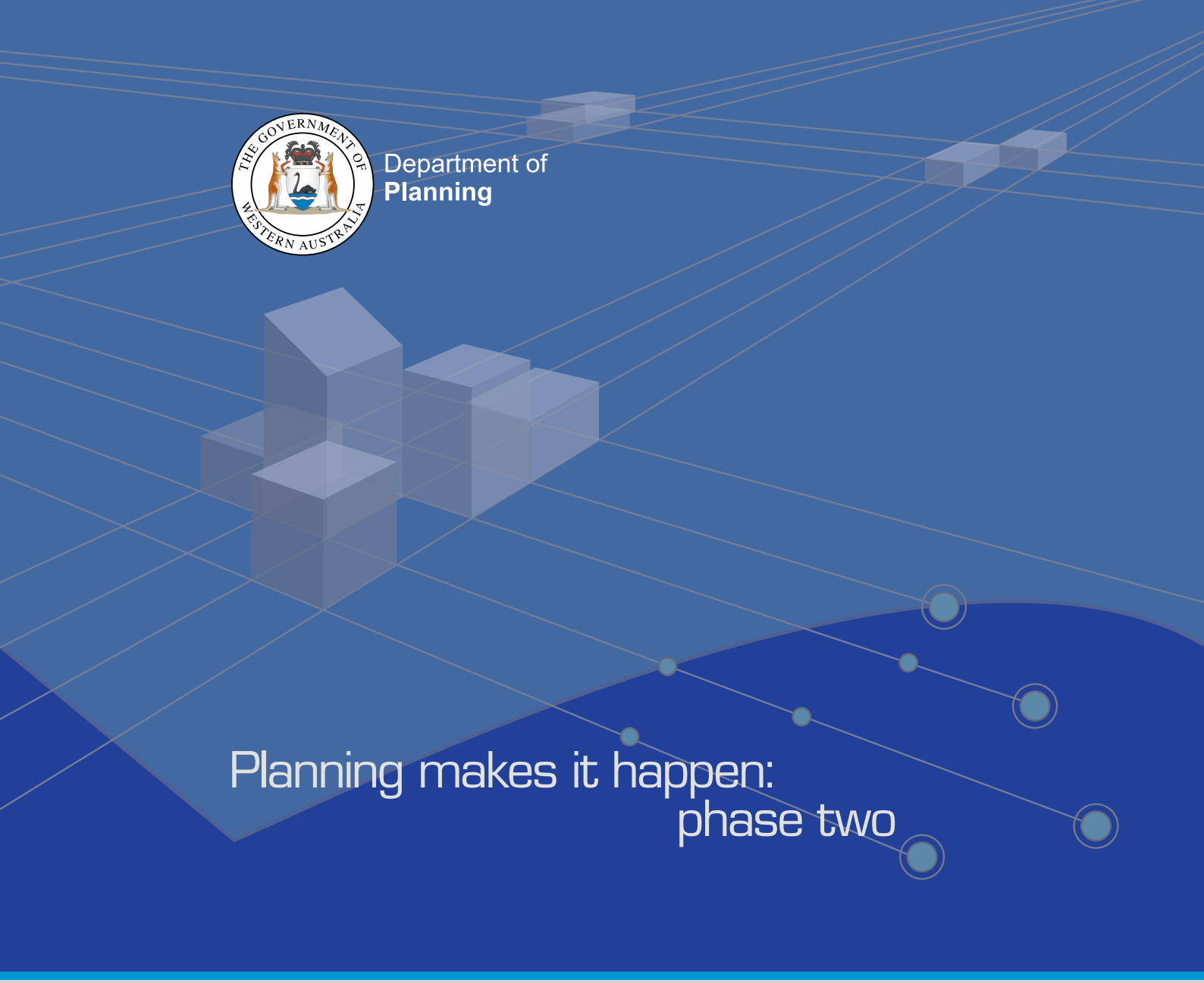

Review of the *Planning and Development Act 2005*

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Contents

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Introduction

The Western Australian Government is committed to continuous improvement of the legislative and strategic framework of the Western Australian planning system. Pursuant to this commitment, the Minister for Planning has commenced a review of the *Planning and Development Act 2005* (the Planning Act), which is the primary piece of legislation governing development and subdivision in Western Australia.

The key aim of this review is to consider the operation and effectiveness of the Planning Act in accordance with the statutory obligation of the Minister for Planning to review the legislation. In addition, the opportunity has been taken to open dialogue with key stakeholders on broader reform, to ensure that the planning system continues to deliver economically, socially and environmentally.

This report sets out issues and proposals for reform identified by the Steering Committee and working groups established by the Department of Planning for the purpose of this review. The Government is now seeking the views of key stakeholders, including local government, planning professionals, industry and the community on all matters addressed in this discussion paper. Other suggestions regarding measures for clarifying, streamlining and improving the planning system are also invited.

This paper should be read in conjunction with the Phase Two reform discussion paper, see www.planning.wa.gov.au/planningreform

Background

The Minister for Planning has an obligation under section 268 of the Planning Act to carry out a review as soon as practicable after the expiry of five years from the date of its commencement. The Planning Act, which came into effect in April 2006, consolidated and superseded the *Town Planning and Development Act 1928* (1928 Act), the *Metropolitan Region Scheme Act 1959* (MRS Act), and the *Western Australian Planning Commission Act 1985* (WAPC Act). At the time of the consolidation, it was generally acknowledged that the planning system in Western Australia, as embodied in these Acts, was working well. Accordingly, it was determined at that time that there was no need to undertake a fundamental review of every component of the legislation. Most of the provisions of the Planning Act were carried over without substantive review.

The Planning Act:

- establishes the Western Australian Planning Commission (WAPC);
- gives power to the WAPC to make State planning policies, region planning schemes, regional interim development orders, planning control areas and improvement plans;
- establishes the requirement to obtain approval from the WAPC before subdividing land;
- gives power to local governments to make local planning schemes for their local government area; and
- sets out a regime for the payment of compensation for injurious affection caused by the making of a local or region planning scheme.

In 2010, the *Approvals and Related Reforms (No.4) (Planning) Act* was passed, which resulted in amendments to the Planning Act. The purpose of these amendments was to streamline and improve the approvals process in line with a whole-of-government initiative. The key amendments:

- established development assessment panels to determine applications for significant urban, industrial and infrastructure developments;
- extended the use of existing strategic instruments such as improvement plans and planning control areas to strengthen state and regional planning throughout the State;
- enabled the State to create regulations for collecting data on local development decisions to monitor the effectiveness of reforms to the approvals process;
- provided a mechanism for local planning schemes to be updated to implement State planning policies; and
- streamlined and clarified other existing provisions and processes to improve the efficiency of the approvals process.

Scope of review

The primary purpose of this review is to consider the operation and effectiveness of provisions of the Planning Act that have been in operation since its enactment in April 2006. The objectives are to:

- identify the specific provisions that do not operate satisfactorily and the reasons for such deficiencies;
- identify and recommend measures to ameliorate ambiguities in drafting or resulting from judicial interpretation;
- recommend amendments that would improve the operation of the Act; and
- consider and have regard to such other key matters and issues as appear to be relevant to the operation and effectiveness of the Act, including, but not limited to, those matters identified in this discussion paper.

Key issues and proposals

1 Injurious affection and compensation

Currently in Western Australia, the *Land Administration Act 1997* (LAA) provides the 'standard' statutory framework for the taking of land and the heads of compensation. Land is compulsorily taken only if all reasonable attempts at a negotiated purchase have been exhausted. Generally such land is taken for an impending work. A number of Government agencies have their own statutory taking powers though generally these utilise the Land Administration Act compensation provisions.

The WAPC and local governments have taking powers under the Planning Act to enable land to be taken for the purposes of regional and local planning schemes. The Planning Act, unlike the LAA, also provides a separate and specific 'compensation' called 'injurious affection'.

Injurious affection compensation under planning legislation contrasts with that of the Land Administration Act where the focus is primarily upon compulsorily taking for an immediate work. Planning works on longer timeframes for the identification and implementation of public reserves such as open spaces, railways, freeways, regional roads. Under planning legislation the affected landowner generally controls the process of compensation (other than in the case of compulsory takings). A landowner decides when to sell their property or to lodge development applications, which trigger claims for compensation. Should a claim or the purchase price be disputed, it is the landowner, not the responsible authority, who determines whether to submit the matter to arbitration or the Supreme Court.

The WAPC rarely compulsorily takes land. A majority of its annual land purchases are initiated by landowners. The reservation of land gives landowners a guaranteed purchaser should they wish. Likewise the owner is free to sell their property on the open market in the knowledge that they or a future landowner has a vested right to compensation, the value of which rises as the value of the property rises, including the benefit of upzonings in the intervening period between reservation and acquisition.

The identification of a reservation in a scheme does not provide an immediate right to claim compensation. The mere reservation of land in a region or local planning scheme does not prevent its continued use for the purposes that existed prior to reservation (non-conforming use). The right to compensation arises where the owner is about to suffer 'real' injury such as upon the first sale of the property (affected by a reservation), or refusal of a development proposal that would otherwise be likely to be approved but for the reservation.

In 2005, amendments were made to the Planning Act to standardise the basis upon which injurious affection arising from regional and local planning schemes is compensated.

The Law Reform Commission (LRC) released a discussion paper in October 2007 entitled *Compensation for Injurious Affection*. The final report, completed in July 2008, reflects the results of the LRC's investigation into whether the principles, practices and procedures pertaining to the issue of compensation for injurious affection to land in Western

Australia, require reform. Proposals from the LRC that are supported by the Department of Planning are set out below, along with other identified issues and proposals. The proposals aim to be consistent with a whole of government approach to private property compensation.

