



THIRTY-NINTH PARLIAMENT

REPORT 93

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

**REVIEW OF THE *PLANNING AND DEVELOPMENT*
(*DEVELOPMENT ASSESSMENT PANELS*)
*REGULATIONS 2011***

Presented by Hon Kate Doust MLC (Chair)

September 2015

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“6. Uniform Legislation and Statutes Review Committee

- 6.1 *A Uniform Legislation and Statutes Review Committee* is established.
- 6.2 The Committee consists of 4 Members.
- 6.3 The functions of the Committee are –
- (a) to consider and report on Bills referred under Standing Order 126;
 - (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
 - (c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
 - (d) to review the form and content of the statute book; and
 - (e) to consider and report on any matter referred by the Council.
- 6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.”

Members as at the time of this inquiry:

Hon Kate Doust MLC (Chair)	Hon Brian Ellis MLC (Deputy Chair)
Hon Mark Lewis MLC	Hon Amber-Jade Sanderson MLC (until 18 August 2015)
Hon Samantha Rowe (from 18 August 2015)	

Staff as at the time of this inquiry:

Alex Hickman (Advisory Officer (Legal))	Samantha Parsons (Committee Clerk)
	Tracey Sharpe (Committee Clerk)

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

unileg@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

ISBN 978-1-925149-30-2

Government Response

This Report is subject to Standing Order 191(1):

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

Glossary	
Act	<i>Planning and Development Act 2005</i>
Amendment Regulations	<i>Planning and Development (Development Assessment Panels) Amendment Regulations 2015</i>
COAG	Council of Australian Governments
DAF	Development Assessment Forum
DAP	Development Assessment Panel
Department	Department of Planning
Department Review	The review of DAPs conducted by the Department of Planning initiated in September 2013.
JDAP	Joint Development Assessment Panel
LDAP	Local Development Assessment Panel
Panel	In the context of planning law, an expert decision making body with various responsibilities, which can include the giving of advice and the determination of an application for planning approval.
Regulations	<i>Planning and Development (Development Assessment Panels) Regulations 2011</i>
SAT	State Administrative Tribunal

SAT Act	<i>State Administrative Tribunal Act 2004</i>
SLWG	Short-List Working Group
WALGA	The Western Australian Local Government Association
WAPC	The Western Australian Planning Commission

CONTENTS

GOVERNMENT RESPONSE

EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS i

EXECUTIVE SUMMARY i

FINDINGS AND RECOMMENDATIONS ii

CHAPTER 1 INTRODUCTION..... 1

REFERENCE AND PROCEDURE 1

Committee approach 2

CHAPTER 2 BACKGROUND TO THE REGULATIONS..... 5

SUMMARY OF DEVELOPMENT ASSESSMENT PANELS 5

DEVELOPMENT ASSESSMENT FORUM 6

COUNCIL OF AUSTRALIAN GOVERNMENTS PROCESS 10

DEVELOPMENT OF THE REGULATIONS 11

OTHER AUSTRALIAN JURISDICTIONS 13

New South Wales 13

South Australia 14

Victoria 14

THE PURPOSES OF DEVELOPMENT ASSESSMENT PANELS 15

OPERATION OF DEVELOPMENT ASSESSMENT PANELS 16

Types of DAPs and composition of panels 16

Types of DAP applications 16

Application and decision-making process 18

Review by the State Administrative Tribunal 21

THE DEPARTMENT'S REVIEW OF THE REGULATIONS 21

CHAPTER 3 ISSUES IDENTIFIED BY THE COMMITTEE..... 25

LOCAL GOVERNMENT PLANNING SCHEMES 25

Committee comment 29

THIRD PARTY RIGHT OF REVIEW 30

Other jurisdictions 36

A (now repealed) third party right of appeal in a local planning scheme 37

The position of a local government in Western Australia 37

Evidence considered 38

Committee comment 41

COMPLAINTS ABOUT DAPS 43

ROLE OF LOCAL COUNCILLORS ON DAPS 44

Committee comment 52

FINANCIAL CRITERIA TO BE MET FOR AN APPLICATION TO BE HEARD BY A DAP 53

Financial criteria 53

The option to opt-in or out of the DAP process 55

Criteria to determine state or regional significance	56
Committee comment.....	57
VALUING OF APPLICATIONS TO ACHIEVE THE DAP FINANCIAL CRITERIA.....	58
Evidence considered	60
Committee comment.....	65
CONFIDENTIAL PROCESSES	66
Committee comment.....	70
DAP MEMBERS REPRESENTING DEVELOPERS	71
Committee comment.....	75
REASONS FOR DECISIONS BY DAPS	76
EXERCISE OF DISCRETIONARY POWERS	91
Committee comment.....	95
DELAYS IN THE DAPS PROCESS	98
Committee comment.....	100
TRAINING OF DAP MEMBERS	102
Committee comment.....	104
DAP APPLICATION FEES	106
Fees for DAP applications	106
Fees for DAP members.....	109
Committee comment.....	111
Fees for DAP applications	111
Fees for DAP members	111
RESUBMITTING PLANNING APPLICATIONS PREVIOUSLY REFUSED	111
Committee comment.....	113
THE DAP WEBSITE.....	114
REGULATION 17 APPLICATIONS	115
Committee comment.....	117
STANDING ORDERS PROCEDURE - ADVANCE NOTICE OF MOTIONS	118
Committee comment.....	119
TIMEFRAMES UNDER THE REGULATIONS	120
Committee comment.....	120

