

PRACTICE NOTES

WESTERN AUSTRALIAN ENVIRONMENTAL PLANNING LAW

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INTRODUCTION

Purpose of Practice Notes

The purpose of these Practice Notes is to provide a practical introduction into the WA Environmental Planning Laws for practitioners unfamiliar with the system.

Focus of Paper

These Practice Notes focus on the principal areas of environmental planning practice in WA, and examine in particular:

- The principal written laws relevant to planning in WA;
- The arrangement and scope of the *Planning and Development Act 2005*;
- The contents and arrangement of planning schemes;
- Structure Planning and Infrastructure Cost Sharing;
- Land use control;
- Subdivision control including strata subdivision;
- Review of planning decisions;
- Enforcement of Schemes, Planning Approvals and Conditions;
- Injurious affection arising from the making or amendment of schemes and compensation;
- Overlap of planning with other laws dealing with:
 - environmental protection;
 - State heritage;
 - liquor licensing;
 - mining.

Aim of Notes

The aim of these Practice Notes is, by examination of the law relevant to the above topics, to provide users with a workable familiarity with:

- (a) planning schemes and the system of land use control;
- (b) the system of subdivision control including strata and survey strata subdivision;
- (c) processes for enforcement of planning schemes and terms and conditions of approvals;
- (d) the system for claiming compensation for injurious affection arising from the making of planning schemes;
- (e) processes for reviewing planning decisions; and
- (f) the role of environmental assessment and review relevant to the planning system.

List of Abbreviations

C/T - Certificate of Title.

IDO - Interim Development Order.

LAA - Land Administration Act 1997.

LG - Local Government.

LTO - Land Titles Office - Office of Land Information.

MRPA - Metropolitan Region Planning Authority (now WAPC).

MRTPS Act - Metropolitan Region Town Planning Scheme Act 1959.

MST - Model Scheme Text, in Appendix B of the TP Regulations.

P & D Regulations - Planning and Development Regulations 2009

Planning Act 2005 or **PA** - Planning and Development Act 2005.

Planning Act 1928 - Town Planning and Development Act 1928.

POS - Public Open Space.

R Codes - The Residential Design Codes 2008, published as an Appendix to SPP 3.1.

SAT - State Administrative Tribunal.

STA - Strata Titles Act 1985.

TLA - Transfer of Land Act 1893.

TPB - Town Planning Board (now WAPC).

TP Regulations - Town Planning Regulations 1967.

WAPC - Western Australian Planning Commission.

WAPC Act - Western Australian Planning Commission Act 1985.

CHAPTER 1 - THE PRINCIPAL WRITTEN LAWS RELEVANT TO PLANNING IN WA

1.1 MAJOR PLANNING WRITTEN LAWS

Planning practice in WA is highly regulated by written laws, including statutes, regulations and planning schemes (region, local and redevelopment).

An environmental planning law practitioner in WA must have a high level of familiarity with the following written laws:

(a) ***Planning and Development Act 2005***

This Act is a consolidation of the principal environmental planning enactments in WA since 1928, with minimal reforms¹ and is the primary reference point for the making, amendment and application of planning instruments including State Planning Policies, Region Planning Schemes, Local Planning Schemes, Interim Development Orders, Planning Control Area Declarations and Improvement Plans, and the relationship between those various instruments; the primary rules for subdivision control; general principles for development and land use control; compensation and land acquisition relevant to planning; enforcement of planning instruments and conditions of planning approval; and review of discretionary planning decisions.

(b) ***Town Planning Regulations 1967***

These Regulations provide the detailed procedure for making and amendment of local planning schemes, and contain in Appendix B the Model Scheme Text required to be used for all new local planning schemes.

(c) ***Planning and Development Regulations 2009***

These Regulations extend the procedural provisions for subdivision of land otherwise contained in the Planning Act 2005.

(d) ***Metropolitan Region Scheme 1963***

This is the region planning scheme for the Perth Metropolitan Region. It deals primarily with regional zones and reservations, and provisions for development and land use control at regional level. The MRS provisions provide the broad regional framework for the more specific land classification and development and land use control provisions of the 30 Perth metropolitan local planning schemes.

When working with the development and land use control provisions of the MRS, it is necessary to be aware of the WAPC Notices of Delegation which are published in the Government Gazette, and delegate to local governments authority to deal with the majority of development applications under the MRS.

1.2 OTHER PLANNING RELATED WRITTEN LAWS

A legal practitioner with more than a passing interest in environmental planning law should also have some familiarity with the following written laws:

(e) **Redevelopment Acts**

East Perth Redevelopment Act 1991
Subiaco Redevelopment Act 1994
Midland Redevelopment Act 1999
Armadale Redevelopment Act 2001

¹ McLeod D.W. "Planning and Development Act 2005" (Law Soc WA 2006).

These Redevelopment Acts set up Redevelopment Authorities and provide for Redevelopment Schemes which displace other planning schemes within the scheme area and impose a separate level of development control by the Redevelopment Authority.

Hope Valley-Wattleup Redevelopment Act 2000
Perry Lakes Redevelopment Act 2005.

These Redevelopment Acts provide for redevelopment programmes by a State Government agency without giving the development agency separate development control powers. Special provision is made for land acquisition, but for radically different methods in the two Acts.

(f) ***Strata Titles Act 1995***

Sets out the rules and procedures for the creation and operation of strata titles for subdivision of buildings and deals with survey strata titles where land is subdivided into lots with common property, without the necessity of there being existing buildings.

(g) ***Environmental Protection Act 1986***

Section 38 of this Act requires a decision-making authority to refer for assessment to the EPA any proposal (including planning proposals) which may have a “significant effect on the environment”. Regional planning schemes and amendments and local planning schemes and amendments must be referred to the EPA for assessment before advertising (Part IV Division 3). Generally speaking development proposals which comply with an assessed scheme and raise no new environmental issues do not need to be referred for assessment.

(h) ***Heritage of Western Australia Act 1990***

Development proposals affecting any place protected by the provisions of the Act must be referred to the Heritage Council for consultation and special weight is given to Heritage Council recommendations and comments.

(i) ***Swan and Canning River Management Act 2006***

This Act provides overriding development control by the responsible Minister within the Control Area of the Swan and Canning Rivers Management Authority. Associated laws extend the influence of the Swan River Trust, e.g. cl 29 of the MRS ensures WAPC control (by withdrawal of delegation) of development proposals on land partly within the Control Area, and on land which abuts waters within the Control Area.

(j) ***Swan Valley Planning Act 1995***

This Act establishes the Swan Valley Planning Committee which must be **consulted** on any planning scheme or amendment, or any development proposal in the Swan Valley.

(k) ***State Administrative Tribunal Act 2004***

This Act sets up the State Administrative Tribunal and sets out the principal operating procedures for the SAT. The SAT deals with all reviews of discretionary decisions by planning authorities.

(l) ***State Administrative Tribunal Rules 2004***

(m) ***State Administrative Tribunal Regulations 2004***

- (n) ***Land Administration Act 1997***
Sets out the procedures for the acquisition of land for public works, and is the source of the procedural provisions for compulsory taking of land for the purpose inter alia of planning schemes. The Act contains laws relating to Crown land and Crown reserves, and laws relating to the status of roads other than main roads.
- (o) ***Public Works Act 1902***
The former statute for land acquisitions; now defines public works.
- (p) ***Transfer of Land Act 1893***
Provides for the Torrens system and the system of land title registration and creating titles for new lots, which is the ultimate focal point of the land subdivision process.

1.3 POLICIES

Additionally, planning practitioners need to have a high level of familiarity with a significant body of the State, regional and local planning policies, and other agency policies.

CHAPTER 2 - WA PLANNING LEGISLATION CONTEXT

2.1 SIGNIFICANCE OF THE PLANNING AND DEVELOPMENT ACT 2005 (“PLANNING ACT”)

The significance of the Planning Act is that it contains the primary laws dealing with all areas of land use planning, and land use control, in WA. As it is primarily a consolidation of planning statutes in existence before 9 April, 2006, and as many Court and Tribunal decisions were based on previous statutes whose provisions remain relevant in the consolidated form, it is essential for legal practitioners working in the area of Environmental Planning Law, to have some knowledge of the previous statutes, how they fed into the Planning Act, and how to cross-reference between the old statutes and this new consolidated Act.

2.2 BRIEF HISTORICAL BACKGROUND OF PLANNING STATUTES (PLANNING ACT 1928)

(1) ***Town Planning and Development Act 1928***

The Environmental Planning Law system in WA has a strong historical connection with the early planning law of the UK. The Planning Act 1928 was WA’s first comprehensive planning legislation, and was significantly influenced by the *Housing Town Planning etc Act 1909* of the UK.²

The two principal focal points of the Planning Act 1928 were:

Planning Schemes (Part 1); and
Subdivision of land alienated from the Crown (Part 3).

The Planning Act 1928 from the outset made subdivision the responsibility of a State Government agency.³ The Act contemplated however that its Part 1 dealing with planning schemes would be the concern of local government.⁴ As a result partly of the Great Depression and the Second World War, there was little impetus for the making

² 1928 Parliamentary Papers, Vol 11 “Report of Select Committee of the Assembly on Town Planning and Development Bill” - 30.10.28.

³ Originally the Town Planning Board. Now the Western Australian Planning Commission.

⁴ The term “responsible authority” was defined in terms of the local government responsible for a scheme.

of planning schemes by local governments until a State Government planning scheme was adopted for the Perth Metropolitan Region in 1963.⁵

The Planning Act 1928 in its original form provided for a State Government planning administration which in the early days principally supported the operation of the Town Planning Board and its subdivision control activities, and its supervision of the making of local government planning schemes.

(2) ***Perth Metropolitan Region Planning***

By accident the planning provisions specifically for the Perth Metropolitan Region, in 1959 were enacted in a separate statute, the *Metropolitan Region Town Planning Scheme Act 1959* (“MRTPS Act”). The MRTPS Act made provision for the making and amendment of the Metropolitan Region Scheme (“MRS”), for its interrelationship with local planning schemes, special provisions for compensation for injurious affection arising out of regional reservations and provisions which precluded development for any purpose other than a public purpose (s 36); provision for improvement plans (s 37A), and provision for the collection of a Metropolitan Region Improvement Tax to finance the acquisition, development, maintenance and management of regional reserves (s 38).

(3) ***Western Australian Planning Commission Act 1985***

From the late 1970s there was talk by successive State Governments of consolidating the planning legislation, but instead, in 1985, the division was made more complex when the provisions relating to the new Planning Commission (replacing the Town Planning Board and the Metropolitan Region Planning Authority) were enacted in the Act which was most recently known as the *Western Australian Planning Commission Act 1985*. The WAPC Act provided for the establishment and operation of the WAPC under direction of the Minister, for delegations of authority in connection with the operation of region schemes, and gave power for the making and amendment of region schemes other than the MRS.

(4) ***Planning and Development Act 2005***

Several attempts were made at consolidation of the planning legislation, but that objective was not finally achieved until the passing of the Planning Act 2005. That Act consolidated the provisions of the Planning Act 1928, the MRTPS Act and the WAPC Act, and effected some limited reforms of the planning law⁶.

(5) ***Planning and Development (Consequential and Transitional Provisions) Act 2005***

The repeal of the Planning Act 1928, the MRTPS Act and the WAPC Act was not effected by the Planning Act 2005. That task was performed by the *Planning and Development (Consequential and Transitional Provisions) Act 2005*, which also made consequential amendments to 72 other statutes, and enacted a number of provisions aimed at smoothing the transition from the old to the new legislation.

2.3 CROSS-REFERENCING OF OLD PROVISIONS TO NEW PROVISIONS

A convenient reference source for cross-referencing of provisions of the pre-9 April, 2006 statutes to the provisions of the Planning Act 2005 is set out in the WAPC publication Planning Bulletin No 78 accessible on the WAPC website at www.wapc.wa.gov.au. See also The Law Society of WA paper “Planning and Development Act 2005” by Denis McLeod.¹

⁵ The Metropolitan Region Scheme was gazetted 9/8/1963.

⁶ See 2.4 and Chapter 3 below

2.4 ARRANGEMENT OF THE PLANNING ACT

Given that a decision had been made in 2005 that the new Planning Act would essentially consolidate rather than reform and re-enact the planning laws, the Planning Act 2005 performs the important task of consolidating and organizing the planning laws particularly well. It arranges the planning laws in a systematic and logical order. For legal practitioners who struggled with the complexities arising from the diverse sources of the old three Act system, it is instructive to follow the arrangement of provisions which now compartmentalize the laws in a way which assists in identifying the unifying principles. The Table of Contents of the Planning Act 2005 is a useful finding tool for the logical arrangement of provisions into sequential parts, divisions and sections.

It assists in the consideration of the WA environmental planning law to note that the planning concerns and planning principles and much of the original terminology of the Planning Act 1928 were retained in the 2005 Act.

The previous case law for the most part remains relevant. The Planning Act 2005 continues in the same way as the previous legislation, to work with the other WA State legislation relevant to planning referred to in 1.2 above.

2.5 SUBORDINATE LEGISLATION

Also the significant subordinate legislation continues to operate with little change under the 2005 Act.⁷

2.6 KEY FEATURES OF THE WA PLANNING SYSTEM

(1) **Protection of the public interest, or provision of planning services.**

Planning law in WA can be understood as sets of laws designed to control land use and development. It is common in this era to see the purpose of the planning laws as regulating the provision of planning services to developers. However it may be more appropriate to see the laws as regulating land use and development to protect the public interest. The planning law in WA retains a very close relationship to the planning system introduced in 1928, which focused on planning schemes and subdivision control. Planning schemes were intended to protect public amenity and convenience, and that focus was inherited from the UK Housing Town Planning etc Act 1909. It is easy to make a case for the proposition that the original intent of planning control was to protect the public interest from the irresponsible activities of land developers, rather than to provide planning services to developers.

