbrook, Farrel Road in Midvale, Wanneroo, West Swan, Osborne Park, and the current development of the Muchea Industrial and Commercial area, etc. We question the apparent difference in conservation value of the wetlands in the metropolitan area compared with those in the Gingin Shire.

We understand that as a society, we must all work together to conserve our heritage and environmental values. We consider wetlands in urban areas, and hence conservation space,

are able to be used and appreciated by the general public whilst those in more remote areas benefit the broader community through biodiversity and preservation of ecosystems. However, all must contribute for the well-being of society and social good. It should not, *and cannot*, be entirely the responsibility of land owners in rural areas to preserve and conserve these areas according to Government imposed legislation without fair and just compensation.

We do see clear benefit to State Government in avoiding the associated administrative burden and cost of updating land titles to disclose any encumbrances resulting from changes to legislation. However, if land titles were to contain full disclosure of any encumbrances, it may force any legislation affecting land titles to be applied state wide before any amendments are made. This would be of enormous benefit to greater society as all would be treated equally. It would reinforce the social and economic good by allaying fears of uncertainty around land use and valuations.

Therefore, we ask that exemptions apply until all areas of the state are assessed and that until this is completed, there is a moratorium on prosecutions.

(d) asserts that 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;

We originally purchased "Mindarra Springs" as our superannuation fund, to either live from the proceeds of our grazing enterprise or sell the property. Part of the property's appeal was that it sits on four titles and had the potential for further subdivision for intensive land use such as horticulture. Each of these titles now has an ESA classification. Land value with a government 'overlord' is unable to be ascertained and it is likely that this classification would lead to decreased interest by potential purchasers. Similarly, since the restrictions of ESA on land use are so severe, there would be uncertainty on borrowing ability with lending institutions not being able to ascertain the potential value of the land. To be nearing 75 years of age and be faced with financial insecurity through legislation that is less than clear and seemingly disparate in its geographical application, is ill-deserved.

Adding to the degree of anxiety associated with ESA legislation, is that it is specifically stated that "...no compensation will be paid...". We consider this one of *the most* insulting and unfair things that a government could do. It beggars belief that if a piece of land is so valuable to the environment and thus the wider community, why it would not be paid for in a fair and just way? If the government insists on interfering with property owners rights to this degree, the only option is to purchase affected properties at full commercial (non ESA) independent valuation. Our property with full compliance of ESA regulations, ie. no grazing or normal farming practices on ESA , would conservatively decrease in value by $2.5 million.

It is not that property rights should be given priority or supersede environmental protection, rather the focus should be on finding an appropriate balance, and on ensuring that

compensation is provided to individual land owners when they are obliged to sterilise their land for environmental purpose. (Appendices 4 & 5)

As custodians of "Mindarra Springs" for the past 40 years, we suggest:

- any encumbrance to titles resulting from Government legislation should be equally assessed on any and all similar land without favour;
- the current desktop approach to designating areas as ESA be ground truthed using scientifically valid methods so the intended long-term benefits to society of ESAs have the best possible chance of being achieved;
- there is an exemption clause for farming to continue unencumbered if the land was farmed prior to the 2005 Notice, or;
- full compensation is paid, and;
- until such time this is decided, there must be a moratorium on prosecutions.

When rights are taken away, then contributions to the economic and social community are eroded.

We would appreciate the opportunity to appear before the standing committee for an oral hearing and clarification.

Bryon MICKE

Kay MICKE

24 July 2019

ATTACHMENTS

Appendix 1: ESA map of [redacted] including 50m buffer.

