



The Hon. Rick Mazza MLC
Member for the Agricultural Region
Parliament of Western Australia

31 July 2019
Hon. Adele Farina
Chairman
Standing Committee on Public Administration
Parliament House
4 Harvest Terrace
West Perth WA 6005

Dear Ms. Farina *ADELE*

Standing Committee on Public Administration Inquiry into Private Property Rights

- 1. Recognises the fundamental proprietary right of private property ownership that underpins the social and economic security of the community.**

Property rights can be traced back 800 years to the Magna Carta.

The Australian Human Rights Commission identified the recognition and protection of property rights as an area of key concern during its 2014 national consultation on 'Rights and Responsibilities'.

Property rights are also featured in the Universal Declaration of Human Rights, and also s.51 (xxxi) of the Australian Constitution which provides the Commonwealth Government may make laws for the acquisition of land but only 'on just terms'.

Murdoch University law lecturer Lorraine Finlay, who I will reference extensively, specifically through her *'Environmentally Sensitive Areas in Western Australia: Highlighting The Limits of the 'Just Terms' Guarantee'* paper, states 'on just terms' safeguard' does not apply to the States, and locking away or 'sterilising' private property does not constitute acquisition.

Property rights are linked with economic growth in the sense it provides landowners with the security and incentive to save, invest and be a part of a community. This is especially true for farmers who make their very livelihoods off the land.

Western Australians also have a right to privacy and safety on their land. In recent times this has been put at risk, namely by the rise of radical animal activism, such as the Aussie Farms attack map which encourages trespass.

- 2. Recognises the threat to the probity of the Torrens Title system, which guarantees disclosure, and re-establish the necessity for registration of all encumbrances that**

affect land including Environmentally Sensitive Areas (ESAs), bushfire prone areas and implied easements for Western Power which currently sit behind the certificate of title.

Page 29 of the May 2004 'Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia' report says Butterworths Australian Legal Dictionary defines 'Torrens title' in the following terms:

"A system of land title where a register of land holdings maintained by the State guarantees indefeasible title to land included in the register. The system gives title by registration, as opposed to old system title, which depends on proof of an unbroken chain of title back to a good root of title."

The Torrens system, named after Sir Robert Torrens, was introduced in South Australia in 1857 in an effort to simplify the Deeds system, which was inherited by Australian colonies from England. The Torrens system is worth defending, as it has been adopted in forms by Great Britain, Canada, and parts of the Pacific region, Asia and Europe.

Farmers have a right to be informed of any complications that may jeopardise their future land use such as environmental protections or Aboriginal Native Title.

People should not be buying land under false pretences when information is there to be provided to them. It puts landowners into a world of drawn out legal trouble, depression, reduced income and reduced possibilities, as I will later detail with several examples.

If certain information had been known at the time of purchase, a sale may have not proceeded in the first place. Australia needs to strike a balance between protecting property rights, protecting the environment and also providing compensation to affected landowners. People should not have to seek out information themselves that could implicate their land use.

2.1 Western Power Easements

Easements are an issue for landowners. The Western Power website says their electricity network covers more than 255,000 square kilometres, meaning powerlines and structures are located on or near private property.

Easements allow Western Power to access land to build and maintain infrastructure on private property. As the website says, "if you have an easement registered on your property, there may be some restrictions on the activities you can perform on structures you can place within the easements."

There are guidelines for restricted activity and these include:

- Altering or disturbing the present ground level
- Constructing or erecting any building or structure
- Construction of fencing greater than 2m in height
- Constructing, erecting, improving, enlarging or altering any storm water drain, basin or drain
- Growing, cultivating or maintaining any vegetation exceeding 1m in height
- Stacking or storing any material or garbage
- Using machinery or vehicles that exceed 4.5m in height

- Parking any vehicle or machinery exceeding 2.5m in height

There are instances where implied easements are not registered on the Certificate of Title or registered on the Register. As pages 17 and 18 of the Landgate document 'SPP-14 Easements, Covenants, Notifications and other Interests' says, easements that can be created automatically under section 167 of the Planning and Development Act 2005 detailed in the Planning and Development (Easement) Regulations include:

