PROPERTY RIGHTS UNDER ATTACK IN WESTERN AUSTRALIA

A PAPER ADDRESSING THE EROSION OF PROPERTY RIGHTS IN WESTERN AUSTRALIA

DISCUSSION PAPER

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EXECUTIVE SUMMARY

The traditional Western view of property rights maintains that individuals, groups, companies or trusts have the lawful right to own, use, enjoy and dispose of property, without unreasonable imposition by government.

Even the Chinese Communist Party has accepted their importance. On 22 December 2003, the Central Committee agreed to amend the Chinese Constitution to enshrine private property rights.

Meanwhile, in Western Australia, property rights have been quietly and methodically eroded. There are many examples:

- Property owners affected by policies, such as Bushforever, or rural policies restricting subdivision, are not compensated for any losses.
- Governments take land from private property owners through the subdivision approval process, without compensation.
- Heritage requirements are imposed on property owners, with little or no compensation.
- Property taxes have increased dramatically, and now comprise 42% of the State Budget.

The consequences of the erosion of property rights are of serious concern to our community. It undermines the potential for property ownership, reduces Western Australia's productivity and standard of living, raises levels of inequality in our community, distorts investment patterns, and increases the reliance of the community on fewer individuals.

Ultimately, the erosion of property rights means fewer opportunities for the current generation of Western Australians and future generations.

To fight the erosion of property rights, the Property Council of Australia, Real Estate Institute of Western Australia, and the Urban Development Institute of Australia, and other interested individuals have joined a working party to reassert and clarify traditional rights of property ownership.

The Working Party on the Erosion of Property Rights believes urgent action is needed to halt the erosion of property rights in Western Australia, and seeks political commitments to the following charter:

- all citizens ought be able to own, use and enjoy property;
- the legal system should protect the existing rights of property owners;
- property owners ought to be fairly compensated for any loss of property rights;
- planning processes should support property development in Western Australia; and
- State and local governments will encourage participation in property ownership by ordinary citizens and investors, especially by moderating property taxation and government charges.

This traditional western view of property rights maintains that individuals, groups, companies or trusts have the lawful right to own, use, enjoy and dispose of property, without unreasonable imposition by government.

1. *The right to OWN*

   Ownership of property must be genuine, exclusive and protected by title. To the extent that others can impinge on or abuse property with impunity, ownership becomes a valueless sinecure.

   Owners must be able to enforce laws of trespass and to expect legal redress against theft, malicious damage or unfair seizure.

2. *The right to USE*

   Ownership is meaningless unless property can be put to proper use. Cars are of little benefit unless they may be driven. A farm or industrial property is of little value if it cannot be used to produce a return on capital and labour.

3. *The right to ENJOY*

   The personal satisfaction derived from property ownership is a major motivational force in most economies. Such pleasure may be derived from the profitability, utility or security gained by ownership. It may also be satisfaction taken simply in owning something perceived as beautiful, for example, a painting.

   Enjoyment of property is easily destroyed by unreasonable, capricious or arbitrary impositions by government. Excessive planning restrictions are one example.

4. *The right to DISPOSE*

   Property owners ought be free to sell, gift or will assets without undue interference of the State. Individuals are motivated to improve the productivity and value of assets in the realization that family and designated heirs may benefit from such endeavour. Excessive transaction costs are a source of serious economic and social damage. This is because the right to dispose facilitates the transfer of ownership to the entity most likely to make the most efficient use of the land. Thus property rights provide economic incentives to encourage efficient outcomes for our society.

It is acknowledged above that there are restrictions that are imposed by Government on these property rights that are warranted. The exercise of property rights can impinge on neighbours and others in our communities. This can take the form of pollution or social disruption. The issue faced by our community are how far property rights should be restricted and whether or not compensation should be paid.

These tensions were recognized in an Uthwatt Committee Report (1942) which set out the issues faced by regulators:

1. *Ownership of land does not carry with it an unqualified right of user.*
2. *Therefore restrictions based on the duties of neighbourliness may be imposed without involving the conception that the landowner is being deprived of any property or interest.*
3. *Therefore such restrictions can be imposed without liability to pay compensation.*
4. *But the point may be reached when the restrictions imposed extend beyond the obligations of neighbourliness.*
5. *At this stage the restrictions become equivalent to an expropriation of a property right or interest and therefore (it will be claimed) should carry a right of compensation as such.*

The High Court of Australia, on numerous occasions, has recognized that regulation can amount to depriving property owners where the regulation extends beyond what is required for the public interest.

This paper below sets out the areas where property rights have been unreasonably restricted in Western Australia, invariably without adequate compensation, the consequences of the erosion of property rights, and the actions needed to protect property rights.