CHAPTER 4 THE AMENDMENT REGULATIONS ENACTED DURING THE INQUIRY123

SIGNIFICANT PROVISIONS IN THE AMENDMENT REGULATIONS	123
ISSUES IDENTIFIED DURING THE INQUIRY	124
New regulation 41 – quorum for DAP meeting.....	124
Committee comment.....	129
Lowering of optional financial criteria to \$2 million	130
‘Stop the clock’ mechanisms	132
Committee comment.....	134
Disbanding of the Short-List Working Group	135
Committee comment.....	136
Regulation 17 meetings by electronic means	137

TIMING AND IMPACT OF THE AMENDMENT REGULATIONS ON THE INQUIRY PROCESS ..	137
Notice of motion to disallow	140
Committee comment on the timing of the introduction of the Amendment Regulations	140
CHAPTER 5 FURTHER REVIEW OF THE REGULATIONS	143
CHAPTER 6 CONCLUSION.....	145
APPENDIX 1 BACKGROUND TO SECTION 171F OF THE <i>PLANNING AND DEVELOPMENT ACT 2005</i>	147
APPENDIX 2 STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION, SUBMISSIONS RECEIVED AND HEARINGS	151
APPENDIX 3 THIRD PARTY APPEALS FROM PLANNING DECISIONS IN OTHER JURISDICTIONS	159
APPENDIX 4 LETTER TO THE MINISTER FOR PLANNING DATED 13 MAY 2015	165
APPENDIX 5 LETTER FROM THE MINISTER FOR PLANNING DATED 18 MAY 2015.....	171

EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 On 21 October 2014 the Legislative Council referred an inquiry to review the *Planning and Development (Development Assessment Panels) Regulations 2011* (**the Regulations**) to the Standing Committee on Uniform Legislation and Statutes Review (**the Committee**). Pursuant to the order of reference, the Committee was required to review the operation and effectiveness of the Regulations in accordance with section 171F of the *Planning and Development Act 2005* and report to the Legislative Council by 14 May 2015.
- 2 An extension of time to report was subsequently granted to the Committee, to report by no later than 8 September 2015.
- 3 The Regulations introduced development assessment panels (**DAPs**) as decision making bodies for the purposes of determining applications for planning approvals in Western Australia. For certain types of applications, they have taken the place of local governments and the Western Australian Planning Commission (**WAPC**).
- 4 DAPs determine planning applications for each local government area where a planning scheme applies. A Local Development Assessment Panel operates for the City of Perth and eight Joint Development Assessment Panels operate in various other metropolitan and regional areas.
- 5 An applicant:
 - (a) may choose to have their application determined by a DAP if its estimated cost is \$2 million or more and less than \$20 million for the City of Perth and between \$2 million or more and less than \$10 million for all other DAPs;
 - (b) must have their application determined by a DAP if its estimated cost is \$20 million or more for the City of Perth and \$10 million or more for all other DAPs.
- 6 Certain planning applications cannot be considered by DAPs, including the construction of a single house and for development by a local government or the WAPC.
- 7 The Committee, during its inquiry, received evidence from a wide range of stakeholders, including community organisations, individual community members, Government agencies, legal and planning experts, local governments, industry bodies and presiding members of DAPs. The evidence revealed a number of opposing views

on the various issues raised. The Committee has taken these views into account in its assessment of the operation and effectiveness of the Regulations in this report.

- 8 During the inquiry, the Government enacted a number of significant amendments to the Regulations. The Committee's concerns on the appropriateness of the timing of these amendments and the failure of the Government to give the Committee advance notice of their enactment are canvassed in this report in Chapter 4.

FINDINGS AND RECOMMENDATIONS

- 9 Findings and Recommendations are grouped as they appear in the text at the page number indicated:

Page 30

Finding 1: The Committee finds that the outdated nature of some local planning schemes; their inconsistency with state planning policies and strategic planning frameworks and the inconsistencies of local planning requirements across local governments have contributed to the types of determinations being made by development assessment panels.

Page 30

Finding 2: The Committee finds that there appears to be no provision in the draft Planning and Development (Local Planning Schemes) Regulations for there to be a penalty imposed on local governments if they fail to review their local planning scheme.

Page 44

Recommendation 1: The Committee recommends that the Department of Planning develop a more accessible and transparent process for the making of complaints about development assessment panels and raise greater awareness of its availability.

Page 53

Recommendation 2: The Committee recommends that regulations 24, 25 and 26 of the *Planning and Development (Development Assessment Panels) Regulations 2011* be amended to:

- remove references to local government members of development assessment panels being representatives of the local government or community; and
- refer to local government councillors as independent decision makers on development assessment panels.

Page 65

Recommendation 3: The Committee recommends that the Department of Planning introduce guidance, if not already available, to local governments to assist them in verifying the estimates of the cost of planning applications, including when it is appropriate to obtain independent expert advice on an estimate submitted by an applicant.

