

**PLANNING APPEALS AMENDMENT BILL 2001**

*Consideration in Detail*

Resumed from an earlier stage of the sitting.

**Clause 11: Part V replaced -**

Debate was adjourned after the clause had been partly considered.

Mrs EDWARDES: I note that proposed new section 37(3) provides for a member of the tribunal to be appointed on a full-time or a part-time basis, and this includes the president and deputy president. During the second reading debate I indicated that the New South Wales Land and Environment Court had full-time members. The only part-time members called upon were the mediators. A list was kept of the trained mediators upon whom the court could call. Currently the members of the tribunal are part-time, and this is not to be seen as any reflection on the work they have been doing, nor on them as individuals. The operation and administration of a new structure will require intensive management, and I do not see how that can be achieved with part-time members, particularly given the need to cover the workload. The current tribunal has a very small workload, and two things will occur when the new structure commences. Firstly, some of the ministerial appeals will be referred. That can be discussed later, when the transitional provisions are considered. I do not believe all the referrals currently with the minister will be transferred. I believe that she will continue to deal with at least some of the ministerial appeals. At the end of the day, there will be a referral of some ministerial appeals. There will be an increase in the number of appeals the like of which the tribunal has not yet seen. The immediate impact will be an increased workload. If members work on a part-time basis, there is no capacity to establish a pattern from the start. I note that in the draft practice directions and rules, the anticipated timeframes are very tight. I hope they will be achieved, but I do not think that it will be possible with part-time members. I suppose a whole lot of part-time members could essentially be employed on two-thirds of a full-time load. That would increase the number of hours worked at the tribunal.

The one point I made - which is referred to in the schedules - is that if the current chairman's term has not expired by the time this tribunal is established, he will automatically become the president of the tribunal. I indicated during the second reading debate that the chairman is a well-qualified, highly thought of expert in planning matters in Western Australia. He is probably regarded as one of the, if not the, best. That situation may have arisen by virtue of his position as chairman of the tribunal. He currently also works part-time in the private sector. It has been bandied around within the planning sector that his view becomes law, so essentially, his view on planning matters tends to be treated as that of God. Perhaps that is a reflection on his legal ability and knowledge and understanding of planning laws, but it also comes from his position as chairman of the tribunal. If an appeal is to be heard by the tribunal and the chairman is present, the proponent will obviously make sure that his proposition fits within the thinking of the chairman. If the chairman continues to work part-time in the private sector as well as taking on the position of president of the tribunal, there could be a serious perception of a conflict of interest, although I know that he fully understands what he must do to overcome that.

Mr COWAN: I am interested to learn what appointments of senior and ordinary members the minister expects will be made in the initial period of this tribunal and the ratio of those members who might serve on a part-time basis. I am interested to know how many people the minister expects will be appointed in the initial stages of this legislation. She must have some idea.

Ms MacTIERNAN: I share the view of the member for Kingsley that it probably will be more appropriate that the president of the tribunal be a full-time appointee. That is the aim of the Government. That is why it has expressly provided for the appointment of members on either a full-time or a part-time basis. There is a potential for problems of conflict of interest should the president of the tribunal be involved with matters on which he might, at some later time, make judgments. We must be careful in that regard as it concerns the perception of the tribunal and confidence that the public has in the process. The Government intends to appoint the president on a full-time basis. That will hopefully occur initially, but certainly ultimately. As the member for Kingsley has observed, this Bill contains some transitional provisions. The current chairman will take over as president. His appointment expires on 31 December 2001. As the member rightly indicated, the chairman has a great deal of seniority and respect within the sector. He will make a good inaugural president. What his arrangements will be during the interim period remain to be determined, but the Government shares the view of the member for Kingsley and it intends to make the role of president a full-time position.

In response to the comments of the member for Merredin, the Government obviously wants people with senior status within the profession to be appointed as senior members. It must determine whether it will be able to attract those people into the senior positions on a full-time or part-time basis. There probably will be no more

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senior members than on the current tribunal, which has three members and some deputies. Additional appointments will be those of ordinary members. To begin, the tribunal will probably have three full-time and about seven part-time ordinary members. The Town Planning Appeal Committee and the assessors who operate under that committee basically manage the full number of appeals. The Government believes that if it goes with the numbers already appointed to the tribunal and the Town Planning Appeal Committee, that will more or less cover the needs of the new tribunal. That is being kept open. The member referred to the provision concerning the minister's ability to vary the number of members of the tribunal according to how many are required to expeditiously deal with the appeals. Obviously, if that is not sufficient, the Government can appoint additional part-time members. Something in the order of 16 part-time assessors operate out of the Town Planning Appeal Committee. This tribunal will basically have the same number of part-time assessors. The Government will take the number of members who currently are on the tribunal and the Town Planning Appeal Committee and put them together on this new tribunal.

Mr PENDAL: I will repeat the burden of the remarks that I made during the second reading debate, because everything I have heard in the past 10 minutes from both the member for Kingsley and the minister at the Table confirms all the worst fears that I expressed during that earlier debate.

This legislation goes against every recent trend of providing people with easy access to adjudication or - I put it in the reverse, because that is how it will affect individuals in Western Australia - it goes against a trend that has been designed to give people easy and cost-effective access. For example, in recent years we have created the Small Claims Tribunal to not only demystify the Local Court process but also reduce the costs to litigants who want to settle matters involving relatively small amounts of money. This Parliament has created offices such as the Strata Titles Referee. We have also heard in this Parliament over the past 10 years discussions about creating greater opportunities for mediation to help people receive justice. In one fell swoop, this legislation not only gets rid of ministerial appeals, which effectively cost the appellant nothing, but also replaces ministerial appeals with a complicated, convoluted, professional, formal and institutional framework called the Town Planning Appeal Tribunal.

