40TH PARLIAMENT

Report 33

STANDING COMMITTEE ON PUBLIC ADMINISTRATION

Private property rights: the need for disclosure and fair compensation

Presented by
Hon Adele Farina MLC (Chair)

September 2020

Standing Committee on Public Administration

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ISBN 978-1-925580-20-4

Government response

This report is subject to Standing Order 191(1):

> Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

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EXECUTIVE SUMMARY

1 The right to private property has long been considered fundamental to our social and economic security. This is tempered by the fact that, with the exception of native title land, the Crown ultimately owns all land and grants only 'interests' to private individuals.

2 The key message received by the Standing Committee on Public Administration (Committee) was that the extent to which governments can restrict or interfere with property use and rights, without adequate consultation or compensation, is increasing. Two issues are at the core of this inquiry into Private Property Rights (Inquiry):

- the inadequate disclosure of government interests and encumbrances that affect property
- the inability to access fair and reasonable compensation where a government interference affects property.

3 The issues canvassed in this report are not new. Various inquiries and reviews have considered these matters over the past two decades. The Committee sought an update from the Western Australian Government on the implementation of previous recommendations, finding that many remain outstanding. This Inquiry has also highlighted relevant emerging issues. While precluded from inquiring into particular cases, the Committee uses a range of case studies to illustrate the systemic issues raised.

Encumbrances affecting land

4 There are a range of ways that governments can lawfully interfere with private property. Such measures can have adverse effects on individual landowners. The terms of reference of this Inquiry provided encumbrances for the Committee to focus on, including Bush Fire Prone Areas and implied easements for Western Power.

5 While environmental protection is widely considered to be in the public interest, the Committee heard that the cost and impact is often borne predominantly by individual landowners. Environmentally Sensitive Areas (ESAs) are an example. The *Environmental Protection Act 1986* creates an offence for the unauthorised clearing of native vegetation. To prevent the incremental degradation of rare flora and wetlands, regulatory exemptions for low impact, routine land management practices do not apply in ESAs, and a clearing permit is required.

6 Landowners felt strongly about the impact of ESAs on their lives, livelihood and property rights. As all wetlands in the agricultural regions of Western Australia (WA) are ESAs, many pastoralists and graziers are concerned about the legality of their existing grazing practices. Affected landowners were not notified when ESAs were declared in 2005, and ESAs are not registered on Certificates of Title. To address community confusion, the Committee recommends that the WA Government clarify the legislative definition of clearing.

7 Governments may reserve land for public purposes, such as schools, hospitals and highways. Landowners submitted that the value of their property, their ability to use and enjoy their property, or both, have been adversely affected by planning decisions. Some landowners have been in limbo for decades, not knowing when the WA Government will choose to proceed with acquiring their land. The Committee found that planning reservations can result in prolonged uncertainty about the future use and value of land.

Disclosure

8 Under the Torrens title system, a state-maintained register of land holdings guarantees indefeasible, or certain, ownership. The Certificate of Title is the official land ownership record for each parcel of land. Landowners were sometimes unaware of encumbrances on their property at the time of purchase, as they were not listed on the Certificate of Title. Submitters told the Committee that all interests, limitations, encumbrances and notifications that restrict the use or enjoyment of land should be registered or linked to the Certificate of Title. The Committee concluded that failure to do so erodes confidence in the Torrens title system.

9 Conversely, Landgate, the WA Government's land information agency, suggest that to register all interests on the Certificate of Title would undermine the integrity of the Torrens system. Landgate submit that the Torrens title system does not guarantee full disclosure of all interests affecting land on a Title, and an attempt to do so could potentially undermine the principle of indefeasibility.

10 The Committee found that Landgate has made substantial progress towards disclosing a greater range of interests in land over the past 15 years, through:

- the Shared Land Information Platform, which allows members of the public to search linked datasets through interactive maps
- Property Interest Reports (PIRs), which list approximately 90 interests affecting land not listed on the Certificate of Title, such as heritage orders, wetlands and Bush Forever areas. Property Interest Reports are available on the Landgate website for $60.

11 Though useful, the Committee found that neither of these tools can be relied on to disclose all interests affecting land. The Committee makes a number of recommendations about PIRs and the uncertainty created by unregistered interests. The Minister for Environment recently announced that the WA Government will implement one of these recommendations, adding ESAs to the list of interests reflected on a PIR.

Compensation

12 Submitters to this Inquiry largely did not dispute that the WA Government may, at times, need to acquire or reserve their land. However, people feel strongly that fair and reasonable compensation should accompany such actions.

13 The *Land Administration Act 1997* and *Planning and Development Act 2005* provide for injurious affection compensation where landowners have suffered loss due to an acquisition or reservation. The Committee heard from landowners who were concerned with the operation of compensation arising from planning reservations in particular. The Law Reform Commission of Western Australia recommended amendments to both Acts in 2008 to improve injurious affection provisions. These recommendations remain outstanding, and the Committee recommends that the WA Government proceed to implement them.

14 Not every government interest or restriction affecting the use, enjoyment or value of land has an avenue for claiming injurious affection compensation. ESAs are one such example that the Committee inquired into.

15 Compensation for land affected by power lines is limited by statute. Recommendations from the Public Administration and Finance Committee (2004) and Law Reform Commission of Western Australia (2008) to expand access to compensation are not a priority for the WA Government, due to cost. Because current costing details are not available, the Committee recommends that the WA Government assess the potential costs.

16 The Australian Constitution requires that the Australian Government acquire property on 'just terms'. It was suggested that a similar provision should apply in WA. The Committee heard that the WA Government has investigated this option, and formed the view that such a provision would not be appropriate in the *Constitution Act 1889*. The WA Government has indicated its intention to amend the *Land Administration Act 1997* to include a reference to 'just terms'. The Committee recommends that this step be extended to all legislation enabling the WA Government to take actions impacting private property rights.

Licences and authorities–water

17 The Committee inquired into the property rights of government-issued licences and authorities. Licences are not 'real property' in the same way that land is.

18 Water is one of the State's most important resources, underpinning major industries including agriculture, mining, industry and urban development. For some groups, such as farmers, the right to access water is a key and valuable asset. Water is also an increasingly scarce and vulnerable resource.

19 The *Rights in Water and Irrigation Act 1914* allows the WA Government to control and manage the State's water resources, including through licencing. The Department of Water and Environmental Regulation submit that water licences do not confer a proprietary right, as water vests in the Crown. However, licence holders are able to trade their water entitlements with other water users for a profit.

20 A number of issues with current water licensing arrangements were canvassed, including:

- the 'first in' approach to water allocation, which means newer farmers may have to rely on purchasing water from established licence-holders
- community concern about the proposed Southern Forests Irrigation Scheme
- inconsistent advice from the Department of Water and Environmental Regulation in the Warren-Donnelly catchment in relation to who is, and is not, exempt from licensing requirements
- statutory compensation provisions that have never been used.

Licences and authorities–fishing

21 The Committee concluded that Government-issued commercial fishing access rights are a form of private property rights. Fish and aquatic resources in WA are managed by the State for the community's benefit. They are a shared resource not owned by any person until lawfully caught.

22 Commercial fishing (including aquaculture) contributes approximately $1 billion annually to the State economy. Commercial fishers may be granted rights under the *Fish Resources Management Act 1994* and the *Pearling Act 1990* to take aquatic resources through authorisations (most commonly, licences) and entitlements (such as a quantity of fish) associated with those authorisations.

23 Key issues arising from the Inquiry include:

- sustainability of aquatic resources
- allocation and re-allocation of entitlements
- shifts in priority of use between consumptive users (the taking of aquatic resources in the commercial, recreational, and customary sectors)
- shifts in priority of use of the marine environment between consumptive uses (the taking of aquatic resources) and non-consumptive uses (non-fishing activities, such as marine

park establishment, harbour development, and offshore oil and gas exploration and production)

- compensation for loss in market value and fisheries adjustment.

24 Fishing law is currently under reform. The *Fish Resources Management Act 1994* and the *Pearling Act 1990* will be repealed and replaced by the *Aquatic Resources Management Act 2016*. Implementation has been delayed while an amendment is progressed through the Aquatic Resources Management Amendment Bill 2019.

25 A well-managed marine environment with secure rights provides certainty to commercial fishers. A clear understanding of the circumstances in which compensation may be available for loss in market value of authorisations and entitlements, and for adjustments to fisheries, will strengthen the industry.

Moving forward

26 The Committee understands that the WA Government's ability to intervene with an individual's property is often necessary to provide infrastructure, protect the environment, and preserve sensitive resources like water and fish.

27 In conclusion, the Committee found that issues such as poor communication and a lack of transparency create uncertainty and a sense of injustice in the community. For many people, these issues relate to either their livelihood or their single biggest asset. With this in mind, the Committee's recommendations call for additional clarity, security and fairness to restore the balance between the common good and individual rights.

Findings and recommendations

Findings and recommendations are grouped as they appear in the text at the page number indicated:

FINDING 1 Page 5

Private property rights in Western Australia have been the subject of several inquiries and reviews over the past 20 years.

FINDING 2 Page 9

Property rights are longstanding and fundamental to the economic security of our society.

FINDING 3 Page 15

Environmentally Sensitive Areas under the *Environmental Protection Act 1986* particularly impact, or are perceived to impact, pastoralists and graziers in the agricultural regions of Western Australia.

FINDING 4 Page 16

Members of the public may find it difficult to identify whether their land, or part thereof, has been declared an Environmentally Sensitive Area.

FINDING 5 Page 23

Due to the repeal of four Environmental Protection Policies, the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* may contain expired information, which is misleading for members of the public.

RECOMMENDATION 1 Page 24

Where an Environmental Protection Policy has been repealed and land is not otherwise covered by the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, the Department of Water and Environmental Regulation write to relevant landowners, notifying that their land is no longer subject to an Environmentally Sensitive Area.

RECOMMENDATION 2 Page 24

Following the prescription of Environmentally Sensitive Areas in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*, the Department of Water and Environmental Regulation inform all landowners in writing that their land is an Environmentally Sensitive Area, and advise them of the potential implications if native vegetation is present.

RECOMMENDATION 3 Page 24

The Minister for Environment ensure expired information resulting from the repeal of Environmental Protection Policies is removed from the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*.

RECOMMENDATION 4 Page 25

The Premier introduce in the Parliament of Western Australia an omnibus bill amending all relevant Western Australian legislation to make it a statutory requirement for Western Australian Government departments and agencies, when making decisions or taking actions that impact on the use of a landowner's property, to notify each individual landowner impacted in writing before the decision is made or action taken, and advise how this will impact the landowners use of the land. Further, that impacted landowners be provided an opportunity to make submissions before the decision is made and/or action taken.

FINDING 6 Page 27

The meaning of grazing is unclear under the *Environmental Protection Act 1986*.

RECOMMENDATION 5 Page 27

The Minister for Environment introduce a Bill in the Parliament of Western Australia to clarify the definition of clearing under section 51A of the *Environmental Protection Act 1986*, with a view to clarifying whether grazing livestock is permissible within an Environmentally Sensitive Area.

FINDING 7 Page 28

Some landowners may still be unaware that there is an Environmentally Sensitive Area on their land.

RECOMMENDATION 6 Page 28

The Western Australia Government pay landowners impacted by an Environmentally Sensitive Area fair compensation if the value of the property is diminished by the Environmentally Sensitive Area due to the landowner being unable to use the land subject of the Environmentally Sensitive Area in accordance with its zoning use.

FINDING 8 Page 32

Planning reservations can result in prolonged uncertainty for landowners about the future use and value of their land.

RECOMMENDATION 7 Page 32

Where the Western Australian Government reserves land to be used for a public purpose, it should:

- purchase the land, if the landowner wants to sell

  or

- if the landowners does not want to sell, and the land is not immediately required by the Western Australian Government, permit the landowner to develop, use and improve the land in accordance with its existing zoning.

RECOMMENDATION 8 Page 33

Where a buffer zone is created and where requested by the landowner, that the Western Australian Government or the protected industries be required to purchase the land at the market value prior to the creation of the buffer zone.

FINDING 9 Page 36

Statutory easements may be registered on Certificates of Title, but this is not always the case.

RECOMMENDATION 9 Page 36

The Minister for Energy direct Western Power to include a link to Landgate's Shared Location Information Platform on its website, and inform readers that geographical information system mapping will identify whether their property is impacted by a Western Power encumbrance.

FINDING 10 Page 47

Landgate's Property Interest Reports contain information about a wide range of interests affecting property that are not listed on the Certificate of Title.

FINDING 11 Page 48

Property Interest Reports cannot be relied on to disclose all interests affecting land.

FINDING 12 Page 49

The Western Australian Government is unwilling and unable to guarantee the information contained in a Property Interest Report.

FINDING 13 Page 49

Landgate's Shared Land Information Platform and Property Interest Reports are the Western Australian Government's preferred tools for disclosing a range of interests in land.

RECOMMENDATION 10 Page 49

The Minister for Lands direct Landgate to inquire into and report on:

1. measures that need to be implemented and the resources required for the Western Australian Government to guarantee information contained in a Property Interest Report and on the Shared Land Information Platform is accurate and complete
2. the implications, including financial costs, for Western Australian Government agencies and landowners if the Western Australian Government were to require all government-imposed interests affecting land to be registered on the Certificate of Title.

The Minister for Lands table the report in both Houses of Parliament by June 2023.

RECOMMENDATION 11 Page 50

Landgate include a disclaimer on its website about the types of interests that are not included in Property Interest Reports, such as those administered by the Commonwealth Government and local governments, and some Western Australian Government interests affecting land, and where people can find information about such interests.

RECOMMENDATION 12 Page 50

Landgate include a disclaimer on Property Interest Reports advising that not all interests affecting land are in included in the Reports or the Shared Land Information Platform.

FINDING 14 Page 51

Only 91 Western Australian Government-imposed interests or encumbrances affecting land are reflected in Property Interest Reports.

RECOMMENDATION 13 Page 51

Landgate continue cross-sector consultation to ensure data relating to all Western Australian Government interests affecting land is included in the Shared Land Information Platform.

RECOMMENDATION 14 Page 51

The Premier issue a Circular instructing Western Australian Government departments and agencies responsible for interests affecting land to share relevant data with Landgate.

RECOMMENDATION 15 Page 52

The Minister for Energy instruct energy operators to work with Landgate to ensure that energy operator easements are reflected in a clear way on Property Interest Reports and in the Shared Land Information Platform maps.

RECOMMENDATION 16 Page 53

The Minister for Environment direct the Environmental Protection Authority, in collaboration with Landgate, to list each individual Environmental Protection Policy in Property Interest Reports.

FINDING 15 Page 55

The Real Estate and Business Agents and Sales Representatives Code of Conduct requires that real estate agents and sales representatives ascertain, verify and communicate all material facts to a transaction, but are not specifically required to provide prospective buyers with a Property Interest Report.

RECOMMENDATION 17 Page 55

The Western Australian Government amend the Real Estate and Business Agents and Sales Representatives Code of Conduct to require that real estate agents inform clients of the option to purchase a Property Interest Report in relation to a real estate transaction.

FINDING 16 Page 56

The information contained in Property Interest Reports are fixed in time, and individuals are not notified of future changes.

RECOMMENDATION 18 Page 56

The Western Australian Government establish a service similar to TitleWatch to inform clients of updates to their Property Interest Report.

FINDING 17 Page 61

The Law Reform Commission of Western Australia's 2008 recommendations to amend section 241 of the *Land Administration Act 1997* have not been implemented.

RECOMMENDATION 19 Page 63

The Minister for Planning ensure that the new Bill to amend the *Land Administration Act 1997* implements the Law Reform Commission of Western Australia's relevant 2008 recommendations regarding compensation for injurious affection.

RECOMMENDATION 20 Page 73

Where funds are available in the Metropolitan Region Improvement Fund, and landowners seek acquisition of their reserved land, the Western Australian Government make additional funds available from the Metropolitan Region Improvement Fund to the Western Australian Planning Commission to facilitate the immediate purchase of the land.

FINDING 18 Page 75

Recommendations made by the Law Reform Commission of Western Australia in 2008 to amend the *Planning and Development Act 2005* have not yet been implemented.

RECOMMENDATION 21 Page 76

The Minister for Planning progress amendments to the *Planning and Development Act 2005* recommended by the Law Reform Commission of Western Australia in 2008.

RECOMMENDATION 22 Page 78

The Minister for Planning introduce a Bill in the Parliament of Western Australia to ensure the 'good faith' requirement does not unreasonably deprive a landowner of any avenue for compensation.

RECOMMENDATION 23 Page 81

The Minister for Planning bring a Bill before the Parliament of Western Australia to amend the *Planning and Development Act 2005* to clarify whether injurious affection compensation can be claimed in respect of a development application by a subsequent owner who obtained title through inheritance.

FINDING 19 Page 81

Injurious affection compensation is available for some government encumbrances imposed for public benefit, but not for others.

FINDING 20 Page 82

The cost of environmental protection as it relates to Environmentally Sensitive Areas is borne predominantly by landowners.

FINDING 21 Page 84

The *Country Areas Water Supply Act 1947* provides for the payment of injurious affection compensation where a licence for land clearing to preserve water catchments is refused and the land is rendered unproductive, or uneconomic, or has otherwise been injuriously affected.

RECOMMENDATION 24 Page 88

The Western Australian Government assess the potential costs of implementing recommendations 24 and 28 from the Law Reform Commission of Western Australia's 2008 project on compensation for injurious affection, so that the potential financial implications can be better understood, and publish a report detailing the findings of the assessment.

FINDING 22 Page 91

The presence of electricity transmission lines on private property may increase the costs to the landowner associated with undertaking works on the property.

RECOMMENDATION 25 Page 91

The Minister for Energy consider requiring Western Power to compensate landowners carrying out reasonable works on their property for any additional costs incurred as a result of electricity transmission lines on the property.

FINDING 23 Page 93

The Western Australian Government is of the view that a provision guaranteeing that property be acquired on just terms may not be appropriate in the *Constitution Act 1889*, and would not substantially change the operation of legislation such as the *Land Administration Act 1997*.

RECOMMENDATION 26 Page 94

The Western Australian Government amend section 241 of the *Land Administration Act 1997* to include a reference to 'just' compensation, as recommended by the Western Australian Law Reform Commission in 2008.

RECOMMENDATION 27 Page 94

The Western Australian Government amend relevant sections of all legislation which enables the Western Australian Government to take actions impacting private property rights, to require compensation on just terms.

FINDING 24 Page 114

Access to water in fully allocated or over-allocated water subareas is restricting horticultural activity in these subareas.

FINDING 25 Page 114

Water security is a real and growing issue in a drying climate.

FINDING 26 Page 118

Under the proposed Southern Forests Irrigation Scheme, the Southern Forests Irrigation Co-operative will licence water from the Department of Water and Environmental Regulation and distribute water between shareholders, who may then trade water amongst themselves.

FINDING 27 Page 127

The *Rights in Water and Irrigation Act 1914* does not provide a legislative process for determining whether a section 5 exemption applies, and does not provide that this determination must be made by the Department of Water and Environmental Regulation.

FINDING 28 Page 127

There are no local by-laws in relation to springs in the Warren-Donnelly catchment.

FINDING 29 Page 133

There is no legislative head of power for the new administrative process instigated by the Department of Water and Environmental Regulation enabling it to make a determination as to whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies.

FINDING 30 Page 133

The *Rights in Water and Irrigation Act 1914* expressly provides that 'spring rights' are exempt from regulation unless a by-law is enacted bringing the spring within the Act's Part 3 licensing provisions.

FINDING 31 Page 133

Almost four years after the Department of Water and Environmental Regulation instigated a new administrative process enabling it to make a determination on whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies, the Department is unable to provide clear and consistent details of the process even though the Department maintains that it has consistently applied the new process since late 2016.

RECOMMENDATION 28 Page 133

The Minister for Water commission an independent inquiry into the Department of Water and Environmental Regulations new administrative process requiring landowners to make an

application for a bed and banks permit so as to enable the Department to determine whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies. The matters to be examined by the inquiry to include:

1. the Department's legislative authority for imposing the process
2. compliance with the new process
3. the effectiveness of the process in achieving the desired outcomes
4. whether the process has been consistently applied by the Department
5. landowners concerns with the process
6. legislative changes needed to give statutory effect to the process
7. changes needed to improve the process, having regard to procedural fairness and a right of review by an independent body.

RECOMMENDATION 29 Page 133

If the Department of Water and Environmental Regulation is to persist with its new administrative process requiring landowners to make an application for a bed and banks permit so as to enable the Department to determine whether a section 5 exemption applies, the Minister for Water introduce in the Parliament of Western Australia a Bill to amend the *Rights in Water and Irrigation Act 1914*, to expressly provide for the process and for a right of review or appeal to an independent body. The Bill to also provide for the Department of Water and Environmental Regulation to establish and maintain a register of spring exemptions and spring dams.

FINDING 32 Page 135

The Department of Water and Environmental Regulation's communication with landowners in the Warren-Donnelly catchment on the new administrative process for the Department to determine whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies was tardy, lacked detail as to the mechanisms of the process and did not reach all impacted or potentially impacted landowners. Nor did it include a public communication to all in the Warren-Donnelly catchment.

RECOMMENDATION 30 Page 135

If the Department of Water and Environmental Regulation persist with this administrative process to trigger a determination by the Department on whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies, the Department write to all owners of agricultural land in the Warren-Donnelly area to inform them of the process, including details of the mechanisms of the process. Further, the Department is to issue a public notice detailing the process and its mechanisms.

RECOMMENDATION 31 Page 135

The Department of Water and Environmental Regulation immediately make its newsletters available on its website.

RECOMMENDATION 32 Page 135

The Department of Water and Environmental Regulation develop, in consultation with agricultural landowners in the Warren-Donnelly catchment, a communication strategy that identifies those

matters the Department must communicate to owners of agricultural land, commits to timely communication, and to communicate in writing directly with owners of agricultural land in the Warren-Donnelly catchment (not licensees only).

FINDING 33 Page 137

The *Rights in Water and Irrigation Act 1914* does not require the Department of Water and Environmental Regulation to maintain a register of spring exemptions or spring dams, as these do not require licencing and are not prescribed as part of the definition of 'instrument'.

RECOMMENDATION 33 Page 137

If the Department of Water and Environmental Regulation persists with its requirement that landowners make an application for a bed and banks permit to trigger a determination by the Department as to whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies, then the Department should establish and maintain a register of spring rights and spring dams. The *Rights in Water and Irrigation Act 1914* and regulations should be amended to provide for the establishment and maintenance of a register of spring rights and spring dams.

RECOMMENDATION 34 Page 143

The Department of Water and Environmental Regulation:

- immediately provide comprehensive training to its officers on all aspects of the *Rights in Water and Irrigation Act 1914*, not limited to those matters identified by this inquiry, and the new administrative process for the Department to determine whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies
- implement a quality assurance program to monitor the accuracy and consistency of advice provided by its officers
- develop a clear set of guidelines for Department officers to use in determining whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies
- seek independent legal advice on the Department's legislative authority to implement the new administrative process and any changes needed to improve the process, provide procedural fairness and a right of review.

RECOMMENDATION 35 Page 143

The Department of Water and Environmental Regulation implement a departmental policy requiring all Department officer emails providing advice of a preliminary nature or based on a desktop assessment only to clearly state:

1. the advice contained in the email is of a preliminary nature only (and based on desktop assessment only, where applicable) and should not be taken as formal or final advice and the landowner should not commence any activities based on this advice

And in relation to emails to Warren-Donnelly landowners in relation to spring rights, emails should also clearly state:

2. an onsite visit and assessment is required before the Department is able to provide a formal determination

3. to reduce the risk of being in breach of the legislation and associated enforcement activity, landowners need to ensure they have formal confirmation in writing from the Department as to whether they have spring rights before undertaking any works
4. the Department has implemented a new administrative process requiring formal assessment by the Department on whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies. Landowners must comply with the process, by making an application for a bed and banks permit in order to trigger the formal assessment by the Department.

RECOMMENDATION 36 Page 144

If the Department of Water and Environmental Regulation persist with this new administrative process providing for the Department to make a formal determination on section 5 exemptions, the *Rights in Water and Irrigation Act 1914* should be amended to provide for the process and for a right of review against a decision by the Department that a section 5 exemption does not apply. Where an application for review is received by the Department, an independent hydrologist and surveyor, as agreed by the Department and the landowner, and in the absence of agreement as chosen by the landowner, are to be engaged to undertake an independent assessment on whether a section 5 exemption applies. The decision of the hydrologist and the surveyor as to whether a section 5 exemption applies shall stand. The costs are to be equally shared between the Department and the landowner.

FINDING 34 Page 147

Although compensation for water licence amendment is available under the *Rights in Water and Irrigation Act 1914*, the provisions are very narrow and as a result have never been used.

RECOMMENDATION 37 Page 148

The Department of Water and Environmental Regulation review and consider the effectiveness of current compensation provisions.

FINDING 35 Page 152

Fish and aquatic resources are a community resource, not owned by any particular person until lawfully caught.

FINDING 36 Page 153

Fish and aquatic resources in Western Australia should be managed by the State on behalf of the Western Australian community.

FINDING 37 Page 155

Commercial fishing authorisations and entitlements confer only a right of access to the public resource, not a right of ownership over that resource.

FINDING 38 Page 158

The most recently available data from the Department of Primary Industries and Regional Development indicates that a majority of Western Australia's fish stocks are being managed sustainably and are not at risk or vulnerable through fishing.

RECOMMENDATION 38 Page 158

The Department of Primary Industries and Regional Development publish an updated *State of the Fisheries* report as a matter of urgency, and continue to publish such reports on an annual basis.

FINDING 39 Page 161

Integrated Fisheries Management sets a sustainable harvest level for a fish or aquatic resource for each sector, determining allocations between sectors, and managing each sector's take of the fish or aquatic resource within their allocation.

FINDING 40 Page 161

Integrated Fisheries Management is an appropriate tool for determining how fish and aquatic resources may be sustainably shared between the commercial, recreational, and customary fishing sectors.

FINDING 41 Page 162

Long-term sustainability of fish and aquatic resources is a paramount consideration in managing these resources.

FINDING 42 Page 164

Accurate data regarding fish and aquatic resource breeding stock status, and catch and effort range, is critical to determining an appropriate Total Allowable Catch for each resource.

FINDING 43 Page 164

Determining accurate and appropriate Total Allowable Catch for fish and aquatic resources is fundamental to ensuring sustainability of the resource.

FINDING 44 Page 166

The *Fish Resources Management Act 1994* provides for significant ministerial discretion in the management of the fish and or aquatic resources. Ministerial Orders and other instruments are subsidiary legislation for the purposes of the *Interpretation Act 1984,* subject to scrutiny and disallowance in the Parliament.

FINDING 45 Page 167

Pearling is an industry in which activities, and therefore rights, are integrated. As such, an adverse impact on the security of any particular activity or right may adversely affect another activity or right.

FINDING 46 Page 168

The Fisheries Legislation Service is a tool for finding information regarding which rules apply to various commercial fishing activities; however, its utility is diminished by its complexity in that a user must search numerous categories to locate all rules which apply to various commercial fishing activities.

FINDING 47 Page 168

The Department of Primary Industries and Regional Development does not guarantee the accuracy of the information contained in the Fisheries Legislation Service.

RECOMMENDATION 39 Page 168

The Department of Primary Industries and Regional Development investigate whether the Fisheries Legislation Service can be simplified so users may avoid searching numerous categories for all rules which apply to various commercial fishing activities.

RECOMMENDATION 40 Page 168

The Department of Primary Industries and Regional Development reform the Fisheries Legislation Service so as to guarantee the accuracy of the information contained therein.

FINDING 48 Page 170

Appropriate allocation of entitlements, within a Total Allowable Catch for the resource, is fundamental to sustainable management of fish and aquatic resources.

FINDING 49 Page 171

Decisions regarding allocation of entitlements (both within the commercial sector, and between sectors) may be more readily accepted if there is a clear understanding of the basis on which these decisions are made.

FINDING 50 Page 175

Compensation should not be payable to commercial fishers for the loss in market value of licences, authorisations, entitlements, or resource shares (under the *Fish Resources Management Act 1994,* the *Pearling Act 1990*, and the *Aquatic Resources Management Act 2016* as applicable) where adjustments are made solely for reasons of fish or aquatic resource sustainability.

FINDING 51 Page 177

Integrating compensation currently available under the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*, *Fisheries Adjustment Schemes Act 1987*, and through ex gratia payments, as well as publishing a guideline under section 254 of the *Aquatic Resource Management Act 2016* to provide practical guidance to persons who have duties or obligations under these Acts, will improve the certainty and security of commercial fishing access rights.

RECOMMENDATION 41 Page 177

The Western Australian Government publish a guideline under section 254 of the *Aquatic Resource Management Act 2016* regarding compensation for commercial fishers, including but not limited to how the quantum of compensation may be determined consistently.

RECOMMENDATION 42 Page 177

The Minister for Fisheries investigate the utility of amending the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987* to allow for compensation to be paid to commercial fishers by entities which benefit from reallocation of entitlements and shift in priority of use of the marine environment and aquatic resource.

RECOMMENDATION 43 Page 179

The Minister for Fisheries reform legislation regarding compensation for commercial fishing by integrating the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987*, and conduct a review of the circumstances in which compensation is available, including when there are reallocations to non-consumptive uses such as marine parks and port development.

RECOMMENDATION 44 Page 179

The Minister for Fisheries investigate the utility of amending the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987* to allow for compensation to be paid to commercial fishers by entities which benefit from reallocation of entitlements and shift in priority of use of the marine environment and aquatic resource.

FINDING 52 Page 182

The Department of Primary Industries and Regional Development's Marine Reserve Compensation Process Information Sheet, January 2019, provides a useful summary to commercial fishers of the compensation processes under the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*.

RECOMMENDATION 45 Page 184

The Department of Primary Industries and Regional Development produce an information sheet or similar which outlines the compensation processes under the *Fisheries Adjustment Schemes Act 1987*.

FINDING 53 Page 187

Expanding the scope of the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987* may reduce the incidence of ex gratia compensation payments which in turn may lead to more consistent compensation decision making.

RECOMMENDATION 46 Page 187

The Minister for Fisheries consider the circumstances in which ex gratia payments are made to commercial fishers, with a view to reducing the incidence of such payments and instead providing a clear basis for compensation eligibility in legislation and greater transparency.

FINDING 54 Page 194

The resource-based, risk-based, and rights-based nature of the *Aquatic Resources Management Act 2016* will increase sustainability of the aquatic resource and strengthen commercial fishing access rights.

FINDING 55 Page 194

The statutory regime, including the statutory consultation processes, in the *Aquatic Resources Management Act 2016* has the effect of strengthening the security of commercial fishing access rights.

CHAPTER 1
Introduction

About the Inquiry

1.1 On 12 June 2019, the Hon Rick Mazza MLC moved that the Legislative Council:

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

(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

(c) recognises the property rights of government-issued licenses and authorities including commercial fishing

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

(e) directs the Standing Committee on Public Administration to conduct an inquiry into the matters described above - with them as its terms of reference - and to report to the House within nine months of the date of the referral.

1.2 The Standing Committee on Public Administration (Committee) commenced the inquiry into Private Property Rights (Inquiry) in June 2019, with the above as its terms of reference.

1.3 The Committee received 85 submissions and held 16 public hearings, including three hearings with groups of individual stakeholders (See Appendix 1 for a full list of submissions and hearings).

1.4 The Committee was to report within nine months of the date of referral. On 20 February 2020, the Legislative Council granted an extension of time to report until 24 September 2020. On 17 September 2020, a further extension was granted until 22 October 2020.

About the report

1.5 The issues canvassed in this report are not new. Various inquiries and reviews have considered these matters over the past two decades. A major part of this Inquiry was obtaining an update on the implementation status of previous recommendations. In addition, the Committee has investigated and highlighted relevant emerging issues.

1.6 The report focusses primarily on State Government actions that affect property, although the Committee notes that the Commonwealth government and local governments also have significant impact in this space.

1.7 The Inquiry deals with a diverse range of complex issues, including land reservation, environmental regulation and various licensing schemes. The wide variety of evidence received reflects this complexity. All of these issues relate back to one or both of two concepts key to this Inquiry—disclosure and compensation.

- **Chapter 2** outlines what property means, the nature and characteristics of property rights and the current erosion of those rights.
- **Chapter 3** details the ways in which the Western Australian Government can restrict or interfere with the use and enjoyment of private property.

- **Chapter 4** sets out the perceived risk to private property rights posed by the failure to disclose Government-imposed interests and restrictions on property, and measures intended to address that risk.
- **Chapter 5** deals with the availability of compensation in relation to Western Australian Government regulation affecting private property rights, and the case for a constitutional guarantee of property acquisition on 'just terms'.
- **Chapter 6** sets out the rights and current issues associated with licences to take water.
- **Chapters 7 and 8** address the rights and current issues associated with licences to take fish.

1.8 The Committee's terms of reference preclude it from inquiring into the merits of a particular case or grievance unless received as a petition.[1] However, where the Committee has received a significant amount of evidence about a particular issue, it has included case studies throughout this report to illustrate a point.

1.9 Terms and acronyms used in this report are explained in the glossary.

Previous inquiries

1.10 As noted above, many of the issues canvassed in this report have been considered by Parliamentary Committees, commissions or government agencies in the past. The Committee is aware that some stakeholders have been frustrated with what they perceive to be a slow rate of progress over the years:

> The PGA notes that these inquires have made many recommendations to improve the definition and protection of private property rights, but is very disappointed that very few have been accepted or implemented by governments of any political persuasion.[2]

Inquiry into the Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia

1.11 In 2001, the Standing Committee on Public Administration and Finance (PAF Committee) commenced an inquiry into the impact of State Government actions and processes on the use and enjoyment of freehold and leasehold land in Western Australia (WA) (2004 Inquiry).[3]

1.12 The Inquiry broadly covered:

- the nature of freehold and leasehold interests in land
- State acquisition of land and compensation
- mining interests over freehold and leasehold land
- restrictions on land clearing in the agricultural region of WA
- planning and environmental restrictions on the use of freehold and leasehold land
- independent appeal processes in land use matters.

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1 Standing Orders of the Legislative Council, Schedule 1.

2 Submission 61 from Pastoralists and Graziers Association of Western Australia, 31 July 2019, p 3.

3 Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004.

1.13 Some of the specific issues covered in the 2004 Inquiry that arose as part of the current Inquiry include:

- transmission line and water pipeline easements
- land use zonings
- land clearing restrictions in agricultural areas
- environmental policies relating to urban bushland and wetland conservation
- notification and recording of restrictions on land use.

1.14 Other issues were central to the 2004 Inquiry, but are not particularly relevant to the current Inquiry. These include compulsory acquisition and mining interests.

1.15 The PAF Committee tabled its report in May 2004, making 37 recommendations. The then-Government of WA responded, supporting 16 recommendations, supporting the principle or intent of 13 recommendations and supporting in part one further recommendation. The Government did not support seven of the recommendations.

1.16 In its initial response to the PAF Committee, the WA Government agreed with the general intention of the report. The WA Government identified six overriding principles and committed to consider developing and/or adopting policy to give effect to these (see Appendix 2).

1.17 The Committee asked the relevant WA Government Ministers to provide an update on the implementation status of each of these recommendations in 2019. For the full list of recommendations, the corresponding original WA Government response (2004) and current implementation status (2019), see Appendix 2.

1.18 The 2004 Inquiry is discussed throughout this report, but is particularly relevant to Chapter 5, which deals with compensation in relation to land.

Law Reform Commission Project 98 – compensation for injurious affection

1.19 In 2004, the PAF Committee recommended that the Attorney General refer the broad issue of compensation for injurious affection to land in WA to the Law Reform Commission of WA (WALRC) for review.

1.20 The WALRC issued its report on compensation for injurious affection in 2008, making 31 recommendations. The WALRC Report is of particular relevance to Chapter 5 of this Report.[4]

Petition number 42: request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005

1.21 In 2015, the Environment and Public Affairs Committee inquired into a petition to repeal the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, making nine recommendations.[5]

1.22 In September 2019, the Committee wrote to the Minister for Environment seeking the implementation status of the nine recommendations. Each recommendation is included in a table at Appendix 3 with the corresponding original Government response and status update.

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4 Law Reform Commission of Western Australia, *Project 98: compensation for injurious affection,* 2008.

5 Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 41, *Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, August 2015,

1.23 The report on Petition number 42 is particularly relevant to Chapters 3 and 4 of this Report, which deal with encumbrances affecting land and how these are disclosed.

Fisheries Management Paper No. 165, November 2002

1.24 In 2002, the Integrated Fisheries Management Review Committee of the former Department of Fisheries produced a report to the former Minister for Agriculture, Forestry and Fisheries.[6]

1.25 The report broadly covered the:

- fishing management framework under the *Fish Resources Management Act 1994* (FRM Act)
- nature of fishing access rights and a discussion of whether these constitute private property rights
- needs of the commercial, recreational, and customary fishing sectors as they relate to sharing of the fish resource
- requirements of a new management framework in the context of Ecologically Sustainable Development (ESD).

1.26 Some of the specific issues covered in the report that arose as part of this Inquiry include:

- management objectives for fisheries
- determining sustainable fishing catch levels
- bases for determining allocations of fishing catch entitlements, including transferring allocations of entitlements between groups
- compensation.

1.27 The report made 21 recommendations and the Minister's proposed position with respect to each recommendation was published in the report. Broadly, the Minister agreed either in full or in part with the intent or principle of 16 recommendations, and disagreed with five recommendations. The report then invited the public to make submissions regarding how WA's fisheries should be managed.

1.28 The Committee asked the current Minister for Fisheries to provide an update on the current Government's position with respect to each recommendation. For the full list of recommendations, the corresponding former Minister's proposed position, and the current Government's position, see Appendix 4.

Fisheries Occasional Publication No. 102, November 2011

1.29 In 2011, an Access Rights Working Group of the former Department of Fisheries produced a report to the former Minister for Fisheries which identified key factors affecting commercial fishing, pearling, and aquaculture access rights under the FRM Act.[7]

1.30 The report broadly covered:

- the ownership of fish in a property rights context
- the nature of fishing access rights

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6 Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 165, *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee*, November 2002.

7 Government of Western Australia, (then) Department of Fisheries, Occasional Publication No. 102, *Improving Commercial Fishing Access Rights in Western Australia*, November 2011.

- leases and licences for aquaculture and pearling
- ESD
- discussion of whether a rights-based system improves the ecological sustainability of fisheries.

1.31 The report found that strengthening the property characteristics of fishing access rights may lead to the following public policy and community benefits:

- improve sustainability for aquatic resources
- a place for fishing in an increasingly crowded marine environment
- improved security for the supply of commercially caught fish to the community
- improved security for recreational fishing and other harvest sectors
- improved economic and social performance from commercial fisheries
- improved administration and allocation processes for the use of marine biological resources.[8]

1.32 The report made 19 recommendations, however the then-Government's position was not included in the report.

1.33 The Committee asked the current Minister for Fisheries to provide an update on the current Government's position with respect to each recommendation. For the full list of recommendations and the current Government's position, see Appendix 5.

FINDING 1

Private property rights in Western Australia have been the subject of several inquiries and reviews over the past 20 years.

Comment on two important matters

1.34 The Committee takes this opportunity to provide comment on two important matters:

Evidence to Parliamentary inquiries

1.35 Generally speaking, Parliamentary Committees will not publish submissions containing adverse reflections on a person or organisation rather than the merits of their argument or opinion and will not invite the writer of the submission to give oral evidence to the Committee as doing so may provide the writer with a platform on which to repeat the adverse reflections.

1.36 Witnesses to Parliamentary inquiries are afforded the protection of parliamentary privilege. However, they are expected to exercise this freedom responsibly. The freedom of speech afforded to witnesses to make written submissions and/or give oral evidence is not intended to provide a protected forum in which to make adverse reflections about others. Such adverse reflections are not constructive and may result in a Parliamentary Committee determining not to make the witnesses submission available on its website and not to call the witness to give oral evidence to the Committee.

1.37 During this Inquiry, the Committee had reason to exercise this discretion. Those aspects of the submission relevant to the Inquiry terms of reference were considered by the Committee. The Committee made no use of the adverse reflections in preparing this report. They were irrelevant to the Inquiry.

[8] ibid., p 34.

Incorrect, false or misleading evidence

1.38 Knowingly providing incorrect, false or misleading evidence to a Parliamentary Inquiry is a serious matter and may undermine the integrity of the Inquiry or a Parliamentary Committee's findings and recommendations to Parliament.

1.39 The Committee takes this opportunity to remind witnesses appearing before Committees that their evidence is given under oath (or affirmation). Witnesses should not knowingly provide incorrect, false or misleading information to Parliamentary Committees. If a witness is not sure about a question, the witness may ask for clarification of the question. Where a witness requires time to check details or to more fully consider a matter before answering a question, the witness may ask that the question be taken on notice, enabling the witness to provide the Committee with a written answer. These options should be exercised to avoid giving incorrect, false or misleading evidence.

1.40 The procedure followed by the Committee included:

- inviting written submissions
- on consideration of the written submissions, determining which witnesses to call to provide oral evidence to the Committee
- inviting certain witnesses to provide oral evidence
- due to the number of submissions received, some hearings were held with discrete groups of submitters (witnesses), based on commonality identified in the written submissions
- in some instances, written questions or an indication of the subject matter of questions to be put at the hearing were provided to witnesses
- WA Government departments and agencies were invited to make opening and closing statements, and some WA Government departments and agencies were invited to attend more than one hearing to enable the Committee to delve into further detail. Some WA Government departments and agencies took questions on notice and some were provided with multiple additional questions, and in some instances on multiple occasions
- all witnesses were provided with a copy of their transcript of evidence and invited to write to the Committee informing the Committee or any corrections to the transcript and/or to provide further clarification or further information with respect to any answer provided.

1.41 Knowingly making incorrect, false or misleading statements may be a breach of parliamentary privilege or a contempt of Parliament.

1.42 With this Inquiry, if the Committee had not sought an extension of time and persisted in asking further and further questions, it may have provided incorrect information to Parliament, which would have undermined the integrity of the Inquiry.

CHAPTER 2
Property and property rights

Introduction

2.1 The terms of reference required that the Committee inquire into the fundamental proprietary nature of private property ownership that underpins the social and economic security of the community.

2.2 This Chapter will briefly outline:

- the meaning of property
- the nature and characteristics of property rights
- whether property rights are being eroded.

2.3 For a more comprehensive treatment of these topics, the Committee refers readers to the 2004 Inquiry report.[9]

What is property?

2.4 The *Property Law Act 1969* defines property as including:

> real and personal property and any estate or interest therein and any thing or chose in action.[10]

2.5 The distinction between these two types of property dates back to Norman times.[11] Real property includes interests in land and structures on land. Personal property includes physical possessions and tangible or intangible legal rights, such as leaseholds, intellectual property rights, shares and some contractual rights.[12]

2.6 When the term 'property' appears in legislation without definition, its meaning becomes a question of statutory interpretation.[13] The High Court has tended to take a wide view of the concept of property:

> it means any tangible or intangible thing which the law protects under the name of property.[14]

The nature and characteristics of property rights

2.7 Individual property rights date back to the Magna Carta, and have long been considered fundamental.[15] Generally, a 'property right' will include some or all of the rights to:

- use and enjoy the property (also known as 'quiet enjoyment')[16]

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9 Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7 *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004.

10 *Property Law Act 1969* s 7.

11 Bradbrook, MacCallum and Moore, *Australian Real Property Law*, Thomson Reuters, Pyrmont, New South Wales, 2016, p 6.

12 For example, see *City of Swan v Lehman Bros Australia Ltd* (2009) 179 FCR 243.

13 ibid.

14 Georgiadis v AOTC (1994) 179 CLR 297.

15 See, for example, William Blackstone, Commentaries on the Laws of England (1765).

16 *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* (1976) 2 NSWLR 15, 23.

- exclude others from accessing or using the property (also known as 'exclusivity')[17]
- sell or give away the property (also known as 'transferability').[18]

2.8 It is worth noting that the Crown (in this case, the State) ultimately owns all land, and may grant interests in land to private individuals or corporations.[19] Freehold title (fee simple) is the closest interest to true ownership.[20] The Crown's ownership of all land is qualified by rights conferred by native title.

2.9 As the PAF Committee noted, there are a myriad of ways in which the WA and Commonwealth governments can lawfully interfere with private property rights. Only some of these interferences attach to a right to compensation—for example, where a government acquires private land for a public purpose.[21]

2.10 In a legal sense, 'property' does not necessarily describe a thing, but a legal relationship with, or interest in, that thing.[22] Therefore, the term 'property' can be thought of as referring to a 'bundle of rights':

> The word 'property' is often used to refer to something that belongs to another. But … 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'.[23]

2.11 A 'property right' may take different forms depending on the type of property.[24] For example, significant property rights attach to real property, such as fee simple interests in land. Less solid are the rights that attach to entitlements such as fishing and water licences. These will be discussed in more detail at Chapters 6, 7 and 8.

2.12 Throughout this Inquiry, the Committee heard about the fundamental importance of property rights. For example, the Pastoralists and Graziers Association of Western Australia submit that a strong system of property rights is a fundamental requirement of a capitalist economy.[25] According to the Joondalup Urban Development Association:

> The saying 'safe as houses' and much of the prosperity Australians have derived from property has stemmed from the security that property rights give.[26]

2.13 According to Louise Staley, Member of the Victorian Legislative Assembly and former Director at think tank the Institute of Public Affairs:

> It is not an overstatement to claim that the maintenance of private property rights is at the base of our society, wealth and safety.[27]

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17 *Radaich v Smith* (1959) 1010 CLR 209, 222.

18 *Milirrpum v Nabalco* (1971) 17 FLR 141, 171.

19 Bradbrook, MacCallum and Moore, *Australian Real Property Law*, Thomson Reuters, Pyrmont, New South Wales, 2016, p 4.

20 Submission 69 from Landgate, 31 July 2019, p 4.

21 *Land Administration Act 1997* Part 10.

22 *Yanner v Eaton* (1999) 201 CLR 351, 365-6.

23 ibid.

24 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Canberra, 2 March 2016, p 464.

25 Submission 61 from Pastoralists and Graziers Association of Western Australia, 31 July 2019, p 3.

26 Submission 43 from Joondalup Urban Development Association, 30 July 2019, p 2.

27 Institute of Public Affairs, *Property rights in Western Australia – time for a changed direction*, report prepared by Louise Staley, Melbourne, July 2006, p 3.

2.14 In moving that this Inquiry be referred to the Committee, the Hon Rick Mazza MLC said that private property underpins the economic security and wealth of individuals and companies, meaning that any erosion of private property rights is 'an erosion of the very fabric of our society':

> Property rights are linked with economic growth in the sense that they provide landowners with the security and incentive to save, invest and be a part of a community. This is especially true for farmers who make their livelihoods off the land. Most people aspire to own their own homes, and the family home is generally the single biggest asset that people have.[28]

FINDING 2

Property rights are longstanding and fundamental to the economic security of our society.

Are property rights being eroded?

2.15 Most people accept that there are cases in which a government will need to acquire land for a public purpose. However, the Committee heard throughout this Inquiry that the extent to which governments can restrict or interfere with property use and rights, without consultation or compensation, is increasing. Louise Staley wrote for the Institute of Public Affairs in 2006:

> 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.[29]

2.16 Submitters to this Inquiry agreed:

> Farmers are increasingly uncertain about their future and their rights as landholders. Successive governments have done little to allay concerns or clear the way. Property rights of farmers must be respected in relation to government decisions affecting land and water entitlements to give them confidence to invest and run a farm business.[30]

> My greatest concern about the erosion of respect for property rights over recent decades relates to the protection of natural values on private land where the private landowner arguably obtains no meaningful [or] measurable financial or other benefit from the government-ordained protective measures and instead the overwhelming majority of benefits accrue to the public.[31]

2.17 A sense of increasing erosion may be damaging to public confidence in private property rights:

> at the moment our Torrens title is not worth the paper it is written on. It means nothing.[32]

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28 Hon Rick Mazza MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4008.

29 Institute of Public Affairs, *Property rights in Western Australia – time for a changed direction*, report prepared by Louise Staley, Melbourne, July 2006, p 2.

30 Submission 6 from WAFarmers, 18 July 2019, p 2.

31 Submission 29 from Bernie Masters, 29 July 2019, p 1.

32 Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 20.

2.18 The Pastoralists and Graziers Association of Western Australia submit that despite the fundamental importance of property rights to our society, they are misunderstood and poorly defined. They use the analogy of a 'bundle of sticks' to describe the 'bundle of rights':

> The 20th Century saw a massive increase in government intervention in society and markets whereby government legislation, regulations and policies significantly altered the nature of property rights as previously understood by the owners of economic goods.
>
> Almost invariably, the legislative and regulatory changes have resulted in a transfer of 'sticks' from the private to government realm. From a PGA perspective, this transfer represents an erosion of the property rights held by individuals and businesses.
>
> In Western Australia, significant erosion of private property rights has been effected through the development and implementation of planning and environmental legislation/regulations that have either destroyed private property rights or transferred them to government ownership.[33]

2.19 Two particular issues are the focus of this Inquiry, as per the terms of reference:

- the inadequate disclosure of government interests and encumbrances that affect property
- the inability to access fair and reasonable compensation where a government interference affects property.[34]

2.20 Regarding both of these issues, Lecturer in Law at Murdoch University, Lorraine Finlay, submitted that the main concern is the need to strike an appropriate balance between individual and public 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.[35]

2.21 Ms Finlay pointed out that the underlying principles of private property rights protection tend to find easy agreement in abstract terms. What is more difficult is taking the steps to protect these rights in practice:

> 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.[36]

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33 Submission 61 from Pastoralists and Graziers Association of Western Australia, 31 July 2020, p 3.

34 The exception to this are some submitters who access common goods, particularly fish and water, who are happy to forgo fair and reasonable compensation when the government interference is in the interests of sustainability.

35 Submission 47 from Lorraine Finlay, 31 July 2019, p 2.

36 ibid., p 1.

CHAPTER 3
Encumbrances that affect land

Introduction

3.1 Inquiry term of reference (b) requires the Committee to inquire into:

> 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.

3.2 A property interest gives rights to a landowner, but may also impose restrictions or responsibilities that may impact their use or enjoyment of the land.[37] There are a number of ways that the WA Government can, and does, impact upon the use and enjoyment of land. While enacted for the public good, such measures can have adverse effects on individual landowners.

3.3 The following government-imposed interests or encumbrances were raised in debate in the Legislative Council and submissions, and are therefore relevant to this Inquiry:

- land acquisition
- Environmentally Sensitive Areas
- planning reservations
- utility easements (power and water)
- Bush Fire Prone Areas.

3.4 The Committee emphasises that the above is not an exhaustive list.

3.5 This Chapter will outline the nature of the interests or encumbrances listed above and the impact these have on property value and the ability of landowners to use and enjoy their property. Chapters 4 and 5 will then address the issues of disclosure and compensation in relation to these encumbrances.

Land acquisition

3.6 Perhaps the oldest and best understood way that governments can interfere with property rights is by the compulsory acquisition of land. Compulsory acquisition is the power of a government to acquire private rights in land without the willing consent of its owner or occupier for a public purpose:

> This power is often necessary for social and economic development and the protection of the natural environment. Land must be provided for investments such as roads, railways, harbours and airports; for hospitals and schools; for electricity, water and sewage facilities; and for the protection against flooding and the protection of water courses and environmentally fragile areas.[38]

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37 Submission 69 from Landgate, 31 July 2019, p 8.

38 Food and Agriculture Organisation of the United Nations, *Compulsory acquisition of land and compensation*, Rome, 2008, p 63.

3.7 Compulsory acquisition is variously known in other jurisdictions as compulsory taking, resumption or expropriation. The power comes from 'eminent domain', the right of the government to acquire land for public utility works without the consent of its owner:[39]

> The power of a government to take the land of a citizen without consent is an inherent power that comes into existence with the establishment of the government...this power does not require recognition by constitutional provision or statute, but exists in absolute and unlimited form.[40]

3.8 The *Land Administration Act 1997* (LA Act) is the primary WA statute governing dealings in Crown land, and enables the Minister for Lands to sell Crown land in fee simple. It is also the primary statute providing for compulsory and voluntary land acquisition by the WA Government and other authorised bodies where land is required for public works.

3.9 Part 9 of the LA Act provides for the compulsory acquisition of interests in land for public purposes. Where authorised by law, interests in land held by a person other than the Crown may be taken. A number of agencies and organisations can compulsorily acquire land for public purposes, including:

- the WA Planning Commission
- the Department of Planning, Lands and Heritage
- Western Power
- Main Roads WA
- the Water Corporation
- local governments.

3.10 Agencies may try to pursue voluntary avenues where possible. For example, the Water Corporation prefers to acquire land by agreement:

> Although the *Water Services Act (2012)* permits us to acquire land, we always prefer to reach an amicable agreement with landowners. If negotiation and mediation fails, compulsory purchase of the land or easement is by way of a 'taking order.'[41]

3.11 Compulsory acquisition has the potential to affect the use and enjoyment of property by depriving a private individual of that property. However, complaints about compulsory acquisition under the LA Act did not emerge as a major focus in submissions to this Inquiry.

Environmentally Sensitive Areas

Background

3.12 Environmental protection is widely considered to be in the public interest.[42] However, the Committee heard that the cost and impact of environmental protection is often

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39 Macquarie dictionary, See: https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=eminent+domain. Viewed 16 April 2020.

40 Julius Sackman et al, *Nichols on eminent domain*, Matthew Bender and Company Inc., 1997.

41 Water Corporation, *Acquiring land for essential service works*, Perth, p 2.

42 For example, see Glen McLeod, 'The Tasmanian Dam case and setting aside private land for environmental protection: who should bear the cost?', *The Western Australian Jurist*, 2015, vol. 6, p 127; Lucretia Dogaru, 'The importance of environmental protection and sustainable development', *Procedia – Social and Behavioural Science*, 2013., vol. 93(21), pp 1344-8 and United Nations Environment Programme, *Environmental rule of law – first global report*, January 2019, Nairobi, p 8.

disproportionately borne by individual landowners rather than the community. Submitters offered Environmentally Sensitive Areas (ESAs) and their associated regulation as an example.

3.13 In 2003, the *Environmental Protection Act 1986* (EP Act) was amended to include new provisions to protect native vegetation and control clearing. Under these provisions, the Minister for Environment may declare an area to be an ESA. The provisions also establish that it is an offence to clear native vegetation unless with a legislative exemption or permit.[43] The offence of land clearing will attract penalties of up to $250 000 for individuals, $500 000 for companies, and a daily penalty for each day clearing continues after notice has been given.

3.14 Section 51C provides that a person who clears native vegetation commits an offence, unless the clearing is:

- done in accordance with a clearing permit
- of a kind set out in Schedule 6
- of a kind prescribed for the purposes of this section and is not done in an ESA.

3.15 The only grazing allowed for in Schedule 6 is grazing on pastoral lease land. In practice, this means that landowners who wish to conduct clearing activities on an ESA which is not subject to authorisation under a written law must obtain a permit from the Department of Water and Environmental Regulation (DWER).

3.16 In 2005, the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* (Notice) was gazetted, effectively declaring an ESA on 98 000 parcels of land across WA.[44] The Notice is attached at Appendix 6. Areas declared to be ESAs under the Notice include:

- a declared World Heritage property as defined in the Environmental Protection and *Biodiversity Conservation Act 1999* (Cth)
- an area included on the Register of the National Estate under the *Australian Heritage Council Act 2003* (Cth)
- defined wetlands (including wetlands listed under the Ramsar Convention, nationally important wetlands as defined by the Commonwealth Government, and others) and the area within 50 metres of the wetland
- certain areas covered by vegetation within 50 metres of rare flora
- the area covered by a threatened ecological community
- certain Bush Forever sites
- certain areas covered by the following Environmental Protection Policies:
    - Environmental Protection (Gnangara Mound Crown Land) Policy 1992
    - Environmental Protection (Western Swamp Tortoise) Policy 2002
    - Environmental Protection (Swan Coastal Plain Lakes) Policy 1992
    - Environmental Protection (South West Agricultural Zone Wetlands) Policy 1998
    - Environmental Protection (Swan and Canning Rivers) Policy 1998.[45]

3.17 ESAs are only relevant in the context of native vegetation, meaning the clearing provisions only apply if native vegetation is also present on the property:

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43 *Environmental Protection Amendment Act 2003*, s 51C.

44 Sarah McEvoy, Executive Director, Strategic Policy, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 8.

45 *Environmental Protection (Environmentally Sensitive Areas) Notice 2005,* s 4.

> there are about 98 000 properties that have an ESA layer that sits across them. That does not necessarily mean that those properties actually have native vegetation and therefore that the ESA would apply, because there might not be native vegetation that needs to be cleared and an exemption sought.[46]

3.18 With reference to the Notice and the EP Act, and in consultation with DWER, it is up to landowners to ascertain if their property is declared an ESA and if the clearing provisions apply due to the presence of native vegetation.

3.19 Hon Helen Morton, former Minister for Mental Health representing the Minister for Environment, said that areas were prescribed as ESA to ensure an extra level of consideration is afforded:

> The intent of listing areas or classes as ESAs is to ensure that clearing that is allowed by exemption under regulations cannot be undertaken without consideration through a permit application and therefore potentially degrade areas of special environmental sensitivity or value.[47]

3.20 ESAs are intended to prevent incremental degradation of rare flora, threatened ecological communities and high value wetlands. On how ESAs are identified, DWERs 'a guide to grazing of native vegetation' states:

> ESAs primarily adopt areas established under other legislation (for example, areas covered by Environmental Protection Policies made under the EP Act, Ramsar convention wetlands or World Heritage properties listed under the Environment Protection and Biodiversity Conservation Act 1999), or based on Government endorsed policies and documents such as Bush Forever.[48]

3.21 The Notice replaced the ESAs defined in Regulation 6 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (Clearing Regulations). The then-Department of Environment did not consider any provisions of the Notice to be controversial:

> Given that no additional areas are defined, and that the environmentally sensitive areas have been operating for nine months without significant incident, it is not anticipated that the notice will be contentious or sensitive.[49]

3.22 The Committee notes that while no new ESAs were defined by the Notice, landowners were not notified that their land was impacted at this point.

Impact on farmers and graziers

3.23 Pastoralists and graziers in the agricultural regions of WA have been especially impacted by the ESA regime. All wetlands in the agricultural regions of WA have been declared ESAs, and therefore many pastoralists and graziers have defined wetlands on their properties.[50] This raises serious questions for landowners about the ability to carry on with their enterprises, which often include grazing.

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46 Kelly Faulkner, Executive Director, Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 3.

47 Hon Helen Morton MLC, Minister for Mental Health, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 October 2015, p 7061.

48 Department of Water and Environmental Regulation, *A guide to grazing of native vegetation*, September 2015, p 2.

49 Environmental Protection (Environmentally Sensitive Areas) Notice 2005, *Explanatory Memorandum*, Legislative Council, p 1.

50 Lorraine Finlay, 'Environmentally Sensitive Areas in Western Australia: highlighting the limits of the 'just terms' guarantee', *University of Western Australia Law Review*, 2016, vol. 41, 1, p 60.

3.24 DWER claim that practically, this may not be the case:

> From our perspective, a refusal of a clearing permit application typically prevents future clearing and associated land uses for that area that has been refused, but it does not require the landowner to cease undertaking activities in areas which have already been lawfully cleared.
>
> So, in agricultural areas, people will still continue to do what they have always done in relation to those extensively cleared areas, for example, even if the area they were seeking to clear was not approved for that purpose.[51]

FINDING 3

Environmentally Sensitive Areas under the *Environmental Protection Act 1986* particularly impact, or are perceived to impact, pastoralists and graziers in the agricultural regions of Western Australia.

3.25 The Committee heard from a number of landowners who feel passionately about the impact the Notice has had on their lives, livelihood and property rights. Affected landowners were not individually advised when the Notice came into effect, and many are concerned about the seemingly arbitrary inclusion of all wetlands:

> It is PGA's view, and that of many of our members who have been directly impacted, that ESAs were implemented hastily, without appropriate stakeholder consultation, with questionable technical justification for the inclusion of extensive areas of "ephemeral wetlands" that exist only in winter, certainly without any PRA and were not communicated to effected landholders by the WA Government.[52]

3.26 Some feel there is inequity in the way ESAs have been designated:

> 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.[53]

3.27 The Committee heard that it is difficult for prospective purchasers to identify whether the land they are interested in purchasing is an ESA.[54] ESAs are not listed on Certificates of Title, and can be difficult to identify on Landgate's Property Interest Reports (discussed in more detail in Chapter 4). While members of the public can search online maps, the Committee heard that this is not a straightforward process:

> Even now, I have clever young people in my office, who practise in the area and so on, and they find it hard to access the systems that tell you where the ESAs are. If they find it hard, there is no hope for someone like me, or anyone, I think, of a certain generation, unless they are right up with it. For some reason it is really hard to find out where ESAs are.[55]

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51 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 8.

52 Submission 61 from Pastoralists and Graziers Association of Western Australia, 31 July 2019, p 5.

53 Submission 12 from Kay and Bryon Micke, 24 July 2019, p 4.

54 Submission 6 from WAFarmers, 18 July 2019, p 8.

55 Glen McLeod, Principal, Glen McLeod Legal, transcript of evidence, 18 November 2019, p 8.

FINDING 4

Members of the public may find it difficult to identify whether their land, or part thereof, has been declared an Environmentally Sensitive Area.

3.28 A number of submissions suggested that compensation should be available for landowners who have been adversely affected by an ESA on their land.[56] This proposition will be discussed further in Chapter 5.

3.29 By restricting clearing, ESA regulations have the potential to restrict economic activity on private property:

> Farm and business competitiveness, productivity and jobs are lost. The environmental legislation acts as a Government imposed quota, tariff, or tax on private farming landowners.[57]

3.30 However, the Committee notes that the presence of an ESA does not necessarily preclude clearing from taking place. The Hon Helen Morton said in 2015:

> Since the regulations took effect, more than 900 clearing permits have been granted within ESAs.[58]

3.31 Prosecution for clearing on an ESA appears to be rare. DWER told the Committee that while there have been 8 prosecutions pursuant to section 51C of the EP Act since 2015, none of these prosecutions were within ESAs.[59] As at 27 February 2020, there are currently 78 reports of alleged unauthorised native vegetation clearing under investigation.[60] Not all of those cases will be within an ESA.

3.32 While prosecution may currently be rare, the Committee notes that this could change in the future if subsequent governments decide to pursue a more aggressive approach.

Case study—Peter Swift

3.33 Peter Swift bought his 485-hectare property near Frankland River in 2007. He intended to 'run a few cattle and sheep' on the property after retiring from his work in the north of WA.[61]

3.34 Mr Swift had been away up north working and maintains he had not cleared the property.[62] He sought to explain this at a meeting with then-Department of Environment and Conservation officers. According to Mr Swift, they would not hear him out. They maintained he had illegally cleared his property and would be prosecuted. Mr Swift left the meeting asking for a senior officer to contact him.[63]

3.35 Thirteen months later, Mr Swift was charged that between 22 November 2007 and 13 December 2009 at Lot 1, Diagram 67189 Bunnings Log Road, Frankland River, he caused or

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56 For example, Submission 12 from Kay and Bryon Micke, 24 July 2019, Submission 48 from Peter Swift, 31 July 2019, and Submission 47 from Lorraine Finlay, 31 July 2019.

57 Submission 35B from Steve Chamarette, 30 July 2019, p 1.

58 Hon Helen Morton MLC, Minister for Mental Health, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 October 2015, p 7061.

59 Mike Rowe, Department of Water and Environmental Regulation, Answer to question on notice B4 asked at hearing held 17 February 2020, dated 4 March 2020, p 4.

60 Mike Rowe, Department of Water and Environmental Regulation, Answer to question on notice B6 asked at hearing held 17 February 2020, dated 4 March 2020, p 6.

61 The Committee refers readers to paragraph 5.130–5.149, which discuss costs and compensation regarding Environmentally Sensitive Areas.

62 Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 17.

63 ibid., pp 17-8.

allowed clearing of native vegetation to occur without authorisation, contrary to section 51C and 99Q of the EP Act.[64]

3.36 The matter was heard in the Manjimup Magistrate's Court and evidence was taken in March 2013 over 3 days, with the defence calling expert evidence. The then-Department of Environment and Conservation relied on an aerial image which they say was taken about 22-29 November 2007,[65] and a satellite image taken on 13 December 2009.[66] In addition, both the prosecution and the defence tendered photos. Questions were raised about the reliability of comparing an aerial image with a satellite image and the interpretation of those images.[67] In addition, questions were raised about inconsistencies between the images and the photos.[68]

3.37 The previous owner gave evidence that he had a clearing permit and admitted to clearing the property during the time he owned the property.[69] There was disagreement between expert witnesses as to when the clearing was likely to have occurred. The Magistrate heard from the defence expert and other defence witnesses that clearing occurred around 30 years earlier, and in the early 1990s.[70] The WA Government expert maintained the clearing occurred within 5 to 10 years prior.[71]

3.38 The Forest Products Commission (FPC) had a pine plantation, under contract, on the property at the time.[72] They had constructed a drain on the property to manage salinity and Mr Swift testified to maintaining weeds in and along the drain using a Pederick rake.[73]

3.39 By the end of the trial, the WA Government's case amounted to arguing that if the Court was to accept, based on the evidence of the accused, that he maintained the drain in the cleared area with a Pederick rake, and this occurred within the relevant period this would amount to clearing for the purposes of the EP Act and the case would be proven.[74]

3.40 In relation to this, Magistrate Hamilton stated in her decision:

> the State's case against the Accused was never put on the basis that his maintaining the drain amounted to the clearing alleged. Even if I did find that this occurred within the relevant period, which I do not, to say that maintaining a drain constructed by one government department, or under instructions from that department, in relation to the growing of trees under a contract with the same or another government department amounts to an offence under legislation administered by another government department is to create a farcical situation whose proportions could only be envisaged by Sir Humphrey Appleby.[75]

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64 Tracy Littlefair, Acting Regional Manager, Magistrates Court and Tribunals, Department of Justice, email, 18 September 2020, Attachment 1, p 2.

65 Department of Water and Environmental Regulation, Answer to question on notice 7 asked at hearing held 19 August 2020, dated 28 August 2020, p 1.

66 Tracy Littlefair, Acting Regional Manager, Magistrates Court and Tribunals, Department of Justice, email, 18 September 2020, Attachment 1, p 30.

67 ibid., p 25.

68 ibid., p 29.

69 ibid., pp 3-4.

70 ibid., pp 5 and 22.

71 ibid., p 24.

72 ibid., p 16.

73 ibid.

74 ibid., p 27.

75 ibid.

3.41 Mr Swift told the Committee that he endured three long years of emotional stress, anxiety, huge legal bills and loss of income.

3.42 Mr Swift told the Committee that he had no knowledge that 200 hectares of his property was an ESA. The original sale of the property was settled through a solicitor, and the presence of an ESA on the land was not detected at that point.[76] Mr Swift explained that if he had known about the ESA, he would not have purchased the property.[77]

3.43 Following the court case, Mr Swift met with the then-Department of Environment and Conservation to ascertain which activities he could carry out on the property:

> I said, "What can I and can I not do?" "You need a permit to graze your stock. You are not allowed to do this; you are not allowed to do that." I said, "Well, I didn't buy a national park, I bought a rural farmland."[78]

3.44 Mr Swift would need to apply for a permit to clear native vegetation to use the property for grazing. The cost of a clearing permit varies depending on the size of the clearing. If Mr Swift applied for a clearing permit for the whole of his property or that part of his property not covered by the ESA, on current fees, the fee is about $2 000 if it is determined to be 'extensive land use zone'.[79] A clearing permit is valid for two years. If it was determined that a clearing permit was needed, Mr Swift would need to apply for a clearing permit every two years for as long as he intended to graze livestock, and the fee would apply to each application.

3.45 Mr Swift met with the then-Minister for Environment and then-Attorney General to explain his ordeal and seek recompense for his financial losses,[80] and lost work time.[81] Mr Swift explained that the ordeal:

> has destroyed my life.[82]

3.46 It was suggested that Mr Swift apply for an ex-gratia payment. He told the Committee that he did so, however, it was refused.[83]

3.47 Mr Swift told the Committee about the impact of the ESA:

> The application of the ESA has adversely affected my property value and following the court case and subsequent effect of having an ESA on my property, I suffered a mental breakdown and continuing mental health issues. This resulted in me not being able to continue working up North or pursuing other employment.[84]

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76 Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 21.

77 ibid., p 22.

78 ibid., p 18.

79 Department of Water and Environmental Regulation. See: https://www.der.wa.gov.au/our-work/clearing-permits/fees/faqs. Viewed 23 September 2020.

80 Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 18.

81 Submission 48 from Peter Swift, 31 July 2019, p 1.

82 Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 18.

83 ibid.

84 Submission 48 from Peter Swift, 31 July 2019, p 1.

3.48 Affected landowners are able to apply for a clearing permit:

> A permit can be granted, but they only apply for between two and five years, can be revoked at any time and an ESA is not static and changes according to rainfall, so cannot be effectively fenced.[85]

3.49 Mr Swift expressed the view that ESAs were developed with the intent to take freehold land from people and not pay for it. As for the Torrens title system, Mr Swift said:

> it's not worth the paper it's written on … we have lost all our rights…[86]

3.50 In 2019, Mr Swift told the Committee that although he had placed the property on the market, it had not sold.[87] In addition, the bank commenced legal proceedings to recover the debt owed, being the mortgage.[88] An offer to purchase the property by the FPC at 'nearly $400 000 less than it was marketed for' was opposed by the local shire on the grounds that the FPC wanted to continue to use the property for plantation timber, and the shire did not want farmland being lost to plantations.[89] The FPC took the matter to the State Administrative Tribunal. At the time of the hearing in October 2019, the matter was still being negotiated.[90]

3.51 Mr Swift's requests for meetings with Ministers of the current WA Government have been declined.[91] He said:

> They send you back to the Department of Environment Regulation, which cannot answer the questions. That is why I wrote to the minister, because they [the Department] cannot answer my questions.[92]

3.52 Recently the Committee was informed by Mr Swift that an agreement had been reached, with the FPC, with Mr Swift's bank agreeing to accept this as payment in full of the mortgage.[93] Mr Swift maintains that both he and his financial institution suffered a monetary loss.[94]

3.53 Mr Swift continues to suffer mental health problems and has been unable to work.[95]

Case study—Kay and Bryon Micke

3.54 Kay and Bryon Micke own a 545-hectare property near Gingin, where they have operated a sheep grazing enterprise for 40 years. Grazing stock have been present on the property since approximately 1904.[96]

3.55 The Micke's first became aware of ESAs in 2012, when a neighbour was investigated for illegal clearing. After searching the maps available through the DWER website, they found that 'around 50 percent of the property' was declared as an ESA.

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85 ibid.

86 Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 20.

87 ibid., p 18.

88 ibid., p 21.

89 ibid., p 19.

90 ibid.

91 ibid., p 20.

92 ibid.

93 ibid., p 21.

94 Peter Swift, private citizen, email, 15 May 2020.

95 Submission 48 from Peter Swift, 31 July 2019, p 1.

96 Submission 12 from Kay and Bryon Micke, 24 July 2019, p 3.

3.56 Mr and Mrs Micke believe that because most of their productive land area has been 'locked up' by ESA regulations, their property value has decreased by approximately $2.5 million. They contend that they, along with other farmers in the area, have suffered significant stress as a result:

> 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.
>
> 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.[97]

3.57 As well as causing concern, the ESA has caused confusion. It is unclear to them precisely how the wetlands on the property were defined. Mr Micke has had difficulty getting advice from various environment agencies. Mrs Micke refers to the situation as 'a mix-up all the way through, with various layer upon layer of legislation'.[98]

3.58 The Micke's have interpreted the EP Act to mean that grazing livestock on their property is illegal,[99] although it seems possible to the Committee that DWER could advise otherwise, as per the Guidelines. The Micke's have chosen not to apply for a permit:

> It is bureaucracy; how much respect are we going to have to deliver bureaucracy like this?[100]

3.59 The Committee notes that the 2-5 year default clearing permit term, costing potentially thousands of dollars each time, may play a role in decisions to avoid the process. The cost and time limit associated with clearing permits could make it difficult for people to run their businesses and plan for the future.

3.60 Like Peter Swift, they would prefer to sell the land. They attempted to sell the land to the WA Government for conservation, but were unsuccessful.[101] The Western Australian Planning Commission (WAPC) advised that it is approached by landowners 'a few times a year' to purchase land that, while not reserved, has conservation value. The WAPC has purchased some such properties, which are primarily used to offset the environmental effects on public works.[102]

3.61 The Committee considers that the main issue in this case is not the threat of prosecution, but the stress and uncertainty that comes with knowing land is not completely your own—particularly when the owners have found the process and legislation difficult to navigate. In addition, time limits associated with clearing permits and the loss of resale value of property are also issues.

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97 ibid., p 4.

98 Kay Micke, private citizen, transcript of evidence, 21 October 2019, p 15.

99 Submission 12 from Kay and Bryon Micke, 24 July 2019, p 11.

100 Bryon Micke, private citizen, transcript of evidence, 21 October 2019, p 15.

101 Kay Micke, private citizen, transcript of evidence, 21 October 2019, p 13.

102 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 13 May 2020, p 5.

Petition to repeal

3.62 Concerns around the ESA regime are not new. On 17 June 2014, the Hon Mark Lewis tabled a petition in the Legislative Council seeking to repeal the Notice (Petition).[103] The Petition was referred to the Standing Committee on Environment and Public Affairs (Environment Committee).

3.63 The Petition requested that the Legislative Council recommend the repeal of the Notice, submitting that:[104]

- the Notice was invalid, as the WA Government had failed to fulfil legislative consultation requirements
- owners of land with an ESA were unaware of the impacts of the Notice on their properties, as there was no consultation
- owners of land with an ESA were at risk of criminal prosecution for clearing native vegetation
- if the Notice was 'fully implemented' it would destroy the livelihoods of thousands of property owners.

3.64 The Environment Committee tabled its report on the Petition in August 2015. The Committee recommends that interested readers refer to that report for more detail.

3.65 The Environment Committee made 13 findings, including that:

- consultation on the Notice was so limited as to be pointless
- the seemingly all-encompassing and untested inclusion of wetlands in the Notice is cause for concern
- there is limited information available to the public on ESAs
- landowners were not adequately advised that a law restricting their land use had been introduced
- noting an ESA on a Certificate of Title would notify the landowner or another party (after a title search) of the existence of an ESA, but would not notify that person of the impact of the ESA
- if the Government introduces a law that impacts on property owners and may potentially devalue property, the Government should formally notify each landowner of the law and the impact of the law.

3.66 While the Environment Committee did not recommend the repeal of the Notice, it made 9 recommendations, including that:

- the Notice and the scope of land declared an ESA be reviewed, with a particular focus on wetland areas
- each affected landowner be written to, advising of the existence of the ESA and its impact
- section 51C of the EP Act be redrafted to state in positive language the circumstances in which a person is authorised to clear native vegetation.

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103 Tabled Paper 1518, Legislative Council, 17 June 2014.

104 Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 41, *Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, August 2015, p 15.

Implementation status

3.67 In September 2019, the Committee wrote to the Minister for Environment seeking the implementation status of the recommendations. Each recommendation is included in a table at Appendix 3 with the corresponding original Government response and status update.

3.68 To date, the current and previous Governments have implemented four of the Environment Committee's nin recommendations. For example, in 2015 DWER developed 'A guide to grazing of native vegetation' (Guide). As recommended, DWER consulted publicly and with stakeholder groups including the Pastoralists and Graziers Association of Western Australia and the Gingin Property Rights Group.[105]

3.69 DWER has also removed the expired regulation 6 from the Clearing Regulations and provided a clearer link on its website for the public to view information regarding ESAs.

3.70 The Minister for Environment told the Committee that some of the Environment Committee's 2015 recommendations will be addressed through upcoming reforms to the EP Act.[106] In October 2019, a discussion paper entitled 'Modernising the Environmental Protection Act' and an exposure draft bill were published for public comment:[107]

> The principal criticism that has been levelled at the clearing provisions is their complexity, and that they are focused on process rather than outcomes. This view is at the heart of many stakeholder submissions made during previous reviews.
>
> The Bill simplifies and improves the provisions for clearing of native vegetation by focusing on environmental outcomes rather than administrative processes.[108]

3.71 The Environmental Protection Amendment Bill 2020 (EP Bill) was introduced in the Legislative Assembly in April 2020. The Committee notes that at least two of the outstanding recommendations of the Environment Committee will not be addressed by the EP Bill—what constitutes 'clearing', and disclosure (see 'outstanding issues' at 3.83).

Review of the scope of land declared ESA

3.72 An ongoing issue is the scope of land declared ESA under the Notice. In 2015, the Environment Committee found that while areas of special environmental sensitivity or value should be afforded extra protection, the all-encompassing and seemingly untested inclusion of wetlands in the Notice was a cause for concern:

> 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.[109]

3.73 Submitters have reiterated this concern in the course of the current Inquiry:[110]

> 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

105 Hon Albert Jacob MLA, Minister for Environment and Heritage, letter, 6 October 2015, p 4.

106 Hon Stephen Dawson MLC, Minister for Environment, letter, 15 October 2019, p 5.

107 ibid., p 3.

108 Department of Water and Environmental Regulation, *Modernising the Environmental Protection Act – discussion paper*, Government of Western Australia, October 2019, p 17.

109 ibid.

110 Submission 12 from Kay and Bryon Micke, 24 July 2019.

> designation contains areas deserving of the highest possible levels of environmental protection.[111]

3.74 The Environment Committee recommended that the Minister for Environment review the scope of land declared an ESA, with a focus on wetland ESAs.[112]

3.75 A complicating factor is that a range of State and Commonwealth agencies are responsible for the various instruments used to declare ESAs under the Notice, including the Commonwealth Department of Agriculture, Water and Environment and the WA Environmental Protection Authority (EPA). DWER told the Committee that those agencies are responsible for reviewing their own instruments.[113]

3.76 The EPA advise that four of the five Environmental Protection Policies currently listed in the Notice as declaring areas to be ESA have been repealed:

> Of the five environmental protection policies listed in the notice, only the Western swamp tortoise environmental protection policy remains in force. The review of that environmental protection has been deferred until the science informing the review of the swamp tortoise recovery plan is made available. We anticipate the review of that environmental protection policy to be completed by 30 November 2022.[114]

3.77 The repealed Environmental Protection Policies include the:

- Environmental Protection (Gnangara Mound Crown Land) Policy 1992
- Environmental Protection (Swan Coastal Plain Lakes) Policy 1992
- Environmental Protection (South West Agricultural Zone Wetlands) Policy 1998
- Environmental Protection (Swan and Canning Rivers) Policy 1998.[115]

3.78 Although these four Environmental Protection Policies have been repealed, they are still listed in the Notice. The Committee considers that this is misleading to members of the public who may refer to the Notice to determine if their land is an ESA.

FINDING 5

Due to the repeal of four Environmental Protection Policies, the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* may contain expired information, which is misleading for members of the public.

3.79 Principles of the rule of law require that the law must be certain and clear, particularly when it prescribes offences and penalties.[116] The Committee agrees that subsidiary legislation, such as the Notice, should be current and correct.

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111 Submission 47 from Lorraine Finlay, 31 July 2019, p 7.

112 Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 41, *Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, August 2015, p iii.

113 Mike Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 2.

114 Dr Tom Hatton, Chairman, Environmental Protection Authority, transcript of evidence, 20 May 2020, p 2.

115 *Environmental Protection (Environmentally Sensitive Areas) Notice 2005,* s 4.

116 Law Council of Australia, *Policy statement – rule of law principles*, Canberra, March 2011, p 2.

3.80 DWER advise that out of date information will be removed when ESA declarations are moved from the Notice to the Clearing Regulations, a change proposed by the EP Bill.[117] The Committee is not satisfied with this response, as there is no certainty as to whether the EP Bill will pass and when subsequent amendments to the Notice and Clearing Regulations will be enacted, if at all.

3.81 DWER does not intend to notify landowners in the areas subject to repealed policies that their land is no longer an ESA:

> **The CHAIR**: ...I would have thought that communication of a change of status would have been an important role for the department to undertake with affected landowners.
>
> **Ms FAULKNER**: The ESA layer cuts across the entire state. As I understand it—Sarah might be able to correct me—there are about 98 000 properties that have an ESA layer that sits across them...At this point, we do not contact each individual landowner where an ESA might apply or not apply. I should just add that we do have an interactive map that is available, so someone could identify whether their property has an ESA layer if they wanted to. [118]

3.82 The Committee notes that repeal of the Environmental Protection Policies will not necessarily mean all land in those areas is no longer an ESA—some may be otherwise covered by the Notice, for example, Ramsar wetlands. However, the Committee concluded that any landowners who are no longer impacted by the Notice should be advised by letter, and expired information should be removed from the Notice as soon as possible.

RECOMMENDATION 1

Where an Environmental Protection Policy has been repealed and land is not otherwise covered by the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, the Department of Water and Environmental Regulation write to relevant landowners, notifying that their land is no longer subject to an Environmentally Sensitive Area.

RECOMMENDATION 2

Following the prescription of Environmentally Sensitive Areas in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*, the Department of Water and Environmental Regulation inform all landowners in writing that their land is an Environmentally Sensitive Area, and advise them of the potential implications if native vegetation is present.

RECOMMENDATION 3

The Minister for Environment ensure expired information resulting from the repeal of Environmental Protection Policies is removed from the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*.

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117 Sarah McEvoy, Executive Director, Strategic Policy, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 2.

118 Kelly Faulkner, Executive Director Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 3.

RECOMMENDATION 4

The Premier introduce in the Parliament of Western Australia an omnibus bill amending all relevant Western Australian legislation to make it a statutory requirement for Western Australian Government departments and agencies, when making decisions or taking actions that impact on the use of a landowner's property, to notify each individual landowner impacted in writing before the decision is made or action taken, and advise how this will impact the landowners use of the land. Further, that impacted landowners be provided an opportunity to make submissions before the decision is made and/or action taken.

Outstanding issues

3.83 Two issues raised in the 2015 Petition Report remain unresolved—clarity around what constitutes clearing under the EP Act, and disclosure.[119]

What constitutes clearing

3.84 There is some confusion in the community about the definition of 'clearing' under the EP Act.[120] This creates a problem, because the definition underpins an offence.

3.85 As outlined at 3.14, section 51C of the EP Act establishes the offence of unauthorised clearing native vegetation:

> **51C. Unauthorised clearing of native vegetation**
>
> A person who causes or allows clearing commits an offence unless the clearing —
> (a) is done in accordance with a clearing permit; or
>
> (b) is of a kind set out in Schedule 6; or
>
> (c) is of a kind prescribed for the purposes of this section and is not done in an environmentally sensitive area.

3.86 Under section 51A of the EP Act, clearing means:

> (a) the killing or destruction of; or
>
> (b) the removal of; or
>
> (c) the severing or ringbarking of trunks or stems of; or
>
> (d) the doing of any other substantial damage to,
>
> some or all of the native vegetation in an area, and includes the draining or flooding of land, the burning of vegetation, the grazing of stock, or any other act or activity, that causes —
>
> (e) the killing or destruction of; or
>
> (f) the severing of trunks or stems of; or
>
> (g) any other substantial damage to, some or all of the native vegetation in an area.

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119 Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 41, *Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, August 2015.

120 For example, see Submission 12 from Kay and Bryon Micke, 24 July 2019, p 3.

3.87 DWER developed the Guide to provide guidance on when grazing constitutes 'substantial damage' to native vegetation, and is therefore clearing under the EP Act.[121] The Guide indicates that DWER will apply the following guidance in determining whether or not the grazing of stock constitutes substantial damage and is therefore clearing:

> Sustainable grazing at levels that are consistent with existing, historic grazing practices where such grazing does not result in significant modification of the structure and composition of the native vegetation is not considered to be clearing.
>
> Grazing that involves the severing of stems or taking leaves or minor branches, but does not compromise the long term health of the native vegetation, is not considered to be clearing. The most visible indications of substantial damage caused by grazing to native vegetation include:
>
> • death;
>
> • ringbarking;
>
> • excessive defoliation, root loss or uprooting.[122]

3.88 According to Lorraine Finlay, Lecturer in Constitutional Law at Murdoch University, there is a clear legislative presumption against any clearing under the EP Act, which the Guide does not reflect:[123]

> it does not reflect the substantially broader definition that is expressly provided for on the face of the legislation. For example, the legislation expressly states that the grazing of stock that causes substantial damage to 'some or all of the native vegetation in an area' will be considered clearing. Any native vegetation that is consumed by grazing stock must [necessarily] have been substantially damaged – it has been eaten![124]

3.89 The Committee considers that landowners could easily interpret the definition of clearing under section 51A in this way, assuming that grazing constitutes 'substantial damage', as the native vegetation is being consumed. For example, Kay and Bryon Micke interpreted clearing this way:

> 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.[125]

3.90 As mentioned at paragraph 3.79, principles of the rule of law require that the law must be certain and clear, particularly when it prescribes offences and penalties.[126] Landowners should be able to understand what is required of them by referring to the legislation, rather

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121 ibid.