Page 76

Recommendation 4: The Committee recommends that the Department of Planning ensures that the Development Assessment Panel Code of Conduct 2011, (pursuant to regulation 45(3) of the *Planning and Development (Development Assessment Panels) Regulations 2011*), and the Development Assessment Panel Practice Notes: DAP Standing Orders prohibit members of development assessment panels representing applicants on applications before development assessment panels on which they sit.

Page 90

Recommendation 5: The Committee recommends that the Minister representing the Minister for Planning introduce an amendment to the *Planning and Development Act 2005* to provide for development assessment panels to give reasons for all determinations.

Page 91

Recommendation 6: The Committee recommends that the Minister representing the Minister for Planning introduce an amendment to the *Planning and Development Act 2005* to prescribe what reasons for determinations by development assessment panels must include.

Page 91

Finding 3: The Committee finds that if there will be a requirement for development assessment panels to provide reasons for all determinations, at least one panel member will be required to draft reasons and that it would be appropriate for the Government to remunerate this accordingly. The quantum of this remuneration is a matter for the Government to determine.

Page 102

Recommendation 7: The Committee recommends that the Government introduce regulations pursuant to section 263(2)(ea) of the *Planning and Development Act 2005* to provide for the reporting by local governments in relation to applications for planning approval, including the time taken to determine applications to development assessment panels.

Page 102

Recommendation 8: The Committee recommends that the Department of Planning arrange for an independent analysis to be undertaken of all data relating to development assessment panels once sufficient comparative data is available with respect to planning determinations by local governments.

Page 105

Recommendation 9: The Committee recommends that the Department of Planning reviews the adequacy of the training provided to members of development assessment panels.

Page 106

Recommendation 10: The Committee recommends that the Department of Planning ensures members appointed to development assessment panels and their alternates receive training pursuant to regulation 30 of the *Planning and Development (Development Assessment Panels) Regulations 2011* as soon as possible after their appointment.

Page 106

Recommendation 11: The Committee recommends that regulation 30 of the *Planning and Development (Development Assessment Panels) Regulations 2011* be amended to require mandatory follow up training of development assessment panel members and their alternates at regular intervals.

Page 114

Recommendation 12: The Committee recommends that the Government investigate the appropriateness of applicants being able to resubmit applications which have previously been refused in the planning system in Western Australia.

Page 118

Recommendation 13: The Committee recommends that the Department of Planning issue a practice note containing guidance on the exercise of the presiding member's discretion pursuant to regulation 40(4) of the *Planning and Development (Development Assessment Panels) Regulations 2011* to hold a meeting of a development assessment panel to determine a regulation 17 application in public.

Page 121

Recommendation 14: The Committee recommends that the *Planning and Development (Development Assessment Panels) Regulations 2011* be amended to provide for the presiding member to have a discretion to extend the notice period for meetings of development assessment panels in appropriate circumstances.

Page 130

Recommendation 15: The Committee recommends that regulation 41 of the *Planning and Development (Development Assessment Panels) Regulations 2011* be repealed and substituted with the following provision:

41. Quorum

(1) At a meeting of a Local Development Assessment Panel, 3 members of the LDAP including —

- (a) the presiding member; and
- (b) another specialist member; and
- (c) a local government member or their alternate,

constitute a quorum.

(2) At a meeting of a Joint Development Assessment Panel, 3 members of the JDAP including —

- (a) the presiding member; and
- (b) another specialist member; and
- (c) one of the local government members referred to in regulation 25(1)(a) or their alternate,

constitute a quorum.

Page 135

Recommendation 16: The Committee recommends that the *Planning and Development (Development Assessment Panels) Regulations 2011* be amended to give a local government not less than 14 days to give the administration officer of the development assessment panel a notice given to the applicant under regulation 11A.

Page 135

Recommendation 17: The Committee recommends that the *Planning and Development (Development Assessment Panels) Regulations 2011* be amended to provide the presiding officer of the development assessment panel with the sole discretion to extend the period within which the responsible authority report must be given in certain circumstances, including where the applicant has submitted late information to the local government.

Page 141

Recommendation 18: The Committee recommends that the Department of Planning give sufficient advance notice of its intention to introduce legislation to any committee of the Legislative Council which is inquiring into any matter to which such legislation is relevant.

Page 143

Recommendation 19: The Committee recommends that the Minister representing the Minister for Planning introduce an amendment to section 171F of the *Planning and Development Act 2005* to provide for further periodic reviews of the operation and effectiveness of the *Planning and Development (Development Assessment Panels) Regulations 2011* by a standing committee of the Legislative Council.

CHAPTER 1

INTRODUCTION

REFERENCE AND PROCEDURE

1.1 On 21 October 2014 the *Planning and Development (Development Assessment Panels) Regulations 2011* (**the Regulations**) were referred to the Standing Committee on Uniform Legislation and Statutes Review (**the Committee**) by order of the Legislative Council. Pursuant to this order, the Committee was required to report to the Legislative Council by 14 May 2015.