The minister's response appalled me. She spoke in terms of numbers. She spoke about a full-time tribunal president and senior tribunal members and the activities of ordinary tribunal members. Everything points to the limitation of the capacity of ordinary men and women to receive any sort of justice or adjudication through the town planning appeal process. It is a gigantic step backwards and will be a haven for lawyers and other professionals. The idea that people can represent their own appeals at a minimum cost through the ministerial appeal system will be swept aside. I find that most objectionable. The minister defended this in her response to the second reading debate by saying that the Government has a mandate. One would need a broad and liberal view of a mandate to accept that argument. That fact that a party promises something in an election campaign does not mean it is justifiable when held up against the cold, hard light of day. Many of my electors will be denied access to adjudication and justice in the town planning process. We are formalising something that does not need to be formalised. We are institutionalising something that does not need to be institutionalised. We will add costs to a system that is almost costless, or at least very cost efficient. I am stunned that a Government of this kind believes this system has advantages for its natural constituency. It is one of the worst town planning decisions this place has made for 10 to 15 years. I said during the second reading debate that if the system of ministerial appeals lacks transparency, we should make it transparent. If it lacks professionalism, let us make it professional; but let us not throw the baby out with the bathwater, which is precisely what we are about to do. Everything the minister said on proposed section 37 over the past 10 to 15 minutes confirms that. It is a gigantic leap into the past and will do no-one any good.

Ms MacTIERNAN: I completely reject those remarks. There is absolutely no evidence to support the member for South Perth's comments. The member extolled the virtues of a number of tribunals. He talked about the Small Claims Tribunal and made reference to the small debts division of the Local Court and the Strata Titles Referee. This system derives many of its characteristics from those bodies. To a large extent, they provided the model that is before us. We recognise that the Town Planning Appeal Committee is not appropriate for dealing with the full range of appeals. Therefore, we are introducing a layered system similar to what exists in the courts. That same layering occurs even within the Local Court, through the small debts division.

Mr Pendal: That is my point. Your emphasis on the courts is what disturbs me. It formalises it. You have already given the answer in your second reading speech, but how many people have chosen to put their case to the current tribunal and how many have chosen to proceed with a ministerial appeal? It is something like 10 to one.

Ms MacTIERNAN: The member fails to understand that those figures relate to the committee as it is currently constituted.

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Mr Pental: You want to make it worse.

Ms MacTIERNAN: That is absolute nonsense. To date, we have had an intelligent debate on this matter, and I have appreciated the comments and contributions of members. Genuine issues have been raised. However, the member for South Perth does not accept the policy of the Bill. We will not change the policy of the Bill, but I will address the issues.

Mr Pental interjected.

Ms MacTIERNAN: When I sit down, the member can again stand and say that he does not like the system. He can play his favourite role of Don Quixote as long as he likes. We will stay here all night and he can play Don Quixote.

Mr Pental interjected.

Ms MacTIERNAN: The member for South Perth extolled the virtues of the Small Claims Tribunal, the small debts division of the Local Court and the Strata Titles Referee. Those bodies are either tribunals or courts. We are bringing many of the principles that guided the formation of those bodies into the Town Planning Appeal Tribunal because we recognise that one of the reasons the committee has not attracted more than 10 per cent of town planning appeals is that it is too legalistic and formal. We are now introducing layering into the system so that, depending on the nature of the appeal, we can respond to claims with different levels of complexity and need in the context of differing costs and formalities. Our layered system will result in a procedural arrangement that will be suitable for the seriousness and the gravitas of different appeals. We will proceed with that.

The member for South Perth also has the idea that ministerial appeals simply happen. The cost of the Town Planning Appeal Committee far exceeds the cost of the Town Planning Appeal Tribunal.

Mr Pental: To the appellant? Give us all the costs.

Mr Omodei: How can you know that?

Ms MacTIERNAN: I refer to the annual cost of the Town Planning Appeal Committee. The member for South Perth believes these things just get done. It costs \$1 million a year to run the Town Planning Appeal Committee.

Mr PENDAL: My first observation is that when one makes spirited defence of one's case, the minister loses her temper and directs a bit of abuse. That might work in the Caucus or the councils of the Labor Party.

Ms MacTiernan: Talk about the pot calling the kettle black.

Mr PENDAL: The minister is required to justify what she is trying to do without trivialising the objections raised on behalf of constituents. That is the first lesson she has to learn. Secondly, everything the minister has said in response to me in the past five minutes adds weight to my argument. She picked up my argument about the small debts division of the Local Court, the Strata Titles Referee and these tribunals and adjudicative bodies, and my point is that they were introduced to bring justice downwards. They were introduced to bring justice and adjudication and its costs downwards. The minister is working the system so that it all goes upwards.

The minister went on to say that I misunderstood what the Government is doing. She said, "All we are doing is simplifying the functions of the current tribunal." It is 46 pages of simplification; it is absurd! It is the lawyers' dream; it is the answer to all their prayers. If the Government wants to simplify something, why is there a 46-page Bill to do it? That makes it more mysterious; it makes it more difficult for ordinary people to follow. The battler will not have a snowball's chance in hell under these provisions. It will be more complex. People will need to go to lawyers, town planners or someone else in private practice. This system is introduced by a minister and a Government who say that they want to deliver justice at a lower cost or, at least in this case, deliver a sense of real adjudication to people who will be aggrieved. The minister does not need to talk about tilting at windmills and all that nonsense. These are real people who will face greater costs, and they will need to go to professional people for adjudication and justice, which at the moment most have been able to access by ministerial appeal.

