

Swan Valley Protection Bill 2016

EXPLANATORY MEMORANDUM

Background

The purpose of this Bill is to repeal the *Swan Valley Planning Act 1995* and introduce a more effective planning framework for the Swan Valley. It authorises the creation of the Swan Valley Development Plan, which is a strategic document setting out the planning, development and land use vision for the Swan Valley. The following explains how the Act, together with the development plan, will operate to protect the rural character of the Swan Valley.

PART 1 – PRELIMINARY

This part contains the short title and relevant commencement provisions.

Clause 1: Short Title

The short title of the Bill will be *Swan Valley Protection Bill 2016*.

Clause 2: Commencement

Provides that clause 1 comes into operation on the day of Royal Assent and the rest of the Bill on a day fixed by proclamation, and different days may be fixed for different sections.

Clause 3: Terms Used

This clause contains definitions of various terms used in the Bill. Many of these terms adopt definitions used in the *Planning and Development Act 2005* to promote consistency and certainty within the planning system.

Clause 4: Swan Valley

This clause defines the boundaries of the Swan Valley by reference to a plan certified by the Minister and held at the offices of the Western Australian Planning Commission (Commission). The map in Schedule 1 of the Bill is indicative of the Swan Valley area. The boundaries are consistent with that established under the *Swan Valley Planning Act 1995*, except for a section of the southern boundary which has been modified slightly, to exclude a portion of industrial land near the intersection of Reid Highway and Great Northern Highway.

Clause 5: Act Binds the Crown

This Bill provides for the Crown to be bound by its provisions.

PART 2 – SWAN VALLEY DEVELOPMENT PLAN

Clause 6: Swan Valley Development Plan

This clause authorises the creation of the Swan Valley Development Plan (referred to as “the development plan”), and regulates what it must provide for, together with what matters it may address.

- 6(1) – establishes that the development plan is to be created and approved in accordance with this part of the Bill.
- 6(2) – requires the development plan to be created with the express purpose of protecting the rural character of the Swan Valley.
- 6(3) – requires that the development plan contain provisions which describe the Swan Valley’s physical environment, its planning context and the region in which it is located.
- 6(4) – identifies what the development plan may, but need not, make provision for. This includes matters such as development, land use, zoning, subdivision and infrastructure or services for the Valley.
- 6(5) – this provision stipulates that the development plan does not have the status of subsidiary legislation. This is significant in terms of understanding the development plan’s status. A local or region planning scheme has the status of subsidiary legislation (s5 *Interpretation Act 1984*). The development plan does not have this status. Instead it is a strategic document used to inform the preparation and amendment of such schemes.

As such, this clause authorises the creation of an instrument, which outlines the strategic planning vision for the Swan Valley and contains policy guidance and controls to ensure future land use, development and subdivision aligns with that vision. The overriding purpose of this plan, and its contents, must be the protection of the Swan Valley’s rural character.

Clause 7: Preparation and submission of development plan proposal

This clause regulates how the development plan is created and submitted to the Minister for approval.

- 7(1) – invests the power to initiate the creation or amendment of the development plan in the Minister and identifies that the Commission is the body required to undertake this process.
- 7(2) – provides that, in response to the Minister’s written request, the Commission is to prepare a suite of documents that together comprise what is termed a “development plan proposal.” This must include the development plan itself (or

amendment thereto), and any document that constitutes an amendment to any planning scheme applicable to the Swan Valley. This enables the Commission to prepare amendments to any local planning scheme, in addition to its planning scheme(s). Ordinarily, the local government prepares amendments to its local planning scheme. The Commission's power under this Bill is limited to such amendments necessary to ensure that the scheme is consistent with the development plan or gives effect to it. The Commission is given this power to ensure simultaneous amendment to both planning schemes.

- 7(3) – Preceding subclause (7(2)(b) to (d)) refers to a “proposed development plan.” Clause 7(3) is a drafting device which is used to clarify when that reference applies to a new development plan or amendments to an existing one.

The distinction is necessary because, whilst the Minister may ask the Commission to prepare a development plan, or amend an existing one, the nonspecific phrase “proposed development plan” is used in subclauses 7(2)(b) – (d) to describe both.

Including this clause enables each of cl. 7(2)(b), (c) and (d) to be drafted more simply. Without it, those provisions would need to separately address proposals that amend a development plan and then proposals that create a development plan.