1.2 A copy of the Regulations can be accessed on the website of the State Law publisher.¹

1.3 The referral was in the following terms:

That this Council —

(1) refers to the Uniform Legislation and Statutes Review Committee the review into the Planning and Development (Development Assessment Panels) Regulations 2011 required pursuant to section 171F of the Planning and Development Act 2005; and

(2) requires the Uniform Legislation and Statutes Review Committee to —

(a) report to the Legislative Council in relation to this inquiry on or before 14 May 2015; and

(b) forward a copy of its report under (b)(i) to the Speaker of the Legislative Assembly, for tabling in that house on the same day as the report is tabled in the Legislative Council.²

1.4 Historical background on the Parliamentary debate when section 171F was inserted into the Act is provided at **Appendix 1**.

1.5 On 17 March 2015 the Legislative Council extended the Committee's time in which to report to 8 September 2015.

¹ http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_12173_homepage.html.

² Legislative Council, *Parliamentary Debates (Hansard)*, 21 October 2014, p7518.

- 1.6 The Committee called for submissions by contacting 16 stakeholders directly and advertised the inquiry in *The West Australian* on Saturday, 29 November 2014. The Committee received 47 submissions.
- 1.7 The Committee held 17 public hearings as well as hearings with the Department of Planning (**the Department**) and the Western Australian Local Government Association (**WALGA**) on 17 November 2014.
- 1.8 The Committee held a second hearing with the Department on 4 May 2015 after the Government enacted the *Planning and Development (Development Assessment Panels) Amendment Regulations 2015* (**the Amendment Regulations**) (see Chapter 4 of this report).
- 1.9 Details of stakeholders invited to make a submission, submissions received and the witnesses, are noted in **Appendix 2**. Submissions and transcripts of the hearings are posted on the Committee's website at www.parliament.wa.gov.au/uni.
- 1.10 The Committee wishes to thank all submitters, those who gave answers to questions on notice as well as witnesses who made themselves available for hearings.

Committee approach

- 1.11 The Committee has proceeded on the basis that the inquiry's terms of reference do not authorise the Committee to inquire into the policy of the Regulations and whether they, and development assessment panels (**DAPs**) established by the Regulations, should have been introduced in Western Australia. The Committee only considered Government policy and evidence received to the extent that it was relevant to the operation and effectiveness of the Regulations.³
- 1.12 The Committee also considered the amendments to the Regulations enacted by the Amendment Regulations during the course of the inquiry. The timing of these amendments caused considerable inconvenience and delay. The Committee's consideration of the Amendment Regulations is dealt with in Chapter 4 of this report.
- 1.13 In undertaking this inquiry, the Committee has assessed the operation and effectiveness of the Regulations and whether they have been effective in delivering their intended outcomes. This involves assessing whether the Regulations have produced outcomes consistent with the purposes of the Regulations, as outlined in documentation produced by the Department and other sources summarised in Chapter 2 of this report.
- 1.14 The Committee has principally relied upon the evidence of submitters and witnesses based on their experiences of DAPs, rather than its technical review of the Regulations

³ See Hon Kate Doust MLC, Chair, Standing Committee on Uniform Legislation and Statutes Review, *Transcript of Evidence*, Session Two, 22 June 2015, p3.

and associated guidance documentation, in making its assessment on the operation and effectiveness of the Regulations.

CHAPTER 2

BACKGROUND TO THE REGULATIONS

SUMMARY OF DEVELOPMENT ASSESSMENT PANELS

- 2.1 A person who wishes to use or develop land must apply to the relevant responsible authority, usually the local government or the Western Australian Planning Commission (**WAPC**), for planning approval, which will assess the application and either grant approval with or without conditions or refuse planning permission. The rules in a planning scheme, along with other applicable legislation, apply to the making of an application. Some of the factors considered by the responsible authority include the impact of the proposed use or development on the locality; the proposed height of the development and the amount of traffic likely to be generated by the proposal.⁴
- 2.2 In a number of Australian jurisdictions in recent years, expert panels have been established, following the work undertaken by the national Development Assessment Forum (**DAF**), described below, to undertake various development assessment roles. This includes the giving of advice to the responsible Minister and local governments on planning matters and the determination of applications for planning approval.
- 2.3 The Regulations established DAPs in Western Australia in July 2011 to determine certain applications for planning approval in the place of the relevant responsible authority. The types of applications DAPs consider are guided by the application of financial criteria and the application of a number of exclusions, described in paragraphs 2.38 to 2.40.
- 2.4 A DAP is an independent decision-making body comprised of three technical experts and two local government members. The technical experts are appointed by the Minister for Planning. The local government members are either elected members nominated by the relevant local government or voters in the relevant local government district appointed by the Minister for Planning in the absence of a nomination.
- 2.5 In its review of the operation and effectiveness of the Regulations the Committee has considered the following background to the Regulations.

⁴ See also Australian Government, Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, Productivity Commission Research Report, Volume 1, April 2011, p78, <http://www.pc.gov.au/inquiries/completed/regulation-benchmarking-planning/report/planning-volume1.pdf> (viewed 10 August 2015).