122 Department of Water and Environmental Regulation, *A guide to grazing of native vegetation*, Perth, September 2015, p 4.

123 Lorraine Finlay, 'Environmentally Sensitive Areas in Western Australia: Highlighting the limits of the 'just terms' guarantee', *The University of Western Australia Law Review*, pp 54 and 57.

124 ibid., p 56.

125 Submission 12 from Kay and Bryon Micke, 24 July 2019, p 3.

126 Law Council of Australia, *Policy statement – rule of law principles*, Canberra, March 2011, p 2.

than a guidance document on the DWER website. The fact that a guidance document has been issued suggests a level of community confusion and misunderstanding.

FINDING 6

The meaning of grazing is unclear under the *Environmental Protection Act 1986*.

3.91 DWER elaborated on the current situation:

> **Ms McEVOY**: The definition of "clearing" includes a whole lot of things but also talks about substantial damage. That guideline was very much around defining what was meant by substantial damage. Clearing to the extent that it had happened in the past—so, not changing it, not intensifying it, not increasing the number of stock that were grazing or introducing them to different areas—was considered not to cause substantial damage.
>
> **The ACTING CHAIR**: So you do not believe there is a need for legislative clarification?
>
> **Ms McEVOY**: I guess that is a decision for government.[127]

3.92 The Committee notes that the EP Bill retains the current definition of clearing.

3.93 The Committee is of the view that it is unreasonable to expect members of the public to refer to a department-issued guidance document to ascertain whether grazing constitutes clearing, particularly when the Guide itself is not definitive. The Committee also notes that it is not DWERs role to define an offence for which a member of the community may be prosecuted. This is a role for Parliament.

RECOMMENDATION 5

The Minister for Environment introduce a Bill in the Parliament of Western Australia to clarify the definition of clearing under section 51A of the *Environmental Protection Act 1986*, with a view to clarifying whether grazing livestock is permissible within an Environmentally Sensitive Area.

Disclosure

3.94 A major and enduring criticism of the Notice is that individual landowners were never advised that they had an ESA on their land:

> 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 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. As a result, many current landowners may unknowingly be committing a criminal offence.[128]

3.95 In 2015, the Environment Committee recommended that the then-Department of Environmental Regulation write to each affected landowner to advise of the existence of the ESA and its impact. In 2019, the Minister for Environment advised that this recommendation is not supported.[129]

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127 Sarah McEvoy, Executive Director, Strategic Policy, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 10.

128 Submission 6 from WAFarmers, 18 July 2019, p 8.

129 Hon Stephen Dawson MLC, Minister for Environment, letter, 26 November 2019, p 5.

3.96 DWER confirmed that in 2020, it is possible that some Western Australians are still unaware that there is an ESA on their land.[130] If members of the public wish to locate an ESA, they can search the address through DWERs interactive online maps. The adequacy of this option is discussed in Chapter 4.

3.97 The Committee asked DWER if anyone currently under investigation for unauthorised clearing claimed to be unaware that their land was an ESA. DWER advised that they have not formally interviewed all landowners of matters under investigation, but of those who have been interviewed, none contended that they were unaware that their land has an ESA.[131]

3.98 The Committee is of the view that WA Government departments and agencies have a duty, albeit not a statutory duty, to inform landowners of any actions or proposed actions by government that may impact a landowner's use of their land. Further, that simply advertising the change/action, holding workshops or consulting stakeholder groups, while important and supported, should not be in substitution to writing to impacted landowners. The decision by the WA Government not to notify landowners of an ESA on their land, and not to act on the Environment Committee's 2015 recommendation to this effect, has resulted in:

- some landowners being unaware that there is an ESA on their land
- considerable anxiety for impacted landowners
- landowners denied the opportunity to be heard on the matter and better informed of their duties in relation to the land determined an ESA.

FINDING 7

Some landowners may still be unaware that there is an Environmentally Sensitive Area on their land.

RECOMMENDATION 6

The Western Australian Government pay landowners impacted by an Environmentally Sensitive Area fair compensation if the value of the property is diminished by the Environmentally Sensitive Area due to the landowner being unable to use the land subject of the Environmentally Sensitive Area in accordance with its zoning use.

Planning reservations

3.99 Planning in WA is comprised of two major components:

- strategic planning, which focuses on big picture framework setting for towns and regions in WA to guide land supply, use and development
- statutory planning, which involves day to day decision making, guided by legislation, on planning schemes, subdivision and development proposals.[132]

3.100 The WAPC is a statutory authority established by the *Planning and Development Act 2005*, which is responsible for state wide strategic planning. The WAPC may include up to 15 members, and its functions include developing and reviewing the State Planning Strategy, the key strategic planning document informing state-wide planning and development

130 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 21 February 2020, p 7.

131 Department of Water and Environmental Regulation, Answer to question on notice 7 asked at hearing held 17 February 2020, dated 4 March 2020, p 7.

132 Department of Planning, *Introduction to the Western Australian Planning System*, Perth, February 2014, p 1.

decisions. The Department of Planning, Lands and Heritage (DPLH) supports the operation of the WAPC.

3.101 Statutory planning is largely conducted by local governments, who prepare and administer local planning schemes and strategies to ensure appropriate planning controls for land use and development.[133]

The reservation of land for public purposes

3.102 Local governments and the WAPC can reserve land for public purposes under local, regional or state planning schemes. For example, the Metropolitan Region Scheme, which defines the future use of land and provides the legal basis for planning in the Perth metropolitan region, dividing it into broad zones and reservations.

3.103 'Public purpose' means a purpose that serves or is intended to serve the interests of the public or a section of the public and includes a public work.[134] Purposes for which land may be reserved include:

- car parks
- civic and cultural amenity
- commonwealth Government
- cultural heritage conservation
- highways and important regional roads
- hospitals
- parks and recreation areas
- port installations
- power services, including electricity and gas supply
- prisons
- public purpose of the State
- railways
- schools
- special uses
- State forests
- universities
- water catchments
- water services, including sewerage and drainage
- waterways.[135]

3.104 Land proposed for private use is typically classified as 'zoned', while land proposed for public use is 'reserved'.[136]

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133 ibid.

134 *Planning and Development Act 2005* s 172.

135 ibid., schedule 6.

136 Law Reform Commission of Western Australia, *Compensation for injurious affection*, 2008, p 36.

'Sterilisation' of land

3.105 In some cases, land will be reserved for relatively immediate use—for example, to provide additional land for a project that is already underway. In other cases, it may be reserved for decades in anticipation of a future need—for example, the construction of a major highway.[137]

3.106 In 2004, the PAF Committee observed that:

> So far as landholders are concerned, reservation of their land effectively sterilises that land from future development and removes any potential for any future increases in the land's value.[138]

3.107 These concerns still appear to exist today. The Committee heard from a number of submitters who are concerned that the value of their property, their ability to use and enjoy their property, or both, have been adversely affected by planning decisions. Many landowners consider that their land has been 'sterilised' by planning schemes, sometimes leaving them 'in limbo' for decades.

3.108 The Minister for Planning pointed out that it may not always be accurate for landowners to claim that their land has been 'sterilised' through the planning process:

> If a landowner's land was "sterilised" for any use but a public use, then it would trigger a claim for compensation under the P&D Act. Frequently landowners can continue to use the land (i.e. for a rural or semi-rural purpose), but cannot yet develop the land to a higher and better use, as might be expected in the future. Deprivation of a right to develop is not a proprietary interest. In other cases, some form of "sterilisation" and a trigger for compensation has occurred. However, either the claim for compensation has not been made, or that claim was made invalidly (such as putting in two claims)...[139]

3.109 Some submitters are frustrated by the impact that seemingly sweeping planning decisions can have on the value of their most important asset. For example, the Committee heard from one couple in the West Mundijong area who missed out on industrial rezoning because of a reservation for a future freight realignment.[140] The submitters contend that this situation has affected the value of their property and made it more difficult to sell on the private market.[141]

3.110 The following case studies illustrate how submitters to this Inquiry have been impacted by zoning or reservation.

Case study—Oakajee Narngulu Infrastructure Corridor

3.111 Narngulu Industrial Estate is a large-scale industrial estate located 12 kilometres south east of Geraldton, designed to accommodate businesses requiring lots of 4.5 hectares, such as transport, logistics and manufacturing businesses.[142]

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137 ibid.

138 Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 432.

139 Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2019, p 2.

140 Submission 10 from Western Australia Land Compensation, 23 July 2019, p 1.

141 Submission 67 from Susan Downs and Francis Trichet, 31 July 2019, p 1.

142 Development WA. See: https://developmentwa.com.au/projects/industrial-and-commercial/narngulu-industrial/overview. Viewed 3 September 2020.

3.112 Planning for a port and industrial estate at Oakajee commenced in the 1990s.[143] In 2010, the State government commenced planning for the Oakajee Narngulu Infrastructure Corridor (ONIC) to enable a coordinated infrastructure and services corridor around Geraldton. The proposed corridor is 34 kilometres long and will be designed to facilitate significant road, rail and utility services connections between the Narngulu Industrial Estate, the proposed Oakajee port and the existing Geraldton port.[144]

3.113 For the Shire of Chapman Valley, this has resulted in a situation where affected land has been 'sterilised' for development, and its market value adversely affected:

> The ONIC is an example of where the State Government plan for land to be developed for public purpose at some time in the future, yet do not assist the affected landowners by acquiring the land or subdividing the land to allow the landowners to move on or develop as they require.[145]

3.114 In June 2019, the Shire of Chapman Valley council voted to allow a development application that lies within the proposed ONIC. A new farm shed is proposed to be clustered with an existing residence, which will ultimately require acquisition and demolition. As the ONIC land has not yet been formalised by the State Government as a service corridor, there was no reason to refuse the development application. Councillor Peter Humphrey said that while the future land acquisition is uncertain, the council should allow the owner to operate his business in as unrestricted a manner as possible.[146]

3.115 Both the Oakajee Estate and the ONIC have been the subject of uncertainty in recent years. The Minister for Planning provided a status update:

> On 14 June 2013, Mitsubishi (the initial proponent for the Oakajee Port and Rail, announced intentions to suspend its plans for a port at Oakajee. The Oakajee project requires a proponent exporting sufficient quantities of iron ore at a market price that justifies construction of a new deepwater port.
>
> Creation of the ONIC requires acquisition of private land. Previously, funding ($39.5 million over four years from 2014-15) was allocated to Department of Planning to acquire land and appropriately zone the ONIC. This funding allocation was withdrawn during the 2015-16 Mid-Year Review.
>
> Further progression of the Oakajee project depends on global demand for iron ore. At this time there are no individual Mid West projects large enough to underpin the project. As such, Government has not allocated funding for land acquisition.[147]

3.116 The Chief Executive Officer of the Shire of Chapman Valley submitted that the WA Government must become quicker and more efficient in dealing with land tenure issues associated with future planning and development, rather than leaving landowners and businesses in limbo for decades. This includes assigning adequate funds to acquire land from affected landowners, and proceeding with acquisition as a matter of priority.[148]

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143 Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2019, p 4,

144 Department of Planning, Lands and Heritage. See: https://www.dplh.wa.gov.au/information-and-services/district-and-regional-planning/country-planning/mid-west/oakajee-narngulu-infrastructure-corridor. Viewed 3 September 2020.

145 Submission 1 from Shire of Chapman Valley, 2 July 2019, p 1.

146 ibid., p 3.

147 Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2020, p 4.

148 Submission 1 from Shire of Chapman Valley, 2 July 2019, p 1.

FINDING 8

Planning reservations can result in prolonged uncertainty for landowners about the future use and value of their land.

RECOMMENDATION 7

Where the Western Australian Government reserves land to be used for a public purpose, it should:

- purchase the land, if the landowner wants to sell

  or

- if the landowners does not want to sell, and the land is not immediately required by the Western Australian Government, permit the landowner to develop, use and improve the land in accordance with its existing zoning.

Case study—Mandogalup

3.117 The suburb of Mandogalup is located in the Town of Kwinana, 30 kilometres south of Perth. Historically populated by market gardeners and dairy farmers, since the 1970s Mandogalup has been home to an Alcoa residue disposal area (Area F). The Committee heard from Mandogalup residents Margaret and Hubert de Haer, whose property is located approximately 500 metres from Area F:

> At the time we were told that the lifespan would be 10-20 years, however the licence has been renewed on a number of occasions and it is now close to 50 years old. In 2004, Alcoa committed (after engaging in a period of consultation with community stakeholders) that Area F Residue Lake would be closed in 2010 and rehabilitated by 2015, however this has not occurred.[149]

3.118 The Committee heard that land use and planning in Mandogalup have been uncertain for many years.[150] Mandogalup has been identified for potential urban development on a number of occasions since the 1980s, including by the Jandakot Draft Structure Plan of 1993. However, there are ongoing concerns about urban development due to the potential for residential activities to be impacted by dust from nearby industry, and the potential for urban development to encroach on the Kwinana Industrial Area:[151]

> Generally, potential health and amenity impacts from dust in the area have not been well understood. Accordingly, planning decisions have either been deferred or made on the basis of the precautionary principle pending further data from detailed investigations becoming available. Consequently, arguments underpinning land use planning proposals have been subject to applications for review at the State Administrative Tribunal and in the Supreme Court.[152]

3.119 In June 2016, legislation was introduced proposing a buffer zone around the Western Trade Coast industrial area, which stretches from Coogee to East Rockingham. It was argued that the buffer zone was required to prevent urban encroachment and provide planning certainty for industry. The inclusion of Mandogalup in the proposed buffer zone was a blow to locals,

149 Submission 22 from Margaret and Hubert de Haer, 28 July 2019, p 1.

150 ibid.

151 Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2020, p 8.

152 ibid., p 8.

who said a legislated buffer would leave them unable to sell, subdivide or further develop their properties. [153]

3.120 The result of this ongoing uncertainty is that Mandogalup residents have had difficulty selling their properties. Margaret and Hubert de Haer told the Committee that families in Mandogalup face great financial insecurity. With no end in sight, the situation is particularly stressful for those residents who are retired or approaching retirement, and hope to down size in the near future:

> It is extremely difficult to sell land and homes in Mandogalup and has always been this way because of the presence of the Alcoa Residue Lakes and uncertainty in relation to planning and zoning. Many properties remain on the market for years without being sold.
>
> We fear that, even if Mandogalup is eventually zoned industrial, demand for land in the area will only arrive in 20-30 years time (given that only a third of the industrial land in the Kwinana and Rockingham area has been developed).[154]

3.121 The Committee understands that the WA Government is currently working to address these concerns. In 2016, the State Government requested that EPA investigate the potential health and amenity impacts of dust in Mandogalup, and provide advice on the size of a land use planning buffer. Advice provided by the EPA in 2017 identified negligible impacts in some areas, and other areas where more investigation monitoring was necessary.[155]

3.122 The WAPC has prepared an improvement plan for the area, and is now progressing the preparation of the Mandogalup Improvement Scheme, which will investigate and consider all development scenarios (rural, urban and industrial).[156]

RECOMMENDATION 8

Where a buffer zone is created and where requested by the landowner, that the Western Australian Government or the protected industries be required to purchase the land at the market value prior to the creation of the buffer zone.

Utility easements

3.123 An easement is a right held by one person to make use of the land of another.[157] An express easement is created by grant, reservation or registration and conferred expressly by an instrument.[158]

3.124 An implied easement, on the other hand, is:

> An easement that is not expressly created by a grant or reservation in an instrument, but is implied by law. Implied easements recognised by law include easements of necessity, quasi-easements, intended easements, easements implied from the general words implied into all conveyances under legislation (for example (NSW) Conveyancing Act 1919 s 67), easements implied from the description of

153 Daniel Emerson, 'Fight as zoning hits home values', *The West Australian*, 23 May 2016.

154 Submission 22 from Margaret and Hubert de Haer, 28 July 2019, p 2.

155 Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2019, p 8.

156 ibid., p 9.

157 Macquarie Dictionary Online. See: https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=easement. Viewed 25 September 2020.

158 Lexis Nexis, Encyclopaedic Australian Legal Dictionary. See: Results for easement. Viewed 25 September 2020.

> the land, and easements implied under the principle of non-derogation from grant.[159]

3.125 The types of easements most likely to affect private property owners in WA are statutory easements, whether express or implied, to facilitate utilities such as water, drainage and electricity.

3.126 Easements may be registered against freehold or Crown land under the *Transfer of Land Act 1893* (TL Act). According to Landgate, the types of easements typically presented for registration include rights to:

- erect a party wall
- take water from wells or bores
- install and operate drains and drainage works
- install, maintain and operate oil, gas or other pipelines
- install, maintain and operate electric power lines, telephone and other cables and supporting pylons.[160]

3.127 The PAF Committee explained in 2004:

> Although at common law for an easement to be valid it must benefit the holder of another, neighbouring, parcel of land (the "dominant tenement"), s 195 of the *Land Administration Act 1997* expressly provides that the State of Western Australia, a State instrumentality, a statutory body corporate or a local government may create an easement without a dominant tenement.
>
> This provision enables public works and service infrastructure (such as for water and power services) to be constructed and maintained on freehold land by way of an easement corridor, without the necessity for the State or other body having to acquire the freehold of either the land which is the subject of the easement or any neighbouring land.[161]

Water Corporation

3.128 As the principal supplier of water, wastewater and drainage services in WA, the state-owned Water Corporation is a land acquiring agency. Under the *Water Services Act 2012*, the Water Corporation may acquire land, or obtain a right to use land, for a water supply, wastewater or drainage project to deliver, expand or improve essential services.[162]

3.129 This includes statutory easements that enable it to access parts of property for maintenance or asset repair. Water Corporation easements are registered on title deeds.[163]

3.130 The Minister for Water told the Committee about how the Water Corporation balances public and private interests in making these decisions:

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159 ibid.

160 Landgate, *EAS-01 Easements*, 1 May 2020.

161 Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 41, *Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, August 2015, p 28.

162 Water Corporation. See: https://www.watercorporation.com.au/-/media/files/residential/about-us/our-commitments/acquiring-land-for-essential-service-works-brochure.pdf. Viewed 12 February 2020.

163 Water Corporation. See: https://www.watercorporation.com.au/home/faqs/buying-selling-and-building/what-is-an-easement-and-how-does-it-affect-my-proposed-building. Viewed 12 February 2020.

> In delivering these essential services, the Corporation balances a range of interests including the impacts of climate change, the wellbeing of its customers, and the economic development of the state. Successfully balancing these imperitives has, over a long period, delivered strong improvements in the value of private property and public assets throughout the State.[164]

Energy operators

3.131 Electricity corporations in WA have strong powers under the *Energy Operators (Powers) Act 1979* to acquire, enter and occupy land, without an easement:

> Enter upon and occupy any land or other premises and there, without being bound to acquire the same or any estate or interest therein (except where otherwise provided by this Act or such as may be required by a claimant to be taken under Part 9 of the *Land Administration Act 1997*) by the best available route and in a practicable manner, construct, extend, or improve works, maintain and conduct undertakings and facilities, and carry on undertakings or works requisite, advantageous, or convenient to the exercise and performance of the functions of the energy operator or any such function.

3.132 Western Power, Synergy and Horizon are the three corporations supplying energy across WA. Western Power submitted to this Inquiry, telling the Committee that:

> Western Power, in the main registers easements for transmission lines operating at 200kV and above. Most of these lines are 330kV lines. Western Power sometimes also obtains easements for 132 kV transmission lines.
>
> Generally, Western Power has no formal easements for its thousands of kilometres of lower voltage distribution lines. Many of these lines exist on private property as permitted under statutory provisions.[165]

3.133 The Committee heard that because such easements may limit the way that landowners can use their property, the easements should be disclosed on the Certificate of Title:

> Without full disclosure of these encumbrances, there is an unfair devaluation of property through implied threat even when none exists. These should be fully disclosed at the time of issue so that they can be addressed by the owner of the land immediately.[166]

3.134 One submitter told the Committee that had he known about the implied easement for energy operator access on his property, he would have sought legal advice prior to purchase.[167]

3.135 The Committee acknowledges that an easement can limit or restrict property use. According to the Western Power website:

> If you have an easement registered on your property, there may be some restrictions on the activities you can perform or structures you can place within the easements.[168]

3.136 Although such easements can be registered on a Certificate of Title as per Part 3 of the TL Act, unlike Water Corporation easements, they typically are not. Landgate advised the

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164 Hon Dave Kelly MLA, Minister for Water, letter, 17 October 2019, p 1.

165 Submission 70 from Western Power, 31 July 2019, p 2.

166 Submission 75 from David and Gail Guthrie, 31 July 2019, p 1.

167 Submission 7 from Terrence Ealing, 18 July 2019, p 5.

168 Western Power. See: https://westernpower.com.au/safety/360-aware/industry-safety/easements/. Viewed 3 September 2020

Committee that there is currently no requirement for statutory easements to appear on the Certificate of Title to be legally effective.

3.137 However, the Western Power website states that:

> In some areas Western Power may have an easement registered on the Certificate of Title.[169]

3.138 While this may be the case in some areas, the Committee is aware that in practice, not all energy operator easements are registered on the Certificate of Title.[170]

FINDING 9

Statutory easements may be registered on Certificates of Title, but this is not always the case.

3.139 Western Power acknowledge that it is important for customers to have access to information that allows them to understand the encumbrances on their property:

> That's why we recently updated our GIS spatial mapping into Landgate layers to ensure our safety clearance zone/easements are visible to external entities via Landgate's publicly available 'Shared Location Information Platform', accessible on their website.[171]

3.140 The Committee notes that the section of the Western Power website that explains easements does not direct visitors to the Landgate website, where they may use the Shared Location Information Platform to ascertain if their property is impacted by an easement or encumbrance, and its location on the property.

RECOMMENDATION 9

The Minister for Energy direct Western Power to include a link to Landgate's Shared Location Information Platform on its website, and inform readers that geographical information system mapping will identify whether their property is impacted by a Western Power encumbrance.

Bush Fire Prone Areas

3.141 In 2015, the Department of Fire and Emergency Services implemented a series of reforms in response to the findings of 'Shared Responsibility: The Report of the Perth Hills Bushfire February 2011 Review'.[172] The reforms included the gazettal and release of the first edition of the Map of Bush Fire Prone Areas, which identified areas that are subject, or likely to be subject, to bushfire attack:

> Additional planning and building requirements may apply to new proposals within a Bush Fire Prone Area. These requirements ensure future developments within a Bush Fire Prone Area are better prepared to manage the risk of bushfire.[173]

3.142 Owners of land in Bush Fire Prone Areas will be required to obtain and comply with a Bushfire Attack Level Assessment in order to build, which will involve a level of time, effort and expense on the landowners part.

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169 ibid.

170 For example, Submission 7 from Terrence Ealing, 18 July 2019.

171 Submission 70 from Western Power, 31 July 2019, p 2.

172 Submission 54 from Department of Fire and Emergency Services, 31 July 2019, p 1.

173 ibid.

Conclusion

3.143 From planning reservations that linger for years to environmental regulations that restrict land use, there are a range of ways that the WA Government can interfere with the use and enjoyment of private property to achieve public benefit. This Chapter was not an exhaustive list of encumbrances, but highlighted a few examples that feature prominently in this Inquiry.

3.144 From one encumbrance to the next, the laws and processes in place to ensure that interests are adequately disclosed, and properly compensated for, can vary significantly. The remainder of this Report will consider where potential improvements can be made.

CHAPTER 4
The need for disclosure

Introduction

4.1 The Committee has been asked to inquire into the probity of the Torrens title system and the case for registering encumbrances that affect land, including ESAs, Bush Fire Pone Areas, and electricity easements that currently sit behind the Certificate of Title.

4.2 This Chapter will outline:

- the Torrens title system
- the perceived threat to the Torrens title system caused by the non-disclosure of interests on the Certificate of Title
- current measures aiming to address this threat
- options for improvement.

The Torrens title system

4.3 The Torrens title system is 'a system of land title under which a State-maintained register of land holdings guarantees indefeasible ownership of land'—that is, ownership that is not capable of being annulled, voided or undone.[174]

4.4 The Torrens system was first introduced in South Australia in 1857 to simplify the Deeds system that Australia inherited from England. Countries across the world have since adopted similar systems of land titling.[175] The Committee refers readers to the 2004 Inquiry for more comprehensive coverage of the history and characteristics of the Torrens title system.[176]

4.5 The TL Act implements the Torrens system in WA. The WA Land Information Authority, a statutory authority trading under the business name Landgate, administers the TL Act and oversees property ownership in WA. Landgate provide a secure land titles system, land valuation and location information including titles, property sales reports, maps and satellite imagery.[177]

4.6 According to Landgate:

> WA's Torrens regime delivers a strong, accurate, efficient and reliable land titles system, upon which financial investment and development in land, for commerce, housing and agriculture can occur with confidence. It provides certainty and security of land titles through these three key legal principles:
>
> 1. Certainty (known as indefeasibility) of registered title;
>
> 2. Guarantee of that registered title by the State Government; and

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174 Lexis Nexis, Encyclopaedic Australian Legal Dictionary. See: Torrens title. Viewed 25 September 2020.

175 Western Australia, Legislative Council, Public Administration and Finance Committee, Report 7, *The impact of State Government actions and processes on the use and enjoyment of freehold and leasehold land in Western Australia*, May 2004, p 30.

176 Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004.

177 Landgate. See: https://www0.landgate.wa.gov.au/about-us/our-story. Viewed 8 January 2020.

3. Compensation payable by the State in certain circumstances, including fraud and error.[178]

Certificate of Title

4.7 A Certificate of Title is an official land ownership record. The TL Act requires that a separate Certificate of Title be created and maintained on the Register of Lands for each parcel of land.[179] The purpose of the Register of Lands is to record property ownership in a publicly accessible way.

4.8 A limited number of other interests or encumbrances have traditionally been registered on the Certificate of Title, including mortgages and leases.[180]

4.9 The Registrar of Lands may only register on a Certificate of Title those interests that have a head of power and statutory authority under the TL Act or other relevant legislation. Examples of registerable interests include land transfers (whether by fee simple, non-payment of rates, transfer of lease etc), statutory and non-statutory restrictive covenants, mortgages, leases and carbon rights.[181] A full list of interests that may currently be registered on a Certificate of Title can be found at Appendix 7.

4.10 According to the Landgate website, the Certificate of Title provides:

- current ownership details
- volume and folio
- survey plan number and type
- document numbers for encumbrances and notifications
- whether there is a caveat against the title.[182]

4.11 Anyone can order a copy of the Certificate of Title for any property in WA through Landgate for $26.50.

Indefeasibility

4.12 A key feature of the Torrens title system is the principle of indefeasibility, or certainty, of title. This is enacted by section 63 of the TL Act, which provides that a Certificate is to be conclusive evidence of title:

> No certificate of title created and registered upon an application to bring land under this Act or upon an application to be registered as proprietor on a transmission shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate; and every certificate of title created and registered under any of the provisions herein contained shall be received in all courts of law as evidence of the particulars therein set forth or incorporated and of the entry thereof in the Register, and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in or power to

178 Submission 69 from Landgate, 31 July 2019, p 3.

179 *Transfer of Land Act* s 48(1).

180 Justine Bell, 'The Shared Land Information Platform in Western Australia: A blueprint for sustainable management of land?', *Flinders Law Journal*, 2010, vol. 12, 2, p 107.

181 Landgate, Answer to question on notice 5 asked at hearing held 19 February 2020, dated 6 March 2020, p 2.

182 Landgate. See: https://www0.landgate.wa.gov.au/titles-and-surveys/certificate-of-title. Viewed 3 September 2020.

> appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.[183]

4.13 Only 'registerable' interests will be included on a Certificate of Title. It appears that there is no neat definition of registerable interests, with Landgate struggling to provide clarity:

> **The CHAIR**: You used the term "registered interest in land". Who determines whether an interest is a registered interest or a non-registered interest?
>
> **Ms DUKES**: It is within the legal framework of the operation of the Torrens system in Western Australia. It is mainly legislative general law and some of it is made by the courts. It determines what is registrable and what is not. Essentially, it is an interest in land that would be registrable. The registrar of titles will register those things that are compliant with the legal framework of the Torrens principles and that broader legal framework.
>
> **The CHAIR**: Would you be able to provide the committee with a list of all those interests that are registered interests?
>
> **Ms DUKES**: No, it is a legal definition of interests in land but generally the types of things that you would find are changes of ownership such as transfers of land, mortgages—so financing—and leases. They are the main things that are interest in land, and subleases and things like that, so the traditional things—easements and restrictive covenants; that sort of thing. We do not have a definitive list. I do not think it would be possible to get one.
>
> **The CHAIR**: You refer to a legal definition. Can you provide the legal definition to the committee?
>
> **Ms DUKES**: No. I cannot do that because it is an open definition. It is interests in land so it depends on particular circumstances. Sometimes legislation creates new interests on land so that would be regarded as a new interest, but it is generally years of property law that we have incorporated—"we" being the state—into the Torrens system.[184]

4.14 In some cases, legislation allows for notifications about certain matters to be placed on a Certificate of Title. For example, the WAPC may place notices on the Certificate of Title regarding bushfires, hazards or other factors seriously affecting the use and enjoyment of the land.[185] As noted at paragraphs 3.136–3.138, statutory easements may be registered on a Certificate of Title, but this is not always the case.

The 'threat' to the Torrens title system?

4.15 The motion referring this Inquiry to the Committee suggests that the Torrens title system in WA may be under threat because certain encumbrances that affect land, such as ESAs, Bush Fire Prone Areas and implied easements are not registered on the Certificate of Title.

4.16 The Hon Rick Mazza MLC, who moved the motion that established this Inquiry, told the Committee:

> Land owners have a right to know what encumbrances are placed on their land that they have or are about to acquire by way of notices registered on the certificate of title so that they can make informed business decisions.[186]

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183 *Transfer of Land Act* s 63(1).

184 Susan Dukes, Commissioner of Titles, Landgate, transcript of evidence, 19 February 2020, p 5.

185 Submission 69 from Landgate, 31 July 2019, p 2.

186 Submission 60 from Hon Rick Mazza MLC, 31 July 2019, p 9.

4.17 The Committee heard that all interests, limitations, encumbrances and notifications that restrict the usage or enjoyment of the land should be registered on the Certificate of Title:

> We agree that all encumbrances should be shown on the Title. Implied easements from the Water Corporation should also be shown. If these encumbrances are to be placed on titles then, if the encumbrance affects the land value, compensation should be available.[187]

4.18 A Perth-based property settlement agent told the Committee that failure to reflect implied easements, ESAs and Bush Fire Prone Areas on the Certificate of Title undermines both the Torrens system and Landgate:

> As a Settlement agent, I find it difficult to obtain information aforementioned, therefore, what chance do you think that the general public have?[188]

4.19 Many submitters agree. For example, WAFarmers submit that any limitation on a landholders use or enjoyment of a property must be communicated to the landholder and registered in an easily accessible electronic format linked to the Torrens title:[189]

> There is no doubt that Torrens' system was constructed on firm foundations: reliability, simplicity, low cost, speed and suitability. However its ability to register all the encumbrances, interests and limitations on land usage has struggled to keep up with the wave of restrictions that commonwealth and state governments are imposing over landholders.[190]

4.20 Conversely, Landgate suggest that to include all property interests on the Certificate of Title would pose a threat to the probity of the Torrens title system by potentially undermining the principle of indefeasibility. Landgate submit that the Certificate of Title is not the appropriate mechanism for disclosing all interests in land:

> The purpose of the Torrens system of title by registration is not to record 'all' interests and factors affecting the use and enjoyment of land on the certificate of title.
>
> Entering all such factors and estates and interests onto the land Titles Register alone would not ensure they receive the protection of registration granted under the Torrens system, and would be complex and difficult to practically maintain.[191]

4.21 Furthermore, Landgate submit that the Torrens title system does not guarantee full disclosure on the Certificate of Title of everything that may possibly affect the use and enjoyment of land:

> An interest recorded on the WA land Register is only one way by which the rights and interests of owners of land can be lawfully affected.
>
> Given the potential number of interests that may apply to a parcel of land, it would be both inefficient and impractical to require all interests to appear and be maintained on the certificate of title.[192]

4.22 The Hon Stephen Dawson MLC said in the Legislative Council, during debate on the motion moving this Inquiry:

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187 Submission 10 from Western Australia Land Compensation, 23 July 2020, p 1.

188 Submission 36 from Plus Your Settlements, 30 July 2019, p 1.

189 Submission 6 from WAFarmers, 18 July 2019, p 2.

190 Submission 6 from WAFarmers, 18 July 2019, p 1.

191 Submission 69 from Landgate, 31 July 2019, p 2.

192 ibid., p 5.

> It may increase the complexity of conveyancing and require professionals to advise of the meaning and the relevance of those interests, and it could also potentially slow down the conveyancing process. It could also increase costs...[193]

4.23 The Committee notes these concerns, particularly as they relate to cost. If a person seeks to make a change on the title register, this must be done in accordance with the TL Act. The prescribed Landgate fee for lodging such a change is $178.20. Other legislation may govern this process in the case of agencies registering interests in land (for example, the *Heritage Act 2018*), but the process will follow that contained in the TL Act.[194]

4.24 The party benefitting from the change pays the cost. By way of example, the Water Corporation may lodge notifications, memorials and easements against land for a variety of reasons. Where a land owner applies for a service that does not conform with the level of service required by the Water Corporation's licence, the Water Corporation may lodge a notification of special condition on the Certificate of Title. The land owner pays the cost of lodging the notification—in this instance, the $178.20 Landgate fee and the $286.11 Water Corporation fee. However, when the Water Corporation registers an easement to protect its assets over private land, it pays the $178.50 Landgate fee.[195]

Previous inquiries

4.25 In its 2001-04 inquiry into the impact of state government actions and processes on the use and enjoyment of freehold and leasehold land in WA, the PAF Committee considered the registration of restrictions on land use.

4.26 After hearing from stakeholders who were unaware of restrictions on their property, the PAF Committee formed the view that:

> with the benefit of modern information technology, 3-D map making abilities and the Internet, it is no longer an acceptable excuse to argue that a restriction on land use could not be accurately depicted on a Certificate of Title.[196]

4.27 The then-Department of Lands Administration (DOLA) held a similar view:

> It is a fundamental part of this submission that the efficiency and integrity of the land registration system (through the Torrens system) is being eroded because many of the limitations and prohibitions affecting land and interests in land are not collected and are not centrally available for access by everyone.
>
> There is a strong need for customers and persons dealing in land in Western Australia to have one central point of contact to search all interests in land and any limitations, prohibitions and other notifications that could affect that land. It is proposed that the Torrens Register remains the central point of record for those interests currently registered and that other unregistered interests be easily accessible, to allow a clear picture to be developed for anyone requiring the information.[197]

4.28 Given that DOLA had identified over 180 interests which were not recorded on the Certificate of Title, it suggested that to register all restrictions affecting a parcel of land on the

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193 Hon Stephen Dawson MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4018.

194 Grahame Gammie, Chief Executive Officer, Landgate, email, 31 July 2020.

195 Pat Donovan, Chief Executive Officer, Water Corporation, email, 6 August 2020.

196 Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 526.

197 ibid., pp 524-5.

Certificate of Tittle would be 'administratively difficult and cost prohibitive'.[198] However, DOLA agreed that an accessible 'one stop shop' mechanism for finding this type of information must be developed.

4.29 The PAF Committee made three main recommendations in relation to registering restrictions and other such interests:

- That, in the short term, the Department of Land Information continue to implement its aim of establishing itself as a "one stop shop" database of all interests affecting land as an urgent priority (recommendation 35).
- That, for the long term, the Department of Land Information introduce, as soon as practical, an electronic three dimensional Certificate of Title which records all interests affecting the land described on the Certificate of Title (recommendation 36).
- That, the Government introduce, after a two year phase in period, legislative requirements that:

  (a) any policy, strategy, plan or other document impacting on administrative decision making with respect to land use that affects one or more specific certificates of title, is to be of no effect unless it is registered with the Department of Land Administration; and –

  (b) all policies, strategies, plans or other documents impacting on administrative decision-making with respect to land use that are specific to a Certificate of Title are to be, upon registration with the Department of Land Information, cross-referenced with the relevant Certificate of Title (recommendation 37).[199]

4.30 The WA Government supported recommendation 35, noting that DOLA was developing a land information platform to integrate and provide access to land information from across government:

> The system will enable interested parties to source a wide range of government land information including key details about rights, restrictions and obligations associated with a land parcel or certificate of title.[200]

4.31 However, the WA Government did not support recommendation 36 or 37. Recommendation 36 related to expanding the range of interests recorded on the Certificate of Title. DOLA had identified over 180 interests in land that were not registered on Certificates of Title at the time, including native title claims, planning and conservation policies, heritage listing and contaminated sites. To register all of these on Certificates of Title would be 'administratively difficult and cost prohibitive'. Furthermore:

> A certificate of title has the benefit of a State guarantee as to its accuracy. With the recording of all "possible" interests affecting land on the certificate of title, it would not be feasible to extend this guarantee to all items and this may have the effect of eroding the integrity and indefeasibility of the certificate of title.[201]

4.32 The Minister for Lands told the Committee in 2019 that this position remained unchanged.[202]

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198 ibid., p 526.

199 ibid., p 530.

200 Government of Western Australia, *Response of the Western Australian Government to the Western Australian Standing Committee on Public Administration and Finance*, 2004, p 29.

201 ibid.

202 Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 9.

4.33 Recommendation 37 proposed a legislative requirement that all policies, strategies and plans affecting land use be registered. The WA Government did not support the recommendation on the basis that it was impractical and cost prohibitive. The Minister for Lands maintained that position in 2019:

> There are an enormous number of Commonwealth, State and Local Government policies, strategies, plans and other documents that may impact on administrative decision-making with respect to land use.
>
> It would be impractical to record all of these on the certificate of title and impractical and very difficult to keep the information current and reliable. In addition, unlike a certificate of title, none of this information can nor should be guaranteed by the State.
>
> Previous estimates place the cost of establishing such a system in the vicinity of $50 million ($68 million adjusted for inflation) with operating costs in the vicinity of $10 million ($13.7 million adjusted for inflation) per annum. These costs would ultimately have to be passed onto consumers (in the main, landowners) and would make obtaining or amending a certificate of title cost prohibitive.
>
> As noted in Recommendation 35, individuals can obtain information on interests affecting a parcel of land through the SLIP and a PIR. However, the certificate of title is the primary reference point. This approach is considered a more practical and cost-effective means of addressing the main concerns that this recommendation seeks to address and resolve.[203]

4.34 For the full recommendations of the PAF Committee, the corresponding government responses and implementation updates, see Appendix 2.

Shared Land Information Platform

4.35 Recommendation 35 has since been implemented.[204] The WA Government began developing the Shared Land Information Platform (SLIP) in 2004, aiming to link and open access to location information held by a range of government agencies.[205] Rather than assembling all relevant data in one place, the SLIP draws on and provides access to that data, which remains in the custody of the relevant government agency.[206] By 2012, the SLIP included access to over 400 datasets.

4.36 Members of the public may search their address free of charge on the Landgate website using the interactive mapping tool. Interactive mapping displays information such as boundaries, local government area and sales history. Landgate also offers nine products for purchase with more detailed property information (see Table 1).

Table 1. *Property documents available for purchase*

Document	Contains	Price
Certificate of Title	Owner details, lodged or registered interests or claims (encumbrances) against that ownership.	$26.20
Plan	Graphical depiction of land parcels such as lots, roads, easements and other interests.	$26.20

203 Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 9.

204 ibid., p 8.

205 The Government of Western Australia, *A Location Information Strategy for Western Australia*, November 2012, p 32.

206 Justine Bell, 'The Shared Land Information Platform in Western Australia: A blueprint for sustainable management of land?', *Flinders Law Journal*, 2010, vol. 12, 2, p 119.

Document	Contains	Price
Property Interest Report	Comprehensive property report that identifies interests not shown on the Certificate of Title.	$60.00
Single Property Sales Report	Sales history for an individual property including lot size, beds, baths, survey details and build year.	$6.50
Suburb Sales Report	Sales history of any suburb or local government area.	$36.40
Gross Rental Value Extract	Last three gross rental values, title and property details and past, future and current valuation dates.	$8.50
Unimproved Land Value Extract	Last three unimproved land values, title and property details and past, future and current valuation dates.	$8.50
Title Watch	Online title monitoring services that sends automatic email notifications when an action is detected on a Certificate of Title. 12-month subscription that starts immediately.	$31.50
Aerial Photography	Full aerial view of a single property, street or suburb. Historic photography shows changes to Perth suburbs since 1948.	$28.24

[Source: Landgate. See: https://www0.landgate.wa.gov.au/property-reports/single-address-report/property-interest-reports. Viewed 25 September 2020.]

Property Interest Report

4.37 SLIP has enabled Landgate to create and offer a Property Interest Report (PIR) for any given parcel of land. PIRs have been available since 2007.[207] The PIR serves as a guide to interests that relate to this property not recorded on the Certificate of Title, and includes:

- information about the property, including aerial photography and other details
- a summary of interests that affect the property
- a summary of interests that do not affect this property
- details of interests that affect the property. [208]

4.38 Landgate provided the Committee with a sample PIR, which is also available on the Landgate website.[209] At a cost of $60, Landgate submit that the PIR is an appropriate, effective and inexpensive means by which any member of the public can access detailed information relevant to a parcel of land.[210] Since 2013, Landgate has only received two complaints about the accuracy of PIRs.[211] A list of interests included in a PIR can be found at Appendix 8.

4.39 In 2004, DOLA identified 'at least 180 interests that affect land'.[212] Identifying this list of interests took approximately 18 months. Landgate has not kept a record of all subsequent legislation, regulation and policy changes that create new interests, and was not able to

207 Graeme Gammie, Chief Executive Officer, Landgate, letter, 6 March 2020, p 2.

208 Submission 69 from Landgate, 31 July 2019, p 8.

209 Submission 60 from Landgate, 31 July 2019.

210 ibid., p 2.

211 Landgate, Answer to question on notice 8 asked at hearing held 19 February 2020, dated 6 March 2020, p 4.

212 Government of Western Australia, 'Response of the Western Australian Government to the Western Australian Standing Committee on Public Administration and Finance', 2004, p 29.

provide the Committee with an authoritative current number of Government interests in land.[213]

4.40 The PIR currently covers 91 interests in land, and is built to accommodate further interests that may exist in the future.[214] Although Landgate cannot confirm the total number of interests, the Committee assumes it is more than 91. Landgate continuously consult across the WA Government to identify and add new interests—for example, 12 Water Corporation interests were added in November 2019.[215]

4.41 A full list of interests currently available in the PIR can be found at Appendix 7. These interests include:

- Bush Fire Prone Areas
- Western Power Infrastructure
- Waterways Conservation Act Management Areas
- Water Corporation infrastructure
- Environmental Protection Policies
- possible road widening
- future state roads
- threatened flora and fauna
- wetlands/Ramsar Wetlands
- Heritage Council Conservation Order
- Region/Local Planning Schemes
- Groundwater Salinity
- Bush Forever Areas
- Native Vegetation
- Aboriginal Heritage Places.

4.42 Landgate is not able to record on the SLIP all privately created interests in land, such as private agreements and unregistered easements.[216]

213 Graeme Gammie, Chief Executive Officer, Landgate, email, 30 July 2020.

214 Landgate, *Interests currently available in Property Interest Report*, July 2020.

215 Landgate, Answer to question on notice 4 asked at hearing held 19 February 2020, dated 6 March 2020, p 2.

216 Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2020, p 7.

Figure 1. *Extract from sample Property Interest Report*

4. Details of interests that AFFECT this property

21

Legislation governing the interest:
Water Agencies (Powers) Act 1984
Water Agencies (Water Use) By-laws 2010

Water Corporation Infrastructure (above and below ground)
Responsible agency:
Water Corporation

Definition of Interest:
The Water Corporation operates vast water, sewerage and drainage pipe networks throughout WA. At any given location there may be various infrastructure in the ground of different sizes, depths, alignments and materials belonging to the Water Corporation.

Affect of Interest:
The selected property **is impacted** by Water Corporation pipes or access chambers. No construction is permitted in the proximity of this infrastructure without the consent of the Water Corporation and it should be noted that 24 hour access may be required for maintenance purposes in certain circumstances.

Sewer Infrastructure:
Infrastructure Type - Sewer Main

Water and sewer services located outside the property boundaries (road reserves) are not included in this report, as this report only includes interests inside the property boundaries. However they can be viewed here, www.mywater.com.au/css-web-external/pub/propertySearch.

Please be aware that it is a **legislative requirement** to notify the Water Corporation of any proposed construction, alteration or demolition of a building in areas where the Corporation is the licensed provider of water, wastewater or drainage services. A person is not permitted to construct, alter or demolish a building without the prior authorisation of the Water Corporation.

For more information contact our office on 13 13 95, or see www.watercorporation.com.au/moving-buying-and-building/buying-or-selling.

[Source: Submission 60 from Landgate, 31 July 2019, p 12.]

4.43 Prior to the SLIP and its associated products, prospective purchasers and other interested individuals may have been required to make upwards of 20 inquiries with a range of government agencies. In theory, the availability of the SLIP should reduce this number significantly. The result is lower transaction costs for landholders and prospective purchasers.

4.44 Associate Law Lecturer Justine Bell argued in 2010 that in this regard, WA was ahead of most other Australian jurisdictions.[217] Today, most Australian jurisdictions have various spatial systems in place allowing people to find planning information relating to their land. Victoria and South Australia now also offer detailed property reports, though the Committee notes a South Australian property report costs $296, significantly more than a PIR in WA.[218]

4.45 When experimenting with the SLIP from Perth, the Committee found the maps to be slow to load and often difficult to understand. The Committee notes that this complex system may present access barriers to people living in regional or remote areas with slower internet speeds, and that many people would not be familiar with using this type of system.

FINDING 10

Landgate's Property Interest Reports contain information about a wide range of interests affecting property that are not listed on the Certificate of Title.

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217 Justine Bell, 'The Shared Land Information Platform in Western Australia: A blueprint for sustainable management of land?', *Flinders Law Journal*, 2010, vol. 12, 2, p 105. .

218 South Australian Integrated Land Information System, *SAILIS price list 2018-19*, 2018.

FINDING 11

Property Interest Reports cannot be relied on to disclose all interests affecting land.

An appropriate mechanism for disclosing interests?

4.46 Despite the ability to procure a PIR, many submitters to this Inquiry remain concerned that the failure of the Certificate of Title to disclose all interests that affect land is a threat to the Torrens title system.

4.47 When speaking to his motion on this topic, the Hon Rick Mazza MLC stated that prospective purchasers should not be expected to look further than the Certificate of Title for information about restrictions on their land use:

> People should not have to seek out information themselves that could have implications on their land use. Many matters affecting land are now behind title and the information needs to be sought out separately from a title search, which undermines the integrity of the Torrens title system.[219]

4.48 However, Landgate maintain that the PIR is the most appropriate mechanism for disclosing most interests and restrictions:

> If all other interests affecting land appeared on the certificate of title, it would clutter the title with information and make the certificates of title more difficult for people to understand. The PIR complements a title search and provides a richness of information and detail on interests that affect the land, and interests that do not apply to the land, that could not be practically replicated on a certificate of title.
>
> Landgate encourages anyone looking to purchase a property to obtain a PIR to help them fully understand what other interests may affect their future use of the land. It is equally useful for current owners to be up to date if they are considering any changes to their property.
>
> The complexity and expense of seeking to integrate all this information into certificates of title is contrary to the essence of the underlying principles of WA's Torrens titles system of simplicity, efficiency and cost effectiveness.[220]

4.49 The Minister for Environment expressed a similar view:

> There never was an intention for such rights and interests affecting land and land use to be shown on the certificates of title, nor to be guaranteed by the government. There is a difference between legal interests in land and factors affecting the use and enjoyment of land.[221]

4.50 The Committee notes that the Minister for Environment did not elaborate on what those differences may be.

4.51 While cost, practicality and the potential for increased complexity are all factors, the inability to guarantee the interests included in a PIR appears to be a key reason:

> The state is not willing—in fact, it is not able—to guarantee such a large category of other interests.[222]

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219 Hon Rick Mazza MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4008.

220 Submission 69 from Landgate, 31 July 2019, p 5.

221 Hon Stephen Dawson MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4018.

222 ibid., p 4018.

4.52 Information contained in a Certificate of Title is indefeasible, or guaranteed. Indefeasibility does not, however, attach to a PIR. Murdoch University School of Law lecturer Lorraine Finlay suggests that we should consider why the Government is unable to assign such a guarantee when it has created the restrictions in question in the first place:

> 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.[223]

FINDING 12

The Western Australian Government is unwilling and unable to guarantee the information contained in a Property Interest Report.

4.53 Because the system is dependent on individual government agencies as data custodians, Landgate acknowledge that the PIR is not appropriate as a single point of reference:

> **Mr GAMMIE**: To make the property interest report the sole place that people go to is probably not practical at this point in time. What the property interest report endeavours to do, as I mentioned before, is provide that simple point of entry for people to find out what relates to their particular title. It is a very dynamic system.
>
> **The CHAIR**: If they identify that there is an interest that is not on their certificate of title but is in the property interest report, do they then need to go to that relevant department to get more information?
>
> **Mr HOFMANN**: Correct. The report has a fantastic interest dictionary, so if you click on the interest in question, it gives you a formal description of how it works, who is the responsible agency, the legislation that is part of where that interest comes from and contact details as well. When you get the report, it shows that same level of information.[224]

FINDING 13

Landgate's Shared Land Information Platform and Property Interest Reports are the Western Australian Government's preferred tools for disclosing a range of interests in land.

4.54 The idea that a statutory easement can be registered on a Certificate of Title, but an ESA declaration cannot, seems contrary. The Committee is not convinced by the WA Government's position that interests listed in the PIR are inappropriate for listing on a Certificate of Title.

RECOMMENDATION 10

The Minister for Lands direct Landgate to inquire into and report on:

1. measures that need to be implemented and the resources required for the Western Australian Government to guarantee information contained in a Property Interest Report and on the Shared Land Information Platform is accurate and complete

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223 Submission 47 from Lorraine Finlay, 31 July 2019, p 5.

224 Graeme Gammie, Chief Executive and Roberto Hofmann, Account Manager, Natural Resource Management and Critical Infrastructure, Landgate, transcript of evidence, 19 February 2020, p 7.

2. the implications, including financial costs, for Western Australian Government agencies and landowners if the Western Australian Government were to require all government-imposed interests affecting land to be registered on the Certificate of Title.

The Minister for Lands table the report in both Houses of Parliament by June 2023.

Issues with the Property Interest Report

4.55 According to Lorraine Finlay, while the PIR is a positive step forward, 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.[225]

4.56 PIRs cover many, but not all, interests and encumbrances that may affect the use and enjoyment of the land. In the Committee's view, this affects their level of utility.

4.57 Because the SLIP is a state-centric system, it does not often reflect interests or encumbrances imposed by the federal government. The Committee queried whether members of the public would be aware of this:

> **The CHAIR:** When someone looks up a property interest report on the Landgate website, will it, in that section of other information, actually inform the searcher that they should look to a commonwealth website for information about any commonwealth interests in relation to their property?
>
> **Mr HOFMANN:** Not that I am aware of.
>
> **The CHAIR:** Do you think that it would be a good idea to do that?
>
> **Mr GAMMIE:** It is certainly something we can take on board.[226]

4.58 The Landgate website states that a PIR provides 'all known property interests in one report'.[227] The Committee considers that this could be misleading. Nothing on the PIR webpage indicates that the PIR may not reflect interests imposed by other levels of government, or all WA Government interests affecting land.

RECOMMENDATION 11

Landgate include a disclaimer on its website about the types of interests that are not included in Property Interest Reports, such as those administered by the Commonwealth Government and local governments, and some Western Australian Government interests affecting land, and where people can find information about such interests.

RECOMMENDATION 12

Landgate include a disclaimer on Property Interest Reports advising that not all interests affecting land are in included in the Reports or the Shared Land Information Platform.

4.59 Even when a PIR and Certificate of Title are purchased together, an individual could not be confident that other interests do not exist. While Landgate is coming closer to being a 'one-

225 Submission 47 from Lorraine Finlay, 31 July 2019, p 4.

226 Graeme Gammie, Chief Executive and Roberto Hofmann, Account Manager, Natural Resource Management and Critical Infrastructure, Landgate, transcript of evidence, 19 February 2020, p 8-9.

227 Landgate. See: https://www0.landgate.wa.gov.au/property-reports/single-address-report/property-interest-reports. Viewed 3 September 2020.

stop shop', the Committee is of the view that improvements could be made. Such improvements largely depend on other government agencies, as the data custodians:

> The dependency is in terms of Landgate becoming aware, as an agency, and letting us know in the first instance. It then needs to be mapped and added as a layer into the SLIP system and then attached to the property interest report.[228]

FINDING 14

Only 91 Western Australian Government-imposed interests or encumbrances affecting land are reflected in Property Interest Reports.

4.60 The SLIP is a dynamic system, and Landgate told the Committee that it is continuously identifying and adding new interests:

> In fact, that number has changed since we made our submission. We are now up to about 89 interests, and they are covered in the property interest report. It is quite a dynamic area. We have been working across the sector for some years to create the property interest report and there are 89 interests at present. It is growing as Landgate, through its consultation across the sector, which is continuous, uncovers new interests.[229]

RECOMMENDATION 13

Landgate continue cross-sector consultation to ensure data relating to all Western Australian Government interests affecting land is included in the Shared Land Information Platform.

RECOMMENDATION 14

The Premier issue a Circular instructing Western Australian Government departments and agencies responsible for interests affecting land to share relevant data with Landgate.

4.61 Some other interests may be reflected on the PIR, but in a way that may be confusing or unclear to members of the public. The majority of complaints that the Committee received in this regard were about ESAs and energy operator easements, both of which have the potential to affect use and enjoyment of land (as outlined in Chapter 3).

4.62 For example, in relation to energy operator easements:

> Data sets from Western Power, Horizon Power and Water Corp are available through SLIP, through data.wa as a catch net. Some of those are used in a property interest report; some of them are not.[230]

4.63 One submitter who purchased a PIR, but later found an undisclosed energy operator easement to exist on the property, expressed his frustration:

> The Property Report instigated by Landgate showed no sign of it in the report that we paid for and their excuse is that they cannot force any Government Agency or Corporation to reveal this information and neither did Western Power wish to make admission that it existed. So a purchaser cannot be assured under what

228 Graeme Gammie, Chief Executive, Landgate, transcript of evidence, 19 February 2020, p 6.

229 ibid., p 2.

230 Roberto Hofmann, Account Manager, Natural Resource Management and Critical Infrastructure, Landgate, transcript of evidence, 19 February 2020, p 10.

conditions and encumbrance exist on this land to make a fully informed decision of whether to buy or not.[231]

RECOMMENDATION 15

The Minister for Energy instruct energy operators to work with Landgate to ensure that energy operator easements are reflected in a clear way on Property Interest Reports and in the Shared Land Information Platform maps.

4.64 Because a number of submitters/witnesses struggled to locate an ESA on their property through SLIP, the Committee took the opportunity to test the process during a private hearing with Landgate. The Committee used the address of an agricultural property, which it knew to have an ESA. In relation to this address, the Committee purchased every relevant document from the Landgate website, at a total cost of $153.60.

4.65 The Committee notes that although Landgate advised that the purchaser would usually receive the documents by email in 10 minutes, in this case it took approximately one hour.[232] This was in Perth, with high-speed internet.

4.66 While 'Native Vegetation' is an interest listed on the PIR, an ESA is not. Presumably, a landowner or prospective purchaser who saw 'Native Vegetation' on their PIR would need to then do their own search on the DWER website to ascertain if an ESA is present.

4.67 DWER advised the Committee that it may be misleading to include 'ESA' in the title of the interest, as not all Native Vegetation is on an ESA. Including ESAs as an interest in the PIR will likely involve 'technical issues, costs and stakeholder engagement issues'.[233] The Committee finds this explanation unsatisfactory.

Figure 2. *Extract from Property Interest Report*

Native Vegetation

Responsible agency:
Department of Primary Industries and Regional Development

Definition of Interest:
Clearing of native vegetation is prohibited unless a clearing permit is granted by the Department of Primary Industries and Regional Development (DPIRD) or the clearing is for an exempt purpose.

Affect of Interest:
The selected property or area of land **falls within** an area known to have native vegetation.

All clearing of native vegetation requires a permit unless it is exempt. Exemptions apply for day-to-day activities that have a low environmental impact. Exemptions do not apply in areas classified as Environmentally Sensitive Areas.

[Source: Landgate, extract of Property Interest Report for property in Gingin, February 2020, p 15.]

4.68 The agency displayed in Figure 2 as being responsible for Native Vegetation is Department of Primary Industries and Regional Development (DPIRD). In response to a query from the Committee, DWER is liaising with Landgate to update incorrect text in the PIR.[234]

231 Submission 7 from Terrence Ealing, 18 July 2020, p 5.

232 Roberto Hofmann, Account Manager, Natural Resource Management and Critical Infrastructure, Landgate, transcript of evidence, 19 February 2020, p 3.

233 Michael Rowe, Director General, Department of Water and Environmental Regulation, letter, 2 April 2020, p 1.

234 ibid., p 2.

4.69 After some issues loading the maps, the Committee was able to locate the ESA on the property in question using the 'Locate' online mapping function through SLIP. However, this required selecting two drop-down options from a list of layers.

4.70 In the Committee's view, an individual would need an understanding of what an ESA is and a level of computer literacy to locate an ESA in this manner. Timothy Houweling, Director of Cornerstone Legal, told the Committee that the system is becoming more accessible over time:

> **Mr HOUWELING:** They pretty much put everything on there now. You can also link it up with SLIP data through Google Earth, so you can put different layers of data, bushfire-prone areas —
>
> **The CHAIR:** But seriously, how many people have that sort of IT skill to be able to do that?
>
> **Mr HOUWELING:** It is more and more available; there is no doubt.[235]

4.71 On 25 June 2020, with reference to this Inquiry, the Minister for Environment announced that ESAs would soon be added to PIRs. ESAs became the 91st interest to be included on a PIR in July 2020. As the Committee had planned to make a recommendation in this regard, the Committee supports this development.

4.72 One of the interests listed on a PIR is Environmental Protection Policies. The Committee was concerned that most members of the public might not be aware of exactly what this means. DWER advised that Environmental Protection Policies are those policies developed under Part 3 of the EP Act and approved by the Minister for Environment, including:

- Environmental Protection (Western Swamp Tortoise Habitat) Policy 2011
- Environmental Protection Goldfields Residential Areas Sulfur Dioxide Policy and Regulations 2003
- Environmental Protection (Kwinana) (Atmospheric Wastes) Policy 1999 and Regulations 1992
- Environmental Protection Peel Inlet – Harvey Estuary Policy 1992.[236]

4.73 In the particular example the Committee considered, 'Environmental Protection Policies' was listed as an interest that did not affect the property. The Committee is of the view that this could easily be misinterpreted by members of the public as meaning no environmental restrictions apply. In this case, of course, the property is in fact an ESA. DWER advised that:

> The Department understand that there may be technical constraints in identifying how these apply to individual properties, and recommends that the Standing Committee on Public Administration seeks advice from Landgate.[237]

RECOMMENDATION 16

The Minister for Environment direct the Environmental Protection Authority, in collaboration with Landgate, to list each individual Environmental Protection Policy in Property Interest Reports.

4.74 Most people are familiar with the concept of a Certificate of Title. A second issue is whether the average person is aware that PIRs act as another source of information about property interests. Landgate have promoted its availability:

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235 Timothy Houweling, Director, Cornerstone Legal, transcript of evidence, 18 November 2019, p 11.

236 Michael Rowe, Director General, Department of Water and Environmental Regulation, letter, 2 April 2020, p 2.

237 ibid.

> Landgate has previously run advertising campaigns—radio and newspaper et cetera—to raise awareness in the early days. Primarily we rely on the online domain to promote the PIR.[238]

4.75 As at 22 February 2020, a total of 68 879 reports have been produced, including:

- 20 003 individual interest inquiries
- 48 876 consolidated PIRs (available from 2013).[239]

4.76 Statistics on the Landgate website suggest that approximately 24 000 properties are sold in WA per year, meaning that since 2013 PIRs have been produced for 33 percent of sales.[240]

4.77 The Committee is satisfied that a PIR is easy to find—the Landgate website offers users the option to purchase a PIR when searching an address from the landing page, or through SLIP maps.

4.78 While the Committee is aware that not all members of the public will be aware of PIRs, it is likely that most real estate agents and settlement agents are. While some real estates may encourage prospective buyers to purchase PIRs as a matter of course, this likely depends on the individual agent:

> Some real estate agents, for example, saw it as a fantastic part of due diligence to cover themselves with regard to disclosing information to prospective buyers or sellers. Same again, some of the real estate agents felt it was detrimental to their ability to sell a property because it means they had to look into more information to find out that there are 16 interests against this property and they need to go to 16 different departments and work out what they are and understand them in order to disclose more information to a prospective buyer or seller.[241]

4.79 The real estate and settlement agencies are regulated by the *Real Estate and Business Agents Act 1978* and the *Settlement Agents Act 1981*, which are administered by the Commissioner for Consumer Protection:

> Under these Acts, real estate agents and settlement agents have (largely) unique Codes of Conduct; however there are some overlaps mostly in the areas of the application of an appropriate level of skill, care and diligence as well as keeping their related clients fully informed on matters that affect or have the potential to affect their interests in relation to the sale and purchasing of real estate.[242]

4.80 Rule 24 of the Real Estate and Business Agents and Sales Representatives Code of Conduct 2016 requires that real estate agents and sales representatives must make reasonable efforts to ascertain, verify and communicate material facts in relation to a sale:

> **24. Material facts**
>
> (1) Prior to the execution by a client of any contract relating to the sale or lease of any real estate or business the agent or sales representative must make all reasonable efforts to ascertain or verify all facts material to the transaction (the material facts) that a prudent agent or sales representative would ascertain or verify.

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238 Graeme Gammie, Chief Executive, Landgate, transcript of evidence, 19 February 2020, p 4.

239 Landgate, Answer to question on notice 1 asked at hearing held 19 February 2020, dated 6 March 2020, p 1.

240 Landgate. See: https://www0.landgate.wa.gov.au/property-reports/market-trends/property-statistics/test-house-price-statistics. Viewed 3 September 2020.

241 Roberto Hofmann, Account Manager, Natural Resource Management and Critical Infrastructure, Landgate, transcript of evidence, 19 February 2020, p 3.

242 Submission 63 from Department of Mines, Industry Regulation and Safety, 31 July 2019, p 2.

(2) An agent or sales representative must promptly communicate a material fact to any person who may be affected by the material fact and appears to be unaware of it.

4.81 According to the Hon Rick Mazza MLC, the fact that there is no specific definition of 'material fact' in the Code of Conduct is a problem, particularly in relation to identifying Bush Fire Prone Areas.[243]

4.82 However, the Department of Mines, Industry Regulation and Safety advised the Committee that:

> The Commissioner has advised the real estate industry that while there is no specific definition of what constitutes a material fact, it should include the information a reasonable person would likely use when deciding whether to proceed with a particular property transaction. It follows that a reasonable person would consider the disclosure of whether a property is in a designated bushfire prone area to be a material fact, given the development implications and potential costs to them.
>
> Consumer Protection is of the view that the code requirements already establish that an agent should check the Map of Bushfire Prone Areas, the certificate of title and also consider providing prospective buyers with a Property Interest Report as means of disclosing a range of potentially relevant issues. This includes whether a property is in a designated bushfire prone area, and what that might mean when building or developing that property. Prospective buyers can also purchase a Property Interest Report from Landgate or ask the selling agent to do so.[244]

FINDING 15

The Real Estate and Business Agents and Sales Representatives Code of Conduct requires that real estate agents and sales representatives ascertain, verify and communicate all material facts to a transaction, but are not specifically required to provide prospective buyers with a Property Interest Report.

RECOMMENDATION 17

The Western Australian Government amend the Real Estate and Business Agents and Sales Representatives Code of Conduct to require that real estate agents inform clients of the option to purchase a Property Interest Report in relation to a real estate transaction.

4.83 A third issue is currency. For the price of $31.50, individuals can sign up for TitleWatch, an annual subscription service that notifies users when there has been a change to a Certificate of Title. Presently, 430 people have TitleWatch subscriptions.[245]

4.84 However, there is no such option for PIRs, which are fixed in time. Lorraine Finlay told the Committee that for this reason, PIRs are more useful to prospective buyers than current 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

[243] Submission 60 from Hon Rick Mazza MLC, p 3.

[244] Submission 63 from Department of Mines, Industry Regulation and Safety, 31 July 2019, p 4.

[245] Landgate, Answer to question on notice 6 asked at hearing held 19 February 2020, dated 6 March 2020, p 3.

> 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.[246]

FINDING 16

The information contained in Property Interest Reports are fixed in time, and individuals are not notified of future changes.

4.85 The Committee asked Landgate whether a service similar to TitleWatch could be offered in relation to PIRs. Such a service is possible from an information technology perspective, but:

> Consideration would need to be given to the process requirements for Landgate and contributing agencies, likely market demand and the cost of implementing and maintaining such a service.[247]

RECOMMENDATION 18

The Western Australian Government establish a service similar to TitleWatch to inform clients of updates to their Property Interest Report.

Conclusion

4.86 This Chapter has outlined the mechanisms for disclosing interests affecting land, specifically Certificates of Title and PIRs. The Committee notes that the WA Government has taken positive steps since 2004 to disclose interests. In particular, Landgate's SLIP and PIRs are useful tools for prospective buyers hoping to find out how their land use may be affected by government issued encumbrances.

4.87 The Committee accepts that the purpose of the Torrens land title system is to provide certainty of ownership. However, failure to disclose relevant interests by any mechanism can threaten private property rights by undermining purchasing confidence. The Committee is therefore also of the view that the Torrens land title system can, and should, disclose all interests affecting property, as opposed to only the select list of interests currently included on a Certificate of Title.

4.88 Evidence to the Committee showed clear support for all interests and encumbrances affecting land to be displayed on a Certificate of Title.[248] Landowners feel that a comprehensive Certificate of Title would be the simplest and most transparent mechanism, and seek the accuracy guarantee that would attach. While the Committee agrees with this view, it also notes evidence from Landgate and the Hon Stephen Dawson MLC about the cost and complexity for landowners and conveyancers of adding additional interests to a Certificate of Title.

4.89 For these reasons, the Committee's recommendations in this Chapter have aimed to both:

- ensure the utility and accuracy of the PIR and SLIP, as tools for disclosing a broad range of interests in land
- investigate the potential viability of including all interests affecting land on a Certificate off Title by assessing any potential negative consequences for landowners.

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246 Submission 47 from Lorraine Finlay, 31 July 2019, p 4.

247 Landgate, Answer to question on notice 7 asked at hearing held 19 February 2020, dated 6 March 2020, p 4.

248 For example, Submission 6 from WAFarmers. 18 July 2019; Submission 75 from Gail and David Guthrie, 31 July 2019 and Submission 36 from Plus Your Settlements, 30 July 2019.

CHAPTER 5
Compensation

Introduction

5.1 Term of reference (d) required the Committee to inquire into the payment of fair and reasonable compensation where the value of a property is diminished by a government encumbrance (such as an ESA) or resumption (such as compulsory acquisition) to derive public benefit.

5.2 As outlined in Chapter 3, there are a number of ways that government actions can affect the use or value of private property. In some cases, landowners may be eligible for compensation under the LA Act or the *Planning and Development Act 2005* (PD Act).

5.3 This Chapter will outline the following concepts, which were raised through debate preceding and submissions to this Inquiry:

- injurious affection
- compensation under the LA Act, including recommendations from past inquiries and proposed reforms
- compensation under the PD Act, including recommendations from past inquiries and proposed reforms
- where compensation for injurious affection is not available, including for land affected by an ESA and utility easements
- 'just terms' compensation under the Australian constitution.

5.4 Due to the specificity of the subject matter, compensation in relation to water and fishing licences will be dealt with separately at Chapters 6, 7 and 8.

What the Committee heard

5.5 The Committee heard significant support for the payment of fair and reasonable compensation to landowners where the value of a property is diminished by a government encumbrance:[249]

> In all cases where public benefits are created by government legislation or policy decisions at the expense of private benefits, state and/or local governments as appropriate should pay compensation to the owners of private land for lost earnings arising from the decisions of government.[250]

5.6 In his submission to this Inquiry, the Hon Rick Mazza MLC said:

> Governments need to take responsibility for their policies and provide adequate compensation to property owners who have had their property rights diminished.[251]

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249 For example, see Submission 29 from Bernie Masters, 29 July 2019; Submission 23 from Wayne Gowland, 28 July 2019; Submission 47 from Lorraine Finlay, 31 July 2019 and Submission 60 from Hon Rick Mazza MLC, 31 July 2019.

250 Submission 29 from Bernie Masters, 29 July 2019, p 2.

251 Submission 60 from Hon Rick Mazza MLC, 31 July 2019, p 9.

5.7 For the most part, submitters did not dispute that there are situations in which the WA Government can rightfully acquire interests in land:

> As a rural Member I continued to receive complaints from constituents on many issues, particularly clearing and the loss of property rights when public infrastructure, such as Gas pipelines and large electric power lines were installed. Land owners generally accepted the need for the installations but believed they could often be put on Crown land and if not the land owner should receive compensation from the community, as the structure was for the benefit of the community.[252]

5.8 Such acquisition of rights should be accompanied by compensation. It was submitted that in relation to certain encumbrances, current compensation frameworks are inadequate:

> 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.[253]

5.9 Dr Garry Middle, a planning academic at Curtin University, told the Committee that where compensation is paid, the converse should also apply:

> Where governments construct infrastructure and private benefits follows – for example building railway lines or upgrading areas like Scarborough and property values of the surrounding areas increases – then some of this benefit should flow back to governments and the taxpayers who funded these projects.[254]

Injurious affection

What is injurious affection?

5.10 The term 'injurious affection' is commonly used in land acquisition legislation to refer to damage suffered by landowners in respect of land retained, and particularly its depreciation in value:[255]

> It is a neat, expressive way of describing the adverse effect of the activities of the resuming authority upon a dispossessed owner's land.[256]

5.11 For example, section 173 of the PD Act provides:

> Subject to this Part any person whose land is injuriously affected by the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority.[257]

5.12 This is not to say that the damage has resulted from a legal 'wrong'—according to Baron Bramwell in *McCarthy v Metropolitan Board of Works*:

> What is done is rightful under the powers of the Act. It means hurtfully or "damnously" affected. As when we say of a man that fell and injured his leg. We do not mean that his leg was wronged, but that it was hurt. We mean he fell, and his leg was injured, that is to say, hurtfully affected.

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252 Submission 11 from Gingin Private Property Rights Group, 24 July 2019, p 2.

253 Submission 47 from Lorraine Finlay, 31 July 2020, p 5.

254 Submission 20 from Dr Garry Middle, 26 July 2019, p 3.

255 D Brown. 'The differing faces of injurious affection', *Western Australian Law Review*, 1972, vol. 10, 4, p 336.

256 *Marshall v Director General, Department of Transport* [2001] HCA 37, p 19.

257 *Planning and Development Act 2005* s 173(1).

> At the same time, I am clearly of opinion that to entitle the parties interested to compensation, the injury or hurt must be such as a could not lawfully be inflicted except by the powers of the Act.[258]

5.13 There are two distinct, but related, applications of 'injurious affection' to land under WA law:

- the compulsory acquisition of an interest in land under the LA Act (although the term 'injurious affection' is not used in this Act)
- in the context of planning law under the PD Act.[259]

5.14 The WA Government explained in 2004:

> the term "injurious affection" has been adopted in WA (and it would appear has now superseded the taking statute) to represent the concept of a diminution of value of land due to certain restrictions on the use of land arising out of the imposition of town planning rules or regulations or the compulsory taking of land.[260]

5.15 This Chapter deals with both applications separately.[261]

Land Administration Act

5.16 The LA Act is the primary WA statute governing dealings in Crown land, and enables the Minister for Lands to sell Crown land in fee simple. It is also the primary statute providing for compulsory and voluntary land acquisition by the WA Government and other authorised bodies where land is required for public works.

5.17 Part 10 of the LA Act provides for compensation where an interest in land has been acquired.

5.18 Although the LA Act is the principal Act governing land acquisition, it interacts with a number of other Acts that may employ slightly different approaches:

> there are a number of other WA statutes which involve the carrying out of works of a public character which affect the value of privately owned land, in the sense that they result in a diminution of the value of abutting land of the same owner for the benefit of the public, even though compensation entitlements vary from statute to statute and from work to work. What can be described as the reticulated infrastructure statutes, such the *Energy Operators (Powers) Act 1979 (WA), Water Agencies (Powers) Act 1984 (WA), Dampier to Bunbury Pipeline Act 1997 (WA)*, and *Petroleum Pipelines Act 1969 (WA)*, illustrate the different conceptual approaches adopted by the WA Parliament in balancing the importance of public infrastructure and the benefits that it brings to private owners (including a potential betterment or enhancement component in the value of their land by reason of their access to such services) against the limitations imposed by the physical presence of such works on land.
>
> In general, the trend has been to require the agency to compulsorily acquire the fee simple or a suitable lesser interest in land under the compulsory taking statute for works of a particularly high significance and impact, but to exempt from a requirement to take an interest in land at all in respect of lesser works, such that an owner whose property is affected by the presence of works may have no

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258 *McCarthy v Metropolitan Board of Works* [1874] LR 7 HL 243.

259 Law Reform Commission of Western Australia, *Project 98 – compensation for injurious affection*, July 2008, p 7.

260 Government of Western Australia, *Response of the Western Australian Government to the Western Australian Standing Committee on Public Administration and Finance*, 2004, p 10.

261 The WALRC also discuss the meaning of the term injurious affection in the 2008 report, Compensation for Injurious Affection, Found here: https://www.lrc.justice.wa.gov.au/_files/P98-FR.pdf.

> entitlement to compensation at all. The approach of the statutes to the issue of compensation arising out of the impact of such works is not uniform.[262]

5.19 Energy operators, such as Western Power, pay compensation in accordance with legal requirements under the LA Act as read with the *Energy Operators (Powers) Act 1979* (EOP Act):

> If the compensation laws are ever changed then Western Power will, of course, pay compensation in accordance with the new laws.[263]

5.20 The EOP Act provides that energy operators are not liable to pay compensation under the LA Act for any damage attributable to their rightfully accessing a property or performing necessary works. Furthermore:

> No claim lies against an energy operator by reason of any loss of enjoyment or amenity value, or by reason of any change in the aesthetic environment, alleged to be occasioned by the placing of works of the energy operator on any land.[264]

2004 Inquiry

5.21 In 2004, the PAF Committee made several recommendations in relation to land acquisition and compensation, including that:

- a single Act be enacted to deal with all aspects of compulsory land acquisition in WA (recommendation 3)
- the broad issue of compensation for injurious affection to land in WA be referred to the WALRC for review (recommendation 12)
- all land acquiring agencies and bodies should accompany their initial offer of compensation to a landholder in a compulsory acquisition of any interest in land with an advance (recommendation 15)
- all land acquiring agencies and bodies pay the reasonable costs of independent land valuation, compensation assessment advice and legal costs to landholders for both compulsory and voluntary acquisitions (recommendations 17 and 18)
- a single, independent land acquisition agency be established to acquire all land acquisitions at a fair price on behalf on the WA Government and associated bodies (recommendation 20)
- the WA Government adopt the proposed model land acquisition procedure (recommendation 21).

5.22 The Committee recommends that readers refer to the 2004 Report for more detail and Appendix 2 for a full list of recommendations and their current implementation status.

Implementation status

Not supported

5.23 Some recommendations were not supported by the WA Government, and continue not to be supported today. For example, the WA Government maintains that a model land acquisition

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262 Government of Western Australia, *Response of the Western Australian Government to the Western Australian Standing Committee on Public Administration and Finance*, 2004, p 10.

263 Submission 70 from Western Power, 31 July 2019, p 3.

264 *Energy Operators (Powers) Act 1979* s 45(2).

procedure proposed by the PAF Committee at recommendation 21 is 'overly simplistic and formulaic, and not suitable in relation to compulsory acquisitions'.[265]

Implemented without legislative change

5.24 Some recommendations were implemented without legislative change. For example, the WA Government advised that in relation to recommendation 15, it is general practice to make an offer of advance payment of 100 percent of the offer of compensation, on the basis that the payment is not to be regarded as prejudicing the affected landholders right to continue negotiating on the final amount. The LA Act recommends 90 percent, although:

> Instances may arise, however, where an offer of an advance payment of less than 90 per cent is appropriate, where additional information such as financial statements are required to compensate for other matters such as disrupted business costs.[266]

Law Reform Commission of Western Australia

5.25 Recommendation 12 was implemented in 2005, when the Attorney General directed the WALRC to report on the issue of compensation for injurious affection to land. As the principal Act for acquiring land in WA, the LA Act was a major focus of this project.

5.26 In particular, section 241 of the LA Act, which deals with how compensation is determined, was found to the 'central and crucial provision' in WA for the acquisition of land. Thirteen of the WALRC recommendations related to section 241. The broad intent of the recommendations were to ensure that section 241 implements compensation for injurious affection in a clear and fair way. To date, none of those recommendations have been implemented.[267]

FINDING 17

The Law Reform Commission of Western Australia's 2008 recommendations to amend section 241 of the *Land Administration Act 1997* have not been implemented.

Land Acquisition Legislation Amendment (Compensation) Bill 2014

5.27 In 2014, the *Land Acquisition Legislation Amendment (Compensation) Bill 2014* (LALAC Bill) was introduced into Parliament:

> The Bill's purpose was to deliver a fairer and more transparent approach for the assessment and determination of compensation for landholders where private property is acquired by the State and to ensure that compensation paid for the compulsory acquisition of a part of a property is assessed not only on the value of the land taken, but also on the greater impact it has on the entire property.[268]

5.28 During the second reading speech, former Premier Colin Barnett said:

> The legal framework that enables government to acquire interests in land, and to provide compensation when doing so, is complex and spread across a number of

265 Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 5.

266 ibid., p 3.

267 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 17 February 2020, p 8.

268 Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 5.

> different acts. In addition, there are inconsistencies between acts, further adding to the complexity.[269]

5.29 The LALAC Bill would have implemented 14 of the 31 recommendations made by the WALRC. The WA Government also announced at this time that it was progressing further reforms to the LA Act that would implement additional recommendations made by the WALRC.[270] The former Premier also tabled the Private Property Rights Charter for WA (Charter), which emphasised the principles of compensation and the use of compulsory acquisition as a 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.
>
> 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.[271]

5.30 Murray Nixon, President of the Gingin Private Property Rights Group, told the Committee that there have been some improvements since the introduction of the Charter, which instructed agencies to place public infrastructure on Crown land, where possible.[272]

5.31 The LALAC Bill proposed to amend the following:

- LA Act
- EOP Act
- *Water Agencies (Powers) Act 1984*
- *Water Services Act 2012*.

5.32 Where compensation has traditionally only been available when a freehold interest in land is taken, the LALAC Bill would have enabled landholders to claim compensation for a reduction in the value of retained land when any interest is taken. This would have included lesser interests, such as easements.[273]

5.33 The LALAC Bill contained provisions specific to energy operators and water service providers, to ensure that fairer compensation can occur in these cases while keeping the costs of essential services reasonable:

> These provisions will enable essential projects for the community to continue, while still providing more equitable compensation for affected landholders than is currently the case.
>
> For example, an energy operator or water provider will not be required to pay compensation for the loss of amenity value when they are utilising existing legislative powers to enter onto land to construct or maintain works without acquiring an interest in land to do so. These powers may need to be utilised regularly or on short notice to ensure the continued supply of energy or water. In

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269 Hon Colin Barnett MLA, Premier, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 November 2014, p 8992.

270 ibid.

271 Government of Western Australia, *A Private Property Rights Charter for Western Australia*, 27 November 2014, p 3.

272 Submission 11 from Murray Nixon JP OAM, 19 July 2019, p 2.

273 Hon Colin Barnett MLA, Premier, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 November 2014, p 8992.

> these circumstances, there is minimal impact on the landholder and it is not appropriate for compensation to be provided.[274]

5.34 The LALAC Bill did not advance past the second reading stage and subsequently lapsed at the end of the 39th Parliament.

Land Administration Bill

5.35 The WA Government has confirmed that it is currently drafting a new Bill to amend the LA Act (proposed Land Administration Bill), which will include the LALAC amendments to the LA Act. However, when the Committee asked how the Bill will deal with determining compensation value, DPLH advised that it does not have a draft Bill for that section yet:

> It would also be fair to say that, given our current priorities and partly because of machinery of government changes and where the pressure points are, it is not something we are actively working on at the moment.[275]

RECOMMENDATION 19

The Minister for Planning ensure that the new Bill to amend the *Land Administration Act 1997* implements the Law Reform Commission of Western Australia's relevant 2008 recommendations regarding compensation for injurious affection.

Water Corporation

5.36 As a land acquiring agency, 11 of the recommendations of the 2004 Inquiry were relevant to the Water Corporation. Eight of these recommendations have since been implemented.[276]

5.37 The Committee did not receive specific evidence or complaints about the Water Corporation and its role as a land acquiring agency.

Planning and Development Act 2005

Injurious affection provisions

5.38 The PD Act was enacted in 2005 to consolidate the *Town Planning and Development Act 1928*, the *Metropolitan Region Town Planning Scheme Act 1959* and the *Western Australian Planning Commission Act 1985* into one single, streamlined Act.[277] The PD Act establishes the WAPC and provides for local, regional and state planning schemes.

5.39 Injurious affection has a different, albeit related, effect under the PD Act than the LA Act, as the land is not necessarily acquired.[278] According to the WALRC:

> In the context of a compulsory acquisition of an interest in land, the expression (as used in the *Public Works Act before 1997*) applied to a person's land other than the land acquired from that person. It referred to any reduction of the value of adjoining land of the person caused by the carrying out of, or the proposal to carry out, the public work for which the land was acquired.

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274 ibid., p 8993.

275 Gail McGowan, Director General, Department of Planning, Lands and Heritage, transcript of evidence, 17 February 2019, p 10.

276 Hon Dave Kelly MLA, Minister for Water, letter, 17 October 2019, p 2-3.

277 Hon John Kobelke, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 7 April 2005, p 572.

278 Law Reform Commission of Western Australia, *Project 98: compensation for injurious affection,* 2008, p 18.

> In the context of planning law, however, the expression applies to the decrease in value of a person's interest in land caused by a planning scheme's application to that land. Adjoining land is not relevant.[279]

5.40 The WA Government said in 2004:

> It is not just any planning restriction that will result in a diminution in value of land giving rise to an entitlement to compensation, but only restrictions that are attributable to a limitation on the use of private land for no purpose other than a public purpose. This occurs by means of the classification of land by "reservation" as distinct from "zoning" under a town planning scheme, region scheme or redevelopment scheme.[280]

5.41 Part 11, Division 2 of the PD Act provides for compensation where land is injuriously affected by a planning scheme. Section 173 provides that subject to Part 11, a person whose land is injuriously affected by the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority.

5.42 Section 174 establishes that land is injuriously affected by the making or amendment of a planning scheme if, and only if:

- that land is reserved (whether before or after the coming into operation of this section) under the planning scheme for a public purpose

  or

- the scheme permits development on that land for no purpose other than a public purpose

  or

- the scheme prohibits wholly or partially —
  - the continuance of any non-conforming use of that land

    or

  - the erection, alteration or extension on the land of any building in connection with or in furtherance of, any non-conforming use of the land, which, but for that prohibition, would not have been an unlawful erection, alteration or extension under the laws of the State or the local laws of the local government within whose district the land is situated.

5.43 Either claimants or responsible authorities may apply to the State Administrative Tribunal for determination of any question as to whether land is injuriously affected. Compensation is then determined by arbitration in accordance with the *Commercial Arbitration Act 2012*, unless the parties agree on some other method of determination.

5.44 Section 177 provides that compensation cannot be paid in respect of reserved land until:

- the land is first sold following the date of the reservation

  or

- the responsible authority:
  - refuses an application made under the planning scheme for development on the land

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279 ibid

280 Government of Western Australia, *Response of the Western Australian Government to the Western Australian Standing Committee on Public Administration and Finance*, 2004, p 7.

or

- grants development approval on the land subject to conditions that are unacceptable to the applicant.

