PLANNING APPEALS AMENDMENT BILL 2001

Consideration in Detail

Resumed from 9 August.

Clause 11: Part V replaced -

Debate was adjourned after the clause had been partly considered.

Proposed section 42 -

Mrs EDWARDES: This proposed section deals with the delegation by the president. Under proposed subsection (1) -

> . . . the President may delegate to any member or class of member or the Principal Registrar any function of the President under this Act, the regulations or the rules.

Proposed subsection (2) states -

> The President is not to delegate his or her functions under section 58 or 61 to a member or to the Principal Registrar unless that person is a legal practitioner.

Proposed section 58 deals with questions of law. Proposed section 61 deals in part with questions of law under subsection (3) of that proposed section. I ask the minister to clarify the circumstances under which the president is likely to delegate under subsection (1). Is it the case that the person to whom the powers are delegated under proposed sections 58 and 61 must be a legal practitioner?

Ms MacTIERNAN: The delegation would be a question of managing the workload. Given that it is essential that matters are dealt with expeditiously, and, for example, if the president were tied up in a major hearing, we would not want the more administrative work of the tribunal to grind to a halt. The delegation is primarily aimed at ensuring that the work is done expeditiously.

The member's analysis is correct; the removal of the right to delegate certain of the president's functions is because those sections involve matters of law. For that reason it would not be appropriate to delegate the president's functions to the registrar, or to any member who was not a legal practitioner.

Mrs EDWARDES: Under proposed subsection (1) the president is required to determine how the tribunal is to be constituted for the purposes of each appeal. A determination will be made on whether the appeal is a tier 1 appeal or tier 2 appeal, and it clarifies which issues will be complex and which will be simple. The president can delegate this function to the principal registrar. Is it to be presumed that the principal registrar or any member of the tribunal can carry out this function of determining whether an appeal will be a tier 1 or tier 2 appeal, or does it relate only to the fundamental day-to-day administrative operations of the tribunal?

Ms MacTIERNAN: It is a matter of trusting the judgement of the president in the way in which he delegates his powers. The provision the member for Kingsley cited, involving the determination of the nature of the tribunal in any one case, might be as simple, for example, as allocating the tier 1 cases to a particular ordinary member. By and large, it would be appropriate for that to be undertaken by the principal registrar. However, we would not expect the president to delegate the power to form tribunals of senior members. To some extent, as with these tribunals generally, one must have a certain amount of confidence in the commonsense of the president and the way in which he exercises those powers of delegation.

I have been advised that it is unusual to constrain the power of delegation in this regard. We have considered other parallel legislation in which the power to delegate to any person is unrestricted; for example, the Environmental Protection Act, with which the member is no doubt more familiar than I am. We are following those same models. We expect a senior person to hold the position of president of the tribunal and that the powers of the president to delegate would be exercised responsibly.

Mrs Edwardes: The minister mentioned the Environmental Protection Act. In which circumstances does the minister refer to the powers of delegation?

Ms MacTIERNAN: We understand that the Environmental Protection Act provides for powers of delegation. We also understand that both the minister and the chief executive officer can delegate any of their powers under the Environmental Protection Act.

Mrs Edwardes: Not in all instances; there are limitations on those delegations. The minister is talking about a different type of environment. The tribunal is totally different from the Environmental Protection Authority.

Ms MacTIERNAN: We believe that the limitation on the president's power to delegate should be confined to those areas that involve matters of law, in which one would clearly need to be a legal practitioner to determine

whether a particular issue was a matter of law. We would be surprised if the president of the tribunal delegated responsibility, for example, for the formation of a panel to deal with a major matter, including its composition. However, there would not necessarily be any difficulty with the principal registrar's taking on the role of allocating the work among, for example, the ordinary members of the tribunal. That is how the delegation of power will operate. We must be mindful that, as well as having that administrative role, the president of the tribunal will undertake work in hearings, and may be tied up for considerable periods on major cases. We would not want the tribunal to grind to a halt. I do not think that the appellants would want that to happen in any sector.

Mrs EDWARDES: I did not want the minister to clarify the limitation of the delegation of powers by the president; I wanted clarification of the minister's expectation. On a previous occasion, I referred to the permanency or the full-time or part-time status of the president. We would not want a part-time president to delegate his workload; therefore, I needed some clarification of that issue.

Ms MacTIERNAN: I reiterate the remarks I made the other day. For the long term and in the not too distant future, we hope to have a full-time president. When the tribunal is fully up and running, for a variety of reasons we do not believe that it would be appropriate for the presidency to be conducted in a part-time fashion. That would not be appropriate because of the sheer workload, and also because it is important to ensure that there are no perceptions of a conflict of interest.

Proposed section put and passed.

Proposed section 43 -

Mrs EDWARDES: This proposed section deals with the role of the principal registrar and his office. Will the minister clarify the primary function of the role of the principal registrar of the tribunal?

Ms MacTIERNAN: The remuneration and conditions are set out in schedule 4. The principal registrar will have the functions of the executive officer to the tribunal and may also be one of the senior members of the tribunal. In practice, it is likely that the principal registrar's primary functions will be to assist the president in the day-to-day management of the tribunal's case load. She would also be able to fulfil interlocutory functions.

Mrs EDWARDES: I like that the minister said "she". Proposed subsection (4) states that the principal registrar may be appointed as a senior member of the tribunal. Qualifications of members of the tribunal are referred to under proposed section 38(1), which details a number of different fields of experience. Proposed section 38(5) states that a person is not eligible for appointment as a senior member unless that person has extensive knowledge or experience in a class of matter that may be dealt with by the tribunal. Does proposed subsection (4) mean that the qualification requirements of proposed subsections (1) and (5) would automatically apply? How would that be determined?

Ms MacTIERNAN: Our expectation is that the principal registrar should also have sufficient qualifications to meet the requirements of proposed section 38. It is important that the position be occupied by someone who has the flexibility to move between the administrative role and the quasi-judicial role and, in particular, to resolve those interlocutory matters. Our intention is to select for that role a person of sufficient standing to fulfil one of the categories mentioned in proposed section 38.

Mrs EDWARDES: My experience in making appointments to tribunals and courts is that the commissions are usually done altogether; therefore, the commission as the principal registrar would be done at the same time as the commission as a member or senior member. Unless proposed subsections (1) and (5) were fulfilled, the commission as a member or senior member would not apply and the person could then be appointed only as the principal registrar. It is not usually the case that the person goes in and out of the roles. The person is usually appointed as the principal registrar at the same time as he is appointed a member or senior member. Proposed section 38(5) is worded such that it means that that commission would not be made if that term were not fulfilled.

Ms MacTIERNAN: Which term?

Mrs Edwardes: I know what your expectations are, but do proposed subsections (1) and (5) mean that the person could not be appointed to those roles unless he or she complied with the requirements in those subsections?

Ms MacTIERNAN: I am not sure that this will be a problem, because we consider the role of principal registrar to be a very senior position. The position would go only to a person who had proper qualifications or experience in either legal matters or public administration. To carry out the role of principal registrar, the person would need to have, at the very least, one or other of the qualifications that are set down in proposed section 38. It is inconceivable that we would appoint someone who had experience in neither planning law nor public administration. We do not think there is any chance of this creating a difficulty in practice.

Mrs Edwardes: Will the positions be advertised in the normal course, excluding the position for the president which is referred to in one of the schedules, or will the current staff be transferred like for like?

Ms MacTIERNAN: No final decision has been made on that. Obviously, there is a considerable bank of experience in the Town Planning Appeal Committee and we want to utilise that experience. We also must be mindful of the rights of those officers and the cost to the State if we do not take them on in some role or another.

Mrs Edwardes: Is there no current similar position as a principal registrar?

Ms MacTIERNAN: No. Some very senior people in either of those two bodies could fulfil this role. We have not made a decision on that. However, we expect that a considerable number of people who are involved in, for example, the Town Planning Appeal Committee will find a home in the new system.

Proposed section put and passed.

Proposed section 44 -

Mrs EDWARDES: Proposed section 44 states that the president may from time to time give directions to the principal registrar with respect to the performance of his functions or with respect to any other matter. The question that has been asked of me, and therefore I am asking it of the minister, is whether the president's directions should be made available publicly, as is consistent with the publication of reasons of a particular determination as in proposed section 59(b). Proposed section 59(b) refers to the written reasons for determination and publication of reasons. The concern is that any directions that the president may give the principal registrar on any particular matter, and to which the principal registrar is to give effect, may be published as is referred to in proposed section 59(b).

Ms MacTIERNAN: I am glad the member explained at the beginning of her comments that someone had asked her to say this rather than it being her own idea. It would be a complete nonsense to expect that the president's directions to a subordinate officer about the discharge of his administrative functions be subject to some sort of publication in some form or another. The Parliament would grind to a halt under the load of paper that would come in if we were to entrench such systems throughout the public sector and our courts. It is made very clear in the legislation that when the principal registrar is acting as a member of the tribunal, there is no capacity for the president to direct the principal registrar.

Mrs Edwardes: This is just proposed subsection (2). It is not when the principal registrar is acting as a member or senior member.

Ms MacTIERNAN: That is right. When the principal registrar is exercising a judicial function, there is no capacity for direction. However, when the principal registrar is acting in an administrative role and is subordinate to the president, quite rightly, as applies with any senior executive position, the president has the right to do that. It would be bizarre and an extraordinary precedent if we were to suggest that those directions become matters of publication.

Proposed section put and passed.

Proposed section 45 put and passed.

Proposed section 46 -

Mrs EDWARDES: Proposed section 46 deals with the functions of the registrar and the previous section indicated that that appointment is subject to the Public Sector Management Act, as are other officers necessary to assist in the administration of the tribunal. Proposed section 46 deals with the register of all appeals and decisions and with keeping copies of the reasons for decisions, etc. Those registers are public as is noted further on in the Bill. However, given the archiving and keeping of records and the like, will those functions of the tribunal be subject to the Freedom of Information Act?

Ms MacTIERNAN: I am unclear about what is being suggested. The decisions will be published, and the member for Kingsley has indicated that she is aware of that. What class of information is the member talking about?

Mrs Edwardes: Other classes of information.

Ms MacTIERNAN: Such as?

Mrs Edwardes: Such as correspondence and documents that would come within the function, or the role, of the tribunal that are subject to FOI.

Ms MacTIERNAN: I will seek clarification from the Crown Solicitor's Office about what is the standard provision in the area of tribunals and courts. That is something on which we will have to take advice. Essentially, the provisions that currently apply to the tribunal will remain. We have not in any way changed -

Mrs Edwardes: Is that subject to FOI?

Ms MacTIERNAN: We will check that. We were not aware that there was an issue with the courts given that they are public documents. We will have that checked and I will get back to the member on that point.

Mrs EDWARDES: The Freedom of Information Act has schedules of exclusions of Acts. I do not know whether particular sections and/or classes relating to the current tribunal are included in those schedules. However, the Freedom of Information Act should be considered whenever new legislation is brought forward to ascertain whether the availability of information to the public is being restricted. We must look at how the availability of information under the FOI Act has been determined in the past, and how people have obtained their information. The Freedom of Information Act currently operates for the ministerial appeals. We have heard from the Freedom of Information Commissioner about the generous fashion in which the previous minister approached the request for information under the FOI Act, and that he ensured that information was being made public. Now that the bulk of appeals will go to the tribunal, will there be a restriction on information available to the public?

Ms MacTIERNAN: I will set the record straight. Those of us who have been involved in using the Freedom of Information Act to try to access information about ministerial appeals know that the information, by and large, is pretty light on the ground. The ministers in the previous Government would not produce the reports prepared by the Town Planning Appeal Committee to the proponents. In contrast, the current Government is distributing the reports to the appellants and respondents before they are considered. The previous Government did not do that; it required people to go through the Freedom of Information Act process. When we sought to access the files that were kept by these appeals officers, as well as the reports, we were horrified to find that only scant records of contact were kept. It was not even possible to trace to whom the appeals assessor had spoken, or the content of the conversations that the appeals assessor had. That will be in stark contrast to the system that this Government is setting up, in which representations by either side will be made completely public. No longer will there be a bank of information which exists only in someone's head, which has never been committed to paper, and which has never been able to be challenged because a paper trail did not exist. While this debate has been reasonable and amicable, I advise the member for Kingsley not to crow too much about the FOI record of the previous Government because, although the reports could be extracted under FOI, very little other information was available. Occasionally an interesting letter from a backbencher was made available, but the backbencher's letter to the minister was quite different from the noises that he or she had made in the community. However, by and large, an unsatisfactory history of record-keeping has been revealed through the FOI system.

An opposition member: That is why it should be improved.

Ms MacTIERNAN: It has been improved under this current Administration. In addition to providing the report as a matter of routine to the respondents and the appellants before the final hearing, we have also made it clear there must be better record-keeping, and that all the reports must cite precisely what contact has been made with various parties, and the nature of that contact. We have moved someway towards improving the system; however, because of its very nature, we will never know for sure what happened.

For the edification of the member for Kingsley, proposed section 51(3) of the Planning Appeals Amendment Bill states -

> Except where otherwise provided by or under this Act, the regulations or the rules or otherwise determined by the Tribunal(as it is by this subsection authorised to do), a hearing of an appeal before the Tribunal is to be in public.

Therefore, there will be a high degree of publicity. The specific matter of whether it is FOI exempt has not been canvassed here because we are continuing with the current arrangements. However, we will have that information checked, and I will get back to the member for Kingsley.

Mrs EDWARDES: I thank the minister for that. Proposed section 51(3) does indicate that the hearings will be in public. However, in this instance, we are not talking about hearings but about documents. I do not wish to debate with the minister the issue of record-keeping, or otherwise of the ministerial appeals system under the previous Government. However, I will put on record comments that were made by the Freedom of Information Commissioner, Bronwyn Keighley-Gerardy to ensure that the facts are on the record. In January, the Freedom of Information Commissioner said that disclosures by the planning minister under the FOI Act had improved the planning appeals system in Western Australia, and that the minister had received 19 FOI applications in 2000, 15

in 1999, and 17 in 1998, all of which were given full or edited access to documents on all but one occasion, when the request was refused. Ms Keighley-Gerardy also stated that it seemed that the current approach of the minister in dealing with such requests for access records accorded with the spirit and intent of the FOI Act, and advanced the public interest in government accountability through transparency of the decision-making process. She added further that, in her opinion, the operation of the present ministerial appeal system was a vast improvement, and that disclosures under the FOI Act had improved rather than detracted from the town planning appeal system.

I want to ensure that the FOI Act will not limit or restrict information that has been available to people. As the minister knows, the FOI Act had to be used because third parties were involved, and the consideration and acceptance, or otherwise, of the disclosure of that information had to be sought on all those occasions.

Ms MacTIERNAN: While the conduct of the previous minister might have vastly improved the level of disclosure, compared to that of the penultimate minister, for the reasons I have set out, the system was nowhere near adequate. I reject the claim that freedom of information had to be resorted to in order to produce this data because of the third parties. The Government has acted at all times with Crown Law advice, and has provided those reports for every appeal that has been dealt with without there being any obligation placed on any party to attempt to retrieve them under freedom of information after the decision has already been made. The previous Government could have gone much further, but chose not to.

Proposed section put and passed.

Proposed section 47 -

Mrs EDWARDES: This proposed section creates further rights of appeal, or of referral of a matter to the appeal tribunal. It is broken up under many different Acts, the first of which are -

(a) this Act or any town planning scheme in force under this Act;

(b) the *Metropolitan Region Town Planning Scheme Act 1959* or the Metropolitan Region Scheme;

I address some questions to the minister to determine whether matters fall within paragraph (a) and/or (b). There is a body of opinion that matters pertaining to use classification are not appealable. If a council, for instance, classifies a McDonald's restaurant as a brothel - this might be seen to be an extreme case - there would be no right of appeal. The words "use classification" should be included after the words "any town planning scheme" and under paragraph (a) to remove doubt that use classification will be an appealable matter. The second and third matters are structure plans and outline development plans of relevant local authorities. My view would be - I seek clarification of this - that those are subordinate to the Act, and therefore would be incorporated already as appealable matters. I would like the minister to confirm that those are matters which are already covered under paragraph (a).

Ms MacTIERNAN: This provision is inserted to further clarify the range of appeal rights. It does not in any way change the range of appeals that can be heard. This proposed section states the status quo. The decisions that can be appealed are discretionary decisions made under some statutory provisions. They do not include structure plans or outline development plans. As I understand it, the practice has been that they are policy documents, and in themselves are not appealable. The issue of use classification is more complex. From my experience, the appeal will not be so much on the use classification, as on the exercise of the council's decision to refuse a development application. The question of use classification will become part of the decision made by the local authority, but is not itself the subject of the appeal. The decision not to approve a development application is in turn based on the use classification, which is to be considered as part of an appeal. Further advice can be obtained on this, but the practice seems to me to have been that examining whether the use classification of the particular development falls within a particular class is one of the matters considered in the course of the appeal.

Mrs Edwardes: Could the minister refer to the part of the Act which refers to this matter, given that she has said that the proposed section is not adding anything?

Ms MacTIERNAN: Section 37 of the Act, in the interpretive part, has a list of those things that fall within the ambit of the word "appeal" in the legislation. Some other provisions are included here because they have been placed in legislation passed subsequent to the Town Planning and Development Act 1928. These include the Heritage of Western Australia Act 1990, the Strata Titles Act 1985, the East Perth Redevelopment Act 1991, the Subiaco Redevelopment Act 1994, the Midland Redevelopment Act 1999, and the Hope Valley-Wattleup Redevelopment Act 2000. These Acts were not cited in the original legislation.

Section 37 of the existing legislation has an interpretive provision that cites the various Acts under which appeals are allowed. The only two that are not mentioned in this section, but which are mentioned in the Bill, are the Western Australian Planning Commission Act 1985 and the Strata Titles Act 1985. We are not creating any new appeal rights. These appeal rights already exist under the legislation. We are simply seeking to bring them into one place within this Bill, so that the full ambit of appeal matters is clear. By and large, the rights are contained in section 37 of the Town Planning and Development Act 1928, the Western Australian Planning Commission Act 1985 and the Strata Titles Act 1985. We are simply seeking to ensure that the complete list of legislation can be found in one place.

Mrs EDWARDES: Can we go through that slowly? Section 37 of the Town Planning and Development Act identifies several sections - sections 7, 8A, 8B, 7B, 6 and 26(1). Proposed section 47(1)(a) of the Planning Appeals Amendment Bill 2001 refers to -

> this Act or any town planning scheme in force under this Act;

By referring to "this Act" rather than the individual sections, does it take in matters that are broader than those sections or is it just a neater way of drafting it? There would be no appeal right unless it was provided under that Act as outlined. There are two issues.

Ms MacTIERNAN: It is clear that this does not create any new appeal rights. The provision clearly states that a person may appeal or refer a matter to the tribunal if a right is conferred on that person by this Act or any other town planning scheme. It is not generating or creating any new rights. It is simply saying that if a person has the right to appeal under this legislation or a town planning scheme in force under this legislation, an appeal can be made to the tribunal. It does not create any further rights.

Mrs EDWARDES: I presume the answer will be the same for proposed section 47(1)(c), which deals with the Western Australian Planning Commission Act 1985. The current section 37 deals only with sections 25 and 37E. Proposed paragraph (c) contains the additional words -

> or any regional planning scheme within the meaning of that Act;

Can the minister clarify what that means for the right of appeal?

Ms MacTIERNAN: As I understand it, the member for Kingsley wants to know the nature of the rights detailed in the Western Australian Planning Commission Act. They are contained in sections 37E and 37J of that Act. Basically, they refer to the right to appeal against the imposition of a regional development order. It is anticipated that the regional development orders will control development that is pending during the period that a regional planning scheme is being developed. As the member knows, a planning scheme is being developed for the Peel region, and planning schemes have been proposed for Bunbury and, more recently, Geraldton. Before those schemes operate, it is necessary to put development controls in place to prevent slash and burn or opportunistic development that would compromise the effectiveness of those schemes. Regional development orders can be imposed, but a right must be given to proponents or landowners to appeal against the imposition of a regional development order. That is what this provision refers to.

Mrs Edwardes: Current section 37 of the Town Planning and Development Act 1928 deals with sections 25 and 37E of the Western Australian Planning Commission Act. The minister just mentioned sections 37E and 37J. Is section 37J a new right of appeal? What happened to section 25? Sections 37(f) and (g) of the Town Planning and Development Act refer to sections 25 and 37E of the Western Australian Planning Commission Act. The minister referred to sections 37E and 37J. It would appear that -

Ms MacTIERNAN: Will the member for Kingsley stand and set out her argument, so that we can follow it.

Mrs EDWARDES: The minister indicated that the Bill before us will create no new rights of appeal. She indicated that the provisions in section 37 have been transferred to proposed section 47, and the drafting has been improved. There are two points: firstly, proposed section 47(1)(c) refers to the Act or any regional planning scheme within the meaning of the Act. Does the addition of the words "or any regional planning scheme within the meaning of the Act" create something new? Secondly, when we spoke about the particular sections under the legislation, the minister referred to sections 37E and 37J. Section 37J is not mentioned under section 37 of the Town Planning and Development Act at the moment. Where is section 37J?