(2) **Key features of Planning in WA**

Planning practice in WA is characterised by the following key features:

- (a) The tight control and often direct intervention of the State Government in the land development process (epitomized by the various Redevelopment Acts).
- (b) The dominant role of the Planning Minister at key points in the planning process (e.g. the making of regional and local planning schemes; the making of State Planning Policies; the declaration of planning control areas; the nomination of key members to the WAPC; the power of direction of the

⁷ Town Planning Regulations 1967; Metropolitan Region Scheme; and various local government planning schemes, now called “local planning schemes”.

WAPC in the exercise of any of its functions, and the power to direct local governments in the scheme making and amendment process, and in the enforcing the observance of their schemes.

- (c) WAPC control of subdivision, and dominance of local government planning functions through:
 - the pre-eminence of regional planning schemes administered by WAPC;
 - the making and amendment of local planning schemes;
 - control of models for local planning scheme provisions;
 - control of the R-Codes, setting standards for residential development;
 - making of State Planning Policies to which local governments are required to have due regard in carrying out key planning functions.
 - (d) Local governments have a key role in administering and enforcing land use and development controls, through local planning schemes and by delegated authority from the WAPC under RPSs.
 - (e) Powerful influence of the development and land investment industries and their lobbying organisations imposing their interests on the planning processes through their patronage and lobbying of State Governments.
 - (f) The moderating influence of the SAT in the statutory system of review of discretionary planning decisions.
 - (g) Restrained role of the Supreme Court in the system of judicial review of planning decisions and processes.
- (3) These features will be demonstrated and emphasized by the more detailed consideration of WA planning law that follows.

The planning law in WA has been fashioned by, and at the same time is designed to accommodate, these key features. They are reflected in the planning related legislation.

CHAPTER 3 - OVERVIEW OF THE PLANNING AND DEVELOPMENT ACT 2005

3.1 PURPOSE OF THIS CHAPTER

The purpose of this chapter is to provide an introduction to the full range of planning practice functions in WA through a brief overview of the Planning Act 2005. Some significant planning functions fall outside the scope of the Planning Act 2005 (e.g. the operation of the various Redevelopment Acts), and those matters will be dealt with separately. The greater part of the balance of these Practice Notes will involve an elaboration in subsequent Chapters of the law relating to those planning practice functions covered by the Planning Act 2005.

3.2 CONTENTS OF THE PLANNING AND DEVELOPMENT ACT 2005

- Note: 1. No attempt is made to refer to every provision of the Act. For the most part, only provisions of general or common significance are mentioned in this overview.
2. Provisions which are considered in later chapters (e.g. contents of region or local planning schemes; subdivision approval process; development approval process; enforcement of schemes; review of discretionary decisions etc) will be dealt with in this overview by mention only, to maintain the context..
3. Provisions which are not dealt with under a broad topic heading in later chapters, but which have special interest or significance, may be dealt with here in a little depth **because** they are not dealt with otherwise.

Part 1 - Preliminary

- (1) **Purposes of the Act.** Section 3 sets out the purposes of the Act. It is clearly intended as an aid to interpretation, and directly addresses the continuity of meanings between the three previous major planning statutes on the one hand and the Planning Act 2005 on the other hand.
- (2) **Definitions of Terms.** Section 4(1) sets out definitions which are operative not only for the purpose of the Planning Act 2005, but also for the region planning schemes (“RPS”) and local planning schemes (LPS”), the various Regulations and various other planning instruments, made under the authority of that Act. Some key definitions are:

“**development**”. This term is primarily defined to mean **the development or use of land**.

(As to the meanings of “development” and “use” in the context of that definition, see the *University of WA* case⁸. Burt, CJ in that case explained that -

“‘development’ encompasses two ideas -

- (i) ‘use’ of the land - activities which are done in or on the land but which do not interfere with the actual physical characteristics of the land; and
- (ii) ‘development’ - - activities which result in some physical alteration to the land which has some degree of permanence to the land itself.”

The term can at any time (depending on the context) mean:

- development in the colloquial sense, referring to the carrying out of building, construction or other work on land;

⁸ *University of WA v City of Subiaco and MRPA* (1980) 52 LGRA 360 at 363.

- use being the commencement, carrying out or change of use of land; or
- both development and use (as is generally the case in an application for approval to commence development, and in some provisions of the MRS - e.g. cl 10.⁹)

In addition to development or use, “development” is defined to include -

- any demolition, erection, construction, alteration of or addition to any building or structure on the land;**
- the carrying out on the land of any excavation or other works;**
- an extended meaning in relation to a place to which a Conservation Order under s 59 of the Heritage Act applies.**

“land” has a special definition for the purposes of the Act.

“lot” is given a detailed and technical definition. The main elements of the definition refer to -

a defined portion of land

- for which a Crown Grant or Certificate of Title has been or can be issued; or**
- depicted on a Diagram or Plan of Survey of a subdivision approved by the WAPC.**

Because of its detailed and technical terms, the definition must be considered carefully in any case where the term “lot” has special significance.

Note that in this definition (unlike the very similar definition under the Planning Act 1928), strata lots, survey strata lots and common property lots under the *Strata Titles Act 1985* are specifically excluded.¹⁰

“planning scheme” means a local or region planning scheme that has effect under this Act and includes -

- the provisions of the scheme; and**
- all maps, plans, specifications and other particulars contained in the scheme and colourings, markings or legends on the scheme;**

Note that although a planning scheme includes the relevant maps and plans, they are not published with the scheme text in the Gazette (s 87(5)).

“responsible authority” - under this definition, the responsible authority for a local planning scheme or local IDO is the relevant local government; the responsible authority for a region planning scheme is the WAPC, or a local government exercising power delegated to it by the WAPC.

(3) Conflict between RPS and LPS

Section 4(3). A provision of the Act relating to a region scheme is to be construed in conjunction with the provisions of the Act relating to a local planning scheme as if those provisions related to region schemes. But if the provision relating to a region scheme is in conflict with, or inconsistent with the provision relating to a

⁹ See comments of Wickham, J in *City of Perth v. Food Plus Pty Ltd* (Unreported; Full Ct of Supreme Ct; 19/4/83)

¹⁰ The State Government in July 2008 published proposals to amend the Planning Act including amendments to deal with this issue.

local planning scheme, for the purpose of construing provisions relating to a region scheme, the provision relating to the region scheme prevails to the extent that it is in conflict or inconsistent.

This interpretation provision is descended from s 3 of the MRTPS Act. It has a directly applicable significance in regard to sections such as 87(5), which exempts the need for gazettal of the maps, plans or diagrams of a local planning scheme without affecting their status as part of the scheme. Because of s 4(3) the same must apply to a region scheme.

But of greater significance is the fact that this principle must apply also to the relationship between a region planning scheme and a local planning scheme, because each of them has effect as if enacted by the Planning Act 2005 (see as to region planning schemes ss 33(1)(b), 56(3) and 62(3), and as to local planning schemes ss 68(1)(b) and 87(4)). This relationship between region and local planning schemes, and its significance in the dual approval situation, was explained by Burt, CJ in the *University of WA* case⁸, at p.364.

(4) **Crown Bound.**

S 5(1) - “Except as provided in section 6 this Act binds the Crown.”

This subsection effectively repeats section 35 of the Planning Act 1928.

S 5(2) - A region planning scheme binds the Crown.

This subsection effectively repeats s 45 of the MRTPS Act, but extends its application to all region planning schemes.

The reason for retaining this apparently odd combination of provisions is probably explained by s 6 (which effectively repeats s 32 of the Planning Act 1928), and the decision in the case *City of Bayswater v. Minister for Family and Children’s Services*.¹¹

Because a local planning scheme has the same effect as if enacted in the Act s 5(1) has the effect that a local planning scheme binds the Crown, but subject to the provisions of s 6. On the other hand, as s 5(2) expressly provides that a region planning scheme binds the Crown, there is no scope to apply the limitation in s 6 to a region planning scheme. We thus have the anomalous situation where, because of s 6, the **provisions of the Planning Act 2005** relating to region planning schemes do not interfere with the right of the Government or a local government to carry out a public work, but the Government or a local government carrying out a public work is required to comply with the **provisions of a region planning scheme**.

(5) **Public Works carried out by Government or Local Government**

S.6 - The State Government (and its agencies) and local governments when carrying out a public work do not need to comply with the Planning Act. That necessarily applies also to an LPS because it has effect as if enacted in the P&D Act, but they need to have regard to the purpose and intent of an LPS, orderly and proper planning and amenity.

¹¹ *City of Bayswater v. Minister for Family and Children’s Services & Ors* [2000] 108 LGERA 182 (Full Court)

In the absence of any requirement for an agency to lodge an application under a LPS, the obligation of an agency to have regard to the purpose and intent of a scheme, and to have regard to orderly and proper planning and amenity, is effectively unenforceable.

An application must be lodged for the purpose of the MRS, and because of clause at cl.28 of the MRS, will need to be lodged with the responsible LG, but the WAPC has withdrawn the delegation to LG's to determine such applications¹².

Part 2 - The Western Australian Planning Commission

(1) WAPC Status

The WAPC is constituted a body corporate (s 7(2)), and is an agent of the State (s 8).

(2) WAPC Membership

The WAPC Board consists of:

- **a chairperson appointed by the Governor on the nomination of the Minister;**
- **6 persons from different fields of interest or expertise, all appointed by the Governor on the nomination of the Minister,;**
- **6 ex-officio members representing specified departments or agencies;**
- **a nominee of the Minister being a person experienced in urban and regional planning employed in an agency for which the Minister is responsible;**
- **a person nominated by the regional Minister.**

The technical (ex-officio) representatives and other State government representatives can easily dominate the WAPC on matters of specific government interest (eg planning for major roads). Given the strong Government representation, it seems unlikely the Minister will frequently feel any need to direct the WAPC in the exercise of its functions (see (5) below), other than in purely formal circumstances.

(3) WAPC Functions and Powers

The functions of the WAPC are set out in s 14, and its powers are set out in s 15.

(4) WAPC Delegation

S 16 gives the WAPC specific power to delegate any of its functions to -

- (a) a member of associate member of the WAPC;**
- (b) a committee of the WAPC or a member of such a committee;**
- (c) an officer of the WAPC;**

¹² See WAPC gazetted notice of delegation 29/11/2002

- (d) a public authority or a member or officer of a public authority; or
- (e) a local government, or a committee or an employee of a local government.

The WAPC exercises those powers of delegation regularly, particularly to its own committees, and to local government. In fact the vast bulk of the development control functions under the MRS are discharged by local governments, most commonly through the device of deemed approval under cl.26 of the MRS, but nevertheless the effect of the deeming is dependent upon the existence of the delegation to LGs.

(5) **Ministerial Direction**

Under s 17, the Minister may give written directions to the WAPC with respect to the exercise or performance of any of its functions, either generally, or in relation to a particular matter, and the WAPC is to give effect to any such direction (s 17(1)).

The only constraint on the Minister in directing the WAPC is the requirement of tabling of the direction in Parliament within 14 days after the direction is given. Tabling in Parliament would not seem to have much significance where the Minister directs the WAPC to determine a development application in a particular way. Tabling in Parliament would not have the effect of reversing a determination of a development application made by the WAPC under direction of the Minister. Where the WAPC is directed by the Minister to refuse an application, the applicant would have a right of appeal to the SAT, but the Minister even then has the power to call in an application for review to the SAT (s 246), though such a call in is also subject to gazettal and tabling in Parliament (s 246(4)). As there is no third party right of appeal, there would be no statutory redress for any objector to a development proposal approved by the WAPC under direction of the Minister.

(6) **Minister's Access to Information**

Under s 18, the Minister is entitled to have access to any information in the possession of the WAPC, including access to documents.

Part 3 - State Planning Policies

State Planning Policies are the successors of the approved statements of planning policy the subject of s 5AA of the Planning Act 1928.

An SPP is to be directed primarily towards broad general planning and facilitating the co-ordination of planning throughout the State by local governments (s 26(2)).

An SPP may make provision for any matter which may be the subject of an LPS (s 26(3)).

Part 3 sets out the matters to which the WAPC is to have regard in the preparation of an SPP, and sets out the process for making and amendment of an SPP.

State Planning Policies deal with significant issues such as -

- Residential Design Codes (setting standards for residential development);
- Metropolitan Centres Policy (dealing with shopping centre development in the Perth Metropolitan Region);

- Coastal Development Policy (amongst other things establishing maximum building heights for buildings on the coast).

For practical purposes effect is given to SPPs by the following means:

- (a) Under s 77, every LG in preparing or amending an LPS -
 - (i) is to have **due regard** to any SPP which affects its district; and
 - (ii) may include a specified SPP in a scheme, and where it does so the SPP is to have effect as part of the scheme, subject to any modification set out in the scheme (s 77(2)(b)).
- (b) In determining an application for review of a planning decision, the SAT is to have **due regard** to any SPP which may affect the subject matter of the application (s 241(1)).
- (c) Most local government zoning schemes require the LG to have due regard to any SPP when determining an application, and in fact such a provision is made in cl 10.2(c) of the Model Scheme Text.¹³

And of course, the WAPC applies its SPPs by its oversight of the making and amendment of LPSs.

Part 4 - Region Planning Schemes (RPS)

(1) Power to make RPS and Objects

An RPS may be prepared for all or any of the objects, purposes, provisions, powers or works for which a LPS may be prepared under s 69(1), and may provide for planning, replanning or reconstructing the whole or any part of a region (s 34(2)).

(2) Making and Amending RPS

The provisions for making an amendment of the MRS are set out in Divisions 2 to 4 inclusive of Part 4. There is only one procedure for making a RPS, but there are two different procedures for amending an RPS as follows:

- (a) the normal procedure for amendment which is similar to the procedure for making a RPS; and
- (b) a simplified procedure for minor amendments, where the WAPC forms the opinion that the amendment does not “constitute a substantial alteration to a region planning scheme”. (S 57).

(3) Procedure for Making or Amending RPS

The procedure for making an RPS or for an amendment other than a minor amendment involves the following steps:

- (a) The WAPC or the Minister must form the opinion that matters of State or regional importance require the preparation or amendment of a RPS (s 34(1)).