> *Property, great and small, is a principal source and sustenance of human endeavor.*
>
> *Ownership motivates, and so becomes a stimulant and catalyst of personal energy and individual creativity. Property is a wellspring of private wealth and financial independence.*
>
> *Its utilization gives security and financial strength to individuals, their families and, in favorable circumstances, to successive generations of families.*
>
> *Property is the basis on which surplus wealth, both private and social, is accumulated and invested in new ventures, so helping to underpin the social contract in a civil society*

The rights of property owners to own, use, and enjoy their property are under attack in many areas in Western Australia. In the last decade, we have seen an unprecedented erosion of the rights and interests of private property owners. This has been seen most clearly over the last decade in three key areas:

1. Compulsory acquisition as expressed in the deprivation of land without adequate compensation.

2. Planning and development controls, where an increasing number of conditions being imposed on approvals without compensation, and refusal of approvals without consideration of the merits of projects.

3. Excessive rates of taxation applied to private property, which include stamp duties, land tax, the emergency services levy and Perth Parking Levy.

COMPULSORY ACQUISITIONS WITHOUT ADEQUATE COMPENSATION

Since the settlement of Western Australia, private property rights have become increasingly regulated and subject to compulsory acquisition. Although the Commonwealth Constitution protects an individuals' private property against acquisition on unjust terms, this protection is not contained in the Western Australian Constitution.

Remarkably, legislative amendments that remove or diminish private property rights are rarely challenged by either side of politics. In Australia, the reinvigoration of the concept of the Crown's radical title and the increasing strength of the 'green' vote seem to provide justification and political reason for legislative interference with private property interests. Calls for the continued recognition of private property rights are muffled and seen as coming from the far right. *Far reaching legislative amendments affecting private landowners' interests are passed through Parliament without too much of a whimper from anyone except minor interest groups, but what is at stake is far more serious than some small landowners private interests in property*. What is at stake is the foundation of a stable democratic capitalist nation. This is not a green or brown debate, but a debate about whether it is legitimate to affect private property owners' interests beyond what is required to protect the "greater good".

Increasingly arguments in favour of private rights are submerged under the weight of the politically correct environmental movement. What is often forgotten is that landowners have, for years, been the greatest environmentalist protecting land from senseless degradation. Today, a new class of self-anointed visionaries who neither own property nor have money to pay for policies they espouse rule the agenda. "Property for the common good," they cry, the land owners look on, they have heard it before, and know only too well the tragedy of the commons.

Both the Town Planning and Development Act and relevant regional planning legislation provide for the payment of compensation in circumstances where land is affected by the making of a scheme. On the surface, this appears to be fair. However, it is the way in which these provisions apply, and equally situations in which these provisions do not apply, that gives rise to a feeling, particularly among landowners of reserved land, that they have not been treated fairly. The reason for this is as follows:

1. Land owners of land affected by a reservation receive only market value of the land.
2. Land owners of land affected by land considered to have particular environmental benefits are not compensated and do not have recourse to compensation.
3. Land owners of land affected by policy, such as bushforever, or rural policy restricting subdivision are not compensated as these are just policies, and after all planning is based on policy.
4. As a condition of subdivision the Western Australian Planning Commission will require the ceding of regional reservations even though this is contrary to a number of Supreme Court appeal cases. In particular, foreshore land has been required to be ceded.

These issues are discussed in more detail below.

Environmental legislation or policy has a marked impact on the value of land. Rather than valuing land affected by reservations generously, the valuation of land affected by reservations is more likely to be depressed. Land owners who hold regional reservations will often be required to cede that land free of cost at the time of the subdivision of the land. Land owners whose land is affected by environmental conditions do not have the same means to claim compensation.

When the Western Australian Planning Commission implements a regional reservation, landowners are told that they can trigger a claim for compensation by lodging a development application that is subsequently refused because of the reservation or approval with conditions that are unacceptable to the landowners. However, landowners often find that the position is somewhat different from what they are told. Landowners who seek to trigger compensation pursuant to Section 36 of the Metropolitan Region Town Planning Scheme Act 1959 (MRTPS) by lodging a development application are often thwarted in their attempts because the development application in fact needs to be genuine, i.e. establishing that the landowner genuinely intends to carry out the development. Landowners therefore cannot lodge a development application for the purpose of triggering the right to claim compensation. Section 36 of the MRTPS Act requires the application to be "bona fide". There is a certain unreality in a person lodging a development application over reserved land. Put simply, it is difficult to make a bona fide application in these circumstances as the outcome will invariably be a refusal. The Supreme Court's decision in Bond found that compensation could not be claimed where a refused development application had been made solely for the purpose of triggering a claim for compensation. This being the case, the reality is that, short of selling land, there is no mechanism available to landowners in the Metropolitan Region Town Planning Scheme Act 1959 to trigger a compensation claim. In *Temwood Holdings Pty Ltd v Western Australian Planning Commission* Appeal 29, 40 & 41 (2001) WATPAT 4 the Tribunal Chairman acknowledged this difficulty and said that "Bond, in combination with Love, has significant and unfortunate consequences. If an owner primarily intends to subdivide land, an application to develop will be invariably contrived. If the owner makes contemporaneous applications to develop and subdivide, it is then a matter of luck if the development is refused before the condition is imposed."

