IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P 47 of 2016

BETWEEN: **WESTERN AUSTRALIAN PLANNING COMMISSION**
Appellant

and

SOUTHREGAL PTY LTD
First Respondent

and

DAVID STEPHEN WEE
Second Respondent

AND:

No. P 48 of 2016

BETWEEN: **WESTERN AUSTRALIAN PLANNING COMMISSION**
Appellant

and

TREVOR NEIL LEITH
Respondent

RESPONDENTS' SUBMISSIONS

Part I: Internet Publication

1. This submission is certified to be in a form suitable for publication on the internet.

Part II: Issues

2. The issue in these appeals is whether a person to whom s. 177(2)(b) of the *Planning and Development Act 2005* (W.A.) (**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 other words, are purchasers of land affected by reservations for a public purpose under a planning scheme (i.e. persons in the position of the respondents in each appeal) entitled to make a claim for compensation for injurious affection against the

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responsible authority (the appellant) in circumstances where compensation has not previously been paid.

Part III: *Judiciary Act 1903*, s. 78B

4. The respondents consider that notice in compliance with s. 78B of the *Judiciary Act* is not required.

Part IV: Facts

5. The respondents generally accept the material facts set out in the narrative of facts and chronology in the Appellant's Submissions (**AS**).

Part V: Applicable statutory provisions

10 6. In addition to the provisions in Annexure A to the AS, it may be necessary to refer to:

(a) the provisions of the *Planning and Development (Consequential and Transitional Provisions) Act 2005*. These are in Attachment A to these Submissions;

(b) the repealed provisions of Part IIB of the *Western Australian Planning Commission Act 1985*. These are in Attachment B to these Submissions.

Part VI: Argument

7. ***Introduction***. The appeals turn on the construction of the provisions of Part 11 Division 2 of the *PD Act* (**Division 2**). The respondents contend that the issue
20 referred to in paragraph 2 above should be answered in the affirmative in each appeal.

8. The primary Judge and the Court of Appeal were correct in their interpretation of Division 2. They applied the fundamental tenet of statutory interpretation that the meaning of a provision must be determined by "by reference to the language of the instrument viewed as a whole" and that each provision should be construed "so that it is consistent with the language and purpose of all of the provisions of the statute".

9. ***Operation of Division 2***. The provisions of Division 2 confer, delimit and provide for quantification of, an entitlement to compensation where land is injuriously affected by the making or amendment of a planning scheme.

30 10. The starting point is s. 173(1) which provides:

> "(i) 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."

11. As the words "Subject to this Part" indicate, there are other provisions of the Act which are to be taken into account in determining whether, and when and by whom, and in what amount such compensation may be claimed. To describe s. 173(1) as the "controlling" provision – as do AS[24], [25] – overstates its role. To the extent to which it is necessary to give it a label, it is the commencing provision. It speaks of an entitlement, but it is necessary to go to the other provisions of Division 2 to derive the ambit and operation of that entitlement in the several circumstances in which it applies.

12. The first of the other provisions which is relevant is s. 173(2). It denies the existence of an entitlement to compensation in respect of things done with respect to the land after the date the planning scheme takes effect (or such later date as may be fixed by the Minister). Again an entitlement to compensation which otherwise might exist under Division 2 will not exist in the circumstances specified in s. 175.

13. Importantly s. 174 sets out the three sets of circumstances in which land is injuriously affected by the making or amendment of a planning scheme. It is a definition provision in that it determines, when, for the purposes of s. 173(1), land "is injuriously affected" by the making or amendment of a planning scheme. The provision of s. 174 directly relevant to the appeals is s. 174(1)(a), the respondents' land having been "reserved" under the PRS "for a public purpose".

14. In relation to the three sets of circumstances referred to in s. 174(1), it may be noted that AS[26] and [27][1] suggest that the absence of provisions equivalent to s. 177, in circumstances to which ss. 174(1)(b) or (c) apply, has the result that the Court of Appeal's decision could not apply to such cases. Therefore it is said that the "natural meaning of s. 173(1)"[2] "controls all eligibility for compensation".

15. That argument should not be accepted for the following reasons. *First*, s. 174(1)(a) on the one hand and ss 174(1)(b) and (c) on the other deal with different topics. Section 174(1)(a) refers to *reservations* for public purposes. As s. 181 recognizes,

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[1] See too AS[30].
[2] I.E. the meaning assumed at AS[21].

the reservation may be revoked or reduced. Sections 174(1)(b) and (c) on the other hand deal with terms of the planning scheme which have immediate effect on the ability to develop land. *Secondly*, it is erroneous to treat s. 174(1)(a) in isolation from the other provisions of Division 2 which refer specifically to it, importantly ss. 177, 178(1)(a) and 179.

16. Section 177 deals with a number of matters affecting claims to compensation in cases falling within s. 174(1)(a), namely when – as the opening words of s. 177(1) make apparent –land is reserved for a public purpose under the planning scheme.