1.1 Transference of jurisdiction to the State Administrative Tribunal to determine compensation and betterment matters

The LRC recommended (Recommendation 17) *"that s 176(1) be amended to accord jurisdiction to the State Administrative Tribunal (SAT) in respect of compensation, including as to whether the land has been injuriously affected and as to the amount of compensation. Similarly, s 184(4) should be amended to accord jurisdiction to the State Administrative Tribunal in respect of compensation and recovery of betterment value."*

Section 176 of the Planning Act currently sets out two separate processes:

(a) the applicant can apply to the SAT for determination of whether land is injuriously affected; and

(b) where there is dispute as to the amount of compensation to be paid and the manner of payment, then the dispute is to be determined by arbitration in accordance with the *Commercial Arbitration Act 1985*.

The LRC proposes to replace these two processes with a single process whereby the SAT can determine either question.

In addition, section 184(4) states that where there is a dispute about the amount of compensation to be paid and the manner of payment, then the dispute is to be determined by arbitration in accordance with the *Commercial Arbitration Act 1985*. The LRC is proposing that the SAT be given the power to determine such disputes.

The Department supports the idea that the SAT should be a 'one stop shop' for applications for review of planning decisions. The amendments proposed to be made to sections 176(1) and 184(4) will help to remove some complexity in the system by making the SAT the only appeal authority able to determine disputes regarding compensation for injurious affection. As such, the Department supports the proposed amendments set out in the LRC recommendation.

1.1.1 It is proposed that all matters relating to compensation and injurious affection should be determined by SAT, rather than a separate Board of Valuers or the Commercial Arbitration Act 1985.

1.1.2 This will require amendments to:

- *section 172 to remove the definition of 'Board';*
- *section 176 to remove the reference to the Commercial Arbitration Act 1985 and replace with the SAT;*
- *sections 182 and 183 to remove jurisdiction from the Board of Valuers and transfer to the SAT; and*

- *sections 184 and 188 to remove the reference to the Commercial Arbitration Act 1985 and replace with the SAT*

This proposal will be subject to integration with amendments to the State Administrative Tribunal Act 2004.

1.2 Ability of original owner to assign compensation rights

The LRC recommended *(recommendation 20)* amendments to section 178(1) and the Model Scheme Text which would have the effect of allowing the original owner to assign compensation rights.

Accordingly to the LRC entitlement to compensation should expire:

(1) for the original owner –

(a) six months after a development application is refused or approved with unacceptable conditions but only in respect of the particular development application refusal or conditional approval (i.e. not in respect of a subsequent development application made by the same owners in good faith); or

(b) six months after first sale, if not assigned to the purchaser;

(2) for a purchaser of reserved land –
six months after a development application is refused or approved with unacceptable conditions provided that the original owner has, at the time of selling the land, assigned to the purchaser, in approved form, his entitlement to compensation upon an unsuccessful development application;

(3) and in any case –
subject to a discretion of the Minister to extend the time limit.

The Department and the WAPC's position on this matter is that the original owner is the only person who is entitled to claim compensation under section 178(1), as the right to compensation is unique to the land owner who is injuriously affected when a scheme or amendment initially takes effect. The right to claim compensation for injurious affection does not pass to subsequent owners. This is because a purchaser is likely to have purchased the land from the original owner at a reduced price, due to the presence of the reservation over the land. Any subsequent payment of compensation for injurious affection would constitute compensation for the loss of something that the purchaser never had and had not otherwise made payment towards.

The WAPC is concerned about the right to claim compensation continuing indefinitely, instead of the parties being required to deal with the injurious affection at the time that it arises. If section 178 was amended as proposed, giving owners the right to assign their right to compensation to a purchaser, then the WAPC may be forced to provide compensation many years after the event that created the injurious affection.

The Department acknowledges that section 178(1) does not clearly express that only the original owner is entitled to claim compensation. As such, it may be necessary to amend section 178(1) to clarify this position.

1.2.1 It is proposed to amend section 178 (1) to clarify that only the original owner is entitled to make a compensation claim. This will confirm that there are two circumstances in which a land owner has a right to claim compensation for injurious affection for a regional reservation, where:

- *the land is first sold at a reduced value following the reservation; or*
- *an application to develop the land is refused or granted subject to unacceptable conditions.*

1.3 Definition of planning scheme

The LRC recommends *(recommendation 23) "that the words 'or any part thereof' be included in the definition of 'planning scheme' in s 4."*

This recommendation arises from the *Mt Lawley (No 1)* 29 WAR 273 case. In that case, the Full Court held that only the operative amendment of the Metropolitan Region Scheme was to be disregarded during the assessment of the value of the land. This decision was possible due to the definition of 'scheme' in the MRS Act, which included the words *'or any part thereof'*.

When the Planning Act was amended in 2005, a new definition was inserted to address the consolidation of the three previous planning Acts, as the definition of 'planning scheme' in each Act was different. For this reason, the words *'or any part thereof'* were removed.

The Department agrees that this amendment should be progressed.

1.3.1 It is proposed that the words 'or any part thereof' be included in the definition of 'planning scheme' in s 4, in line with the LRC's recommendation.

1.4 WAPC capacity to take land

In the *Mandurah Enterprises* decision (*Mandurah Enterprises Pty Ltd and Graham v WAPC* [2010] HCA 2), the WAPC took reserved and zoned land for the purposes of the Perth to Bunbury rail project to avoid the severing of a parcel of zoned land from road access. The High Court determined that whilst the Taking Order effected by the WAPC for the purpose of the scheme was not invalid in its entirety (the portion taken in respect of the railway and road reservations remained valid), the Taking Order was invalid to the extent that it purported to take unreserved portions of land.

The taking of the severed portions could have been achieved had the Public Transport Authority used its powers under the *Public Works Act 1902* to take zoned portions for the purpose of the railway work, rather than rely on the WAPC.

The key issue is the timing and funding of infrastructure and the extent to which the WAPC powers ought to be used to effect projects independently of the agency carrying out the infrastructure works in reliance of such takings. In some situations, it may be desirable for the WAPC to have the power to take zoned land for the purposes of a region scheme. For example, if, as the result of a taking, a portion of zoned land would be severed or without legal access.

1.4.1 With respect to acquisition under sections 190 and 191, it is proposed amendments be made to allow additional acquisition of zoned land in situations where acquiring only the reserved land would leave a parcel of zoned land severed from road access.

1.5 Ability to purchase adjoining land

The LRC recommended (*recommendation 26*) that s 190 be amended to allow the purchase by agreement of land adjoining reserved land if the reserved land is to be acquired by agreement or by taking, whether or not the adjoining land is comprised in the planning scheme and whether or not the purchase is for the purpose of a planning scheme.

The LRC states that section 190 prevents the acquisition of land adjoining reserved land, as the purchase of such land would not be "for the purpose of the planning scheme".

As a result of the *Mandurah Enterprises/Graham* case (see discussion at 3.4), there is some ambiguity as to the scope of section 190 in the purchase of land that is not specifically the subject of the reservation.

Section 14 (j) – setting out the WAPC's functions provides –

> "The functions of the Commission are –
>
> to develop, maintain and manage land held by it that is reserved under a region planning scheme or improvement scheme and to carry out such works, including the provision of facilities on the land, as may be incidental to development, maintenance or management or to be conducive to the use of the land *for any purpose for which it is reserved; ...*"

This suggests that the narrower interpretation of "for the purposes of the scheme" applies both to sections 190 and 191. That is only land that is the subject of a reservation can be subject to dealings. In *Mandurah Enterprises/Graham*, the High Court indicated that it framed the dispute over the 1928 Act equivalent of section 191 as *"...questions of statutory interpretation to be assessed by reference to the statutory presumption against an intention to interfere with vested property rights."*

The Department considers that section 190 should be modified to clearly give WAPC the capacity to purchase the whole of a lot on a voluntary sale basis, even if only part of it is reserved. Given the formulation by the High Court of 'land for the purposes of the scheme' being limited to land reserved for public purposes under the scheme, the terms of section 190 of the Planning Act might be argued to mean that the purchase powers are to be read as narrowly as the taking powers.

1.5.1 It is proposed to amend section 190 to clarify that the WAPC's powers to negotiate the acquisition of land extend to the whole lot, not just the portion of a lot that has been reserved for a particular purpose.

1.6 Compensation payable only once

On 2 February 2012, a decision was handed down in *Vincent Nominees Pty Ltd v WAPC and Board of Valuers* CIV 2665 of 2008, which considered a number of statutory provisions relating to injurious affection. This case considered a number of provisions under the current Planning Act as wells provisions of the former *Metropolitan Region Town Planning Scheme Act 1959* and the *Town Planning and Development Act 1928*. In this case, a current owner of land that had been the subject of an injurious affection claim prior to purchase, challenged the WAPC's determination to purchase the land at the affected value.

Section 171 provides that if compensation has been paid once, then no further compensation is payable. This provision did not prevent a challenge in the *Vincent Nominees case* to the WAPC's entitlement to deduct the value of compensation previously with respect to a reservation on a property paid in calculating the purchase price. The decision of the Supreme Court supported the WAPC's position in this case. However, to prevent further challenges it is proposed to include amendments to confirm this position. This may take the form of including similar language with respect to voluntary agreements to purchase (s190) as is currently used with respect to compulsory acquisition in section 192(2). That is, where compensation has previously been paid, then the purchase price based on unaffected land value is to be reduced by an amount that bears the same ratio to such value as the previously paid compensation had to the land value at that time.

