PLANNING APPEALS AMENDMENT BILL 2001

Second Reading

Resumed from 25 October.

HON DERRICK TOMLINSON (East Metropolitan) [8.42 pm]: I feel like a person who has been relaxing in his lounge chair watching an excellent television program, when somebody has jumped up and changed the channel. I was hoping that Hon Peter Foss would go from forestry and the bumblings of Hon Kim Chance, to education and the bumblings of Alan Carpenter and the wholesale slaughter of the senior administration in education, and to health and Sergeant Bob trying to weave his way through a morass of failure of medical policy. Unfortunately, somebody changed the channel. Instead, we are debating the Planning Appeals Amendment Bill. It was not I who changed the channel. I will bring members the news.

When last we were speaking on this Bill, I indicated that in 1997 Rod Chapman had been commissioned to review the town planning appeal system in Western Australia. I indicated that his terms of reference required him to consider three options. The first was the retention of the current dual system, with some improvements. This option required him to identify and detail improvements to both systems if the dual system were to be retained. The second option available to him was the retention of the current dual system, but the merging of the administration of the two appeal bodies and the streamlining of their procedures. It would be the same dichotomy of ministerial and tribunal appeal but one administrative process. The third option was to allow appeals only through a revamped tribunal, which would provide elements of consideration, lay hearings, court hearings on legal matters and provide for call-in powers for the minister.

In order to evaluate the three options that were presented to him, Rod Chapman considered the current Town Planning Appeal Tribunal and the Town Planning Appeal Committee, or the ministerial process. He identified the advantages and the criticisms of both. With the Town Planning Appeal Tribunal, he identified the advantages that the tribunal had established a reputation for sound decision making; it was independent and not seen to be biased in its determinations; that mediation had been introduced, and so on. As far as criticisms were concerned, he observed that appellants were reluctant to appeal to the tribunal as they were intimidated by the court-like procedures used, evidence was given under oath and witnesses were subject to cross-examination.

Chapman also observed that the legal costs of the Town Planning Appeal Tribunal were prohibitive. The preparation of witness statements was expensive and, although the tribunal did not require appellants to be legally represented, the perception was that if people appeared before the tribunal, they needed legal representation and expert witnesses. I refer to page 14 of the report. In other words, its advantage was that it was legalistic; its disadvantage was that it was legalistic. In fact, only five per cent of appeals were dealt with by the tribunal. What were those appeals? They were appeals that required the elucidation of or adjudication on matters of law.

With the Town Planning Appeal Committee, or ministerial appeals, Chapman identified the advantages that ministerial appeals were popular and provided a low-cost option for appellants; that the process was informal; it was a quick review of planning decisions; the minister would deal with appeals that involved questions of public policy; the minister would make decisions based on compassionate grounds; and there was no need for legal representation. I talked about its disadvantages last time when I was speaking before the recess. One of them is the perception that there is political bias in ministerial decisions. More important than that, mediation is not available in ministerial appeals; the appellant has no right to a hearing; there is a lack of natural justice in the procedures followed; the appellant is not given the opportunity to challenge the respondent's comments or comments made by third parties, except during discussions with the investigating member; and the parties to the appeal are interviewed separately and do not know what information is conveyed or on what basis recommendations are made to the minister.

Looking at the two, balancing the advantages and disadvantage of each, they cancelled one another out. However, when it came to the opinions of the peak bodies, what do we find? The Western Australian Municipal Association in a written submission to the Chapman review on 23 July 1997 came up with this preferred position -

> Following the workshop sessions at WAMA's appeal forum, major outcomes were identified and agreement was reached on local government's preferred system.

I am referring to an unnumbered page in the report, but it is in the appendix in which WAMA's submission is presented.

> It was agreed that an improved system should be based on the following principles:

This is interesting -

> introduction of a suitable mediation process in the Town Planning Appeal Tribunal and Ministerial Appeal processes which take due regard of the decision making framework of local governments, -

Hon G.T. Giffard: What page is it?

