

Pastoralists & Graziers Association of WA

Submission on:

Standing Committee on Public Administration

Inquiry into Private Property Rights



31 July 2019

Submission from Pastoralists & Graziers Association of WA on Inquiry on Private Property Rights by the Standing Committee on Public Administration

The Pastoralists and Graziers Association of WA (PGA) appreciates the opportunity to make a submission to the Standing Committee on Public Administration for its Inquiry into Private Property Rights.

The PGA is a non-profit industry organisation established in 1907, which represents primary producers in both the pastoral and agricultural regions in Western Australia. Members include pastoral leaseholders and freehold farmers through the full spectrum of some of Australia's largest corporate pastoral groups to family-owned companies and trusts and individual landholders in Western Australia.

The PGA's core and guiding principles are property rights, subsidiarity¹, self-interest, self-reliance, rule of law, free markets, competition, lean², small government and reduced regulations.

Nothing is more fundamental to the PGA and the interests of its members than well-defined and secure private property rights as they underpin both the social and economic security of individuals and the community in which they live and work.

Due to this importance, the PGA has long maintained a *Private Property Rights & Resources Committee* (PPRRC) to specifically monitor how changes in government legislation, regulations and policy may impact on existing private property rights of members, make submissions to relevant inquires and advocate for a greater awareness and understanding of the nature and importance of property rights to individuals, businesses and the community.

Through the PPRRC, the PGA has participated in many property rights related parliamentary inquires at both the Federal and State levels. At the State level these include the following Parliamentary Inquires:

- The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia³;
- Inquiry into Pastoral Leases in Western Australia⁴; and

¹ Subsidiarity - the principle that decisions should always be taken at the lowest possible level or closest to where they will have their effect, for example in a local area rather than for a whole country;
<http://dictionary.cambridge.org/dictionary/english/subsidiarity>

² LEAN simply means creating more value for customers with fewer resources (<https://www.lean.org/WhatsLean/>)

³ [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(InqByName\)/2202992EEDCCFC6A48257831003D343A?OpenDocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(InqByName)/2202992EEDCCFC6A48257831003D343A?OpenDocument)

⁴ [http://www.parliament.wa.gov.au/C8257837002F0BA9/\(InqByName\)/Inquiry+into+Pastoral+Leases+in+Western+Australia?opendocume nt](http://www.parliament.wa.gov.au/C8257837002F0BA9/(InqByName)/Inquiry+into+Pastoral+Leases+in+Western+Australia?opendocume nt)

- Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005⁵.

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

The PGA strongly supports the view that⁶:

- A strong system of property rights is one of the most fundamental requirements of a capitalist economic system as well as one of the most misunderstood concepts;
- That property rights are a human right; and
- The defining, allocation and protection of property rights comprise one of the most complex and difficult sets of issues that any society has to resolve.

As an industry peak body, the PGA supports the modern economic view that property rights are a socially-enforced construct for determining how a resource or economic good is used and owned. Who owns the economic good, whether individuals, associations, governments or nobody, has profound implications on how the economic good will be used.

As a pro-market industry peak body, the PGA strongly believes that the most efficient use of economic resource and therefore the maximum wealth creation for society is most likely through non-government ownership of economic goods by individuals and businesses. The primary role of government is not to own property rights but to ensure that property rights are well defined and protected so that non-government owners of property rights can make long term plans for the use of their economic resources.

While much discussion about property rights concerns what is known as Real Property (land), a more modern view is that Real Property is a sub-set of property rights in general. In this framework, property rights can be viewed as an attribute of any economic good with four broad components, often referred to as a “bundle of rights”⁷:

1. the right to use the good;
2. the right to earn income from the good;
3. the right to transfer the good to others, alter it, abandon it, or destroy it; and
4. the right to enforce property rights.

Another common analogy for the “bundle of rights” is a “bundle of sticks” where each stick represents an individual right, such that any property owner possesses a set of “sticks” that defines what the owner is permitted and not permitted to do with an economic good.

Some have argued that the emergence of the concept of ‘bundle of rights’ in the late-19th century and subsequent fashionable use has provided increasingly interventionist

⁵ [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(SearchResDes\)/DBEC9D39381C341848257E9E0012D1A0?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(SearchResDes)/DBEC9D39381C341848257E9E0012D1A0?opendocument)

⁶ <https://www.econlib.org/library/Enc/PropertyRights.html>; accessed 29 Jul 2019.

⁷ Klein, Daniel B. and John Robinson. "Property: A Bundle of Rights? Prologue to the Symposium." *Econ Journal Watch* 8(3): 193–204, September 2011; <https://econjwatch.org/articles/property-a-bundle-of-rights-prologue-to-the-property-symposium>; accessed 29 Jul 2019.

governments with a framework for rearranging or redefining the “bundle” without total violation of ownership of an economic good⁸.

The 20th Century saw a massive increase in government intervention in society and markets whereby government legislation, regulations and policies significantly altered the nature of property rights as previously understood by the owners of economic goods.