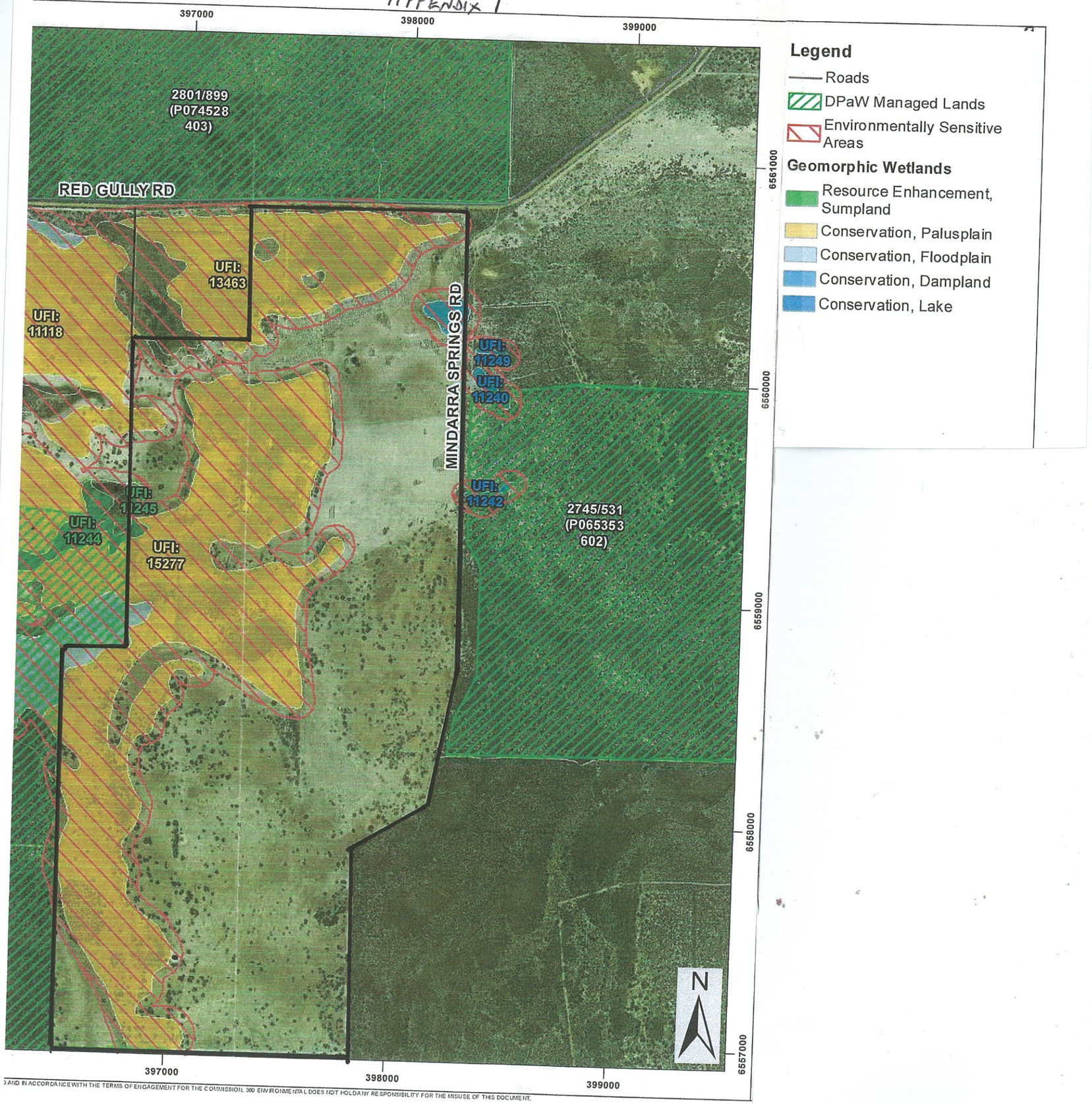
Appendix 2: Farming restrictions on ESAs.

Appendix 3: [redacted] in relation to surrounding Nature Reserves.

Appendix 4: Property Rights in Western Australia*: Time for a changed direction*, Louise Staley.

Appendix 5: Private Property Rights Charter for Western Australia, Paper 2349, C Barnett.

APPENDIX 1



AND IN ACCORDANCE WITH THE TERMS OF ENGAGEMENT FOR THE COMMISSION. 360 ENVIRONMENTAL DOES NOT HOLD ANY RESPONSIBILITY FOR THE MISUSE OF THIS DOCUMENT.