Hon DERRICK TOMLINSON: As I have said, the page is unnumbered, but it is about two pages from the back of the report. It continues -

> financial constraints faced by local governments, its statutory role and information requirements;
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> the respondent be given an opportunity to review and comment on any further information introduced by the appellant;
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> a more accountable system in the Ministerial Appeal process which identifies the reasons behind the decision;
>
> the retention of the dual system currently in operation in the State of Western Australia;
>
> introduction of flexibility in procedures and costs associated with the appeal mechanisms

Although WAMA identified shortcomings in the dual system, it argued for and its preference was the retention of the dual system; that is, ministerial and tribunal appeals. Likewise, the Urban Development Institute of Australia described its preferred system as follows -

> In seeking to address the disadvantages inherent in the current system the UDIA proposes the following as key elements of any new system which emerges from the review:
>
> dual system of appeals -Ministerial and Tribunal to continue to co-exist
>
> simple, informal, non-threatening, easy to operate
>
> Tribunal should not depend on the legal system but proponent should have the right to be represented by a consultant who may be a lawyer
>
> should be inexpensive and within reach of all proponents
>
> all decisions should be published
>
> full disclosure and exchange of documents between the parties, including details of the respondent's decision and any relevant comments by referral authorities on which the respondent may have based its decision. This disclosure should occur prior to the mediation process.
>
> mediation should be mandatory with representatives having full power to agree to brokered outcome
>
> most appeals resolved by mediation.

When I read the UDIA and WAMA submissions and compared them with the Labor Party's policy, which forms the basis of the Bill now before us, I came to the conclusion that the ALP got it right in that it identified -

Several members interjected.

Hon DERRICK TOMLINSON: Why is it so shocking to acknowledge that sometimes even idiots get it right? Having spent a lifetime as a teacher, I recognise that every idiot sometimes gets something right. In this case, insofar as it has taken notice of the UDIA and WAMA submissions and adopted the kernel of those propositions, the ALP got it right. Unfortunately, it is only partly right, and that is the nub of the problem.

WAMA and UDIA both argued for the retention of the dual system, but with improvements. However, the Law Society submission presents something different. It again picked up the proposition that the tribunal and ministerial appeal systems have advantages and disadvantages. However, it suggested that if somehow we could

marry the two and bring to that marriage the best aspects of both, we would have a workable system. The Law Society said that, instead of having a dual system, we should have a unified system that provides all the diversity of the dual system.

The next significant difference between the proposals is that, whereas WAMA and UDIA argued for an informal process in the main, but with a judicial system when there was a need to adjudicate on questions of law, the Law Society argued for what is principally a juridical system; that is, a system based upon legal processes. The proposition argued by the Law Society is this -

> 5.7 While the tasks of administration in the Courts in W.A. are undertaken by non-lawyers generally, in all of the Courts, the senior official overseeing the system is a legal person, being the most senior Judge or Magistrate in the relevant jurisdiction. That situation ensures that the body conducts itself in a legally and judicially correct manner, and perhaps equally impartially, ensures that the Court organization is perceived as judicial in nature, and therefore unbiased and detached from partisan pressure or influence.
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> 5.8 The planning appeal system should be recognized as an adjudicating body. The senior official should be a lawyer of high standing and preferably appointed with Supreme Court Judge status to ensure seniority and judicial detachment.

This is the point at which the ALP policy and the Government's Bill falls down. It got it right in saying that there should be informality and diversity, due process and open hearings, a full report on the reasons for the appeal, that the principles of justice should apply and that the appellant and the defendant should have full access to what each is saying. It got all of that right. However, it got it wrong by following the proposition of the Law Society of WA that it must be essentially a juridical process, must follow the processes of law and must be a quasi-court process. The tribunal will therefore deal with matters informally and openly. It will have diversity in the process so that it has an opportunity to hear the full range of issues that represent the contentions between appellants and respondents in this process. However, that opportunity will be constrained by the tribunal having at its head a person qualified to be a judge; that is, a person who has eight years standing as a senior legal practitioner whose principal role will be to adjudicate questions of law. There will be legal representation and the legal representation will be according to the due processes of a juridical system. Those two principles are contradictory. The very point that the Chapman report made - that the legalistic processes of the appeals tribunal are intimidating and therefore appellants avoid the tribunal because they are intimidated by it - is the very provision that the Government has imposed in this Bill following the Law Society's submission.

Hon G.T. Giffard: That is drawing a long bow.