5.45 In relation to the above, a claim for injurious affection must be made within six months.[281] Section 187 of the PD Act provides the option for the responsible authority to elect to acquire the affected land instead of paying compensation.

Metropolitan Region Improvement Tax

5.46 Separate to pursuing a claim for compensation, affected landowners may enter into negotiations with the WAPC for the voluntary purchase of the reserved land.

5.47 The Metropolitan Region Improvement Tax (MRIT) is a special purpose tax used to finance the cost of providing land for roads, open spaces, parks and similar public facilities, which is payable in addition to land tax on property located in the metropolitan area.[282] The Metropolitan Region Improvement Fund (MRIF) is the account that holds the proceeds from the MRIT. The MRIF was set up for the primary purpose of funding land acquisition and compensation.[283]

Table 2. *Income from Metropolitan Region Improvement Tax*

	2018	**2019**
WAPC income from MRIT	$93 326 000	$89 784 000
MRIF	$399 228 000	$440 107 000

[Source: Western Australian Planning Commission, *Annual report 2018/19*, pp 54 and 58.]

5.48 In the metropolitan region, this funding is the source of land acquisition and injurious affection funding. DPLH confirmed that there is an expenditure limit on the MRIF:

> Any land that is reserved under the region scheme, that fund is available to pay compensation or to purchase the land. The amount of money that we are allowed to spend each year is very carefully regulated by Treasury.[284]
>
> What generally occurs is that nearly all of the Planning Commission's acquisition program is driven by landowners themselves, either approaching the commission to buy reserve land or by lodging claims for compensation.[285]

5.49 In 2018-19, the WAPC's land acquisition program for the whole of WA included the purchase or payment of injurious affection compensation for 56 properties, totalling 502.4 hectares at a cost of $58.7 million.[286]

What the Committee heard

5.50 As mentioned earlier in this Chapter, the Committee heard little from members of the public who were unsatisfied with the land acquisition process under the LA Act. However, it received evidence from numerous submitters who claim to have been injuriously affected by

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281 *Planning and Development Act 2005*, s 178.

282 Government of Western Australia, Department of Finance. See: https://www.wa.gov.au/organisation/department-of-finance/land-tax. Viewed 10 September 2020.

283 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 17 February 2019, p 8.

284 David Caddy, Chairman, Western Australian Planning Commission, transcript of evidence, 17 February 2019, p 8.

285 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 17 February 2019, p 3.

286 Western Australian Planning Commission, *Annual report 2018/19*, p 31.

planning processes. This section summarises a range of examples relating to compensation for both zoning (private use, local governments) and reservation (public use, WAPC).

5.51 This is in addition to the case studies provided in Chapter 3, which gave examples of how planning reservations can act as encumbrances on land—particularly where people are in 'limbo' due to planning reservations that are in place for decades.

5.52 WA Land Compensation is a valuation and real estate agency business who specialise in land compensation claims. WA Land Compensation provided several case studies, and told the Committee that their main concern was with a lack of fairness in the administration of the PD Act:

> Where some private land is reserved in town planning schemes, for the purposes stated in a), and compensation is available, then these same policies etc should not be used by the Authority's valuers, planners etc for the reason land has a diminished value. Unfortunately, it is our experience, they do. These policies have to be disregarded so fair value is determined and paid.[287]

5.53 Another submitter, who sold his family home to the WA Government following its reservation, said:

> I appreciate that at times it is necessary for public purposes to take precedence over private ownership. This must be an open and fair process that reflects the power imbalance between the parties.[288]

Case study—City of Joondalup infill

5.54 In a similar vein, the Committee also heard from landowners who contend that recoding in residential areas to increase density has had a detrimental effect on their property value and use.

5.55 In recent years, the WA Government has pushed local governments to increase allowable density around shopping centres and transport hubs, such as train stations. The City of Joondalup's Local Housing Strategy and Local Planning Scheme Number 3 identified 10 areas within the City as appropriate for increased density.

5.56 Since 2016, landowners in those Housing Opportunity Areas (HOAs) have been able to redevelop their properties to accommodate the extra density allowance.[289] The City of Joondalup has allocated properties in HOAs have dual density codes, meaning they are allocated two density codes—for example, R20/40.[290]

5.57 The effect of a dual density code is that landowners may only redevelop their properties at the higher density code in accordance with the Residential Development Local Planning Policy, to ensure developments result in improved streetscapes and do not unduly affect existing neighbourhood amenity.

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287 Submission 10 from Western Australia Land Compensation, 23 July 2019, p 2. (a) We submit that it is becoming more evident that numerous policies, for the public's benefit, are being layered on top of private titles without compensation rights. For example Bush Forever, rare flora and wetland classifications, development buffers, natural and built heritage, 'reservations' in structure plans etc.

288 Submission 4 from Neville Hills, 11 July 2019, p 8.

289 City of Joondalup. See: https://www.joondalup.wa.gov.au/kb/resident/local-housing-strategy. Viewed 23 January 2020.

290 ibid.

Table 3. *General site requirements for single houses, grouped dwellings and multiple dwellings in areas coded less than R40*

R Code	Average square metres required per dwelling
R20	450 square metres
R30	300 square metres
R40	220 square metres
R60	150 square metres

[Source: Department of Planning, Lands and Heritage, *SPP 7.3 Residential design codes – Volume 1*, 2019, p 47.]

5.58 While rezoning or recoding to allow for higher density use is typically a welcome sign, in the case of parts of the City of Joondalup, landowners submit that it has resulted in unintended adverse consequences:

> Previously private backyards are no longer private. Unrestricted solar access becomes shadowed. Trees disappear and the environment gets hotter because of the Urban Heat Island Effect. A previously light-filled room becomes dark, and potentially less private. Traffic and noise increases, and so on. [291]

5.59 The Joondalup Urban Development Association was formed because of the impact the City's infill strategy is having on homeowners. Members of the Association believe that when infill is imposed over the top of a lower residential coding, the impact that this new development will have on adjacent property owners, and their ability to enjoy that property, should be considered. [292]

5.60 An Edgewater resident told the Committee that he is concerned about a recent decrease in his land value due to a planning proposal to build 14 apartments around the corner:

> At a recent community meeting with the Mayor one of the residents who lives over the back fence from us raised some concern over the value of his property which he had assessed by an agent, the agent then explained that the house around the corner that was sold just over a year ago for a good price (ours, I believe) would now be marketed for $40k less due to the development...[293]

5.61 Joondalup residents are seeing their suburb change rapidly, and in their view, not for the better:

> If they carry on with this policy, because they are not underpinning it with any infrastructure, any traffic management, any of the basic structures that you need to underpin infill, what we are going to end up with is slums—because there is nothing to support it.[294]

5.62 The Joondalup Urban Development Association also feel that the consultation process was inadequate:

> **The CHAIR**: Was there a public consultation process?
>
> **Mrs THOMPSON**: This is part of the problem because the public consultation process, we believe, was inadequate because instead of writing to the landowners and stakeholders to say, "This is what is happening", they put a small-space ad into the newspaper that we were not receiving in our area. So, basically, nobody saw it,

[291] Submission 41 from Andy Murphy, 30 July 2019, p 1.

[292] Submission 43 from Joondalup Urban Development Association, 30 July 2019, p 3.

[293] Submission 80 from Michael Dighton, 31 July 2019, p 1.

[294] Suzanne Thompson, Vice President, Joondalup Urban Development Association, transcript of evidence, 16 October 2019, p 9.

> and if they had have seen it, it did not mention R40, did not mention R60, and it did not mention specific suburbs.[295]

5.63 The City of Joondalup is aware of these concerns:

> changes made to the State Government's Residential Design Codes to remove average site areas for multiple dwellings and a lack of State Government support for a City of Joondalup initiative to restrict the development of multiple dwellings to sites 2,000 square metres or larger, have resulted in development outcomes in the Housing Opportunity Areas that were not originally envisaged by the City.
>
> Some residents are also concerned about the type of development currently occurring in Housing Opportunity Areas and called on the City to review how infill development is managed.[296]

5.64 According to its website, the City responded to these concerns by developing the draft new development standards for HOAs. [297] The new standards include restrictions on the number of apartments that can be built in certain areas, new standards for trees and landscaping, and other development standards that aim to better manage the impact of infill development.[298]

5.65 Although the standards will guide better future development, for some areas, the damage has already been done. The Association submit that compensation should be payable in the same way that compensation is payable when land is acquired by government for a public purpose:

> When Government seeks to acquire large areas of land for public purposes as part of a greater good, it usually does so by paying recompense to the land owners. Re-coding should be no different.
>
> Any recoding will clearly adjust land values and although that will often (as has been the case historically) reflect increased values, where recoding results in a loss of value, some kind of compensation should be paid to those who have the value of their property right diminished through no fault of their own.[299]

5.66 The Committee raised with WAPC that submitters contend that the increased density has adversely affected property values. The WAPC responded that this is a matter of amenity. While changes to amenity are taken into account when considering whether to approve development under a planning scheme, there is no injurious affection compensation available in relation to lost or altered amenity:

> The tests is where you can use your property for no purpose other than a public purpose, in which case, that is when you are entitled to compensation. Change to amenity et cetera does not involve any acquisition of land or it being used only in accordance with a public purpose.[300]

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295 ibid., p 10.

296 City of Joondalup. See: https://www.joondalup.wa.gov.au/kb/resident/hoa. Viewed 13 February 2020.

297 ibid.

298 City of Joondalup. See: https://www.joondalup.wa.gov.au/community-consultation-for-draft-new-development-standards-for-housing-opportunity-areas?nocache=true. Viewed 10 September 2020.

299 Submission 43 from Joondalup Urban Development Association, 30 July 2019, p 5.

300 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 17 February 2020, p 6.

5.67 This view appears to align with section 174 of the PD Act, which outlines when compensation for injurious affection under the PD Act turns on a change in land use, rather than change in land value.[301]

Case study—reservation preventing business improvements, the Vaz family

5.68 Melwyn Vaz and his family have owned and operated a service station and roadhouse, along with a residence, on land in Yanchep since 1987. In the early 1990s, a freeway reservation was placed over the land:

> They may not even need it in 50 years' time because there may not even be a freeway—it could be a highway; it could be anything—but at that time, they needed that space.[302]

5.69 Mr Vaz's situation differs from the other case studies included in this Report, as the reservation had a commercial impact. Mr Vaz points out that the business has needed to expand and evolve over the years to remain profitable, but has not been able to due to the reservation:

> Many tradespeople and other heavy users of fuel were now using LPG.
>
> Because we didn't have LPG available at the Service Station we missed out on their business, which was very profitable due to the frequency of them coming into the shop and buying the many other things that Tradespeople and workers consumed daily, as well as refuelling their vehicles. These products have a high profit margin and so just for those customer losses alone, for over 20 years, meant a massive loss of profit to the family.
>
> This reduced our ability to grow the business, employ more people, pay more tax and get a decent wage for working for 14 hours a day, 7 days a week.
>
> The inability to rebuild the Service Station into a more modern building meant that we have to operate out of the original building that was built in the late 1960's and slightly modified over the following years.
>
> The original building contained asbestos and was small and meant that the site was unable to be used to it's full potential.[303]

5.70 This has left the family unable to compete with new service stations in the area, and losing money on a daily basis.304 Because of these commercial impacts, the amount of compensation offered was insufficient:

> the amount that the government offered wouldn't have even bought new pumps an tanks, let alone buy a new block of land [to] build a whole new Service Station and compensate for the loss of business.[305]

5.71 Land is valued at the time of purchase or compensation, taking current zoning into account and disregarding the reservation. However, the WAPC confirmed that when it purchases property by negotiation, it does not necessarily pay for a business.[306]

5.72 In this case, the reservation's impact on land use has had significant commercial and financial implications for the Vaz family. Mr Vaz told the Committee that as a result of the reservation,

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301 *Planning and Development Act 2005* s 174(1)(c).

302 Melwyn Vaz, Director, GOA Investments Pty Ltd, transcript of evidence, 30 October 2019, p 2.

303 Submission 46 from Melwyn Vaz, 30 July 2019, p 3.

304 ibid., p 4.

305 ibid., p 2.

306 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 2.

he has been unable to make improvements to the business, making it difficult to plan for the future and to meet changing consumer expectations.

5.73 The WAPC informed the Committee that it can only purchase or compensate for the land, not the business losses that the family claims to have suffered over the past 20 years. This is where Mr Vaz contends that change is required:

> We feel that the system needs to become fairer and take into account the hugely detrimental affect that forced encumbrance has on private commercial properties that have very successful businesses on them and compensate them suitably, on just terms.[307]

5.74 Although the WAPC cannot compensate for business losses, the Committee heard that the WAPC has recently granted planning approvals for service station upgrades where the reserved land is unlikely to be required for 10 or more years:[308]

> One of them was a complete rebuild of a service station in the metropolitan area on Toodyay Road, which involved even the conversion of part of it into the modern-day shops that they have, a whole new canopy, new pumps, all of those things. It was not just a moderate or minor improvement—this was a significant upgrade.[309]

5.75 Mr Vaz told the Committee that an attempt in the early 2000s to install a small concrete footing in order to add an Autogas cylinder (to service the growing demand for liquid petroleum gas) was denied.[310] Even if Mr Vaz had been granted approval to make upgrades, the reservation would impact his confidence to invest money in development. This is also relevant to lending institutions—the Committee questions why a bank would finance major upgrades when there is no clarity about when the land will be acquired to build the freeway.

5.76 The Committee notes with concern that by limiting compensation to the land only, the WAPC avoids compensating the landowner for their investment in and loss of the business operating on the land. This loss could be considerable, especially if the business and 'good will' in the business cannot be sold separately or the business cannot easily be relocated to another location. The Committee is of the view that this does not amount to fair compensation for the landowners' loss.

5.77 Unfortunately, significant improvements are no longer an option for the Vaz family. In December 2019, the service station burned down in the Yanchep bushfires.[311] The WAPC anticipates that the Vaz family will approach the WAPC to purchase the property, and has set funding aside for this purpose. The final purchase price will depend on any insurance settlement or WA Government assistance provided to the family.[312]

Case study—the Caruso family

5.78 The Committee heard from Sandra Dennett, who submitted on behalf of her parents, Vincenzo and Isoletta Caruso. The Caruso family purchased a 53 hectare property in 1989,

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307 Submission 46 from Melwyn Vaz, 30 July 2019, p 4.

308 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 6.

309 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 7.

310 Submission 46 from Melwyn Vaz, 30 July 2019, p 3.

311 Anita McInnes, 'Burnt out service station targeted by thieves and the curious', *Yanchep News Online*, 8 January 2020.

312 David Caddy, Chairman, Western Australian Planning Commission, transcript of evidence, 20 May 2020, p 3.

with the intention of keeping a small section for the family and developing and selling the rest. These plans were soon halted:

> By 1990 he was told to stop clearing and to stop working on his property as the State Government had intention to purchasing the block from him. At this stage the land would likely have been identified for future urban. Vincenzo did the right thing and stopped all work on his land.
>
> During this time there were various offers from private investors to purchase the land but he could not accept any offers as he had to wait for the WAPC.
>
> While he waited he put [his] plans on hold and no longer worked in his beloved vegetable patch and no longer tendered to his fruit trees.
>
> Part of the block became reserved as part of the 1994 Wungong Water Strategy then in 2010 the balance of the land became reserved. The consequence was that the land was now reserved. The Caruso family has been paying land tax and council rates on the property as well as fighting [an] expensive losing battle to keep it maintained and clear of rubbish at their expense for the past 20 plus years.[313]

5.79 The lot remains reserved under the Metropolitan Region Scheme, and is subject to a Bush Forever designation. The Caruso family have struggled to manage the land, which is now subject to significant environmental requirements. The amount of compensation offered was said to be inadequate:

> Over the last two decades Vincenzo and his family have been fighting to receive fair compensation and it has taken it's toll on his health and that of his wife. The WAPC had initially made [an] offer of $400,000 which the family rejected as it was a ridiculous offer when compared to neighboring properties which sold for many many millions of dollars and all of which were promptly cleared of any vegetation and developed for housing. There was no environmental studies done over our land before it was reserved, nevertheless it was reserved to fit with the Jandakot Regional Park.
>
> After hundreds of thousands of dollars in lawyers and Arbitration fees Vincenzo received some compensation for the small area he had cleared. The rest of the property was valued at $0 and yet he still pays land taxes and council rates to this day awaiting the WAPC to make another unfair offer of payment. The distress continues to take it's toll on the health of Mr and Mrs Caruso who are both 82. Mr Caruso now battles cancer.[314]

5.80 DPLH advise that a compensation payment has already been made in respect of the portion of the property highlighted in green in Figure 3. No compensation has been paid in respect of the balance of the property, and the entire property is still owned by the Caruso family.[315]

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313 Submission 78 from Sandra Dennett, 31 July 2019, p 1.

314 ibid., p 2.

315 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 4.

Figure 3. *Portion of Caruso property compensated for*

[Source: Tabled by Western Australian Planning Commission during hearing held 20 May 2020.]

5.81 In May 2019, the WAPC wrote to the Caruso family and the owners of an adjoining property about reopening negotiations for purchase. These are the last two properties required for the Anstey-Keane wetlands within the Jandakot Regional Park.[316]

5.82 Due to negotiation delays and the continued deterioration of the property, in March 2020 the WAPC resolved to proceed with the compulsory acquisition of the two properties. The Minister for Planning has approved the compulsory acquisition.[317] Chief Property Officer Timothy Hillyard contends that compulsory acquisition rather than negotiation will 'certainly not be a financial disadvantage to either landowner':[318]

> **The CHAIR**: Is the price that is likely to be paid to the Carusos different under compulsory acquisition as compared to a negotiated settlement?
>
> **Mr HILLYARD**:... It would certainly be a greater amount, although when we approached both the owners in this case we offered to negotiate to purchase the land on the basis that it was the equivalent of a taking, so we would include a solatium and those sorts of matters. So it is a taking by agreement, if you like.[319]

Case study - fully allocated land acquisition budget

5.83 The Committee heard from Ivan Yujnovich, who owns a block of land which is reserved under the Metropolitan Region Scheme. Mr Yujnovich has requested the voluntary purchase of his land from the WAPC. On request, he was advised that the purchase could not occur that year as funds for land acquisition were already fully allocated:

316 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 3.

317 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, email, 12 June 2020.

318 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 2 May 2020, p 4.

319 ibid.

> The 2019/20 land acquisition budget, to be approved by the WAPC next month, is currently fully committed, so the WAPC is unable to enter into voluntary negotiations to purchase the reserved portion of your property. You may, however, approach the WAPC later this year to request consideration of a voluntary purchase and subject to priorities and funds being able to be identified, the WAPC could enter into negotiations at that time.[320]

5.84 The Minister for Planning advised the Committee that the WAPC remains willing to commence voluntary negotiations in relation to Mr Yujnovich's reserved land, has the purchase in its acquisition program, and awaits further contact from the affected party.[321]

5.85 The Committee questions why the WAPC cannot initiate this contact. Chief Property Officer Tim Hillyard advised:

> it is really up to Mr Yujnovich to approach the commission when he wants to recommence these negotiations. Obviously, if we got to a point where it was necessary to construct the road, then we would start talking to him—shall we say, the commission would initiate those discussions leading towards compulsory acquisition—but it is important that a landowner does not feel compelled to sell the reserve land if the timing is not right for them.[322]

5.86 The Committee questioned whether there is anything to prevent such purchases being pushed back year after year on the basis of a fully allocated acquisition program. David Caddy, Chairman of the WAPC, responded that the WAPC is always open to landowners coming back to renegotiate or to reopen negotiations.[323]

5.87 The Committee notes that the MRIT is collected to provide funds for such purposes, and in 2019 there was $440 million in the MRIF, yet only $89 784 000 (see Table 2, page 83) was allocated to the WAPC for land acquisition.[324] The Committee does not accept that landowners should be financially impacted due to artificial restraints placed on funds for land acquisition in any particular year, if there are available funds in the MRIF.

RECOMMENDATION 20

Where funds are available in the Metropolitan Region Improvement Fund, and landowners seek acquisition of their reserved land, the Western Australian Government make additional funds available from the Metropolitan Region Improvement Fund to the Western Australian Planning Commission to facilitate the immediate purchase of the land.

The 2004 Inquiry

5.88 The 2004 Inquiry related mainly to acquisitions, and was primarily concerned with the LA Act. In addition, the PD Act was not yet in force in 2004. Relevant processes were mostly included in the former *Metropolitan Region Town Planning Scheme Act 1959*. However, several of the PAF Committee's recommendations are relevant.

5.89 At the time, stakeholders were calling for the introduction of statutory timeframes on the rezoning process, to avoid situations where residents were left in 'limbo' about the future of their area for decades.

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320 Submission 5 from Ivan Yujnovich, 16 July 2020, p 9.

321 Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2019, p 7.

322 Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 5.

323 David Caddy, Chairman, Western Australian Planning Commission, transcript of evidence, 20 May 2020, p 5.

324 Western Australian Planning Commission, *Annual report 2018/19,* pp 54 and 58.

5.90 Some of the relevant recommendations of the PAF Committee included that:

- where private land is required for a public purpose which will alter the existing granted land use (as distinguished from anticipated land use) on that private land, the Crown should either compensate fairly for the downgrading of the permissible land use or acquire the property outright (recommendation 26)
- the WA Government undertake a review of both the administrative process of the WAPC and existing statutory timeframes within planning legislation in order to address the decline in the percentage of planning applications processed within statutory timeframes (recommendation 29)
- the WA Government review those provisions of the planning legislation relating to the resolution of inconsistencies between local and regional planning schemes so as to establish whether additional/alternative statutory time frames are required to ensure that inconsistencies are resolved in the shortest possible time (recommendation 31)
- all landholders affected by a proposed reservation or zoning change under a draft region scheme should be contacted in person by the Department for Planning and Infrastructure, and provided with copies of all relevant documentation free of charge (recommendation 32)
- the LA Act and relevant planning legislation be amended to provide that an acquisition of land by the State or local government following a claim for injurious affection under the planning legislation, is to be treated on the same terms and conditions as a compulsory acquisition of land under Parts 9 and 10 of the LA Act (recommendation 33)
- the Department of Land Information maintains a comprehensive and publicly available list of all policies, strategies and plans which impact on administrative decision-making pertaining to land use (recommendation 34).

5.91 For a full list of recommendations with the corresponding initial and current Government responses, see Appendix 2.

Implementation

5.92 The Minister for Planning advised the Committee that recommendations 26, 29, 31, 32 and 34 have been implemented, either through the enactment of the PD Act in 2005 or through the several rounds of planning reform that followed.[325]

5.93 The Minister for Planning advised that the enactment of the PD Act has made claiming injurious affection compensation more practicable:

> Prior to April 2006 when the *Planning and Development Act 2005* came into operation, injurious affection claims were seldom lodged due to the time limit of 6 months and likely the additional requirements under s.12(2a)(b)(i) of the *Town Planning and Development Act 1928*.[326]

5.94 Statutory timeframes were addressed by the Planning and Development Local Planning Schemes Regulations 2015 (LPS Regulations), as part of the Planning Reform Agenda:

> Among other things, the LPS Regulations introduced three categories of Local Planning Schemes amendments being, basic standard and complex. The categorisation allows for simpler Scheme Amendment proposals to be dealt with more quickly as they are subject to a shorter assessment period.

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325 Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2019, pp 11-4.

326 ibid., p 11.

> The LPS Regulations also introduced maximum timeframes in which the WAPC is to provide a recommendation to the Minister for Planning with respect to Local Planning Schemes and Local Planning Scheme Amendments. Prior to the introduction of the LPS Regulations, there was no regulated timeframe in which the WAPC was to provide such a recommendation.[327]

5.95 Planning reforms continue, and the new Action Plan for Planning Reform proposes more streamlined assessment processes and shorter statutory timeframes for basic applications.

5.96 While the WA Government supported recommendation 33 in principle, it noted that a claim for injurious affection under the PD Act cannot be treated under the same terms as the LA Act, as it does not equate to compulsory acquisition. The Minister for Planning advised that this would result in a significant financial burden to the State.[328] Based on this correspondence, and despite its in-principle support, it appears that the WA Government does not intend to implement this recommendation.

Law Reform Commission of Western Australia

5.97 In 2008, the WALRC made 8 recommendations to amend the PD Act as part of its project on compensation for injurious affection, including that:

- section 176 and 184(4) of the PD Act (see Appendix 9) be amended to accord jurisdiction to the State Administrative Tribunal in respect of compensation (recommendation 17)
- if land is reserved, section 179 of the PD Act (see Appendix 9) provide that the compensation payable to the owner includes both the reduction of the value of the reserved land and the reduction of the value of adjoining land owned by the applicant (however, if adjoining land value is increased, the increase is to be offset against the amount of compensation that would otherwise be payable) (recommendation 18)
- section 192(1)(b) of the PD Act be amended to make clear that the value of land is to be assessed without regard to any increase or decrease in value attributable to the operation or effect of the planning scheme, or a proposal to implement the planning scheme (recommendation 22).

5.98 None of the recommended amendments have been implemented in the 12 intervening years.

FINDING 18

Recommendations made by the Law Reform Commission of Western Australia in 2008 to amend the *Planning and Development Act 2005* have not yet been implemented.

5.99 Glen McLeod, firm principal of Glen McLeod Legal, has over 40 years of experience representing clients who have made claims for public purpose reservations under Part 11 of the PD Act. He told the Committee that recommendation 17 of the WALRC, that compensation and valuation matters be determined by the State Administrative Tribunal, was 'low-hanging fruit' which is long overdue for implementation:

> At the moment, they are determined by arbitration. There is no sound reason for putting parties to the expense of a private arbitration when there exists an expert Tribunal having the requisite expertise to deal with such matters.

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327 ibid.

328 ibid., p 13.

> My short comment is that the use of arbitration is expensive, which gives the state an advantage, and it is secretive. It works against transparency and the building up of a bank of precedents containing relevant principles.[329]

5.100 The WAPC supports recommendation 17 of the WALRC:

> It has been the view of the WAPC for many years, probably at least 10, that all compensation matters should go to the State Administrative Tribunal, and matters only be considered on appeal, if you like, to the Supreme Court on questions of law. There were submissions made to the review of the SAT act, and it is a matter that is also involved in the review of the Planning and Development Act on its fifth-year review. That is a matter that is under consideration, as are the other recommendations from the Law Reform Commission.[330]

5.101 The Committee expresses its disappointment that despite support for the WALRC recommendation 17, no progress has been made in the intervening 12 years for its implementation.

5.102 Mr McLeod also supports recommendation 18, that section 179 of the PD Act provide that the compensation payable to the owner includes the reduction of the value of both the reserved land and the adjoining land owned by the applicant.

5.103 While not yet legislated, WAPC advise that the current legislative review of the PD Act will consider both recommendations.[331]

RECOMMENDATION 21

The Minister for Planning progress amendments to the *Planning and Development Act 2005* recommended by the Law Reform Commission of Western Australia in 2008.

The 'good faith' hurdle

5.104 Section 177(3) of the PD Act provides that the Arbitrator, in determining compensation, must be satisfied that the sale or development application that triggered the claim took place, or was made, in 'good faith'. Glen McLeod Legal submit that this requires reform:

> This is a problematic requirement in our experience. If a landowner suffers detriment because of a reservation, which is probably always the case, then there should be no added 'good faith' requirement which is in effect an unjustified impediment to making a claim.[332]

5.105 WAPC advised the Committee that the purpose of the good faith requirement is to determine whether:

> the application that was made in order to trigger a claim for compensation was something that the person was actually going to do, not just some fanciful proposal to trigger a claim and that they have not really suffered any injury because it was a fanciful proposal, if you like. It just makes sure that people are doing things in an orderly and proper way.[333]

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329 Submission 73B from Glen McLeod Legal, 31 July 2019, p 1.

330 Timothy Hillyard, Chief Property Officer, Department of Planning, Land and Heritage, transcript of evidence, 17 February 2020, p 7.

331 ibid.

332 Submission 73B from Glen McLeod Legal, 31 July 2019, p 2.

333 Timothy Hillyard, Chief Property Officer, Department of Planning, Land and Heritage, transcript of evidence, 17 February 2020, p 11.

5.106 The Committee heard from a landowner who claims to have been adversely affected by the good faith requirement. Robert White and his family have owned land in Kwinana since the 1940s. Approximately 40 hectares of the property was designated as a Bush Forever site in 2010, precluding it from clearing.[334]

5.107 Mr White submitted that when he applied for compensation, the WAPC claimed the application was not made in good faith. It appears that this was based on the fact that the land had not been cleared before that point, although Mr White points out:

> Our land has a huge resource of yellow building sand, some of the neighbouring properties have mined yellow sand up to the northern boundary of our land. Yet the WAPC argues that the development band which the bush forever restriction placed over our land has made no difference to the value of our asset.[335]

5.108 A representative of DPLH told the Committee that in this case, no compensation was payable. However, the WAPC told the Committee that it has offered to purchase the land, and is awaiting a response from the landowners.[336] The landowner subsequently told the Committee that he has not heard from the WAPC in this regard.[337]

334 Submission 34 from Robert White, 30 July 2019, p 1.

335 ibid., p 2.

336 Timothy Hillyard, Chief Property Officer, Department of Planning, Land and Heritage, transcript of evidence, 1 February 2020, p 11.

337 Robert White, private citizen, email, 16 June 2020.

5.109 According to Mr McLeod:

> If the landowner suffers detriment because of a reservation, which is probably always the case, then there should be no added good faith requirement to make an application to simply access your rights to compensation.
>
> Of course, it is a requirement that could be waived by the government agencies—the WAPC in particular—but they never do. They always require, in my recent experience anyway, that the claimant who is seeking compensation show good faith, which is just another procedural hurdle that the unfortunate claimant has to overcome.[338]

5.110 The WALRC also commented on the good faith requirement in 2008:

> it was suggested in a submission to the Commission, some land owners are both unable to sell reserved land and unable to make a development application in good faith, and are thereby deprived of any avenue for compensation.[339]

5.111 The WALRC noted that the overriding purpose of the compensation provisions is to delay payment of compensation until the land is needed, or the owner is 'distinctly disadvantaged'. The Committee takes 'distinctly disadvantaged' to mean that as a result of the reservation, the owner is unable to use the land in accordance with his or her rights and entitlements applicable to the land before the reservation was imposed, or is unable to sell the land. While the WALRC considered that allowing artificial applications would thwart this purpose, it recommended an amendment to the PD Act to provide relief in hardship cases.

5.112 The Committee is of the view that an amendment to the PD Act should be considered to ensure the good faith requirement does not unreasonably deprive the landowner of any avenue for compensation.

RECOMMENDATION 22

The Minister for Planning introduce a Bill in the Parliament of Western Australia to ensure the 'good faith' requirement does not unreasonably deprive a landowner of any avenue for compensation.

Unexecuted claims

5.113 The Committee heard that the PD Act should be amended in light of the High Court's 2017 decision in *WAPC v Southregal Pty Ltd* and *WAPC v Leith*.[340]

5.114 Mr McLeod told the Committee that for many years, the convention in WA was that an unexecuted compensation claim regarding reserved land could be passed onto a subsequent owner.[341] If the owner of the land at the time of its reservation did not claim compensation, a subsequent owner of the land could claim compensation. The argument behind this is that the right to claim compensation runs with the land.

5.115 In 2004, the High Court cast doubt over this longstanding practice by overruling the WA Court of Appeal in the case of *WAPC v Temwood Holdings Pty Ltd*.[342] An issue in question was whether the statutory right to compensation passed with the land. Two High Court

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338 Glen McLeod, Principal, Glen McLeod Legal, transcript of evidence, 18 November 2019, p 3.

339 Law Reform Commission of Western Australia, *Compensation for injurious affection*, 2008, p 47.

340 *Western Australian Planning Commission v Southregal Pty Ltd, Western Australian Planning Commission v Leith* [2017] HCA 7.

341 Submission 73B from Glen McLeod Legal, 31 July 2019, p 2.

342 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63.

judges thought that a subsequent owner did not have a right to compensation. Two other judges held the opposite view, and a fifth judge did not address the issue.[343]

5.116 The entitlement of a subsequent owner to compensation in WA has been unclear since 2004.[344] Interestingly, the WA Government did not introduce legislation to clarify the law following the High Court decision in Temwood.

5.117 In 2017, the High Court confirmed that subsequent owners cannot claim, even where no claim was executed, in the cases of *WAPC v Southregal Pty Ltd* and *WAPC v Leith*.

5.118 Southregal and Leith claimed compensation for injurious affection under the PD Act after both lodged development applications that were rejected by the WAPC. Their respective parcels of land were subject to a reservation for regional open space under the Peel Region Scheme which came into effect in March 2003.[345]

5.119 Southregal purchased its land in October 2003 for $2.6 million and claimed compensation of $51.6 million. Leith purchased its land in October 2003 for $1.28 million and claimed compensation of $20 million.[346] The WAPC rejected the claims for compensation on the grounds that compensation was only payable to the owners of the land at the time of reservation.[347]

5.120 In 2017, the High Court confirmed that subsequent owners cannot claim, even where no claim was executed, in the cases of *WAPC v Southregal Pty Ltd* and *WAPC v Leith*.

5.121 Both applied to the Supreme Court, where it was found that both were entitled to compensation. The WAPC appealed the decision in the High Court, which set aside the decision of the WA Court of Appeal in a 4:1 decision.[348]

5.122 Kiefel and Bell JJ reasoned:

> No reference is made in s 173(1) to a person who purchases land which is already affected by a reservation. It does not suggest that anyone but a landowner at the time of reservation will be entitled to compensation.
>
> A purchaser does not fall within the description of a person whose land is affected "by the making" of a planning scheme. A purchaser would only be entitled to compensation if there was, subsequent to that person becoming the owner, an amendment of the planning scheme which injuriously affected the purchaser's land.[349]

5.123 In brief, the High Court held:

- A subsequent purchaser does not fall within the description of a person whose land is affected 'by the making' of a planning scheme[350]

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343 *Western Australian Planning Commission v Southregal Pty Ltd, Western Australian Planning Commission v Leith* [2017] HCA 7, 8 February 2017, p 4.

344 Casteldine Gregory Law & Mediation. See: https://cglawmediation.com.au/2017/02/high-court-rules-that-purchaser-of-land-not-entitled-to-compensation-for-land-injuriously-affected-by-planning-scheme/. Viewed 3 September 2020.

345 *Western Australian Planning Commission v Southregal Pty Ltd, Western Australian Planning Commission v Leith* [2017] HCA 7, 8 February 2017, p 36.

346 ibid., p 13.

347 ibid., p 1.

348 ibid.

349 ibid., p 7.

350 ibid., p 10.

- Purchasers are aware of the planning scheme provisions at the time of purchase, and are therefore not at the same disadvantage as the original owner[351]
- Compensation for the value reducing effect of the reservation would have been available to the previous owner at the point of sale (as this was the trigger event for a claim of compensation, not the subsequent purchaser's rejected development application.[352]

5.124 Glen McLeod Legal contend that law reform is required in light of Southregal, to restore the former practice in WA of allowing entitlement to claim compensation in respect of reserved land to transfer to the subsequent owner. Mr McLeod used the example of clients who may not have had the wherewithal to pursue a compensation claim, such as elderly clients who simply wish to sell their properties and move on to the next stage in life:

> **The CHAIR**: But surely the subsequent owner would have been aware of any impediment on that title and therefore would have known that at the time they made the purchase, and that would have affected the purchase price, or at least they should have known about it if they had applied due diligence?
>
> **Mr McLEOD**: Yes, that is true. Again, I think there are two points there. One is—this is a limited point, really—that before the High Court decisions, some purchases were made on the assumption that you could claim compensation, so those people lose out. Now, everyone should be aware of it. So that is a fair point.
>
> ....
>
> My main point is that I cannot see why the onus should be on the owner at the time that the reservation is made to make a claim. There is no good reason why, if a reservation is applied to your land, and the reservation is there forever, that the right to claim compensation cannot run with the land, in the same way that planning approval rights run with land and so on. These are rather significant property-related issues that affect the value of land, and to deny someone the right of compensation or the flexibility to transfer the compensation in all sorts of different circumstances is a technicality that we can do without.[353]

5.125 With reference to the second reading speech on the *Metropolitan Region Town Planning Scheme Act Amendment Act 1968*, Keifel and Bell JJ observed that a purchaser of land that is subject to reservation may be expected to adjust the purchase price accordingly, and therefore obtain the land at a lower price and avoid the loss the statute predicts the original owner will suffer.[354] Therefore, compensation is payable to the person who owns the land at the time of the reservation, and not a buyer of injuriously affected land.

5.126 Understandably, the High Court decision would be of particular concern to landowners who have purchased land affected by a reservation on the assumption that they would be able to seek compensation for injurious affection caused by the reservation. However, as observed by Keifel and Bell JJ, it is likely that the purchase price reflected the market value of the land as a result of the reservation. The onus is on the purchaser to undertake due diligence.

5.127 The Committee asked the WAPC if there were any plans to amend the PD Act in light of the Southregal decision. A representative of DPLH advised that there are not, as the decision reflects the original intention of the legislation:

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351 ibid., p 12.

352 ibid., p 34.

353 Glen McLeod, Principal, Glen McLeod Legal, transcript of evidence, 18 November 2019, p 6.

354 *Western Australian Planning Commission v Southregal Pty Ltd, Western Australian Planning Commission v Leith* [2017] HCA 7, 8 February 2017, p 12.

> So the intent is that if you are the first affected landowner, you are entitled to lodge a claim for compensation. If you choose not to because you would get a fair price in the market, in any event—the reservation did not impact upon you—then the rights to claim compensation fall away.
>
> However, that does not stop then—the same as we normally operate through the year—a landowner affected by a reservation coming to the commission and saying, "I've got this reservation on my property. Would you buy it?" Yes, the commission would buy it. Or, equally, that never happens, but along comes Main Roads when they are ready to build the road and then if the landowner does not wish to negotiate the release of the property that is required, then it is compulsorily acquired, and the processes go through there.
>
> I think the issue that came through that decision was that we should always compensate the first affected person and then the market is informed, and compensation and all negotiations go upon people being fully aware of all of the issues that are ongoing.[355]

5.128 The High Court decision in Southregal and Leith has largely settled the law in WA on this matter after years of uncertainty. The Committee notes, however, that it remains unclear if compensation can be claimed in respect of a development application by a subsequent owner who obtained title through inheritance.

RECOMMENDATION 23

The Minister for Planning bring a Bill before the Parliament of Western Australia to amend the *Planning and Development Act 2005* to clarify whether injurious affection compensation can be claimed in respect of a development application by a subsequent owner who obtained title through inheritance.

Where injurious affection compensation is not available

5.129 Not every Government encumbrance that affects use or enjoyment, or value, of land has an avenue for claiming injurious affection compensation. For example, the EP Act does not provide for a landowner who has been injuriously affected by an ESA to be compensated.

FINDING 19

Injurious affection compensation is available for some government encumbrances imposed for public benefit, but not for others.

Environmentally Sensitive Areas

5.130 A number of submitters expressed their support for compensating landowners who have been adversely affected by an ESA:[356]

> If Government environmental legislation inflicts a loss in the value of private property, (for the benefit of the community), then the community, not the property owner should bear the cost.[357]

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355 Timothy Hillyard, Chief Property Officer, Department of Planning, Land and Heritage, transcript of evidence, 17 February 2020, p 10.

356 For example, Submission 12 from Kay and Bryon Micke, 24 July 2019; Submission 25 from S Mead, 28 July 2019; Submission 35B from Steve Chamarette, 30 July 2019; Submission 23 from Wayne Gowland, 28 July 2019; Submission 6 from WAFarmers, 18 July 2019 and Submission 48 from Peter Swift, 31 July 2019.

357 Submission 35B from Steve Chamarette, 30 July 2019, p 1.

> I am very concerned by the erosion of farmer property rights. If we are prevented from clearing land or using ESA areas for farming purposes, farmers should be compensated as it is for public benefit.[358]
>
> Pay fair and reasonable compensation to the owner of private property affected by these uses if the value of the property is diminished by a government encumbrance or resumption in order to derive a public benefit.[359]

5.131 Submitters to this Inquiry have spoken of the need to strike a balance between landowners and the state in terms of who bears the cost.[360] The Committee has heard that regarding ESAs, the associated costs are disproportionately borne by landowners.[361] These costs may include:

- any decrease in value resulting from restrictions on the use of the property
- permit application fees
- maintenance and other costs associated with meeting biosecurity requirements.[362]

FINDING 20

The cost of environmental protection as it relates to Environmentally Sensitive Areas is borne predominantly by landowners.

5.132 The PAF Committee discussed the need for fair compensation in relation to interests in land taken by the State Government for a public purpose back in 2004. While environmental regulation has evolved since that time, the principle can clearly be applied to ESAs:

> where such an interest in the land, or any granted right attaching to that interest, is subsequently taken from the landholder by the State Government for a public purpose, then the State should provide fair compensation to the landholder.[363]

5.133 Members of the Legislative Council referred to the 2004 report when debating a motion relating to ESAs in 2014. During this debate, a number of Members supported the principle of compensation for ESA, or at least acknowledged that the issue needs to be properly addressed.[364]

5.134 The main argument against ESA compensation has been the potential cost to the State:

> **Hon SUE ELLERY**: On the view that a property owner should be compensated for it, as we made the point in the committee—I do not have the page reference—it is a huge issue for the state, whoever is in government. It would come at a huge cost if we were to change our system from one that does not have compensation built into it to one that does. I can appreciate, I guess, why since 2002 government, in response to our committee's report, has not bitten the bullet on that. I can understand that it is a big decision to make because it would involve an awful lot of money.

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358 Submission 25 from S Mead, 28 July 2019, p 1.

359 Submission 48 from Peter Swift, 31 July 2019, p 2.

360 Submission 12 from Kay and Bryon Micke, 24 July 2019, pp 5-6.

361 Submission 47 from Lorraine Finlay, 31 July 2019, p 5.

362 Submission 23 from Wayne Gowland, 28 July 2019, p 2.

363 Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 42.

364 For example, the Hons Rick Mazza, Nigel Hallett and Sue Ellery MLCs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014 .

> **Hon RICK MAZZA**: You're quite right. It is a lot of money but at the moment that financial burden is being borne by the few landholders it affects, so those people have that burden on reduced land values.[365]

5.135 According to Lorraine Finlay, while ESA compensation would undoubtedly impose a significant financial burden on the State, 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.[366]

5.136 By providing an avenue for ESA compensation, public servants may be more inclined to consider the financial implications of the decision to 'lock away' certain land:

> 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.[367]

5.137 It is not unheard of to compensate landowners for injurious affection arising from environmental restrictions. For example, under the Tasmanian *Nature Conservation Act 2002*, landowners who are prevented from clearing their land by the *Forest Practices Regulations 2017* may apply for compensation.[368] Assessment of compensation includes having regard to the value of any agricultural activities being carried out on the relevant land, and any agricultural potential of the relevant land unable to be realised.

5.138 It is worth noting that not every landowner with an ESA will have suffered injurious affection. Presumably, the landowner would need to have applied for a clearing permit, and had that application refused. The Committee is of the understanding that the clearing permit refusal would also need to negatively impact the value of the land. This may occur if the landowner is then required to cease or restrict farming or other productive activity on the land.

5.139 In 2018-19, DWER received 443 clearing permit applications, and refused to grant 15, or 3.4 percent.[369] Of those, only three were within an ESA, and DWER advised the presence of an ESA is unlikely to have been the reason for the refusal.[370] The Committee was not told the reason for the refusals.

5.140 It is not known how many landowners with an ESA on their property approached DWER to discuss lodging a clearing permit and were informed it was unlikely to be approved, so did not proceed to make an application.

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365 ibid., p 5678.

366 Submission 47 from Lorraine Finlay, 31 July 2019, p 6.

367 ibid.

368 *Nature Conservation Act 2002* (Tas) s 41.

369 Department of Water and Environmental Regulation, Answer to questions on notice 2 and 3 asked at hearing held 17 February 2020, dated 4 March 2020, pp 2-3.

370 Kelly Faulkner, Executive Director, Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, pp 7-8.

5.141 Injurious affection compensation for environmental regulation is not unheard of in WA. The *Country Areas Water Supply Act 1947* (CAWS Act) provides for the construction, maintenance, administration and safeguarding of water supplies to the Goldfields and Great Southern regions.[371] The CAWS Act has some similarities to the EP Act, in that a licence is required for certain land clearing to preserve water catchments.

5.142 Unlike the EP Act, the CAWS Act provides for the payment of injurious affection compensation where a licence is refused, rendering their land unproductive or uneconomic, or otherwise injuriously affecting the land.[372] The WALRC pointed out that in some cases, both a licence under the CAWS Act and permit under the EP Act will be required in relation to the same land:

> Hence, refusal of authority to clear land in a control area attracts compensation under one Act and no compensation under another.[373]

FINDING 21

The *Country Areas Water Supply Act 1947* provides for the payment of injurious affection compensation where a licence for land clearing to preserve water catchments is refused and the land is rendered unproductive, or uneconomic, or has otherwise been injuriously affected.

5.143 The Minister for Environment told the Committee that he does not support compensation arising from the presence of ESAs:

> The effect of ESAs is much less significant than the clearing provisions as a whole, as can be seen from statistics on the area of clearing refused. In addition, the impact of ESAs is only to require a clearing permit, which is the requirement for the majority of clearing in any case.[374]

5.144 In the absence of supporting evidence, the Committee is not persuaded that the only impact of an ESA is to require a clearing permit.

Permit costs

5.145 Apart from any injurious affection that may be suffered, landowners may be subject to significant costs to apply for a clearing permit. Landowners who apply for a permit to clear on an ESA will pay between $400 and $10 000 depending on the size of the application area.[375] In 2018-19, fees for the assessment of clearing permits were increased for the first time since the introduction of the clearing provisions in the EP Act.

5.146 Permit application fees are used to fund the application and assessment process, including increasing staff numbers, developing and updating guidance documents and improving systems.[376] DWER estimate that even with the new fee structure, fee revenue only covers 6 percent of the cost of its service.[377]

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371 Law Reform Commission of Western Australia, *Project 98: compensation for injurious affection,* 2008, p 75.

372 *Country Areas Water Supply Act 1947* s 12E.

373 Law Reform Commission of Western Australia, *Project 98: compensation for injurious affection,* 2008, p 76.

374 Hon Stephen Dawson MLC, Minister for Environment, letter, 15 October 2019, p 1.

375 *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* r 7.

376 Department of Water and Environmental Regulation. See: https://www.der.wa.gov.au/our-work/clearing-permits/fees/faqs. Viewed 10 September 2020.

377 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 4.

5.147 DWER confirmed that the permit fee is paid upfront to cover the cost of the application and assessment process. Refunds are not given when an application is refused, but may be considered when an application is withdrawn prior to a decision being made.[378]

5.148 Although the risk of refusal may be acceptable for a $400 fee, a $10 000 fee is a significant risk. To avoid paying a permit fee only to have an application refused, DWER recommend that applicants engage with them early and often:

> For those applicants who are looking at large areas that might have significant environmental impacts, we absolutely encourage them to talk to the department in the first instance before they lodge an application. The department is able to provide some desktop advice, looking at some desktop information and looking at those values, and can have a frank discussion about the possibilities.[379]

5.149 In addition, DWER publish a guide to the assessment of applications to clear native vegetation to inform applicants about what they should consider before and during the process.[380] The Committee notes that the fees apply to all clearing permit applications, not just those on an ESA.

Energy operators

5.150 As outlined in Chapter 3, energy operators in WA have the power under the EOP Act to compulsorily acquire, enter and occupy land to carry out necessary public works. Compensation for compulsory acquisition is governed by Parts 9 and 10 of the LA Act, but is subject to the EOP Act.

5.151 Under section 45(4) of the EOP Act, energy operators are not required to acquire an easement for new transmission lines below 200kV:

> Western Power is obliged under the *Energy Operators (Powers) Act 1979* to acquire land or an interest in land, typically an easement, whenever it is operating network infrastructure at or above 200kV. For all other network infrastructure operating below 200kV, Western Power is not obliged to acquire land or an interest in land, however they may choose to for operational reasons.[381]

5.152 This acts as a limit on potential injurious affection claims. Where an Energy Operator takes an interest that is less than fee simple (such as an easement), the landowner is not entitled to claim compensation for resulting diminution of the value of any adjoining land, which otherwise arises from section 241(7) of the LA Act.

5.153 Other limitations exist under the EOP Act. Section 45(1) and (2) provide that, in relation to claims against the energy operator for the use of land and the application of the LA Act:

> (1) Subject to subsection (3), an energy operator shall not be liable to pay compensation for, or in respect of any damage attributable to, the placing of any works or other things to which section 43(1) applies or by virtue of the grant of the right of access deemed by that subsection to be vested in the energy operator.
>
> (2) No claim lies against an energy operator by reason of any loss of enjoyment or amenity value, or by reason of any change in the aesthetic environment,

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378 Kelly Faulkner, Executive Director, Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 6.

379 ibid.

380 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 8.

381 Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 2.

alleged to be occasioned by the placing of works of the energy operator on any land.

5.154 The Committee heard support for extending compensation to landowners impacted by easement. For example, WA Land Compensation suggest:

> Section 241 (7) of the Land Administration Act should be amended. Fee Simple should be replaced with any interest in land. That would then include easement interests for pipelines & power lines.[382]

5.155 The Hon Rick Mazza MLC noted in the Legislative Council that this debate has been going on for years:

> I would like to see this government or a future government introduce a bill of some kind that would give some surety of compensation for blighting or easements that could affect the value of a person's private property in this state. It is lacking; it is a conversation that has been ongoing in this place for many years. I do not know for how much longer the conversation can go on without some action taking place along the lines I have advocated here today.[383]

5.156 A number of recommendations from the 2004 Inquiry pertained to the Western Power Corporation. The Western Power Corporation has since been abolished and replaced by three statutory, government-owned corporations:

- Synergy – South West Interconnected System (Verve merged with Synergy in 2014)
- Horizon – regional/remote – everywhere outside of the South West Interconnected System
- Western Power (Electricity Networks Corporation) – South West Interconnected System.

5.157 Energy Policy WA was established as a standalone sub-department of the Department of Mines, Industry Regulation and Safety in 2019.[384] Energy Policy WA administers the EOP Act.

5.158 The PAF Committee made three main recommendations in relation to compensation and energy operators:

> **Recommendation 10:** The Committee recommends that an appropriate method and level of compensation should be established by legislation for those landholders whose land is subject to an electricity transmission line easement. To achieve that end, the Committee recommends that one of the following two options be implemented by the State Government:
>
> (a) Section 45(2) of the *Energy Operators (Powers) Act 1979* be repealed; and
>
> (b) The *Land Administration Act 1997* be amended to expressly provide for compensation to a landholder for injurious affection to the landholder's land arising from the acquisition by a State Government department, agency or body of any interest in that landholder's land. The calculation of injurious affection should also take into account the value of the land covered by the easement.
>
> or
>
> Both the *Energy Operators (Powers) Act 1979* and the *Land Administration Act 1997* be amended to provide that the compensation to be paid to a landholder for the

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382 Submission 10 from Western Australia Land Compensation, 23 July 2020, p 11.

383 Hon Rick Mazza MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4013.

384 Energy Policy Western Australia. See: https://www.wa.gov.au/organisation/energy-policy-wa. Viewed 10 September 2020.

acquisition by Western Power Corporation of an electricity transmission line easement must include a component for land value that is equivalent to one hundred per cent of the land value of the land covered by the easement.

Recommendation 11: The Committee recommends that the *Energy Operators (Powers) Act 1979* be amended to require that Western Power Corporation shall obtain an easement for all electricity transmission lines constructed on freehold land.

Recommendation 12: The Committee recommends that the Attorney General, independent of the amendment to the *Land Administration Act 1997* contained in Recommendation 10, refer the broad issue of compensation for injurious affection to land in Western Australia to the Law Reform Commission of Western Australia for review.[385]

5.159 A full list of recommendations, with the corresponding initial government response and update on implementation status can be found at Appendix 2.

Implementation status

5.160 The WA Government remains unsupportive of recommendation 10, which provides two options for extending compensation to landowners impacted by an energy easement. The Minister for Lands told the Committee that current legislation achieves an appropriate balance between providing low cost electricity to the public, and the private interests of landowners. A change in this position would likely result in costs being passed on to electricity consumers:

> As at 2015/16, there were some 67,000 km of overhead powerlines in Western Australia. Any consideration of legislative change as recommended by the Committee could have significant financial implications for the State and it may be that additional costs imposed from the compensation required by the proposed change would increase the cost of new electricity infrastructure, which would almost certainly be passed onto consumers. In some areas of the State, it may render the installation of electricity infrastructure uneconomic and prevent potential users from accessing an essential service.[386]

5.161 The Minister for Lands did not provide an update on the status of recommendation 11. With reference to the EOP Act, the recommendation has not been implemented.

5.162 Recommendation 12, that the Attorney General refer the broad issue of compensation for injurious affection to land to the WALRC, has been implemented. In 2008, the WALRC published its final report on Project 98 – Compensation for Injurious Affection.

5.163 The WALRC report built on and further interrogated the PAF Committee's inquiries into injurious affection compensation from energy operators. In relation to energy operators, the WALRC recommended that:

> **Recommendation 24**
>
> The Commission recommends that other statutes which provide for acquisitions by agreement reflect or incorporate ss 168 and 169 of the *Land Administration Act 1997* (WA) where land is acquired for public purposes at the government's initiative and where reserved land is acquired.

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385 Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7 *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p v.

386 Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 2.

Recommendation 28

> The Commission recommends that s 45(2) of the *Energy Operators (Powers) Act 1979* be amended so as not to derogate from s 241(7) of the *Land Administration Act 1997* (WA), but to otherwise remain operative; that is, in respect of persons who have not suffered a taking of land.[387]

5.164 The 2014 LALAC Bill proposed to implement 14 of the WALRCs 31 recommendations, and included several amendments to the EOP Act to deliver a fairer and more transparent approach for the assessment and determination of compensation for landholders where private property is acquired by the state.[388]

5.165 Unlike the LALAC Bill, the proposed Land Administration Bill[389] will only amend the LA Act. The Committee asked the Minister for Energy if there are any plans to progress the WALRCs recommendations, including amending the EOP Act:

- to incorporate sections 168 and 169 of the LA Act where land is acquired for public purposes at the government's initiative and where reserved land is acquired (recommendation 24)
- so as not to derogate from section 241(7) of the LA Act (recommendation 28).

5.166 The Minister for Energy advised that these amendments are not a priority because of potential financial implications:

> the implementation of proposals of this form could potentially have significant financial implications for the State and would require a thorough investigation of the public benefits and costs.
>
> Given these potential financial implications the proposals are not considered to be a priority matter from an energy portfolio perspective.[390]

RECOMMENDATION 24

The Western Australian Government assess the potential costs of implementing recommendations 24 and 28 from the Law Reform Commission of Western Australia's 2008 project on compensation for injurious affection, so that the potential financial implications can be better understood, and publish a report detailing the findings of the assessment.

Case studies—Western Power infrastructure

5.167 Don Robertson told the Committee about how the presence of power lines on his farm has added significant costs to his plans to replace a boundary fence. About thirteen native marri trees growing near the boundary require removal to proceed with the fence. Mr Robertson suggests that this task would be relatively simple and inexpensive, if not for the power lines:

> Removal of the trees will be about $12,000 more than usual in these circumstances because there are Western Power lines close to the fence. Specialised equipment and procedure must be used to safely fell the trees without damage to the power lines.

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387 Law Reform Commission of Western Australia, *Project 98: compensation for injurious affection,* 2008, pp 83-4.

388 Land Acquisition Legislation Amendment (Compensation) Bill 2014, *Explanatory Memorandum*, Legislative Council, p 1.

389 See paragraph 5.35 on the Department of Planning, Lands and Heritage's proposed new Land Administration Bill to amend the *Land Administration Act 1997*.

390 Hon Bill Johnston MLA, Minister for Energy, letter, 2 April 2020, p 1.

> Western Power refuses to share costs of removing thirteen trees or reduce the cost by temporarily lowering the power lines to the ground, even though it is likely tree removal now would save Western Power and taxpayers greater ongoing annual pruning costs.[391]

Figure 4. *Native marri trees that must be removed to replace the boundary fence*

[Source: Submission 59 from Don Robertson, 31 July 2019, p 1.]

5.168 In a reply email, Western Power declined to assist for the following reasons:

- The cost of doing so being cost prohibitive in relation to our annual and ongoing maintenance program, especially when considering the precedent this would set for other members of the public.
- The need to consider local flora and fauna. In particular, our environment area expressed concern about the possibility of nesting Black Cockatoos, and the requirement to apply for approval for pruning/removal from the Commonwealth Department of Environment and Energy.[392]

5.169 The Commonwealth Department of Environment and Energy seeks cost recovery for environmental assessment and approval processes carried out under the *Environmental Protection and Biodiversity Conversation Act 1999*. The Hon Jessica Shaw MLA pointed out in her correspondence to Mr Robertson that the potential environmental costs for the works at hand could be in order of $50 000.[393]

5.170 Mr Robertson submitted that Western Power's refusal to assist or compensate landowners in such circumstances is contrary to their submission to the 2004 Inquiry:

391 Submission 59 from Don Robertson, 31 July 2019, p 1.

392 ibid., p 2.

393 ibid., p 3.

> Western Power is required to make good or otherwise pay adequate compensation for the damage to land that is attributable to its entry onto land and the erection of its works there.[394]

5.171 Western Power did not believe that point was relevant to the case at hand.

5.172 Beryl Crane also told the Committee about this issue. In preparing to replace a boundary fence:

> I asked a contractor a few weeks ago if he could provide a price to clear the trees impacting on the fence and the firebreak and he advised that whilst he could manage most of the tree branches adequately there were a number of living trees and at least two dead ones that would not be safe for him to trim or remove because they were either closer than 1.8m to the power line or too tall to fell without risk of hitting the powerline.
>
> The alternative was to bring in a cherry picker and licenced contractor which would be prohibitively expensive from his point of view. He also felt that it was the responsibility of Western Power to maintain the safety of the powerlines in these circumstances where specialist services were required.[395]

5.173 Ms Crane is now in a position where the local council has granted authority for clearing around the boundary, but her ability to clear is restricted by the proximity of the power lines. She notes that when the easement for the property was first put in place, no compensation was paid despite restrictions on use and potential future impacts:

> It certainly seems like the public utilities consider it to be 'their' property when it suits them but our responsibility when it suits them also.[396]

5.174 The Committee also received evidence from Terrence Ealing, a landowner with power lines and poles on his property. Mr Ealing believes that in accessing his property to conduct works, Western Power have caused damage, including running over reticulation and introducing Cotton Flax, a gazetted weed.[397]

5.175 The Committee raised this with Western Power, who advise that their Safety, Health and Environmental Management System includes procedures and work instructions related to land access and associated biosecurity risks.[398] The Environmental and Land Access Agreement Procedure applies to construction, modification and demolition works, and requires that:

- evidence of risk mitigation in the design phase be documented
- assessments be carried out when potential impacts are identified that require subject matter expertise
- when required by legislation, land access approvals are obtained.[399]

5.176 These cases illustrate how Energy Operator infrastructure can affect landowners, even where the circumstances may not trigger a legislative compensation claim.

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394 Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 91.

395 Submission 81 from Beryl Crane, 31 July 2019, p 1.

396 ibid, p 2.

397 Submission 7 from Terrence Ealing, 18 July 2019, pp 8-9.

398 Ed Kalajzic, Chief Executive Officer, Western Power, letter, 9 September 2020, p 1.

399 ibid., Attachment 1, pp 1-2, 4, 6. More detail is available in correspondence from Western Power dated 9 September 2020, available on the Committee's webpage.

FINDING 22

The presence of electricity transmission lines on private property may increase the costs to the landowner associated with undertaking works on the property.

RECOMMENDATION 25

The Minister for Energy consider requiring Western Power to compensate landowners carrying out reasonable works on their property for any additional costs incurred as a result of electricity transmission lines on the property.

Compensation on 'just terms'

5.177 Submitters suggest that compensation should not only be available—it should also be fair. Some have linked the concept of fair and reasonable compensation to the requirement in the Australian Constitution that property be acquired on 'just terms'.[400] Here, the Committee will consider the suggestion that a similar provision should apply in WA.

The Australian Constitution

5.178 Section 51(xxxi) of the *Commonwealth of Australia Constitution Act* (Australian Constitution) provides that the Federal Parliament must exercise its power to acquire property from any state or person 'on just terms':

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws; [401]

5.179 This provision has been described as a 'very great constitutional safeguard',[402] which has its roots in universal human rights:

> The Constitutional requirement of 'just terms' in a Commonwealth acquisition law, can be characterised as a manifestation of a fundamental or core legal right of the kind sought to be protected in the Universal Declaration on Human Rights and the Constitution of the United States of America, with an ancestry that dating back at least to the Magna Carta of 1215.[403]

5.180 The 'just terms' provision is limited in two ways:

- it does not apply to property acquired by States
- it only applies to property 'acquired', which may mean that it does not extend to injurious compensation for interests that are less than the taking of a freehold interest in land (such as planning reservations and restrictions imposed by environmental regulations).

5.181 Because the states are not directly bound by the 'just terms' guarantee, they have a much wider constitutional power of eminent domain.[404] In 1949, Chief Justice Latham said:

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400 See, for example, Submission 11 from Murray Nixon, 24 July 2019 and Submission 32 from Western Australian Property Rights Association, 30 July 2019.

401 *Commonwealth of Australia Constitution Act* (Cth) s 51xxxi.

402 CJ Barwick, *Trade Practices Commission v Tooth 1979* [1979] HCA 47.

403 Glen McLeod, 'The Tasmanian Dam case and setting aside private land for environmental protection: who should bear the cost?', *The Western Australian Jurist*, 2015, vol. 6, p 126.

404 D Jackson and S Lloyd, 'Compulsory Acquisition of Property', *AMPLA Yearbook*, 1998.

> if they judge it proper to do so for some reason, may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust.[405]

5.182 Compensation for property acquisition in WA arises from the LA Act. The DPLH webpage states:

> The High Court decision of New South Wales v Commonwealth (1915) 20 CLR 54 held that the sovereignty of each State Parliament empowers it to take or acquire land with or without payment of compensation.
>
> The power vested in this State to take land or interests in land is set out in Part 9 of the LAA and the compensation entitlement of owners of interests in land taken under Part 9 is set out in Part 10 of the LAA.[406]

What the Committee heard

5.183 The Committee heard strong support for the enshrinement of a 'just terms' requirement in the WA Constitution:

> Given that there is no constitutional provision equivalent to s. 51 (xxxi) in the States at all, the "deprivation of property gap" in State laws is a yawning one and much more significant.[407]

5.184 Former Member of the Legislative Council and President of the Gingin Private Property Rights Group, Murray Nixon, told the Committee:

> At Federation, the States were concerned that the new Government would acquire State land and made it clear in the Federal Constitution that it could only be acquired on Just Terms. Unfortunately, because there is not a similar clause in our State Constitution some claim that only the Federal Government is required to compensate. This in turn has led the Federal Government using the States as a way of avoiding having to pay compensation for Property Rights damaged by International Agreements.[408]

5.185 Submitters expressed support for such a provision to extend to other types of resumption, such as environmental restrictions and fishing licences:

> There is a clause in the Federal Constitution that ensures property can only be acquired on just terms, however there is no similar clause in the State Constitution. This has often meant that environmental legislation has blighted property rights but no compensation has been available to the landowner.[409]
>
> When government removes or diminishes rights to property without assuming full ownership it should be seen as 'acquiring' a proportionate number of the rights in the proprietary 'bundle'.[410]

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405 *CJ Latham in PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382.

406 Department of Planning, Lands and Heritage. See: https://www.dplh.wa.gov.au/information-and-services/crown-land/appeals-and-compensation. Viewed 10 September 2020.

407 Submission 40 from Peter Ingall, 30 July 2019, attachment 1, p 3.

408 Submission 11 from Murray Nixon JP OAM, 24 July 2019, p 4.

409 Submission 31 from Arthur and Linda Williams, 29 July 2019, p 1.

410 Submission 6 from WAFarmers, 18 July 2019, p 5.

A 'just terms' provision for Western Australia?

5.186 In a 1988 constitutional referendum, Australians were asked whether the constitutional requirement of 'just terms' should be extended to property acquired under the law of a state or territory. The question was defeated, along with other proposed amendments:

> The true level of public support for the idea was, however, impossible to gauge due to the way in which the question was presented as part of a larger package.[411]

5.187 In 2004, the PAF Committee recommended:

> that any future review by the State Government of the Western Australian constitutional legislation should include detailed consideration as to whether a 'just terms' or 'fair' compensation provision needs to be incorporated into the legislation with respect to the acquisition by the State Government for public purposes of privately-held property.[412]

5.188 At the time, the WA Government agreed to consider the provision during any future review of the WA Constitution. However, it noted that a constitutional guarantee would not substantively change the operation of legislation such as the LA Act, and that such a provision would need to operate as a limitation on state legislative power.[413]

5.189 When providing an update in 2019, the WA Government told the Committee that the recommendation has been considered and investigated. It was determined that there are several reasons why a 'just terms' provision in the WA Constitution may not be appropriate, including that a 'just terms' provision:

- does not appear to be necessary in the field of compulsory land acquisition
- could have far reaching effects in other areas of state legislation, which would limit the ability of the WA Government to pursue its legislative agenda and the WA Parliament to enact legislation
- could subvert the public interest to private rights in situations where the compensation payable might be prohibitive
- would require a WA referendum to be introduced
- would represent a departure from the approach adopted in all other Australian states.

FINDING 23

The Western Australian Government is of the view that a provision guaranteeing that property be acquired on just terms may not be appropriate in the *Constitution Act 1889*, and would not substantially change the operation of legislation such as the *Land Administration Act 1997*.

5.190 The Committee has investigated and confirmed that no other state constitution contains a requirement that acquisition of property occur on just terms. However, as the PAF Committee noted in 2004, a number of states have instead included a 'just terms' compensation obligation in relevant land acquisition legislation. While the LA Act does not

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411 Sean Brennan, 'Section 51(xxxi) and the acquisition of property under Commonwealth-State arrangements: the relevance to native title extinguishment on just terms', *Australian Indigenous Law Review*, 2011, vol. 15, 2, p 74.

412 Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7 *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 217.

413 Western Australian Government, *Response to the Standing Committee on Public Administration and Finance in relation to Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia,* July 2004.

contain a specific reference to 'just terms', the compensation regime operates in a similar way to those states that do use the express term.[414]

5.191 While the broad issue of 'just terms' was outside the scope of the 2008 WALRC project on Compensation for Injurious Affection, the WALRC did recommend that section 241 of the LA Act be amended to include a reference to 'just' compensation, similar to that in section 54(1) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW):

> **54 Entitlement to just compensation**
>
> (1) The amount of compensation to which a person is entitled under this Part is such amount as, having regard to all relevant matters under this Part, will justly compensate the person for the acquisition of the land.
>
> (2) If the compensation that is payable under this Part to a person from whom native title rights and interests in relation to land have been acquired does not amount to compensation on just terms within the meaning of the Commonwealth Native Title Act, the person concerned is entitled to such additional compensation as is necessary to ensure that the compensation is paid on that basis.[415]

5.192 In 2014, the LALAC Bill proposed to make this amendment:

> In addition, this bill will enshrine in the Western Australian *Land Administration Act 1997* the requirement that compensation be provided to landholders on just terms. Although in practice there are well-established common law rules to require that there be just compensation, the insertion of an express reference to just terms will ensure that all parties must recognise this.

5.193 As mentioned earlier in this Chapter, the LALAC Bill did not proceed past the second reading stage. However, DPLH has confirmed that amendments to the LA Act from the LALAC Bill, in some form, will be progressed as part of the new Bill to amend the LA Act, which is currently being drafted.

RECOMMENDATION 26

The Western Australian Government amend section 241 of the *Land Administration Act 1997* to include a reference to 'just' compensation, as recommended by the Western Australian Law Reform Commission in 2008.

RECOMMENDATION 27

The Western Australian Government amend relevant sections of all legislation which enables the Western Australian Government to take actions impacting private property rights, to require compensation on just terms.

Outstanding issues

5.194 Glen McLeod, Director of Glen McLeod Legal told the Committee that WA requires a positive, express 'just terms' right in the state constitution:

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414 Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 56.

415 *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 54.

> such a right that is a positive right to protect property rights exists at common law. It is just that it has been not enforced over many years because of the rise of statutory systems for providing compensation.
>
> At the time the federal Constitution was written and the states' constitutions were written, my view is that there was a right that was taken for granted. Unfortunately, it was too taken for granted. They did not write a positive right into the state Constitution. I think that needs to be addressed.[416]

5.195 While the Committee notes this argument, it is of the view that a more appropriate first step is to enshrine the notion of 'just terms' in all relevant legislation.

Conclusion

5.196 Injurious affection in relation to land operates in WA under two key Acts—the LA Act and the PD Act. Other encumbrances, such as ESAs and easements for energy operators to access a property, do not give rise to a right to claim injurious affection compensation.

5.197 Landowners who submitted to this Inquiry often did not dispute that land could, or should be reserved or acquired for a public purpose. However, these landowners submit that compensation should be payable, and should be fair and reasonable.

5.198 Similarly, landowners impacted by power lines submit that energy operators should be required to register an easement and just compensation should be payable, not only for the restricted use of the land the subject of the easement, but also for the additional costs incurred by the landowner for associated works as a result of the power lines.

5.199 A number of relevant recommendations from the PAF Committee and the WALRC remain outstanding, after more than a decade. As recommended in this Chapter, the Committee considers that progressing these changes will lead to improvements for landowners.

[416] Glen McLeod, Principal, Glen McLeod Legal, transcript of evidence, 18 November 2019, p 4.

CHAPTER 6
Government issued licences and authorities—water

Introduction

6.1 The core issue in this Chapter is term of reference (c), which required the Committee to inquire into the property rights of government-issued licences and authorities, including commercial fishing. In considering the extent to which the rights conferred by licences are proprietary in nature, this Chapter relates to a lesser extent to terms of reference (b) and (d), regarding disclosure and compensation.

6.2 Licences are not real property in the way that land is. However, licences may include some proprietary characteristics, and can be thought of as existing on a continuum of property interests. The Committee understands that it is for this reason that people tend to think of certain licences as property.

6.3 The WA Government issues a wide range of licences and authorities. For example, Lotterywest provides authority to retailers to act as agents, and the Minister for Education can licence properties to be used as school premises.[417]

6.4 Two types of licences were raised through submissions, and the Committee has inquired into these:

- water—discussed in this Chapter
- fishing—discussed in Chapters 7 and 8.

6.5 Water resources are some of the State's most important, underpinning major industries including agriculture, mining, industry and urban development.[418] For some groups, such as farmers, the right to access water is a key and valuable asset.

6.6 Water is also an increasingly scarce and vulnerable resource. Rainfall in the southwest has reduced by around 15 percent since the mid-1970s, and it is projected to continue to decline.[419] The Minister for Regional Development; Agriculture and Foods; and Ports said of the water availability landscape last year:

> this is a time when we are facing very, very significant climate change, which is bringing, particularly to the southern half of our state, a significant reduction in rainfall and an increase in heat, and we clearly have a problem. It is important to make this very clear.[420]

6.7 This Chapter will outline:

- water administration in WA, including current legislation governing the granting of licences and proposed reforms
- the rights associated with water licences, and whether these are proprietary in nature

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417 Hon Mark McGowan MLA, Premier, letter, 29 September 2020, p 2 and Hon Sue Ellery MLC, Minister for Education and Training, letter, 19 September 2019, p 1.

418 Department of Water, *Securing Western Australia's water future*, August 2013, p iii.

419 ibid., p 3.

420 Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 March 2019, p 1251.

- current issues raised in submissions, including encouraging efficiency and equity in water use, the Warren Donnelly Surface Water Allocation Plan, registration of water entitlements and compensation.

Water administration in Western Australia

Legislation

6.8 DWER is responsible for managing water resources in WA. Water resources in WA are currently managed under six Acts.

Table 4. *Water management legislation in Western Australia*

Act	Function
Water Agencies (Powers) Act 1984	Outlines the general functions of the Minister for Water and enables DWER to coordinate cross-government efforts to protect and manage water resources.
Rights in Water and Irrigation Act 1914	• Provides for the regulation, management, use and protection of water resources. • Enables DWER to grant licences to take water, construct wells (including bores and soaks) and interfere with the bed and banks of a watercourse. • Enables DWER to grant permits for activities that may damage, obstruct or interfere with water flow.
Country Areas Water Supply Act 1947	Protects public drinking water sources in country areas. The CAWS Act and CAWS Regulations are used to manage and prevent salinisation of water resources in the clearing control catchments, which are the Mundaring Weir, Wellington Dam, Harris River Dam and Denmark River catchment areas and the Warren River and Kent River water reserves.
Metropolitan Water Supply, Sewerage and Drainage Act 1909	Protects public drinking water sources in metropolitan areas.
Environmental Protection Act 1986	Provides for the clearing of native vegetation in and around wetlands.
Waterways Conservation Act 1976	Provides for management of declared waterways, i.e. Albany waterways, Avon River, Wilson Inlet, Peel Inlet and Leschenault Inlet.
Metropolitan Arterial Drainage Act 1982	Provides for an arterial drainage scheme and the declaration of drainage courses.

[Source: Department of Water and Environmental Regulation. See: https://www.water.wa.gov.au/legislation/current-legislation/water-resources-management-legislation. Viewed 10 September 2020.]

6.9 DWER also provides exemptions for water utilities from licencing under the *Water Services Act 2012*.

Water licencing

6.10 Licences and permits are granted under the:

- *Rights in Water and Irrigation Act 1914* (RIWI Act)
- *Country Areas Water Supply Act 1947*
- *Waterways Conservation Act 1976*.

6.11 The RIWI Act allows the State to control waters in a watercourse, wetland or underground water source, with certain exceptions for water flowing from springs or in wetlands within the boundaries of private property.[421]

6.12 This Chapter focuses primarily on the most commonly issued type of licence, a licence to take water under section 5C of the RIWI Act. [422] A 5C licence allows the licence holder to take a specified amount of water from a watercourse, well, and/or underground source. It is an offence to take water without a licence (exemptions apply).

6.13 A water licence is a legal document with terms, conditions and limits, and does not give the holder ownership of the water resource—water remains vested in the Crown, and the licence grants limited access for a specified duration.[423]

6.14 DWER summarised the process:

> People apply to us for a licence to access the water, subject to the water being available and for us undertaking assessment against the requirements of the legislation. The licence is issued typically for a period of 10 years, so that then grants those people an authorisation to use the water consistent with the licence terms and conditions.
>
> In addition to that, there are a series of riparian rights that people have access to, so if they are close to a river or stream, they may have access to that water without requiring a licence from us. There is also an exemption under the legislation in those circumstances where the spring rises on a person's property to be able to use that water without licensing.[424]

6.15 Licences to take water are issued on a 'first-in, first-served' methodology.

6.16 At the time of considering an application for a licence to take water, DWER considers the information provided with the application against the matters it considers relevant, consistent with Schedule 1, Clause 7(2) of the RIWI Act having due regard to the size of the property, the type of agricultural use and the reasonable needs for the proposed development/use.[425]

6.17 The licensee should take and use water consistent with the authorised purposes and terms and conditions of the water licence. If water is taken for any of the purposes stated in the licence, the water will be considered to be 'used'.[426] Water may be used for agricultural or other purposes, such as drought proofing. In surface water, the water may be used for

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421 *Rights in Water and Irrigation Act 1914,* ss 5, 5A.

422 Jason Moynihan, Acting Executive Director, Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 2.

423 Department of Water and Environmental Regulation. See: https://www.water.wa.gov.au/licensing/water-licensing/types-of-licenses. Viewed 10 September 2020.

424 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 2.

425 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 5.

426 ibid., pp 3-4.

managing losses and dam maintenance as part of holistic and sustainable business planning.[427]

6.18 Licences with water entitlements of 10 000 KL or more are required to meter or measure their water use in accordance with the *Rights in Water and Irrigation Regulations 2000* (RIWI Regulations).[428] In some cases, DWER may approve an alternative measurement method if it is impracticable to install a meter. In surface water resources, water may be taken by interception of stream flow in a dam and alternative measurement methods may be adopted if necessary. Direct pumping is generally metered to measure this take from the resource.[429]

6.19 A water licence does not guarantee that there will be sufficient water in the resource specified on the licence to enable the licensee to take their entitlement each year. DWER would be able to terminate the licence consistent with the legislation and policy of the time. DWER advise the circumstances of the termination may give rise to a financial impost on the State. However it is not possible to describe what, if any, impost there may be, without knowing the full circumstances leading to a potential termination.[430]

6.20 At the time of renewing a water entitlement, DWER may consider, but is not limited to, the allocation status of the resource, water allocation planning objectives for the area, historical use by the licensee, current and future use and demand, and the licensee's circumstances and reasons for not complying with the licence.[431]

6.21 DWER may reduce an entitlement under a water licence where the quantity of water that may be taken under the licence has consistently not been taken.[432]

6.22 DWERs policy, Management of Unused Licensed Water Entitlements, recommends a timeframe of three years for a water entitlement to be considered unused.[433] However, local water allocation plans may have a different timeframe for action. In such circumstances, the water allocation plan applies.[434]

6.23 Under Schedule 1, Clause 24(2)(d) of the RIWI Act, DWER may amend a licence where the quantity of water that may be taken under the licence has consistently not been taken. DWER provides the licensee with the opportunity to comment on the proposal before making a decision to reduce the entitlement. If the licensee does make comments, DWER is to have regard to those comments before making its final decision.[435]

6.24 The head of power to reduce a licenced entitlement at the time of licence renewal is under Schedule 1, Clause 15. Licences issued under the RIWI Act contain a number of terms and conditions, including annual water entitlement. The licensee must meet these terms and conditions if access and use of the water is to be maintained.[436]

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427 ibid., p 7.

428 ibid., p 6.

429 ibid.

430 ibid., p 14.

431 ibid., p 4.

432 *Rights in Water and Irrigation Act 1914*, schedule 1 cl 24(2)(d).

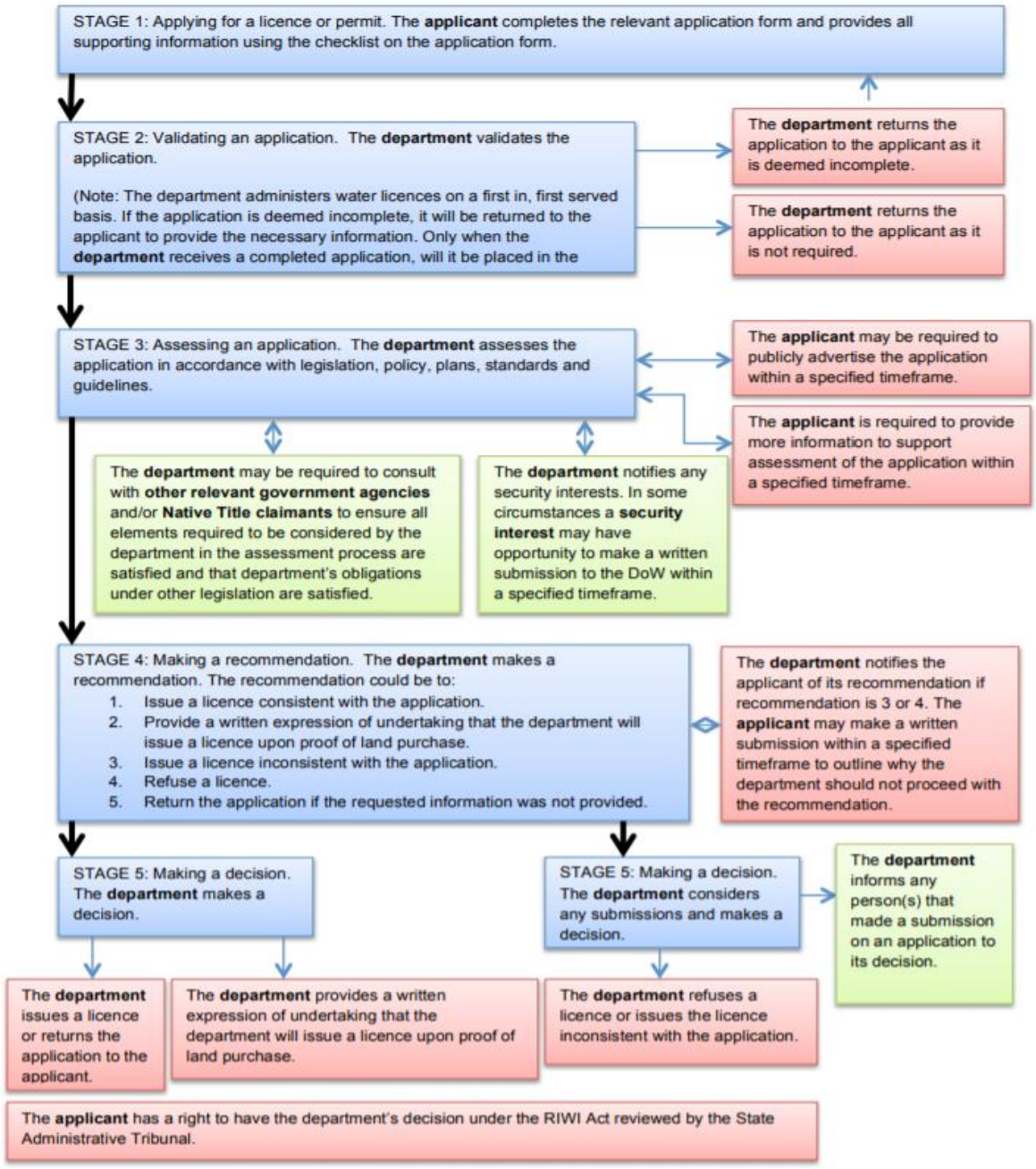
433 Department of Water and Environmental Regulation, *Management of unused licensed water entitlements*, November 2019, p 4.

434 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 3.

435 ibid.

436 ibid., p 4.

Figure 5. *Water licensing process*



[Source: Department of Water and Environmental Regulation, See: https://www.water.wa.gov.au/licensing/water-licensing/the-water-licensing-process/water-licensing-flowchart. Viewed 25 September 2020.]

6.25 Approximately 14 000 current licences exist for ground or surface water, covering a volume of approximately 4 000 gigalitres of water. This water use is approximately:

- 40 percent mining
- 16 percent agriculture
- 15 percent public water supplies.[437]

[437] Jason Moynihan, Acting Executive Director, Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 2.

6.26 Licences are issued for up to 10 years. Licences may be renewed on application, subject to conditions.

6.27 With the exception of mining and public water supply sectors, WA is the only Australian jurisdiction that does not apply any form of cost recovery for the take and use of water. In every other state, a transaction fee is applied to the issuing of new water licences. In most states, a transaction fee is also applied to the renewal or amendment of an existing licence.[438]

6.28 An online Water Register can be used to search licencing and water availability information with regard to individual properties.[439] The search function can be used to determine if a current licence is associated with a property, if a licence is valid, or if water resources are available on the property in order to apply for a licence.

Licencing exemptions—spring rights

6.29 Certain water is exempt from licencing requirements. Part 3 of the RIWI Act provides that the Crown owns natural waters and outlines how the use and flow of water may be controlled. Section 5C provides certain rights to access water that do not require a licence to access water. These include:

> (c) a right conferred by —
>
> (i) section 9, 10, 20, 21, 22 or 25A; or
>
> (ii) a local by-law of the kind referred to in section 26L(3)(d); or
>
> (iii) another written law;

6.30 In addition, section 5 of the RIWI Act provides that Part 3 does not apply to:

> (a) the water flowing from any spring the water of which rises to the surface on land that has been granted or demised by the Crown until it has passed beyond the boundaries of the land belonging to the owner or occupier of the land on which the water so rises; or
>
> (b) the water in any wetland the bed of which is on land that has been granted or demised by the Crown and is wholly within the boundaries of the land belonging to the owner or occupier of the land on which it is situated;
>
> unless the spring or wetland is prescribed by local by-laws as being a spring or wetland to which this Part applies.
>
> (2) A spring or wetland may not be prescribed as a spring or wetland to which this Part applies unless —
>
> (a) taking water from the spring or wetland will, in the opinion of the water resources management committee established under Division 3C for the locality or localities in which the by-law is intended to apply, have a significant impact on the flow or level of a watercourse or wetland; and
>
> (b) that committee recommends to the Minister that this Part applies to or in relation to the spring or wetland.

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438 Department of Water and Environmental Regulation. See: https://www.water.wa.gov.au/licensing/water-licensing/types-of-licenses. Viewed 10 September 2020.

