

## The Current Approach:

#### Ad Hoc and Unfair

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

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

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

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

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

## A Better Approach:

## Protection and Compensation

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

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

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

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

## What are Property Rights?

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

Does it mean an owner can do whatever she wants to with her property, including for example dumping toxic waste on it or hunting every animal and bird until none remains? The short answer has always been no. Property owners have always been subject to some state regulation, usually in relation to allowing others to enjoy their own property, but in recent years the level of regulation has spiralled out of control to the extent that for many property owners a substantial part of the value of their property has been destroyed.

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

# Why Should Anyone Care about Property Rights?

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

## Protection from Bullies is Slipping Away

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

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

State Governments have no constitutional necessity

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

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

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

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

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

## Heritage

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

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

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

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

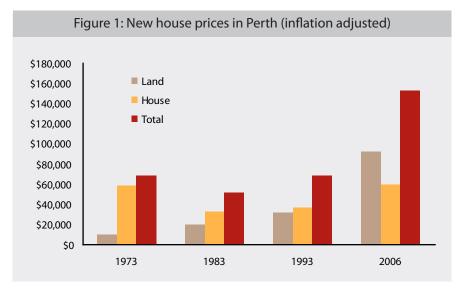
In addition, Western Australia allows a precinct to be listed on the register, notwithstanding that each place within that precinct does not have heritage significance. This means whole suburbs can be listed because of a general streetscape or ambiance. Too bad if this means sub-standard housing is preserved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

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

## Housing and Land

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

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



Source: HIA

of normal practice, planning policies have become increasingly intrusive and have brought rationing of land for housing.

The results have been predictable—as the supply is restricted, prices have ballooned upwards. Since 1973, in real terms, average new house prices have doubled. But the cost of building houses themselves have remained constant, while the land on which they stand has increased over eightfold. This is illustrated in Figure 1.

However, though land values for housing and other development purposes have increased quite dramatically, this has not resulted in a gain for any but a few landowners. The inflexibility of property use stemming from the regulatory planning controls on land for housing and other urban types of usage has created a two tier system. It has brought greater value for those landowners with property close to urban areas and zoned for housing. Such property comprises a mere 0.1 per cent of the aggregate supply of land in the state. Much of the benefit is in any event pre-empted by swollen state-imposed development charges.

It has had negative effects on other property values. Increased planning stringency that is the corollary of rationing land for housing and other purposes has reduced land values in many cases by preventing landowners in areas not zoned for development from subdividing their land or building additional houses on it.

## Farmland Vegetation

Farmers are major custodians of environmentally sensitive land, including habitats of endangered species. Their natural instinct upon finding an endangered species may be to protect and nurture it by including preservation in farm planning but under the current legislation this is not only discouraged, but penalised.

The Productivity Commission Inquiry into the Impacts of Native Vegetation and Biodiversity Regulations observes:

The Commission has concluded that the current heavy reliance on regulating the clearance of native vegetation on private rural land, typically without compensating landholders, has imposed substantial costs on many landholders who have retained native vegetation on their properties. Nor does regulation appear to have been particularly effective in achieving environmental goals — in some situations, it seems to have been counter-productive.

All over Western Australia farming land is being assessed for its environmental and amenity value. Once assessed, any patches of native vegetation or wetlands are in effect ceded to the state since no development can then occur on them. This occurs without landowners knowing about it until a so-called consultation process starts and then it is too late. Under the current system, the consultation process starts once the government has set the regional principles of assessment, usually in conjunction with the actual assessments but only the resulting assessments can be appealed against and the appeal is only on whether what is assessed meets the principles. It is unacceptable to consult with affected landowners only after the principles of assessment have been set because this means if your land meets the principles it is affected and there is no compensation and no right of appeal.

The Western Australian Environmental Protection Act (1986) as amended in 2004 makes it criminally illegal for anyone to harm the environment and in particular damage any native flora or fauna, dead or alive, intentionally or by accident without a permit. The problem is compounded by the fact that only environmental damage in excess of \$20,000 will be prosecuted but there is no means of calculating the value of environmental damage.

There are examples in Western Australia of virtually entire farms being assessed as having conservation value, often when their owner has voluntarily chosen to fence off wetlands, plant native species, retain old trees for habitat and keep stock out of waterways. Yet having done all this, the farmer effectively loses control of his ability to farm his land. By contrast, the environmentally irresponsible farmer is much less likely to face restrictions because there is nothing left to protect.

No compensation is payable to farmers for the loss of previously productive land. The land is often classified or zoned for conservation, but not actually reserved for that purpose so the capacity of the property owner to use it is removed but there is no avenue for compensation or acquisition by government. In some cases "conservation covenants" are imposed which force the landowner to maintain, manage or improve the conservation or landscape values of a site. In these cases the unfortunate landowner may have to pay to maintain or create an area with conservation value which at the same time reduces the saleable value of the land, a pay now and pay later scheme!

#### Water

Western Australia's water must serve many users including urban populations, farmers, industry and environmental conservation. Each will value an additional unit of water differently and each may change his/her valuation following a change of plans or even something as unexceptional as dry weather. Mediating between these users is a complex task and relevant rights are not always as certain as they are with land.

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

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

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

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

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

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

#### A Solution

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

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

#### Consistency

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

Legislation arising from such a review will;

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

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

#### **Openness**

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

#### Compensation

At a minimum the WA constitution should be amended to match that of the Federal constitution to pay just compensation when property is taken from private landholders by the government. However, often regulation reduces the value of property without actually changing title so the law needs to go further. An appropriate

protection for property owners would be legislation with constitutional effect which requires the state to compensate land owners when land use restrictions reduce the value of their property by excision of existing rights.

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

### Right of Appeal

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

#### Conclusion

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

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