Appendix 2

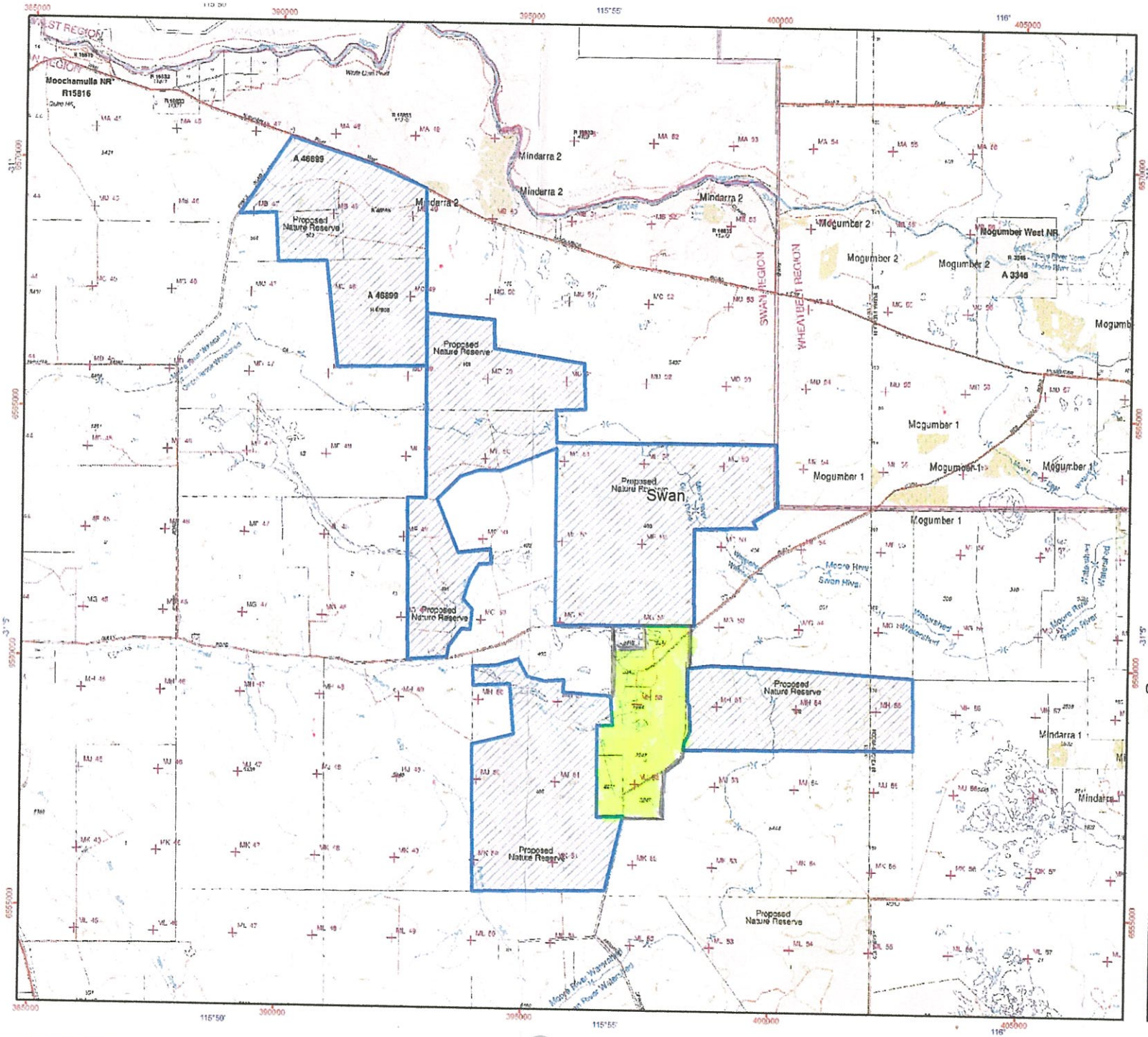
FARMING ON ENVIRONMENTALLY SENSITIVE AREAS (ESA) WITHOUT PERMITS

IT IS ILLEGAL TO:

1) Graze stock
2) Clear to construct a building
3) Clear as a result of an accident caused otherwise than by the negligence of the person clearing or authorised to clear; or to prevent imminent danger to human life or health or irreversible damage to a significant portion of the environment
4) Clear for fire hazard reduction
5) Clear in accordance with a Code of Practice
6) Clear for firewood for domestic heating or cooking
7) Clear to provide fencing and farm materials
8) Clear for woodwork
9) Clear by licenced surveyors
10) Clear along a fence line – alienated land (clearing on either side of a fence line on private property to provide access for fence maintenance or construction)
11) Clear along a fence line on Crown land
12) Clear for vehicular tracks
13) Clear for walking tracks
14) Clear to maintain existing cleared areas for pasture, cultivation or forestry
15) Clear to maintain existing cleared areas around infra-structure, etc including for fire risk reduction for a building
16) Clear under the "Rights in Water and Irrigation Act 1914"
17) Clear under the "Country Waters Supply Act 1947"
18) Clear isolated trees including those more than 50 metres from other vegetation
19) Clear a temporary by-pass road (public or private)
20) Clear for a crossover from a road to a property
21) Clear for maintenance in existing transport corridors (public or private)
22) Clear in accordance with a notice of intention under the "Soil and Conservation Regulations 1992".

References:

1) Environmental Protection Act 1986 – Version 08-b0-02
2) Environmental Protection (Clearing of Native Vegetation) Regulations 2004 – Version 02-c0-00
3) A Guide to the Exemptions and Regulations for Clearing Native Vegetation under the Environmental Protection Act 1986 – Version 1 2005



Consultation Map SWC_046; Red Gully Reserves 1

Legend

APPENDIX 3

SWC_046

SWC_046

1642 Red Gully Rd
Mindarra, GINGIN

0 1 2 4 6 8

Kilometres

1:75,000

(A3)

Projection: Universal Transverse Mercator
MGA Zone 50. Datum: GDA94

Department of Parks and Wildlife

Graticule shown at 5 minutes intervals

Grid shown at 5000 metre intervals

Produced by the Department of Parks and Wildlife

Produced at 10:13am, on May 31, 2016

PAPER 2439 BARNETT 27/11/01

APPENDIX 5

A PRIVATE PROPERTY RIGHTS CHARTER FOR WESTERN AUSTRALIA

Legality

Government action which adversely affects private property rights in land may only be taken as authorised by, and in accordance with, the law.

Providing a community benefit

Government action which adversely affects private property rights in land should endeavour to benefit the community or otherwise advance the public interest.

Public officials should only take government action which adversely affects private property rights in land when they consider it to be justified, having regard to the appropriate balance between the public interest to be advanced by the action and the public interest in the protection of private property rights in land.

Considering the interests of private land owners

Cost, inconvenience and loss sustained by private property owners should be considered when contemplating government action which will adversely affect private property rights in land, so far as the applicable legislation permits.

Public officials should resolve matters affecting private property rights in land, including any negotiations on acquisitions or compensation, without unreasonable delay. Whilst disputes should be attempted to be resolved by agreement in the first instance, public officials should initiate available legal processes to determine the dispute in order to avoid protracted delays.

Considering alternatives

Public officers should consider whether there are any alternative means by which the relevant community benefit or public interest could be advanced in a manner which avoids or reduces adverse effects on private property rights in land.

Compulsory acquisition as last resort

Acquisition by agreement should be attempted before privately owned land is compulsorily acquired, where this will not unduly compromise the advancement of the relevant community benefit or public interest.

Fair compensation, on just terms

Laws for the compulsory acquisition of privately owned land should provide for compensation in an amount that will, having regard to all relevant matters, justly compensate the landowner for the acquisition of the land in a manner which is fair to the community and the landowner.

Transparency and clarity

Laws which provide for government action that adversely affects private property rights in land should endeavour to ensure that legislation and processes pertaining to the acquisition are clear and readily understood.

Certainty and Consistency

Laws for the compulsory acquisition of privately owned land should endeavour to provide:

- holders of interests in land with certainty as to the relevant rules and processes; and
- consistent rules and processes across different laws, where this will not unduly compromise the advancement of the relevant community benefit or public interest.

Consultation

Before taking government action that will have a direct adverse effect on private property rights in land, the land owner should be consulted where this will not unduly compromise the advancement of the relevant community benefit or public interest

Independence and Contestability

Private land owners should be provided with the opportunity to have compensation for the compulsory acquisition of their land determined by an independent and impartial body.