Instead of being required to cede regionally or environmentally significant land, the Western Australian Planning Commission should make use of private planning means to control land use and pay landowners compensation. The use of restrictive covenants and easements can restrict the use of significant land without the requirement that such land be ceded. Landowners who have regionally or environmentally significant land should be compensated, to the extent that holding such land impacts on their future rights.

Water rights example

The existence of fresh water in rural areas is one of the largest determinant of value for land that there is, so to remove the water right is tantamount to a partial and significant resumption of rights that attach to land, if not the land itself. If the State sees fit to resume the water from a property, than it follows that fair compensation should be paid. See Pat Byrne, News Weekly, "Unrestricted Water Trading a Danger to Farmers", p. 4.

Water trading, which is gaining increased support by the Council of Australian Governments, carries with it the consequence of removing the water right from the land to Corporate and Government entities removed from the land.

The water trading philosophy relies on the assumption that the value of farm production will be maximized if water it transferred from low value agriculture to high value agriculture. This assumption is basically flawed:

- Markets change, so high value crops can soon become low value crops due to overproduction. The choice of what to plant is generally best left to the farmer, without the need to consider the return on his investment in water, which, we assert, he already has rights to.

- Basic economic and social theory dictates the desirability to keep agricultural cost inputs low, as this has an effect on the cost of food.

- Farmland derives its value from its productive capacity. Without water, the productive capacity of land is reduced. Because much of Western Australia's food production is derived from irrigation farmland, eg. Carnarvon, Harvey and Kununurra, there is not only an erosion of property rights issue to address here, but also a clear social responsibility.

Property owners should have the right to draw and use the water that is on the land. Where that right is removed, fair compensation must be paid on the basis of value of the land before the resumption of the water right compared to the value of the land after the right has been extinguished.

PLANNING AND DEVELOPMENT CONTROLS

Buying a home or property is the biggest investment that most Australians make in a lifetime and, for most of us, when we purchase a property we also assume to have acquired certain rights: such as the right to exclusive use, the right to sell, to build a house upon, to farm, etc.

However, from where we stand today, it is evident that something has gone wrong. Today, average Australians struggle to buy a house and, when they do, they find themselves with limited rights. Property rights have not been suddenly removed – they have been eroded by government over time to a point where even the principles of ownership are no longer respected.

A major cause of this erosion has been the land use planning, environmental and heritage legislation and regulations which enable the government to strip property owners rights without paying them adequate compensation, or any compensation at all.

The impact of legislation and regulation

Land use planning, environmental, conservation and heritage regulations were all originally designed to protect public amenity and to provide for development and land use outcomes which the modern community desires but, without regulation, the market may fail to deliver, or for which costs and benefits cannot be reliably distributed without the intervention of authority.

Today there remains a legitimate need for this type of regulation. However it is our concern that it has pushed well beyond preserving public interest by introducing excessive requirements through legislation, regulation, policies, by-laws and administrative practices which impose detailed control over the use and development of private land, eroding the rights and choices of property owners.

Of even greater concern is the lack of fair compensation available for property owners whose property rights are adversely impacted by planning, conservation and heritage legislation and regulations. There is an increasing trend in government to push the cost of the land use planning, conservation and heritage agenda on to individual home and other property owners who are expected to bear the burden for the good of the greater community. This is clearly inequitable.

This includes legislation and policies which:

- impinge on private property to such a degree that the land is rendered worthless to the owner, while leaving the title with the owner – who has little or no recourse for compensation;
- provide the government with the power to compulsorily acquire land from private property owners without fair compensation;
- allow the government to take land from the private property owner through the subdivision approval process; and
- increase the cost of obtaining planning and development approvals thereby pushing up the cost of a new house and reducing housing affordability for thousands of Australians.

Private property rendered worthless through Government restrictions.

In 1928, the common law was modified in Western Australia with enactment of the Town Planning and Development Act which provided that a person whose land is injuriously affected by the making of a scheme is entitled to compensation. A claim must be made within six months of the scheme being approved and gazetted. However, land is not considered to be injuriously affected unless development is not permitted for other than a public purpose; or non-conforming land use rights are cancelled (wholly or partly).

Non-conforming land use rights relate to a use that was lawful immediately prior to the coming into operation of a scheme that is not in conformity with any provision dealing with the new zoning or classification of land, for example land being rezoned from "Urban" to "Public Purpose Road Reserve". Reserved land can be purchased or compulsory acquired for the purpose of the scheme. In Western Australia, injurious affection is not payable on 'zoned' land - that is land that is not required for a public purpose such as commercial, residential, rural and industrial. Where a town planning scheme 'up zones' land, a landowner gains a potential benefit. Where land is 'down zoned' for whatever reason, no compensation is payable if a loss occurs.

In addition to this, the concept of "betterment" has been increasingly entertained by local authorities. Betterment in effect seeks to tax a landowner at the time of development for any upzoning that has occurred – basically as a result of the passage of time in a growing area.