¹³ Town Planning Regulations 1967, Appendix B

- (b) The WAPC resolves to prepare a RPS or amendment (s 35).
 - (c) The proposed RPS or amendment is to be referred to the EPA for environmental review (ss 38 and 39).
 - (d) In the case of any RPS or amendment applying to land in the Swan Valley, referral to the Swan Valley Planning Committee is required (s 40).
 - (e) The WAPC must obtain the Minister's consent to go to the stage of seeking public submissions (s 42).
 - (f) If the Minister consents, then public submissions are invited by gazettal and newspaper advertising (s 43). If the scheme or amendment changes the zoning or reservation of any land, then the WAPC is to make reasonable endeavours to give written notice to the owners of the land affected (s 43(4)). The WAPC is also required to consult any public authorities or persons which appear to the WAPC likely to be affected (s 43(5)).
 - (g) The WAPC is required to consider all submissions (s 44). Each person making a submission is to be given the opportunity to be heard by the WAPC or a committee established for the purpose (s 46).
 - (h) Further referral to the Swan Valley Planning Committee is required for a scheme or amendment affecting land in the Swan Valley.
 - (i) The WAPC is to report to the Minister on all submissions (s 48).
 - (j) The Minister may withdraw a scheme or amendment, or may give final approval (ss 49 and 50). The Minister may direct the WAPC to again undertake a public inspection process for any scheme or amendment which has been modified after the initial public inspection (s 51).
 - (k) Approval of the Governor is required (s 53).
 - (l) Following Governor's approval, the scheme or amendment is published in the Gazette, but maps, plans and diagrams are not required to be gazetted.
 - (m) S 55 gives an opportunity to the Governor to revoke the Governor's approval of an RPS or amendment or part thereof even after gazettal.
 - (n) The RPS or amendment and the WAPC's report on submissions are to be laid before each House of Parliament within 6 sitting days of gazettal (s 56(1)).
 - (o) The RPS or amendment **has effect as if enacted in the Act** when it is no longer subject to disallowance (s 56(3)).
- (4) **Minor Amendments to RPS**

Any particular MRS amendment may do no more than rezone or remove the reservation from a single lot, or change slightly the alignment of a regional road. S 57 gives the opportunity to the WAPC **to resolve that a proposed amendment does not, in the opinion of the WAPC, constitute a substantial alteration to an RPS**. Such a resolution cannot be made in regard to zoning of land in the Swan Valley (s 57(2)). The effect of such a resolution is that the simplified procedure in Division 4 applies to making the minor amendment.

Simplified procedure for making minor amendment.

- (a) The WAPC or Minister must form the opinion in s 34(1).
- (b) WAPC resolution to prepare the amendment (s 35).
- (c) WAPC forms the opinion the proposed amendment does not constitute a substantial alteration to the RPS (s 57(1)).
- (d) A copy of the amendment is sent to the Minister (s 58(1)(a)).
- (e) Publication of notice in the Gazette and in a daily newspaper (s 58(1)(b)).
- (f) If the amendment changes the zoning or reservation of any land, then the WAPC is to make reasonable endeavours to give written notice to the owners of the land affected (s 58(1)(c)). The WAPC is also required to consult any public authorities or persons which appear to the WAPC likely to be affected (s 58(1)(d)).
- (g) The WAPC is required to consider all submissions and make a report and recommendations for the Minister.
- (h) Minister may approve with or without modifications or decline to approve (s 62(1)).
- (i) Amendment published in the Gazette (s 62(2)(a)) but without maps, plans or diagrams.
- (j) The minor amendment has effect as if enacted in the Act upon gazettal.

The above procedure for making a minor MRS amendment is similar to the procedure for making an LPS amendment.

(5) Substantial Alteration

There is no definition or set of criteria in the Act for determining what is a substantial alteration to the MRS. The question was the central issue in the application to the case in the two *Helena Valley/Boya Association (Inc)* actions. Both the *Helena Valley/Boya* actions involved decisions of the Full Court of the WA Supreme Court. The first case¹⁴ avoided the “substantial alteration” issue because the Court found that the WAPC had erred in its delegation process. The second case¹⁵ did come to grips with the question whether the proposed MRS amendment could properly be characterised as involving a substantial alteration. The Court found that the opinion as to substantial alteration could reasonably have been formed, and the decisions, particularly that of Ipp, J, give some idea of the kind of criteria that should be applied in forming the “substantial alteration” opinion. The issue has lost much of its significance with the current tendency for all MRS amendments to be dealt with by the substantial alteration procedure, and for lesser amendments to be gathered together in a single “omnibus amendment”.

¹⁴ Re Beggs; Ex parte Helena Valley/Boya Association (Inc) (1989) 2 WAR 422.

¹⁵ Re Beggs; Ex parte Helena Valley/Boya Association (Inc) (Unreported; Full Court 28/2/92)

(6) **Omnibus Amendment**

The distinction between substantial amendments and minor amendments to a RPS has lost some of its significance through the use of “omnibus amendments”. The common practice is for the WAPC to save up amendments to an RPS and to put them through the processes of a substantial amendment at one time. That may simplify procedures for the WAPC, but it can significantly extend the time that it takes for any RPS amendment to work through the process from the original proposal to the point where it takes effect.

(7) **Amending “Urban Deferred” to “Urban”**

Cl 27 of the MRS provides:

“By resolution of the WAPC notified in the Government Gazette land may be transferred from the Urban Deferred Zone to the Urban Zone”.

That provision is clearly intended to be applied literally. In cl 23 of the MRS, “Urban Deferred” and “Urban” are both designated as zones. Transfer of land from one zone to the other is rezoning. Rezoning is an amendment. The procedure for amendments is set out in Divisions 3 and 4 of Part 4 of the Planning Act 2005. The MRS is subordinate legislation and cannot override or modify the provisions of the Act. In fact, to the extent of its inconsistency with provisions of the Act, cl 27 is void¹⁶. Nevertheless, the WAPC always has, and continues, to use the cl 27 procedure for “Urban Deferred” to “Urban” rezonings, and the validity of the process hasn’t yet been challenged. A justification for the adoption of a very simple process for change from “Urban Deferred” to “Urban” zone is that the big issues of policy and principle would most likely be dealt with on the change to “Urban Deferred”. It can be assumed that such an amendment would only occur where there is an acceptance that the intended use of the land is to be urban. However if the procedure is to be simplified for the “Urban Deferred” to “Urban” change, the law should reflect that. It doesn’t seem to do so at present.

(8) **Consolidation of Region Planning Scheme**

Provision is made in Division 5 of Part 4 for the consolidation of a regional planning scheme. Under s 63(1) an MRS is to be consolidated if the Minister so directs. By comparison, under Division 5 of Part 5, an LPS is required to be consolidated every 5 years (s 88(2)).

(9) **Structure and Contents of Region Planning Scheme**

See Chapter 5 Part 5.8.

Part 5 - Local Planning Schemes (LPS)

(1) **Power to make LPS and Objects**

The prescription for the making of an LPS is very broad as set out in s 69 -

“69(1) A local planning scheme may be made under this Act with respect to any land -

¹⁶ Interpretation Act 1984 s 43(1)

- (a) **with the general objects of making suitable provision for the improvement, development and use of land in the local planning scheme area; and**
 - (b) **making provision for all or any of the purposes, provisions, powers or works referred to in Schedule 7.**
- (2) **With those objects a local planning scheme may provide for planning, re-planning, or reconstructing, the whole or any part of the local planning scheme area.”**

This broad prescription is quite similar in its terms to the power contained in s 6 of the Planning Act 1928. The very wide terms of that power have been noted in a number of cases including:

*Pearse v City of South Perth*¹⁷.

The scope of the power is wide enough to authorize provisions for development control even though there was no specific provision in the Act or the First Schedule authorizing such provisions.

The provisions of the First Schedule are not to be read as limiting the generality of the head of power in the Act.

See also *R v Camberwell City Council Ex parte Heller and Gocs* (1965) LGRA 306.

*Bonton Pty Ltd v City of South Perth & Ors*¹⁸

Brinsden, J commented to the following effect:

The words “with the general object of improving and developing ... land to the best possible advantage” comprehend prohibitions and restrictions on land use, not only “positive” planning; includes the power to impose interim restrictions on land use, even for the purpose of gaining time to consider future planning options.

In that case Brinsden J was dealing with a challenge to the validity of a scheme amendment that appeared to have been made to have effect for a limited period of time, prohibiting tall buildings, and intended to allow time for a permanent scheme amendment to the same effect to come into operation. It did not matter to the Court that the temporary scheme amendment would prevent the TPAT from determining an appeal in favour of the plaintiff under the existing scheme provisions which had no height control.

*Costa & Ors v Shire of Swan*¹⁹

Olney, J in the *Costa* case dealt with a challenge to the validity of a development scheme which sought to impose an obligation on owners within the scheme area to contribute towards the cost of shared infrastructure. Olney, J made comments to the following effect -

¹⁷ *Pearse v City of South Perth* [1968] WAR 130

¹⁸ *Bonton Pty Ltd v City of South Perth* [1982] WAR 213 at 217.

¹⁹ *Costa v Shire of Swan* [1983] WAR 22

He defined a town planning scheme as ‘a programme of action with respect to any land, houses, buildings or other works and structures (which may be situated in any city, town, suburb or rural area) which has the general object of improving and developing such land etc to the best possible advantage.

Note that Olney, J was dealing with a development scheme, the primary object of which is the development of land. A development scheme cannot deal with the zoning of land and a zoning scheme may have been given a very different description.

“The scope for town planning schemes is as wide and diverse as the ingenuity of planners is able to contemplate.”

(2) **Schedule 7 – Matters that may be dealt with by a Scheme**

The equivalent of Schedule 7 under the Planning Act 1928 was Appendix A. Olney J, in the *Costa* case observed that Appendix A was added to the power to make schemes in 1955, and elaborated but did not extend or limit the power (see also *Pearse* 16). The same should apply to Schedule 7 under the Planning Act 2005. Schedule 7 nevertheless contains a comprehensive elaboration of the matters which are or may reasonably be dealt with in planning schemes. While Schedule 7 gives useful guidance as to matters that may be included in schemes, it is clear from the comments of Olney, J in the *Costa* case that the fact that a matter is not mentioned in Schedule 7 does not mean that the matter can’t be dealt with in a scheme.

(3) **Compliance with Statutory Procedures for Making or Amending LPS**

Although it has been repeatedly recognized in cases in WA that there is a great deal of flexibility as to the subject matter of planning schemes and amendments, the same does not apply to the requirement of compliance with the statutory procedures. It is only a scheme or amendment made properly in accordance with the statutory procedures which is capable of the robust application spoken of in *Pearse*, *Bonton* and *Costa*.

In *Reidy-Crofts v Antulov*²⁰

The City of Wanneroo’s Planning Scheme provided that the Scheme Maps formed part of the Scheme. At that time the Planning Act 1928 required that the Scheme be published in the Government Gazette. The Scheme Maps were not published in the Government Gazette. The Full Court held that the Scheme Maps had not been properly promulgated and could not be treated as a valid part of the Scheme. As a consequence the zoning and reservation provisions of the Scheme failed as they depended upon the land classifications shown on the Scheme Maps and the whole Scheme, which depended on zoning for the efficacy of its planning controls, was consequently ineffective. The same applied to all other local government zoning schemes in WA, as they all depended on the Scheme Maps and none were gazetted. Amendment to the Act was soon passed stipulating that Scheme Maps did not need to be gazetted to be effective, and the amendment retrospectively validated schemes which had previously been gazetted without the Scheme Maps.

²⁰ *Reidy-Crofts v Antulov* [1983] WAR 35

Gadaldi v City of Gosnells²¹

In this case Wallace, J in the Supreme Court dealt in a similar way with a scheme amendment, the map for which was not published in the Gazette. Wallace, J held that the purported rezonings in the amendment were not effective by reason of the failure to publish the amendment maps in the Gazette. The Act was quickly amended again to confirm that amendment maps did to need to be gazetted.

Notwithstanding the strict approach taken by the Supreme Court in regard to the Scheme Map formalities, some formalities in the Regulations for making and amending schemes may be treated as prescriptive only (see ***Bonton v City of South Perth***).

A number of other cases deal with the width of the power to make or amend planning schemes under the WA legislation.

(4) Proposed Scheme as a Seriously Entertained Planning Proposal

As noted in ***Begley v. City of Wanneroo***²², a planning scheme or amendment may be given some effect (when the planning authority is exercising a discretionary power) even before it has completed the statutory process, if it is a seriously entertained planning proposal. It can be applied with much the same effect as a properly prepared planning policy.²³

(5) Planning Scheme Binding on WAPC

A planning scheme is capable of binding the WAPC in the exercise of its statutory subdivision powers.²⁴ S 138(2) of the *Planning Act 2005* now confirms that the WAPC is not to give a subdivisional approval that conflicts with the provisions of a LPS, but subject to the qualifications in s 138(3).

(6) Procedure for making a LPS

Local planning schemes are made and amended by a process which involves the following essential elements:

- (1) The responsible LG resolves to prepare the scheme, or to adopt a scheme prepared by owners (s 72(1)).**
- (2) Referral to agencies (Part 5 Dir 3).**
- (3) Environmental Review (ss 81 & 82, 85 and 86).**
- (4) Public inspection (s 84.1)**
- (5) Approval by the Minister (s 87(1)).**

²¹ *Gadaldi v City of Gosnells* Unreported; SCT No 1293/88; decided 27/1/89

²² *Begley v City of Wanneroo* [1970] WAR; *Humphreys v TPS* (Unreported; T.PI.Ct.129/74; decided 10/6/75); *Ironbridge Holdings Pty Ltd v SPC* (Unreported; T/A 1/92; decided 10/8/92); *SPC v Wallasley Pty Ltd* (Unreported; delivered 26/5/95; S.Ct Lib No 950254); *Carcione Nominees Pty Ltd v Minister for Planning and City of South Perth & Ors* [2005] WASCA 56

²³ *Agnew Clough Ltd v TPB* (WATPAT, No 1 of 1979, 1 May 1980, Unreported)

²⁴ *SPC v Wallasley Pty Ltd*, *supra*

(6) Publication in the Gazette, advertising and display (s 87(3)).

(7) The scheme when gazetted has full force and effect as if enacted (s 87(4)).

