IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

No. P47 of 2016

BETWEEN

WESTERN AUSTRALIAN PLANNING COMMISSION

Appellant

and

SOUTHREGAL PTY LTD

First Respondent

DAVID STEPHEN WEE

Second Respondent

No. P48 of 2016

BETWEEN:

WESTERN AUSTRALIAN PLANNING COMMISSION

Appellant

and

TREVOR NEIL LEITH

Respondent

APPELLANT'S SUBMISSIONS

State Solicitor for Western Australia
Level 25 David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000

Telephone: (08) 9264 1484
Fax: (08) 9264 1440
Ref: SSO 1495-16
Contact: Stephen Willey

Part I: CERTIFICATION AS TO INTERNET PUBLICATION

1. The Appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: CONCISE STATEMENT OF ISSUES

2. The question of law to be resolved is:

> Whether a person to whom s 177(2)(b) of the *Planning and Development Act 2005* (WA) (the PD Act) would otherwise apply can be entitled to compensation pursuant to ss 173 and 177(1)(b) of the PD Act, in circumstances where the land has been sold following the date of the reservation, and where no compensation has previously been paid under s 177(1) of the PD Act.

3. In substance, the question is whether a person who purchased land already reserved can be entitled to compensation for injurious affection in respect of that reservation.

Part III: CERTIFICATION AS TO SECTION 78B OF THE JUDICIARY ACT

4. The Appellant certifies that it does not consider that any notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: REPORTS OF DECISIONS BELOW

5. The primary judgment, *WAPC v Leith* [2014] WASC 499, is not reported.

6. The judgment of the Court of Appeal, *WAPC v Southregal* [2016] WASCA 53, is reported as (2016) 49 WAR 487, 214 LGERA 128, 332 ALR 477, [2016] ALMD 4115.

Part V: NARRATIVE STATEMENT OF FACTS

7. The Peel Region Scheme (PRS) came into effect and reserved part of each of the subject lands as regional open space on 20 March 2003, pursuant to Part 4 PD Act.

8. Each Respondent purchased its land after 20 March 2003. In P47 of 2016 (*WAPC v Southregal*) the relevant land (Lot 2 of then Murray Location 644[1]) was purchased on 22 October 2003 for $2,600,000.[2] In P48 of 2016 (*WAPC v Leith*) the relevant land (Lot 20 Estuary Road, Dawesville[3]) was purchased on 30 June 2003 for $1,280,000.[4]

9. Clause 18(a) of the PRS prohibits development of reserved land without the Appellant's approval. Each Respondent applied for development approval under cl 19 PRS, which the Appellant refused.[5] Each Respondent claimed compensation under Part 11 Division 2 of the PD Act.[6] The Appellant declined each Respondent's claim because no Respondent was "a person *whose* land is injuriously affected *by the making* ... of a planning scheme" for the purposes of s 173(1) PD Act.[7]

10. In arbitration proceedings, each Respondent claims compensation under Part 11, Division 2. Southregal and Wee claim $51.6M[8] and Leith claims $20M.[9] By consent, special cases were stated for the determination of a question of law by the Supreme Court, that question was replicated in the Appellant's ground of appeal in the Court of Appeal and in the High Court.[10]

Part VI: ARGUMENT

11. The controversy centres on the meanings of, and relationship between, ss 173(1) and 177 PD Act.

---

1 Part of which was subject to the relevant reservation.
2 Special Case for Determination of Question of Law (Southregal) dated 30 September 2014, Attachment SW2.
3 Part of which was subject to the relevant reservation.
4 Special Case for Determination of Question of Law (Leith) dated 30 September 2014, Attachment TL2.
5 Reasons of Beech J in *Leith v WAPC* [2014] WASC 499 (Trial Judge Reasons) at [3]. Appeal Court Reasons at [3]. Leith's application was refused on 11 June 2009. Southregal's application was deemed refused on or about 4 February 2008.
6 Appeal Court Reasons at [3]; Trial Judge Reasons at [3].
7 Appeal Court Reasons at [3]; Trial Judge Reasons at [3].
8 The claim by Southregal and Wee was lodged on or about 15 July 2008: Special Case for Determination of Question of Law (Southregal), Attachment SW8.
9 The claim by Leith was lodged on or about 29 June 2009: Special Case for Determination of Question of Law (Leith), Attachment TL7.
10 Appeal Court Reasons at [5]; Trial Judge Reasons at [15].

12. A person whose land is injuriously affected by the making or amendment of a planning scheme is entitled to compensation: s 173(1). The Appellant's case is that the only person entitled to compensation is the owner of land at the time that the planning scheme was made or amended including that person's testamentary and intestate successors. A purchaser of reserved land has no entitlement to claim compensation for injurious affection.

13. Section 173(1) provides:

> Subject to this Part any person whose land is injuriously affected by the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority.

14. As the trial Judge correctly said, the "natural" reading of s 173(1), considered in isolation, is that only a person who owned the land at the date it became injuriously affected is eligible for compensation.[11]

15. Section 174(1) confines "*land is injuriously affected by reason of the making or amendment of a planning scheme*" (for the purposes of s 173(1)) to three forms (causes) of injurious affection:

    (a) Section 174(1)(a): imposition of a reserve for public purposes.

    (b) Section 174(1)(b): prohibition on use for purposes other than public purposes.

    (c) Section 174(1)(c): prohibition on the continuation of non-conforming uses.

16. For reserves, but not for the other forms of injurious affection, entitlement to be paid compensation is deferred by s 177(1) until either; (a) the land is first sold; or (b) the responsible authority refuses development approval or imposes unacceptable conditions on development. At one or the other event, compensation becomes payable to the persons specified in s 177(2).

17. Section 177(2) of the PD Act provides:

---

[11] Trial Judge Reasons at [42]-[43]. The point is mentioned by the Court of Appeal at [33], [73], [79] and [83]. See also [34] and [110].

(2) Compensation for injurious affection to any land is payable only once under subsection (1) and is so payable —

(a) under subsection (1)(a) to the person who was the owner of the land at the date of reservation referred to in subsection (1)(a); or

(b) under subsection (1)(b) to the person who was the owner of the land at the date of application referred to in subsection (1)(b),

unless after the payment of that compensation further injurious affection to the land results from —

(c) an alteration of the existing reservation of the land; or

(d) the imposition of another reservation of the land.

18. Part of the *ratio decidendi* of the trial Judge and of the Court of Appeal was that by s 177(2) an eligibility for compensation is enjoyed by subsequent purchasers, and s 173 must therefore be interpreted to take a meaning other than its ordinary reading.[12]

19. In *Western Australian Planning Commission* v *Temwood* (*Temwood*)[13] the High Court addressed this question in respect of substantively equivalent legislation.[14] The joint reasons of Gummow and Hayne JJ at [94]-[96] and [99]-[109] support the Appellant's submissions. The reasons of McHugh J support the Court of Appeal's *ratio* mentioned at [18] above. The judgment of Callinan J supports the Respondents' case. Heydon J did not address the issue.

20. The Appellant's argument comprises the following nine submissions:

---

12 Appeal Court Reasons at [73]-[74], [110]; Trial Judge Reasons at [44] and [46].

13 [2004] HCA 63; (2004) 221 CLR 30.

14 The legislation considered in *Temwood* was repealed and re-enacted in consolidated form in 2005 in the PD Act. All parties and judges involved have accepted that the legislation in the present cases cannot be distinguished from that considered in *Temwood*. For convenience, these submissions on *Temwood* have converted their Honour's rulings on sections of the repealed legislation into rulings on the current legislation. The references can be traced to those sections operative as at 2004 as follows:

s 36(1) *Metropolitan Region Town Planning Scheme Act 1959* (WA) (repealed) (MRTPS Act), when read with s 11 of the *Town Planning and Development Act 1928* (WA) (repealed), is substantively equivalent to s 173(1) PD Act.

s 36(3) and (3a) MRTPS Act are equivalent to ss 177(1) and (2) PD Act (respectively).

s 36(4)(a) MRTPS Act is equivalent to s 177(3)(a) PD Act.

s 36(5) MRTPS Act is equivalent to s 178(1) PD Act.

s 36(6) MRTPS Act is equivalent to s 179 PD Act.

ss 36(9) and (10) MRTPS Act is equivalent to s 181 PD Act.

(1) Natural meaning of s 173(1)

21. On its ordinary meaning, the expression "*any person whose land is injuriously affected* ***by the making or amendment*** *of a planning scheme*" in s 173(1) conveys a temporal restriction, by fastening on an event, not a state of affairs. On its ordinary reading s 173(1):

(a) provides compensation to a person who owns land at the time that a planning scheme is made or amended, thereby injuriously affecting his or her land; and

(b) requires that the injurious affection must arise from the making or amendment of the scheme, not by its existence.[15]

22. Weight must be given to the ordinary meaning of legislative text.[16] In *Kettering Pty Ltd v Noosa Shire Council* (*Kettering*)[17] at [25], the High Court held that like expressions carried a temporal connotation.

