RESPONSE OF 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

Executive Summary

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 One
The *Land Administration Act 1997* 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 Two
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 *Land Administration Act 1997* in terms of "taking and compensation" be applied to the greatest possible extent.

Principle Three
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 Four
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 Five
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 Six
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.

Specific responses to each of the thirty-seven recommendations follow.

Government's Response to the 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.

Response

The Government **supports** the recommendation.

The Government will ask the Department of Land Information 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 Department of Land Information 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.

Recommendation 2: The Committee recommends that the Department of Land Information 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.

Response

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 Department of Land Information's website and ultimately on the proposed land information platform when operational.

Recommendation 3: The Committee recommends the enactment of a single Act dealing with all aspects of the compulsory acquisition of land in Western Australia.

Response

The Government **endorses the intent** of the recommendation

The *Land Administration Act 1997* (LAA) 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 LAA when applicable.

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.

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.

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 landowner for the duration of the project.

Response

The Government **supports** the principle of a designated officer as the primary point of contact in each government land acquisition.

Recommendation 6: The Committee recommends that, wherever practical, State Government departments, agencies and bodies use existing easements and service corridors for their infrastructure projects.

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.

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:
(a) be in writing and sent to the landholder;
(b) specify the chemicals to be used; and
(c) be provided well in advance of the intended treatment date.

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

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.

Response

The Government **supports** the recommendation in principle.

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).

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.

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.

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* be repealed; and
(b) The *Land Administration Act 1997* 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.

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 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.

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 land owners would need to be accounted for through increased tariffs paid by electricity consumers.

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.

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 & 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.

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.

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 & 10 of the *Land Administration Act 1997*) 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 *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 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 (WA)* 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 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 (WA)* 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 (WA)* and re-enacted into Parts 9 and 10 of the *Land Administration Act 1997 (WA)*.

As the Report observes, Section 63(b) of the *Land Acquisition and Public Works Act 1902 (WA)* as it stood prior to the enactment of the *Land Administration Act 1997 (WA)* provided that in determining compensation payable following a compulsory acquisition of <u>any</u> 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 S 241(7) of the LAA provides:

> "(7) <u>if the fee simple in land is taken</u> 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 S 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 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 S.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 S 241(7) of the *Land Administration Act 1997 (WA)*. It may be that this is unobjectionable in some circumstances. For example, in the case of the *Dampier to Bunbury Pipeline Act 1997 (WA)*, 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 *Land Administration Act 1997 (WA)* 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 S.241 (7)(a). The betterment concept is also reflected in the context of planning controls, in Section 11(2) and (4) of the *Town Planning and Development Act 1928 (WA).* 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.

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.

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.

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.

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.

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 payment is not to be regarded as prejudicing in any way the affected landholder's right to continue negotiations as to the final compensation outcome.

Response

The Government **supports the intent of** the recommendation.

General practice is to **make an offer of advance payment of 100% 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 *Land Administration Act 1997* is 90%.

Instances may arise however where an offer of advance payment less than 90% is appropriate where additional information such as financial statements are required to compensate for disrupted business costs and the like.

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.

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 *Land Administration Act 1997* (WA) 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 *Land Administration Act 1997 (WA)*, 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 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%.

Thirdly, the *Land Administration Act 1997 (WA)* 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 S51 (xxxi); and
- 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 *Environmental Protection Act 1986 (WA)*, 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 *Land Administration 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.
- 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.

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.

Response

The Government **supports** the principle of the recommendation where land is affected by an acquisition under the *Land Administration Act 1997* 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: (1) being undertaken by a Licensed Valuer; (2) a minimum of two quotes being obtained and submitted for agency consideration prior to authorising the Valuer to proceed; (3) agreement to the exchange of valuations; and (4) 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% 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).

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 any offer and associated documentation in relation to both voluntary and compulsory acquisitions on interests in land.

Response

The Government **supports in part** the recommendation where land is affected by an acquisition under the *Land Administration Act 1997* 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 $1,000 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).

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 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.

Response

The Government **supports** the recommendation where land is affected by an acquisition under the *Land Administration Act 1997* 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 every day 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 Land Administration Act 1997 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).

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.

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.

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.

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 *Land Administration Act 1997* 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.

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 were a compulsory acquisition under Parts 9 and 10 of the *Land Administration Act 1997.*

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 (ie. 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% 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% (solatium) is payable in the case of a compulsory taking of land under section 241(9) of the *Land Administration Act 1997*. (see overriding Principle Four).

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.

Response

The Government **supports** the recommendation in principle.

The Minister for State Development has indicated that it may be "somewhat presumptuous, inappropriate and probably counter productive" 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.

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 *Environmental Protection Act 1986* (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.

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 *Environmental Protection Act 1986*. 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.

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.

Response

The Government **supports** the recommendation in principle

Schedule 5 of the *Environmental Protection Act 1986* contains a set of ten 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 *Environmental Protection Act 1986* 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.

Recommendation 26: The Committee recommends that where private land is required for a 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.

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 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 *Land Administration Act 1997* 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.

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.

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 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.

Recommendation 28: The Committee recommends that the State Government review the operation of Part V, of the *Environmental Protection Act 1986* (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.

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 *Environmental Protection Act 1986*. 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.

Recommendation 29: The Committee recommends that the State Government undertake a review of both the administrative process of the Western Australian Planning Commission and existing statutory timeframes within planning legislation in order to address the decline in the percentage of planning applications processed within statutory timeframes.

Response

The Government **supports** the recommendation.

The Department for Planning and Infrastructure has established the Statutory Planning Improvements Review (SPIR) 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 MRS amendments, Town Planning Scheme amendments, Structure Plans and Development Applications.

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.

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.

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.

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 Metropolitan Region Scheme

(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.

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 Department for Planning and Infrastructure, and provided with copies of all relevant documentation free of charge.

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.

Recommendation 33: The Committee recommends that the *Land Administration Act 1997* 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 *Land Administration Act 1997.*

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, where as the *Land Administration Act 1997* 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 Western Australian Planning Commission (WAPC) electing to purchase the land in accordance with the provisions of the Act at “value” (ie 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 *Land Administration Act 1997* as it would be effectively the equivalent of a compulsory acquisition allowing land owners to lodge a claim for compensation to include all the heads of claim provided for within the *Land Administration Act 1997.*

The Government recommends that a **5% 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.

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.

Recommendation 34: The Committee recommends that 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.

Response

The Government **does not support** the recommendation.

The Department of Land Information 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 Department of Land Information 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.

Recommendation 35: The Committee recommends 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.

Response

The Government **supports** the recommendation in terms of government interests in land.

The priority of the Department of Land Information (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 Department (DLI) will not be in a position to record all privately created interests in land, such as private agreements and unregistered easements.

Recommendation 36: The Committee recommends 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.

Response

The Government **does not support** the recommendation.

The Department of Land Information 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.

Recommendation 37: The Committee recommends 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.

Response

The Government **does not support** the recommendation.

The Department of Land Information (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 co-operation 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.