- 7(4) – This subclause requires the Commission to comply with timeframes set by the Minister.
- 7(5) – This subclause identifies who the Commission should consult when formulating a development plan proposal. Consultation with the Environmental Protection Agency and any local government for the Swan Valley is mandatory, but the Commission has discretion as to which other public agencies or persons it consults with. Regard must be given to submissions received as a result of consultation. Requirements for any public consultation are to be set out in regulations, which will be developed. The head of power for creating such regulations is contained in cl. 18 of this Bill.
- 7(6) – provides the Commission with a broad discretion as to how it undertakes consultation that is either required of it, or available to it.

Clause 8: Requirement for further consultation

Under this clause, the Minister can direct the Commission to undertake further consultation on a development plan proposal.

When the Minister receives a development plan proposal, he or she has the right to issue a written notice to the Commission directing it to undertake further consultation on the plan. As the Minister may determine the contents of the notice, he or she has considerable discretion to decide what consultation must be undertaken and how. The Minister may require the Commission to report on the consultation undertaken.

Clause 9: Approval of development plan proposal

This clause regulates the finalisation of the development plan and any scheme amendments prepared by the Commission.

- 9(1) – upon receipt of a development plan proposal the Minister may approve it; request the Commission change it and resubmit it for approval, or refuse to approve it.
- 9(2) – This provision prevents the Minister from approving a development plan proposal unless it complies with the content and purpose requirements stipulated in clause 6. As mentioned in the explanation of cl. 6, the development plan's overriding purpose must be to protect the Swan Valley's rural character. The Minister cannot approve a proposal which departs from this.
- 9(3) – If the Minister approves of the proposal, subclauses (a) – (d) provide that the documents comprised in a development plan proposal take effect on a day termed the "commencement day." This is a day stipulated in a gazettal notice published by the Commission following the Minister's approval. By virtue of these subclauses, scheme amendments made under this Bill are given the same force and effect as if they were processed under the principal act governing such matters, namely the *Planning and Development Act 2005*.

Clause 10: Requirements for notification and publication

This clause regulates the communication and publication of the Minister's approval of a development plan proposal. It also identifies what constitutes the "commencement day," being the day a development plan and any scheme amendments take effect.

The *Planning and Development Act 2005* requires, that when a planning scheme is created or amended, it must be published in the Government Gazette. This clause creates a similar requirement.

- 10(1) – requires the Commission to provide a Swan Valley local government notice of the Minister's approval and a copy of the development plan and associated scheme amendments. The Commission must also publish, in the *Government Gazette*, any scheme amendment contained in the proposal, together with a notice of the Minister's decision (the Notice).
- 10(2) – a Notice published under subclause (1) must specify on what day the approved proposal takes effect, identify the documents contained within it and where physical and electronic copies are located. The date selected under subclause (2)(a) is the "commencement day" referred to in clause 9(3).
- 10(3) – the date on which the proposal takes effect must not be earlier than the date of publication. As such, the Notice may specify the proposal takes effect after its gazettal, but not before.

- 10(4) – this subclause permits the publication of scheme amendments from the proposal, without any maps, diagrams or plans. This is consistent with the process in s54(a) and s87(5) of the *Planning and Development Act 2005*, which permits the Commission to publish a planning scheme, or amendment thereto, in the *Government Gazette* absent maps, diagrams or plans.

Clause 11: Requirements for documents to be publically available.

Documents within the development plan proposal must be freely available to the public, in both electronic and physical formats.

- 11(1) – After publication, the Commission must ensure the documents contained within the proposal (i.e. the development plan and any scheme amendments) are available on its website and can be inspected at its offices, for free, during business hours.
- 11(2) – Each Swan Valley local government must, after publication, also ensure the said documents can be inspected at its offices, for free, during business hours.

Clause 12: Revocation of development plan

These are mechanical provisions regulating how a development plan can be revoked.

- 12(1) – This subclause sets that a development plan may be revoked either by the approval of a subsequent development plan, or, the Minister may revoke a development plan by approving an instrument of revocation.
- 12(2) – under this subclause the Commission must publish notice of a development plan's revocation in the *Government Gazette*.
- 12(3) – stipulates when revocation through a subsequent development plan is effective. This occurs when the new development plan takes effect.
- 12(4) – stipulates that revocation through a written instrument takes effect when notice of it is published, or, on any later date specified in the notice.

