

Submission from Trevor Prestage and Lawrence Prestage

1 Thank you for the opportunity to provide a submission for the Inquiry into Private Property rights.

2 We wish to address the point of reference (d) relevant to our case.

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

3 We are the executors of the estate of the late Mrs Lois Prestage who was the owner of [REDACTED] [REDACTED] (the **Property**). The late Mr Ralph Prestage (or brother) and the late Mrs Prestage (our sister -in-law) had purchased the Property in 1972 as an investment with potential for future residential rezoning in the Southern River area. The Property was 85% cleared, however the whole of the Property was designated as a Bush Forever site in the year 2000. This effectively sterilised the entire Property from any form of rezoning or beneficial use (despite the surrounding locality being largely rezoned and developed for residential development).

4 The Property was eventually made subject to a Parks and Recreation reservation for conservation purposes by an amendment to the Metropolitan Region Scheme (MRS) in 2010, which supposedly provided the owners the right to claim compensation for injurious affection (diminution of value) in certain circumstances.

5 The presumption that fair and reasonable compensation must be paid to the owner of private property where the value of the property is diminished, does not apply where land is reserved under the MRS. Compensation in such cases is not immediately payable, but postponed until a 'trigger event' occurs (where either the land is first sold or a development application is refused or made subject to unacceptable conditions) and a claim is made to the WAPC. There are also a number of pre-requisites to be satisfied, for example in respect the intended sale of the land the owner must give prior notice of that intention to the WAPC, and must make an application to the Board of Valuers (a statutory board of government - appointed valuers) (**BoV**) to determine the 'unaffected' value of the land.

6 The history of this matter shows that the WAPC has a disregard for the rights of owners to obtain fair and reasonable compensation for impacts of a reservation for public purposes over their land, and will go to extraordinary lengths to frustrate the processes that are provided for such compensation to be determined and recovered. We raise the following issues specifically arising from this case

7 Ralph and Lois Prestage made a claim for compensation for injurious affection dated 17 October 2013 following the refusal of their application for development approval (of a residence) by the WAPC on 21 August 2013. The WAPC elected to purchase the Property (instead of paying compensation) but its unreasonable offer of \$1.65M was rejected by Ralph and Lois and they applied to SAT for a determination of the value of Property.

8 The WAPC sought to argue in SAT that the Property had intrinsic conservation values and that the effect of the BushForever designation should be taken into account. Ralph and Lois had to retain solicitors and obtain extensive evidence planning, environmental and valuation experts to rebut the WAPC arguments (at considerable cost to Ralph and Lois).

9 Ralph passed away in January 2015 and shortly thereafter in February 2015 Lois, in clear distress and ill health, instructed her solicitors to withdraw the claim for compensation and to discontinue the SAT proceedings. Her lawyers informed both the WAPC and their lawyers as follows:

Mrs Prestage is an elderly lady who suffers from serious health conditions and the passing of Mr Prestage has impacted greatly upon her.

Mrs Prestage indicated that she does not wish to continue the application for compensation as she does not have the mental nor physical capacity to do so

- 10 Shortly after that advice the WAPC's lawyers applied for a costs order against Lois (who was in hospital at the time) for over \$37,000, however the SSO's claim for a costs order against Mrs Prestage was heard and dismissed by the SAT on 14 May 2015. The actions of the WAPC and their lawyers to pursue costs (when the owners were entitled to progress the SAT proceedings for a fair determination of value) were clearly oppressive and unconscionable.
- 11 On 3 July 2015 Lois gave to the WAPC notice of her intention to sell the land (in order to be able to claim compensation following sale) and on the same form requested the BoV to determine the 'unaffected' value of the Property. The Department's Manager of Land Acquisitions (Mr Tim Hillyard) noted the request for the BoV valuation by Lois and commented that the 'notice of intention should take its course' and that 'this will establish the unaffected value'. The Department (the WAPC's administrative arm) took no further steps in relation to the BoV proceedings despite being aware of the background of the matter (in particular the earlier SAT proceedings).
- 12 The BoV heard evidence from Lois' valuers and accepted the planning, environmental and valuation evidence that had been produced by Lois' representatives, and relied upon a valuation report prepared by one of the BoV appointed members and in September 2015 determined the 'unaffected' value of the Property to be \$6.235M.
- 13 The WAPC thereafter pursued Supreme Court proceedings to challenge the correctness of the BoV valuation, arguing (amongst other things) that the BoV had failed to give the WAPC sufficient procedural fairness in failing to notify the WAPC of its intended determination (despite the Department's officers being aware of Lois' application to the BoV). The judge at first instance (Beech J) rejected the WAPC's application and held that in the circumstances the BoV was not required to invite submissions from the WAPC. Beech J also held that the sterilising effect of BushForever was a 'step' in the process of reservation and required by law to be disregarded in the valuation of the Property.
- 14 The WAPC then appealed Beech J's decision and commenced the appeal to the Court of Appeal on 1 November 2016. Lois passed away in May 2017 before the Court of Appeal heard the appeal (on 11 August 2017). The Court of Appeal (by majority) upheld Beech J's decision and dismissed the appeal on 21 August 2018. The WAPC thereafter made an application to the High Court for special leave to appeal the Court of Appeal decision. The High Court refused the special leave application on 13 February 2019. In dismissing the special leave application the High Court observed that the Court of Appeal's reasoning was consistent with 'settled principles' of law.
- 15 We consider that the WAPC's conduct was oppressive and pursued lengthy court proceedings at great expense to the owners of the Property; the advice from our solicitors are that the proceedings were unmeritorious and the WAPC's conduct did not conform to the standard of fairness that is expected of the State as a 'model litigant'. Although each of the courts made costs orders, it is clear that as the executors we will not be able to recover the full extent of costs incurred in the proceedings and other costs in maintaining the Property.
- 16 The determination of the Board of Valuers valuation is 'final' under section 183(2) PDAct, and should have been immune to legal challenge (particularly a legal challenge by another agency of Government such as the WAPC). The WAPC persisted in pursuing unmeritorious court proceedings where the BoV valuation should have been respected and treated as final.
- 17 The effect of the proceedings pursued by the WAPC was to delay the determination of any claim for compensation that might have been made in the event the then owner (the late Mrs Prestage) had sold the subject land. The WAPC was well aware that the late Mrs Prestage was in seriously ill health and highly vulnerable to any litigation involving her rights as an owner, at the time her agent served the Notice of Intention to sell upon the WAPC (on 3 July 2015). Lois passed away in the course of these highly contentious court proceedings.
- 18 After the Court of Appeal heard argument on 11 August 2017 and reserved its decision, the WAPC's lawyers belatedly sought to raise an argument that the function of the BoV was pointless as the owners would not have a right to make a claim for compensation following any sale of the property, as there had been an earlier trigger event and claim (which had been withdrawn in the SAT proceedings) and that any right to claim compensation had been extinguished. The WAPC lawyers sought to base this argument on