Hon DERRICK TOMLINSON: Let us follow that long bow. Let us look first at the composition of the tribunal. Clause 37(1) reads -

> The Governor is to appoint as members of the Tribunal -
>
> (a) a President;

Clause 38(4) reads -

> A person is not eligible for appointment as President or deputy President unless the person is a legal practitioner of not less than 8 years' practice and standing.

It is fair to describe such a person - although eight years is a relatively short time - as a senior legal practitioner qualified to be appointed as a judge. The deputy president would have the same qualifications as the president. The Bill does not say how many senior and ordinary members there will be or how many there will be in total. The tribunal will comprise the number of persons that the minister considers necessary to expeditiously deal with appeals. We therefore do not know how many senior and ordinary members there will be on the tribunal, but there will be enough to do the job. However, there is a requirement that every member, whether a senior or ordinary member, must in the opinion of the minister have knowledge of and experience in one or more of the fields of urban and regional planning, architecture and urban design, engineering, surveying, environmental science, planning law, heritage matters, public administration, commerce and industry. There are nine disciplines and there could be members from each discipline or members who are well versed in more than one discipline. However, those nine disciplines must be covered and in those nine disciplines there is the broad catch-all discipline of commerce and industry. There will be, however, senior and ordinary members who have that knowledge and experience.

What is the difference between senior and ordinary members? The minister has the right to decide that, in his or her opinion, the members have knowledge and experience. The difference between senior and ordinary

members is that those who are eligible for appointment as senior members have, in the minister's opinion, extensive knowledge and experience in a class of matter that might be dealt with by the tribunal; in other words, senior members will have extensive knowledge in one of those fields and ordinary members will have only knowledge or experience in one of those fields. The difference, therefore, between senior members and ordinary members is the word "extensive"; that is, extensive in the opinion of the minister. However, we still do not know how many senior and ordinary members there will be. All we know is that there will be enough to do the job. Some may be full time and some may be part time, as members may be appointed on full-time or part-time bases. However, all members could be full time or all could be part time.

Hon Ken Travers: This is a bad argument.

Hon DERRICK TOMLINSON: I am sorry, but this is what the Government's Bill says and I am doing nothing more than telling the member what it says.

Hon G.T. Giffard: Indeed.

Hon DERRICK TOMLINSON: Even the parliamentary secretary agrees with me.

My question is: how will this work? My next question is: who will adjudicate particular matters and how will the tribunal function? The president of the tribunal will determine whether it will be a tribunal of one, two or three members. The president will decide whether the tribunal will comprise senior members, senior members and ordinary members or ordinary members. The president has this Bill to guide him or her.

Appeals are divided into unnamed but specified categories. The briefing notes on the Bill refer to them as class 1 and class 2 appeals. Nowhere in the legislation are the terms class 1 and class 2 used, but class 1 appeals are described. Class 1 appeals are those in which there is a development application to a value of less than $250 000, or such other amount as is prescribed by the regulations. The figure of $250 000 is arbitrary. Why is it $250 000? It is because it sounds like a reasonable number, and the Bill distinguishes between class 1 and class 2 appeals by using the value of $250 000. If a development application has a value of $249 000, it will be a class 1 appeal and if it has a value of $251 000, it will be a class 2 appeal. However, the regulations might change that figure.

If it is not a development application to a value of less than $250 000, it could be a development application for a single house on a single lot of a value of less than $500 000, or such other amount as is prescribed by the regulations. It is that figure or any other figure. Why is it that figure? I suppose twice $250 000 is $500 000, and that sounds like a good enough figure. We started off with a figure that sounded like a good figure. Then we come to a single house on a single lot development. What value will we put on that? Think of a figure and double it - $500 000. However, that can be changed by regulation. What is it going to be?

The third type of class 1 appeals might be the determination of, or conditions imposed on, an application for approval to subdivide a lot into not more than three lots. One form of class 1 appeals is a development application to the value of $250 000, or some other figure to be decided by regulation; another is a development application for a single house on a single lot to the value of $500 000, or some other figure. However, when we come to subdivisions, it is three. Why is it three? Why is it not to the value of $250 000 or $500 000? If someone wants to subdivide a block in, say, East Perth, that subdivision might have a value of $1.5 million or $3 million - think of a figure. A subdivision of three lots in Carmel, that salubrious suburb overlooking the Bickley Valley, might be worth $240 000. If a block of land in Kirup were subdivided -

Hon G.T. Giffard: Is that how it is pronounced?