Ms MacTiernan: It is not mentioned under section 37 where?

Mrs EDWARDES: Under section 37 of the Town Planning and Development Act. Section 25 of the Western Australian Planning Commission Act is referred to under section 37(f). The minister did not refer to section 25 when she spoke to me about the matters of appeal available under the Western Australian Planning Commission Act. She referred to section 37E, which is contained in section 37(g), and section 37J. Section 37J is not

currently contained within the interpretation of "appeal" in section 37 of the Town Planning and Development Act. Is that something new? If not, where is it currently contained within the Act? Section 25 applies.

Ms MacTIERNAN: It was an oversight, presumably by one of the member for Kingsley's colleagues. Section 37J was a recent amendment to the Western Australian Planning Commission Act. That amendment, which was made last year, introduced rights in relation to appeals against certain orders. Section 37J(4) reads -

> The owner on whom a notice is served under subsection (1) or (2) may, within the period specified in the notice, appeal in the manner prescribed to the Minister against any direction in the notice.

Subsection (5) says -

> The Minister after considering an appeal under subsection (4) may confirm, vary or cancel the direction and the Minister may, where he confirms or varies the direction, by written notice, direct that the owner shall comply with the direction as so confirmed or varied, as the case requires, within such period, being not less than 40 days after the service of the notice, as is specified in the notice.

Mrs Edwardes: When was it proclaimed?

Ms MacTIERNAN: On 19 December 2000. When the Bill was introduced, no concomitant amendment was made to section 37 of the Town Planning and Development Act. The sections in that Act do not capture the full right of appeal. As part of this process, we are therefore amending section 37J to make the appeal right not to the minister, but to the tribunal.

Mrs EDWARDES: Will the minister confirm that the addition of the words "or a regional planning scheme" to the Western Australian Planning Commission Act will not create any new appeal rights?

Ms MacTIERNAN: It was always anticipated that once regional schemes were in place, just as those rights are available under town planning schemes that are subsidiary to the Town Planning and Development Act, schemes subsidiary to the WA Planning Commission Act will have the potential of appeal rights. The Government does not believe it is a new right; it believes it was inherent in the appeals provision of that legislation that it would apply to the schemes created under the WA Planning Commission Act. We think it is inherent, but for completeness of drafting and to ensure the amendment is consistent with the extension of proposed section 47(1)(a) and (b), where reference is made to the schemes created under the Town Planning and Development Act, it will apply to any appeal conferred by the Act or by a scheme that is created under the Act.

Mrs Edwardes: Have any appeals been made?

Ms MacTIERNAN: No, because no schemes have been finalised, nor have any regional development orders been made. It is early days.

Mrs Edwardes: Is the reference under paragraph (a) similar?

Ms MacTIERNAN: Yes, it is an appeal right directly under the Act or an appeal right enshrined in a town planning scheme that has force by virtue of this Act.

Mrs EDWARDES: With regard to the example of use classification - that is, of changing McDonald's to a brothel - the minister explained that it is not the use classification that would be appealed but the decision of the process by the council. Where does that appeal right fall within the Bill or the planning legislation?

Ms MacTIERNAN: Section 8(a) of the Town Planning and Development Act makes it clear that any exercise of discretion of power under a scheme is appealable. It reads -

> 8A. (1) Subject to this section, if -
>
> (a) under a town planning scheme, the grant of any consent, permission, approval or other authorization is in the discretion of the responsible authority; . . .
>
> the applicant may appeal to the Minister against the authority's decision in accordance with Part V.

This is also picked up in express rights in virtually every town planning scheme.

A person may apply for approval to build a warehouse in which to store cars, but an express provision may mean that that area is not to be used for car yards. The applicant would be seeking to characterise his development not as a car yard but as a warehouse and, therefore, it would fall within a different provision. The council may knock back the warehouse on the basis it believed the classification was a car yard, which may be a prohibited use or an SA use. The applicant may then appeal against the council's decision. There is some lack of clarity here. If, for example, the warehouse use were discretionary and a car yard was a prohibited use for which there was no discretion, the council may argue on an appeal that there is no discretion because the warehouse would be a car yard and, therefore, a prohibited use. The council would not have exercised any discretion. That is one

way of approaching it. However, often the question arises about whether, as a matter of fact, the council has that right. On appeal, the factual matter of whether it is a warehouse or car yard would be the subject of consideration. If it were considered to be a warehouse, it would be a discretionary decision, not a non-discretionary decision. Often the argument is raised by the council that it is a non-discretionary use, but it may well be a discretionary use depending on the question of fact, which is often determined in ministerial appeals. I am not sure what attitude the tribunal will take on that matter, but it is difficult, particularly when "prohibited use" is involved.

Mrs EDWARDES: I thank the minister for that explanation. When we receive the Green Bill on prostitution, we will see whether appeal rights will be available based on areas of prohibited use and discretionary use.

Ms MacTiernan: That is right.

Mrs EDWARDES: The Strata Titles Act has not been referred to in the Bill under "Interpretation". I take it a specific provision provides for appeal to the tribunal.

Ms MacTIERNAN: I refer the member to section 26(5) of the Strata Titles Act. It states -

> . . . an applicant may appeal to the Minister to whom the administration of the *Town Planning and Development Act 1928* is for the time being committed by the Governor or to the Town Planning Appeal Tribunal constituted under that Act against -

The section then provides a list of refusals against which those matters can be appealed.

Mrs Edwardes: Obviously there is a consequential amendment to that section.

Ms MacTIERNAN: Yes. We are removing the involvement of the minister. We are not seeking to preserve any of the ministerial powers contained in that section. Section 25B of the Strata Titles Act provides for certification that can be used to get the title.

Mrs EDWARDES: I thank the minister for that. I refer her to proposed section 47(1)(j). The drafting of the rights and the Acts under which they appear is specific; yet a catch-all phrase of "any other written law" has been included. Are there thought to be other written laws, and if so, why are they not referred to?

Ms MacTIERNAN: My advisers tell me they are confident about the comprehensive way in which they scoured the legislation; however, we have included this catch-all just in case. For this provision to be invoked, another statute must provide for a pre-existing right of appeal. It does not of itself create any new appeal rights.

Proposed section put and passed.

Proposed section 48 put and passed.

Proposed section 49 -

Mrs EDWARDES: I reiterate that I do not propose to move my amendment on the Notice Paper because the minister has already amended the Bill to allow parties access to a tier 1 appeal.

Proposed section 49 deals with the notice of hearings. Proposed subsection (1) states -

> The Principal Registrar is to give notice, in accordance with the regulations or rules, of the time and place for the hearing of the appeal to -
>
> (a) each party to the appeal; and
>
> (b) each other person entitled to notice under the regulations or rules.

The regulations and rules establish time frames. It has been suggested that not only should the time and place be identified in the notice, but also each party should be notified of the classification of the appeal and the composition of the tribunal as determined by its president. I take it that once the time and place for the hearing of an appeal have been identified, the tribunal has already identified whether it is a tier 1 appeal and which members will appear on the panel. It would not be too much effort to include that information in the notice to each party. That would allow the parties to order their affairs. For example, knowing whether the appeal is classified as a tier 1 or tier 2 appeal will help the parties decide whether they need to appoint a solicitor.

The proposed section the minister inserted by amendment allows parties to opt for a tier 1 appeal. How will that be factored into this process?

Ms MacTIERNAN: We are talking about notices of hearings. A range of procedural matters will take place before a hearing is set down, such as the issues of classification, election and agreement that an appeal be dealt with in a certain way. Similar to the way in which courts deal with a raft of preliminary matters, the tribunal will

administratively deal with such matters before parties proceed to a hearing. I am not sure whether it would be appropriate to include these matters in the hearing notice. That would be a later procedure.

Further, we are not keen to advertise who will be on a panel. That could lead to forum shopping, in which a party could claim to not be available on a particular hearing date because a certain person is on the panel.

Mrs Edwardes: That never happens in the court!

Ms MacTIERNAN: We do not want to encourage any unhealthy practices.

We expect that the principal registrar will deal with all the preliminary matters, such as classification, prior to setting down a hearing.

Dr WOOLLARD: I move -

> Page 18, after line 2 - To insert after paragraph (1) -
>
> (2) The Principal Registrar is to give notice of the time, place and subject of the appeal to the community -
>
> (a) in relation to an appeal referred to in section 40(3), by advertising in a local newspaper; or
>
> (b) in relation to an appeal other than one referred to in section 40(3), by advertising in a local newspaper and in a newspaper circulating generally in Western Australia.

This will oblige the principal registrar to notify the community of appeals, ensuring that it is aware of and has an opportunity to be involved in decisions and developments. The community wants to have a say on a regular basis, not just every four years. I sought to represent the people of Alfred Cove by putting people before politics. Therefore, it would be irresponsible for me not to recognise that obligation and help frame legislation that gives the community an opportunity to show its concerns about planning developments.

Proposed subsection (2)(a) - which is directed at developments under $250 000 in value - is intended to ensure that the community is made aware of deficiencies in relevant town planning schemes. In a large number of cases the Minister for Planning has overturned decisions of local governments against the wishes of the local community because the relevant town planning scheme had loopholes that needed to be addressed. Proposed section (2)(b) is directed toward large-scale developments that will have an impact outside local communities. Publication in *The West Australian* would enable the wider community to be involved in issues that may affect them. Examples are Ningaloo reef, Leighton Beach and the Heathcote heritage site, including Duncraig House and the lower parklands. Such issues do not just affect local residents; people from all over the State have passionate feelings about and a sense of ownership of such developments. I ask the Government to consider this amendment, which will give the community knowledge of the appeals and the opportunity to be involved in decisions and developments.

Ms MacTIERNAN: I understand what the member for Alfred Cove seeks to achieve but I think it is entirely impractical and would cause a great deal of controversy in the community because the vast majority of appeals will not attract the interest of third parties. To impose on the system an obligation to advertise in local newspapers or state newspapers for some days before the appeals procedure could continue would create delays. All debate until now has been against delay. It would also introduce bottlenecks. The vast majority of appeals are of no interest to third parties. It is using a sledgehammer to crack a walnut. If third parties were interested in these matters, they would follow them through the earlier hearings. We should bear in mind that most appeals are on decisions made in other public forums such as local authorities, the Western Australian Planning Commission or the Heritage Council. All such decisions have, in themselves, been public proceedings. If there are interested third parties - either individuals or groups - they will be well aware of the matters and well able to follow whether an appeal has been lodged. They will be able to lodge submissions. An appeal is a matter of public disclosure and third parties will be able to join the appeal by lodging submissions. Most appeals are based on public decisions. After the public decision is made, there is a time frame in which an appeal can be lodged. It is open to any community activist or concerned individual to follow a matter, see whether an appeals process is under way and lodge a submission. This amendment is using a sledgehammer to crack a nut. It would add immensely to the cost and the delay and the Government would be roundly criticised by local governments, the development industry and many of the appellants. I understand what the member is attempting to do and that she wants to ensure that interested third parties have a right to participate, but it is not necessary to do it this way because previous decisions that have been appealed have been subject to a very public process. Third parties will know whether appeals have been lodged. They can follow the original decision and contact the tribunal.

Dr WOOLLARD: Is the minister saying that these matters will be dealt with at an earlier stage of the process and that the community will be made aware of them? It is fair to say that communities are often disenchanted with the representation they get in local government. Local governments do not always act in their best interests. Transgressions of councils such as those at Wanneroo and Cockburn demonstrate that the interests of the average ratepayer are often not a priority when it comes to major development decisions. Initiating this process is a way of informing the community of what is happening so it can speak up earlier.

Ms MacTIERNAN: I am not arguing that we should not do this because it has already been decided by a council or the Western Australian Planning Commission. The earlier process is a public process. It does not matter whether it is Duncraig House, the Nutri-Metics site or a marina at Mindarie Keys, the matters will be known to all interested parties. When a decision is made, which they may or may not support, they will know there is a certain period in which to contact the town planning appeal tribunal or their local authority to see if an appeal has been lodged. If one has been lodged, they can lodge a submission. I am not arguing that third parties should be happy just because a matter has come before a council. As it will be publicly known that a matter has been before a council, it will not be necessary, profitable or useful to advertise the fact. How many people will read the public notices sections of newspapers? People will know that decisions are in the pipeline and they will be able to go to the tribunal. We have to be firm on this because, as a practical matter, the failure to advertise will not exclude anyone genuinely interested in such matters. Third parties will follow cases and know full well what is going on. Against that, we have to balance the imposition of cost and delays that will be created if we follow this process.

Amendment put and negatived.

Mrs EDWARDES: I agree with the minister that the process, in terms of the determination and whether there is agreement, would need to have taken place before the notice goes out, particularly as it must be determined whether an appeal is a tier 1 appeal. The draft rules need to be changed to reflect the amendment that the Chamber has passed. The minister appears concerned about advertising who will be on the panel. She and I are aware that an appointment of a judge or magistrate is subject to availability and appellants may choose before whom they appear. I am not sure whether that will change once the identity of the individual is known. Under proposed section 38, the qualifications and skills of an individual may be a matter for an appellant, in any event.

Ms MacTiernan: The qualifications that the minister had have never worried them in the ministerial appeal process.

Mrs EDWARDES: No, they rather liked ministers to deal with it because it meant that the process was quick, easily accessed and affordable. That is the system they would like to ensure remains in place. Even if the minister does not want the composition of the tribunal included, if notice is to be given of the time and place that meetings of the tribunal are to be held, I do not understand why the tier 1 appeal is not included in that notice, because that would have been determined already and should be included in the notice that is going out. Maybe the minister does not want to put the composition of the tribunal into the substantive part of the Act; however, it could easily be incorporated in the notice that is given to the parties. It would make sense for that to occur, because the parties must determine what they want to do. They want to know whether they will need to employ a solicitor. If it has been decided already that the issue is either a simple tier 1 appeal or a complex tier 2 appeal about which agreement has not been reached, the composition of the tribunal should be made known to the parties. It would make sense to identify the composition of the tribunal in the notice.

Ms MacTIERNAN: These are administrative matters that must be dealt with in the rules. There will be different processes for tier 1 and tier 2 appeals. For example, tier 2 appeals will commence with a notice of mediation; however, that is not necessary for tier 1 appeals because the entire process will be non-adversarial. Inherent in the notices that go out will be the distinction between tier 1 and tier 2 appeals.

We have begun a consultation process about the rules with all of the stakeholders. Obviously, the rules cannot be finalised until the Bill is in its final form. The rules must be made clear to people because there are different procedures for tier 1 and tier 2 appeals, and that will be inherent in the procedures that are followed. The parties will be notified of that. That type of detail will be dealt with in the rules.

Mrs EDWARDES: I thank the minister and note her comments about the consultation process concerning the rules. I talked to one party yesterday that had not received a copy, and perhaps I will raise that issue with the minister's office over the break.

I refer to proposed new section 49(2) that deals with a case whereby a person to whom notice has been given in accordance with the rules fails to attend the hearing. In that case, the hearing may be held in the absence of that person. Is that section in the current Act? Does that situation happen often, and in what circumstances does it occur? Is it proposed that those circumstances will be included in the rules or the regulations? Will the Bill

provide for any party to seek deferment of a hearing when it is warranted to do so, for example, if that person were unable to attend the hearing due to an innocent mistake?

Ms MacTIERNAN: I am not sure whether the member is aware that the provision we are dealing with is identical to the existing provision in the legislation. I do not know how often people fail to appear at the Town Planning Appeal Tribunal. It is highly inappropriate that a person can frustrate a matter being dealt with by simply failing to attend the hearing. In my extensive dealings with the Building Disputes Tribunal a cause of great concern was how often certain builders would frustrate the appeals process either by twelfth hour adjournments or by not attending the hearings. In one case I dealt with, 24 adjournments had been sought and granted. We must deal more firmly with the way in which those people that I call "vexatious defendants" conduct themselves and frustrate the hearings of matters by their failure to appear at hearings and their use of the "dog ate my homework" type of excuse.

The tribunal has all the powers of the Supreme Court and all the usual provisions that relate to adjournments apply; therefore, the tribunal has the power. I am concerned about how often people use the tactic of not attending hearings as a means of frustrating the appeals process. It can also result in great cost for a litigant who must engage a lawyer and who attends court only to find that there has been a last minute adjournment. Frankly, tribunals should become firmer on this matter.

Mrs EDWARDES: I support the minister on that issue. On many occasions tribunals and committees have been frustrated in that manner.

Have criteria been proposed to establish legitimate reasons for the failure of a person to attend a hearing, or will it be purely at the discretion of the member, senior member and/or president?

Ms MacTIERNAN: The nature of the discretion will not change from the current composition of the tribunal. The standard approach has been adopted as in other tribunals and courts. It would be foolish of us to attempt to describe all the types of circumstances that might warrant an adjournment. That would be impossible to calculate. We must rely on the capacity of the people that are put in judicial positions to act fairly and reasonably to all parties.

Mrs Edwardes: Would the minister advise the Chamber, for those people who have never practised in the courts, as to what are the standards.

Ms MacTIERNAN: They are self-evident; for example, the tribunal would take into account a circumstance in which there were a major tragedy on the morning of a court case, or if there were a genuine reason that an appellant was not able to collect evidence crucial to the case that was not as a result of the appellant sitting on his hands. It might be that a solicitor was not available at a late stage in a case and it would be impractical to brief another solicitor. Those usual sorts of reasons would be taken into consideration by the tribunal.

Not many other members are listening to this debate or seeking clarification and, with the member for Kingsley's experience in the law, I know that she does not need further clarification either.

Mrs EDWARDES: The minister would be surprised how many people read *Hansard*. It is important to make sure that some of these matters are on record.

I will make a point about proposed new section 49 and the timing of appeals. This is a matter about which the minister cannot advise, nor can she change or amend it; it is merely a point. I hope that the tribunal will take into account the timing of appeals and consider local government statutory processes and responsibilities. I also hope that travel arrangements can be made for people who live in the country. The Western Australian Municipal Association and many regional councils are concerned about the timing of the appeals process. Although everybody wants to reduce the delays to the system, they have some timing issues that must be dealt with.

Ms MacTIERNAN: Absolutely. We agree with that. As the tribunal will be dealing with local authorities in the bulk of these appeals, I am sure it will be sensitive to the needs of the local authorities. It goes to the question of the capacity to mediate the appeals, because it is difficult to constructively engage in mediation unless the local authorities are prepared to give some sort of advance authorisation to the officers acting on their behalf. There is no point in a mediation process in which every point of the mediation must be delayed another month while it goes back through the committee system and full council. If councils want to engage constructively in the mediation system, they will have to work hard at developing some protocols for giving authorisation to staff, and perhaps give some room to move, so that resolutions can be made.

Proposed section put and passed.

Proposed section 50 -

Mr COWAN: When I last spoke on this Bill, I indicated to the minister that some parts of the legislation could be improved. It is most noticeable that the Bill does not make any provision for the determination of appeals to have a finite time line. The purpose of my amendment is to insert a new subsection (4). It would effectively give notice to the tribunal, whether it be in the form of a single-member tribunal or a three-member tribunal, that it has a limitation on the time in which it must consider any appeal, so clearly no delay can be brought about as a consequence of a matter being the subject of appeal. For that purpose, we have decided that it would be appropriate to insert a new subsection (4). I move -

Page 18, after line 22 - To insert the following -

(4) A final determination of an appeal is to be made within the following timeframes after the applicant gives notice of an appeal to the Tribunal –

(a) Single Member Tribunal (Simple Appeal) 90 days;

(b) Three Member Tribunal (Complex Appeal) 180 days.

The amendment speaks for itself. It indicates clearly that the tribunal has a time line, as do people who are making an appeal if a planning decision is made. If my memory serves me correctly, an appeal can be lodged within 30 days. If we are to put time lines on appellants, there is every reason that the tribunal has a time line in which it must make its deliberation and determination and deliver that decision to the people who are appealing.

Ms MacTIERNAN: We are concerned to ensure that these decisions are dealt with in a timely manner. Indeed, in the practice directions, we have proposed a series of time lines, and I will read them for the member. The time benchmarks for class 1 appeals state -

4. The Registrar shall endeavour to set down a Class 1 Appeal for hearing within 7 days after the lodgment of the Grounds for Contesting the Appeal.

5. Where possible, the determination of a Class 1 Appeal should be made orally at the conclusion of the hearing. In any event, every determination should be delivered and published within 7 days of the conclusion of the hearing.

6. Unless the President otherwise allows and then only in exceptional circumstances, an Ordinary Member must not reserve a decision for more than 2 weeks.

The time benchmarks for class 2 appeals state -

7. At the conclusion of the Directions hearing under Rule 29 of the Town Planning Appeal Tribunal Rules 2001, the Registrar shall endeavour to set down a Class 2 Appeal within 28 days, unless the parties otherwise agree.