439 Department of Water and Environmental Regulation. See: https://water.wa.gov.au/maps-and-data/maps/water-register. Viewed 25 September 2020.

6.31 The Committee is primarily concerned with (a), relating to spring water. In practice, this means that people may use water rising from a spring on their land without requiring a licence. This exemption is known in the community as 'spring rights'. DWER state that the term 'spring exemption' more accurately reflects the intent of the RIWI Act.[440] The term 'spring rights' is the term generally used by the community. Both terms are used in this report.

6.32 Where a section 5 exemption applies, there is no limit to the quantity of water that a land owner/occupier can take, even within an over-allocated area.[441] The landowner may also build a dam to hold the spring water without requiring a licence or bed and banks permit.[442] Other legislation however, including that administered by a local government authority, may apply in relation to the construction of a dam or other infrastructure on a property. A list of licences and dams connected with water and dams is provided at Appendix 10.

6.33 Historically, as no licence is required under the RIWI Act, determinations of 'spring rights' have been made by self-assessment by the landowner. There is no legislative process in place for landowners to check eligibility for spring rights.[443] DWER advises that some landowners have incorrectly self-assessed that the spring rights exemption applies, when it does not.[444]

6.34 DWER informed the Committee that changes to the RIWI Act in 2000,[445] in an effort to provide greater clarity to the interpretation and application of the section 5 exemption included amendments to the definition of a 'spring' and the meaning of a 'watercourse', together with other amendments to Division 1, including section 5.[446]

6.35 Section 2 of the RIWI Act defines 'spring' as:

> a spring of water naturally rising to and flowing over the surface of land, but does not include the discharge of underground water directly into a watercourse, wetland, reservoir or other body of water.

6.36 The meaning of 'watercourse' is found at section 3 of the RIWI Act, it provides:

> (1) In this Act, unless the contrary intention appears — watercourse means —
>
> (a) any river, creek, stream or brook in which water flows;
>
> (b) any collection of water (including a reservoir) into, through or out of which any thing coming within paragraph (a) flows;
>
> (c) any place where water flows that is prescribed by local by-laws to be a watercourse, and includes the bed and banks of any thing referred to in paragraph (a), (b) or (c).
>
> (2) For the purposes of the definition in subsection (1) — (a) a flow or collection of water comes within that definition even though it is only intermittent or occasional; and (b) a river, creek, stream or brook includes a conduit that wholly or partially diverts it from its natural course and forms part of the river,

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440 Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 8.

441 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 3.

442 Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 10.

443 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 10.

444 ibid., p 11.

445 Refers to changes enacted as a result of the *Rights in Water and Irrigation Amendment Act 2000*.

446 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, pp 9-10.

> creek, stream or brook; and (c) it is immaterial that a river, creek, stream or brook or a natural collection of water may have been artificially improved or altered.

6.37 The Committee notes that neither the definition of 'spring' or the meaning of 'watercourse' clearly state that the spring must rise to the surface at the head (or the start) of the watercourse for the section 5 exemption to apply. The Committee asked DWER whether sections 2, 3 and 5 clearly state that the spring is required to rise to the surface at the head of a watercourse. Mr Adam Maskew of DWER replied:

> That is the advice that we have, yes.[447]

6.38 The Committee is of the view that a person reading sections 2, 3 and 5 is unlikely to understand this to be the case.

6.39 DWER's position that the Rights in Water and Irrigation Amendment Bill 1999 (RIWI Amendment Bill 1999) changes to sections 2, 3 and 5 clarified that the section 5 exemption only applies if the spring is at the start of a watercourse is not apparent on review of the supporting documents and the Hansard debates. The Bill's clause notes do not indicate that the effect of the changes to sections 2, 3 and 5 of the RIWI Act are to require that the spring must rise to the surface at the head (or the start) of the watercourse for the section 5 exemption to apply.[448]

6.40 The reference to spring rights in the RIWI Amendment Bill 1999 second reading speech states:

> During the consultation period, many people expressed a concern over the inability to tackle the problems resulting from the use of springs. Of course, springs are jealously guarded by the landowner and any form of control must be carefully considered and properly justified. The Bill proposes that by-laws can be made to control the use of springs on private property if, and only if, the use will have a significant impact on other water resources. To ensure that proper consideration is given to the landowner's rights, controls can be introduced only when the water resources committee, the commission and the minister all agree that they are needed.[449]

6.41 The Committee notes that DWERs Water Quality Protection Note No. 53 on dam construction and operation in rural areas, dated September 2019, states that 'a water allocation licence may not be required if water is flowing from springs, until it passes beyond the boundary of the land on which the spring water rises'.[450] It does not state that the spring water must rise at the start of a watercourse. It does, however, advise the reader to contact DWER to confirm if they meet the requirements.

6.42 The Committee found that the DWER website directs readers to contact DWER for more information on the matter. The Committee suggests that the risk of DWER providing inconsistent advice may be reduced if more detail on when exemptions apply and when licences and permits are required is publicly available, rather than leaving DWER officers to provide advice and confirm that exemption requirements are met.

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447 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 2.

448 Rights in Water and Irrigation Amendment Bill 1999, Clause Notes, June 1999.

449 Hon Dr Kim Hames MLA, Minister for Water Resources, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 1 July 1999, p 9937.

450 Department of Water and Environmental Regulation, *Dam construction and operation in rural areas*, September 2019, p 3.

6.43 In addition to the issue of incorrect self-assessments by landowners, DWER told the Committee that the advice it has given in the past on the application of section 5 exemptions has been inconsistent,[451] and in some cases incorrect.[452]

6.44 The Committee notes that when discussing section 5 exemptions in hearings, DWER officers used terms such as 'existing interpretation',[453] 'further understanding'[454] and 'updated understanding',[455] suggesting that the application of section 5 exemptions has evolved since the statutory changes to the RIWI Act in 2000. Mr Michael Rowe, Director General of DWER, explained at a hearing on 19 August 2020 that the advice DWER has given on section 5 exemptions has:

> changed over time, based on our understanding of the legal interpretation of the legislation and how it should apply.[456]

6.45 In seeking to understand the trigger for this 'change over time', the Committee put this question to DWER, who explained:

> Rapid uptake of licensed water entitlements in the Warren Donnelly since 2016 has resulted in most water resources becoming fully allocated. Therefore, landholders have sought to find alternative sources of water, which has included exploring water drawn from springs exempt from regulation. In working with landholders on exploring opportunities related to taking water associated with springs, the Department sought to ensure a consistent interpretation of the *Rights in Water and Irrigation Act 1914* to provide equity in decision-making.[457]

As part of this process, DWER maintain:

> The Department has invested considerable resources since early 2018 to the existing interpretation and application of the section 5 exemption to provide greater certainty to landholders.[458]

6.46 It is not clear to the Committee how DWERs understanding of the legal interpretation of the legislation could change over time since the enactment of the Rights in Water and Irrigation Amendment Act 2000 (RIWI Amendment Act 2000), in the absence of further legislative changes.

6.47 It appears that the RIWI Amendment Act 2000 did not provide the intended clarity to the application of the section 5 exemption of spring rights. Further, it is concerning that it was not until subareas in the Warren-Donnelly catchment became fully allocated that DWER sought to ensure a consistent interpretation and the RIWI Act, and to correct previous incorrect advice provided by DWER to some landowners advising that they had a spring exemption when they did not.

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451 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

452 Department of Water and Environmental Regulation, Answer to question on notice 2 asked at hearing held 19 August 2020, dated 1 September 2020, attachment 3, p 3.

453 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 10.

454 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, Standing Committee on Environment and Public Affairs, 23 October 2019, p 14.

455 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

456 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

457 Anthea Wu, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 8.

458 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 10.

6.48 DWERs delay (some 16 to 18 years after the RIWI Amendment Act 2000) in addressing the issue of incorrect self-assessments and incorrect or inconsistent advice from DWER on whether a 'spring rights' or section 5 exemption applies is problematic. In the intervening period, spring rights dams have been constructed on the understanding of the land owner (either by self-assessment or based on incorrect advice from DWER) that a spring right applied, and in some cases, the opportunity for these landowners to apply for a licence to take water has been lost, as the area is now fully allocated.[459]

6.49 It is an essential feature of the rule of law that the legislation be clear, and is able to be understood by those who are bound to it.[460] The Committee adds that it should also be understood by those who are tasked to administer it, and consistently applied. The law should not be open to different interpretation that can change over time. The Committee is of the view that further legislative amendments are needed to be able to provide greater clarity and certainty. If it is the WA Government's intention that a spring rise to the surface at the head of the watercourse for a section 5 exemption to apply, the RIWI Act should specifically state this.

6.50 There is still no legislative process for landowners to check eligibility for spring rights, DWER told the Committee that it now uses the licence application process to determine whether a spring right applies. DWER recommends landowners submit an application to take water to support a formal determination of whether a section 5 exemption applies, thereby limiting the risk of incorrect self-assessment and potentially contravening the legislation. If the section 5 exemption applies to that spring, the applicant will be informed that a licence is not required to take water from that spring. Issues associated with this process are explored in the case study at paragraph 6.98.

6.51 DWER advised that a landowner taking water from a spring on their property will likely reduce the amount of water available downstream.[461] In setting and reviewing allocation limits for surface water, DWER will evaluate the volume of unlicensed (exempt) water and measure it against stream flows at various locations in the catchment.

6.52 The Committee enquired as to how DWER ensures that downstream supply to licence holders is not reduced by unlicensed water use upstream. DWER does not regulate unlicensed water, and suggest that a potential approach is to enact a by-law to prescribe the spring for the purposes of Part 3 of the RIWI Act, which would cause a licence to be required to take water from that spring. The decision is made by the Minister for Water on recommendation by a water resources management committee.[462]

6.53 DWER evaluates the volume of unlicensed use periodically as part of setting and reviewing allocation limits for surface water resources. This unlicensed use, which includes the take of water under section 5 exemptions, is estimated and assessed against measured streamflow at various locations in the catchment. DWER relies on geospatial datasets (e.g. hydrography, aerial photography, topography, geology) and available information on current and historical land use, seasonality and water flows.[463]

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459 Alan Blakers, Committee Member, Western Australian Water Users Coalition, transcript of evidence, 30 October 2019, p 3.

460 Law Council of Australia, *Policy statement – rule of law principles*, Canberra, March 2011, p 2.

461 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 2.

462 ibid., p 12.

463 ibid., p 2.

Trade and transfer

6.54 The RIWI Amendment Bill 1999 introduced a range of reforms, including the ability for a licence holder to trade water:

> Licences are, and will remain, the primary means of specifying commercial entitlements to use water. Under the reforms a licence will become a negotiable asset that the holder can trade solely at his or her discretion, provided this causes no environmental harm or other problems. Trading will give water users the opportunity to manage their supply of water, and match it to their needs. This new opportunity for agri-business will allow irrigators to increase their commercial returns and their security. Markets are already operating in South Australia, New South Wales, Victoria and among Western Australian farmers in the South-West Irrigation Cooperative. Trading will be introduced to an area only when the commission and the water resources committee agree it is ready and wants the trading. The approval of the Water and Rivers Commission or the water resources committee will be required for the transfer of a licence and local by-laws may be made to prohibit or govern the transfer. The introduction of licence trading, if not properly controlled, could create conditions favourable to speculation. To manage this, controls will be placed on who can hold a licence.[464]

6.55 Trading and agreements allow unused water to be moved to other properties in the same subarea as demand requires.[465]

6.56 The DWER website explains:

> A **transfer** takes place when a licence to take water is permanently transferred to another person and the water will continue to be taken from the same location. For example, a transfer could take place if there is a change in property ownership.
>
> A **trade** takes place when a water entitlement, or part of an entitlement, is permanently traded to another person and the water will be taken from another location and potentially use it for a different purpose. Trades typically occur in fully allocated water resource areas where new water entitlements are no longer available.
>
> An **agreement** is a form of lease and occurs via the temporary assignment of a licensed water entitlement, or part of an entitlement, by a licence holder to another party. The water may be used at the same or a different location. Agreements cannot exceed the term of the original licence.[466]

6.57 When selling the land holding (property), the licence holder is responsible for advising DWER of the impending change in ownership of the land. Prior to, or within 30 days of settlement, licence holders may apply, for a fee, to transfer the licence to the new property owner, trade the entitlement to another party or amend the licence for use on their new property.[467]

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464 Hon Dr Kim Hames MLA, Minister for Water Resources, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 1 July 1999, p 9936.

465 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 7.

466 Department of Water and Environmental Regulation. See: https://www.water.wa.gov.au/licensing/water-licensing/transfers,-trades-and-agreements. Viewed 25 September 2020.

467 Department of Water and Environmental Regulation. See: https://www.water.wa.gov.au/licensing/water-licensing/transfers,-trades-and-agreements#faq6.2. Viewed 10 September 2020.

6.58 Notwithstanding that water licence holders pay no licence fee and pay no charge to take water, licence holders are able to trade water licences for profit.[468] The financial value of the trade, transfer or lease is negotiated between the buyer and seller.[469]

Water Allocation Plans

6.59 Division 3D of the RIWI Act enables the Minister for Water to prepare regional, sub-regional and local water management plans. Consultation with the relevant water resources management committee is required.

6.60 Water management plans outline how much water can be taken from groundwater and surface water resources, while safeguarding the sustainability of the resource and protecting the water-dependent environment.

6.61 DWER uses water allocation plans to guide individual licensing decisions so that they collectively contribute to economic, social and environmental outcomes. Water allocation plans do not exist for all water resources across the state—only in those areas where water is in high competition or extensively used. DWER estimates that there are between 20 and 30 active water allocation plans in WA.[470]

6.62 The plans allow for a gradual reduction of over-allocation:

> Through the water allocation plan, we can try to set a pathway forward to reduce the allocation over time. If the system is already fully allocated and there is over-allocation and people have not used their water for a period of time, we might bring that water back into the pool, effectively, and basically retire that allocation.[471]

6.63 Water allocation plans are developed with 'extensive consultation with water users in the area', to ensure rules and principles are locally appropriate:

> You can imagine that the rules that apply to extracting surface water in the south west will potentially be very different from what they are in the Kimberley, for example, and, similarly, groundwater extraction rules might be very different on the Gnangara mound than other parts of the south west are.[472]

6.64 Water allocation plans typically last for 10 years, and DWER will typically review the objectives every two to three years:

> While the plans themselves do not necessarily change fundamentally at that time, the major review period is the opportunity for when plans can be updated, and that flows into licensing decisions and local rules that we might set.[473]

6.65 A process governs community consultation regarding new or amended water allocation plans:

> The former Department of Water's *Water allocation planning in Western Australia: A guide to our process 2011* outlines how community consultation is a critical part of all stages of water allocation planning.

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468 Department of Water and Environmental Regulation. See: https://www.water.wa.gov.au/licensing/water-licensing/types-of-licenses. Viewed 10 September 2020.

469 Department of Water and Environmental Regulation. See: https://www.water.wa.gov.au/licensing/water-licensing/transfers,-trades-and-agreements#faq6.2. Viewed 10 September 2020.

470 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 3.

471 ibid., p 4.

472 ibid., p 3.

473 ibid.

> Consultation throughout the process of developing or altering a plan also involves local water resource management or water advisory committees where these are in place. Once a draft plan is developed, it is released for public comment. Submissions on the draft plan are invited and used to inform the final plan.[474]

Reform

6.66 In August 2018, the WA Government approved drafting on the Water Resources Management Bill. The proposed Bill will consolidate the six current Acts regulating water into a single Water Resources Management Act:[475]

> It is time to stop patching the existing Acts and rebuild the legislative framework for water management.[476]

6.67 The reform is required to simplify what has become a complicated and convoluted legislative environment:

> Continuous amendment over the decades has resulted in complicated, and in some cases convoluted legislation that has not kept pace with important improvements in modern water resource management.
>
> The State Government is working to reform water legislation, policy and administrative processes. This will deliver new water resources management and water services legislation that is flexible, progressive and more capable of managing water today and in the future.
>
> The legislative reform will support Western Australia's growth and development and protect the environment, even in a changing climate.[477]

6.68 The Director General of DWER was unable to answer the Committee's questions about whether the proposed Water Resources Management Bill will increase certainty for landowners, with DWER claiming drafting instructions are cabinet-in-confidence.[478] The Bill is currently with Parliamentary Counsel's Office and subject to change. DWER advised the overarching policy intent is to give effect to the intention of the National Water Initiative:

> In essence, the principles are the same, which is you need to understand your resources on a case-by-case basis; you need to have a plan in place that sets out allocation limit that will be managed to. Then you need a system of entitlements that exist within that system that makes sense appropriate to that system.
>
> Currently, we have water licences. They are the main form of instrument that we use to allocate water. The proposal into the future might be that new water resources management legislation could provide for a consumptive pool with, effectively, a share of the entitlement allocated on a proportionate basis to water users. Again, that is subject to the bill being finalised and developed.[479]

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474 Department of Water and Environmental Regulation, Answer to question on notice 1 asked at hearing held 17 February 2020, dated 4 March 2020, p 1.

475 Department of Water and Environmental Regulation. See: http://www.water.wa.gov.au/legislation/water/water-resource-management-legislation. Viewed 10 September 2020.

476 Department of Water, *Securing Western Australia's water future*, August 2013, p 4.

477 Department of Water and Environmental Regulation. See: http://www.water.wa.gov.au/legislation/water. Viewed 10 September 2020.

478 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 5 and Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 8.

479 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 5.

6.69 While noting that the below is subject to change through the parliamentary process, DWER told the Committee that its current policy position in relation to the Water Resources Management Bill includes:

- enhanced security with respect to water entitlements in the form of statutory water allocation plans
- spring and riparian rights to remain as present under the RIWI Act
- introduction of variable water allocation limits and variable licenced water entitlements.[480]

6.70 DWER advise that the reforms will align WA with the principles of the National Water Initiative (NWI), a blueprint for water reform, which was agreed in 2004 by the Council of Australian Governments.[481] The NWI is a shared commitment to increase the efficiency of water use across Australia. Under the NWI, State and Territory governments will:

- prepare comprehensive water plans
- achieve sustainable water use in over-allocated or stressed water systems
- introduce registers of water rights and standards for water accounting
- expand trade in water rights
- improve pricing for water storage and delivery
- better manage urban water demands.[482]

Proprietary rights associated with licences

6.71 The Committee heard that licences are not 'real property', legal estates, nor legal interests in land,[483] and are therefore not recognised under the land titles system:

> There are no certificates of titles for water. So it would not be possible to link information about fishing licences or any other water licences to land titles, or through the PIRs [Property Interest Reports].[484]

6.72 The Committee also heard that licences are not property at all. Timothy Houweling, Director of Cornerstone Legal, questioned this particular Inquiry term of reference by referring to section 50(2)(c) of the *Interpretation Act 1984*:

> A government has a right to issue a licence. A licence is not considered to be property. Perhaps under the federal government fair and just terms, we can bring that within compensation but under the Interpretation Act, government agencies are able a grant licence on the terms that are reasonable and the exercise of the discretion and it can also cancel a licence, and there is no requirement for the payment of compensation in those circumstances. That particular term of reference has contained within it an assumption that may not be entirely correct.[485]

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480 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 9.

481 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 5.

482 Department of Agriculture, Water and the Environment. See: https://www.agriculture.gov.au/water/policy/nwi. Viewed 10 September 2020.

483 Submission 69 from Landgate, 31 July 2019, p 5.

484 ibid.

485 Timothy Houweling, Director, Cornerstone Legal, transcript of evidence, 18 November 2019, p 5.

6.73 The rights associated with water are notoriously difficult to define. Water is a common good resource, and all natural water resources in WA are vested in the Crown.[486] Definition of these rights is further complicated by the variable nature of the resource.[487]

6.74 While landowners who hold water entitlements have rights, there has been significant debate about whether these rights or entitlements are proprietary rights. The Minister for Environment said that rights in water must be distinguished from ownership:

> Water licences issued under the *Rights in Water and Irrigation Act 1914* grant the right to take water for a particular use, but do not give ownership of water to licensees.[488]

6.75 In *ICM Agriculture Pty Ltd v Commonwealth* (2009), the High Court found that the reduction of water entitlements does not constitute the acquisition of property.[489] The case concerned the replacement of bore water licences with aquifer access licences. This resulted in a reduction of the amount of groundwater the plaintiffs were entitled to abstract. Although there was debate on this issue, French CJ, Gummow and Crennan JJ considered that the licences were not proprietary:

> Where a licensing system is subject to Ministerial or similar control with powers of forfeiture, the licence, although transferable with Ministerial consent, nevertheless may have an insufficient degree of permanence or stability to merit classification as proprietary in nature.[490]

6.76 On the other hand, Hayne, Kiefel and Bell JJ considered otherwise:

> It may readily be accepted that the bore licences that were cancelled were a species of property. That the entitlements attaching to the licences could be traded or used as security amply demonstrates that to be so.[491]

6.77 The 'common' nature of water is a further limitation on proprietary rights. In the ICM case, French CJ, Gummow and Crenna JJ stated that:

> the groundwater in the [Groundwater System] was not the subject of private rights enjoyed by [the plaintiffs]. Rather … it was a natural resource, and the State always had the power to limit the volume of water to be taken from that resource.[492]

6.78 DWER confirmed that a water allocation licence does not give rise to a 'property right' in water:

> The State grants rights to access the water resources, through the issuing of water licences under section 5C of the RiWI, which allows licence holders to take water under the RiWI Act. A water licence holder and water access entitlement holder does not 'own' the water. They only have the right to access the water.
>
> A property right is a right to an interest or thing which is legally capable of ownership and which has value. A licence granted under section 5C of the RiWI Act

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486 *Rights in Water and Irrigation Act 1914* s 5A.

487 D Brennan and M Scoccimarro, 'Issues in defining property rights to improve Australian water markets', *The Australian Journal of Agricultural and Resource Economics*, 2002, vol. 43, 1, p 70.

488 Hon Stephen Dawson MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4019.

489 See *ICM Agriculture Pty Ltd v the Commonwealth* [2009] HCA 51 and *Arnold v Minister Administering the Water Management Act 2000* [2010] HCA 3.

490 *ICM Agriculture Pty Ltd v the Commonwealth* [2009] HCA 51, p 25.

491 ibid., p 55.

492 ibid., p 27.

> is a statutory entitlement, rather than a property right, as it does not grant ownership of anything. Rather, it is a licence issued under the statute which allows a person to take an action which would otherwise be prohibited by the RiWI Act (i.e. take water).[493]

6.79 However, as outlined at 6.54, licence holders are able to trade their water entitlements for a profit. This has caused some in the community to view water licences as a property right. The Committee notes that the ability of the licensee to trade water licences and certain other government issued licences in exchange for a monetary payment sits somewhat awkwardly with the WA Government retaining the proprietary right in the natural resource.

6.80 The Committee notes that water licences are not property in the same way that 'real property', such as land, is. However, water licences have proprietary characteristics such as exclusivity and transferability, to a degree. As with fishing licences (see Chapters 7 and 8), the Committee considers that water licences exist on the continuum of property interests.

6.81 Proprietary or otherwise, entitlements and rights in water do exist. Some suggest that such rights are not assigned an adequate level of priority:

> 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.[494]

6.82 In a working paper on the case of the Gnangara groundwater system, University of Western Australia academics James Skurray, Ram Pandit and David Pannell found that the rights associated with water in WA are 'conditional, temporary and vulnerable to amendment'.[495]

6.83 Achieving a balance between preserving water and recognising landowners water rights is important to farmers, who require a level of certainty to plan for the future:

> Farmers are increasingly uncertain about their future and their rights as landholders. Successive governments have done little to allay concerns or clear the way. Property rights of farmers must be respected in relation to government decisions affecting land and water entitlements to give them confidence to invest and run a farm business.[496]

6.84 The NWI has attempted to deliver some certainty in this space by providing statutory access entitlements, which possess some key characteristics of property rights—namely, exclusivity, transferability and enforceability (see paragraph 2.7).[497]

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493 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 5.

494 Institute of Public Affairs, *Property rights in Western Australia: time for a changed direction,* report prepared by Louise Staley, July 2006, p 6.

495 University of Western Australia, School of Agricultural and Resource Economics, *Institutional impediments to groundwater trading: the case of the Gnangara groundwater system of Western Australia*, report prepared by James Skurray, Ram Pandit and David Pannell, November 2011, p 2.

496 Submission 6 from WAFarmers, 18 July 2019, p 2.

497 Australian Law Reform Commission, Report #129, *Traditional rights and freedoms – encroachment by Commonwealth laws,* 1 March 2016, p 472.

Current issues

Encouraging efficiency and equity in water use

6.85 DWERs operational policy on water entitlement transactions for WA states that the trading of water entitlements is an effective means for optimising the benefits of using water.[498] It also notes that transactions are most common where water is fully allocated.

6.86 Where a water entitlement is unused, typically over a three-year period, DWER will look to recoup that water and amend the quantity on the licence.[499] This creates an incentive for landowners to lease their entitlements, rather than lose the water.

6.87 The Committee, while acknowledging that holders of water licences value the right to trade water, expresses its concern that in fully allocated or over-allocated subareas, the right to trade water may mean that licence holders are able to hold onto their full water allocation even if it is in excess to his/her needs rather than have the excess or unused water returned to the 'pool' for distribution,[500] thereby possibly preventing new landowners to the subarea from securing a water licence and realising the full agricultural potential of their property.

6.88 The Committee asked DWER if the system of trading arrangements encourages over-use or waste of water by those with a water allocation, who wish to avoid their allocation being reduced:

> I guess the legislation provides for trading arrangements. It is not well used in the south west of the state. It is surprising to me that it is not, to be honest. It exists as an opportunity and I do not why people may or may not be doing it. It is up to them. I guess we do not see evidence of hoarding in that sense, but the opportunity exists for people to move water around and to make money from it—the legislation clearly provides for that.[501]

6.89 In terms of why it has no reliable evidence of 'water hoarding', DWER advised:

> The cost to a licensee of pumping water would also act as a deterrent to poor water use efficiency practices, and can potentially impact negatively on crop production.[502]

6.90 The Committee also asked whether the current 'first in-first served' system of water allocation delivers a fair and equitable outcome for owners of agricultural land, particularly in fully allocated or over-allocated subareas:

> The Department undertook a review of this policy in 2011 with stakeholders. Feedback at that time was that it was considered the most fair and transparent way in which water could be allocated. However, depending on the circumstances, the Department may apply a different approach to allocating additional water resources in the future.[503]

6.91 When questioned as to why available water cannot simply be distributed between all properties in a subarea on the basis of size and agricultural use, DWER responded:

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498 Department of Water and Environmental Regulation, *Operational policy on water entitlement transactions for Western Australia*, November 2010, p v.

499 Department of Water and Environmental Regulation. See: https://www.water.wa.gov.au/licensing/water-licensing/transfers,-trades-and-agreements#faq6.10. Viewed 10 September 2020.

500 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 14.

501 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 11.

502 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 4.

503 ibid., p 5.

> Such an approach may be applicable in a 'greenfields' scenario. However, to do so where high levels of pre-existing development exists is impractical due to varying catchment flow responses and may adversely affect existing users' licences to take water. Allocation planning for water resources acknowledges pre-existing use and development when setting local water allocation planning objectives for the catchment area.
>
> In addition, water is generally unevenly taken and available across a catchment due to clearing, soil types, water salinity, stream networks, groundwater systems (including their connectivity) and proposed usages. Land use changes over time.[504]

6.92 The Committee heard evidence that in fully allocated subareas, when water becomes available it is highly contested.[505] The 'first in-first served' methodology means landowners need to have an application ready to lodge before availability of the water is advertised to have any hope of being 'first in' to secure a water licence.

6.93 A lack of access to water in over allocated or fully allocated water subareas is restricting expansion of horticultural businesses and growth of the agriculture industry in the Warren-Donnelly catchment.[506] Witnesses called for greater transparency in DWERs modelling and calculation of available water in subareas and catchments, and the quantity of water needed to sustain the environment.[507]

6.94 The Committee asked DWER whether it assesses 'need' when considering water licence applications:

> The department considers the information provided with the application against the matters it considers relevant consistent with Schedule 1 Clause 7(2) of the RIWI Act having due regard to the size of the property, the type of agricultural use and the reasonable water needs for the proposed development.[508]

6.95 On how water within a subarea becomes over-allocated, DWER told the Committee:

> Over-allocation occurs when the taking of water exceeds the availability of water from a water resource. Climate change is a key factor, as rainfall runoff/infiltration has significantly reduce in recent years, which impacts on the sustainable yield of the water resource and may result in over-allocation where competition for water is high.[509]

6.96 DWER added:

> Over-allocation can occur as a consequence of a number of mechanisms which may include where take and use is under-estimated or previously unidentified or changes in exempt status.[510]

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504 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 3.

505 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

506 Tyne Logan, 'Farmers in a town with annual rainfall of 981mm face a shortage of water for irrigation', *ABC News*, 18 September 2018.

507 Alan Blakers, Committee Member, Western Australian Water Users Coalition, transcript of evidence, 30 October 2019, p 4.

508 Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 5.

509 ibid., p 3.

510 ibid.

6.97 Concerned with the drying climate and what this may mean for landowners into the future, the Committee asked whether DWER actively promotes efficient use of water by farmers such as drip irrigation systems:

> The department promotes the adoption of water efficiency measures. Irrigation efficiency, engagement with landowners is undertaken by the Department of Primary Industries and Regional Development.[511]

FINDING 24

Access to water in fully allocated or over-allocated water subareas is restricting horticultural activity in these subareas.

FINDING 25

Water security is a real and growing issue in a drying climate.

Case study—water in the Warren-Donnelly area

6.98 The Committee heard from the WA Water Users Coalition (Coalition), who are concerned that DWER have acted inconsistently, without transparency and failed to provide clarity in relation to water allocation in the Manjimup area. The Coalition formed in the late 1990s to respond to the RIWI Amendment Bill 1999, which allowed the sharing of water that can be taken under riparian rights and the imposition of controls on springs and wetlands on private land.[512]

Background

6.99 The Warren-Donnelly area comprises the Warren River catchment area and the Donnelly River catchment area.

6.100 In 2008, DWER began working on a surface water allocation plan for the Warren-Donnelly area after a study indicated that some rivers may be fully or over-allocated:

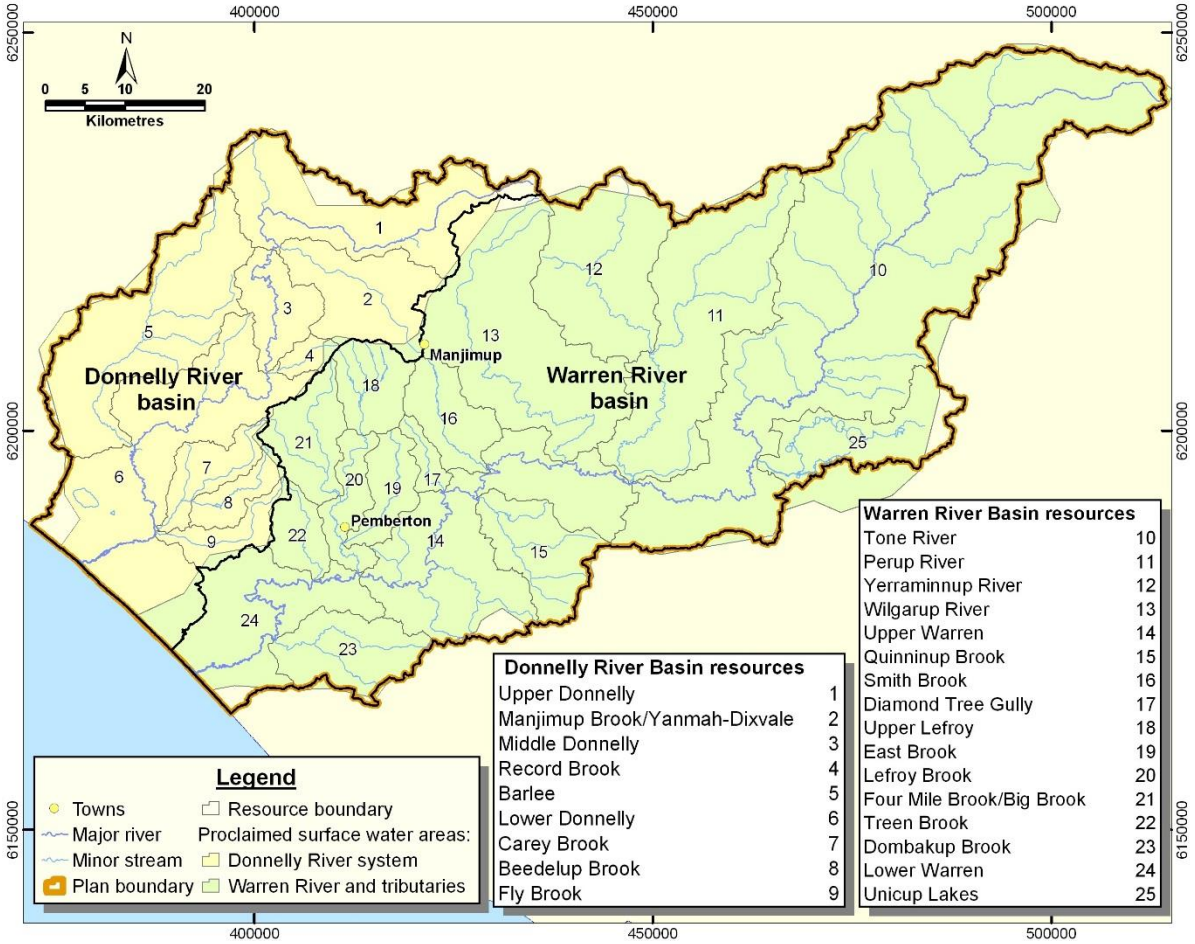
> This highlighted that individual licence assessments were no longer enough to manage water use effectively at a subarea level and allocation limits needed to be introduced.[513]

511 ibid., p 6.

512 Submission 33 from Western Australian Water Users Coalition, 30 July 2019, p 1.

513 Department of Water and Environmental Regulation. See: https://www.water.wa.gov.au/planning-for-the-future/allocation-plans/south-west-region/warren-donnelly-surface-water-allocation-plan. Viewed 10 September 2020.

Figure 6. *Warren-Donnelly surface water plan area and subareas*



[Source: Department of Water and Environmental Regulation. See: http://www.water.wa.gov.au/planning-for-the-future/allocation-plans/south-west-region/warren-donnelly-surface-water-allocation-plan. Viewed 10 September 2020.]

6.101 The Warren-Donnelly Surface Water Allocation Plan (Plan) came into effect in 2012, introducing allocation limits and formalising how DWER would manage and allocate surface water in the area.

6.102 The Warren-Donnelly catchment is divided into 25 surface water subareas. The subarea is referred to as a surface water resource.[514] The Plan establishes the total amount of water that can be taken from a water resource without compromising reliability to existing landowners or damaging the environment.[515]

6.103 DWER allocates water up to the allocation limits for each of the surface water subareas in accordance with the licencing and allocation approach set out in Chapter 4 of the Plan on the basis of 'first in-first served'. Once a subarea is fully allocated, DWER will refuse applications for new entitlements (or increases to existing entitlements) for high reliability water. Other options such as trading or transfers and assessing lower reliable water may be available.[516]

6.104 The Plan states:

[514] Department of Water and Environmental Regulation, *Warren-Donnelly Surface Water Allocation Plan*, April 2012, p 3.

[515] ibid., p 9.

[516] ibid., p 15.

> Under this plan, there is enough water allocated to meet current use and the highest estimated demand projected by CSIRO for the whole plan area to 2030 (39.8 GL/year). However, in five irrigated subareas there is only limited water available now and local demand is likely to exceed allocation limits.[517]

6.105 At the time of the release of the Plan, of the almost 69GL available for self-supply, only 37.5GL or 55 percent was allocated. As at January 2016, only 42.8GL or 62 percent of available water for licencing has been allocated. In addition, approximately 10GL of water was allocated under variable take licences.[518]

6.106 This has resulted in an increase in the subareas where water is no longer available. In the Plan, only two of the nine subareas in the Donnelly River catchment and three of the 16 subareas in the Warren River catchment were fully allocated or had no water available for licencing. Today, this has doubled in the Donnelly River catchment to four subareas and tripled in the Warren River catchment to nine subareas.[519]

Southern Forests Irrigation Scheme

6.107 In 2015, the WA Government contributed $3.6 million to the first stage of the Southern Forests Water Futures project. The Southern Forest Irrigation Scheme (SFIS) began as a State initiative to explore what can be done to provide water security to the Manjimup-Pemberton region against the impacts of climate change.[520]

6.108 The proposed SFIS involves taking water from the forested areas of the Upper and Middle Donnelly subareas and Record Brook (which will be made into a reservoir with a storage capacity of 15GL) to irrigate land through a 250km pipeline distribution network that will supply water to horticultural and agricultural producers who have purchased a water entitlement under the SFIS:[521]

> It comprises the harvesting of peak flows that are over and above the environmental requirements of the Donnelly River and storing in an off stream storage dam on Record Brook that is then gravity fed to farmers through an integrated underground pipe system.
>
> This type of irrigation system is new to Western Australia but is common practice in Tasmania as it provides low impact to the environment and water reliability to the farmers.[522]

6.109 The Manjimup Brook/Yanmah-Dixvale subarea has been declared to be fully-allocated by DWER.[523] Landowners in the Manjimup Brook/Yanmah-Dixvale subarea see water rushing through the waterways within the subarea and are frustrated when told by DWER that no new water licences or variable take licences will be issued as the available water within the

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517 ibid., p 13.

518 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1.

519 ibid.

520 Ralph Addis, Director General, Department of Primary Industries and Regional Development, letter, 10 June 2020, p 1.

521 Department of Primary Industries and Regional Development. See: https://www.agric.wa.gov.au/waterforfood/southern-forests-irrigation-scheme. Viewed 20 September 2020.

522 Ralph Addis, Director General, Department of Primary Industries and Regional Development, letter, 10 June 2020, p 1.

523 Department of Water and Environmental Regulation, Answer to question on notice 2 asked at hearing held 19 August 2020, dated 1 September 2020, attachment 3, p 2.

subarea has been fully allocated. They believe they are being denied access to the water in order to supply water for the SFIS.[524]

6.110 The SFIS proposal is currently with the EPA for assessment. The estimated publish date for the EPA assessment report is July 2021. DPIRD is the lead agency for the SFIS project, with licencing managed by DWER:[525]

> The amount that can be pumped will be controlled by strict licencing conditions imposed by DWER that ensures that water taken will not have significant downstream environmental impacts.[526]

6.111 DPIRD told the Committee that while there are approximately 452 water licences in the Warren-Donnelly catchment, only around 238 growers (horticultural businesses) are considered to be within 2 kilometres of the SFIS pipeline infrastructure.[527] This is considered to be the total number of growers that could potentially (water limiting) connect to the SFIS. Of the 238, 70 growers have already signed up:

> which represents around a 30 per cent take up by eligible growers and a take up of more than 80 per cent of the available water.[528]

6.112 The SFIS will be owned and operated by the Southern Forests Irrigation Co-operative Ltd (SFI Co-operative), and all scheme users (people who have purchased a water entitlement under the SFIS) will be members of the co-operative.[529]

6.113 The SFI Co-operative will determine how stored water is distributed to members, and it is likely that members will trade any of their unused water between themselves.[530] The SFI Co-operative will administer water trading within the SFIS.[531]

6.114 The Committee asked DPIRD about the likelihood of the SFIS being used for water speculation, water banking, and water trading outside the SFIS. DPIRD stated:

- water trading outside the SFIS is unlikely, unless water sources are hydraulically linked
- water trading is subject to member provisions under the *Co-operatives Act 2009* and being a land owner within the SFIS area which will protect against water speculation and water banking
- while it is possible that rules could change to permit outside trading in the future, the requirement for new infrastructure to access the water would significantly influence the price
- due to the 'closed loop' nature of the water supply and relatively small volume of water available, DPIRD do not expect trading outside the SFIS to be an attractive proposition to water speculation.[532]

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524 Hon Terry Redman MLA, letter to Standing Committee on Environment and Public Affairs, 22 August 2020, p 1.

525 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 11.

526 Ralph Addis, Director General, Department of Primary Industries and Regional Development, attachment to letter, 10 June 2020, p 2.

527 ibid., p 1.

528 ibid.

529 ibid., p 3.

530 ibid., p 2.

531 ibid.

532 ibid., pp 2-3.

6.115 Interestingly, while stating it would be unlikely that the SFIS would not use all its water entitlement, DPIRD advised in the event that the SFIS does not use all its water entitlement, the unused water will continue to flow out to the ocean.[533] It will not make any further water available to other subareas unless the available water is pumped, stored and distributed in a similar manner as the SFIS:

> If no water is pumped from the Donnelly River then unused water will continue to flow out to the ocean. It will not make any further water available to other catchments unless the available water is pumped, stored and distributed in a similar manner as the SFIS.[534]

6.116 Both DPIRD and DWER are of the understanding that the 'property' in water remains with the State. The SFI Co-operative will licence water through DWER.[535] Because the licence is subject to ongoing review and conditions, it is possible that DWER could suspend or cancel the licence in certain circumstances.[536] While DWER stated that shareholders have no proprietary right to SFIS water, DPIRD noted:

> The licence is not absolute property – it contains some elements of perpetuity and transferability, but it does not provide exclusivity in terms of access to the water resource.[537]

FINDING 26

Under the proposed Southern Forests Irrigation Scheme, the Southern Forests Irrigation Co-operative will licence water from the Department of Water and Environmental Regulation and distribute water between shareholders, who may then trade water amongst themselves.

6.117 The SFIS has generated significant discord between farmers in the Warren-Donnelly area. According to the Coalition:

> The majority of rural landowners in the Warren-Donnelly district in the Shire of Manjimup will not benefit from the Southern Forest Irrigation Scheme. Many farmers run livestock only and most private funded self-supply irrigators do not require any water from the Southern Forest Irrigation Scheme.
>
> The Western Australian Water Users Coalition has concerns on many issues including the absence of consultation in regards to the recognition to the probity of the Torrens title system that are emerging with the Southern Forest Irrigation Scheme proposal.[538]

6.118 Some landowners in the Manjimup Brook/Yanmah-Dixvale subarea (a fully allocated subarea), opposed to the SFIS, argue that the scheme is taking away water that they would otherwise be able to access.[539] They maintain that they should not have to purchase a water entitlement under the SFIS to access water that they would otherwise have been able to access without the additional cost of purchasing a water entitlement under the SFIS. Further, that water from the Donnelly River catchment should not be lost to landowners in that catchment in favour of landowners in the Warren River catchment. They see water rushing

533 ibid., p 2.

534 Ralph Addis, Director General, Department of Primary Industries and Regional Development, letter, 10 June 2020, attachment 1, p 2.

535 ibid., p 1.

536 ibid., p 2.

537 ibid., p 1.

538 Submission 33 from Western Australian Water Users Coalition, 30 July 2019, p 2.

539 Hon Terry Redman MLA, letter to Standing Committee on Environment and Public Affairs, 22 August 2020, p 1.

through the waterways within the subarea and are frustrated when told by DWER that no new water licences will be issued as the water available for licencing in the subarea is fully allocated.[540] In addition, there is a moratorium on the issue of variable take licences.[541] Some believe that they are being denied access to the water in order to supply water for the SFIS.[542] DPIRD and DWER refute this.[543]

6.119 DPIRD and DWER maintain that, based on their modelling, the water to supply the SFIS is coming from the forested areas in the Upper Donnelly and Middle Donnelly subareas, not the Manjimup Brook/Yanmah-Dixvale subarea.[544]

6.120 Some landowners have questioned the accuracy and reliability of DWER modelling and some of the assumptions made as part of the modelling.[545] The Committee observed that DWER may not have enough gauging stations and some are not in the best locations to best inform the modelling.

6.121 The Committee questioned the modelling in the region, given that there appears to be no gauging stations in the Upper Donnelly:

> My simple knowledge of the way the models are developed is that we have gauging stations right through the catchment and they may be temporary in nature or we have some very long-term ones established in the 1950s and 1960s. In the model we have, those gauging stations are right around the state, we can use them to reference the land-use types and things like that. So, based on the information that is collected, we can understand the water runoff based on the catchment type, and that is how the model is built and calibrated to the observed records.[546]

6.122 The Committee questioned whether with no gauging stations in the Upper Donnelly and a single temporary gauging station located to one side of the Manjimup Brook/Yanmah-Dixvale subarea, which DWER indicates it intends to make permanent, provides DWER with sufficient information for its modelling, and whether a gauging station at Sears Road, as requested by the community, would provide greater clarity:

> In the Manjimup subarea, the gauging station that you referred to us making permanent is actually at the outflow, so it actually collects all of the water that flows out of that subarea. It is not on one branch or another; it is at the outlet. It is four kilometres downstream of what was the Sears Road bridge at which we have had temporary gauging stations, but through the site investigations that our hydrographers undertake to determine the best place in the catchment to collect the hydrographic information that they do, the Manjimup Brook outflow gauging station is a much superior site to the Sears Road that we have tried to operate. The Sears Road is quite wide, so for a very small change in water height, you get quite a large volume recorded and that creates errors for us. The water enters that area at an angle, which is difficult to measure. The site also has pylons in the middle of

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540 Tyne Logan, 'Farmers in a town with annual rainfall of 981mm face a shortage of water for irrigation', *ABC News*, 18 September 2018.

541 Mal Gill, 'Irrigation plan divides Manjimup community', *Farm Weekly*, 24 June 2019.

542 Hon Terry Redman MLA, letter to Standing Committee on Environment and Public Affairs, 22 August 2020, p 1.

543 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 9 and Ralph Addis, Director General, Department of Primary Industries and Regional Development, letter, 10 June 2020, attachment 1, p 2.

544 ibid.

545 Tabled Paper 2831, Legislative Council, 27 June 2019, p 1.

546 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 10.

the bridge that change the characteristics of that. When we compare that to the Manjimup Brook outflow, it is a much narrower site; the water pretty much hits it straight on. It is a much better site for us to do our measurements on. [547]

6.123 In relation to the water seen rushing through the watercourses in the Manjimup Brook/Yanmah-Dixvale subarea, DWER told the Committee that this is due to under use of allocated or licenced water.[548] If the licence holders are not using water in their dams, there is less need to draw water to top up the dams and large volumes of water can be seen flowing through the watercourses, giving the perception that there is more water that could be allocated.[549]

Figure 7. *Gauging station at Manjimup Brook*

[Source: Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 August 2020, attachment 1.]

Spring rights controversy

6.124 There are no local by-laws prescribing springs in the Warren-Donnelly catchment to be subject to the RIWI Act Part 3 licencing provisions.[550] Under the RIWI Act, DWER has no authority to regulate exempt water.

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547 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2019, p 10.

548 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 9.

549 Ben Drew, Manager, Water Allocation Planning, Department of Water and Environmental Regulation, transcript of evidence, Standing Committee on Environment and Public Affairs, 23 October 2019, p 13.

550 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, 12 June 2020, email, p 12.

6.125 There is no legislative head of power or statutory process for DWER to determine whether a spring exemption applies. Historically, spring rights under section 5 have been self-assessed by landowners. DWER has told the Committee that in some instances, these self-assessments have been incorrect (see subsection on licencing exemptions, paragraphs 6.29 - 6.53).

6.126 The Coalition told the Committee about a number of cases in the Warren-Donnelly catchment area where landowners believed they had 'spring rights' (a section 5 exemption), and were later advised by DWER that they did not. The Coalition feel that landowners in the area have received incorrect and inconsistent advice from DWER:[551]

> In March 2019 DWER notified landowners in the Warren-Donnelly district in the Shire of Manjimup that the DWER has incorrectly issued letters confirming Spring Rights in the past and are being reviewed as they are identified. There is no certainty that the landowner is eligible for a new licence and the DWER has imposed limits to access water.[552]

6.127 The Coalition told the Committee about a landowner who was recently told his spring exemption did not exist. According to the Coalition, that landowner has challenged DWERs decision and his original licence quantity has been restored.[553]

6.128 Understandably, this has led to a level of anxiety amongst landowners reliant on spring rights for their water, who are worried that the same could happen to them at any time:

> I currently live on a 128-acre property, which is totally spring rights. We are at a huge risk if spring rights are revoked and our property value would probably halve.[554]

> Back then, they gave him spring rights on his property. He had licensing. He had 360 000 kilolitres I think he said. They give him spring rights. In December last year, they saw him and told him he has not got spring rights. He challenged it. They visited. They managed to say, "You haven't got spring rights but we'll give you a licence for 280"—I think that is what he was offered. He said, "No, I don't want that."
>
> They have taken his spring rights and offered him a licence or far less—no, a decrease of about 25 per cent on what he had.[555]

6.129 DWERs actions have caused landowners, particularly those in fully allocated subareas in the Warren-Donnelly catchment, dependent on their spring rights for supply of water, significant anxiety and frustration. Section 5 of the RIWI Act provides a clear exemption from licencing where spring rights exist. David Wren, Secretary of the Coalition, explained from his perspective:

> In this case, my understanding, and what the Legislative Council has said in legislation, is that you do not need a licence for springs. That is what it said—and you do not need a licence for run-off, but yet DWER is saying you need a licence.
>
> Why do you need a licence? It says that you do not; it is on your property or it arrives at your property, use a spring—it is the first call of water. You get a flow of

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551 The March 2019 notification is a reference to the Warren-Donnelly Water Update March 2019 newsletter.

552 Submission 33 from Western Australian Water Users Coalition, 30 July 2019, p 4.

553 Alan Blakers, Committee Member, Western Australian Water Users Coalition, transcript of evidence, 30 October 2019, p 4.

554 Rosslyn Knowling, Chairperson, Western Australia Water Users Coalition, transcript of evidence, 30 October 2019, p 1.

555 Alan Blakers, Committee Member, Western Australian Water Users Coalition, transcript of evidence, 30 October 2019, p 4.

> water, you capture the run-off and you use it—that is what it says. But they are coming in saying that you need one.[556]

Incorrect or inconsistent advice

6.130 In addition to the issue of incorrect self-assessments by landowners, the Committee has heard evidence that in some instances the advice DWER has provided on the application of section 5 exemptions has been inconsistent or incorrect, advising that a section 5 exemption applies when it did not.[557] This was confirmed by Mr Moynihan at a hearing on 17 February 2020:

> In the past there has been some inconsistent advice provided by the department to farmers around whether a spring right or an exemption from regulation for springs has applied.[558]

6.131 Mr Moynihan further advised:

> Where the farmers or the dams are found to have received or have thought that they have an exemption for spring rights previously, there may be a correction made... There is an alternative approach put in place whereby a licensed water allocation will be issued to them for the equivalent of what the spring right, or what they saw as a spring right, was previously.[559]

6.132 The Warren-Donnelly Water Update newsletter issued by DWER, dated March 2019, states:

> It is acknowledged that DWER has incorrectly issued letters confirming Spring Rights in the past and [these] are being reviewed as they are identified.[560]

A licencing process for determining spring exemptions

6.133 Section 5 of the RIWI Act provides that a spring exemption applies if certain criteria is established and provided local by-laws have not been implemented prescribing the spring as being a spring to which Part 3, meaning the licencing provisions of Part 3, apply.

6.134 The RIWI Act is silent as to who must determine whether a section 5 exemption applies. There is no legislative requirement for DWER to make a determination that a spring right exemption applies, although it is acknowledged that DWER has a role in enforcing the RIWI Act and there are penalties for taking water without a licence and where no exemption applies.[561]

6.135 DWER told the Committee that most dams in the Warren-Donnelly catchment do not have eligibility for a section 5 exemption.[562]

6.136 Mr Moynihan, at a hearing on 17 February 2020, told the Committee that DWER are currently going through a correction process with respect to section 5 exemption, or what the land owner thinks is a section 5 exemption spring dam:

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556 David Wren, Secretary, Western Australian Water Users Coalition, transcript of evidence, 30 October 2020, p 7.

557 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2019, p 7.

558 Jason Moynihan, Acting Executive Director, Regional Delivery, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7.

559 ibid.

560 Department of Water and Environmental Regulation, Answer to question on notice 2 asked at hearing held 19 August 2020, dated 1 September 2020, attachment 3, p 3.

561 *Rights in Water and Irrigation Act 1914* s 5C.

562 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, p 10.

> With the increasing competition for water and, possibly, over-allocation in a number of areas, the department has been taking steps to confirm which dams do have access to that eligibility for spring rights and those that do not. Where the farmers or the dams are found to have received or have thought that they have an exemption for spring rights previously, there may be a correction made. There will be some communication to the farmer.[563]

6.137 Mr Moynihan explained that under the correction process:

> No-one has a water allocation taken away from them.[564]

6.138 Mr Moynihan further explained:

> There is an alternative approach put in place whereby a licensed water allocation will be issued to them for the equivalent of what the spring right, or what they saw as a spring right, was previously. The department is working through those on a case-by case basis, but it is fair to say that there are a number of farmers that believed that they did have spring rights that may not exist.[565]

6.139 The Committee sought to understand how DWER officers came to provide inconsistent and/or incorrect advice to landowners in the Warren-Donnelly catchment on whether a section 5 exemption applies:

> The inconsistencies identified related to the application and interpretation of the Section 5 exemption as it relates to Section 2 and Section 3. Changes to the RiWI Act in 2000 included those to the definition of a 'spring' under Section 2, Section 3 in relation to 'Meaning of a "watercourse'' and amendments to Division 1 including Section 5. The Department has invested considerable resources since early 2018 to the existing interpretation and application of the Section 5 exemption to provide greater certainty to landholders. The Department has predominantly undertaken site visits to inspect, and confirm spring exemptions since this time; and has provided broader updates to growers and stakeholders through a number of mechanisms including public workshops (October 2018) and the Warren-Donnelly 'Water Update' newsletter.[566]

6.140 Noting that the RIWI Act amendments were enacted in 2000, and the action of enforcing an 'updated understanding' of the legislation by DWER commenced, on initial advice from DWER, in 2018, the Committee sought clarification as to whether the RIWI Act specifically stated that a spring must be at the head of a watercourse for a section 5 exemption to apply. Mr Moynihan explained:

> The legislation covers off on it and there are some local water planning provisions and policies that underlie that.[567]

6.141 Subsequently at a hearing on 19 August 2020, in answer to a question from the Committee seeking clarification on the local provisions and policies, Mr Maskew said:

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563 Jason Moynihan, Acting Executive Director, Regional Delivery, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7.

564 ibid.

565 ibid.

566 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, p 10.

567 Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 9.

> In terms of any other information that we take into account in terms of spring exemptions, there are no underlying policies or local area management plans.[568]

6.142 DWER explained the reason for its enforcement that a spring must be at the head or start of the watercourse to qualify for a section 5 exemption:

> it is a way to manage the water resource effectively so that the exemptions apply to those points at the start of the watercourse and do not capture others that may be difficult to manage. It is a water management approach...[569]

6.143 The Committee notes that the amendments to the RIWI Act were enacted in 2000, however, the actions by DWER to check or correct past incorrect self-assessments and incorrect or inconsistent advice by DWER to landowners began in 2018, some 18 years after the legislative amendments. The trigger being increased competition for water and subareas becoming fully-allocated. It appears that before this, DWER had not been actively enforcing the RIWI Act, or this particular 'updated understanding' or interpretation of the Act (see paragraph 6.49 for the Committee's view on legislative clarity).

6.144 DWER told the Committee that together with this 'correction process', in early 2018 it had instigated an 'administrative process' which enabled DWER to formally determine whether a section 5 exemption applies:

> There is no legislative process for landowners to check eligibility for the spring exemption. The Department now uses the licence application process to determine whether a spring exemption applies.
>
> ...
>
> The Department now recommends landowners submit an application to take water to support a formal determination of whether a Section 5 exemption applies, thereby limiting the risk of incorrect self-assessment and potentially contravening the legislation. If the section 5 exemption applies to that spring the applicant will be informed that a licence is not required to take water from that spring.[570]

6.145 The Committee notes DWERs advice to the Committee being that landowners claiming or seeking to claim a section 5 exemption were now required to make an application for a licence to take water.

6.146 If DWER determine that a section 5 exemption does not apply, the new administrative process requiring the landowner to make an application for a licence to take water, would enable DWER to issue a licenced water allocation for the equivalent of what the landowner thought was a spring right.[571] At the hearing, DWER did not inform the Committee that this was restricted to historic dams only. Subsequently, in written answers to questions on notice DWER qualified the application of this approach, saying it would be applied to historic dams only:

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568 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 2.

569 Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 9.

570 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, p 10.

571 Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7.

> If a historic dam exists that has been incorrectly presumed as being exempt under Section 5, the Department will acknowledge that dam and its historic take of water through the issue of a licence equivalent to the dam's capacity.[572]

6.147 A historic dam is one constructed before March 2010. This is the date from which current use had been considered as part of developing the Plan.[573] DWER also informed the Committee that this approach would be applied even if the subarea was fully allocated.[574]

6.148 The Committee notes this marks a significant departure from DWERs initial advice. At the hearing on 17 February 2020, DWER said that if it was determined that a section 5 exemption did not apply, DWER would issue a licence to take water equivalent to what the landowner thought was a spring exemption.[575] The Committee was not told it applied only to historic dams. In an answer provided on 12 June 2020, DWER qualified this so as to restrict it to historic dams (pre-March 2010 construction) only.[576] The effect of this restriction being that despite DWERs earlier assurance that no one would have a water allocation taken away from them, if DWER determines a section 5 exemption does not apply and a landowners dam is not a historic dam, the landowners right, or what they thought was a right, to use the spring water is taken away and no licence to take water for the equivalent amount will be issued by DWER.

6.149 The Committee makes the observation that it appears this 'management approach' or 'administrative process' by DWER seeks to regulate unlicensed water use to the level of DWERs estimated unlicensed water use at the time of developing the Plan. If this is the case, this is concerning and disadvantages landowners with a spring on their land who had not sought a spring exemption or constructed a spring dam before the implementation of this new management approach/administrative process.

6.150 Since January 2018, DWER has undertaken 50 farm visits of 43 landholdings (some required multiple visits) and assessed 68 dams. Of the 68 dams, DWER determined that:

- 41 were spring dams under the section 5 exemption
- 5 dams that were licensed, were correctly licensed as the section 5 exemption did not apply
- 22 dams believed to be spring dams, either by incorrect self-assessment or incorrect earlier advice from DWER, were not eligible for a section 5 exemption. Of these:
    - 20 were determined to be historic dams and granted a license for the same amount as the capacity of the dam (DWER did not advise whether the landowners were required to lodge an application for a licence to take water)
    - 2 dams are still under consideration by DWER.[577]

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572 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, pp 10-1.

573 Rachel Osborne, Acting Ministerial Coordinator, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 1 September 2020, attachment 1, p 6.

574 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, pp 10-1.

575 Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7.

576 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, pp 10-1.

577 Rachel Osborne, Acting Ministerial Coordinator, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 1 September 2020, attachment 1, pp 4-5.

6.151 The following is a breakdown of the individual landholders/properties visited by subarea, as provided by DWER.

Table 5. *Individual properties visited by subarea*

Subarea	Number
Middle Donnelly	8
Manjimup Brook – Yanmah-Dixvale	8
Smith Brook	6
Upper Lefroy	7
Lefroy Brook	6
Treen Brook	3
East Brook	1
Upper Warren	1
Wilgarrup	3

[Source: Rachel Osborne, Acting Ministerial Coordinator, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 1 September 2020, attachment 1, p 5.]

6.152 While acknowledging DWERs intention in establishing this new administrative process may have been to provide greater certainty or surety in relation to section 5 exemptions, the Committee is not persuaded that the process achieves this and considers it problematic. Encouraging or requiring landowners to go through the licencing process in order to formalise a spring exemption seems to the Committee like an attempt to regulate, and with no legislative head of power permitting DWER to do so, may be beyond DWERs legislative authority.

6.153 The Committee sought clarification from DWER on the legislative head of power permitting DWER to require landowners to go through the licencing process in order to formalise whether a spring rights exemption applies:

> **Mr ROWE**: I think the answer to that would be that we are really try to make sure that for the avoidance of any doubt and to ensure that people are acting in accordance with the law, they use the licensing process to apply under the relevant section of the Rights in Water and Irrigation Act. If we find through that process that they do not actually require a licence because they are exempt, then we would confirm with them at the time that that is the case.
>
> **The CHAIR**: But is that not contrary to the act, because the act specifically provides that a spring rights is exempt from the requirement of going through a licence process?
>
> **Mr ROWE**: That is right. I understand where you are coming from, but I guess we are trying to be thorough and make sure that people are doing the right thing for their own sake and for everybody else's.[578]

6.154 According to Adam Maskew, South West Regional Manager, DWER, the head of power in the RIWI for DWERs involvement in this process is the 'fact that unless there is an exemption, a licence is required':

[578] Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 3.

> By making application, they provide that surety for themselves that they will either get a water licence, or through that we will identify that an exemption applies and we will then cease the licensing process.[579]

6.155 The Committee does not consider this to be an express legislative power. Furthermore, it is unclear how landowners are meant to know about this expectation:

> **The CHAIR**: How does the landowner reading the act know that they need to use the licence application process to determine that a section 5 exemption applies when the act clearly states that this is exempt from licensing?
>
> **Mr MASKEW**: The act is silent in that state.
>
> **The CHAIR**: I think it is a bit more than silent. I think that it expressly states that a licence is not required.
>
> **Mr MASKEW**: It does.[580]

FINDING 27

The *Rights in Water and Irrigation Act 1914* does not provide a legislative process for determining whether a section 5 exemption applies, and does not provide that this determination must be made by the Department of Water and Environmental Regulation.

FINDING 28

There are no local by-laws in relation to springs in the Warren-Donnelly catchment.

6.156 On the issue of surety, the Committee sought clarification from DWER as to how this new administrative process provides landowners with greater certainty. Mr Maskew explained:

> By making application, they provide that surety for themselves that they will either get a water licence, or through that we will identify that an exemption applies and we will then cease the licensing process.[581]

6.157 The Committee is concerned that this new administrative process provides landowners with little surety or comfort. The RIWI Act does not provide for DWER to make a determination on whether a section 5 exemption applies. The RIWI Act provides that spring rights are exempt from regulation. Further, some landowners have, in the past, sought DWERs advice and received written confirmation that a section 5 exemption applies, only now to be told that the earlier advice was incorrect,[582] so it is reasonable that landowners would have little confidence in any determination made by DWER under the new administrative process being correct or that it could be relied on into the future. The new process does not guarantee this. Furthermore, DWERs constant changes to the process do not instill confidence in the process.

6.158 In addition, there is no requirement under this new administrative process for DWER to provide reasons for its decision that a section 5 exemption does not apply. There is no right of review or appeal against a determination by DWER that a section 5 exemption does not

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579 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 3.

580 ibid., p 4.

581 ibid., p 3.

582 ibid., p 7.

apply.[583] In light of DWERs admission that DWER has provided inconsistent and incorrect advice on section 5 exemptions in the past,[584] understandably landowners have little to no confidence in DWERs decision making going forward. A right of review or appeal by an independent body is needed in order to provide landowners with some confidence going forward.

6.159 In response to the Committee's question on whether this new administrative process applied across the whole of WA:

> **Mr MASKEW:** It is certainly our preference for people to do that right across the state if they believe that an exemption exists for their property.
>
> **The CHAIR:** Has this been communicated to landowners right across the state?
>
> **Mr MASKEW:** We have done it on an as-needed basis in the more fully allocated areas and we progressively roll out that communication with people.
>
> **Mr ROWE:** I think it is also probably safe to say that this situation arises predominantly in the areas that we are talking about today. It is not widespread right across the rest of the state where it becomes an issue.[585]

6.160 The apparent lack of consistency in DWER's handling of spring rights has caused landowners in the Warren-Donnelly catchment to call for more transparency from DWER in relation to its decisions:

> At the moment they are operating like a secret society... [586]

A permit process for determining spring exemptions—DWERs new administrative process, mark 2

6.161 In response to further questions from the Committee on this new administrative process to initiate an assessment by DWER for a spring exemption, DWER replied:

> By way of providing greater clarity, the Department uses an application for a Permit to Interfere with the Bed and Banks of a Watercourse under Sections 11, 17 and 21A rather than an application for a licence to take water under Section 5C to trigger an assessment regarding exemptions from regulations related to springs.[587]

6.162 The most recent answer does not provide greater clarity, as suggested by DWER. To the contrary, it is at odds with its evidence to the Committee at hearings under oath (or affirmation) on 17 February 2020, 19 August 2020, and in answers to additional questions provided by email dated 12 June 2020.[588] A bed and banks permit is very different to a licence to take water.

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583 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 3.

584 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

585 Adam Maskew, South West Regional Manager, and Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 4.

586 Alan Blakers, Committee Member, Western Australian Water Users Coalition, transcript of evidence, 30 October 2019, p 9.

587 Anthea Wu, Section Manager, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1.

588 Jason Moynihan, Acting Executive Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7. Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7. Anthea Wu, Section Manager, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, page 10.

6.163 For a process DWER maintain they have been applying consistently since late 2016,[589] it is disturbing that DWER senior officers are not across the detail of the process and have initially provided incorrect evidence to the Committee only to subsequently, 16 days before the Committee was due to report, correct their evidence. This does little for DWERs credibility.

6.164 This most recent advice that the process uses a bed and banks permit to trigger an assessment regarding exemptions from regulations related to springs is also at odds with earlier advice provided by DWER:

> For a spring exemption, there is no bed and bank permit required when it is coming up on your property, so no set permit or application is required for that one.[590]

6.165 The Committee notes with concern DWERs change in its evidence to the Committee that if a section 5 exemption does not apply, a correction would be made issuing a licence to take water for the equivalent amount as the spring dam.[591] The answer provided by DWER on 11 September 2020 states that where a section 5 exemption does not apply, a licence to take water will be considered only if it is a historic dam and there is water available in the subarea or water resource.[592] This is a significant departure from its earlier evidence to the Committee and has significant implications for landowners.

6.166 DWER told the Committee that at the end of this new administrative process requiring landowners to make an application for a bed and banks permit, the landowner will receive a formal letter which acknowledges the application and notification that DWER considers, based on the application and a site assessment, the exemption from regulation applies in relation to the presence of a spring. Where regulated and unregulated storages (existing dams) on watercourses are present, these will be clarified for the landowner as part of the correspondence.[593] DWER did not say whether a formal letter would be provided if it determined that a section 5 exemption did not apply. Further, DWERs authority to review all existing dams on the watercourses on the property as part of an assessment for a bed and banks permit is doubtful.

6.167 The Committee reiterates its previously stated concern that a person reading the RIWI Act would not understand that this is required and DWERs imposition of this process may be beyond DWERs statutory authority. Also, if the spring dam is constructed, it is unclear whether the RIWI Act permits DWER to issue a bed and banks permit retrospectively.

6.168 DWER's answer to questions on 8 and 11 September 2020 identified another change in DWER's evidence to the Committee restricting the circumstances when DWER, on determining a section 5 exemption does not apply, would issue a licence to take water. DWER's evidence, on 12 June 2020, was if a section 5 exemption does not apply and it is an historic dam, DWER would make a correction by issuing a licence to take water to the capacity of the dam regardless of whether the water resource is fully or over allocated.[594] In its answers to questions provided on 8 and 11 September, DWER changed its evidence

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589 Anthea Wu, Section Manager, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1.

590 Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 2 May 2020, p 10.

591 Jason Moynihan, Acting Executive Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7.

592 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 3.

593 ibid., p 2.

594 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, pp 10-1.

saying that a licence to take water would only be issued if the water resource is not fully or over allocated.[595] Further, that where water is available in the water resource, DWER would consider issuing a licence, suggesting DWER may not necessarily issue a licence to take water.[596] This is a significant departure from its earlier evidence to the Committee that no one would have a water allocation taken away. This has significant implications for landowners.

IMPORTANT NOTE

The Department of Water and Environmental Regulations' inconsistent evidence to the Committee

On 8 and 11 September 2020, DWER changed its evidence to the Committee in relation to the new administrative process to trigger a determination regarding exemptions from regulations related to springs, in three material respects:

- The start date for the new administrative process was changed from early 2018 to late 2016. DWER now maintain the process has been applied consistently in the Warren-Donnelly since late 2016.
- The new administrative process requires a landowner to make an application for a permit to interfere with the bed and banks of a watercourse under sections 11, 17 and 21A of the RIWI Act, rather than an application for a licence to take water under section 5C.
- If a section 5 exemption does not apply, licencing for historic dams will be considered only if there is water available in the subarea or water resource, contrary to DWERs earlier evidence that licences to take water would be issued for the equivalent amount, being the capacity of the dam, regardless whether the subarea or water resource is fully allocated or over allocated.

This is in addition to DWERs evidence detailed earlier in this Chapter, being:

- If a section 5 exemption does not apply, only historic dams will be considered for licensing. Initially, DWERs evidence to the Committee did not alert the Committee that licensing would apply to historic dams only, however, its evidence that no one would have a water allocation taken away did not indicate any restriction of this licensing approach to historic dams only.

[Source: Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1 and email, 11 September, attachment 1.]

6.169 DWERs evidence to the Committee about the new administrative process requiring landowners to make an application for a bed and banks permit is that:

> By making application, the applicant provides surety for themselves and the regulator that they will either be assessed for a licence to take water where an exemption does not apply or notified formally that the exemption applies. In doing so, the process:
>
> - formalises a consistent process the Department undertakes to make an informed decision on the application;

[595] Anthea Wu, Section Manager, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1 and email, 11 September, attachment 1, p 3.

[596] ibid.

- reduces the risk of landholders interfering with the beds and banks of a watercourse by building storages that may potentially be in breach of the *Rights in Water and Irrigation Act 1914*. This in turn reduces the potential requirement for the landowner to seek trade or agreement for the storage, or potentially to remove the storage where an entitlement cannot be secured. Both of these requirements may represent costs to the landowner.

- allows consideration under the 'first-in first-served' methodology (where water is available in the resource, and where an exemption is not applied).[597]

6.170 The Committee notes that DWER's evidence to the Committee is that, in 2018-19 one agreement was entered into and in 2019-20 two agreements were entered into and the application forms indicate that the price paid was $0.[598] Further, that if the dam exists, and DWER determine that a section 5 exemption does not apply, it is not a historic dam and the water resource is fully allocated, the landowner is likely to incur costs to remove the storage/dam. This was not noted by DWER in its evidence as detailed in paragraph 6.169.

6.171 The Committee sought clarification from DWER on whether it would guarantee to stand by its determination under the process, on whether a section 5 exemption applies, in the future. DWER replied:

> The final letter reflects a decision related to information available at the time including legislation at the time. It also notes that the decision is subject to future changes in legislation, as mentioned by Mr Mike Rowe in his evidence to the committee.[599]

6.172 The Committee refutes DWERs statement that this was mentioned by Mr Rowe in his evidence to the Committee. Future changes to legislation should not impact an earlier decision made by DWER unless the relevant statutory provision provides, by express terms, that it is to apply retrospectively.

6.173 The Committee raised concerns about the new administrative process in relation to procedural fairness, there being no requirement for DWER to provide the landowner with reasons for its decision and there being no right to appeal the decision. DWER told the Committee that:

> There is no formal appeals process for a decision on an application for a bed and banks permit under *the Rights in Water and Irrigation Act 1914*.
>
> There are provisions within the RiWI Act for landowners to appeal to the State Administrative Tribunal when they move into their application for the 5C take licence if they need to go down this pathway. But initially a landholder may also lodge a complaint with the [Ombudsman] Western Australia.[600]

6.174 The Committee questioned how an application for a permit to interfere with the bed and banks of a watercourse would enable DWER to consider issuing a water allocation licence under the 'first in-first served' methodology (as DWER explained would be the case when it had previously informed the Committee that the landowner would make an application for a licence to take water). DWER answered as follows:

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597 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1.

598 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 13.

599 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 2.

600 ibid., p 3.

> Applications may be lodged with the department at any time. The submission of an application related to a stream exemption provides a formal acknowledgement by the landholder to develop the take and use of the water resource, thereby placing them in line for consideration against the respective resource. Where the Department considers that an exemption does not apply, and where water is available in the resource, an application to take water will be requested to complement the permit application. Where the resource is fully allocated and there is no exemption, the permit will likely be refused. However, the Department may license a historical spring dam above the allocation limit.[601]

6.175 The Committee notes that the benefits of 'first in-first served' methodology may be lost under this 'version' of the new administrative process, as another party may lodge an application to take water while DWER are considering the landowner's application for a bed and banks permit, and therefore be 'first in'. Also, under this process a landowner would be required to make two applications, an application for a bed and banks permit and an application for a licence to take water. The Committee suggests for these reasons, a process requiring an application for a licence to take water, as opposed to an application for bed and banks permit, would be superior and preferable from the landowners' viewpoint.

6.176 Noting DWERs most recent evidence that the new administrative process has been applied consistently since late 2016, the Committee enquired as to DWER's communication on this matter with landowners before the Warren-Donnelly Water Update newsletter of March 2019. DWER replied as follows:

> It was applied to those applications received by the Department in this period and promoted at a series of public meetings held in late 2018 and the Water Update newsletter of March 2019, in addition to one-on-one meetings with landholders and licensees.[602]

6.177 The Committee also notes DWER's earlier evidence, provided in response to further questions from the committee on 8 September 2020, that:

> There has been no broad public notice of the specific mechanism of using an application for a permit to interfere with the bed and banks of a watercourse under Sections 11, 17 and 21a of the RIWI act to initiate an assessment for an exemption related to springs.[603]

6.178 It is of concern to the Committee that although the new process was established in late 2016, based on DWER's evidence, it did not inform landowners of the new process until it held public meetings or workshops in late 2018. In light of the RIWI Act express provision that there is no regulation of spring rights and DWER's lack of communication on this new process, it is difficult to comprehend how a landowner would have known in late 2016, 2017 and early to mid-2018 to make an application under this new process.

6.179 The Committee sought to understand how many landowners seeking DWERs confirmation that a section 5 exemption applied, were aware of this new administrative process and made an application for a bed and banks permit for each year since 2016. DWER was less than forthcoming in its reply, saying that its records do not differentiate between a bed and banks permit for spring dam exemptions and for other reasons. The best DWER could say is that it had undertaken 43 site visits to make assessments of spring exemptions since January 2018

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601 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, p 3.

602 ibid.

603 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1.

and a further 3 were undertaken in the period July 2017 to December 2018.[604] The Committee notes the overlap of 12 months being January 2018 to December 2018. The reason for this overlap is not clear. DWER did not say whether a bed and banks permit application or a licence to take water application was made in relation to any of these visits.

FINDING 29

There is no legislative head of power for the new administrative process instigated by the Department of Water and Environmental Regulation enabling it to make a determination as to whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies.

FINDING 30

The *Rights in Water and Irrigation Act 1914* expressly provides that 'spring rights' are exempt from regulation unless a by-law is enacted bringing the spring within the Act's Part 3 licensing provisions.

FINDING 31

Almost four years after the Department of Water and Environmental Regulation instigated a new administrative process enabling it to make a determination on whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies, the Department is unable to provide clear and consistent details of the process even though the Department maintains that it has consistently applied the new process since late 2016.

RECOMMENDATION 28

The Minister for Water commission an independent inquiry into the Department of Water and Environmental Regulations new administrative process requiring landowners to make an application for a bed and banks permit so as to enable the Department to determine whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies. The matters to be examined by the inquiry to include:

- the Department's legislative authority for imposing the process
- compliance with the new process
- the effectiveness of the process in achieving the desired outcomes
- whether the process has been consistently applied by the Department
- landowners concerns with the process
- legislative changes needed to give statutory effect to the process
- changes needed to improve the process, having regard to procedural fairness and a right of review by an independent body.

RECOMMENDATION 29

If the Department of Water and Environmental Regulation is to persist with its new administrative process requiring landowners to make an application for a bed and banks permit so as to enable the Department to determine whether a section 5 exemption applies, the Minister for Water introduce in the Parliament of Western Australia a Bill to amend the *Rights in Water and Irrigation Act 1914*, to expressly provide for the process and for a right of review or appeal to an independent body. The Bill to also provide for the Department of Water and Environmental Regulation to establish and maintain a register of spring exemptions and spring dams.

[604] Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 3.

DWERs communication to landowners in the Warren-Donnelly about the new administrative process

6.180 The new administrative process for DWER to determine whether a section 5 exemption applies has been communicated to landowners:

> We have held a number of workshops, particularly in the Warren– Donnelly area, over the last three years or so where we have talked about the spring exemption and how that determination is made. We have sent out numerous newsletters to our licensees and those newsletters are also placed in the local shire, on our countertop and also at the local ag department as part of that information as well.[605]

6.181 In response to the Committee's request for a copy of each of the 'numerous newsletters', DWER provided one newsletter only—the Warren-Donnelly Water Update dated March 2019.[606]

6.182 In addition to acknowledging that 'DWER has incorrectly issued letters confirming Spring Rights in the past and [these] are being reviewed as they are identified', the newsletter states:

> You must have written confirmation from the department that you qualify for spring rights.[607]

And:

> to reduce the risk of being in breach of the legislation and associated enforcement activity you need to ensure you get confirmation from DWER as to whether you have spring right before you undertake any works.[608]

6.183 The newsletter contains no information about the new administrative process requiring landowners to make an application for a bed and banks permit, so to enable DWER to determine whether a section 5 exemption applies. Nor the possible requirement for a licence to take water, should DWER determine that a licence is required. The March 2019 edition of the newsletter is the first edition of the newsletter and the process, based on DWERs evidence, has been consistently applied since late 2016.[609]

6.184 The Committee pressed DWER for a copy of each of the numerous newsletters informing landowners of the new administration process, only to be told that the Warren-Donnelly Water Update March 2019 edition is the only one in which the matter is raised.[610]

6.185 Further, the Committee understands that DWER emails the newsletter to licensees in the Warren-Donnelly catchment, however, not all landowners with self-assessed spring dams also hold a water allocation licence and therefore do not receive the newsletter as they are not licensees.[611]

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605 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 4.

606 Department of Water and Environmental Regulation, Answer to question on notice 2 asked at hearing held 19 August 2020, dated 1 September 2020, p 2.

607 ibid., attachment 1, p 3.

608 ibid.

609 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, p 1.

610 ibid.

611 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 4.

6.186 No letters have been sent to impacted landowners informing them of the new administrative process, and no broad public notice on the process has been issued.[612]

6.187 The Committee was not able to verify whether information on the new administrative process has been provided at workshops and at one-on-one meetings with landowners and licensees as stated by DWER.[613]

6.188 In response to a question, DWER told the Committee the newsletters are not available on the DWER website, however, DWER has commenced work on making them available on its website, which should be finalised in the coming weeks.[614]

6.189 It would appear DWERs communication with landowners in the Warren-Donnelly catchment falls well short of what the community would expect of a government department and as a result some Warren-Donnelly landowners would be unaware of DWERs new administrative process, which does not bode well for compliance and its success. The Committee is of the view that DWER needs to vastly improve its communication with landowners in the Warren-Donnelly area. When implementing a new administrative process, DWER should write directly to impacted landowners.

FINDING 32

The Department of Water and Environmental Regulation's communication with landowners in the Warren-Donnelly catchment on the new administrative process for the Department to determine whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies was tardy, lacked detail as to the mechanisms of the process and did not reach all impacted or potentially impacted landowners. Nor did it include a public communication to all in the Warren-Donnelly catchment.

RECOMMENDATION 30

If the Department of Water and Environmental Regulation persist with this administrative process to trigger a determination by the Department on whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies, the Department write to all owners of agricultural land in the Warren-Donnelly area to inform them of the process, including details of the mechanisms of the process. Further, the Department is to issue a public notice detailing the process and its mechanisms.

RECOMMENDATION 31

The Department of Water and Environmental Regulation immediately make its newsletters available on its website.

RECOMMENDATION 32

The Department of Water and Environmental Regulation develop, in consultation with agricultural landowners in the Warren-Donnelly catchment, a communication strategy that identifies those matters the Department must communicate to owners of agricultural land, commits to timely communication, and to communicate in writing directly with owners of agricultural land in the Warren-Donnelly catchment (not licensees only).

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612 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 2.

613 ibid.

614 ibid., p 2.

Register of spring dams

6.190 Under Part 3, Division 3E of the RIWI Act, DWER is required to keep a register of the various instruments that are issued under that Act. Instruments for that purpose are defined as a licence under section 5C, an exemption under Section 26C and a direction under Sections 22, 26G or 26GC. The RIWI Act also specifically prescribes the information that is to be in the register in respect of each instrument.[615]

6.191 On the question of whether spring rights are included in the register, Mr Rowe said:

> Because a spring right is not prescribed as part of the definition of an "instrument", it is considered out of scope for inclusion in our register.[616]

Mr Moynihan added:

> it is not captured in the definitions or provisions of the act, so it cannot be included in the register at this stage.[617]

6.192 The Committee asked whether registering spring rights had been considered by DWER:

> **The CHAIR:** I appreciate that the registering of the spring rights is not required under the current legislative scheme. Has any consideration been given to amending the legislative scheme to require the registration of spring exemptions?
>
> **Mr ROWE:** No, Ms Farina, there has not been.
>
> **The CHAIR:** Do you think that would assist with some of the controversy that is occurring in the Warren–Donnelly area?
>
> **Mr ROWE:** I do not have a strong view on that at the moment... I guess it is a policy choice for the government of the day as to whether or not they feel as though this needs to be given greater clarity through some other process in the legislation.[618]

6.193 The Committee sought clarification on whether, under the new administrative process, DWER had considered establishing a register of approved spring dams to provide landowners with surety and people purchasing property easily access that information prior to purchase. Mr Rowe told the Committee:

> I do not know that we have given that any consideration. Adam, do you have any insights into that in particular? No? I do not have an answer to that at this stage...[619]

6.194 The Committee is of the view that if DWER are to persist with their new administrative process requiring DWER to formally determine if a section 5 exemption applies, DWER should establish a register of spring rights and spring dams.

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615 *Rights in Water and Irrigation Act 1914*, s 26GZJ

616 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 8.

617 Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 8.

618 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 9.

619 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 6.

FINDING 33

The *Rights in Water and Irrigation Act 1914* does not require the Department of Water and Environmental Regulation to maintain a register of spring exemptions or spring dams, as these do not require licencing and are not prescribed as part of the definition of 'instrument'.

RECOMMENDATION 33

If the Department of Water and Environmental Regulation persists with its requirement that landowners make an application for a bed and banks permit to trigger a determination by the Department as to whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies, then the Department should establish and maintain a register of spring rights and spring dams. The *Rights in Water and Irrigation Act 1914* and regulations should be amended to provide for the establishment and maintenance of a register of spring rights and spring dams.

An example—Ms Melissa Nicholls and Mr Clinton Robertson—DWER determination of no spring exemption

6.195 Melissa Nicholls and Clinton Robertson purchased a property in Glenoran, near Manjimup, in 2014. There is a single dam on the property.[620] The previous owner had a licence to take water and in addition, on the understanding that he had spring rights, he took water from a spring on the property into the dam:[621]

> The sale price was $615,000, with a premium paid per acre due to the spring fed dam on site and quality of the water due to the natural spring feeding the dam.[622]

6.196 Based on a visual inspection and research into the land, they understood the spring to originate and be solely contained on the property, with the exception of a by-wash to an onsite dam. When Ms Nicholls and Mr Robertson heard about challenges to spring rights in the area in 2018, they sought official recognition of their exemption.[623]

6.197 Ms Nicholls and Mr Robertson were granted a surface water licence on 19 May 2017 for a volume equivalent to the capacity of their dam, resulting from a transfer from the previous licensee and owner.[624]

6.198 On 12 November 2018, Ms Nicholls emailed DWER requesting a review related to a claim of spring rights. On 12 February 2019, DWER identified to Ms Nicholls that a visit to the property boundary identified that the watercourse which fed the dam originated on the adjacent Crown Reserve. On 1 August 2019, DWER undertook a site visit with Mr Robinson and found that while water was found to rise and flow within the property, this water discharged into a watercourse that commenced upstream, or up-gradient of this point and outside the property boundary. As such, DWER reaffirmed in writing the following day that the exemption did not apply.[625]

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620 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 4.

621 David Wren, Secretary, Western Australia Water Users Coalition, email, attachment 1, 14 November 2019, pp 2-3.

622 ibid., p 2.

623 ibid., p 3.

624 Department of Water and Environmental Regulation, Answer to question on notice 3 asked at hearing held 19 August 2020, dated 1 September 2020, p 3.

625 ibid.

6.199 As DWER do not maintain a register of spring rights or spring dams, it is not possible for a prospective purchaser of a property to readily determine whether assumptions they are making or information provided by the seller or the seller's agent is accurate.