1.6.1 Section 171 provides that if compensation has been paid in relation to a matter either under the Planning Act or any other legislation, then no further compensation is payable. It is proposed to clarify this section and/or section 190 to prevent challenges to the WAPC acquiring land at its affected value in the event that compensation has previously been paid.

1.7 Interest accruing where election to purchase process delayed

The Planning Act provides for adjudication of purchase prices, where elections to purchase being made by the WAPC, to be referred to the SAT for resolution. However, the SAT lacks power under its legislation to award interest. A clarifying amendment is proposed to determine how the issue of interest is to be resolved in the case of delay in the determination of a price.

Since the *Nicoletti case (Nicoletti v WAPC* [2006] WASC 131), claimants who are worried that the WAPC is taking too long to make offers following elections (such that they will lose capital gain in circumstances of a rising market), have had the capacity to withdraw their claim and re-lodge new development applications with a view to triggering new compensation claims. This is an indirect way of dealing with the interest issue.

1.7.1 The Planning Act provides for adjudication of purchase prices following elections to purchase being made by the WAPC to be referred to the SAT for resolution. However, the SAT lacks power under its legislation to award interest. A clarifying amendment is proposed to determine how the issue of interest is to be resolved in the case of delay in the determination of a price.

1.8 Uniform compensation provisions

In 2005, amendments were made to the Planning Act to consolidate the compensation provisions of the three separate acts into a common set of uniform provisions. This resulted in uniform compensation provisions to overcome inconsistencies between compensation rights under both region and local government schemes.

The extension of compensation provisions for region schemes to local government schemes has provided for consistency and advantage to land owners who will not be limited to the period specified in the scheme for making a claim for compensation.

On the other hand, this has resulted in local governments becoming liable for undertakings of the State government in some circumstances. It is proposed to amend the provisions regarding injurious affection to ensure that local governments do not become liable to pay compensation in cases where the injurious affection relates to State government action over which the local government had no control.

1.8.1 It is proposed to consider amendments to the provisions regarding injurious affection to ensure that local governments do not become liable to pay compensation in cases where the injurious affection relates to State Government action over which the local government had no control.

1.9 Other proposed modifications to injurious affection provisions

A number of other minor and clarifying amendments are proposed to improve the clarity and effectiveness of provisions of the Planning Act relating to injurious affection claims.

1.9.1 New provision that the lodgement of a claim for injurious affection has the effect of cancelling any previous claims with respect to the same reserved land. This is to ensure that that multiple claims can not be active at the same time (see Nicoletti case).

1.9.2 New provision to be introduced to provide that if an injurious affection claim is not acted upon by the claimant within 12-months of lodgement, the claim automatically lapses.

1.9.3 Amend section.191(3)(a) to replace '171' with '175' and section (3)(b) replace '180' with '18', to correct the references to the appropriate provisions of the LAA.

1.9.4 For clarification, it is proposed to include express power to resume land for a Planning Control Area to be consistent with the resumption powers for Improvement Plans/Schemes.

1.9.5 New provision that Improvement Plans be deemed' public works' for the purposes of Part 9 LAA, particularly with respect to agreements to take land under s.168 LAA.

1.9.6 New provision to require easements for access in lieu of whole reservations, for example shared use paths along the river..

1.9.7 To address some issues in the acquisition of land subject to strata schemes, some suggested amendments to the Strata Title Act may be proposed. For example, (i) inclusion of provision to automatically amend strata schemes at Landgate by excising road truncations, widenings and lots acquired for scheme reserves/ public works when shown on separate deposited plans and the land transfers to responsible authority or taking registered; and (ii) where common property is taken, claimant to be body corporate not individual unit holders body corporate and to decide whether to distribute compensation or pay into common fund for future strata works.

2 Region planning schemes

Under the Planning Act, a region planning scheme may be prepared for all or any of the objects, purposes, provisions, powers or works for which a local planning scheme may be prepared under s 69(1), and may provide for planning, re-planning or reconstructing the whole or any part of a region (s 34(2)). They establish broad zonings of land with which local planning schemes must be consistent, and also provide the mechanisms for reserving or acquiring land for state and regional purposes.

There are currently three region planning schemes operating in Western Australia: Metropolitan Region Scheme (MRS); Peel Region Scheme (PRS); and the Greater Bunbury Region Scheme (GBRS).

The MRS has been in operation since 1963 and provides the legal basis for State planning in the Perth metropolitan region. Under the MRS, all development requires approval by the WAPC unless it is of a class that has been exempted from the need for approval or delegated to local governments for approval. Under the PRS and the GBRS, which were drafted more recently, only those classes of development set out in resolutions by the WAPC require approval.

Following this review of the Planning Act, it is proposed to review the text of the region planning schemes, in particular the MRS, to ensure that the provisions are current and consistent with the Planning Act and other applicable statutory instruments.

2.1 Amendment process for region planning schemes

The preparation, development and approval process for region planning schemes is subject to extensive delays. Two of the key legislative requirements that have been attributed with causing delays are the environmental assessment process and advertising processes. Currently the average timeframe for an environmental assessment (and finalisation of a Region Planning Scheme amendment) are between three to five years.

Reform of the region scheme amendment process is proposed as part of the Phase Two reform discussion paper (www.planning.wa.gov.au/planningreform).

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

1. The WAPC or the Minister must form the opinion that matters of State or regional importance require the preparation or amendment of a region planning scheme (s 34(1));
2. The WAPC resolves to prepare a region planning scheme or amendment (s 35);
3. The proposed region planning scheme or amendment is to be referred to the Environmental Protection Authority (EPA) for environmental review (ss 38 and 39);
4. In the case of any region planning scheme or amendment applying to land in the Swan Valley, referral to the Swan Valley Planning Committee is required (s 40);
5. The WAPC must obtain the Minister's consent to go to the stage of seeking public submissions (s 42);
6. If the Minister consents, then public submissions are invited by gazettal and newspaper advertising (s 43). If the scheme or amendment changes the zoning or reservation of any land, then the WAPC is to make reasonable endeavours to give written notice to the owners of the land affected (s 43(4)). The WAPC is also required to consult any public authorities or persons which appear to the WAPC likely to be affected (s 43(5));
7. The WAPC is required to consider all submissions (s 44). Each person making a submission is to be given the opportunity to be heard by the WAPC or a committee established for the purpose (s 46);
8. Further referral to the Swan Valley Planning Committee is required for a scheme or amendment affecting land in the Swan Valley;
9. The WAPC is to report to the Minister on all submissions (s 48);
10. The Minister may withdraw a scheme or amendment, or may give final approval (ss 49 and 50). The Minister may direct the WAPC to again undertake a public inspection process for any scheme or amendment which has been modified after the initial public inspection (s 51);
11. Approval of the Governor is required (s 53);

12. Following Governor's approval, the scheme or amendment is published in the Gazette, but maps, plans and diagrams are not required to be gazetted;

13. Section 55 gives an opportunity to the Governor to revoke the Governor's approval of a region planning scheme or amendment or part thereof even after gazettal;

14. The region planning scheme or amendment and the WAPC's report on submissions are to be laid before each House of Parliament within six sitting days of gazettal (s 56(1)); and

15. The region planning scheme or amendment has effect as if enacted in the Act when it is no longer subject to disallowance (s 56(3)).

An alternative process for amendments is set out in Division 4, which involves less procedural steps. This process is for amendments that in the opinion of the WAPC, do not constitute a substantial alteration to a region planning scheme. The effect of such a resolution is that the simplified procedure in Division 4 applies to making the minor amendment. The steps in the simplified procedure for making an amendment in Division 4 are:

1. The WAPC or Minister must form the opinion in s 34(1);

2. WAPC resolution to prepare the amendment (s 35);

3. WAPC forms the opinion the proposed amendment does not constitute a substantial alteration to the region planning scheme (s 57(1));

4. A copy of the amendment is sent to the Minister (s 58(1)(a));

5. Publication of notice in the Gazette and in a daily newspaper (s 58(1)(b));

6. If the amendment changes the zoning or reservation of any land, then the WAPC is to make reasonable endeavours to give written notice to the owners of the land affected (s 58(1)(c)). The WAPC is also required to consult any public authorities or persons which appear to the WAPC likely to be affected (s 58(1)(d));

7. The WAPC is required to consider all submissions and make a report and recommendations for the Minister;

8. Minister may approve with or without modifications or decline to approve (s 62(1));

9. Amendment published in the Gazette (s 62(2)(a)) but without maps, plans or diagrams; and

10. The minor amendment has effect as if enacted in the Act upon gazettal.

The requirement to refer all Region Planning Scheme amendments to the EPA can add complexity and delays to the process particularly if environmental assessment is required under s.48A of the *Environmental Protection Act 1986* (EP Act). It is important to ensure that the potential environmental impacts of proposed amendments are accurately assessed and taken into account in considering the

feasibility, scope and content of scheme amendments. However, there are classes of amendments which may not raise any significant environmental issues of concern but which are still required to go through the full legislative process of referral.

2.1.1 It is proposed to restructure the provisions setting out the procedures for amending region planning schemes to effectively reverse the default position. That is, all amendments must follow the truncated process set out in Division 4 unless, in the opinion of the WAPC, the amendment constitutes a 'substantial alteration' to a region planning scheme and is of a class that makes it necessary or desirable to subject it to the longer process in Division 3.

2.1.2 It is proposed to amend the process for amendments to provide that only those scheme amendments which are of a class specified in the regulations (to be developed in consultation with the EPA), are required to be referred to the EPA.