8. Where possible, the determination of a Class 2 Appeal should be made orally at the conclusion of the hearing. In any event, every determination should be delivered and published within 4 weeks of the conclusion of the hearing.

9. Unless the appeal involves complex issues and the President otherwise allows, the Tribunal must not reserve a decision for more than 8 weeks.

By the standards of tribunals, we are trying to move these matters along fairly rapidly. We are setting down a series of time lines; that is, how long after an appeal is lodged should the hearing be commenced and how long after the hearing has taken place should a decision be made and recorded. We do not believe it is appropriate at this point to include this in the legislation, particularly when we are moving into new territory. We are not sure what the levels of appeals will be and what difficulties might emerge. We believe they will be containable. However, we do not believe we should deliver this degree of inflexibility into the legislation proper. We are particularly concerned that the time line be from the date of the application; for example, it may be the appellant who constantly seeks an adjournment. A few appellants who have made applications under ministerial appeals have sought adjournments of the consideration of their appeals for six months, a year or, in some respects, even longer. When I made it clear to all the appellants who had sought to do this that it was not our intention to give any credence to this practice, a lot of legal correspondence was entered into and, at the end of the day, they withdrew their appeals.

It is true that, in the past, appellants have tried to use this appeals procedure as a sword of Damocles to hold over and to bully particular local authorities. In some instances, when the appellant has been a particularly rich and powerful corporation, it has been successful. Of course, the success rate has changed considerably, given that we have taken a stricter approach to the law; that is, we have applied the law rather than not applied the law. We support the idea of setting benchmarks. We have set those benchmarks into the practice directions. We believe

they are tight frameworks, but we do not believe they should be enshrined in legislation at this point. We certainly do not think that the time line should be set from the point of lodgment. In some cases, such as the immensely complex Whitfords case, evidence has been led by the appellant. That would have been totally impossible to achieve within the time lines put forward by the member.

Mrs EDWARDES: I support the amendment. In doing so, I will highlight the time standards for the disposal of cases in the New South Wales Land and Environment Court. Of course, it has different classes from the two tiers in this case. The court's classes 1, 2 and 3 are similar to our tier 1 and probably the lower end of tier 2. Ninety-five per cent of applications are to be disposed of within six months of filing. In 1998, 85 per cent of those matters met the time standard. In actual fact, 15 per cent of matters under those classes did not meet the six-month time frame.

Ms MacTiernan: Where are those provisions set out? Are they provisions in the court's rules or provisions within the Act?

Mrs EDWARDES: I identified that on the last occasion. I recall that we were talking about the provisions, and I checked and found they are in the court's rules; they are not in the Act. I am happy to give the minister a copy of the documents that I received from the Chief Judge of the Land and Environment Court. In classes 4, 5 and 6, 95 per cent of applications are to be disposed of within eight months of filing. In 1998, 70 per cent of those matters met the time standard. The time standards set for reserved judgments are that 50 per cent of reserved judgments in all classes are to be delivered within 14 days of the hearing, 75 per cent within 30 days of the hearing, and 100 per cent within 90 days of the hearing. The court is constantly attempting to improve those time standards.

I support the amendment because, despite the fact that tight time frames are imposed in the draft rules, those tight time frames obviously will be looked at from time to time as current matters before the tribunal are undertaken. However, the issue for appellants is that delay is their enemy. Delay costs money. Even though there are some time frames in the draft rules, it would give some confidence to the whole system if they were included in the legislation. Even if the time lines expressed in the Bill were long, at least it would put the matter into the public arena. Appellants would know and understand that delays would be experienced, but it would ensure a discipline of process. As such, the stakeholders suggest that they would like something firmer; that is, something included in the legislation, rather than just in the draft rules.

Ms MacTiernan: However, they are not in the legislation in New South Wales, are they?

Mrs EDWARDES: No. However, we do not have to follow New South Wales; we can have our own legislation. The concerns are that the appeals process can get bogged down. Bureaucratic processes can totally bog them down and time frames can blow out to the cost of parties. Delay and cost are the two key issues, and the stakeholders would like them addressed by the inclusion of even long time frames in the Bill as opposed to some tight time frames being put into the draft rules.

Sitting suspended from 6.02 to 7.00 pm

Mr COWAN: I want to comment on the rules and I hope the minister will respond. I thought this amendment might not be necessary because the rules would impose enforceable time frames on the tribunal. However, the provisions dealing with the procedures of the tribunal do not impose limitations on the tribunal. Although some rules may be laid down, any tribunal, whether it is hearing a simple appeal or a complex appeal, can decide that there are some exceptional circumstances and it will not make a decision according to those rules.

What is the status of the rules? I have considered the responsibilities of the president and the way in which the president can determine the practice of the tribunal. However, I did not see anything in the Bill that indicated to me that the rules made would be adhered to. It will be a matter of discretion for the tribunal, and I do not think that is good enough. We have set a range of requirements for the prescribed period of lodgment of an appeal -

Ms MacTiernan: Surely you would not want it to be otherwise; it would be a nonsense.

Mr COWAN: That is why we have moved this amendment.

Ms MacTiernan: It would be a nonsense to not have a time limit on when an appeal could be lodged because one would never know when a matter was going to end.

Mr COWAN: I agree but I think it needs to be carried the full distance. The rules state that a tribunal must make its determination within a prescribed period and that it can reserve its determination for only a period, and that is fine. However, what is the legal status of those rules? It is great to work on the principle of goodwill, but the minister will accept that at some time, goodwill will not exist. There is no legal requirement upon the tribunal to say that it will set a particular time line. It can say, "The rules are the rules but we will have to break them because of our workload or because the matter is too complex and we are not going to make a decision

until we feel like it." I appreciate the fact that the minister has been prepared to give us copies of draft rules and draft practice directions because that does help. However, unless the minister can tell us that the rules have legal status, we should incorporate into the Act precisely what we are seeking to do here. We should impose limitations on the tribunal, require it to make a determination within 90 days so that it cannot say that because of certain circumstances - its workload or whatever - the rules have no legal status and therefore, it will not make a decision for some time.

Ms MacTIERNAN: The member for Merredin is correct. These rules are not enforceable in law in those instances. I am not sure if the member had in mind that we would take the members of the tribunal out in public and give them a good National Party flogging if they had not met their appeal deadlines. We are prepared to be courageous, to move forward and to break new ground, but there is a limit to how far we are prepared to go. We have not been able to find one other jurisdiction in all of Australia that enshrines in law -

Mr Cowan: I would have thought you would love to be the person who set the precedent.

Ms MacTIERNAN: No, there is good reason for this because there is no point in having rules unless they are enforceable. This is a matter for administrative guidance and work practice, and to set a performance standard for the people who will be occupying positions on the Town Planning Appeal Tribunal - in the same way as the performance standards that are set for the public service are not enshrined in the Public Sector Management Act. It is about as sensible as that.

Mr Cowan: I will not argue with you on that Act!

Ms MacTIERNAN: Unless one has the performance standard of the percentage of things the public sector does with which the minister is happy.

Mr Cowan: We know you are never happy.

Ms MacTIERNAN: I have very good public servants, I must say.

Mr Cowan: We are not talking about the quality of the public service; we are talking about your happiness, minister.

Ms MacTIERNAN: I can assure the member for Merredin that I am sometimes happy.

The member for Kingsley cited some time lines used in other States. The Government has examined the legislation and the rules of the New South Wales Land and Environment Court, and the time lines that are set down in that eminent jurisdiction are not legally binding. They are like those that the Government proposes, as a guide for a minister setting up a performance standard. This has been explained on a couple of occasions, and it is not the intention of the Government to go on debating it. The need for time lines is appreciated, and they have been entrenched into the practice directions. It has been made clear that that is the way the Government wants the tribunal to function, and that the performance of the members and the president will be assessed against their ability to meet those time lines, while at the same time dispensing justice that is fair and equitable. It has also been pointed out that the time lines are unrealistic and often an appellant might for various reasons want adjournments of a matter. The amendment proposed by the member for Merredin would not always act in favour of those people in whose interests he is purporting to act. I have given my explanation for this, and it is not my intention to continue to repeat the same point, knowing how sensitive the member for Merredin is to repetition.

Mr BRADSHAW: I support this amendment, because it is important that a time frame be put into the regulatory process. The rules that the minister has been referring to do not set down a time frame that must be abided by.

Ms MacTiernan: In all the eight years of the previous Government, can the member for Murray-Wellington tell me of one tribunal for which that Government set time lines?

Mr BRADSHAW: No, I cannot, but that is no excuse for not making some time lines now.

Ms MacTiernan: Could the absence of time lines be due to the fact that they are neither practical nor sensible?

Mr BRADSHAW: I disagree with the minister on that point. People who lodge appeals are often under extreme pressure. I had a case last year of a man who was appealing over his subdivision, and was in dire financial straits. I do not believe that the appeals system should make a determination simply because the appellant is in dire financial straits, but the sooner he gets an answer, the sooner he can get on with his life and work out how he will deal with the situation. A time frame is very important. The rules that the minister is talking about have no statutory force. The thing that worries me is what effect this amendment would have if the appeal tribunal does not abide by the time frame? A further amendment is needed to the effect that if an appeal is not heard within a certain time, it is automatically granted.

Ms MacTiernan: Then an appellant could hold up the procedure, and apply for one adjournment after another, because if he were able to hang on for three months, the appeal would automatically go through.

Mr BRADSHAW: I was going to address that matter, because the minister did say that some of appellants want delays. The rules can be made so that no-one can delay the process. Once the appeal is lodged, the appellant is locked into the process, and the time frame. The appellant cannot come back with other changes or amendments.

Ms MacTiernan: What about mediation? Where does that fit into the scenario?

Mr BRADSHAW: It can be worked into the rules in any way the minister likes. I do not think these time frames are too bad. Ninety days is basically three months for the single-member tribunal, and for the complex appeal, before the three-member tribunal, the limit is six months. Those are not bad time frames; it is not exactly rushing things. Unless some rule is in place that says that appeals must be dealt with within a certain time, when a minister deals with 700 appeals each year - I suggest that in due course those numbers will increase due to increasing population and increased activity - the Government of the day may decide not to allocate any more resources, and the time frames will increase. The fact that rules are in place means nothing. Even this amendment, which I support, needs to be tightened up so that something is in place that forces the appeals tribunal to abide by the time frame. I know there will always be exceptions, but appellants should be made to abide by the time frames, and if they do not like them, they should not lodge appeals.

Mr COWAN: I am experiencing a sense of deja vu here. I am reminded very much of the legislation that was passed through this House about two years ago on rail freight. I might be copping the other end of the stick; I am not sure of that. I remind the minister that, in the time benchmarks that are included in the rules, there is no real termination point. The minister has said that a determination must be made one week after the final hearing, but those hearings can go for as long as the tribunal chooses. There is no limitation, even within the rules, which the minister has used as an example, which renders this amendment unnecessary. The rules permit hearings to be continued for any length of time, and then, after the final hearing, the decision must be made within a week, or within four weeks in the case of a more complex appeal. As the minister said, an appeal could go on and on because of further hearings being required, with fresh evidence being presented, which will delay the process. I cannot understand why specific time frames within which an appeal must be lodged can be included in the law, but specific time frames within which the tribunal must deal with an appeal cannot be included. It would be a very good guide for the tribunal, as it is appointed, whether it be a simple appeal before a single-member tribunal or a more complex appeal before a full tribunal. If the tribunal knows that there is a 90-day limitation, it will not muck around. It will ensure that the number of hearings required will be held within the 90 days, in the case of a simple appeal, or within 180 days, in the case of a more complex appeal. It would be appropriate that those guidelines are there for the tribunal, as well as for the appellant. I say this particularly on the basis that third parties are being permitted to be involved in an appeal. If third parties want to lodge all sorts of reasons for an appeal to be considered, one way or another, it may well be that that in itself has a tendency to extend the time allocated by the tribunal. Again, the amendment would serve notice on third parties that wanted to lodge written submissions that there was only a prescribed period during which that could be done. I do not think the rules are adequate. Some of these appeals have the capacity to go beyond a reasonable amount of time.

I am not saying that the minister is not seeking to break new ground. I find it fascinating that the minister does not want to create a precedent, because she loves to create precedents with just about everything she does. I thought she would jump at the chance to do something with this legislation that would set a benchmark for every other State to follow. However, if the minister is not prepared to accept that, I make the point that the rules are not explicit about the length of time that can be taken for a hearing. The only time frame is that of the period after the final hearing in which a decision or determination must be made. That is not good enough. It is appropriate for tribunals to have a time line in which to make a determination, given that third parties can now be part of an appeal.

Ms MacTIERNAN: The member for Merredin is correct. The practice directions do not contain an overall time limit, from start to finish, as envisaged in his amendment. However, there is a time line for the setting down of a matter for a hearing and, once that hearing is completed, for delivering judgment on that matter. There is a sound reason for that; it is not within the control of the tribunal to determine how long a matter will take. The tribunal has control over the time taken to set down a hearing. It also has control of the time taken from the finalisation of an appeal to the production of a decision. However, it does not have control over how long it will take to hear an appeal. That depends on the case being made by any of the parties to the action, the number of witnesses called, and the complexity of the issues that come to the fore. Under those circumstances, it would be entirely inappropriate to lock the tribunal into a time frame for matters over which it has little control. Rough justice would arise from that. I suspect that is why there is no such provision in any other legislation.

This Government is happy to break new ground. It believes that the benchmarks set down in the practice directions are new ground in the administration of justice. However, the Government is not prepared to go the additional step proposed by the member for Merredin, because it thinks it is not do-able and would create a barrier to the proper examination of cases. It will depend on the goodwill of the appellants and respondents to get on with the matter. We have heard that everyone wants these appeals dealt with quickly. I am confident that they will be heard. If there is a problem, we can come back and address it at a later stage. We are not going to set up an impossible situation. The member for Murray-Wellington stumbled upon a point: what is the point of this provision when it is unenforceable? Does it mean that a decision made outside that framework is not valid? Does it mean that the appeal ceases? We could not have the situation proposed by the member for Murray-Wellington in which a party automatically wins the appeal if it can sit out the three-month time limit. Members can imagine the sorts of game plans and legal strategy that would be engaged in to ensure that the three months were sat out. It is a bit like the upper House; if a disallowance motion remains on the books for a certain period, the regulation is automatically disallowed. It would not be something that either appellants or respondents would be happy about, because it would produce rough justice. I know how hypersensitive the member for Merredin is about tedious repetition from my previous debates on legislation with him; it is not my intention to upset our possible future senator by engaging in that.

Mrs EDWARDES: I referred to time standards earlier in this debate and gave the minister a copy of the document to which I referred. I am sorry that the status of those time standards is not more apparent in the document by the Land and Environment Court of New South Wales, which was written by Justice Pearlman. The court has adopted time standards for disposal of cases and reserved judgments. There is some reference in the draft rules to when decisions in reserved judgments should be handed down. Given the fact that the minister is not going to accept the amendment proposed by the member for Merredin, perhaps the president would like to consider adopting or including some time standards for the disposal of cases when redrafting those draft practice directions. It sets a benchmark. It allows a measurement of performance. Since the adoption of those time standards by the Land and Environment Court, compliance with them has continually improved. Justice Pearlman said that effort and vigilance were needed to ensure that those time standards were met. Given the fact that the minister will not support the amendment put forward by the member for Merredin, might that not be something the president could look at in the redrafting of those rules?

Mr BRADSHAW: I know that legal people generally draft legislation. Again, I have problems with situations that allow people to make money out of spreading things out and making them go longer -

Ms MacTiernan: Like the member for Murray-Wellington is doing now!

Mr BRADSHAW: No, I am not. I am serious on this matter. This is the only amendment I have spoken on. A time frame should be in place. I remember the trial of a jockey who jumped off a horse, which went for nine months. That was a total disgrace. I believe in the old KISS principle: to keep things simple. In this case, the minister is making it possible for people to draw out an appeal and make it longer. I am sure that some rules or regulations could be put in place to provide a certain time frame in which to put forward a case and to get it over and done with. Unfortunately, some people in this world believe that the more they speak, the more they will impress and they will win their argument. In general, I find that works in reverse. The minister is probably helping those people who think that the more they talk, the more they will impress people. I have come across some of those people over the years. In this job, one sees it all the time. It will help people if the appeal system is kept simple and to a limited time frame. This idea of leaving it open so that people can come in and filibuster to try to impress the tribunal is just not on. The taxpayers will have to pay for it. It will be just like that nine-month trial of the jockey who jumped off the horse. It is disgraceful. There should be some way to amend or fix it, and perhaps even the legal system, to impose time constraints on those people who wish to filibuster and carry on. There is a need to tie it down. There should be a time frame within which a decision must be made. I suspect that those appellants who want to delay will be in the minority. They will have to live by the rules. If they cannot, too bad. The majority want a speedy decision. It is important to tie down the time frame. I support the amendment even though the legislation needs more teeth.

Ms MacTIERNAN: In response to the member for Kingsley, the time benchmarks the Government has set are tighter.

Mrs Edwardes: I agree that that is true in the process.

Ms MacTIERNAN: The Government's approach is to deal with each case. These time lines deal with percentages of cases that come within those frameworks. I am happy to draw them to the attention of the tribunal president once the legislation is passed. If benefit can be gained from revamping these aspects, the

Government will do so. People are interested not so much in the percentage of cases that must be dealt with in a time frame, but how each case will be dealt with. That has been the Government's focus.

Amendment put and a division taken with the following result -

Ayes (17)

Mr Birney	Mrs Hodson-Thomas	Mr Pendal	Dr Woollard
Dr Constable	Mr McNee	Mr Sullivan	Mr Bradshaw *(Teller)*
Mr Cowan	Mr Marshall	Mr Sweetman	
Mr Day	Mr Masters	Mr Waldron	
Mrs Edwardes	Mr Omodei	Ms Sue Walker	

Noes (22)

Mr Brown	Mr Hyde	Ms McHale	Mr Templeman
Mr Carpenter	Mr Kobelke	Mr Marlborough	Mr Watson
Mr Dean	Mr Kucera	Ms Martin	Mr Whitely
Dr Edwards	Ms MacTiernan	Mr O'Gorman	Ms Quirk *(Teller)*
Ms Guise	Mr McGinty	Mr Quigley	
Mr Hill	Mr McGowan	Ms Radisich	

Pairs

Mr Trenorden	Mr Bowler
Mr House	Mr Logan
Mr Ainsworth	Mrs Roberts
Mr Edwards	Mr Ripper
Mr Board	Mr Andrews
Mr Barnett	Dr Gallop

Amendment thus negatived.

Proposed section put and passed.

Proposed section 51 -

Mrs EDWARDES: This proposed section deals with the tribunal procedure and provides that it is bound by the rules of natural justice, but not by the rules of evidence, and that it may inform itself of any matter as it thinks fit. Proposed paragraph (d) refers to dealing with each appeal with as little formality and technicality as possible and determining each appeal with as much speed as possible while giving it proper consideration. Obviously the legislation is designed to keep the process as simple as possible, while ensuring an element of formality, which is evidenced by proposed subsection (5). That proposed subsection refers to everyone having the same rights and privileges and being subject to the same obligations and penalties in the trial of an action at law in the Supreme Court.

Proposed subsection (5) is the only provision of the legislation that might allow for mediation. In the direction statement on planning appeals, the minister pledged to establish a framework to entrench a genuine mediation process that will encourage parties to settle disputes outside the formal hearing process. Further reference was made to all cases being required to proceed to mediation before a hearing is conducted. The mediation process is designed to take into account the decision-making structures of local government; it will be non-coercive and will not be allowed to prejudice the outcome of a hearing if the matter is not resolved. Part 5A of the New South Wales Land and Environment Court Act sets out a framework and process for mediation and neutral evaluation. Neutral evaluation involves identifying and reducing the issues of fact and law in dispute; that is, its aim is to reduce the number of issues before a hearing and to resolve them. It is another effective tool in reducing delay.

Can the minister outline where she sees mediation occurring in this process? How does she see it occurring? Within what framework will it occur? Why was mediation not incorporated in the substance of the Bill? Given the heavy emphasis on mediation reducing delay and costs, it is strange that it is not mentioned in the Bill as something that should be taken into account. The minister indicated, as to the difference between tier 1 and tier 2, that tier 2 would have mediation and tier 1 would not need it due to the informality. Once lawyers are involved, informality will be reduced and there will be a more formal process. I will come back to that shortly. If they agree not to have solicitors and two parties get together around a table with a member, this can take the place of mediation, but I suggest that the minister not deny mediation operating for tier 1. We have passed an

amendment to this Bill to the effect that if both parties agree - no matter what the issue is before the tribunal - the substance of the matter going on appeal can be dealt with as a tier 1 matter before a single member. There may be a need for mediation to operate in those instances.

I note that the minister said that, sometimes, requests were made for appeals before the minister to be delayed - often to enable mediation to occur with the council. Everybody liked the process. How does the minister see it operating?