The minister seems to have the impression that I think these ministerial appeals pop out of the air. No, I have never imagined that. I am sure, in common with other members who have helped hundreds of people with these problems over the years, these appeals do not come at no cost. I know that the bureaucracy does not deal with them at no cost; however, the minister is trying to tell us that some huge cost is associated with ministerial appeals. I acknowledge that, but the difference is that that cost is borne by the Government of the day; it is built into the department's budget. Under this system the cost will be borne by the people on the outside, the people who I, the minister and everyone else in this Chamber represent.

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Finally, why change something that is relatively low cost to something that will be significantly more costly? Why take something that is relatively simple and put all the mystifying elements of the law around it, so that bewilderment on the part of the ordinary people will be complete? This will be a monument to the minister when she leaves this Parliament, because it will be the downside for every decent person who currently has access to town planning appeals, and has access to those appeals for virtually nothing.

Ms MacTIERNAN: The Government is abolishing this system because it believes the system of ministerial appeals is flawed, and that there is a denial of natural justice and a lack of transparency that cannot be easily remedied. Since we got into government we have instituted a number of procedures that we believe have increased transparency. They are certainly not adequate, but it is the fundamental nature of the system that does not allow those issues to be addressed.

We also believe it is inappropriate for a minister to deal with these matters as a feudal lord. Our job is to get the policy settings right and to leave the individual implementation of what is basically a quasi-judicial function to tribunals specially established for that purpose. That is why we are doing it.

The member is wrong in saying that we have made this more complicated. The provisions within this legislation dealing with the Town Planning Appeal Tribunal are in part V. The existing part V is contained in legislation that is 24 pages long -

Mr Pental: So it is only 24 pages more complicated; I thought it was 46 pages more complicated.

Ms MacTIERNAN: I am trying to pay the member for South Perth some respect by answering his questions, notwithstanding what I may think of their merit, so I will continue. The current part V is 24 pages long and the new part V consists of 18 pages; that is, the legislation people will now deal with in this regard is six pages, or 25 per cent, smaller than was previously the case. I do not see that we can stand accused of making this more complicated.

A number of the other changes that have been made in this Bill do not directly relate to town planning appeals per se; they are provisions that correct some anomalies within the mechanisms of enforcement of local government orders and town planning schemes. Perhaps the member has not understood that as yet, and has presumed that the entire provisions within this legislation - the entire 46 pages he has referred to - in fact refer to the town planning appeals. We have more compact legislation that in many ways is plainer than it was previously.

The member for South Perth also referred to the need for people to have representation. We have modelled this on the Small Claims Tribunal and the small debts division, and it will be possible for people to access the system without the need for legal advice. It has a clear emphasis on informality in the hearing of class 1 cases.

Mr Pental interjected.

The ACTING SPEAKER (Mr Dean): Order, member for South Perth!

Ms MacTIERNAN: We have emphasised the degree of informality. Perhaps the member for South Perth is unaware of this, although I did mention during the second reading debate that the overwhelming majority of cases heard by the minister are submitted by a representative of the appellant. They are not commonly lawyers; they are most commonly planning consultants, surveyors or architects. The current system is not quite as the member for South Perth envisages. We believe it will be possible for people to represent themselves. We have expressly provided that they can have non-legal representation; we have also allowed the appellant in these class 1 cases - the simple cases - the right to veto legal representation for the respondent. All those things provide ample protection.

Ms SUE WALKER: Proposed section 37(1) refers to a president, a deputy president, senior members and ordinary members.

Does the Bill state how many senior members and ordinary members are to be appointed?

Ms MacTiernan: No, we discussed this before you came in.

Ms SUE WALKER: Does any Act in Western Australia give that latitude for appointing any number of members to such a body? Does any remuneration attach to the appointment of members and, if so, what is the remuneration to be paid to the president, deputy president, senior members and ordinary members? I note that the Governor can appoint members to the tribunal. Under proposed section 37(2) will the pool of members that the minister chooses come only from members who are appointed when the legislation commences, or from the current pool of members, if there is one? Is the minister preparing to extend the pool of members?

Ms MacTiernan: There are members of the tribunal because the tribunal exists at the moment.

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Ms SUE WALKER: What sort of members are they?

Ms MacTiernan: We have gone through this, but we will go through it again.

Ms SUE WALKER: Are there senior members and ordinary members in the tribunal at the moment?

Ms MacTiernan: No, there are only members of the tribunal. The member for Nedlands has recently come into the debate, but, as we have explained over and over again, we are restructuring the tribunal so that we will have different classes of appeals. Therefore, it is important and we think appropriate to have different levels of members, just as one has different levels of the judiciary in courts with varying jurisdictions.

Ms SUE WALKER: What would they be paid for their services?

Ms MacTiernan: This has not been decided.

Ms SUE WALKER: Will all of them be paid?

Ms MacTiernan: Absolutely.

Ms SUE WALKER: Are there currently members on the tribunal and how much are they paid?

Ms MacTiernan: There are part-time members on the tribunal. Their fees are set in a procedure with the Salaries and Allowances Tribunal.

Ms SUE WALKER: Under proposed section 37(2) it appears that the minister is in a position to appoint as many members as he or she wishes.

Ms MacTiernan: That is correct.

Ms SUE WALKER: Is any formula contained in the Bill that lets us know on what basis the minister will think it necessary to expeditiously deal with appeals? Is there any set number of members? On what basis is it said that the minister will consider it necessary to deal with the appeals and to increase the composition of the tribunal? How does proposed section 37(2) sit with proposed division 2, section 40(1) which states that the present president is to determine how the tribunal is to be constituted?