Hon DERRICK TOMLINSON: That is where we get the Kirup syrup! A subdivision of three lots there might be worth $75. Why do we have one form of class 1 appeals under which the magic figure is $250 000 or some other figure, another group of class 1 appeals under which the magic figure is $500 000 or some other figure, but for the third class, regardless of the value of the subdivision, if it is up to three lots, it is a class 1 appeal, and if it is four lots, it is a class 2 appeal? That is a very arbitrary and entertaining categorisation of appeals.

If it is a class 1 appeal, it is to be heard by a tribunal constituted by a single ordinary member. Remember, an ordinary member is a person who has knowledge and expertise - not extensive. An ordinary member, one with only knowledge and expertise, may hear a class 1 appeal in a tribunal of one. I am not sure how there can be a tribunal of one, because "tri" means three. Nevertheless, it will be a tribunal of one because it is really based upon the Roman notion of a tribunal, which is one leader. However, if in the opinion of the president the appeal referred to in subsection (3) - in other words, the class 1 appeal worth somewhere between this and that, which is less than three subdivisions - is sufficiently complex or raises matters of sufficient complexity, the president may direct that the appeal be determined by a tribunal constituted by a member who is not an ordinary member, or by three ordinary members.

A person who is not an ordinary member is the president, the deputy president or a senior member. If it is not the president, the deputy president or a senior member, the president may direct that the tribunal be constituted by three ordinary members. Therefore, three ordinary members equal one senior member, or one president, or one deputy president. However, the difference between an ordinary member and a senior member is that word "extensive"; but it is "extensive" knowledge and expertise in the opinion of the minister. How will this work?

The president will decide which appeals will be heard by whom and how, and he will select from a group of members who may be senior members or ordinary members, some of whom might be part time or full time, or all of whom might be full time or part time. Having made that decision, the president has the power to review the decisions made by the tribunal. A question of law may be involved in the appeal, and a legal practitioner may not have been on the tribunal. The proposition with which we started was the Law Society of WA's proposition, which has been imported into the Australian Labor Party's policy and imported into the Bill. The proposition that the Law Society argued is that even though a Town Planning Appeal Tribunal is about planning principles, because it is an appeal, it is an adjudication. Because it is an adjudication, it is a legal process - it is a question of law. Therefore, there must be a president, or a chief officer who is a senior legal practitioner. That single legal practitioner who deals with matters that, by that argument, are all matters of law, can review any decision that contains a question of law. Does it not follow that the president of the tribunal can review any decision of any tribunal in which a legal practitioner was not a member of the tribunal?

Hon Tom Stephens: Mr Tomlinson, with strong and compelling arguments like those you are presenting to the Chamber, I don't understand why you're not sitting where Hon Peter Foss is and he is not sitting where you are. You should be on the front bench, and he should be dislodged.

Hon DERRICK TOMLINSON: I thank Hon Tom Stephens very much. I have grown to respect him. I am growing to respect him more. But, jeez, Tom, I told you that eight years ago!

Hon Ray Halligan: He is a slow learner.

Hon DERRICK TOMLINSON: Yes.

Hon Ljiljanna Ravlich: As a parliamentary secretary for disability services, I take offence.

Hon DERRICK TOMLINSON: It is offensive that Hon Ljiljanna Ravlich is a parliamentary secretary. I will scratch her back since Hon Tom Stephens has scratched mine. I have always said that Hon Ljiljanna Ravlich should not be in this House. She should be the member for Cockburn, and she should not have been squeezed out by members' union mates. She should have been allowed to be the member for Cockburn. Furthermore, she should be on the front bench in the other place.

The DEPUTY PRESIDENT (Hon Jon Ford): Order, members! We will keep to the question, please.

Hon DERRICK TOMLINSON: Yes, I will return to the question. The Bill, therefore, according to the argument that I was entertaining before we were entertained, allows the president the power to review every appeal decision, except those appeal decisions made by a tribunal when a legal practitioner is a member of the tribunal. Every one of those matters will be determined by a question of law. The president not only has those powers and sits in the position of judge, he or she is qualified to be a judge -

Hon Peter Foss: He is a he, actually. I have already worked out who "he" is.