In 1959, the Metropolitan Region Town Planning Scheme Act was enacted which provided particular provisions in respect of the Metropolitan Area. The provisions of the Town Planning and Development Act (so modified) also apply to compensation under the Metropolitan Region Scheme. This leaves a significant number of situations where property rights can be seriously eroded and restricted with little or no recourse for compensation. For example:

- Land use zoning which restricts the future development potential of land but does not take away a pre-existing use. This includes, for example, the zoning of rural land as "Agriculture" or "Priority Agriculture Zones", removing any possibility of rural land owners to subdivide or develop their land in the future, but not removing the right to continue using the land for agriculture;

- Town planning, heritage or environmental legislation and regulations which severely restrict the use of private property, such as the ability to alter a building on a property, build on a property, the type and form of buildings that can be constructed on a property or the removal or planting of vegetation on a property. Examples of this include the inclusion of a property on the State Register of Heritage Places or the placing of a Conservation Order over a place by the Minister for Heritage;

- Policies which place restrictions over the use of part or all of a private property (such as Bush Forever, conservation policies or buffer policies) but for which there is no avenue for compensation because they are only policies, not legislation; or

- Town planning legislation which restricts the use of private property by classifying or zoning it for conservation but not actually reserving the land for this purpose – removing the rights of the property owner but providing no avenue for compensation or for acquisition of the land by the government. This includes the zoning of private property as "conservation" or the imposition of "conservation covenants" which make the property owner responsible for managing the conservation and landscape values of the site and severely restrict any opportunities for future development.

These types of restrictions can have devastating impacts on private property owners. They can eliminate the ability of property owners to enjoy their property and importantly, to sell and profit from their property which for most West Australians is their only asset of significant value and is crucial to ensuring a secure retirement.

An example of this is the case of a property owner in Canning Vale whose land was identified by the government as containing a significant conservation wetland and was subsequently, without consultation and completely unbeknown to the owner, identified the land as a Conservation Category Wetland. The owner then found that 90 per cent of the property, which they had paid for over 30 years and was their only major asset, was now so severely restricted in use that it was effectively worthless - they were not able to sell the property on the private market as it had no development potential - yet they had no avenue to claim compensation.

Compulsory acquisition and inadequate compensation

As outlined above, there are situations in which compensation for injurious affection is payable or where the Western Australian Planning Commission can elect to acquire land reserved under the Metropolitan Region Scheme instead of paying compensation for injurious affection. Similarly, the Commission may elect to acquire land affected by a reservation under the Scheme in lieu of paying compensation for injurious affection. Despite this, many land owners who have been affected by a scheme find that compensation available under the Act is woefully inadequate.

For example, land reserved under the Metropolitan Region Scheme that is required by the Commission for implementation of the Scheme the Commission can purchase the land for 'fair market value' unaffected by the Scheme ie the reservation is disregarded and the assumed alternative zoning substituted. While this sounds reasonable on face value, it can have serious pitfalls for land owners. For example, people who run a business from their property may not be properly compensated for the disturbance or loss of their business.

Section 36 of the MRTPSA provides for compensation for injurious affection, or alternatively the opportunity to elect to purchase the land. The focus of Section 36 is compensation for injurious affection, not the purchase of land, the Supreme Court has held in *Mount Lawley Pty Ltd -v- Western Australian Planning Commission* [2002] WASC 307 that the provisions of the MRTPSA are not to be read as compulsory acquisition provisions. The value given to land under the MRTPSA is the market value. In *Hill & Anor v Western Australian Planning Commission* [2000] WASC 101, Hill was operating a piggery on land declared a planning control area on the "Gnangarra Water Mound". After refusal of development approval to construct an extension to the shed and lagoon relining of the existing piggery the land owners lodged a claim for compensation. The Western Australian Planning Commission elected to purchase his land. The land owner claimed the value of the land including the loss of the business caused by the decision of the Western Australian Planning Commission to acquire the land. The court found that the owner could only claim market value for the land and nothing more, thus the landowner could not claim for the destruction of his business.

In addition, the Western Australian Planning Commission may, with the consent of the Governor, compulsorily take land for the purpose of the Scheme, which is known as resumption. Settlement of a claim upon resumption would include the fair market value of the land plus removal expenses and disruption and reinstatement of a business, architects and quality surveyor fees, any discounted building contracts, severance plus an amount up to 10% (solatium).

Again while this compensation sounds fair, problems arise for land owners where their land has been substantially devalued as a result of the making of a scheme (which is known as planning blight). The problem of planning blight arises where structure plans (which are non statutory) propose reserves such as regional parks, freeways and railways, as these do not allow compensation to be claimed until a scheme is declared and lands are reserved. The period from when the reserve is first proposed in a structure plan to finalisation of the reserve may take some considerable time (a significant number of years in some cases) whilst studies are completed and the statutory processes completed.