Ms MacTIERNAN: I said to my advisers at the time of drafting this that only lawyers would understand that provision. Obviously one lawyer at least does not understand the use of the word "tribunal". There is quite deliberately no set number of members because we are going into uncharted waters.

Ms Sue Walker: So it is an open cheque book.

Ms MacTIERNAN: We are making the assumption -

Ms Sue Walker: Is there a budget?

Ms MacTIERNAN: There is a budget.

Ms Sue Walker: What is it?

Ms MacTIERNAN: The budget is roughly a composite of that of the Town Planning Appeal Committee.

Ms Sue Walker: How much is it?

Ms MacTIERNAN: All of these questions have been addressed in the past 15 minutes.

Ms Sue Walker: I am entitled to ask, and that is the information I am after. How much is set aside for remuneration?

Ms MacTIERNAN: Most administrative tribunals have provision for some flexibility depending on the workload.

Ms Sue Walker: Which ones?

Ms MacTIERNAN: To continue, we do not resile from that. We do not believe that it is a justifiable criticism.

Ms Sue Walker: Which tribunals?

Ms MacTIERNAN: If the member for Nedlands is not happy with it she can move an amendment. We are very clear about the reason we are doing this. It is unclear what numbers will be needed. It will depend to a large extent on the workload. As I explained to the member for Merredin, our intention is to appoint the same number of senior members as are currently members on the tribunal. We are looking to appoint three or four full-time ordinary members and seven part-time ordinary members. We are determined to ensure that the system does not get bogged down. If there is a need to appoint more members to the tribunal to deal with these cases, we will be in a position to respond to that; hence the provision that the tribunal will comprise the number of persons the

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minister considers necessary to expeditiously deal with the appeals. The member asked for the current charges for and the salaries paid by the tribunal. The chairman is paid \$215 an hour and a member of the tribunal is paid \$70 an hour. Therefore, the total fees in the current budget for tribunal members are roughly \$200 000.

Ms Sue Walker: How much is the deputy president paid?

Ms MacTIERNAN: I will take that question and, on advice, get back to the member.

Ms Sue Walker: You have members at \$70 an hour, but what about senior as opposed to ordinary members?

Ms MacTIERNAN: We have not determined the levels of salaries that will be paid. It will be determined under the provisions of the Salaries and Allowances Act that require that we make certain submissions and that salaries and allowances are set as deemed appropriate.

Mr JOHNSON: I share some of the concerns of the member for South Perth, particularly where I think that the minister is abrogating some of her responsibilities and is taking away the access of ordinary members of the public to the minister.

Ms MacTiernan: The policy of the Bill has been settled.

Mr JOHNSON: I realise that. I was merely saying that I agree in many instances with what the member for South Perth said.

I realise that the Governor will make the appointment, but in truth the minister will, because the minister will recommend to the Governor who should be appointed to the tribunal. That is the way our system works, and I do not have a problem with that at all. The minister will make recommendations to the Governor as to the appointment of the president and other members of the tribunal.

Ms MacTiernan: That is correct.

Mr JOHNSON: Does that include every one of them?

Ms MacTiernan: How else would they possibly get appointed?

Mr JOHNSON: I merely want to know whether this applies to only the deputy president and the senior members. How far down the chain does it go? Other members of staff will be employed by the tribunal. Will the president of the tribunal recommend to the minister who should be appointed to the tribunal? Will the president recommend to the minister members of staff who should be employed; if so, which staff and in what capacity? Will the president have authority to employ or contract individuals such as consultants and advisers, whether town planning or legal advisers?

Mrs EDWARDES: I will follow on from the member for Nedlands. The minister indicated that some \$190 000 -

Ms MacTiernan: That was the salaries for the tribunal members.

Mrs EDWARDES: They will be paid per hour. My experience in the appointment of people in positions similar to that of a president who has eight years experience as a legal practitioner, is that they are usually appointed by the Salaries and Allowances Tribunal as equivalent to a District Court judge or a Supreme Court judge. Therefore, \$190 000 would not go far if it included the president's salary, particularly if that position were full time. Other ongoing costs must also be taken into account, including superannuation. That is a big issue for members of the judiciary. The minister indicated that there were some operational costs. I wonder whether those costs would be made available.

Ms MacTiernan: Operational costs of what?

Mrs EDWARDES: Of the Town Planning Appeal Committee and the tribunal. I think the minister intended to refer to that before her time ran out.

Mr COWAN: While the minister is getting advice, I will raise an issue that could be regarded as relatively trite.

Ms MacTiernan: You will fit in very well.

Mr COWAN: The minister must give some consideration to the definition of the membership of the tribunal. I do not think the word "ordinary" is necessary. The members of the tribunal should consist of the president, the deputy president -

Ms MacTiernan: If the member moves an amendment, I will agree to it.

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Mr COWAN: My understanding of the process is that if one amendment is agreed to, the clerks will ensure consequential changes are made, wherever the word “ordinary” appears. The Clerk is now telling me that that is not the case; therefore, I would be chasing a rainbow for the rest of this process.

I suggest that the members of the tribunal need not be referred to as “ordinary”. Perhaps some of the advisers at the Table will advise the minister on that matter. I would prefer that the tribunal consist of a president, a deputy president, senior members and members. I know that is trite, but why would a letter be sent to someone that said, “Dear sir or madam, you have just been appointed an ordinary member”?

Ms MacTiernan: The members would describe themselves as members.

Mr COWAN: Why not have senior members and members?

Ms MacTiernan: I do not have any attachment to the term “ordinary”.

Mr COWAN: There have been some ordinary performances in this place, and I do not know whether the minister can claim that she was not part of them - I cannot either!