Ms MacTIERNAN: Firstly, mediation is referred to in the substance of the Bill, in that proposed section 69 provides that the president may rule in relation to mediation and conciliation of an appeal. The draft rules that we have put before the House expressly refer to this issue of mediation. Mediation is enshrined in all class 2 appeals pursuant to the draft rules, but with class 1 appeals we believe that it is not necessary and would lead to more delay. Given the member's concern about delay, I do not see how we could justify putting another step into the procedure.

It is important to understand how a class 1 appeal will be conducted. The member, who I think in a previous life had some experience as a Minister for Consumer Affairs, would have had some exposure to the Small Claims Tribunal and would be aware that that tribunal conducts itself with a minimum of formality, with a process that is not adversarial in its nature, in the sense that the referee of the tribunal can ask questions and move back and forth between the parties. This is specifically contemplated in a class 1 appeal. The legislation states that a class 1 appeal shall be conducted with as much informality as possible having regard to the need for an expeditious determination, and in a manner that encourages the parties to reach agreement where possible on some or all of the issues arising in the appeal.

Mrs Edwardes: That does not rule out the potential for mediation.

Ms MacTIERNAN: Mediation is incorporated. The entire process is one that is "mediated" - if that is the right word - in that it does all of those things that one tries to do in a mediation.

I note that the member is also expressing concern as to the class 1 appeals: that these monsters, the lawyers, will get into the system and destroy the mediation. I must point out that we have mediation in the Local Court, the District Court and certainly the Federal Court of Australia and the Supreme Court, where lawyers are involved. The mere existence of the legal profession is not antipathetic to mediation. Secondly, we have made it clear that in class 1 appeals there will not be any legal representation in many instances - indeed the appellant has the right of veto over legal representation - and even on a more major matter the parties can agree not to have legal representation. We think we have the mediation issue well and truly covered in this legislative package, which includes the draft rules.

Mrs EDWARDES: The minister indicated that, although the tribunal can make rules for mediation and conciliation, it is obviously understood - because it is not defined anywhere - what mediation and conciliation would mean. The minister did not respond as to the reason it was thought not to include some processes. For instance, the sections in the Land and Environment Court Act refer to the purpose of the part - that is quite a standard process to which the minister has already referred - to what the mediation is, and also to what neutral evaluation means. Neutral evaluation would also be a tool for mediation. The section refers to definitions, the fact that it is to be voluntary, the cost, the agreements, the arrangements, who would be the mediators and the evaluators, and how the court would do it for a referral, etc. There is also a section on privilege and secrecy, and exoneration from liability for mediators and evaluators. I wonder why it was thought unnecessary to incorporate those types of sections.

Ms MacTIERNAN: The answer is simple. We already have a Town Planning Appeals Tribunal operating, with no reference to mediation in its legislation, which has set up a very successful process. I cannot recall the precise figures, but in excess of 50 per cent of the cases that come before the tribunal are now resolved by mediation. This is a sledgehammer to crack a nut. We already have mediation before this tribunal; it is already working without us having to create immensely complex provisions within the legislation. However, there is reference to mediation in the legislation, we have injunctions to move expeditiously and informally towards the resolution of these appeals, and specific provisions are set down in the rules to guide the tribunal into the future. Basically, the Town Planning Appeals Tribunal is already doing a good job at mediation, and we are encapsulating that in a set of rules, and making some reference to that in the legislation; it is working and it will continue to work.

Mrs EDWARDES: I admire the minister's confidence, although this will be somewhat different to the Small Claims Tribunal.

Ms MacTiernan: I am talking about the Town Planning Appeals Tribunal.

Mrs EDWARDES: The minister has already made a comparison with the Small Claims Tribunal. The minister should not become impatient; it is still early in the evening. I will work through each of these proposed sections; we will do it in the same logical way and work together.

The minister made some comparisons with the Small Claims Tribunal. The minister will find that one of the differences is the cost, and the potential loss to and risk for appellants before the Town Planning Appeals Tribunal will be far greater than for those who appear before the Small Claims Tribunal. My suggestion is that the minister not rule out the way tier 1 operates and the possibility of mediation. Of course, the court can determine that and, as I see it, the court has not ruled it out; the court will have the ability to do that.

I want to talk about the cost. Proposed new section 51(5) reads -

> The parties, legal practitioners, witnesses and all other persons attending the Tribunal have the same rights and privileges and are subject to the same obligations and penalties as in the trial of an action at law in the Supreme Court.

The result of this proposed subsection will be that few appellants will not have legal representation, because they would run the risk of either losing an appeal on a point of law or being in breach of some point of law that will not be known to a layperson. The likelihood of parties to an appeal not being represented is low, because of the potential risk of loss to the appellant. This will highlight the complexities of the tribunal appeal system, which will come in for criticism down the track. However, we will not know that until the new system is up and running and appeals are heard. Few people use the current tribunal system, so we cannot compare the current experience of the tribunal with how it will operate in the future.

References to the Supreme Court in this proposed subsection suggest that the tribunal will operate in much the same way as it does at present. Therefore, the legislation should provide for more flexibility and informality in the current tribunal's proceedings. The minister wants to reduce further the formality of the current tribunal; however, a couple of clauses in this Bill will not allow that to happen. Despite the best endeavours of the minister to do otherwise, the legislation will ensure the greater use of legal practitioners. Comparing the proposed appeal tribunal with the Small Claims Tribunal is not relevant.

A person gave me an outline of the cost of using legal practitioners. This relates to a minor matter that has gone to mediation. It has not even gone to court, and already the costs of the legal practitioner, who did not prepare the appeal notice - the planning consultant did - are $9 955. The appeal process will be an expensive exercise.

Ms MacTiernan: What was the nature of the matter? It will be interesting to see that.

Mrs EDWARDES: I do not have it with me, but it is a relatively simple matter and the delay has been caused by the respondent and not by the appellant. Although this company can afford the legal costs, many people will find those sorts of costs prohibitive.

Ms MacTIERNAN: The member is boxing at shadows. Over the past couple of months, I have had reports from planning consultants who have come to terms with the fact that a new system will come into place. They have taken cases to the tribunal rather than to the minister, although that probably has something to do with a desire to change the rate of success of appeals. These planning consultants have told me that the tribunal is nowhere near the scary place that it has been made out to be. Even before the implementation of these reforms that we are proposing, these consultants find themselves in a tribunal in which they are comfortable operating. Given that the appellant will have the power to veto these applications for legal representation, I do not believe we will see the sorts of problems about which the member for Kingsley is concerned. However, the Government will review this legislation after it has been in place for two years, and will monitor those sorts of things. It is not our intention or desire to see this become a tribunal that is expensive and costly for minor appeals. The Government is confident that the processes that will be put in place will result in speedy and cost-effective determinations, particularly of minor matters.

Dr WOOLLARD: In view of the Government's refusal to accept the amendment to proposed new section 49, there is no point in my proceeding with the amendment standing in my name on the notice paper.

Mrs EDWARDES: I move -

> Page 19, line 25 - To delete the passage "If the parties to an appeal agree,".

Under proposed section 51(4), the tribunal may conduct all or part of an appeal entirely on the basis of documents, without any physical appearance by the parties or their representatives or witnesses. Essentially, written submissions are possible and an appeal can be determined without anybody appearing. The benefit of deleting the words "If the parties to an appeal agree" is that the decision is left to the discretion of the tribunal, so that it is not a matter of whether the parties agree - and therefore do not agree to allow written submissions; the tribunal retains the discretion to decide whether it wishes to conduct an appeal or part of an appeal solely on the

basis of documents. This is a valuable amendment because it keeps the decision within the tribunal's discretion. In particular, with appeals from regional areas like Geraldton, Carnarvon or the like, which require air travel and accommodation on one or more occasions, the tribunal can determine whether written submissions will be allowed and the appeal will be conducted along that basis without the need for parties to appear. That will assist to reduce the cost of appearing before the tribunal and is similar to a ministerial appeal. The minister has said that the tribunal will not be prohibited from travelling to regional areas, as the country appeals committee does. However, the legislation provides no time frame for these appeals to be heard, and we do not know how the new tribunal will operate. It is reasonable to expect that the tribunal will make the appropriate decision. We have talked about the frustration that parties feel when cases are being heard, particularly when one of the parties wants his or her day in court and wants to travel to Perth to be seen and heard. In that instance, this amendment will allow the tribunal to determine otherwise. There should be greater flexibility for the tribunal to determine whether a matter could be heard on the basis of written submissions alone.

Ms MacTIERNAN: I do not agree with this. If a party to an action believes that there should be the exposure of a public hearing, that should be respected. I do not feel the same repugnance to the notion of people having their day in court, bearing in mind that in the vast majority of cases, we will find far more agreement than otherwise. The Nutri-Metics International (Australia) site is a classic example of one party wanting to ensure that there was proper public exposure of a particular matter and that it was not dealt with in a comparatively inaccessible manner. The majority of these appeals will be of no interest whatsoever to third parties. I believe that we will get a high level of agreement on the part of the parties that the case can proceed entirely on the basis of documents submitted. What is being proposed is really antithetical to the whole reason that we are going with the approach to abolish ministerial appeals. We want a greater degree of openness. If no player in the field is concerned about its being without a public hearing, so be it, but we are not in the business of shutting down the day in court when a party to a matter believes it is important that it get publicly exposed.

Mrs EDWARDES: Until such time as we have experience of how matters will proceed through the court, we will not know how regional areas will have effective appeals in the tribunal without huge costs being attached. I never said that the day in court is repugnant, but there are some people - the minister will have come across them as well - who will ensure that their appeals are heard the way they wish them to be heard. We can have faith and trust in the tribunals. The minister has said that of the ability of the president and members to make decisions. I would be quite comfortable in leaving with them the discretion of whether the matters should be heard on the basis of written submissions alone. Although an appeal would not be heard in public, the Bill contains sufficient safeguards to ensure that all information would be publicly available. Therefore, the amendment would not cut down that element at all. I have great faith in the tribunal's ability to determine that appropriately. It would reduce costs for regional areas. Although the number of appeals would not be great, there will be a great cost.

Ms MacTIERNAN: Although we have indicated that in certain administrative matters we have confidence in the tribunal being the determiner of its own course of action, the issue of a public hearing goes right to the heart of the principle of natural justice and the way in which justice should be administered in this State. It is not to be equated with the administrative arrangements that we earlier said we wanted to leave to the discretion of the tribunal. At the end of the day, this is the real guts of what this legislation is about. It is about ensuring that there is proper openness and transparency in dealing with these matters. I do not expect that it will happen necessarily in many cases, but there will be times when a case is of such a nature and importance that one of the parties will want to insist that it be the subject of a public hearing. To my mind, it is so central to what we are attempting to do that I am not prepared to accept or even contemplate this amendment.

With regard to cost, just as members of the Town Planning Appeals Committee travel to points north, south, east and west to inspect sites and take submissions, we anticipate that we will see tribunal members making forays into regional areas to hear cases. One tends to see these appeals arise in almost area clusters. We anticipate that there will be scheduled circuits, just as there are with other courts, and that it will not be necessary by and large for people from regional areas, if they do not wish to do so, to come to Perth to have appeals dealt with, especially class 1 appeals.

Amendment put and negatived.

Proposed section put and passed.

Proposed section 52 put and passed.

Proposed section 53 -

Mrs EDWARDES: We have touched upon representation in the debate. The proposed section provides that a person may appear personally or be represented by an agent or legal practitioner. An appellant may elect at any time that no party to the appeal is to be represented by a legal practitioner and at any time the appellant may

change that position. The veto over a legal practitioner is welcomed. I have raised my concern that the objective of the proposed section will not succeed. However well meaning the minister has been in trying to ensure that appeals to the tribunal are as easy and inexpensive as under the current system of appeals to the minister, it will not happen in the same way. Even if we were to have the low-budget-type proposals, I believe we will find that the non-use of lawyers will occur in the majority of cases. Of course, some people will choose to use lawyers. I also raised in debate that when people use agents and the like, codes of conduct - the minister is not keen on looking at them at the moment - may need to be looked at further down the track because I am sure that, like me, she will be become increasingly concerned about some of the conduct and the quality of the advice and representation that people get and for which they pay money. I am not talking about a family friend, or an aunt or uncle, who acts as the agent for the individual. I am talking about a person who holds up a shingle and says he is representing so and so. In planning appeals, the use of planning consultants is considerable, and those people have the necessary expertise. I do not have a concern about those people. I have a concern because, from my experience in other tribunals, agents do not always have the expertise that they claim to have, and their conduct is often wanting in some respects. However, it is not in the public interest to deter appellants from appealing cases, and this clause will be valuable for those appellants who cannot afford a legal practitioner.

I have found the legal bill to which I referred earlier. Unfortunately, it does not give the full details of the case, but I am told it is one of the more simple matters. It may be a service station, but I am not even sure of that, because I have spoken to so many people over the past few weeks. That matter has only just gone to mediation, and despite the fact that the planning consultants prepared the grounds of appeal in the first instance, the lawyers' bill was $9 955. The preliminary work has been a very expensive exercise, and that does not take into account the likelihood that the case will go to court for a hearing, which is likely to cost in excess of $50 000. That sort of cost may restrict people who believe they need a solicitor, and they may believe it is better to take the shorter option in the first instance, rather than appeal. Therefore, compromises that are not necessarily in the best public interest may be made because the cost of going to the tribunal becomes exorbitant; and that then raises the question of equity of access.

Ms MacTIERNAN: The member has underestimated the number of surveyors and planning consultants who do planning appeals. Indeed, those classes of persons are the agents of most of the planning appeals that come before me. I am sure they will not be deterred and will continue to operate actively in this segment of the market. I am sure they will market themselves aggressively as a good alternative and will lock into the capacity for the appellant to veto legal practice on the other side in relation to class 1 appeals and will carve out a healthy niche for themselves. Therefore, I do not share the member's pessimism about the change in the configuration of representation in these areas.

However, there is a point of concern about the standard of those persons who may be described as lay advocates. I agree that if a person is assisting as a friend or family member, without payment, that is a very different matter and one that we should leave entirely open. However, people who are holding themselves out and attracting payment for their advocacy may need to be brought to rein, and I intend to draw this matter to the attention of the president of the tribunal with a view to considering whether we want to put some form of code of conduct in the rules. My advisers tell me that the experience of trying to deal with this problem in relation to industrial advocates has not been entirely successful. However, that does not mean that we should not try to put in place some standards, because it may be of concern if people are offering advice and holding out the false hope to those who have been on the receiving end of a negative planning application that if they take them on, they will have a reasonable prospect of success, even though that is not a reasonable analysis of the situation at hand. If legal practitioners were to behave in that way, there would be some recourse to the Legal Practice Board. However, with lay advocates there is no such recourse.

It is a potential problem. However, to some extent we need to take the industry as we find it. To a large extent, the planning appeals system is run by planning consultants and surveyors, and also, I suppose, architects. We are not trying to cause a massive redirection of work from those people to the legal profession. Therefore, taking that reality into account, and taking into consideration the concern of the industry that to not allow these advocates and restrict it simply to legal representation may have adverse cost and time consequences, we will stick with this route, but we will raise with the president whether we need to put some form of code of conduct in the rules.

Mr COWAN: Does the minister intend to proceed with her amendment, because I am looking forward to debating it?

The ACTING SPEAKER (Mrs Hodson-Thomas:): There is another amendment on the Notice Paper, which precedes the minister's amendment.

Dr WOOLLARD: I notice that the minister's proposed amendment on page 20 after line 23 is substantially the same as my amendment on the Notice Paper. I thank the minister for supporting my proposal. I acknowledge the minister's ability to recognise and accept good ideas that are proposed. Although I acknowledge that some minor drafting amendments are required, the amendment is substantially the same because it allows legal representation, when appropriate, for third parties that are permitted by the tribunal to make an oral submission. This is essential, because it puts third parties on an equal footing in terms of representation before the tribunal. In addition, some people who make third-party submissions may be more comfortable talking to the tribunal than sending in a written submission. It is important that when those people get the chance to appear before the tribunal, they are given every chance to tell their side of the story. In view of the minister's conciliatory approach to this matter, I will not move my amendment and will support the minister's amendment.

Ms MacTIERNAN: The member for Alfred Cove is absolutely right. This is fundamentally the member's amendment, and I was not attempting to steal her thunder. Indeed, when I wrote out our amendment, I originally put it in the member's name. However, at the time we could not locate the member to get her to sign it, and the Clerk indicated that it would be highly unusual for me to put in an amendment in the member's name. Therefore, in order to ensure that we got the amendment on the Notice Paper, I put it in my name in the hope that the member would then put in an identical amendment. We acknowledge that the member has raised a sound principle, and one that perhaps we had not thought of. From time to time, third parties will want to make submissions and will not necessarily have the confidence or the verbal or language skills to make that presentation. Therefore, I thank the member for Alfred Cove for spotting this as an issue and for bringing forward that amendment. I am more than happy to acknowledge that it is substantially her amendment. Therefore, I move -

> Page 20, after line 23 - To insert the following -
>
> (2) A person making a submission under section 57 may -
>
> (a) appear personally; or
>
> (b) be represented by an agent or, if any party to the appeal is entitled to be so represented, by a legal practitioner.

Mrs EDWARDES: Essentially, this matter will be dealt with later in proposed section 57, which states that the tribunal may receive or hear submissions from a person who is not a party. I will speak on that matter a little later. However, this amendment picks up and reflects how a person may be heard before the tribunal.

Amendment put and passed.

Proposed section, as amended, put and passed.

Proposed section 54 put and passed.

Proposed section 55 -

Mrs EDWARDES: Proposed section 55 deals with the tribunal inviting submissions from the Minister for the Environment before determining certain appeals. It states that before determining an appeal to the tribunal from a decision referred to in section 8B or a decision relating to an environmental condition, the tribunal is to invite the Minister for the Environment to make a submission. Section 8B of the Act - it is not part of the Bill - deals with an appeal against a decision under section 48I of the Environmental Protection Act, and that is when the Minister for Planning and Infrastructure was previously involved.

The issue is again one about which we have been speaking for some time; that is, the time-related issue. The practical aspect of this is that the appeal cannot progress until the Minister for the Environment has made a submission in respect of that appeal. Consequently, there is a further delay in the system. I wonder whether the minister could expand on how she sees this clause operating in submissions from the Minister for the Environment before appeals are determined.

Ms MacTIERNAN: This picks up a provision that is currently in the legislation at section 52A, which basically provides that -

> Before determining an appeal to the Appeal Tribunal from a decision relating to an environmental condition, the Appeal Tribunal shall invite the Minister for the Environment to make a submission . . .

Basically, it is identical in substance to a provision already in the legislation. It certainly was not our proposal to diminish in any way the strength of the environmental provisions.

Mrs Edwardes: It was not our intention either. We just want to know how the process will operate.

Ms MacTIERNAN: It is likely to work in much the same way that it works now; that is, when there is an appeal against an environmental condition, the Minister for the Environment is asked to make a submission on that matter. What more can I say? It is fairly evident. If there is an appeal on an environmental condition or a decision referred to in section 8B, the tribunal must invite the Minister for the Environment to make a submission. The tribunal can set a time frame for a response. Indeed, members will note that the provision does not require that the tribunal defer making a decision until such time as the minister has made a submission. Clearly, if the minister does not make a submission within a time frame that the tribunal thinks is reasonable, the tribunal can nevertheless proceed. The tribunal is required only to invite a submission; it is not required to wait until a submission is received.

Mrs EDWARDES: I am glad that the Minister for the Environment is not in the House at this time, because she will be invited to make a submission only just before the determination of the appeal. However, I understand that the minister is saying that the tribunal can set down a time frame in the request for a submission.

I seek clarification on one point. Is it a submission on all appeals that relate to an environmental condition - I am sure that they must be numerous - or does this provision apply only when the environmental condition is attached to a decision referred to in section 8B?

Ms MacTIERNAN: I am sure that the member for Kingsley has not been out of legal practice for so long that the basic standard principles of statutory construction have slipped her memory. Clearly, there is an "or" in that proposed section, so it is an appeal from a decision referred to in section 8B or a decision relating to an environmental condition. Therefore, my interpretation is that they are separate.

Mrs Edwardes: It could have gone either way as far as being an environmental condition or any decision referred to in section 8B. Essentially, it is all appeals to which an environmental condition is attached.

Ms MacTIERNAN: That is correct. The member may have had an issue if the words "decision relating to" had not been repeated. However, given that those words are repeated, it is clear that two separate things are referred to. I draw the member's attention to the definition of "environmental condition" in section 2 of the Act. "Environmental condition" has a precise meaning. It means a condition agreed to under section 48F, or decided under section 48J, of the Environmental Protection Act.

Proposed section put and passed.

Proposed section 56 -

Mrs EDWARDES: Because this is similar to a previous proposed section with which we were dealing, I need to seek clarification of the interpretation or understanding of matters that may be the subject of appeal. Proposed subsection 1(a) states that the Appeal Tribunal is to have due regard to any approved statement of planning policy prepared under section 5AA. What other policies will not be taken into account? What does not come under section 5AA? I seek clarification of this probably because of my limited understanding of the planning law. Also, does this include town planning strategies, structure plans, town planning schemes and local planning policies? Is it clear that the Appeal Tribunal will have due regard to all relevant planning instruments? Will the minister advise on that matter?