Hon DERRICK TOMLINSON: Let me come to that. The member is anticipating me, as he always does. The president sits in the position of judge and presides over what is a court, based upon the model of the Supreme Court and the District Court. It has been given all sorts of propositions that it will operate in an open, informal and non-intimidating way, but people will be sitting before the bench and presenting their arguments with lawyers on either side and they will be forced to follow judicial process - a very juridical process, in fact. It is a court of appeal presided over by a judge, who has the ultimate decision-making power. That judge may also direct the principal registrar, but the principal registrar is to be the executive officer of the tribunal, although the executive officer of the tribunal may be directed by a judge on any matter except those matters in a question of appeal on which the executive officer or principal registrar may be sitting as a senior member.

What do we find when we come to the appointment of the principal registrar? The principal registrar is a ministerial appointment. The principal registrar is not an officer of the public service and is not to be included in the senior executive service for the purposes of the Public Sector Management Act, but that person who is appointed by the minister and is not a public servant and certainly not a member of the senior executive service will be the accountable officer for the purposes of the Financial Administration and Audit Act. That executive officer, if we look at the provisions of the Financial Administration and Audit Act - and I will not read them to members - has the ultimate responsibility and accountability for the administration, the financial management, the performance management, the financial performance management, the outcomes management, and all other

aspects of the management of the tribunal. That person will be instructed by the tribunal president. However, this ministerial appointment, who cannot be a member of the public service, is therefore qualified to be a member of the tribunal, because members of the public service cannot be members of the tribunal. The principal registrar is not a member of the public service and can be a member of the tribunal, and he may be instructed by the president even though he is the senior executive officer, although he may also have delegated to him all of the powers of the president, except those relating to review of appeals if he is not a legal practitioner. So it is highly likely that this fellow will be a legal practitioner appointed by the minister, but he will not be a public servant. The salary and entitlements of this principal registrar are to be determined pursuant to the Salaries and Allowances Act 1975, as set out in proposed schedule 4, section 3, subsection (1) -

> Subject to the *Salaries and Allowances Act 1975,* the Principal Registrar -
>
> (a) is to be paid salary and allowances at a rate per year determined by the minister.

That is fair enough. If they want a good bloke they have to pay for him, but in proposed section 3(1)(b) he receives the same annual leave, sick leave and long service leave entitlements as an officer in the public service. Not only may the minister determine his or her salary, and he or she also be entitled to all the privileges of sick leave and long service leave as a permanent officer of the public service, but the minister may also determine other terms and conditions of service that apply to the principal registrar. This is the senior executive officer of the tribunal, who may be a senior member of the tribunal and sit on hearings as a senior member, who may have delegated to him all of the authority of the president if the principal registrar is a legal practitioner. He is appointed by the minister on terms and conditions determined by the minister. I ask: which member of the legal profession is lined up for this little sinecure? Which junior partner in Dwyer Durack is waiting for this Bill to be passed so he can move into this five-year appointment with rights of renewal, with terms and conditions of appointment and with a salary to be determined by the minister? This senior executive officer, the principal registrar, is the accountable officer of the tribunal who takes orders or who may be instructed by the president except on matters of appeal.

Hon Peter Foss: It sounds like the real work is going to be done by the registrar.

Hon DERRICK TOMLINSON: I am not quite sure where authority lies. Does authority lie with the quasi-judicial appointment or the president of the tribunal? Does authority lie with the non-public service public servant appointed by the minister? If that person is the accountable officer and is able to be directed by the president, where in this Bill is there a provision that says the accountable officer when directed by the president is to record the direction? Will that direction be published in some way, perhaps in the annual report or in some other way? The composition of the tribunal is indefinite, other than we know that it has a president, deputy president, and senior members and ordinary members, who may or may not be full time or part time and who may or may not sit on category 1 or 2 appeals depending on what the president thinks. The tribunal is presided over by a person who, to all intents and purposes, has the trappings of a judge, who can direct the senior executive officer, and who is a ministerial appointment with terms and conditions of appointment determined by the minister. This is an interesting tribunal, which will operate according to the due processes of the law. In following due processes of the law it will also be open, non-intimidating and flexible, and the appellants may or may not have representation; that is, if the appellants decide they do not want to be represented. However, if the opponent is a legal practitioner, the president will direct that the appellants be represented, even though they may not want to be represented. However, if the president thinks a case is so complex that the appellants must be represented, they will be represented, even though they may not want to be.