23. That interpretation is reinforced by other provisions, which similarly depend upon the event of the making or amendment of a planning scheme; not upon the state of affairs of being reserved:

(a) Section 174(1) reiterates that compensable injurious affection turns on the event of the making or amendment of a planning scheme.

(b) Section 175, which applies to ss 173 and 174, employs the extended phrase: "*by* ***reason of*** *the making or amendment of*".

(c) Sections 177(2)(c) and (d) refer to injurious affection resulting from the "*alteration*" of a reserve and the "*imposition*" of a reservation, each of which implies an event rather than a state of affairs.

(d) Section 177(1) uses the expression "... *when under a planning scheme any land has been reserved ... no compensation is payable until ...*", which implies a past event.

---

15 Cf trial Judge Reasons at [42], Appeal Court Reasons at [33], [73], [79] and [83].

16 Unless there are sufficient indications of some other meaning: *Cody v J H Nelson Pty Ltd* [1947] HCA 17; (1947) 74 CLR 629, 647 Dixon J. See also section 19(3)(a) *Interpretation Act 1984* (WA) as to use of extrinsic material.

17 [2004] HCA 33; (2004) 207 ALR 1. The relevant expressions were: "by the coming into force"; "imposed by the planning scheme"; "came into operation"; "by its operation"; "coming into operation"; and "comes into force".

(e) Section 186(1) refers to land being injuriously affected "*by* the declaration or *by the amendment* of the declaration …".

10

(2) Section 173(1) is "controlling"

24. Gummow and Hayne JJ[18] said that the opening words of s 173(1) are the "controlling words of what follows"; i.e., they control eligibility for compensation. In construing provisions, a court may be required to determine which is the leading provision and which is the subordinate provision and which must give way to the other.[19] The controlling effect of those words in

20 s 173(1) is that the interpretations of other sections defer to that status.

25. The sequence of provisions in Part 11 Division 2 is conventional, and supports the "controlling" status of s 173(1):[20]

(a) Section 173 creates the entitlement.

(b) Sections 174 and 175 limit the scope of entitlement.

(c) Section 176 identifies the tribunal for determining compensation (and

30 other things).

(d) Section 177 defers compensation (for reserves) to the occurrence of one or other of two events.

(e) Section 178 sets limitation periods for making a claim for compensation.

(f) Section 179 sets out the method for determining the amount of

40 compensation.

26. Eligibility for compensation for the two non-reserve forms of injurious affection can stem only from s 173(1), because there is no provision comparable to s 177(2) that applies to ss 174(1)(b) and (c). For those types of injurious affection, only the owner at the date of the making or amendment of

---

18 *Temwood* at [102].

50 19 *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [70].

20 *Project Blue Sky* at [70]. Statutory provisions are to be read in the sequence with which they were drafted: *Patman v Fletcher's Fotographics Pty Ltd* (1984) 6 IR 471, 474-475; *Girardi v Commissioner of State Taxation* [2013] SASC 43.

the scheme is entitled, and a sale of the land necessarily terminates all entitlement. Therefore, s 173(1) retains its "natural" meaning and controlling status for the purposes of ss 174(1)(b) and (c), and the Court of Appeal's *ratio* could not apply to them.

27. But s 173(1) cannot have two meanings – a non-temporal meaning for s 174(1)(a) and a temporal meaning for s 174(1)(b) and (c). Rather, the natural meaning of s 173(1) controls all eligibility for compensation.

(3) Object/Policy of the PD Act

28. A person who intends to purchase reserved land knows, or should know,[21] of the planning restriction giving rise to the injurious affection.

29. However, the decision of the Court of Appeal would allow a person to be paid compensation who has suffered no loss (having paid an "affected" price) or who suffered loss through lack of diligence (because he paid an "unaffected" price for affected land). It is an implicit object of the compensation regime not to "compensate" persons who have suffered no loss, which object informs the interpretation.[22]

30. Further, the object of the legislation is unlikely to include compensating a purchaser of reserved land, because there is no equivalent provision that creates such an entitlement for the two non-reserve forms of injurious affection under ss 174(1)(b) and (c).

31. Furthermore, the effect of the phrase "*first sold*" in s.177(1)(a) is that only the owner at the date of reservation is entitled to compensation upon the sale of reserved land. There is no rational explanation for Parliament extending eligibility to all purchasers of reserved land to claim compensation in respect of a development application, as if such compensation ran with the land, but not extending eligibility in the event of an on-sale. Rather, a purchaser is never entitled.

---

21 See cl 47 of the PRS, under which a "certificate" is issued on settlement requisitions "*stating the manner in which* [the land] *is affected by the Scheme*". See also the Minister's remarks in second reading speeches referred to below, referred to by Gummow and Hayne JJ at [107] of *Temwood*.

22 *Interpretation Act 1984* (WA) s 18.

32. Last, on the Appellant's case, there is no prospect of competing applications for compensation because the first sale of the land after it is reserved terminates all other triggers.[23] The Court of Appeal was wrong at [107] in finding to the contrary. However, a consequence of the Respondents' case is that contemporaneous applications for compensation may be made by the previous owner (arising from sale) and the new owner (arising from his development application) – and the PD Act contains no provision to resolve such competing claims.

(4) Redundancy arises if the natural reading of s173(1) is not applied

33. The following phrases would be redundant under the decision of the Court of Appeal:

(a) In s 173(1) and s 174(1): "*the making or amendment of*". Those same words would be redundant when repeated in s 178.

(b) In s 174(1)(a): *"(whether before or after the coming into operation of this section)*".

(c) In s 175: "*by reason of the making or amendment of*".

(d) In s 186(1): "*the declaration, or by the amendment of the declaration, of*".

34. Martin CJ considered that the words "*the making or amendment of*" in ss 173 and 174 were not made redundant by his Honour's interpretation, because the words recognise the "obvious" and "inevitable" fact that injurious affection arises from a scheme provision which can only exist by way of the making or amendment of a scheme.[24]

35. With respect, that observation does not address the objection as to redundancy. Parliament is presumed not to have employed inutile words. In *Project Blue Sky v Australian Broadcasting Authority*[25] at [71] it was held that:

---

23 Note that s 177(2)(b) does resolve this issue if the development application was made before sale (s 177(1)(b)(ii) allows an "applicant", instead of an "owner", to make an application.)

24 Appeal Court Reasons, at [82] and [84].

25 [1998] HCA 28; (1998) 194 CLR 355.

> ... it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

36. If the mere existence of a planning scheme was sufficient to confer entitlement to compensation, there would be no need for the words "*making or amendment of*" to be used in Division 2 of Part 11.[26] Indeed, there would be a need to ***not*** include those words – they would serve to confuse.

(5) No redundancy on the Appellant's interpretation

37. On the Appellant's interpretation, s 177(2)(b) PD Act is not superfluous, void, or insignificant, or inconsistent with s 173(1).

38. Sections 177(1) and (2) draw a distinction between an "applicant" for development approval (s 177(1)(b)) and the "owner" at the date of such application (s 177(2)(b)).

39. Section 177(2) allows an "applicant" (not necessarily the "owner") to apply for development approval and to determine whether the approval conditions are "unacceptable". One reason for this is that an original owner may allow a prospective purchaser to *apply for* development, and to so apply in order *to assess* the development potential for the purpose of the proposed purchase, but, if the outcome of the application is adverse, it is still the "*owner*" who is entitled to compensation under s 177(2)(b) (because of the effect upon the price the potential purchaser will then pay).[27]

40. This entitlement of a non-owner to apply for development approval and adjudge the acceptability of conditions has existed since 1963, and has been incorporated into Form 1 since 1985.[28]

---

[26] Trial Judge Reasons at [43]. Cf Appeal Court Reasons at [82], [84] and submissions at [34] – [35] above.

[27] PRS clause 28 and Form 1 require an application to be made in the form attached to the scheme, which form accommodates application by a person not the owner. Such an application must be signed (authorised) by the owner.

[28] See the Metropolitan Region Scheme Form 1 as at 1985, Government Gazette 29 November 1985 p 4473.

41. In that light, the legislative intent for the use of "applicant" in s 177(1)(b)(ii) is to reflect that entitlement of a non-owner to adjudge whether conditions are acceptable. That made it convenient for a separate provision (the earlier equivalent to s 177(2)(b)) in 1986[29] to ensure that compensation was payable to the owner, and not payable twice.[30]

42. Further, that reference to "owner" includes persons who obtain property otherwise than by purchase, but stand in the shoes of the original owner, e.g. testamentary and intestate succession: Gummow and Hayne JJ at [108] of *Temwood*. Hence, use of a different ***date*** in s 177(2)(b) (date of development application, rather than date of reservation) accommodates the possibility of a successor by then being the entitled owner. Cf Court of Appeal at [106].