Ms MacTIERNAN: These policies were singled out for inclusion because the tribunal was uncertain about whether they were to have any status. They were obviously important statutory policies and we wanted to make sure they had consideration. However, because of the difficulties members had with this section, which emerged from the debate and from amendments subsequently moved by the member for Alfred Cove, we recognised where the confusion was coming from. I therefore move -

> Page 21, line 23 - To insert after "due regard to" the words " relevant planning considerations including".

The amendment will ensure that these are not the only policies to be included. We anticipate the provision will include, for example, council policies that do not have statutory force but policies that should be considered if relevant to the issue at hand. The inclusion of paragraphs (a) and (b) came from debate in the tribunal as to the status of these policies.

To clarify that, this provision was in the Act originally because of that concern. We are seeking to pick up the provision and, recognising that we take a broad brush approach to this matter, we want the tribunal to have due regard to all relevant planning considerations. We believe the policies, such as community design guidelines and built form policies that various councils have in force from time to time, should also be taken into account.

Mrs Edwardes: You are talking also about policies that are in force from time to time?

Ms MacTIERNAN: I do not know how we could apply the legislation to something that is not in force.

Mrs Edwardes: Your knowledge of this area would be far greater than mine.

Ms MacTIERNAN: I would not want to exaggerate it. A classic example would be the design guidelines in the western suburbs where councils seek to impose some control over the streetscape. Those sorts of policies are relevant planning considerations. There is a curious policy in one country shire against using recycled materials. Although we understand that council is trying to avoid the proliferation of rusty corrugated iron, the policy has other ramifications that indicate the council has not thought through the issue as carefully as it might have. We recognise that there is a difficulty with the framing of this clause in that it suggests that these policies are the only ones to be considered. We are therefore trying to broaden the clause by using the words "all relevant considerations". I hope the discussion tonight will provide some further guidance to the tribunal in that regard.

Amendment put and passed.

Mrs EDWARDES: Proposed subsection (2) reads -

> In the case of an appeal that relates to land to which the *Heritage of Western Australia Act 1990* applies, and whether or not a statement of planning policy provides for the conservation of that land, the Tribunal -
>
> (a) is to refer the matter to the Heritage Council for advice;
>
> (b) may receive or hear submissions made on behalf of the Heritage Council;
>
> (c) may join the Heritage Council as a party to the appeal; and
>
> (d) is to have due regard to the objects of the *Heritage of Western Australia Act 1990.*

Can the minister outline what this proposed subsection means? For instance, at what stage does the Heritage Council get involved? Does it include when the property is interim listed, permanently listed or simply referred to the Heritage Council for consideration by other parties? Can the minister clarify when an appeal must be referred back to the Heritage Council to receive its advice? I know the minister obviously does that currently, but what is her experience with developments involving the Heritage Council on its advice in instances of demolition and other issues when an agreed development incorporates a heritage building? The statement of planning policy provides for the conservation of that land. Could the minister clarify what that means and give an example of the statement of planning policy referring to the conservation of that land? It obviously does not refer to a building but to other elements.

Ms MacTIERNAN: It is important to clarify that land as defined in the legislation includes land tenements, hereditaments and any other interest thereon, also houses, building and other works and structures. It is broadly defined. This is not a matter that we deliberated on because that provision is effectively in the legislation. The only change in this amendment Bill is the deletion of the reference to the minister. The provision already applies. Its meaning is a little ambiguous; that is, land to which the Heritage of Western Australia Act applies. I can get some advice for the member later. However, we did not particularly turn our mind to this provision because it is not being amended. I presume it would mean either land that was listed, including interim listed, or land over which there was a conservation order. It would have to be land over which the Heritage Council had made an order. It would be impossible to imagine that the provision would relate simply to a referral to the Heritage Council. It would have to be a matter that had been the subject of an order, otherwise the Act does not apply. I shall clarify that later for the member. As I said, we did not turn our mind to the matter because it was already an existing provision in the legislation and not something we were seeking to change.

Dr WOOLLARD: I move -

> Page 21, after line 23 - To insert before subparagraph (a) -
>
> (a) any submission made by a member of the public in respect of that appeal;

This amendment requires the tribunal to consider any submissions made by the public. This is essential for the submissions of third parties to be considered and/or effective. It is crucial to the accountability of the tribunal. Without it, the tribunal could choose to ignore those submissions, which would make a mockery of the community's rights.

Ms MacTIERNAN: I am concerned about this amendment and the Government will not support it. I understand the member's point. The Government has moved an amendment - which has just been passed - providing that in any appeal the tribunal is to have due regard to relevant planning considerations. It has an obligation to have regard to relevant planning considerations no matter from where they come - the appellant, the respondent or a third party. If this amendment were passed, the tribunal could have regard to submissions that do not involve relevant planning considerations. That would not be a positive change. The Government wants the tribunal to

be guided by consideration of relevant planning issues. It has examined the member's amendment and tried to understand her concerns. The Government's amendment has included a provision that the tribunal is to have due regard to any relevant planning consideration. That should address the member's concern. Now that it has been made clear that the tribunal is to consider all relevant planning considerations, making an additional statement that it must also consider any submission made by the public about an appeal suggests that it could consider matters that are not relevant planning considerations. That is not what the member intended, but that is how it would be interpreted. The submissions made by third parties that involve relevant planning considerations will be picked up. That would always have happened, but, to put it beyond doubt, the Government has moved an amendment to achieve that purpose.

Dr Woollard: Does the Government's amendment mean that the tribunal will be required to look at all submissions?

Ms MacTIERNAN: The tribunal is required to look at all submissions relating to relevant planning considerations.

Dr WOOLLARD: Given the minister's explanation, I seek leave to withdraw my amendment.

Amendment, by leave, withdrawn.

Mrs EDWARDES: I refer members to proposed subsection (2). The East Perth Redevelopment Authority sent the minister approval for demolition of some houses a couple of months ago. The minister returned the approval for reconsideration or for advice from the Heritage Council.

Ms MacTiernan: Your sources are impeccable.

Mrs EDWARDES: The issue was referred to in *The West Australian*, unless the minister is talking about another case.

Ms MacTiernan: Do you have the requests about the Midland Redevelopment Authority?

Mrs EDWARDES: I do not have them yet. Obviously, the minister will provide further advice about how this process will operate.

Ms MacTiernan: That has nothing to do with this legislation. I did that in my role as the minister responsible for the East Perth Redevelopment Authority.

Mrs EDWARDES: How did the minister determine that the matter required advice from the Heritage Council? Were the properties interim listed, was it an order or did someone make a submission? What alerted the minister to get further advice from the Heritage Council before signing off on the demolition? I understand the demolition of a house has potentially far greater implications because it cannot be easily reconstructed. Why did the minister involve the Heritage Council?

Ms MacTIERNAN: Although it has absolutely nothing to do with the Bill before us, the East Perth Redevelopment Authority had already sought advice from the Heritage Council. I looked at the advice as it was relayed to me from the authority and then exercised my independent judgment about those buildings. I thought some of the advice, as it was relayed to me, was ambiguous. I said that I was not persuaded about the properties and that I needed further evidence if I were to agree to their demolition. The East Perth Redevelopment Authority had already sought the advice. Clearly, we are talking about properties built prior to 1910. Within the Perth context, any such structure has potential heritage significance that warrants recognition. I exercised my independent judgment about the value of one group of houses. I thought the material provided was ambiguous and indicated that I would not approve the demolition.

Mrs Edwardes: Has a final decision been made?

Ms MacTIERNAN: I am still of the view that the three houses in Parry Street should remain intact.

Mrs EDWARDES: I refer members to proposed subsection (3). I have foreshadowed an amendment, but, before I move it, can the minister define the word "hardship". I wrote to the minister's office requesting a definition and the response pointed out that the use of the word "hardship" rather than the word "compassionate" has the effect of focusing the tribunal's inquiries upon the relevant underlying facts rather than upon its response to those facts. Apparently, according to the dictionary definition, the term "hardship" relates to parties having been oppressed or in need as opposed to the term "compassionate", which is synonymous with sorrow or pity. I am sure the minister's office was trying to be helpful, but it does not get the point about the term "hardship". Hardship is far more economically based and, as such, the tribunal would already have taken it into account, as would the minister.

The logic is hard to follow as to why we have the arbitrary threshold of subdivision appeals and not development appeals, and then only on not more than three lots. I know we have argued about the difference between three lots and four lots, but if an applicant is requesting a subdivision of four lots, hardship cannot be considered as grounds for appeal. Thirdly, other issues may be more compelling. I wonder what else the tribunal has found in determining those issues and taking into account good and proper planning and the like. However, there are the what-ifs. There may be more compelling reasons than hardship.

Ms MacTIERNAN: This provision was inserted following discussions with some of my parliamentary colleagues and it also arose out of a discussion at the stakeholders' forum. There is good reason for it applying to subdivision approvals rather than to development applications, and that is that we have to go back to where the decisions we are appealing come from. The decisions on development applications are made by a local authority; they are made by nine to 12 elected representatives from the local community, who are well placed to consider any hardship or compassionate grounds. They will be far better placed than the tribunal to make a decision as to whether or not there is a genuine case for hardship. Elected officials have made a decision. Those sorts of aspects of hardship and compassion can be put to the local authority. If the local authority decided that they were a load of bunkum, or did not warrant overturning established planning principles, my view is that that has been submitted to a jury of one's peers and that is the decision.

We recognise that with the Western Australian Planning Commission, decisions for subdivisions are based on a different scenario. These decisions are made entirely within a bureaucracy. I appreciate the work done by the WA Planning Commission, but its decisions tend to be based on the application of strict planning principles. If a case arose in which some personal circumstances needed to be taken into account, one could not be entirely confident - this is not a criticism of the WA Planning Commission, as that is not its role - that that would occur. It is appropriate that a distinction be made between those two cases because they come from two different streams.

I turn now to the reason for stipulating three lots, and we can always talk about the cut-off line. From our experience, the majority of these subdivision applications are for two or three lots; very few applications from incorporated non-property development people are for more than that. I do not know whether on the member's side of politics she deals with the battling land developer who wants to plead compassion for his company -

Mrs Edwardes: The issue I have raised before is like the situation of the market gardener, and they can be battling.

Ms MacTIERNAN: The view we have taken is that basically, if we are talking more than a three-lot subdivision, we are talking about a pretty hefty whack of headworks and subdivision fees. We are talking about someone who is in the league which deals with serious money. We believe it is inappropriate to make those distinctions. A case was argued by my parliamentary colleagues who wanted to see some flexibility for these smaller-lot subdivisions. A number of opposition members also argued this point quite strongly, and we were keen to provide some sort of accommodation.

Mrs Edwardes: How do you define that hardship?

Ms MacTIERNAN: Like many terms in the law, a definition will develop over time. The courts will develop an interpretation. We are looking at a person who is perhaps unduly oppressed or has a special need. I feel more comfortable with that term, as a term guiding the court, than I am with a term such as "compassion", which, as has been pointed out today, is synonymous with sorrow and pity. As we are dealing with land development and land subdivision, the issues of need and undue oppression are probably far more relevant than sorrow and pity.

Mrs EDWARDES: Following the minister's reference to the addition of the word "compassion", I move -

Page 22, line 16 - To insert after the words "claims of hardship" the words "and compassion".

The minister, in her understanding of the definition of "hardship", indicated that such cases arose. I cannot remember the minister's words, but they included circumstances which might also warrant merit or somebody being in need. I refer the minister to the Capel case, which she decided. I do not say that the minister might make a different decision today, but this was one of her early decisions, and the comments from the public arena indicate that she is gaining a greater level of experience, knowledge and understanding in the determination of appeals that are coming to her office. I am not saying that the minister would make a different decision today from that which she made then, but that may well be the case. The issue was that the subdivision fell outside the scheme; it was not possible to do it, nor was it possible to send it back to be amended, first, because of cost and, secondly, because it would create a precedent within the community, and the council did not want everybody having smaller lot sizes.

Ms MacTiernan: What was the problem with just constructing a smaller house on the lot?

Mrs EDWARDES: The people involved did not wish to do that. They wanted to give their daughter some level of financial security.

Ms MacTiernan: Why would she not be financially secure with another house?

Mrs EDWARDES: Because the property was always going to be in the parents' name.

Ms MacTiernan: They could have had an amendment to the title.

Mrs EDWARDES: They could have done all of those things, but there were other family considerations. I think other family members were involved. It is hard for us to sit behind a desk and say, "You can do this, and you can do that." I am sure they went through all of those options and considerations, because they would have been much cheaper than the process they actually undertook. As such, it was a case of merit, and one that was definitely warranted.

Ms MacTiernan: That is in your judgment.

Mrs EDWARDES: That is in my judgment and in the judgment of many others, not the least of whom included the Shire of Capel, the local members of Parliament in that area and many other people who supported this application. In these instances, in which cases warrant consideration outside hardship, I would love to think that "hardship" would be defined as need, but I think the definition will be more along the lines of economic considerations.

Ms MacTiernan: This is what the member is talking about. The case the member has just advanced dealt with the need to provide for financial independence.

Mrs EDWARDES: I am not sure that that would fall totally within the definition of "hardship". It is more likely that hardship will cover financial and economic considerations.

Ms MacTiernan: That is what you are talking about. It is about creating a valuable piece of land, which ultimately is what the decision was about.

Mrs EDWARDES: I am pleased that the tribunal can reflect on the minister's view that hardship should be defined broadly and should take into account financial and economic considerations. That might result in a better outcome for the likes of the Capel case. If the tribunal were to implement the minister's view, that would assist those people and probably many other people. If the interpretation of hardship were as broad as the minister suggests, the Capel case would have been determined otherwise.

Ms MacTiernan: Just because the tribunal might consider it does not mean they would determine it in another way.

Mrs EDWARDES: The minister is right, but at least the tribunal will be able to take hardship factors into consideration. The Opposition wants to add the words "and compassion" so that the tribunal can examine other factors that may be more compelling than just financial and economic considerations, and which are currently considered by the minister.

Amendment put and negatived.

Proposed section, as amended, put and passed.

Proposed section 57 -

Mr COWAN: This clause relates to the capacity of the tribunal to deal with submissions from third parties, although they are described as "submissions from persons who are not parties". One issue that concerns a great number of people is the extent to which third parties can bring about some degree of delay or additional work for the tribunal that will slow down the process of appeals being heard. The National Party placed an amendment on the Notice Paper before receiving the minister's copy of the rules. The minister has made it clear that in a class 1 appeal, she would expect a hearing to commence within seven days of the lodgment of an appeal. On that basis the amendment we proposed might be regarded as superfluous. We were seeking to ensure that third parties or other parties to an appeal have to submit an appeal in writing. It is appropriate that that should be the case. People who want to be obstructionist could present themselves to a tribunal hearing and indicate that they have an interest because they are a builder, a neighbour or whatever, and as a consequence of that there is likely to be a delay while the tribunal considers whether, under the provision of the Bill, a person has a sufficient interest in the appeal. It is hardly likely that the tribunal will make a decision there and then at the hearing - unless it is a completely spurious case - and when someone has a small amount of substance to his or her appeal, the tribunal might want to adjourn the hearing. I am trying to circumvent that, so that the tribunal has the capacity to

determine beforehand whether submissions from third parties or "persons who are not parties" should proceed. I seek leave to change the period in my foreshadowed amendment from "14" to "7".

The DEPUTY SPEAKER: I would prefer that we deal with amendments on the Notice Paper in the order they are printed, so I ask that the member for Merredin move that when we get to his proposed amendment.

Mr COWAN: If you prefer to handle it all at once.

Mrs EDWARDES: As the member for Merredin has outlined, proposed section 57 deals with the tribunal being able to receive or hear submissions from persons who are not a party to the appeal. There has been considerable concern over third-party appeal rights. The industry supported the Labor Party's election commitment not to allow third-party appeal rights to third-party decisions. However, the direction statement on planning appeals pledges to provide third parties, either individuals or community groups who were heard as of right before the original decision was made, with the right to be heard during the appeal. This would appear to be a narrower application of the principle than in proposed section 57, which deals with that person having sufficient interest in the appeal.

Could the minister define what "sufficient interest" is likely to be? Is it limited to matters of a strictly town planning nature or to matters in which the parties would have had a right to be heard before the original decision was made? That brings the minister back to the direction statement, which will give the stakeholders confidence in the system. What is the status of submissions, given the fact that they can be heard orally or represented by another party - not in the formal definition - or by a legal practitioner? Will submissions be able to be cross-examined and parties be able to challenge or test the contents of submissions, or will submissions be given due regard under the planning considerations amendment that we have just debated without their having been tested by the parties, which would seem to be a bit unfair?

My queries are: firstly, why is proposed section 57 broader than that which was proposed previously; secondly, what is the definition of "sufficient interest"; and, thirdly, will submissions be able to be challenged or tested?

Ms MacTIERNAN: The paper was released for general discussion. As a result of discussions with other parties, the Government believed that it was more in keeping with the standard practice in tribunals to talk about parties with a sufficient interest. For example, the Industrial Relations Act - an Act with which the member for Kingsley would be familiar - abounds with references to sufficient interest. The member may be aware that the rules define what is to be taken into account in determining whether a person has a sufficient interest. The rules state -

(a) in the case of an appeal in respect of a development, is a landowner or resident in the locality, the amenity of which may be affected;

(b) in the case of a subdivision, is an authority that is required to advise on the clearance of conditions;

(c) can provide the Tribunal with assistance not available or likely to be available from any party; or

(d) has an interest over and above the general public.

It is true that we have tried to keep the definition fairly broad while making it a little more substantial than someone being a disinterested bystander. People must obviously pass one of those hurdles. We are talking about persons who are not a party. It is open to them to take on the burden of seeking to become joined to the action, but that of course opens them up to a range of legal expenses and costs that most third parties would not be prepared to take on. We are talking about people who will not become a third party. By not becoming a third party but being a person making an independent submission, they have no right to cross-examination and nor are they to be cross-examined by the parties. However, that having been said, the relevance and the weight given to their submissions will obviously bear that out. It is of course open to the respondent and the appellant to make counter-submissions in relation to their submissions.

One of the great themes of the ministerial appeals has been the practice whereby people do not know what other parties are saying about the case. I know from using the freedom of information legislation that no records are kept of what third parties say about these matters. There is no capacity for people to know the case that is being mounted against them and so answer it. We are proposing to have a situation in which the statements made by those other persons are made in public. Although they are not cross-examinable, they can be answered by an appellant, respondent or other party joined to the action.

Mr Cowan: How would they know there is another party if it is a written submission?

Ms MacTIERNAN: Any written submissions become court documents and are distributed to all parties.

Mr Cowan: The submission does not have to be written.

Ms MacTIERNAN: The submission can be oral, in which case those people will be at the hearing.

Mr Cowan: If, under one of the previous provisions in this legislation everybody has already agreed that there will not be another party, and someone just rocks up to the tribunal hearing, that person will be denied access as another party, because of the decision that nobody else will be present.

Mrs EDWARDES: I would like to hear more from the minister.

Ms MacTIERNAN: If there is an agreement between the parties that the case proceed on written submissions, it is my understanding that the capacity to deal with a case on written submissions would not preclude a person seeking to make submissions under proposed section 57 from giving an oral presentation. Although the parties concerned have agreed that their case will proceed by way of written submissions, the rules make reference to this by saying that in determining whether the tribunal conducts all or part of an appeal entirely on the basis of documents, the tribunal should have regard, among other things, to the wishes of third parties making submissions under proposed section 57.

How we see this playing out, and it is certainly our intention, is that although those people who are legally parties to the action might agree that they proceed by way of written documents, a third party wishing to make an oral submission could apply to make an oral submission, and it would be up to the tribunal to determine whether it received a submission in an oral form. I would imagine that the tribunal in those circumstances would look at the particular circumstances of the individual.

Mrs Edwardes: Parties to an appeal would be notified in advance that such an oral submission is to be made.

Ms MacTIERNAN: That is right. That would be quite important. I imagine that in most instances people would be prepared to make their submissions in writing. However, there might be circumstances in which a person has a case for which, through lack of capacity or whatever, he would prefer to make an oral submission. It is quite clear that there is not to be any right of cross-examination. If people want to cross-examine, they must get themselves joined as third parties. We see that happening, for example, with local authorities on an appeal relating to heritage matters, which might wish to be joined as a third party. We might find local authorities putting themselves forward as third parties to a Western Australian Planning Commission appeal. Obviously, if they formally become a third party and expose themselves to the cost potentialities, they can join the case at that higher level. This is a much more informal procedure that does not invoke any cost. Likewise, concomitantly, the powers they have are less. They have no entitlement to cross-examination, but they have protection against being cross-examined. Their submissions can nevertheless be challenged by way of counter-submissions by the parties to the case.

