Submission to the Standing Committee on Public Administration

Inquiry into Private Property Rights

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The protection of private property rights is an area where it is relatively easy to find agreement on the underlying principles in abstract terms, but much harder to find agreement as to the practical steps that then need to be taken.

The need for this Inquiry is a case in point. The difficulty is not in identifying the problem. The erosion of private property rights by state government action has been comprehensively identified, documented and considered by previous parliamentary committees, including the May 2004 report of the Standing Committee on Public Administration and Finance titled *'The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia'* and the August 2015 report by the Standing Committee on Environment and Public Affairs titled *'Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005'*. The problem is finding the political will to actually fix the problems that have already been identified, and to translate good intentions into practical outcomes.

Recognising the work that has been done by these previous parliamentary committees, this submission will be relatively brief and focus directly on the key terms of reference. From the outset, however, there are two key points to highlight that underpin this submission.

The first is that while we often discuss rights in the abstract, it is absolutely essential not to forget that human rights are ultimately about individual human beings. I would encourage this Committee to pay particular regard to the evidence that it receives from individuals who have felt the direct impact of these issues. When governments make decisions about property rights it is all too easy to forget that real people and livelihoods are affected. The emotional and financial impact that these types of decisions can have (and have had) on individuals should be right at the heart of this Committee's deliberations.

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The second preliminary point is that this discussion is all about finding an appropriate balance between individual and community interests. Private property rights are not absolute. It is well recognised that the government has the right to pass laws that impact on private property rights in order to achieve a wider public benefit. However, given the importance of private property rights, the government should be acting only when there is a clear and compelling public interest, should be imposing only the smallest necessary burden, and should be prepared to bear the cost of doing so. There is no question that there will be times when it is entirely appropriate for laws to restrict private property rights. The problem arises when the laws overreach and have a disproportionate impact, and when the cost is entirely borne by the individual rather than the community that supposedly benefits.

A. The Fundamental Importance of Property Rights

Private property rights have long been regarded as fundamental, and their historical context can be traced back over 800 years to the *Magna Carta.* They remain just as relevant and significant in the contemporary context. As I have previously observed:[2]

> 'There is an essential and undeniable connection between property rights, the rule of law, limited government and the protection of individual liberties. There is also an inextricable link between economic growth and property rights, with guaranteed property rights providing individuals with the security and incentive that is necessary to both save and invest'.

Given the economic profile of Western Australia, the connection between private property rights and economic growth is particularly important to consider. Property rights have been recognised as one of the key measures of economic freedom, with the reasons for this being summarised in the 2019 Index of Economic Freedom:[3]

> 'In a functioning market economy, the ability to accumulate private property and wealth is a central motivating force for workers and investors. The recognition of private property rights and an effective rule of law to protect them are vital features of a fully functioning market economy. Secure property rights give citizens the confidence to undertake entrepreneurial activity, save their income, and make long-term plans because

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[2] Lorraine Finlay, *Submission to the Australian Law Reform Commission on the Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, Interim Report* (20 September 2015). Accessed at: <https://www.alrc.gov.au/inquiries/freedoms/submissions>.

[3] Terry Miller, Anthony B. Kim & James M. Roberts, *2019 Index of Economic Freedom: 25th Anniversary Edition* (The Heritage Foundation, 2019). Accessed at: <https://www.heritage.org/index/>.

they know that their income, savings, and property (both real and intellectual) are safe from unfair expropriation or theft.

Property rights are a primary factor in the accumulation of capital for production and investment. Secure titling is key to unlocking the wealth embodied in real estate, making natural resources available for economic use, and providing collateral for investment financing. It is also through the extension and protection of property rights that societies avoid the "tragedy of the commons," the phenomenon that leads to the degradation and exploitation of property that is held communally and for which no one is accountable.'

B. Probity of the Torrens Title System

The terms of reference for this Inquiry referred specifically to the 'threat to the probity of the Torrens title system' and raises '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'.

I would endorse this approach. There is no doubt that the government may lawfully burden private property in all of the ways listed above. However, where the government decides to significantly encroach on the way that specific property owners use identified parcels of land surely the bare minimum requirement must be for that restriction to be imposed in a transparent and accountable way. The rule of law demands nothing less.