43. On the reasons of McHugh J at [40] of *Temwood*, it was not so much that s 177(2)(b) contains a redundancy on the Appellant's case, but that its confinement to testamentary and intestate succession was an "unlikely" legislative intent. However, first, the operation of s 177(2)(b) is not so confined – see [38]-[41] above. Second, if a provision has a real operation, even if it does less work than it would on an alternate construction, it is not otiose for the purposes of the presumption.[31] Third, express entitlement for testamentary and intestate successors is not "unlikely": see s 208 *Land Administration Act 1997 (WA)*, which repealed and re-enacted s 37 of the *Public Works Act 1902 (WA)*.

44. Together, those considerations answer McHugh J at [40] of *Temwood*, and augment the reasons of Gummow and Hayne JJ. They also answer the Court of Appeal's ruling that a purchaser is entitled to compensation by s 177(2)(b).[32]

(6) Words "read in" to s 177(1)

45. Contrary to the reasons of the Court of Appeal, the Appellant's interpretation does not require one to illegitimately read into s 177 words to the effect that

---

29 Trial Judge Reasons at [71]. See also Annexure A - Part B page 38 (footnote 53).

30 Committee Notes, Hansard, 2 July 1986, p.1209, (second and third paragraphs). And see [57] below.

31 *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23, (2010) 241 CLR 252 at [76], [79] per Heydon J.

32 Appeal Court Reasons at [110].

compensation is deferred until "*the first to occur of*" a sale or a development application.[33]

46. Section 177(1) provides that compensation is not "payable" until one or other event, which necessarily means it is payable upon the occurrence of the first of those events. Indeed, "reading in" of the words "*the first to occur of*" would be redundant.

47. Section 177(2) provides that compensation is "payable only once", and is so payable upon one or other event. That is to say, compensation is not *payable* twice, once at each event. Therefore, s 177(2) is necessarily read as if it contained the words "*the first to occur of*".

48. In any event, there is no rule against interpreting a statute "as if" it contained additional words.[34] The Court of Appeal[35] relied on *Marshall*[36] and *Kettering,*[37] but those cases preclude reading words into a provision *in order to curtail a beneficial entitlement.* The question under s 177 PD Act is whether there is any entitlement in the first place for a purchaser of reserved land; not whether an admitted entitlement is being curtailed.

49. Section 177 is a restriction on entitlement, and is therefore not within the *Marshall/Kettering* ratio.[38]

(7) PD Act does not postpone entitlement pending loss becoming "apparent"

50. Martin CJ at [81] said that the deferral of entitlement is partly because the precise manner and extent of injurious affection will not be "apparent" until the land is sold or acceptable development is refused. This observation was made in support of the ruling that an entitlement to compensation survives first sale.

---

33 Martin CJ ruled at [77] and [88] that the "fundamental obstacle" to the reasoning of Gummow and Hayne JJ in *Temwood* is that it requires words of limitation be "read into" s 177(1) to the effect that compensation is deferred until "the first to occur" of a sale or a development application and that a limitation be implied upon the class of persons referred to in s 177(2)(b).

34 *Taylor v Owners of Tarata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at [37]-[38].

35 Appeal Court Reasons at [31] and [116]

36 *Marshall v Director General Department of Transport* [2001] HCA 37; (2004) 205 CLR 603 at [38].

37 [2004] HCA 33; (2004) 207 ALR 1 at [31].

38 See: *Victims Compensation Fund v Brown* [2003] HCA 54; (2003) 201 ALR 260; at [33], per Heydon J (McHugh ACJ, Gummow, Kirby and Hayne JJ agreeing); and *Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at [5] per Gleeson CJ.

However, first, that proposition is self-defeating: if the extent and manner of injurious affection are apparent at first sale, then there is no justification for entitlement surviving first sale.

51. Second, nothing in the text of the PD Act supports his Honour's proposition. As the trial Judge correctly observed at [62], the primary reason for deferring compensation was to avoid the flood of claims that would otherwise attend the commencement of the Metropolitan Region Scheme in 1963 (which reason is applicable to the commencement of the PRS is 2003) and the deferral was also said to be justified because the loss becomes "real" at sale or development refusal. That does not advance one way or the other the issue in contention (see [50] above).

52. Third, the assessment of compensation must follow s 179(1). Whether at first sale[39] or upon a development application,[40] the assessment is based on an opinion on what is likely and unlikely to be approved. Therefore, the extent of loss does not *become* apparent at either stage; rather it is the assessment that makes the extent of loss apparent, not the sale or development application outcome.

(8) McHugh J should not be followed

53. McHugh J agreed with the view of Gummow and Hayne JJ for the period prior to the 1986 legislative amendments, but did not agree with that interpretation after those amendments: [38]. Those amendments added the separate reference to development applications, now reflected in s 177(2)(b) PD Act. With respect, those amendments generated the current controversy; they do not resolve it.

54. The point has been addressed in Parliamentary debates, as follows. First, several Hansard excerpts directly support the Appellant's interpretation.[41]

---

39 This assessment will proceed without any development application having been determined.

40 The particular development application need not reflect the land's highest and best use, yet the assessment must reflect any loss of that highest and best use potential.

41 (i) Second Reading Speech, Hansard 3 September 1968, p.754, (last 3 complete paragraphs) as quoted by the trial Judge at [68].
(ii) Second Reading Speech, Hansard 29 October 1968, p.2248, (penultimate paragraph and the 2 preceding paragraphs).
(iii) Second Reading Speech, Hansard 6 November 1969, p.2285, (second to fourth paragraphs) as quoted by Martin CJ at [59].

55. Second, reliance on the Hansard passage from 4 November 1969, p. 2098 in the Legislative Council is misplaced.[42] That passage caused a question directly on point to be raised in the Legislative Assembly.[43] The questioning Member explained that he had read what had been said in the Council (see Hansard, 12 November 1969, p. 2608), and that discussions outside the House had resulted. In answer, the Minister at (Hansard 12 November 1969, p.2608) made this clarification in respect of his colleague's speech:

> "The Bill ... is designed to ensure that the owner at the time of reservation, ***and he alone***, will be compensated."[44]

56. Further, there was good cause for the Member's question: (a) the speech at Hansard, 4 November 1969, p.2098 contains an inconsistency – the responsible Minister had said that purchasers are "expected to acquaint themselves with the details affecting the land" (implying they should investigate whether the land is reserved before purchasing) yet then said that purchasers are protected anyway (implying they need not investigate); and (b) it was inconsistent with what had been said on other occasions.

57. Third, in 1986, concerning the Amendment which McHugh J in *Temwood* considered decisive, the Responsible Ministers said that the Bill did not constitute major change.[45] It was aimed at preventing double claims.[46] There was no mention of extending entitlement to persons other than the owner at reservation, which would have been a major and notable amendment.

58. Fourth, the 1986 amendments[47] contained no corresponding amendment of limitation periods (now s 178), which would have been a natural consequential change had it been intended to extend eligibility to purchasers of reserved land but not purchasers of land otherwise injuriously. On the Respondents' case, one may be obliged to read s 178(1)(a) as if three limitation periods were

---

42 Second Reading Speech, Hansard 4 November 1969, p. 2098, (third paragraph) as quoted by Martin CJ at [57], see also [58].

43 Second Reading Speech, Hansard 12 November 1969, p. 2607, (2nd paragraph) and p. 2608, (4th paragraph).

44 Second Reading Speech, Hansard 12 November 1969, p.2608, (last paragraph).

45 Second Reading Speech, Hansard 12 June 1986, p.173, (Legislative Assembly) and Second Reading Speech, Hansard 2 July 1986, p.1199, (Legislative Council).

46 Committee Notes, Hansard 2 July 1986, p.1209, (second and third paragraphs).

47 Trial Judge Reasons at [71]. See also Annexure A - Part B page 38 (footnote 53).

independent of each other. This would have the unacceptable consequence that compensation for the type of injurious affection under s 174(1)(b) is also (arguably) extended to purchasers by a side wind (that form of injurious affection is not covered by s 177(2), upon which McHugh J relied for a significant policy change).

