PARLIAMENT OF WESTERN AUSTRALIA

THIRTY-NINTH REPORT

OF THE

LEGISLATION COMMITTEE

IN RELATION TO THE

Planning Legislation Amendment Bill 1995

Presented by the Hon Derrick Tomlinson (Chairman)

39

May 1996

Members of the Committee

Hon Derrick Tomlinson MLC (Chairman)
Hon Bill Stretch MLC
Hon Ross Lightfoot MLC

Staff of the Committee

Stuart Kay (Advisory/Research Officer)
Jason Agar (Committee Clerk)

Terms of Reference

A Bill originating in either House, other than a Bill which the Council may not amend, may be referred to the Committee after its second reading or during any subsequent stage by motion without notice... A referral under [this paragraph] includes a recommittal.

The functions of the Committee are to consider and report on Bills referred under this order.

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Report of the Legislative Council Legislation Committee

in relation to the

Planning Legislation Amendment Bill 1995

1 Reference and Procedure[1]

1.1 The *Planning Legislation Amendment Bill 1995*[2] (the *Bill*) was referred to the Legislation Committee on 3 April 1996 on a motion by the Minister for the Environment, Hon Peter Foss MLC. The motion was in the following terms:

> The Bill be referred to the Legislation Committee with the following instructions -
>
> (1) The Committee not return an amended Bill or recommendations as to amendments other than mere drafting amendments.
>
> (2) The Committee consider the balance in the overall scheme of the Bill and the various changes made by the Bill to determine whether it achieves a reasonable balance between the bringing forward of environmental assessment and the certainty given by that assessment.
>
> (3) The Committee consider whether the basis of further review of any assessment is adequate.
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> (4) The Committee report no later than May 2, 1996.

1.2 Because of the short time the Committee was given to report on the *Bill*, the Committee did not advertise for public submissions. Instead, it invited the Conservation Council of Western Australia Inc (Conservation Council), the Urban Development Institute of Australia WA Division Inc (UDI) and the Western Australian Municipal Association (WAMA) to give evidence to the Committee. The Committee also invited the Minister to appear before the Committee to give it more details about the purpose and scope of the referral of the *Bill* to the Committee. The Minister and representatives from the three organisations referred to all appeared before the Committee on 18 April 1996[3].

1.3 On 2 May 1996, the Committee sought, and was granted, an extension of time (to 9 May 1996) for presentation of its report.

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[1] A list of the abbreviations used in this Report appears at Appendix 1.

[2] No. 47-2B.

[3] A list of the witnesses who appeared before the Committee is attached as Appendix 2.

2 Contents and Purpose of the *Bill*

2.1 The *Planning Legislation Amendment Bill 1994* (No. 63) was introduced into Parliament on 4 August 1994. As a result of opposition from the environment movement, developers and local government authorities, it was withdrawn on 15 November 1994. The provisions dealing with environmental planning became the subject of the *Bill* currently before the Committee.

2.2 The *Bill* contains 58 clauses in 7 parts:

Part 1: Preliminary
Part 2: Amendments to *East Perth Redevelopment Act 1991*
Part 3: Amendments to *Environmental Protection Act 1986*
Part 4: Amendments to *Metropolitan Region Town Planning Scheme Act 1959*
Part 5: Amendments to *Subiaco Redevelopment Act 1994*
Part 6: Amendments to *Town Planning and Development Act 1928*
Part 7: Amendments to *Western Australian Planning Commission Act 1985*

2.3 For the purposes of considering "the balance in the overall scheme of the Bill", the most important provisions are those contained in Part 3, relating to amendments to the *Environmental Protection Act 1986*.

2.4 Clause 20 of the *Bill* creates 2 new divisions (Divisions 3 and 4) in Part IV of the *Environmental Protection Act 1986*. Division 3 deals with "assessment of schemes" and Div 4 deals with "implementation of schemes".

2.5 In his Second Reading speech in the Legislative Council, Hon Peter Foss said:

> This Bill is aimed at bringing the planning and environmental evaluation procedures together at an early stage of the development process and providing the Environmental Protection Authority with powers under the Environmental Protection Act to assess the environmental issues raised by town planning schemes.

3 Background to the Planning Process

What is Planning?

3.1 Land use planning involves the identification and allocation of land for current and future uses or purposes. Thus land may be identified as being suitable for residential or industrial development, agricultural purposes or recreational parkland, or set aside as nature reserves or national parks.

3.2 While planning attempts to provide for the future, plans are often formulated in response to contemporary problems; for example, population pressures or, more recently, environmental concerns.

What is Environmental Planning?

3.3 Whilst environmental planning is certainly one aspect of planning generally, it is fundamentally different from other types of planning in one respect. The central focus of most planning is human activities. Based on biological and environmental sciences, environmental planning is also concerned with the intrinsic values of non-human life and the general environment. Ultimately, of course, humans depend upon the biosphere for survival and consequently concern with non-human life and the general environment is relevant to the long term survival of the human species.