Private land owners should be provided with the opportunity to refer other matters concerning the administration of laws which adversely affect private property rights in land to the State Ombudsman.

APPENDIX 4

Property Rights in Western Australia
Time for a changed direction

Louise Staley

Institute of Public Affairs
Occasional Paper July 2006

The Current Approach:
Ad Hoc and Unfair

The old adage that "your home is your castle" is no longer true for many Western Australians. As community attitudes to heritage conservation and environmental management have changed, Government has imposed more and more controls on what can be done with privately owned property in many cases without consultation with or compensation for long-term owners.

Because of the reach and volume of the regulations, the Government's approach necessarily calls for too much interpretation by quite junior bureaucrats. The law becomes arbitrary. There is, for instance, no appeal against heritage listing, despite the fact that this imposes significant restrictions on what can then be done with a property. Current law even allows a precinct to be listed notwithstanding that not every property within it has heritage significance.

Building development is allowed or denied apparently at whim. Increasingly stringent conditions have been imposed on development, denying landowners income earning opportunities and increasing land costs for housing and other uses. Accusations of favouritism, which are no doubt not always justified, are commonplace.

Although the case was subsequently dropped, a farmer was prosecuted for breaking a branch from a fenceline track. Agriculturists have been prevented for several years from cultivating and grazing while bureaucrats take inordinate time to respond to applications to do what, at the time they acquired their properties, the owners purchased the right to do. Bureaucrats have actually changed the basis of refusal during a period of negotiation. In short, the law in these matters is to an unusual extent ad hoc and unfair.

What is more, this overly prescriptive regulation often fails its primary aim. Attempts to protect heritage and rare species are sometimes having the opposite effect. All too often we see heritage listed buildings being left to fall into disrepair or hear of farmers who do not report what they suspect are rare or endangered fauna or flora from fear of losing the use of their land. What started out as a desire to protect heritage and native vegetation is instead having the opposite effect.

A Better Approach:
Protection and Compensation

Preserving and enhancing the physical environment and heritage should be supported. However, measures to achieve this inevitably impose costs. These costs may or may not be justified in particular cases and their justification calls for technical judgments that are beyond the scope of this paper. However, the questions of how much cost, who should bear it and what are the methods that impose the lowest cost, must be addressed rather than the current approach of pretending that no costs are incurred. If there is a public benefit then it should come at public not individual private cost.

Government regulatory intrusion in land use has become so great as to undermine previous notions of landowner rights. This intrusion and permit requirement system should be rolled back. At the very least, existing property owners deserve compensation when new controls reduce the value of the homes or land in which they have put their savings; moreover they are entitled to be consulted about changes to controls on their properties and to have avenues of appeal open to them to oppose unfair government regulation.

By adopting a whole of government approach to the protection of property rights, all Western Australian can be protected from the power of Government to unilaterally act against property owners' interests. Of immediate concern are heritage listed buildings, farmland vegetation and water.

Most people want to do "the right thing" with heritage and environmental management; this approach will help them to achieve the outcomes the community expects from the owners of properties of heritage value or environmentally sensitive farmland.

What are Property Rights?

At their most basic, property rights involve two fundamental aspects: possession or control of the resources available from property, and title which is the expectation that others will recognize rights to control a resource, even when it is not in possession. But what does that mean really? Over time, the protection of property rights has evolved to mean owners have the right to obtain benefits from their property, including the right to put it to productive use, and to dispose of it through sale. These rights exist because of, and to the extent that, the existing law supported by social customs, secure them.

Does it mean an owner can do whatever she wants to with her property, including for example dumping toxic waste on it or hunting every animal and bird until none remains? The short answer has always been no. Property

owners have always been subject to some state regulation, usually in relation to allowing others to enjoy their own property, but in recent years the level of regulation has spiralled out of control to the extent that for many property owners a substantial part of the value of their property has been destroyed.

Governments have always possessed the power, to be exercised presumably only in the public interest, to restrict or remove property owners' rights by transferring them to someone else, say a utility, or cancelling them. Our own Constitution limits the Commonwealth Government, but not State Governments, to taking "on just terms". In recent years the level of regulation of property has escalated, often stripping owners' rights unfairly to the extent that for many property owners a substantial part of the value of their investment has been destroyed.