Ms MacTiernan: We had some excellent performances as well. The terminology was taken from the Victorian Civil and Administrative Tribunal.

Mr COWAN: Victoria is a very ordinary place.

Ms MacTiernan: I can see that the member is practising to be a senator already.

Mr COWAN: I think I have made my point. It is unnecessary to move an amendment, but I hope the minister will consider this issue and explain to another place that we do not need to use the term “ordinary” members; we can satisfy ourselves by describing them just as members.

Ms MacTIERNAN: We cannot simply delete the word “ordinary”, although it is not anticipated that members will describe themselves as ordinary, because the rest of the legislation refers to members generically, meaning both senior and junior members.

Mr Cowan: It does not talk about ordinary members, and it does not refer to junior members.

Ms MacTIERNAN: The word “member” is used to describe the class; that is, the president and deputy president, as well as senior and ordinary members. We toyed with the idea of using the term “junior” members; however some of the members will probably be of a considerably advanced age. Many of the assessors on the Town Planning Appeal Committee are gentlemen from the retired gents’ brigade. Many of those members perhaps would not want to be described as “junior”. We do not have a particular attachment to the word “ordinary”. Members of the Town Planning Appeal Tribunal would simply sign their correspondence as a member of the Town Planning Appeal Tribunal. I understand the member’s concern, but I do not think that it will be a problem in practice.

The member for Hillarys wants to know how members of the tribunal will be appointed. The members’ appointments will be made in the standard way; that is, by the Government.

Mr Johnson: The minister is taking my question out of context. I know that they are appointed by the minister. The Governor officially appoints them, but the minister recommends them to the Governor. Will the president recommend to the minister who should be appointed to the tribunal?

Ms MacTIERNAN: I imagine that the Government effectively will appoint the members of the tribunal. We will take advice from a wide range of sources on who would be appropriate members. If the member for Hillarys speaks to the member for Kingsley, who has had experience as an Attorney General, she will tell him that even when making appointments to the Supreme Court, one must have regard for the wishes of the Chief Justice in that matter. Obviously, not all Attorneys General did, as we well know. However, most Attorneys General will discuss the matter with the Chief Justice.

The member also asked a question about staff. I am sure that the member for Hillarys, as is his wont, spent hours poring over the details of this legislation, only he missed this bit. Other officers of the tribunal will be appointed under the Public Sector Management Act. I commend proposed section 45 of this clause to the member.

Mr Johnson: I also asked whether the president could employ consultants as advisers under a contract arrangement.

Ms MacTIERNAN: We are running down a burrow. He or she will have powers similar to those in the existing tribunal and in tribunals generally. The budget figures for the Town Planning Appeal Committee for 2000-01

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was \$977 000. The Town Planning Appeal Tribunal's budget was roughly \$228 000, and the Land Valuation Tribunal's budget was \$289 000. Those two operate from existing premises.

Mrs Edwardes interjected.

Ms MacTIERNAN: No, that is a matter for us to put to the Salaries and Allowances Tribunal. It will take some time to make a decision on that. It has been given some thought, but there needs to be discussions within the profession so it is set at a level that is economic and sufficiently high to attract a person of the standing that we want.

Mrs Edwardes: It is my experience that the big issue is superannuation when one wants to attract the best candidate. If the minister has the view that the current chairman should continue and go full time, remuneration will be the key issue. The chairman would be able to earn far more in a different position.

Ms MacTIERNAN: The legal profession is always interested in remuneration, but it is not the only concern. I know of people who have taken on positions in the Supreme Court and have taken a considerable reduction in remuneration because they enjoy the opportunity to make decisions at that level and to provide a public service. I agree that, when dealing with the legal profession, remuneration is of critical interest, but it will not be the only concern.

**Proposed section put and passed.**

**Proposed section 38 -**

Mrs EDWARDES: This section deals with the qualifications of members. It is broad, wide-ranging and reflects the experiences of many assessors and members of the appeals committee and the tribunal. At first glance, I did not think that anybody was missed that could possibly have an interest that would be valuable in making decisions. The building industry told me that, given some of the matters that have been the subject of an appeal, particularly ministerial appeals, practical knowledge and experience of the building process would be needed from time to time. Most of the fields covered are broad and wide ranging. I do not know whether the building industry has raised with the minister whether building experience will be added as a necessary qualification of members. It might provide the minister with broader options as to who he or she can approach with an invitation to join the tribunal. It may provide expertise that does not have to be paid for, as would be the case with expert witnesses. It would provide the tribunal with people who would be aware of the implications of decisions made by the tribunal.

Ms MacTIERNAN: Similar representations have been made, but in the 200 appeals I have dealt with there has not been one where a knowledge of building codes would have been a relevant consideration. It was considered, but there can be no appeals against decisions made under the building codes, for example, in relation to a building licence. If we were incorporating into the legislation appeals against decisions on building licences, I would agree with the member. As we are not, there is no case for it. There is an argument that such cases should not be dealt with by the Minister for Local Government and that they are better brought before a tribunal. If that were the case, there would be some validity to the point. We have worked through this point but could not come up with a discretion that was appealable before the tribunal where practical building skills came into play as opposed to issues of architecture, urban design and engineering.

Mrs Edwardes: The minister's experience outweighs mine in this area. I believe that certain building codes will be adopted by local councils and would be incorporated under the Town Planning and Development Act. Is it not the case that regulations affecting the size of windows and other issues -

Ms MacTIERNAN: That is building design and is covered under architecture and urban design. It is not connected to building codes. It is as much a design feature.