3.4 In the view of some people, environmental planning advice sometimes conflicts with human social interests and unreasonably favours some aspect of environmental protection. However, planners must achieve a balance between long term requirements and short term demands. This balance is a central principle of sound environmental planning.

A Brief History of Environmental Planning in Western Australia

3.5 The State of Western Australia has approximately 12,000 kilometres of coastline and 2.5 million square kilometres of land surface. Only 27% of the population live on 99.8% of the land[4]. This makes regional planning, and particularly regional environmental planning, in Western Australia a daunting task.

3.6 Western Australia was settled in 1829. Before setting out, Lieutenant Governor Stirling was issued with instructions that in "laying the foundations of any... town, care must be taken to proceed upon a regular plan, leaving all vacant places which will in future be required for thoroughfares and as the sites of churches, cemeteries and other public works of utility and general convenience"[5]. The countryside was to be divided into sections (of one square mile or 640 acres), townships (25 sections), hundreds (4 townships) and counties (16 hundreds)[6]. As Berry concludes:

> From these mathematically restrictive and formal instructions, it is clear English administrators had little idea about the conditions of colonial settlement. By necessity, Stirling, as Governor, and Roe, as Surveyor-General, ignored many of these instructions.[7]

3.7 Berry goes on to say:

> [There] is little evidence that any great forethought or planning on accepted town planning lines was considered in the laying out of the major ports and towns prior

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4 MacRae, I & Brown, D, "The evolution of regional planning in Western Australia", in Hedgcock, D & Yiftachel, O (Eds), *Urban and Regional Planning in Western Australia*, Paradigm Press, 1992, p 206.

5 Berry, C, "The evolution of local planning in Western Australia", in Hedgcock, D & Yiftachel, O (Eds), *Urban and Regional Planning in Western Australia*, Paradigm Press, 1992, p 18.

6 *Ibid*.

7 *Ibid*, pp 18-19.

> to 1929. [However, in] some of the early towns of the colony, the town layout seems to combine a European formality with *a practical approach to the terrain*.[8] (Emphasis added.)

3.8 Environmental planning was not originally a formal part of the planning process in Western Australia, though, as was pointed out to the Committee by officers representing the Minister for Planning, good planners would clearly be aware of and take into account obvious limitations imposed by the local environment.

3.9 Modern metropolitan planning in Western Australia begins with the Stephenson and Hepburn Report on the Perth and Fremantle metropolitan region published in 1955[9]. Though a formal environmental assessment was not a statutory requirement, Singleton says:

> [The report] gave a worthy coverage of the natural assets of the region [the Swan Coastal Plain], recognising the intrinsic environmental capacities of the setting as they were then understood to be, even though by today's standards it appears inadequate. The Atlas with the report indicates a coarse assessment of the region. The soil and vegetation zones shown are of the generic zones pre-settlement, rather than the status and condition of soil and vegetation in the region at the time of the plan.
>
> The report made little mention of certain physical characteristics of the region that are now taken for granted. These include the groundwater mounds and the various aspects of the coastal plain environment dependent on them: the wetlands, the remaining natural vegetation, and the groundwater balance of the region...[10]

3.10 The Stephenson and Hepburn Report evolved and developed into the 1962 Metropolitan Region Scheme following enactment of the *Metropolitan Region Town Planning Scheme Act 1959*. The Metropolitan Region Scheme was comprehensively reviewed in the late 1960s.

3.11 The next major development in the planning of the Perth metropolitan area was the publication of *The Corridor Plan for Perth*[11] in November 1970. It was the subject of some controversy and was not endorsed by State Cabinet until April 1973. Although not a statutory instrument, it was then adopted by successive governments into the 1980s. The basis of the *Corridor Plan* was that urban growth should be based on clusters or corridors of development with sub-regional centres to be established as counter-magnets to central

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8 *Ibid*, p 19.

9 Stephenson, G & Hepburn, A, *Plan for the Metropolitan Region, Perth and Fremantle*, 1955.

10 Singleton, J, "Environmental planning for the Swan Coastal Plain", in Hedgcock, D & Yiftachel, O (Eds), *Urban and Regional Planning in Western Australia*, Paradigm Press, 1992, p 236.