6.200 Ms Nicholls and Mr Clinton say they purchased the property at a premium price on the understanding that the dam was spring fed and the loss of the spring exemption has diminished the value of the property.[626] They maintain the dam has historically been fed by the spring in addition to the licenced water allocation and this should have been recognised by DWER.[627]

6.201 DWER maintain the licence to take water transferred from the previous owner and licensee is equivalent to the dam's capacity.[628]

6.202 It should be noted that DWER attaches conditions to licenses, including when the water can be taken to top up the dam. Possibly the spring feeding into the dam provided further top up outside the period of the license to take water, thus providing more water for the agricultural business, which has now been lost as a result of DWER's determination.

6.203 It is not known whether the previous owner had a letter from DWER incorrectly advising a section 5 exemption applied or whether he had made an incorrect self-assessment.

An example—Mr Garry Kilrain—DWERs inconsistent advice

1. Spring exemption

6.204 In an email dated 18 October 2020, Mr Maskew informed Mr Kilrain that he and another DWER officer had determined that a section 5 exemption applied to the site, east of Dixvale Road, where Mr Kilrain intended to build a spring dam. The email reads as follows:

> we agree that the site you propose on the east side of Dixvale Rd is covered by spring rights. You will not need a permit to construct or take water from this site.[629]

6.205 On the basis of this advice, the Committee understands Mr Kilrain proceeded to purchase what he needed to construct the spring dam and to pipe the water to where it was needed on his landholdings and began construction of the dam.[630]

6.206 DWER subsequently told Mr Kilrain that, contrary to earlier advice, a section 5 exemption does not apply to the dam. The Committee questioned DWER on this:

> The first advice was based on a desktop assessment, and we have subsequently been out on site with Mr Kilrain and looked at all of the watercourses on his property to determine, with our updated understanding, which ones were eligible for spring exemptions and which ones were not, and with that updated understanding, I got it wrong.[631]

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626 David Wren, Secretary, Western Australia Water Users Coalition, email, attachment 1, 14 November 2019, p 2.

627 ibid.

628 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 4.

629 Garry Kilrain, private citizen, email, 18 September 2020, p 5.

630 Hon Adele Farina MLC, Chair, Standing Committee on Public Administration, transcript of evidence, 19 August 2020, p 7.

631 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

6.207 The Committee understands that water from stock and domestic purpose dams cannot be used for commercial production. Thus, is does not meet Mr Kilrain's need for water for commercial production.[632]

6.208 Unclear about the nature of the 'updated understanding' between October 2018 when the initial advice was provided to Mr Kilrain and DWERs subsequent advice that the initial advice was incorrect, the Committee sought clarification:

> That is because we went out and did that site inspection, and we determined that you can see the mapping—that was quite old in that instance—had not correctly mapped the watercourse on that property and that that watercourse actually started on the other side of the Dixvale Road on a different property, so it actually came across a number of different types of ownership before it entered Mr Kilrain's property.[633]

6.209 DWER explained that with the competition for water, they are now having to do site inspections rather than rely on desktop assessments using Landgate maps.[634]

6.210 In response to the Committee's question about the uncertainty caused to landowners as a result of DWERs inconsistent advice, Mr Rowe explained:

> I think we have acknowledged in evidence to this committee previously that the advice we have given in the past has been inconsistent, and it has changed over time, based on our understanding of the legal interpretation of the legislation and how it should apply. That is, as I understand it, part of the reason why we are now asking people to apply for a licence anyway, because it allows us to do that thoroughly.[635]

6.211 In response to a further question concerning changed legal interpretation since October 2018, Mr Rowe explained that DWER cannot necessarily rely on the mapped or desktop assessment as they have done in the past because of the nuances and locally specific situations. This has resulted in the added due diligence of DWERs site inspections.[636]

6.212 Noting that DWERs email to Mr Kilrain did not contain any qualifying statement that it was preliminary advice only or inform Mr Kilrain of the new administrative process, the Committee put further written questions to DWER and received the following responses:

> Q3 If DWER had implemented the administrative process requiring farmers to lodge an application under the licence approval system –
>
> a. why didn't the email to Garry Kilrain tell him that he was required to lodge an application under the licence approval system?
>
> Answer: The Department sought to implement the requirement to lodge an application after this time. Experiences such as those with Mr Kilrain, who progressed his plans based on informal correspondence from the Department, led

632 Garry Kilrain, private citizen, email, 21 September 2020, p 1.

633 Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

634 ibid.

635 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

636 ibid.

the Department to instigate a formal method of assessment where there is the possibility that regulation will ultimately be required.[637]

Committee comment: this is inconsistent with DWERs evidence that the new process was in place in late 2016 and has been consistently applied since this date.

b. Why did Mr Maskew tell Garry Kilrain they agreed he had spring rights if an application [under the new process] hadn't been lodged and assessed?

Answer: The Department had not implemented the requirement at that time and the nature of the discussions were largely conceptual in nature.[638]

Committee comment: this is inconsistent with DWERs evidence that the new process was in place in late 2016 and has been consistently applied since this date.

c. Why did Mr Maskew tell Garry Kilrain the Department agreed he had spring rights based on a desktop assessment if an onsite inspection was required?

Answer: The Department provided informal advice to support the conceptual development of water supply options for Mr Kilrain.[639]

Committee comment: this is inconsistent with DWERs evidence that the new administrative process required site assessments and that DWER was conducting site inspections from early 2018.

If [the October 2018 email] was a preliminary assessment only, why doesn't the email say so?

Answer: The Department has been in communication with Mr Kilrain since early 2018 around the potential water development options for the property. Much of this discussion has been conceptual in nature with various options discussed, as Mr Kilrain had not indicated a preferred option. It was an oversight not to specify the desktop nature of the assessment in this email but was consistent with the nature of the preceding discussions.[640]

Committee comment: nothing in DWERs email indicates to Mr Kilrain that it is preliminary advice and should not be acted on. It needs to be understood, Mr Kilrain was operating on the basis that DWER do not regulate spring dams, as specified in the RIWI Act, and thus had no expectation that the advice could not be relied on and acted on.

6.213 This example raises serious doubts as to the reliability of DWERs evidence to the Committee that the new administrative process has been consistently applied by DWER since last 2016. Further, it highlights that landowners cannot have any confidence in advice provided by DWER as recently as October 2018 that they have spring rights. Also, DWERs inconsistent or incorrect advice is not a matter of the past, as suggested by DWER.

6.214 The Committee does not accept DWER's evidence on this matter, as it is contrary to DWER's evidence that:

- The new administrative process commenced in late 2016 and has been applied consistently since. This predates the October 2018 email to Mr Kilrain.

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637 Rachel Osborne, Acting Ministerial Coordinator, Ministerial Liaison Unit, Department of Water and Environmental Regulation, 1 September 2020, attachment 4, p 3.

638 ibid.

639 ibid.

640 ibid., p 1.

- The new administrative process requires DWER to do an on-site assessment before making a determination, thus DWER ought to have completed the on-site assessment before providing the October 2018 email to Mr Kilrain, as this is the process that had been in place either since late 2016 or early 2018 when DWER say they were doing site inspections and assessments.

Further,

- nothing in the email indicates—
    - the advice was based on a desktop assessment only

      or
    - it was a discussion that was 'conceptual in nature'

      or
    - the advice was informal only

      and/or
    - the adivce in the email should not be relied on or acted on.

indeed, the email is unambiguous, it states that Mr Kilrain has a spring exemption and no bed and banks permit is required.

- DWER presented no evidence to support its claim that the Landgate map was outdated and inaccurate.
- There was no 'updated understanding' between 18 October 2018 and DWER's subsequent advice. DWER's evidence is that the 'updated understanding' occurred sometime before or around late 2016.

6.215 If advice on spring exemptions provided by DWER to Mr Kilrain as recently as October 2018 is 'wrong', noting that this occurred after DWERs 'updated understanding' and almost four years after implementing the new process, and at a time when DWER has been reviewing its past incorrect advice, it does little to instil confidence in DWER and its compliance with the new process. Further, it raises serious doubts as to which of DWERs advice to Mr Kilrain was incorrect, the initial advice that he had a spring exemption or the subsequent advice that he does not.

6.216 DWER told the Committee that Mr Kilrain was approved to build a small dam at this site:

> that was deemed to be an exempt one for stock and domestic purposes, not for springs...[641]

6.217 This example serves to illustrate the serious and costly ramifications of DWERs inconsistent or incorrect advice for landowners.

6.218 Landowners cannot proceed with any certainty while DWER continues to provide inconsistent and/or incorrect advice.

An example—Mr Garry Kilrain—DWERs inconsistent advice

2. Dam alongside Graphite Road

6.219 Mr Kilrain has a licensed dam on his property alongside Graphite Road. It was commissioned by his uncle (deceased) in about 1991.[642] Mr Kilrain maintains that the dam was previously

[641] ibid., p 8.

[642] Garry Kilrain, private citizen, email, 18 September 2020, p 3.

licensed to take water up to its capacity of 77 000KL. [643] He has a department storage/use form provided to his uncle (then licensee) which lists all his licenced dams and indicates a dam with a capacity of 77 00KL.[644] Also, he has a letter from the surveyor of the dam dated 6 June 1991 which states the capacity of the dam is 74 000kl. [645]

6.220 DWER dispute this capacity. DWER maintain that it is not clear from the departmental storage/use form to which dam the 77 000KL refers.[646] DWER has not identified to the Committee another dam on Mr Kilrain's property to which it may refer. Also, DWER maintains that the surveyor letter doesn't identify with sufficient clarity the location of the dam referred to or provide supporting design and other information.[647]

6.221 DWER is not satisfied by an email from the surveyor dated 13 June 2020, confirming the dam is the one alongside Graphite Road and citing its capacity of 74 000 kilolitres:[648]

> The email ... was not supported by a statement of accuracy, plans or cross sections from which the department could verify the volume.[649]

6.222 DWER undertook an on-site inspection and determined that the capacity of the dam is 30 000KL. Subsequently, DWER did another on-site inspection and revised the capacity of the dam to 55 000KL, which DWER maintain is consistent with information from Mr Kilrain's uncle. [650] The documents in support provided by DWER are:

- A schedule of existing surface water diversions which DWER say cites the dam as having a capacity of 60 000 KL, this being a request for a surface water diversion.[651] This document is signed by Mr Kilrain's deceased uncle and dated 30 July 1991.[652]
- An inspection note dated 27 May 2003 which DWER say cites a dam capacity of 52.5 megalitres.[653] It is not signed by Mr Thomas Kilrain. [654]

6.223 The Committee acknowledges that the information provided in the three departmental documents[655] is not clear, there are inconsistencies between the documents and within the inspection note, and arguably the information contained in the documents is subject to interpretation. The Committee is of the view that the surveyor's email provides clarity as to

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643 ibid., p 2.

644 ibid., p 4.

645 ibid., p 3.

646 Rachel Osborne, Acting Ministerial Coordinator, Ministerial Liaison Unit, Department of Water and Environmental Regulation, 1 September 2020, attachment 4, p 5.

647 ibid.

648 Garry Kilrain, private citizen, email, 18 September 2020.

649 Rachel Osborne, Acting Ministerial Coordinator, Ministerial Liaison Unit, Department of Water and Environmental Regulation, 1 September 2020, attachment 4, p 5.

650 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 6.

651 Rachel Osborne, Acting Ministerial Coordinator, Ministerial Liaison Unit, Department of Water and Environmental Regulation, 1 September 2020, attachment 4, p 5.

652 Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 4.

653 Rachel Osborne, Acting Ministerial Coordinator, Ministerial Liaison Unit, Department of Water and Environmental Regulation, 1 September 2020, attachment 4, p 5.

654 ibid.

655 These include the site inspection note and schedule provided by the Department of Water and Environmental Regulation, and the storage/use form provided by Mr Kilrain.

the dam being referred to, however acknowledges that the supporting documentation required by DWER has not been provided.

6.224 Subsequently, DWER advised the Committee that Mr Kilrain also has a 20 000 kilolitre pump back entitlement, and this will result in a revised license of 75 000 kilolitres.[656] However, Mr Kilrain maintains that DWER should not be using the pump back entitlement as a means of suggesting how he could achieve an entitlement of 75 000KL at this dam. He maintains the dam has a capacity of 74 000KL – 77 000KL and was previously licenced for 77 000KL, and DWER should license it for 74 000KL – 77 000KL.

6.225 It is not clear how the dam can be assessed by DWER as having different capacities and the dam can be recorded by DWER as having different capacities.

6.226 This illustrates the frustrations caused by DWERs inconsistent advice/records. It is not unreasonable to expect that DWER would have a record that clearly identifies the dam and clearly states the capacity of the dam.

Concluding comments

6.227 The Committee expresses its view that DWER providing inconsistent and incorrect advice is not a matter of the past, as suggested by DWER.

RECOMMENDATION 34

The Department of Water and Environmental Regulation:

- immediately provide comprehensive training to its officers on all aspects of the *Rights in Water and Irrigation Act 1914*, not limited to those matters identified by this inquiry, and the new administrative process for the Department to determine whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies
- implement a quality assurance program to monitor the accuracy and consistency of advice provided by its officers
- develop a clear set of guidelines for Department officers to use in determining whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies
- seek independent legal advice on the Department's legislative authority to implement the new administrative process and any changes needed to improve the process, provide procedural fairness and a right of review.

RECOMMENDATION 35

The Department of Water and Environmental Regulation implement a departmental policy requiring all Department officer emails providing advice of a preliminary nature or based on a desktop assessment only to clearly state:

1. the advice contained in the email is of a preliminary nature only (and based on desktop assessment only, where applicable) and should not be taken as formal or final advice and the landowner should not commence any activities based on this advice

And in relation to emails to Warren-Donnelly landowners in relation to spring rights, emails should also clearly state:

2. an onsite visit and assessment is required before the Department is able to provide a formal determination

[656] Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 6.

3. to reduce the risk of being in breach of the legislation and associated enforcement activity, landowners need to ensure they have formal confirmation in writing from the Department as to whether they have spring rights before undertaking any works
4. the Department has implemented a new administrative process requiring formal assessment by the Department on whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies. Landowners must comply with the process, by making an application for a bed and banks permit in order to trigger the formal assessment by the Department.

RECOMMENDATION 36

If the Department of Water and Environmental Regulation persist with this new administrative process providing for the Department to make a formal determination on section 5 exemptions, the *Rights in Water and Irrigation Act 1914* should be amended to provide for the process and for a right of review against a decision by the Department that a section 5 exemption does not apply. Where an application for review is received by the Department, an independent hydrologist and surveyor, as agreed by the Department and the landowner, and in the absence of agreement as chosen by the landowner, are to be engaged to undertake an independent assessment on whether a section 5 exemption applies. The decision of the hydrologist and the surveyor as to whether a section 5 exemption applies shall stand. The costs are to be equally shared between the Department and the landowner.

Registration and perpetual licences

6.228 Most encumbrances that restrict or limit the use and enjoyment of a property, such as an ESA, energy operator easements or planning scheme reservations, are attached to the affected land, rather than the owner. While water licences are entitlements and not restrictions, the Committee understands why landowners may draw a comparison, due to the ability of water entitlement levels to affect use and enjoyment of land.

6.229 Water licences are not automatically transferred with the sale of a property. The buyer must negotiate the transfer of the licence prior to or within 30 days of settlement. In the event that the licence is not transferred, the buyer must apply for a new licence.[657] In addition to being a burden on buyers, this requirement can be problematic in areas where the allocation limit has been reached.

6.230 The main difference between water licences and encumbrances such as ESAs is that water entitlements in WA are subject to transfer and trade. The benefits of a water transfer scheme include increased efficiency of water use through the use of price signals to regulate supply and demand, and the flexibility to respond to fluctuations in water availability. Transfer schemes are considered to be particularly beneficial where conditions such as population growth and declining rainfall are driving water scarcity.[658]

6.231 Water licences are not perpetual. This provides flexibility for regulators, but creates uncertainty amongst landowners:

> Currently, they give you a 10-year licence and then you have this uncertainty.[659]

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657 Department of Water and Environmental Regulation. See: https://www.water.wa.gov.au/licensing/water-licensing/transfers,-trades-and-agreements. Viewed 24 September 2020.

658 University of Western Australia, School of Agricultural and Resource Economics, *Institutional impediments to groundwater trading: the case of the Gnangara groundwater system of Western Australia*, report prepared by James Skurray, Ram Pandit and David Pannell, November 2011.

659 David Wren, Secretary, Western Australian Water Users Coalition, transcript of evidence, 30 October 2020, p 7.

6.232 The Coalition proposes that to grant perpetual licences, including in relation to spring rights, would decrease their fear of their entitlements being taken away:

> In this situation, my understanding is that if the spring rights were made into a legal document, it would be a perpetual licence, tied to the land. So you would have to have land and you would have a perpetual licence—that is it. They could not take it.[660]

6.233 Because water allocation plans are 'ever changing documents', members of the Coalition do not consider the plans a good substitute for perpetual licences. While the Committee understands why landowners wish for an ongoing guarantee of their water entitlements, it is also aware that water availability is highly variable, and flexibility is essential to its management.

6.234 The Committee asked DWER about their position on perpetual licences. DWER advised that it manages the taking of water under the RIWI Act, and that its long-standing policy is to issue licences for a maximum term of 10 years.[661]

6.235 The Coalition also proposes that registration would promote certainty. WA already has a publicly accessible water register on the DWER website, as required by the NWI Intergovernmental Agreement. This aims to foster public confidence and state unambiguously who owns the entitlement, and the nature of any encumbrances on it.[662]

6.236 Certain types of water are not included on the water register. Division 3E of the RIWI Act provides for the register of instruments. Because section 5 exemptions for springs and wetlands are not included in the definition of 'instrument',[663] they are outside the scope of the water register.[664]

6.237 When asked for its position on registering water licences on a Certificate of Title, DWER advised:

> whatever the law provides for is what we manage to. The current licensing regime provides for licences to be transferred to a new owner, but they do have to apply for that transfer to occur.[665]

6.238 The Committee notes that while such a register increases security for landowners by enabling them to be certain of their existing entitlements at a point in time, registration does not mean that entitlements are perpetual or fixed.

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660 ibid.

661 Michael Rowe, Director General, Department of Water and Environmental Regulation, email, 14 August 2020.

662 Department of Agriculture, Water and the Environment. See: https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/water/Intergovernmental-Agreement-on-a-national-water-initiative.pdf. Viewed 24 September 2020.

663 *Rights in Water and Irrigation Act 1914,* s 26GZH.

664 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 2 May 2020, p 8.

665 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 4.

Compensation

6.239 The Committee heard that where water entitlements are reduced, licence holders should be adequately compensated. In a paper for the Institute of Public Affairs, Louise Staley said:

> A government should have the authority to 'resume' water for public amenity, just as it may resume land, but only on just terms.[666]

6.240 The Coalition suggested to the Committee that compensation should also be payable for any resulting loss of property value arising from a reduction in water entitlements.[667] The Committee has not received specific evidence to suggest that property values are impacted by fluctuations in water entitlements. DWER also told the Committee that it was not aware of any evidence to suggest reductions in water entitlements have an impact on property value.[668]

6.241 The City of Wanneroo told the Committee about its attempts to obtain compensation for growers affected by a reduction in water licences expected to arise from proposed revisions to the Gnangara Groundwater Areas Allocation Plan:

> The Taskforce recommended that if water licences are to be reduced the State Government should consider an 'adjustment package' for growers, including the making of 'ex gratia' payments (ie. payments which are not legally required to be made). In response to this particular part of the recommended adjustment package, the Minister advised that she cannot support ex gratia payments, where reduction of water licences is due to climate change.
>
> These reason why the above payments were referred to as ex gratia is because in Western Australia, there is no legal obligation on the State Government to compensate growers when government reduces water licences.[669]

6.242 The RIWI Amendment Bill 1999 introduced provisions to provide for compensation for licence amendments, suspensions or cancellations, in limited circumstances.[670] These provisions can be found at Division 9, Schedule 1 of the RIWI Act.

6.243 Although section 39 was broadened in response to a recommendation of the Standing Committee on Legislation in 2000, it remains relatively narrow.[671] In a submission to the Water Resources Management Reform position paper, Research Assistant Professor Michael Bennett provides useful commentary on the effect of the compensation provisions:

> It is clear that under these provisions compensation is not available where a licence is amended to recoup unused water entitlements and that compensation may be available in most other cases, such as where a water entitlement is reduced to protect the water resource or the associated environment, or for consistency with an approved water resource management plan. However, the right to compensation is so heavily qualified as to have very little operation. There are two important exemptions:

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666 Institute of Public Affairs, *Property rights in Western Australia: time for a changed direction*, report prepared by Louise Staley, July 2006, p 6.

667 Submission 33 from Western Australian Water Users Coalition, 30 July 2019, p 4.

668 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 4.

669 Submission 50 from City of Wanneroo, 31 July 2019, p 1.

670 University of Western Australia, Michael Bennett. See: https://www.law.uwa.edu.au/__data/assets/pdf_file/0008/2474819/Submission-on-Water-Resources-Law-Reform_M-Bennett.pdf. Viewed 24 September 2020.

671 Western Australia, Legislative Council, Standing Committee on Legislation, Report 51, *Rights in Water and Irrigation Amendment Bill 1999*, 20 June 2000, pp 42-3.

a. In all cases, compensation is only available if the licence holder's use of water is consistent with the objects of the Act. This arguably means that no compensation is payable where entitlements are reduced to return water use to sustainable levels, given that one of the objects of the Act is sustainable water use. This would be consistent with the statement in the Second Reading speech for the Amendment Bill, highlighted above, that no compensation is payable for "changes that are necessary to reduce excessive use to sustainable levels."

b. In most cases compensation will not be available unless "the Minister is of the opinion that the effect of the exercise of the power on the person is not fair and reasonable having regard to the exercise of the power in respect of other licence holders in the surrounding area". This appears to pick up on the suggestion by West Australian Water Users Coalition and Pastoralists and Graziers Association, as noted by the Standing Committee on Legislation, that "compensation is not necessary where there is a 'pro-rata' reduction to all users for environmental purposes".

6.244 Michael Bennett also notes that there are other ways in which the Minister for Water may prevent a licence holder from taking their full water entitlement, including through conditions or issuing a direction in writing.[672] These are not compensable.

6.245 DWER advised that the compensation provisions have never been utilised, and there has never been a request for compensation under those provisions:[673]

> **The CHAIR**: Why do you think these provisions have never been used?
>
> **Mr ROWE**: Probably because they are a very narrow set of circumstances in which people can apply for compensation.[674]

FINDING 34

Although compensation for water licence amendment is available under the *Rights in Water and Irrigation Act 1914*, the provisions are very narrow and as a result have never been used.

6.246 Current compensation provisions may evolve through the Water Resources Management Bill, but at this stage, it is not clear how. Any changes are likely to move towards alignment with other states and the NWI principles, which provide for slightly different compensation arrangements than those available under the RIWI Act:

> As far as I can tell, most other legislation around Australia is broadly consistent with the national water initiative, which sets out a set of guiding principles that Australian governments have signed up to. The national water initiative contains provisions for what is known as risk sharing. It sets out, effectively, provisions for when water users might be entitled to compensation. It is quite narrowly defined in the sense that the principle is that it is only if there is a government policy decision which would mean that water users' access to water is significantly impacted. For example, the national water initiative contemplates that if water has to be reduced as a result of climate change, then that is not a compensable trigger.

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672 University of Western Australia, Michael Bennett. See: https://www.law.uwa.edu.au/__data/assets/pdf_file/0008/2474819/Submission-on-Water-Resources-Law-Reform_M-Bennett.pdf. Viewed 24 September 2020.

673 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 6.

674 Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 11.

> Up until now, the *Rights in Water and Irrigation Act 1914* is our enabling legislation for the management and use of water in Western Australia. Parts of that legislation are not consistent with the national water initiative. When the government introduces a new water resources management bill, that is an opportunity to make Western Australia's law more consistent with the national water initiative.[675]

RECOMMENDATION 37

The Department of Water and Environmental Regulation review and consider the effectiveness of current compensation provisions.

Conclusion

6.247 Water is an increasingly scarce and variable public good, yet many livelihoods rely on access to it. While water licences are not 'real' property, they can be thought of as existing on a continuum of property interests. The Committee considers that clearly defined entitlements and fit-for-purpose compensation processes could provide landowners with the sense of security they seek.

[675] Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 6.

CHAPTER 7
Fishing licences: Current legislative scheme regarding commercial fishing

Introduction

7.1 The terms of reference for this Inquiry include that the House:

> Recognises the property rights of government-issued licenses and authorities including commercial fishing.

7.2 This Chapter will discuss:

- the proprietary nature of fishing access rights
- management of commercial fishing
- issues specific to commercial fishing, aquaculture, and pearling, including allocation of entitlements
- compensation.

7.3 WA has a coast line of almost 13 000km,[676] and is home to a vast range of fish and other aquatic resources sought by fishers and farmed by aquaculturalists.[677]

7.4 Commercial fishing (including aquaculture) contributes approximately $1 billion annually to the WA economy.[678]

Relevant law

7.5 Access to fish and aquatic resources in WA is governed primarily by State legislation, and Commonwealth legislation applies in some instances. Some common law principles continue to apply such as the public's right to fish. The scope of the following two chapters will be limited to discussion of management of fish and aquatic resources within WA's jurisdiction under State legislation.[679]

7.6 The FRM Act is the primary Act which regulates fishing and aquaculture in WA, and distinguishes between commercial, recreational, and customary fishing. The *Pearling Act 1990* (Pearling Act) regulates pearling and pearl oyster hatchery activities in WA.

7.7 Aquatic resource management in WA is currently under reform. The *Aquatic Resources Management Act 2016* (ARM Act) will repeal the FRM Act and Pearling Act when Part 17 is

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676 Landgate, 4 March 2020. See: https://www0.landgate.wa.gov.au/maps-and-imagery/wa-geographic-names/interesting-wa-facts. Viewed 7 April 2020.

677 Department of Primary Industries and Regional Development, 4 April 2018. See: http://www.fish.wa.gov.au/species/Pages/default.aspx. Viewed 7 April 2020.

678 BDO EconSearch, *Australian Fisheries and Aquaculture Industry 2017/18: Economic Contributions Estimates Report, A Report to the Technical Advisory Group*, 30 September 2019, p 49.

679 Western Australia has jurisdiction over the State's coastal waters, which are waters within three nautical miles of the Western Australian coast. The Commonwealth has jurisdiction over Australia's Exclusive Economic Zone, which is waters between three and 200 nautical miles of the Western Australian coast. However, responsibility for management of fisheries may be reallocated by agreement between the State and Commonwealth under an Offshore Constitutional Settlement arrangement. This has occurred in relation to numerous fisheries.

proclaimed.[680] The Department of Primary Industries and Regional Development (DPIRD) advises that:

> The new Act was scheduled for commencement on 1 January 2019, however, this has been deferred while an amendment to the Act is progressed.[681]

7.8 The ARM Act received Royal Assent almost four years ago, on 29 November 2016, however it has not yet been proclaimed in its entirety. Amendments to the ARM Act are currently being progressed through the Aquatic Resources Management Amendment Bill 2020 (ARM Amendment Bill).

7.9 Various fishing sectors have differing interests in the shared fish and aquatic resources. The aim of the commercial sector is to profit from catching and selling fish, the recreational sector's focus is on enjoyment of the experience, and the customary sector's interest relates to cultural needs and values.[682]

7.10 DPIRD is responsible for protecting and growing WA's agricultural, fisheries, aquaculture, food industries and regional economies.[683] In managing fish and aquatic resources, DPIRD advised that it is:

> Providing for the sustainability of our fish resources in our aquatic environment, providing security and certainty to commercial fishers, while also recognising the need of other resource users and broader community expectations.[684]

7.11 Across all sectors, the primary objective is to ensure that fisheries and their habitats are sustainable. Fish and aquatic resources are managed through an integrated approach that considers a wide range of social, economic, and environmental factors, particularly in the context of population growth, changing environmental conditions, and advancing fishing technologies.[685] DPIRD publishes status reports of the fisheries and aquatic resources of Western Australia; refer to paragraph 7.49 for discussion of the most recent report.

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680 The *Aquatic Resources Management Act 2016* (ARM Act) is part of the new legislative framework (discussed in Chapter 8) and will replace the *Fish Resources Management Act 1994* and *Pearling Act 1990*. The ARM Act received Royal Assent almost four years ago, on 29 November 2016, however it has not yet been proclaimed in its entirety. On 1 May 2018, a proclamation was published in the Government Gazette that on 2 May 2018, the following provisions of the ARM Act come into operation: Part 1 sections 3, 4, 5, and 8; Part 2; Part 3 Division 1, Division 2 sections 14(1) and (4), 15 to 21, and 23 to 27, Division 3 section 32 to 40; and Part 16 sections 253 to 257. Amendments to the ARM Act are currently being progressed through the Aquatic Resources Management Amendment Bill 2020(discussed in Chapter 8).

681 Department of Primary Industries and Regional Development, 10 December 2018. See: https://www.fish.wa.gov.au/Fishing-and-Aquaculture/Aquatic-resources-management-act/Pages/default.aspx. Viewed 10 April 2020.

682 Department of Primary Industries and Regional Development, 30 September 2015. See: https://www.fish.wa.gov.au/Fishing-and-Aquaculture/Customary-Fishing/Pages/Customary-Fishing-FAQ.aspx. Viewed 7 April 2020.

683 Department of Primary Industries and Regional Development *Annual Report 2019*, p 3.

684 Ralph Addis, Director General, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 2.

685 Department of Primary Industries and Regional Development, 8 November 2016. See: http://www.fish.wa.gov.au/Sustainability-and-Environment/Pages/default.aspx. Viewed 7 April 2020.

Are fishing rights property rights?

7.12 The common law position is that, with some exceptions, fish found in tidal waters are common property and are not owned by any person. Once caught, a fish becomes owned by the person who caught it.[686]

7.13 Previous inquiries or reports have found that fish resources are common property and it is for Government to determine who has access to the resource and on what conditions:

> While a licence may be seen as having characteristics of a proprietary nature, it is the creation of government, is controlled by government and may be revoked by government.
>
> …
>
> There is no property vested in anyone in the resources of the sea.[687]

7.14 Another report found that fishing rights:

> Describe the right of individuals or groups to engage in the act of fishing, with the aim of capturing fish.
>
> …
>
> Fishing rights appear to have the most similarity with the legal notion of a 'non-possessory interest' used in property law, rather than land title.[688]

7.15 A non-possessory interest right includes a right to use and enjoyment; easements, profit a prendre[689] and licences.

7.16 The former Minister for Fisheries stated:

> It needs to be recognised that fish and aquatic resources in WA are a community resource. In short, no person owns any fish in tidal waters until they are lawfully caught.
>
> …
>
> Authorisations permitting commercial fishing activities do not provide a property right, but rather a right to access this resource. [690]

7.17 At a hearing, DPIRD reiterated that:

> Our fish resources in WA are common property, so they belong to no-one while they are in a wild state, and are essentially managed by the state on behalf of the Western Australian community.[691]

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686 Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 195, *Nature and Extent of Rights to Fish in Western Australia, Final report*, June 2005, p 15.

687 Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 165, *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee*, November 2002, p 40.

688 Government of Western Australia, (then) Department of Fisheries, Fisheries Occasional Publication No. 102, *Improving Commercial Fishing Access Rights in Western Australia: Access Rights Working Group Report to the Hon Norman Moore, MLC, Minister for Fisheries*, April 2011, p 8.

689 Profit a prendre means the right of persons to share.

690 Hon Dave Kelly MLA, (then) Minister for Fisheries, letter, 26 September 2019, p 2.

691 Ralph Addis, Director General, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, pp 1-2.

7.18 The Committee agrees that fish and aquatic resources are a community resource not owned by any particular person.

FINDING 35

Fish and aquatic resources are a community resource, not owned by any particular person until lawfully caught.

7.19 Further, DPIRD advises that fishing access rights under the FRM Act:

> Are not full inalienable or perpetual property rights in the way that perhaps freehold ownership of land is, but they are on the continuum of property interests relatively strong and relatively clear.[692]

7.20 Many stakeholders agree with this position regarding the nature of fishing access rights, including the peak industry body for the commercial sector, the Western Australian Fishing Industry Council (WAFIC). It advises that the:

> Issue of property rights is still a critical one for all of us… We are not talking about exclusive property rights; we are talking about a shared resource in a responsible policy framework.[693]

7.21 The WAFIC submits that fishing access rights have acquired the typical characteristics of property rights, including:

- tenure
- right to renew
- register of interests
- ability to lease, lend, mortgage and transfer under a will
- compensation rights in some circumstances. For example, under the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* (FRICMR Act) [694]
- being subject to stamp duty.[695]

7.22 The Committee notes that, further to WAFIC's submission, fishing access rights may also be transferred other than by will.[696]

7.23 The peak body for the recreational sector, Recfishwest, advises that:

> Defining property rights as they apply to fisheries is problematic as property rights consists of a collection of different of characteristics. While [a] number of distinguishable characteristics of property rights can be high, security of title, exclusivity, longevity and the ability to be transferred are considered the most

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692 Ralph Addis, Director General, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 10.

693 Ron Edwards, Chairman, Western Australian Fishing Industry Council, transcript of evidence, 28 October 2019, p 2.

694 In part, the Long Title of the Act states that it is 'AN ACT to provide for the payment of compensation to holders of leases, licences and permits under the *Fish Resources Management Act 1994* and *Pearling Act 1990* on account of the effect of marine nature reserves and marine parks constituted under the *Conservation and Land Management Act 1984*…'.

695 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, p 5.

696 For example, section 140 of the *Fish Resources Management Act 1994* allows for transfer of authorisations (such as licences) and section 141 allows for the temporary transfer of entitlements under an authorisation.

> crucial property rights characteristics as they apply to government issued fishing authorisations.[697]

7.24 The Pearl Producers Association (PPA) also agrees that fishing access rights share some characteristics of traditional property rights. It submits that rights in the marine domain are property rights; not in the traditional sense, but in the sense of a multi-user and multi-activity environment.[698]

7.25 The Committee's view is that certain characteristics of fishing access rights suggest that they are indeed a form of property right, notwithstanding that some matters require approval by the CEO of DPIRD (CEO), including that:

- authorisations (s 68 FRM Act), fish processing licences (s 85 FRM Act), aquaculture licences (s 94 FRM Act), and aquaculture leases (s 97 FRM Act) may be renewed
- authorisations may be transferred (s 140 FRM Act) and entitlements under authorisations may be temporarily transferred (s 141 FRM Act)
- authorisations and aquaculture leases may be used as security for lending, as suggested by Part 12 of the FRM Act which allows security interests to be recorded on a public register
- the CEO may sell a forfeited entitlement (which is an entitlement reduced by a Court following conviction of certain offences) to an eligible person (s 76(4) FRM Act)
- in relation to an aquaculture lease, a holder has an exclusive right to keep, breed, hatch, culture and harvest within the leased area the species of fish that are specified in the lease, and has ownership of all fish within the leased area under the licence (s 97 FRM Act).

7.26 Another position is that ownership of resources is not the key contention, but rather, how access to resources is managed:

> In the marine domain what is at issue is rarely absolute ownership but the setting of priorities between different uses and between different users and, if conflicting the processes to resolve these.[699]

7.27 The Committee supports the Government's aim that fish and aquatic resources should be managed or regulated for the benefit of industry and the community.

FINDING 36

Fish and aquatic resources in Western Australia should be managed by the State on behalf of the Western Australian community.

Commercial fishing

7.28 Commercial fishing under the FRM Act means fishing for a commercial purpose.[700] Commercial purpose means the purpose of sale or any other purpose that is directed to gain or reward.[701]

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697 Submission 72 from Recfishwest, 31 July 2019, p 2.

698 Aaron Irving, Executive Officer, Pearl Producers Association, transcript of evidence, 28 October 2019, p 15.

699 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, p 3.

700 *Fish Resources Management Act 1994,* s 4(1).

701 ibid.

7.29 The commercial fishing industry is WA's third most important industry in terms of economic impact, after mining and agriculture.[702] Key stakeholders in the commercial sector include the:

- WAFIC – for fishing, aquaculture, and pearling
- Western Rock Lobster Council (WRLC) – for rock lobster
- West Coast Abalone Divers Association (WCADA) – for abalone
- PPA – for oyster pearls.

7.30 The FRM Act refers to 'fish' which it defines as meaning various aquatic organisms (with some exceptions), and a 'fishery', which it defines as stocks of fish and classes of fishing activities in respect of those stocks.[703] By contrast, the ARM Act refers to 'aquatic organisms' which it defines as organisms of any species that lives in or adjacent to waters (with some exceptions), and 'aquatic resources' which it defines as populations or groups of aquatic organisms in bioregions, areas, habitats, or ecosystems.[704]

7.31 The FRM Act prohibits people from undertaking commercial fishing activities unless the person is authorised to engage in that activity.[705]

7.32 Authorisations (defined in section 4(1) of the FRM Act as meaning a licence or permit) and associated entitlements (for example, to catch a certain quantity of fish) confer only a right to access the public resource, not ownership of it. DPIRD explained the distinction as follows:

> Consistent with the concept of commercial fishing rights representing a right of access, rather than ownership, commercial fishers in WA have not been required to pay a Government fee for grant of authorisations or entitlement which reflects a property-like value. Commercial fishers pay an annual access fee.[706]

7.33 In broad terms, commercial fishing activities are managed by restricting inputs and outputs. Inputs include matters such as boat numbers and sizes, types of fishing gear, and the length of the fishing season. Outputs include matters such as the quantity of fish which may be caught.[707]

7.34 Aquaculture, which is a form of commercial fishing, under the FRM Act means the keeping, breeding, hatching, culturing or harvesting of fish.[708] It may be conducted in marine or inland waters. It is the world's fastest-growing food production sector and is projected to provide 62 percent of global seafood by 2030.[709]

7.35 Pearling is another form of commercial fishing. Under the Pearling Act, pearling means all or any of the following activities:

> (a) taking, or attempting to take, pearl oysters; or

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[702] Department of Primary Industries and Regional Development, 18 May 2012. See: https://www.fish.wa.gov.au/Fishing-and-Aquaculture/Commercial-Fishing/Pages/Commercial-Fishing-Guide.aspx. Viewed 10 April 2020.

[703] *Fish Resources Management Act 1994,* s 4(1).

[704] *Aquatic Resources Management Act 2016*, ss 3(1) and 4.

[705] Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 195, *Nature and Extent of Rights to Fish in Western Australia, Final report*, June 2005, p 18.

[706] Submission 68 from Department of Primary Industries and Regional Development, 29 July 2019, p 2.

[707] ibid., p 1.

[708] *Fish Resources Management Act 1994,* s 4(1).

[709] Department of Primary Industries and Regional Development *Annual Report 2019*, p 44.

(b) removing, or attempting to remove, pearls from pearl oysters; or

(c) moving, dumping, holding, storing or transporting pearl oysters; or

(d) practising, or attempting to practise, pearl culture techniques,

and a reference to a pearling activity is a reference to one of those activities.[710]

7.36 Various licences and permits control pearling activity, for example, a pearl diver's licence under section 13 of the Pearling Act.

FINDING 37

Commercial fishing authorisations and entitlements confer only a right of access to the public resource, not a right of ownership over that resource.

Recreational fishing

7.37 Recreational fishing under the FRM Act means fishing other than commercial fishing or customary fishing.[711] It is permitted with a licence for certain types of fishing activities, and is managed by rules relating to bag and size limits, and rules specific to species and bioregions.[712]

7.38 The recreational fishing sector comprises approximately 700 000 fishers which represents approximately one quarter of the State's population.[713]

7.39 Recfishwest claims that increasing regulation of fishing access rights has led to those rights taking on more characteristics of property rights. It claims that:

> Security of title, exclusivity, longevity and the ability to be transferred are considered the most crucial property rights characteristics as they apply to government issued fishing authorisations.[714]

Customary fishing

7.40 Customary fishing under the FRM Act means fishing by an Aboriginal person that:

(a) is in accordance with the Aboriginal customary law and tradition of the area being fished; and

(b) is for the purpose of satisfying personal, domestic, ceremonial, educational or non-commercial communal needs;[715]

7.41 Customary fishing acknowledges that Aboriginal people have rights to fish and hunt in accordance with ongoing tradition and culture. Section 6 of the FRM Act allows an Aboriginal person to take fish from any waters without a recreational fishing licence if it is done so in accordance with continuing Aboriginal tradition if 'taken for the purposes of the person or

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710 *Pearling Act 1990,* s 3(1).

711 *Fish Resources Management Act 1994,* s 4(1).

712 Department of Primary Industries and Regional Development, 29 January 2018. See: http://www.fish.wa.gov.au/Fishing-and-Aquaculture/Recreational-Fishing/Recreational-Fishing-Rules/Pages/default.aspx. Viewed 8 November 2019.

713 Recfishwest, 2020. See: https://recfishwest.org.au/about-us/. Viewed 7 April 2020.

714 Submission 72 from Recfishwest, 31 July 2019, p 2.

715 *Fish Resources Management Act 1994,* s 4(1).

his or her family and not for a commercial purpose'. Sustainability of fish and aquatic resources is a priority in this sector, as in the other sectors.[716]

The Department of Primary Industries and Regional Development

7.42 DPIRD manages fishing in WA, including in the commercial, recreational, and customary sectors.

7.43 DPIRD assists the Minister for Fisheries in the administration of numerous Acts (and related subsidiary legislation), including:

- FRM Act and Fish Resources Management Regulations 1995
- Pearling Act and Pearling (General) Regulations 1991
- *Fisheries Adjustment Schemes Act 1987* (FAS Act) and Fisheries Adjustment Schemes Regulations 2009
- FRICMR Act and Fishing and Related Industries Compensation (Marine Reserves) Regulations 1998
- *Fishing Industry Promotion Training and Management Levy Act 1994* and Fishing Industry Promotion Training and Management Levy Regulations 2016
- ARM Act.

7.44 DPIRD also assists with conducting:

- research, management, surveillance, enforcement and education in the marine parks and reserves established under the *Conservation and Land Management Act 1984* (CALM Act)
- compliance activities at sea, on behalf of the Department of Transport
- compliance activities in waters adjacent to WA in Australia's Exclusive Economic Zone, in accordance with the *Fisheries Management Act 1991* (Cth), on behalf of the Commonwealth.[717]

7.45 The FRM Act and Pearling Act legislative frameworks are supported by DPIRD's administrative guidelines, fisheries management papers, fisheries management publications, fisheries research and research contract reports, and state of the fisheries reports.[718]

7.46 DPIRD advises that it takes a holistic approach by considering the combined effects of all fishing sectors in accordance with ESD and Ecosystem Based Fisheries Management (EBFM). This involves making decisions on the best use of the fish resource within a total and sustainable catch for each fishery or fished stock. This may involve allocation or reallocation of fish resources to either the recreational or commercial fishing sectors.[719]

7.47 DPIRD divides WA into six separate *bioregions* which are geographical areas with ecosystems with common environmental conditions and by climate/rainfall characteristics in inland river

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716 Department of Primary Industries and Regional Development, 30 September 2015. See: https://www.fish.wa.gov.au/Fishing-and-Aquaculture/Customary-Fishing/Pages/Customary-Fishing-FAQ.aspx. Viewed 7 April 2020.

717 The Department of Primary Industries and Regional Development manages the majority of fishing activities in Western Australia in the Australian Fishing Zone under Part 5 of the *Fisheries Management Act 1991* (Cth) and Part 3 of the *Fish Resources Management Act 1994*. See: http://www.fish.wa.gov.au/About-Us/Legislation/Pages/default.aspx. Viewed 8 November 2019.

718 Department of Primary Industries and Regional Development. See: http://www.fish.wa.gov.au/About-Us/Publications/Pages/default.aspx. Viewed 8 November 2019.

719 Department of Primary Industries and Regional Development, 23 August 2018. See: http://www.fish.wa.gov.au/Fishing-and-Aquaculture/Pages/default.aspx. Viewed 4 November 2019.

systems. The bioregions are then divided further into ecological assets, which include ecosystems, habitats, captured fish, and protected species.[720] The six bioregions are shown at Figure 8:

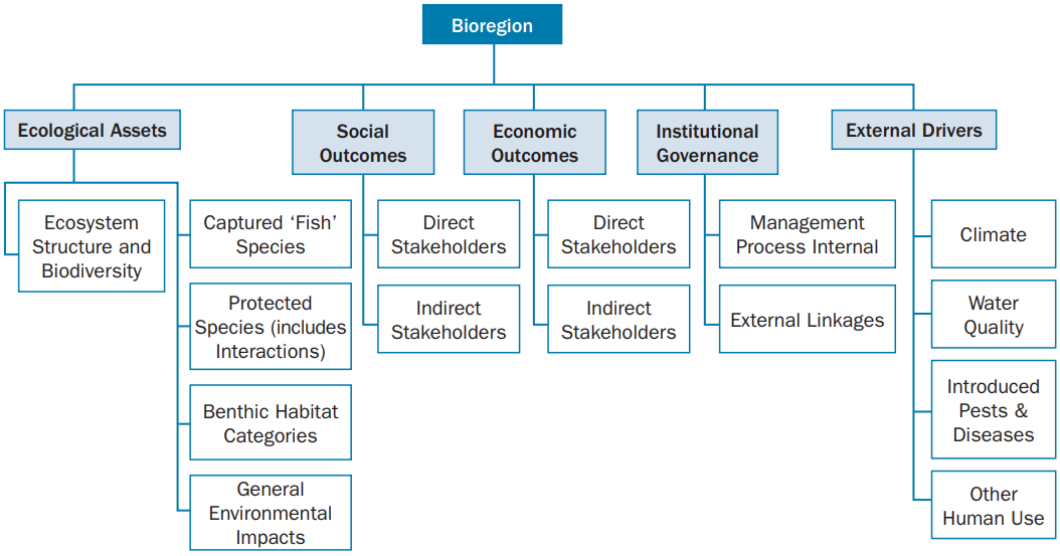
Figure 8. *The six bioregions of Western Australia*

[Source: Department of Primary Industries and Regional Development. See: https://www.fish.wa.gov.au/Sustainability-and-Environment/Fisheries-Science/Pages/default.aspx. Viewed 25 September 2020.]

7.48 Each bioregion has a tailored EBFM component tree in which the ecological components have been subdivided into the set of ecological resources/assets relevant to that bioregion. Seen in Figure 9, these ecological components are balanced against community values to help deliver better community outcomes.

720 Department of Primary Industries and Regional Development, 23 August 2018. See: http://www.fish.wa.gov.au/Sustainability-and-Environment/Sustainable-Fisheries/Pages/Sustainable-Fisheries-Management.aspx. Viewed 4 November 2019.

Figure 9. *Ecosystem Based Fisheries Management component-tree showing ecological components divided into ecological resources/assets relevant to a bioregion*



[Source: Department of Primary Industries and Regional Development. See https://www.fish.wa.gov.au/Documents/new_legislation/next_generation_fisheries_ARM Act.pdf. Viewed 25 September 2020.]

Current state/health of Western Australia's fisheries

7.49 DPIRD publishes a report, *State of the Fisheries,* of the status or health of fisheries and aquatic resources in WA. The report outlines the most recent assessments of the cumulative risk status for each of the aquatic resources.

7.50 These reports were published annually, however the latest report is for the period 2017-18.[721] It shows that 97 percent of fish stocks were assessed as not being at risk or vulnerable through fishing.[722] The data is now three years out of date.

7.51 The report includes several resources that were previously classified as *sustainable – recovering*, indicating that management actions taken to date have resulted in those resources recovering at acceptable rates.

7.52 Only two resources were classified as *inadequate*, namely the West Coast whitebait stock and the snapper stock of the Gascoyne Demersal Scalefish Fishery.[723]

FINDING 38

The most recently available data from the Department of Primary Industries and Regional Development indicates that a majority of Western Australia's fish stocks are being managed sustainably and are not at risk or vulnerable through fishing.

RECOMMENDATION 38

The Department of Primary Industries and Regional Development publish an updated *State of the Fisheries* report as a matter of urgency, and continue to publish such reports on an annual basis.

721 Prior to the 2017-18 report, reports were published for periods including 2016-17, 2015-16, 2014-15, 2013-14.

722 Department of Primary Industries and Regional Development, *Status reports of the fisheries and aquatic resources of Western Australia 2017/18*, report prepared by Fisheries Science and Resource Assessment and Aquatic Resource Management Branches, Perth Western Australia, 2018, p 1.

723 ibid.

Commercial fishing under the *Fish Resources Management Act 1994* and the *Pearling Act 1990*

Introduction

7.53 The FRM Act regulates fishing and aquaculture in WA in the various fishing sectors. Whilst the FRM Act regulates a range of fishing activities, it is not a code for the creation of fishing rights, and some fishing activities are still carried out in reliance on the public's common law right to fish.[724]

7.54 The objects of the FRM Act are listed in section 3 of the Act and include management of fisheries and aquaculture in a sustainable way.

7.55 Commercial fishing and aquaculture is managed through a range of licences, leases, and authorisations issued under the FRM Act.

7.56 The Pearling Act regulates the use of pearl oyster resources in WA.

7.57 The Pearling Act does not contain an objects section; however, its long title includes that the Act is to provide for the conservation and management of pearl oyster fisheries.

7.58 Pearling is managed through a range of licences, leases, and permits issued under the Pearling Act. Licences authorise pearling activities.

Commercial fishing and related licences and authorisations issued under the *Fish Resources Management Act 1994* and the *Pearling Act 1990*

7.59 The licences, leases, and authorisations relating to commercial fishing currently issued under the FRM Act are:

- Commercial Fishing Licence—this is a personal licence which permits the holder to engage in commercial fishing and to sell fish
- Managed Fishery Licence—this authorises operation in a Managed Fishery
- Interim Managed Fishery Permit—this authorises operation in an Interim Managed Fishery
- Fishing Boat Licence—this authorises a boat to be used for or in connection with commercial fishing
- Carrier Boat Licence—this authorises a boat to be used to transport fish taken by another boat for a commercial purpose
- Fish Processing Licence—this authorises processing of fish for a commercial purpose
- Permit to Construct a Place to Process Fish—this is a one-off requirement for approval to construct or establish a place where fish will be processed for a commercial purpose
- Exemption for a Commercial Purpose—this is an authority which may be granted by the CEO for a commercial purpose
- Section 43 Order—this is a prohibition order which may make exceptions to the prohibition. The exceptions may be defined by reference to certain licences
- Fishing Tour Operator's Licence and Restricted Fishing Tour Operator's Licence—these permit fishing tours to be undertaken for a commercial purpose

[724] Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 195, *Nature and Extent of Rights to Fish in Western Australia, Final report*, June 2005, p 19.

- Aquaculture Licence—this authorises aquaculture activities and the sale of aquaculture product
- Aquaculture Lease—the Minister for Fisheries may grant an aquaculture lease over WA land or waters and provides the exclusive right to undertake aquaculture in the leased area, but does not provide exclusive access to the area.

7.60 An aquaculture lease has proprietary characteristics in that it gives the leaseholder the exclusive right to:

- keep, breed, hatch and culture fish within the leased area
- take the species of fish from the leased area.

7.61 Further, an aquaculture farm lease confers ownership of all fish in the leased area as specified in the lease. A holder of an aquaculture lease is also required to hold an aquaculture licence to engage in aquaculture activities within the leased area.

7.62 The licences relating to pearling currently issued under the Pearling Act are:

- Pearling (Wildstock) Licence—this permits pearling activities to be undertaken in the form of fishing for pearl oysters and seeding those pearl oysters
- Pearling (Seeding) Licence—this permits pearling activities to be undertaken in the form of seeding hatchery produced pearl oysters
- Pearl Oyster Hatchery Licence (for Propagation)—this authorises propagation of pearl oyster spat at land-based sites
- Pearl Oyster Hatchery (Nursery) Licence—this permits the grow-out of spat on a nursery site
- Pearl Oyster Hatchery (including Hatchery Nursery) Licence—this authorises propagation and grow-out of pearl oysters
- Pearl Farm Licence—this may be issued by the CEO for pearling activities
- Pearl Diver's Licence—this is a personal licence which authorises a person to dive while undertaking pearling or hatchery activities
- Pearl Boat Licence—this authorises a boat to be used to carry out pearling or hatchery activities
- Pearl Boat Master's Licence—this authorises a person to be in control of a boat used to carry out pearling or hatchery activities.

7.63 There is wide scope and variety in the licences, leases, authorisations, and permits issued under the FRM Act and the Pearling Act (as applicable) which shows the significant controls DPIRD uses to manage the sector so as to ensure sustainability. Refer to paragraph 7.37 for further discussion regarding management under the current legislative scheme.

7.64 Commercial fishing, aquaculture, and pearling access rights in licences and permits are not property rights in the traditional sense. However, they include features which are proprietary in nature, which in some circumstances include exclusivity, perpetuity, and transferability.[725]

[725] Aquaculture leases are exclusive, not perpetual (however are more enduring than a mere revocable licence), and not expressly transferrable under the *Fish Resources Management Act 1994*. Exclusive licences are exclusive, not perpetual (however are more enduring than a mere revocable licence), and not expressly transferrable under the *Fish Resources Management Act 1994*. Authorisations are not exclusive, not perpetual (however include a limited guarantee of renewal, subject to exceptions), and include a limited guarantee of transferability under the *Fish Resources Management Act 1994*, subject to exceptions. See: Department of Fisheries, *Fisheries Management Paper No. 195: Nature and Extent of Rights to Fish in Western Australia,* June 2005.

7.65 Appendix 11 contains, in table form, a summary of commercial fishing and related licences and authorisations under the FRM Act and Pearling Act, and includes whether these confer a property right and whether compensation is available.

Integrated Fisheries Management

7.66 The former Department of Fisheries' Integrated Fisheries Management (IFM) Government Policy 2009 was developed due to growth in WA's population and coastal development, and increasing interest in recreational fishing.[726]

7.67 The IFM Government Policy 2009 contains:

- guiding principles for integrated fisheries management
- guidance on how harvest levels for fisheries will be determined
- guidance on how each fishing sector will be managed effectively
- the process for allocation of entitlements and optimal resource use
- information on compensation.

7.68 IFM is a process that determines how fish and aquatic resources can be shared between the various fishing sectors to ensure resource sustainability, including in relation to allocation of access and entitlements.[727]

7.69 The process involves setting an allowable and sustainable harvest level for a fish or aquatic resource for each sector, determining allocations between user groups, and managing each sector's take of the fish or aquatic resource within their allocation. The process also includes a method of reallocation of catch share between user groups.[728]

7.70 The Committee considers that the principles of IFM are a useful tool for various aspects of fish and aquatic resource management, including the setting of sustainable harvest levels.

FINDING 39

Integrated Fisheries Management sets a sustainable harvest level for a fish or aquatic resource for each sector, determining allocations between sectors, and managing each sector's take of the fish or aquatic resource within their allocation.

FINDING 40

Integrated Fisheries Management is an appropriate tool for determining how fish and aquatic resources may be sustainably shared between the commercial, recreational, and customary fishing sectors.

726 Department of Primary Industries and Regional Development, 8 August 2013. See: https://www.fish.wa.gov.au/Sustainability-and-Environment/Sustainable-Fisheries/Sharing%20our%20fisheries/Pages/default.aspx. Viewed 7 April 2020.

727 ibid.

728 ibid.

The precautionary approach

7.71 The precautionary approach was adopted by Australia in the *National Strategy for ESD* in 1992 and subsequently, has been incorporated into a range of environmental legislation as one of the guiding principles.[729] It has been incorporated into the FRM Act:

> **4A. Precautionary principle, effect of**
>
> In the performance or exercise of a function or power under this Act, lack of full scientific certainty must not be used as a reason for postponing cost-effective measures to ensure the sustainability of fish stocks or the aquatic environment.

7.72 In the context of aquatic resource management, the precautionary principle provides that where there is a high degree of scientific uncertainty, high potential cost of error, and low reversibility of impacts, then the management methods appropriate in these circumstances may include bans and moratoria. Conversely, where there is a low degree of scientific uncertainty, less onerous management methods in the form of preventative measures are appropriate. Further, corrective measures may be appropriate management methods in low risk circumstances.[730]

FINDING 41

Long-term sustainability of fish and aquatic resources is a paramount consideration in managing these resources.

Management of fisheries and determination of Total Allowable Catch

7.73 A report by the former Integrated Fisheries Allocation Advisory Committee (IFAAC) to the former Minister for Agriculture, Forestry and Fisheries considered that data is required on two levels to support management decisions:

- biological and stock assessment information for sustainable management
- wider economic and social information to assist with allocation decisions.[731]

7.74 Fisheries science aims to establish the status of each stock of fish and aquatic resource and the rate of exploitation, to ensure sustainable use of the resource.[732]

7.75 Sustainable management of fish and aquatic resources involves determination of a sustainable harvest level, commonly known as a Total Allowable Catch (TAC), and the allocation of entitlements.

7.76 TAC is not defined in the FRM Act, however at section 3(1) of the ARM Act it is defined as the quantity of a managed aquatic resource that may be taken by the commercial and recreational fishing sectors in a fishing period for the resource.

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729 Government of Western Australia, (then) Department of Fisheries, Fisheries Occasional Publication No. 79, *A Sea Change for Aquatic Sustainability: Meeting the Challenge of Fish Resources Management and Aquatic Sustainability in the 21st Century*, June 2010, p 8.

730 ibid., p 5.

731 Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 165, *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee*, November 2002, p 41.

732 Government of Western Australia, (then) Department of Fisheries, Fisheries Occasional Publication No. 79, *A Sea Change for Aquatic Sustainability: Meeting the Challenge of Fish Resources Management and Aquatic Sustainability in the 21st Century*, June 2010, pp 8-9.

7.77 DPIRD collects data regarding breeding stock status, and catch and effort range, for WA's major commercial and recreational fisheries.[733] DPIRD advises that it uses this data to monitor the success of its management arrangements (for example, in Management Plans), specifically in relation to:

- Ensuring the sustainability status of the State's aquatic resources
- The success of keeping fish catches (or effort) at appropriate levels for
  - Commercial and
  - Recreational fisheries and
- Ensuring that sustainably managed commercial fisheries provide benefits to the State as a result of significant local sales and export earnings from fish and fish products.[734]

7.78 The level of information and certainty about breeding stock status and catch and effort ranges will vary between fisheries and a precautionary approach to management should be adopted where there are limitations to available data.[735]

7.79 DPIRD advises that its research is conducted as follows:

> Our researchers collaborate with other researchers and fisheries' managers providing support with statistical design and analysis, population dynamics and stock assessment, data management, monitoring of fishery catch and effort, and recreational fishing and community surveys.
>
> The researchers provide preliminary analysis and assessment of the data collected during routine monitoring of commercial and recreational fisheries. They also undertake leading-edge research into the development of fisheries stock assessment models and sustainability reporting techniques. Results from major recreational fishing and community and stakeholder attitude surveys are added to the comprehensive fisheries databases.
>
> Most research projects take between three and ten years, with planning often starting at least five years ahead. Sometimes we carry out shorter-term projects, such as assessing a new type of fishing gear, the status of a fish population or surveying the habitat of a particular area.[736]

7.80 Sustainable management of fish and aquatic resources and determination of TAC are interrelated in quota-managed fisheries. If the majority of the TAC is able to be achieved using an acceptable amount of fishing effort, then this indicates that the TAC has been set at an acceptable level in terms of sustainability. Conversely:

> If an unusually large expenditure of effort is needed to take the TAC, or fails to achieve the TAC by a significant margin, this may indicate that the abundance of the stock is significantly lower than anticipated.[737]

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733 Department of Primary Industries and Regional Development *Annual Report 2019*, p 233.

734 ibid.

735 Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 165, *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee*, November 2002, pp 55-6.

736 Department of Primary Industries and Regional Development, 6 January 2016. See: https://www.fish.wa.gov.au/Sustainability-and-Environment/Fisheries-Science/Stock-assessment-and-data-analysis/Pages/index.aspx. Viewed 7 April 2020.

737 Department of Primary Industries and Regional Development *Annual Report 2019*, p 179.

7.81 In its latest annual report, DPIRD has published a table with details of the fish or aquatic resource, the relevant fishery, assessment of breeding stock sustainability, and annual quotas for catch and effort of that fish or aquatic resource for the commercial and recreational sectors.[738]

7.82 The Committee considers that accurate data regarding fish and aquatic resource stock levels, and catch and effort range, is crucial to determining an appropriate TAC for each resource. In turn, an appropriate TAC is fundamental to ensuring the resource remains sustainable.

FINDING 42

Accurate data regarding fish and aquatic resource breeding stock status, and catch and effort range, is critical to determining an appropriate Total Allowable Catch for each resource.

FINDING 43

Determining accurate and appropriate Total Allowable Catch for fish and aquatic resources is fundamental to ensuring sustainability of the resource.

Management of commercial fishing

7.83 Part 6 of the FRM Act deals with the management of fisheries in WA. A fishery is defined in the FRM Act as follows:

> ***fishery*** means —
>
> (a) one or more stocks or parts of stocks of fish that can be treated as a unit for the purposes of conservation or management; and
>
> (b) a class of fishing activities in respect of those stocks or parts of stocks of fish;[739]

7.84 The FRM Act allows the Minister for Fisheries to make most decisions and to use a number of management tools, including Management Plans, regulations, notices, orders, and CEO notices and determinations,[740] which are all forms of subsidiary legislation and therefore subject to disallowance in Parliament under the *Interpretation Act 1984*.[741]

7.85 Management of fisheries under the FRM Act occurs in an incremental manner, from:

> a "developmental" status involving controlled resource exploration, through an interim management phase which allowed the performance of the fishery to be assessed and the scientific assessment methods to be appraised, to a "managed" status for a mature fishery where the controls and assessment were largely settled and longer term access rights could be established with confidence.[742]

7.86 In summary, Part 6 of the FRM Act operates as follows:

- section 54 allows the Minister for Fisheries to determine, amend, or revoke a Management Plan

738 ibid., Appendix 2.

739 *Fish Resources Management Act 1994*, s 4(1).

740 Notices and orders may, for example, prohibit fishing by certain methods, by species, in particular locations, or by a person or class of person.

741 *Interpretation Act 1984,* s 42.

742 Government of Western Australia, (then) Department of Fisheries, Fisheries Occasional Publication No. 102, *Improving Commercial Fishing Access Rights in Western Australia: Access Rights Working Group Report to the Hon Norman Moore, MLC, Minister for Fisheries*, April 2011, p 14.

- section 55 provides that instruments made under section 54 are subsidiary legislation
- section 56 species the content of Management Plans
- section 58 specifies that Management Plans may provide for authorisations (which, are either Managed Fishery Licences for a Managed Fishery, or Interim Managed Fishery Permits for an Interim Managed Fishery, as defined in section 53)
- section 59 provides that a Management Plan may specify the capacity of a fishery, by reference to matters such as the quantity of fish, fishing gear, boats, persons, or any other thing
- section 60 specifies that a Management Plan may provide for entitlements under authorisations
- section 61 provides that a Management Plan may prohibit fishing
- section 63 provides how an Interim Managed Fishery may become a Managed Fishery
- section 64 specifies how Management Plans are determined. Relevantly, it requires the Minister for Fisheries to consult with any advisory committee established in respect of the fishery, and any other advisory committees or persons, if any, as the Minister thinks appropriate. A draft plan must be published in the Government Gazette and invite representations on the draft plan to the Minister
- section 65 contains a procedure for amendment of Management Plans and provides that an advisory committee/s or persons must be consulted before the plan is amended or revoked.

7.87 The majority of WA's commercial fisheries are managed under Management Plans issued under the FRM Act.

7.88 Management Plans for managed fisheries are developed by DPIRD in conjunction with industry, peak bodies, associations, and community groups. Management controls used in the management of commercial fisheries are primarily:

- input controls which control what goes into the water—such as licensing, fishing gear restrictions, fishing boat restrictions, limits on time available to fish, spatial closures, seasonal closures
- output controls which control what comes out of the water—such as limits on the quantity of fish that may be taken.[743]

7.89 Where necessary, additional controls may also be used, namely:

- permanently closing areas to fishing to protect habitats
- specific measures to protect juvenile or breeding fish (such as size limits and seasonal and area closures).[744]

7.90 Where commercial fishing activities occur in an area that is not a Managed Fishery pursuant to a Management Plan, these activities may be regulated through a range of other permissions, including:

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743 Department of Primary Industries and Regional Development, 18 May 2012. See: http://www.fish.wa.gov.au/Fishing-and-Aquaculture/Commercial-Fishing/Pages/Commercial-Fishing-Guide.aspx. Viewed 7 April 2020.

744 ibid.

- section 7 of the FRM Act exemptions—which allow the Minister for Fisheries to grant a specified person or class of persons an exemption from all or any of the provisions of the Act, including for commercial purposes
- section 43 of the FRM Act orders—which allow the Minister for Fisheries to prohibit a specified person or class of persons from engaging in any fishing activity of a specified class, and further allow the Minister to amend or revoke such an order
- regulation licences under section 257 of the FRM Act—which are licences relating to matters which can be provided for in the regulations.[745]

7.91 The Committee notes that the FRM Act is highly prescriptive with regard to management of fish and aquatic resources, however considers that the possibility of significant ministerial discretion may undermine the certainty of various aspects of management and sustainability, and in turn, fishing access rights.

FINDING 44

The *Fish Resources Management Act 1994* provides for significant ministerial discretion in the management of the fish and or aquatic resources. Ministerial Orders and other instruments are subsidiary legislation for the purposes of the *Interpretation Act 1984,* subject to scrutiny and disallowance in the Parliament.

Management of aquaculture

7.92 Part 8 of the FRM Act deals with management of aquaculture in WA.

7.93 In summary, this Part operates as follows:

- section 90 provides that a person must not engage in aquaculture without a licence, and section 91 provides exceptions to this requirement
- section 92A requires licence applicants to have a Management and Environmental Monitoring Plan in place which identifies how the applicant will manage any risks to the environment and public safety in relation to the proposed aquaculture activity
- section 92 provides circumstances in which an aquaculture licence may be granted by the CEO of DPIRD
- section 93 provides that an aquaculture licence remains in force for 12 months from the date of grant or renewal, unless otherwise provided in the FRM Act or in the licence
- section 94 relates to renewal of an aquaculture licence
- section 95 provides that conditions may be imposed on an aquaculture licence
- section 97 relates to the grant of an aquaculture lease, to occupy or use an area of land or waters, for the purposes of aquaculture
- section 99 specifies the relationship between an aquaculture licence and aquaculture lease.

Management of pearling

7.94 Part 2 of the Pearling Act deals with pearling and hatchery activities, including pearling licences, hatchery licences, hatchery permits, and pearl oyster farms. Part 3 of the Pearling Act deals with pearl farm leases, licences, and permits.

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745 Government of Western Australia, (then) Department of Fisheries, Fisheries Occasional Publication No. 102, *Improving Commercial Fishing Access Rights in Western Australia: Access Rights Working Group Report to the Hon Norman Moore, MLC, Minister for Fisheries*, April 2011, p 18.

7.95 Pearling is by nature, an integrated industry, meaning it includes 'pearl culture activities, transport, seeding operations to induce a pearl, holding oysters in the wild and harvesting'.[746] The PPA said:

> That is problematic for us, in an industry where all the property rights are integrated. We have fishing rights and we have lease rights or real property rights. The diminishment of one of those rights or the lack of integration of one of those rights or recognition has an impact on the other side.
>
> We need to understand that these are kept together. The point I have here is that if we adversely affect one of the integrated activities, the total effect is the undermining of the disposition of the entire property right, from fishing to grow out, and the investment in infrastructure, jobs, property and everything that goes with that investment in that property right.[747]

7.96 The Committee agrees with the position that pearling is an integrated industry and that diminishment of one integrated activity may adversely affect the pearling venture as a whole.

FINDING 45

Pearling is an industry in which activities, and therefore rights, are integrated. As such, an adverse impact on the security of any particular activity or right may adversely affect another activity or right.

How to find which rules apply

7.97 DPIRD, in conjunction with the State Law Publisher, provides an online database called the Fisheries Legislation Service which contains fisheries legislation, consolidated Management Plans, consolidated notices and orders, and CEO notices and determinations.[748]

7.98 DPIRD acknowledges the complexity of the multitude of legislative instruments which affect fishing rules on its webpage for this database as the following note reveals:

> **Please note**: to understand all management 'rules' in place for a particular fishery, it is important to consider all types of subsidiary legislation that may apply as well as consider all relevant Acts.[749]

7.99 The webpage provides that a search may be performed for particular information in relation to a species of fish, a fishery, an area, or an activity. The webpage warns that:

> It is important that you refer to all of the above categories, as looking in just one category alone may not contain all of the rules.[750]

7.100 Further, the webpage provides a number of disclaimers regarding the accuracy or currency of the legislative instruments/fishing rules:

> It is important to note these the online versions are not the official versions. Although the documents presented online have been carefully collated and

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746 Submission 65 from Pearl Producers Association, 31 July 2019, p 4.

747 Aaron Irving, Executive Officer, Pearl Producers Association, transcript of evidence, 28 October 2019, p 16.

748 Available at: https://www.slp.wa.gov.au/statutes/subsiduary.nsf/Fisheries?OpenPage.

749 Department of Primary Industries and Regional Development, 25 July 2012. See: https://www.fish.wa.gov.au/About-Us/Legislation/Western_Australian_Fisheries_Legislation/Pages/default.aspx. Viewed 7 April 2020.

750 ibid.

> amended as changes to the principle notice were published in the Government Gazette, their accuracy cannot be guaranteed.
>
> Accordingly – (a) no warranty is given that they are free from error or omission nor as to the accuracy of any information in them; and (b) the State of Western Australia and its servants expressly disclaim liability for any act or omission done in reliance on the documents or for any consequences of any such act or omission.[751]

7.101 The webpage also contains a further, general disclaimer constituting 23 lines and 349 words.[752]

7.102 Persons wishing to proceed to the database must indicate acceptance of the conditions by clicking a link titled 'I agree'.

FINDING 46

The Fisheries Legislation Service is a tool for finding information regarding which rules apply to various commercial fishing activities; however, its utility is diminished by its complexity in that a user must search numerous categories to locate all rules which apply to various commercial fishing activities.

FINDING 47

The Department of Primary Industries and Regional Development does not guarantee the accuracy of the information contained in the Fisheries Legislation Service.

RECOMMENDATION 39

The Department of Primary Industries and Regional Development investigate whether the Fisheries Legislation Service can be simplified so users may avoid searching numerous categories for all rules which apply to various commercial fishing activities.

RECOMMENDATION 40

The Department of Primary Industries and Regional Development reform the Fisheries Legislation Service so as to guarantee the accuracy of the information contained therein.

Allocation of entitlements

7.103 The terminology in the FRM Act relevant to entitlements is as follows:

- an 'authorisation' is defined as a 'licence' or a 'permit'
  - 'licence' means: aquaculture licence, commercial fishing licence, fishing boat licence, fish processor licence, managed fishery licence, recreational fishing licence, and any other licence provided for in regulations
  - 'permit' means: interim managed fishery permit, or permit granted under section 80 for a fish processing premises
- an 'entitlement' is defined as an entitlement that a person has from time to time under a managed fishery licence or an interim managed fishery permit.

7.104 The key proprietary characteristics of authorisations and entitlements under the FRM Act are:

751 ibid.

752 ibid.

- renewability of authorisations up to 60 days after expiry subject to good behaviour and payment of relevant fees
- transferability of authorisations and entitlements under an authorisation
- the ability to temporarily transfer (for a licensing period) entitlements under an authorisation to help facilitate lease arrangements.[753]

7.105 DPIRD acknowledges that allocation of entitlements is very complex:

> I think it is fair to say that access allocations are some of the most difficult, complex, challenging issues in fisheries management.[754]

7.106 Broadly, DPIRD advises that determination of access and allocation of entitlements often occurs by it considering fishers' catch history, and conducting catch history assessments based on statutory fishing returns that fishers are required to provide. Based on that information, DPIRD advises that it is able to gain an understanding of an individual fisher's fishing catch history and often makes use of independent panels to help it provide guidance to the Government (through the Minister for Fisheries) regarding appropriate access criteria.[755]

7.107 DPIRD advises that the independent panels can:

- consider the nature of the aquatic resource
- consider the management objectives
- invite submissions
- provide advice on the most appropriate access criteria.[756]

7.108 As noted at paragraph 7.66, the IFM Government Policy 2009 specifies a number of matters, including the process for allocation of entitlements and optimal resource use.

7.109 Whilst the IFM Government Policy 2009 is in effect, the IFAAC is no longer operational. The Minister for Fisheries advised that the IFAAC ceased to be in effect in 2017.[757]

7.110 DPIRD advised that IFAAC's processes were protracted and complex, and that as the State transitions towards the ARM Act framework, a decision has been made that a formal committee is not the most efficient method for providing advice regarding allocation of entitlements.[758]

7.111 Some fishers are uncertain regarding the status of the IFM Government Policy 2009. WAFIC said:

> But people forget it and new ministers and new governments do not quite understand it. It is not in a statutory guideline. What is the status of it? It is unclear.[759]

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753 Submission 68 from Department of Primary Industries and Regional Development, 29 July 2019, p 2.

754 Ralph Addis, Director General, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 1.

755 Heather Brayford, Deputy Director General, Sustainability and Biosecurity, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 12.

756 ibid.

757 Hon Peter Tinley MLA, Minister for Fisheries, letter, 6 March 2020, p 9.

758 Heather Brayford, Deputy Director General, Sustainability and Biosecurity, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 5.

759 Guy Leyland, MSC Industry Project Leader, Western Australian Fishing Industry Council, transcript of evidence, 28 October 2019, p 7.

7.112 DPIRD advised that IFM Government Policy 2009 relates to dealing with the holistic resource, and that it continues to apply this policy as it operates on a resource basis rather than on a sector-type basis.[760]

7.113 DPIRD advises that the subsequent WA Government Fisheries Policy Statement March 2012 incorporated elements of IFM from the IFM Government Policy 2009, and although it has not been adopted by the current government, DPIRD still takes its elements into account during fisheries management.[761]

7.114 The Minister for Fisheries confirms that to date, the Policy Statement 2012 has not been formally adopted by the current government, however:

> It continues to reflect the key management principles underpinning fisheries and aquatic resource management in WA.[762]

7.115 The Policy Statement 2012 deals with the following issues:

- resource management, including the concepts of ESD and EBFM
- resource access and allocation
- environmental management
- marine planning
- development and growth.

7.116 The Policy Statement 2012 notes that commercial fishers experience challenges arising from:

> A combination of declining real prices, escalating fuel and labour costs, increasing competition from imports, fluctuations in the Australian dollar, environmental and biological impacts on fish stocks, and loss of fishing grounds.[763]

7.117 The Policy Statement 2012 also notes the challenges faced by the recreational and customary sectors. It concludes that IFM is required because fishing sectors are not distinct, but rather are intertwined, and that issues relating to each sector may overlap.

7.118 The Committee agrees with the former Department of Fisheries that there is a need to develop a clear understanding of the basis on which allocation decisions will be made.[764] Part of this understanding involves acknowledging that the strength of fishing access rights provided to commercial fishers needs to be balanced against the State's responsibility to provide an adequate return to the community and to share the available resource amongst all users, including those in the recreational and customary sectors.[765]

FINDING 48

Appropriate allocation of entitlements, within a Total Allowable Catch for the resource, is fundamental to sustainable management of fish and aquatic resources.

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760 Heather Brayford, Deputy Director General, Sustainability and Biosecurity, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 5.

761 ibid., p 6.

762 Hon Peter Tinley MLA, Minister for Fisheries, letter, 6 March 2020, p 6.

763 Department of Fisheries, *Western Australian Government Fisheries Policy Statement,* March 2012, p 4.

764 Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 165, *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee*, November 2002, section 5.4.

765 Submission 68 from Department of Primary Industries and Regional Development, 29 July 2019, p 2.

FINDING 49

Decisions regarding allocation of entitlements (both within the commercial sector, and between sectors) may be more readily accepted if there is a clear understanding of the basis on which these decisions are made.

Case study on proposed allocation of entitlements—Western Rock Lobster

7.119 The WRLC advised that in November 2018, the former Minister for Fisheries proposed to introduce a policy which would have increased the Western Rock Lobster catch quota by 1 700 tonnes, of which 1 385 tonnes would be allocated to the State at no cost, and which could then be used to generate revenue through an annual lease or future sale.

7.120 The WRLC advises that following further discussions, in early-2019, the Government announced it would not proceed with the proposal, and would instead increase the annual quota for the commercial sector by 315 tonnes with most of this being allocated for local supply. The Government also announced it would form a 'Premier's Task Force' with a term of reference focused on improving security of access rights.[766]

7.121 The WRLC submits that three months of negotiations between it and the Government ended without agreement and as such, in May 2019, the former Minister for Fisheries announced the cessation of all discussions with industry about the local supply. Further, DPIRD advised that the Premier's Task Force would cease and be disbanded, despite never convening.[767]

7.122 The WRLC explained that these Government actions highlight the risk the industry faces through Government intervention with regard to legal rights commercial fishers have to their share of the Western Rock Lobster catch.[768]

7.123 The Minister for Fisheries ultimately has discretion regarding allocation decisions.

7.124 The WRLC submits that the proposal regarding allocation of entitlements had a significant monetary value:

> This seizure of 17.3 per cent of a fully allocated fishery was valued in excess of $1 billion.[769]

7.125 Rabobank, which is a financial institution involved in lending to commercial fishers, advises that it applies lending value to fishing quota, and the reduction in quota value in the case of this proposal would have impacted clients' lending abilities. Rabobank advises that in turn, this would stifle the flow of credit thereby creating further uncertainty:

> In today's current modern economy where growth and sustainability are critical, it is unreasonable for the State to burden individual citizens, in this case commercial fishermen (and investors, some of which is investors superannuation), with the costs of loss of property value by government for reasons of public benefit.[770]

7.126 Rabobank provided evidence that the Government's proposal led to reduction in unit prices, as confirmed by brokers:

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766 Submission 13 from Western Rock Lobster Council, 24 July 2019, pp 9-10.

767 ibid., p 10.

768 ibid.

769 Matt Taylor, Chief Executive Officer, Western Rock Lobster Council, transcript of evidence, 28 October 2019, p 13.

770 Submission 28 from Rabobank, 29 July 2019, p 2.

Figure 10. *Reduction in Western Rock Lobster unit prices*

	Pre announcement	Post announcement
A zone	$10,000 / unit (July 2018)	$8,500 / unit (November 2018)
C zone	$8,050 / unit (November 2018)	$6,400 / unit (December 2018)

[Source: Submission 28 from Rabobank, 29 July 2019, p 2.]

7.127 Fishing Families WA expressed the view that the proposal would have had an impact on sustainability of the resource. It advises that the addition of approximately 16 700 new deployable pots and quota units would most likely have led to serious sustainability issues.[771]

Register of registrable interests

7.128 The register is dealt with in Part 12 of the FRM Act. The Registrar must keep a register of registrable interests,[772] which must be available for public inspection.[773] The registerable interests that are recorded on the register are authorisations, temporary aquaculture permits, aquaculture leases and exemptions.[774] The holder of an authorisation or aquaculture lease may apply to the Registrar to have noted on the register that a specified person has a security interest in a registrable interest.[775]

7.129 The effect of the register is that it provides some protection to persons who have a security interest.[776] The Registrar must, as soon as is practicable, provide notice to a security holder if any of the following events occur in respect of the registrable interest:

- the holder of the authorisation or aquaculture lease, or their agent, is convicted of a prescribed offence under the FRM Act
- an application is made to the CEO to vary the authorisation or to transfer the authorisation or the whole part of an entitlement under the authorisation
- an aquaculture lease is to be varied or transferred
- a fisheries adjustment scheme under the FAS Act is established in respect of an authorisation
- the CEO proposes to cancel, suspend, or not renew an authorisation or proposes to terminate an aquaculture lease
- the holder of an authorisation or aquaculture lease gives notice of intention to surrender an authorisation or terminate an aquaculture lease.[777]

7.130 Although the register is available for public inspection at DPIRD's office, and not on the internet, the requirement that the Registrar provide notice to a security holder of the above events nevertheless provides certainty to security holders that their interests may be protected.

7.131 The register is important both for security holders and the industry more broadly. In this regard:

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771 Submission 56 from Fishing Families WA, 31 July 2019, p 1.

772 *Fish Resources Management Act 1994*, s 125(1).

773 ibid., s 125(3).

774 ibid., s 125(1).

775 ibid., s 127.

776 A 'security interest' is defined in section 4(1) of the *Fish Resources Management Act 1994* to mean, in relation to an authorisation or aquaculture lease, an interest in the authorisation or aquaculture lease (however arising) which secures payment of a debt or other pecuniary obligation or the performance of any other obligation.

777 *Fish Resources Management Act 1994*, s 130.

> Banks lend on it. The more you scare them, the less they will lend on it. That is the problem. Instead of being prepared to lend 60 per cent to 70 per cent of market value, they might have dropped down to 20 per cent. That means that capital formation goes down, the efficiency of that industry goes down, long-term investment will reduce, and people's incentives to manage the fishery well and obey the rules, also reduce at the same time.[778]

Compensation for loss in market value and fisheries adjustment

Introduction

7.132 Compensation for loss in market value of licences, authorisations, and entitlements[779] is typically available in three circumstances:

- under the FRICMR Act, which applies following the creation of marine nature reserves and marine parks under the CALM Act,[780] and provides that those events can lead to holders of various leases, licences, and permits under the FRM Act and the Pearling Act to be entitled to compensation for the loss in market value of those authorisations
- under the FAS Act, which provides for voluntary and compulsory acquisition by the State of authorisations and entitlements held under the FRM Act in certain circumstances
- ex gratia, on a case-by-case and merit-based decision made by the Government at the time of the event.

7.133 The ARM Act will not repeal the FAS Act and the FRICMR Act; it will make only minor amendments to these Acts which will remain largely in force.

7.134 Appendix 12 contains, in table form, a summary of whether compensation is available in relation to various commercial fishing and related licences and authorisations intended to be issued under the ARM Act.

7.135 There is a principle of statutory interpretation that legislation should not be regarded as permitting the removal or impairment of a vested property right without compensation unless the contrary intent is clear from the statute.[781]

7.136 The presumption can be rebutted by statute, and examples of such a rebuttal are:

- where the legislation expressly provides that no compensation is payable for the acquisition
- where the legislation provides for some compensation.[782]

7.137 In the commercial fishing context, legislation in the form of the FRICMR Act and FAS Act provide for some compensation.

When is compensation available and how is it quantified?

7.138 There are competing views regarding reallocation of entitlements and associated compensation, namely:

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778 George Kailis, Professor Management and Law, Notre Dame University, and Chair of Western Australian Fishing Industry Council Legislation and Policy Subcommittee, transcript of evidence, 28 October 2019, p 8.

779 By contrast, the terminology used in the *Aquatic Resources Management Act 2016* is 'resource shares' and associated 'catch entitlements' for a fishing period. Refer to Chapter 8 for further discussion.

780 *Conservation and Land Management Act 1984*, s 4.

781 Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 195, *Nature and Extent of Rights to Fish in Western Australia, Final report*, June 2005, p 33.

782 ibid., p 34; *Durham Holdings Pty Ltd v New South Wales* (2001) 177 ALR 436.

- the commercial sector may consider that if its allocation is reduced for the purpose of reallocating it to recreational or other users, then compensation should be payable
- the contrary view is that if fish are a community resource, and are not owned by any group, then compensation should not be payable for reallocations that are in the community's best interests.[783]

7.139 The terms of reference for the Law Reform Commission's project (discussed at paragraph 1.19) related to compensation for injurious affection to land. The report notes that outside of the land context, the ordinary meaning of the term 'injurious affection' is to affect in an injurious manner and that a century of use of the term has built an accretion of connotations which vary between jurisdictions. [784]

7.140 In the commercial fishing context, numerous submitters have referred to injurious affection to commercial fishing licences and authorisations. The WRLC compared this to injurious affection to land:

> The bottom line is that you have to consider each case on its merits. It is no different from any case of injurious affection or loss of property, even on the land side or on the sea side, in terms of how you approach it.[785]

7.141 The WAFIC submitted that injurious affection may occur where the State reorders priorities of use and access to the marine domain. [786]

7.142 Previous inquiries into fishing access rights have considered that, in relation to compensation:

> Where a reallocation of resources from one user group to another results in demonstrable financial loss to an individual, there should, in principle, be an entitlement to compensation.[787]

7.143 Previous inquiries have considered that compensation should not be payable for reasons of sustainability:

> However, lest there be any doubt on one matter, we make it clear that the issue of compensation should not arise where allocations are reduced for reasons of sustainability. It is confined to the reallocation of resources between user groups.[788]

7.144 DPIRD's current position is as follows:

> The department does not support compensating commercial fishers where changes occur simply through response to sustainability conditions. I think,

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783 Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 165, *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee*, November 2002, p 67.