**Proposed section put and passed.**

**Proposed section 39 -**

Mrs EDWARDES: I need clarification on this section. I wonder why it was included in this way. My query is related more to drafting than anything else.

Ms MacTIERNAN: It is standard procedure to have the machinery provisions included in a schedule. We must have a mechanism to have the schedule incorporated into the Bill. Such a section needs to be placed where it is contiguous with the other provisions relating to members so that people reading the legislation can readily see the provisions affecting the appointment and remuneration of tribunal members.

Mrs Edwardes: It seems strange to me that it was not an additional subsection of proposed section 38.

Ms MacTIERNAN: One is for qualifications and this is how they are to be dealt with.

**Proposed section put and passed.**

**Proposed section 40 -**

Mrs EDWARDES: Proposed section 40 is involved and complex in a number of ways. It will allow the President to determine how the tribunal is constituted for the purposes of each appeal. Subsection (2) states that the tribunal must have either one or three members. Subsection (3) states, except where a direction is given under subsection (4), what will constitute a tier 1 appeal. Tier 1 and tier 2 appeals are not referred to in the legislation. It is essentially what one derives from the interpretation of the sections. Tier 1 appeals are those which will be less complex than will be dealt with by the ordinary member of the tribunal. It will, more than likely, be one member of the tribunal rather than three. There will be a choice as to whether people have legal representation. I do not have a problem with the President determining how each of the appeals will be dealt with and by whom.

The critical issues that have been consistently raised with us are delays and costs. Picking up the benefits of the ministerial appeal system and adding all the other items, will be critical to ensuring that decision-making in appeals will be transparent and open, that information sharing will occur, and all the other elements the Government had in its mind in moving to a full tribunal system. Proposed section 40(3) provides a very narrow basis upon which tier 1 appeals will be defined. We have been told that the majority of appeals will fall under tier 1, the simpler category. I have proposed an amendment to increase the figure of \$250 000 to \$600 000, and the minister has brought in an amendment to increase it to \$500 000, rather than including it in the rules. That is a good way to go, otherwise there would be the argument of substantive legislation against delegated legislation. No Parliament wishes to get into that argument.

The mention of three lots in proposed section 40(3)(a)(ii) is an issue in the process of determining who will subdivide into three lots or into four. I note the minister's response to the "mums and dads" against "full commercial development" argument. It would be very complex to attempt to determine where the line is to be drawn about what will be regarded as a full commercial development. The examples I gave included that of the market gardener, who has worked very hard all his life on his land, and his reason for subdividing is to provide for his superannuation. I do not regard that as being a full commercial development, since it is still dealing with "mums and dads". The legislation allows the tribunal to determine where matters are to go. Some criteria have been set down - the president has the ability to transfer matters from tier 1 to tier 2, if they are seen to be more complex or sensitive. The amendments I have on the Notice Paper allow for the appellant to make the election, so that the appellant is determining the cost and duration of the appeal, and then takes the risk. This might be regarded as something of a novel approach, but it does allow appellants the ability to make a choice for themselves.

Mr COWAN: The member for Kingsley is quite right. The proposed new section 40 sets out the process, and as such is a very important section. I had only one significant problem with this. The minister has addressed this problem with the amendment on the Notice Paper. The National Party put forward the argument that an opportunity was needed for an appeal involving a single residence on a single lot to be heard as a simple appeal. Although the value may be argued over, I do not wish to equivocate about it. The amendment that has been put in place covers the requirements of the National Party, and as a consequence, there is no point in proceeding with the National Party's proposed amendment. The minister has successfully addressed the principles upon which the National Party sought to introduce its own amendments.

I agree with the member for Kingsley about the need for a very good process, but the principles behind this proposed section, along with the amendments the minister has brought in, go a fair way to addressing my concerns. It may very well happen that at some time in the future, the president of the tribunal, or those bodies associated with the development industry, particularly in the residential and commercial sphere, will have to come to the responsible minister and indicate whether the system is working. If a signal is given that serious delays exist in the time taken for appeals, it may be necessary to introduce new amendments to place a timetable in which determination of appeals should be delivered. That is not relevant to this proposed new section. The relevance of this section is the way in which the president must determine how the tribunal will be constituted. I am comfortable with the amendment the minister has proposed covering the necessary eligibility for simple appeals, and the powers given to the president of the tribunal under the other proposed sections are a very good starting point for the process which must be adopted and followed by the tribunal. I look forward to seeing how this will work in practice, but I think it is reasonable, particularly with the proposed amendment.

Ms MacTIERNAN: I thank members for their contributions. A couple of things have been done here to address some of the concerns raised during the second reading debate. The amendments the Government is proposing introduce a new category of appellants that may opt for class 1, and it is hoped that this will pick up the single house on a single lot where the value of the house is less than \$500 000. Any house valued at up to that amount

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can be a class 1 appeal. There may be different definitions of what constitutes a battler, but any such definition should be covered in that category. The provision that makes it clear that, where both parties agree that a matter can be dealt with as a tier 1, that can take place, has been moved from the rules to the substantive legislation.

Mrs Edwardes: If the appellants determine that they would like a tier 1, irrespective of whether it fits within the criteria of a tier 1, and the other side agrees, it can be a tier 1.

Ms MacTIERNAN: Yes, but as with all of the other tiers, exceptional circumstances may lead the president to decide that that is inappropriate.

Mrs Edwardes: That meets the other point that I was going to make - giving the president the opportunity, if a matter fell within a tier 2, to make it a tier 1.

Ms MacTIERNAN: The Government has decided it would be better to put the ball in the court of the appellant. If the appellant makes an application to make a matter a tier 1 matter, and if the respondent and any other parties had no objection, provided it did not, in the president's view, give rise to any serious problems, that matter could be treated as a tier 1 matter. If people want these matters to be dealt with in an expeditious, summary fashion, they will have the capacity to do so.