DEVELOPMENT ASSESSMENT FORUM

- 2.6 DAPs, according to the Government, were modelled on the DAF leading practice model,⁵ which was developed in response to the need to improve development assessment systems to ensure they were streamlined, efficient and effective to reflect increasing levels of development activity.⁶
- 2.7 The DAF was formed in 1998 to bring key stakeholders together to reach agreement on ways to streamline the processes used for development approval while preserving high quality decision making.⁷ DAF provides advice and recommendations through the Planning Officials Group to the Local Government and Planning Ministers' Council.⁸
- 2.8 DAF membership includes the:
- Australian Local Government Association
 - State and Territory local government associations
 - Commonwealth, State and Territory governments
 - development industry
 - related professional associations
- 2.9 In 2003 DAF commissioned the Centre for Developing Cities at the University of Canberra to develop a model for leading practice development assessment. The model recommended reforms of development assessment systems and processes across jurisdictions, including the separation of the roles of policy development and assessment of development applications.
- 2.10 The proposed development assessment model was considered at the Local Government and Planning Ministers' Council meeting on 13 February 2004⁹ where it was agreed that a national stakeholder consultation process was necessary to fully evaluate the strengths and weaknesses of the model.

⁵ *Implementing Development Assessment Panels in Western Australia*, Policy Statement, April 2011, piii.

⁶ See Development Assessment Forum, *A Leading Practice Model for Development Assessment in Australia*, March 2005, p1, <http://www.raia.com.au/i-cms?page=6849> (viewed 9 April 2015).

⁷ See Ms Gail McGowan, Director-General, Department of Planning, *Transcript of Evidence*, 19 June 2015, p2 and Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, pp5-6.

⁸ Australian Local Government Association, <http://alga.asn.au/?ID=157> (viewed 30 April 2015).

⁹ <http://lgam.wikidot.com/local-government-and-planning-ministers-council> (viewed 22 July 2015).

- 2.11 The national consultation process was conducted over a 12 week period across four key stakeholder groups —local government, state/territory government, industry and community. Over 580 individuals from more than 400 organisations participated in one or more consultation activities.¹⁰
- 2.12 In March 2005, the Local Government and Planning Ministers' Council released a final development assessment model. This proposed ten leading practices that a development assessment system should exhibit and six assessment 'tracks' that apply these practices to a range of assessment processes, noted and summarised in Tables 1 and 2.¹¹ Leading practices five and eight were cited by the Department in a discussion paper outlining the framework for DAPs in Western Australia, which are noted in Table 1.¹²

Table 1**The DAF leading practices**

Leading practice	Detail
1. Effective development policy	Elected representatives should be responsible for the development of planning policies. This should be achieved through effective consultation with the community, professional officers and relevant experts.
2. Objective rules and tests	Development assessment requirements and criteria should be written as objective rules and tests that are clearly linked to stated policy intentions. Where such rules and tests are not possible, specific policy objectives and decision guidelines should be provided.
3. Built-in improvement mechanisms	Each jurisdiction should systematically and actively review its policies and objective rules and tests to ensure that they remain relevant, effective, efficiently administered and consistent across the jurisdiction.
4. Track-based assessment	Development applications should be streamed into an assessment 'track' that corresponds

¹⁰ Australian Local Government Association, <http://alga.asn.au/?ID=157>.

¹¹ Development Assessment Forum, *A Leading Practice Model for Development Assessment in Australia*, March 2005, pp2-4, <http://www.raia.com.au/i-cms?page=6849> (viewed 9 April 2015).

¹² *Implementing Development Assessment Panels in Western Australia, Discussion Paper*, September 2009, http://www.planning.wa.gov.au/dop_pub_pdf/Discussion_Paper.pdf (viewed 22 May 2015).

	<p>with the level of assessment required to make an appropriately informed decision. The criteria and content for each track is standard.</p> <p>Adoption of any track is optional in any jurisdiction, but it should remain consistent with the model if used.</p>
5. A single point of assessment	<p>Only one body should assess an application, using consistent policy and objective rules and tests.</p> <p>Referrals should be limited only to those agencies with a statutory role relevant to the application. Referral should be for advice only. A referral authority should only be able to give direction where this avoids the need for a separate approval process.</p> <p>Referral agencies should specify their requirements in advance and comply with clear response times.</p>
6. Notification	<p>Where assessment involves evaluating a proposal against competing policy objectives, opportunities for third-party involvement may be provided.</p>
7. Private sector involvement	<p>Private sector experts should have a role in development assessment, particularly in:</p> <ul style="list-style-type: none"> • Undertaking pre-lodgement certification of applications to improve the quality of applications. • Providing expert advice to applicants and decision makers. • Certifying compliance where the objective rules and tests are clear and essentially technical. • Making decisions under delegation.
8. Professional determination for most applications	<p>Most development applications should be assessed and determined by professional staff or private sector experts. For those that are</p>

	<p>not, either:</p> <p>Option A – Local government may delegate development assessment determination power while retaining the ability to call-in any application for determination by council.</p> <p>Option B – An expert panel determines the application.</p> <p>Ministers may have call-in powers for applications of state or territory significance provided criteria are documented and known in advance.</p>
9. Applicant appeals	<p>An applicant should be able to seek a review of a discretionary decision.</p> <p>A review of a decision should only be against the same policies and objective rules and tests as the first assessment.</p>
10. Third-party appeals	<p>Opportunities for third-party appeals should not be provided where applications are wholly assessed against objective rules and tests.</p> <p>Opportunities for third-party appeals may be provided in limited other cases.</p> <p>Where provided a review of a decision should only be against the same policies and objective rules and tests as the first assessment.</p>