784 Law Reform Commission of Western Australia, *Project 98: compensation for injurious affection,* 2008, pp 6-7.

785 Peter Rogers, Consultant to Western Rock Lobster Council, transcript of evidence, 28 October 2019, p 9.

786 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, pp 7-8.

787 Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 165, *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee*, November 2002, p 69.

788 ibid.

> broadly, everyone in the industry and community understands that approach and is generally supportive.[789]

7.145 Many in the industry support this position, including WAFIC in the commercial sector, which submits that compensation should not be payable for:

> Reasons of environmental fluctuation and that reductions [in entitlements, priority of use, and access] in relation to natural changes in stock abundance would not give rise to compensation.[790]

7.146 Recfishwest, for the recreational sector, agrees with this position:

> It is unreasonable to expect the State to provide compensation as a result of a decrease in the TACC due to environmental conditions.[791]

7.147 The Committee considers that compensation should not be payable to commercial fishers where adjustments to entitlements (and similar) are made solely due to reasons of fish or aquatic resource sustainability. This is particularly so given that these are community resources not owned by any particular person, and that the State has responsibility to ensure sustainability of the resource for future generations.

FINDING 50

Compensation should not be payable to commercial fishers for the loss in market value of licences, authorisations, entitlements, or resource shares (under the *Fish Resources Management Act 1994,* the *Pearling Act 1990*, and the *Aquatic Resources Management Act 2016* as applicable) where adjustments are made solely for reasons of fish or aquatic resource sustainability.

7.148 Prof George Kailis, Professor Management and Law, Notre Dame University, and Chair of WAFIC Legislation and Policy Subcommittee, submits that compensation is not always the core issue, but rather a well-ordered marine domain with long-term secure rights.[792] Further, he submits that there are deficiencies in the current compensation arrangements:

> At the moment, though, it is pretty ad hoc. If you fall within marine reserves, you are under the [FRICMR Act]. If it is a fisheries adjustment, there is the [FAS Act] and systems there. If it falls outside those lines, it is negotiate as best you can.[793]

7.149 Prof Kailis submits that in this regard, the current partial compensation systems should be brought together and integrated, and a guideline about this be issued under the ARM Act.[794] With respect to how compensation has been quantified:

> The bottom line is that you have to consider each case on its merits. It is no different from any case of injurious affection or loss of property, even on the land side or on the sea side, in terms of how you approach it. Generally, the practice has always been looking at cash flow over a long period of time, and either taking a profit approach, a market approach or a calculation both on some sort of multiplier of goodwill. That is normally the way the fisheries adjustment scheme

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789 Ralph Addis, Director General, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 2.

790 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, p 7.

791 Submission 72 from Recfishwest, 31 July 2019, p 4.

792 George Kailis, Professor Management and Law, Notre Dame University, and Chair of Western Australian Fishing Industry Council Legislation and Policy Subcommittee, transcript of evidence, 28 October 2019, p 3.

793 ibid., p 4.

794 ibid, pp 4-5.

> committee has worked in the past. Other situations have resulted in act-of-grace payments in different circumstances...[795]

7.150 Dr Peter Rogers, consultant to the WRLC, submits that the quantum of compensation should:

> Be mindful of the strength of the lost right, catch history, the price paid for rights that are lost, investment warnings that had been issued, the reduction in the relative proportion of the allocated allowable harvest level, the length of time the right has been held, changing community expectations and the subsequent viability of any remaining rights held (if any).[796]

7.151 Dr Rogers submits that the policy framework in the ARM Act is arguably inadequate:

> There is a lack of what I call an adequate policy framework to deal with both the process and the reallocation in the instruments. Either you use compensation or you use a market-based approach, or you reach agreement between the parties as a way of going forward.[797]

7.152 In this regard, the WAFIC recommends that:

> Existing policies implementing rights-based management, including compensation, be consolidated and published as guidelines under sections 254 to 257 of the ARM Act[798]

7.153 Section 254 of the ARM Act provides that the Minister for Fisheries may issue, amend, or revoke guidelines for any of the following purposes:

> (a) providing practical guidance to persons who have duties or obligations under this Act or any other Act administered by the Minister;
>
> (b) providing information to industry and the public.[799]

7.154 Section 256 of the ARM Act requires that the Minister for Fisheries consult with any industry body the Minister thinks appropriate prior to issuing, amending or revoking a guideline under section 254 of the ARM Act.

7.155 The effect of a guideline is that it must be taken into account by a person who performs a function under the ARM Act or another Act administered by the Minister for Fisheries.[800]

7.156 The WAFIC stated that currently, compensation is typically paid on an ad hoc basis and in these circumstances, settlements are confidential. WAFIC submits that:

- transparent and systematic compensation mechanisms be introduced
- well-designed compensation mechanisms will not lead to a floodgate of claims.[801]

7.157 The WAFIC recommends that a single agency be established to deal with all compensation claims in order to centralise procedural requirements.[802] The WRLC also makes this recommendation and expands on it by submitting that:

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795 Peter Rogers, Consultant to Western Rock Lobster Council, transcript of evidence, 28 October 2019, p 9.

796 Submission 72 from Recfishwest, 31 July 2019, p 5.

797 Peter Rogers, Consultant to Western Rock Lobster Council, transcript of evidence, 28 October 2019, p 9.

798 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, p 6.

799 *Aquatic Resources Management Act 2016*, s 254(1).

800 ibid., s 257.

801 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, p 7.

802 ibid., pp 2, 9.

> This could take the form of either a tribunal or authority with the power of determination, providing direction, expertise and consistent policy outcomes and transparency across the Western Australian Government sector, overall improving efficiency and consistency of public administration. A judicial role proving appeal rights for non-frivolous claims may also be an appropriate function. The scope of the proposal must include major infrastructure quasi government corporations such as Western Power, the Water Authority, Ports etc., as well as major private infrastructure developments and Local Government.[803]

7.158 The WAFIC submits that funding for compensation could be borne by those who benefit from reallocation of entitlements and shift in priority, rather than the State.[804] Shifts in priority may include consumptive use to the recreational sector or non-consumptive uses (where non-fishing activities are prioritised over fishing uses) such as industrial development, marine parks, offshore oil and gas exploration and production, and harbour development. [805] However, WAFIC submits that the State may decide, for public policy or economic reasons, that it should fund compensation.[806]

7.159 The Committee suggests that the Minister for Fisheries further explore the option of establishing a single authority to deal with all compensation claims from commercial fishers, as proposed by WAFIC.

7.160 The Committee makes the following findings and recommendations about compensation.

FINDING 51

Integrating compensation currently available under the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*, *Fisheries Adjustment Schemes Act 1987*, and through ex gratia payments, as well as publishing a guideline under section 254 of the *Aquatic Resource Management Act 2016* to provide practical guidance to persons who have duties or obligations under these Acts, will improve the certainty and security of commercial fishing access rights.

RECOMMENDATION 41

The Western Australian Government publish a guideline under section 254 of the *Aquatic Resource Management Act 2016* regarding compensation for commercial fishers, including but not limited to how the quantum of compensation may be determined consistently.

RECOMMENDATION 42

The Minister for Fisheries investigate the utility of amending the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987* to allow for compensation to be paid to commercial fishers by entities which benefit from reallocation of entitlements and shift in priority of use of the marine environment and aquatic resource.

Fishing and Related Industries Compensation (Marine Reserves) Act 1997

7.161 The FRICMR Act crystallises when certain 'relevant events' occur. These events relate mainly to the creation of marine nature reserves and marine parks under the CALM Act,[807] and provides that those events can entitle holders of various leases, licences, and permits under

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803 Submission 13 from Western Rock Lobster Council, 24 July 2019, pp 14-5.

804 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, p 5.

805 ibid., p 7.

806 ibid., p 5.

807 *Conservation and Land Management Act 1984*, s 4.

the FRM Act and the Pearling Act to compensation for the loss in market value of those authorisations.

7.162 The creation of marine nature reserves and marine parks is another tool used alongside fisheries management contributing to sustainability of the marine environment and the conservation of aquatic biodiversity. Their creation prohibits or limits some activities within the area, including those relating to commercial fishing..[808]

7.163 The CALM Act provides that reservation of a marine nature reserve shall be for:

> (a) the conservation of the natural environment; and
>
> (b) the protection, care and study of flora and fauna; and
>
> (c) the preservation of any feature of archaeological, historic or scientific interest.[809]

7.164 In a marine nature reserve, there is a complete prohibition on commercial fishing, aquaculture, pearling, and recreational fishing.[810]

7.165 The CALM Act provides that reservation of a marine park shall be for:

> the purpose of allowing only that level of recreational and commercial activity which is consistent with the proper conservation of the natural environment, the protection of flora and fauna and the preservation of any feature of archaeological, historic or scientific interest.[811]

7.166 As soon as practicable after the reservation of a marine park, the Minister for Fisheries must classify the park, or areas of the park, as either a general use area, sanctuary area, recreation area, or special purpose area.[812] The effect of these classifications relates to a varying degree of limitation on commercial fishing, aquaculture, and pearling activities.

7.167 The people who may be entitled to compensation are holders of 12 various licences, leases, and permits as specified in the Act.[813] A person who holds an authorisation is entitled to fair compensation for any loss suffered by the person as a result of the relevant event.[814]

7.168 A person suffers loss if and only if the market value of the authorisation held is reduced because:

> (a) the authorisation will not be able to be renewed;
>
> (ba) the authorisation relates to commercial fishing of more than one type or class and will not be able to be renewed in respect of each of those types or classes;
>
> (b) the authorisation relates to an area and will only be able to be renewed in respect of a part of that area;

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808 Department of Primary Industries and Regional Development, 20 July 2018. See: https://www.fish.wa.gov.au/Sustainability-and-Environment/Aquatic-Biodiversity/Marine-Protected-Areas/Pages/default.aspx. Viewed 7 April 2020.

809 *Conservation and Land Management Act 1984*, s 13A(1).

810 ibid., s 13A(2).

811 ibid., s 13B(1).

812 ibid., s 13B(2).

813 *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*, s 3(1). The 12 licences, leases, and permits specified in this section are: Aquaculture lease, aquaculture licence, commercial fishing licence, fishing boat licence, fish processor's licence, managed fishery licence, interim managed fishery permit, farm lease, hatchery licence, hatchery permit, pearling licence, and pearling permit.

814 *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*, s 5(1).

(c) the authorisation relates to an area and will only be able to be renewed in respect of another area;

(d) the authorisation relates to an area and will not be able to be renewed in relation to that area without the recommendations of the CALM Minister being taken into account under section 94(3)(d) or 98A(2)(d) of the [FRM Act] or section 27A(2)(d) or 27B(2)(d) of the [P Act];

(e) an area will not be available for commercial fishing after the renewal of the authorisation; or

(f) in the case of a fishing boat licence or a fish processor's licence, an area used for fishing under one or more associated or relevant commercial fishing licences, managed fishery licences or interim managed fishery permits (the ***related authorisations***) will not be available for commercial fishing after the renewal of the related authorisations.[815]

7.169 The WAFIC submits that the FRICMR Act should be expanded further, namely that:

> The limited compensation rights under the FRICMR Act also apply to fishers and aquaculturalists whose rights of access are re-allocated to others, or are taken from the industry for other purposes, including where they are reallocated to non-consumptive uses such as marine parks and port development[816]

7.170 The Committee refers to its earlier Finding 51 regarding integration of compensation.

RECOMMENDATION 43

The Minister for Fisheries reform legislation regarding compensation for commercial fishing by integrating the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987*, and conduct a review of the circumstances in which compensation is available, including when there are reallocations to non-consumptive uses such as marine parks and port development.

RECOMMENDATION 44

The Minister for Fisheries investigate the utility of amending the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987* to allow for compensation to be paid to commercial fishers by entities which benefit from reallocation of entitlements and shift in priority of use of the marine environment and aquatic resource.

7.171 In the case of commercial fishers, where an area of water may be closed to that activity due to creation of a marine park, the person must obtain a certificate from the CEO stating that, in the CEO's opinion, the history of the authorisation shows that the area has been fished under the authorisation on a 'long and consistent basis'.[817]

7.172 DPIRD advises that it considers 'long term and consistent' to mean:

> Fishing at least once a year for five years out of the last seven years that fishing has been permitted[818]

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815 ibid., s 5(2).

816 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, p 6.

817 *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*, s 5(5).

818 Department of Primary Industries and Regional Development, *Marine Reserve Compensation Process Information Sheet*, January 2019, p 3.

7.173 However, the Committee notes there is no definition of 'long term and consistent' in either the FRICMR Act or its regulations.

7.174 Section 5 of the FRICMR Act provides that the amount of compensation payable is 'fair compensation'. This is assessed by reference to the reduction in market value of the authorisation and compensation is limited to this amount. Notably, the Act requires consideration of whether the reduction in market value of the authorisation has been offset or mitigated by an increase in the market value of the authorisation as a result of a voluntary or compulsory fisheries adjustment scheme under related legislation, namely the FAS Act.[819]

7.175 Other forms of loss, including impacts on individual operations arising from the creation of the relevant event, such as increased travel time and fuel costs, are not compensable if not linked to a reduction in market value of the authorisation.[820]

7.176 Ultimately, however, the amount of compensation is determined by negotiation between the person entitled to compensation and the Minister for Fisheries.[821]

7.177 Some submitters, including Recfishwest, refer to the concept of 'just terms' in the context of compensation. The concept of 'just terms' is discussed at paragraph 5.177.

7.178 While licences such as commercial fishing licences have proprietary characteristics, they do not constitute property in the traditional sense. As such, the issue of constitutional 'just terms' compensation would be of no effect if implemented – unless the rights conferred by licences become recognised as property rights. This primary issue must be addressed before considering whether a Government action has resulted in a commercial fishing access right being 'acquired'.

7.179 The Committee's view is that a more appropriate solution may be to reform the legislation dealing with commercial fishing compensation rather than considering the concept of 'just terms'.

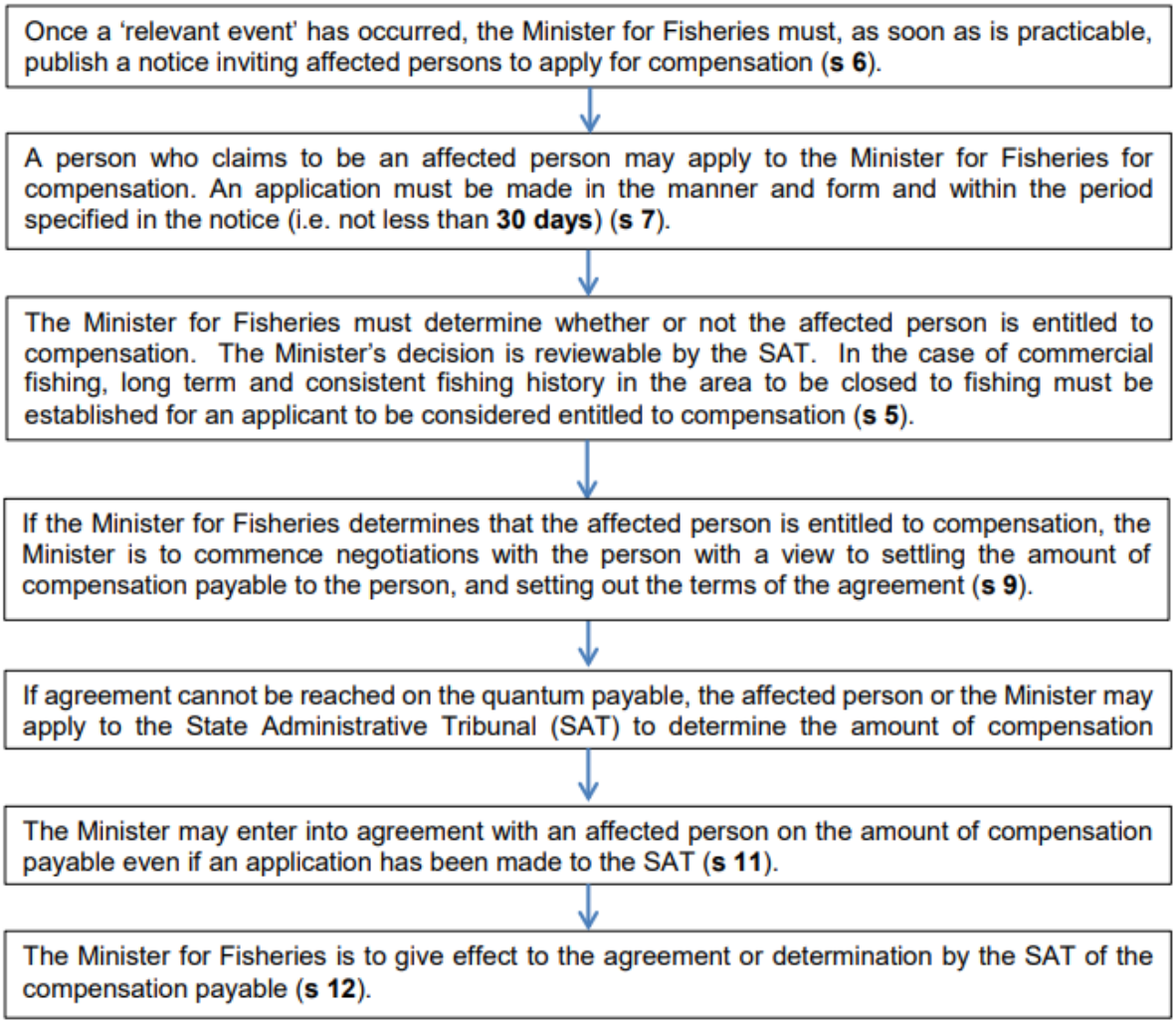
7.180 At a hearing, DPIRD explained the process of applying for compensation under the FRICMR Act and how it is quantified. DPIRD also referred to its information sheet called 'Marine Reserve Compensation Process' dated January 2019 which provides a summary of the process as follows:

819 *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*, s 5(3).

820 Department of Primary Industries and Regional Development, *Marine Reserve Compensation Process Information Sheet*, January 2019, p 4.

821 *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*, s 9.

Figure 11. *Fishing and Related Industries Compensation (Marine Reserves) Act 1997 summary of compensation process*



[Source: Department of Primary Industries and Regional Development, Marine Reserve Compensation Process Information Sheet, January 2019, p 5.]

7.181 Since the Marine Reserve Compensation Process Information Sheet was developed (in January 2019), there has been a review of the application of the FRICMR Act, following which the scope of application of the FRICMR Act has been broadened:

> Such that any licence holder who suffers a loss in the market value of an authorisation as a result of commercial fishing being prohibited in an area of a marine park is eligible for compensation.[822]

7.182 Relevant licence holders have been made aware of the broader interpretation of the FRICMR Act for the present compensation purposes relating to the Ngari Capes marine park, and that they have been provided with a further opportunity to make an application for compensation.[823]

[822] Ralph Addis, Director General, Department of Primary Industries and Regional Development, letter, 10 March 2020, p 1.

[823] ibid.

FINDING 52

The Department of Primary Industries and Regional Development's Marine Reserve Compensation Process Information Sheet, January 2019, provides a useful summary to commercial fishers of the compensation processes under the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*.

Fisheries Adjustment Schemes Act 1987

7.183 The FAS Act provides for voluntary and compulsory acquisition by the State of authorisations and entitlements held under the FRM Act in certain circumstances. Where this occurs, the State is obliged under the FAS Act to pay compensation as determined in accordance with the Act.[824]

7.184 The former Minister for Fisheries explained that the objective of the FAS Act is as follows:

> Schemes operating under the [FAS Act] look to reduce the number of authorisations or entitlements within a commercial fishery in return for an appropriate amount of compensation, to deliver an identified management objective in the respective fishery.[825]

7.185 DPIRD advises that the FAS Act provides for two types of adjustment schemes, being voluntary and compulsory, but that a compulsory scheme has not been established in WA. A voluntary scheme is established to:

> reduce the size of the fishery, and, in essence, to buy out entitlement. They normally happen in two cases. One is where industry actually wishes to fund a scheme, and that is to, basically, restructure a fishery where it is over-capitalised and they want to look at some economic restructuring… The other one is when the state offers compensation where it wishes to reduce the size of a fishery for a range of purposes, often in respect [of] resource reallocation.[826]

7.186 In terms of the process applicable under the FAS Act, DPIRD advises that:

> A committee of management needs to be established [which] … normally needs to provide advice to government on, firstly, the desirability of establishing a scheme. Once the scheme is established, the notice establishing that scheme sets out the objectives of the scheme and also can determine who is a person entitled to offer to surrender their authorisation. The minister then calls for invitations to offer authorisations for compensation, and the committee of management provides advice to the minister, and, in essence, it is an offer and acceptance process.[827]

7.187 DPIRD advises that the ARM Act will alter the circumstances in which compensation may be available for commercial fishers in relation to the FAS Act:

> The [FAS Act] will continue to apply to authorisations and entitlements under ARM Act (for example, Fishing Boat Licences or units of entitlement in managed

824 Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 195, *Nature and Extent of Rights to Fish in Western Australia, Final report*, June 2005, p 35.

825 Hon Dave Kelly MLA, (then) Minister for Fisheries, letter, 18 November 2019, p 1.

826 Heather Brayford, Deputy Director General, Sustainability and Biosecurity, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 7.

827 ibid., pp 7-8.

> fisheries), it will not be able to be applied to resource shares in a Managed Aquatic Resource.[828]

7.188 DPIRD explains that this is because:

> The [ARM Act] does not expand the scope of the [FAS Act] to include this new type of entitlement for commercial fishers.[829]

7.189 The Committee notes that the ARM Act provisions which make consequential amendments to the FAS Act[830] do not expand its scope to provide an entitlement to compensation relating to resource shares. The Committee's view, which is in line with its earlier Recommendation 43 is that the review of the circumstances in which compensation is available include whether the FAS Act should apply to resource shares issued under the ARM Act.

7.190 The former Minister for Fisheries advised that with respect to the FAS Act, a Committee of Management is approved by Cabinet and its functions include:

> Providing advice on the appropriateness of establishing an adjustment scheme, the process that should be followed and the quantum of the compensation payable.[831]

7.191 Further, after an adjustment scheme is established:

- that committee receives a briefing on the subject matter from DPIRD, and then initiates a process that allows for written submissions from applicants.
- applicants can make offers and in some cases counter offers
- applicants may withdraw an application in light of the voluntary nature of the scheme
- the committee must remain independent and provide objective advice free from lobbying
- as such, potential applicants do not meet and take part in the committee's deliberations
- DPIRD's annual reports include details of all adjustment schemes, including committee membership.[832]

7.192 Section 14G of the FAS Act provides that the quantum of compensation payable is 'fair compensation' which is 'assessed as the market value of the authorisation or entitlement'.

7.193 The Committee notes the process applicable under the FAS Act includes negotiations and the making of offers and in some cases counter offers. Ultimately, however, the amount of compensation is determined by negotiation between the person entitled to compensation and the Minister for Fisheries.

7.194 The Committee notes that, unlike the FRICMR Act, DPIRD has not produced an information sheet outlining the compensation process applicable under the FAS Act.

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828 Heather Brayford, Deputy Director General, Sustainability and Biodiversity, Department of Primary Industries and Regional Development, letter, 3 March 2020, p 1.

829 ibid.

830 *Aquatic Resources Management Act 2016*, ss 337-43.

831 Hon Dave Kelly MLA, (then) Minister for Fisheries, letter, 18 November 2019, p 1.

832 ibid, p 2.

RECOMMENDATION 45

The Department of Primary Industries and Regional Development produce an information sheet or similar which outlines the compensation processes under the *Fisheries Adjustment Schemes Act 1987*.

Case study—Ocean Reef Marina

7.195 John Brindle, President of WCADA, provided a submission[833] claiming that the proposed development of the Ocean Reef Marina will remove at least nine tonnes of the Roei abalone grounds fished by commercial and recreational divers on the reef platform. Mr Brindle said this level of impact is an estimate and there is considerable uncertainty regarding the impact following the development of the marina due to silting and loss of abalone grounds north of the proposed development site and impacts on visibility.[834]

7.196 WCADA submits that Roei abalone licence holders will suffer injurious affection as follows:

> The inability to sell their authorisations to fish due to the uncertainties of future development impacts without significant discounting during the ten or so years the project has been under consideration.
>
> The loss of visibility and inability to access the reef north of the development due to sediment plumes associated with the development.
>
> The expected direct loss of productive grounds as a result of the development both immediate and consequentially post development silting of reef platform.[835]

7.197 WCADA submits that:

- the proposed construction of the Ocean Reef Marina will cause a reduction of fishing access for the West Coast Roei Abalone Fishery with an associated requirement to reduce harvest levels (quota) to ensure resource sustainability[836]
- the Minister for Fisheries has decided that a Voluntary Fisheries Adjustment Scheme under the FAS Act is the appropriate mechanism for compensation due to expected loss of fishing access with the proposed construction of the Ocean Reef Marina[837]
- the FAS Act was not designed to deal with this issue as this is not a simple reduction in fishing access similar to what occurs following declaration of a marine park, and notes that the Act does not oblige the State to provide compensation in these circumstances.[838]

7.198 WCADA recommends that the scope of the FAS Act be expanded to provide for where a fishing industry is excluded from access and where injurious affection through loss of resource access can be demonstrated.[839] However, WCADA suggests that negotiated compensation may be a better alternative:

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833 In his capacity as President of the West Coast Abalone Divers Association, noting that he is also an abalone fisherman.

834 Submission 26 from West Coast Abalone Divers Association, 29 July 2019, p 1.

835 ibid.

836 ibid., p 2.

837 ibid.

838 ibid., pp 2-3.

839 ibid.

> In talking to the fishermen about where we go from here, I would like to investigate, potentially, what was discussed earlier—just about a commercial negotiation, of a compensation to the level that is acceptable to the fishermen to just release themselves from the whole procedure of this marina, because currently, the level of loss, initially, we do not agree with. We think it will be more.[840]

7.199 WCADA is of the view that there may be further compensation in future subject to results of stock level monitoring:

> It has been committed that there will be a five-year monitoring program to adjust the fishermen, possibly with a further compensation if it is shown that the stock levels are reduced even further.[841]

7.200 WCADA explains the timeframe is an issue:

> But in the case of that [the five-year monitoring program], then you go through another big bunfight about your loss of income over the previous five years, while you have not been able to fish that area because the loss will be pretty well straightaway … Five years after construction is completed, I think I am going to be nearly 80. It is just too long winded.[842]

7.201 The former Minister for Fisheries advised that a Voluntary Fisheries Adjustment Scheme will seek to reduce (through buy-out/compensation) an appropriate amount of entitlement to compensate for the Roei abalone habitat lost due to the development. Although WCADA's view is that the impacts of the Ocean Reef Marina development will be higher than that estimated, the former Minister notes that this estimate followed a Public Environmental Review conducted by the Environmental Protection Authority.[843]

7.202 Given that the impact of the Ocean Reef Marina development is only an estimate and subject to change, the Minister for the Environment placed a number of conditions on the proponent of the development. One condition is ongoing monitoring of the habitat for at least five years.[844] The former Minister for Fisheries advises that the proponent could consider providing further compensation at any stage.[845]

7.203 This case study provides an example of the inadequacy of current compensation legislation. The Committee considers that these commercial fishers face uncertainty by being required to wait five years for the compensation process to be finalised. This delay fails to have regard to commercial fishers' current situation arising from their business losses. It would be preferable for the entirety of compensation to have been paid at the outset.

Ex gratia payments

7.204 DPIRD advises that in addition to the FAS Act and FRICMR Act, compensation in the form of ex gratia payments may be available:

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840 John Horwood, President, West Coast Abalone Divers Association, transcript of evidence, 28 October 2019, p 2.

841 ibid., p 3.

842 ibid.

843 Hon Dave Kelly MLA, (then) Minister for Fisheries, letter, 18 November 2019, p 2. The Public Environmental Review report may be accessed at: http://www.epa.wa.gov.au/sites/default/files/PER_documentation/PUBLIC%20ENVIRONMENTAL%20REVIEW%20NOVEMBER%202016%20.pdf

844 Hon Dave Kelly MLA, (then) Minister for Fisheries, letter, 18 November 2019, p 2.

845 ibid.

> There have been incidences where the government has made compensation by way of act of grace payments. That is a case-by-case and merit-based decision for the government at the time of the event.[846]
>
> …
>
> Instances where there is not an entitlement to compensation [under the FAS Act or FRICMR Act] where act-of-grace payments have been made for legitimate policy reasons, but if there is a dispute, which is perhaps where you are going, decisions to settle in the absence of a legal entitlement conversation would be made on the basis of how grey is the area, would have to be a pretty reasonable case to make a settlement.[847]

7.205 DPIRD advised that in general, ex gratia payments are made to commercial fishers where access associated with a licence is diminished, but where other mechanisms provided for in legislation (such as the FRICMR Act or the FAS Act) or otherwise at law cannot be applied.[848]

7.206 DPIRD provided an example as follows:

> if an area of a fishery is closed for reasons other than establishment of a marine park, but there is to be no reduction in the number of licences in the fishery (that is, the same number of licences have access to a reduced area), Act of Grace payments may be made in recognition of this loss. Such closures usually occur to address resource sharing issues between commercial and recreational fishers.[849]

7.207 DPIRD advised that between 2010-11 and the current financial year,[850] five ex gratia payments relating to commercial fishing access were made; each of these was made due to closure of areas to commercial fishing.[851]

7.208 WAFIC commented on the lack of transparency around compensation payments, which it claimed are often confidential. It argued that a single authority or agency should be established with responsibilities for assessing compensation, centralising processes, and increasing consistency.[852]

7.209 DPIRD advised it is open to this possibility:

> **The ACTING CHAIR**: Can a single authority/agency be established with responsibilities for accessing compensation in order centralise process and increase consistency?
>
> **Mr ADDIS**: I think plausibly the answer would be yes, but it would require an amendment to the statutory mechanism we deal with.
>
> **Ms BRAYFORD**: Yes. I do not think there would be [a] practical reason why that would not be possible.[853]

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846 Ralph Addis, Director General, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 9.

847 ibid., p 11.

848 Joanne Kennedy, Manager Strategic Projects, Department of Primary Industries and Regional Development, email, 25 June 2020.

849 ibid.

850 Noting that a full archival audit was not possible in the timeframe provided.

851 ibid.

852 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, pp 2, 7.

853 Ralph Addis, Director General and Heather Brayford, Deputy Director General, Sustainability and Biodiversity, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 11.

Case study—Ex gratia payment to commercial wetline fisher

7.210 Raymond Yukich is a former commercial wetline fisher who reached a settlement with the former Department of Fisheries regarding his Fishing Boat Licence endorsement.[854] DPIRD reviewed Mr Yukich's submission to this Inquiry and advised that there was some confusion as to the validity of the fisher's Fishing Boat Licence endorsement when a Limited Entry Fishery Notice was implemented. This confusion was not clarified for a number of years. It was subsequently clarified that the endorsement was of no effect and that the fisher therefore did not meet the criteria for access to the fishery.[855]

7.211 This case study provides one example of the circumstances in which an ex gratia payment may be and was made. However, DPIRD's general position is that:

> It is not normal practice to provide compensation or similar payments where a fisher does not meet criteria for access to a fishery.[856]

7.212 The Committee notes its earlier Finding 51 regarding ex gratia payments and Recommendations 43 and 44 regarding reform of compensation for commercial fishing and is of the view that, as part of that reform, consideration be given to the circumstances in which ex gratia payments are made.

FINDING 53

Expanding the scope of the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987* may reduce the incidence of ex gratia compensation payments which in turn may lead to more consistent compensation decision making.

RECOMMENDATION 46

The Minister for Fisheries consider the circumstances in which ex gratia payments are made to commercial fishers, with a view to reducing the incidence of such payments and instead providing a clear basis for compensation eligibility in legislation and greater transparency.

7.213 The Committee is of the view that currently available compensation for commercial fishing is multifaceted. Recommendations 41 to 45 seek to redress the complexity around compensation and primarily address reform of the FRICRM Act and the FAS Act, expanding the scope in which compensation is available, and to investigate the utility of establishing a single agency to deal with all compensation claims for commercial fishers.

Conclusion

7.214 Fish and aquatic resources in tidal waters are a community resource, not owned by any person until lawfully caught. These resources are managed for the benefit of the WA community with sustainability as a paramount consideration to ensure the resource may be utilised by future generations. Commercial fishing rights represent a right of access to the resource subject to the requirements of the current legislative scheme under the FRM Act and the Pearling Act. Compensation is available for loss in market value, authorisations, and entitlements, and for adjustment to fisheries, in a range of circumstances.

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854 Submission 30 from Raymond Yukich, 30 July 2019, p 1.

855 Ralph Addis, Director General, Department of Primary Industries and Regional Development, letter, 10 March 2020, p 2.

856 ibid.

CHAPTER 8
Fishing licences: New legislative scheme regarding commercial fishing

Introduction

8.1 The terms of reference for this Inquiry include that the House:

> Recognises the property rights of government-issued licenses and authorities including commercial fishing.

8.2 This Chapter will discuss:

- development of the new legislative scheme
- management of commercial, recreational, and customary fishing
- issues specific to commercial fishing, aquaculture, and pearling, including allocation of entitlements
- transition from the current to the new legislative scheme.

Development of new legislative scheme

8.3 The ARM Act will replace the FRM Act and the Pearling Act and will become the primary legislation under which fishing, aquaculture, pearling, and aquatic resources are managed in WA.[857]

8.4 The ARM Act integrates fisheries and aquatic resource management by considering the impact of fishing activities on the broader ecosystem in accordance with the principles of ESD and EBFM. In contrast, the FRM Act manages fishing activities by reference to specific fisheries.

8.5 The ARM Act's integrated approach focuses on clearly defined aquatic resources and recognises the need to maintain ecological sustainability as well as resource access for commercial, recreational, and customary fishing, research, and other community benefits.[858]

8.6 DPIRD advises that the ARM Act will improve fisheries management for the State as well as providing some improvements in security, certainty, and clarity of access rights for commercial fishers because:

> The ARM Act makes it necessary for the minister of the day to make explicit the policy objectives for which the resource is to be managed and to reflect those in an aquatic resource management strategy, or ARMS, which gives everybody,

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857 The *Aquatic Resources Management Act 2016* (ARM Act) received Royal Assent on 29 November 2016, however it has not yet been proclaimed in its entirety. On 1 May 2018, a proclamation was published in the Government Gazette that on 2 May 2018, the following provisions of the ARM Act come into operation: Part 1 sections 3, 4, 5, and 8; Part 2; Part 3 Division 1, Division 2 sections 14(1) and (4), 15 to 21, and 23 to 27, Division 3 section 32 to 40; and Part 16 sections 253 to 257. Amendments to the ARM Act are currently being progressed through the Aquatic Resources Management Amendment Bill 2020.

858 Department of Primary Industries and Regional Development, 23 August 2018. See: http://www.fish.wa.gov.au/Fishing-and-Aquaculture/Aquatic-resources-management-act/Pages/Management.aspx. Viewed 8 April 2020.

> including commercial fishers, a clear direction as to the purpose for which the resource is being managed.[859]

8.7 Discussion regarding development of a new legislative scheme has been occurring for some time.[860]

8.8 The former Department of Fisheries considered the FRM Act to be deficient because it does not consider:

- The questions associated with managing aquatic biological resources used by multiple sectors for competing purposes as a biological unit (as opposed to a fishery based on a specified gear type or single stock/single species/single sector) or provide any head powers that would allow this approach to be taken readily.
- Fishing access rights for non-commercial sectors or how these might be managed, transferred and given continuity at a sectoral, as well as an individual, level.[861]

8.9 During debate on the motion that the Committee conduct this Inquiry, reference was made to the nature of fishing rights as 'property rights' but was rebutted. The Minister for Environment said:

> Fishing licences issued under the [FRM Act] are statutory rights to take fish. Such fishing licences are not property rights.[862]

8.10 Further to these discussions, during development of the ARM Act, DPIRD advises that it reviewed legislative models for fisheries and oceans management internationally in the United Kingdom, Canada, the United States of America, New Zealand, as well as domestically in South Australia, the Northern Territory, Tasmania, Victoria, and New South Wales.[863]

8.11 As such, DPIRD claims that the new legislative regime has been developed based on best practice concepts drawn from across the world which were modified for a best fit for WA, having regard to the characteristics of many fisheries in the State, which are small-scale and multispecies.[864]

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859 Ralph Addis, Director General, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 2.

860 Fisheries Management Paper No. 165 (November 2002) discusses the management framework under the *Fish Resources Management Act 1994* and the requirements of a new management framework. Fisheries Management Paper No. 195 (June 2005) notes that Western Australia is committing significant resources to the analysis and development of a new approach to fisheries management in which the whole of the fish stock is managed. Occasional Publication No. 79 (June 2010) was produced following direction from the Minister for Fisheries to the former Department of Fisheries to investigate and scope the requirements for new fisheries legislation which would ensure sustainable development and conservation of biological resources in the 21st century. Occasional Publication No. 102 (November 2011) is the outcome of work undertaken by the Access Rights Working Group, which was formulated to provide advice on the improvement of commercial fishing access rights, including reference to the development of proposed new aquatic resources management legislation.

861 Government of Western Australia, (then) Department of Fisheries, Fisheries Occasional Publication No. 79, *A Sea Change for Aquatic Sustainability: Meeting the Challenge of Fish Resources Management and Aquatic Sustainability in the 21st Century*, June 2010, p 13.

862 Hon Stephen Dawson, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4019.

863 Submission 68 from Department of Primary Industries and Regional Development, 29 July 2019, p 5.

864 ibid.

8.12 New fisheries legislation is required to ensure that WA can continue to meet future challenges and demands in the face of increasing pressures on our environment.[865] The former Minister for Fisheries advised that these pressures include:

> Population growth, coastal development, and competition for priority uses in the marine environment from many different interest groups. Rapidly advancing fish finding, fishing and communications technologies are making fish more vulnerable to fishing than ever before, while changing ocean temperatures and climatic conditions that have become evident in the past 15 years appear to be driving changes in the population cycles and abundance of many aquatic species. On top of these factors, an increase in international shipping and transport of live organisms has heightened the severe risk posed to our ecological communities through the introduction of harmful organisms and diseases.[866]

8.13 The former Minister for Fisheries advised that development of the ARM Act occurred in consultation with the commercial fishing industry and that the partially proclaimed Act has the overwhelming support of both the commercial and recreational sectors.[867]

8.14 The WRLC advised that 'we cannot afford not to implement the [ARM Act] legislation', however noted deficiencies in the policy framework relating to the process and the reallocation in the instruments.[868] It expanded on this point in its submission, including that:

- there must be legislative certainty on agreed principles and processes for determining allocations and reallocations between sectors, and the proportion of the available TAC to be available to each sector
- fishing licences be recognised as 'property' in the ARM Act for the purposes of compensation.[869]

8.15 Further, the WRLC submitted that:

> If there was certainty in the [ARM Act] legislation that said fishing access rights were open to compensation and you had appropriate mechanisms to deal with it… a lot of that uncertainty would disappear.[870]

8.16 The WAFIC expressed that the ARM Act 'can improve fisheries management',[871] however also shared similar concerns regarding aspects of the ARM Act, including that:

- there is uncertainty regarding the quality of fishing access rights
- policies regarding allocation, reallocation, and compensation must be formalised

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865 Department of Primary Industries and Regional Development, 10 December 2018. See: https://www.fish.wa.gov.au/Fishing-and-Aquaculture/Aquatic-resources-management-act/Pages/default.aspx. Viewed 8 April 2020.

866 Aquatic Resources Management Bill 2015, *Explanatory Memorandum*, Legislative Council, p 1.

867 Hon Dave Kelly MLA, (then) Minister for Fisheries, letter, 26 September 2019, p 3; Submission 68 from Department of Primary Industries and Regional Development, 29 July 2019, p 3.

868 Peter Rogers, Consultant to Western Rock Lobster Council, transcript of evidence, 28 October 2019, p 9.

869 Submission 13 from Western Rock Lobster Council, 24 July 2019, pp 4, 6.

870 Peter Rogers, Consultant to Western Rock Lobster Council, transcript of evidence, 28 October 2019, p 9.

871 George Kailis, Professor Management and Law, Notre Dame University, and Chair of Western Australian Fishing Industry Council Legislation and Policy Subcommittee, transcript of evidence, 28 October 2019, p 6.

- commercial fishers should retain their existing fisheries management arrangements under the FRM Act, and should not be forced under new management arrangements under the ARM Act, until those policies are formalised.[872]

8.17 The WAFIC also submitted that the ARM Act should be amended to recognise fishing rights as property.[873]

8.18 The PPA expressed concerns that the ARM Act does not treat pearling as an integrated industry.[874]

8.19 DPIRD advises that the ARM Act strengthens access rights for commercial fishers through the following within a Managed Aquatic Resource:

- the ongoing right of access (resource shares) which are granted in perpetuity for the life of the Aquatic Resource Use Plan (ARUP)
- separation of resource shares from the (generally) annual right to fish (catch entitlement) arising from shares.
- requirement to grant share options where an ARUP is revoked, except if shares of an equivalent value will be allocated to the holder under a subsequent ARUP
- an emphasis on penalties for poor behaviour being directed at the fisher, rather than impacting on the value of resource shares.[875]

8.20 DPIRD notes the interrelationship between certainty of access rights, investment, and sustainability and how:

> Providing commercial fishers with certainty regarding their ongoing access to the resource is important for encouraging long-term investment in the industry. This in turn creates an incentive for commercial fishers to support sustainable fishing practices.[876]

8.21 In relation to aquaculture, DPIRD advises that the ARM Act provides a clearer understanding of tenure for the purposes of aquaculture.[877]

8.22 In relation to pearling, DPIRD advises that the ARM Act provides scope to diversify activities that can be undertaken on leases to encompass other forms of aquaculture.[878]

8.23 The Committee notes that there is no uniform agreement by industry stakeholders and DPIRD regarding the ARM Act.

Introduction

8.24 This section is based on current legislation as at the time of drafting in June 2020. As noted previously at paragraph 7.8, the entirety of the ARM Act has not yet been proclaimed, almost four years after receiving Royal Assent. The ARM Amendment Bill, introduced in the Legislative Assembly in April 2020, proposes to amend or delete certain relevant provisions of the ARM Act, including:

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872 George Kailis, Professor Management and Law, Notre Dame University, and Chair of Western Australian Fishing Industry Council Legislation and Policy Subcommittee, transcript of evidence, 28 October 2019, p 5.

873 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, p 4.

874 Aaron Irving, Executive Officer, Pearl Producers Association, transcript of evidence, 28 October 2019, p 16.

875 Submission 68 from Department of Primary Industries and Regional Development, 29 July 2019, p 4.

876 ibid., p 2.

877 ibid., p 4.

878 ibid.

- amending the definition of 'resource share'
- amending the definition of 'aquatic resource'
- amending the content of an 'Aquatic Resource Management Strategy' (ARMS)
- amending the content of an 'Aquatic Resource Use Plan'
- deleting the requirement for the CEO to publish notice of certain decisions relating to aquaculture licences.

8.25 The Committee is restricted in that the ARM Amendment Bill has not been referred to the Committee, and as such it can comment only on the current legislative scheme.

8.26 DPIRD advises that the key principles of ARM Act are that it is:

- resource-based, in that it focuses on the sustainable use of aquatic resources, aquatic organisms, and aquatic ecosystems with outcome-focused recourse use planning provisions to ensure transparency and to achieve a balance between resource use and conservation
- risk-based, in that it provides formal risk-based assessment processes to determine management actions where adequate scientific information is not available
- rights-based, in that it ensures the long-term business interests of the fishing industry and the community are given structure and security within a legal framework, which facilitates investment, innovation and stewardship.[879]

8.27 WAFIC, as the peak body for the commercial sector, advises that it supports the technical amendments made by the ARM Amendment Bill, which will improve and clarify the ARM Act's operation.[880]

8.28 Unlike the FRM Act which focuses on fish in fisheries, the ARM Act is framed by reference to an 'aquatic resource' in bioregions, areas, habitats or ecosystems:

> **4. Meaning of aquatic resource**
>
> (1) In this Act, a reference to an aquatic resource is a reference to —
>
> (c) a population of one or more identifiable groups of aquatic organisms; or
>
> (d) one or more identifiable groups of aquatic organisms in a bioregion, area, habitat or ecosystem.
>
> (2) Without limiting subsection (1), an identifiable group of aquatic organisms includes —
>
> (a) a species of aquatic organisms; and
>
> (b) a species of aquatic organisms limited by reference to sex, weight, size, reproductive cycle or any other characteristic.[881]

8.29 The core objectives of the ARM Act relate to ecological sustainability of aquatic resources and the benefits flowing from the use of those resources. This is reflected in the objects section of the Act.[882]

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879 Submission 68 from Department of Primary Industries and Regional Development, 29 July 2019, p 3.

880 Alex Ogg, Chief Executive Officer, Western Australian Fishing Industry Council, email, 22 June 2020.

881 *Aquatic Resources Management Act 2016*, s 4.

882 ibid., s 9.

8.30 The ARM Act expands on the objects specified in the FRM Act by referring to ecological sustainability of aquatic resources rather than fisheries, and by making explicit reference to economic, social, and other benefits that those resources may provide.

8.31 The objects of the ARM Act may be achieved as follows:

> **10. Means of achieving objects of Act**
>
> The objects of this Act are to be achieved in particular by —
>
> (a) conserving and protecting aquatic resources and aquatic ecosystems and where necessary, restoring aquatic ecosystems; and
>
> (b) managing aquatic resources and aquatic ecosystems on the basis of relevant scientific data and principles; and
>
> (c) encouraging the sustainable development of fishing, aquaculture and other activities reliant on aquatic resources; and
>
> (d) encouraging members of the public to actively participate in decisions about the management and conservation of aquatic resources and aquatic ecosystems; and
>
> (e) ensuring that the interests of different sectors of the community that use aquatic resources or aquatic ecosystems are identified and considered; and
>
> (f) managing aquatic resources and aquatic ecosystems in a manner that is as practical, efficient and cost effective as possible.[883]

8.32 A person or body exercising functions or powers under the ARM Act must have regard to the objects of the Act and the means by which they are achieved.[884]

Protection of commercial fishers' rights under the *Aquatic Resources Management Act 2016*

8.33 DPIRD advises that statutory consultation processes, and numerous instruments of subsidiary legislation (which are subject to scrutiny by the Parliament), are key features of the ARM Act protecting commercial fishers.[885]

8.34 DPIRD advises that the ARM Act provides for a multistage process before commercial fishing entitlements are issued:

> First of all, the declaration of the aquatic resource … is subsidiary legislation.
>
> The ARMS is subject to two months of statutory consultation…
>
> the ARUPs underneath the ARMS are also subsidiary legislation subject to statutory consultation.
>
> Once … into the ARMS and the ARUP framework, there is an ongoing right to access the resource in the form of resource shares. Those resource shares exist for the life of the ARMS. They do not need to be renewed each year; they simply exist for that period.

883 ibid., s 10.

884 ibid., s 11.

885 Joanne Kennedy, Manager, Strategic Projects, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 10.

> At the start of each fishing period, those shares give rise to the annual catch entitlement for the particular resource, which can be registered at the beginning of each fishing period and exists only for the period of that fishing period.[886]

8.35 A resource share is defined in section 3(1) of the ARM Act to mean a share in respect of a managed aquatic resource that is made available under the ARMS for the resource.

8.36 A fishing period is defined in section 16(1)(e) of the ARM Act to mean a period for which activities in respect of the aquatic resource are to be regulated in accordance with an ARMS for the resource.

8.37 DPIRD advises that the ongoing right of access (resource shares) and the associated annual catch entitlement can be transferred independently to another fisher or rights holder which has benefits:

> That means that the holder of the resource shares can be completely separated from the fishing activity on the water and is therefore separated from any kind of compliance activity and any sort of issues that can arise as a result of compliance activity in terms of the value of their share going forward. That provides a greater level of security and certainty than currently under the FRM Act.[887]

8.38 The Committee's view is that the prescriptive nature of the ARM Act will enhance resource sustainability and strengthen commercial fishing access rights, particularly due to the proprietary characteristics of resource shares and catch entitlements.

FINDING 54

The resource-based, risk-based, and rights-based nature of the *Aquatic Resources Management Act 2016* will increase sustainability of the aquatic resource and strengthen commercial fishing access rights.

FINDING 55

The statutory regime, including the statutory consultation processes, in the *Aquatic Resources Management Act 2016* has the effect of strengthening the security of commercial fishing access rights.

Commercial fishing and related licences and authorisations intended to be issued under the *Aquatic Resources Management Act 2016*

8.39 Licences and authorisations relating to commercial fishing will be issued under the ARM Act. Additional licences will also be created and issued under the associated regulations. However the former Minister for Fisheries advised that these are still in development and details about these licences are not yet available.[888]

8.40 The licences and authorisations relating to the commercial sector that are intended to be issued under the ARM Act are:

- Resource Shares – these represent an ongoing right to access a managed aquatic resource, and give rise to a catch entitlement at the commencement of each fishing period

886 Joanne Kennedy, Manager, Strategic Projects, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 10.

887 ibid.

888 Hon Dave Kelly MLA, (then) Minister for Fisheries, letter, 26 September 2019, p 2.

- Catch Entitlement – this is generated from resource shares at the commencement of each fishing period, and represents the quantity of the TAC that the holder of the entitlement can take
- Managed Fishery Licence – this authorises operation in a Managed Fishery
- exemption for a Commercial Purpose – this is an authority which may be granted by the CEO for a commercial purpose
- section 125 Order – this is a prohibition order which may make exceptions to the prohibition. The exceptions may be defined by reference to certain licences
- Aquaculture Licence – this authorises aquaculture activities within an area covered by an Aquaculture Lease
- Aquaculture Lease – this may be granted over WA land or waters and provides the exclusive right to undertake aquaculture activities within the leased area. Currency of the lease is dependent on the currency of an Aquaculture Licence.

8.41 Appendix 12 contains, in table form, a summary of commercial fishing and related licences and authorisations intended to be issued under the ARM Act, and includes whether these confer a property right and whether compensation is available.

Management

Ecologically Sustainable Development and Ecosystem-Based Fisheries Management

8.42 ESD is the concept that seeks to integrate short and long-term economic, social and environmental effects in all decision making.[889]

8.43 The *National Strategy for ESD* is previously referred to in paragraphs 7.71 to 7.72. Adopted by all levels of Australian governments in 1992 it:

> Provides broad strategic directions and framework for governments to direct policy and decision-making. The strategy facilitates a coordinated and co-operative approach to ecologically sustainable development and encourages long-term benefits for Australia over short-term gains.[890]

8.44 The strategy defines ESD as:

> Using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.[891]

8.45 The FRM Act explicitly provides for the precautionary principle in section 4A, however this is not reflected in the ARM Act. Rather, section 10(b) of the ARM Act, which provides how the objects of the Act are to be achieved, refers to management of aquatic resources and aquatic ecosystems on the basis of relevant scientific data and principles.

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889 Government of Western Australia, (then) Department of Fisheries, *Marine Aquarium Fish Managed Fishery report*, October 2010, p 9.

890 Department of Agriculture, Water and the Environment. See: http://www.environment.gov.au/about-us/esd. Viewed 7 April 2020.

891 ibid.

8.46 DPIRD advises that it implements the principles of ESD in the context of managing fishing activities in WA. The ESD National Framework core objectives for sustainable fisheries are to:

> Protect biodiversity and maintain essential ecological processes
>
> Enhance individual and community well-being by following a path of economic development that safeguards the welfare of current and future generations
>
> Provide effective legal, institutional and economic frameworks for ecologically sustainable development.[892]

8.47 Fish ecosystems are exposed to numerous risks to their sustainability, including:

- the capture of target and non-target species which could reduce their biomass to unviable levels
- impacts of fishing on the broader ecosystem which directly affect the marine landscape through damage caused by fishing gear
- possible changes to trophic structure from removals of predators and/or prey.[893]

8.48 EBFM is a holistic approach that takes into account all ecological resources, as well as economic and social factors in deciding how to manage fisheries. This approach recognises that fishing activity inevitably has an impact on ecosystems. Fishing activities can result in significant economic and social benefits to the community. Ecosystem impact is risk-assessed and managed appropriately.[894]

8.49 The relevance of EBFM to fisheries management is that it provides a mechanism for assessing and reporting on the regional level risk status of all of WA's aquatic resources and therefore the effectiveness of the aquatic resource management arrangements in delivering community outcomes.[895]

8.50 DPIRD advises that it uses a step-wise and risk-based approach to integrate all of the fishery level assessments and management systems into a form that can be used for aquatic resource management planning.[896]

Management of aquatic resources

8.51 Part 3 of the ARM Act deals with managed aquatic resources.

8.52 Management will occur primarily through an ARMS and an associated ARUP for an aquatic resource.

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892 Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 157, *Policy for the Implementation of Ecologically Sustainable Development for Fisheries and Aquaculture within Western Australia*, March 2002, p 25.

893 ibid.

894 Department of Primary Industries and Regional Development, 23 August 2018. See: http://www.fish.wa.gov.au/Sustainability-and-Environment/Sustainable-Fisheries/Pages/Sustainable-Fisheries-Management.aspx. Viewed 8 November 2019.

895 Department of Primary Industries and Regional Development, *Status reports of the fisheries and aquatic resources of Western Australia 2017/18*, report prepared by Fisheries Science and Resource Assessment and Aquatic Resource Management Branches, Perth Western Australia, 2018, p 3.

896 ibid.

8.53 An ARMS is defined in section 3(1) of the ARM Act:

> ***aquatic resource management strategy (ARMS)***, in relation to a managed aquatic resource, means a strategy approved for the aquatic resource under section 20(1) as in force from time to time;

8.54 DPIRD advises that an ARMS is a high-level policy document, which must be approved by the Minister for Fisheries, and which establishes the main management objective for the resource and inter and intra sectoral allocations.[897]

8.55 An ARUP is defined in section 3(1) of the ARM Act:

> ***aquatic resource use plan (ARUP)***, in relation to a managed aquatic resource, means a resource use plan made in respect of the aquatic resource under section 24(1) as in force from time to time;

8.56 DPIRD advises that an ARUP outlines the management arrangements for each sector including the processes for monitoring each sector's catch and ensuring it remains in line with the amount set out in the ARMS. In most cases, there will be multiple ARUPs under an ARMS potentially applying to different sectors and/or fishing activities.[898]

8.57 Section 13 of the ARM Act requires the Minister for Fisheries to ensure that the condition of aquatic resources and the aquatic environment is kept constantly under consideration, and allows for the conducting of a risk assessment of the ecological sustainability of an aquatic resource.

8.58 In summary, Part 3 operates as follows:

- section 13 relates to monitoring of aquatic resources
- sections 15 to 22 relate to an ARMS, and specify the requirement for an ARMS, its content, that the CEO is required to consult on a proposal or draft ARMS, that revision of a proposed ARMS may occur following consultation, and that an ARMS may be approved, amended, or revoked
- sections 23 to 31 relate to an ARUP, and specify that the Minister for Fisheries is to make an ARUP for a managed aquatic resource, its content, the method for allocating resource shares under an ARUP, the effect of an ARUP on management plans and regulations, and the effect on an ARUP if an ARMS is revoked
- section 34 specifies how resource shares are allocated
- section 35 specifies the nature of resource shares
- section 36 provides how resource shares may be transferred
- section 37 relates to registration of catch entitlements associated with resource shares
- section 38 relates to transfer of catch entitlements
- section 39 relates to sureties for authorisations
- section 40 allows for registration of sureties
- section 41 relates to return or substitution of sureties for authorisations
- section 42 relates to grant of share options

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897 Submission 68 from Department of Primary Industries and Regional Development, 29 July 2019, p 3.

898 Department of Primary Industries and Regional Development, 23 August 2018. See: http://www.fish.wa.gov.au/Fishing-and-Aquaculture/Aquatic-resources-management-act/Pages/Management.aspx. Viewed 8 April 2020.

- section 43 relates to entitlements to convert share options.

Aquatic Resource Management Strategy

8.59 Section 16 of the ARM Act specifies what must be included in an ARMS.

8.60 The section is highly prescriptive and its elements establish the basis for developing the specific management arrangements (such as gear restrictions, quotas, closed seasons and bag limits) that will ensure the ARMS' objectives are met. Specific management arrangements for the resource are set out in ARUPs and associated regulations.[899]

8.61 Fishing Families WA recommends that the Minister for Fisheries not be permitted to revoke an ARMS under sections 21(3) and 29 of the ARM Act as once access rights and catch entitlements have been allocated, and that instead the resource can be managed entirely by setting the TAC. Should the resource become very degraded such that fishing cannot occur, then the TAC may be set at zero until the resource recovers.[900]

Aquatic Resource Use Plan

8.62 An ARUP is subsidiary legislation which establishes management objectives for each sector, the rules and parameters to achieve these objectives, and the allocation of fishing access rights amongst commercial fishers.[901]

8.63 For the commercial sector, ARUPs will allocate transferrable shares in the resource, with each share entitling the holder to a proportion of the annual catch available for commercial fishing.[902]

8.64 ARUPs will work alongside regulations and other legislation to deliver robust management controls.[903]

8.65 Section 25 of the ARM Act is also highly prescriptive of what must be included in an ARUP including specifying the number of resource shares (if any) in the aquatic resource available under the ARUP.

Relationship between an Aquatic Resource Management Strategy and an Aquatic Resource Use Plan

8.66 As noted above, an ARUP outlines the management arrangements for each specific sector, including the commercial, recreational, and customary sectors, and ensures that it remains in line with the associated ARMS.

8.67 The integrated approach also considers non-extractive use plans (for activities such as eco-tourism and recreation), resource protection plans (in key habitats and for vulnerable species), and other sectoral use plans (such as collection of broodstock). The effect of these various uses on an aquatic resource and ecosystem is cumulative and represented visually as follows.

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899 Department of Primary Industries and Regional Development, 23 August 2018. See: http://www.fish.wa.gov.au/Fishing-and-Aquaculture/Aquatic-resources-management-act/Pages/Management.aspx. Viewed 8 April 2020.

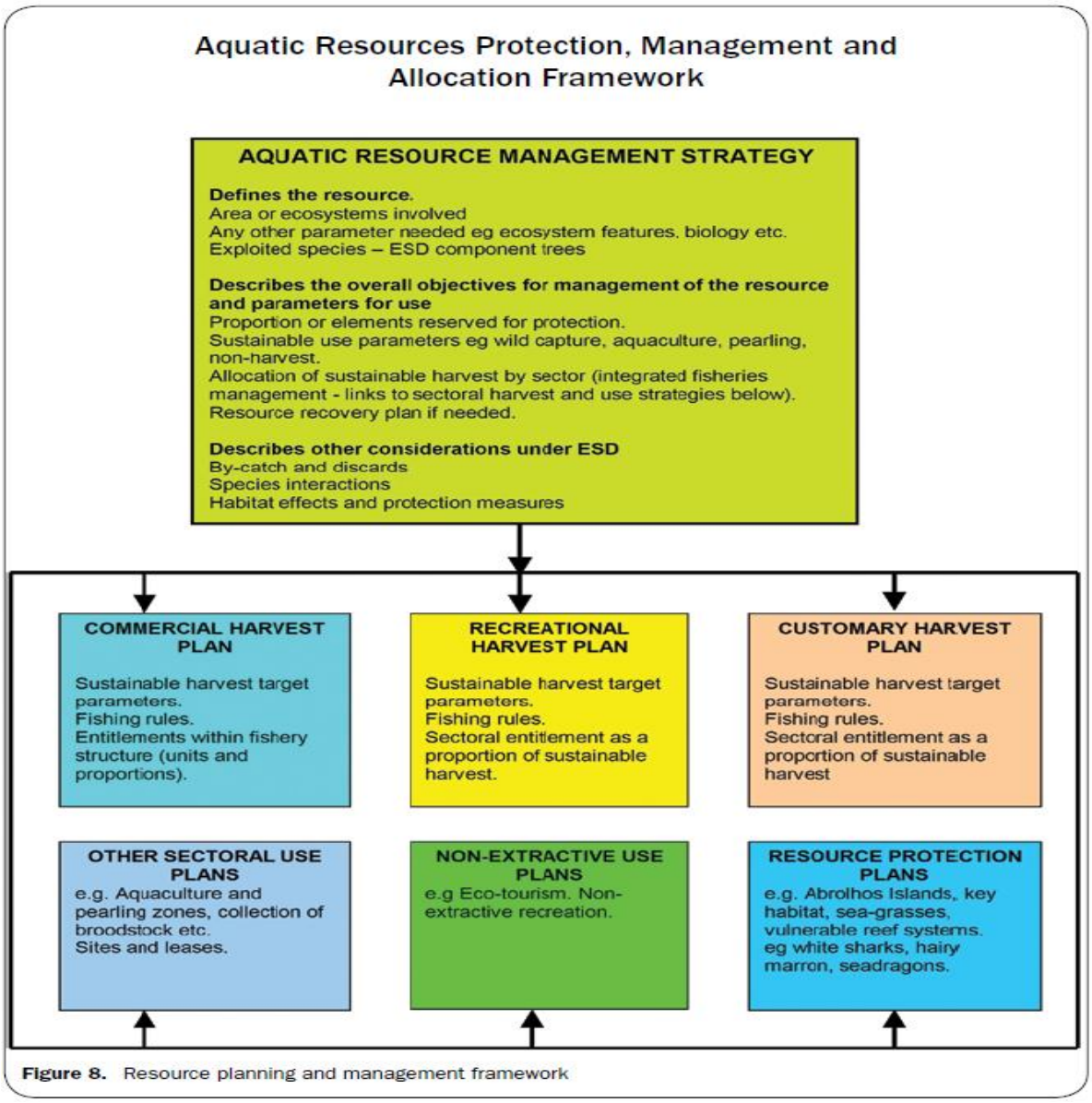
900 Submission 71 from Fishing Industry Women's Association of Western Australia, 31 July 2019, pp 1-2.

901 Submission 68 from Department of Primary Industries and Regional Development, 29 July 2019, p 3.

902 Department of Primary Industries and Regional Development, 23 August 2018. See: http://www.fish.wa.gov.au/Fishing-and-Aquaculture/Aquatic-resources-management-act/Pages/Management.aspx. Viewed 8 April 2020.

903 ibid.

Figure 12. *Aquatic resources protection, management, and allocation framework proposed for new Act to replace the Fish Resources Management Act 1994 and Pearling Act 1990*



[Source: Fisheries Occasional Publication No 79, June 2010, p 19.]

Management of aquaculture

8.68 Part 5 of the ARM Act deals with aquaculture, separately to managed aquatic resources.

8.69 In summary, this Part operates as follows:

- section 68 clarifies the relationship between an aquaculture licence and an aquaculture lease
- section 69 prohibits the undertaking of aquaculture without an authorisation
- sections 72 to 74 relate to the development of aquaculture
- sections 75 to 87 relate to aquaculture licences, including grant, form, effect, duration, renewal, conditions, and transfer
- sections 88 to 96 relate to aquaculture leases, including grant, effect, duration, conditions, and variation.

Management of pearling

8.70 There are 14 licence holders in the pearling industry and the resource is managed using a quota system that sets a maximum number of wild stock pearl oysters that may be taken each year.[904]

8.71 DPIRD advises that:

> Controls take the form of a TAC, which ranges from 500,000 pearl oysters to 1.5 million in a good year. The TAC is divided into individual transferable quotas (ITQs). We review wild stocks each year then set the TAC for each of the three pearl oyster fishing zones.[905]

8.72 There is a distinction between hatchery-bred pearl oysters and wild-stock pearl oysters in terms of value; DPIRD advises that:

> Hatchery-bred pearl oysters are now a major part of pearl production. The value of a hatchery quota unit stays the same but the value of wild stock quota units varies – in some seasons high wild stock levels means higher quotas.[906]

8.73 DPIRD advises that the *Pinctada maxima* pearl oyster resource will be the first aquatic resource to transition to a new management framework under ARM Act when the Act commences.[907]

8.74 DPIRD released a draft ARMS in July 2018.[908] As noted above, the ARM Act requires that an ARMS include certain details about management of an aquatic resource. An example of some of these key points for pearling is as follows.

8.75 Pursuant to section 16(1)(a) of the ARM Act, the draft ARMS describes the aquatic resource to be managed as aquatic organisms of the species *Pinctada maxima*.[909]

8.76 Pursuant to section 16(1)(b) of the ARM Act, the draft ARMS provides that the main objective to be achieved by managing the ecological sustainability of the pearl oyster resource is to optimise the economic return to the WA community including through the production of high quality pearls and associated products.[910]

8.77 Pursuant to section 16(1)(c) the ARM Act, the draft ARMS provides that the minimum quantity of the aquatic resource that is considered necessary:

> To maintain ecological sustainability, the spawning stock (spawning potential) of this resource must be maintained above levels where future recruitment should not be materially affected by the current stock size.[911]

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904 Department of Primary Industries and Regional Development, 25 November 2019. See: https://www.fish.wa.gov.au/Fishing-and-Aquaculture/Pearling/Pearling-Management/Pages/default.aspx. Viewed 8 April 2020.

905 ibid.

906 ibid.

907 Department of Primary Industries and Regional Development, 10 December 2018. See: https://www.fish.wa.gov.au/Fishing-and-Aquaculture/Aquatic-resources-management-act/Pages/default.aspx. Viewed 8 April 2020.

908 Department of Primary Industries and Regional Development, *Aquatic Resources Management Paper No. 1: Draft Aquatic Resource Management Strategy: Pinctada maxima Managed Aquatic Resource*, July 2018.

909 ibid., p 5.

910 ibid.

911 ibid., p 6.

8.78 The draft ARMS notes the integrated nature of pearling. Pursuant to section 16(1)(d) of the ARM Act, the activities that should be regulated in respect of the aquatic resource are:

> Noting the integrated nature of the pearling industry, activities that involve the commercial take of pearl oysters, pearl production and other activities involving the aquaculture and processing of pearl oysters in WA waters should be regulated. Commercial fishing activities will be managed under a commercial ARUP for this resource. All other activities will be managed by the appropriate provisions of the ARM Act, as well as regulations made under the ARM Act and any relevant Administrative Guidelines.[912]

8.79 Pursuant to section 16(1)(f) of the ARM Act, the draft ARMS provides that the quantity of the aquatic resource that is to be available in a fishing period for customary fishing and public benefit uses is 40 000 live pearl oysters.[913]

8.80 Pursuant to section 16(1)(g) of the ARM Act, the draft ARMS provides how the TAC is to be calculated:

> Following on from the consideration of quantities required for resource sustainability, customary fishing and public benefit uses, the Harvest Strategy details the constant exploitation approach whereby the TAC is set in proportion to the overall wild stock abundance.
>
> As detailed in the Harvest Strategy, the spawning stock population estimates and recruitment indices are compared to their reference levels and corresponding control rules to allow the Department to recommend Sustainable Harvest Levels (SHL: a range that the TAC is required to be set within). The recommended overall SHL will include particular SHLs for Zone 1, 2 and 3 of the commercial fishery, as described within the commercial ARUP for this resource. The harvest control rules enable the SHL to be adjusted on a regular basis to provide appropriate protection based on the current stock and recruitment levels. When the stock abundance is predicted to be lower, the SHL is adjusted downward. Similarly, the SHL can be raised in years when the available abundance is predicted to be higher.
>
> The Harvest Strategy is reviewed periodically to ensure that it remains relevant, this review may include changes to the reference levels, control rules and any other relevant information.
>
> SHL are discussed through the process outlined within the Harvest Strategy. The CEO will determine the TAC for each zone of commercial fishery for the fishing period based on the above scientific advice and having regard for any additional advice provided by:
>
> • the Department (including any applicable co-management arrangements);
>
> • any relevant advisory group;
>
> • a recognised peak sector body;
>
> • a resource share holders.[914]

8.81 Pursuant to section 16(1)(j) of the ARM Act, the draft ARMS provides for the number of shares in the resource that are to be available to the commercial sector:

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912 ibid.

913 ibid.

914 Department of Primary Industries and Regional Development, *Draft aquatic resource management strategy: Pinctada maxima managed aquatic resource*, July 2018, pp 7-8.

> The number of resource shares that are to be available to the commercial sector in this resource will be 572.
>
> Resource shares will be available in the relevant zone as defined by the commercial ARUP for this resource. The number of resource shares available in Zone 1 will be 115, Zone 2 will be 457 and Zone 3 will be 0.[915]

8.82 The PPA submits that the pearling industry differs from other commercial fishing ventures in that:

- pearling requires close integration between fishing activities and preliminary culture activities at various stages of the pearl production process, and without integration it is not possible to culture pearls
- the industry has been proven to have a benign impact on the environment.[916]

8.83 The PPA recommends that:

- formal processes should be adopted regarding the setting of water lease fees
- compensation should be paid where priorities are re-ordered by the State
- there should be agreed, clear and transparent processes for allocation and re-allocation of rights.[917]

8.84 As previously stated at paragraphs 7.94 to 7.95, the Pearling Act emphasised the need for pearling to be recognised as an integrated industry and that an adverse impact on any one interdependent activity will adversely affect all other integrated activities, with the total effect being the undermining of investment, infrastructure, jobs, and property.[918]

8.85 The Committee agrees with the position that pearling is an integrated industry and that diminishment of one integrated activity may adversely affect the pearling venture as a whole, and refers to its earlier Finding 37.

Other management methods

8.86 A number of fisheries which are currently managed under the FRM Act will transition to being managed under an ARMS and ARUP, however, not all fisheries will transition in this manner.[919]

8.87 Existing arrangements under the FRM Act will continue once the ARM Act comes into operation, and it will also be possible for existing management plans (created under the FRM Act) to be amended under the ARM Act.[920]

8.88 The ARM Act also allows for rules and licensing arrangements for fishing activities to be introduced without an ARMS or ARUP.[921]

8.89 Further, DPIRD advises that when determining allocation of resource shares, the Minister for Fisheries is required, under section 26 of the ARM Act, to consider the interests of people

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915 ibid., p 8.

916 Submission 65 from Pearl Producers Association, 31 July 2019, p 2.

917 ibid., pp 8, 10, and 11.

918 ibid., p 4.

919 Department of Primary Industries and Regional Development, 23 August 2018. See: http://www.fish.wa.gov.au/Fishing-and-Aquaculture/Aquatic-resources-management-act/Pages/Management.aspx. Viewed 8 April 2020.

920 ibid.

921 ibid.

who have previously taken the resource and any existing rights that people may have before the managed aquatic resource was established.[922]

Determination of Total Allowable Catch

8.90 As discussed at paragraph 7.73 onwards regarding the current legislative scheme, sustainable management of fisheries (and aquatic resources) is related to TAC.

8.91 In the context of the ARM Act, the ongoing right of access in the form of resource shares, the TAC, and annual catch entitlements (which are associated with resource shares) are inter-related. The TAC and the quantity of TAC available for commercial fishing and recreational fishing are calculated in accordance with the ARMS for the resource.[923]

8.92 Section 16(1)(g) of the ARM Act provides that an ARMS must include details of the method to be used in calculating the TAC for the aquatic resource. An example of this in the pearling context has been discussed at paragraphs 8.791 to 8.8072.

8.93 The annual catch entitlement associated with a resource share in the aquatic resource is also calculated in accordance with the ARMS for that resource.[924] The catch entitlement allocated to a resource share for a fishing period is the quantity of TAC divided by the number of resource shares in the resource.[925]

8.94 A holder of a resource share is permitted a catch entitlement of an amount that is equal to the allocated catch for the share.[926]

8.95 The holder of a resource share may request that the CEO register them as the holder of a catch entitlement of an amount equal to the allocated catch for the resource share.[927]

8.96 The Minister for Fisheries advises that in relation to the TAC:

> ARM Act will require that in Managed Aquatic Resources, the CEO must gazette a notice not less than 30 days before the start of a fishing period which sets out the Total Allowable Catch for the resource.[928]

Allocation of entitlements

8.97 Section 26 of the ARM Act deals with the method for allocating resource shares under an ARUP. If the Minister for Fisheries makes an ARUP that sets out a method for allocating resource shares, the Minister must have regard to:

> (a) the interests of persons who have a history of involvement in taking the resource;
>
> (b) the interests of persons who have entitlements to take the resource under this Act immediately before the commencement of the ARUP;
>
> (c) any option granted under section 42(2) in respect of the resource or a component of the resource.[929]

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922 Joanne Kennedy, Manager, Strategic Projects, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 10.

923 *Aquatic Resources Management Act 2016*, s 33(2).

924 ibid.

925 ibid., s 33(3).

926 ibid., s 37.

927 ibid.

928 Hon Peter Tinley MLA, Minister for Fisheries, letter, 6 March 2020, p 9.

929 *Aquatic Resources Management Act 2016*, s 26(1).

8.98 The method for allocating resource shares in an ARUP may include:

(a) allocation based on converting previous entitlement to take the resource to a specified share entitlement; or

(b) allocation based on converting options granted under section 42(2) to a specified share entitlement; or

(c) grant by the CEO on application, including payment of an application fee if applicable, and on the basis of specified criteria; or

(d) sale by public tender or auction.[930]

8.99 If an ARUP provides a method for allocating resource shares other than by sale by public tender or auction, then the ARUP must provide:

(a) that a decision not to allocate a resource share is a reviewable decision for the purposes of sections 146 and 147; and

(b) that a person who is affected by a decision about allocation of a resource share is an affected person for the purposes of those sections.[931]

8.100 Sections 34 to 43 of the ARM Act deal with administrative matters for managed aquatic resources in the context of commercial fishing.

8.101 Other relevant sections of the ARM Act include:

- Section 34, which provides that when an ARUP comes into operation, any available resource shares under that plan vest in the Minister for Fisheries. The Minister must, as soon as is practicable after the ARUP comes into operation, allocate the resource shares in accordance with the method set out in the ARUP. Further, a person to whom resource shares are allocated may request the CEO register them as the holder, and the CEO must register that holder accordingly if the request is made in an approved form and with payment of the associated fee.
- Section 35, which outlines the connection between resource shares and catch entitlements. It provides that subject to section 37, a holder of a resource share at the beginning of a fishing period is entitled to be registered as the holder of the allocated catch for the share for that fishing period. In the property rights context, the section provides that a resource share is transferable as provided by the Act, is capable of devolution by will or by operation of law, and is not 'personal property' for the purposes of the PPSR.
- Section 36, which provides that resource shares may be transferred in accordance with the relevant ARUP or regulations. The CEO must transfer resource shares upon request, unless certain circumstances apply as outlined in section 36(3) of the ARM Act.
- Section 37, which provides that the holder of a resource share may request that the CEO register them as the holder of a catch entitlement of an amount equal to the allocated catch for the share. The CEO must register the applicant as the holder of catch entitlement unless certain circumstances apply as outlined in section 37(5). Further, the

930 *Aquatic Resources Management Act 2016*, s 26(2).

931 *Aquatic Resources Management Act 2016*, s 26(3). Section 146 of the *Aquatic Resources Management Act 2016* requires the CEO to provide written notice to an affected person of a reviewable decision, for example, a decision to refuse to grant an authorization other than an aquaculture licence. Section 147 of the *Aquatic Resources Management Act 2016* provides that an affected person may apply to the State Administrative Tribunal for a review of a reviewable decision.

section provides that a catch entitlement is not 'personal property' for the purposes of the PPSR.

- Section 38, which provides that a person who is registered as a holder of catch entitlement may request the CEO to transfer part or all of the catch entitlement to another person. The CEO must effect the transfer in accordance with the regulations and subject to any conditions set out in the relevant ARUP.
- Sections 39 to 41, which relate to sureties for authorisations in circumstances where the holder of an authorisation to undertake activities regulated under an ARUP is charged with or convicted of an offence under the Act or other aquatic resource-related legislation.
- Section 42, which provides that if an ARUP is revoked, regardless of whether the associated ARMS is also revoked, the resource shares provided for under the ARUP are void, and the registration of any catch entitlement relating to those void shares is cancelled. In these circumstances, the CEO must grant a share option in respect of each resource share under a revoked ARUP to the person who was the holder of the resource share immediately prior to the ARUP's revocation.

8.102 Allocation of entitlements occurs as per an ARMS. The Minister for Fisheries advises that:

> An ARMS must include the main management objective for the resource and the associated proportional allocation of the resource between the recreational and commercial sectors.[932]

8.103 The Minister for Fisheries advises that as the IFAAC is no longer in effect:

> The formal process around allocation decisions is being reviewed as part of the shift to ARM Act. Government is committed to an efficient and transparent process which may include the use of working groups or panels where appropriate.[933]

Register of registrable interests

8.104 The register is dealt with in Part 10 of the ARM Act.

8.105 The CEO must keep a register of registrable interests,[934] which must be available for public inspection.[935] The holder of any of the following may apply to the CEO to have noted on the register that a specified person has a security interest[936] in the registrable interest:

- aquaculture lease
- aquaculture licence
- licence granted under the regulations authorising a person to operate fishing tours
- managed fishery licence
- resource share.[937]

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932 Hon Peter Tinley MLA, Minister for Fisheries, letter, 6 March 2020, p 7.

933 ibid., p 9.

934 *Aquatic Resources Management Act 2016*, s 150.

935 ibid., s 151.

936 'Security interest' is defined in section 3(1) of the *Aquatic Resources Management Act 2016* to mean, in relation to a registrable interest referred to in section 153, an interest in the registrable interest (however arising) which secures payment of a debt or other pecuniary obligation or the performance of any other obligation.

937 *Aquatic Resources Management Act 2016*, s 153.

8.106 The CEO must note a general description of the nature of the security interest, the name and business address of the person who has the security interest, and any other prescribed details.[938]

8.107 The utility of the register is that it provides some protection to persons who have a security interest. The CEO must, as soon as is practicable, provide notice to a security holder if any of the following events occur in respect of the registrable interest:

- the holder of the registrable interest, or their agent, is convicted of a prescribed offence under the ARM Act
- for a managed fishery licence or an aquaculture licence: an application is made to the CEO to vary or transfer an authorisation or of an entitlement under the authorisation, a fishery adjustment scheme under FAS Act is established, the CEO proposes to cancel suspend or not renew the authorisation, or the holder of the authorisation gives notice of intention to surrender the authorisation
- for an aquaculture lease: the lease is varied or transferred, the Minister for Fisheries proposes to terminate the lease, or the holder of the lease gives notice of intention to terminate the lease
- for a resource share: a request is made to the CEO to transfer the share, the holder of the share gives notice of intention to nominate the share as surety for an authorisation, or the Minister for Fisheries proposes to revoke an ARMS or ARUP under which the resource share is held.[939]

Transition from current legislative scheme to new legislative scheme

Introduction

8.108 When Part 17 of the ARM Act is proclaimed, the FRM Act and Pearling Act will be repealed.

8.109 The Committee notes the ARM Act may be amended prior to proclamation subject to passage of the ARM Amendment Bill.

8.110 The ARM Act allows for some transitional arrangements. For example, current management arrangements (Management Plans) and aquatic resource access rights under the FRM Act to remain in place, where they will continue to operate under the ARM Act until they are transitioned into a Managed Aquatic Resource framework which consists of resource shares and catch entitlements under the ARM Act.[940]

8.111 The Minister for Fisheries advises that principles of IFM will continue under the ARM Act:

> [IFM] remains a core element of fisheries and aquatic management in Western Australia. This is underscored by the fact IFM principles are central to the [ARM Act].[941]

8.112 Transitional provisions are dealt with in Part 18 of the ARM Act:

- Division 2 of Part 18 deals with transitional provisions for the FRM Act.

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938 ibid., s 154.

939 ibid., s 156.

940 Hon Dave Kelly MLA, (then) Minister for Fisheries, letter, 26 September 2019, p 2; Department of Primary Industries and Regional Development, *Status reports of the fisheries and aquatic resources of Western Australia 2017/18*, report prepared by Fisheries Science and Resource Assessment and Aquatic Resource Management Branches, Perth Western Australia, 2018, p 1.

941 Hon Peter Tinley MLA, Minister for Fisheries, letter, 6 March 2020, p 1.

- Division 3 of Part 18 deals with transitional provisions for the Pearling Act.

8.113 Consequential amendments to other Acts are dealt with in Part 19 of the ARM Act:

- Division 5 of Part 19 deals with consequential amendments to the FAS Act.
- Division 6 of Part 19 deals with consequential amendments to the FRICMR Act.

8.114 Appendix 13 provides a comparison of the characteristics of access rights under FRM Act Management Plans, ARM Act transitioned Management Plans, and ARM Act Managed Aquatic Resources. These characteristics relate to the proprietary nature of each of these access rights in terms of exclusivity, durability, transferability, and security.

Transitional provisions

8.115 In summary, Division 2 of Part 18 of the ARM Act relating to the FRM Act operates, relevantly, as follows:

- section 271 provides that an 'FRM Act authorisation' means a lease or authorisation issued under the FRM Act
- section 272 provides that an exemption under section 7 of the FRM Act continues in force
- section 273 provides that a Management Plan determined under section 54(1) of the FRM Act that was in effect immediately before commencement continues to have effect for the purposes of the ARM Act until it is amended or revoked by the Minister for Fisheries (following, in most instances, a period of mandatory consultation), or a relevant ARUP takes effect
- section 274 provides that an FRM Act authorisation that was in effect immediately before commencement is taken to be a lease, permit, or authorisation on the same conditions that applied to that instrument under the FRM Act
- section 279 provides that the register of registerable interests continues under the ARM Act with the same information that was included in it under the FRM Act.

8.116 DPIRD advises that:

> All of the existing FRM Act management plans and other management arrangements will transition under ARM Act either through transitional provisions that are already within ARM Act itself or through transitional arrangements that we will be including in the regulations, which will sit under ARM Act.[942]

8.117 In summary, Division 3 of Part 18 of the ARM Act relating to the Pearling Act operates, relevantly, as follows:

- section 285(1) provides that a 'Pearling Act authorisations' means a lease, licence, or permit issued under the Pearling Act. Section 285(2) provides that a Pearling Act authorisation that was in effect immediately before commencement is taken to be a lease or authorisation on the same conditions that applied to that instrument under the Pearling Act
- section 286 relates to Management and Environmental Monitoring Plan requirements for transitioned authorisations.

[942] Joanne Kennedy, Manager, Strategic Projects, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 3.

8.118 DPIRD advises that arrangements under the Pearling Act will not transition to the ARM Act under transitional provisions, and instead an ARMS and associated ARUPs will be created for pearling:

> Arrangements under the [P Act] will not transition to ARM Act so hence we need, prior to full implementation of AMRA, to have moved pearling into an aquatic resource management strategy with an associated aquatic resource use plan. It is basically envisaged that existing arrangements in terms of those who currently have access to pearling under the Pearling Act and the quantum of their access will be transitioned under ARM Act.[943]

8.119 Division 5 of Part 19 of the ARM Act makes consequential amendments to the FAS Act. In addition, section 349 of the ARM Act inserts the following section 6A into the FAS Act in relation to compensation for loss suffered in respect of resource shares:

> **6A. Compensation for loss suffered in respect of resource shares**
>
> (1) A person who holds a resource share in a managed aquatic resource is entitled to fair compensation for any loss suffered by the person as a result of a relevant event.
>
> (2) For the purposes of subsection (1) a person suffers loss if, and only if, the market value of the resource share held by the person is reduced because —
>
> (a) an aquatic resource use plan under which the resource share was allocated is amended so that it no longer applies to an area; and
>
> (b) as a result of the amendment the amount of allocated catch for the resource share for a fishing period after the amendment is made will be less than it would have been if the amendment had not been made.

8.120 Division 6 of Part 19 of the ARM Act makes consequential amendments to the FRICMR Act.

8.121 The WAFIC advised that commercial fishers have concerns about transitioning from the FRM Act and the Pearling Act to the ARM Act:

> People are not going to want to enter into new management arrangements being uncertain whether in that process they will lose valuable rights.[944]

8.122 The WAFIC clarified that these valuable rights are commercial fishers' allocations in a fishery, and that there is a concern that the new management arrangements may disregard longstanding practice in regard to these allocations. Further, WAFIC submitted that there must be certainty with regard to allocation processes as commercial fishers will not want to transition if they hold concerns they will lose a significant part of their business.[945]

8.123 However, WAFIC submitted that this issue could be addressed:

> If the policy is very clear, if it is expressed in a contemporary document—in other words, brought up to date by government—and the rules around that process are very clear to everybody, then there is a lot less anxiety. If those things are not yet that clear, that increases a high level of anxiety, which is a pity, because that act is there because we can improve fisheries management of people—transition to it—

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943 ibid.

944 George Kailis, Professor Management and Law, Notre Dame University, and Chair of Western Australian Fishing Industry Council Legislation and Policy Subcommittee, transcript of evidence, 28 October 2019, p 5.