(7) Making a LPS Amendment

S.75 makes it clear that a LG not only can adopt an amendment proposed by owners of land, but also can adopt an amendment proposed by owners. It was argued by the plaintiff in the case *Prudential v City of Joondalup*²⁵ that it was improper for a City to make a scheme amendment for an individual owner, or at an owner's request. The Court did not agree. In fact a significant proportion of scheme amendments are made to accommodate the requirements of one or a group of owners. Furthermore reg 25 of the Regulations reflects this reality by allowing for the costs of publishing notice of an amendment to be recovered from an owner who requested it.

The procedure for a LPS amendment is broadly similar to the procedure for making a scheme. There are significant differences of detail which arise out of the provisions of the Regulations.

(8) Town Planning Regulations 1967 elaborate the Procedures

The procedures for making an LPS and an amendment are set out in detail in the Regulations. The regulations for making schemes generally apply to amendments subject to the modifications stipulated in regs 25 and 25AA.

(9) Land in more than one LPS

Any land may be included in the scheme area for more than one LPS, but only one LG zoning scheme (s 70).

This provision recognises the fact that many LGs may have development schemes relating to land within the scheme area of their zoning scheme. Metropolitan LGs which still have operating development schemes include the Cities of Stirling, Bayswater, Swan and Canning, and there are also various non-metropolitan LGs with operating development schemes.

Development schemes are exceptionally flexible planning instruments for regulating new development, especially if there is a requirement for shared infrastructure cost contribution, and especially where there are fragmented land ownerships. But as will be discussed later, the making of development schemes is perceived by the development industry to be too slow, and the schemes are perceived as too heavily controlled by LGs. Furthermore, as a consequence of a very few LG development schemes being poorly drafted and/or badly administered, they have fallen out of favour with local governments. When a significant number of local governments have experienced the complications of working with the alternative to development schemes, namely general structure planning provisions and general infrastructure cost sharing provisions incorporated in their zoning schemes, it is possible that the advantages of development schemes, at least for the local government administrators, will be appreciated.

²⁵ *Prudential Trustees WA Ltd v City of Joondalup* (1999) 106 LGERA 117

(10) **Schemes extending to more than one District**

A LG may prepare or adopt a scheme for land within its district and an adjacent district (s 72(1)). LGs may jointly prepare or adopt a scheme relating to land in each of their districts (s 72(2)).

(11) **Redevelopment areas**

A LPS cannot be used for land in a Redevelopment Area under a Redevelopment Act, but only for land subject to a Redevelopment Scheme, in the case of the East Perth, Subiaco, Midland and Armadale Acts (s 71).

(12) **LPS Review (Part 5 Div 5)**

- (a) **A LPS is to be kept under review.**
- (b) **A consolidation of an LPS is to be prepared every 5 years (taking account of all amendments (s 88(1) and (2))).**
- (c) **An LG may prepare a new Scheme instead of a consolidation (s 88(3)).**
- (d) **The Minister may by notice in the gazette, direct an LG to prepare a consolidation within a specified period, or may exempt an LG from the requirement of consolidation for a development scheme (s 88(4)).**

The requirement for consolidation is an appropriate replacement of the requirement of 5 yearly review and the assumption of 5 yearly replacement in the *Planning Act 1928*. The review process under that Act was onerous, and was seldom complied with. Most LG schemes take more than 5 years to complete the process from preparation to promulgation. Therefore under the 1928 Act, an LG was legally under obligation to commence review of its existing scheme while it was waiting for the Minister to approve a new replacement scheme, or before the previous review process was completed. The requirement of 5 yearly consolidation on the other hand is practical.

- (e) **The consolidation is to be submitted for WAPC approval and advertised for public inspection inviting submissions (s 89).**
- (f) **Under s 90, not later than 6 months after preparing a consolidation, the LG is to report to the Minister on the operation of its LPS and to report on submissions, and make recommendations as to whether the scheme as consolidated is satisfactory (s 91), requires amendment (s 92), should be repealed and replaced (s 94), or simply repealed.**

(13) **Minister's Order**

- (a) **The Minister may order an LG to prepare or adopt a scheme, or to consent to modifications or conditions imposed by the Minister on a proposed new scheme (s 76(1)).**
- (b) **The power is greatest in the case of an LG failure to adopt a scheme prepared by owners of land under s 72(1)(b). In that case the Minister may adopt the scheme in lieu of ordering the LG to do so (s 76(2)).**

The Minister has had this power since 1928, but has never used it. It has been threatened on at least one occasion, and that proved to be enough to persuade the LG to take the action the Minister considered appropriate.

- (c) The Minister has frequently ordered an LG to proceed with a modification or condition.
 - (d) Note that the powers of the Minister under s 76 do not extend to scheme amendments. It is possible that a proponent of amendment may invoke the provisions of s 76 by expressing the scheme amendment as a minor LPS. This procedure has been proposed but not tested. The Minister now has powers under s.125 to order a LG to amend a LPS, but **only** “to ensure consistency with a RPS, a proposed RPS or a proposed amendment to a RPS. (See comments under Part 9 below in this chapter.)
 - (e) Since an LG can have only one zoning scheme (s 70(2)), a minor LPS as canvassed in (d) above could only be a development scheme (which by definition in reg 3 cannot zone land). Since developers have no patience with development schemes (see (9) above) and generally prefer to use the structure plan process for new developments, it seems unlikely the power in s 76(2) will be exercised.
- (14) **Minister’s control over making and amendment of LPS**

- (a) Until 1996 LG’s had a high level of control over the making and amendment of their schemes. Each of the procedural steps in s.7 of the *Planning Act 1928* was permissive, so that an LG having taken one step in the process did not need to take the next. Furthermore, in the Regulations, prior to March 1996, a LG could either decline to proceed or resolve not to proceed with any step in the process (eg under cl.17, the options were for the LG either to resolve to proceed or to resolve not to proceed with a scheme or amendment after public inspection). In 1995, s.7(2) of the *Planning Act 1928*, was amended to give statutory recognition for the first time, the requirement of public inspection in the process of making or amending a LPS. The draftsman used the word “shall” in the expression of the requirement of public inspection, and in the way the subsection was redrafted, the word “shall” appeared to condition all other steps the LG might take to complete the making or amendment of a scheme – including submission to the Minister for approval. Under the earlier form of s.7(2), a scheme or amendment having been prepared or adopted by the LG, required only the approval of the Minister and gazettal before it became effective.

The Minister, who at that time was in dispute with the City of Nedlands over its refusal to forward certain scheme amendments for his approval (see the case *Murcia Holdings Pty Ltd and Ors v City of Nedlands and Ors*²⁶ opportunistically asserted that the “shall” in the new s.7(2) obliged a local government to continue with all the steps for the making of a scheme or amendment after the resolution to prepare. Because of difficulties in that interpretation due to the terms of the provisions for environmental assessment, the Minister’s position was modified to an assertion that the control of the process passed to the Minister after public inspection. Then in 1996 the Regulations were amended to reflect that interpretation.

- (b) The Minister has wide powers to require a LG to make or amend or consolidate a scheme, including: ss.76, 88(4), 91(3), 92(1), 125 and 128.

²⁶ *Murcia Holdings Pty Ltd & Ors v. City of Nedlands* Unreported; [1999] WASC 241 per Anderson, J

(15) **Planning Scheme on Crown Land**

S 97 (as with s 19 of *The Planning Act 1928*) **allows for the possibility of a planning scheme being prepared by the WAPC for Crown Land that is to be developed and sold, leased or otherwise disposed of. The power is seldom if ever used.**

(16) **Structure and Contents of Local Planning Scheme**

See Chapter 5 Parts 5.6 and 5.7 below.

Part 6 - Interim Development Orders (IDO)

An IDO is a simple planning instrument, the purpose of which is to impose an uncomplicated control on land development pending the preparation and promulgation of a planning scheme. The control is effected by a prohibition on all development, or development of certain classes, or development with certain exceptions, unless approval of the responsible authority has first been obtained. An IDO is a powerful instrument; a regional or local IDO prevails over any inconsistent LPS or local law (s.129).

(1) **Regional IDO or Local IDO**

Division 1 deals with regional IDOs. IDOs controlled development in the Perth Metropolitan Region from the time publication of the Stevenson Hepburn Report in 1955 until the coming into operation of the MRS in September 1963. There is no longer any need for an IDO in the Perth Metropolitan Region.

(2) **Local IDOs**

Local IDOs are still used by non-metropolitan local governments.

(3) **No IDO in the Perth Metropolitan Region**

Under s 98(1)(a), and s 102(1), the possibility of a regional or local IDO respectively for the Perth Metropolitan Region is precluded.

(4) **Duration of IDO**

An IDO, whether regional or local, has effect either until revoked or on the expiry of 3 years from the day on which the IDO first applied in the relevant area. (S 107(2)). The operation of an IDO may be extended for a further period not exceeding 12 months if the WAPC in the case of a regional IDO, or the Minister in the case of a local IDO thinks fit.

(5) **Continuity of IDO Control is Essential**

To avoid the possibility of developments acquiring non-conforming rights during any hiatus in the period of an IDO, care must be taken to ensure that any fresh IDO, or any extension of an existing IDO takes effect before the existing IDO expires.

(6) **Conflict between Regional IDO and LPS**

Under s 101, a regional IDO does not empower the granting of approval of a development if the development would contravene the provisions of an LPS in force in the area of the regional IDO.

(7) **Contents of IDO**

Section 99 deals with the contents of a regional IDO, and s 103 deals with the contents of a local IDO.

(8) **Making of IDO**

The procedure for the making of a regional IDO by the WAPC or for a local IDO by the Minister is simple. A regional IDO is made by resolution of the WAPC (with the approval of the Minister, s 98(1)(b)) by resolution, and a local IDO is made by the Minister by order.

(9) **Effect as if Enacted**

A regional IDO or a local IDO when made and published in the Gazette has effect as if enacted in the Planning Act 2005 (s 107(1)).

Part 7 - Planning Control Areas (PCA)

(1) **Purpose of PCA**

A PCA declaration is one of the suite of instruments available to the WAPC to impose special short term control over land to achieve a particular regional or State planning purpose. The complete suite of these instruments is:

- Regional IDO - to impose planning control pending the making of a regional planning scheme.
- SPP
- Planning scheme over Crown land (Part 5 Division 6) - a scheme intended to facilitate the preparation of Crown land for sale, lease or other disposal.
- PCA Declaration - special control over land where the WAPC considers the land may be required for a public purpose.
- Improvement Plan - planning land for an urban purpose.
- MRS clause 32 resolution - temporary withdrawal of delegated authority for local governments to determine applications on land within the MRS where the WAPC considers that development requires special consideration.

(2) **Formality for PCA Declaration**

A PCA Declaration is made by resolution of the WAPC, with the approval of the Minister, and notice of the declaration is to be published in the Gazette (s 112(1)).

A PCA Declaration cannot be made over land within the Management Area of the Swan River Trust.

The Minister's approval of a PCA Declaration cannot be sought in respect of land in the Swan Valley until the WAPC has informed the Swan Valley Planning Committee and invited submissions, and provided the Minister with a copy of any submissions of the Committee.

There are special constraints in regard to land to which the Heritage of Western Australia Act 1990 applies (s 112(4) and (5)).

(3) **Duration of Declaration**

A PCA Declaration has effect for 5 years, or until revoked, whichever is sooner.

(4) **Effect of PCA Declaration**

Under s 115, it is provided that a person who wishes to commence and carry out development in a PCA “may apply to the local government in the district of which the planning control area is situated for approval of that development”. Under s 115(2) the application and plans are to be lodged with the local government. However under s 115(3) the LG, within 30 days of receiving the application, is to forward the application together with its recommendation to the WAPC for determination.

Nothing in Part 7 specifically stipulates that there is no role for a local government planning approval in respect of land in a PCA. However that is assumed by the WAPC to be the effect of s 115. By providing that a person wishing to commence and carry out development in a PCA must apply to the local government, and then providing that the local government must forward the application to the WAPC for determination, the WAPC takes s 115 to indicate that no approval under the relevant LPS is required. It would have been easy for the legislation to make that intent clear in s 115, and its failure to do so may permit an inference to the contrary. But having regard to s 130, the comments of Burt, CJ in *University of WA v City of Nedlands*²⁷ may be pertinent.

(5) **Determination of Application**

The WAPC in determining an application within a PCA may refuse the application, or approve with or without conditions, having regard to the matters set out in s 116.

(6) **Determination may be Reviewed**

Section 250 allows for the possibility of an application for review of a decision in respect of development in a PCA.

(7) **Enforcement**

Under s 117, the WAPC may revoke an approval in respect of development in a PCA if the development is carried out in a manner which is not in conformity with the approval or any conditions.

Additionally, s 220 specifically provides that the carrying out of development in a PCA without prior approval under s 116, or in a manner which is not in conformity with the approval or conditions, amounts to an offence subject to the penalties in s 223.

(8) **Non-conforming Use Rights**

Section 118 protects non-conforming use rights under a PCA Declaration.

²⁷ (1990) 52 LGRA 360 at 364-5. See also the TPAT decision in *City and Suburban Group Pty Ltd v City of Stirling* (Unreported; TPAT 37/98; 14/8/98).

(9) **PCA Provisions prevail**

Under s.130, the PCA provisions in Part 7 prevail over –

- (a) every other provision of the Act;
- (b) any TPS; and
- (c) any LPS to the extent of any inconsistency.

Part 8 - Improvement Plans

Part 8 of the Act allows for the WAPC to publish an Improvement Plan in respect of land which is considered by the WAPC to be appropriate for urban development.

Improvement Plans have been used by the WAPC on a number of occasions, including in preparation for the Port Coogee development, and in preparation for the Ascot Waters development. Sections 119 to 121 detail the provisions relevant to the making of and operation of Improvement Plans.

Improvement Plans are not intended to over ride or substitute for planning controls under other planning instruments (s 122).