Clause 13 – Instruments prepared under local planning scheme

This provision requires a Swan Valley local government to amend any policy, strategy or instrument made under its local planning scheme to comply with the development plan. Such instruments usually guide decision making under a scheme, and compelling consistency with the development plan advances the Bill's objectives. Further, as a scheme is subsidiary legislation it will override a policy, strategy or instrument to the extent of any inconsistency. For this reason, such instruments should be updated forthwith to correctly accord with the local planning scheme.

Clause 14 – application of *Planning and Development Act 2005* to amendments to planning schemes under this Part.

The *Planning and Development Act 2005* establishes how a region planning scheme, local planning scheme or improvement planning scheme can be amended. In the case of local planning schemes the process is augmented by the *Planning and Development (Local Planning Schemes) Regulations 2015*.

By virtue of clause 14, the existing scheme amendment process will not apply to schemes that are amended pursuant to this Bill. This clause provides for an expedited scheme amendment process, reflective of the fact the development plan will undergo extensive consultation and review, and the respective scheme amendments will simply reflect the development plan's provisions. Applying the existing scheme amendment process would largely repeat the consultation and review already undertaken and delay the development plan's implementation.

- 14(1) – Part 4, Divisions 2, 3 and 4 of the *Planning and Development Act 2005* regulate the making or amendment of region planning schemes.

Under this subclause, these provisions will not apply to region planning scheme amendments under this Bill.

- 14(2) – sections 79 to 83 of the *Planning and Development Act 2005* stipulate when, concerning the preparation or amendment of a local planning scheme, the Heritage Council's advice is required, the Environmental Protection Authority should be consulted and when consideration must be given to the a Swan River Management Programme and consultation undertaken with persons likely to be affected. Part 5, Division 4 of the *Planning and Development Act 2005* concerns advertising scheme amendments and approval by the Minister.

By virtue of this subclause, these provisions together with regulations relating to local planning schemes (such as the *Planning and Development (Local Planning Schemes) Regulations 2015*) will not apply to local planning scheme amendments under this Bill.

- 14(3) – sections 79 to 83 and Part 5, Division 4 of the *Planning and Development Act 2005* apply to the creation or amendment of an improvement scheme. Sections 122B (3A) – 122B (3) of the *Planning and Development Act 2005* concern consultation with local governments affected by the proposed improvement scheme, and applies the *Planning and Development (Local Planning Schemes) Regulations 2015* to improvement schemes.

By virtue of this subclause, these provisions together with regulations relating to local planning schemes (such as the *Planning and Development (Local Planning Schemes) Regulations 2015*) will not apply to improvement scheme amendments under this Bill.

- 14(4) – the *Planning and Development (Local Planning Schemes) Regulations 2015* contains a model scheme text. This is a template scheme, containing standardised provisions. Local governments may use this when creating or updating their schemes. Local governments may vary or exclude the model provisions if the Minister is satisfied that exclusions or variations are required to address exceptional individual local government circumstances.

This subclause ensures that the same flexibility is available to any local planning scheme amendment made under the Bill.

Importantly, the provisions set out in Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* will apply to the local planning scheme in the ordinary way. Those provisions constitute “deemed provisions” in terms of s257B of the *Planning and Development Act 2005*.

PART 3 – MISCELLANEOUS

Clause 15: Review of the Act

This clause ensures the Act is reviewed and a report on the review presented to Parliament.

- 15(1) – this subsection requires the Minister to review the Act 5 years after it has been in operation.
- 15(2) – requires the Minister to report on this review to both Houses of Parliament.

Clause 16: Delegation

This clause provides for the Minister to delegate his or her powers or duties.

- 16(1) – this subsection authorises the Minister to delegate to any person, any of his or her powers or duties under the Bill, except for this power of delegation.
- 16(2) – provides for any delegation the Minister makes to be in writing and signed by the Minister.
- 16(3) – provides that a delegate, is considered to have complied with any conditions or terms stipulated in the delegation instrument, unless the contrary is shown.
- 16(4) provides that this clause does not preclude the Minister performing a function under this Bill through an agent or an officer. This clause reflects the common law “Carltona” principle that recognises Government officials have agents, who may be authorised to carry out certain tasks, without having a formal delegation to do so.

Clause 17: Protection from liability

This clause provides protection from liability for persons who, in good faith, perform functions under the Act. This is consistent with the recognition that acts under this Bill will be of a policy rather than operational nature.