945 ibid., p 6.

> but they will not wish to transition to it if they are worried about losing a significant part of their business.[946]

8.124 The Committee is of the view that transition to new management arrangements should not be used as a pretext for adversely affecting commercial fishers' existing rights and entitlements and agrees with WAFIC that:

> Moves to new management arrangements should not be used as a pretext for reallocation. Conflating improvements in management with re-allocations to the benefit of only some users will inevitably lead to confusion and conflict. Such actions undermine the credibility of the State as a fishery manager and dilute the benefits Western Australia receives from good quality Rights Based Management.[947]

8.125 DPIRD advises that potential changes to rights may occur only when an ARMS and an ARUP are developed for an aquatic resource, where:

> There is a need under the [ARMS] for government to determine the main objective from managing the resource and in association with that, the proportion of the resource that will be allocated to commercial and recreational fishers, as well as allowing for uses such as customary fishing and public benefit uses.[948]

8.126 However, DPIRD advises that this may be addressed through consultation which is required to occur:

> The ARMS itself is required to have a statutory consultation period of two months, which allows all relevant stakeholders to provide input into the process. The ARMS then specifies the statutory consultation process that will apply to the [ARUPs] which sit under it. Once the ARMS is in place, in order to effectively operationalise that ARMS, there will need to then be consultation on the [ARUPs] prior to them coming into place. The [ARUPs] are subsidiary legislation so the usual processes of tabling those before Parliament and disallowance then applies. There is quite a rigorous process to go through in terms of actually considering how the resource is allocated both between sectors and within sectors that is associated with that transition.[949]

8.127 The Committee notes the following relevant provisions of the ARM Act with regard to consultation on an ARMS:

- section 17 provides that a draft ARMS must be published and invite submissions on it to the CEO
- section 18 provides that the CEO must consult on the draft ARMS
- section 19 provides that the CEO must consider those submissions, and may revise the draft ARMS.

8.128 Further, the Committee notes that under section 24 of the ARM Act, the Minister is not to make an ARUP unless consultation has been carried out, and in the opinion of the Minister, the ARUP is consistent with:

- the ARMS for the aquatic resource

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946 ibid.

947 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, p 6.

948 Joanne Kennedy, Manager, Strategic Projects, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 4.

949 ibid.

- all other ARUPs made for the aquatic resource
- regulations made in relation to the ARMS for the resource.

8.129 DPIRD acknowledges that there may be value in developing a document that provides some guiding principles around how matters such as allocation may occur, however, notes that part of moving to an ARMS is a requirement for government to determine the main objective for managing the aquatic resource. This occurs through development of an ARMS from which allocation decisions will flow.[950]

8.130 DRIRD advises that there is no power under the ARM Act to establish *new* Management Plans similar to those under the FRM Act. *Existing* Management Plans (under the FRM Act) may be amended under the ARM Act.[951]

8.131 WAFIC recommends that allocation processes have integrity and that these should be kept separate from processes regarding reallocation where Management Plans are created under the new ARM Act processes.[952]

8.132 WAFIC recommends:

- until existing policies have been more formally incorporated into the ARM Act, fishers should only be transitioned from existing management plans to management plans and arrangements to new arrangements under the ARM Act where the affected fishers agree that this should occur
- allocation processes be separated from reallocation processes. [953]

8.133 The Fishing Industry Women's Association of WA suggested section 16 of the ARM Act be amended to:

- require the Minister for Fisheries, when setting out an ARMS or ARUP, to grant the same fishing rights and sector allocations for each fishery that was a managed fishery under the FRM Act as was provided by the FRM Act, regulations, or as set out in IFM
- stipulate that once in force, an ARMS shall remain in force.[954]

8.134 The Committee is of the view that the ARM Act includes sufficient statutory consultation provisions at numerous stages through development of an ARMS and an ARUP, and should address the preceding concerns.

Proposed amendments to the *Aquatic Resources Management Act 2016* and delay in commencement

8.135 DPIRD advises that commencement of the entirety of the ARM Act has been delayed because there is an error in the drafting of the Act which would lead to problems in proper implementation. The drafting has led to doubt around DPIRD's capacity to allocate access according to zones or specific species under management. Such management tools are currently available under the existing legislation.[955]

8.136 Further, DPIRD advises that there are two other issues with the ARM Act which require amendment:

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950 ibid.

951 ibid.

952 Submission 55 from Western Australian Fishing Industry Council, 31 July 2019, p 6.

953 ibid., p 7.

954 Submission 71 from Fishing Industry Women's Association of Western Australia, 31 July 2019, p 2.

955 Ralph Addis, Director General, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, p 2.

- flexibility around the way 'aquatic resources' are defined, which will lead to more efficient management
- removing a requirement for decisions to grant, transfer, or vary an aquaculture licence to be advertised.[956]

8.137 The Committee notes that, as at the date of drafting, the ARM Amendment Bill has been passed by the Legislative Assembly and is currently before the Legislative Council.

Conclusion

8.138 The transition from the current legislative scheme under the FRM Act and the Pearling Act to the ARM Act will not change the position with respect to the nature of commercial fishing rights; that is, these rights will continue to be a right of access to the resource. Fish and aquatic resources in tidal waters will remain a community resource, not owned by any person until lawfully caught. These resources are managed for the benefit of the WA community and sustainability will remain a paramount consideration. The new legislative scheme will lead to increased security of commercial fishing access rights backed by compensation availability in certain circumstances.

Hon Adele Farina MLC
Chair

[956] Joanne Kennedy, Manager, Strategic Projects, Department of Primary Industries and Regional Development, transcript of evidence, 17 February 2020, pp 2-3.

APPENDIX 1

SUBMISSIONS RECEIVED AND PUBLIC HEARINGS HELD

Submissions received

Number	From
1	Shire of Chapman Valley
2	Lawrie Bugeja
3	Lee Pritchard
4	Neville Hills
5	Ivan Yujnovich
6	WAFarmers
7	Terrence Ealing
8	Mark Wells
9	Shire of Gingin
10	WA Land Compensation
11	Murray Nixon
12	Bryon and Kay Micke
13	Western Rock Lobster Council
14	Gil Waller
15	Private citizen
16	Law Society of Western Australia
17	Private citizen
18	Steve Milton
19	REIWA
20	Dr Garry Middle
21	Tebco Fishing Company
22	Margaret and Hubert de Haer
23	Wayne Gowland
24	Commercial Egg Producers Association (WA)
25	S Mead

Number	From
26	West Coast Abalone Divers Association
27	Lan Cheng Ng
28	Rabobank
29	Bernie Masters
30	Raymond Yukich
31	Arthur and Linda Williams
32	WA Property Rights Association
33	Western Australian Water Users Coalition
34	Robert White
35A	Combined Zone C Association
35B	Steve Chamarette
36	Sam Winter
37	John Horwood
38	Geraldton Fishermen's Co-operative
39	Leschenault Fisheries
40	Peter Ingall
41	Andy Murphy
42	David Gooch
43	Joondalup Urban Development Association
44	John Horsley
45	Jenny Le-Fevre
46	Melwyn Vaz
47	Lorraine Finlay
48	Peter Swift
49	Patricia West
50	City of Wanneroo
51	Mark Bombara

Number	From
52	Alan, Peta and Shane Miles
53	Australian Institute of Conveyancers
54	Department of Fire and Emergency Services
55	WA Fishing Industry Council
56	Fishing Families WA
57	Seafood Industry Australia
58	Taryn Miller
59	Don Robertson
60	Hon Rick Mazza MLC
61	Pastoralists and Graziers Association of Western Australia
62	Roger King
63	Department of Mines, Industry Regulation and Safety
64	Water Corporation
65	Pearl Producers Association
66	Department of Biodiversity, Conservation and Attractions
67	Susan Down and Francis Trichet
68	Department of Primary Industries and Regional Development
69	Landgate
70	Western Power
71	Fishing Industry Women's Association of Western Australia
72	Recfishwest
73A	Murray Delta Residents and Ratepayers Association
73B	Glen McLeod Legal
74	Trevor and Lawrence Prestage
75	Gail and David Guthrie
76	Mark Ainsworth

Number	From
77	Private citizen
78	Sandra Dennett on behalf of Vincenzo and Isoletta Caruso and family
79	Ray and Ann Forma
80	Michael Dighton
81	Beryl Crane
82	Shire of Serpentine Jarrahdale
83	Kenneth John O'Dea
84	Department of Planning, Lands and Heritage
85	Dr Rupert Johnson

Public hearings held

Date	Participants
16 October 2019	Ivan Yujnovich Robert White Susan Downs Francis Trichet Joondalup Urban Development Association Suzanne Thompson, Vice President Murray Delta Residents and Ratepayers' Association Lindsay Webb, Vice Chairman
21 October 2019	Pastoralists and Graziers Association of Western Australia Gary Peacock, Chairman Private Property Rights and Natural Resource Management Committee Doug Hall, Policy Officer, Private Property Rights and Natural Resource Management Committee
	Shire of Gingin Wayne Fewster, Councillor Aaron Cook, Chief Executive Officer Gingin Private Property Rights Group Murray Nixon, President Bryon Micke Kay Micke Peter Swift
28 October 2019	Western Rock Lobster Council Matt Taylor, Chief Executive Officer Dr Peter Rogers, Consultant Notre Dame University Professor George Kailis, Professor Management and Law WA Fishing Industry Council Dr Ron Edwards, Chairman Guy Leyland, MSC Industry Project Leader Pearl Producers Association Aaron Irving, Executive Officer West Coast Abalone Divers John Brindle, President Dr Peter Rogers, Consultant John Horwood

Date	Participants
30 October 2019	Western Australian Water Users Coalition Rosslyn Knowling, Chairperson David Wren, Secretary Alan Blakers, Committee Member
	Wayne Gowland
18 November 2019	Glen McLeod Legal Glen McLeod, Principal
	Cornerstone Legal Timothy Houweling, Director
17 February 2020	Department of Primary Industries and Regional Development Ralph Addis, Director General Heather Brayford, Deputy Director General – Sustainability and Biosecurity Joanne Kennedy, Manager Strategic Projects Angela Howie, Acting Principal Legal Officer
	Department of Water and Environmental Regulation Mike Rowe, Director General Sarah McEvoy, Executive Director, Strategic Policy Kelly Faulkner, Executive Director, Regulatory Services Jason Moynihan, Acting Executive Director Regional Delivery
	Department of Planning, Lands and Heritage Gail McGowan, Director General Timothy Hillyard, Chief Property Officer Alison Gibson, Executive Director Sze-Hwei Yen Western Australian Planning Commission David Caddy, Chairman
19 February 2020	Landgate Graeme Gammie, Chief Executive Susan Dukes, Commissioner of Titles Jean Villani, Registrar of Titles Roberto Hofmann, Account Manager, Natural Resource Management and Critical Infrastructure

Date	Participants
20 May 2020	Department of Water and Environmental Regulation Mike Rowe, Director General Kelly Faulkner, Executive Director, Regulatory Services Sarah McEvoy, Executive Director, Strategic Policy Jason Moynihan, Acting Executive Director, Regional Delivery Ben Drew, Acting Director, Water and Ecosystem Planning
	WA Planning Commission David Caddy, Chairman Department of Planning, Lands and Heritage Tim Hillyard, Chief Property Officer
	Department of Biodiversity, Conservation and Attractions Mark Webb, Director General Peter Sharp, Executive Director – Parks and Visitor Services Dr Margaret Byrne, Executive Director - Biodiversity and Conservation Science Gretta Lee, General Legal Counsel Ruth Harvey, Manager Species and Communities Environmental Protection Authority Dr Tom Hatton, Chairman
19 August 2020	Department of Water and Environmental Regulation Mike Rowe, Director General Kelly Faulkner, Executive Director, Regulatory Services Sarah McEvoy, Executive Director, Strategic Policy Stuart Cowie, Executive Director, Compliance and Enforcement Adam Maskew, South West Regional Manager

APPENDIX 2

THE IMPACT OF STATE GOVERNMENT ACTIONS AND PROCESSES ON THE USE AND ENJOYMENT OF FREEHOLD AND LEASHOLD LAND IN WESTERN AUSTRALIA

Overriding principles from WA Government response

The Government agrees with the general thrust of the report and will consider developing and/or adopting policy to give effect to these overriding principles.

- **Principle 1:** The *Land Administration Act 1997* (LA Act) is the principal legislation for compulsory acquisition or taking of interests in land in WA. The Government does not believe that separate stand-alone legislation is required. The ability to voluntarily acquire land is considered a valid method of enabling the Government to plan for the long-term future needs of the State and to consolidate land requirements for public works on a non-urgent or not immediately required basis, without recourse to the full heads of claim or compensation that would apply to a "just in time" or immediate or urgent compulsory acquisition.
- **Principle 2:** The Government considers that due to the complexity and possible impacts on the economic, social and environmental development of the State, a "one size fits all" approach is not appropriate and that the ability for individual agencies with enabling powers to acquire land be maintained but the processes of the LA Act in terms of "taking and compensation" be applied to the greatest possible extent.
- **Principle 3:** Where multiple land requirements exist by public authorities, these should be acquired at the same time with one department, agency or body responsible for the action. In the absence of a particular department, agency or body having specific taking power, acquisition is to be undertaken via the Department for Planning and Infrastructure. The Department for Planning and Infrastructure is the designated central government agency responsible for the acquisition of private interests in land and shall undertake this activity as a service on behalf of Government departments, agencies and bodies as required (excluding independent statutory authorities).
- **Principle 4:** Landowners whose land has been affected by reservations should have an entitlement to financial assistance for valuation and legal advice. Additionally when owner/occupiers, where the land is their principle place of residence, have a measure of uncertainty imposed upon them provision should be made for a premium to be paid on top of fair market value if they decide to enter into a voluntary sale with Government.
- **Principle 5:** A Code of Conduct and a Procedure Manual will be prepared for adoption across government in respect of the use of chemicals on government and privately owned land holdings. The Procedure Manual is to include consultation and notification requirements that specify the chemicals to be used.
- **Principle 6:** The responses to the recommendations of the Report are not intended to apply where the Government is purchasing land in the open market place or the land is not affected by a reservation under planning legislation or a planning instrument.[957]

[957] Government of Western Australia, *Response pf the Western Australian Government to the Western Australian Legislative Council Standing Committee on Public Administration and Finance in relation to the Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia,* Perth, July 2004, p 2.

Table 6. *Recommendations, initial government response and current status*

Update on status of recommendations
Recommendation 1 The Committee recommends that a brief, plain English, information sheet be developed by the Department of Land Information which summarises the main aspects of land law in Western Australia and explains the rights and obligations of freehold and leasehold landowners. Such a publication should be made available to the public free of charge. **Initial Government response** The Government supports the recommendation. The Government will ask the Department of Land Information (DLI) to prepare a brief "plain English" information sheet that summarises the main aspects of land law in Western Australia and explains the rights and obligations of freehold and leasehold landowners. The Government also supports the preparation by the DLI of a comprehensive "plain English" document explaining the rights and obligations of freehold and leasehold landowners in relation to voluntary negotiations, compulsory acquisitions and compensation procedures. It is envisaged that such document(s) would be supported by detailed technical documents that include the following, and allow interested parties the choice of a simple general understanding to a detailed technical level including some reference to legislation and case law. • an overview • frequently asked questions • an explanation of the compensation processes • a more detailed technical report including external links to case law. The document(s) would be produced in consultation with the legal, property and valuation sectors to ensure a broad consensus. The information would be provided to all landowners at the commencement of voluntary negotiations or compulsory acquisitions. Also supported by the Water Corporation. **2019 update from Minister for Lands (Landgate)** The Government supported the recommendation and Landgate supports the recommendation. Several "how to" brochures incorporating plain English explanations of the rights and obligations of freehold and leasehold landowners were produced. The various Land Titles Registration Practice Manuals also include plain English explanations of freehold and leaseholder ownership. Landgate provides this information free of charge online via its corporate website www.landgate.wa.gov.au. In addition, there are now a number of helpful "Land Transactions toolkits" online including: "The Land Titles Registration policy and procedure Guides"; Strata Titles Policy and Procedure Guides; "Land transactions forms and fees"; Land transactions reference guides. Customer Self Service videos can be watched online through Landgate's website free of charge.
Recommendation 2 The Committee recommends that the DLI liaise with relevant stakeholders and industry bodies to facilitate the distribution of a plain English information sheet on land law in Western Australia, as recommended in Recommendation 1, from the offices of local governments, real estate agents and settlement agents, and to incorporate the information sheet's contents within relevant standard conveyancing forms. **Initial Government response**

Update on status of recommendations

The Government supports the recommendation.

The document(s) (with requisite disclaimers) would be made widely available to all landowners free of cost through appropriate government departments, agencies and bodies and would include distribution through local authorities, real estate agents and settlement agents.

The document(s) would also be available initially on the DLI's website and ultimately on the proposed land information platform when operational.

Also supported by the Water Corporation.

2019 update from Minister for Lands (Landgate)

The Government supported the recommendation and Landgate supports the recommendation. The "Land Transactions toolkits" including: "The Land Titles Registration policy and procedure Guides"; Strata Titles Policy and Procedure Guides; "Land transactions forms and fees"; Land transactions reference guides and Customer Self Service videos are available online through Landgate's website free of charge.

These guides are not available on the Shared Location Information Platform (SLIP) as they are not relevant to the operation of the SLIP and it is more appropriate to disseminate this information through the Landgate website. External agencies are free to link to these guides and information through their own websites.

Recommendation 3

The Committee recommends the enactment of a single Act dealing with all aspects of the compulsory acquisition of land in Western Australia.

Initial Government response

The Government endorses the intent of the recommendation.

The LA Act is the single and principle Act under which land is compulsorily acquired in the State of Western Australia. (see overriding Principle One).

Separate enabling legislation that applies to Statutory Authorities and specialist agencies should continue to principally stand-alone and interact with the LA Act when applicable.

Also supported by the Water Corporation.

2019 update from Minister for Lands (DPLH)

The Government endorses the intent of the recommendation. The LA Act is the single and principal Act under which land is compulsorily acquired in the State of Western Australia. Separate enabling legislation that applies to Statutory Authorities and specialist agencies interacts with the LA Act when applicable. The ability to acquire land is considered to be a valid and cost-effective method of enabling Government to plan for the long-term future needs of the State by consolidating land requirements for public works on a non-urgent or not immediately required basis.

The Government does not believe that separate stand-alone legislation is required and this position is supported by the findings of the Law Reform Commission's Compensation for Injurious Affection: Final Report, undertaken in response to Recommendation 12 of the Standing Committee on Public Administration and Finance's report and published in July 2008. The Law Reform Commission stated that "the better means of ensuring continuity, consistency and balance in Western Australia is to ensure that all statutes requiring the acquisition of land apply the provisions of the LA Act".

Update on status of recommendations

It should be noted that compensation under the *Planning and Development Act 2005* (PD Act) does not equate to compulsory acquisition. It is compensation for the interim loss of the use of land by a landowner. Where compensation under the planning system is provided that compensation is then taken into account, when the land is voluntarily purchased or compulsorily acquired. Similarly, where a person's land is reserved in a planning context and they are entitled to compensation but do not claim it, that person would receive the full amount of compensation when the land is eventually voluntary purchased or compulsorily acquired. Under both scenarios there is no double-dipping of compensation.

Recommendation 4

The Committee recommends that where multiple agencies are involved in the compulsory acquisition of land for significant major public works projects, that a lead agency be appointed to carry out all of the acquisitions.

Initial Government response

The Government supports the recommendation.

The Department for Planning and Infrastructure is the most suitable lead agency to carry out all compulsory acquisitions where multiple agencies are involved. The recommendation is contained within overriding Principle Three.

Where a Statutory Authority or specialist agency is clearly dominant in a multiple agency compulsory acquisition, that authority can be delegated as the lead agency by agreement.

Also supported by the Water Corporation.

2019 update from Minister for Lands (DPLH)

The Government supports the recommendation. Major projects in Western Australia are assigned to one of five lead agencies that work with project proponents to manage all government interactions and statutory approvals. This helps improve efficiency and reduce the time taken to deliver projects while fully considering the public interest. Where multiple land requirements exist, these are acquired at the same time with one agency responsible for the action. In the absence of that particular agency having specific land acquisition power, acquisition is undertaken by the Department of Planning, Lands and Heritage (DPLH).

DPLH is the most suitable agency to carry out all compulsory acquisitions, where multiple agencies are involved. However, where a Statutory Authority or specialist agency is clearly dominant in a multiple agency compulsory acquisition, that authority can be delegated as the lead agency by agreement.

2019 update from the Water Corporation

The Corporation acknowledges that in certain circumstances a joint approach to land acquisition would be appropriate but would reserve the right to deal on all land acquisitions/requirements independently as appropriate.

Recommendation 5

The Committee recommends that all land acquiring State Government departments, agencies and bodies appoint a field officer for each specific land acquisition project and ensure that that field officer remains the primary point of contact for the department, agency or body with each affected landholder for the duration of the project.

Initial Government response

The Government supports the principle of a designated officer as the primary point of contact in each government land acquisition.

Update on status of recommendations
Also supported by the Water Corporation. **2019 update from Minister for Lands (DPLH)** The Government **supports** the principle of a designated primary point of contact in each government land acquisition. When Government embarks on the compulsory acquisition of land, there is a position designated to be the principal and ongoing point of contact for landowners. **2019 update from the Water Corporation** The Corporation's current practice is to appoint directly to each land acquisition a suitably experienced property officer to manage the acquisition process.
Recommendation 6 The Committee recommends that, wherever practical, State Government departments, agencies and bodies use existing easements and service corridors for their infrastructure projects. **Initial Government response** The Government supports the principle of using where possible existing infrastructure corridors, public land generally and existing easements to co-locate new infrastructure. However, it notes that there may be issues of unacceptable societal risk in co-locating some infrastructure elements. Also supported by the Water Corporation. **2019 update from Minister for Lands (DPLH)** The Government supports the principle of using existing infrastructure corridors, public land generally and existing easements to co-locate new infrastructure where possible. DPLH regularly advises agencies to consider using existing infrastructure corridors, public land and existing easements to co-locate new infrastructure. However, it should be noted that the co-location of certain infrastructure elements may pose an unacceptable risk to the general public and/or the infrastructure itself and is not feasible in every instance. **2019 update from Minister for Energy** The Government at the time expressed support for the principle of using existing infrastructure corridors, public land generally and existing easements to co-locate new infrastructure where possible. However, it also noted that there may be issues of unacceptable societal risk in co-locating some infrastructure elements. Western Power endeavours to use existing easements and service corridors, wherever practical. Western Power also endeavours, wherever available and practical, to locate its infrastructure in road reserves using standard alignments in accordance with the Utility Providers Code of Practice (link provided in correspondence). From an energy portfolio perspective this position remains unchanged, noting that transmission infrastructure generally has a minimal impact on land use. **2019 update from the Water Corporation** The Corporation installs infrastructure within its existing easements wherever possible or practical, allowing for construction constraints, landowner consent, operational requirements and constraints, and outlined permitted use within the easement conditions. **2019 update from Western Power** Western Power endeavours to use existing easements and service corridors, wherever practical. Western Power also endeavours, wherever available and practical, to locate its infrastructure in road reserves using standard alignments in accordance with the Utility Providers Code of Practice.

Update on status of recommendations

Recommendation 7

The Committee recommends that Western Power Corporation notify landholders of the intended use of chemicals on electricity transmission line poles on landholders' property. Such notice should:

- be in writing and sent to the landholder
- specify the chemicals to be used
- be provided well in advance of the intended treatment date.

Initial Government response

The Government supports the recommendation.

The Government proposes to develop a code of conduct and procedure manual to be adopted by all government departments, agencies and bodies proposing to use chemicals or any product potentially harmful to humans, livestock or land in terms of notice of intended entry to private land, the activity to be undertaken and details of the chemicals or products to be utilised and for what purpose. (see overriding Principle Five).

Note statutory rights of entry and mining at Recommendation 23.

2019 update from Minister for Energy

The Government at the time expressed support for this recommendation and advised of the intention to develop a code of conduct and procedure manual to be adopted by all government departments, agencies and bodies proposing to use chemicals or any product potentially harmful to humans, livestock or land, in terms of notice of intended entry to private land, the activity to be undertaken and details of the chemicals or products to be utilised and for what purpose.

Western Power acts to ensure that its use of chemicals complies with specific requirements of the Department of Health, the Department of Agriculture and Food, the Department of Water and Environmental Regulation and Worksafe. Western Power complies with all written laws in relation to this process and maintains a register of chemically sensitive properties, using only acceptable substances on such properties.

Energy Policy WA will consult with other relevant State Government agencies to ascertain a whole-of-Government position on this matter.

2019 update from Western Power

The use of chemicals complies with the specific requirement of the Department of Health, the Department of Agriculture and Food, the Department of Water and Environmental Regulation and Worksafe. Western Power complies with written laws in relation to this process and also maintains a register of chemically sensitive properties and only uses acceptable substances on such properties.

Recommendation 8

The Committee recommends that Western Power Corporation arrange, at the request of any landholder and at the expense of Western Power Corporation, for the independent testing of both electricity transmission poles treated with chemicals and any livestock that may have come into contact with such poles.

Initial Government response

The Government supports the recommendation in principle.

Update on status of recommendations

Western Power Corporation currently complies with all written laws and maintains a register of chemical free properties and only uses acceptable substances on such properties. Testing on demand is considered unreasonable.

The current process involves the Department of Agriculture, who determines when testing is appropriate and Western Power Corporation remains prepared to carry out whatever testing is required by the Department of Agriculture. (See also overriding Principle Five).

2019 update from Minister for Energy

The Government at the time expressed in principle support for this recommendation, noting that the then Western Power Corporation complied with all written laws and maintained a register of chemical free properties, using only acceptable substances on such properties. Testing on demand was considered as being unreasonable.

From an energy portfolio perspective this position remains unchanged.

Western Power currently arranges tests for chemicals if there is:

- pollution (spills)
- reason to believe there is contamination
- a reporting requirement under the *Environmental Protection Act 1986* (EP Act); or
- a reporting requirement under the *Contaminated Sites Act 2003*.

No livestock testing is conducted.

2019 update from Western Power

Western Power tests for chemicals if there is:

- pollution (spills)
- reason to believe there is contamination
- a reporting requirement under the EP Act
- a reporting requirement under the *Contaminated Sites Act 2003*.

No livestock is tested.

Recommendation 9

The Committee recommends that the details of all significant communications between Western Power Corporation field officers and landholders be confirmed in writing to the landholder, and that all other communication be confirmed in writing when requested by the landholder.

Initial Government response

The Government supports the recommendation.

This is the general practice of the Western Power Corporation and the current approach is considered adequate. The terms "significant communication" and who would determine that requires clarification.

Western Power Corporation will be required to develop a communication policy for property related dealings with private landowners.

2019 update from Minister for Energy

The Government at the time expressed support for the recommendation, noting that the approach proposed was consistent with the then general practice of the Western Power Corporation. From an energy portfolio perspective this position remains unchanged.

Update on status of recommendations

Western Power currently provides a Notice of Entry each time one of its representatives enters land, except in situations where such entry is:

- for a purpose that Western Power has previously provided a Notice of Entry
- in an emergency situation
- in accordance with specific land entry rights contained in a written legal agreement
- to perform minor or routine maintenance or extension works to Western Power s distribution network located on a street under the control of a local or other statutory authority and where the street is unaffected
- on land that is owned by Western Power or similar
- under statutory rights to enter without notice (e.g. to read the meter).

Western Power provides a written Notice of Entry even in situations where the land owner/occupier verbally agrees or consents to the corporation entering the land. A Notice of Entry can be provided to the landowner and/or the land occupier, with a common-sense approach adopted to determine who the Notice of Entry should be provided to (i.e. the party most affected by the land entry).

2019 update from Western Power

A Notice of Entry is required each time Western Power enters land, except in situations where Western Power enters land:

- for a purpose that Western Power has previously provided a Notice of Entry
- in an emergency situation
- in accordance with specific land entry rights contained in a written legal agreement
- to perform minor or routine maintenance or extension works to Western Power's distribution network located on a street under the control of a local or other statutory authority and where the street in unaffected
- that is owned by Western Power or similar
- under statutory rights to enter without notice (e.g. to read the meter).

Western Power provides a written Notice of Entry even in situations where the land owner/occupier verbally agrees or consents to Western Power entering the land. A Notice of Entry can be provided to the land owner and/or the land occupier, with a common-sense approached adopted to determine who the Notice of Entry should be provided to (i.e. the party most affected by the land entry).

Recommendation 10

The Committee recommends that an appropriate method and level of compensation should be established by legislation for those landholders whose land is subject to an electricity transmission line easement. To achieve that end, the Committee recommends that one of the following two positions be implemented by the State Government:

(a) Section 45(2) of the *Energy Operators (Powers) Act 1979* (EOP Act) be repealed;

and

(b) The LA Act be amended to expressly to provide for compensation to a landholder for injurious affection to the landholder's land arising from the acquisition by a State Government department, agency or body of any interest in that landholder's land. The calculation of injurious affection should also take into account the value of the land covered by the easement.

Update on status of recommendations

Or

Both the EOP Act and the LA Act be amended to provide that the compensation to be paid to a landholder for the acquisition by Western Power Corporation of an electricity transmission line easement must include a component for land value that is equivalent to one hundred per cent of the land value of the land covered by the easement.

Initial Government response

The Government does not support the recommendation.

The current legislative environment is considered to set an effective and appropriate approach in balancing between the public interest in improved electricity supply and the private interests of landowners affected by powerlines.

The Committee's recommendation could potentially have significant financial implications for the State, and should not be considered without a thorough investigation of the public benefits and costs.

It may be that the additional costs imposed from the proposed level of compensation may render the planned implementation of electricity infrastructure to be considered uneconomic thus denying potential users access to supply. Community needs for secure electricity supply need to be balanced in consideration of the proposed legislative changes.

The Minister for Energy has pointed out on previous occasions that additional levels of compensation to private landowners would need to be accounted for through increased tariffs paid by electricity consumers.

Initial response from the Water Corporation

- Currently, section 241(7) of the LA Act only allows for compensation for reduction in value of remaining, adjoining land where a freehold interest is acquired (as opposed to a lesser interest such as an easement).
- The Committee notes the unique nature of an electricity line easement. Accordingly, this recommendation is predominantly aimed at dealing with the injurious affection (i.e. reduction in value) to remaining land resulting from a situation where Western Power takes an easement for the construction of an electricity transmission line.

Two options are proposed. If the second option is adopted, this would have little significance for the Water Corporation as it specifically relates to electricity easements.

If the first option is adopted, an impact on the Water Corporation will be felt whereby the Corporation takes an easement over land. Compensation for reduction in value to remaining land would be payable.

2019 update from Minister for Lands (DPLH)

The Government **does not support** the recommendation. The current legislative environment is considered to set an effective and appropriate approach in balancing the public interest in being able to access an efficient and cost-effective electricity supply with the private interests of landowners affected by powerlines. Western Power is obliged under the EOP Act to acquire land or an interest in land, typically an easement, whenever it is operating network infrastructure at or above 200kV. For all other network infrastructure operating below 200kV, Western Power is not obliged to acquire land or an interest in land, however they may choose to for operational reasons.

As at 2015–16, there were some 67 000 km of overhead powerlines in Western Australia. Any consideration of legislative change as recommended by the Committee could have significant

Update on status of recommendations
financial implications for the State and it may be that additional costs imposed from the compensation required by the proposed change would increase the cost of new electricity infrastructure, which would almost certainly be passed onto consumers. In some areas of the State, it may render the installation of electricity infrastructure uneconomic and prevent potential users from accessing an essential service. **2019 update from Minister for Energy** The Government at the time indicated that it did not support the recommendation on the basis that the legislative environment was considered to set an effective and appropriate approach in balancing between the public interest in improved electricity supply and the private interests of landowners affected by powerlines. It also noted that the recommendation could potentially have significant financial implications for the State and should not be considered without a thorough investigation of the public benefits and costs. From an energy portfolio perspective this position remains unchanged. Western Power's current practices for these purposes are aligned with those of other government agencies, with the use of an independent accredited valuer to calculate a valuation in accordance with industry standards and all relevant legislation. **2019 update from Western Power** Western Power is aligned with all other government agencies by getting an independent accredited valuer to calculate a valuation in accordance with industry standards and all relevant legislation.
Recommendation 11 The Committee recommends that the EOP Act be amended to require that Western Power Corporation shall obtain an easement for all electricity transmission lines constructed on freehold land. **Initial Government response** The Government does not support the recommendation. Western Power Corporation's current policy is to offer to acquire an easement for all new transmission lines below 200kV (66 and 132kV) voluntarily, at the determination of each landowner. Implementation of the recommendation would not necessarily require amendment to the Act. Western Power Corporation have advised that cost considerations would need to be taken account of and if amendments were enacted and legislated would need to apply retrospectively to pre-existing transmission lines over which no easements have been taken. Western Power Corporation has indicated that the government would need to seriously analyse the cost implications before proceeding with any amendment of this kind as part of its considerations. **2019 update from Minister for Energy** The Government at the time indicated that it did not support the recommendation, noting the policy of the then Western Power Corporation to offer to acquire an easement for all new transmission lines below 200kV voluntarily (66 and 132kV transmission lines), at the determination of each landowner. It also noted that cost considerations would need to be taken account of, and if amendments were enacted and legislated, would need to apply retrospectively to pre-existing transmission lines over which no easements have been taken. From an energy portfolio perspective this position remains unchanged.

Update on status of recommendations

Western Power currently complies with relevant legislation, that include an obligation in the case of transmission lines operating in excess of 200kV to have a suitable interest in land (e.g. an easement) acquired.

2019 update from Western Power

Western Power currently complies with relevant legislation. It remains an obligation in the case of transmission lines operating >200kV to have a suitable interest in land (e.g. an easement) acquired.

Recommendation 12

The Committee recommends that the Attorney General, independent of the amendment to the LA Act contained in Recommendation 10, refer the broad issue of compensation for injurious affection to land in Western Australia to the Law Reform Commission of Western Australia for review.

Initial Government response

The Government supports a reference to the WA Law Reform Commission to consider the matter of injurious affection.

However it should be noted, the concept of injurious affection is historically associated with the compulsory acquisition statutes. However, currently there remain only three Australian jurisdictions which utilise the term "injurious affection" in such statutes. The High Court in *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 defined injurious affection as:

> "It is a neat, expressive way of describing the adverse effect of the activities of the resuming authority upon a dispossessed owner's land (at [32])."

Western Australia is one of the jurisdictions in which the compulsory taking and compensation statute relating to the carrying out of public works (being those set out in Parts 9 and 10 of the LA Act) does not use the term “injurious affection”.

However, the term “injurious affection” has been adopted in WA (and it would appear has now superseded the taking statute) to represent the concept of a diminution of value of land due to certain restrictions on the use of land arising out of the imposition of town planning rules or regulations or the compulsory taking of land.

It is not just any planning restriction that will result in a diminution in value of land giving rise to an entitlement to compensation, but only restrictions that are attributable to a limitation on the use of private land for no purpose other than a public purpose. This occurs by means of the classification of land by "reservation" as distinct from "zoning" under a town planning scheme, region scheme or redevelopment scheme.

However, as some of the issues giving rise to the Standing Committee Report (Report) illustrate, there are a number of other WA statutes which involve the carrying out of works of a public character which affect the value of privately owned land, in the sense that they result in a diminution of the value of abutting land of the same owner for the benefit of the public, even though compensation entitlements vary from statute to statute and from work to work.

What can be described as the reticulated infrastructure statutes, such the EOP Act, *Water Agencies (Powers) Act 1984*, *Dampier to Bunbury Pipeline Act 1997*, and *Petroleum Pipelines Act 1969*, illustrate the different conceptual approaches adopted by the WA Parliament in balancing the importance of public infrastructure and the benefits that it brings to private owners (including a potential betterment or enhancement component in the value of their land by reason of their access to such services) against the limitations imposed by the physical presence of such works on land.

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In general, the trend has been to require the agency to compulsorily acquire the fee simple or a suitable lesser interest in land under the compulsory taking statute for works of a particularly high significance and impact, but to exempt from a requirement to take an interest in land at all in respect of lesser works, such that an owner whose property is affected by the presence of works may have no entitlement to compensation at all. The approach of the statutes to the issue of compensation arising out of the impact of such works is not uniform.

The *Dampier to Bunbury Pipeline Act 1997* contains a slight variation on that position by creating different compensation entitlements, depending on whether an interest in land has been compulsorily acquired or land designated for inclusion in the Corridor is simply restricted from use in a certain manner.

A range of difficulties have been identified in the drafting of that Act, including provisions related to compensation entitlements, which are currently under review by the Department for Planning and Infrastructure (DPI) and the Pipeline Steering Committee.

Another Act which employs the term 'injurious affection' in a manner which is anomalous relative to the other statutes, is the *Country Areas Water Supply Act 1947* (CAWS Act) which uses "injurious affection" to create a compensation entitlement where a landowner is prevented from clearing vegetation from land for the purpose of preserving water catchment.

Annexure 2 is a table setting out the manner in which the concept of injurious affection has been employed in Western Australia in various statutes. It is clear that the central focus of the concept of "injurious affection" in the Report relates to the changes that occurred and complaints arising from the time the compulsory taking provisions were repealed from the *Land Acquisition and Public Works Act 1902* and re-enacted into Parts 9 and 10 of the LA Act.

As the Report observes, section 63(b) of the *Land Acquisition and Public Works Act 1902* as it stood prior to the enactment of the LA Act provided that in determining compensation payable following a compulsory acquisition of any interest in land, regard was to be had to:

"(b) the damage, if any, sustained by the claimant by reason of the severance of such land from the other adjoining land of such claimant or by reason of such other lands being injuriously affected by the taking, but where the value of other land of the claimant is enhanced by reason of the carrying out of, or the proposal to carry out, the public work for which the land was taken or resumed, the enhancement shall be set off against the amount of compensation that would otherwise be payable by reason of such other land being injuriously affected by the taking."

The re-enacted form of the provision in section 241(7) of the LA Act provides:

> "(7) if the fee simple in land is taken from a person who is also the holder in fee simple of adjoining land, regard is to be had to the amount of any damage suffered by the claimant -
>
> (a) due to the severing of the land from that adjoining land; or
>
> (b) to a reduction of the value of that adjoining land,
>
> However, if the value of any land held in fee simple by the person is increased by the carrying out of, or the proposal to carry out, the public work for which the land was taken, the increase is to be set off against the amount of compensation that would otherwise be payable under (b)."
>
> (emphasis added)

The Valuer General's reference at paragraph [4,148] of the Report to a remark of the Court that what was meant by adopting the wording of section 241(7)(b) was "regrettably unclear" was taken from *Cerini v Minister for Transport* [2001] WASC 309. In that case the WA Supreme Court made

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this "regrettably unclear" observation in the context of a discussion about whether the High Court decision in *Marshall* expanded the concept of injurious affection or diminution in value of land in Western Australia, such that compensation could be claimed regardless of whether or not loss or damage to the value of land of the owner adjoining the land taken could be attributed to the portion of the public work standing on the land acquired alone. The *Marshall* case relates to a Queensland statute worded in a manner significantly different to the WA statute in that it does not distinguish between various activities carried out by a constructing authority in the exercise of its statutory powers. Nonetheless, *Cerini* probably dispenses with the previously applicable principle that injurious affection/diminution in value of adjoining land relates to the size and proximity of the land taken, rather than the nature and extent of the impact of the work itself for which the land was taken. It is the generality of the term 'adjoining land' in section 241(7) that still imports a degree of uncertainty.

There is no compensation available to private landowners whose land is adjacent to and its value affected by the presence of a public work, but no interest in such affected land was taken at all. Proximity is still relevant, and represents an ongoing theme in the Report.

The body of the case law will no doubt continue to evolve in each of the jurisdictions that have to consider the nature and extent of the damage sought by way of injurious affection where the fee simple interest has been taken. But that differs from the issue of whether or not an entitlement to claim for such a diminution in value (whether it is termed injurious affection or otherwise) arises at all where some lesser interest is taken, or a work which has the character of a public work is authorised over land by statute, even if no formal interest in land is taken at all.

Where the acquiring authority under the reticulated infrastructure statutes purports to take an interest less than the fee simple (either an easement or, in the case of the Dampier to Bunbury Pipeline legislation "State Corridor Rights"), these are interests which arguably deny any entitlement to compensation for the diminution in land concept under section 241(7) of the LA Act. It may be that this is unobjectionable in some circumstances. For example, in the case of the *Dampier to Bunbury Pipeline Act 1997*, an alternative method of calculating injurious affection is provided for under that statute. However, at present the two statutes do need to be read together in order to clarify when an entitlement claim for diminution in value occurs and the circumstances in which it might be claimed and there are some uncertainties associated with the same.

The WA Parliament has clearly made a distinction between different types of legislation for which an entitlement to compensation for a diminution in land will be recognised, and the distinction is generally one which reflects the nature and degree to which it is perceived an owner may be restricted in the use of his own land by the nature and extent of the work proposed. Two questions also arise. Firstly, whether it is necessary to require a public authority authorising the carrying out of infrastructure works to formally acquire an interest in land at all in order to permit the public work or other authorised activities to occur. Secondly, in such circumstances, whether it is appropriate to define limited compensation rights using injurious affection concepts.

Consequently, any terms of reference designed to examine the matter further should be directed towards an examination of whether "injurious affection" should be more precisely defined for the purposes of certain statutes, or abandoned in its entirety, with the degree to which or circumstances in which a diminution in value to an owner's land would result in an entitlement to compensation in the hands of a landowner.

Section 241(7) of the LA Act also acknowledges that land may be increased in value by reason of a public work, and that such enhancement (also termed 'betterment') may be set off against any asserted injurious affection/diminution in value loss, although this does not extend through to damage of a 'severance' character calculable pursuant to section 241(7)(a). The betterment concept is also reflected in the context of planning controls, in section 11(2) and (4) of the *Town*

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Planning and Development Act 1928. Diminution in value and increase in value are two halves of the same coin and need to be considered in any review of compensation entitlements. Also supported by the Water Corporation. **2019 update from Minister for Lands (DPLH)** This recommendation has been **implemented**. The Law Reform Commission's *Compensation for Injurious Affection: Final Report* was published in July 2008.
Recommendation 13 The Committee recommends that the State Government review the circumstances of any former landholder who have settled the sale of their properties to LandCorp for the purposes of the *Hope Valley – Wattleup Redevelopment Act 2000* prior to the Cabinet decision introducing a relocation payment, to ascertain whether there is any justification, on equity grounds, for an *ex gratia* payment. **Initial Government response** The Government reviewed the former Coalition Government's decision to close the townsites of Wattleup and Hope Valley. The Government ultimately endorsed the proposition and as a consequence, determined to introduce a relocation allowance because of the special circumstances of the situation, where entire townsites were being closed down. The Government does not support the principle of retrospective payments where Government policy or taxation settings change. **2019 update from Minister for Lands (Development WA)** The Government reviewed the former Coalition Government's decision to close the townsites of Wattleup and Hope Valley. The Government ultimately endorsed the proposition and as a consequence, determined to introduce a relocation allowance because of the special circumstances of the situation, where entire townsites were being closed down. The Government does not support the principle of retrospective payments where Government policy or taxation settings change. As the government response to this recommendation was that the matter was not supported, no further action has been undertaken.
Recommendation 14 The Committee recommends that confidentiality agreements/contract provisions not be entered into between land acquiring State Government departments, agencies or bodies and landholders unless at the express request of the landholder. **Initial Government response** The Government supports the recommendation in principle. Land transfer details are a matter of public record and should record only the price paid for the land. Agreements between landowners and Government in respect of property dealing ought not be the subject of confidentiality agreements and that agreements be subject to the statutory provisions and spirit of the *Freedom of Information Act 1993* (FOI Act). Also supported by the Water Corporation. **2019 update from Minister for Lands (DPLH)** The Government **supports** the recommendation. Agreements between landowners and Government in respect of property dealing ought to not be the subject of confidentiality

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agreements. Land transfer details are a matter of public record and should record only the price paid for the land. It should also be noted that agreements entered into by land acquiring State Government departments, agencies and bodies are subject to the statutory provisions of the FOI Act. The Information Commissioner has observed that, where government agencies seek to acquire land from private citizens, transparency in the acquisition process serves to achieve the objects of the FOI Act. Those objects include making the persons and bodies that are responsible for State and local government more accountable to the public (section 3(1)(b)). The Commissioner recognised a strong public interest in agencies, which possess extraordinary powers and resources in respect of the acquisition of property that are not available to private citizens, being seen to act fairly and transparently. However, it should be noted that it is often landowners, who request the inclusion of confidentiality clauses in land acquisition agreements. **2019 update from the Water Corporation** The Corporation's standard contract does not contain a confidentiality clause. In some instances a confidentiality clause will be included at the request of the landowner. The clause is: The purchaser must not disclose the terms of, or any matters relating to, this contract (other than to its officers, employees and advisers on a confidential basis) unless the seller has consented to the terms of disclosure. **2019 update from Western Power** Western Power will comply with relevant legislation.
Recommendation 15 The Committee recommends that all land acquiring government departments, agencies and bodies should accompany their initial offer of compensation to a landholder in a compulsory acquisition of any interest in land with an advance payment of ninety percent of that offer. Such a payment is not to be regarded as prejudicing in any way the affected landholder s right to continue negotiations as to the final compensation figure. **Initial Government response** The Government supports the intent of the recommendation. General practice is to make an offer of advance payment of 100 per cent of the offer of compensation on the basis that the payment does not prejudice the landowner's right to continue to negotiate as to a final compensation outcome. The Government further recommends that the general practice be adopted where appropriate across Government notwithstanding the statutory recommendation of section 248(2) of the LA Act is 90 per cent. Instances may arise however where an offer of advance payment less than 90 per cent is appropriate where additional information such as financial statements are required to compensate for disrupted business costs and the like. Also supported by the Water Corporation. **2019 update from Minister for Lands (DPLH)** The Government **supports** the recommendation. The LA Act provides that a land acquiring authority may make an offer of an advance payment not exceeding 90 per cent to a landowner, after an offer of compensation has been made.

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Instances may arise, however, where an offer of an advance payment of less than 90 per cent is appropriate, where additional information such as financial statements are required to compensate for other matters such as disrupted business costs.

2019 update from the Water Corporation

In the event of a compulsory acquisition action being carried out, the Corporation's practice is to pay the landowner an amount equivalent to not less than 90 per cent of the offered amount as compensation pre-payment with negotiations then continuing to establish an agreed final compensation figure.

Recommendation 16

The Committee recommends that any future review by the State Government of the Western Australian constitutional legislation should include detailed consideration as to whether a "just terms" or "fair" compensation provision needs to be incorporated into the legislation with respect to the acquisition by the State Government for public purposes of privately-held property.

Initial Government response

The Government agrees to consider the provision during any future review of the constitutional legislation.

However, as the Report notes, submissions by various State agencies responsible for acquisitions, was that their legislation and the manner in which it was administered ready recognised that compulsory acquisition was to be made only where fair compensation, or just terms, was provided to the owner. The provisions of the LA Act are consistent with such a principle.

The amount of compensation is to be determined by reference to the particular considerations identified in the specific legislation that authorises the resumption. A general statement in legislation, such as the LA Act, that an acquisition is to be on just terms, or that compensation is to be fair, would add little to the substantive effect of that legislation.

To have any substantive effect, a "just terms" or "fair compensation" provision would need to operate as a limitation on State legislative power. That is the effect of section 51(xxxi) of the Commonwealth Constitution, which provides that the Commonwealth Parliament may make laws with respect to:

> "The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."

Section 51(xxxi) operates by abstracting from other heads of Commonwealth legislative power the power to make laws for the compulsory acquisition of property. As Dixon CJ noted in Attorney-General (Cth) v Schmidt.

> "The decisions of this Court show that if par (xxxi) had been absent from the Constitution many of the paragraphs of S.51, either alone or with the aid of par (xxxi), would have been interpreted as extending to legislation for the acquisition of land or other property for use in carrying out or giving effect to legislation enacted under such powers. The same decisions, however, show that in the presence in S. 51 of par (xxxi) those paragraphs should not be so interpreted but should be read as depending for the acquisition of property for such a purpose upon the legislative power conferred by par (xxxi) subject, as it is, to the condition that the acquisition must be on just terms."

This statement is subject to some qualifications. For example, the limitation in section 51(xxxi) does not apply to a law made under a head of Commonwealth legislative power that clearly authorises the acquisition of property other than on just terms, such as the taxation power (section 51(ii) of

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the Commonwealth Constitution), or to laws of a kind which do not permit acquisition on just terms, such as a penalty or forfeiture of property.

This operation of section 51(xxxi) of the Commonwealth Constitution arises because of the limitation on Commonwealth legislative power by reference to the subject matters contained in section 51 of the Constitution and the conditioning on one of these heads of power of a requirement of just terms.

A simple reproduction of section 51(xxxi) of the Commonwealth Constitution in a State context would not necessarily have the same effect. If such a provision were to be introduced into the State's constitutional structure, it may be necessary to define with some precision the circumstances in which the "just terms" provision operated, to ensure that acquisitions of property by way of taxation, penalty, criminal forfeiture or confiscation of profits were not prevented. Defining in State legislation the scope of a limitation on such a "just terms" acquisition power of this kind would require very careful consideration and drafting.

No such limitation on State legislative power currently exists, either in Western Australia or any other Australian State. This was confirmed by the High Court in Durham Holdings Pty Ltd v NSW. In regard to the introduction of such a limitation applying to State acquisitions of property are several matters that would need to be considered.

First, the Court in Durham Holdings, recognised that to introduce a limitation on State legislative power requiring that any acquisition of property be on just terms, would involve modification of the arrangements which comprise the Constitutions of the States within the meaning of section 106 of the Commonwealth Constitution. Therefore, in Western Australia this may well have consequences for the manner and form in which such an amendment could be introduced and enacted by the WA Parliament. The introduction and enactment of such a limitation as a matter of State law would affect the expression of State legislative power in section 2(1) of the *Constitution Act 1889* (WA). Such a limitation could only be introduced by a Bill passed with absolute majorities and approved at a referendum in accordance with section 73(2) of the *Constitution Act 1889* (WA).

Secondly, possibly, the only other manner in which a limitation could be introduced would be through an amendment to the Commonwealth Constitution, by way of referendum under section 128 of that Constitution. There was an attempt to effect such an amendment to the Commonwealth Constitution in 1988. The proposal to introduce a section 115A into the Commonwealth Constitution was defeated at referendum both nationally and in each State. In Western Australia this proposal, which was voted on with other proposals for guarantees of trial by jury and religious freedom, attracted a 'yes' vote of only 27.68 per cent.

Thirdly, the LA Act and other related acquisition legislation would be unlikely to contravene a "just terms" requirement in any significant respect. However, there are occasions when the WA Parliament considered that it was appropriate to enact laws that would have contravened a "just terms" provision. Examples of proposed legislation which may contravene such a "just terms" limitation are the *Yallingup Foreshore Land Bill 2002* (WA) and proposals to vest property in Kambalda sewerage works (inadvertently not reserved on sale of the land by WMC) in the Water Corporation.

Fourthly, also, such a "just terms" provision of the kind contemplated could have effects far beyond legislation dealing with the compulsory acquisition of land. For example, Commonwealth legislation dealing with limitation periods has been held to contravene section 51(xxxi) of the Commonwealth Constitution. Those decisions recognise that:

- a right of action can be "property" for the purposes of section 51(xxxi)

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- a law which extinguishes such a right of action will, without providing for just terms, be beyond Commonwealth legislative power.

There are at least two illustrations of the manner in which a "just terms" provision might limit State legislative power:

- Newcrest Mining (WA) Pty Ltd v Commonwealth, where the Commonwealth legislated to create, and prevent mining in, Kakadu National Park without providing compensation to the holders of subsisting mining leases in that area. A majority of the High Court held the taking of the right to mine as an acquisition of property which, because it was effected other than on just terms, was invalid. It may be that an analogy could be drawn with recently introduced clearing provisions in the EP Act, so far as they would prevent the clearing or other development on private land, if the State had a similar just terms provision.
- Georgiadis v AOTC, where Commonwealth legislation which substituted a workers compensation regime for common laws rights, in a manner which extinguished accrued causes of action, was found to be invalid to that extent.

Fifthly, while the introduction of a just terms provision has the capacity to have these effects outside the area of compulsory land acquisition, its introduction is unlikely to alter the current operation of the LA Act in that area. The introduction of such a clause would not resolve any debate as to the detail of the compensation regime provided for by that Act. The determination of the detail of the manner in which compensation was to be assessed and paid would remain a matter for State Parliament. As Dixon J noted in Grace Brothers Pty Ltd v The Commonwealth.

> "Under that paragraph [S51 (xxxi)] the validity of any general law cannot, I think, be tested by inquiring whether it will be certain to operate in every individual case to place the owner in a situation in which in all respects he will be as well off as if the acquisition had not taken place. The inquiry rather must be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country.
>
> ...
>
> In deciding whether any given law is within the power the Court must, of course, examine the justice of the terms provided. But it is a legislative function to provide the terms, and the Constitution does not mean to deprive the legislature of all discretion in determining what is just. Nor does justice to the subject or to the State demand a disregard of the interests of the public or of the Commonwealth."

In view of the above, there are several reasons that suggest that the inclusion of "just terms" provision in the WA Constitution may not be appropriate. For example:

- in the field of compulsory land acquisition, the subject of the Standing Committee's concern, a "just terms" provision does not appear to be necessary
- a "just-terms" provision could have far reaching effects in other areas of State legislation which would limit the ability of the State government to pursue its legislative agenda and the State Parliament to enact legislation
- a "just terms" provision could subvert the public interest to private rights in situations where the compensation payable might be prohibitive

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- the introduction of a "just terms" provision would require a State referendum requiring WA electors to answer the same substantive question as they rejected in 1988; and
- a "just terms" provision would represent a departure from the approach adopted in all other Australian States.

Also supported by the Water Corporation.

2019 update from Minister for Lands (DPLH)

This recommendation has previously been considered and investigated. It was determined that there are several reasons that suggest the inclusion of "just terms" provision in the WA Constitution may not be appropriate. For example:

- in the field of compulsory land acquisition, a "just terms" provision does not appear to be necessary
- a "just terms" provision could have far reaching effects in other areas of State legislation which would limit the ability of the State government to pursue its legislative agenda and the State Parliament to enact legislation
- a "just terms" provision could subvert the public interest to private rights in situations where the compensation payable might be prohibitive
- the introduction of a "just terms" provision would require a State referendum
- a "just terms" provision would represent a departure from the approach adopted in all other Australian States.

In addition, it is generally considered that the LA Act, under which land is compulsorily acquired, is an Act that provides for compensation on just terms. The Law Reform Commission recommended amendments to section 241 of the LA Act in its 2008 *Compensation for Injurious Affection: Final Report*.

In 2014, the Land Acquisition Legislation Amendment (Compensation) Bill 2014 (LALAC Bill) was introduced into Parliament. The Bill's purpose was to deliver a fairer and more transparent approach for the assessment and determination of compensation for landholders where private property is acquired by the State and to ensure that compensation paid for the compulsory acquisition of a part of a property is assessed not only on the value of the land taken, but also on the greater impact it has on the entire property. The legislation to be amended by the LALAC Bill was the LA Act (section 241), EOP Act, *Water Agencies (Powers) Act 1984*, and the *Water Services Act 2012*. The LALAC Bill did not advance beyond the second reading stage and subsequently lapsed.

The proposed amendments to the LAA have since been integrated into the Land Administration Amendment Bill 2018 (LAA Bill). The drafting of that Bill is progressing, noting the State Government's ongoing legislative agenda.

Recommendation 17

The Committee recommends that land acquiring State Government departments, agencies and bodies pay the reasonable costs of landholders obtaining independent land valuation and compensation assessment advice (up to the amount determined by the Land Valuers Licensing Board's Scale of Fees), in relation to both voluntary and compulsory acquisitions of interests in land.

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Initial Government response

The Government supports the principle of the recommendation where land is affected by an acquisition under the LA Act or reservation under a planning instrument.

The general practice of government agencies is to pay the reasonable costs incurred by landowners relating to obtaining valuation and compensation assessment advice in relation to compulsory acquisition only. Payment should be on the basis of:

- being undertaken by a Licensed Valuer
- a minimum of two quotes being obtained and submitted for agency consideration prior to authorising the Valuer to proceed
- agreement to the exchange of valuations
- the valuation being utilised as a means of negotiating a settlement.

The payment of such fees in respect of voluntary purchase is variable across government agencies. In respect to valuation fees for voluntary acquisitions following the creation of a reservation, the Government recommends the reimbursement of up to 90 per cent of the Land Valuers Licensing Board's Scale of Fees with the ability to negotiate beyond that figure in appropriate circumstances. Such payment should be a "one off" reimbursement of a proven cost in the case of a voluntary acquisition enquiry that does not proceed to settlement or paid as part of the total settlement price for the acquisition. (see overriding Principle Four).

Also supported by the Water Corporation.

2019 update from Minister for Lands (DPLH)

The Government supports the principle of the recommendation, where land is affected by an acquisition under the LA Act or reservation under a planning instrument.

The general practice of government agencies is to pay the reasonable costs incurred by landowners relating to obtaining valuation and compensation assessment advice in relation to compulsory acquisition only. Payment should be on the basis of:

- being undertaken by a Licensed Valuer
- a minimum of two quotes being obtained and submitted for agency consideration prior to authorising the Valuer to proceed
- agreement to the exchange of valuations
- the valuation being utilised as a means of negotiating a settlement.

The payment of such fees in respect of voluntary purchase is variable across government agencies.

2019 update from Minister for Energy

The Government at the time expressed in principle support for the recommendation in situations where land is affected by an acquisition under the LA Act or reservation under a planning instrument.

Energy Policy WA will consult with other relevant State Government agencies to ascertain a whole-of-Government position on this matter.

Current practices of Western Power allow a landowner to obtain an independent valuation report during negotiations that is then provided for consideration by the Western Power Valuer. The compensation amount from Western Power will include an allowance for the cost of the report, provided that a receipt is provided for these services and the sum requested is considered reasonable.

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2019 update from the Water Corporation

The Corporation does reasonably include an offer of compensation an amount for consequential losses such as professional fees, where relevant. These include reimbursement to the landowner for reasonable costs associated with an independent valuation on the condition that the valuation is used in negotiations when establishing the final compensation figure and that a copy of the valuation is supplied to the Corporation.

2019 update from Western Power

During negotiations, the landowner can obtain an independent valuation report. This report is then provided to the Western Power Valuer to consider. Western Power's compensation amount will include an allowance for the report so long as a receipt is provided for these services and it is considered reasonable.

Recommendation 18

The Committee recommends that land acquiring State Government departments, agencies and bodies pay the reasonable costs of landholders obtaining independent legal advice on their rights and on any offer and associated documentation in relation to both voluntary and compulsory acquisitions of interests in land.

Initial Government response

The Government supports in part the recommendation where land is affected by an acquisition under the LA Act or by a reservation under a planning instrument.

Recommendations 1 and 2 when implemented will provide landowners with information in such a form as to convey the every day rights and the processes of voluntary and compulsory acquisition.

Where land is the subject of a voluntary acquisition, following the creation of a reservation, it is recommended that a monetary allowance be reimbursed to landowners to source necessary legal advice beyond that provided within the implementation of Recommendations 1 and 2. The allowance should reflect the complexity of the land dealing with the monetary range set at a base of $1000 to be indexed annually.

In the case of compulsory acquisition, it is current practice to pay for the plaintiff's reasonable costs, as awarded by the Court. Where compulsory acquisition compensation is negotiated, the most reasonable equivalent of costs in the absence of a Court award is to be paid having regard as to the nature of the transaction and its complexity. (see overriding Principle Four).

Also supported by the Water Corporation.

2019 update from Minister for Lands (DPLH)

The Government supports the intent of the recommendation. The DPLH has a Statement of Procedures that is provided to all landowners involved in a voluntary or compulsory acquisition, as per the requirement of section 168(2) of the LA Act. This is a plain English explanation of the procedures for the taking of land, the taking of interests in land, compensation, rights of appeal and rights as to future options for the landowner, if land taken is no longer required.

With regard to compulsory acquisition, the LA Act does not contain an obligation to pay legal costs as a head of claim under section 241 however should an offer of compensation be litigated in the State Administrative Tribunal or the Supreme Court, then costs awarded to the plaintiff are paid.

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2019 update from Minister for Energy

The Government at the time expressed partial support for the recommendation, in situations where land is affected by an acquisition under the LA Act or by a reservation under a planning instrument.

Energy Policy WA will consult with other relevant State Government agencies to ascertain a whole-of-Government position on this matter.

Western Power currently provides an allowance of $500 to landowners for seeking legal advice, with payment being made on the provision of a receipt evidencing payment for these services.

2019 update from the Water Corporation

The Water Corporation does reasonably include an offer of compensation amount for consequential losses such as professional fees, where relevant. These include reimbursement to the landowner for reasonable costs associated with legal fees pertaining to the landowner's contractual dealings.

2019 update from Western Power

This recommendation has been implemented. An allowance of $500 is given to landowners for seeking legal advice, with this paid on the provision of a receipt for these services.

Recommendation 19

The Committee recommends that the State Government establish a standard scale of costs in relation to legal advice provided to landholders with respect to their rights and on any offer and associated documentation in relation to both voluntary and compulsory acquisitions of interests in land, to be observed by all land acquiring State Government departments, agencies and bodies when making payments to landholders.

Initial Government response

The Government supports the recommendation where land is affected by an acquisition under the LA Act or by a reservation under a planning instrument in accordance with its response to Recommendations 17 and 18.

Recommendations 1 and 2 when implemented will provide landowners with information in such a form as to convey the everyday rights and the processes of voluntary and compulsory acquisition.

The Government supports the payment of valuation and legal fees in accordance with Recommendations 17 and 18.

Compulsory acquisition compensation under the LA Act is guided by section 241(6) that sets out the types of costs that form portion of the compensation settlement with section 241(6)(e) stating that compensation shall include "any other facts which the acquiring authority or the court considers it just to take into account in the circumstances of the case". (see overriding Principle Four).

Also supported by the Water Corporation.

2019 update from Minister for Lands (DPLH)

The Government supports the recommendation where land is affected by an acquisition under the LA Act. Compulsory acquisition compensation under the LA Act is guided by section 241(6) that sets out the types of costs that form a portion of the compensation settlement with section 241(6)(e) stating that compensation shall include "any other facts which the acquiring authority or the court considers it just to take into account in the circumstances of the case".

2019 update from the Water Corporation

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It is the Water Corporation's position that any reimbursement of costs should be determined on a case by case basis after taking into consideration all of the commercial negotiation outcomes of each dealing.

Recommendation 20

The Committee recommends the establishment of a single, independent, land acquisition agency, with the sole purpose of acquiring interests in land at a fair price, to undertake all land acquisitions on behalf of State Government departments, agencies and bodies.

Initial Government response

The Government supports the recommendation to the extent that a lead agency is responsible in the case of multiple agency involvement (Recommendation 4).

The ability of a single agency to undertake all land acquisition matters would require overriding legislation to empower that agency to utilise the full range of legislative powers currently embodied in the controlling Acts of all government departments, agencies, bodies and statutory authorities.

If a single agency were appointed for this role, it may not be possible to meet deadlines where multiple projects are being undertaken. Current arrangements enable acquiring authorities to deal with landowners directly. Operational requirements such as accommodation works are dealt with in an efficient and expedient manner, however, as set out in Recommendation 4 and overriding Principle Three single agency arrangements will be utilised where possible.

Initial response from the Water Corporation

Not supported.

- Due to varying requirements of Government agencies, one entity could not be expected to understand or accommodate all agencies' needs.
- Benefits would exist with coordination and mediation roles where multiple agencies were involved.
- Establishment of a single authority would arguably achieve consistent application of principles and policy.
- The Water Corporation would, however, lose control of the acquisition process. The Corporation should retain the right to undertake acquisitions on its own behalf, so as to retain some control over the timing and accuracy of the process.
- Under its current legislation, the Water Corporation determines whether it is required to obtain an interest in the land when undertaking works and what is the appropriate interest. The Corporation should retain this power.
- The Water Corporation should retain power to communicate and negotiate directly with the landowner, rather than having to channel negotiations through a third party (i.e. the centralised acquisition agency).
- Consolidation into one Government agency could result in significant backlogs and delays in the process, particularly if the agency was not appropriately funded or staffed.

2019 update from Minister for Lands (DPLH)

The Government supports the intent of the recommendation, to the extent that a lead agency is responsible in the case of multiple agency involvement. However, the ability of a single agency to undertake all land acquisition matters would require overriding legislation to empower that

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agency to utilise the full range of legislative powers currently embodied in the controlling Acts of all government departments, agencies, bodies and statutory authorities. If a single agency were appointed for this role, it may not be possible to meet deadlines, where multiple projects are being undertaken. Current arrangements enable acquiring authorities to deal with landowners directly and single agency acquisition arrangements are used where possible. **2019 update from the Water Corporation** Not implemented. The Water Corporations position is to be in control of the acquisition process due to it being critical to allow for the Corporation's capital works infrastructure construction requirements to be at the forefront of all landowner negotiations thus facilitating on-time delivery of future assets and infrastructure related to essential state and community services. Implementation of this recommendation would create delays and implement an additional level of red tape. **2019 update from Western Power** Western Power will comply with relevant legislation.
Recommendation 21 The Committee recommends that the State Government adopt the Committee's model land acquisition procedure (see paragraph 5.151) for all interests in land acquired by State Government departments, agencies and bodies. **Initial Government response** The Government does not support the recommendation. The model is a substantial departure from current general practice across Government and is considered to unnecessarily expose the Government to a process that could incorporate unrealistic and adversarial valuations and compromise the Government's position to enter into arbitration or court proceedings should a negotiated settlement not be reached. In addition, a part settlement based on a figure being the average of the government's valuation(s) and a landowner's unrealistic or adversarial valuation (element (h)) could encourage a prolonged negotiation and settlement period, especially where interest accrues. The model is considered overly simplistic and formulaic, and therefore inappropriate in relation to compulsory acquisitions, although, some elements could be incorporated into the voluntary acquisition process depending on the complexity of the dealing. The avenues/direction of the LA Act and access to the Supreme Court (proposed State Administrative Appeals Tribunal) are considered to be essential for landowners affected by compulsory acquisition. Compulsory acquisition involves issues such as severance, injurious affection, business disturbance, consequential losses and solatium. These are often complex issues, which require thorough analysis and reference to Court precedent. In such cases the Government may need two or three independent valuations of its own to assist with finalising compensation or in some instances it may be necessary to refer the matter to the Court for direction. **2019 update from Minister for Lands (DPLH)** The Government does not support this recommendation. The model is overly simplistic and formulaic, and not suitable in relation to compulsory acquisitions. The application of the legislative framework provided by the LA Act and access to the State Administrative Appeals Tribunal and the Supreme Court are considered to be essential for landowners affected by compulsory acquisition. Compulsory acquisition involves issues such as severance, injurious affection, business disturbance, consequential losses and solatium. These are often complex issues, which require thorough

analysis and reference to Court precedent. In such cases the Government may need two or three independent valuations of its own to assist with finalising compensation or, in some instances, it may be necessary to refer the matter to the Court for direction.

The model would unnecessarily expose the Government to a process that could incorporate unrealistic and adversarial valuations and compromise the Government's position to enter into arbitration or court proceedings should a negotiated settlement not be reached.

In addition, a part settlement based on a figure being the average of the government's valuation(s) and a landowner's unrealistic or adversarial valuation (element (h)) could encourage a prolonged negotiation and settlement period, especially, where interest accrues.

Initial response from the Water Corporation

Not supported in present form.

- Under its legislation, the Water Corporation is required to attempt to acquire land by agreement prior to commencing compulsory acquisition.
- Process at paragraph 5.151 is aimed at setting out steps which an acquiring authority should take in negotiating an acquisition (i.e. prior to progressing to compulsory acquisition).
- Whilst the process set out in paragraph 5.151 may be suitable in the majority of cases and may not, in fact, differ substantially from the Water Corporation's usual practice, there may be situations that require a different process of negotiation.
- It is desirable that the Water Corporation maintain the ability to undertake negotiations in the manner that is appropriate to the particular case at hand, rather than by reference to a strict procedure.
- If strict procedures in relation to acquisition by agreement are implemented, it may be more efficient to simply proceed straight to a compulsory acquisition, following the process that is already provided in the LA Act (in which case the Corporation's legislation would need to be amended to remove the requirement that the Corporation first attempt to acquire by agreement).
- A standard model could incorporate elements of the proposed procedure including A, B, D, F, I and J. The remaining proposals have the potential to frustrate the negotiation process and may incorrectly reflect the fair compensation values.
- There is distinct potential for the process to be distorted by unscrupulous, inexperienced or incompetent valuers and advocate advisers. The acquiring authority may have higher exposure to litigation and increased frequency of negative outcomes. It is inappropriate to average valuations under any circumstance.
- The proposal at C could be utilised where suitable controlling professional bodies such as the API. provide for valuation standards and accreditation of compensation valuers. These valuers could then be placed on a panel for selection by the land owner and acquiring authority.
- Nothing should limit the ability of acquiring authorities to compulsorily acquire land at any time.

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Recommendation 22

The Committee recommends that the State Government amend relevant legislation to provide that any voluntary acquisition of an interest in land for public purposes is on the same terms and level of compensation as if it were a compulsory acquisition under Parts 9 and 10 of the LA Act.

Initial Government response

The Government believes there is some merit in providing some financial premium for voluntary purchases in some circumstances and therefore supports the spirit of the recommendation where land is affected by a reservation under planning legislation or a planning instrument.

The defining factor between a voluntary acquisition and a compulsory taking is the position of the landowner and the resultant principle of a willing seller (voluntary acquisition) and an unwilling seller (compulsory taking).

Voluntary acquisition that is initiated by the landowner or results from the decline of a development application in respect of reservations in Local and Regional Town Planning Schemes does not constitute a compulsory taking.

The responsible authority considers the request and negotiates to purchase on the basis of market value. There is no obligation on the part of the landowner to proceed.

Compulsory taking results from the necessity to undertake a public work within a relatively short time horizon that affords the landowner with little option as to the outcome (i.e. the public work is required immediately and the issue is effectively a "fait accompli"). A taking date is established and that becomes the effective date for valuation.

The two underlying principles that currently define the processes are further discussed at Recommendation 33.

The two-landowner positions are considered completely different requiring the equally significantly different approach that currently exists.

In order to acknowledge the impost to an owner/occupier (that is the principle place of residence) of land that is subject to a reservation, the Government recommends that a 5 per cent premium be paid, in addition to the market value of a property voluntarily purchased either in part or in full.

An amount of up to 10 per cent (solatium) is payable in the case of a compulsory taking of land under section 241(9) of the LA Act. (see overriding Principle Four).

Initial response from the Water Corporation

Not supported.

- The Committee notes that compulsory acquisition in accordance with Parts 9 and 10 of the LA Act is preferable than acquisition by agreement.
- Again, this recommendation is aimed at prescribing the processes that must be applied to acquisition by agreement (by recommending that such acquisitions should be on the same terms as if it were a compulsory acquisition).
- As discussed above, it is desirable for the Water Corporation to retain a level of discretion and flexibility in relation to acquisition by agreement, and not be bound to provide compensation on the same terms as a compulsory acquisition.
- If the Water Corporation was required to do this, it would be preferable to proceed straight to the compulsory acquisition process. As discussed above, this would require amendment to the Corporation's legislation.

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2019 update from Minister for Lands (DPLH)

The Government supports the recommendation, however, it should be noted that the positions of landowners, who are the subject of a voluntary acquisition or a compulsory taking are significantly different.

The defining factor between a voluntary acquisition and a compulsory taking is the position of the landowner in that one is a willing seller (voluntary acquisition) and the other an unwilling seller (compulsory taking).

Voluntary acquisition that is initiated by the landowner or results from the decline of a development application in respect of reservations in Local and Regional Town Planning Schemes does not constitute a compulsory taking. The responsible authority considers the request and negotiates to purchase on the basis of market value. There is no obligation on the part of the landowner to proceed.

Compulsory taking results from the necessity to undertake a public work within a relatively short time horizon that affords the landowner little option and a date for the taking of the land is established, which becomes the effective date for valuation.

In the case of a compulsory taking of land, an amount of up to 10% (solatium) is payable under section 241(9) of the LA Act.

2019 update from the Water Corporation

The Corporation already takes this approach and all acquisitions (other than those when a property is already on the open market for sale) are evaluated taking into consideration the statutory requirements in relation to compensation entitlements under section 241 of the LA Act.

2019 update from Western Power

Western Power will comply with relevant legislation.

Recommendation 23

The Committee recommends that the Department of Industry and Resources publish an updated version of the Great Southern Development Corporation's [sic Commission] *Code of Conduct for the Owners of Farming Properties and Persons Exploring or Mining on Private (Agricultural) Land in the Central Great Southern* and *Guide for the Owners of Farming Properties in Relation to Exploring and Mining on Private (Agricultural) Land in the Central Great Southern* incorporating mining issues affecting all Western Australian landowners.

Initial Government response

The Government supports the recommendation in principle.

The Minister for State Development has indicated that it may be "somewhat presumptuous, inappropriate and probably counterproductive" for the Department of Industry and Resources to assert an "ownership" of the Code for the purpose of publishing an updated version for widespread distribution and application across the State's agricultural regions.

The Code was the result of a successful culmination of lengthy consultation between the stakeholders during which mutual trust was achieved between those involved in agricultural and mineral resource pursuits. The Code was funded and driven by the then Department of Workplace Relations and Small Business and the Great Southern Development Commission. The then Department of Minerals and Energy was only one of the numerous groups involved in the formulation of the Code.

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Recommendation 24 The Committee recommends that as a matter of course the Department of Environmental Protection provide all applicants for a land clearing permit under Part V, Division 2, of the EP Act (as amended by Part 9 of the *Environmental Protection Amendment Act 2003*), with details of the content of all public submissions received on their application from public authorities and persons who have been invited to comment. **Initial Government response** The Government supports the recommendation in broad terms. The Environmental Protection Authority (EPA) currently summarises issues raised be public submissions and provides these to proponents as a matter of course for assessment under Part IV of the EP Act. The EPA does not provide copies of actual submissions but the names of submitters are provided in its bulletin report. The Department of Environment intends to similarly provide a summary of submissions to proponents. A process for this is being developed. Also supported by the Water Corporation.
Recommendation 25 The Committee recommends that the Department of Agriculture and the Department of Environmental Protection investigate the feasibility of establishing "limit markers" to monitor land degradation on agricultural properties. **Initial Government response** The Government supports the recommendation in principle. Schedule 5 of the EP Act contains a set of 10 principles against which clearing of native vegetation must be considered. The Department of Environment has developed a draft assessment methodology based on these principles which in effect uses criteria to set "limit markers" to decide whether clearing of native vegetation would be acceptable. Part V, Division 2 of the EP Act allows the Chief Executive Officer to set conditions for monitoring and auditing the effects of clearing, on the environment. An extension of the recommendation beyond the present capability of the Departments of Agriculture and Environmental Protection is considered desirable, however would require considerable resources from both government and landowners. Developing meaningful "limit markers" is complex and would be costly and difficult to implement from both technical and political perspectives. Land degradation is often long term, diffuse, and the impact (either on site or off site) hidden or masked until manifest in the final stages. Base line condition would have to be established on approximately 30 000 rural properties, potentially requiring 1–2 million assessments to establish base line conditions. Retrospectivity issues that would need to accompany the proposal are unlikely to be accepted by the rural land owning community. Legal challenges are likely to be common. Also supported by the Water Corporation.
Recommendation 26 The Committee recommends that where private land is required for a public purpose which will alter the existing granted land use (as distinguished from anticipated land use) on that private land, the Crown should either compensate fairly for the downgrading of the permissible land use or acquire the property outright.

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Initial Government response

The Government supports the recommendation.

The scope of the recommendation is to be considered in accordance with the Committee's observations set out in paragraphs 7.375 and 7.376 of the report.

Current legislation (section 11 of the *Town Planning and Development Act 1928* and the *Planning and Development Bill 2004*) provides for the ability to claim compensation in the form of either injurious affection or acquisition where the existing granted land use is altered.

Compensation is also available through the LA Act where pre-existing land use is prevented as a result of the application of the provisions under the *Wildlife Conservation Act 1950,* although voluntary acquisition is the preferred option under government purchase guidelines.

Also supported by the Water Corporation.

2019 update from Minister for Planning

The Government supports the recommendation. The *Planning and Development Act 2005* (Part 11) (PD Act) provides for claims for compensation in the form of either injurious affection or acquisition where the existing granted land use is altered. Under section 173 any person whose land is injuriously affected by the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection. Section 187 also provides the option for the responsible authority to elect to acquire the affected land instead of paying compensation. Prior to April 2006 when the PD Act came into operation, injurious affection claims were seldom lodged due to the time limit of six months and likely the additional requirements under section 12(2a)(b)(i) of the *Town Planning and Development Act 1928*.

2019 update from Minister for Energy

The Government at the time expressed support for the recommendation.

Energy Policy WA will consult with other relevant State Government agencies to ascertain a whole-of-Government position on this matter.

Western Power currently determines compensation for physical damage to land in accordance with the EOP Act. Compensation for an interest in land (e.g. an easement) is calculated in accordance with the LA Act.

2019 update from the Water Corporation

Implemented.

Valuations of land take into account changes in permitted land use as defined in the LA Act.

2019 update from Western Power

Western Power determines compensation for damages to land under the EOP Act. Therefore, if the line and/or easement diminishes the existing use and operation of land, they are compensated separately for this.

Recommendation 27

The Committee recommends that the State Government examine the feasibility of tax and rate assistance to landholders as an incentive for the preservation of natural vegetation.

Initial Government response

The Government supports the recommendation.

The Government has recently provided relief from land taxes for native vegetation under a legally binding covenant. Local government has expressed a view that land zoned for conservation in

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town planning schemes should be subject to land tax relief. However, there is concern that such schemes do not prevent necessarily inappropriate activities that may degrade native vegetation. Rate levels are the provinces of local government. It is understood that a number of local governments do provide for rate reductions for local government sponsored schemes that promote conservation of native vegetation. Any assistance provided should be linked to a requirement to conserve and manage the native vegetation via covenants or town planning scheme controls rather than merely retain native vegetation given that that is already a legal requirement. Also supported by the Water Corporation.
Recommendation 28 The Committee recommends that the State Government review the operation of Part V, of the EP Act (as amended by Part 9 of the *Environmental Protection Amendment Act 2003*) within two years of its commencement in order to determine whether further statutory timeframes need to be introduced into the land clearing application process to ensure that applications are dealt with expeditiously. **Initial Government response** The Government supports the recommendation. The Department of Environment has committed to developing administrative guidelines for the assessment process, which will provide benchmarks for time frames for each stage of the assessment process. It is understood the Appeals Convenor's office is also developing procedures for dealing with appeals in a timely manner. The Government has noted that the extended timeframes that occurred following the introduction of the memorandum of understanding were largely a result of the inadequate legislation under which regulation of clearing occurred. In particular, the *Soil and Land Conservation Regulations 1992* does not provide an approval process and therefore the Commissioner of Soil and Land Conservation did not have the powers of a decision maker following the expiry of the 90 day notification period. In addition, proponents were unable or unwilling to provide the level of information required by the EPA for assessment under Part IV of the EP Act. As a consequence, clearing proposals were commonly held up in the appeals process for lengthy periods of time. Part V, Division 2 does not provide the capacity for time lines to be prescribed in regulation, nor does the Act itself have this provision. The time taken to assess an application to clear will vary from case to case and will largely depend on the complexity of the environmental issues associated with the application, and whether further information is required from the proponent. However, it is considered that the clearing provisions provide a clear process, which should facilitate efficient decision-making. Also supported by the Water Corporation.
Recommendation 29 The Committee recommends that the State Government undertake a review of both the administrative process of the Western Australian Planning Commission (WAPC) and existing statutory timeframes within planning legislation in order to address the decline in the percentage of planning applications processed within statutory timeframes. **Initial Government response** The Government supports the recommendation.

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The Department for Planning and Infrastructure has established the Statutory Planning Improvements Review as an internal review to work in collaboration with the Joint Industry–Government Planning Processes Review Study. The study will focus on planning approval processes for Metropolitan Region Scheme (MRS) amendments, Town Planning Scheme amendments, Structure Plans and Development Applications.

Also supported by the Water Corporation.

2019 update from Minister for Planning

The Government supports the recommendation and has progressed several rounds of planning reform since 2004. As part of the Planning Reform Agenda, the *Planning and Development (Local Planning Schemes) Regulations 2015* (LPS Regulations) were introduced in 2015. Among other things, the LPS Regulations introduced three categories of Local Planning Schemes amendments being, basic standard and complex. The categorisation allows for simpler Scheme Amendment proposals to be dealt with more quickly as they are subject to a shorter assessment period. The LPS Regulations also introduced maximum timeframes in which the WAPC is to provide a recommendation to the Minister for Planning with respect to Local Planning Schemes and Local Planning Scheme Amendments. Prior to the introduction of the LPS Regulations, there was no regulated timeframe in which the WAPC was to provide such a recommendation.

The LPS Regulations also introduce and/or specify timeframes for the progression of other planning processes. The DPLH has built electronic workflow systems for progressing planning applications and tracking performance against timelines contained within the LPS Regulations. These statistics are published in the DPLH Annual Report.

In August 2019, the State Government released its Action Plan for Planning Reform. The Action Plan responds to feedback received from stakeholders regarding the need to improve the timeliness of planning decision-making. The Action Plan proposes the expansion of the risk-based processing of planning applications, with simpler proposals subject to a more streamlined assessment process with shorter statutory timeframes. The improvements outlined in the Action Plan will apply to a range of planning proposals that are assessed and determined by both State (i.e. amendments to region schemes, structure plans) and local (i.e. development applications) governments.

Recommendation 30

The Committee recommends that the State Government undertake an investigation into the types of planning applications for which an environmental bond may be practical.

Initial Government response

The Government supports the recommendation in principle.

A bond could be required as a condition of planning approval where necessary, appropriate and reasonable. The purpose of bonds used in these circumstances is to secure performance of a development or land use in the future, after initial construction or undertaking of a proposal. Use of such bonds in relation to regional and town planning scheme amendments requires further consideration and could require legislative amendment to ensure the use of such bonds are valid and enforceable at law.

Also supported by the Water Corporation.

2019 update from the Minister for Planning

The Government supports the principle of the recommendation. A bond can be required as a condition of planning approval where necessary, appropriate and reasonable. The general purpose

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is to secure performance of a development or land use in the future, after initial construction or undertaking of a proposal (i.e. contribution for public open space, crossovers or landscaping). With specific reference to environmental bonds, this proposal has not been progressed and is contrary to the principles of planning reform which include the streamlining of the planning system. The application of environmental bonds could act or be interpreted as a further layer or impost of the planning system. The introduction of environmental bonds would not likely result in quicker land development approvals as detailed assessments would still be required to establish a bond amount - and the assessment may become more protracted if it led to the imposition of an additional up-front financial cost on development. The intent of this recommendation is now delivered via existing planning processes which have been introduced since the publication of the report and approval of planning instruments which balance environmental and development outcomes and provide certainty regarding what development can or cannot occur. For example, the model subdivision conditions schedule incorporates a range of model conditions that can be placed on subdivisional approvals for the protection or enhancement of environmental assets. In addition, all scheme amendments are currently referred to the EPA under sections 38 and 81 of the PD Act for consideration. The LPS Regulations also articulate that a local government must amend the local planning scheme documents to incorporate conditions set out in a statement received from the EPA under sections 48F and 48G of the EP Act.
Recommendation 31 The Committee recommends that the State Government review those provisions of the planning legislation relating to the resolution of inconsistencies between local and regional planning schemes so as to establish whether additional/alternative statutory time frames are required to ensure that inconsistencies are resolved in the shortest possible time. **Initial Government response** The Government supports the recommendation. The issue is addressed in Part 9 of the Planning and Development Bill 2004. There are occasions where approval under the MRS is required in addition to approval under a local government scheme reflecting the different level of planning issues considered by the determination. The proposed 2005 review of the MRS text will address further opportunities to realise efficiencies. Also supported by the Water Corporation. **2019 update from Minister for Planning** This recommendation has been implemented. Refer to response to Recommendation 29. The LPS Regulations classify an amendment to a Local Planning Scheme (LPS) to bring it into alignment with Region Planning Scheme as a Basic amendment. This is the most expedient of the LPS amendment classifications that allows for quick resolution of inconsistencies. Additionally, the PD Act allows for the concurrent LPS amendment of land being zoned Urban under a Region Scheme where appropriate.
Recommendation 32 The Committee recommends that all landholders affected by a proposed reservation or zoning change under a draft region scheme should be contacted in person by the DPI, and provided with copies of all relevant documentation free of charge.