Part 9 - Relationship between Region Planning Scheme, Local Planning Schemes, Planning Control Provisions and Written Laws

Part 9 contains a set of provisions aimed at ensuring the following hierarchy of pre-eminence:

- (1) The PCA provisions of the Act prevail over every other provision of the Act, prevail over any RPS, and prevail over any LPS, to the extent of the inconsistency (s 130).
- (2) The provisions of the Act relating to region schemes prevail over any inconsistent provision of the Act relating to an LPS, (and therefore necessarily the provisions of an RPS prevail over the provisions of an LPS). (S 4(3); s 124(1)).
- (3) An LPS is not to be approved by the Minister under the Act unless the provisions of the LPS are in accordance with and consistent with each relevant RPS (s 123(1)). The same applies to local laws (s 123(2)).
- (4) The provisions of a regional IDO prevail over any inconsistent provision of an LPS or a local law (s 129(1)).
- (5) The provisions of a local IDO prevail over any inconsistent provision of an LPS or local law (s 129(2)).
- (6) If an RPS or an RPS amendment, when made, is inconsistent with an LPS, the responsible LG is within 90 days of the RPS or RPS amendment having effect, to resolve to prepare an LPS or LPS amendment that is consistent with the RPS or RPS amendment (s 124(2) and (3)).
- (7) The Minister may by written notice direct an LG to prepare an LPS or to amend an LPS to ensure consistency with an RPS, a proposed RPS, or a proposed amendment to an RPS (s 125(1)). If the Minister so directs, the advertisement of an LPS or an LPS amendment is to be published together with the notification of the relevant RPS or RPS amendment (s 125(3)).

- (8) Amendment of an RPS to reserve land automatically amends a relevant LPS to reflect the reservations (s 126(1)). S 126(2) provides that any amendment effected under s 126(1) is to be published in the Gazette, but does not say which agency is to publish the notice.
- (9) Under s 127(1), the Minister may direct an LG to modify a proposed LPS or amendment in the manner specified in the direction. This section reflects and perhaps empowers the provision which has always existed in the Regulations for the Minister to require an LG to adopt modifications or conditions in respect of a proposed LPS or amendment.
- (10) Under s 128, where an LG fails to comply with a Ministerial direction pursuant to s 124(2) or s 125, the Minister may undertake the LPS making or amendment process and recover the costs from the LG.
- (11) **LPS Amendment Process Incorporated with RPS Amendment**
Under s 125(3), the Minister may direct the advertisement of an LPS or amendment to be published together with the notification of the relevant RPS or amendment.
- (12) Taking the matter further, s 126(3) provides that in the case of the rezoning of land in an RPS to “Urban”, the relevant LG may request the WAPC to amend the LPS to an appropriate corresponding zoning. Under s 126(3)(c), publication of notice of the LPS amendment in the Gazette is, by force of s 126, sufficient to amend the LPS as from the date of the gazettal.
- (13) Under s 131, the provisions of an LPS prevail over any inconsistent provision of a LG local law relating to planning.
- (14) Under s 132, the Governor may by order modify or suspend any provision, limitation or condition of or prescribed by any act which conflicts with the provisions of any planning scheme. A provision equivalent to s 132 has existed in the planning legislation since 1928 but there is no record of the provision having been used.

Part 10 - Subdivision and Development Control

A detailed discussion of subdivision control is set out in Chapter 4 below, and a detailed discussion of development control (other than subdivision) is set out in Chapter 5 below.

Part 11 -

The provisions in Part 11 dealing with injurious affection and compensation under the Planning Act is set out in Chapter 7 below.

Part 12 - Financial Provisions

- (1) **Metropolitan Region Improvement Fund and Metropolitan Region Improvement Tax**

One of the recommendations of the Stevenson Hepburn Report in 1955 was that special funding arrangements be made to provide the authority responsible for metropolitan region planning with the funds necessary to acquire and improve regional reserves. Whereas local governments typically do not designate land as a

local reserve under an LPS unless it is owned by the agency for whose purposes the land is reserved, under the MRS very substantial areas of land in private ownership are reserved for regional purposes. The payment of compensation for injurious affection arising from the reservation of land under the MRS, and the costs of acquisition and maintenance of regional reserves was obviously going to impose heavy burdens on the finances of the State.

Two primary measures were adopted in the MRTPS Act to deal with this issue namely:

1. establishment of a Metropolitan Region Improvement Fund financed by a Metropolitan Region Improvement Tax (MRTPS Act Part VI); and
 2. delaying the right to claim compensation for injurious affection arising from an MRS reservation until the land is first sold or a development application is refused or subjected to unacceptable conditions (MRS Act s 36(3)).
- (2) The compensation issue is dealt with in detail in Chapter 7 below.
- (3) Provisions for the Metropolitan Region Improvement Fund are set out in Division 1 of Part 12. Provisions for the Metropolitan Region Improvement Tax are set out Division 2. S 200(1) imposes the obligation to pay the MRIT on every owner of land in the metropolitan region. Under s 200(2) land is chargeable with the tax imposed by and at the rate imposed by the *Metropolitan Region Improvement Tax Act 1959*. The practical effect of the provisions of Division 2 of Part 12 of the Act is that the MRI Tax is imposed on persons liable to pay land tax in the metropolitan region, and is levied and collected in conjunction with land tax.
- (4) Under s 199, the WAPC may apply money in the MRI Fund for expenditure incurred in the acquisition of any property in the metropolitan region, and for the development, maintenance and management of any regional reserve, or the carrying out of works, including the provision of facilities incidental thereto (s 199(1)(b)). Notwithstanding these provisions, the WAPC consistently and systematically seeks to reduce its funding commitments by a number of measures including prominently the following:
- (a) Where possible requiring local governments or developing land owners to give up the land required for regional roads free of cost, and to bear or contribute to the cost of constructing regional roads²⁸. This is done by imposing conditions on subdivision approval (as in the *Ocean Reef* case) or on development approval (as in the *Renstone* case).

The validity of such conditions has been consistently upheld by the Tribunal and the Courts, including the High Court²⁹, though the conditions might not survive on their planning merits, as in *Ocean Reef* and *Renstone*. There is of course no guarantee that the State Government allows the WAPC to use all the MRI Tax money for regional reserve purposes.

- (b) Requiring that regional reserve land such as foreshore reserves, be vested in the State free of cost as a condition of subdivision or development approval. Ordinarily such land would be the subject of an acquisition or election to purchase by the WAPC following a compensation claim (PA s 187).

²⁸ See *Ocean Reef (WA) Pty Ltd v. TPB* (TPAT Appeal No. 27/1983 delivered 8 June, 1984); *Renstone Nominees Pty Ltd v. MRPA* (1984) 21 APA 12

²⁹ *Lloyd & Ors v. Robinson & Anor* (1962-63) 36 ALJR 92 and *WAPC v Temwood* (2004) 221 CLR 30

- (5) Division 3 sets out financial provisions relating to the operation of the WAPC, and Division 4 sets out provisions for apportionment of expenses between local governments for expenses incurred under any LPS.

Part 13 - Enforcement and Legal Proceedings

A detailed consideration of the provisions for enforcement and legal proceedings is given in Chapter 6 below.

Part 14 - Applications for Review

A detailed consideration of the provisions for review of planning decisions is given in Chapter 8 below.

Part 15 - Subsidiary Legislation

(1) Minister's Power to make Regulations for General Provisions of Planning Schemes - Model Scheme Text

- (a) **Section 256(1)** empowers the Minister to make regulations prescribing a set of general provisions etc for carrying out the general objects of **local or region planning schemes**, and in particular for dealing with the matters set out in Schedule 7.
- (b) It is significant to note that the power in s 256(1) relates to general provisions for **local or region planning schemes**.
- (c) It follows that if regulations are made prescribing general provisions for planning schemes, without stipulating that they apply only to local planning schemes or only to region planning schemes, then the general provisions must apply to both local planning schemes and region planning schemes.
- (d) In cl 3 of the *Town Planning Regulations 1967* ("Regulations") the term "Scheme" is defined to mean "a Town Planning Scheme". That term is not defined in the Regulations or in the Planning Act 2005, though the term "Planning Scheme" is defined in s 4 of the Planning Act 2005 to mean a local or region planning scheme etc.
- (e) Some provisions in the Regulations, such as the provisions for the preparation of a planning scheme or amendment, specifically identify a local government as the authority which would prepare the scheme or amendment. However other provisions are more general.
- (f) Regs 11 and 27 of the Regulations deal with the Model Scheme Text, and do not stipulate that their provisions are specific only to local planning schemes. For instance cl 11(1) provides that if a Scheme (including a local scheme or region scheme) envisages the zoning or classification of land a Scheme Text shall be prepared "in accordance with the Model Scheme Text set out in Appendix B", and otherwise, in such manner and form as the Minister may require. Clause 27 of the Regulations provides that the Model Scheme Text is prescribed under the enabling legislation as a set of general provisions for carrying out the general objects of "town planning schemes that envisage the

zoning or classification of land”. That would arguably include a region planning scheme.

- (g) It follows from these provisions that, unless the Minister specifically otherwise requires (as contemplated in reg 11(1)(b)), a region planning scheme, and arguably a region planning scheme amendment, is to be prepared in accordance with the Model Scheme Text.
 - (h) **Section 256(2)**. The implications of this line of reasoning are deepened by s 256(2) which provide that where a planning scheme (which term in the Act is defined to include an RPS) is made in respect of an area, any general provision ... that is appropriate to the area, and in force when the scheme comes into force, has effect as part of the scheme, except so far as the scheme provides for the variation or exclusion of that provision. Once again it is arguable that the reference to the making of a planning scheme in this subsection relates also to the making of a planning scheme amendment (including an RPS amendment), but even if it does not apply to an amendment, the implications for the making of an RPS are significant.
 - (i) S 256(2) raises a problem of some difficulty. Since the subsection seems to have the effect of reading into a planning scheme general provisions such as those in the Model Scheme Text, no-one will know with any certainty until the Supreme Court has made a binding declaration of law on the point, whether the provisions of the Model Scheme Text are appropriate to the area to which a planning scheme applies.
 - (j) Leaving aside the question as to whether or not s 256(2), and the provisions of the Model Scheme Text, apply or are capable of applying to an RPS, the significance of s 256(2) for an LPS is significant. If an LG should succeed in having an LPS made which does not contain provisions of the Model Scheme Text, it is possible that at a later time it could be argued that s 256(2) has the effect of incorporating Model Scheme Text provisions into the LPS. The possible implications of such an automatic inclusion are compounded by the fact that s 256(2) relates to “any general provision as amended from time to time”. It follows that provisions added to the Model Scheme Text after a local government has prepared its own LPS, may be automatically incorporated into an LPS. It is possible that the LG will not know that provisions have been incorporated from the Model Scheme Text automatically into an LPS until such time as the Supreme Court has made a declaration on the question as to whether or not the Model Scheme Text provision is “appropriate to the area” of the LPS.
- (2) **Minister’s Power to make Regulations for making, amending, review, amendment and repair of a Local Planning Scheme**
- (a) S 258 gives power to the Minister to make regulations to regulate the procedure to be observed, amongst other things, for the making and amendment of Local Planning Schemes.
 - (b) The *Town Planning Regulations 1967*, other than Regs 11 and 27 and Appendix B, relate to this power (or its counterpart in the Planning Act 1928).

(3) **Division 2 - Subsidiary Legislation made by the Governor**

- (a) The *Town Planning (Local Government Planning Fees) Regulations 2000* were made under the power in s 261.
- (b) Other provisions for making uniform general local laws and (s 262), regulations (s 263) are also contained in this Division.
- (c) Division 3 contains s 264 which allows for regulations to adopt codes and other texts.

(4) **Part 16 - Miscellaneous**

- (a) Ss 265 gives power to the Minister to delegate the Minister's functions under the Act.
- (b) S 266 makes provision in regard to duties and liabilities of persons performing functions under the Act, and s 267 gives protection from tortious liability to a person performing functions under the Act in good faith.

(5) **Schedules**

Schedule 1 sets out provision in relation to the Constitution and proceedings of the Board of the WAPC.

CHAPTER 4 - SUBDIVISION

4.1 BASIC REQUIREMENTS FOR SUBDIVISION OF LAND

In the absence of statutory controls, subdivision of land is affected by three considerations:

- (1) the requirements of the land owner;
- (2) planning requirements to ensure:
 - good design, and
 - effective arrangement of infrastructure services and facilities (e.g. roads, water supply, sewerage and drainage, POS and community facilities); and
- (3) the requirements of the LTO for land title registration.

4.2 AMALGAMATION AND ROADS

The legislation recognizes that lot creation can be effected not only by formal subdivision, but also by amalgamation and road creation. Consequently they are also controlled under PA s 135. Amalgamation can have a significant role in planning, e.g. assembly of large lots to accommodate major developments such as shopping centres, and arrangement of superlots for resubdivision. Having recognized the potential significance of amalgamation and road creation, they will generally not be differentiated from subdivision in this *..text..*.

4.3 Statutory control on subdivision was first imposed in WA by the Planning Act 1928. Essentially the same control mechanisms remain in the Planning Act 2005. The principal elements include:

- (1) The appointment of a State Government agency to control subdivision (Originally the TPB, and now the WAPC); (PA Part 2);
- (2) Prohibition of subdivision of land without the agency's prior approval (PA ss 135 and 147);
- (3) Prohibition of sale or other significant dealings with land other than as a subdivided lot or lots (PA s 136);
- (4) Consultation with infrastructure agencies as to infrastructure requirements for subdivision conditions (PA s 142).
- (5) Imposition of conditions on subdivision approval to achieve the best possible design and servicing outcomes; (PA ss 143 and 145); and
- (6) Ensuring that lots created by subdivision are acceptable to the LTO for the purpose of issuing new title3s (PA s 146).

4.4 CONSEQUENCES OF ATTEMPTING TO SUBDIVIDE OR TRANSACT WITHOUT PRIOR WAPC APPROVAL

- (1) Failure of the subdivision (PA s 147); or
- (2) Failure of the transaction by reason of illegality; and

- (3) Commission of an offence (PS ss 135(1) and 136(2));

but note the saving provisions in PA s 140.