Reg 33a Easement in favour of a Local Government for drainage access to drainage works or Sewerage

Reg 33b Easement to Water Corporation for water supply, sewerage or drainage or access to water supply, sewerage or drainage works

Reg 33c Easement to Electricity Generation Corporation, Electricity Networks Corporation, Electricity Retail Corporation or Regional Power Corporation for electricity supply

Reg 33d Easement to WA Gas Networks Pty Ltd (or other holder of a distribution licence under the Energy Coordination Act 1994) for gas easement

Reg 33e Easement to holder of a license for the purpose of the supply of a utility service or access to a utility service. (Easement- Telecommunications Supply Service- e.g. Telstra)

As the 2015 Western Power document '*Working safely around the Western Power network*' also states on page 12, "an easement may not be registered on the property, however the restriction zone will still impact land use."

As an example I refer to a June 22, 2018 letter from the Hon Rita Saffioti, the Minister for Lands addressed to the Hon Matthew Swinbourne MLC. She referenced an issue with a Mr Terrence John Ealing, who had concerns with a statutory easement over his land that benefits Western Power. "This easement does not appear on his certificate of title and is not registered on the Register," the Minister says in the letter.

2.2 Bushfire Prone Areas

Bushfire prone areas are located throughout WA, meaning if a property is designated bushfire prone, it can trigger the need for a more detailed assessment of bushfire risk, such as a Bushfire Attack Level (BAL) assessment, before building or developing on a property.

As the Department of Mines, Industry Regulation and Safety website says, "The outcome of a Bushfire Attack Level Assessment may add to the cost or, in case of extreme risk, restrict the proposed development of a property."

The website says under the Real Estate and Business Agents and Sales Representatives Code of Conduct 2016, "real estate agents must make reasonable efforts to obtain all available material facts to a transaction and communicate that information to any person affected by them." However, it says there is no specific definition of what constitutes a material fact, which I find to be problematic.

People can find out if their property is bushfire prone by looking at an online map on the Department of Fire and Emergency Services website. This requires the landowner to seek information themselves.

People can find out if their property is bushfire prone by looking at an online map on the DFES website. This requires the landowner to seek information themselves, which is

unacceptable. The building requirements for different a BAL assessments can run into 10s of thousands of dollars and impact significantly on the buyer. The BFA should be registered on the title as a notice to buyers so they are clear on what they are buying.

How most people find out that their property is now in a Bushfire Prone Area (BFPA) is when they apply for a building licence, besides requiring a BAL assessment, a condition of the building permit is that the landowner has to at their own cost register a notice on their title that the property is in a BFPA. If it is important that the notice is placed on the title then the government should do so when declaring BFPA areas not wait for a building license application and then add insult to injury by requiring the applicant at their cost to register the notice on their own title.

2.3 Environmentally Sensitive Areas (ESA)

State Government laws bypass the 'on just terms' guarantee from the Federal Constitution. The WA Environment Minister is allowed to declare an area to be an Environmentally Sensitive Area (ESA), which makes it an offence to clear native vegetation unless done under legislative exemption or via a permit.

If this is disobeyed, heavy fines can be given. This can be \$250,000 for an individual, and \$500,000 for companies. Daily penalties of \$50,000 for individuals and \$100,000 for companies are given for each day an offence continues once a written warning has been given. This captures day to day farming activities, including grazing cattle, which presents a threat to farming and rights.

To continue farming, you need to apply for a permit which only last for two years and are given at the discretion of the Department. To make matters worse, you need to know your property has been declared ESA. As Finlay writes, "landowners are not individually consulted or notified before their property is encumbered and ESA designation is not recorded on a property's Certificate of Title."

In 2007 the then Minister for Environment confirmed all landholders with declared ESAs on their properties as a result of the 2005 Notice had not been individually notified of that declaration, and the decision was only published in the Government Gazette. This can lead to landholders unwittingly committing a criminal offence on their land.

An August 2015 *Standing Committee on Environment and Public Affairs Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005* had a number of findings.

The Committee found around 98,042 parcels of land in Western Australia, which are not Crown Reserves or State Forest, include land that is classed as ESA.