59. The second, third and fourth points together refute the implication upon which McHugh J relied in *Temwood.*

(9) Callinan J should not be followed

60. Callinan J concluded that s.173(1) should not be read as confined to the class of persons who owned land at the date of the reservation.[48]

61. Aspects of his Honour's reasoning have been addressed above. Callinan J:

(a) like the Court of Appeal, relied on the principles in *Marshall* and *Kettering,*[49] (see above at [48]-[49]);

(b) like the Court of Appeal, concluded that, to confine the class of claimants to the owners at the date of reservation, words must be read into s. 177(2)[50] (see [45]-[47] above); and

(c) relied upon extrinsic materials to support his construction (the relevant parts of Hansard are addressed above at [54]-[57]).[51]

62. Callinan J addressed the question as if a *person* were injuriously affected by the making of a scheme: see [161] of *Temwood.* This led to his Honour addressing the wrong question, and erroneously relying upon the proposition that "*[a]ny person who owns land affected by a scheme is injuriously affected by the making of the Scheme even if that person only acquired the land after the Scheme was made.*"

---

48 *Temwood* at [161].
49 *Temwood* at [160]–[161].
50 *Temwood* at [163] – [166].
51 *Temwood* at [173] – [175]. Callinan J referred to the Metropolitan Region Scheme Report 1962 and the Second Reading Speech for the 1962 amendments to the Metropolitan Region Scheme Act which first introduced provisions that reflect s. 177(1). The extrinsic materials for the subsequent amendments in 1969 and 1986 (which introduced and then amended provisions that reflect s.177(2)) are addressed above at [54] – [57].

63. Callinan J at [163]-[166] focussed on the limitation period provision, now s 178(1) PD Act. However, the interpretation of s 178(1) is controlled by the interpretations of ss 173(1) and 177, not vice versa.

64. Callinan J relied on his interpretation being fairer than that of Gummow and Hayne JJ.[52] However, Callinan J was not referred to the prospect that compensation would be payable to a person who has suffered no loss, or whose own lack of diligence led to a loss, which is a powerful fairness reason to confine the class in the absence of safeguards comparable to those in s 177(3)(a).

Part VII: APPLICABLE STATUTORY PROVISIONS

65. Extracted in Annexure A are the applicable and other relevant statutory provisions.

Part VIII: ORDERS SOUGHT

66. The Appellant seeks the following orders.

1. The appeal be allowed.
2. The declaration made by the Honourable Justice Beech on 22 December 2014, and the answer to the question of law for determination in the special case, be set aside.
3. The question of law for determination in the special case be answered: no.
4. It is declared that the Respondent's claim for compensation for injurious affection lodged with the Appellant on or about 15 July 2008 is invalid by reason of the sale of the land following the date of the reservation under the Peel Region Scheme.
5. The Respondent pay the Appellant's costs of the action, the appeal to the Court of Appeal and the appeal in this Court.

---

[52] *Temwood* at [38] and [41] per McHugh J; [172] per Callinan J.

Part IX: ORAL ARGUMENT TIME ESTIMATE

67. The Appellant estimates that it will take 2 hours to present its oral argument.

Dated this 6th day of October 2016

KM Pettit SC
Francis Burt Chambers

TC Russell
State Solicitor's Office
Telephone: (08) 9264 1888
Facsimile: (08) 9264 1440
Email: t.russell@sso.wa.gov.au

Annexure A – Part A

The provisions of Part 11 of the *Planning and Development Act 2005* (WA) (PD Act) are extracted below from Reprint 1 (23 November 2007). Reprint 1 was in force at the time the Respondents applied for development approval.

The Part 11 provisions remain substantially in force in this form save for minor stylistic amendments. For example, in Reprint 2 of the PD Act (18 February 2011) in some sections (ss 174, 177, 178, 179, 180, 181) a connective 'and' or a disjunctive 'or' was included after each subsection (not just the penultimate subsection as appeared in Reprint 1).

Sections 196 and 197 (which are not the focus of these proceedings) were amended in 2010 (No. 28 of 2010) to include references to 'improvement plan'.

Reprint 2 also amended the headings of sections within Part 11 as follows:

Section	Section headings in Reprint 1 (23 November 2007)	Section headings in Reprint 4 (1 April 2016) and in current version (04-b0-00) (1 July 2016)
Div 1		
171	Only one entitlement to compensation	Entitlement to compensation, limits on
Div 2		
172	Meaning of terms used in this Division	Terms used
173	Entitlement to compensation where land injuriously affected by planning scheme	Injurious affection, compensation for
174	No change	
175	No entitlement to compensation where provisions are, or could have been, in certain other laws	No compensation if scheme's provisions are, or could have been, in certain other laws
176	How questions determined	Questions as to injurious affection etc., how determined
177	No change	
178	When claim for compensation may be made	Claim for compensation, time for making
179	Amount of compensation for injurious affection arising out of reservation for public purposes	Injurious affection due to land being reserved, amount of compensation for
180	Notification may be lodged if compensation paid	Notating title to land after compensation paid
181	Responsible authority may recover compensation if reservation revoked or reduced	Recovering paid compensation if reservation revoked or reduced
182	No change	
183	No change	

Div 3		
184	Betterment, and compensation where scheme amended or repealed	Betterment; compensation for expenses rendered abortive by amendment or repeal of scheme
185	Compensation in relation to interim development order	Injurious affection due to interim development order
186	Compensation in relation to planning control area	Injurious affection due to planning control area
Div 4		
187	Election to acquire instead of compensation	Acquiring land in lieu of paying compensation
188	How value of land is to be determined	Land to be acquired under s. 187, valuing
189	Commission may purchase land before scheme has force of law	Land in proposed region planning scheme, Commission may purchase
190	Responsible authority may purchase land	Land for planning scheme, responsible authority may purchase
191	Responsible authority may take land comprised in scheme	Land in scheme area, compulsory acquisition of
192	Valuation of land or improvements acquired by responsible authority	Land etc. to be acquired under s. 191, valuing
193	Responsible authority has powers of owner of land	Responsible authority's powers as to acquired land
194	Responsible authority may grant easements	Responsible authority may grant easement over acquired land
195	Commission may acquire land included in improvement plan	Land in improvement plan, Commission's powers to acquire
196	Commission may dispose of land acquire by it	Commission may sell etc. acquired land
197	Governor may declare land to be held and used for region planning scheme	Declaring land for public work to be instead held etc. for region planning scheme or improvement plan

Division 1 — General matters in relation to compensation

171. Only one entitlement to compensation

(1) If compensation has been paid under a provision of this Part in relation to a matter or thing no further compensation is payable under any other provision of this Act as a result of the same matter or thing.

(2) When a person is entitled to compensation under this Act in respect of any matter or thing, and is also entitled to compensation in respect of the same matter or thing under any other written law, that person is not entitled to compensation in respect of that matter or thing both under this Act and that

other written law, and is not entitled to any greater compensation under this Act than that person would be under the other written law.

Division 2 — Compensation where land injuriously affected by planning scheme

172. Meaning of terms used in this Division

In this Division —

"Board" means the Board of Valuers established under section 182;

"non-conforming use" means a use of land which, though lawful immediately before the coming into operation of a planning scheme or amendment to a planning scheme, is not in conformity with a provision of that scheme which deals with a matter specified in Schedule 7 clause 6 or 7;

"public purpose" means a purpose which serves or is intended to serve the interests of the public or a section of the public and includes a public work.

173. Entitlement to compensation where land injuriously affected by planning scheme

(1) Subject to this Part any person whose land is injuriously affected by the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority.

(2) Despite subsection (1) a person is not entitled to obtain compensation under this section on account of any building erected, or any contract made, or other thing done with respect to land included in a planning scheme after the date of the approval of a planning scheme or amendment, or after such other date as the Minister may fix for the purpose, being not earlier than the date of the approval of the scheme or amendment.

(3) A responsible authority may make agreements with owners for the development of their land during the time that the planning scheme or amendment is being prepared.

174. When land is injuriously affected

(1) Subject to subsection (2), land is injuriously affected by reason of the making or amendment of a planning scheme if, and only if —

(a) that land is reserved (whether before or after the coming into operation of this section) under the planning scheme for a public purpose;

(b) the scheme permits development on that land for no purpose other than a public purpose; or

(c) the scheme prohibits wholly or partially —

(i) the continuance of any non-conforming use of that land; or

(ii) the erection, alteration or extension on the land of any building in connection with or in furtherance of, any non-conforming

use of the land, which, but for that prohibition, would not have been an unlawful erection, alteration or extension under the laws of the State or the local laws of the local government within whose district the land is situated.

(2) Despite subsection (1)(c)(ii), a planning scheme which prescribes any requirement to be complied with in respect of a class or kind of building is not to be taken to have the effect of so prohibiting the erection, alteration or extension of a building of that class or kind in connection with, or in furtherance of that class or kind in connection with, or in furtherance of, non-conforming use.

(3) Where a planning scheme wholly or partially prohibits the continuance of any non-conforming use of any land or the erection, alteration or extension of any building in connection with or in furtherance of a non-conforming use of any land, no compensation for injurious affection is payable in respect of any part of the land which immediately prior to the coming into operation of the scheme or amendment does not comprise —

(a) the lot or lots on which the non-conforming use is in fact being carried on;

(b) if the prohibition relates to a building or buildings standing on one lot, the lot on which the building stands or the buildings stand; or

(c) if the prohibition relates to a building or buildings standing on more than one lot, the land on which the building stands or the buildings stand and such land, which is adjacent to the building or buildings, and not being used for any other purpose authorised by the scheme, as is reasonably required for the purpose for which the building or buildings is or are being used.