During this time land affected by the proposed reservation loses value and, by the time the reserve is actually gazetted it may be worth considerably less than its value prior to the reserve being proposed, let alone its likely value if it had never been earmarked for a reserve at all.

Eroding private property rights through the planning approvals process

The planning approvals process has become another avenue through which the government is restricting private property rights and requiring land owners to give up land to the government free of cost 'for the public good'.

The Town Planning and Development Act provides for local governments to require that 10% of a development is ceded to the Council free of cost for public open space. The requirement for the land (or cash in lieu of the land) to be provided by the developer for public open space is included in a planning approval as a condition of subdivision. Developers and subdividers generally accept this requirement and factor it into feasibility assessments and cost analysis of any subdivision or development.

However, the government has recently been using the planning approval process as a means of obtaining additional private property free of cost from landowners and of making property owners pay for conservation or land use planning initiatives which are based on planning policy rather than legislation. These are often requirements of which the landowner or developer is not aware until they are included as a condition of subdivision, meaning that they are unable to plan or budget for them and could render entire projects unviable after thousands of dollars have already been spent. This type of problem has particularly arisen where draft policies have been implemented through conditions of subdivision prior to their finalisation and without consultation or communication to stakeholders.

This has resulted in some people seeing their retirement funds and assets depleted without prior warning and with no avenue for compensation.

The principle of giving up public open space is set down in section 20 of the Town Planning and Development Act and reinforced by the 1960's case of *Lloyd v Robinson* (1962) 107 CLR 142. In this case, the court held that a condition imposed to give up public open space is the cost of the privilege to subdivide, this is accepted. However, the Western Australian Planning Commission continue to endeavour to acquire more land for open space then a subdivision really demands by requiring regional open space to be ceded whether or not it exceeds the amount of open space required by a particular subdivision. The fundamental principle of planning, enunciated by Stephenson and Hepburn, conceptualised a distinction between regional open space and public open space. The demand for public open space is a local phenomenon, such as when a developer subdivides land. In contrast, the demand for regional open space arises from regional demands. In particular, early Tribunal decisions such as *Biaco Pty Ltd v SPC* (1998) TPATWA 15, and *Love v Western Australian Planning Commission* (11 June, 1999) TPAT Appeal, 103 recognised the distinction between public and regional open space. For a period, however, the distinction between regional open space and public open space was not as clear. The Tribunal considered regional open space to be given up as a contribution to public open space. The Supreme Court in the WA *Planning Commission v Erujin Pty Ltd* [2001] WASCA 139and *Temwood Holdings Pty Ltd v Western Australian Planning Commission & Anor* [2002] WASCA 10 (1 February 2002) clarified the position and reinstated the distinction between public open space and regional open space. In essence, the Court determined that it is not the intention of the Act to take away regional open space without the payment of compensation. The misappropriation of land by the Western Australian Planning Commission continually making it a condition of subdivision that regional open space be ceded may well amount to interference with private property rights that exceeds public need and, as such, this may well amount to an appropriation of land.

A primary example of the subdivision approval process being used to obtain private property free of charge or with minimal compensation through the planning approval process is Bush Forever. Bush Forever is a state government policy which aims to preserve vegetation which is perceived to have regional conservation significance for the long term benefit of the state's community. Bush Forever is being implemented by the Western Australian Planning Commission through statutory planning instruments (the planning approval process). While few people question the intent of Bush Forever, many would agree that it is extremely unfair to expect a small number of land owners, many of whom are mums and dads, to pay for the conservation agenda of the government or the community. Bush Forever also required land owners and developers to give up land which is perceived to have regional or local conservation significance with little or no compensation. This has placed many land owners in serious financial hardship by rendering their property virtually worthless and has been particularly difficult for some members of the community who feel that they have been penalised for retaining and respecting native bushland on their property.

Where land owned by development companies has been impacted by Bush Forever, the cost of ceding the land to the government has been added on to the price of lots, meaning that the cost is ultimately borne by the new home buyer, while the whole community receives benefit. This is clearly inequitable and has a direct negative impact on housing affordability. We assert that the cost of policies that benefit the entire community should be shared equally shared among the community through fair compensation.

Increasing regulatory controls and requirements push up property prices

Over the last thirty years, the growth of regulations and powers over building and land development have been so great that today there is a broad set of overlapping legislation and regulations that few people are able to understand. As a result, land owners, developers and home builders are required to hire teams of town planning, engineering, environmental, architectural and social science professionals in order to obtain the various required town planning and building approvals and permissions.

The impact of this regulation on property rights has been twofold:

1. Regulation has eroded the rights of property owners in regards to what they can do on their property such as whether an owner is allowed to build on the property, the design and citing of buildings, the use of buildings, the materials and colour of outer walls, boundary walls and fences and in some cases even the plants and plant species that can be planted on or removed from the property.

2. Regulation has increased the complexity of the planning approval process - increasing the cost of property development and home building and pushing up the cost of buying or building a home in Perth.

The increasing complexity of planning and development regulations and requirements has the direct impact of increasing the cost of housing in Perth. This is now the largest cost component of land development.