2.1.3 It is proposed to reduce the required advertising period of Division 3 amendments from 90 days to 60 days.

2.1.4 It is proposed to reduce the required advertising period of 'Division 4' amendments from 60 days to 42 days.

2.1.5 It is proposed to remove the requirement to advertise amendments in the Sunday Times newspaper.

2.1.6 Consideration to be given to formalising the non-statutory pre-referral process with relevant State government agencies and relevant local governments in the Region Scheme amendment process.

2.1.7 It is proposed to introduce an amendment to section 63 to allow the adjustment of scheme reserves to cadastre by notice without full consolidation. That is minor inconsistencies due to data set mismatches to cadastre will be able to be corrected by a simple notification and audit system of the GIS data sets.

2.2 The *Swan Valley Planning Act 2005*

The *Swan Valley Planning Act 2005* (SVP Act) requires that region planning scheme amendments within the SVP Act area are to undertaken as 'major' amendments (s 57 (2) of the Act) which may not be appropriate for minor modifications or anomalies. It is proposed that this requirement be refined in the case of minor amendments, to ensure that they do not have to go through unnecessary delays in the processing of amendments.

2.2.1 It is proposed to amend section 57(2) to enable amendments in the Swan Valley Planning Area to proceed through the process set out in Division 4, unless the WAPC determines such amendment should proceed through the Division 3 process for 'major' amendments.

2.3 Concurrent advertising of Region Planning Scheme and Local Planning Scheme amendments

Land use changes sometimes require an amendment to the region planning scheme and a corresponding amendment to the local government scheme. The legislation currently requires that local government schemes are consistent with the region planning scheme.

The legislation (section 26) provides that where the region planning scheme is amended to reserve land for a public purpose, the local government scheme is automatically amended. The 2010 amendments extended the automatic amendment process to situations where land in a region planning scheme is zoned Urban.

In all other cases, where the region planning scheme is amended with respect to the zoning of land, the local government is required to initiate a corresponding amendment to the local scheme no later than three months after the region planning scheme amendment has the force of law.

It is proposed to further amend this section to allow concurrent amendments for all classes of amendment to region planning schemes.

2.3.1 It is proposed to amend section 126 to extend allow for automatic amendments of local planning schemes to occur concurrently with region planning scheme amendments for all types of zoning and reservation under the region planning scheme (not just for reservations or amendments to Urban zone as is currently the case). Further, when region planning schemes are amended to remove or reduce reservations, local planning schemes should be automatically amended. The concurrent and/or automatic amendments will be subject to the provision of supporting documentation as requested by the WAPC which may include spatial data and structure plan(s).

2.4 Conflict between a Region Planning Scheme and a Local Planning Scheme priority of instruments

Part 9 of the Planning Act sets out the proposed priority of instruments. There is an inconsistency between the terms of the Planning Act and the Metropolitan Region Scheme (MRS).

Section 123 provides that local planning schemes and local laws are to be consistent with a region planning scheme.

Section 124 (1) provides that if a region planning scheme is inconsistent with a local planning scheme, the region planning scheme prevails over the local planning scheme to the extent of the inconsistency.

However, clause 21 of the MRS provides that where a local planning scheme provision is 'at variance' with any provision of Part III of the MRS, the provisions of the local planning scheme shall prevail.

A clarifying amendment may be required to address the ambiguity arising from these inconsistent provisions to confirm the priority of region planning schemes.

2.4.1 It is proposed that Section 124 to be amended to clarify that notwithstanding any provision in the MRS or other region planning scheme, the provisions of a region planning scheme prevail over the provisions of a local planning scheme to the extent of any inconsistency.

2.5 Electronic versions

It is proposed to ensure that the Planning Act enables the electronic version of the region planning schemes to be the official version with statutory effect, once the Department has implemented the appropriate technology, processes and supporting environment. This will allow the electronic version to be continually updated to reflect positional changes to cadastral boundaries resulting from geodetic and spatial upgrades by Landgate of their Spatial Cadastral Database (SCDB). This in turn would allow for more efficient consolidation of minor amendments as well as tracking, auditing and actioning of workflows.

In addition, it is proposed that the range of overlays on electronic versions could be extended in scope and accessibility to provide more accurate and up to date information on the constraints and opportunities within a region planning scheme area. The range of data that can be covered in different layers includes infrastructure (such as gas pipelines, water sewerage, power plants etc), environmental constraints (such as wetlands, contaminated sites, Bush Forever sites), and other areas demarcated in relevant planning policy. Further informational layers may be included such as the location of areas designated under local planning schemes (such as development contribution plans and heritage listings). Only data for which the WAPC is responsible will be included in the mapping.

2.5.1 It is proposed to introduce amendments to relevant sections of the Act (including but not limited to Sections 43, 46, 54, 56, 58, 62 and 63) to ensure that the Planning Act enables the electronic version of the planning schemes to be the official version, once the Department has implemented the appropriate technology, processes and supporting environment.

3 Local planning schemes

Under the Planning Act, a local government may prepare or adopt a local planning scheme or amendment with reference to any land in its district but needs the Minister's approval to do so. The provisions regarding local planning schemes, have remained substantially unchanged since the 1928 Act. Matters which may be the subject of a local planning scheme are contained in section 69 and Schedule 7 of the Planning Act.

Historically, the State has been able to influence the content of local planning schemes through the establishment of the model scheme text (as prescribed in Appendix B of the *Town Planning Regulations 1967*) and, more indirectly, through the development of State planning policies to which the local governments are required to give due regard in the preparation of their schemes.

As a result of the 2010 Amendment Act the legislation now enables the development of general provisions to ensure more consistency in the legal and administrative provisions of the local planning schemes. The regulations regarding the process of amending schemes are being reviewed concurrently with the development of proposed general and model provisions. In addition, in certain circumstances the Minister for Planning will be able to direct local governments to amend their schemes to be consistent with particular State planning policies.

3.1 Amendment process for local planning schemes

Local planning schemes are currently made and amended by a process that involves the following elements:

(i) The responsible local government resolves to prepare the scheme, or to adopt a scheme prepared by owners (s 72(1))

(ii) Referral to agencies (Part 5 Dir 3)

(iii) Environmental Review (ss 81 & 82, 85 and 86)

(iv) Public inspection (s 84)

(v) Approval by the Minister (s 87(1))

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

The preparation, review and amendment of local planning schemes is slow and expensive. Schemes are often long overdue for review before the review formally commences. Local scheme amendments can also take a year or more for approval. There are a range of factors leading to delays including protracted negotiations and lengthy consultation procedures. Two of the key legislative requirements of the process for scheme amendments that have been attributed with causing delays, as with the region planning scheme process, are those relating to (a) referral of all schemes to the EPA, and (b) advertising and consultation periods of scheme amendments.

Major changes occurred to the planning process following the *Planning Legislation Amendment Act 1996*, which introduced the environmental assessment of local planning schemes and amendments. The intention of the legislation was to give the community greater confidence in the land use planning process because the environmental assessment of proposed land uses and development at the rezoning stage would provide certainty that environmental factors have been given proper consideration long before development occurs.

Since then, concerns have been expressed that these procedures have resulted in increased complexity, delays and costs in the planning process without significantly better planning or environmental outcomes.

Section 81 requires all local planning scheme amendments to be referred to the EPA for advice as to whether an environmental review is required. The EPA is required to respond in 28 days. The *Town Planning Regulations 1967* provide that councils are not permitted to advertise a proposed scheme amendment for public inspection until the EPA has provided written confirmation that an environmental review is not required.

In cases where there may be environmental concerns associated with a scheme amendment, it is important for the EPA to be consulted. However, a great majority of scheme amendments do not require an assessment under section 48A of the *Environmental Protection Act 1986*. In addition, if the EPA does determine that an environmental assessment is required under section 48A of the *Environmental Protection Act 1986*, the amendment process can be lengthy and problematic.

In order not to divert resources from cases where significant environmental issues are present, it is proposed to amend section 81 so that only those schemes which give rise to environmental issues need be referred to the EPA.

3.1.1 It is proposed to amend section 81 to provide that only those scheme amendments that are of a class specified in the regulations (to be developed in consultation with the EPA) are required to be referred to the EPA.

3.1.2 Under section 82, there is no time limit on the requirement for a local government to undertake an environmental review when the EPA has acted under section 48C(1)(a) of the Environmental Protection Act 1986 (EP Act). It is proposed to insert a time period within which the local government must comply with the relevant instructions from the EPA.

The requirements relating to the advertising of a scheme amendment are set out in Part 5, Division 4 of the Planning Act.

Section 84 provides that *after* compliance with the EPA referral and environmental review requirements in sections 81 and 82, a local planning scheme *is* to be advertised. In practice, when a scheme is prepared, incorporating an environmental review if required, it is sent to the WAPC for a recommendation to the Minister for consent to advertise for public comment. Pursuant to the *Town Planning Regulations 1967*, the Minister may give consent to advertise the scheme with or without modifications or may withhold consent to advertise. A scheme is to be advertised for a minimum of three months.

Local governments have suggested that delays may be reduced if the public advertising of the proposed scheme amendment could occur simultaneously with any requirement of referral to the EPA.

3.1.3 It is proposed to amend section 84 to (i) reflect the requirement specified in the Town Planning Regulations 1967 that the Minister's consent be obtained prior to advertising; and (ii) provide that, in cases where a referral to the EPA is required under section 81, the Minister may consent to the advertising process proceeding simultaneously with the process of referring the scheme to the EPA.