(4) If any question arises under subsection (3) as to whether at any particular date, any land —

(a) does or does not comprise the lot or lots on which a non-conforming use is being carried on;

(b) is or is not being used for any purpose authorised by a scheme; or

(c) is or is not reasonably required for the purpose for which any building is being used,

the claimant or responsible authority may apply to the State Administrative Tribunal for determination of that question.

175. No entitlement to compensation where provisions are, or could have been, in certain other laws

When land is alleged to be injuriously affected by reason of the making or amendment of a planning scheme, no compensation is payable in respect of the injurious affection if or so far as the relevant provisions of the planning scheme are —

(a) also contained in any Act, or in any order having the force of an Act of Parliament, in operation in the area; or

(b) such as would have been enforceable without compensation if they had been contained in local laws.

176. How questions determined

(1) A claimant or responsible authority may apply to the State Administrative Tribunal for determination of any question as to whether land is injuriously affected.

(2) Any question as to the amount and manner of payment (whether by instalments or otherwise) of the sum which is to be paid as compensation under this Division is to be determined by arbitration under and in accordance with the *Commercial Arbitration Act 1985*, unless the parties agree on some other method of determination.

177. When compensation is payable if land reserved for public purpose

(1) Subject to subsection (3), when under a planning scheme any land has been reserved for a public purpose, no compensation is payable by the responsible authority for injurious affection to that land alleged to be due to or arising out of such reservation until —

(a) the land is first sold following the date of the reservation; or

(b) the responsible authority —

(i) refuses an application made under the planning scheme for approval of development on the land; or

(ii) grants approval of development on the land subject to conditions that are unacceptable to the applicant.

(2) Compensation for injurious affection to any land is payable only once under subsection (1) and is so payable —

(a) under subsection (1)(a) to the person who was the owner of the land at the date of reservation referred to in subsection (1)(a); or

(b) under subsection (1)(b) to the person who was the owner of the land at the date of application referred to in subsection (1)(b),

unless after the payment of that compensation further injurious affection to the land results from —

(c) an alteration of the existing reservation of the land; or

(d) the imposition of another reservation of the land.

(3) Before compensation is payable under subsection (1) —

(a) when the land is sold, the person lawfully appointed under section 176 to determine the amount of the compensation is to be satisfied that —

(i) the owner of the land has sold the land at a lesser price than the owner might reasonably have expected to receive had there been no reservation of the land under the planning scheme;

(ii) the owner before selling the land gave written notice to the responsible authority of the owner's intention to sell the land; and

(iii) the owner sold the land in good faith and took reasonable steps to obtain a fair and reasonable price for the land;

or

(b) when the responsible authority refuses an application made under the planning scheme for approval of development on the land or grants approval of development on the land subject to conditions that are unacceptable to the applicant, the person lawfully appointed under section 176 to determine the amount of the compensation is to be satisfied that the application was made in good faith.

178. When claim for compensation may be made

(1) A claim for compensation for injurious affection to land by the making or amendment of a planning scheme is to be made —

(a) in the case of a claim in respect of injurious affection referred to in section 174(1)(a) or (b), at any time within 6 months after —

(i) the land is sold;

(ii) the application for approval of development on the land is refused; or

(iii) the approval is granted subject to conditions that are unacceptable to the applicant;

or

(b) in the case of a claim in respect of injurious affection referred to in section 174(1)(c), within the time, if any, limited by the planning scheme.

(2) The time limited by a planning scheme under subsection (1)(b) is to be not less than 6 months after the date when notice of the approval of the scheme is published in the manner prescribed by the regulations.

179. Amount of compensation for injurious affection arising out of reservation for public purposes

(1) Subject to this Division, the compensation payable for injurious affection due to or arising out of the land being reserved under a planning scheme, where no part of the land is purchased or acquired by the responsible authority, is not to exceed the difference between —

(a) the value of the land as so affected by the existence of such reservation; and

(b) the value of the land as not so affected.

(2) The values referred to in subsection (1)(a) and (b) are to be assessed as at the date on which —

(a) the land is sold as referred to in section 178(1)(a);

(b) the application for approval of development on the land is refused; or

(c) the approval is granted subject to conditions that are unacceptable to the applicant.

180. Notification may be lodged if compensation paid

(1) When compensation for injurious affection to any land has been paid under section 177, the responsible authority may lodge with the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, a notification in a form acceptable to the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, specifying —

(a) the date of payment of compensation;

(b) the amount of compensation so paid; and

(c) the proportion (expressed as a percentage), which the compensation bears to the unaffected value of the land as assessed under section 179(2).

(2) On receipt of the notification from the responsible authority, the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, is to register the notification.

181. Responsible authority may recover compensation if reservation revoked or reduced

(1) Where —

(a) compensation for injurious affection to land (the **"original compensation"**) has been paid to an owner of land in the circumstances set out in section 177; and

(b) as a result of the planning scheme being amended or revoked the reservation of the land for a public purpose is revoked or the area of the land the subject of the reservation is reduced,

the responsible authority is entitled to recover from the owner of the land at the date of the revocation or reduction of the reservation an amount (the **"refund"**) which is determined by calculating the relevant proportion (as determined under subsections (4) to (7)) of the value of the land as at the date on which the refund becomes payable under subsection (2).

(2) The refund is not payable by the owner of the land until the land is first sold or subdivided following the date of the revocation or reduction referred to in subsection (1)(b) unless otherwise agreed by the owner and the responsible authority.

(3) If the land is owned by 2 or more people they are jointly and severally liable to pay the refund.

(4) When the reservation has been revoked the relevant proportion for the purposes of subsection (1) is the same as the proportion referred to in section 180(1)(c) in relation to the original compensation.

(5) Where the area of the reservation has been reduced the relevant proportion for the purposes of subsection (1) is to be determined as follows —

(a) a notional amount of compensation is determined under sections 177 and 179 as if —

(i) the reservation had never occurred;

(ii) a reservation of the reduced area had occurred when the reduction occurred; and

(iii) the land were being sold;

(b) the proportion (expressed as a percentage) which that notional amount of compensation bears to the current value of the land (unaffected by the existence of the reservation) is calculated; and

(c) the relevant proportion is then determined by deducting the proportion calculated under paragraph (b) from the proportion referred to in section 180(1)(c) in relation to the original compensation.

Example:

Original compensation proportion	25%
Less	
Notional compensation proportion	15%
Relevant proportion =	10%

(6) Despite subsection (4), where the reservation is revoked after an amount has been recovered under subsection (2) in respect of a previous reduction of the reservation, the relevant proportion is the same as the notional compensation proportion calculated under subsection (5)(a) and (b) in respect of the previous reduction.

(7) Despite subsection (5), where the reservation is reduced after an amount has been recovered under subsection (2) in respect of a previous reduction of the reservation, the relevant proportion is to be determined as follows —

(a) a notional compensation proportion is calculated under subsection (5)(a) and (b) in respect of the subsequent reduction; and

(b) the relevant proportion is then determined by deducting the proportion referred to in paragraph (a) from the notional compensation proportion calculated under subsection (5)(a) and (b) in respect of the previous reduction.

Example:

Notional compensation proportion calculated under subsection (5)(a) and (b) on previous reduction	15%
Less	
Notional compensation proportion calculated under subsection (5)(a) and (b) on subsequent reduction	8%
Relevant proportion on subsequent reduction =	7%

(8) For the purposes of subsections (1) and (5)(b) the value of the land is to be determined by one of the methods set out in section 188(2)(a), (b) or (c), but that value is to be determined without regard to any increase in value attributable to factors unrelated to the reservation or to its revocation or reduction.

(9) When the responsible authority has an entitlement to recover an amount under subsection (1) it has an interest in the land and may lodge with the Registrar a notification in a form acceptable to the Registrar of the existence of that interest, and may withdraw, in a form acceptable to the Registrar, any notification so lodged.

(10) On receipt of the notification or a withdrawal of notification from the responsible authority, the Registrar is to register the notification or withdrawal of notification.

(11) Before selling or subdividing land in respect of which a notification is lodged under subsection (9), the owner of the land is to give written notice to the responsible authority, in accordance with the regulations, of the owner's intention to sell or subdivide the land.

(12) Where a notification is lodged under subsection (9) the Registrar of Titles is not to register a transfer of the land without the consent of the responsible authority.

(13) Where a notification as to the land is lodged under subsection (9) with the Registrar of Deeds and Transfers without the consent of the responsible authority, registration of the document the subject of the notification is null and void.

(14) Subject to subsection (15), in the case of land reserved under a region planning scheme, subsection (1) has effect whether the reservation of the land occurred before the commencement of this section or occurs after that commencement.