Table 2**DAF Assessment Tracks¹³**

Assessment Track	Detail
1. Exempt	Development that has a low impact beyond the site and does not affect the achievement

¹³ Further detail can be found at Development Assessment Forum, *A Leading Practice Model for Development Assessment in Australia*, March 2005, pp2-4, <http://www.raia.com.au/i-cms?page=6849> (viewed 9 April 2015), pp28-30.

	of any policy objective should not require development assessment.
2. Prohibited	Development that is not appropriate in specific locations should be clearly identified as prohibited in the regulatory instrument to ensure time is not wasted on proposals that will not be approved.
3. Self-assess	Where a proposed development can be assessed against clearly articulated criteria and it is always true that consent will be given if the criteria are met.
4. Code assess	Development is considered against objective criteria and performance standards – applications would be of a more complex nature than for the self-assess track.
5. Merit assess	Where applications are assessed against complex criteria relating to the quality, performance, on-site and off-site effects of a proposed development, or where an application varies from stated policy. Expert assessment is carried out by professional assessors.
6. Impact assess	Provides for the assessment of proposals against complex criteria that may have a significant impact on neighbouring residents or the local environment.

- 2.13 Each track is intended to be consistent with the ten leading practices and provide a process of assessment that is relevant to the project's complexity and impact on the built and natural environments. The track in which an application is to be assessed must be clear before an application is submitted.¹⁴

COUNCIL OF AUSTRALIAN GOVERNMENTS PROCESS

- 2.14 In February 2006 the Council of Australian Governments (**COAG**), as part of the National Reform Agenda, identified development assessment arrangements as one of

¹⁴ Development Assessment Forum, *A Leading Practice Model for Development Assessment in Australia*, March 2005, pp2-4, <http://www.raia.com.au/i-cms?page=6849> (viewed 9 April 2015). See also Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p5.

the ‘cross-jurisdictional hot spot’ areas where overlapping and inconsistent regulatory regimes were impeding economic activity.¹⁵

- 2.15 In March 2008, COAG agreed to implement regulation and competition reforms under the National Partnership Agreement to Deliver a Seamless National Economy. Development assessment was one of the 36 areas of regulatory and competition reform covered by this agreement.

- 2.16 COAG agreed to the following goal for development assessment reform:

*To improve development assessment processes to provide greater certainty and efficiency in the development and construction sector by reducing regulatory burdens and delays including maximum uptake of electronic development assessment processing nationally, noting that local councils remain responsible for their development policies.*¹⁶

- 2.17 COAG’s Business Regulation and Competition Working Group, which was set up by COAG in December 2007, was tasked to work on an implementation plan for development assessment reform.¹⁷ The DAF development assessment model was used as a framework to guide this reform.

DEVELOPMENT OF THE REGULATIONS

- 2.18 In March 2009 the Department released a consultation paper ‘to identify and reach consensus on the key priority areas and action for planning reform’.¹⁸ One of the actions identified was:

1.18 Development Assessment Panels

In cases of major projects that are likely to face significant approval delays and may be highly contentious, and in cases where major projects are proposed but there is limited local government technical capacity to undertake an appropriate level of assessment, Development Assessment Panels are being considered, as have been

¹⁵ Council of Australian Governments <http://pandora.nla.gov.au/pan/82622/20080515-0841/www.coag.gov.au/meetings/100206/index.html> (viewed 21 May 2015).

¹⁶ Local Government and Planning Ministers’ Council, *First National Report on Development Assessment Performance*, 2008/2009, http://webcache.googleusercontent.com/search?q=cache:7NJom71cKx0J:https://www.coag.gov.au/sites/default/files/brcwg_report_card_progress_deregulation_priorities_attach_A.rtf+&cd=5&hl=en&ct=clnk&gl=au (viewed 21 May 2015).

¹⁷ The relevant extract of this implementation plan can be found at https://www.coag.gov.au/sites/default/files/brcwg_implementation_plan.rtf (viewed 21 May 2015) at p14.

¹⁸ *Building a Better Planning System, Consultation Paper*, March 2009, http://www.planning.wa.gov.au/dop_pub_pdf/Building_a_Better_Planning_System_Consultation_Paper.pdf (viewed 21 May 2015).

*established in other States. Development Assessment Panels would include elected representatives as well as independent experts.*¹⁹

2.19 Subsequently, a discussion paper was released which outlined the Government's proposed framework regarding the operation of DAPs and invited submissions.²⁰ The discussion paper also:

- set out what the Government regarded as issues with the development approvals process which would be addressed by the introduction of DAPs, such as the requirement for dual approval of some applications by local governments and the WAPC, local government resources and a lack of regional planning in remote areas
- stated that DAPs were only intended to deal with complex applications requiring specialist determination having significant impacts on the local or regional area and were not intended to deal with minor applications.

2.20 A policy statement prepared by the Department summarised issues raised in submissions on the discussion paper and outlined the refinements to the proposed DAP model taking into account these submissions, such as financial criteria for DAP applications.²¹

2.21 Two working groups established by the Minister for Planning also considered the key issues raised by submissions.²²

2.22 DAPs were established in Western Australia on 1 July 2011 after the enactment of the *Approval and Related Reforms (No. 4) (Planning) Act 2010* in August 2010 (which introduced a new Part 11A into the *Planning and Development Act 2005 (Act)*) and the publication of the Regulations in the *Government Gazette* on 24 March 2011.