17. In those circumstances s. 177 provides in the first place (in s. 177(1)) that compensation does not become payable for injurious affection to the land until one of two events occurs, the events being:

(a) as provided by s. 177(1)(a), when the land is first sold following the date of reservation;

(b) as provided by s. 177(1)(b), when the appellant refuses an application under the planning scheme for development of the land, or grants such an approval but on terms that are unacceptable to the applicant for approval.

18. Division 2 makes provision for time limits within which claims for compensation may be made. In this regard s. 178(1) provides relevantly that – in a case like this arising under s. 174(1)(a) – the claim may be made at any time within 6 months after:

(a) the land is sold – i.e. where s. 177(1)(a) is applicable; or

(b) the application for approval of development is refused or approval is granted subject to conditions unacceptable to the applicant – i.e. where s. 177(1)(b) is applicable.

19. The reference in s. 178(1) to a claim being made within 6 months after an event referred to in s. 178(1)(a) gives rise to the question – "a claim by whom". That question is answered by s. 177(2). That provision performs relevantly two functions. First, and importantly, it makes it clear that compensation is "payable only once under subsection (1)". Secondly, and equally importantly, it defines the persons to whom such compensation may be payable.

20. Those persons fall into two categories, defined by reference to quite different criteria. They are:

(a) On the one hand the person who was the owner at the date of reservation: see s. 177(2)(a). This applies where the claim for compensation is based on an entitlement arising under s. 177(1)(a), i.e. on the first sale after the reservation.

(b) On the other hand the person who was the owner at the time of the application referred to in s. 177(1)(b) which was unsuccessful or granted on conditions unacceptable to that applicant: s. 177(2)(b).

10 21. That the terms of Division 2 refer to two different sets of circumstances, arising at differing times, may also be seen from the use of differing criteria in s. 177(3)(a) on the one hand and s. 177(3)(b) on the other, and the differing dates for assessment provided for by s. 179(2)(a) on the one hand, and ss 179(2)(b) and (c) on the other.

22. The terms of Division 2 also make it apparent, it is submitted, that the Court of Appeal, per Martin C.J., was correct to say at CA[110]:

> "At the risk of repetition, s. 177(2) of the PD Act, which is specifically directed to the question of the identification of the person entitled to claim compensation expressly refers to the entitlement of two classes of persons – namely, the owner at the date of reservation, and the owner at the date of an
20 application for development approval which is refused or granted subject to unacceptable conditions."

The Chief Justice was also correct to go on to say, as he did in the same paragraph:

> "WAPC submits that on the proper construction of pt 11 div 2 of the PD Act, there is only one class of persons entitled to compensation, namely, the owner at the date of reservation. That construction can only be accepted if the entitlement conferred by the plain and ordinary meaning of the words used in s 177(1) and (2) is significantly constrained by implied limitations not found in the express words of the statute. That approach to the construction of statutes providing for compensation to landowners for the
30 injurious affection of their land is contrary to well established principle and should not be accepted."

23. ***Responses to the contentions in the AS***. The appellant relies on nine submissions in support of a contrary view. Some aspects of these submissions have been dealt with above, and the respondents make the following further submissions.

24. ***"(1) Natural meaning of s. 173(1)". (AS[21]-[23])***. The contention that the natural meaning of s. 173(1) is that only the owner at the time of making or

amendment of the scheme has the right to compensation under the scheme should not be accepted.

25. The contention involves treating s. 173(1) in isolation from the other provisions of Division 2, notably of course s. 177(2), a provision which *in terms* contemplates that the person referred to in s. 177(2)(b) may not be the person referred to in s. 177(2)(a).

26. Further, it is wrong to assume that the temporal connotation assumed by AS[21] is necessarily the natural meaning of s. 173(1): see CA[97] (Martin CJ), CA[115] (Murphy JA). As Martin CJ said at CA[97] there is no difficulty in reading the reference in each of s 173(1) and s 174(1) to injurious affection arising from 'the making or amendment of a planning scheme' as recognition of the inevitable fact that the initial source of any injurious affection must be the making or amendment of a scheme. As Martin CJ went on to say, however:

> "As the injurious affection caused by the making or amendment of a scheme gives rise to a continuing state of affairs and, further, given that the entitlement to compensation as a result of the injurious affection arising from the making or amendment of a scheme is deferred until the manner and extent of the injurious affection is crystallized either by sale of the land at reduced value or by the refusal of development approval or the grant of approval subject to unacceptable conditions, a question necessarily arises as to the identity of the person entitled to compensation upon the occurrence of the event crystallising the inchoate entitlement. That is not a question addressed by s 177(1) and (2)."