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Initial Government response

The Government supports the general intent of the recommendation in respect of reservations. The recommendation is largely already the general practice but is further addressed by the Planning and Development Bill 2004.

Any proposed reserve shall be notified in writing with an invitation extended to meet with an appropriate government officer(s) on site where practical, to discuss the proposal notwithstanding existing statutory consultation provisions.

Also supported by the Water Corporation.

2019 update from the Minister for Planning

This recommendation has been implemented as the PD Act requires that all landowners affected by a proposed change to Region Scheme zoning/reservation are contacted directly. The WAPC also provides for Hearings to be undertaken for all major region scheme amendments and Departmental Officers are available to meet with affected landowners as required.

Recommendation 33

The Committee recommends that the LA Act and relevant planning legislation be amended to provide that an acquisition of land by the State or local government following a claim for injurious affection under the planning legislation, is to be treated on the same terms and conditions as a compulsory acquisition of land under Parts 9 and 10 of the LA Act.

Initial Government response

The Government supports the principle of the recommendation in part.

Essentially planning legislation is utilised to acquire land not directly associated with an immediate public work, whereas the LA Act is primarily utilised to compulsorily acquire land for a public work where the execution of the public work takes precedent.

Complete adoption of the recommendation would signal a major shift in policy from that which is currently in place and result in a largely unquantifiable additional financial burden on government.

The singular and most defining difference in the application of the Acts is that under planning legislation a claim for injurious affection usually results in the WAPC electing to purchase the land in accordance with the provisions of the Act at "value" (i.e. market value) with a definition well supported in case law. Alternatively, the WAPC may pay injurious affection without acquiring any land, which may be left until the land is required for the public work for which it is reserved. In such circumstances, the landowner retains full use of the land upon the payment of injurious affection.

A claim for injurious affection cannot be treated under planning legislation on the same terms as are available in section 241(7)(b) of the LA Act as it would be effectively the equivalent of a compulsory acquisition allowing landowners to lodge a claim for compensation to include all the heads of claim provided for within the LA Act.

The Government recommends that a 5 per cent premium be paid to owner occupiers of a principle place of residence voluntarily purchased in accordance with principles of Recommendation 22.

In addition, landowners will benefit from monetary assistance provisions detailed in Recommendations 17 and 18. (see overriding Principle Four).

The current gradual acquisition of land at market value affected by long term planning issues (*in good time*) rather than public works (*just in time*) would need to be sacrificed in order to fund the cost of compensating landowners on a compulsory acquisition basis.

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Presently all planning acquisitions are either the result of voluntary action by landowners or as a result of a declined development application resulting in the WAPC electing to purchase.

The subject of injurious affection has been discussed at considerable length within the response document.

Also supported by the Water Corporation.

2019 update from Minister for Planning

The Government supports the principle of this recommendation. The PD Act is generally used to acquire land not directly associated with an immediate public work. Planning acquisitions are the product of voluntary action by landowners or a declined development application resulting in the WAPC electing to purchase.

The LA Act is primarily used to compulsorily acquire land for a public work where the execution of the public work takes precedent. This includes up to an extra 10 per cent of the value of the land, if it is taken without the owner's agreement. These two Acts work together but provide distinct avenues for the compensation for or purchase of affected land.

Under the PD Act, a claim for injurious affection generally results in the WAPC electing to purchase the land at market value, in accordance with the provisions of the Act. Alternatively, the WAPC may pay injurious affection without acquiring any land, which may be left until the land is required for the public work for which it is reserved. In these circumstances, the landowner retains full use of the land upon the payment of injurious affection. A notification is attached to the Certificate of Tile identifying the interest that the WAPC has in the land and the amount of compensation paid reflected as a percentage of the unaffected reserved land.

It should be clarified that compensation under the PD Act does not equate to compulsory acquisition. It is compensation for the interim loss of the use of land by a landowner. Where compensation under the planning system is provided, that compensation is taken into account when the land voluntary purchased or compulsorily acquired. Similarly, where a person's land is reserved in a planning context, and they are entitled to compensation, but do not claim it, that person would receive the full amount of compensation when the land is eventually voluntary purchased or compulsorily acquired. Under both scenarios there is no double-dipping of compensation.

A claim for injurious affection cannot be treated under planning legislation on the same terms as are available in section 241(7)(b) of the LA Act as it would be the effective equivalent of compulsory acquisition, allowing landowners to lodge a claim for compensation to include all the heads of claim provided for within the LA Act.

Amendments to this approach would result in significant financial burden on government. The pragmatic and strategic gradual acquisition of land (in good time) at market value affected by long term planning issues would be sacrificed in order to fund the cost of compensating landowners on a compulsory acquisition basis. Landowners full use of the land in the interim would also be sacrificed.

In addition to legislative requirements, the DPLH and WAPC comply with the Premier s Instruction 2014/04, which reflects Government s approach in respect to the primacy of private property rights.

2019 update from Western Power

Western Power will comply with relevant legislation.

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Recommendation 34

The Committee recommends that the DLI maintains a comprehensive and publicly available list of all policies, strategies and plans which impact on administrative decision-making pertaining to land use.

Initial Government response

The Government does not support the recommendation.

The DLI has advised the recommendation is impractical from a logistical aspect and secondly landowners would most likely struggle to identify from such an extensive list, the items that would apply to their land.

The DLI land information platform (described in response to Recommendation 35) currently under development will potentially enable landowners to access key interests, policies, strategies and plans that may affect the enjoyment and use of land – with the currency and accuracy of the information being provided and maintained by each source agency. This offers a practical means of addressing the concerns that have resulted in the recommendation.

Supported by the Water Corporation.

2019 update from Minister for Lands (Landgate)

The Government did not support the recommendation and Landgate does not support the recommendation. It is impractical from a logistical perspective and secondly landowners would most likely struggle to identify items that would apply to their land from such an extensive list. It is also important to note that the administration of the land titles system in Western Australia does not involve decisions around land use.

The SLIP, developed and hosted by Landgate, allows landowners to access key interests that may affect the enjoyment and use of land with the currency and accuracy of the information being provided and maintained by each source agency. This offers a practical means of addressing the concerns that have resulted in the recommendation.

Recommendation 35

The Committee recommends that, in the short term, the DLI continue to implement its aim of establishing itself as a "one stop shop" database of all interests affecting land as an urgent priority.

Initial Government response

The Government supports the recommendation in terms of government interests in land.

The priority of the DLI land information platform (when operational) is to integrate land information and provide access to land information held across government. The system will enable interested parties to source a wide range of government land information including key details about rights, restrictions and obligations associated with a land parcel or certificate of title.

The DLI will not be in a position to record all privately created interests in land, such as private agreements and unregistered easements.

Also supported by the Water Corporation.

2019 update from Minister for Lands (Landgate)

The Government supported the recommendation and Landgate supports the recommendation. Landgate has developed the award-winning SLIP to enable data sets from the numerous agencies with interests affecting land to be linked to the title and made publicly available through a Property Interest Report (PIR). The PIR currently covers 76 interests in land and was built with the

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understanding that further interests in land that would exist in the future. The PIR can accommodate these future interests and is an appropriate, effective and inexpensive means by which a landowner or any member of the public can access detailed information relevant to a land parcel. It is important to note that Landgate is not able to record all privately created interests in land, such as private agreements and unregistered easements on the SLIP and doing so is contrary to the Torrens System.
Recommendation 36 The Committee recommends that, for the long term, the DLI introduce, as soon as practical, an electronic three dimensional certificate of title which records all interests affecting the land described on the certificate of title. **Initial Government response** The Government does not support the recommendation. The DLI has identified at least 180 interests that affect land. Only portion of the possible range of interests are currently contained on the certificate of title. In time key interests obtained through the land information platform may include two and three dimensional image references. A certificate of title has the benefit of a State guarantee as to its accuracy. With the recording of all "possible" interests affecting land on the certificate of title, it would not be feasible to extend this guarantee to all items and this may have the effect of eroding the integrity and indefeasibility of the certificate of title. The significant costs of such a proposal ultimately would need to be passed on and may have the effect that obtaining a copy of an absolute certificate of title would be cost prohibitive. Supported by the Water Corporation. **2019 update from Minister for Lands (Landgate)** The Government did not support the recommendation and Landgate does not support the recommendation as it is cost prohibitive, unfeasible, and contrary to the legal principles of the WA land titles system. At least 180 interests that affect land have been identified by Landgate and only a small portion of these interests are required by to be contained on the certificate of title by the *Transfer of Land Act 1893* (TL Act). Whilst a three-dimensional certificate of titles has not been created, an electronic certificate of title has been introduced. A certificate of title has the benefit of a State guarantee as to its accuracy. If all "possible" interests affecting land were recorded on the certificate of title the State would have to extend this guarantee to these interests. This would expose the State to significant compensation payments, may erode the integrity, accuracy and indefeasibility of the registered certificates of title, clutter the title, and may undermine the simplicity and effectiveness of the WA Torrens system. As noted in Recommendation 35, individuals can obtain information on interests affecting a parcel of land through the SLIP and a PIR. In addition, the Cadastral service, also provided through the SLIP, allows individuals to search and access land interest information using an online map.
Recommendation 37 The Committee recommends that the Government introduce, after a two year phase in period, legislative requirements that:

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- any policy, strategy, plan or other document impacting on administrative decision making with respect to land use that affects one or more specific certificates of title, is to be of no effect unless it is registered with the DOLA
- all policies, strategies, plans or other documents impacting on administrative decision-making with respect to land use that are specific to a certificate of title are to be, upon registration with the DOLA, cross-referenced with the relevant certificate of title.

Initial Government response

The Government does not support the recommendation.

The DLI acknowledges the relevance and intent of the recommendation.

There are an enormous number of Commonwealth, State and Local Government policies, strategies, plans and other documents that may impact on administrative decision-making with respect to land use. It would be impractical to record all of these on the certificate of title and to keep the information current and reliable.

DLI estimates the cost to establish such a system would be in the vicinity of $50 million with operating costs in the vicinity of $10 million per annum. These costs would ultimately have to be passed onto consumers (in the main landowners), which in turn would make the cost of obtaining or amending a certificate of title prohibitive.

The land information platform being developed by DLI in consultation and cooperation with other government agencies (see Recommendation 35), will use the certificate of title as a primary reference and access point. This approach is considered to provide a more practical and cost effective means of addressing the main concerns that this recommendation seeks to address and resolve.

Initial response from the Water Corporation

- This recommendation ties in with the comments made in respect to Recommendation 34.
- This also ties in with Recommendation 35 in that, if Recommendation 37 is implemented and achieved, the DLI will truly be a 'one stop shop' database of all interests affecting land.
- The Water Corporation should strongly support this recommendation.

2019 update from Minister for Lands (Landgate)

The Government did not support the recommendation and Landgate does not support the recommendation as it is impractical and cost prohibitive. There are an enormous number of Commonwealth, State and Local Government policies, strategies, plans and other documents that may impact on administrative decision-making with respect to land use.

It would be impractical to record all of these on the certificate of title and impractical and very difficult to keep the information current and reliable. In addition, unlike a certificate of title, none of this information can nor should be guaranteed by the State.

Previous estimates place the cost of establishing such a system in the vicinity of $50 million ($68 million adjusted for inflation) with operating costs in the vicinity of $10 million ($13.7 million adjusted for inflation) per annum. These costs would ultimately have to be passed onto consumers (in the main, landowners) and would make obtaining or amending a certificate of title cost prohibitive.

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As noted in Recommendation 35, individuals can obtain information on interests affecting a parcel of land through the SLIP and a PIR. However, the certificate of title is the primary reference point. This approach is considered a more practical and cost-effective means of addressing the main concerns that this recommendation seeks to address and resolve.

[Source: Source: Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, Hon Rita Saffioti, Minister for Planning, letter, 22 October 2019, Hon Bill Johnston MLA, Minister for Energy, letter, Hon Dave Kelly MLA, Minister for Water, letter, 17 October 2019, 22 October 2019, Guy Chalkley, Managing Director, Western Power, letter, 10 November 2019, Government of Western Australia, *Response pf the Western Australian Government to the Western Australian Legislative Council Standing Committee on Public Administration and Finance in relation to the Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia,* Perth, July 2004, Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, *Report #7, the Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia,* May 2004]

APPENDIX 3

PETITION 42–REQUEST TO REPEAL THE ENVIRONMENTAL PROTECTION (ENVIRONMENTALLY SENSITIVE AREAS) NOTICE 2005

Table 7. *Recommendations, initial Government response and current status*

Update on status of recommendations
Recommendation 1 The Committee recommends that the Minister for Environment repeals regulation 6 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*. **Initial Government response** Regulation 6 expired (by operation of the *Environmental Protection Amendment Act 2003* section 110(4)(b)) on 9 April 2005 (i.e. on the expiration of nine months after section 110 came into operation). As regulation 6 has expired, it cannot be repealed. In the electronic version of the regulations, regulation 6 has been removed and replaced with a note "[6. Expired on 8 April 2005 by operation of the *Environmental Protection Amendment Act 2003* section 110(4)(b)]." The next hard copy reprint will not include the provision. **Current status** The versions of regulations published in 2015 have removed regulation 6 as per advice in the Government response to the Committee's report.
Recommendation 2 The Committee recommends that the Minister for Environment review the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* (Notice) and the scope of land declared an Environmentally Sensitive Area (ESA) with a focus on wetland ESAs. **Initial Government response** Several Environmental Protection Policies (EPPs) are being reviewed to ensure they are appropriate, necessary and not duplicative of existing protections/regulations. This includes EPPs which protect wetlands declared as ESAs (for example, Swan Coastal Plain Lakes and South-West Agricultural Zone Wetlands). **Current status** The Government is progressing amendments to the *Environmental Protection Act 1986* (EP Act), including prescribing ESAs in regulations This will allow consultation to be tailored to the nature of the change, rather than needing to follow a prescriptive approach which will ensure ESAs remain current and relevant. Regulations also remain subject to scrutiny by Parliament. Since the time of the Committee's report, the Swan Coastal Plain Lakes and South-West Agricultural Zone Wetlands Environmental Protection Policies have been repealed following a review by the Environmental Protection Authority (EPA).

Update on status of recommendations

Recommendation 3

The Committee recommends that the Minister for Environment introduce an effective mechanism of Departmental review where a landowner disputes the Department's decision that their land includes an ESA. This should include a Departmental officer visiting the land in question.

Initial Government response

ESAs are based on areas defined in legislation (for example, areas covered by EPPs made under the EP Act, Ramsar convention wetlands or World Heritage properties listed under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)), or based on policies and mapping such as Bush Forever; conservation category wetlands in the geomorphic wetlands dataset; wetlands mapped in the Busselton-Walpole area; and certain wetlands mapped for Augusta to Walpole.

Where the areas are adopted based on policy or mapping, the custodian for the ESA value is responsible for reviewing and maintaining the accuracy of the data and there are existing processes for this. Understanding the Committee's primary focus on wetlands, I can advise that the Department of Parks and Wildlife as the custodian of wetland mapping has a protocol for updating the boundaries or management category of wetlands. Further information is available at www.dpaw.wa.gov.au/management/wetlands.

Current status

ESAs are based on areas defined in legislation, mapping and policy. In relation to mapping and policy, the Government response in 2015 remains relevant.

Recommendation 4

The Committee recommends that the Minister for Environment amend land clearing laws to provide that the grazing exemption at regulation 5, item 14 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* apply to ESAs declared in the Notice.

Initial Government response

The scheme of the existing legislation provides that exemptions in regulations do not apply in ESAs.

This matter has been addressed through the finalisation of grazing guidelines. This guideline clarifies that sustainable grazing at levels that are consistent with existing, historic grazing practices where such grazing does not result in significant modification of the structure and composition of the native vegetation is not considered to be clearing.

Current status

This recommendation is not supported. It is considered that implementing the recommendation has the potential of resulting in very significant environmental impact. The amendments to the EP Act have proposed an alternative approach.

To ensure that the EP Act can deal with clearing proposals more efficiently, it is proposed to introduce a referral system, which will require that any clearing not exempt under the Act (including that in ESAs) is to be referred to the Chief Executive Officer for a determination of whether a clearing permit is required. In the event that the clearing impact is minor, no clearing permit would be required.

Update on status of recommendations
Recommendation 5 The Committee recommends that the Minister for Environment ensures that the Department of Environment Regulation (DER) conducts broad consultation with the public and Members of Parliament on the draft A guide to grazing, clearing and native vegetation under Part V Division 2 of the EP Act. **Initial Government response** DER released a 'Draft guideline: A guide to grazing and clearing of native vegetation' for public comment between 24 June and 22 July 2015. DER also wrote separately to seek comment from the Pastoralists and Graziers Association, WA Farmers Federation and the Gingin Property Rights Group. Four submissions were received. The submissions received, a consultation summary addressing submissions and a final guideline are available on DER's website and are attached to this response. **Current status** Completed as per advice to the 2015 inquiry.
Recommendation 6 The Committee recommends that the Minister for Environment (in the Government response to this report) advises the Legislative Council of the details of consultation undertaken, or to be undertaken, and the outcome of the public consultation process. **Initial Government response** See comment above. **Current status** Completed as per advice to the 2015 inquiry.
Recommendation 7 The Committee recommends that the Minister for Environment directs the DER to provide a link to the ESA and documents referred to in that Notice on its website. **Initial Government response** DER has included a clearer link on its website for public to view information regarding ESAs. This includes the list of publicly available individual datasets and a link to the State Law Publisher's website which includes the *Government Gazette* containing the ESA Notice. DER's Clearing Permit System and Landgate's Shared Land Information Platform map the locations of ESAs. In addition, all clearing application decision reports are available on DER's Clearing Permit System. **Current status** Completed as per advice to the 2015 inquiry.

Update on status of recommendations

Recommendation 8

The Committee recommends that section 51C of the EP Act be redrafted to state in positive language the circumstances in which a person is authorised to clear native vegetation.

Initial Government response

The intent of listing areas or classes as ESAs is to ensure that clearing that is allowed by exemption in regulations cannot be undertaken in these areas without consideration through a permit application. It is important to acknowledge that the presence of ESAs does not necessarily preclude clearing from taking place. Since the regulations took effect a total of 924 clearing permits have been granted within ESAs. DER has reviewed its guidance statements relating to native vegetation clearing requirements to ensure clear and consistent advice is available to landholders.

Current status

The Government is progressing amendments to the EP Act following consideration of the outcomes of a number of reviews, appeals, Court outcomes and advice that has been received by the Department of Water and Environmental Regulation.

This includes the report of the expert committee chaired by Associate Professor Garry Middle established to review and report on the clearing provisions and suggest amendments to the EP Act, regulations and policies which would improve the effectiveness and efficiency of the regulation of clearing.

An Exposure draft Bill and discussion paper have been recently released for consultation.

Recommendation 9

The Committee recommends that the Minister for Environment directs the Department of Environment Regulation to write to each affected landowner to advise of the existence of the ESA and its impact.

Initial Government response

Section 51B of the EP Act provides that the Minister for Environment may declare by notice either a specified area of the State, or a class of areas of the State, to be an ESA. The notice must be made after consultation with the EPA and such public authorities, persons and groups as the minister considers to have an interest in its subject matter (section 51B(4)). The current Notice was made by the then Minister for Environment on 8 April 2005. It is not considered necessary or practicable to write to each affected landholder.

The Notice only has effect where clearing that is otherwise exempt under regulations is within an area declared as an ESA, in which case a clearing permit is required. In order to determine whether proposed clearing is within the scope of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2003*, landholders would refer to DER's explanatory material and consult with DER as necessary. This ensures that appropriate advice on ESAs is provided.

DER will however ensure that its guidance statements, guidelines and fact sheets available on its website are prominent and easily accessible.

Current status

Not supported. The amendments outlined above would ensure that appropriately targeted consultation is taken with stakeholders, including landowners, through the making of regulations.

Source: Hon Stephen Dawson MLC, Minister for Environment, letter, 15 October 2019, Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 41, *Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, August 2015, and Government of Western

Australia, *Response to the Report 41, Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005,* October 2015.]

APPENDIX 4

FISHERIES MANAGEMENT PAPER NO. 165, NOVEMBER 2002

4.1 The former Minister for Fisheries provided a proposed response to the recommendations in this report at the time it was published.

4.2 In response to the Committee's request, the current Minister for Fisheries provided an update regarding the current Government's position in respect of the report's recommendations.

Table 8. *Recommendations, former Minister for Fisheries' proposed position at date of report, and the current Government's position*

Update on status of recommendations
Recommendation 1 The Western Australian Government introduce an integrated management system for the sustainable management of Western Australia's fisheries. **Minister's proposed position as at date of report** Agree. **Current Government's position** Implemented. Note, Integrated Fisheries Management Policy of 2004, 2009, formal allocations for western rock lobster, Metropolitan abalone, west coast demersal scalefish and pearl oyster resources. Integrated Fisheries Management (IFM) principles are central to the *Aquatic Resources Management Act 2016* (ARM Act).
Recommendation 2 The development and funding of a comprehensive research and monitoring program encompassing all user groups is essential to provide the necessary information for sustainability and allocation issues to be addressed under an integrated framework. **Minister's proposed position as at date of report** Agree. **Current Government's position** The Department of Primary Industries and Regional Development (DPIRD) monitors fishing by both the commercial and recreational sectors.
Recommendation 3 The Department of Fisheries investigate standardising catch information at five nautical mile grids to provide comparative information across all user groups. **Minister's proposed position as at date of report** I agree to a review aimed at standardising catch information between sectors, however it is important that the scale for data collection and reporting is appropriate for each particular fishery. **Current Government's position** Implemented in some commercial fisheries. There is an overall trend towards recording catch data at finer spatial scales. Decisions on the scale at which data is recorded depends on factors such as risk and requirements of third parties (e.g. Commonwealth export approvals).
Recommendation 4 The integrated management system must be open and transparent, accessible and inclusive, flexible, effective and efficient.

Update on status of recommendations
Minister's proposed position as at date of report I agree with the general thrust of this recommendation, however because of the complex and time-consuming nature of fisheries management processes and likely disagreement between parties over allocations, it may be difficult to satisfy 'effective and efficient' criteria. **Current Government's position** The Integrated Fisheries Allocation Advisory Committee (IFAAC) process achieved this. Going forward, ARM Act establishes statutory consultation requirements for an Aquatic Resource Management Strategy (ARMS). An ARMS must include the main management objective for the resource and the associated proportional allocation of the resource between the recreational and commercial sectors.
Recommendation 5 The following nine principles be recognised as the basis for integrated management decisions and, where appropriate, incorporated into fisheries legislation. More specific principles to provide further guidance around allocation decisions may also be established for individual fisheries. **Minister's proposed position as at date of report** I am in general agreement with the nine principles. A number of minor changes may however provide greater clarity around some principles. A review of the recommendations against the current legislation is required to determine if they are already embraced in the head powers contained in the *Fish Resources Management Act 1994* (FRM Act). In particular, Part 6 of the FRM Act requires review to ensure it adequately embraces the principles of integrated management and its application across all sectors. Some of these principles may be better incorporated into Ministerial Policy Guidelines rather than legislation because of the uncertainty and risks of enshrining what will be an 'evolving process' into legislation. **Current Government's position** All of these principles are central to management of fisheries in Western Australia. Some, they are included in legislation and or policy Principles reviewed and amended in 2009 to reflect practicalities of IFM. See: http://www.fish.wa.gov.au/Documents/ifm/IFMGovtPolicy2009.pdf
Recommendation 5(i) Fish resources are a common property resource managed by the Government for the benefit of present and future generations. **Minister's proposed position as at date of report** Agree. **Current Government's position** As per current Government's position in Recommendation 5 above.
Recommendation 5(ii) Sustainability is paramount and ecological requirements must be accounted for prior to any allocation to user groups. **Minister's proposed position as at date of report** Agree. There may be benefit in amending the objects of the FRM Act to make the application of Ecologically Sustainable Development (ESD) principles clear. **Current Government's position** As per current Government's position in Recommendation 5 above.
Recommendation 5(iii)

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Decisions must be made on best available information and where this information is uncertain, unreliable, inadequate or not available, a precautionary approach adopted to minimise risk to fish stocks. The absence of, or any uncertainty in, information should not be used as a reason for delaying or failing to make a decision. **Minister's proposed position as at date of report** Agree, however I believe the required approach to management may be better defined as a cautionary or low risk approach, i.e. "…. a cautious approach adopted to minimise risk to fish stocks". **Current Government's position** As per current Government's position in Recommendation 5 above.
Recommendation 5(iv) A sustainable target catch level must be set for all fisheries and explicit allocations designated to each user group. **Minister's proposed position as at date of report** While a target catch level should be set against a backdrop of sustainability objectives, it may also be set against a number of other management objectives. This may be compounded because of factors such as definition around measurement, determination of imputed catch levels in some fisheries, stock recovery, et cetera. Therefore I suggest this principle should be amended to read "A target catch level must be set where practical …" I see merit in including an additional principle as follows: "In setting allocations for commercial and recreational sectors, recognition must be given to existing customary and passive use of the resource and possible aquaculture requirements". **Current Government's position** As per current Government's position in Recommendation 5 above.
Recommendation 5(v) Allocations to user groups should account for the total mortality on fish resources resulting from the activities of each group, including bycatch and mortality of released fish. **Minister's proposed position as at date of report** Agree. **Current Government's position** As per current Government's position in Recommendation 5 above.
Recommendation 5(vi) The total catch across all user groups should not exceed the sustainable target catch level. If this occurs, immediate steps should be taken to reduce the take within prescribed levels. Management arrangements for each user group should aim to contain their catch within the level set for that group. **Minister's proposed position as at date of report** Agree. (delete 'sustainable' as per (iv)). **Current Government's position** As per current Government's position in Recommendation 5 above.
Recommendation 5(vii) Allocation decisions should aim to maximise the overall benefit to the Western Australian community from the use of fish stocks and take account of economic, social, cultural and environmental factors. **Minister's proposed position as at date of report**

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Agree, however the words "maximise the overall" should be replaced by "achieve the optimal" to make it consistent with the FRM Act. **Current Government's position** As per current Government's position in Recommendation 5 above.
Recommendation 5(viii) Allocations to user groups should generally be made on a proportional basis to account for natural variations in fish populations. This general principle should not however preclude alternative arrangements in a fishery where priority access for a particular user group(s) may be determined. **Minister's proposed position as at date of report** Agree. **Current Government's position** As per current Government's position in Recommendation 5 above.
Recommendation 5(ix) Allocations are notional – they are not "owned" by a group – however management arrangements must provide users with the opportunity to access their allocation. **Minister's proposed position as at date of report** Agree, however I suggest an additional sentence should be added: "There should be limited capacity for transferring un-utilised shares into future years, as such a process may not be sustainable." This is to confirm that, in general, un-utilised shares should not be able to be carried over from a given year because of sustainability reasons, while making allowance that there may be the potential for some limited transfer of capacity in effort managed fisheries. **Current Government's position** As per current Government's position in Recommendation 5 above.
Recommendation 6 A working group comprised of representatives from the Department of Fisheries and relevant interest groups be established for each fishery, to undertake widespread consultation and develop a draft sustainability report for each fishery. **Minister's proposed position as at date of report** Disagree. The existing ESD policy framework meets this requirement. While ESD processes are currently focussed on commercial components of fisheries in order to meet export requirements, the future application of ESD will incorporate wider information across all users. The ESD reports with adjustments will meet reporting requirements. **Current Government's position** Recommendation was not supported by the then Minister. Resource reports were produced for the four resources which have been formally allocated. The information envisaged to be included in these reports is available in documents such as the annual State of the Fisheries and Aquatec Resources Report. Resource Assessment Reports, Ecological Risk Assessment Reports and Harvest Strategies.
Recommendation 7 The Executive Director, Department of Fisheries, approve a Sustainability Report for each fishery, which includes a clear statement on the sustainable target catch level. **Minister's proposed position as at date of report**

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As resources allow, this will occur over time. To date applications for six fisheries have been submitted to Environment Australia and a further nine are under ESD assessment. There are still some 30 fisheries requiring assessment in the future.

Current Government's position

Formal reports have been produced as part all formal allocation processes to date. For those resources that have not been allocated, formal reports have not been produced, but as part of the annual management cycle for a number of fisheries, advice on the allowable harvest level is provided to the Minister, particularly where subsidiary legislation needs to be amended. ARM Act will require that in Managed Aquatic Resources, the Chief Executive Officer must gazette a notice not less than 30 days before the start of a fishing period which sets out the Total Allowable Catch for the resource.

Recommendation 8

An Integrated Fisheries Allocation Council be established by statute and be responsible for investigating resource allocation issues and making recommendations on optimal resource use to the Minister for Fisheries including:

(i) broad allocations between groups within the sustainable catch limits determined for each fishery

(ii) strategies to overcome temporal and spatial competition at a local/regional level

(iii) allocation issues within a sector as referred by the Minister for Fisheries

(iv) more specific principles to provide further guidance around allocation decisions for individual fisheries

(v) other matters concerning the integrated management of fisheries as referred by the Minister for Fisheries.

Minister's proposed position as at date of report

I agree with the general thrust of this recommendation. I recognise that the system must be flexible due to the differing aspirations of users. I suggest a Ministerial Advisory Committee, with clear terms of reference, be established under section 42 of the FRM Act which incorporates points (i)–(v) in the recommendation. In the longer term, the FRM Act can be amended and the committee established as a formal body under Part 4 of the FRM Act. A review of Part 4 of the FRM Act may be required to examine the role and relationship of various committees to reflect a more flexible committee structure and changing processes under integrated management.

A number of minor amendments are suggested:

R8(i) - Delete word "broad".

R8(ii) after "… overcome" insert "allocation and access issues arising from"

An additional principle should be added:

(vi) Allocation principles and processes will be developed in the context of Ministerial Guidelines under section 246 of the FRM Act. These Guidelines will need to cover process of allocation, mediated outcomes and recommendations on allocations based on catch history, or reallocations utilising methodologies incorporating net economic worth calculations with supporting socio-economic data.

Current Government's position

The IFAAC was established as a Ministerial Advisory Committee under the FRM Act. It operated until 2017. The formal process around allocation decisions is being reviewed as part of the shift to

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ARM Act. Government is committed to an efficient and transparent process which may include the use of working groups or panels where appropriate.
Recommendation 9 The Integrated Fisheries Allocation Council comprise a chairperson and four members, not representing sectoral interests in any fishery. **Minister's proposed position as at date of report** Agree in part. An expertise-based committee of three members should be appointed, who bring legal, economic/social, fishery science or management knowledge and experience. **Current Government's position** The IFAAC comprised an independent Chair, a representative from the recreational sector, a representative from the commercial sector, a Department representative and an independent member.
Recommendation 10 The Minister for Fisheries be required to explain publicly any departure from the Integrated Fisheries Allocation Council's recommendations or advice. This obligation should extend to any matter referred to it by the Minister. **Minister's proposed position as at date of report** Disagree. This process should occur in a similar manner to that of other committees in which the Minister advises stakeholders of his decision following consideration of the committee's advice. There should be no constraint on the Minister's discretionary powers. **Current Government's position** Ministerial decisions arising from consideration of IFAAC's recommendations were published.
Recommendation 11 The Integrated Fisheries Allocation Council be responsible for determining the process and timeframes for resolving allocation issues in each fishery. **Minister's proposed position as at date of report** Disagree. The terms of reference and timeframes for fishery reviews should be determined by the Minister. **Current Government's position** As an advisory committee to the Minister the Fisheries to be allocated which were considered by IFAAC were in accordance with Government priorities. A broad process for the development of allocation advice was established, but IFAAC largely determined its own timeframes.
Recommendation 12 The Integrated Fisheries Allocation Council's recommendations or advice to the Minister for Fisheries should become public at the time it is submitted to the Minister. **Minister's proposed position as at date of report** Disagree. The committee should report directly to the Minister and the appropriate release of information determined on a case-by-case basis. **Current Government's position** IFAAC's recommendations were published, but as an advisory committee to the Minister, publication was required to be approved by the Minister.
Recommendation 13

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Where a reallocation of resources from one user group to another results in demonstrable financial loss to an individual, in principle there should be an entitlement to compensation. Compensation may take various forms and does not necessarily involve the payment of money. No compensation should be payable where allocations are reduced for sustainability reasons. **Minister's proposed position as at date of report** Agree. Cases for compensation should be assessed on their merits on a case-by-case basis. I believe priority needs to be given to investigating the potential development of market-based systems to achieve reallocations, along with due consideration of social equity considerations, as soon as practical. **Current Government's position** None of the formal allocation decisions have resulted in this scenario.
Recommendation 14 Appropriate management structures should be introduced for each user group which will allow for the catch of each group to be contained within its prescribed allocation. **Minister's proposed position as at date of report** Agree. This is a Ministerial/Departmental responsibility to administer. I suggest the words "and processes" should be inserted after "structures". **Current Government's position** The range of management tools available under the FRM Act and which will be available under ARM Act enable this to occur.
Recommendation 15 Management arrangements for each user group should incorporate pre-determined actions which are invoked if that group's catch increases above its allocation. **Minister's proposed position as at date of report** Agree in principle. **Current Government's position** This is occurring through the development of harvest strategies.
Recommendation 16 In recognition of the need for more effective management of finfish fisheries: (i) Regional recreational plans for the West Coast and Gascoyne regions be implemented as soon as possible, and planning commence for the North and South Coast regions, to provide a more effective framework within which to control the recreational catch (ii) Specific management arrangements be introduced for the commercial wetline fishery, based on the four regions adopted for recreational fisheries, which provide a framework in which the commercial catch can be contained. One of the key access criteria for the wetline fishery should be fishing history prior to the benchmark date of 3 November 1997. **Minister's proposed position as at date of report** (i) Agree. It should be noted these plans will need review in the future to include target catch levels. (ii) Agree, noting that the department is seeking clarification on legal issues around benchmark dates given possible National Competition Policy considerations. **Current Government's position** Regional Recreational Fishing Strategies were implemented and helped shape elements of the *Fish Resources Management Regulations 1995* (FRM Regulations). There has since been a shift from a

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bioregional based approach to a resource based approach to recreational fishing management. This is a central element of ARM Act. The major components of what was then the commercial wetline fishery have been, or will in the coming months be, under formal management.
Recommendation 17 Each user group within a fishery should continue to be managed within existing catch ranges until a formal assessment under the new allocation process is undertaken. **Minister's proposed position as at date of report** Disagree. I believe we need to be more timely in dealing with allocation issues. I am considering the merits of establishing a benchmark date to formalise existing allocations, possibly consistent with the announcement of this Review in March 2000. **Current Government's position** This principle has been adopted.
Recommendation 18 A baseline of existing catches should be determined for each fishery by the Department of Fisheries based upon the best information available. **Minister's proposed position as at date of report** Agree. However the lack of data should not be used as basis for not achieving the resolution of resource sharing issues. **Current Government's position** The department collects data in the form of commercial fishing returns and recreational surveys for this purpose.
Recommendation 19 For integrated management to proceed, the State Government must ensure that sufficient additional funding is made available to: • Provide the necessary levels of research, management and compliance for the sustainable management of fisheries; and • Ensure the effective operation of an integrated management system **Minister's proposed position as at date of report** Agree. Clearly this will affect timeframes for implementation, however this is a matter for State Government and availability of funds. **Current Government's position** Department budgets and structures have undergone various shifts since publication of this recommendation. A risk-based approach is used to determine how available resources can best be used to achieve required outcomes.
Recommendation 20 To embrace the principles of integrated management, the required funding package should take a multi-tiered and multiuser approach and be equitable across user groups and include: (i) increased contributions from commercial users, including an increase in the level of contribution to the Development and Better Interest Fund (ii) increased contributions from recreational users, including the introduction of a general recreational fishing licence

Update on status of recommendations
(iii) additional State Government contribution from the Consolidated Fund to ensure required funding levels are met, in acknowledgement of the significant social and economic values associated with sustainable fisheries. **Minister's proposed position as at date of report** The issue of greater contributions from users is a matter for Government policy. In this regard it should be noted the Government's current policy is: • it will not increase the level of fees paid by industry to the Development and Better Interest Fund above the level in the Cole/House agreement unless the industry support an increase. • it will not seek to introduce a licence for recreational line fishing in salt water. **Current Government's position** Significant change has occurred in commercial fishing access fees and recreational licensing which has resulted in a greater contribution by both sectors.
Recommendation 21 The State Government establish a separate review to determine the basis for the introduction of a general recreational fishing licensing system. This review should include an analysis of social equity considerations (such as applicability, cost, concessions and exemptions) and applicability of the system to provide information on recreational effort, and possibly catch. **Minister's proposed position as at date of report** Existing bodies and consultative processes are already in place to undertake such a review if required. **Current Government's position** Recreational fishing licensing has been the subject of reviews over time which has resulted in reforms, including the introduction of the Recreational Boat Fishing Licence in 2010. There are currently no plans to implement a general recreational fishing licence.

[Source: Integrated Fisheries Management Review Committee, *Fisheries Management Paper No. 165*, November 2002 and Hon Dave Kelly MLA, Minister for Fisheries, letter, 6 March 2020.]

APPENDIX 5

FISHERIES OCCASIONAL PUBLICATION NO. 102, NOVEMBER 2011

5.1 In response to the Committee's request, the Minister for Fisheries provided an update regarding the current Government's position in respect of the report's recommendations.

Table 9. *Recommendations, and the current Government's position*

Update on status of recommendations
Recommendation 1 That relevant management plans be amended, in line with the department's (then-Department of Fisheries, now-Department of Primary Industries and Regional Development) proposals, to provide for the grant of managed fishery licences at levels of unit entitlement of one or more units and that complementary amendments be made to enable active and inactive fishing licences to be given effect. **Current Government's position** Relevant legislation changes to enable this to occur have been implemented. Many management plans for specific fisheries allow for this arrangement. The required amendments have been made as requested by industry and/or when it has been necessary to amend plans for other purposes or implement new plans.
Recommendation 2 That section 60 be amended, in line with the Department of Fisheries' proposals, to expressly provide for a minimum entitlement to fish in a management plan. **Current Government's position** Implemented.
Recommendation 3 That section 141 be amended in line with the Department of Fisheries' proposals, to permit the transfer of part or all of an entitlement and that relevant amendments be made to management plans where necessary. **Current Government's position** Implemented.
Recommendation 4 That section 140 be amended to permit the transfer of all or part of an entitlement and that relevant amendments be made to management plans where necessary. **Current Government's position** Not implemented in this form, but the same effect is achieved as an outcome of Recommendation 1. That is, a person who wants to transfer all of their entitlement can surrender their licence and the Chief Executive Officer can than grant a new licence and equivalent entitlement (or increase the entitlement of an existing licence).
Recommendation 5 That the Act be amended, in line with the Department of Fisheries' proposals, so that an authorisation can continue after the death of the individual holding the authorisation as an individual or as a tenant in common and can be transferred as part of the estate. **Current Government's position** Implemented.

Update on status of recommendations
Recommendation 6 That the Act be amended, in line with the Department of Fisheries' proposals, so that when an individual who is a joint tenant dies, the authorisation is able to be held by remaining joint tenants. **Current Government's position** Implemented.
Recommendation 7 That in line with the Department of Fisheries' proposals, amendments be made to enable infringement notices to be issued by Fisheries and Marine Officers for management plan offences and that provide for 45 days for the issue of infringement notices. **Current Government's position** Implemented.
Recommendation 8 That Landgate be required to review the Department of Fisheries Register of Licences and report on how to improve administration and security of interest holder aspects. **Current Government's position** This review was completed.
Recommendation 9 That the Department of Fisheries be required to notify the rights owner if prosecution action in relation to the exercise of those rights is proceeding. **Current Government's position** *Aquatic Resources Management Act 2016* (ARM Act) will separate the ongoing right of access from the annual right to fish. This will largely insulate the access rights holder from prosecution action.
Recommendation 10 That administrative sanctions in Part 13 that relate to the cancellation of authorisations be modified to suspension only in relation to managed fishery licences, particularly where these have schemes of entitlement. **Current Government's position** Implemented.
Recommendation 11 The State Government should legislate to establish stronger statutory fishing access rights that are recognised across government and statutory planning provisions that can deliver a better integrated approach to marine resource use and management. In particular, the Government should ensure better recognition of existing fishing rights and co-ordination across agencies and Acts of Parliament which grant or affect rights in the aquatic environment. Specifically - The proposed Aquatic Resources Management Act have a section that describes its relationship to other Acts. That the Wildlife Conservation Act specifically exclude fish as defined in *the Fish Resources Management Act 1994* (FRM Act). That the Conservation and Land Management Act 1985 (CALM Act) is amended to recognise resource management strategies and other plans under the FRM Act (or the proposed new Act) as evidence of proper conservation and protection of fish. (CALM Act Division 3, section 13B). Other

Update on status of recommendations
provisions of the Act not to affect the operation of the FRM Act, except in Marine Nature Reserves (s 4) or other negotiated areas. That the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* (FRICMR Act) includes compensation in relation to the removal or reduction in the quality fishing access rights (as considered in the property rights model) through the operation of any Act of Parliament. **Current Government's position** ARM Act is the result of significant negotiation within Government. It provides a strengthened access right, but as described in the Department's submission, fish resources are common property and while the right to access them has many property-like characteristics, they are not a property right. The FRICMR Act will be consequently amended by ARM Act to enable it to apply to resource shares under ARM Act.
Recommendation 12 The proposed Aquatic Resources Management Act should be structured around the concept of rights-based fisheries management, and make specific provision for establishing and managing these rights in a robust and integrated manner. Specifically, the new Act should provide for: a) A separate Part or Division which describes the rights of resource users and their degrees of exclusivity, durability, transferability and security. b) Power to establish the maximum level to which a given resource or set of resources should be harvested. c) Power to set and enforce sectoral and individual harvest levels (allocations) for all sectors. d) Clear objectives for resource and sector use plans. e) How fishing access rights can be dealt with and how they are to be managed. f) Provision for continuity of fishing rights as a plan is revoked. g) Penalty provisions should focus on the perpetrator/operator and not unfairly penalise rights owners. h) Review the need for and effectiveness of administrative penalties (section 224) in addition to court imposed penalties. **Current Government's position** These elements are central to ARM Act and are dealt with either explicitly or implicitly.
Recommendation 13 For the purpose of developing a new Act, consideration should be given to the replacement or modification of the owner operator model for rights management inherent in the FRM Act, with a new system for the creation, trading and administration of fishing access rights (fishery shares) discrete from fishing activity (fishing permits). A new system could facilitate rights trading by improving rights ownership and reducing the degree of unnecessary administrative intervention in transactions concerning fishing access rights. Consideration should also be given to the flow of liability as provided in FRM Act Part 17 and its impact on compliance and the property right elements of the licence. The Department should work closely with WA Fishing Industry Council and other stakeholders to develop options for inclusion in the new Act as a matter of priority, noting the intention to have a new Act before Parliament in 2011. **Current Government's position** Under a Managed Aquatic Resource, the ongoing right of access (share) will be separate from the annual right to fish (catch entitlement). This will result in compliance action being focussed on the operator rather than the shareholder. Implemented.

Update on status of recommendations
Recommendation 14 That the current licensing requirements of the FRM Act be rationalised to better reflect rights-based management and focus on resource use. Specifically, the multi-tiered requirements to hold managed fishery licences, fishing boat licences, commercial fishing licences and fish processing licences concurrently be streamlined to focus on resource use. Within the current owner-operator framework, the working group suggested that only three licence types, each with explicit rights and permissions attached are required: A managed fishery (resource) licence. This provides access and sub-units of entitlement to a sustainably managed resource. A commercial fishing master's licence (fishing permit). This provides permission to fish commercially, and to run a commercial fishing operation. It provides no right of access without assigned entitlement in a resource. A licence created by regulation: This provides permission to fish commercial and access to unmanaged resources i.e. those without a management plan. It is temporary in nature and allows for exploratory or short-term fishing for a range of purposes. Any need to identify boats, gear or crew should be implemented as a registration against the fishing permit. **Current Government's position** ARM Act provides significant flexibility with respect to licensing arrangements by providing the capacity for various types of licence to be legislated in the regulations, rather than establishing the requirement at Act level (with a few exceptions). It is anticipated that licensing requirements (e.g. the requirement to hold a commercial fishing licence) will be rationalised under ARM Act.
Recommendation 15 The working group recommends that the proposed Entitlement Management System be scoped and constructed in a manner which will facilitate future models of management, including rights trading within and between sectors, as well as within and between fisheries. **Current Government's position** There has been a trend towards digital solutions to entitlement monitoring and licensing functions since the working group report. This is an ongoing, evolutionary process as technology and management arrangements change. It should be noted that the rights framework under ARM Act does not contemplate free trading of entitlement between sectors, so systems in place focus on the commercial sector.
Recommendation 16 That as a matter of priority WA negotiates more robust and clear jurisdictional arrangements with the Commonwealth in relation to the management of all aquatic biological resources out to the boundaries (200 nm) of the AFZ. **Current Government's position** Under the Offshore Constitutional Settlement (OCS) agreement with the Commonwealth, the State has jurisdiction over the vast majority of resources out to the 200 nautical mile limit of the AFZ. This has been enhanced recently with the shift in jurisdiction of the southern demersal gillnet and demersal longline fishery from the Commonwealth to the State.
Recommendation 17 The settlement of these arrangements should give particular regard to ensuring the continuity of fishing access rights of all fisheries sectors which operate within a recognised ecologically sustainable management framework, as provided for in the EPBC Act, and provide for a consistent

Update on status of recommendations
approach to integrated management of marine resource use under either wholly State or wholly Commonwealth jurisdiction depending on the specific nature of the resources in question **Current Government's position** This reflects usual principles in any OCS arrangement.
Recommendation 18 WA should open discussions with the Commonwealth with a view to developing a national fisheries policy which sets out Commonwealth/State intentions at a national level on the position of sustainable fishing in the context of ecologically sustainable development and the conservation of diversity. **Current Government's position** While there is no national fisheries policy statement, there are regular forums, such as the Australian Fisheries Management Forum, where representatives of relevant State and Commonwealth authorities meet to share and coordinate management activities. There is also a productive relationship between DPIRD and relevant Commonwealth Government departments.
Recommendation 19 That the State Government develop a policy statement on the long-term place of sustainable fishing by all sectors as a key use of WA's living aquatic resources, and underwrite the fishing access rights created as a component of ecologically sustainable development. **Current Government's position** The most recent WA fisheries policy statement was released in 2012. To date, this has not been formally adopted by the current Government, but it continues to reflect the key management principles underpinning fisheries and aquatic resource management in WA.

[Source: Department of Primary Industries and Regional Development, *Fisheries Occasional Publication No. 102*, November 2011 and Hon Dave Kelly MLA, Minister for Fisheries, letter, 6 March 2020]

APPENDIX 6

ENVIRONMENTAL PROTECTION (ENVIRONMENTALLY SENSITIVE AREAS) NOTICE 2005

Western Australia

Environmental Protection Act 1986

Environmental Protection (Environmentally Sensitive Areas) Notice 2005

1. Citation

This notice is the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*.

2. Commencement

This notice comes into operation on the day on which it is published in the *Gazette*.

3. Terms used in this notice

In this notice —

defined wetland means —

(a) a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention;

(b) a nationally important wetland as defined in "A Directory of Important Wetlands in Australia" (2001), 3rd edition, published by the Commonwealth Department of the Environment and Heritage, Canberra;

(c) a wetland designated as a conservation category wetland in the geomorphic wetland maps held by, and available from, the Department;

(d) a wetland mapped in Pen, L. "A Systematic Overview of Environmental Values of the Wetlands, Rivers and

Estuaries of the Busselton-Walpole Region" (1997), published by the Water and Rivers Commission, Perth; and

(e) a wetland mapped in V & C Semeniuk Research Group "Mapping and Classification of Wetlands from Augusta to Walpole in the South West of Western Australia" (1997), published by the Water and Rivers Commission, Perth;

ecological community means a naturally occurring biological assemblage that occurs in a particular type of habitat;

maintenance area, of a stretch of road or railway, means any area in the reserve for that stretch of road or railway that is lawfully cleared;

Ramsar Convention means the Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971, as in force for Australia in accordance with the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth, and set out in Australian Treaty Series 1975 No. 48;

rare flora means flora that is declared to be rare flora under section 23F of the *Wildlife Conservation Act 1950*;

threatened ecological community means an ecological community that —

(a) has been determined by the Minister to be a threatened ecological community; and

(b) is referred to in the list of threatened ecological communities maintained by the chief executive officer of the department of the Public Service principally assisting in the administration of the *Conservation and Land Management Act 1984*.

4. Declaration of environmentally sensitive areas

(1) Subject to this clause, the following areas are declared to be environmentally sensitive areas for the purposes of Part V Division 2 of the Act —

(a) a declared World Heritage property as defined in section 13 of the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth;

(b) an area that is included on the Register of the National Estate, because of its natural heritage value, under the *Australian Heritage Council Act 2003* of the Commonwealth;

(c) a defined wetland and the area within 50 m of the wetland;

(d) the area covered by vegetation within 50 m of rare flora, to the extent to which the vegetation is continuous with the vegetation in which the rare flora is located;

(e) the area covered by a threatened ecological community;

(f) a Bush Forever site listed in "Bush Forever" Volumes 1 and 2 (2000), published by the Western Australia Planning Commission, except to the extent to which the site is approved to be developed by the Western Australia Planning Commission, as described in subclause (3);

(g) the areas covered by the following policies —

(i) the *Environmental Protection (Gnangara Mound Crown Land) Policy 1992*;

(ii) the *Environmental Protection (Western Swamp Tortoise) Policy 2002*;

(h) the areas covered by the lakes to which the *Environmental Protection (Swan Coastal Plain Lakes) Policy 1992* applies;

(i) protected wetlands as defined in the *Environmental Protection (South West Agricultural Zone Wetlands) Policy 1998*;

(j) areas of fringing native vegetation in the policy area as defined in the *Environmental Protection (Swan and Canning Rivers) Policy 1998*.

(2) For the purposes of subclause (1)(d), an area of vegetation is continuous with another area of vegetation if any separation between the areas is less than 5 m at one or more points.

(3) For the purposes of subclause (1)(f), an area of a Bush Forever site is approved to be developed by the Western Australia Planning Commission if —

(a) the Commission has made a decision with respect to the area that, if implemented, would have the effect that development or other works can take place in the area;

(b) that decision is not under assessment under Part IV of the *Environmental Protection Act 1986*; and

(c) where an assessment under Part IV of the *Environmental Protection Act 1986* has been made — the decision may be implemented.

(4) An area that would otherwise be an environmentally sensitive area because of this clause is not an environmentally sensitive area to the extent to which the area is within the maintenance area of a stretch of road or railway.

(5) An area that would otherwise be an environmentally sensitive area because of this clause is not an environmentally sensitive area unless —

(a) the determination of the flora, ecological community, site or area has been made public; or

(b) in the case of an area referred to in subclause (1)(d) or (e) — the owner, occupier or person responsible for the care and maintenance of the land has been notified of the area.

(6) In this clause, unless the contrary intention appears or the context otherwise requires, a reference to the determination of flora, an ecological community, a site or an area is a reference to the determination of the flora, ecological community, site or area as in force or effect immediately before the day on which this notice comes into operation.

(7) In subclauses (5) and (6) —

determination, in relation to flora, an ecological community, a site or an area, means the declaration, determination, designation, registration, listing, mapping or other description of the flora, ecological community, site or area;

APPENDIX 7

REGISTRABLE INTERESTS

The Registrar may only register those interests where there is a head of power and statutory authority under the *Transfer of Land Act 1983* or other relevant legislation or law. These currently include:

- Transfer of Land (fee simple), Transfer by Power of Sale, Transfer by Foreclosure, Transfer of Lease, Transfer for Non-payment of Rates, Transfer of Mortgage, Transfer of Charge, Transfer of Carbon Covenant, Transfer of Carbon Right, Transfer of (Tree) Plantation Interests, Transfer by Sheriff of Court, Transfer of Profit a Prendre
- Fee simple, life estates
- Easements – Statutory and non-Statutory
- Trustee in Bankruptcy
- Mortgages of Land, Mortgage of Lease, Mortgage of Planation Interests, Mortgage of Carbon Covenant
- Charges – for example, under the *Bankruptcy Act 1966* (Cth)
- Leases – sub-leases, leases – transfer of leases
- Profit a prendre
- Carbon Right – *Carbon Rights Act 2003*
- Carbon Right form - *Carbon Rights Act 2003*
- Carbon Covenant - *Carbon Rights Act 2003*
- Carbon Covernant form - *Carbon Rights Act 2003*
- Treee Plantation Agreements – *Tree Plantation Agreements Act 2003*
- Change of Name
- Change of Address
- Strata Titles Schemes
- Memorial – *Agriculture & Related Resources Protection Act 1976*
- Memorial – *Country Areas Water Supply Act 1947*
- Memorial – *Metropolitan Redevelopment Authority Act 2011*
- Memorial – *Environmental Protection Act 1986*
- Memorial – *Criminal Property Confiscation Act 2000*
- Memorial – *Land Administration Act 1997*
- Memorial – *Heritage of Western Australian Act 1990*
- Memorial – *Industrial Lands Development Authority Act 1966*
- Memorial – *Legal Aid Commission Act 1976*
- Memorial – Miscellaneous
- Memorial – *Local Government Act 1960*
- Memorial – *Local Government Act 1995*
- Memorial – *Proceeds of Crime Act 1987* (Cth)
- Memorial – *Proceeds of Crime Act 2002* (Cth)
- Memorial – Rural Reconstruction and Adjustment
- Memorial – *Taxation Administration Act 2003*
- Memorial – *Retirement Villages Act 1992*
- Memorial – *Soil and Land Conservation Act 1945*
- Memorial – *Land Tax Assessment Act 1976*
- Memorial – *Fines, Penalties and Infringement Notices Enforcement Act 1994*

- Memorial – *Town Planning and Development Act 1928*
- Memorial – *Planning and Development Act 2005*
- Memorial – *Metropolitan Water Supply, Sewerage and Drainage Act 1909*
- Memorial – *Water Services Act 2012*
- Memorial – *First Home Owners Grant Act 2000*
- Memorial – *Contaminated Sites Act 2003*
- Memorandum of Common Provisions
- Stay Order
- Transmission
- Survivorship
- Crown Grants
- Crown land positive covenants
- Crown land – reserves, leases
- Taking Orders for Land
- Taking Order for Interests in Land
- Notices of Intention to Take Land
- Notices of Intention to Take Interests in Land
- Vesting Order
- Adverse Possesion.[958]

[958] Landgate, Answer to question on notice 5 asked at hearing held 19 February, dated 3 March 2020, pp 4-5.

APPENDIX 8

INTERESTS CURRENTLY AVAILABLE IN PROPERTY INTEREST REPORT

Table 10. *Interests currently available in Property Interest Report*

No	Types on Interest	Date Added
91	Environmentally Sensitive Areas	15/07/2020
90	City of Perth Plot Ratio (City Planning Scheme No. 2)	28/05/2020
89	Water Corporation – Water service is supplied by an Agreement	21/11/2019
88	Water Corporation – Sewer System	21/11/2019
87	Water Corporation – Special Agreement – Non-potable	21/11/2019
86	Water Corporation – Saline Water	21/11/2019
85	Water Corporation – Reserve Sewer, Water and Drainage Infrastructure Contribution Charge	21/11/2019
84	Water Corporation – Private Pressure Sewer System	21/11/2019
83	Water Corporation – Pressure Exempt	21/11/2019
82	Water Corporation- Water, Sewer and/or Drainage	21/11/2019
81	Water Corporation – Farmlands Service Conditions	21/11/2019
80	Water Corporation – Effluent Discharge Scheme	21/11/2019
79	Water Corporation – Brighton Non-Drinking Water	21/11/2019
78	Water Corporation – Beneficiary Lot Water and/or Sewer	21/11/2019
77	State Planning Policy 5.4 Road and Rail Noise	28/08/2019
76	Notices on Properties under the Soil and Land Conservation Act 1945	11/11/2016
75	Notices on Properties under the BAM Act 2007	11/11/2016
74	Water Corporation Non-Standard Services (Private Fire Service)	09/09/2016
73	European House Borer	11/07/2016
72	Sprinkler Restrictions & Bans	19/04/2016
71	Local Government Municipal Inventory	10/12/2015
70	Bush Fire Prone Areas	08/12/2015
69	State Underground Power Program	14/09/2015
68	Jandakot Airport – Aircraft Noise	06/07/2015
67	Jandakot Airport – Land Use Planning	06/07/2015
66	Western Power Infrastructure	05/05/2015
65	Intensive Agricultural Industries	02/04/2015
64	ATCO Gas Australia Infrastructure	25/03/2015

No	Types on Interest	Date Added
63	Perth Airport – Aircraft Noise	15/01/2015
62	Australian Natural, Indigenous and Historic Heritage	10/11/2014
61	APA Group Owned/Operated Gas Transmission Pipeline	23/10/2014
60	Water Resource License	24/09/2014
59	Waterways Conservation Act Management Areas	24/09/2014
58	Mosquito-borne Disease Risk	24/09/2014
57	Water Corporation infrastructure (above and below ground)	31/07/2014
56	Environmental Protection Policies	23/07/2014
55	Lands owned or managed by the Department of Parks and Wildlife	23/07/2014
54	Possible Road widening (Department of Planning)	02/05/2014
53	Future State Roads	26/02/2014
52	Marine Harbours Act Areas	12/12/2013
51	Marine Navigation Aids	12/12/2013
50	Navigable Water Regulations	12/12/2013
49	Shipping and Pilotage Port Areas	12/12/2013
48	Smoke Alarm	28/11/2013
47	Threatened Fauna	28/11/2013
46	State Forest and Timber Reserve	28/11/2013
45	Threatened Flora	28/11/2013
44	Threatened Ecological Communities	28/11/2013
43	Protected Areas - Collaborative Australian Protected Area Database	29/11/2013
42	National Park, Conservation Park and Nature Reserve	28/11/2013
41	Heritage Council - Assessment Program	02/10/2013
40	Heritage Council - Agreement	02/10/2013
39	Residue Management Notice	26/07/2013
38	Liquor Restriction Areas	26/07/2013
37	Metropolitan Regional Improvement Tax	25/07/2013
36	Dampier to Bunbury Natural Gas Pipeline	19/07/2013
35	Commercial Building Disclosure	10/07/2013
34	Perth Parking Policy	19/06/2013
33	Ramsar Wetlands	13/05/2013
32	Titanium Zircon Mineralisation	29/04/2013
31	Water Corporation Infrastructure Buffer Areas	01/04/2013
30	Wetlands	27/03/2013

No	Types on Interest	Date Added
29	Harvey Water Infrastructure	14/01/2013
28	Clearing Control Catchments	06/12/2012
27	Garden Bore Suitability	06/12/2012
26	Groundwater Salinity	06/12/2012
25	Iron Staining Risk	06/12/2012
24	Perth Airport – Land Use Panning	06/12/2012
23	Proclaimed Groundwater Areas	06/12/2012
22	Proclaimed Surfacewater Areas	06/12/2012
21	Heritage Council - Conservation Order	27/09/2012
20	Heritage Council - State Register of Heritage Places	27/09/2012
19	Region Planning Schemes	19/07/2012
18	Local Planning Schemes	18/07/2012
17	Aboriginal Heritage Places	12/03/2012
16	Aboriginal Lands Trust Estate	12/03/2012
15	Contaminated Sites (Contaminated Sites Database)	09/08/2011
14	Residual Current Device	20/05/2011
13	Bush Forever Areas	18/05/2011
12	Former Military Training Area (Unexploded Ordnance)	29/04/2011
11	Basic Raw Materials	14/04/2011
10	Native Vegetation	10/11/2010
9	Public Drinking Water Source Area	04/08/2010
8	1 in 100 AEP Floodplain Development Control Area	05/05/2010
7	Development Control Area (Swan and Canning Rivers)	16/10/2009
6	Petroleum Tenure	16/04/2009
5	Mining Titles	15/04/2009
4	Acid Sulfate Soil Risk	30/09/2008
3	Native Title and Indigenous Land Use Agreements	12/05/2008
2	Control of Access on State Roads	28/02/2008
1	Emergency Services Levy	29/11/2007

[Source: Landgate, Interests currently available in Property Interest report: https://www0.landgate.wa.gov.au/__data/assets/pdf_file/0017/11645/NewInterestsUpdatePIR.pdf, accessed 2 June 2020.]

On 21 November 2019, the following interests were added to the PIR:

- Water Corporation Water service is supplied by an Agreement
- Water Corporation Sewer System
- Water Corporation Special Agreement - Non-Potable
- Water Corporation Saline Water
- Water Corporation Reserve Sewer, Water and Drainage Infrastructure Contribution Charge
- Water Corporation Private Pressure Sewer System
- Water Corporation Pressure Exempt
- Water Corporation Infrastructure Contribution - Water, Sewer and /or Drainage
- Water Corporation Farmlands Service Conditions
- Water Corporation Effluent Discharge Scheme
- Water Corporation Brighton Non-Drinking Water
- Water Corporation Beneficiary Lot Water and/or Sewer

[Source: Landgate, answer to question on notice 4 asked at hearing held on 19 February 2020, dated 6 March 2020, p 4.]

APPENDIX 9

PLANNING AND DEVELOPMENT ACT 2005

176. Questions as to injurious affection etc., how determined

(1) A claimant or responsible authority may apply to the State Administrative Tribunal for determination of any question as to whether land is injuriously affected.

(2) Any question as to the amount and manner of payment (whether by instalments or otherwise) of the sum which is to be paid as compensation under this Division is to be determined by arbitration under and in accordance with the Commercial Arbitration Act 2012, unless the parties agree on some other method of determination.

179. Injurious affection due to land being reserved, amount of compensation for

(1) Subject to this Division, the compensation payable for injurious affection due to or arising out of the land being reserved under a planning scheme, where no part of the land is purchased or acquired by the responsible authority, is not to exceed the difference between —

(a) the value of the land as so affected by the existence of such reservation; and

(b) the value of the land as not so affected.

(2) The values referred to in subsection (1)(a) and (b) are to be assessed as at the date on which —

(a) the land is sold as referred to in section 178(1)(a); or

(b) the application for approval of development on the land is refused; or

(c) the approval is granted subject to conditions that are unacceptable to the applicant.

184. Betterment; compensation for expenses rendered abortive by amendment or repeal of scheme

(4) A question as to the amount and manner of payment (whether by instalments or otherwise) of the sum which —

(a) the responsible authority is entitled to recover under this section from a person whose land is increased in value; or

(b) is to be paid as compensation under this section, is to be determined by arbitration in accordance with the Commercial Arbitration Act 2012 or by some other method agreed by the parties.

192. Land etc. to be acquired under s. 191, valuing

(1) Despite Part 10 of the Land Administration Act 1997, the value of any land or improvements on land which is compulsorily acquired by a responsible authority under section 191 is, for the purpose of assessing the amount of compensation to be paid for the land and improvements to be assessed —

(a) without regard to any increase or decrease in value attributed wholly or in part to any of the provisions contained in, or to the operation or effect of, the relevant planning scheme; and

(b) having regard to values current at the time of acquisition, but in assessing the amount of compensation regard is to be had to any amounts of compensation already paid, or payable, by the responsible authority in respect of the land under Division 2.

APPENDIX 10

LICENCES AND PERMITS CONNECTED WITH WATER OR DAMS

Table 11. *List of licences and permits that may be issued by the Department of Water and Environmental Regulation in relation to or connected with water and/or dams, and the cost of lodging an application.*

Licence or permit	Purpose	Cost
Licence under section 26D of the Rights in Water and Irrigation Act 1914	To commence, construct, enlarge, deepen or alter a well	No cost*
Licence to take groundwater under section 5C of the Rights in Water and Irrigation Act 1914	To take groundwater	No cost*
Permit to interfere with the bed and banks under section 11,17 or 21A of the Rights in Water and Irrigation Act 1914	To interfere or obstruct the bed and banks of a watercourse or wetland	No cost*
Licence to take surface water under section 5C of the *Rights in Water and Irrigation Act 1914*	To take surface water	No cost*
Application for approval of transfer of a licence, water entitlement or agreement referred to in clause 30 of Schedule 1 to the Act	Transfer of licence	$200
Remove or vary a security interest		$70
Obtain a certified copy of a water licence		$50
Obtain an extract from the water register		$25 fee for first page and $1 per page for any additional pages
Testing of a water meter		$500

[Source: Additional questions from Department of Water and Environmental Regulation, September 2020, q 2, p 2.]

*Fees for water licence and permit applications were introduced for the mining and public water supply sectors on 13 November 2018. The fees apply to the assessment of:

- New licences to take water
- Renewals for existing licences to take water
- Amendments of licences to take water
- Licences to construct or alter wells
- Permits for beds and banks.

The fees are based on the level of assessment undertaken by the Department which is determined by the type of application, the volume of water being applied for and the allocation status of the water resource.

For applications that are for a volume of 1500 kilolitres or less per annum, an exemption exists within the Regulations and the fee payable is $200. Department initiated amendments do not incur an application fee.[959]

[959] Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 1 September 2020, attachment 1, p 2.

APPENDIX 11

COMMERCIAL FISHING LICENCES AND AUTHORISATIONS ISSUED UNDER THE *FISH RESOURCES MANAGEMENT ACT 1994* AND THE *PEARLING ACT 1990* PROPERTY RIGHTS AND COMPENSATION

***Attachment B:**

Commercial Fishing and Related Authorisations and Licences Issued Under the *Fish Resources Management Act 1994* and the *Fish Resources Management Regulations 1995*

Licence	Description	Property Right	Compensation	
			Fisheries Adjustment Scheme Act 1987	***Fishing and Related Industries Compensation (Marine Reserves) Act 1997* (FRICMA)**
Exemption for a commercial purpose	Authority which may be granted by the Chief Executive Officer for a commercial purpose, including commercial fishing.	No property right. Exemptions are not licences and cannot be renewed or transferred.	No	No
Section 43 Order	These are orders which prohibit activities. They may provide exceptions to the prohibition, including by reference to holders of certain licences.	No	Associated licences may be subject to this Act which provides a discretionary power for the Minister to establish a compulsory or voluntary scheme to reduce the size of a fishery(ies). Compensation payable under a voluntary scheme is determined by the Minister on advice from a committee of management. Compensation with respect to a compulsory scheme (which has never occurred) is based on the market value of the licence/entitlement.	Compensation may be payable with respect to associated licences, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4).
Managed Fishery Licence	Authorises operation in a	No. Managed Fishery Licences confer a right of	Provides a discretionary power for the Minister to	Compensation payable, based on the reduction in

	Managed Fishery.	access to a common-property resource.	establish a compulsory or voluntary scheme to reduce the size of a fishery(ies). Compensation payable under a voluntary scheme is determined by the Minister on advice from a committee of management. Compensation with respect to a compulsory scheme (which has never occurred) is based on the market value of the licence/entitlement.	market value of the authorisation arising from relevant events (see FRICMA s.4).
Interim Managed Fishery Permit	Authorises operation in an Interim Managed Fishery.	No. Interim Managed Fishery Permits confer a right to access a common-property resource.	Provides a discretionary power for the Minister to establish a compulsory or voluntary scheme to reduce the size of a fishery(ies). Compensation payable under a voluntary scheme is determined by the Minister on advice from a committee of management. Compensation with respect to a compulsory scheme (which has never occurred) is based on the market value of the licence/entitlement.	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4).
Permit to Construct a Place to Process Fish	One off requirement for approval to construct or establish a place where fish will be processed for a	No property right. This is a one off administrative approval requirement.	No	No

	commercial purpose.			
Fish Processing Licence	Authorises processing of fish for a commercial purpose.	No	No	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4).
Aquaculture Licence	Authorises aquaculture activities and the sale of aquaculture product.	No	No	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4).
Aquaculture Lease	Minister may grant an aquaculture lease over WA land or waters.	The lease provides the exclusive right to undertake aquaculture in the leased area and ownership of the aquacultured fish. It does not provide exclusive access to the area.	No	Compensation payable, based on the reduction in market value arising from relevant events (see FRICMA s.4).
Fishing Boat Licence	Authorises a boat to be used for or in connection with commercial fishing.	Fishing Boat Licences do not confer a property right, but they confer a degree of access to common-property fish resources.	Provides a discretionary power for the Minister to establish a compulsory or voluntary scheme to reduce the size of a fishery(ies). Compensation payable under a voluntary scheme is determined by the Minister on advice from a committee of management. Compensation with respect to a compulsory scheme (which has never occurred) is based on the market value of	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4).

			the licence/entitlement.	
Carrier Boat Licence	Authorises a boat to be used to transport fish taken by another boat for a commercial purpose.	No.	No	No
Commercial Fishing Licence	Personal licence which permits the holder to engage in commercial fishing and to sell fish.	No property right. In some circumstances, these licences are associated with a right to access a specific fishery.	Provides a discretionary power for the Minister to establish a compulsory or voluntary scheme to reduce the size of a fishery(ies). Compensation payable under a voluntary scheme is determined by the Minister on advice from a committee of management. Compensation with respect to a compulsory scheme (which has never occurred) is based on the market value of the licence/entitlement. Note, these licences rarely confer access to a specific fishery, so application of this act is largely irrelevant in a practical sense.	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4). Note, these licences would generally have no market value as they are non-transferrable and only rarely confer access to a specific fishery.
Fishing Tour Operator's Licence and Restricted Fishing Tour Operator's Licence	Permits a fishing tour or a restricted fishing tour to be undertaken for a commercial purpose.	No	No	No

Licences and Authorisations Issued Under the *Pearling Act 1990*

Licence	Description	Property Right	Compensation
			***Fishing and Related Industries Compensation (Marine Reserves) Act 1997* (FRICMA)**
Pearling (Wildstock) Licence	Permits pearling activities to be undertaken in the form of fishing for pearl oysters and seeding those pearl oysters.	No property right. The licence confers access to a common-property resource.	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4).
Pearling (Seeding) Licence	Permits pearling activities to be undertaken in the form of seeding hatchery produced pearl oysters.	No property right.	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4).
Pearl Oyster Hatchery Licence (for Propagation)	Authorises propagation of pearl oyster spat at land-based sites.	No property right.	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4)
Pearl Oyster Hatchery (Nursery) Licence	Permits the grow-out of spat on a nursery site.	No property right.	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4)
Pearl Oyster Hatchery (including Hatchery Nursery) Licence	Authorises propagation and grow-out of pearl oysters.	No property right.	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4)
Pearl Farm Lease	May be issued by the Chief Executive Officer for pearling activities.	Pearl oysters, pearls, and pearl oyster spat on the lease used for pearling or hatchery activities are the property of the lease holder. The Chief Executive Officer can authorise the holder to exclude persons from the lease.	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMA s.4)
Pearl Diver's Licence	Personal licence which authorises a person to	No property right	No

	dive while undertaking pearling or hatchery activities.		
Pearl Boat Licence	Authorises a boat to be used to carry out pearling or hatchery activities.	No	No
Pearl Boat Master's Licence	Authorises a person to be in control of a boat used to carry out pearling or hatchery activities.		No

*Note, Pearling Permits and Hatchery Permits are technically compensatable under the FRICMRA, but are only currently issued for research purposes and not commercial fishing.

[Source: Letter from the (then) Minister for Fisheries, 26 September 2019.]

APPENDIX 12

COMMERCIAL FISHING AUTHORISATIONS INTENDED TO BE ISSUED UNDER THE *AQUATIC RESOURCES MANAGEMENT ACT 2016*: PROPERTY RIGHTS AND COMPENSATION

Commercial Fishing and Related Licences and Authorities Intended to be Issued Under the *Aquatic Resources Management Act 2016*

Licence	Description	Property Right	Compensation	
			Fisheries Adjustment Scheme Act 1987	***Fishing and Related Industries Compensation (Marine Reserves) Act 1997* (FRICMA)**
Exemption for a commercial purpose	Authority which may be granted by the Chief Executive Officer for a commercial purpose, including commercial fishing.	No property right. Exemptions are not licences and cannot be renewed or transferred.	No	No
Resource Shares	Resource shares represent an ongoing right to access a managed aquatic resource They give rise to catch entitlement at the commencement of each fishing period.	No property right. Resource shares will confer an ongoing right to be allocated a quantity of the Total Allowable Catch of a common-property resource.	No	Compensation payable for reduction in the market value of a resource share because of loss of access to an area and a resultant reduction in the allocated catch for the resource share following a relevant event (see FRICMRA s.4).
Catch Entitlement	Catch entitlement is generated from resource shares at the commencement of each fishing period. It represents the quantity of the Total Allowable Catch that the holder of the entitlement can take.	No property right. Catch entitlement is a quantity of the Total Allowable Catch that can be taken in a fishing period.	No	No
Managed Fishery Licence	Authorises operation in a Managed Fishery	No. Managed Fishery Licences confer a right of access to a common-	Provides a discretionary power for the Minister to establish a compulsory or voluntary scheme to	Compensation payable, based on the reduction in market value of the authorisation arising

		property resource.	reduce the size of a fishery(ies). Compensation payable under a voluntary scheme is determined by the Minister on advice from a committee of management. Compensation with respect to a compulsory scheme (which has never occurred) is based on the market value of the licence/entitlement.	from relevant events (see FRICMRA s.4).
Aquaculture Licence	Authorises aquaculture activities within the area covered by an aquaculture lease.	No. Currency of the licence is dependent on the currency of the associated Aquaculture Lease.	No	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMRA s.4).
Aquaculture Lease	Minister may grant an aquaculture lease over WA land or waters	Provides the exclusive right to undertake aquaculture activities within an associated lease area and confers ownership of the aquatic organisms and pearls the subject of the aquaculture activities. Currency of the lease is dependent on the currency of a relevant Aquaculture Licence.	No	Compensation payable, based on the reduction in market value of the authorisation arising from relevant events (see FRICMRA s.4).
Section 125 Order	Supercedes s.43 Orders. They are not licences or authorities, but rather prohibition	No	Associated licences may be subject to this Act which provides a discretionary power	Compensation may be payable with respect to associated licences, based on the reduction in

	orders which may make exceptions to the prohibition. These exceptions may be defined with reference to certain licences.		for the Minister to establish a compulsory or voluntary scheme to reduce the size of a fishery(ies). Compensation payable under a voluntary scheme is determined by the Minister on advice from a committee of management. Compensation with respect to a compulsory scheme (which has never occurred) is based on the market value of the licence/entitlement.	market value of the authorisation arising from relevant events (see FRICMRA s.4).

*Note. It is expected that a number of additional authorisations will be provided for under the *Aquatic Resources Management Regulations.* These Regulations are yet to be finalised.

[Source: Letter from the (then) Minister for Fisheries, 26 September 2019.]

APPENDIX 13

CHARACTERISTICS OF ACCESS RIGHTS UNDER *FISH RESOURCES MANAGEMENT ACT 1994* MANAGEMENT PLANS, *AQUATIC RESOURCES MANAGEMENT ACT 2016* TRANSITIONED MANAGEMENT PLAN AND *AQUATIC RESOURCES MANAGEMENT ACT 2016* MANAGED AQUATIC RESOURCES

APPENDIX 1

Comparison of the Characteristics of Access Rights Under FRMA Management Plans and ARMA (Transitioned Management Plans and Managed Aquatic Resources)

Characteristic	FRMA Management Plan	ARMA Transitioned Management Plan	ARMA Managed Aquatic Resource
Exclusivity (the impact of others on the right)	Access to commercial fishing limited according to criteria in the management plan.	Access to commercial fishing limited according to criteria in the management plan.	Access to commercial fishing limited according to the number of shares in the ARMS and the process for allocating the shares under the ARUP.
			ARMS must set out the quantity of the resource available for customary fishing and public benefit.
			ARMS must set out the proportion of the Total Allowable Catch for commercial and recreational fishing and there is an obligation to monitor and manage each sector to its allocation, thereby increasing exclusivity by reducing the capacity for the commercial sector's access to be impacted upon by others.
Durability (the degree of permanence, temporal duration and renewability of the right)	Authorisations are renewable subject to an application being made no more than 60 days after expiry, payment of fees and good behaviour. Note that management plans for interim managed fisheries may include an end date beyond which the plan and associated authorisations are of no effect.	Authorisations are renewable subject to an application being made no more than 180 days after expiry, payment of fees and good behaviour. Note that management plans for interim managed fisheries will transition as managed fishery management plans, so will no longer have a legislated end date.	Shares granted under an ARUP will only need to be registered upon allocation. Annual renewal will not be required. They exist for as long as the ARUP in place. At the start of each fishing period, shares give rise to catch entitlement which is valid for that fishing period upon registration.
Transferability (including the divisibility of the right and ease of temporary leasing and permanent transfer)	Both authorisations and entitlements (e.g. quota units) under authorisations must be transferred upon application subject to limited grounds for refusal (see S.140(2) of the FRMA).	Both authorisations and entitlements (e.g. quota units) under authorisations must be transferred upon application subject to limited grounds for refusal (see S.60 of the ARMA).	Shares must be transferred on request subject to limited circumstances where the transfer must be refused (see S.36(3) of ARMA).
	Entitlements under an authorisation may be transferred independently of the authorisation, but only to another authorisation holder.	Entitlements under an authorisation may be transferred independently of the authorisation, but only to another authorisation holder.	Once registered at the start of each fishing period, shares (the ongoing right of access) and catch entitlement (the annual right to catch fish) are separate entities. Shares and catch entitlement can therefore be transferred independently of each other. This increases divisibility and flexibility to accommodate various business arrangements.
	If a management plan provides for it (most do), entitlements under an authorisation may be temporarily transferred to another authorisation holder to facilitate lease arrangements.	If a management plan provides for it (most do), entitlements under an authorisation may be temporarily transferred to another authorisation holder to facilitate lease arrangements.	

Security (the quality of the right, including ease of cancellation or change and degree of legal protection)	A court may cancel or suspend an authorisation if the court convicts a person of an offence and the CEO of DPIRD applies for the suspension/cancellation.	A court may cancel or suspend an authorisation if the court convicts a person of an offence and the prosecutor applies for the suspension/cancellation.	Shares are granted in perpetuity, subject to the continued existence of the relevant ARUP. They can only be forfeited where an order is made by a court in association with the shares having been used as surety for an authorisation.
	Where three major offences are recorded against an authorisation in a 10 year period, the CEO of DPIRD must suspend the authorisation of one year.	Where three major offences are recorded against an authorisation in a 10 year period, the CEO of DPIRD must suspend the authorisation of one year.	The perpetual nature of shares, together with their separation from the annual right to fish (catch entitlement) and any associated authorisations means that shares and non-fishing shareholders are not impacted upon by prosecution of the fisher. This provides greater security than under the FRMA.
	Authorisations may be cancelled, suspended or not renewed on limited grounds set out in S.143 of FRMA (e.g. non-payment of fees, grounds set out in a management plan, poor behaviour).	Authorisations may be cancelled, suspended or not renewed on limited grounds set out in S.134 of ARMA (e.g. non-payment of fees, grounds set out in a management plan, poor behaviour).	
	Upon cessation of a management plan, while the CEO of DPIRD is to take into account that a person held an	N/A. No new management plans can be made under ARMA.	Upon the revocation of an ARUP, share options must be granted to those who held shares immediately prior to
	authorisation under that plan, the person is not entitled to the grant of a subsequent authorisation as of right.		the revocation, except if a new ARUP is made which allocates shares of an equivalent value to those persons. The Minister must have regard for share options when determining the method for allocating resource shares in a subsequent ARUP.

[Source: Submission 68 from the Department of Primary Industries and Regional Development, 29 July 2019.]

GLOSSARY

Term	Definition
2004 Inquiry	Standing Committee on Public Administration and Finance inquiry into the impact of government actions and processes on the use and enjoyment of freehold and leasehold land in Western Australia, 2001 – 2004.
Area F	Alcoa residue disposal area
ARM Act	*Aquatic Resources Management Act 2016*
ARM Amendment Bill	Aquatic Resources Management Amendment Bill 2020
ARMS	Aquatic Resources Management System
ARUP	Aquatic Resource Use Plan
Association	Joondalup Urban Development Association
Acquire	To take an interest in land, as permitted in Western Australian statute
CALM Act	*Conservation and Land Management Act 1984*
CAWS Act	*Country Areas Water Supply Act 1947*
Charter	Private property rights charter for Western Australia
Clearing Regulations	*Environmental Protection (Clearing on Native Vegetation) Regulations 2004*
CEO	Chief Executive Officer of the Department of Primary Industries and Regional Development
Coalition	Western Australian Water Users Coalition
Committee	Standing Committee on Public Administration
DER	Department of Environmental Regulation (former)
DLI	Department of Land Information (former)
DPIRD	Department of Primary Industries and Regional Development
DPLH	Department of Planning, Lands and Heritage
DOLA	Department of Lands Administration (former)
DWER	Department of Water and Environmental Regulation
Easement	Express/implied
EBFM	Ecosystem Based Fisheries Management
Environment Committee	Standing Committee on Environment and Public Affairs

Term	Definition
EOP Act	*Energy Operators (Power) Act 1979*
EPA	Environmental Protection Authority
EP Act	*Environmental Protection Act 1986*
EP Bill	Environmental Protection Amendment Bill 2020
EPPs	Environmental Protection Policies
ESA	Environmentally Sensitive Area, as declared under the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*
ESD	Ecologically Sustainable Development
FAS Act	*Fisheries Adjustment Schemes Act 1987*
FOI Act	*Freedom of Information Act 1992*
FPC	Forest Products Commission
FRICMR Act	*Fishing and Related Industries Compensation (Marine Reserves) Act 1997*
FRICMR Regulations	*Fishing and Related Industries Compensation (Marine Reserves) Regulations 1998*
FRM Act	*Fish Resources Management Act 1994*
Guide	The Department of Water and Environmental Regulation's 'A Guide to Grazing of Native Vegetation'
HOA	Housing Opportunity Area
IFAAC	Integrated Fisheries Allocation Advisory Committee
IFM	Integrated Fisheries Management
Inquiry	Inquiry into Private Property Rights
Notice	Environmental Protection (Environmentally Sensitive Areas) Notice 2005
LA Act	*Land Administration Act 1997*
LALAC Bill	Land Acquisition Legislation Amendment (Compensation) Bill 2014
LPS Regulations	*Planning and Development Local Planning Schemes Regulations 2015*
MRIF	Metropolitan Region Improvement Fund
MRIT	Metropolitan Region Improvement Tax
MRS	Metropolitan Region Scheme
NWI	National Water Initiative
ONIC	Oakajee Narngulu Infrastructure Corridor

Term	Definition
PAF Committee	Standing Committee on Public Administration and Finance
PD Act	*Planning and Development Act 2005*
Pearling Act	*Pearling Act 1990*
Petition	Petition to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005
PIR	Property Interest Report
Plan	Warren-Donnelly Surface Water Allocation Plan
PPA	Pearl Producers Association
RIWI Act	*Rights in Water and Irrigation Act 1914*
RIWI Amendment Act 2000	*Rights in Water and Irrigation Amendment Act 2000*
RIWI Amendment Bill 1999	Rights in Water and Irrigation Amendment Bill 1999
SLIP	Shared Land Information Platform
SFIS	Southern Forests Irrigation Scheme
TAC	Total Allowable Catch
TL Act	*Transfer of Land Act 1893*
WAFIC	Western Australian Fishing Industry Council
WA	Western Australia
WA Land Authority	Landgate
WALRC	Law Reform Commission of Western Australia
WAPC	Western Australian Planning Commission
WCAA	West Coast Abalone Association
WRLC	Western Rock Lobster Council

Standing Committee on Public Administration

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'**5. Public Administration Committee**

5.1 A *Public Administration Committee* is established.

5.2 The Committee consists of 5 Members.

5.3 The functions of the Committee are to —

(a) inquire into and report on —

(i) the structure, efficiency and effectiveness of the system of public administration;

(ii) the extent to which the principles of procedural fairness are embodied in any practice or procedure applied in decision making;

(iii) the existence, adequacy, or availability, of merit and judicial review of administrative acts or decisions; and

(iv) any Bill or other matter relating to the foregoing functions referred by the Council;

and

(b) consult regularly with the Parliamentary Commissioner for Administrative Investigations, the Public Sector Commissioner, the Information Commissioner, the Inspector of Custodial Services, and any similar officer.

5.4 The Committee is not to make inquiry with respect to —

(a) the constitution, function or operations of the Executive Council;

(b) the Governor's Establishment;

(c) the constitution and administration of Parliament;

(d) the judiciary;

(e) a decision made by a person acting judicially;

(f) a decision made by a person to exercise, or not exercise, a power of arrest or detention; or

(g) the merits of a particular case or grievance that is not received as a petition.'

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