The example of the way that Environmentally Sensitive Area declarations (***ESAs***) have operated in Western Australia highlights these concerns, which were well documented in the 2015 report by the Standing Committee on Environment and Public Affairs.[4] Individuals can find their property subject to an ESA declaration – which significantly changes their legal rights and responsibilities – almost overnight, and without any requirement of individual consultation or notification. The current system does not make it particularly easy for owners or potential purchasers to find out if or how a particular property is affected, and yet this is a question that has significant legal and financial consequences attached to it. As I have previously observed:[5]

'The combined effect of the lack of prior consultation, lack of individual notification, failure to record an ESA designation on a Certificate of Title, and non-user friendly

[4] WA Legislative Council, Standing Committee on Environment & Public Affairs, *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)* (August 2015). See also Lorraine Finlay, "Environmentally Sensitive Areas in Western Australia: Highlighting the Limits of the 'Just Terms' Guarantee" (2016) 41(1) *University of Western Australia Law Review* 49.

[5] Lorraine Finlay, "Environmentally Sensitive Areas in Western Australia: Highlighting the Limits of the 'Just Terms' Guarantee" (2016) 41(1) *University of Western Australia Law Review* 49.

search system is that many property owners are simply not aware that their property is affected, and it is unnecessarily difficult for them to find out.'

I would go one step further than the terms of reference, and recommend that not only should such encumbrances be added to the Certificate of Title, but also that the existing property owners should have to be directly notified of any encumbrance that is so added. At present, individuals can subscribe through Landgate to TitleWatch which 'is an online title monitoring service that sends automatic email notifications when an action is detected on a Certificate of Title'.[6] There are two shortcomings with this system. The first is that any encumbrance that presently sits behind the Certificate of Title will not be part of the TitleWatch alert. The second is that individuals should not be required to pay an annual subscription (currently $31.50 per title) in order to learn about government decisions that directly impact in such a significant way upon their property.

It should be noted that one step that has been taken in Western Australia is the introduction of Property Interest Reports (***PIR***) by Landgate. These are available to the public (at a cost of $60 per property) and provide an indication of all known property interests affecting a specific property, including interests not shown on a Certificate of Title. This is a positive step forward, however it is not itself entirely sufficient. For one thing, it increases complexity by requiring people to go behind the Certificate of Title to obtain a full picture of the particular property. The second issue is that while it may be useful for prospective purchasers, it is not particularly practical for existing property owners. How often should a property owner be expected to order a PIR just to find out whether or not the government has decided to impose an encumbrance on their property? This is a critical question when the encumbrance in question creates legal obligations that operation from the time of its creation. At the very least, if an interest is significant enough to be added to a PIR then this should trigger an automatic notification being sent to the owner of the property concerned.

When speaking in Parliament on the motion that established this Inquiry, the Minister for Environment argued that there was never an intention for all encumbrances to be shown on the Certificates of Title within the Torrens Title system. He stated that '[t]he State is not willing – in fact it is not able – to guarantee such a large category of other interests'[7] and noted that

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[6] Accessed at: <https://www0.landgate.wa.gov.au/for-individuals/property-ownership/fraud-protection/titlewatch>

[7] The Hon. Stephen Dawson MLC (Minister for Environment), *Hansard* (Legislative Council, 12 June 2019), p4007e-4023a, [12].

adding these interests to Certificates of Title may lead to increased complexities and costs. Of course, the *failure* to add these interests to Certificates of Title most certainly does already lead to increased complexities and costs – it is just that these are currently borne exclusively by the individual property owner who finds their land burdened with an ESA declaration. We should also ask *why* the State is not willing or able to provide such a guarantee. After all, these are encumbrances created entirely by the State itself. If the government contends that the interests created are so numerous and complicated that it is simply too onerous a task to track and record them, perhaps that is an indication that the State is simply creating too many encumbrances and imposing too great a burden on individual property owners.

During the same debate, the Hon. Diane Evers MLC made the following observation:[8]

> '… I say *caveat emptor* – buyer beware. Every person who buys a property should be aware that they need to do their homework and find out whatever information they can. I recognise that people do that by going through a conveyancer and asking for and going through the title, but maybe more can be done. It is not as though ESAs are a surprise to anybody.'