27. *Kettering Pty Ltd v. Noosa Shire Council* [2004] HCA 33; (2004) 207 ALR 1, to which AS[22] refers, dealt with quite different provisions and in quite differing circumstances[3]. What does emerge from *Kettering* is that it is necessary to read provisions conferring rights to compensation in the statutory context in which they are found. In the present case to treat s. 173(1) as having a temporal operation unaffected by the other provisions which inform its meaning (such as s. 174) and practical operation (such as ss. 176 and 177) is erroneous.

28. ***"(2) Section 173(1) is "controlling". (AS[24] TO [27]).*** The contention that s. 173(1) is a controlling provision is erroneous. See paragraph 11 above. It is an introductory or commencing provision, but its operation in the several events to which it refers depends on the application of other provisions of Division 2.

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[3] See the relevant provisions set out in *Kettering* at [21] and the discussion at e.g. [25], [28], [31].

29. ***"(3) Object/Policy of the PDA Act". (AS[28] to [32]).*** The contentions in AS[29] and [30] are based on nothing more than pure assertion as to the supposed "implicit" object of Division 2. No provision is relied on to support the assertion. Nothing to which s. 18 of the *Interpretation Act 1984* (WA) might entitle reference supports the suggestion.[4]

30. Further, rather than seeking to imply objects of the nature referred to in AS[29], it is better to pay regard to the safeguards actually provided for by Division 2. They may be seen in the provision that compensation is payable once only (s. 177(2)) and in the provisions of s. 177(3)(a) and (b) as they apply to the circumstances in s. 177(1)(a) or (b) as the case may be.

31. In relation to AS[31] and [32] the restrictions on eligibility for compensation which Parliament has chosen in a case falling within s. 174(1)(a) are:

(a) that compensation is payable once only: s. 177(2);

(b) the time limits provided for by s. 178(1); and

(c) the requirements of s. 177(3).

32. Further the notion that the first sale after reservation terminates all other triggers is not correct for the reasons given at CA[103]-[105], [107]. Such a construction would effectively require the words "the first to occur of" to be read into s. 177(1). In the absence of such words in s. 177(1), the provision should be read such that if land is sold following the date of a reservation, subject to all other requirements of Division 2 of the *PD Act* being satisfied, compensation may still become payable under s. 177(1)(b). The position was well summarized in the words of Beech J. at J[40]:

> "A straightforward reading of the language of s 177(1)(b) and s 177(2)(b) appears to suggest that if the relevant authority refuses a development application (or approves it on unacceptable conditions) for land in respect of which no compensation for injurious affection has been paid, compensation is payable to the person who is the owner of the land at the date of the application. The principles I have just stated suggest that a question that arises is: what features of this statutory scheme have the result that no claim is available?"

33. ***"(4) Redundancy arises if the natural meaning of s. 173(1) is not applied." (AS[33] to [36])***

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[4] Beech J. at J[53] specifically rejected this contention as to the "purpose" of the statutory scheme.

"(5) No redundancy on the Appellant's interpretation." (AS[37] TO [44]). These submissions may be dealt with together.

34. The contention in AS[33], on which AS[33]-[36] depend, does not sufficiently recognize that the term "is injuriously affected by the making or amendment of a planning scheme" is not a term having its own meaning. Rather it is defined, the definition being in s. 174[5].

35. The concept that the *defining* words in s. 174(1) are themselves redundant because they are used in the words defined is, with respect, erroneous. Similarly ss. 175 and 186 are simply the use of the defined term. No redundancy is involved.

10 36. The contentions in AS[37] to [41] depend on the contention in AS[39]. It may be accepted that it provides *one* of the circumstances in which s. 177(2)(b) operates, but (as was said at CA[106]) the fact that the applicant for the developmental approval may not have been the owner at the time the application was made does not detract from the fact that s. 177(2) clearly distinguishes between the entitlement of the owner of the land at the date of reservation, and the entitlement of the owner at the date of application for the development approval.

37. The appellant seeks, in AS[42] and [43], to explain away the apparent generality of s. 177(2)(b) by treating the provision as accommodating the position of those "who obtain property otherwise than by purchase, but stand in the shoes of the original
20 owner, e.g. testamentary and intestate succession".

38. This contention should not be accepted, for the following reasons:

(a) The wording of s. 177(2)(b) in no way supports it. There is no such limitation stated, implied, or indeed required by the provision. Further it may be noted that the provisions referred to in the last sentence of AS[43] indicate the need to make express provision for persons of that capacity, when they are to be included.

(b) There is no particular reason why the entitlement should only apply to those who have obtained property "otherwise than by purchase". The position of such persons may be quite unmeritorious, if any test along the lines of those
30 in AS[29] were to be applied.

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[5] See the words "if, and only if" in s. 174(1).

(c) The considerations adverted to by McHugh J. in *Western Australian Planning Commission v. Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 48, [38]-[42], and by Callinan J. in the same case at 90, [164]-[168], by Beech J. at J[21] and by the Court of Appeal at CA[73], [74].[6]

39. ***"(6) Words "read in" to s. 177(1)." (AS[45] to [49]).*** The Court of Appeal was correct in taking the view that the appellant's contentions involve reading into s. 177 words to the effect that compensation is payable on the first to occur of sale or the making of the unsuccessful or unsatisfactory development approval. See CA[77], [87].