3.2 Objects of a local planning scheme and local planning strategies

The range of objects which can be included in a local planning scheme is currently very broad. Section 69 provides that a local planning scheme may be made: (i) with the general objects of making suitable provision for the improvement, development and use of land in the scheme area; and (ii) making provision for any of the purposes or powers set out in Schedule 7.

Judicial interpretation of the scope of the power currently set out in Schedule 7 (previously set out in Appendix A to the 1928 Act) is that it elaborates but does not extend or limit the power of the local government to provide for general objects in the scheme (see *Costa & Ors v Shire of Swan* [1983] WAR 22).

Most local planning schemes contain the following provisions:

- the identification and classification of land by way of zoning or precincts;
- the types of uses that are permitted or preferred in those zones or precincts;
- the designation of residential density coding by reference to the codings set out in SPP 3.1 Residential Design Codes;
- the designation of Special Control Areas, which act as an overlay to zones or precincts, where particular additional planning controls are required to be applied;
- developmental standards or requirements by reference to the zone or precinct or by reference to the type of use (for example, the number of car bays required to be provided for particular uses, the maximum heights of buildings, the required building setbacks, provisions relating to landscaping and amenity);
- the power to make local planning policies to support and guide the exercise of discretion in decision-making under the scheme;
- in some schemes, a power to require structure plans prior to development or subdivision approval; and
- the process by which an application for development approval is lodged, assessed, and determined.

The preferred view of the WAPC is that the local planning scheme text should be short and succinct, and that the detailed strategic framework should be set out in the local planning strategy. Currently, the Planning Act does not make any reference to local planning strategies.

3.2.1 It is proposed to include a reference to the preparation of local planning strategies in the Act, and to elaborate on the range of objects which should be included in a scheme and those which are better dealt with in a local planning strategy.

3.2.2 In addition, as part of the review process of the model scheme text and general provisions referred to in 4.1 above, it is proposed to transfer certain procedural provisions into generally applicable regulations. This will achieve statewide consistency in planning approval requirements regarding structure plans, development contribution plans, special control areas and administrative procedures. The Minister for Planning will consult with local governments, the Environmental Protection Authority and other affected parties prior to the general provisions coming into effect. Currently, the amendments contemplates two types of general provisions: those that will apply automatically as regulations; and those that must be approved and adopted as part of the scheme amendment process to have effect.

3.3 Restrictive covenants

The restrictive covenants are a matter that may be dealt with by a local planning scheme as set out in Schedule 7. Schedule 7 provides that a local planning scheme may provide for the power of "extinguishment or variation of any restrictive covenant". *Planning Bulletin 91 Estate Covenants: New Residential Subdivisions* was released by the WAPC in July 2008. This Planning Bulletin explains how restrictive covenants are used in the planning system, including how they are varied or extinguished.

A restrictive covenant is an agreement which restricts a landowner in the use or enjoyment of the landowner's land for the benefit of other land or for the benefit of a public authority. Planning Bulletin 91 provides guidelines concerning the variation or 'extinguishment' of restrictive covenants which purport to restrict residential density in a manner that is inconsistent with the applicable residential design codes for the area. Generally, the WAPC is of the view that these are the only types of restrictive covenants in respect of which it is appropriate for the provisions of a local planning scheme to override. Other types of restrictive covenants should generally only be modified by the procedures set out in the relevant provisions of the *Transfer of Land Act 1893* (TLA).

The language in Schedule 7 is not restricted to any particular type of restrictive covenant and contemplates a much broader power.

3.3.1 It is proposed to amend Schedule 7 to modify the power of a local planning scheme to modify or extinguish a restrictive covenant. It is proposed that this power only be used in relation to restrictive covenants affecting any land in the local planning scheme area by which, or the effect of which is that, the number of residential dwellings which may be constructed on the land is limited or restricted to less than that permitted by the local planning scheme (including any covenant purporting to limit or restrict subdivision or limit or restrict the maximum area occupied by a dwelling), to the extent that it is inconsistent with the provisions of the residential planning design codes that apply under the local planning scheme.

It should be noted that the above changes do not propose any changes to existing restrictive covenants relating to control of residential density or subdivision.

3.4 Meaning of the term 'adopt'

The term 'adopt' is interchangeably used in different senses in both the Planning Act and regulations when referring to local planning schemes and amendments. In one sense, it is used to mean the initial adoption of a draft scheme amendment by a local government before it goes through the advertising and environmental review process. This is where the local government has not itself prepared the scheme amendment but rather 'adopted' the initial version prepared by landowners, for the purposes of submitting it to the full process of advertising and consultation. In another sense, it means the final adopting by the local government council, as an amendment ready to be submitted to the Minister

for Planning for his approval. This occurs after the scheme amendment has gone through the referral and advertising processes and is ready to be lodged with the WAPC for final approval by the Minister.

3.4.1 It is proposed to modify sections 72, 75 and 76 to clarify the use of the term 'adopt' in respect of local planning scheme amendments. A distinction is to be made between the initial adoption of an instrument prepared by landowners prior to being submitted through the advertising and referral process, and the final adoption by the Council of a proposed amendment for submission to the Minister for final approval.

3.5 Regulations for Local Planning Schemes

The question of who is authorised to make regulations affecting the content and application procedures under local planning schemes and other planning matters is inconsistent. Sections 256 and 258 empower the Minister to make regulations prescribing provisions in local planning schemes. However, section 261 nominates the Governor as the authority to make regulations concerning planning fees. The Governor also is given a broad power to make regulations under section 263, including the manner applications are made. This inconsistency arises because when the Planning Act was introduced in 2005, it was a consolidation of different statutes, some of which had named the Minister and others the Governor as the appropriate approval authority for new regulations. This oversight should now be corrected.

3.5.1 It is proposed to delete references to 'the Minister' making regulations, such as under sections 256, 257A, 257B, 258, 259, to be replaced with 'the Governor.'

4 Cash-in-lieu of public open space

In Western Australia, since publication of the *Stephenson Hepburn Report* in 1955 and confirmed by the High Court decision in *Lloyd v Robinson* (1967) 107 CLR 142, it has been standard for any subdivision approval agency to require land equal to 10 per cent of the gross subdivisional area in a residential subdivision vested in the Crown free of cost as public open space (POS).

It is not always consistent with good planning design for land to be given as POS (e.g. the area required to be given may be too small for a useable recreation ground or there may be a more appropriate location for public open space in the locality. Provision is therefore made in ss153-156 for dealing with the giving of cash-in-lieu of POS.

Under the current legislative provisions, cash-in-lieu can apply if the WAPC has approved a plan of subdivision of land on condition that a portion of the land be set aside and vested in the Crown for parks, recreation grounds or open spaces generally and:

(a) the WAPC after consultation with the responsible local government so requires (s153(1)(a)); or

(b) the WAPC, the local government and the owner so agree (s153(1)(b)).

4.1 Requirement of a condition to set aside land

The current legislative provisions require that before the WAPC may consider if cash-in-lieu is more appropriate than the setting aside of land, a condition to actually set aside land must have first been applied. That is, cash-in-lieu cannot be considered upfront as a condition in itself. This interpretation was confirmed in *Langer Nominees Pty Ltd & Anor and WAPC* 2007 WASAT 137), which determined that the discretion to approve/require a cash-in-lieu payment was a reviewable decision. The imposition of the condition requiring POS serves as the trigger for the application of section 153 enabling a cash contribution to be made in lieu of the land being set aside.

Given that cash-in-lieu may be more appropriate than the setting aside of land in some situations, it may be more efficient to allow the WAPC to consider the question upfront without the additional step of having to impose the condition to set aside land.

Another anomaly in section 153(2) is that the WAPC may not require cash in lieu where the subdivision creates less than three lots, but it may require actual land for less than three lots. The setting aside of POS land in such subdivisions would usually result in an unusable size of POS. Often land or cash-in-lieu would not be required for two-lot subdivisions, however the provision serves as a deterrant to staging larger subdivisions to avoid a contribution. Where a subdivision creates less than three lots, it is proposed that the option to require cash rather than set land aside may be more consistent in achieving proper planning outcomes.

4.1.1 It is proposed to amend section 153 to allow the WAPC to impose a condition on subdivision approval that POS requirements be satisfied through the payment of cash-in-lieu (without the requirement of a prior condition on the setting aside of land).

4.1.2 Further, it is proposed to delete the limitation in section 153(b) such that cash-in-lieu provisions or the setting aside of land may apply to subdivisions that result in the creation of less than three lots if considered a necessary contribution to the locality.

4.2 Trust account

Section 154 deals generally with money received by a local government under the cash-in-lieu provisions of section 153.

Section 154(1) provides that all money received by a local government under section 153 is to be paid into a separate account of the trust fund established under s 6.9 of the *Local Government Act 1995*.

Local government has questioned why the funds received under section 153 need to go into a trust account rather than a special reserve account as is required for developer contributions under *State Planning Policy SPP3.6 Development Contributions for Infrastructure*. The change to a reserve account is supportable as:

- reserve accounts are established for a specific purpose and strict constraints apply to changing the purpose;

- interest on the reserve account can be restricted to apply to that purpose; and
- the monies are being held in reserve for specific works rather than for a specific individual or company.

4.2.1 Section 154(1) to be amended to allow for monies received under section 153 to be paid into a reserve account (rather than a trust account) in the same manner as Development Contributions under SPP 3.6.