However, the difficulty here is that they *were* a surprise to many of the 4,000 – 6,000 landowners who it is estimated are directly affected by an ESA designation.[9] Indeed, many still do not know, or are not sure, if they are affected. This isn't simply a case of a buyer failing to do their homework. People who had done their homework and purchased unencumbered land found their rights drastically curtailed almost overnight by the application of an ESA declaration to the land that they already owned, and this was done without any prior individual consultation or subsequent individual notification by those responsible for taking the decision. That this was allowed to happen in the first place is disgraceful. The only thing worse is that it has been allowed to continue for so long with the government being aware of the problem, and doing so little to remedy it.

C. Fair and Reasonable Compensation

The key problem with the existing framework is that the State Government has been able to impose substantial restrictions on property rights, but has failed to provide compensation to the existing land owners who have been affected. The argument here is not that individual rights

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8 The Hon. Diane Evers MLC (South West), *Hansard* (Legislative Council, 12 June 2019), p4007e-4023a, [15].

9 The Hon. Mark Lewis MLC (Mining & Pastoral), *Hansard* (Legislative Council, 21 August 2014), p5672b-5681a.

should always and in all circumstances take priority over broader community interests. Instead, it is argued that a better balance needs to be reached. Where the community does have a compelling interest that requires existing property rights to be substantially restricted, the community should be prepared to bear the costs of that decision as a whole rather than forcing an individual property owner to bear the full burden.

The key argument that is often made against any expanded compensation mechanism is that it would impose a significant financial burden on the State. That is undoubtedly true. However, the point that is missed is that a significant financial burden is *already* being imposed. It is just being imposed on individuals rather than the broader community. There is an obvious moral case for sharing these costs. If the community believes that it is important to impose restrictions on a particular parcel of land, then it is only fair that the community should be willing to share those costs.

An expanded compensation mechanism has the added benefit of discouraging the current bureaucratic enthusiasm for sweeping, all-encompassing restrictions. As I have previously observed with respect to ESAs:[10]

> 'At present, a broad-brush approach tends to be applied as there is no tangible cost that government departments or individual bureaucrats need to consider before they 'sterilize' large areas of land under the guise of environmental protection. Forcing the bureaucracy to actually consider the cost of these policies by imposing compulsory compensation mechanisms will lead to environment policies that are more targeted and better focused, effectively prioritizing areas of key environmental significance rather than the current 'super trawler' approach to environmental protection'.

During the debate on the motion establishing this Inquiry, Members spoke about the importance of ESA notices in protecting wetlands, and of the broader importance of protecting areas of environmental significance. Again, the real issue here is finding the appropriate balance. For while it may be appropriate to impose environmental restrictions on areas of high conservation value, it is difficult to seriously support the claim that each and every one of the 98,042 parcels of land in Western Australia that includes an ESA designation[11] contains areas

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[10] Lorraine Finlay, "Environmentally Sensitive Areas in Western Australia: Highlighting the Limits of the 'Just Terms' Guarantee" (2016) 41(1) *University of Western Australia Law Review* 49.

[11] Noting that the full estimate is that 102,792 parcels of land in Western Australia include an area mapped as an ESA, however of those it is estimated that 98,042 titles are not Crown Reserves or State Forest. See WA Legislative Council, Standing Committee on Environment & Public Affairs, *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)* (August 2015), [4.2].

deserving of the highest possible levels of environmental protection. This is particularly the case when we consider the deficiencies in the way that these assessments were conducted, with the Standing Committee on Environment & Public Affairs previously expressing concern about the fact 'that a Department assessment of whether land is an ESA may be based on desktop studies and maps, without a Departmental officer visiting the land in question to assess whether the land is environmentally sensitive'.[12] It is strikingly clear that it is not only areas of high environmental significance that are being captured by this process.

The absence of a guaranteed compensation mechanism encourages bureaucrats to adopt an all-encompassing approach as the cost is shifted away from the decision-maker and placed entirely on the individual property owner. Adopting a guaranteed mechanism to provide fair and reasonable compensation would encourage decision-makers to focus on limiting restrictions to those cases where there is truly a compelling and demonstrable community interest. After all, if these restrictions are there to '… protect all of us; they are there to protect Western Australia'[13] then surely it is only fair for all of us to share the cost?

(30 July 2019)

[12] WA Legislative Council, Standing Committee on Environment & Public Affairs, *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)* (August 2015), [Finding 4] at 20.

[13] The Hon. Diane Evers MLC (South West), *Hansard* (Legislative Council, 12 June 2019), p4007e-4023a, [16].