11 Western Australia, Metropolitan Region Planning Authority, *The Corridor Plan for Perth*, November 1970.

Perth and with non-urban wedges between the corridors to prevent urban sprawl. Singleton comments:

> The Corridor Plan had significant environmental merit even though there were numerous weaknesses. However, the environmental wisdom of the document was developed largely by default rather than conscious deliberation. The corridor-based concept of the plan was a highly graphic urban design strategy, incorporating defensible planning principles but relying heavily on its graphic presentation. The provision of rural wedges, for example, owed more to the logic of the urban corridors than to their intrinsic value as environmental or landscape features... [Their] major benefit only emerged in subsequent years with the realisation that the lack of development in these areas protected the groundwater resources to the south and north of Perth...
>
> It now seems extraordinary that nowhere does the Corridor Plan demonstrate a detailed environmental assessment of the region, or the pursuit of any recognisable environmental planning methodology. Consequently the plan appears to be based on a weak understanding of the natural processes operating in the region...
>
> Despite the environmental weaknesses of the Corridor Plan itself, the subsequent corridor structure plans were generally of a high "planning" calibre with good attention to environmental considerations.[12]

3.12 In 1972 the Department of Conservation and Environment and the Environmental Protection Authority were established. In 1981 the Department of Conservation and Environment published its "System 6" report on conservation areas between Moore River and Cape Naturaliste and including the Perth metropolitan region. This was to have a significant impact on planning decisions throughout the 1980s. A review of the *Corridor Plan* was undertaken between 1985 and 1987. Following public submissions on the report of the Review Group, in 1992 the Department of Planning and Urban Development published *Metroplan* to replace the *Corridor Plan*[13]. Environmental concerns received much greater attention in *Metroplan* than they had previously in planning instruments. Stokes and Hill comment:

> There is a strong nexus in *Metroplan* between environmental issues and policies for rural land, regional open space, heritage, urban design and townscape. A detailed constraints mapping exercise was undertaken as part of the Corridor Plan review which examined the geophysical and environmental characteristics of the region. This was used to identify those areas which should be protected from urban development, and other relatively unconstrained areas which could accommodate urban expansion. Policy measures were also developed for rural land and regional open space. The policies for rural land are aimed at

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[12] Singleton, J, "Environmental planning for the Swan Coastal Plain", in Hedgcock, D & Yiftachel, O (Eds), *Urban and Regional Planning in Western Australia*, Paradigm Press, 1992, pp 237-9.

[13] See generally, Hedgcock, D & Yiftachel, O (Eds), *Urban and Regional Planning in Western Australia*, Paradigm Press, 1992.

> safeguarding the surface and groundwater resources, conserving and protecting key agricultural land and basic raw materials, protecting important landscapes, safeguarding future urban areas for development, and maintaining options for the siting of special uses. Local authorities are responsible for the preparation of local rural strategies which are a component of the Rural Land Use Planning Policy... and require a close analysis of land capability and other environmental information. A particularly important issue in these strategies is to ensure that subdivision for special rural and rural-residential purposes is consistent with regional objectives.[14]

3.13 In the 1980s there were similar developments in (non-metropolitan) regional planning. MacRae and Brown comment:

> [E]nvironmental considerations and public expectations would influence both the planning process and the techniques used in developing regional plans.
>
> Regional planners have always had regard for the physical aspects of an area in the development of planning solutions. Details of climate, landform, soils, geology, vegetation, flora and fauna have invariably formed the basis for decisions on transportation routes, urban settlements, recreation-conservation, resource protection, infrastructure investment, agriculture, etc. Early regional plans in Western Australia followed this principle and confined themselves to the physical aspects of allocating land use.
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> During the 1980s a greater awareness of the impact of human activity on the natural environment, and the availability of expert advice on environmental matters, saw a greater emphasis on natural resource evaluation, and the need for environmental protection. For the first time environmental issues not only became the catalyst for a number of regional planning studies, but helped shape the eventual planning solution.[15]

3.14 Although environmental considerations have received increasing attention in planning instruments since the 1970s, much environmental review continues to be undertaken independently of the planning process.

A Brief Outline of the Role of the EPA in the Context of Planning

3.15 The EPA was established by the *Environmental Protection Act 1971*. That *Act* was repealed and replaced by the *Environmental Protection Act 1986*. The *Environmental Protection Act 1986* requires that all development "proposals" which are likely to have a significant effect on the environment be sent to the EPA for consideration (s 38). Whilst

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[14] Stokes, R & Hill, R, "The evolution of metropolitan planning in Western Australia", in Hedgcock, D & Yiftachel, O (Eds), *Urban and Regional Planning in Western Australia*, Paradigm Press, 1992, p 128.

[15] MacRae, I & Brown, D, "The evolution of regional planning in Western Australia", in Hedgcock, D & Yiftachel, O (Eds), *Urban and Regional Planning in Western Australia*, Paradigm Press, 1992, p 213.

it is the obligation of the relevant local government authority (local council) to send development applications to the EPA (s 38(1)(a)), any other person (s 38(1)(b)(ii)) may also refer a proposal to the EPA. The EPA has a set of procedures for environmental impact assessment to follow in dealing with proposals. They range from internal assessment by the EPA to public hearings.

3.16 Environmental impact assessment has limitations in respect of new or existing activities which individually are too insignificant to be subject to environmental impact assessment. In such circumstances the EPA can make Environmental Protection Policies which can apply to, for instance, areas, activities or emission controls and standards. Environmental Protection Policies are enforceable and override most other State legislation. They have great potential directly to influence planning.