Why Should Anyone Care about Property Rights?

It is not an overstatement to claim that the maintenance of private property rights is at the base of our society, wealth and safety. Everyday millions of people make decisions based on property rights. Perhaps most people take it for granted when they buy a home that there is secure title that can be mortgaged or sold. Yet it is the secure system of property rights that makes this possible, just as it makes possible share investment or building a business.

Protection from Bullies is Slipping Away

Integral to a functioning system of private property is the rule of law. This means the law is administered according to rules, either laws passed in parliament or rules based on precedents of other cases. The rule of law offers protection of the weak against the strong because everyone is treated by the same rules. For example, a person cannot cut down her neighbour's tree just because it is blocking the view. Was someone to do that she could be taken to court and compelled to compensate the owner of the tree.

The most powerful entity in any society is the state because it has the power to make and change the laws. A power government is using to infringe on the existing rights of property owners and often without compensation. Examples include heritage listing, native vegetation controls, water allocations and many others. The tree owner above must appeal to the government through the courts to compel her neighbour to compensate.

State Governments have no constitutional necessity to pay compensation when forcibly acquiring property. There is no question that the WA parliament has the authority, if not always the wisdom, to enact these laws, However, every time it brings in a new law that reduces the value of someone's private property three adverse effects occur. First, there is the direct reduction in value for the affected property owners, which can be trivial or substantial depending on the regulation in question. Second, and far more pernicious, there is the impact on future investment and therefore growth and jobs. Put simply, if government can destroy the value of my property today, what is to stop it doing the same thing to you tomorrow? To account for such a risk investors either decide not to invest or to demand higher rates of return from the investment. Either way, less money is invested in productive projects leading to lower economic growth.

The final effect is upon democratic process itself. In a liberal democracy all citizens, including minorities, merit not only equitable treatment but the benefits of the rule of law. These regulations often rely so heavily on the judgment of officials that they go some considerable way to substituting the rule of bureaucrat for the rule of law.

These regulations are not costless. The value of people's and firms' wealth is reduced every time a new regulation is passed which restricts the ability of property owners to use their property to the best advantage. However, when there have been but a few of these laws passed without affecting that many people, both bureaucrats and the general public forget about the private costs and focus on the supposed public benefit. City environmentalists focus on habitat saved by native vegetation laws, history buffs, (or maybe just those who share Prince Charles' preference for old architecture over new) support heritage overlays and listings and it seems everyone worries about water. It becomes accepted that "community values" can be imposed without the community paying. This has potentially profound implications for liberal democracy. Pluralist society is not mob rule. The capacity of property owners to have a reasonable belief that no government will take or devalue their property without compensation or to have the ability to take action through the courts if that happens is an important break on the excesses of government. In recent times there has been an insidious creeping of these restrictions, to the extent that many people may think it is normal and reasonable to routinely use regulation instead of other ways, including market mechanisms or compensation, to achieve the outcomes now demanded by some vocal sections of the community.

Justice, prosperity and certainty are also community values. The good news is that, by consistently supporting the rights of property owners, heritage protection, environmental conservation and water saving can be

achieved while preserving these community values. Indeed they can be better achieved at lower cost by means that allow the reasonable property owner to cooperate.

Heritage

The building heritage of Western Australia is under threat because property owners have a strong disincentive to maintain and preserve their buildings. At the moment the law says that when your property is placed on the heritage register there is no appeal and no compensation if this reduces its value. Property owners are stuck with a building that in many cases can't be developed or even renovated, certainly can't be pulled down, and the owner has to pay for the heritage maintenance.

> Western Australia [has the] power to order restoration. That is, if a person is convicted on non-approved development under the Heritage Act, he/she can be ordered to make good, to the satisfaction of the minister, any damage done by their action. The minister can also undertake the activity and recover any costs from the owner. (Productivity Commission, *Conservation of Australia's Historic Heritage Places*, 2006: 61).

Further penalties, including jail can apply for failing to comply with heritage orders.