In the report, the Committee acknowledged that writing to all ESA owners would be an 'extensive task', which is apparent from the number of parcels of land that have ESAs. The Committee said writing to all affected landowners would be a big undertaking but it should have been done 10 years ago when the ESA Notice was introduced.

As point 9.27 in the report states, “Indeed, it seems extraordinary to the Committee that a Government would apply the restrictions of ESA status to 98,042 titles without formally notifying the landowners.”

I agree with the Principal Petitioner of the 2015 report when they said ESAs being available on the internet, and the onus being on the landowner to make his or her own inquiries, is not sufficient to make people aware of their legal responsibilities.

The Principal Petitioner added: “Little if any public information was published. There are no printed maps readily available to land owners, who are expected to make enquiries on the Net. Most people would find it difficult if not impossible to determine their responsibility under the Law. Ignorance may not be an excuse, however the Law must be readily available.”

There was also a May 2004 report of the 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*.

In the executive summary it stated ‘the inquiry has expanded far beyond the scope of the previous two incomplete inquiries’. Private property rights have long been an issue as demonstrated with this comment, two incomplete inquiries, the 2004 report and the August 2015 report – and still these issues remain unresolved.

The May 2004 report explains why private land use is such an emotive subject for people. Point six of the executive summary says “an individual’s house and land is seen as their inviolable sanctuary from the stresses of everyday life. When the State exercises its power over privately-held land, however reasonably and with all due care for process, the stress on an individual landholder can be intense.”

A recent example of an injustice at State level that has placed intense stress on a landholder is detailed in the March 29 Farm Weekly story ‘Plea to have property rights hearing’.

2.4 Peter Swift Case

Cranbrook landowner Peter Swift bought his farm 12 years ago, but has been embroiled in a legal nightmare ever since. Shortly after he bought the land, the State Government deemed 200ha of his 485ha property to be an environmentally sensitive area, despite it being zoned as rural farmland by the Cranbrook Shire Council and the title carrying no ESA registration.

This means he cannot graze cattle without a permit and earn income from almost half of his land. A grazing permit could be issued, but these apply for just two to five years and could be revoked at any time, meaning there is too much un-certainty to buy livestock.

Mr Swift was blamed for illegally clearing 14ha of native vegetation on the property by the then Department of Environmental Regulation. In 2013 he was found innocent after a three-year court battle, but was \$360,000 out of pocket for legal costs in defending himself.

The Department of Environment Regulation monitors changes in vegetation through satellite and aerial photography, and had picked up a change in the forested areas of his property after he purchased it. Mr Swift was not aware his land had environmentally sensitive areas at the

time because when legislation was introduced the State Government had not notified landowners.

The saga has left Mr Swift broken, being placed on suicide watch and being financially ruined – without compensation.

He requested a meeting with the Premier and Environment Minister Stephen Dawson to try and resolve his issue, delivering a letter to Dumas House after making the journey in his prime mover.

WA Farmers Policy Officer Kim Haywood summed the situation up when she said “Mr Swift bought the land in good faith and the title said it was for agricultural land with no restrictions. After he bought the property he was told it had environmental restrictions on it.”

Pastoralists and Graziers Association of WA (Inc) property rights spokesperson Gary Peacock said the case was a wakeup call for all landholders in the wake of environmental policy changes by governments as they implemented the UN Agenda 2020, which sought to protect wetlands in agricultural areas.

3. Recognises the property rights of government issued licenses and authorities including commercial fishing.

Under section 3 of the Land Administration Act 1997, “land” is defined as:

- (a) All land within the limits of the State;
- (b) all marine and other water within the limits of the State;
- (c) all coastal waters of the State as defined by section 3 (1) of the Coastal Waters (State Powers) Act 1980 of the Commonwealth; and
- (d) the sea bed and subsoil beneath, and all islands and structures within, the waters referred to in paragraphs (b) and (c).

Therefore our coastal waters are relevant to this land use debate.

Further to this, fishing rights in Australia exist in four primary forms. This is recognised in common law and explained in Warwick Gullet’s book *Fisheries Law in Australia*, and highlighted on page 16 of the April 2011 *‘Improving Commercial Fishing Access Rights in Western Australia’* report.