Almost invariably, the legislative and regulatory changes have resulted in a transfer of ‘sticks’ from the private to government realm. From a PGA perspective, this transfer represents an erosion of the property rights held by individuals and businesses.

More often than not, the justification for this transfer from private to government ownership is the concept of “public use” or “public interest”. While documenting the use and abuse of “eminent domain” to steadily erode private property rights in the United States of America, Ellen Frankel Paul’s *Property Rights and Eminent Domain*⁹ is a salutary lesson for the parallel process that individuals and businesses have experienced in Australia and Western Australia through “compulsory acquisition” by governments. The PGA believes that “public interest” is a highly challengeable concept that is too often used by politicians and bureaucrats to justify the political redistribution of private property rights.

In Western Australia, significant erosion of private property rights has been effected through the development and implementation of planning and environmental legislation/regulations that have either destroyed private property rights or transferred them to government ownership. A great deal of this type of planning and environmental legislation/regulation has its origins in the USA, particularly the state of California. More recently, the European Union has become a major source of environmental legislation/regulatory ideas that also destroy private property rights or transfer them to government ownership.

The PGA is strongly of the view that the very poor understanding of property rights throughout Western Australian society has helped to facilitate the massive erosion of private property rights that many individuals, including PGA members, have experienced. This erosion of private property rights has negative economic consequences that flow through the entire WA community and economy, which many politicians, bureaucrats and community interest groups either do not understand or do not care about. All WA Governments, who have a fundamental responsibility to enhance the economic wellbeing of Western Australians, should be very concerned about these economic negative consequences.

Too often the implementation of planning, environmental or other regulatory frameworks by WA Governments (of all political persuasions) has occurred without adequate consideration and discussion of property rights; including which rights will be affected and what the economic consequences will be to individuals, businesses and communities, as well as to the entire state of Western Australia.

⁸ Klein, Daniel B. and John Robinson. "Property: A Bundle of Rights? Prologue to the Symposium." *Econ Journal Watch* 8(3): 193–204, September 2011; <https://econjwatch.org/articles/property-a-bundle-of-rights-prologue-to-the-property-symposium>; accessed 29 Jul 2019.

⁹ Ellen Frankel Paul (1988) *Property Rights and Eminent Domain*, Transaction Books, New Brunswick, New Jersey.

Consequently, the PGA highly recommends that in future, Regulatory Impact Statements for Legislation/Regulations include a rigorous and comprehensive Property Rights Analysis (PRA). The PRA should use the “bundle of rights/sticks” framework for property rights to more clearly define what property rights actually exist, who owns them and the limit to which they can be used. The PRA should include a significant dialogue with the owners of the property rights as their perspective on what property rights they believe they have and how they might be effected by any proposed change in legislation/regulation is a critical component in improving the definition of the property rights.

Environmentally Sensitive Areas (ESAs) typify the problem. It is PGA’s view, and that of many of our members who have been directly impacted, that ESAs were implemented hastily, without appropriate stakeholder consultation, with questionable technical justification for the inclusion of extensive areas of “ephemeral wetlands” that exist only in winter, certainly without any PRA and were not communicated to effected landholders by the WA Government.

Given the profoundly negative impact that the entire ESA debacle has had on many PGA members, we strongly encourage the WA Government to undertake a complete review of the ESA framework including honest engagement with stakeholders like the PGA. As outlined above, the review should include a Regulatory Impact Analysis including a rigorous and comprehensive Property Rights Analysis.

The PGA is a strong supporter of the Torrens title system and would be very concerned at any attempt to undermine or weaken the system. For the protection of potential buyers (or lessees) it is essential that all encumbrances that affect a title are registered with the title. This includes ESAs and all easements associated with utilities. Having said the above, from the perspective of a current title holder, it should be understood that registering currently unregistered encumbrances will most likely lower the value of the title. From a PGA perspective, the solution here is to minimize the number of encumbrances on a title by not adding more through new legislation/regulation and removing existing encumbrances through rationalizing existing legislation/regulation.

Using the modern “bundle of sticks” framework for property rights, government-issued licences most definitely grant license holders with property rights, though typically the “bundle of sticks” will have very few sticks. From a PGA perspective, Pastoral Leases granted by the Pastoral Lands Board (PLB) on behalf of the WA Government, grant pastoral leaseholders a very small “bundle of sticks”; that is highly limited and restricted property rights.

The PGA is always looking for ways to strengthen the small “bundle of sticks” the pastoral leaseholder has been granted under their Lease, so as to provide the leaseholder with a more secure basis for investing in improved pastoral business operations,. The current Pastoral Reform Package being proposed by the WA Government should strengthen the property rights of pastoral leaseholders.

The *ERA 2017 Inquiry into Reform of Business Licensing in WA*¹⁰ has generated the most comprehensive listing¹¹ of WA Government ‘Licenses’¹² ever created. Every one of these defines, assigns and limits what property rights individuals and businesses actually have. This list should be used extensively by government and non-government entities alike as an important tool for improving our mutual understanding of property rights. PGA members are impacted by many of the licenses listed and the PGA is always looking to minimize the impact of these licenses on the ability of PGA members to operate businesses that benefit, themselves, their community and the state.