2.23 In addition to the Regulations, the Department has published a number of guidance documents to assist in the operation of DAPs including:

- *Development Assessment Panel Code of Conduct 2011*, March 2011 (**DAP Code of Conduct**)

¹⁹ Ibid, p15.

²⁰ Government of Western Australia, Department of Planning, *Implementing Development Assessment Panels in Western Australia, Discussion Paper*, September 2009, http://www.planning.wa.gov.au/dop_pub_pdf/Discussion_Paper.pdf (viewed 22 May 2015).

²¹ Government of Western Australia, Department of Planning, *Implementing Development Assessment Panels in Western Australia, Policy Statement*, April 2011, http://www.planning.wa.gov.au/dop_pub_pdf/Implementing_Development_Assessment_Panels.pdf (viewed 18 August 2015).

²² *Planning and Development (Development Assessment Panels) Regulations 2011, Explanatory Memorandum*, p10.

- *Development Assessment Panel Practice notes: DAP Standing Orders*, July 2012 (**DAP Standing Orders**)
- *Development Assessment Panel Procedures Manual*, September 2013 (**DAP Procedures Manual**)
- *Development Assessment Panel: Training Notes*, June 2011 (**DAP Training Notes**)
- a number of practice notes covering a range of operational matters (**DAP Practice Notes**)
- *Development Assessment Panels: Applicant's Brochure*, July 2011
- *Development Assessment Panel – Questions and Answers*, September 2011.²³

OTHER AUSTRALIAN JURISDICTIONS

2.24 Panels undertaking development assessment have been established in other Australian jurisdictions, as follows.

New South Wales

2.25 A number of panels currently operate in New South Wales, including planning assessment panels, design review panels and joint regional planning panels. The responsible Minister may establish a panel:

- where, in the opinion of the Minister, the council has failed to comply with its obligations under the planning legislation;
- where, in the opinion of the Minister, the council has unsatisfactorily performed its development assessment or planning role;
- where the Independent Commission Against Corruption has written a report recommending the appointment of a panel due to serious corrupt conduct by a councillor in connection with the exercise of functions by the council; or
- the council agrees to the appointment.²⁴

²³ Copies of all documentation can be found on the Department of Planning website at <http://www.planning.wa.gov.au/Development-Assessment-Panels.asp> (viewed 22 May 2015).

²⁴ Government of Western Australia, Department of Planning, *Implementing Development Assessment Panels in Western Australia, Discussion Paper*, September 2009, p5 and pp29-32 http://www.planning.wa.gov.au/dop_pub_pdf/Discussion_Paper.pdf (viewed 22 May 2015).

South Australia

- 2.26 In South Australia, each local government is required to delegate all of its development assessment powers to either a delegated officer, a council development assessment panel or a regional development assessment panel. A council can only determine an application for planning approval in its own right if granted an exemption by the responsible Minister.²⁵

Victoria

- 2.27 In Victoria, a number of planning application committees for each local government area undertake the following functions:

- to advise the Minister on any matters which the Minister refers to it in relation to an application for a permit or class of applications for development permits;
- to advise a responsible authority on any matters which the authority, with the consent of the Minister, refers to it in relation to an application for a permit or class of applications for permits;
- to carry out, as delegate, any function delegated to it by the Minister under section 190 of the *Planning and Environment Act 1987* (Victoria); and
- to carry out, as delegate, any function delegated to it by a responsible authority under section 188 of the *Planning and Environment Act 1987* (Victoria).²⁶

- 2.28 Local governments may also delegate planning applications to, or seek advice from, a planning application committee.

- 2.29 Planning advisory committees may also be established by the Minister to advise on any matters the Minister refers to them.²⁷

- 2.30 Planning application committees were established by the *Planning and Environment (General) Act 2013*, which abolished development assessment committees established by the *Planning Legislation Amendment Act (No.2) 2009*. Development assessment committees differed from current planning application committees in that they made decisions on significant planning permit applications. Planning application

²⁵ Government of Western Australia, Department of Planning, *Implementing Development Assessment Panels in Western Australia, Discussion Paper*, September 2009, pp5-6 and 28-29.

²⁶ Section 97MC, *Planning and Environment Act 1987* (Victoria). See <http://www.dtpli.vic.gov.au/planning/panels-and-committees/planning-panels-victoria> (viewed 3 August 2015) for details on planning application committees.

²⁷ Section 151, *Planning and Environment Act 1987* (Victoria).

committees assist local governments on complex planning matters but do not make decisions on them, unless specifically delegated that role.

THE PURPOSES OF DEVELOPMENT ASSESSMENT PANELS

2.31 The purposes of DAPs, as outlined by the Government, are to:

- enable more effective and efficient decision-making in development applications at local, regional and State levels;²⁸
- provide more effective and efficient processes than is currently the case for significant urban, industrial and infrastructure developments;²⁹
- provide more transparency, consistency and reliability in decision-making on complex development applications;³⁰
- streamline the determination process for particular types of development applications, by eliminating the requirement for dual approval under both the local and region schemes;³¹
- involve independent technical experts in the determination process;³²
- encourage an appropriate balance between independent professional advice and local representation in decision-making for significant projects;³³ and
- reduce the number of complex development applications being determined by local governments, to allow local governments to focus their resources on strategic planning.³⁴

²⁸ Approval and Related Reforms (No.4) (Planning) Bill 2009, *Explanatory Memorandum*, p1.