3.17 The statutory environmental impact assessment processes place responsibility on the proponents of development proposals to produce to the level of environmental impact assessment required, a comprehensive statement of all likely environmental impacts. On the basis of this statement and, where relevant, public comment, the EPA prepares and submits its advice (in a public document) to the Minister for the Environment (s 44 *Environmental Protection Act 1986*). The Minister must then consult with other relevant Ministers (if any) and decide whether or not the proposal may be implemented and on what conditions (s 45 *Environmental Protection Act 1986*). The procedure is by nature reactive, and it can be lengthy.

3.18 The making and amending of town planning schemes (TPS) are not covered by the environmental impact assessment provisions of the *Environmental Protection Act 1986*[16]. Thus, even if land is appropriately zoned for a particular purpose, a developer must nevertheless refer a development proposal (appropriate for the zoning) to the EPA for assessment. In his Second Reading speech in respect of the *Bill*, the Minister said:

> It is, however, at the rezoning stage and not the subdivision or development stage of the land development process that environmental assessment is most appropriate. It is no longer acceptable for the government, through the planning assessment process, to approve the use of land for a particular purpose and then, after investment and development decisions have been made based upon that land-use approval, for the government, through environmental assessment process, to decide that land cannot be used for the purpose previously approved.
>
> It is essential that the environmental assessment is done "up-front" with the planning assessment so that the community has as much information as is reasonably practicable before it when determining the most appropriate use of land.

3.19 All of the witnesses who appeared before the Committee agreed that environmental assessment of land use should take place at the earlier planning stages. However, they disagreed on the desirability, nature and extent of subsequent environmental impact

[16] *Chapple v Environmental Protection Authority*, unreported, Supreme Court of Western Australia, 27 April 1995, No. 1879 of 1994.

assessment procedures. It is in this context that the Committee has been asked to advise on the balance to be found in the *Bill* and the adequacy of procedures for further review of environmental impact assessment.

4 The Witnesses' Concerns

Conservation Council of Western Australia Inc

4.1 The Conservation Council supported the concept of "up-front" environmental review of planning proposals. However, the Conservation Council considers the *Bill* unacceptably reduces the extent of public participation in environmental decision making and fails to ensure that all planning proposals are adequately scrutinised by the EPA. In particular:

4.1.1 The EPA is not required formally to assess all planning schemes, and the public has no right of referral or appeal if the EPA decides not to assess a scheme (*Bill*, proposed s 48A *Environmental Protection Act 1986*). In the Committee's view it is incorrect to say that the public has no such right of appeal, be it a limited one - see *Bill*, proposed s 100(1) *Environmental Protection Act 1986*.

4.1.2 The EPA is not required to publish its decision on planning proposals as it is currently required to do with its decisions on "proposals" (s 44 *Environmental Protection Act 1986*), though it must maintain a public record of schemes referred to it (*Bill*, proposed s 48B *Environmental Protection Act 1986*). In the Committee's view, this is incorrect - see *Bill*, proposed s 48D *Environmental Protection Act 1986*.

4.1.3 The public will lose the right to refer a "proposal under an assessed scheme" (*Bill*, proposed amendments to s 38 *Environmental Protection Act 1986*) if the proposal is in a scheme that previously has been considered by the EPA, even though the previous consideration may have occurred without public consultation.

4.1.4 Planning schemes implemented after Environmental Protection Policies prevail to the extent of any inconsistency with existing Environmental Protection Policies (*Bill*, proposed amendments to s 33 *Environmental Protection Act 1986*); and the EPA must review Environmental Protection Policies if they are inconsistent with an assessed scheme (*Bill*, proposed s 36(1)(aa) *Environmental Protection Act 1986*). This compromises the purpose and function of Environmental Protection Policies.

4.1.5 Other Acts, such as the *East Perth Redevelopment Act 1991* may override the *Environmental Protection Act 1986*.

4.2 The concerns of the Conservation Council in relation to the degree of public participation in the environmental impact assessment process and the provisions of the *Bill* relating to when the EPA must assess a proposed scheme are matters which go to the "balance" of the *Bill* and the basis of further review of environmental impact assessment within the Committee's terms of reference.