Mrs EDWARDES: The minister obviously listened to the Opposition's contribution to the second reading debate. It does not go as far as others would have liked, but it goes some way. The minister has put forward an amended figure of \$500 000, which will lift the value from \$250 000.

Ms MacTiernan: That is in relation to housing.

Mrs EDWARDES: Yes, to single housing. Is that a replacement clause?

Ms MacTiernan: No, a new clause.

Mrs EDWARDES: That figure of \$500 000 is picked up for single housing. That has basically been the argument. Members spoke about the inequity of property values between the outer and inner metropolitan areas and between regional areas. That amendment will meet, in some way, those concerns.

I will return to the argument concerning the figure of three lots as the cut-off between minor and major subdivisions. How did the minister determine that figure? Her direction statement referred to complex matters as being those involving 200 lots. That is a big jump. That figure might have been plucked out of the air, but there is a big jump between three lots and 200 lots. I am not advocating the figure of 200 lots. Why can it not be four lots? How are major and minor subdivisions defined? The minister has defined a minor subdivision as one involving three or fewer lots. All others - of four lots and above - are major subdivisions. I do not know anyone in the community who would consider a four or six-lot subdivision to be a major subdivision. I would like to know how the definition of minor subdivisions was determined.

The other question I have - and I do not understand it at all - is how will the new concept of three-dimensional freehold title lots be considered? I have been advised that it complicates the issue. I do not understand what the term "three-dimensional freehold title lots" means. Perhaps the minister could advise the House how it will fit within this legislation. I understand that it will cause a major concern to some large inner city projects and will perhaps complicate the decision-making process in terms of whether it fits within this criteria.

Ms MacTIERNAN: One must draw the line somewhere. Whether setting out the jurisdiction for the Local, District or Supreme Courts, one must come up with a figure that represents the upper limit of that jurisdiction. People always ask why another figure was not determined. The Government wanted to avoid situations in which a person of limited resources would be embroiled in a legal process that he could ill afford. The Government made a judgment based on practical experience that the majority of so-called domestic subdivisions involve two or three lots. A four-lot subdivision requires a substantial cost undertaking of headworks and general subdivision costs. It is not something that a person of little means is in a position to undertake.

Mrs Edwardes: Are headwork charges not included for subdivisions of three lots or less?

Ms MacTIERNAN: Yes, they are, but the scale of headwork charges and subdivision costs are such that if someone has the resources to run a four-lot subdivision, he has the resources to get a planning consultant for a proper tribunal hearing. The Government had to set the bar somewhere. There is nothing magical about that figure, but from my experience and from talking to tribunal and committee members, it was agreed that the vast majority of subdivision applications from non-professionals are for two or three lots. The Government decided to go with that cut-off on that basis.

The member for Kingsley also asked a question about vacant cubic lots.

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Mrs Edwardes: You will confuse me even more. Is that what I was talking about when I referred to three-dimensional freehold title lots?

Ms MacTIERNAN: The advice is that they cannot be approved under the Strata Titles Act 1985.

Mrs Edwardes: Can you explain what this is about?

Ms MacTIERNAN: I understand the notion is that before people build on a lot that will be strata titled, they can notionally divide it not just on the horizontal, but on the vertical as well. Legal advice on this issue is that it cannot be done under the powers set out within strata title legislation. It can be done once a building is on site. Airspace cannot be divided.

Mr COWAN: I just noticed one issue that I would like to raise generally, rather than when the minister introduces her second proposed amendment to clause 11, which would add the words -

an appeal where the appellant has elected at the time of commencing the appeal to have the appeal determined by a single ordinary member, and the other parties to the appeal have agreed with that election;

That is interesting, as it now appears that the minister will allow third parties to have some say on how the appeal process proceeds. If I were the appellant and elected to have a simple appeal with a single-member sitting of the tribunal, I would not like the prospect of other parties saying that they wanted a full tribunal hearing. I would like some assurance, either now or once the minister has moved the amendment, that the appellant will have a greater ability to determine how the appeal shall proceed, either as a simple appeal or as an appeal in which there is no representation. That will be important if the minister, in this process, wants to maintain the acknowledged simplicity, speed and efficiency of the existing ministerial appeal process. If there is a capacity for parties to the appeal to have some say about whether it will be a simple appeal, or for third parties to say that they want legal representation, it will inevitably end up in the small debts court. Far too often these become matters of legal argument, rather than settlement of a dispute between two parties.

Ms MacTIERNAN: I understand the point made by the member for Merredin.

Mr Cowan: The ordinary member for Merredin this time!

Ms MacTIERNAN: The future senator. This problem is more theoretical than real. We are basically setting out a raft of situations in which it will be a class 1 appeal as of right. We then wanted to provide a more general provision, so that any appeal could be moved into the class 1 category if the parties agreed. It is true that that could give a third party some control over that process.

Mrs Edwardes: Won't that just be the respondent?

Ms MacTIERNAN: It will primarily be the respondent. It is important to remember that it must be a joined third party. It will not be simply someone who makes a submission, but someone who is joined as a party for costs. If someone is joined as a party, he is liable for costs. He puts himself in the firing line on all counts. Experience shows that very few people apply to be joined as a third party. It is a great rarity. It is likely that, even under our model, the vast majority of third parties will use the provision to make a submission. They may have limited rights if they make a submission rather than be joined as a party, but they also have limited obligations and are not exposed to orders for costs.

I understand the member's point, but I do not believe it will create the problem he fears. This will be a special exemption to allow any matter, no matter how complicated, to be brought within the class 1 regime; therefore, it is important that we have some control over the mechanism.