10 40. In particular AS[46] and [47] are incorrect in suggesting that the terms of s. 177(1) and (2) *necessarily* mean that it is payable on the first of those occurrences. There is no reason why that should be so.

41. AS[47] is theoretically correct in saying that there is no absolute rule against interpreting a statute "as if" it contained additional words. As the passage from *Taylor v. Owners of Strata Plan No 11564* (2014) 253 CLR 531 quoted in support of that proposition makes clear, however, such a course is rather unusual: see *Taylor* at 548, [37]-[38]. In particular it will not be adopted when, as here, the insertion of words is to fill so-called "gaps" or to make an insertion which is "too big, or too much at variance with the language in fact used by the legislature":
20 *Taylor* at 548, [38]. See also *Taylor* at [39].

42. The submissions in AS[48] and [49] seek to put on *Marshall v. Director General Department of Transport* (2004) 205 CLR 603 and *Kettering* a gloss not justified by those decisions. In particular Gaudron J.'s observation in *Marshall* at 623, [38] was prefaced by her remark at [37] that:

> "good reason must be shown before it will be concluded that the legislature did not intend the consequences that would flow if the provision in question were given its natural and ordinary meaning."[7]

43. The operation of that principle in circumstances involving affectation of land rights was then stated by her Honour at [38] as follows:

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[6] *Temwood Holdings* is dealt with further below.
[7] That remark – it may be noted – is very apposite here, in relation to the effect to be given to the presence of s. 177(2).

> "Although the rule that legislative provisions are to be construed according to their natural and ordinary meaning is a rule of general application, it is particularly important that it be given its full effect when, to do otherwise, would limit or impair individual rights, particularly property rights. The right to compensation for injurious affection following upon the resumption of land is an important right of that kind and statutory provisions conferring such a right should be construed with all the generality that their words permit. Certainly, such provisions should not be construed on the basis that the right to compensation is subject to limitations or qualifications which are not found in the terms of the statute."

44. There is nothing in that observation which supports the narrow view of it suggested by AS[48] and [49]. Nor is any such narrow view supported by the observations in *Kettering*[8] – concerning *Marshall:* see *Kettering* at [31], [32].

45. ***"(7) PD Act* does not postpone entitlement pending loss becoming "apparent"". (AS[50] to [52]).** The AS under this heading attack the observations of the Court of Appeal at CA[81] to the effect that although the making or amendment of a planning scheme can injuriously effect land by constraining the use to which it can be put, "the precise manner and extent of the injurious affection will not be apparent until the land is sold at a lesser value than it might otherwise have achieved but for the reservation or cannot be developed as desired because of the reservation".

46. The statements made at CA[81] simply express a view which, as Martin CJ there said, explains "at least in part" why the entitlement to compensation was deferred until one of those events occurred. There was nothing novel or heterodox about that view. It had been referred to by Callinan J. in *Temwood* at 91, [169] and 92, [172]. It also has the distinct advantage of seeming sensible. It should also be noted that, contrary to the second and following sentences of AS[50], Martin CJ's observation at CA[81] was made as one of three considerations militating against the appellant's reliance on the use of the words "the making or amendment of a planning scheme" in s. 173(1): see CA[79]. The criticism in the last sentence of AS[50] does not recognize that Martin CJ was speaking of alternatives.

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[8] And in the cases referred to in *Kettering* at fn [22]. See too *AB v. Western Australia* (2011) 244 CLR 390 at 402, [24].

47. It is difficult, with respect, to follow the contention in AS[51]. It appears to rely on Beech J. at J[62], but one of the reasons there referred to[9] is that claims for compensation are likely to arise "where a sale at a depressed price has been effected or where consent for development has been withheld", i.e. in the circumstances referred to by Martin CJ at CA[81].

48. ***"(8) McHugh J. should not be followed". (AS[53] to [59]).***

"(9) Callinan J. should not be followed" (AS[60]-[64]). These submissions may be dealt with together.

49. Because the views of Gummow and Hayne JJ on the one hand and McHugh J. and Callinan J. on the other in *Temwood* are to opposite effect on the interpretation of the then legislative provisions, each party to those appeals calls in aid the views of the Justices in *Temwood* supporting them.

50. The reasons in *Temwood* were considered in detail in the reasons of the courts below in the present appeals. See Beech J. at J[17]-[18], [21]-[22], [64], [69], [77] and in the Court of Appeal Martin CJ at CA[10]-[30], [63], [72]-[77], [92], [94], [100], [102], [110] and Murphy JA at [115].

51. The fundamental problem with the construction of Division 2 arrived at by Gummow and Hayne JJ in *Temwood* is that, as Martin CJ said at CA[77], it requires words to be read into each of s. 177(1) and s. 177(2) which are not there. See too Murphy JA at CA[115].