Urban Development Institute of Australia WA Division Inc

4.3 UDI supported the broad intention of the *Bill* which it considered is to provide that land once zoned for a particular use is able to be used for that purpose. In other words, the main aim of the *Bill* is to provide certainty in the planning and development process - once zoning, with or without environmental conditions, is determined (at an early stage in the planning process), no further environmental conditions or restrictions will be imposed at a later stage in the development process. UDI had the following reservations in respect of the *Bill*:

4.3.1 The requirement that the EPA must consider a proposal under an assessed scheme in the event that it did not "have sufficient scientific or technical information to enable it to assess the environmental issues raised by that proposal" (*Bill*, proposed s 38(3)(b) *Environmental Protection Act 1986*) is seen as undermining the integrity of the *Bill* and its aim of providing certainty. It appears to the Committee that this concern also relates to proposed s 48I of the *Bill* which provides that when a "proposal" (eg for a development) comes to the notice of a responsible authority (eg a local council or the WAPC), the responsible authority must consider whether any environmental issues raised by the proposal previously have been assessed by the EPA under an assessed scheme and if the proposal complies with the assessed scheme. If the environmental issues have not previously been assessed or the proposal does not comply with the assessed scheme, the responsible authority must refer the proposal to the EPA for assessment or refuse to approve the implementation of the scheme.

4.3.2 If the EPA is overwhelmed with schemes which it must assess, and which it does not have the resources to assess, it may apply the "precautionary principle" and issue instructions for an environmental impact assessment process to be carried out in respect of the scheme. UDI suggested that adequate funding must be provided to the EPA to ensure this does not occur.

4.3.3 UDI had some reservations about the requirement to refer all schemes to the EPA for assessment. On balance, however, it supported the provisions until such time as they prove unworkable.

4.3.4 UDI was concerned about the cost to local government authorities of compliance with the *Bill* and how this may affect developers. It considered that the Government should provide funds to retrospectively assess amendments to the Metropolitan Region Scheme made in the past 2 years. The Committee agrees that costs of compliance may seriously affect local government authorities.

4.4 The Committee considers that the first of UDI's concerns relating to when the EPA may be required to assess a proposal under an assessed scheme is a matter which goes to the "balance" of the *Bill* and the basis of further review of environmental impact assessment within the Committee's terms of reference.

Western Australian Municipal Association

4.5 WAMA considered that the *Bill* is an acceptable compromise for the purpose of incorporating environmental review in the planning process. It expressed concerns with matters including:

4.5.1 Proposed amendments to s 7(2) of the *Town Planning and Development Act 1928* relating to the right of local government to withdraw from a scheme amendment process.

4.5.2 Clause 50 of the *Bill* which provides that the discretion of the WAPC is not fettered by the provisions of TPSs (except in respect of compliance with environmental conditions), which provision overturns the decision of the Supreme Court of Western Australia, *State Planning Commission v Wallasley Pty Ltd*, unreported, 26 May 1995 (No. 1179 of 1994), that the discretion of the WAPC is fettered by TPSs.

4.5.3 The cost to local government authorities of compliance with the *Bill*, particularly in respect of smaller and less wealthy local government authorities where substantial time may pass between the environmental impact assessment procedure and the ability of the local council to recoup the cost of it from a developer. As has already been noted, the Committee agrees that costs of compliance may seriously affect local government authorities.

4.5.4 The resource capacity of the EPA to be able to consider all schemes within relevant time constraints.

4.5.5 The danger that local government authorities may ultimately be required to become "environmental police" for the EPA when they have neither the expertise nor the resources necessary to perform this function.

4.6 Though useful information for the Committee, none of these matters is directly relevant to the Committee's limited terms of reference.

5 The Proposed (Environmental) Planning Process[17]

An Outline of the Current Planning and Development Process[18]

5.1 For planning purposes the State currently is divided into 142 areas or municipalities administered by local government authorities. Of these, 26 are in the Perth metropolitan region.

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[17] The process is, in reality, not an "environmental planning process"; rather, it is a planning process which takes into account environmental considerations. The title for this section has been adopted for the sake of brevity.

[18] See generally, Wood, D & Hillier, J, *Planning Made Simple*, Curtin University of Technology, 1992.

5.2 Under the *Town Planning and Development Act 1928*, each local government authority is responsible for preparing and reviewing TPSs. TPSs are legal and binding documents. They will usually be accompanied by a map delineating areas of particular land use and even specifying details about the number and size of, for instance, residences that may be built in an area.

5.3 A zoning TPS is the basic tool of development control within a municipality. Zoning TPSs may cover the whole of a municipality and define the basic uses to which various areas of land can be put, and may include protection of the natural environment or heritage places.

5.4 Development schemes may apply to specific areas within a zoning scheme. They may provide for the development or redevelopment of land and include requirements for the provision of infrastructure and services, open space and the subdivision of land into residential, commercial or industrial areas.

5.5 Owners of land wishing to develop or subdivide it may propose TPSs. These are subject to approval by the relevant local government authority.

5.6 Under legislation such as the *Town Planning and Development Act 1928* and the *Metropolitan Region Town Planning Scheme Act 1959*, there are various opportunities for public participation in the process of making and amending TPSs. There are also various avenues of appeal for people affected by them.

5.7 There is no formal or statutory requirement for environmental review of a TPS, though, as has been noted, competent planners will take into account environmental constraints on planning matters.