(15) In the case of land reserved under the Metropolitan Region Scheme, where the reservation occurred before the commencement of this Act, subsection (1) does not have effect if —

(a) the revocation or reduction of the reservation occurred before 1 July 1998; or

(b) the sale or subdivision referred to in subsection (2) occurred before 1 March 1995,

but otherwise has effect whether the revocation or reduction occurred before the commencement of this section or occurs after that commencement.

(16) In any other case subsection (1) has effect if the revocation or reduction occurs after the commencement of this section.

(17) In this section —

"register" means to register under the *Registration of Deeds Act 1856* or *Transfer of Land Act 1893*, as the case requires;

"Registrar" means the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires.

182. Board of Valuers

(1) A Board of Valuers is established.

(2) The Board consists of the following members appointed by the Governor —

(a) a chairperson nominated by the Commission; and

(b) 3 other members nominated by the body known as The Real Estate Institute of Western Australia and incorporated under the *Associations Incorporation Act 1987*.

(3) Each of the persons appointed to the Board is to be an Associate or a Fellow of the Australian Property Institute, an association incorporated under the laws of South Australia.

(4) Judicial notice is to be taken of the signature of the chairperson on any finding of the Board.

(5) Schedule 9 has effect.

183. Valuations by the Board

(1) The owner of land that is subjected to injurious affection due to, or arising out of, the land being reserved under a planning scheme for a public purpose who gives notice of intention to sell the land and claim compensation is to, unless the responsible authority waives the requirement, apply to the Board of Valuers in the prescribed manner for a valuation of the land as not so affected and the Board is to make the valuation.

(2) Subject to subsection (4), a valuation made by the Board under subsection (1) is to be communicated to the applicant and to the responsible authority and, for the purposes of this Division, a valuation so made is final.

(3) Upon receipt of a valuation made by the Board under this section, the responsible authority is to advise the owner of the subject land of the minimum price at which the land may be sold without affecting the amount of compensation (if any) payable to him or her under this Division.

(4) Where any land with respect to which a valuation has been made under this section is not sold within a period of 6 months from the making of the valuation, the Board may, at the request of the owner of the land, if in the circumstances of the case it thinks it just to do so, review the valuation and either confirm the valuation or vary it.

(5) Where the Board reviews a valuation under subsection (4), it is to notify the owner of the land and the responsible authority accordingly and upon that notification subsection (3), with such modification as circumstances require, applies to the valuation as reviewed by the Board.

Division 3 — Other compensation

184. Betterment, and compensation where scheme amended or repealed

(1) If, by the expenditure of money by the responsible authority in the making and carrying out of a planning scheme, any land or property is within 12 months of the completion of the work, or of the section of the work affecting the land, as the case may be, increased in value, the responsible authority may recover from any person whose land or property is so increased in value, one half of the amount of that increase.

(2) A claim by a responsible authority for the purposes of subsection (1) is to be made within the time, if any, limited by the planning scheme, not being less than 3 months after the date when notice of the approval of the scheme is first published.

(3) If a planning scheme is amended or repealed by an order of the Minister under this Act any person who has incurred expenditure for the purpose of complying with the planning scheme is entitled to compensation from the responsible authority, in so far as any such expenditure is rendered abortive by reason of the amendment or repeal of the planning scheme.

(4) A question as to the amount and manner of payment (whether by instalments or otherwise) of the sum which —

(a) the responsible authority is entitled to recover under this section from a person whose land is increased in value; or

(b) is to be paid as compensation under this section,

is to be determined by arbitration in accordance with the *Commercial Arbitration Act 1985* or by some other method agreed by the parties.

185. Compensation in relation to interim development order

(1) Compensation for injurious affection to any land within a regional order area or a local order area or for loss arising from any other cause is payable under this Part as a result of the operation of the relevant interim development order if, and only if —

(a) the Commission or the local government administering the interim development order —

(i) refuses an application made under that interim development order for approval of development on that land; or

(ii) grants such an application subject to conditions,

on the ground that the proposed planning scheme for the regional order area or local order area, as the case requires, is to include that land within a reservation for public purposes; and

(b) any decision for the review of which the claimant has made an application under section 249 has been affirmed in whole or in part by the State Administrative Tribunal.

(2) The Commission or local government, as the case requires, may, and if the claimant so requests is to, purchase any land injuriously affected at a price not exceeding the value of that land at the time of —

(a) the refusal of approval; or

(b) the grant of approval subject to conditions,

without regard to any increase in value attributable wholly or in part to the proposed region planning scheme or proposed local planning scheme for the regional order area or local order area in which the land is situated.

(3) If the land is not purchased under subsection (2), when compensation of the kind referred to in subsection (1) is claimed that compensation is to be determined by arbitration in accordance with the *Commercial Arbitration Act 1985* or by some other method agreed by the parties.

186. Compensation in relation to planning control areas

(1) Compensation is payable in respect of land injuriously affected by the declaration, or by the amendment of the declaration, of a planning control area, and land so affected may be acquired by the Commission, in the same circumstances and to the same extent as if the land in the planning control area, instead of being in the planning control area, had been reserved under a planning scheme for a public purpose.

(2) Division 2 applies to compensation payable under this section as if any reference in that Division to compensation for injurious affection to any land were a reference to compensation under this section for injurious affection as a result of the declaration of a planning control area under section 112, or the amendment of the declaration under section 113.

Division 4 — Purchase or compulsory acquisition

187. Election to acquire instead of compensation

(1) Where compensation for injurious affection is claimed as a result of the operation of the provisions of section 174(1)(a) or (b), the responsible authority may at its option elect to acquire the land so affected instead of paying compensation.

(2) The responsible authority, within 3 months of the claim for injurious affection being made, is to by written notice given to the claimant —

(a) elect to acquire the land; or

(b) advise that it does not intend to acquire the land.

(3) Where the responsible authority elects to acquire the land as provided in subsections (1) and (2), if the responsible authority and the owner of the land are unable to agree as to the price to be paid for the land by the responsible authority, the price at which the land may be acquired by the responsible authority is to be the value of the land as determined in accordance with section 188.

(4) If —

(a) an owner of land claims compensation and the responsible authority elects to purchase the land instead of paying compensation; and

(b) the price to be paid for the land by the responsible authority has not been determined for the purposes of subsection (3),

the owner of the land may withdraw the claim for compensation and, upon that withdrawal, the election has no effect.

188. How value of land is to be determined

(1) The value of the land referred to in section 187(3) is to be —

(a) the value of the land on the date the responsible authority elects to acquire the land under that section; and

(b) determined without regard to any increase or decrease, if any, in value attributable wholly or in part to the planning scheme.

(2) Subject to subsection (4), the value of the land referred to in section 187(3) is to be determined —

(a) by arbitration in accordance with the *Commercial Arbitration Act 1985*;

(b) by the State Administrative Tribunal on the owner of the land applying to it for a determination of that value; or

(c) by some other method agreed upon by the responsible authority and the owner of the land.

(3) If arbitration has not commenced under subsection (2)(a), an application has not been made under subsection (2)(b), and no method has been agreed under subsection (2)(c), within 12 months of the date on which the responsible authority elected to acquire the land, the responsible authority may —

(a) refer the matter for determination by arbitration in accordance with the *Commercial Arbitration Act 1985*; or

(b) apply to the State Administrative Tribunal for a determination of that value,

and the value determined under this subsection is to be the value of the land for the purposes of section 187.

(4) Where a dispute is referred for determination under subsection (3)(a) there is to be taken to be, for the purposes of the *Commercial Arbitration Act 1985*, an arbitration agreement to refer the dispute, and the parties to the agreement are to be taken to be the owner of the land and the responsible authority.

189. Commission may purchase land before scheme has force of law

The Commission may, if it considers that any land to which a proposed region planning scheme or a proposed amendment to a region planning scheme is to apply is likely to be comprised in the scheme, purchase the land.

190. Responsible authority may purchase land

The responsible authority may, for the purpose of a planning scheme, in the name and on behalf of such responsible authority, purchase any land comprised in the planning scheme from any person who may be willing to sell the same.

191. Responsible authority may take land comprised in scheme

(1) The responsible authority may, for the purpose of a planning scheme and with the consent of the Governor, take compulsorily under and subject to Part 9 of the *Land Administration Act 1997* (but subject to subsection (3)), any land comprised in the scheme, and whether situate within or without the boundaries of the district of the responsible authority.

(2) Land acquired under subsection (1) is to be acquired in the name and on behalf of the responsible authority.

(3) When any land is taken compulsorily under the powers conferred by this section the provisions of —

(a) sections 166 to 171 inclusive; and

(b) section 180,

of the *Land Administration Act 1997* do not apply to or in respect of the land or the taking or in any manner whatsoever, and that Act is to be read and construed as if the provisions were deleted.