52. Further the approach taken by McHugh JA in *Temwood* at 47, [37]-[38] was correct. The legislation had been amended by the addition of amendments including the predecessor to s. 177(2). The provisions had to be read as affected by the amendments[10].

53. The criticism of McHugh J.'s reasons, at AS[54]-[57], should not be accepted. The Hansard passages referred to at AS[55] and [56] preceded the 1986 amendments. Further the Ministerial "aim" referred to in AS[57] was achieved by the limitation of compensation to "only once" in s. 177(2).

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[9] See para [183] of the 1962 Report quoted by Beech J. at J[62].

[10] *Commissioner of Stamps (SA) v. Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463 (Brennan CJ, Dawson and Toohey JJ; *Kartinyeri v. The Commonwealth* (1998) 195 CLR 337 at 375, [67] (Gummow and Hayne JJ).

54. As to AS[58], any supposed difficulty in relation to claims based on s. 174(1)(b) could not apply to claims such as this, for which specific provision is made by s. 177(2).

55. In relation to Callinan J.'s reasoning in *Temwood*, the criticism at AS[62] is misplaced: Callinan J. at [161] was there stating his conclusion, not posing a question.

56. It is submitted that there is nothing unorthodox in the reasons of Callinan J. at [163]-[166] in *Temwood*. The argument in AS[63] should be rejected.

57. As to AS[64], the appellants' contention relies on the view of "fairness" which the AS assume. But that view leaves out of account that s. 177(3) is the legislature's method of providing for standards of conduct.

58. The respondents would also add, in relation to the reasons of Gummow and Hayne JJ in *Temwood* the following:

(a) the Second Reading Speeches or other extrinsic material do not lead to a conclusion that the right to compensation is temporally fixed to the first of two stipulated events happening i.e. the first sale of the land or the determination of a development application (see Callinan J at [173]-[175]);

(b) Gummow and Hayne JJ's reliance on the words "by the making of" (in s 11 of the *TP & D Act*; now s 173(1) as importing a temporal connection between the Scheme and those entitled to compensation (see at [95]-[96]) is inconsistent with the words in s 177(1)(b) which necessarily refer to a different period of time;

(c) Indeed, it is submitted, reliance on those words as importing a limitation is inconsistent with their Honours' own construction of s 36(3a)(b) (now s 177(2)(b)), namely that it relates to special situations such as developments application by volunteers taking the land by testamentary or intestate succession from that owner (see also McHugh J at [40]), as even those persons did not own the land at the time of the "making of" the scheme;

(d) Imposing this or other limitations on the application of the class of transferees who would be entitled to compensation under the second limb of section 177(1)(b) does not take into account the effect on transactions where a sale occurs prior to the making of a scheme but is settled after – a potential circumstance not addressed by Gummow and Hayne JJ; and

(e) The approach to construction taken by McHugh and Callinan JJ is more consistent with the ordinary grammatical meaning of the words and with a "fair, large and liberal" interpretation[11].

10 59. ***Orders sought.*** The appeals should be dismissed with costs.

Part VII: Cross-appeal; Contention

60. Not applicable.

Part VIII: Oral argument

61. The respondents' oral argument is estimated to take 1½ hours.

Dated 24 October 2016

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[11] *A.B. v. Western Australia* (2011) 244 CLR 390 at 402, [24].

ATTACHMENT A

The provisions of the *Planning and Development (Consequential and Transitional Provisions) Act 2005* (WA) are extracted below. These provisions have been in place since 9 April 2006 and remain in force.

Part 1 — Preliminary

1. Short title

This is the *Planning and Development (Consequential and Transitional Provisions) Act 2005*.

2. Commencement

(1) This Act comes into operation on a day to be fixed by proclamation.

(2) Different days may be fixed under subsection (1) for different provisions.

3. Interpretation

In this Act —

commencement day means the day on which this section comes into operation;

existing Commission means the Commission established under the WAPC Act;

MRTPS Act means the *Metropolitan Region Town Planning Scheme Act 1959*;

PD Act means the *Planning and Development Act 2005*;

TPD Act means the *Town Planning and Development Act 1928*;

WAPC Act means the *Western Australian Planning Commission Act 1985*.

Part 2 — Repeal and amendment of legislation

[Divisions 1-3 (s. 4-14) — Consequential amendments omitted.]

Division 4 — Miscellaneous amendments

15. Acts in Schedule 2 amended

The Acts mentioned in Schedule 2 are amended as set out in that Schedule.

16. Power to amend regulations

(1) The Governor, on the recommendation of the Minister, may make subsidiary legislation amending subsidiary legislation made under any Act.

(2) The Minister may make a recommendation under subsection (1) only if the Minister considers that each amendment proposed to be made by the regulations is necessary or desirable as a consequence of the enactment of the PD Act or this Act.