An Outline of the Proposed (Environmental) Planning Process

5.8 The following outline of the proposed planning process incorporating environmental review has been derived from the legislation and from descriptions of the process:

5.8.1 given to the Committee by the Minister (in his Second Reading speech and in evidence);

5.8.2 contained in an article published in the WAPC *Planning Bulletin*[19]; and

5.8.3 contained in a flowchart provided to the Committee by the DEP (a copy of the flowchart is attached as Appendix 3[20]).

The outline is not, and is not intended to be, a comprehensive description of the entirety of the new process. It is included only for the purpose of assisting in identifying if and to what extent there may be an imbalance in the *Bill* within the Committee's terms of reference.

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[19] Western Australian Planning Commission, "Planning Legislation Amendment Bill 1995", (1995) 4 *Planning Bulletin* 1, July 1995.

[20] It is noted that some of the section references on the flowchart are incorrect.

5.9 All references in the following outline are to sections of the *Environmental Protection Act 1986* as amended by the *Bill*, or, where indicated, to the *Town Planning and Development Act 1928* as amended by the *Bill*. Environmental impact assessment is referred to as "environmental review" in the new legislation.

5.10 The proposed new planning process commences (for the purposes of the legislation) when a local authority resolves to prepare or adopt a TPS or an amendment to a TPS (s 7A *Town Planning and Development Act 1928*). This covers all TPSs and amendments thereto of the WAPC, local government authorities and the East Perth and Subiaco Redevelopment Authorities. All types of TPS, including local TPSs, redevelopment schemes and regional planning schemes are referred to simply as "schemes". All relevant authorities are referred to as "responsible authorities".

5.11 Forthwith upon resolving to prepare or adopt a scheme, the responsible authority must refer it to the EPA (s 7A *Town Planning and Development Act 1928*) with appropriate information to enable consideration of the need for environmental assessment. The EPA must determine in the first place whether or not it needs to assess the scheme (s 48A(1)(a)). If it determines that it does not need to assess the scheme, it must notify the responsible authority of that fact within 28 days (s 48A(1)(a)). The EPA may give informal environmental advice to the responsible authority at this time. The responsible authority may then proceed with the normal planning process.

5.12 If the EPA considers that it should assess the scheme, it must notify the responsible authority of that fact within 28 days (s 48A(1)(b)) and, within 60 days of the referral, send the responsible authority any instructions regarding the content and scope of the required environmental review (s 48C). The instructions may require the responsible authority to conduct a public review of the scheme under the public review procedures contained in other relevant planning legislation (s 48C). The EPA may require the responsible authority to advertise the availability of information about the public review (s 48C(5)).

5.13 Any person who disagrees with a decision of the EPA not to assess a scheme, or with the level of environmental review required, or with the content of instructions issued to the responsible authority, may appeal to the Minister within 14 days (s 100(1)).

5.14 The EPA must maintain a public record of all schemes referred to it, together with details of EPA decisions not to assess a scheme or details of the instructions issued in respect of any assessment (s 48B).

5.15 The responsible authority then performs the requisite environmental review in respect of the scheme or draft scheme and sends it to the EPA (s 7A1 *Town Planning and Development Act 1928*). The EPA must check that the environmental review has been undertaken in accordance with any instructions it issued regarding the environmental review and advise the responsible authority of compliance or non-compliance within 30 days (s 7A1(1)(b) *Town Planning and Development Act 1928*). If the EPA advises the responsible authority that the scheme complies with the instructions or does not advise the responsible authority of non-compliance within 30 days, the responsible authority may proceed to advertise the scheme under s 7(2)(a) *Town Planning and Development Act 1928*. If the EPA considers that the environmental review has not complied with instructions and so advises the responsible authority, the responsible authority may appeal to the Ministers

for the Environment and Planning to rule that the environmental review has complied with the instructions (s 7A1(2) *Town Planning and Development Act 1928*).

5.16 Following notification of compliance (or a failure to notify), the responsible authority must advertise the scheme (s 7(2) *Town Planning and Development Act 1928*). All environmental submissions received by the responsible authority must be sent to the EPA within 7 days (s 7A2(a) *Town Planning and Development Act 1928*) and the responsible authority must, within 42 days, give its response to the submissions to the EPA (s 7A2(b) *Town Planning and Development Act 1928*).

5.17 The EPA must then assess the environmental review and report to the Minister, who must as soon as possible publish the report (s 48D). Any person who disagrees with the report may appeal, within 14 days, to the Minister (s 100(2)). In certain circumstances, the Minister must consult with the Minister for Planning (s 101(2d)).

5.18 The Minister must then consult with the Minister for Planning in respect of any conditions that are to be imposed upon implementation of the scheme (s 48F(1)). A statement of the conditions must be sent to relevant stakeholders and published (s 48F(2)). The responsible authority only may request a review of any such conditions (s 48G). There is no opportunity for any person other than the responsible authority (and the Ministers) to have any further input into the process. Environmental conditions incorporated in the scheme are binding on the responsible authority.