A report prepared for the Urban Development Institute of Australia (WA Division) by ACIL Tasman in 2002 found that, in Western Australia, direct servicing costs (earthworks and retaining walls, landscaping (estate), stormwater drainage, sewerage, water, underground power installation, roadworks and associated professional fees etc) contribute up to 42% of the total cost of land development and

therefore markedly impact on the cost of a new home. This is an increase of 133% since 1992 – substantially increasing the cost of a new home.

The Australian dream of a young family owning their own home has, in several capital cities become just that – a dream! Australia faces a crisis centred around the country's inability to deliver affordable homes to young families on terms realistic enough to enable the families to pay the debt off in a reasonable time, to then enable these same families to save sufficient other funds to allow for a reasonable standard of living in retirement.

Growth in government regulation

Poor coordination by government departments that have input into the land development process has lead to a literal "explosion" in government policy. This is resulting in development approvals being issued with an ever increasing amount of conditions. In many instances, these conditions are unworkable, scientifically flawed, impractical and extremely expensive to implement.

The shout of "conservation" has been too often used as a means of justifying the imposition of pages of conditions on development approvals that not only cost a huge amount to adhere to but also have the effect of creating costly delays for the developer that in the final analysis get passed onto the home buyers in order for the developers to cover the interest costs.

The vicious circle typically starts with a government department formulating a policy in an area where they have little knowledge. The policies are not subject to public scrutiny before implementation, and can be arbitrarily imposed on a developer after a subdivision or development approval has been granted, but before clearances for title can be applied for.

Whilst these conditions are appealable to the Western Australian Planning Commission, in reality the cost and consequences of mounting the appeal is outweighed by the benefits.

More insidious though, is the imposition of conditions by local authorities at the time clearances are being applied for at the final stage of the land development process.

Given that at this point, all the costs associated with the development have been outlayed and the developer is awaiting settlement on blocks that have been pre-sold, the imposition of these clauses is virtually an act of extortion by the local authority as the developer has no real alternative but to agree to the additional conditions.

The unpredictable nature of these last minutes impositions then results in the risk element of the development equation being increased to cover the additional expenses. This expense once again has the effect of increasing the price of the land to the ultimate purchasers.

Examples of this behaviour are numerous in the Busselton Shire where the imposition of conditions relating to the relocation and monitoring of Ring Tailed Possums and the imposition of notations on titles relating to the land being in mosquito risk areas have become common practice.

Whilst the Ring Tail Possum is an endangered species, it appears not to be an endangered species in the areas in the Busselton Shire, where the policies have been introduced.

One of the more ridiculous conditions imposed by the Busselton Shire on a planning application was the obligation on the developer to retain the maximum amount of Old Growth Jarrah trees in a particular subdivision. The subdivision was in fact in an area surrounded by Jarrah dieback and the vast majority of the so-called Old Growth Jarrah trees were in fact re-growth, with the balance on the creekline being over mature stands that were dying anyway.

The above scenario has evolved largely due to the following reasons:

- Powerful minority groups opposing development per-se seeking appeasement on as many fronts as possible

- Local and State Governments formulating policy in areas where they are not qualified to do so.

- Policies of different Government Departments being non-standard and in conflict with each other

With local authorities developing their own biodiversity policies, the situation is set to get a lot worse, as these policies are likely to be in conflict with the Department of Environment and CALM.

It is interesting to note that on a Federal level, this problem does not exist because the constitution recognizes that fair compensation must be paid.

The community, including land developers have a desire to see land set aside for public purposes. However, the trend within planning bureaucracies is to see land developers make contributions towards "regional open space".

It is a bitter irony for responsible landowners, that they are in effect the most vulnerable to having their land socialized, because they have protected areas of ecological significance by not clearing and fencing off wetland areas, wildlife corridors and areas of coastal significance.

EXCESSIVE PROPERTY TAXATION

One of the most visible areas of attack on property rights are the property taxation increases and new charges imposed in Western Australia in the last 10 years.

Growing property taxes and charges

Property taxes and charges can be broadly grouped into three categories:

1. Direct property taxes on ownership, e.g, land tax and the metropolitan region improvement tax.

2. Transaction property taxes, e.g. stamp duties on property transfers and mortgages, GST, Capital Gains Tax.

3. Indirect property taxes – eg insurance taxes, levied on premiums charged to property owners, and requirements placed on property developers.

In WA, the main State property taxes and charges are stamp duties, land tax, the metropolitan region improvement tax, the emergency services levy and the Perth Parking Levy. The revenue collected from these taxes and charges from WA property owners has increased dramatically over the last 10 years:

- land tax paid has doubled;
- the metropolitan region improvement tax paid has more than doubled;
- stamp duty paid by WA property purchasers has increased four fold;
- a new annual charge of $118 million has been introduced in the Emergency Services Levy; and
- the Perth Parking Levy, introduced in 1999, has increased by more than 150% in the last 3 budgets.