- 17(1) – this subsection provides protection from liability for wrong doing to a person who performs, or purports to perform, a function under this Act, provided it is done in good faith.
- 17(2) – the protection from personal liability for wrongdoing in subsection (1) does not exempt the Commission, State or local government from liability, which arises from the actions referred to in subsection (1).
- 17(3) – Under this subsection, the protection provided in (1) applies even though what was done could have occurred independently of this Act.
- 17(4) – this subsection clarifies that the protection afforded under this section extends to circumstances involving a failure to take action i.e. to an omission.

Clause 18: Transitional provision: approval of first development plan

This clause regulates the process by which the first development plan is created. These provisions release the Commission from complying with the formal consultation requirements under the Bill. This enables the proposed plan, which has been advertised and consulted upon, to be submitted to the Minister shortly after the Bill is enacted. Subjecting it to the Bill's formal consultation requirements would largely repeat the consultation already undertaken and delay its implementation.

These provisions also permit the scheme amendments to be submitted to the Minister after the development plan, rather than concurrently. This ensures that if the development plan, but not the scheme amendments, is ready for approval, preparation of the amendments will not delay the development plan's submission to the Minister.

- 18(1) – defines the term “associated planning scheme amendments” by reference to the documents that would be required under cl.7(2) of the Bill. Clause 7 concerns the preparation and submission of a development plan proposal, and subsection (2) identifies the scheme amendments that should be included in this.
- 18(2) – clarifies this section only applies to the first development plan.
- 18(3) – This permits the Commission to submit the first proposed development plan, and necessary scheme amendments, absent a Ministerial request for its preparation and without complying with the consultation requirements under cl.7(5).
- 18(4) – This subsection grants the Commission the flexibility as to when it submits certain documents to the Minister. It may submit the proposed plan together with the scheme amendments, or it may submit the scheme amendments at a later stage.

- 18(5) – If the Commission submits only the proposed development plan to the Minister, the scheme amendments must be submitted as soon as possible thereafter. Further, the subclause provides for any approved development plan to prevail over the existing schemes, in the event there is an inconsistency, until such time as the schemes are amended.
- 18(6) – this subsection operates to ensure that the submission, approval and publication processes outlined in clauses 7 - 11 apply to the development plan and scheme amendments for the first development plan, whether they are submitted to the Minister together or separately.

Clause 19: Regulations

- 19(1) – provides that the Governor may make regulations prescribing all matters that are necessary or convenient to be prescribed for giving effect to the purposes of the Act.

PART 4 – REPEAL AND CONSEQUENTIAL AMENDMENTS

DIVISION 1 – REPEAL

Clause 20: *Swan Valley Planning Act 1995* repealed.

This clause repeals the current *Swan Valley Planning Act 1995*.

DIVISION 2 – CONSEQUENTIAL AMENDMENTS

Subdivision 1 – Planning and Development Act 2005 amended

Clause 21: Act Amended

Stipulates that this subdivision of the Bill operates to amend the *Planning and Development Act 2005*.

Clause 22: Section 4 amended

This clause deletes existing Swan Valley definitions and replaces the term “Swan Valley” with a definition based on this Bill.

Clause 23: section 36 amended

Section 36 imposes restrictions that apply to the making or amending of the Metropolitan Region Scheme. Clause 22 will add a new restriction at s.36(e). The purpose of this clause is to provide that the Metropolitan Region Scheme applying to the Swan Valley is not to be made or amended in a manner that is inconsistent with the development plan.

Clause 24: section 40 deleted

Section 40 refers to consultation with the Swan Valley Planning Committee. The repeal of the *Swan Valley Planning Act 1995* dissolves this committee. This section is therefore deleted by clause 24.

Clause 25: section 47 deleted

Section 47 refers to consultation with the Swan Valley Planning Committee. The repeal of the *Swan Valley Planning Act 1995* dissolves this committee. This section is therefore deleted by clause 25.

Clause 26: section 48 amended

This deletes a reference to section 47, which is deleted by clause 25.

Clause 27: section 49 amended.

This clause deletes references to reports prepared by the Swan Valley Planning Committee which will be dissolved.

Clause 28: section 57 amended.

Section 57(2) prevents changes to zoning of land in the Swan Valley from being processed as a minor region scheme amendment. This would conflict with the new processes contemplated under the Bill. Section 57(2) is therefore deleted.