192. Valuation of land or improvements acquired by responsible authority

(1) Despite Part 10 of the *Land Administration Act 1997*, the value of any land or improvements on land which is compulsorily acquired by a responsible authority under section 191 is, for the purpose of assessing the amount of compensation to be paid for the land and improvements to be assessed —

(a) without regard to any increase or decrease in value attributed wholly or in part to any of the provisions contained in, or to the operation or effect of, the relevant planning scheme; and

(b) having regard to values current at the time of acquisition,

but in assessing the amount of compensation regard is to be had to any amounts of compensation already paid, or payable, by the responsible authority in respect of the land under Division 2.

(2) Where compensation has been paid, or is payable, in respect of land under Division 2, then, subject to subsection (3), there is to be deducted from the compensation assessed under subsection (1) an amount that bears the same ratio to the compensation so assessed as the compensation paid or payable under that Division bears to the unaffected value of the land, as determined under this Part.

(3) In assessing the amount to be deducted from compensation under subsection (2), the person lawfully appointed to determine the amount of compensation is to have regard to —

(a) any improvements or demolitions lawfully made to or on the land, subsequently to the determination of the unaffected value of the land; and

(b) to the earlier termination of the tenure of the land, where the compensation might otherwise have been affected by an assurance given by the responsible authority, and which the responsible authority is by this paragraph authorised to give, that the tenure was to be of a greater period.

193. Responsible authority has powers of owner of land

Subject to the relevant planning scheme, a responsible authority which takes or acquires land under this Part has all the powers of an owner in respect of the land, and may erect buildings on the land or otherwise improve and make use of the land in such manner as the responsible authority thinks fit.

194. Responsible authority may grant easements

(1) The responsible authority may grant to any person any easement in, upon, through, under, or over, any land taken or acquired for planning purposes, subject to such conditions and payments of such rents as the responsible authority thinks fit.

(2) A grant of an easement under subsection (1) is subject to revocation without compensation at any time the responsible authority thinks fit, or in the case of a breach of any condition under which an easement may have been granted.

195. Commission may acquire land included in improvement plan

(1) The Commission may while the relevant region planning scheme has the force of law, purchase or otherwise acquire any land included in an improvement plan in force under section 119 by agreement with the owner of the land.

(2) In default of agreement under subsection (1), the Commission may acquire the land compulsorily under and subject to Part 9 of the *Land Administration Act 1997*, as modified by this section.

(3) Subject to this section, the provisions of Parts 9 and 10 of the *Land Administration Act 1997* apply to the taking of any land compulsorily under this section, with such modifications as circumstances require and in so applying those provisions any reference to the Minister administering that Act is to be read as a reference to the Minister administering this Act.

(4) Nothing in this section is to be construed as taking away or in any way derogating from or diminishing any power otherwise conferred by this or any other Act upon the Commission or any other authority, body or person.

196. Commission may dispose of land acquired by it

(1) The Commission is to hold for the purposes of the relevant region planning scheme any land acquired by it under this Part and may, subject to subsections (2) and (3), dispose of or alienate that land —

(a) for or in furtherance of the provisions or likely provisions of the relevant region planning scheme; or

(b) if that land is no longer required by the Commission.

(2) Subject to subsection (3), except with the consent of the Governor, the Commission is not to dispose of or alienate any land compulsorily acquired by it other than for or in furtherance of the provisions or likely provisions of the relevant region planning scheme.

(3) In exercising a power to dispose of or alienate land conferred by this section, the Commission is to have regard to the general principle that in such cases land acquired by the Commission should, if in the opinion of the Minister it is practicable and appropriate to do so, be first offered for sale at a reasonable price determined by the Minister to the person from whom that land was so acquired.

197. Governor may declare land to be held and used for region planning scheme

(1) Where any land held, taken, resumed or otherwise acquired under any Act, for any public work, is in the opinion of the Governor not required for that work and is required for the purposes or likely purposes of a region planning scheme, the Governor, despite Part 9 Division 5 of the *Land Administration Act 1997*, may declare by notice published in the *Gazette* that the land is to be held and may be used for the purposes of the region planning scheme.

(2) From the date of the publication of the notice the land described in the notice, by force of this section, vests in the Commission for the purposes of the region planning scheme.

(3) The Commission is to ensure that a memorial is lodged with the Registrar in respect of land vested in the Commission under this section as soon as is practicable after the land is so vested.

(4) The memorial is to be —

(a) accompanied by the notice published under subsection (1) in respect of the relevant land; and

(b) in a form approved by the Registrar.

(5) The Registrar is to register the memorial against the relevant land and take such steps as are necessary to record the vesting.

(6) In this section —

"register" means to register under the *Registration of Deeds Act 1856* or *Transfer of Land Act 1893*, as the case requires;

"Registrar" means the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires.

Annexure A - Part B

The legislative scheme for compensation for injurious affection under the *Metropolitan Region Scheme* at the time *WAPC v Temwood Holdings Pty Ltd* [2004] HCA 63; (2004) 221 CLR 30 was heard and determined includes provisions of the *Town Planning and Development Act 1928* (WA) and the *Metropolitan Region Town Planning Scheme Act 1959* (WA) which are now repealed.

At the time of *Temwood*, the *Western Australian Planning Commission Act 1985* (WA) enabled the Western Australian Planning Commission to prepare 'regional planning schemes' in any part of Western Australia and included (at Part IIB) provisions relating to compensation for injurious affection. It is not necessary to include the (now repealed) PART IIB provisions for the purposes of the appeal.

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

Part 1 – Town Planning

11. Compensation

(1) Any person whose land or property is injuriously affected by the making of a town planning scheme shall, if such person makes a claim within the time, if any, limited by the scheme (such time not being less than 6 months after the date when notice of the approval of the scheme is published in the manner prescribed by the regulations), be entitled to obtain compensation in respect thereof from the responsible authority:

Provided that a person shall not be entitled to obtain compensation under this section on account of any building erected, or any contract made, or other thing done with respect to land included in a scheme after the date of the approval of a scheme, or after such other date as the Minister may fix for the purpose, being not earlier than the date of the approval of the scheme.

Provided also that the local government may make agreements with owners for the development of their land during the time that the town planning scheme is being prepared.

(2) Whenever, by the expenditure of money by the responsible authority in the making and carrying out of any town planning scheme, any land or property is within 12 months of the completion of the work, or of the section of the work affecting such land, as the case may be, increased in value, the responsible authority shall be entitled to recover from any person whose land or property is so increased in value, one half of the amount of such increase, if the responsible authority makes a claim for that purpose within the time, if any, limited by the scheme, not being less than 3 months after the date when notice of the approval of the scheme is first published.

(3) Where a town planning scheme is altered or revoked by an order of the Minister under this Act, any person who has incurred expenditure for the purpose of complying with the scheme shall be entitled to compensation from the responsible authority, in so far as any such expenditure is rendered abortive by reason of the alteration or revocation of the scheme.

(4) Any question as to whether any land or property is injuriously affected or increased in value within the meaning of this section, and as to the amount and manner of payment (whether by instalments or otherwise) of the sum which is to be paid as compensation under this section, or which the responsible authority is entitled to recover from a person whose land is increased in value shall be determined by arbitration under and in accordance with the *Commercial Arbitration Act 1985*, unless the parties agree on some other method of determination.

12. Compensation not recoverable in certain cases

(1) Where land or property is alleged to be injuriously affected by reason of any provisions contained in a town planning scheme, no compensation shall be payable in respect thereof if or so far as the provisions are also contained in any public general or local Act, or in any order having the force of an Act of Parliament, in operation in the area, or are such as would have been enforceable without compensation, if they had been contained in local laws lawfully made by the local government.

(2) Land or property shall not be deemed to be injuriously affected by reason of the making of any provisions inserted in a town planning scheme which, with a view to securing the amenity, health, or convenience of the area included in the scheme, or any part thereof, prescribe the space about, or limit the number of, or prescribe the height, location, purpose, dimensions, or general character of buildings, or any sanitary conditions in connection with buildings, or the quantity of land that may be taken for parks or open spaces, which the local government, having regard to the nature and situation of the land affected by the provisions, considers reasonable for the purpose or which provide for the conservation of any land to which the *Heritage of Western Australia Act 1990* applies.

(2a) (a) In this subsection, unless the context otherwise requires, the expression —

"appointed day" means the day on which the *Town Planning and Development Act Amendment Act 1956*, comes into operation [1];

"land" includes any building or structure on land;

"non-conforming use" means a use of land which, though lawful immediately prior to the coming into operation of a town planning scheme, is not in conformity with any provision of that scheme which deals with a matter specified in clause 10 of the First Schedule;

"public purpose" means a purpose which serves or is intended to serve the interests of the public or a section of the public and includes a public work within the meaning of the expression **"public work"** in the *Public Works Act 1902*.