The effect of this approach is unfortunate, if predictable. Some property owners, particularly those with buildings of marginal heritage value allow them to deteriorate to the point where all heritage value is lost and the buildings are condemned. Others risk the fines and conviction to bring the bulldozers in at midnight, making a calculation that the risks are outweighed by the potential for making a reasonable return from redevelopment. At least one caught fire!

In addition, Western Australia allows a precinct to be listed on the register, notwithstanding that each place within that precinct does not have heritage significance. This means whole suburbs can be listed because of a general streetscape or ambiance. Too bad if this means sub-standard housing is preserved to maintain a heritage flavour.

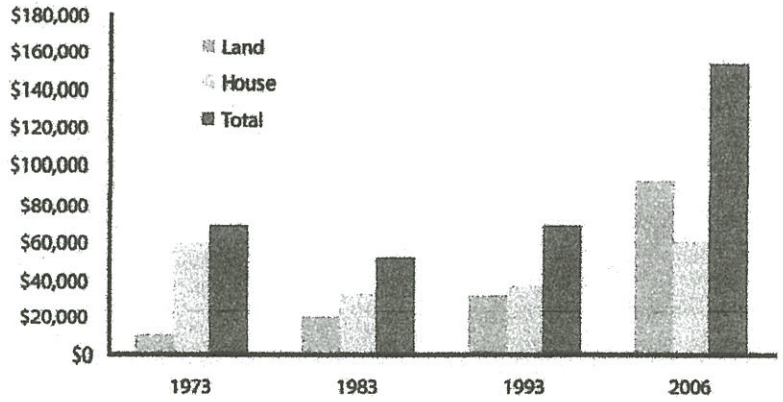
Because whole suburbs can be listed, often individual property owners get it wrong when they paint their house or pull down an old garden shed only to later find out they have breached a heritage order they weren't even aware of. Apart from the affects on actual property value due to heritage listing, there is also the problem of increasing complexity with multiple Acts of Parliament impacting on homeowners. Ignorance of the law is no defence against breaking the law but an average family would find it difficult to wade through, understand and act on the plethora of legislation affecting what can be done with their home if it becomes heritage listed. The mental anguish suffered by people trying to comply is impossible to quantify but the cost incurred from having to hire a lawyer to interpret the legislation can be valued and is yet another measure of the reduction in property rights.

Housing and Land

Government intervention in the form of zoning has created shortages of land for housing and other such uses and has been the major factor that has priced many young Western Australians out of the housing market.

Western Australia has the dubious honour of being the first Australian jurisdiction to legislate to control the use of private land with the Town Planning and Development Act in 1928. Originally little more than a codification

Figure 1: New house prices in Perth (inflation adjusted)



Source: HIA

Like all scarce goods, the most equitable way to allocate water is to allow price to direct it to its most valued use—to allow owners of water rights to sell to whomever will pay them best. At the same time, current use may not be the most valued use. Values can change over time as, for example, the environment is more highly valued now than in the past or population expansion makes piping water to urban centres the most valued use. Even within one industry the most valued use can change over time as, for example, cropping replaces wool and vineyards irrigated pasture. To best accommodate these changes water needs to be able to be moved from one use to another and price is the most equitable as well as efficient way to do this.

Irrigation farmers have invested in properties with attendant water rights that are a large part of the value of their undertakings. If water rights are to be divorced from the land, as they should be, then owners must be given a title to the water that is the equivalent of their title to the land. The government's first responsibility is to make ownership of water rights as certain and enduring as is the ownership of land, to protect them with the equivalent of a Torrens title. Land holders' bankers also require as much.

What then of the environment? Many people believe that 'environmental flows' ought to be increased. If the government wants to increase these then, as custodian of the public interest, it must pay existing water holders for that right, just as it does when it acquires land. A government should have the authority to 'resume' water for public amenity, just as it may resume land, but only on just terms. Because over-allocated water usage in Western Australia, unlike much of the Eastern States, is uncommon, this requirement should present this State Government with no serious difficulty. It should however move promptly to clarify the several water rights in those catchments where water is approaching or has exceeded full allocation. In catchments where the marginal value of water is low there is less urgency but there too owners deserve clear title.