Clause 29: section 71 amended

Section 71 contains restrictions that are to apply to the making or amendment of certain local planning schemes. This clause inserts an additional restriction in s.71. The purpose of new subclause (c) is to provide that a local planning scheme applying to the Swan Valley is not to be made or amended in a manner that is inconsistent with the development plan.

Clause 30: section 78 deleted

This clause concerns consultation with the Swan Valley Planning Committee in relation to preparing or amending a local planning scheme that applies to the Swan Valley. It is deleted, as this committee is dissolved by the repeal of the *Swan Valley Planning Act 1995*.

Clause 31: section 112 amended

Section 112 relates to the declaration of a planning control area. This clause removes references to the Swan Valley Planning Committee (which will be dissolved) and inserts a requirement that the Commission have regard to the development plan, before seeking approval to any planning control area declaration.

Clause 32: section 119 amended

Section 119 concerns the preparing and making of an improvement plan. This clause inserts a specific restriction for such plans in the Swan Valley. The purpose of new subclause 119 (3D) is to provide that an improvement plan applying to the Swan Valley is not to be made or amended in a manner that is inconsistent with the development plan.

Clause 33: section 122B amended

Section 122B concerns the preparation or amendment of an improvement scheme. This is done using the provisions that regulate the creation or amendment of local planning schemes. It is necessary to include the reference to the new subsection 71 (c) (inserted by clause 29 above) to require that an improvement scheme applying to the Swan Valley is not made or amended in a manner that is inconsistent with the development plan.

Section 122B(2) is deleted as it refers to the Swan Valley Planning Committee, which is dissolved by the repeal of the *Swan Valley Planning Act 1995*.

Clause 34: section 134 amended

Section 134 (3) – (8) outlines referral and consultation requirements with the Swan Valley Planning Committee, where applications for subdivision approval or for approval to certain dealings under section 136 concern land in the Swan Valley. This is deleted, on account of the committee's dissolution.

Subdivision 2 – Swan and Canning Rivers Management Act 2006.**Clause 35: Act amended**

This subdivision amends the *Swan and Canning Rivers Management Act 2006*.

Clause 36: section 67 amended

This clause deletes existing Swan Valley definitions and replaces the term “Swan Valley” with a definition based on this Act.

Clause 37: section 73 amended

Section 73 relates to consultation with local governments or certain authorities about development applications determined under the *Swan and Canning Rivers Management Act 2006*. Where such an application concerns land in the Swan Valley, the Swan Valley Planning Committee must be consulted. Clause 37 deletes the provisions relating to referral to this committee.

Clause 38: section 75 amended

Under section 75, the CEO of (currently) the Department of Parks and Wildlife must prepare a draft report on an application to be determined under the *Swan and Canning Rivers*

Management Act 2006. This draft report must be circulated to the parties who were consulted on the application. This will include the Swan Valley Planning Committee if the land in question relates to the Swan Valley. Clause 38 deletes the provisions relating to providing the draft report to the committee.

Clause 39: Section 76 amended

Section 76 concerns the CEO's final report on the development application. The CEO provides this to the Minister for the Environment, the applicant and other parties. If the Swan Valley Planning Committee was consulted during the application, it will receive a copy. Clause 39 deletes provisions relating to this committee.

Clause 40: Section 80 amended

Under Section 80 the Minister for the Environment can determine the development application. Save for the limited circumstances in s80(d)(i) and (ii), the said Minister cannot approve the application in a manner contrary to the Swan Valley Planning Committee's advice. Clause 40 deletes this restriction. In its place it provides that the Minister cannot determine matters contrary to the development plan.

Clause 41: section 82 amended

Section 40 concerns the Minister giving notice of changes to his or her decision. The section contemplates notice being given to the Swan Valley Planning Committee, in certain circumstances. This is deleted, on account of the committee's dissolution.

Clause 42: section 87 amended

The CEO may, under section 85, approve certain developments. Under s.87 the Minister may revoke this. If the Minister exercises this power, notice is to be given to certain persons or bodies which can include the Swan Valley Planning Committee. The provision relating to this notice is to be deleted, on account of the committee's dissolution.

SCHEDULE 1 – MAP OF THE SWAN VALLEY (INDICATIVE ONLY)

This schedule contains a map that is indicative only of the plan entitled the "Swan Valley Development Plan Area", which contains the geographically correct depiction of the area, and is certified by the Minister and held at the offices of the Commission.