4.5 SUBDIVISION PROCEDURE

- (1) Planner prepares a plan of subdivision. (There will often be a need for input by other experts such as expert surveyors, engineers, geologists, and environmental or heritage consultants to achieve an acceptable and workable design.)
- (2) Plan of subdivision with Application submitted to WAPC (PA s 135 and P & D Regulations).
- (3) WAPC forwards plan of subdivision to the responsible LG, public authorities and utility service providers whose functions may be affected by the subdivision, for their objections and recommendations. (PA s 142).
- (4) After considering any objections and recommendations under s 142, the WAPC is to:
 - (a) approve the plan of subdivision;
 - (b) refuse approval;
 - (c) approve subject conditions to be complied with before the diagram or plan of survey will be endorsed with the approval of the WAPC. (PA s 143).
- (5) Conditions may be imposed prohibiting or restricting access to or from a road abutting the subdivision (PA 150).
- (6) If the WAPC refuses to approve, the applicant may within 28 days request in writing the WAPC to reconsider the refusal.
- (7) If the WAPC approves with conditions, the applicant may within 28 days request in writing the Commission to reconsider any condition (PA s 151).
- (8) An applicant may apply to SAT for review of a decision of the WAPC on an application to it under ss 135, 136 or 151, including conditions. (There may also be an application to SAT to review a deemed decision under s 253 as referred to below).
- (9) Upon completion of the works required to comply with conditions the applicant will arrange for a survey of the subdivision “as constructed”, to produce a diagram or plan of survey (“deposited plan” when lodged with WAPC). The diagram or plan of survey must be in accordance with the approved plan of subdivision (PA s 145(4)(a)), and the WAPC will ordinarily require “clearances” from subdivision approval
- (10) Within:
 - (a) 4 years for a subdivision creating more than 5 lots: and
 - (b) 3 years for a subdivision creating 5 or less lots, the applicant is to lodge the diagram or plan of survey with the WAPC for endorsement of approval (PA s.145(1) and (2)).
- (11) The WAPC approval of a plan of subdivision ceases to have effect if the diagram or plan of survey is not submitted to the WAPC within the time limits in s.145(2), and thereafter it cannot be submitted. A subdivider still wishing to subdivide must make a

fresh application under s.135 which may or may not be approved as there may be different conditions.

- (12) If the WAPC does not endorse approval on the deposited plan within 30 days (or such longer period as the applicant agrees) (PA s.146(5)), then the applicant may give notice of default (s:253(2)(c)), and make application to SAT for reviews.
- (13) A title application is required to be lodged with the LTO within 24 months of endorsement of WAPC approval on the deposited plan (PA s.146(1)(b)).
- (14) Note the significant connection between the first initiative to subdivide land into smaller lots, and the ultimate consolidation of the lots into the Register of Titles. The objective of subdivision is to obtain Certificates of Title for new lots, which are then negotiable.
- (15) The lands shown on a deposited plan as reserves for any of the purposes in PA s.154(1), and as a reserve for a road, are vested as Crown land:
 - (a) in the case of a plan lodged for registration under the *Strata Titles Act 1985*, at the time the Registrar of Titles registers the plan under the LTA; and
 - (b) in any other case, at the time the new C/T for the land the subject of the deposited plan has been registered under the TLA.

(For roads, - s.168, and other reserves, s.152).

- (16) It is at the time of vesting of reserves in the Crown that the subdivision process is truly completed in law and in fact. From that time there is no return.

4.6 IMPORTANT MILESTONES IN THE SUBDIVISION PROCESS

- (1) S.135. Application to WAPC for approval of a plan of subdivision.
- (2) S.138(1) and s.143. WAPC may give approval subject to conditions which are to be carried out before the approval becomes effective. This is not subdivision approval, but is approval to undertake subdivision.
- (3) S.145 WAPC endorsement of approval on a diagram or plan of survey (deposited plan).
- (4) S.146. Registrar of Titles can issue C/Ts when WAPC approval endorsed on deposited plan.
- (5) S.161. Land is subdivided on the date on which WAPC endorses its approval on deposited plan.

This is the time of legal subdivision.

- (6) Ss.152 and 168. Reserves on deposited plan vest in the Crown when new C/Ts registered under LTA. This is the time of factual subdivision when the process is effectively completed and cannot be terminated.

4.7 ADDITIONAL ISSUES IN PA PART 10 ASSOCIATED WITH SUBDIVISION

(1) **Cash-in-lieu of POS**

In WA since publication of the Stephenson Hepburn Report, in 1955, and confirmed by the High Court decision in *Lloyd v Robinson* (1967) 107 CLR 142, it has been normal for the subdivision approval agency to require land equal to 10% of the subdivisional area in a residential subdivision vested in the Crown free of cost (PA s.152(a) and (f)).

It is not always consistent with good planning design for land to be given as POS (eg area required to be given away be too small for a useable recreation ground). Provision is therefore made in ss.153-156 for dealing with the giving of cash-in-lieu of POS. Cash-in-lieu can apply:

- (a) If the WAPC after consultation with the responsible LG regimes (s.153(1)(a));
or
- (b) If the WAPC, the LG and the owner so agree (s.153(1)(b)).

(2) **When approval of subdivision is deemed subdivision approved under planning scheme**

Much of the work required to complete a subdivision and comply with conditions fall within the broad definition of “development” in PA s.4 and of most Planning Schemes. Under PA s.157 it is provided that WAPC approval for a plan of subdivision be deemed to be approval of the responsible authority under a planning scheme of works necessary to enable the subdivision of the land that are-

- (a) shown on the plan; or
- (b) required by the WAPC to be carried out as a condition of approval. (s.157(1)).

The WAPC may determine otherwise at the time of approval (s.157(1)). Note that the various Redevelopment Authorities are not included in the definition of the term “responsible authority”, and Redevelopment Schemes and PCA Declarations are not included in the definition of “planning scheme”. Therefore subdivisional works still require planning approval of the responsible authority under a Redevelopment Scheme, and if the land is within a Planning Control Area. Note that s.157 continues from and expands upon s.20D introduced with the Planning Act 1928 in 1985. It has a wider sweep than s.20D. S.157 does not avoid a need for a building licence for subdivisional works involving building construction. (eg. terracing walls), or a demolition licence, so there may be heritage or Aboriginal heritage issues on that account for the local government.

(3) **Expenses of road or waterway construction and road drainage - and LG supervision of road design**

- (a) S158(1) provides that a subdivider may contract with the responsible LG to construct and drain roads and construct waterways.
- (b) Subss 158(2) and (3) provide that if no such arrangement is made, the subdivider is to pay the LG on demand 3% of the cost of construction and drainage if the subdivider has not engaged a consulting engineer to supervise but other 1½%.

- (c) S159 provides a procedure for an original subdivider to compel a later subdivider to pay a contribution to the cost of a subdivisional road provided by the original subdivider and with which the later subdivision has a lot or lots which share a common boundary with the road and has a road that joins the existing road of the original subdivider.
- (d) Ss 168 and 170 provide for LG control over the design and specifications for local roads and waterways, and s170(5) allows for a right to apply to SAT to review the LG requirements.
- (e) In the same context, s169 empowers the WAPC to publish in the Gazette minimum standards of construction for roads and waterways, apparently intended to apply as models, but as at **30/9/08** none had been published or proposed.

(4) **WAPC Notification on Title**

Under s165 the WAPC can notify hazards or other factors seriously affecting the use or enjoyment of land on C/Ts of subdivisional lots as a condition of subdivision approval.

This (and the previous s12A of the Planning Act 1928) has been used to give notice of factors such as a midge nuisance from neighbouring wetlands, or the possible presence of unexploded ordnances such as at the wartime artillery range at Warnbro Sound/Safety Bay. The device would not be effective to protect the approach authorities from flood risk if subdivision was permitted in a flood risk if subdivision was permitted in a floodway, or an coastal land subject to extreme tidal action. The appropriate response there is to refuse subdivision for purposes involving building development.

(5) **Easements**

S167 allows for the creation of easements burdening subdivisional lots, in favour of a LG or servicing agency. It is apparent that an easement under s167 would operate as an easement in gross without a dominant tenement. (PA s167(2) and (3)).

The Registrar of Titles can extinguish or vary such an easement in the circumstances set out in s167(4) and (5).

(6) **Encroachments**

S166 provides for the facilitation of the recognition and regularization of encroachments up to 1 metre arising from building work. The provision contemplates a special use subdivision to correct an error, but only where the encroached owner agrees.

CHAPTER 5 – DEVELOPMENT CONTROL

5.1 GENERAL COMMENT

- (1) Comprehensive development control in WA is imposed primarily through planning schemes.
- (2) Zoning by-laws were attempted and there was a period when IDOs were used in the Metropolitan Region (the old s7A or the Planning Act 1928). Ss 98 (*Regional*) and 102 still allow for IDOs but only outside the Metropolitan Region.

5.2 MULTIPLE PLANNING APPROVALS IN REGION PLANNING SCHEME AREAS

- (1) In most country LGs in WA the only planning control is under the relevant LPS.
- (2) In the Perth Metropolitan Region, the Peel Region, and the Greater Bunbury Region, there is additional planning control under the relevant RPSs.

In LG districts within the Region Scheme Areas, there is ordinarily a system of dual planning approvals under the RPS and the relevant LPS. But the potential complexity in that is relieved by:

- delegation of planning approval powers under the RPS by the WAPC to relevant LGs; and
 - deeming approval of an application under the LPS to be approval for the purpose of the RPS³⁰.
- (3) In the Perth Metropolitan Region, there is the additional possibility of planning control under a Redevelopment Act and Redevelopment Scheme as explained in 5.4 below. *Redevelopment Schemes are similar in their structure and the controls they impose to LPSs.*
 - (4) Some LGs have guided development schemes, which don't deal with the zoning or classification of land. Development control under such schemes comprises only the requirement to comply with the Scheme Map or Development Guide Map in the subdivisional development of land, and to contribute to the cost of shared infrastructure. That control is additional to planning approval under the relevant LPS.
 - (5) The most common planning control is that imposed under a LPS. The 5 measures of control under a LPS are explained in 5.6(5) below.

5.3 DEVELOPMENT CONTROL UNDER REGION SCHEMES

- (1) The Region Schemes currently are MRS, Peel Region Scheme, and Greater Bunbury Region Scheme. Although their format is basically similar to the format of a LPS, they impose control only by:
 - (i) classification (zones and reserves); and
 - (ii) control of development application.

³⁰ MRS cl 26;

- (2) The WAPC is the authority primarily responsible for RPSs, but the main responsibility for dealing with development applications is ordinarily delegated to LGs by a Notice of Delegation published in the Gazette³¹. The WAPC reserves to itself decisions on key developments, such as major retail centres and public works by agencies of the State.
- (3) Note that in the Metropolitan Region for a development wholly within the Swan development control area under the Swan And Canning Rivers Management Act 2006 planning approval is given only by the responsible Minister or in some cases the Swan River Trust.³²

Planning applications for developments partly within the control area, or on land abutting waters within the control area, are determined by the WAPC³³.

- (4) Planning applications under a RPS for developments wholly or partly within Regional Reserves are determined by the WAPC.
- (5) Under the MRS, developments in a category caught by a cl 32 Resolution are determined by the WAPC.
- (6) Where a development is wholly within a regional reserve, there is no scope for a parallel determination under the relevant LPS³⁴.

Based on the reasoning of Burt, CJ in the *University of WA* case, it should by logic follow that where any development is required to be referred to the WAPC for determination under a RS, there is no scope for planning approval under a LPS. It was so held by the TPAT³⁵. See also PS ss4(3) and 124(1). However the WAPC and most LGs act to the contrary, and the point will remain moot until it has been determined at judicial level.

5.4 DEVELOPMENT CONTROL UNDER REDEVELOPMENT ACTS/SCHEMES

- (1) The planning control under the redevelopment schemes of the *East Perth Redevelopment Act 1991*, the *Subiaco Redevelopment Act 1996*, the *Midland Redevelopment Act 1999*, and the *Armadale Redevelopment Act 2002* operate like a combination of a LG zoning scheme and development scheme.
- (2) The Redevelopment Acts:
 - Establish a Redevelopment Authority as an agency of the State;
 - Establish a Redevelopment Area;
 - Give the RA power to control development in the Redevelopment Area;
 - Give power to make a Redevelopment Scheme to operate within the Redevelopment Area; and
 - *Disapply* the MRS and the relevant LPS within the Redevelopment Area;
 - Are intended primarily to perform a redevelopment task within the Redevelopment Area, and only secondarily to control development within the area;

³¹ The most recent Notices of Delegation for the MRS were published in the Gazette on 19/12/08.

³² Swan and Canning Rivers Management Act Part V

³³ MRS cl 29(1)

³⁴ *University of WA v City of Subiaco & Anor* (1980) 52 LGRA 360

³⁵ *City and Suburban Group Pty Ltd v City of Stirling* (T/A 37/98; Unreported; dec 14/8/98)

- Are intended to remain under review as to their relevance and to be repealed when their work is done.
- (3) The East Perth, Subiaco and Midland Redevelopment Acts have operated in the privileged circumstances of developing predominantly land owned or contracted by the State or the LG, and their development control functions have been minimal. Developing their own land, and with finances guaranteed, those 3 Redevelopment Schemes had to be successful.
 - (4) The Armadale Redevelopment Area contains a significant amount of privately owned land, and the redevelopment problems are similar to those facing LGs dealing with co-operative development and infrastructure cost sharing. Structure planning and infrastructure cost sharing is undertaken using provisions similar to the WAPC's draft Model Scheme provisions for LGs³⁶.

5.5 LOCAL GOVERNMENT DEVELOPMENT SCHEMES

- (1) Local government development schemes are an extraordinarily flexible instrument for guiding the development of land. They have minimal recognition in written law, in that Reg 3 of the TP Regulations contains a definition of "development scheme" as a scheme involving works, constructions or alteration of boundaries, but not including a scheme involving the zoning or classification of land. From that slight recognition, a wide variety of development schemes emerged, principally in the 19970s and 1980s which facilitated the orderly development of much residential and development land which otherwise would have been difficult to assemble into developable parcels.