4.3 Approval of the Minister

Section 154(2)(c) provides that with the Minister's approval, a local government may apply the funds received as cash-in-lieu to the improvement or development of land anywhere in the locality of the local government for the purpose of parks, recreation grounds or open spaces (not just land included in the locality in which the land included in the plan of subdivision is located). As a matter of practice, this decision is often delegated by the Minister to the WAPC up to a certain financial threshold. To streamline the procedure, it is proposed that the WAPC be the final approval authority for the purposes of this sub-section. This should be a sufficient check and balance on how the funds are applied by the local government.

4.3.1 It is proposed to replace 'Minister' with 'Commission', as the approving authority regarding the potential wider application of funds received as cash-in-lieu provided for under section 154(2).

4.4 Joint subdivision agreement

Section 154(2) provides four ways in which the money held in that part of the trust fund is to be applied. One of the four ways is the reimbursement of a owner (first owner) of land included in a *joint subdivision agreement* for land that has been set aside for open space where the first owner set aside a greater proportion of land than another owner (the second owner). This section was included in the Planning Act in 2005. It was not in the 1928 Act and is yet to be judicially considered.

The issue of what constitutes a 'joint subdivision agreement' has recently been raised, and in particular whether or not a local structure plan or POS strategy could come within the scope of the definition. Accordingly, it is proposed to amend this provision to clarify the scope of 'joint subdivision agreement'.

4.4.1 Section 154(2)(d) to be amended to clarify the scope and definition of 'joint subdivision agreement.

4.5 Method of valuation

The interpretation of section 155(3)(b)(iv) regarding the calculation of the market value of land has been the subject of dispute. In particular, whether or not the requirement to take "into account the added value of all other improvements on or appurtenant to the land" is appropriate when it comes to calculating the costs of roads and waterway construction pursuant to section 159, has been questioned. This review may present an opportunity to clarify provisions concerning valuation to limit ambiguity and bring the legislative requirements in line with current best practice in valuation methodology.

To reduce disputes, the possibility of prescribing in more detail the preferred methodology for valuations under the Planning Act may be considered, including model calculation worksheets and templates.

In addition, consistent with other proposals to transfer jurisdiction of dispute resolution for matters under the Planning Act to the SAT, it is proposed that disputes as to valuation matters also be referred to the SAT.

4.5.1 Section 155(3)(b)(iv) to be amended to clarify the matters to be taken into account in calculating the market value of land for the purposes of determining the amount of cash-in-lieu for POS payable, (and also for the purpose of determining road costs recoverable by original subdividers pursuant to section 159). A model worksheet may be developed and included as an appendix or published on the website.

4.5.2 It is proposed to amend section 155 to provide that any disputes as to valuation be referred to the SAT rather than determined pursuant to the Commercial Arbitration Act 1985.

5 Subdivision and development control

There is an ongoing need to draft legislation in clear and simple language and to make legislative enactments accessible to the general public as well as the legal profession. This review of planning legislation is an opportunity to clarify and generally improve provisions dealing generally with the subdivision and development approval process.

To some extent the consolidation and amendment to the Planning Act in 2005 achieved further simplification and streamlining of provisions relating to the subdivision process, but there are some ongoing issues that may be addressed in this review.

5.1 'Conflict' between subdivision and local planning schemes

In 2005, amendments were made to the Planning Act to require the WAPC to give due regard to local planning schemes when considering subdivision applications and to not give an approval that 'conflicts' with the provisions of a local planning scheme. However, section 138(3) provides that the WAPC may approve a subdivision that conflicts with a local planning scheme in certain circumstances.

Local government schemes are the central instrument for local planning in Western Australia and the WAPC should not be able to disregard schemes in making subdivision decisions. On the other hand, the WAPC should be allowed some flexibility in its discretion in determining subdivisions to ensure that State interests are protected in respect to land supply.

While the current provisions in section 138 are aimed at balancing these concerns, there is some confusion about the meaning of the term 'conflicts', and the situations in which the WAPC is permitted to approve a subdivision that is not consistent with the provisions of a local planning scheme.

Clarifying amendments will be considered to more specifically consider the circumstances in which a local planning scheme may be varied from in approving a subdivision.

5.1.1 It is proposed to clarify the meaning of 'conflicts' in section 138(3) and/or to further iterate the circumstances in which a subdivision approval may be given that is contrary to the provisions of a local planning scheme.

5.2 Clearance of conditions

The WAPC may require an applicant for subdivision approval to comply with such conditions as the WAPC thinks fit before the WAPC will endorse a deposited plan (diagram or plan of survey). Frequently the WAPC imposes conditions that require a matter specified in the condition to be carried out to the satisfaction of a third party; such conditions are termed 'ambulatory conditions'.

In 2005, the Planning Act was amended in order to provide certainty by validating ambulatory conditions. It is proposed to consider additional processes and procedures to assist in the clearance of conditions by the WAPC and other parties to ensure greater certainty and clarity in the process.

The practice of the WAPC in relying on local government and State agencies to liaise directly with subdividers to facilitate clearance of subdivision conditions is recognised in the legislation but the circumstances in which formal advice from such agencies may be required may need to be further clarified.

5.2.1 It is proposed to introduce provisions setting out a more formal resolution process for clearing subdivision conditions.

5.3 Recovery of costs of original subdivider

Section 159 provides a procedure for an original subdivider to compel a later subdivider to pay a contribution to the cost of a subdivisional road provided by the original subdivider. This applies to roads or waterways with which the later subdivision has a lot or lots which share a common boundary with the the existing road of the original subdivider.

'Subdivider' is not defined. From time to time there have been disputes over the interpretation of who is liable under this section, and the application of the valuation methodology under section 155 with respect to the cost of roads.

Consideration will also be given to whether or not the scope of section 159 should extend beyond the costs of roads incurred by an original subdivider to costs for other infrastructure such as sewerage, water, drainage and perhaps telecommunications, which are a fundamental requirement to service a subdivision, particularly residential. Where developer contributions do not exist this would enable developers, particularly small developers, to reduce the risk for development as they will be able to seek cost recovery. This is particularly important in areas that are fragmented and/or remote.

5.3.1 Clarifying amendments are proposed to section 159 ensure that the formula for reimbursement of the costs to the original subdivider are reasonable and accurate. In particular, that the original subdivider may only recover 'one-half' of the 'reasonable costs' from a later subdivider once, and modification of language in section 155(3)(b)(iv) regarding improvements on the land in the application of road and waterway costs.

5.3.2 Comments are sought on the proposal to extend the scope of section 159 to enable an original subdivider to recover costs not only for roads but also other essential infrastructure including sewerage, water, drainage and perhaps telecommunications.

5.4 Local government supervision of road design

Sections 168 and 170 provide for local government control over the design and specifications for local roads and waterways and s 170(5) allows for a right to apply to the SAT to review the local government requirements.

In the same context, s 169 empowers the WAPC to publish in the Gazette minimum standards of construction for roads and waterways, apparently intended to apply as models, but to date none have been published or proposed.

Currently, there are no time limits that apply the local government consideration of designs and specifications, nor any minimum standard published by the WAPC to guide them. It is proposed to clarify the requirements in Section 170 as to the timeframe and standards that a responsible authority is bound by in requesting a subdivider to comply with the requirements regarding roads and waterways.

5.4.1 An amendment to section 170 is proposed to provide a timeframe and refer to standards and specifications for the purpose of providing certainty and clarity to subdividers on complying with requirements of responsible authority for roads and waterways.

5.4.2 An amendment to clarify that section 157 – which provides for deemed approval of subdivision works – is subject to the requirement in section 170 that roads and waterways be subject to approval by the responsible authority.

5.5 Definition of 'development'

The current definition of 'development' in the Act (section 4) is: 'development' means the development or use of any land, including —

(a) any demolition, erection, construction, alteration of or addition to any building or structure on the land;

(b) the carrying out on the land of any excavation or other works;

(c) in the case of a place to which a Conservation Order made under section 59 of the *Heritage of Western Australia Act 1990* applies, any act or thing that —

(i) is likely to change the character of that place or the external appearance of any building; or

(ii) would constitute an irreversible alteration of the fabric of any building.

The term 'development' is used both in the definition and in the explanation. This causes confusion when wanting to describe 'development' as purely 'works' being undertaken, as opposed to any 'use' being undertaken. Also, it is often not clear when using the term 'development' whether it is applying to both 'use of the land' and 'development' (works) or just 'works'.

5.5.1 It is proposed to consider amending the definition of 'development' as follows:

'development' means the use of any land, or undertaking any works in, on or under any land including —

(a) any demolition, erection, construction, alteration of or addition to any building or structure on the land;

(b) the carrying out of any excavation or other works;

(c) in the case of a place to which a Conservation Order made under section 59 of the *Heritage of Western Australia Act 1990* applies, any act or thing that —

(i) is likely to change the character of that place or the external appearance of any building; or

(ii) would constitute an irreversible alteration of the fabric of any building.

6 Time limits on endorsement of subdivision plans

6.1 Expiry of plans under section 145

Issues have arisen with the way that applications for WAPC endorsement of an approved plan of subdivision are lodged with the Department of Planning.

Section 145 of the Planning Act requires that a person who has an approved plan of subdivision, must lodge an original diagram or plan of survey of the subdivision to the WAPC for endorsement before the prescribed period expires. Generally, the prescribed period is four years from the date of approval for subdivisions creating more than five lots, and three years in all other cases.

The current process allows an applicant to make an application using the standard Form 1C, accompanied by the prescribed fee and a copy of the original plan of subdivision that has been lodged with Landgate for certification. The 'certified correct' original plan is often not provided to WAPC until some time after the Form 1C has been lodged, and in some cases is not received until after the expiration of the prescribed period.