(3) Nothing in this section prevents subsidiary legislation from being amended in accordance with the Act under which it was made.

Part 3 — Transitional and saving provisions

Division 1 — Preliminary

17. Application of Interpretation Act 1984

(1) The provisions of the *Interpretation Act 1984* (for example, sections 16(1), 36 and 38) about the repeal of written laws and the substitution of other written laws for those so repealed apply to the repeal of an Act mentioned in Schedule 1 as if that Act were repealed and re-enacted by the PD Act.

(2) The other provisions of this Act are additional to the provisions applied by subsection (1) and except in the case of section 14(3) and (4) do not affect the operation of the provisions applied by subsection (1).

18. Transitional regulations

(1) If there is no sufficient provision in this Act for dealing with a transitional matter, regulations under this Act may prescribe all matters that are required or necessary or convenient to be prescribed for dealing with the matter.

(2) In subsection (1) —

transitional matter means a matter that needs to be dealt with for the purpose of —

(a) effecting the transition from the provisions of the Acts repealed by this Act to the provisions of the PD Act; or

(b) effecting the transition from the provisions of an Act amended by a provision of this Act (the ***amending provision***) as in force before this Act comes into operation to the provisions of that Act as in force after the amending provision comes into operation.

(3) Regulations made under subsection (1) may provide that specified provisions of the PD Act as in force on or after the commencement of that Act, or of subsidiary legislation made under that Act, or of an Act amended by this Act —

(a) do not apply; or

(b) apply with specified modifications,

to or in relation to any matter.

(4) If regulations under subsection (1) provide that a specified state of affairs is to be taken to have existed, or not to have existed, on and from a day that is earlier than the day on which the regulations are published in the *Gazette* but not earlier than the commencement day, the regulations have effect according to their terms.

(5) In subsections (3) and (4) —

specified means specified or described in the regulations.

(6) If regulations contain a provision referred to in subsection (4), the provision does not operate so as —

(a) to affect in a manner prejudicial to any person (other than the State, an authority of the State or a local government), the rights of that person existing before the day of publication of those regulations; or

(b) impose liabilities on any person (other than the State, an authority of the State or a local government) in respect of anything done or omitted to be done before the day of publication of those regulations.

19. Construction of references in written laws

(1) Unless the context otherwise requires, a reference in a written law to an enactment repealed by this Act includes a reference to the corresponding provision, if any, of the PD Act.

(2) A reference in a written law to a town planning scheme may, where the context so requires, be read as if it had been amended to include or be a reference to a local planning scheme under the PD Act.

(3) A reference in a written law to a regional planning scheme under the WAPC Act may, where the context so requires, be read as if it had been amended to include or be a reference to a region planning scheme under the PD Act.

(4) A reference in a written law to a statement of planning policy may, where the context so requires, be read as if it had been amended to include or be a reference to a State planning policy under the PD Act.

Division 2 — Continuation of various bodies, memberships and appointments

20. WAPC continues

(1) The Western Australian Planning Commission established under the PD Act is a continuation of and the same legal entity as the Western Australian Planning Commission established under the WAPC Act, with the same rights and obligations as the existing Commission.

(2) If in a written law or other document or instrument there is —

(a) a reference to the existing Commission; or

(b) a reference that is read and construed as a reference to the existing Commission,

the reference may, where the context so requires, be read as if it had been amended to be a reference to the Commission established under the PD Act.

21. Membership of Commission

(1) The persons who were members and deputy members of the existing Commission (including the chairperson and deputy chairperson) immediately before the commencement of the PD Act continue in office, under and subject to that Act, as the chairperson, deputy chairperson, members and deputy members of the board of the Commission established under the PD Act.

(2) A person to whom subsection (1) applies is to be regarded as having been appointed under the PD Act.

(3) If in a written law or other document or instrument there is —

(a) a reference to the chairperson or a member of the existing Commission; or

(b) a reference that is read and construed as a reference to the chairperson or a member of the existing Commission,

the reference may, where the context so requires, be read as if it had been amended to be a reference to the chairperson or a member of the board of the Commission established under the PD Act.

22. Staff

(1) People who were engaged by the existing Commission immediately before the commencement of the PD Act continue, under and subject to that Act, as officers of the Commission.

(2) A person mentioned in subsection (1) is to be regarded as having been engaged under the PD Act.

(3) Except as otherwise agreed by the officer of the Commission, the remuneration, existing or accrued rights, rights under a superannuation scheme or continuity of service of an officer of the existing Commission are not affected, prejudiced or interrupted by the operation of subsection (1) or the repeal of the WAPC Act.

(4) The rights under a superannuation scheme of a person who was an officer of the existing Commission are not affected, prejudiced or interrupted by the repeal of the WAPC Act.