(2) Resumption Development Schemes

The earliest development schemes tended to be **resumption development schemes**, where the responsible LG acquired the land in the Scheme Area by agreement if possible, but more commonly by the simple process of compulsory taking. Owners could elect either to receive compensation, or to participate in the scheme. Any compensation paid became a Scheme Cost. The LG would carry out the subdivision development of the **Scheme Area**, in accordance with the **Scheme Map**. The infrastructure works provided by the LG were the **Scheme Works**, the costs of which, together with administration costs were the **Scheme Costs**. The Scheme would allow the LG to sell developed lots to pay the Scheme Costs, and the remaining lots were distributed between the **Participating Owners**³⁷.

(3) Guided Development Schemes

In time the simple resumption model was resisted by owners who were capable of and wished to carry out their own development work. The development scheme evolved into the "guided" model, which could be as simple as publishing a **Guide Plan** to guide development in the Scheme Area, accompanied by text provisions requiring that development be in accordance with the Guide Plan. The TPB (later the Planning Commission) working with the LG would ensure that subdivision complied with the Guide Plan.

³⁶ Draft MST provisions for Development Areas (Structure Planning) and draft SPP 3.6 Development Contributions for Infrastructure

³⁷ Shire of Swan Town Planning Scheme 2A was a successful example of resumption development scheme. There were numerous schemes of that kind in the 1970s and 1980s in Wanneroo, Stirling, Bayswater, Swan, Canning, Gosnells and in numerous other LG areas.

Generally guided development schemes were more complex than that, and provided for the LG to carry out the major infrastructure works, recovering contributions to the Scheme Costs from owners according to a cost sharing formula in the Scheme Text³⁸.

(4) **Combined development Schemes**

Schemes were successfully undertaken which were a combination of **Resumption Development** (to facilitate the part of the Scheme Area with small lot holders) and **Guided Development** elements (to accommodate the part of the Scheme Area controlled by professional developers).³⁹ Some schemes used a variation of that model, avoiding land acquisition by the LG, but having a Council Development Area, where the LG provided major infrastructure, and a Private Development Area, where the infrastructure was provided by owners, the LG only administering the infrastructure cost sharing arrangement.⁴⁰

(5) **Model for Subdivision Development under Structure Plan and Cost Contribution Plan**

By the early 1990s, infrastructure costs in subdivisions, had risen dramatically, principally as a result of the success of the WAPC in passing off to developers the costs of regional infrastructure. The Planning Minister at the time accepted that development schemes were the problem and required that instead of development schemes, structure planning and infrastructure cost sharing provisions should be incorporated in zoning schemes. That remains the predominate position and the WAPC has drafted model provisions to be incorporated in zoning provisions for that purpose.³⁵

(6) **Validity of Cost Contribution Arrangements**

The key to the success of development schemes lay in the ability to compel owners to contribute to the cost of shared infrastructure. That seems like the imposition of a tax or levy, and a challenge to the validity of the Shire of Swan Town Planning Scheme No.8 was mounted on that basis in the *Costa* case.⁴¹ Olney, J made it clear that the power in the legislation to make schemes was very broad, and broad enough to permit contributory development schemes. Olney, J was assisted to that conclusion by the provision in s.7(3) of the Planning Act 1928 (now in ss.68(1) and 87(4) of the PA) that a planning scheme when gazetted has effect as if enacted in the Act.

5.6 DEVELOPMENT CONTROL - LOCAL PLANNING SCHEMES

- (1) The LPS is fundamental to development control in WA. This part deals with the general approach to development control under a LPS.
- (2) Development control through the requirement of planning approval under LG planning schemes applied effectively in WA until the PA came into operation on 9/4/06 without there being any direct statutory power. The validity of that form of control was challenged in the *Pearse* case.⁴² The broad prescription for making schemes in the old s6 was considered adequate to empower the making of development control provisions in LG planning schemes.

³⁸ eg Shire of Swan TPS 5 and TPS 7; City of Stirling TPS 38, City of Canning TPS 17, TPS 21, and TPS 24.

³⁹ eg Shire of Kalamunda TPS 6.

⁴⁰ eg City of Swan TPS 8 and TPS 14.

⁴¹ *Costa v Shire of Swan* [1983] WAR 22. See Olney, J at p25 lines 27-34 and p29 lines 19-38.

⁴² *Pearse v City of South Perth* [1968] WAR 130

- (3) The PA left no scope for doubt on the issue of power. S162 of the PA provides that where a planning scheme or an IDO provides that development is not to be commenced or carried out without planning approval, then development must not be commenced or carried out unless -
- (a) approval has been obtained and is in force; and
 - (b) the development is carried out in accordance with any condition of planning approval.

For a reason that is not apparent s 163 makes a special case of development within a heritage place. The application for approval is to be made to the responsible authority in the case of an application under a LPS or a local IDO, and otherwise to the WAPC.

S164 confirms that a responsible authority may grant retrospective planning approval. LPSs, including the Model Scheme Text, make similar provisions.

In October 1999, cl 27 and Appendix B added the Model Scheme Text to the TP Regulations, and cl 11 was amended to require that -

“11(1) If a Scheme envisages the zoning or classification of land a Scheme Text shall be prepared -

- (a) in accordance with the Model Scheme Text set out in Appendix B; and
 - (b) otherwise, in such manner and form as the Minister may require.”
- (4) There are still numerous LG planning schemes prepared before 1999, and many which were in an advanced state of preparation before October 1999, which do not follow the Model Scheme Text. Nevertheless the Model is sufficiently similar to all LG zoning schemes for it to be relied on as typical.
- (5) The 5 measures for land use and development control typically used in LG zoning schemes in WA are:

I **Zoning of land** for appropriate purposes, and **reservation** for public purposes.⁴³

II **Use Class permissibility designations** as permitted, not permitted or discretionary in the various zones. This is demonstrated by a Zoning Table which is a matrix cross referencing Use Classes against Zones.⁴⁴

III **Development approval** by Council as contemplated by PA s162.

IV **Standards and requirements**

- (i) Prescribing standards and requirements for development, sometimes referable to use classes, sometimes to zones, and sometimes to other categories such as density codings under the R-Codes. For all intents and purposes the R-Codes now set out the standards and requirements for residential development in all LPSs. The R-Codes are not part of Schemes, but are appended to State Planning Policy 3.1, and LGs as a general rule through cl 5.2 of the MST or otherwise as required by the

⁴³ MST - Part 3 (Reserves), cll 4.1 and 4.2 (Zones).

⁴⁴ MST - Cll 4.3 and 4.4

WAPC, incorporate the R-Codes by reference in their zoning schemes.

- (ii) As an example of this type of control, a LPS may provide that on-site car parking is to be provided for all developments in accordance with a parking table, and the parking table will stipulate a set number of bays per unit area - e.g. 6 bays per 100m² of net lettable floor space for retail uses, and say 1 bay per 4 seats for a restaurant use.
- (iii) It is common for a LPS to include a provision allowing Council to relax standards and requirements in its discretion. Such provisions have been the subject of much dispute and interpretation⁴⁵. For an example of a discretion clause see MST cl 5.4. Satisfaction of all standards and requirements of a LPS does not necessarily mean an Application must be approved if there is a general discretionary claim - such as cl 10.2 of the MST requiring regard to amenity, compatibility etc.⁴⁶

V Structure Planning and Cost Contribution Plan

- (i) A fifth distinct category of development control has evolved over the last 20 years, which amounts in effect to the incorporation of guided development scheme type provisions into a zoning scheme.
- (ii) This type of development control is used in areas which have not been subjected to strategic planning and zoning/reservation in advance of development pressure. The underlying principle is that the Council in consultation with landowners and servicing agencies:
 - Work out what the pattern of development should be, and present that in a Structure Plan (Regional District or Local).
 - Work out what infrastructure should be the subject of cost contribution by owners of land in the Structure Plan Area (e.g. POS; primary schools; drainage sumps; water supply, sewerage and drainage headworks ; major distributor roads; bridges etc. As the model provisions inappropriately allow a Structure Plan to be prepared either by land owners or the LG, a powerful owner may start the best development opportunities in its own direction, and less powerful owners may be discouraged from objection through ignorance/inexperience, or because the powerful owner has offered to pay the fees of the consultants preparing the Structure Plan.

Note that the WAPC has recognized developer obligation to contribute to the cost of social infrastructure⁴⁷.

- Carefully assess the costs of shared infrastructure. This can be complex and time-consuming but must be done **carefully** by **competent experienced** professionals who have

⁴⁵ *Dumbleton & Anor v. Town of Bassendean* [2005] WASAT 145

⁴⁶

⁴⁷ Draft Planning Bulletin 3.6

substantial PI insurance, and a clear legal duty to the LG and/or significant others.

- Establish a Cost Contribution Plan that has undergone public consultation, and is demonstrably fair.
- (iii) The LG usually administers the Cost Contribution Plan as it has the responsibility to see that key infrastructure is in place (roads, bridges, drainage, POS, social infrastructure).
- (iv) Subdivision approval is of course by the WAPC. The WAPC generally ensures there is a condition of subdivision approval requiring the subdivider to contribute in accordance with the Cost Contribution Plan. The diagram or plan of survey for the subdivision is not endorsed by the WAPC unless the LG clears the condition as to cost contribution.

Although the LG may be called upon to approve strata development, the Structure Planning and Cost Contribution Plan sets of provisions are about:

- establishing de-facto zones and reserves; and
 - subdividing land in accordance with the design proposed in the Structural Plan.
- (v) The difficult development control problems come later, when building development is proposed. Usually there is insufficient time for the LG to formalise the proposed zones and reserves in the Structure Plan, so it is necessary to resort to treating the proposed zones as if they are zones, and then applying the ordinary provisions of the Zoning Table of the LPS, or setting up a completely fresh matrix of land use permissibilities cross-referenced against so called “zones”. They don’t become true zones without a scheme amendment. That is a step in the process that was intended in the earliest formulations of the Structure Plans model, but it seems to have been lost sight of. LGs will need to do it, but they may wait until the next generation LPS.
- (vi) There are potential problems for LGs with compensation claims, and those issues have not yet been worked through satisfactorily.

5.7 DEVELOPMENT APPROVAL PROCESS UNDER LPS

(1) **Reserved Land**

The MST provides a convenient and reasonably typical example of the development approval process. Steps are as follows:

- (a) For development on land reserved under a LPS, the guidance that the Zoning Table provides for the permissibility of uses in the development of zoned land is absent. The procedures for development of reserves in cl 3.4 of the MST borrow from the development approval processes for zoned land. The steps are as follows:

Cl 3.4.1 prohibition of development or use of a Local Reserve without first obtaining planning approval under Part 9.

Cl 3.4.2 an LG in determining an application is to have due regard to -

- (i) the discretion issues in cl 10.2; and
 - (ii) the ultimate purpose intended for the Reserve.
- (b) As a general principle, to protect the interests of its ratepayers, a LG:
- (i) should not reserve land for the purpose of a public authority unless the land is owned by the public authority; and
 - (ii) if a LG does happen to have reserved land for the purpose of a public authority, the LG should not refuse any development application on the land, or subject on approval to any conditions not accepted by the Applicant in writing, unless the public authority gives an adequate indemnity against the LG's liability for compensation.

(2) **Zoned Land**

For development of zoned land, the process is as follows:

(a) **Identification of Use Class**

The applicant makes an evaluation of the appropriate use class and ensures that it is permissible in the relevant zone.

(b) **Application Formalities**

Application for development/use approval is made on the prescribed form (MST cl 9.1) with accompanying plans and other materials (MST cl 9.2). If it is accepted by the LG the prescribed fee is paid. (The LG might consider a different use class applies with a different permissibility designation. The PA s 252(2) now provides a right to an Applicant to apply to SAT to review such a decision by the LG).

(c) **Evaluation, Report, Recommendation**

The application is evaluated by the LG's planning officers. They will determine the application themselves if they have delegated authority. Otherwise they report to Council and recommend approval or refusal, and generally detail conditions which should be imposed if there is an approval.

Any conditions must be imposed by the same decision-maker that determines the application.⁴⁸ Therefore the Council must have recommendations on the appropriate conditions when it approves an application.

(d) **Public Submissions**

If the application involves a use which has an "A" permissibility designation under cl 4.3.2 of the MST, it must be notified for public comment in accordance with cl 9.4.

There may be reasons why the LG will decide to notify for public comment a use with a “D” permissibility designation, and in some cases perhaps even a development involving a “P” use, if there are significant issues of bulk and height etc.

(e) **Consideration**

The LG then considers the application having regard to, amongst other relevant things, the matters in MST cl 10.2.

(f) **Determination**

The application is determined under cl 10.3 and may be:

- (a) grant of approval with or without conditions; or
- (b) refusal.

(g) **Notification of Decision**

Under cl 10.4 the LG conveys its determination to the applicant in the prescribed form. Approval usually allows 2 years for substantial commencement (MST cl 10.5.1). The MST does however allow for an application to extend the term of the approval before the time has expired (MST cl.10.5.2).

(h) **Deemed Refusal**

If an application is not determined within 60 days from receipt by the LG, and the applicant has not agreed to extend the time, it is deemed to be refused (MST 10.9.1) and therefore can be challenged on an application to SAT for review.

(i) **Review**

The MST cl 10.10 confers a right to apply for review of a LG decision made in the exercise of a discretionary power. See also PA s 252. The subject of review will be covered in more detail in 8.11 below, but for present purposes the following points are emphasised:

- (i) Most LPSs, and s 252 of the PA confer the review right on **applicants only**;
- (ii) There needs to have been an application to the responsible authority for the grant of a consent, permission, approval or other authorisation;
- (iii) The grant applied for must be in the discretion of the responsible authority under a planning scheme, and must be refused or approved subject to conditions;
- (iv) Although the question of the classification of a use, and the question of the permissibility of a use not listed in the Zoning Table, have been recognised as legal (involving interpretation of the Scheme) or

factual, or mixed fact and law, and as such not discretionary,⁴⁹ the PA s 252(2) specifically confers a right of review in those situations.

- (v) Likewise, a LPS can confer rights of review in other situations not involving an application, or by other than the applicant, or issues not involving discretion. But unlike the old Ministerial Appeal/Tribunal Appeal toss up, PA s 252(3) precludes the possibility of a review under both s 252(1) and (2) and under a scheme.