When determining water policy within a property rights framework, the key principle must be the protection of existing rights to water. It is unacceptable for current users of water to have the rules changed and massive additional charges imposed or complete withdrawal of water when they have made investment decisions based on current rights. Moreover, water policy must explicitly account for long practice. There are many who have made major investment decisions over sixty or more years based on access to water. Even in cases where this use of water is not legislatively permitted, the long-standing legal principle of adverse possession must be applied.

Just as the law provides for long-standing practice to be recognised as a form of title, the same law limits that title to the extent the property has been possessed. In the case of water, this means a right to the quantity of water taken, not to a general right to take as much as possible. So, if a farming family, over many generations have pumped water from a creek to fill their damns, with no argument from government but also no permit, that property should be allowed to hold title to the average amount of water pumped. However, this right does not extend to that property being able to increase the flow ten-fold so the farm can begin irrigating crops. Existing water users, therefore should have legal rights to water, even when long-standing use has never been approved, but these are limited rights.

Water rights must be legislatively protected to allow holders the opportunity to exploit, mortgage or sell them as best serves their circumstances. Not all landholders may want to utilise their entire entitlement. The beauty of applying property rights principles to water is that by making it tradeable, some users, perhaps those in ill health or past retirement who cannot work the land in the same way but need additional income, can remain on their farm and gain the income from selling part of their water entitlement to someone who wants to irrigate, or to an urban authority or to an environmental pool.

A Solution

A just society does not confiscate people's property without compensation. A just society does not restrict the use and devalue people's property without compensation. A just society treats everyone, rich and powerful or poor and weak, the same in the eyes of the law. Under these criteria, Western Australia is no longer a just society.

A fair system is based on four principles: consistency, openness, compensation, and right of appeal.

Consistency

All existing legislation needs to be reviewed to introduce consistency for how landholders are treated by all levels of government. In addition to heritage and farmland vegetation highlighted in this document, the review will include planning laws, water entitlements and use, and any other aspect of Western Australian law which affects private property ownership and use.

Legislation arising from such a review will;

1. require all state government departments and local government to apply a uniform process to detail any actual harm or public nuisance that proposed regulations are designed to stop or prevent, the extent to which they affect private property owners, and whether the goals of the proposed regulations can be achieved using less prescriptive means, such as voluntary programs,

2. introduce mandatory benefit-cost analysis of proposed regulation using a standardised framework across government which values economic, environmental and, where possible, social benefits and costs from proposed property regulation. No legislation is to be enacted without the results of such analysis being made public for an adequate time period,
3. prohibit state and local governments from using their compulsory acquisition powers to expropriate private property for private development in order to generate more tax revenue, and,
4. prohibit non-legislative policies which have the effect of placing restrictions over the use of private property. All limitations on private property must be legislative and open to usual accountability mechanisms. Property owners who believe non-legislated mechanisms are adversely affecting them should have access to appeal mechanisms.
5. progressively remove zoning restrictions on new housing development.

Openness

All government agencies, including statutory authorities, must be required to contribute to a central database, operated by the Valuer General, of any covenants, heritage listings, environmental restrictions or other listings which place restrictions on individual properties, including heritage overlays of entire suburbs. Landowners and potential purchasers must, at a minimum, be able to easily, and at low cost, discover what they can and cannot do to their own property.

Compensation

At a minimum the WA constitution should be amended to match that of the Federal constitution to pay just compensation when property is taken from private landholders by the government. However, often regulation reduces the value of property without actually changing title so the law needs to go further. An appropriate protection for property owners would be legislation with constitutional effect which requires the state to compensate land owners when land use restrictions reduce the value of their property by excision of existing rights.

Such a measure would have the added blessing of providing a financial incentive to the government that it does not now have to prioritise its heritage, environmental and water use goals, concentrating on the most important.

Right of Appeal

Establish a Private Property Tribunal to rule on the reasonableness of compensation paid by government to private property owners when their property is expropriated or devalued due to restrictions.

Conclusion

Western Australia will best balance community calls for environmental and heritage protection with the benefits of economic growth from development by getting the incentives right. This package of reforms achieves that balance through compensating property owners where appropriate and opening up the process to proper, independent scrutiny. The result will be better protection of all the assets that the community values.

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