23. Committees

(1) In this section —

existing committee means —

(a) the Executive, Finance and Property Committee established under the WAPC Act;

(b) the Statutory Planning Committee established under the WAPC Act;

(c) the Infrastructure Coordinating Committee established under the WAPC Act;

(d) the Coastal Planning and Coordination Council established under the WAPC Act;

(e) any regional planning committee established under the WAPC Act; and

(f) any District Planning Committee established under the MRTPS Act.

(2) A committee established under the PD Act is a continuation of and the same legal entity as the existing committee of the same name established under the WAPC or MRTPS Act with the same rights and obligations as the existing committee.

(3) The Sustainable Transport Committee established under the PD Act is a continuation of and the same legal entity as the Transport Committee established under the WAPC Act with the same rights and obligations as the existing committee.

(4) If in a written law or other document or instrument there is a reference to an existing committee, the reference may, where the context so requires, be read as if it had been amended to be a reference to the committee of the same name established under the PD Act.

(5) If in a written law or other document or instrument there is a reference to the Transport Committee, the reference may, where the context so requires, be read as if it had been amended to be a reference to the Sustainable Transport Committee established under the PD Act.

(6) The persons who were members of an existing committee immediately before the commencement of the PD Act continue in office, under and subject to that Act, as the members of the committee of the same name established under the PD Act.

(7) The persons who were members of the Transport Committee immediately before the commencement of the PD Act continue in office, under and subject to that Act, as the members of the Sustainable Transport Committee established under the PD Act.

24. Board of Valuers

(1) In this section —

existing Board means the Board of Valuers established under the MRTPS Act.

(2) The Board of Valuers established under the PD Act is a continuation of and the same legal entity as the existing Board with the same rights and obligations as the existing Board.

(3) If in a written law or other document or instrument there is a reference to the existing Board, the reference may, where the context so requires, be read as if it had been amended to be a reference to the Board of Valuers established under the PD Act.

(4) The persons who were members of the existing Board immediately before the commencement of the PD Act continue in office, under and subject to that Act, as the members of the Board of Valuers established under the PD Act.

Division 3 — Transitional provisions

25. Subsidiary legislation and fees

(1) Regulations made under —

(a) section 8 of the TPD Act or section 26 of the MRTPS Act continue in force as if they were made under section 256 of the PD Act;

(b) section 9(1) of the TPD Act continue in force as if they were made under section 258 of the PD Act;

(c) section 9(2b) of the TPD Act continue in force as if they were made under section 259 of the PD Act;

(d) section 33B of the TPD Act continue in force as if they were made under section 261 of the PD Act;

(e) section 44 of the MRTPS Act, section 58 of the WAPC Act or section 27A(5) or 34 of the TPD Act continue in force as if they were made under section 263 of the PD Act,

and may be amended or repealed accordingly.

(2) Local laws made under section 31 of the TPD Act continue in force as if they were made under section 262 of the PD Act and may be amended or repealed accordingly.

(3) Fees prescribed under section 29 of the TPD Act continue, until fees are set under section 20 of the PD Act, to be chargeable and payable as if the fees were set under section 20 of the PD Act.

26. Planning schemes in course of preparation

Any planning scheme that, on the commencement day, is being prepared under the TPD Act or the WAPC Act may continue to be prepared as if the steps taken under that Act were taken under the PD Act.

27. Caveats

(1) A caveat lodged under section 36 of the MRTPS Act or section 35 or 36 of the WAPC Act but not registered before the commencement day may be registered under section 180 or 181 of the PD Act, as the case requires, as if it were a notification under that section of the PD Act.

(2) A caveat —

(a) registered under section 36 of the MRTPS Act or section 35 or 36 of the WAPC Act; and

(b) subsisting immediately before the commencement day,

is taken to be a notification registered under section 180 or 181 of the PD Act, as the case requires.

Division 4 — Other savings

28. Section 9(4) and (5) TPD Act

The repeal of section 9(4) and (5) of the TPD Act does not affect the validity of any town planning scheme, amendment to a town planning scheme, act or thing referred to in section 9(4) of the TPD Act, and those subsections continue to apply in relation to those schemes, amendments, acts and things as if the subsections had not been repealed.

29. Section 28A(5) TPD Act

Section 28A(5) of the TPD Act continues to apply in relation to liability and matters referred to in that subsection as if section 28A had not been repealed.

30. Section 37A(4a) MRTPS Act

The repeal of section 37A(4a) of the MRTPS Act does not affect the validity of any agreement, act, matter or thing referred to in that subsection, and that subsection continues to apply in relation to those agreements, acts, matters and things as if the subsection had not been repealed.

Part 4 — Validation provision

31. Validation of certain endorsed approvals

Any approval of the Commission endorsed on a diagram or plan of survey of a stage of a subdivision under the *Town Planning and Development Act 1928* before the coming into operation of this section is taken to be, and always to have been, as valid and effective as it would have been if section 145 of the *Planning and Development Act 2005* had been in operation at the time of the endorsement and the approval had been endorsed under that section.

[Schedules 1 and 2 — Consequential amendments omitted.]