The PGA strongly believes that compensation should be paid to a property right holder when their property rights are diminished, taken or destroyed by government (or non-government) actions. However, this is only possible if the property rights are well defined so that both parties have a mutual understanding of what the property rights are. Again a strong argument for greater clarity about the nature of property rights.

Often governments use the excuse that compensation would entail a prohibitive cost. From a PGA perspective this clearly indicates that the action precipitating the prohibitive compensation bill should not occur; that is the potential prohibitive cost is a clear market signal that the proposed action is an unsound expenditure. In the case of non-government entities, the possibility of the effected parties seeking compensation through legal action typically modifies plans to limit the potential damage to other parties’ interests. The fact that governments typically dismiss the impact of harming other parties’ interests and the issue of compensation is seen by many as abuse of government police powers. This abuse of police powers in the name of ‘public interest’ is one of the reasons that respect for democracy in the West is declining.

The PGA believes that one of the main reasons that property rights have not been better understood, defined and protected is the fact that the philosophical foundation for the Regulatory framework in nearly all Western democracies, including Western Australia, is largely based on the early 20th Century economist Pigou and his welfare economics. In particular that regulations are required to address so called ‘market failures’ and that ‘taxes’ are an efficient and effective means of minimizing externalities imposed by one person’s activities on others¹³.

By definition, Pigovian-based legislation/regulation will always reduce or destroy private property rights as the solution is always for government to intervene to address what Pigovian’s believe are ‘market failures’ or unacceptable externalities. Furthermore, throughout Western nations, this approach to regulation has resulted in an exponential

¹⁰ <https://www.erawa.com.au/licensinginquiry>

¹¹ <https://www.erawa.com.au/cproot/20121/4/2017Licinq%20-%20final%20report%20-%20appendix%20H.xlsx>

¹² Captures licences, registrations, notifications, authorisations, accreditations, permits, approvals and certifications.

¹³ See PGA submission on the *DWER Cost Recovery Discussion Paper* (<https://www.dwer.wa.gov.au/consultation/costrecovery>): (https://www.dwer.wa.gov.au/sites/default/files/water_and_native_vegetation_clearing_fees_submission/Pastoral,%20Property%20Rights%20and%20Resources.PDF)

growth in regulations resulting in a ‘leviathan’ that governments increasingly struggle to service financially and with sufficient fit-for-purpose human resources.¹⁴

However, there exists an alternative and more modern approach based on the seminal work of the Nobel Laureate economist Ronald Coase in developing a property rights-based solution to *The Problem of Social Cost*¹⁵ and the New Institutional Economics subsequently developed by the likes of Nobel Laureates Oliver Williamson, Douglass North and Elinor Ostrom and research programs of organizations such as the Property Environment Research Centre (PERC)¹⁶.

The beauty of this ‘Coasian’ property rights-based approach to addressing regulatory issues is that it requires clear definition of property rights (currently lacking) and then encourages mutually beneficial trading of those property rights between owners. This approach encourages trading not raiding of property rights. Furthermore, a ‘Coasian’ regime will be more effective, efficient and less costly than the current failing ‘Pigovian’ regime.

What responsible government can afford to ignore the opportunity to reduce to economic burden of regulation on itself, let alone its citizens?

In Conclusion:

The PGA believes that because well-defined and secure private property rights are essential for the social and economic wellbeing of both individuals and the community, it highly recommends that the WA Government develop and introduce to the WA Parliament a *Private Property Rights Bill* that:

- recognizes property rights as a fundamental right of all Western Australians;
- property rights are the primary basis for social and economic wellbeing of both individuals and the community;
- requires a rigorous and comprehensive Property Rights Analysis (PRA) as part of any Regulatory Impact Statements undertaken for legislation/regulations;
- permits retrospective application of PRAs, so that hastily and poorly developed policies such as ESAs can be reviewed and dramatically improved;
- fully recognizes and leverage off important tools such as the *ERA 2017 Inquiry into Reform of Business Licensing in WA*; and
- includes a requirement for compensation which mirrors section 51(xxix) of the Australian Constitution.

Opportunity to appear before a Committee Hearing:

Finally, given the significance of Private Property Rights to the PGA and its members, the PGA is keen to participate in any hearings that the Committee may conduct as part of the Inquiry

¹⁴ See *The Growth of Federal Environmental Law 1971-2016* (April 2017) Institute of Public Affairs; (https://ipa.org.au/wp-content/uploads/2017/05/IPA_Report_Growth_Of_Federal_Environmental_Law_170430.pdf); while this is an analysis of Australian Federal environmental laws, the PGA believes the growth trajectory is mirrored in the growth trajectory of WA environmental laws.

¹⁵ <https://www.law.uchicago.edu/files/file/coase-problem.pdf>

¹⁶ <https://www.perc.org/>

process. This would provide the representatives of the PGA the opportunity to appear before the Committee to further elaborate on the views provided in this submission.

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