1, the public right to fish, 2. the exclusive right of landowners to fish in waters on private land, 3. The right to take fish as defined, or modified by statute, generally under Fisheries legislation, and 4. Native title fishing rights.

On page 87 of the 2017 WA Labor Platform under Section 334 stated, on point A, it says WA Labor will ‘seek to more clearly define the property rights of commercial fishing license and authority holders’.

In my view the Government’s western rock lobster proposal did not align with the 2017 Labor Platform. The proposal sought Government to take control of 17.3 per cent of the

annual catch, lifting the annual allowable catch by 1,700 tonnes, with 1,385 of those coming under State control to sell or lease licences at they saw fit.

Fish stocks in this State need to be carefully managed to continue to provide benefits to the community, especially for licence holders. As Recfishwest said in their submission to the McGowan Government Rock Lobster Industry Growth Plan, “the Government’s plan to increase the catch of lobster by 1,700 tonnes could result in more than 16,000 additional commercial crayfish pots in the water.” This would have surely negatively affected the resource for other users.

Speaking to Perth Now, Seafood Industry Australia said it did not usually intervene in State affairs, but it could not ignore the rock lobster issue because of the “major repercussions on property rights nationally, not just within the seafood industry.”

Mindarie rock lobster fisher John Servaas Jr, speaking to ABC News on January 12, 2019, said he would be happy to talk to the Government about local supply, “but the ownership of the pots, the dilution of fishing rights, is something we oppose strongly.”

These comments show a lack of adequate consultation and understanding between Government and industry. There were grave fears about the future sustainability of the resource which undermined the confidence of licence and permit holders.

For example, I point to January 8, 2019’s ABC story of fisherman Jake Suckling who purchased 25 A-zone pots, fearing he would lose \$1 million overnight due to a possible glut that would damage the value of his pots and also the market. Boat builder Peter Ellis from the same story said the intervention proposal cost him a contract of three million dollars.

Banks were starting to re-assess their security arrangements with fishers which put a tremor through the industry. The sovereign integrity of property rights whether real or non-real is crucial to the security of commerce with-in the state.

4. Assert 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.

As page 73, Chapter 3 of the May 2004 report states “unlike the Commonwealth Constitution, there is no provision in either the Constitution Act 1889 or the Constitution Act 1899 requiring the Western Australian Parliament to make provision for ‘fair’ or ‘just’ compensation when it passes laws allowing the State to acquire private property.

Nor is there “express reference to the payment of ‘just’ or fair compensation in either the Land Administration Act 1997, the Public Works Act 1902, the Metropolitan Region Town Planning Scheme Act 1959, or the Town Planning and Development Act 1928 in the event of the compulsory acquisition or reservation of privately held land.”

As Lorraine Finlay said in her September 2, 2015 speech *A Home No Longer a Castle – real property rights in the context of mining and environmental claims*, “the argument is not that property rights should supersede environmental protection. Rather, the focus should be on finding an appropriate balance, and on ensuring that compensation is provided to individual land-owners when they are required to ‘sterilize’ their land for environmental purposes.”

Finlay makes a number of arguments in her speech about the issue of compensation. Compensation for anybody left worse off by a change in Government policy has almost become a persuasive requirement in modern day politics. So why should restriction of property rights be viewed any differently?

Finlay believes the community, through Government compensation, should bear the cost of restrictions placed on land. Currently we force individual landowners to bear the burden of the costs, which are heavy. "If the community believes it is important to impose particular environmental restrictions on a parcel of land, then the community should be willing to bear the cost,"

There is also a practical argument for compensation to be paid to private property owners as it would improve environmental outcomes through better relationships with landholders. There is no cost that Governments need to consider when they 'sterilize' large areas of land when they claim environmental protection. If compensation was a factor, Finlay believes it would force Government to carefully consider the cost of their policy.

As Finlay says, this "will lead to environmental policies that are more targeted and better focused, effectively prioritising key environmental significance rather than the current 'super trawler' approach to environmental protection."

The Principal Petitioner from the 2015 *Standing Committee on Environment and Public Affairs Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005* accurately said:

"We believe that if property rights are taken, compensation should be available on just terms. If the community wishes to lock up valuable land as a type of National Park, the land owner must receive compensation. If land use is restricted for the community's benefit, not their own, the community should purchase the property or pay just compensation.