Mr COWAN: This raises a very interesting situation. One can assume that the tribunal is hearing a simple appeal in which there has already been agreement between the appellant and the parties to the appeal that they will have a case heard in a particular way. The provisions of proposed section 57 will mean any person can present himself to that hearing and can give - I need to be careful with the terms -

Ms MacTiernan: You need to read the provision before you say that.

Mr COWAN: I have read it. The only guiding factor is that the tribunal may receive or hear submissions from a person who is not a party to the appeal if the tribunal is of the opinion that the person has sufficient interest in the appeal. If people can claim that they have a sufficient interest in the appeal, I guarantee that the tribunal will do one of two things. It will agree, unless the claim is completely frivolous. We could all work out which are those cases. Notwithstanding what agreements might have been made by the parties to the appeal, if people want to come along and say that they are not a party to the appeal but they want to exercise their rights under proposed section 57 and that they have an interest - in other words, going back to the rules the minister has indicated that they are within that locality or a local government body - they must be heard.

On that basis, if the parties to the appeal have already made an agreement that they will have the issue dealt with without representation, then under proposed section 57 people who are not parties to the appeal will be able to exercise their right to be present and be heard. The consequence is that the tribunal will adjourn and the case will be delayed. It is, therefore, appropriate that those people who are not a party to the appeal but are interested enough to exercise their rights under this provision give some notice to the tribunal, and to the appellants and respondents, that they intend to put a case forward, so that the appellants and respondents can respond also, otherwise the only option may be for the tribunal to adjourn the hearing, overturn the original agreement and bring all the parties to the tribunal so that they can respond to what is said. We can avoid that if people who are not a party to the appeal but who want to exercise their rights under proposed section 57 are required to put in writing the reasons they want to exercise those rights.

Ms MacTIERNAN: There may be a role for some such provision in the rules, and we are happy to take that up and look at it within the context of the rules, but not within the context of the legislation, because it is a question of detail. I believe the member is overstating the possible ramifications. It is important to understand that nothing in this proposed section gives a person the right to make an oral submission. Proposed section 51(4) states that if the parties to an appeal agree, the tribunal may conduct all or part of the appeal entirely on the basis of documents, without any physical appearance by the parties or their representatives or witnesses.

Mr Cowan: Your own rules are broad enough to say that people who are the residents of the locality can exercise their rights.

Ms MacTIERNAN: No. Where is the right to make an oral submission?

Mrs Edwardes: It is under the amendment that you have just moved, which states that a person making a submission under proposed section 57 may appear personally.

Ms MacTIERNAN: Yes, but that means act in their own right rather than have another person act on their behalf. We are happy to put a provision in the rules that these persons must give some notice of their intention to be a party. We have no particular difficulty with the principle, but I am concerned that it may generate some delay. In some instances the matter may already be listed, and we need to give a bit more thought to the notice period, because I am concerned that it may clash with the benchmarks that we have set down, which provide that the registrar shall endeavour to set down a class 1 appeal for hearing within seven days after lodgment. I undertake that we will try to sort out within the rules the matter of a non-party giving notice of intention to submit.

My preference is to put some controls on the other end of the process, because it may not become obvious to the other parties for some time that an issue has arisen or evidence has been given about which they want to make a submission. Given the limited rights of those people, we can afford to be somewhat flexible. They cannot hold up proceedings. They can put their case to the tribunal, and the tribunal can choose whether to receive it; and if the tribunal believes that it has already had the hearing and those people have left it too long, then that is basically a problem for the person making the submission, not for the appellant or the respondent. We will discuss with the president of the tribunal how we will deal with that matter.

Mr COWAN: That is one of the difficulties I have also, because the minister has set some benchmarks. A class 1 appeal must be lodged within 30 days of a planning decision being made, and within 14 days of that appeal being lodged a statement must be submitted giving the grounds for contesting the appeal. When should people who are not a party to an appeal but who want to exercise their rights under proposed section 57 announce their intention to do that? I thought that perhaps that could be done at the same time, but on reflection I believe they should do that beforehand, and there should be provision for that in the grounds for contesting the appeal.

I take the minister's point about this provision. It may be appropriate to provide that if the residents of a locality wish to present an oral or written submission, their names must be recorded in a register, along with whether they are supporting or contesting the appeal, so that the tribunal and the parties to the appeal will know the general sentiments of the people who are seeking to exercise their rights under proposed section 57. At this stage, other than at the hearing itself, neither the tribunal, the appellant nor those who are contesting the appeal will have the ability to learn that there are not third parties, but people who are not parties to the appeal wanting to present a view.

If the tribunal wants to exercise its responsibility and it looks at the rules, the rules effectively say that a landowner or a resident within the locality is entitled to exercise his rights under section 57. It is appropriate that there should be some form of register that states that people who are interested should, within a prescribed time, register that interest and may exercise their rights under section 57. At this moment, no notice whatsoever must be given.

Ms MacTIERNAN: In practice, I do not think that is how it will work. Even though there are no express provisions within the legislation, non-party submissions are already made to the tribunal. I guess we are seeking to formalise it.

Mr Cowan: Submissions in writing?

Ms MacTIERNAN: I do not know. I think occasionally the tribunal may take verbal submissions. In the vast majority of these cases, a person would be required to contact the tribunal and to indicate a desire to participate in the process. The tribunal must then determine whether that person is entitled to participate. I do not think there will be a case in which people are confronted on the day with someone who turns up at the tribunal hearing

and makes a submission. Nevertheless, we are prepared to look at the rules to ascertain how we can write in some provisions that will not undermine the time benchmarks for class 1 appeals but which will provide clarity of the mechanism for these non-party submissions.

Dr WOOLLARD: Proposed section 57 states -

> The Tribunal may receive or hear submissions . . . if the Tribunal is of the opinion that that person has a sufficient interest in the appeal.

How can the tribunal be of that opinion if there is no requirement on the tribunal to accept submissions from interested third parties? Why is the word "may" used? I believe that the wording should be "is to receive submissions", so that the tribunal sees those submissions and they are not filtered off before they get to the tribunal. After the minister has responded, I will determine whether to move my amendment.

Ms MacTIERNAN: I have some sympathy for the position advanced by the member for Alfred Cove. In this proposed section, we are making it clear to the tribunal that we want third parties to be considered, and we are setting the threshold broadly so that, in effect, a wide class of persons can make submissions. To get the stakeholders to agree to that, we had to compromise. The compromise was that, ultimately, we would give the tribunal the power to determine whether it would receive a submission.

From the statements made by the member for Merredin tonight, members will know that there is angst about this right delaying proceedings. Therefore, we had to engage in a trade-off, and that was to get broad support for the right of non-parties to make submissions. We had to keep some flexibility for the tribunal to rule out those people who might be considered to have a vexatious interest, because that was a strong concern. In fact, there was a large amount of lobbying and pressure to remove any such provision from the legislation. People argued that we should not give these non-parties the right to be involved and to make submissions. We resisted that, and we wanted to set a broad threshold for getting into the tribunal and being able to make submissions. The quid pro quo for that was that, basically, we had to use the word "may", so that there lay with the tribunal a discretion to control the situation if it was perceived, for example, that it was effectively an abuse or that it would in an unfair and unjust way hold up proceedings.

That is the reason we did that. It was a matter of trying to get broad community support for this proposed section. We have made it clear from the way in which we have spoken about this legislation and from the way in which it has been drawn that the presumption is very much in favour of receiving the submissions, not ruling them out. That is why, for example, we have drawn that sufficient interest provision very broadly. I understand the issue raised by the member for Alfred Cove. Initially, I probably would have gone in that same direction. However, as I said, it was important to get a broad consensus of support on that matter. Therefore, we believed that it was more important to draw the boundaries widely so that more people were potentially included; yet the tribunal had the capacity, if there was an abuse or unreasonable demands were made, to step in and limit the number of submissions.

Dr WOOLLARD: I do not believe that this wording creates a right for a third party to lodge an appeal. My amendment will put an obligation on the tribunal to accept submissions. Under the present wording, there is no obligation on the tribunal. Middle-level management could look at the submissions and say that they are or are not relevant. Therefore, I do not believe that the tribunal will see all submissions from the general community. Consequently, I move -

> Page 22, line 23 - To delete all words after "Tribunal" and substitute -
>
> > is to receive a written submission and may hear an oral submission from a person who is not a party to an appeal in respect of an appeal.

Ms MacTIERNAN: I have explained at length why we are not going down that path. I will respond to the member's concern that someone in mid-level management will deal with these matters. The language has been chosen carefully. The word "Tribunal" in this proposed section means the panel member or members who will hear the case and make the decision. The case will not be able to be given to an administrative officer to determine.

Dr Woollard: Will they see the written submissions?

Ms MacTIERNAN: Yes, they will, and they will make the decision whether to put those submissions into evidence. Therefore, these matters will not be dealt with bureaucratically; they will be dealt with by the tribunal, and the tribunal will comprise whoever constitutes the panel for that case. The member has heard the debate, and the member for South Perth spoke volubly of his concerns about delay and the capacity for these appeals to be strung out. Although we have sympathy for the principle that the member for Alfred Cove is trying to instil,

it is for those reasons that we cannot support it. However, I assure the member that in that regard the tenor of the tribunal will be as inclusive as possible.

Mr COWAN: The member for Alfred Cove is trying to come at this problem from a slightly different angle but with the aim of achieving the same purpose; that is, to ensure that anybody exercising an entitlement under this proposed section would serve notice on the tribunal which, in turn, would then indicate to the appellant and respondents to the appeal that an interest had been declared by a third party.

I took on board the minister's comments about having the issue dealt with in the rules in a way that would ensure some notice is served. However, there is no provision in the legislation as it stands for anybody to exercise a right under proposed section 57 to do anything other than appear before the tribunal on the date of the hearing and claim that right, and nobody would know about that claim until that person did so. It is appropriate to require prior notice. The minister wants to provide for it under the rules; I am ambivalent about that. I learnt a long time ago that it is better to have such matters built into legislation because rules that have no statutory force can often be ignored or consigned to the wastepaper basket.

Ms MacTiernan: No, the rules will be enforced as delegated legislation.

Mr COWAN: Will the minister do it in the form of a regulation? Is the minister prepared to gazette these regulations? I bet she will not.

Ms MacTiernan: This is a form of subsidiary legislation. The rules and regulations have the same force.

Mr COWAN: If it is possible to strengthen the rules to the extent that they have the same force as subsidiary legislation, and therefore come under the scrutiny of not only the Parliament but also a committee of the Parliament, it would give me a little satisfaction and I would retract what I said about the rules not having statutory force and that people could therefore break them. It helps a lot that there is a capacity for the provision to be regarded as subsidiary legislation or to have the force of regulations. I would like to build into the rules a capacity for not only the tribunal but also the appellant and respondent to have notice prior to the hearing of the interest of a third party. People who are not a party to an appeal but who want to exercise their rights under section 57 to present oral or written submissions could give that notice. That is important because otherwise this provision will be exercised to delay and delay and delay.

Ms MacTIERNAN: In response to the member for Merredin, I clarify that these rules under the Act have the statutory force of delegated legislation. Although I appreciate the attempts at solidarity on the crossbenches, it is inaccurate of the member for Merredin to purport that he is coming at this issue from the same direction as the member for Alfred Cove.

Mr Cowan: No, I said I was coming from a different direction but trying to achieve the same purpose.

Ms MacTIERNAN: It is a fundamentally different direction because the member for Merredin's concern is to cut down the capacity for these cases to be strung out by a variety of matters, including the involvement of non-parties. It is not true that the member for Merredin is aiming at the same sort of thing as the member for Alfred Cove, and I do not believe his analysis is correct. However, I appreciate that the legislation would be improved if we set out in the rules a precise mechanism for non-parties to get their cases into the system. As I said, I am not prepared to set a 14-day rule because it might create delays in class 1 matters. We need to give the matter a bit more thought. We will do that and have something drafted and incorporated into this legislation before it goes to the other place so that a clear pathway is provided for non-party submissions.

Mrs EDWARDES: Far be it from me to be mischievous -

Ms MacTiernan: And so completely out of character!

Mrs EDWARDES: Absolutely! However, given that tribunal members and/or others will hang off every word of the minister in interpreting the Parliament's intention, can the minister clarify what she meant when she said to the member for Alfred Cove that non-parties will be broad based and inclusive; yet when I raised the considerable concerns that were expressed to me about non-parties and the minister's involvement, the minister said they would be limited by the definition of "sufficient interest" in the draft rules read by the minister, which does not include any member of the public. I want to ensure that this debate on proposed section 57 is not left on the basis that non-parties to an appeal, from whom the tribunal may receive or hear submissions, will be totally inclusive and broad based.

Ms MacTIERNAN: I point out again that the matters to be taken into regard in determining "sufficient interest" are set out clearly in the rules and we believe they speak for themselves. Although they are generally inclusive, they do not embrace every man and his dog.

Dr WOOLLARD: If the tribunal will review submissions from interested third parties and not middle management, why does proposed section 57 state that the tribunal "may receive" instead of "is to receive" submissions? The word "may" leaves a loophole that may result in some submissions not reaching the tribunal.

Ms MacTIERNAN: The intention of the legislation is that the word "receive" means to incorporate submissions into the evidence for consideration as part of the case. The tribunal will have an obligation to look at the submissions and decide whether a third party has a sufficient interest and whether the submissions are matters of substance. If they are, they will then be received in that they will be incorporated and become part of the submissions in the case. Alternatively, the tribunal can read the submissions, decide that they are insubstantial and that it is not prepared to receive them. In other words, the tribunal may read the submissions but they will not become part of the body of evidence in the case.

Mr COWAN: I was seeking the leave of the House to vary the number of days in the provision relating to the requirement for something to be delivered in writing. Notices sent to the various parties to an appeal detailing the grounds for contesting an appeal should contain a clear indication of those who are not party to the appeal but who have exercised their right under proposed section 57. Can the minister ensure that, if anyone wants to register as a person who is not a party to an appeal but wants to make a submission, either in writing or orally, to the tribunal, he or she must do so before the 14 days has elapsed? In other words, the notice should state that parties other than those who are party to the appeal will be making their point. That would serve notice to those appealing the case or contesting the appeal. That is very important. Can the minister ensure that that is done when she is looking at that timing?

Ms MacTIERNAN: That will be done.

Amendment put and negatived.

Proposed section put and passed.

Proposed section 58 -

Mrs EDWARDES: This proposed section deals with questions of law. It provides that if the tribunal is constituted without a member who is a legal practitioner, and a question of law arises, it may be decided in accordance with the opinion of the president. Proposed section 61(1) provides that the tribunal constituted by the president may of its own motion review a determination or order of the tribunal when constituted without a member who is a legal practitioner upon a matter involving a question of law. In other words, if a question of law arises, it should be decided by a legal practitioner. However, if it is determined by a member who is not a legal practitioner, the president can take it upon himself to review that decision and make a determination, or whatever.

We could do away with proposed section 61(1), because proposed section 61(2) deals with the ultimate right of appeal. We could change the word "may" in proposed section 58 to "shall" to provide that any questions must be decided in accordance with the opinion of the president. Of course, given the previous proposed section, the president could probably delegate that task to a legal practitioner. It means that all questions of law will be decided by a legal practitioner, and the issue will not be left to the president upon his own motion to review the determination and/or direction that involves a question of law.

Ms MacTIERNAN: I am having trouble working out what the member is saying. Does she want to delete the word "may" from the proposed section so that, if a tribunal is constituted without a legal practitioner and a question of law arises, it shall be decided in accordance with the opinion of the president?

Mrs Edwardes: Given proposed section 61(1), we would not have the president calling it back in and causing further delay.

Ms MacTIERNAN: The Government is trying to make this as simple as possible. The majority of these cases will not involve complex matters. These issues might be determined time and again. By allowing the president to have an oversight role - he will be monitoring the tribunal's performance -

Mrs Edwardes: A body of opinion will start to develop.

Ms MacTIERNAN: That is correct. The Government is trying to make this as timely and cost-effective as possible. However, we must retain the capacity for these issues to be dealt with if they prove to be problematic. If no problem arises, these issues will go through to the keeper. If a problem does arise, this provision will enable the president to step in. It also allows the president to step in of his own motion or as a result of an application by a third party.

The legislation will establish two conduits: first, if, having reviewed the decision, the president believes a problem exists, he will be able to step in of his own right; or, second, if a party to the appeal believes that the tribunal has it wrong or is aggrieved, the president will be able to step in. It will allow for two levels of supervision without going over the top. We must bear in mind the imperative that the process be as timely as possible. We do not want it bogged down with minor and uncontentious matters.

Mrs EDWARDES: Accordingly, I will not move my amendment.

Proposed section put and passed.

Proposed section 59 put and passed.

Proposed section 60 -

Mrs EDWARDES: This proposed section deals with equality of access. The costs associated with the appeals process must be fair and reasonable. I have raised the issue of individuals feeling that they are left with no choice but to engage a legal practitioner, given the risk of going into the process as a layperson and not being au fait with the law. The other problem is small councils that are less able to defend decisions without legal representation in cases involving large organisations that can cope with high legal costs. Each party to an appeal bears its own costs, except when the tribunal believes that a party has behaved unreasonably.

Can the minister expand on the circumstances in which such a ruling would be made? The tribunal might order a party involved in vexatious or frivolous action to pay such costs as the tribunal thinks fit. Some of the costs I have heard of in the eastern States can be quite prohibitive and very expensive. Rather than having a right of appeal to a tribunal, if a party believes it has a case and the costs warrant it, it could have the right to go directly to the Supreme Court and, as such, have the right to have costs awarded against the other party. That right has been exercised in New South Wales and parties have been able to recoup costs when there have been unreasonable delays.

Would the minister clarify what she understands by "behaved unreasonably", and is she aware that "bearing their own costs" allows people not to be frightened of taking an appeal in case they lose and have to pay the other party's costs? I understand parties must always decide whether to take action, but parties on the other side may be subjected to unreasonable and unfair expense.

Ms MacTIERNAN: This provision contains nothing new. It is simply taken from the legislation as it exists at the moment - section 54C. Parties can seek adjournment after adjournment using excuse after excuse. For example, parties can apply for adjournments at the last minute when the other side has already committed its representatives to attend hearings, perhaps leading to evidence that in the end turns out to be irrelevant - all the normal sorts of things of which the member will be aware that constitute unreasonable, vexatious or frivolous behaviour in various jurisdictions.

Dr WOOLLARD: I move -

Page 23, line 17 - To insert after "appeal" the following -

or a person who has made a submission in respect of that appeal,

My amendment extends the power of the tribunal to award costs against parties who try to manipulate or abuse the appeal system to include third parties. This was to act as a deterrent for those who might be tempted to thwart a development with some ulterior motive, and it reflects the same principles as used in our judicial system to prevent the courts from being abused.

Ms MacTIERNAN: I understand the concern expressed by the member for Alfred Cove. It is important to understand that third parties can be formally joined as parties to an appeal. If, for example, a local authority joins itself to an appeal, or a neighbour goes through that process and is joined as a party, and does not rely on the rights under proposed section 57, those parties will have all the rights of cross-examination, leading witnesses, etc. They will be subject to the possibility of having costs awarded against them, as will the third parties, who are formally parties to a proceeding. I do not think there will be many of those, but a few people will use the proposed section 57 provisions - the non-parties. They have limited rights; that is, they do not have rights to lead witnesses and they do not have rights to cross-examine. At the end of the day, their conduct can be controlled by the tribunal.

I do not think the amendment is appropriate or desirable, because of their limited rights and because of the tribunal's capacity to supervise their level of involvement, to rope them into the costs portfolio. I know what the member is saying. The power is already there in relation to third parties who have the capacity to delay or unreasonably interfere with the proceedings. Those who are simply exercising their rights under proposed

section 57 can and should be controlled by the tribunal. There is a limited capacity for them to create the sort of mischief that the member is concerned about.

Amendment put and negatived.

Proposed section put and passed.

Proposed section 61 -

Mrs EDWARDES: Proposed section 61 deals with a review by the president. I ask the minister to clarify that those review decisions will be public and consistent with the publication of reasons for the determination. Proposed section 61(3) deals with a time period. An application for a review by a party to the appeal must be done within one month of the direction, determination or order being given to the party. Therefore, if the president is to call in a determination, as he is likely to do, particularly given our discussion on proposed section 58, why is there not a time frame to provide some finality to the hearing as well?

Ms MacTIERNAN: There is no doubt that the decisions by the president will be required to be in writing and to be published. They become decisions to which proposed section 59 refers, because they are decisions of the tribunal, constituted by the president. All that is invoked. I note the member for Kingsley's point about there being some time limit. She has alerted us to an issue. There is a limit, in that an application for review of a direction or determination must be made within one month. It is perhaps unclear whether the president is limited by that time period. We will need to do some work to make that clear.

Mrs EDWARDES: I alert the House that I will not move my amendment.

Proposed section put and passed.

Proposed section 62 -

Mrs EDWARDES: I would like the minister to clarify, for the record, that the decision by the president under proposed section 61 does not prevent an appeal to the Supreme Court under proposed section 62, and that there is no need to go through the president before an appeal is made to the Supreme Court.