Hon Peter Foss: Or may not be able to afford to be represented

Hon DERRICK TOMLINSON: Yes. All matters decided by a tribunal in which a member is not a legal practitioner will be subject to review by the president. The president may then set aside the decision of the tribunal and impose his own, and may set aside the conditions of the decision and impose his own. I think that is a recipe for conjecture or, if members prefer, a recipe for disaster.

Hon Peter Foss: It gets pretty complex doesn't it?

Hon DERRICK TOMLINSON: Yes; it is complex indeed.

Before we move on, I want to raise one issue because it is an important one. That is the matter of third party appeals. Under proposed section 53 a party to an appeal may appear personally or, subject to subsection (4) be represented by an agent or a legal practitioner. A person making a submission under proposed section 57 may appear personally, or be represented by an agent or, if any party to the appeal is entitled to be so represented, by a legal practitioner. In addition to hearing submissions by the appellants either in person or if they choose, by document, under section 57 the tribunal may receive or hear submissions from a person who is not a party to an appeal in respect of the appeal if it is of the opinion that that person has a sufficient interest in the appeal. I think

that means that a third party, while not having a right of appeal, does have a right to make a submission to the appeal if the tribunal considers that person has a sufficient interest.

Let me take as an example, one of the local government authorities in the East Metropolitan Region. There existed for as long as I can remember a service station that was owned by a single family and had been passed on through the generations. As one might imagine, it had not kept up with the times in terms of its facilities. It was a humble service station, but was part of that community. It existed on two lots; the service station was set on the front side of one lot, with a gully behind it through which a rather attractive stream wended its way. Next door on the second lot was a house - a humble cottage set among trees alongside a brook. It was sold to an up and coming Western Australian oil company, which obviously saw a commercial opportunity. It made a development application to the local government authority to demolish the cottage and the service station and redevelop the site as a service centre, taking maximum advantage of the site by maximising the size of the building and providing 24-hour service, petrol, oils, banking, milk, bread, pizza, rotisserie chickens, chocolates - whatever one could want; which is consistent with modern practice in service stations. Around that idyllic spot, which had a brook flowing through the trees, were some very nice homes. On the other side of the lot was a popular park. On Mothers Day people cannot find a seating space, and on any weekend there are lots of families with children playing with the ducks and paddling in the water.

Hon Frank Hough: Wood ducks?

Hon DERRICK TOMLINSON: No wood ducks, but they would duck if they could duck. They are not only attractive houses, but also valuable houses that are predominantly occupied by self-funded retirees, who were business and professional people. They had been there for some considerable time, because in this idyllic place people tend to retire and stay. They were accustomed to the family service station, because it was part of the ambience and part of their community. It was unobtrusive; it was surrounded by trees and had the babbling brook separating it from the houses.

The PRESIDENT: Order! I trust the member will get to the point.

Hon DERRICK TOMLINSON: Mr President, I was going to demonstrate that those people wanted a right of appeal.

The PRESIDENT: I thought as much.

Hon DERRICK TOMLINSON: The development application went to the local government authority. The local government authority saw the merit of the commercial development because it would bring revenue to the town. It also would have been a very attractive entry statement to the town, because the developer promised the local government authority that it would be architecturally compatible with the ambience of its surroundings. It promised that the development would be pretty and it would fit in. Some benefits were to be gained by this development. However, the local residents thought it was offensive and intrusive. The local government, being responsive to its ratepayers, wanted to reject the development application and, faced with a quandary, asked the developer to modify its proposal to allay the objections of local residents. The developer, keen to realise the value of its investment, complied. Thus, the local government authority, even though it realised it was going against the wishes of its ratepayers, approved the development. However, the architectural designs that were eventually presented showed not the design that had been promised and which would be compatible with the ambience of its surroundings, but another one of the great white blocks that characterised this group of service stations. The local residents in the immediate vicinity were outraged. They came to my office and asked what they could do. I said nothing, because they did not have a right of appeal. They were not a party to the development. The parties to the development were the proprietor of the petrol company and the local government authority. The residents were simply the poor suckers who lived in the area, paid the rates and had invested in the ambience for their retirement, and who now had to accept that their wishes and expectations had been frustrated. They had no right of appeal.