To address some of the inconsistencies between practice and applicable regulatory provisions and forms, the Department is proposing some changes to its Form 1C and lodgement process. In addition, some legislative change will be considered.

6.1.1 It is proposed to amend section 145(5), to clarify that the 30-day statutory period for dealing with a request for endorsement of an approved plan of subdivision commences from the date that the WAPC receives a complete and valid application. This includes not only a valid Form 1C but also the 'certified correct' original plan from Landgate.

6.1.2 Amend section 145(7) to provide some flexibility for the WAPC to accept an original plan after the expiration of the prescribed period in section 145(2), in circumstances where the applicant has lodged the Form 1C and all other relevant documentation in a timely manner, but due to extenuating circumstances, the original plan was not received from Landgate prior to the expiration date.

6.1.3 It is proposed to introduce an option to allow WAPC the discretion to 'roll over' subdivision approvals (once only) for a further two years upon the payment of a reduced fee providing there has been no significant planning changes in respect of the area or servicing authority specifications. Similar provisions could be introduced for development applications.

6.2 Issuance of title under section 146

Section 146 was inserted into the Planning Act as part of the 2005 consolidation. This section operates to prevent the Registrar of Titles from registering a new certificate of title for a subdivided property if the application for a title is not made within the specified time period. The aim of this section is to provide a finite period between a subdivision approval and the right to make a title application, thereby

ensuring that there are no dormant subdivision approvals that may continue to be valid for an indefinite period. The aim is to prevent the approval being acted upon at a much later date when it may be out-of-step with modern planning practices.

If an applicant fails to apply for a title on an endorsed diagram or plan of survey within the period prescribed under section 146 (generally two years from the date of endorsement of the plan by the WAPC), the applicant will be required to recommence the entire subdivision process from the beginning under section 135 of the Planning Act. The approvals of the WAPC under sections 135 and 145 will have lapsed and cease to have any effect.

While section 146 prevents the creation of titles after a certain period, it does not expressly provide for the WAPC's approval to lapse.

6.2.1 It is proposed to amend section 146 to clarify that once the time period specified to lodge with Landgate for the issuance of title, a diagram or plan of survey endorsed with the approval of the WAPC has lapsed, the effect is that the WAPC approval is deemed revoked, and the endorsed diagram or plan of survey ceases to be valid or effective.

7 Pre-selling – amendments to section 140

Pre-selling (or selling off-the-plan) describes a situation where developers make an offer to transfer or sell land or property that has not yet received title as an individual lot.

Currently, the Planning Act prohibits dealing in land that has not yet received title as a separate lot unless certain preconditions are met. These preconditions are set out in section 140.

Previously, the Land and Housing Industry reference group and the Department of Consumer affairs have proposed that section 140 be amended to restrict the practice of pre-selling. The amendment would effectively restrict the practice of entering into presale contracts for the sale or purchase of land that requires or proposes the subdivision of land into three or more lots unless the WAPC has given approval to the subdivision. While the market conditions that were the impetus for this concern have subsided, it is considered that this review is an opportunity to clarify the operation of this section.

There is some ambiguity in section 140 as to whether the preconditions require WAPC approval of the actual *agreement* to (pre)sell in addition to the requirement for approval of the proposed *subdivision* to be obtained within the prescribed period of time. As a matter of practice, the WAPC does not engage in reviewing and approving the entering into of agreements to (pre)sell land.

The Law Society supports an amendment that reinstates the position under the 1928 Act (as amended) which provides that the validity of an agreement to sell be conditional on WAPC approval of the proposed *subdivision*, without the requirement that the agreement itself be approved by the WAPC.

In addition, the opportunity will be taken to clarify the effect on the rights and obligations of the parties to an agreement, in circumstances where subdivision approval or final endorsement of a plan does not occur within a specified timeframe.

7.1 It is proposed to amend section 140 to remove the reference to the WAPC approving an agreement to pre-sell land and to effectively reinstate the legislative position under the 1928 Act (as amended). That is, an agreement to 'pre-sell' land may be entered into provided that such agreement is conditional upon approval of the subdivision by the WAPC.

7.2 Section 140(3)(b) and section 141 are proposed to be amended to clarify the rights and obligations of the parties to agreements to sell for situations where either (i) WAPC approval is not obtained within the period of six months after the date of entering into the transaction; or (ii) final endorsement of the diagram or plan of survey and/or the issuance of title does not occur within a specified period of time.

8 Enforcement and legal proceedings

In addition to the enforcement provision contained with local planning schemes and region planning schemes, Part 13 of the Planning Act sets out matters relating to enforcement and legal proceedings.

Sections 211 to 235 set out the powers of the Minister, the WAPC, or the local government, as the case may be, to ensure compliance with the provisions of a planning scheme or the Planning Act, including directions by the Minister given under the Planning Act. This review is an opportunity to consider the scope of these legislative provisions and the adequacy of current practice regarding enforcement.

8.1 Increase in penalty

The *Heritage and Planning Legislation Amendment Act 2011* had the effect of amending section 223 of the Planning Act to increase the maximum penalty amount for offences under the Act from $50,000 to $200,000, and the daily continuing offence rate from $5,000 to $25,000. Prior to this change, the penalty amounts had not been reviewed since the early 1990s.

As part of this review it is proposed to review the adequacy of the penalty amounts by engaging in a comparative analysis of rates in other Australian jurisdictions and across other Western Australian jurisdiction.

8.1.1 It is proposed to review the penalty amount under the Planning Act based on the current penalty amounts prescribed under comparable legislation in Western Australia and other jurisdictions.

8.2 Enforcement of local planning schemes and the scope of section 211

Section 211 (based on section 18 of the 1928 Act) enables any person aggrieved by the failure of a local government to enforce or act in accordance with a scheme to request the Minister to consider the matter.

The Minister may determine not to take any action in response to the representations or, if the Minister considers it appropriate to do so, the Minister may refer the representations to the SAT for its report and recommendations.

The Minister may then order the local government: (a) to do all things necessary for enforcing the observance of the scheme; or (b) to do all things necessary for executing any works which the local government is required to execute.

From time to time, the scope of section 211 is challenged by persons aggrieved by the action or inaction of their local government in a particular planning matter. However, this provision is not intended to operate as a third party appeal right but rather is there for serious or significant acts or omissions by the local government which have the effect of not enforcing the relevant local planning scheme.

Further clarification of the scope and process provided by this provision may be considered in this review.

8.2.1 It is proposed to further specify the scope and process under section 211 to ensure that it is not used as a form of third party appeal right.

8.3 Minister's enforcement powers under section 212

Section 212 allows the Minister to take action on behalf of a local government if it fails to comply with an order or direction given under the sections listed in subsection (1). These include failures by the local government to comply with:

- an order under section 76 (preparing local planning schemes and amendments);
- an order made under section 77A (State Planning Policies);
- a provision of Part 5 Division 5 (review of local planning schemes);
- an order under section 211 (enforcing a local planning scheme); and
- the regulations made under section 258 (preparation and advertisement of local planning schemes and other matters.

8.3.1 This section will be reviewed to ensure that this power extends to all relevant directions and orders given by the Minister pursuant to the Planning Act.

8.4 Powers of responsible authority – section 214

Some minor clarifying amendments are proposed to this section. Currently, in the case of an unauthorised development, the power of the responsible authority is arguably limited to directing the proponent to remove the development and restore the land to its condition immediately before the development started. It would be prudent to allow other appropriate measures to be directed by the responsible authority where removable of the development or restoration would not result in a satisfactory planning outcome.

8.4.1 It is proposed to expand the range of measures that a responsible authority may direct a proponent of unauthorised development to undertake. This will be in addition to the power to direct removal of the development and restoration of the subject land.

8.5 Unauthorised subdivision works – section 219

Section 219 provides a person who commences, continues or carries out works *for the purpose of enabling the subdivision of land* otherwise than (a) as shown on a plan of subdivision approved by the WAPC; or (b) as required by the WAPC to be carried out as a condition of approval of the plan of subdivision commits an offence.

In certain circumstances where an applicant is carrying out unauthorised works, the evidentiary burden of establishing the requisite intent that the works are *for the purpose of enabling the subdivision of land* may interfere with the proper and fair implementation of the offence provision in section 219. To ensure that applicants undertaking unauthorised works do not have the opportunity to escape liability for their actions due to the current wording of this section, a modification is proposed to ensure that its objectives are met.

8.5.1 It is proposed to amend section 219 to remove the requirement that the purpose of the works needs to be established for an offence to have occurred. It will be sufficient for the works to be have been commenced or carried out on land that is the subject of a subdivision application and otherwise than as shown on a plan of subdivision approved by the WAPC, or as required by the WAPC to be carried out as a condition of approval.

8.6 Planning infringement notices – section 228

Section 228 provides for infringement notices to be issued and refers to a 'designated person'. This term is not defined and may require further clarification.

8.6.1 It is proposed to amend this section to include a definition of 'designated person'.

9 Public works exemptions

The development approval process for public works throughout the State is in need of review. The existing provisions in sections 5 and 6 of the Act have been the subject of frequent legal advice seeking clarification as to whether or not a particular body or type of work comes within the scope of a public work exemption.

The definition of 'public work' is set out in section 4 of the Act, which includes any public work as defined in the *Public Works Act 1902*. This list of public works was originally compiled in 1902 and has been infrequently revised on an ad hoc basis since then. If a work does not come within an exemption under the Act, a development application needs to be lodged with the WAPC for approval under a region planning scheme, unless it comes within one of the separate list of exemptions set out in the region planning scheme.