ATTACHMENT B

The provisions of Part IIB of the *Western Australian Planning Commission Act 1985* (WA) (repealed) are extracted below. These provisions were repealed on 9 April 2006.

Part IIB — Application of sections 11 and 12 of Town Planning and Development Act 1928 to regional planning schemes

[Heading inserted by No. 59 of 1999 s. 14.]

30. Construction of sections 11 and 12 of Town Planning and Development Act 1928 in relation to regional planning schemes

The provisions of sections 11 and 12 of the *Town Planning and Development Act 1928* apply, with such modifications as are necessary, to the provisions of a regional planning scheme and for that purpose the former provisions shall be read and construed as if —

(a) the Commission were the "responsible authority" or "local government" wherever referred to in those 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) of that Act; and

(c) those provisions included section 33(1), (2), (3) and (4) and section 34.

[Section 30 inserted by No. 59 of 1999 s. 14.]

31. Claims for injurious affection

(1) A regional planning scheme may provide that when 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 and Development Act 1928* the Commission may at its option elect to acquire the land so affected instead of paying compensation.

(2) The Commission shall, within 3 months of the claim for injurious affection being made, by notice in writing given to the claimant —

(a) elect to acquire the land; or

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

[Section 31 inserted by No. 59 of 1999 s. 14.]

32. Price of land acquired by Commission in absence of agreement

(1) When the Commission elects to acquire the land as provided in section 31, 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 (2).

(2) The value of the land referred to in subsection (1) shall be the value of the land 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 regional planning scheme.

[(3) repealed]

[Section 32 inserted by No. 59 of 1999 s. 14; amended by No. 55 of 2004 s. 1319.]

33. Compensation for injurious affection to land reserved for public purpose

(1) Subject to subsection (3), when under a regional planning scheme any land has been reserved for a public purpose, no compensation is payable by the Commission 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 Commission refuses an application made under the regional planning 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.

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

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

(a) when 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 the owner might reasonably have expected to receive had there been no reservation of the land under the regional planning scheme;

(ii) that the owner before selling the land gave notice in writing to the Commission of the owner's 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) when the Commission refuses an application made under the regional planning 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.

(4) A claim for compensation under subsection (1) 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.

[Section 33 inserted by No. 59 of 1999 s. 14.]

34. Amount of compensation

(1) Subject to this Part, the compensation payable for injurious affection due to or arising out of the land being reserved under a regional planning scheme for a public purpose, where no part of the land is purchased or acquired by the Commission, shall not 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) shall be assessed as at the date on which —

(a) the land is sold as referred to in section 33(1)(a);

(b) the application for permission to carry out development on the land is refused; or

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

[Section 34 inserted by No. 59 of 1999 s. 14.]

35. Caveat may be lodged if compensation paid

(1) When compensation for injurious affection to any land has been paid under section 33(1), the Commission may lodge with the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, a caveat against the land 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 34(2).

(2) On receipt of the caveat from the Commission, the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, shall register the caveat.

[Section 35 inserted by No. 59 of 1999 s. 14.]

36. Commission may recover compensation if reservation revoked or reduced

(1) When —

(a) compensation for injurious affection to land (the "***original compensation***") has been paid to an owner of the land in the circumstances set out in section 33(1); and

(b) as a result of the regional 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 Commission 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 Commission.

(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 35(1)(c) in relation to the original compensation.

(5) When the area of the reservation has been reduced, the relevant proportion for the purposes of subsection (1) shall be determined as follows —

(a) a notional amount of compensation is determined under sections 33(1) and 34 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 35(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), when 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), when 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 shall 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 shall be determined by one of the methods set out in section 34(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 Commission has an entitlement to recover an amount under subsection (1) it has an interest in the land and may lodge with the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, a caveat against the land giving notice of the existence of that interest, and may withdraw any caveat so lodged.

(10) On receipt of the caveat from the Commission, the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, shall register the caveat.

(11) Before selling or subdividing land against which a caveat is lodged under subsection (9), the owner of the land shall give notice in writing to the Commission of the intention of the owner to sell or subdivide the land.

(12) When a caveat is lodged under subsection (9) the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, shall not register a transfer of the land without the consent of the Commission.

[Section 36 inserted by No. 59 of 1999 s. 14.]

37. Valuation by Board of Valuers

(1) In this section —

"Board" means the Board of Valuers established under section 36B of the Metropolitan Scheme Act.

(2) The owner of land that is subjected to injurious affection due to, or arising out of, the land being reserved under a regional planning scheme for a public purpose who gives notice of his or her intention to sell the land and claim compensation

shall, unless the Commission waives the requirement, apply to the Board for a valuation of the land as not so affected and the Board shall make that valuation.

(3) The provisions of section 36C of the Metropolitan Scheme Act and the regulations made under that section apply, with such modifications as are necessary, to an application and valuation under subsection (2).

[Section 37 inserted by No. 59 of 1999 s. 14.]