"If the community wishes to use agricultural land for other purposes, they must buy it or fully compensate the land owner in other ways."

On the subject of compensation, the current leader of the House the Hon. Sue Ellery on page 49 of the 2015 Committee report said: "I can understand that is a big decision to make because it would involve an awful amount of money, however there are serious issues around compensation that need to be properly addressed."

I agree these issues need to be properly addressed. It is a lot of money that Government would be required to pay in compensation, however at the moment this is being borne by a few landholders, and this comes with the burden of reduced land use and values.

On page 42, Chapter 2 of the May 2004 report it features the following observation:

"The Committee believes that where such an interest in the land, or any granted right attaching to that interest, is subsequently taken from the landholder by the State Government for a public purpose, then the State should provide fair compensation to the landholder."

5. Conclusion

Governments need to take responsibility for their policies and provide adequate compensation to property owners who have had their property rights diminished. Land owners have a right to know what encumbrances are placed on their land that they have or are about to acquire by way of notices registered on the certificate of title so that they can make informed business decisions.

Yours faithfully,


Hon Rick Mazza MLC

<https://thewest.com.au/business/agriculture/embattled-farmer-drives-case-home-to-premier-ng-b881145273z>

<https://www.farmweekly.com.au/story/5974301/plea-to-have-property-rights-hearing/>

<https://www.abc.net.au/news/2019-04-22/fremantle-shop-wins-64-year-legal-battle-to-build-a-bike-shed/11035122>

https://viewdalethumbs.s3-ap-southeast-2.amazonaws.com/walabor/prod/49/Files2018Documents/180216_2017WALaborPlatform.pdf?X-Amz-Content-Sha256=UNSIGNED-PAYLOAD&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAIHDVBK6EMVXFV4PA%2F20190429%2Fap-southeast-2%2Fs3%2Faws4_request&X-Amz-Date=20190429T075635Z&X-Amz-SignedHeaders=host&X-Amz-Expires=1200&X-Amz-Signature=a17d3010c8d8c7d03557e3bcf2d1c6f199e76d3905ff128c94f20529ab871a3a

<https://www.alrc.gov.au/home-no-longer-castle-lorraine-finlay>

<https://www.farmweekly.com.au/story/4402677/no-just-terms-on-acquisition/>

[http://www.parliament.wa.gov.au/parliament/commit.nsf/\(WebInquiries\)/36846BCD5C59355048257831003E95E9?opendocument](http://www.parliament.wa.gov.au/parliament/commit.nsf/(WebInquiries)/36846BCD5C59355048257831003E95E9?opendocument)

<https://www.perthnow.com.au/business/agriculture/cray-fishers-fear-for-rock-lobster-industry-over-wa-government-plan-ng-b881049905z>

<https://www.abc.net.au/news/2019-01-12/restaurant-owners-support-lobster-changes-opposed-by-industry/10710202>

<https://www.medianet.com.au/releases/171417/>

<https://www.farmweekly.com.au/story/5974301/plea-to-have-property-rights-hearing/>

http://www.fish.wa.gov.au/Documents/occasional_publications/fop102.pdf

<https://westernpower.com.au/safety/360-aware/industry-safety/easements/>

<https://westernpower.com.au/media/2341/working-safely-around-the-western-power-network-handbook-20170508.pdf>

<https://www.commerce.wa.gov.au/publications/disclosure-requirements-bushfire-prone-areas-real-estate-bulletin-issue-129-december>

https://www0.landgate.wa.gov.au/_data/assets/pdf_file/0003/61797/SPP-14-Easements,-Covenants,Notifications-and-other-Interests.pdf

[http://www.parliament.wa.gov.au/Parliament/petitionsdb.nsf/\(\\$all\)/0D5FB70E9BEF79A5482582B9002A87C7/\\$file/ev.047.180622.let.001.rs.pdf](http://www.parliament.wa.gov.au/Parliament/petitionsdb.nsf/($all)/0D5FB70E9BEF79A5482582B9002A87C7/$file/ev.047.180622.let.001.rs.pdf)