Ms MacTIERNAN: The Government thought this section might assist to achieve a timely outcome. An action in the Supreme Court is an expensive process. The Government has enabled those sorts of questions to be canvassed in a relatively low-cost jurisdiction in an informal setting without the full weight and majesty of the Supreme Court being invoked. We will have to check whether it will be necessary to go through an appeal to the president of the tribunal in the first instance. There may be some commonwealth principle that people have some obligation to exhaust all other available mechanisms before they go to the Supreme Court, but I suspect not. This is an expanding provision to allow for a cheaper option, so that it is not simply a matter of going straight from a class 1 appeal to the Supreme Court. We are trying to keep a more cost-effective jurisdiction in play for as long as possible.

Mrs EDWARDES: I do not have the answer to the question the minister posed on whether there is a commonwealth principle that one must go through all the stages available in the hierarchy of appeals. At first blush, from my reading of the Bill, my understanding of the many stakeholders, and the advice that has been given to us, it is not necessary to go to the president of the tribunal first, and a decision by the president does not prevent an appeal to the Supreme Court. That is of particular interest to a large number of people who may want to go straight to the Supreme Court, rather than go through another step to the president. If someone wants to go down the path of an appeal to the Supreme Court, we may as well let them get on with it.

Ms MacTIERNAN: It is not the Government's intention in any way to create another needless step in that process. Provided that no provision exists within the rules of the Supreme Court to prevent people going directly to the Supreme Court they could do so. If a decision has been made by a tribunal member and the party does not want to proceed by way of a review to the president, it is not the Government's intention to introduce another level in order to create more legal process. We introduced this proposed section to provide a low-cost alternative. Subject to there being no principle that requires one to exhaust all possible remedies before taking a matter to the Supreme Court, it is our view that it is possible for a person to go straight to the Supreme Court.

As I say, we would be a bit cautious about this. We do not want, as there has been in the past, an excess of litigation. We are all saying that we want appeals to be resolved more quickly. This legislation does not create any greater issue than there is already with ministerial appeals. We all know that ministerial appeals can be subject to Supreme Court action, although on somewhat different grounds. Our expectation would be that these matters should, where possible, go through the president first to get that determination and then on to the Supreme Court.

Mrs Edwardes: So you have reversed the position?

Ms MacTIERNAN: I am trying to think through this provision. I suppose that the potential for there to be the use of some legal process that might subvert the appeal process would lead us to be a bit cautious about making a blanket statement that people should be able to go directly to the Supreme Court.

Mrs Edwardes: Many people would want to have that right. Their understanding is that they have it. Will you get some legal advice to clarify the position before the third reading?

Ms MacTIERNAN: Yes, I will.

Proposed section put and passed.

Proposed section 63 -

Mr COWAN: Because we must deal with the technical parts of the legislation, I will deal with a very important issue. Notwithstanding that we agree with the minister's capacity to ensure that planning appeals are made through a process that leaves the minister out of it, unless the minister chooses to call in an appeal or to make a submission of her own volition or by way of invitation from the tribunal, I am still of the view that the minister needs to have the capacity, if the minister so desires, within a given period of time after the tribunal has delivered its decision, to review such a decision or determination of the tribunal.

The proposed amendment to proposed section 63 is effectively a small technicality because we intend to seek to insert a section in respect of proposed section 65 that effectively gives only the minister the right to review a decision within a month of the tribunal's making that decision. Before we do that we are required to amend proposed section 63 for the simple reason that it provides that the determination of the tribunal is final. We are effectively saying that the determination of the tribunal is final other than in those areas that have been provided for in proposed sections 61 and 62 in this amending Bill. I move -

Page 24, line 31 - To delete "and 62" and substitute ", 62 and 65(4)".

Ms MacTIERNAN: This amendment would allow me to go through all the appeals decided by the tribunal and choose which ones I wish to revisit. It is repugnant to the philosophy of our appeals process. I believe the amendment is out of order in that it is contrary to the policy of the Bill. It may not be technically out of order; but it is in complete opposition to the philosophy and purpose of the legislation.

Mr COWAN: That is nonsense, and the minister knows it. She has the capacity under proposed sections 64 and 65 to become involved in appeals. There is no question about that. This merely adds another dimension to that involvement. To say it is contrary to the spirit of the legislation - which is what I think she intended to say - is arrant nonsense. She has the capacity under proposed section 64 to intervene to the extent that she can make a submission, and under proposed section 65, she can call in an appeal. She should not tell me that this amendment is contrary to that. The provisions in the legislation effectively allow the minister to intervene during or before the tribunal's determination. I am seeking to ensure that some ministerial responsibility remains after the tribunal has made a decision, so that if the minister thinks the way in which an appeal was determined was unjust, she can do something about it.

How many times have we heard a minister say, "I can't do anything. My hands are tied. I do not have the power"? I heard her ministerial colleague the Minister for Health say that today. It is about time that ministers assumed their full responsibilities and that legislation provided powers to ensure the capacity for ministerial decisions when they are required after the event. It is time that happened, as opposed to the Minister for Planning and Infrastructure saying that it is okay for her to interfere during the course of a determination, but that she could not possibly have some power of intervention if the tribunal made an unjust decision or determination. She wants to be like her ministerial colleague the Minister for Health and tell everybody that her hands are tied and she does not have any power to act. That is a cop-out, and she knows it.

Ms MacTIERNAN: If we took the member for Merredin's argument to its logical conclusion, every rape and murder case and stealing matter would be reviewable by the Attorney General and every case of a dodgy real estate agent would be reviewable by the Minister for Consumer Protection. It is an absurdity. It is not our role to make individual decisions on quasi-judicial matters. We have said that we will make a determination in some cases that are questions of state and regional significance and in which the issues are of such importance to the broader community that we have a responsibility to call them in.

We are not proposing that a tribunal go to the trouble of making determinations on all those individual matters that have no state or regional significance - small-lot subdivisions, back fences and side setbacks - and then have them be subject to the approval of the minister, who would operate as an appeal against the appeal. I cannot

believe the member for Merredin seriously proposes this amendment. He has made some useful and pertinent contributions to the debate, but we cannot support this.

Mr COWAN: I remind the minister that it would not be a bad idea if she were to look at the amendment. The amendment does not permit every appeal that has been heard by the tribunal to be reviewed by the minister. We use the minister's words in proposed section 65(1), which states, "if the Minister considers that the appeal raises issues of such State or regional importance that it would be appropriate for the appeal to be determined by the Minister". In other words, the minister can call in the appeal before the tribunal has made the determination. We are saying it may be more appropriate for the minister to allow the tribunal to follow its course, and if there is some disagreement about a determination that has been made by the tribunal on an issue of state or regional importance, the minister shall then have the power to review. It certainly does not include every determination made by the tribunal in a class 1 or class 2 appeal under the minister's jurisdiction. It applies only to issues that the minister has already determined, under proposed section 65(1), to be of state or regional importance. With regard to those issues, the minister should have that capacity and additional responsibility. It does not become the minister, given her legal background, to draw the comparison that she drew.

Ms MacTIERNAN: To draw what comparison?

Mr Cowan: That this is similar to other cases heard before the judiciary that may be appealed to a minister.

Ms MacTIERNAN: I think it is.

Mr Cowan: I think you used the words "rape cases".

Ms MacTIERNAN: The member's logic is that ministers should be prepared -

Mr Cowan: You are saying that you can interfere as a minister during the course of an appeal being heard by the tribunal, but you cannot possibly review it. We are saying that if the minister can do all those things, then certainly the minister can review it.

Ms MacTIERNAN: That is incorrect. We have provided that the minister can take over an appeal before it is determined in cases of state or regional importance if the minister believes it is important to do so. I refer the member to his amendment. The amendment is not confined to cases that raise matters of state or regional importance. It goes on to say that it can apply also to cases in which the minister deems there are special circumstances that warrant ministerial review of the tribunal's determination. That can mean absolutely anything. Therefore, our analysis of this stands.

The proposed amendment will allow the minister to act as a separate court of appeal from the tribunal, because any case in which a person argues hardship or compassion, or whatever, may be deemed by the minister to be a special circumstance. That will create a whole new layer of appeal from each and every decision of the Town Planning Appeal Tribunal, and that is absolutely antithetical to the principle of the legislation.

Mr COWAN: That is not the case, and the minister knows it.

Ms MacTiernan: What is not the case - that your amendment does not say that?

Mr COWAN: It does talk about special circumstances, but given the limited rights of these people, and given also the requirement that these issues and decisions must be tabled in the Parliament, it is hardly likely that a responsible minister will exercise that power unwisely.

Ms MacTiernan: What about the Nutrimetics case; what about the Mindarie Keys case?

Mr COWAN: The minister is not the same minister and is not going to do that. The minister would be required to table in Parliament all her determinations. That may act as a deterrent for the minister to cross the line. It is important that the minister does not shirk the opportunity to accept ministerial responsibility. The minister has no difficulty with the capacity to deliver a submission or call in a particular appeal at the time. Let us realise, for one reason or another - no matter how efficient people are or how hard the bureaucracy tries - that some things sometimes slip through the net. I will tell the minister what will happen in this case. She will stand up and say that she has no power to do anything because the legislation does not allow her to do anything.

This is a discretionary power. If the minister wants to increase her workload and establish the reputation of previous ministers for planning with respect to hearing appeals, then she might exercise her discretionary power more than a responsible minister should. The power should be there. That is my point.

Amendment put and a division taken with the following result -

Ayes (17)

Mr Ainsworth	Mr Day	Mr Marshall	Ms Sue Walker
Mr Barnett	Mrs Edwardes	Mr Masters	Mr Bradshaw *(Teller)*
Mr Birney	Mrs Hodson-Thomas	Mr Omodei	
Mr Board	Mr Johnson	Mr Sullivan	
Mr Cowan	Mr McNee	Mr Waldron	

Noes (29)

Mr Andrews	Mr Hyde	Mr McRae	Mrs Roberts
Mr Brown	Mr Kobelke	Mr Marlborough	Mr Templeman
Mr Carpenter	Mr Kucera	Ms Martin	Mr Watson
Mr Dean	Mr Logan	Mr Murray	Mr Whitely
Mr D'Orazio	Ms MacTiernan	Mr O'Gorman	Ms Quirk *(Teller)*
Dr Edwards	Mr McGinty	Mr Quigley	
Ms Guise	Mr McGowan	Ms Radisich	
Mr Hill	Ms McHale	Mr Ripper	

Pairs

Mr Edwards	Mr Bowler
Mr Sweetman	Dr Gallop

Amendment thus negatived.

Proposed section put and passed.

Proposed section 64 -

Mrs EDWARDES: Proposed section 64 is essentially a carryover from the old Act. I wonder whether the minister could clarify for the record the meaning of the words "will have a substantial effect on the future planning of the area". What is likely to be the consideration? Do ramifications beyond the area in which the land is situated come into the question? What happens if there is a matter of precedent, as has been put to me? What has been the interpretation of that section?

The concern has been raised that even though this is a carryover from the old Act, there is substantial ambiguity in that the tribunal may be able to assume a future planning function through the appeal process per se, and, as such, the ministerial intervention may not be of a planning nature, but may undermine the planning system. Given that the section has been in existence for some time, will the minister advise us on how it has been used in the past and provide us with her knowledge and experience of the interpretation of that phrase?

Ms MacTIERNAN: We have not done an examination of this, because we are not seeking to change this provision. I understand that the previous minister, at his own instigation, made use of this power and intervened in an appeal on a couple of occasions.

We certainly have not done that since I have taken office; therefore, we have no first-hand experience of that. I am sure the member is probably aware of some of the interventions of the former minister.

Mrs Edwardes: You would have to be a little more clearer than that.

Ms MacTIERNAN: It is basically to make sure that if major issues of a strategic nature are involved, the minister, as the person primarily responsible for planning policy and strategic planning in this State, has the capacity to ensure that a submission is fully put before the tribunal. For example, it may be that the local authority involved as the respondent is not sufficiently equipped to present the broader strategic case, but that perhaps the minister is better placed to present the bigger picture. For example, it might concern the development of a large shopping centre. The local authority might have a view on whether a shopping centre should be allowed to expand because it would have a positive impact on its rate base. However, it might be contrary to the planning of the rest of the metropolitan area, in that it might destroy the capacity of nearby or regional centres to function.

Mrs Edwardes: Proposed section 64(1) states -

> . . . substantial effect on the future planning of the area in which the land the subject of the appeal is situated . . .

The minister is not talking about the future planning of the area but about the land on which the shopping centre is situated.

Ms MacTIERNAN: It depends on the definition of "area". For example, in this instance it might refer to the south east corridor of the metropolitan area.

Mrs Edwardes: Is it not such a narrow restriction as I have identified?

Ms MacTIERNAN: Not necessarily. Most of the cases I can think of tend to focus on the location of shopping centres and what they might do to town centres. I do not intend to debate this at length because it is not something that the Government seeks to change; it is already in the legislation.

Mrs EDWARDES: I sought clarification on the interpretation and how that section has been used in the past. I am not aware of the particular sections to which the minister refers. Perhaps at the third reading stage, the minister will enlighten us further.

Will the minister clarify and confirm the public way in which this submission would be dealt with. Will there be transparency and accountability in submissions by the minister being made public? It has been suggested that the minister should be required to report to Parliament and detail the appeals that have been the subject of submissions by the minister, and that the minister should include the reasons therefore. However, if the minister can highlight how it will be made public, everyone will be aware of the minister's reasons for making those submissions.

Ms MacTIERNAN: I do not intend to debate these any further. We have got to the stage at which we are being silly. These provisions are in the existing legislation; they are not provisions the Government has proposed to change. The minister's intervention is in a public forum to a tribunal. All documentation will be public documentation and all appearances made by the minister will be public appearances. I understand that in the past generally the interventions have been at the request of the WA Planning Commission; for example, in support of regional planning principles. As I said, we will not entertain any amendments to this proposed subsection because it provides for a perfectly public process.

Mrs Edwardes: I do not have an amendment. I ask the minister to clarify the matter? It is not a big issue. If the minister had a little patience we would be nearly there.

Ms MacTIERNAN: I will go through it again for the member. The submissions will be made to a tribunal and will be public. All documentation will be public. All oral submissions in the appeal will be transcribed so that there can be no suggestion that the minister's intervention is other than fully in the public arena. We do not believe there is any point in changing this proposed section.

Proposed section put and passed.

Proposed section 65 -

Mrs EDWARDES: This is a key part of the Bill. Proposed section 65 deals with an area in which the minister may call in an appeal on issues of such state or regional importance that it would be appropriate for the appeal to be determined by the minister. Proposed subsection (2) reads -

> The Minister may direct -
>
> > (a) The Principal Registrar to refer an appeal to which this section applies to the Minister for determination; . . .

That means the principal registrar may be asked to refer an appeal to the minister, or the tribunal may hear an appeal without determination, which would then be referred to the minister with recommendations for determination. An appeal can therefore be dealt with in two ways. There are a couple of issues in respect of the proposed subsection. One is the process by which it will happen. How will it be determined? What is an issue of such state or regional importance? What would be the basis of such an appeal being referred to the minister? For example, would the parties be notified by the tribunal of the referral to the minister when the matter came on for hearing, because publicity had been generated for some time and the minister wanted the matter referred to her or brought to her attention when an appeal was lodged? Will that happen or will all appeals be brought to the attention of the minister or her officers, and as such the minister will decide which appeals she will determine? Has the minister thought about how she will call in such appeals? What is an issue of such state or regional importance in which the minister will call in an appeal?

Ms MacTIERNAN: Issues of state or regional importance would be matters of considerable renown that would have undergone a public process, either through the Western Australian Planning Commission or a local

authority. They will therefore be matters of which any reasonably competent minister would have notice. No special mechanisms need be in place as they would be matters of controversy of which a minister would be expected to be aware and would decide whether to intervene.

We have canvassed at length during the second reading debate the matter of state or regional importance. These are matters that have the capacity to impact in a substantial way on the wellbeing of the State as a whole; for example, a major resource development or port facility; or, in the case of regional importance, a similar development in the metropolitan area or a rural region. They would not be matters relating to someone's fence setback or a three-lot subdivision.

At the end of the day, the minister will be politically accountable for the decision that he or she made in relation to the matter. Given that just five minutes ago members wanted to put in a provision about all appeals of state and regional significance and, indeed, any other appeals that I thought had special circumstances -

Mr Cowan interjected.

Ms MacTIERNAN: When I deemed there were special circumstances. I do not presume that members have any difficulty with a minister retaining some level of responsibility for those matters that were deemed to be of state and regional significance. We have given examples of the sorts of issues to which we are referring. However, these matters will be decided by government in the full light of publicity, and we will be accountable to the people in that way.

Mr COWAN: I do not have any difficulty with this proposed section. I was seeking to add a little more to it, which would have given a discretionary power to the minister even after the tribunal had made a decision. I will give an example that is not based on a matter of fact. However, incidents have been related to me in which it can happen. When the minister is able to call in and deal with these particular appeals, this example would not fit the category. I made mention of this issue in the second reading debate, and it deserves repeating because no thought has been given to accommodating the position I was talking about. In agricultural or rural areas, where planning decisions are required or zoning rules are put down, one of the rules states that there can be no subdivision that would be smaller than a parcel of land that would be economic in terms of the agricultural production for which that land is utilised. If, for example, a person wanted a subdivision that allowed him to retain his home on a block of rural land, and if the general zoning rules precluded that and the tribunal said that that could not be done, there is no way the minister could intervene. However, there may well be a case in which a person is desperate for the settlement of property, whether it be for strong personal reasons that are difficult for an individual, such as a marriage break-up in which a division of the assets must be brought about and which cannot be put into effect.

That is one of the reasons we were seeking some form of ministerial intervention for those special circumstances. The tribunal would make a determination and say, "Here are the rules, these are the particular zoning laws and we are abiding by those; the subdivision is not to be permitted." It certainly will not be of regional or state importance, but it is of paramount importance to the individual. Unless there is a capacity within the tribunal to understand - this is one of the reasons the member for Kingsley used the term "compassion" - those issues that are important at that level, where clear zoning rules give a direction to the tribunal and it is made very clear that it is to take into account planning laws as they exist and they cannot be avoided, every now and again there will be just that one occasion when something somewhere gets missed. I will repeat the point I made before: I do not want the Minister for Planning and Infrastructure to be in the same position as the Minister for Health when he said, "My hands are tied; I cannot do anything about this particular issue."

There does need to be a capacity for ministerial discretion. In moving away from the situation in which a greater number of appeals were heard through ministerial intervention, as opposed to those which should have gone through a tribunal, the pendulum has swung a little too far. This clause should have contained some provision for a minister to exercise discretion in dealing with issues, not necessarily of State or regional importance, but which have some special circumstances attached to them. The tribunal may have made a determination, based on its requirements, that overlooks some of the needs of individuals who require changes to zoning that would have been of benefit to them.

Ms MacTIERNAN: The member for Roe raised some of these same concerns during the second reading debate. The point that I made then was that I recognise there are problems with subdivision policy, and the policy governing subdivision in rural areas, but that is not dealt with by a series of random decisions that are often inconsistent, depending to some extent on a person's capacity to engage in a piece of purple prose. What I think is important is that ministers, instead of deciding whether or not Mr Bloggs or Mrs Rosario is going to be able to divide this or that bit off, actually get down there and do something about the fundamental problems that appear

in the policy. Unfortunately, ministers have been sidetracked by the whole process of dealing with one-off cases, and have not spent enough time dealing with the strategic and policy issues.

The Government must get those policy settings right, and I agree that they are not right. One of the manifestations of that is the vast number of appeals on this matter coming up. All these issues - the extent to which assessments of agricultural viability are accurate, or relevant, the extent to which bush blocks should be separated off - should be attended to, but they should not be dealt with on the basis of how good a story an applicant can spin to the minister.

Mrs EDWARDES: In view of the amendment foreshadowed by the minister, which picks up the tenor of what was intended by mine, I will not be proceeding with my amendment.

Mr COWAN: I can understand the principles that the minister talks about, and I wish her well, but I can assure her of one thing: she is not going to get there. There will be occasions when, no matter how right the minister thinks she has been able to get the policy, there will be a need for ministerial discretion to be applied. I will not labour this point, but it will not be long before someone in this place, during a grievance debate, or using some other mechanism available, will point out to the minister problems with the legislation, which everybody supports in principle - that there should be a greater direction of appeals to a proper tribunal operating under a proper structure and process. The minister has been prepared to build into this legislation provision for ministerial intervention or discretion at only two points. The first is by placing a submission to the tribunal, either on the appellant's own initiative, or at the invitation of the tribunal. The minister may call in the submission, and ask the tribunal to make recommendations before reaching a determination. However, the minister has not taken that extra step, and I disagree with her.

Ms MacTiernan: That is 100 per cent correct.