5.19 Following the determination of any appeals and the setting of appropriate conditions by the Minister, the responsible authority incorporates the conditions in the scheme (s 7A3 *Town Planning and Development Act 1928*).

5.20 The Minister for Planning may then approve the scheme, require the scheme to be modified as he sees fit, or refuse to approve the scheme (s 7(2a) *Town Planning and Development Act 1928*). If the scheme is approved, the responsible authority may implement it.

5.21 UDI considers that, generally, this should be the end of the matter. Once a scheme is approved, any development consistent with the scheme should not be referred to the EPA for another environmental review. UDI argues that this is necessary if the *Bill* is to confer certainty in the planning process. However, the *Bill* does provide further opportunities for environmental review in appropriate circumstances.

Referral of Proposals Under Assessed Schemes to the EPA

5.22 Where a proposal complies with an assessed scheme, generally there is no requirement for any further assessment or environmental review by the EPA.

5.23 However, section 48I provides that where a proposal (such as a development proposal) which is likely to have a significant effect on the environment comes to the notice of a relevant responsible authority, the responsible authority must consider whether the environmental issues raised by the proposal were assessed in the assessment of the assessed scheme and whether the proposal complies with the conditions of the assessed scheme. If the responsible authority considers that the environmental issues raised by the proposal were considered in the assessment of the scheme and that the proposal complies with the

conditions of the assessed scheme, then the responsible authority need not refer the proposal to the EPA under s 38. However, if the responsible authority comes to the contrary conclusion, the responsible authority must refer the proposal to the EPA under s 38. The EPA must then assess the proposal essentially in the manner that it would currently assess ordinary proposals.

5.24 Furthermore, if the EPA did not have the scientific or technical information necessary to assess the environmental issues raised by a proposal when it assessed an assessed scheme under which the proposal is made, it may assess the proposal (s 38(3)).

5.25 There is no opportunity for a member of the public to refer a proposal under an assessed scheme to the EPA (s 38(1)(b)(ii)). However, if a proposal under an assessed scheme is referred to the EPA, the EPA must follow the normal procedures for considering proposals, which will bring in the usual public rights of appeal.

6 The Balance of the *Bill*

The Question of Certainty

6.1 On behalf of its members, UDI indicated that developers are seeking some certainty in the planning process. For example, if an area is zoned industrial under an assessed scheme, developers want to know that they can establish an industry there without having to undertake further environmental review or incurring substantial expenses in early development work only to be told that they cannot proceed with the industry.

6.2 To put it bluntly, there is no such thing as absolute certainty. Human society, human knowledge and human needs are dynamic. They are not fixed and capable of being determined with certainty. As short a time ago as 15 years, the hole in the Ozone Layer was virtually unknown and certainly the science of its causes and dimensions had not been established. Today we know that CFCs contribute to the breakdown of ozone and there is an international protocol for the reduction of the use of CFCs, which has had a significant effect on manufacturers of CFCs. At the turn of the century, roads had to be planned for horses and buggies; now they have to be planned to take into account automobile traffic congestion and pollution. Yesterday's toxic waste dump is today's residential development (eg Love Canal in North America). To seek absolute certainty and security for a desired land use may be illusory.

6.3 The best that can be achieved in terms of certainty is **reasonable** certainty.

6.4 In the context of referral to the EPA of proposals under assessed schemes, one of the principal concerns of UDI, the Committee considers that the circumstances in which such proposals may be assessed by the EPA are sufficiently restrictive to give reasonable certainty to the implementation of assessed schemes and to developers who make proposals under them. Furthermore, in its submission, UDI indicated that it was not opposed to "tiered" assessment, that is, different levels of assessment as land uses become more specific. The restrictions on the circumstances in which the EPA may assess proposals under assessed schemes appear to the Committee to be more stringent than would be required to give effect to a tiered assessment approach. Consequently, the Committee has concluded that the *Bill* gives reasonable certainty to the development process.

Public Participation

6.5 Though some of the specific concerns of the Conservation Council appear to be based upon a wrong interpretation of the *Bill*, one of the principal concerns of the Conservation Council was the perceived diminution of opportunities for public participation in the environmental assessment process as a whole. The Committee considers that there is some justification for this concern.

6.6 Whilst formal public participation is clearly contemplated in the early stages of assessment of a scheme, there is potential in the latter stages for responsible authorities to seek, and Ministers to determine, that the public input into the process be overridden. Whilst Ministers may have regard to the full range of information "on the record" before them, they are not expressly bound to take that information into account in making their decisions. No doubt Ministers will take into account the full range of information available to them, but they are not expressly required to do so.