The DEPUTY SPEAKER (Ms Guise): The member for Hillarys.

Mrs EDWARDES: I am the member for Kingsley. The Deputy Speaker is catching the minister's disease.

Mr Cowan: It is contagious.

Mrs EDWARDES: I certainly hope not; although he has a place by the sea. My electorate is a bit further inland.

Given the minister's response and the two amendments she will move, I will not move my amendments. The first amendment I planned to move would have increased the value of a development on which an appeal is classed from \$250 000 to \$600 000. The minister's amendment will increase it to only \$500 000, but that is consequential; I prepared the amendment because I wanted to make the point that the amount in the Bill is far too low. The second amendment would have allowed the appellant a choice in the level of appeal, and the minister has gone some way towards that, even though, as the member for Merredin said, that could be knocked back. However, her amendment will allow people who do not necessarily have all the resources at their fingertips to approach the other side. For example, local governments in regional areas will be conscious of the

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costs and want to appeal under the first tier. It will not always be the case that the appeals that do not fit into the level 1 criteria will be the legally and factually complex issues. The minister's amendment is appropriate, even though it does not go as far as the one I planned to move. However, I will not move my amendments.

I ask the minister to put on the record something that has been raised with me on a number of occasions and which I clarified during my personal briefings. Given the confusion in the community, it is important that the minister put on the public record whether the value of the development, as referred to in the Bill, incorporates the value of the land in the development. If an application relates to a development, it should refer to the cost of that development and, therefore, not necessarily incorporate the value of the land. Will the minister put on the record how the figure of \$500 000 will be determined?

Ms MacTIERNAN: The figure is based on the value of the development. When people complete development applications, they are required to nominate the cost of the development. That does not, in any way, shape or form, incorporate the value of the land. The figure relates to the value of the works to be done on the land. The same sort of concept is used to set fees for development applications. There is nothing unusual about that proposal.

For the further enlightenment of the member for Merredin, third parties are most often joined when the respondent is the Western Australian Planning Commission. In those circumstances, the local authority or the Heritage Council of Western Australia may be joined as parties.

Mrs Edwardes: Or other state government agencies such as the Water and Rivers Commission.

Ms MacTIERNAN: Yes.

Mr COWAN: Given the amendment to be moved by the minister, I will not proceed with the National Party's amendment to proposed section 40.

Ms MacTIERNAN: I move -

Page 13, after line 20 - To insert -

- (ii) the determination of, or conditions imposed in respect of, a planning application to commence a development of a single house on a single lot of a value that is less than \$500 000 or such other amount as is prescribed by the regulations, or any development ancillary to that development;

Page 13, after line 26 - To insert -

- (b) an appeal where the appellant has elected at the time of commencing the appeal to have the appeal determined by a single ordinary member, and the other parties to the appeal have agreed with that election;

#### **Amendments put and passed.**

#### **Proposed section, as amended, put and passed.**

#### **Proposed section 41 -**

Mrs EDWARDES: Proposed section 41 deals with the president responsible for administration. The president will be responsible for directing the business of the Town Planning Appeal Tribunal and the determination of the appeals, and we have already dealt with the issue of when and how appeals are likely to be regarded as simple or complex. The president is also responsible for the management of the administrative affairs of the tribunal and may determine the places and times for sittings of the tribunal. We have spoken about why the position of president needs to be full-time. We will speak about the role of the principal registrar later.

When I visited the Chief Judge of the New South Wales Land and Environment Court, Mahla Pearlman, she indicated that she found the court users group very helpful with the administration and improvement of the services of the court. The court users group is a consultative committee that provides recommendations to the Chief Judge to improve the functions and services provided by the court, and it ensures that the services and facilities of the court are adapted to the needs of litigants and their representatives. The committee meets with the Chief Judge three times a year. The meetings are reasonably informal. No formal minutes are kept, but a short résumé of the discussion is forwarded to members after each meeting. Each member may nominate topics for discussion, which are circulated prior to each meeting. The other members who attend from the court users group included Justice Pearlman herself, Justice Lloyd, Peter Jensen, a senior commissioner, Stafford Watts, commissioner, and the acting registrar. They are the people who represent the court. The bodies who are invited to be part of the court users group are broad and many. It is a forum for discussion and consultation that makes

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recommendations to the Chief Judge. Given the newness of the tribunal in Western Australia, this would be an excellent proposition.

The bodies that have been invited to be members of the court users group include the Australian Institute of Building Surveyors, the Australian Institute of Environmental Health, the Australian Institute of Landscape Architects, the Australian Property Institute Inc, three government departments - the Department of Land and Water Conservation, the Department of Local Government and the Department of Urban Affairs and Planning - the Environment and Planning Law Association, the Environmental Protection Authority, the Environmental Defender's Office, the Ethnic Communities' Council of New South Wales, the Housing Industry Association Ltd, the Institution of Engineers, the Australian Institution of Surveyors, the Law Society of New South Wales, the Local Government Association of New South Wales, the Local Government Lawyers Group - I do not know that there is such a body in Western Australia - the Nature Conservation Council of New South Wales, the New South Wales Bar Association, the Property Council of Australia, the Royal Australian Institute of Architects, the Royal Australian Planning Institute and the Urban Development Institute of Australia.

The Chief Judge is very complimentary about the way this body has worked, and I commend it to the minister.

Ms MacTIERNAN: This is something that we would be prepared to support. We have already had some discussions with the chairman.

**Proposed section put and passed.**

Debate adjourned, on motion by Ms MacTiernan (Minister for Planning and Infrastructure).