certain obiter dicta expressed by some of the High Court judges in the case of *WAPC v Southregal* and others [2017] HCA 7. Our lawyers obtained the advice of Queens Counsel who advised that the Southregal case did not support such an argument and that a further claim could be made by the executors of the estate (standing in the same position as the deceased owner) in the event that the land is sold.

19 The WAPC lawyers was advised accordingly, but despite this advice the WAPC maintains that the executors do not have any right to make a claim for compensation in the event of a sale of the Property, and in relying on that position refuse to advise what the 'minimum price' the Property may be sold for as required by section 183(3) of the Act. This despite the Australian Property Institute advising all members, as a result of the Southregal case, that they had received WAPC advice that if an owner withdrew a claim for compensation, then that owner's compensation rights **would not be forfeited**.

20 The WAPC continues to refuse to respect the BoV valuation despite the validity of the BoV valuation being confirmed in all the courts referred to above, and have not offered to purchase the Property for that determined value.

21 The Property is vacant and unimproved and not capable of being developed and used for a beneficial purpose (as demonstrated by the WAPC's refusal of Ralph and Lois' development application). Despite this the owners have had to meet ongoing liabilities such as land tax, Council rates and ongoing management costs. In these circumstances the affected value is negative or nil, and the only possible purchaser in the market in reality is the WAPC. The WAPC, however, holds that it is under no obligation to compulsorily take the land and will not make an offer based on what has been properly determined as the unaffected value of \$6.235M.

22 The conduct of the WAPC throughout has been oppressive and unconscionable and we ask that a Parliamentary Inquiry in to the conduct of this matter be undertaken.

Summary

23 The Estate of the late Mrs Prestage have incurred considerable legal costs in defending the BoV valuation. Since the 1st July 2014 our brother, sister-in-law and now the executors of the estate have been forced to pay out \$367,270.40 in Lawyers costs, rates and taxes and other associated costs because the WAPC refuse to accept the BoV valuation. This is an unacceptable situation.

24 The spirit of the legislation is to be fair to private land owners. Since we have become involved as executors it is clear the the WAPC have a conflict of interest in the outcome of negotiations with private land owners and use the power that the public have vested in them to force owners into accepting ridiculously low prices for their land. In our case this conflict can be seen from the way they choose to ignore court decisions even though they initiated all of the court proceedings.

25 The WAPC are currently both the planners and the negotiators. This situation is the cause of the conflict of interest. The WAPC plan the reserves etc and because they have a fixed annual budget their interest is to negotiate with private land owners in the bests interests of their annual budget ignoring the interests of land owners.

26 If the WAPC really want to resolve the current injustice towards the valuation of land owned by private owners then they should write to land owners who have had their land reserved during the past 20 years, as many of these owners may have missed the public notification calling for submissions and our discussions with other affected owners have all indicated the same type of oppressive treatment by the WAPC.

27 It is our submission that the power of decisions upon the acquisition of reserved properties and the payment of compensation to affected owners should be taken from the WAPC and conferred upon an independent Tribunal (such as SAT) who should be able to report upon such matters to the responsible Minister.