5.8 DEVELOPMENT APPROVAL PROCESS UNDER MRS

- (1) The broad development control imposed under PA s 162(1) applies to a RPS as well as a LPS. (As there is no provision in s 162 that breach of the prohibition in the section is an offence, or any specific reference to s 162 and s 223, it may not be open to prosecute for a breach without a prohibition in a scheme to which s 218 does apply.)
- (2) In the MRS:
- Cl 10 contains a general obligation to apply for and obtain written approval of the **responsible authority** before commencing or continuing development. This applies to development of all land in the Metropolitan Region, both zoned land and reserved land.
 - For reserved land, cl 13, and 18, with a certain amount of duplication, relate to the requirement for written approval of the **Commission** (not the “responsible authority” as in cl 10 and 24). Cl 16 excludes certain uses and developments on reserved land owned by or vested in public authorities.
 - Cl 24 provides that approval of the **responsible authority** is required for development of land zoned under the MRS, except as provided in subcl (2).

Subcl (2) excludes the requirement of development approval under the MRS of zoned land if:

- (a) the land is not subject of a notice under MRS cl 32, or PA s 112; and
- (b) the development consists of:
- (i) erection of a single dwelling-house which will be the only building on the lot no part of which is within or abuts the Swan development control area; or
 - (ii) work on, in, over or under a street or road by a public authority under any Act.
- Cl 5. Explains that the responsible authority under the MRS is the authority the WAPC delegates as the responsible authority under PA s 16. See the Notice of Delegation.³⁰
 - Cl 28. Requires an application for approval of the **responsible authority** to be lodged with the relevant LG.

⁴⁹ *Erceg v MRPA* [WATPAT 28/83; Unreported; dec 29/10/84]; *Minister for Planning; ex parte City of Canning* (1998) 101 LGERA 284, at 287 and 296.

- Cl 29(1). Requires the LG with which an application is lodged under cl 28, within 7 days to forward the application for determination by the WAPC where -
 - (i) the application is for the development of land -
 - (I) reserved under Part II of the MRS;
 - (II) part of which is in the Swan Development Control Area; or
 - (III) which abuts any part of the Swan Development Control Area.⁵⁰
 - (ii) the application relates to zoned land the subject of a resolution under MRS cl 32 or PA s 112; or
 - (iii) the application is for development of land **abutting reserved land** and is not of a type the LG can determine under the Notice of Delegation.
- Cl 29(2). The LG determines other development applications on land zoned under the MRS.

The LG otherwise can within 42 days make recommendations to the WAPC as to applications to be determined by the WAPC (MRS cl 29(3)).
- Cl 26. Approval of a development application by a LG under its own LPS is deemed to be approval of the application for the purpose of the MRS (i.e. under cl 29(2)).
- Cl 30A. Details how the WAPC is to deal with an application received by it pursuant to cl 29(1)(a)(ii) and (iii) (i.e. on land partly within or abutting the Swan Development Control Area).
- Cl 30B. Details how a responsible authority is to deal with a development within the Swan Valley (referral for advice of the Swan Valley Planning Committee).
- Cl 33. Sets out the matters the WAPC or a LG exercising delegated power under the MRS is to consider - essentially
 - purpose for which land is zoned or reserved under MRS;
 - orderly and proper planning of the locality;
 - preservation of the amenity of the locality.

There may be a refusal or an approval with or without conditions.
- Cl 31(2). There is a deemed refusal if an application is not determined within 60 days.
- Cl. 32. WAPC may, by resolution identify land areas or uses which are subject to special approval control. Effectively delegation to LGs is withdrawn.

⁵⁰ Where an application is for development of land wholly within the Swan Development Control Area, the application is required by Part V of the Swan and Canning River Management Act 1996 to be referred to the Swan River Trust for determination by the Trust or the Minister for that Act.

5.9 CONDITIONS OF DEVELOPMENT APPROVAL

(1) Conditions are universal

Development approvals are seldom given without conditions.

(2) Challenges to Conditions

An applicant receiving an approval subject to conditions may challenge any of the conditions on an application for review to SAT on either or both of 2 broad grounds:

- (a) the condition is invalid (i.e. as a matter of law it is defective and unenforceable; or
- (b) the condition is not appropriate in the circumstances of the case.

Both those broad grounds will be explained briefly below.

(3) Invalidity of Conditions

There are few subjects in Planning Law that have generated more case, rules and principles than the issue of validity of conditions. The subject is dealt with in detail elsewhere, and it is sufficient in the present context to refer the most fundamental principles.

(a) Primary test of validity

In the *Newbury* case⁵¹ the House of Lords held that a condition is valid if -

1. It has a *bona fide* planning purpose;
2. It fairly relates to the development considered;
3. It is reasonable in the *Wednesbury* sense⁵² i.e. it is not so unreasonable that no reasonable planning authority could have imposed it. The primary test of validity has been considered and applied in many cases⁵³.

(b) Certainty

A condition will be invalid if it is uncertain. But a condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results.⁵⁴

⁵¹ *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, and moved *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR per McHugh J at [57].

⁵² *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1KB 2223

⁵³ *Lloyd v Robinson* (1962) 107 CLR 142; an early statement of the principles by the High Court in a case. The *Newbury* case enlarged the *Lloyd v. Robinson* test with reference to *Wednesbury* reasonableness. The test was applied in a subdivision case by the WATPAT in *Ocean Reef (WA) Pty Ltd v TPB (T/A 27/83; Unreported; dec 8/6/84)* where the challenged condition was held valid, but set aside as inappropriate in the circumstances of the case. The test was applied in a building development case by the WATPAT in *Renstone Nominees Pty Ltd v MRPA* (1986) 21 APA 12 where the challenged condition was held valid, but set aside as inappropriate in the circumstances of the case. The test was applied and the authorities considered by WATPAT in *Perrymead Investments Pty Ltd v WAPC (T/A 9/96; unreported; dec 22/10/96)*. The original approach of the High Court in *Lloyd v Robinson* was reaffirmed in *WAPC v Temwood*.

⁵⁴ *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 637, at 677, followed in *Weigall Constructions v Melbourne & Metropolitan Board of Works* () 30 LGRA 334.

(c) **Finality**

A condition may be invalid for lack of finality. A condition which imparts to a consent a quality in virtue of which it ceases to be final is not a proper one.⁵⁵

(d) **Ambulatory conditions**

A condition which depends for its performance on a decision other than by the authority that imposed it is invalid.⁵⁶

(e) **Severability**

If a condition is void for any reason, the result may be that the approval would itself be invalid if it is not severable.⁵⁷

(f) **Run with the land**

Conditions run with the land together with the planning consent⁵⁸. The owner of the land to which the planning approval applies is obliged to comply with the conditions⁵⁹.

(g) **Must be imposed by the approving authority**

A Council cannot leave it to officers to formulate/impose conditions after approval has been given.⁶⁰

(h) **If condition not complied with there is no approval**

It is unlikely all conditions would have that effect; e.g. a condition requiring landscaping to be maintained, if not complied with, would not render the approval invalid.⁶¹

⁵⁵ Nixon v Randwick Municipal Council (1991) 23 NSWLR 734 at 738 (Priestley, JA, and at 739 (Clarke, JA).

⁵⁶ Hill & Anor v SPC (TPAT 5/94, unreported; dec 16/8/94).

⁵⁷ Kriticos v Parramatta City Council (1971) 21 LGRA 404 at 4089; Weigall Constructions v MMBW (supra)

⁵⁸ Corporation of the City of Unley v Claude Neon Ltd (1983) 32 SASR 329 at 332, 49 LGRA 65 at 58

⁵⁹ Esther Investments Pty Ltd v Dawson (unreported S Ct No 6084A; dec 31/10/85). Also Ryde Municipal Council v McQuarie University (1977-78) 139 CLR 633 per Gibbs ACJ at 638.

⁶⁰ The WAPC; ex parte Leeuwin Conservation Group Inc [2002 WASCA 150

⁶¹ Smith v Wyong Shire Council (1970) 19 LGRA 61 at 64; but see Lidcombe Developments Pty Ltd v Warringah Shire Council (1980) 41 LGRA 420 at 427.

CHAPTER 6 - ENFORCEMENT

6.1 REVOCATION OF APPROVAL

Some planning schemes provide for an approval to be revoked if conditions are not complied with including the MRS cl 30(2). But it is unlikely that an approval could be effectively revoked without due process; the applicant would need to receive notice and an opportunity to be heard, and the decision would be open to review.

6.2 INFORMAL NOTICE

Neither the PA nor the MST recognize the role of an informal notice of breach, in practice any planning authority is able to give written notice of a breach of a scheme provision, and an intention to take enforcement action if the breach is not remedied. Failure to respond appropriately to the notice would result in prosecution under PA s 218 for the Scheme contravention (see 9.4 below).

6.3 S 214 DIRECTION

The PA s 214 empowers the issuing of directions for contravention of a PS or IDO, or PCA requirements.

- (1) S 214(2) direction. The direction under s 214(2) is in the notice of a stop work direction.
- (2) S 214(3) direction. The direction under s 214(3) is to remove, pull down, take up or alter the development; and restore the land as nearly as possible to its former condition.
- (3) S 214(2) and 214(3) directions may be contained in the same instrument. (PAS 214(4)).
- (4) A s 214(3) direction is to specify a time (not less than 60 after service of the direction) for compliance. (PAS 214(6)).
- (5) Under s 214(7) failure to comply with a direction is an offence.
- (6) Where a s 214 direction is not complied with, the responsible authority may itself do what is required to comply (PA s 215(1)), and recover the expense for compliance in a court of competent jurisdiction from the person liable to comply (s 215(2)).
- (7) A problem LGs perceive with s 214 directions is that the process of enforcement often becomes bogged down in the process of:
 - (a) SAT review, with a possible Supreme Court appeal on a legal issue; and
 - (b) if the SAT review goes against the developer, there is usually an application for retrospective approval of the offending development;
 - (c) if that application is refused, there can be a SAT review application against that.
- (8) On the other hand, the issuing of a direction opens the possibility of a decision on the legality of a development, and the question of a scheme breach, by a SAT member who has planning expertise, in proceedings where the breach is determined on the balance of probabilities. That may in appropriate cases be preferable to leaving proof

of an offence to a Magistrate with no planning expertise, and where all elements of the breach must be proved beyond reasonable doubt.

6.4 PROSECUTION

- (1) S 218 provides that a person commits an offence who:
 - (a) contravenes the provisions of a PS;
 - (b) commences, continues or carries out development otherwise than in accordance with the provisions of the scheme; or
 - (c) commences, continues or carries out development otherwise than in accordance with a condition.
- (2) S 223 sets out the penalties for an offence under the Act, and a daily penalty for a continuing offence.

6.5 INJUNCTION

Under s 215 an injunction may be sought from the Supreme Court to restrain a contravention of the PA, a PS or an IDO, or breach of a condition. Such action is without prejudice to any proceedings for an offence against the PA (incl s 214(7) and s 218).

6.6 REPRESENTATION TO MINISTER

- (1) Under PA s 211, a person may make representation to the Minister if the person is aggrieved by -
 - (a) failure of a LG to enforce or implement effectively the observance of a LPS; or
 - (b) failure of a LG to execute works required under a LPS.
- (2) This procedure cannot be used to review the discretionary decisions of a LG under a LPS. Effectively, it is only available to review a LG's failure to enforce observance of its LPS⁶².
- (3) The Minister may refer the representation to SAT for investigation and report, but the Minister is not bound by them. (s 211(2) to (5)).
- (4) The LG may appeal against a Ministerial Order to the Supreme Court, whose decision is final.

6.7 MINISTERIAL ASSUMPTION OF LG POWERS

- (1) The Minister is given power under s 212 to issue a notice to a LG requiring it to perform certain functions including:
 - (a) comply with a s 76 order to prepare or adopt a LPS;
 - (b) comply with an order under s 211; or
 - (c) comply with provisions of the TP regs.

⁶² cite case that are authority for this proposition.

- (2) Under s 212(3), if the LG fails to comply with a notice, the Minister may do what is required under the notice, and may recover costs from the LG (PA s 212(7)).

CHAPTER 7 - INJURIOUS AFFECTION AND COMPENSATION

7.1 To understand decisions in compensation and injurious affection cases decided in WA prior to commencement of the PA on 9/4/06, it is necessary to know a little about the pre-existing law.

7.2 COMPENSATION AND INJURIOUS AFFECTION UNDER THE PLANNING ACT 1928

- (1) S 11 of the Planning Act 1928 conferred a right to claim compensation where land was injuriously affected by the making of a scheme.
- (2) S 12 in subsection (1), (2) and (2a) cut back the right to claim compensation. Most significantly, s 12(2a)(b) excluded claims for compensation where land was injuriously affected by zoning or classification provisions (including reservation) unless as a consequence:
 - (i) the scheme permitted development of the land for no purpose other than a public purpose; or
 - (ii) the scheme prohibited wholly or partially –
 - the continuance of a non-conforming use; or
 - the erection, alteration or extension of any building in connection with or in furtherance of, any non-conforming use.
- (3) Furthermore, under s 11, a claim for compensation was to be made within the period stipulated in the scheme after the making of the scheme, not being less than 6 months. Schemes usually allowed 6 months for claims. Claims were very seldom made within that time.
- (4) The 1928 Act was silent on the question whether the claim for compensation, and the point was never judicially considered.
- (5) The MRTPS Act in 1959 established a significantly different regime for claims for compensation under the MRS. S 36 was the key provision (together with s 3), as it started with the assumption that s 9.11 and 12 of the Planning Act 1928 provided that compensation for injurious affection for the reservation of land under the MRS was not payable until:
 - (a) the land was first sold after the imposition of the reservation; or
 - (b) development of the land was refused or subjected to a condition unacceptable to the applicant.
- (6) The PA 2005 has provided the same compensation regime for a LPS and a RPS, and the new regime is very similar to that which applied previously to the MRS under s 36 of the MRTPS Act.

The following are the key provisions:

S 171 **Only one entitlement to compensation**