Section 6 of the Planning Act effectively provides an exemption from development approval for public works undertaken by any of the agencies specified in section 6. Section 5(2) states that a region planning scheme binds the Crown (i.e. all section 6 bodies except local government). This means that the exemption provided by section 6 does not extend to the requirements of a region planning scheme for State agencies but does for local governments. As such, section 6 bodies may be required to apply for approval to commence development, including public works, under a relevant region planning scheme.

9.1 Range of public and minor works

There are a number of works and proposals that, under the current legislation, do not fall within the legislative exemptions and so must be forwarded into the WAPC for formal approval. In many cases, the consideration of the applications by the WAPC adds little or no value as there are no complex planning issues to be resolved. In addition to clarifying existing exemptions, this review aims to identify further classes of works that may be appropriate for exemption from the approval process. This may result in amendments to the definitions in the Act as well as revisions to the lists of exemptions in Clause 16 the Metropolitan Region Scheme. The aim is to reduce the number of applications that are unnecessarily adding to backlog in the approvals process, particularly where there are no planning issues in respect of which WAPC consideration would add value.

9.1.1 The definition of 'public works' will be expanded to include the range of works identified by the WAPC as not requiring approvals. This may be done either by expanding the list to iterate a list of specific works (to be subscribed in subsidiary legislation) or by revising the definition to allow more flexibility in determining whether or not a work amounts to a public work for the purposes of section 6.

9.2 Public and private bodies

There is also often confusion about the range of public and private bodies that may claim the public works and other region planning scheme exemptions. There is further complexity where there are partnerships between State and private bodies doing public works. It is not always clear in the case of corporate or semi-corporate bodies providing utilities and other services that previously were provided by the State, when and if certain exemptions apply. The review will consider the need to be more specific in the definitions of 'public bodies' and the iteration of various bodies that may be entitled to the exemption.

9.2.1 It is proposed to further clarify the bodies that may claim exemptions for public works under the Planning Act or region planning schemes.

9.3 Discrepancy between local government and State agencies

The effect of sections 5 and 6 is that the 'Crown' is bound by a region planning scheme, but not by a local planning scheme in relation to public works. This subsection carries forward the legal position arising from the decision of the Full Court of the Supreme Court in the *City of Bayswater v Minister for Family and Children Services and Others* [2000] WASCA 151 (Bayswater case) – namely, section 6 bodies are required to apply for approval to commence development, including public works, under the Metropolitan Region Scheme (MRS).This has led to a situation where a local government, not being included in the Crown, is exempt from approval under a region planning scheme for public works, but a State department or agency is not exempt.

9.3.1 It is proposed that section 5 be amended so that the legislative position returns to the situation prior to the Bayswater case. That is, neither the Crown nor local governments will be bound by region planning schemes in undertaking public works.

9.4 Consultation where exemption applies

Finally, in cases where the exemption under section 6 does apply, there have been implementation issues regarding the requirements in subsections 6(2) and (3). These require a proponent to consult with relevant authorities and have regard to the proper planning and the objects of schemes applicable in the area, even though there is no requirement to submit a formal application. The review may consider whether or not the provisions setting out these requirements need to be strengthened.

9.4.1 It is proposed to more specifically prescribe the consultation requirements in cases where a section 6 exemption does apply.

10 Crown and State land

The 2010 Amendments inserted section 267A, which was aimed at streamlining the process for the giving of approval or signature of the owner of Crown land or freehold land in the name of the State. It is proposed to further amend this section to allow more efficient delegation of the functions to appropriate officers under applicable legislation.

10.1 It is proposed to amend section 267A to give effect to the following:

- If an approval or signature of the owner of Crown land or freehold land in the name of the State is required for the purposes of this Act, the following will apply–

  (a) Where Crown land is a reserve managed by–

    (i) a State instrumentality as defined under the LAA; or

    (ii) a management body referred to in section 46(10)(b) of the *Land Administration Act 1997*; or

    (iii) a local government and the development is consistent with the reserve's purpose and is not for a commercial purpose, the approval or signature may be provided by the management body of the reserve, subject to sub-sections (i) and (j);

  (b) Where Crown land is leased under a Crown lease, the approval or signature may be provided by the lessee, subject to sub-sections (i) and (j);

  (c) Where the road is a main road under the *Main Roads Act 1930*, the approval or signature may be provided by the Commissioner of Main Roads;

  (d) Where the road is a road where a local government has care, control and management under section 55(2) of the LAA but where there is a balcony or other structure proposed to be constructed over that road (whether or not as an encroachment), the approval or signature may be provided by the Minister for Lands (subject to sub-section (i)) and the relevant local government;

  (e) Where the road is a road where a local government has care, control and management under section 55(2) of the *Land Administration Act 1997* but where there is no balcony or other structure proposed to be constructed over that road, the approval or signature may be provided by the relevant local government authority;

  (f) Where Crown land is vested in a person or body under a written law other than the *Land Administration Act 1997*, the approval or signature may be provided by that person or body;

  (g) Where the development relates to a mining tenement granted over Crown land under the *Mining Act 1978*, the approval or signature may be provided by the Minister for Lands [It is proposed further that authorisations may be given to DMP officers under 267A(2)(b)]; or

  (h) Where sub-sections (a)-(g) above do not apply, the approval or signature may be provided by the Minister for Lands;

(i) Where there is a structure proposed to be constructed over a reserve, leased Crown land, road or other Crown land within the meaning of sub-sections (a), (b), (d), (g) and (h), but the encroachment is prescribed for the purposes of section 76(1)(c) of the *Building Act 2011* as a minor encroachment, or the encroachment is authorised under the *Land Administration Act 1997*, the approval or signature of the Minister for Lands is not required;

(j) Where a structure is proposed to be constructed as an encroachment over land the subject of a reserve or Crown lease as referred to in sub-sections (a) or (b) and to which sub-section (i) does not apply, the approval or signature of the Minister for Lands is also required.

- If the approval or signature of the Minister for Lands is required under subsection (1), the approval or signature may be given by:

  (a) the Minister as defined in the *Land Administration Act 1997* section 3(1) (the *Minister for Lands*); or

  (b) a person who is authorised in writing by the Minister for Lands to do so.

- Nothing in this section will limit the ability of the Minister for Lands to otherwise perform a function through an officer or agent.

- (Nothing in this proposed amendment affects —

  (a) a right or obligation that any other person, as an owner of land mentioned in subsection (1), has under this Act in relation to that land; or

  (b) how that right may be exercised or that obligation may be satisfied.

- In this section, 'Crown lease', 'management body', 'managed reserve' and 'road' will have the respective meanings given to those terms in the *Land Administration Act 1997* section 3(1).

11 State planning policies

State planning policies (SPPs)are intended to facilitate the coordination of planning throughout the State. Local governments must have regard to SPPs when preparing or amending local planning schemes and the State Administrative Tribunal must likewise have regard to SPPs in determining appeals. Until the 2010 Amendments, SPPs, which are vital instruments for securing the co-ordination of planning matters, could only be incorporated into local planning schemes as and when each scheme was amended.

As a result of the introduction of section 77A in the 2010 Amendments, the Minister now has the power to direct a local government to amend its local planning scheme to be consistent with a particular State Planning Policy. To ensure the fair and reasonable implementation of the powers under this section, it is proposed to prescribe more particular requirements regarding the format and content of SPPs.

A continuing trend is the preparation of supplementary guidelines to assist the implementation of State Planning Policies. The most recent example is the explanatory guidelines prepared as part of the Residential Design Code. It is considered that sufficient weight needs to be given to guidelines as an effective policy tool within the planning system, especially where they are expected to guide the implementation of SPPs and

decision making in general. One further option would provide the WAPC with discretion to adopt a supplementary guideline as a State planning guideline to give it greater weight in the decision making process.

11.1 Part 3 of the Planning Act may be amended to expressly provide that the WAPC may prepare and adopt supplementary guidelines to assist in the implementation of State planning policies. State planning guidelines are to be taken into account in the determination of proposals. To the extent of any inconsistency, the provisions of a State Planning Policy shall prevail over the provisions of supplementary guidelines.

12 Interaction of the Planning Act with other legislation

This review is an opportunity to consider the interaction of the Planning Act with the provisions of other legislation which impact upon the planning system.

Different legislation impacts upon the power to approve applications for development and subdivision. They do this in a number of ways:

- Some stop a planning decision-making authority from making a decision until the application has been assessed by another entity (for example the *Environmental Protection Act 1986*)
- Some require input from another entity before a planning decision-making authority can determine the matter (for example the *Heritage of Western Australia Act 1990*)
- Others require referral to another entity for their comment (for example the *Swan Valley Planning Act 1995*).

12.1 It is proposed to commence separate reviews with respect to the interaction of the Planning Act with key legislation that impacts upon the planning system including, but not limited to the following:

Environmental Protection Act 1986

Contaminated Sites Act 2003

Heritage of Western Australia Act 1990

Swan Valley Planning Act 1995

Swan and Canning Rivers Management Act 2006

Mining Act 1978

Public submissions

Comments and submissions on the issues and proposals set out in this paper are welcome. The closing date for submissions is **Friday 13 December 2013**.

To make your submission effective:

- Group your points under the relevant headings.
- When you make a comment on a particular proposal, include the proposal number to assist with the consideration of submissions.
- State clearly and simply your point of view and the reasons for it, including any evidence or factual data that could be used to support your opinion.

Comments and submissions should be emailed to:

planningreform@planning.wa.gov.au

Or submitted on line at:

www.planning.wa.gov.au/planningreform