

To: The Chair, Standing Committee on Public Administration  
Hon. Adele Farina MLC  
Attention: Ms Kristina Crichton, Committee Clerk  
Parliament House,  
4 Harvest Terrace  
West Perth WA 6005

## **Submission: Inquiry into Private Property Rights**

Thank you for the opportunity to make a submission on this matter.

### ***Natural hazards***

There seems to be an implication in Terms of reference (b) that placing a certificate on a title is a threat to “probity of the Torrens title system”. I would like to challenge this with particular reference to environmentally sensitive and bushfire-prone areas.

Property ownership operates within a largely a market-based system where the value of the property is expressed in the buying/selling price. As with all market based systems, they can only operate properly if full and proper information is made available by the seller to the prospective buyer. Properties have known threats or constraints - for example those that are within a fire prone area, or have areas of contaminated soil within their boundaries – would be less desirable places to live than places that aren’t the subject to these threats or constraints. Placing notices on the titles on these affected properties is the best way to ensure that the market determined value of the property is accurate and properly expressed in the selling/buying price. This ensures buyers are fully informed and aware at the time of purchase.

It is unrealistic to expect that all of these threats are known now or were in the past, and that these threats will not change over time, and property values will also change over time as the knowledge of these threats changes. It is the risk that is inherent in any purchase. Also, it is unrealistic to expect that property prices will always increase – the Torrens title system does not guarantee this.

Many of these threats are natural – bushfires, coastal erosion and flooding - and it is not the role of Governments to compensate for loss of property value in the face of these threats. Governments’ role is to investigate threats and help quantify the levels of the associated risks to help the market operate properly.

In short, making it clear what the nature of a threat is and what the level of risk is are not threats to the “probity of the Torrens title system” but the proper role of governments which is to ensure the market is properly informed on all the factors that go to determining the actual value of a particular property.

### ***Climate change and natural hazards***

Of course, under climate change, several of the above threats will increase – i.e. the fire risk of many properties will increase, more properties will be subject to inundation and flooding, and more coastal properties will be impacted by erosion. This raises several difficult to deal with issues for governments in relation to private properties.

Firstly, as the level of these threats increases and more properties will be threatened, the nature and extent of these threats and risks need to be made known so that the market can operate correctly. As noted above, this is the role of governments. With respect to coastal hazards and risks, State Planning Policy 2.6 requires that local governments do this risk assessment work and that they make the information publicly available. Putting a notice on a title seems the best way to inform the market and potential buyers of this risk.

These increasing threats will inevitably mean that some of these properties will become so hazardous that it will not be safe to continue to occupy them – extreme fire risk, continuous flooding and erosion reaching property boundaries and eventually the house/building.

In the absence of any other action, these properties will not be able to be sold as no buyer will be prepared to purchase that threat and hazard. Arguably, this is the market operating as it should do – as I noted above, it is unrealistic to expect that property prices will always increase.

The second issue relates to what is the role of government in these circumstances? Should governments intervene and ‘force’ affected property owners to move out of properties they cannot sell – do governments have a moral obligation to ensure people are not exposed to extreme risks? Should governments intervene to mitigate that risk – for example use public money to build a sea wall to protect properties from falling into the ocean? Is this governments interfering with normal market forces? Should government spend public money to provide a private benefit?

I would strongly argue that this is not proper use of government money and that mitigation measures should only be applied for public, not private, benefit. The role of government is simply to make sure the market is properly informed. The residual question is what is the moral obligation of governments to help property owners to re-locate in the face of these risks and what, if any, government resources should be used to facilitate re-locations?

The third issue relates to what might be called latent property rights. For example, if land becomes permanently inundated, or disappears into the ocean because of erosion, does that property still exist? If so what rights remain to the land owner? These are not just academic questions, but ones that the Committee needs to put its mind to as the impacts of climate change increase.

A related issue is about public access, especially in relation to coastal erosion. The beach is considered to be a public asset in WA, and, to this end, the coastal area – the beach and adjacent dunes - are, for the most part, in public reserves. Erosion will inevitably mean that at some point and at some locations, the coastal reserve will disappear and private property boundaries will extend to the highwater mark. In these cases, public access/ownership of the beach effectively ceases. This would be intolerable, and should be part of the considerations about addressing coastal properties threatened by erosion – the timing of any re-location should be carried out to ensure on-going public access/ownership of the coast.

### ***Environmentally sensitive areas***

Terms of reference (a) states “recognises the fundamental proprietary right of private property ownership that underpins the social and economic security of the community”, which suggests that this a fundamental and unchallenged principle. This ‘right’ is not absolute and must be seen within two broader contexts.

First, properties (land) will often have values other than those that are the private interest of the Torrens property owner. Some of these values are easily recognisable – for example minerals, the groundwater underneath the property, especially if that groundwater is required for public purposes. As well, any remnant native vegetation will have value to a range of fauna that occupy that vegetation.

Second, governments have responsibilities to conserve biodiversity, both because it's the right thing to do but also because Australia is signatory to a range of biodiversity related international treaties.

There will inevitably be occasions when these considerations will have to override Torrens title rights. Mostly, governments will purchase these lands that are of the highest biodiversity value. It is clear that these values are more important than private property rights and to protect these biodiversity values, constraints on private land uses will have to be applied. The market needs to be informed of this new information and placing a notice on the title is a reasonable thing to do. The market can operate properly and potential buyers, including government, can price in the full values of the property.

***Fair and reasonable compensation be paid***

I note again that Terms of reference (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”. If this is the case – the implication being adequate compensation should be paid because of this government action – then the converse should also apply. Where governments construct infrastructure and private benefits follows – for example building railway lines or upgrading areas like Scarborough and property values of the surrounding areas increases – then some of this benefit should flow back to governments and the taxpayers who funded these projects. The Committee should take this into account when considering how to address this terms of reference.

Thank you for your time in considering the issues raised in my submission. I would be happy to elaborate further on any of these matters should you require it.

Sincerely,

Dr Garry Middle