Hon Peter Foss: Did the council approve the development on the condition that the building was suitable for the amenity of the area?

Hon DERRICK TOMLINSON: The council thought it had, but that agreement was not legal or binding. There was only the approval to go ahead with the development application on the promise of a particular style of architecture, but on the actuality of standard service station architecture. The local government found itself in an embarrassing situation. I confirmed with the minister's office that the residents were not parties to the appeal because they were third parties to the development application. That is fair enough. An appeal is a matter for the proponent and the local government authority or another authority that makes the decision about the application. Those are the two parties. Other persons may be affected by the development, but they are not parties to it. They do not put any capital at risk and they do not have to run the risk of commercial loss. It is not their money that is going into the development. The local government organisation is morally and politically

obliged to listen to its ratepayers, but it has the authority to make the decision. The residents confer authority on their local government ward councillors by electing them, just as I argue that we as elected representatives have authority for decision making conferred upon us. The two parties to the appeal are the organisation with the authority and the rightful owners of the land who have aspirations to realise the value of their investment. It can be argued that persons who are not members of the local authority and who are not proponents of the development also have a vested interest in the development. Residents have a vested interest in the value of the development by virtue of their investment in their properties according to an ambience to which they aspire. They have a set of values, some of which are financial and some of which are aesthetic. They have vested interests in the development of their community. Does it not follow that they should have some right of appeal in the process? I would like Hon Graham Giffard, the parliamentary secretary, to address that in his summing up.

There are two valid propositions. The first is that the only parties who have a right to participate in the appeal are those who are directly involved; that is, the proponents and the local government or decision-making authority.

Hon Peter Foss: Which looks after everyone's interests.

Hon DERRICK TOMLINSON: I thank the member. They should be the only parties involved in the appeal. The other proposition is that the interests of the community transcend those limited interests. Should not other persons have a right to be heard in the decision-making process? They are heard to the extent that every development or subdivision application must go through a process of advertising and public submissions, and evaluation of those submissions. They have a right to be heard, but when it comes to the decision-making process, they are locked out of the process of appeal. They are two defensible propositions.

Hon Peter Foss: Until we look at the practical implications.

Hon DERRICK TOMLINSON: That is why I ask the parliamentary secretary to respond. I want to know why the Government, through proposed section 57 in this Bill, says that a third party has the right to make a submission to an appeal - to have its point of view heard - but not to be a party to the appeal. Why should a third party who in the opinion of the tribunal has a sufficient interest in the appeal have the right to make a submission but not to be a party to the appeal or initiate an appeal? I look forward to the parliamentary secretary's explanation of that. I have an open mind.

Hon B.K. Donaldson: How far does that go? Do third party rights extend to someone who does not live close by but who may drive past that area?

Hon DERRICK TOMLINSON: That is an excellent and important question. Where do the third party appeal rights end? Do they extend to someone who drives past or who lives five kilometres away overlooking the idyllic Bickley valley? Why does he not have the right to an appeal, even though he is not a landowner in the immediate vicinity? He is a member of the community. That is a very important question.

Hon G.T. Giffard: Did you answer that question for the people who came into your office?

Hon DERRICK TOMLINSON: I told them they had no right of appeal.

Hon G.T. Giffard: Did you tell them whether you thought it right or wrong?

Hon DERRICK TOMLINSON: I was not asked for an opinion.

They sold their houses and moved, which was sad because they had invested their retirement in that locality. That really gets down to the nub of the question. One cannot resolve these things as questions of law; they are questions of value. The Law Society and the Government have said that these are ultimately questions of law, but in many town planning appeals we are talking about people's aspirations for the property they own. Those aspirations are not necessarily confined to financial aspirations.

Hon Dee Margetts: The proponents have rights under law. If that is all right, why should third parties not have rights?

Hon DERRICK TOMLINSON: That is a question the parliamentary secretary will answer.

