SUBMISSION TO THE LEGISLATIVE COUNCIL OF WA

IN REGARD TO THE

STANDING COMMITTEE ON PUBLIC ADMINISTRATION

Inquiry Into Private Property Rights

I hereby make my submission which addresses the terms of reference of the Standing Committee with particular regard to those which were cited in the public notice, as:

(b) Recognising the threat to the probity of the Torrens title system;

(d) Asserting that fair and reasonable compensation MUST be paid to the owner of private property if its value is diminished by a government encumbrance or resumption in order to derive a public benefit; and

(e) Conducting an enquiry into those matters.

Recognising The Threat To The Probity Of The Torrens Title System

There are three areas of concern, numbers 1 and 2 below concern the probity and numbers 2 and 3 concern the ability to search the title with all relevant matters being disclosed and at a reasonable cost to the public:

1. All matters relevant to the assumed right of the title accurately reflecting/affecting the status of interest held by the proprietor should be noted as an encumbrance, if that matter is contained within any contract or other legal agreement, legislation, adopted planning Policy, Scheme or Strategy, publicly notifiable act or letter of obligation, issued by any government or quasi-government body or officer, and any other matter subject to ratification prior to that ratification, with a registered proprietor advised in writing of that occurrence.

2. The adoption by Landgate of the digitally held titles and other documents has led to a title search which does not allow scrutiny of the originating interest, the chain of ownership and the history of encumbrance. This has severely weakened the integrity of the search which is required for any legal purpose.

3. The digital title system does not provide the legal survey document nor the encumbrance documentation, all of which requires separate searches with each attracting a search fee currently set at $26.20 per search. A digital search online takes a few minutes and does not involve any direct interaction with Landgate employees. A full search of a title might involve between five and ten requests which is an inordinate cost in terms of the product.

Fair And Reasonable Compensation Must Be Paid

The areas of concern which need to be urgently addressed, particularly in regard to resumption/compulsory acquisition, arise from the following:

1. Two Acts, Planning and Development Act and Land Administration Act, provide most of the Statutory rights to compensation, however, they are not fit for purpose with respect to the common law intent to provide fair and just compensation where land is required for public purposes, in particular lacking clarity as to interpretation.

2. The State Solicitor's Office, which acts on behalf of most of the government acquiring authorities, is assumed to fulfil the role of 'Model Litigant' in our society, however, it fails to do so, consistently watering down the due processes and pursuing cases in Court the end result of which is to decrease the State's *legally assessed obligation to pay compensation* rather than enforce its *obligation to pay fair compensation according to the Statute interpreted under common law.*

3. The acquiring authorities, most notably the WAPC, MRWA and Water Corporation, often engage in a practice of negotiation based on valuations obtained by valuers who are assessing the 'market value' on a willing buyer willing seller assessment of the current market without reference to the terms of compensation claimable under the relevant Statute and which do not look at the overall loss to the owner. Unfortunately, this sets the level of value and the owner is often forced to engage a series of experts in different fields and lawyers to provide on-going advice and representation. The due process set out in the Acts which would otherwise allow a fair assessment, has thereby been abandoned.

4. What should be an open and accountable process by government has descended into a closed and secretive, combatant and costly process, for both the government and the owner of private property.

5. The lack of a dedicated Land Compensation Court in WA (as operates in NSW) has resulted in drawn out cases with dubious results as to fairness in the matter of compensation due to decision makers not being familiar with the expert evidence and its relevance to the cases and our State's legislation.

6. The SAT set up for a cost and time effective method of dispute resolution has taken on the framework of the Supreme Court in regard to the giving and hearing of evidence and now provides no means of relief to many applicants.

7. The upshot of the break-down of a dependable and fair compensation process has resulted in many owners accepting offers of compensation which are woefully inadequate or are the result of a decision which is eminently appealable but beyond their financial means. These results are, however, relied upon by the authorities to influence future acquisitions.

8. The State Solicitor's Office has adopted an apparent policy of where it has been involved with a compensation case taken to court, at some late stage when it becomes apparent to it that it is not likely to win, makes a 'Calderbank Offer' which, if not accepted, becomes the threshold for the owner to not have their costs paid and possibly have to pay the SSO costs. Usually, the offer is significantly more than any amount the SSO has been prepared to pay before that point, however, also significantly less than the owner has claimed. The basis of a Calderbank Offer stems from two independent parties who have willingly entered into a commercial contract and have come to an impasse, with there likely to be an expectation of some good-will as to both parties exercising some compromise. **This is not the same basis as a compulsory acquisition and is an unethical approach to impose on the unwilling owner of private land taken by acquisition and who has not been treated in accordance with the due process set out in the Acts.**

9. An agreement as to a purchase price/payment of compensation for land required for a public purpose made between the SSO/Acquiring Authority and a private owner is subject to a secrecy clause which prevents the owner from making any details public and provides a convenient cloak for the acquiring authority when details are being sought. **This is unconscionable action by the authorities. Any acquisition of public purpose land should be wholly transparent, there is no argument for commercial confidentiality, it is just to prevent the public from being fully informed.**

10. Most of the above applies to compulsory acquisition, however, similar issues exist in being able to achieve adequate payment under the P & D Act where land is reserved but not likely to be purchased by the government. The main issue is the lengthy periods of reservation and the lack of understanding by experts as to the need to consider the 'non-reserved' proper planning processes in order to determine the effect of the reservation. This can only be addressed by a dedicated Land Compensation Court.

11. There is an appalling track record of Arbitrations, SAT and Court decisions in WA in the past few years which have consistently found for the government despite overwhelming evidence as to its case being unsupported, due principally to the lack of 'hard' market evidence as no similar circumstances have evolved in the past. The decision makers seem reluctant to find for the owner as it may set a precedent, and dare it be said, that the decision maker will not be required in future cases; this has been very evident in the appointment, or rather, lack of agreement by the SSO as to qualified Arbitrators put forward by owners' lawyers.

12. The various government departments/authorities have been inclined to appoint the same valuers who have consistently met their particular instructions. MRWA some years ago commissioned a report from Counsel, Mr Tim Pettit, which set out what should be provided in an independent valuation, however, it is fairly clear that his advice has not been acted upon, as it recommended that reports not meeting the standard should not be used.

13. The Water Corporation, which seems to prefer to negotiate on land requirements but takes an inordinantly long time and shuns the use of 'compensation' claim items, has issued a list of valuers it is prepared to allow owners to engage – this is surely an illegal use of its powers.

14. Finally, by way of example of unfairness in regard to assessment of compensation, a case which was decided and consequently appealed against by the owner, was granted leave of appeal in regard to the assessment of value as the Judge essentially threw out the evidence and became the 'third valuer'. The appeal was sent back to the same Judge who would only conduct the appeal case on the basis of his instructions to the valuers in which he listed three of the sales heard in the original case to be the only evidence used, despite the fact that one was not a sale, one sold after an option but also subsequent to planning confirmation and the third was not even remotely comparable as to potential, size or location. Needless to say, the owner could not contemplate the cost of an appeal pre-destined to provide a likely worse result than in the original case. This was not justice, not done nor seen to be done.

Yours sincerely

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