As a result, property taxes have grown to comprise 42% of WA Government taxation revenue in 2003-2004.

The GST also now applies to many property transactions.

Considering Australia as a nation, an Access Economics Report of February 2000 found that there are only four countries with a greater reliance on property taxes than Australia.

Impact of property tax growth

The insidious growth in property taxes erodes capital values and impinges on the ability of the property owner to enjoy their land, in a manner not experienced by other asset holders, eg shareholders or bondholders.

Property taxes add to the cost base of all WA businesses. These costs are reflected in higher prices for end consumers or lower profits or larger losses for businesses. A 2002 Property Council of Australia survey of operating costs in Perth office buildings and WA shopping centres showed that statutory charges (which incorporate municipal rates and land tax) are now:

- 54% of total expenses of retail properties in the city centre;
- 38% of total expenses of sub regional shopping centres; and
- 32% of total expenses of office buildings in Perth.

A consequence is higher rents and costs of products purchased in Perth.

Property taxes also reduce WA's attractiveness as a destination for investment funds. This causes problems for WA because capital is increasingly mobile around Australia and overseas. WA needs an efficient tax system to compete to attract this capital to secure investment and increase employment. $5.3 billion private new capital expenditure was injected into the WA economy in 1999-2000. *28% of this was foreign capital.* Anecdotal evidence clearly indicates that large scale offshore investment is targeted primarily into the Victorian and NSW markets, not WA.

Property taxes also increase the costs of rental properties for those who cannot afford or choose not to purchase property. Property taxes lower capital values of land, increasing the rental return sought from tenants to compensate for the lower capital growth.

The impact of property tax increases in Western Australia is exacerbated by high gearing levels commonly associated with property ownership. Because property is often geared, small changes in tax rates can result in large changes of profitability.

One reason for the increasing reliance on property taxes is that the rapid integration of world economies has left tax systems open to competition between nations. The result is more freedom over where to do business. Why would a firm set up shop in Germany, for example, with a top corporate tax rate of nearly 60 per cent, when directors could choose Sweden where corporate tax is half as much? Regulators have decided to target the physically immobile property sector. However, this is a short-sighted approach. Capital is highly mobile. A competitive tax system will assist WA to attract foreign capital. Conversely, a non-competitive property tax system will see investors choose international or interstate property investment – or simply turn to investments in other asset classes such as shares.

Conclusions

The high proportion of expenditure by property owners on statutory charges reflects a tax regime that is disproportionately reliant on property taxes and charges in WA. Property taxes also affect property owners who suffer from lower capital values and higher transaction costs for purchasing property. The cost to society is significant.

> *An Access Economics Report of February 2000 prepared for the Real Estate Institute of Australia found that there was a "clear economic case for reducing State property taxes ahead of many other State taxes".*

A reduction in property taxes would provide all WA businesses with offices or retail premises with a lower cost base and increased profitability. Residents will also benefit from an increased standard of living through a higher disposable income.

To ease the proportion of the tax burden falling on property, the WA Government should make a commitment to return surplus GST revenues to property tax payers. This would amount to in excess of $100 million per annum in tax cuts for Western Australian property owners each year.

CONSEQUENCES OF A LOSS OF PROPERTY RIGHTS

The consequences of the erosion of property rights in Western Australia are significant:

- an undermining of social confidence in property ownership;
- an unproductive allocation of land uses, affecting Western Australia's productivity and standard of living;
- rising levels of inequality in our community and associated social problems;
- increased levels of reliance on government expenditure;
- a distortion of investment patterns in property;
- fewer property developments, resulting in fewer places where Western Australians live, work, recreate and socialise; and
- fewer jobs and more unemployment.

Professor Fogg argues that the law is changing and outlines three competing models of legislation governing property rights. The first model is where "the law exists and should be used to protect private property and its institutions…and concedes proprietary to environmental planning legislation only so far as legislation protects existing proprietorial enjoyments and preserves the landowner's right to develop." The second model stresses that "the law exists and should be used to promote the public interest, if necessary against the interests of private property." The third model is based on public participation. Fogg calls this the radical or populist approach to the role of law and "emphasises processes rather than outcomes." He cites examples such as "community consultation, community input to statutory committees, public environmental inquiries and the expansion of the standing to sue. Decisions are not made on objective evidence but on the "feelings of the members of the community."

Fogg considers that "if we saddle ourselves with unnecessarily onerous environmental requirements that operate as disguisement for a social agenda, then both we and our children will suffer." (Fogg, A. "Environmental Politics and Law" in Duncan, W. (Federation Press, 1991) Australian Studies in Law, "Commercial and Property Law," 4) As a coalition we ask you will the direction of this and previous governments likely to cause us and our children to suffer? Could it just be that we have strangled private property ownership too tightly?

WHAT IS NEEDED TO PROTECT PROPERTY RIGHTS IN WESTERN AUSTRALIA

The Working Party on the Erosion of Property Rights believes urgent action is needed to halt the erosion of property rights in Western Australia.