6.7 It may be said that Ministers should not be limited in the exercise of their discretion. Certainly it is true that it is one of the functions of governments (and their Ministers) to arbitrate in cases of competition between groups for access to resources such as land. In order to do so, Ministers are given wide discretionary powers. However, in the present circumstances this results in the potential to exclude effective public participation in the assessment of a scheme - subject only to political pressures that may be placed on Ministers by lobby groups.

6.8 Indeed, this was a concern expressed by the Conservation Council - that, for the public to be able effectively to participate in controversial planning matters, it may be necessary for interested groups to lobby responsible authorities and Ministers. This makes the process more political than the Conservation Council considers desirable. It may also detract from the possibility of decisions being made having due regard to scientific or technical considerations.

6.9 The Committee believes that this is a valid concern and considers that the problem could be alleviated by expressly providing that Ministers must make decisions based on information available on the public record, as is required of many decision-making authorities in the United States of America.

6.10 Additionally, it is not at this time clear how the public participation provisions will work in practice.

6.11 On the question of whether or not the public should be permitted to refer to the EPA proposals under assessed schemes, the Committee considers that, in the absence of such an ability, there is potential for unnecessary conflict between environmental groups and developers. There is also a failure to take advantage of considerable community expertise in such matters. Balanced against this is the requirement of providing reasonable certainty to developers.

Comment Upon the Referral of the *Bill*

6.12 The Committee considers that the manner in which the *Bill* was referred to it is not satisfactory. In particular, the Committee is concerned that:

6.12.1 it was not permitted to recommend amendments to the *Bill*; and

6.12.2 it was denied the opportunity to consider a range of concerns raised by witnesses (for example, the matters referred to in paragraph 4.6).

6.13 The time given to the Committee to consider the *Bill* was inadequate. The *Bill* was referred to the Committee on 3 April 1996 and the Committee was required to report on 2 May 1996. The fact that the Committee was denied adequate time to review the *Bill* is reflected by the fact that it required an extension of time to present its report.

6.14 The Committee recommends that more consideration be given to the following matters raised by the Conservation Council and WAMA and commented upon in this report:

6.14.1 the potential for conflict in overlapping clauses in the various pieces of relevant legislation and the consequent difficulties that will be faced in interpreting and applying them;

6.14.2 the role of local government authorities in monitoring and enforcing environmental standards (which is a role that should be filled by the EPA);

6.14.3 the fact that the public and environmental experts may not be made aware of planning matters such as subdivisions and therefore in practice will not have any opportunity to bring new scientific evidence to the attention of the EPA;

6.14.4 the costs to local government authorities of complying with the environmental review requirements of the *Bill*;

6.14.5 the apparent lack of transitional arrangements in respect of recent past amendments to the Metropolitan Region Scheme and amendments to schemes already in the course of preparation; and

6.14.6 the lack of an adequate and assured fund to enable small country shires to meet their obligations under the *Bill*.

Conclusions

6.15 The Committee has some reservations about whether the *Bill* achieves "a reasonable balance between the bringing forward of environmental assessment and the certainty given by that assessment". The Committee has similar reservations about "the basis of further review of any assessment [being] adequate". However, the Committee's terms of reference in respect of the *Bill* do not permit it to make recommendations for substantive amendments to the *Bill*.

6.16 The Committee believes that effective opportunities for public participation in the process may avoid unnecessary conflict in controversial cases. It may also avoid a perception that assessment of environmental matters based on scientific data has been sacrificed to political considerations.

6.17 Though not strictly within its terms of reference, the Committee draws to the attention of the House the concerns expressed by UDI and WAMA with respect to the potential difficulties for some local government authorities to pay the costs of mandatory environmental reviews and of the necessity that Government adequately fund the EPA to permit it to perform its functions in the planning process.

Appendix 1: List of Abbreviations

DEP	Department of Environmental Protection
EPA	Environmental Protection Authority
MRS	Metropolitan Region Scheme
TPS	town planning scheme
UDI	Urban Development Institute of Australia WA Division Inc
WAMA	Western Australian Municipal Association
WAPC	Western Australian Planning Commission

Appendix 2: List of Witnesses

Hon Peter Foss MLC, Minister for the Environment

Ian Wight-Pickin, Principal Private Secretary, Minister for Planning
Bryan Jenkins, Chief Executive Officer, Department of Environmental Protection
James Malcolm, Manager Special Projects, Department of Environmental Protection

Representing the Conservation Council of Western Australia Inc:

Philip Jennings, Treasurer
Rachel Siewert, Co-ordinator

Representing the Urban Development Institute of Australia WA Division Inc:

Anne Arnold, Executive Director
Michael Glendinning, Councillor

Representing the Western Australian Municipal Association:

John D'Orazio, Planning Spokesperson
Caroline Ameduri, Director of Policy

Appendix 3: EPA Simplified Process Chart

(References are to sections of the *Environmental Protection Act 1986*, or, where indicated, to the *Town Planning and Development Act 1928*.)