I want to turn to the question of the rules. So much of the procedure of the Town Planning Appeal Tribunal will be driven by the rules. The president is the quasi-judicial head of the tribunal. Proposed section 69 reads -

> The President is to make such rules under this Act regulating -
>
> (a) the practice and procedure to be followed in, or for the purposes of, an appeal;
>
> (b) the forms to be used in relation to an appeal;

(c) the practice and procedure to be followed in the mediation and conciliation of an appeal, and other matters related to mediation and conciliation;

(d) any other matters,

When I read that I was attracted to have a look at what the Supreme Court Act has to say about rules in the Supreme Court. The Supreme Court Act reads likewise -

> Rules of Court may be made under this Act, by the Judges of the Supreme Court, for the following purposes: -

It then elaborates a set of matters that the rules may entertain. It is much more extensive than the Planning Appeals Amendment Bill. However, the difference I found is that the rules of the Supreme Court are required by its Act to be presented to the Parliament, where they lie upon the Tables of both Houses for 14 days, and may be disallowed at any time during those 14 days; in other words, the rules of the Supreme Court, by the Supreme Court Act, are subject to parliamentary scrutiny.

Hon J.A. Scott: Where is the rule that says you can ignore the rules?

Hon DERRICK TOMLINSON: The rule that says one can ignore the rules! I am sorry, but the member nearly made me choke on my water. While the member finds that rule, I will conclude, and perhaps he can pick up on the proposition afterwards.

Although the rules of the Supreme Court are subject to scrutiny by the Parliament, as is made quite clear in the Supreme Court Act, the Bill is silent on this matter. I know there is an opinion about what the Interpretation Act has to say on this, but I would like to hear the parliamentary secretary explain to us why the Bill is silent on the question of parliamentary scrutiny.

I said at the beginning that it would be churlish of the Opposition to oppose this Bill, because it enacts a plank of the 1996 platform of the Liberal Party. The 1996 platform of the Liberal Party, following the recommendations of the Chapman report in 1997, were translated into the Planning Appeals Bill 1999. That Bill of 1999 was less legalistic and much more administrative in its process, but did not progress through this Parliament and had, I must admit, considerable opposition from peak bodies such as the Western Australian Municipal Association and the Urban Development Institute of Australia. I do not think that we can say our Bill is better than this Government's. It is an irrelevant argument. The Bill enacts the principle that is adopted by both of the major parties, the Liberal Party and the Labor Party. I am not quite sure what the Labor minors' position is on the matter, but I am looking forward to hearing what One Nation has to say about it.

Although the Liberal Party sees some flaws and hooks in the Bill, and I have tried to indicate what some of those hooks are, the Opposition supports the Bill.

HON J.A. SCOTT (South Metropolitan) [9.57 pm]: I was about to start my speech in another way, but Hon Derrick Tomlinson reached a very fundamental point in this debate about all the laws that we promulgate in this place and how those laws are interpreted by courts, including the quasi-courts, as he has called them, such as the Town Planning Appeal Tribunal.

The powers that we are given to make laws in this place, and the powers that the courts have to interpret those laws, are given to us by the community at large. They are not powers that appear out of nowhere or we give ourselves. The powers are handed to us to act on behalf of the citizenry. That is why the penultimate issue that Hon Derrick Tomlinson raised is so important; that is, the third party rights of appeal. How can we pass laws on behalf of our citizens that restrict their ability to take part in the process? An avenue through which people could appeal was provided for under the Environmental Protection Act. Members of the community could make appeals until 1994, when a court case occurred in which Hon Robin Chapple was involved, which concerned the Burrup Peninsula.

Hon Dee Margetts: That was before he was honourable, was it?

Hon J.A. SCOTT: That is right, it was his pre-honourable days.

All too often in this place we forget where our powers come from. It is important when considering Bills like this that we take that into account. We must say to ourselves that the powers to legislate are given to us, not by political parties and not by developers, but by the citizenry. We should respect that and ensure that we do not cut the citizenry out of the processes that we set up in this place to administer planning or any other aspect of government. I will get back onto that subject later, but I thought it important to stress it at this time.

I support the general thrust of this Bill because it removes the minister from the process. When he began his speech some weeks ago, Hon Derrick Tomlinson mentioned that removing the minister from the appeals system would mean removing the accountable person. Unlike the minister, the person on the tribunal is not accountable

to the electorate. That makes it imperative to reintroduce the facility for electors to participate fully in the planning appeals tribunal process. That would address the member's concerns.

Debate adjourned, pursuant to standing orders.