Fundamental to this protection is a commitment by our politicians to a charter of property rights, supporting the following principles, by committing to the following propositions:

- all citizens ought be able to own, use and enjoy property;
- it is socially and economically beneficial for citizens to participate in the ownership of property;
- the legal system ought protect the existing rights of property owners;
- property owners should be fairly compensated for any losses of property rights;
- planning processes will support property development in Western Australia; and
- State and local governments will encourage participation in property ownership by ordinary citizens and investors, especially by moderating property taxation and government charges.

COMBATITIVE STRATEGIES

The Working Party on the Erosion of Property Rights is working to evaluate a number of strategies to combat the ongoing loss of property rights. These may include a:

- Public campaign to expose the problem, informing community of risks.
- Political campaign for legislative reform.
- Identification of Members of Parliament supportive of the working party.
- Exposition of bureaucratic corruption of due process in respect of property rights.
- Co-ordination of community opposition to erosion of property rights.
- New, single website promoting the protection of property rights.

ABOUT THE WORKING PARTY ON THE EROSION OF PROPERTY RIGHTS

The Working Party on the Erosion of Property Rights was established in 2003 to:

- Reassert and clarify traditional rights of property ownership
- Expose ways in which property rights are being diminished or lost
- Detail the social and economic consequences of the loss of property rights
- Formulate objectives designed to protect property rights

Below is the agreed memorandum of understanding between the member organizations and individuals.

MEMORANDUM OF UNDERSTANDING

Between the Real Estate Institute of Western Australia (Inc.), Urban Development Institute of Australia (Western Australian Division), Property Council of Australia (Western Australian Division) and other interested individuals.

PREAMBLE

The WORKING PARTY ON THE EROSION OF PRIVATE PROPERTY RIGHTS ("the Coalition") was formed in 2003 with the objective of utilizing the diverse range of expertise and special interests of its constituent membership, in particular those which relate to the defense of private property rights.

The Coalition does not supplant these interest groups. Rather, it facilitates the exchange of information, identifies common concerns and strengthens their public impact through co-operation.

STRUCTURE

This Memorandum of Understanding (MOU) is a statement of principles that the Coalition agree to and will work toward.

This MOU will terminate upon the agreement of all members of the Coalition at a formal meeting. Members can leave the Coalition with written notice.

New members will only be admitted to the Coalition upon the formal agreement of all parties.

Nothing in this memorandum precludes individual parties taking their own political action on matters considered by the Coalition.

WHAT ARE PROPERTY RIGHTS?

The COALITION supports the traditional western view of property rights. Simply, this maintains that individuals, groups, companies or trusts have the lawful right to own, use, enjoy and dispose of property, without unreasonable impositions by government.

The right to OWN

Ownership of property must be genuine, exclusive and protected by title. To the extent that others can impinge on or abuse property with impunity, ownership becomes a valueless sinecure.

Owners must be able to enforce laws of trespass and to expect legal redress against theft, malicious damage or unfair seizure.

2. The right to USE

Ownership is meaningless unless property can be put to proper use. Cars are of little benefit unless they may be driven. A farm is of little value if it cannot be used to produce a return on capital and labour.

Individuals desire to own property in order to gain some benefit, usually but not always, a commercial or social one.

3. The right to ENJOY

The personal satisfaction derived from property ownership is a major motivational force in most economies. Such pleasure may be derived from the profitability, utility or security gained by ownership. It may also be satisfaction taken simply in owning something perceived as beautiful, for example, a painting.

4. The right to DISPOSE

Property owners must be free to sell, gift or will assets without undue tax or interference of the State. Excessive taxation paid as death Duties, for example, was a source of serious economic and social damage.

Individuals are motivated to improve the productivity and value of assets in the realization that family and designated heirs may benefit from such endeavour.

TERMS OF REFERENCE

In the last decade we have seen an unprecedented erosion of the rights and interests of private property owners, this has been seen most clearly over the last decade in four key areas:

- Subdivision and development control as expressed in an increasing number of conditions being imposed on approvals, and refusal of approvals without consideration of the merits of projects, on the basis of policy alone.
- Conservation as expressed in the refusal of development control and the depression of land values without compensation for environmental and social purposes.
- Compulsory acquisition as expressed in the deprivation of land without adequate compensation.
- Rates of taxation applied to private property as expressed in Land Tax, Stamp duty and the emergency services levy.

OBJECTIVES

So that an effective united voice will be heard on these complex and diverse issues peak bodies and interested persons have joined as a coalition ("the group") for the following purposes:

- To promote public appreciation of the rights, interests and expectations of private property owners.

- To draw on the resources and experience of different groups who represent the interest of private property owners to develop a common understanding of issues affecting private property owners.

- To develop a common understanding of the threat to private property interests by developing issues papers covering the key areas.

- To develop an agreed action plan to bring about policy and legislative change within the major political parties addressing the key areas of concern.

- To implement an agreed action plan developed by the group.