(b) Subject to the provisions of paragraph (c), land shall not be deemed to be injuriously affected by reason of any provision of a town planning scheme which comes into force on or after the appointed day, and which deals with any of the matters specified in clause 10 of the First Schedule, unless the scheme

(i) permits development on that land for no purpose other than a public purpose; or

(ii) prohibits wholly or partially the continuance of any non-conforming use of that land or the erection, alteration or extension on the land of any building in connection with or in furtherance of, any non-conforming use of the land, which, but for that prohibition, would not have been an unlawful erection, alteration or extension under the laws of the State or the local laws of the local government within whose district the land is situated.

(c) Notwithstanding the provisions of paragraph (b) a provision of a town planning scheme which prescribes any requirement to be complied with in respect of a class or kind of building shall not be deemed to have the effect of so prohibiting the erection, alteration or extension of a building of that class or kind in connection with, or in furtherance of non-conforming use.

(d) Where a town planning scheme, which comes into operation on or after the appointed day, wholly or partially prohibits the continuance of any non-conforming use of any land or the erection, alteration or extension of any building in connection with or in furtherance of a non-conforming use of any land, no compensation for injurious affection is payable in respect of any part of the land which immediately prior to the coming into operation of the scheme, does not comprise

(i) the lot or lots on which the non-conforming use is in fact being carried on; or

if the prohibition relates to a building or buildings standing on one lot,

(ii) the lot on which the building stands or the buildings stand; or

if the prohibition relates to a building or buildings standing on more than one lot,

(iii) the land on which the building stands or the buildings stand and such land, which is adjacent to the building or buildings, and not being used for any other purpose authorised by the scheme, as is reasonably required for the purpose for which the building or buildings is or are being used.

(e) Notwithstanding the provisions of section 11, if any question arises under paragraph (d) as to whether at any particular date, any land does or does not comprise the lot or lots on which a non-conforming use is being carried on, or is or is not being used for any purpose authorised by a scheme, or is or is not reasonably required for the purpose for which any building is being used that question shall, on the application of the claimant or the responsible authority be determined by arbitration under and in accordance with the *Commercial Arbitration Act 1985*, unless the parties agree on some other method of determination.

(3) When a person is entitled to compensation under this Act in respect to any matter or thing, and is also entitled to compensation in respect to the same matter or thing under any other enactment, he shall not be entitled to

compensation in respect of that matter or thing both under this Act and that other enactment, and shall not be entitled to any greater compensation under this Act than he would be under such other enactment.

Metropolitan Region Town Planning Scheme Act 1959 (WA)

Part V — Compensation, betterment, acquisition

36. Application of sections 11 and 12 of Town Planning Act to Scheme

(1) For the purposes of applying the provisions of sections 11 and 12 of the Town Planning Act to the provisions of the Scheme, the former provisions shall be read and construed as if —

(a) the Commission were the "responsible authority or local government" wherever referred to in the sections; and

(b) the passage, "varied, amplified or revoked by the Commission" were substituted for the passage, "altered or revoked by an order of the Minister under this Act" in section 11(3); and

(c) those provisions included subsections (3), (3a), (4), (5) and (6).

(2) (a) The Scheme may provide that where compensation for injurious affection is claimed as a result of the operation of the provisions of section 12(2a)(b)(i) or (ii) of the Town Planning Act the Commission may at its option elect to acquire the land so affected instead of paying compensation.

(b) The Commission shall, within 3 months of the claim for injurious affection being made, or where such a claim is made before the date of the coming into operation of the *Metropolitan Region Town Planning Scheme Act Amendment Act 1968* [1], within 3 months of that date, by notice in writing given to the claimant, either elect to acquire the land or advise that it does not intend to acquire the land.

(2a) Where the Commission elects to acquire the land as provided in subsection (2), if the Commission and the owner of the land are unable to agree as to the price to be paid for the land by the Commission, the price at which the land may be acquired by the Commission shall be the value of the land as determined in accordance with subsection (2b).

(2b) The value of the land referred to in subsection (2a) shall be the value thereof on the date the Commission elects to acquire the land under that subsection, and that value shall be determined —

(a) by arbitration in accordance with the *Commercial Arbitration Act 1985*; or

(b) by the State Administrative Tribunal on the owner of the land applying to it for a determination of that value;

or

(c) by some other method agreed upon by the Commission and the owner of the land,

and that value shall be determined without regard to any increase or decrease, if any, in value attributable wholly or in part to the Scheme.

(3) Subject to subsection (4), where under the Scheme any land has been reserved for a public purpose, no compensation is payable by the responsible authority for injurious affection to that land alleged to be due to or arising out of such reservation until —

(a) the land is first sold following the date of the reservation; or

(b) the responsible authority refuses an application made under the Scheme for permission to carry out development on the land or grants permission to carry out development on the land subject to conditions that are unacceptable to the applicant.

(3a) Compensation for injurious affection to any land is payable only once under subsection (3) and is so payable —

(a) under paragraph (a) of that subsection to the person who was the owner of the land at the date of reservation; or

(b) under paragraph (b) of that subsection to the person who was the owner of the land at the date of application,

referred to in that paragraph, unless after the payment of that compensation further injurious affection to the land results from —

(c) an alteration of the existing reservation thereof; or

(d) the imposition of another reservation thereon.[53]

(4) Before compensation is payable under subsection (3) —

(a) where the land is sold, the person lawfully appointed to determine the amount of the compensation shall be satisfied —

(i) that the owner of the land has sold the land at a lesser price than he might reasonably have expected to receive had there been no reservation of the land under the Scheme;

---

[53] Before amendments in 1986 (No 6 of 1986) s36(3) and (3a) of the *Metropolitan Region Town Planning Scheme Act 1959* (WA) provided as follows:

(3) Subject to subsection (4) of this section, where under the Scheme any land has been reserved for a public purpose, no compensation is payable by the responsible authority for injurious affection to that land alleged to be due to or arising out of such reservation until:

(a) the land is first sold following the date of the reservation; or

(b) the responsible authority refuses an application made under the Scheme for permission to carry out development on the land or grants permission to carry out development on the land subject to conditions that are unacceptable to the applicant.

(3a) Compensation for injurious affection to any land is payable only once under paragraph (a) of subsection (3) of this section and is payable to the person who is the owner of the land at the date of reservation referred to in that paragraph, unless after the payment of that compensation further injurious affection to the land results thereafter from an alteration of the existing reservation on the land or the imposition of another reservation thereon.

(ii) that the owner before selling the land gave notice in writing to the responsible authority of his intention to sell the land; and

(iii) that the owner sold the land in good faith and took reasonable steps to obtain a fair and reasonable price for the land;

or

(b) where the responsible authority refuses an application made under the Scheme for permission to carry out development on the land or grants permission to carry out development on the land subject to conditions that are unacceptable to the applicant, the person lawfully appointed to determine the amount of compensation shall be satisfied that the application was made in good faith.

(5) A claim for compensation under subsection (3) shall be made at any time within 6 months after the land is sold or the application for permission to carry out development on the land is refused or the permission is granted subject to conditions that are unacceptable to the applicant.

Annexure A – Part C

Section 208 of the *Land Administration Act 1997* (WA) which replaced (now repealed) section 37 of the *Land Acquisition and Public Works Act 1902* (WA).

Land Administration Act 1997 **(WA)**

Part 10 - Compensation

208. Who can claim compensation

(1) A claim for compensation may be made by any person entitled to compensation under this Part, or by the person's executor or administrator, whether or not the person has the power to sell and convey the interest on which the right to compensation depends.

(2) Any claim on behalf of beneficiaries of trusts, wards or incapable persons may be made by their trustees or guardians.

Land Acquisition and Public Works Act 1902 **(WA)**

37. By whom compensation may be claimed (now repealed)

A claim for compensation may be made by any person seised, possessed of, or entitled to the land taken or entered upon or to any estate or interest therein, or by the executor or administrator of any such person, whether such person has or has not the power to sell and convey the same. Any claim on behalf *of cestuis que trustent*, wards, lunatics, or idiots, may be made by their trustees, guardians, or committees respectively.

Annexure A – Part D

Interpretation Act 1984 (WA)

18. Purpose or object of written law, use of in interpretation

In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

19. Extrinsic material, use of in interpretation

(1) Subject to subsection (3), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or

(b) to determine the meaning of the provision when —

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law includes —

(a) all matters not forming part of the written law that are set out in the document containing the text of the written law as printed by the Government Printer; and

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of Parliament before the time when the provision was enacted; and

(c) any relevant report of a committee of Parliament or of either House of Parliament that was made to Parliament or that House of Parliament before the time when the provision was enacted; and

(d) any treaty or other international agreement that is referred to in the written law; and

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister before the time when the provision was enacted; and

(f) the speech made to a House of Parliament by a Minister on the occasion of the moving of a motion that the Bill containing the provision be read a second time in that House; and

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the written law to be a relevant document for the purposes of this section; and

(h) any relevant material in any official record of proceedings in either House of Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to —

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.