

Property rights and just terms compensation

15 July 2019

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Key issues:

- In Western Australia 12 years ago, Peter Swift purchased his farm unaware that the property was declared an environmentally sensitive area. The encumbrance was not registered on the Certificate of Title and precluded him from developing his land.
- As a result, state-wide debate and parliamentary inquiry into private property rights and 'just terms compensation' have been sparked.
- On 12 June 2019, the Honourable Rick Mazza proposed there be an inquiry into whether (where there is a public benefit to be derived from privately owned land) compensation should be paid and the encumbrance registered on the Certificate of Title.

Peter Swift purchased his farm in Western Australia 12 years ago, unaware that the property was declared an environmentally sensitive area (**ESA**). The encumbrance was not registered on the Certificate of Title (**CoT**) and precluded him from developing his land.

On the back of Mr Swift's inability to 'farm' the land and the subsequent loss of value in the land because of that declared ESA, state-wide debate and parliamentary inquiry into private property rights and 'just terms compensation' have been sparked. Legislative amendments were not made to introduce 'just terms compensation' into Western Australia.

On 12 June 2019, the Honourable Rick Mazza proposed there be an inquiry into whether (where there is a public benefit to be derived from privately owned land) compensation should be paid and the encumbrance registered on the CoT (**Parliamentary Debate**).

The motion put was passed 18 to 17.

The Parliamentary Debate centred on two main issues:

1. interference with private property rights; and
2. registration of all encumbrances on titles to land.

Private property rights

In Australia, land that is privately owned does not entitle the landowner to exclusive possession and control over those lands. Rather, the Crown or State owns all land at the outset and grants an interest in land, with freehold title being the type of grant that is considered closest to absolute ownership. However, land ownership rights in Western Australia are subject to restrictions that may be imposed if the government sees fit.

Pursuant to the *Land Administration Act 1997* (WA), compensation is claimable by a landowner whose land is compulsorily acquired or affected by reservation, or by an authorised authority for a public purpose. However, the claim for compensation does not extend where the government otherwise interferes with property rights for a public purpose (directly or indirectly) and restricts property rights, such as declaring land an ESA.

The effect of the current State legislative framework governing the interference with land ownership fails to account for the wide variety of circumstances in which private land may be interfered with.

Encumbrances on a CoT

The Torrens Title System (Torrens System) has long been regarded as a cheap, efficient and effective system of land administration that provides transparency to buyers and sellers of real property by requiring registration of certain encumbrances affecting land.

The Parliamentary Debate highlighted an issue that a number of interests which affect the use and enjoyment of land are not required to be registered such as an implied easement, land declared as a bushfire-prone area or an ESA. It was argued that this lack of transparency threatens the probity of the Torrens System.

Proponents for the improved protection of private property rights argue that this perceived lack of transparency undermines the integrity of the Torrens system because people should be aware of the constraints on land they are purchasing - *caveat emptor*. As a result of the lack of transparency, purchasers are not buying the land which they perceive they are buying. Further, improved transparency will discourage buyers from assuming they are able to do as they please with the land.

Proponents opposing the need for improved transparency in property rights argue that it was never the intention for rights and interests (such as ESAs which affect the land) to be shown on the CoT. Additionally, the existence of those interests that do not appear on the CoT do not threaten the probity of the Torrens System; there is a difference between legal interests in land and factors affecting the use and enjoyment of land.

It was also argued that listing all interests on a CoT would be both inefficient and impractical and may result in 'cluttering the CoT' with information which could lead to a CoT being more difficult to understand. Perhaps detail on a CoT caused confusion in days gone by, but due diligence has become a sophisticated process and 'detail' should no longer prove prohibitive.

Conclusion

The inquiry into the issue of private property rights and 'just terms compensation' is due to take place over a nine month period. We look forward to the publication of the findings and will keep you updated as to its progress.

For more information, please contact HopgoodGanim Lawyers' [Planning](#) team.

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