Mr COWAN: I disagree. Occasions will arise when someone will use the Parliament to explain to the minister that there is an inadequacy in the legislation, because the final discretion that the minister should be able to exercise in rare or special circumstances has been removed. Parliament will have to deal with this matter some time in the future, because no matter how hard we try there will always be anomalies, not in legislation alone, but in the administration of the law, and it will not be to the advantage of individuals who deserve some natural justice. It will be necessary to introduce amendments to this legislation to provide that the minister has the final discretion in these special circumstances. This minister has denied that, and at some time in the future the Parliament will seek to correct that matter.

Mr AINSWORTH: I share concerns similar to those expressed by the member for Merredin. The minister correctly mentioned that I had raised those concerns during the second reading debate. The other avenue of appeal that this legislation would have provided is that extra opportunity for those cases which just do not fit the standard pattern - whatever that might be - in this new structure. Unfortunately, when we go out and see these individual landholdings, and look at the topography, the land capabilities and the other things that are pertinent to a particular piece of land, we find that a set of rules put in place by the Parliament with the best of intentions - and administered by the Department of Land Administration with what I presume are the best of intentions - does not always lead to the right decision because of the differences and the peculiarities of some parcels of land. All these factors - the size of the land in relation to surrounding properties and the variations between adjacent land-holdings - cannot be catered for under legislation, without the existence of some discretionary opportunity in the process of administering that Act of Parliament. That is why we say there needs to be an alternative opportunity for the minister to intervene - not in every case, not even in every tenth case, but perhaps in every two-hundredth case - when a situation does not happen to fit what is otherwise a perfectly -

Ms MacTiernan: How am I going to decide whether it is one in every 200 cases?

Mr Cowan: How will you decide to call in an appeal? How will you decide to enter a submission? The same reasoning and logic you use for that is the logic and reasoning you will use for other cases.

Mr AINSWORTH: If there were to be a rush of second appeals - if I can call them that - to the minister, whoever that might be, the minister would initially perhaps get more of these secondary appeals than would be reasonable. That is a possibility. Most of those, what I might call frivolous appeals, would be rejected out of hand, and people would stop wasting their own time, particularly if they were paying someone to draft those appeals and to provide all the maps, photographs and the reasons their cases were special. The message would get home very quickly that the minister could not be expected to deal with just any old appeal, or come down on their side with a favourable determination. To deny those rare cases in which there are definite sets of circumstances that are worthy of a second look, but which are not covered by the Act, is a shortcoming of the Bill.

Ms MacTIERNAN: Unfortunately for the members for Merredin and Roe, the rot set in around the twelfth century, during the reign of Henry II, when society started to move away from the unfettered power of feudal lords to sit in judgment and began to set up those instruments we now call courts. I remind members that a hardship provision was inserted to make it clear that tribunal members will be able to consider matters concerning small lot subdivisions, to which the member, by and large, referred, in much the same way that a minister was able. I do not want members to think that we are going to populate the tribunal with hard-hearted robots who will be insensitive to the special needs of country people. They will make those decisions in a reasonable and consistent fashion.

The Government's view is that provisions have been made to deal with those special cases and it is not appropriate for the minister to once again be the last resort. Quite frankly, the reality is that a party would have nothing to lose under those circumstances if it appealed to the minister. Many of the cases that come under the jurisdiction of ministerial appeals basically have no substance; they are tried on because people have nothing to lose. That principle would continue to apply.

Mrs EDWARDES: I will raise a couple of points on this proposed section before the minister moves her amendment. The first point is that under proposed section 65(3)(a), the minister cannot give a direction under proposed subsection (2), which is essentially the calling-in power, -

> in respect of an appeal made under the Heritage of Western Australia Act . . .

Why is this distinct from other Acts?

The second point concerns regional importance. Will any appeal arising out of a regional scheme be of regional importance and, therefore, capable of being called in?

Ms MacTIERNAN: As I understand the matter concerning the heritage Act, it would not be appropriate for a minister to call in the decision of another minister under the legislation as it stands. What was the member for Kingsley's second concern?

Mrs Edwardes: Whether an appeal arising out of a regional scheme, by virtue of its being of regional importance, would be subject to being called in?

Ms MacTIERNAN: Some of those would be minor matters and not subject to calling-in. The Government does not intend to set down the exact circumstances under which it would deem something to be of regional or state significance. That decision will be left to the judgment of the minister of the day. The public will judge the decisions on those determinations in the full glare of publicity. I move -

> Page 26, line 29 - To insert after "in the *Gazette*" the passage "and, as soon as is practicable, is to cause a copy of it to be laid before each House of Parliament".

This provides that when a minister calls in an appeal it is not only published in the *Government Gazette* but is also tabled in the Parliament.

Amendment put and passed.

Proposed section, as amended, put and passed.

Proposed section 66 -

Mrs EDWARDES: If under proposed section 65(2) the minister allows the tribunal to hear the appeal, and it refers its recommendations to the minister, it is subject to the guidelines outlined in section 51. Essentially section 51 lays out the processes of the tribunal. The tribunal is bound by the rules of natural justice and it must ensure each party to an appeal is given a reasonable opportunity to present the case, to inspect any document, to make submissions and so on. The Government's reasons for changing the planning appeals system relate to the criticism it has levelled at previous ministers that the process is not transparent or accountable and that the principles of natural justice have not been applied etc. However, nothing in this section changes that. The only change relates to when the minister determines an appeal under proposed section 65(2)(a). Nothing in this legislation will ensure that the rules and principles of natural justice are applied, that there is transparency and sharing of information, and that everybody is given an opportunity to be heard etc. Should not the guidelines outlined in proposed section 51 apply to the minister when he or she determines an appeal under proposed section 65(2)(a)?

Ms MacTIERNAN: We anticipate that very few appeals will be determined under this provision. We have also made it clear that these appeals will need to take into account factors other than planning considerations; for example, factors that affect the public interest, but may not specifically be described as planning matters. It is the Government's intention that the minister's decision to call in an appeal, and the reason for that, will be made

public. At the end of the day, a decision will be made and that decision will be published. No specific provisions set down a particular process for hearing the appeal. The reason is that this is not limited to planning matters and a class of cases, but may go beyond normal planning considerations. The minister has responsibility for the public interest and has a responsibility to consider those factors. It is not about a normal planning appeal in which there is a dispute between two parties and the minister is acting as an arbiter. This is a different case altogether, in which the minister is saying that as it is a matter of broader public interest the minister will exercise broader determination. Although we would expect a minister to receive submissions from all parties, the appeal will not be determined purely as a dispute between two parties but will be substantially guided by public interest.

Mrs EDWARDES: If that were the case, I would have thought that in the public interest some principles of natural justice and the application of them would have been incorporated in the procedures. The procedures appear to be exactly the same as the current ones, with appeals being determined by the minister. Proposed section 66 contains nothing that would remove the criticism levelled by the current Government and the current minister at the current ministerial appeal system. The mere fact that the minister says that there are very few such appeals and there are likely to be very few is not the point. The minister says that she will act only in the public interest and determine any appeal, not necessarily on planning guidelines. We are talking about the Town Planning Appeal Tribunal to which a party has appealed on planning issues. The minister has the right to consider regional and state importance when determining those issues, but this proposed section flies totally in the face of all the criticism that the minister and this Government have levelled at the current system of ministerial appeals.

If the Government is serious about applying principles of natural justice, transparency and accountability, the mere fact that consideration will be wider than the principles of planning demands that parties have an opportunity to be heard. It may be that the direction will be published, but then what? The minister indicates that it is presumed that the minister would call for submissions and so on. However, nothing in the system removes the criticism levelled at the current ministerial appeals system. I find it amazing that the minister is defending the position, particularly given her strong stance.

We have supported ministerial appeals being moved to the tribunal. We have concerns about ensuring that the process will still provide the level of accessibility and justice that is currently being delivered at a very cheap rate with quick decision-making. We have been addressing those issues. I find it amazing that the minister will defend the position on the basis that she does not think there will be many such appeals. I presume that this minister will act properly, but it will not always be this minister. She has been highly critical of past ministers' lack of application and natural justice. I would have thought that she would have incorporated such a provision in the Bill.

Ms MacTIERNAN: It is important to understand that in this very limited class of appeals it is not merely a case of parties being able to answer the cases against them. It is a matter of consideration being given to an overriding public interest that must be brought into play. That is why such a case would distinguish itself from other cases.

Mrs Edwardes: What do the parties do? Their lives are on hold and they are not even spoken to.

Ms MacTIERNAN: There is no indication that is the case. I am intrigued, because six months ago the member for Kingsley was a minister in a Government that had a provision before this Parliament that gave the minister the call-in power to intervene in the appeal at any time without there being any public announcement.

Mrs Edwardes: Minister, we are now discussing your criticism of the ministerial system not providing natural justice, and it is the reason we have a Bill before us.

Ms MacTIERNAN: These cases are not simply an issue between two parties; they are in the broader public interest. I am happy to consider making it clear in the legislation that parties have the right to make submissions and that those submissions will be made public. I have no difficulty with that. No amendment dealing with these provisions has been foreshadowed, but it is not something with which we have difficulty. I point out that submissions in such a case will be dealt with slightly differently from those in other cases, because the case will have been called in by the minister in recognition that it is of major public interest. The issues will not be determined simply by how the two parties answer the cases that are put against them; public interest considerations must also be taken into account. I have no difficulty with introducing an amendment in the upper House that says, for example, that in those circumstances, the minister will call for submissions from both parties and anyone else who wishes to make a submission, and that those submissions will be made public.

Mrs EDWARDES: We look forward to such an amendment in the other place. I am sure it was merely an oversight during the drafting of the Bill.

Proposed subsection (5) states that "The decision of the Minister is final." The Minister for Planning and Infrastructure earlier indicated that an appeal to the Supreme Court has lied, although it has not always been on a question of law. She obviously assumed that I knew what she was talking about. In what circumstances has there been an appeal against a minister's decision? Will the wording of proposed subsection (5) prevent that?

Ms MacTIERNAN: We need to distinguish between appeal rights and the right of parties to, through writs of certiorari and other prerogative writs, seek judicial review. Actions in the Supreme Court against ministerial decisions are applications for judicial review; they are not appeals per se. Those appeals are made on the merits of the cases. Applications for judicial review generally claim that the minister acted outside the principles of administrative law.

I propose an amendment to clause 11, which was circulated this evening.

Mr Cowan: I didn't receive a copy of the amendments.

Ms MacTIERNAN: We asked the officers to circulate these amendments some hours ago. This amendment is similar to the one on the Notice Paper. We have amended it slightly to improve the wording. I move -

> Page 27, lines 17 and 18 - To delete the lines and substitute the following -
>
> (b) as soon as is practicable, cause a copy of those reasons to be laid before each House of Parliament;

Some suspicion emanated from the opposition benches that we may be prescribing in the regulations that they shall be published in the "Widgiemooltha Times", or something like that.

Mr Cowan: That is a great town!

Ms MacTIERNAN: Yes, and that is probably a great and esteemed journal, but unfortunately not as widely read as it should be. To allay the fears of those suspicious members, we have made it clear that those decisions will now be tabled in the Parliament.

Amendment put and passed.

Proposed section, as amended, put and passed.

Proposed sections 67 and 68 put and passed.

Proposed section 69 -

Mr COWAN: This section deals with the issue that was raised earlier in the debate; namely, how much regulatory force is given to the rules. Section 70 states that if a regulation is inconsistent with a rule, the regulation prevails to the extent of the inconsistency. Therefore, there is a distinction between rules and regulations. I would like an undertaking from the minister, particularly with regard to the preparation of any rules that may require that those persons who are not a party to an appeal shall give some indication that they want to exercise their rights under proposed section 57, that the minister will not indicate to this House in the future that because these are rules and not regulations, they are not subject to the scrutiny of the Parliament. That is a simple request and one that will be important for the good carriage of this legislation when it is enacted.

Ms MacTIERNAN: I presume the member understands that opposition members cannot initiate changes to regulations but can only disallow regulations.

If there is any dispute about Parliament's capacity to effect the rules, it can be dealt with by way of the regulations. We understand that the regulations will prevail over the rules, and the rules will need to be consistent with the regulations. There is power under proposed section 70 to make regulations as necessary, to give effect to the provisions of part 2. They can be made in respect of any matter for which rules may be made. If there is an inconsistency between a rule and a regulation, the regulation will prevail. That is set out in proposed section 70. If there are any difficulties with the rules, we will be able to rectify them by way of a regulation. To the extent that there was any inconsistency with the rules, we could make a regulation that prevailed over the rules. Proposed section 70 gives us the regulatory power to override any deficiency in the rules.

Mr COWAN: That is my point. That is only provided that one gets to the position in which regulations are in place. If regulations are drafted that have no bearing on the rules, there will never be a degree of inconsistency. Drafted rules must be subject to some form of parliamentary scrutiny, but they will not be unless they are regulations. I think the minister understands that point very well. I want to see rules drafted in a form of a regulation that will come under the scrutiny of Parliament.

Ms MacTIERNAN: I understand the member's concern. If a problem emerged and the member's successor, for example, talked about problems in the tribunal with access and notice of appeal, and asked what would be done, I am sure that the member for Merredin would have instructed his successor that it would not be acceptable for me to answer that I had no power. It would not be acceptable for me to say that the rules determined that such matters were the responsibility of the president. The member for Merredin and every other opposition member would be well aware of proposed section 70, and that I had the power to introduce regulations that would remedy any defect in the rules as seen by the Parliament. The member's concern that I might plead powerlessness - if that were the desire - is addressed by proposed section 70 that provides clear power.

Mr Cowan: Is there the will?

Ms MacTIERNAN: That is a political matter.

Proposed section put and passed.

Proposed section 70 put and passed.

Clause, as amended, put and passed.

Mrs EDWARDES: I do not propose to move the amendment standing in my name. I am pleased that the minister has an amendment affecting the review of the Act. I initially wanted a review of the Act after one year and the minister has an amendment for a review after two years. I believe that is appropriate. In all probability it will give us a far more effective assessment of how the tribunal is operating. In the first instance, referrals of ministerial appeals will be left over, and that will give an uneven assessment of what is going on in the use of the tribunal. I am pleased that the minister picked up that amendment.

New clause 12 -

Ms MacTIERNAN: I move -

> Page 29, after line 9 - To insert the following -
>
> **12. Review of *Town Planning and Development Act 1928***
>
> (1) The Minister is to carry out a review of the operation of the *Town Planning and Development Act 1928*, as amended by this Act, on the second anniversary of the coming into operation of Section 11 of this Act.
>
> (2) The Minister is to prepare a report based on the review and, as soon as is practicable after its preparation, cause the report to be laid before each House of Parliament.

The member for Kingsley is right. The reason we wanted to defer the review until two years had expired was precisely as the member said. There will be a lot of settling down and trial and error in the first instance. That will always be the case with a tribunal that has effectively undergone a rebirth. We will get a much more accurate picture arising out of its second year of operation than its first.

New clause put and passed.

Clauses 12 to 15 put and passed.

Clause 16: Current appeals -

Mrs EDWARDES: Clause 16 deals with the current appeals before the minister. Clause 16(4) states -

> If an appeal has been made to the Minister after 1 July 2001 but not finally determined before the commencement day, the appeal may be referred by the Minister to the Town Planning Appeal Tribunal for determination and the Tribunal has the same powers and functions in relation to the appeal as if the appeal had been made to the Tribunal after the commencement day.

That raises a number of issues. It denies access to all those people who have appealed to the minister, even though the appeal may have been made after 1 July. They may have selected that process at that time but have no desire to progress an appeal in a tribunal for many reasons, not the least of which may be increased costs or the fact that there will be further delay at the tribunal.

The second issue is the status of the appellants' priority. It appears that the appeals will be dealt with as though they had been sent to the tribunal after the commencement date. Although the appeals may have been lodged since 1 July, for example, the appellants will lose any priority they had. Will the minister confirm how that is likely to be determined?

In her response to the second reading debate, the minister indicated that she had no intention of referring all the appeals on her desk, and that she was intent on determining some of those appeals. I wonder whether the

minister could bring the House up to date on how many appeals she has on her desk with recommendations waiting for her to sign off on. How many appeals have been lodged with the minister? How many of those appeals have been lodged since 1 July?

The issue has been raised to determine how many appeals are likely to be referred to the tribunal, and the resources that will be required to pick up a backlog, because there will be a backlog. It does not matter what the minister does. Any appeals referred to the tribunal will be more than the tribunal anticipates, particularly if the minister intends to refer some and not all. For how long does the minister intend to continue to determine appeals after the commencement date? Does she intend to put aside a couple of days and hack through it all? A couple of practical considerations must be considered in the issue of referral to the tribunal.

The other issue is not to refer any appeals to the tribunal until the tribunal is in place. Again, that brings us back to the commencement day, and not necessarily the date on which the legislation is proclaimed, because of the insistence that everything else must be up and running, not the least of which are the rules and regulations, the tribunal itself, the staffing and other considerations. The tribunal may come into being some time after the Act has been proclaimed. Does the minister have an idea of the time that would be needed to bring that all together? Does she anticipate a commencement date of 1 January? Is that the date on which the minister expects the tribunal to be up and running? Is it 1 March? Does she have any idea when it is likely to happen, on the basis that the legislation will go through the Parliament before the end of the year?

Ms MacTIERNAN: Currently, 219 appeals are outstanding and I believe the majority were in existence on 1 July.

Mrs Edwardes: Have many been lodged since 1 July?

Ms MacTIERNAN: Unfortunately, I do not have that figure with me. Taking the normal flow into account, I would say about 20 to 25 have been lodged since that time. This is a question of managing the work flows of the tribunal and my office. I will continue to determine the vast majority of appeals because they were lodged before 1 July. However, it is in the interests of all parties that I have the flexibility to refer these appeals to the tribunal, where they will be dealt with more quickly.

Mrs Edwardes: That is an indictment on your processes, minister.

Ms MacTIERNAN: No, it is because planning appeals are only one of a number of issues to be dealt with. We are dealing with town planning schemes and a raft of issues across government that in many instances affect the rights and lives of many people. We must make judgments about the time given to determine appeals on minor matters compared with larger policy issues. When this Government arrived in office, 370 appeals were awaiting determination. That number has been reduced but appeals continue to be lodged and we continue to work on them, but we will not drop everything else to deal with these appeals.

Mrs Edwardes: This amendment covers only appeals since 1 July.

Ms MacTIERNAN: That is right. The point is I will take some time to work through the appeals that arrived in my office prior to that date. We hope to have the tribunal in its expanded form up and running before 1 January 2002, which will depend to some extent on how long it takes to get this legislation through the Legislative Council.

Mrs Edwardes: What else needs to be done after it passes through the Legislative Council and has a quick trip back to this place to deal with any amendments made by the Council? Rules, regulations and the appointment of a president of the tribunal need to be made.

Ms MacTIERNAN: Yes, and we must appoint a pool of suitable experts. Obviously, a number of people who have the capacity to do the job are already members of the Town Planning Appeal Tribunal. However, anybody whom we take from the Town Planning Appeal Committee will obviously need training, for instance, in the principles of natural justice and the requirements of transparency, as they will be acting in a different capacity. Therefore some training will need to be undertaken by them to ensure that, as they move from the role of making recommendations to the role of making decisions, they are fully aware of the range of their responsibilities.

Clause put and passed.

Clause 17 put and passed.

Clause 18: Existing appointments -

Ms MacTIERNAN: An amendment to this clause has been circulated. We want to make it clear that the transitional provisions in relation to the chairman do not result in the chairman automatically being appointed for five years. The way in which the Bill was drafted would have meant that, on commencement, the chairman of

the tribunal would have been taken to have a five-year appointment from the last day on which he became the chairman of the tribunal. Basically, he will occupy the position of president for the period that he would have occupied the position of chairman. That does not mean that he will not be a candidate for reappointment. Provided this legislation comes into effect before the end of the year, he will become the president and will hold that position until such time as his term as chairman would have expired. It is not of itself extending his term. I move -

> Page 35, lines 28 and 29 - To delete "on the day on which he was last appointed to the office of Chairman" and substitute -
>
> > for a term expiring on the day on which his term as Chairman would, but for this Act, have expired

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 19 to 23 put and passed.

Clause 24: ***Metropolitan Region Town Planning Scheme Act 1959*** **-**

Mrs EDWARDES: We just need clarification, and the issue has been raised elsewhere. The clause refers to the consequential amendments to the Metropolitan Region Town Planning Scheme Act. Subclause (6) deals with notices being served and the Town Planning Appeal Tribunal confirming or varying the direction. I want to clarify that the responsibility for the enforcement rests with and is maintained by the appropriate authority, whether it be the Western Australian Planning Commission, the local government and so on. Who will serve the notice in writing?

Ms MacTIERNAN: My advice is that the commission or the local government exercising the powers of the commission may serve a notice in writing upon the owner of the land. I am not quite sure what the member for Kingsley is getting at. It seems to be the same.

Mrs Edwardes: I just wanted confirmation that that was the case.

Clause put and passed.

Clauses 25 to 28 put and passed.

Title put and passed.