²⁹ Hon John Day MLA, Minister for Planning, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 18 November 2009, p9265b – Second Reading Speech (Approval and Related Reforms (No.4) (Planning) Bill 2009).

³⁰ Id.

³¹ Government of Western Australia, Department of Planning, *Development Assessment Panel Procedures Manual*, September 2013, p4.

³² Id. See also Western Australia, Legislative Assembly Estimates Committee B, Hon John Day MLA, Minister for Planning, 11 June 2015, ppE48-E49.

³³ Department of Planning, Western Australian Planning Commission, <http://www.planning.wa.gov.au/publications/888.asp> (viewed 22 July 2015).

³⁴ Government of Western Australia, Department of Planning, *Implementing Development Assessment Panels in Western Australia, Discussion Paper*, September 2009, <http://www.planning.wa.gov.au/publications/888.asp> (viewed 17 April 2015). See also Government of Western Australia, Department of Planning, *Development Assessment Panel Procedures Manual*, September 2013, p4, <http://www.planning.wa.gov.au/daps/data/Publications/Procedures%20Manual/DAP%20Procedures%20Manual.pdf> (viewed 3 June 2015).

- 2.32 It is against these purposes that the Committee has assessed the operation and effectiveness of the Regulations based on feedback received from organisations and individuals who gave evidence to this inquiry.

OPERATION OF DEVELOPMENT ASSESSMENT PANELS

- 2.33 The Department's guidance documents (as noted in paragraph 2.23) explain how DAPs operate. The main features of DAPs are summarised below.³⁵
- 2.34 DAPs have been established as independent decision-making bodies to determine applications for planning approval made under local and regional planning schemes. They make decisions in place of the original decision-maker, being a local government or the WAPC for certain planning applications. They comprise technical experts and local government members.
- 2.35 The original decision maker remains responsible for undertaking the assessment of the application and preparing a responsible authority report containing recommendations, which is taken into account by the DAP when making a decision.

Types of DAPs and composition of panels

- 2.36 There is a DAP in place for each local government area where a planning scheme applies. A Local Development Assessment Panel (**LDAP**) operates for planning applications in the City of Perth and eight Joint Development Assessment Panels (**JDAPs**) operate in various other metropolitan and regional areas. LDAPs service a single local government area, whereas JDAPs service two or more.³⁶
- 2.37 DAP members are appointed by the Minister for Planning and the panel is comprised of five members, including three specialist members and two local government members. The specialist members appointed are the presiding member, the deputy presiding member and a third specialist member. The local government members are nominated by the local government for the area for which a DAP is established.

Types of DAP applications

- 2.38 The Regulations prescribe four different classes of applications that can be considered by a DAP:
- Mandatory applications that must be determined by the relevant DAP.

³⁵ See also the summary of the operation of DAPs in Maginn, Paul and Foley, Neil, *From a centralised to a 'diffused centralised' planning system: planning reforms in Western Australia*, Australian Planner, Volume 51, Issue 2, 10 April 2014, pp157-158.

³⁶ The *Planning and Development (Development Assessment Panels) Order 2015*, enacted on 24 July 2015, consolidated the number of regional DAPs from nine to three.

- Optional applications which must be determined by a DAP if the applicant has chosen the DAP as the relevant decision-maker.
- An application delegated to the DAP by a local government or the WAPC.
- A minor amendment application, being an application to amend or cancel any development approval, or conditions of approval, granted previously by a DAP.³⁷

2.39 The Regulations also prescribe the following financial criteria that applications must meet:

- For mandatory applications:
 - a) for the City of Perth LDAP, with an estimated cost of \$20 million or more;
 - b) for JDAPs, with an estimated cost of \$10 million or more.
- For optional applications:
 - a) for the City of Perth LDAP, with an estimated cost of \$2 million or more and less than \$20 million;
 - b) for JDAPs, with an estimated cost of \$2 million or more and less than \$10 million.

2.40 A DAP cannot consider an ‘excluded development application’, which is defined as follows:

excluded development application means a development application for approval of—

(a) construction of—

- (i) a single house and any associated carport, patio, outbuilding and incidental development;
- (ii) less than 10 grouped dwellings and any associated carport, patio, outbuilding and incidental development;
- (iii) less than 10 multiple dwellings and any associated carport, patio, outbuilding and incidental development; or

³⁷ Development Assessment Panel–Questions and Answers, September 2011, <http://www.planning.wa.gov.au/Development-Assessment-Panels.asp> (viewed 22 May 2015), p2.

- (b) *development in an improvement scheme area; or*
- (c) *development by a local government or the Commission; or*
- (d) *development in a district for which —*
 - (i) *a DAP is not established at the time the application is made;*
or
 - (ii) *a DAP has been established for less than 60 days at the time*
*the application is made;*³⁸

Application and decision-making process

- 2.41 Applicants must pay a fee for a DAP application upon lodgement of the completed form in addition to existing fees imposed by a local government under the Act.³⁹
- 2.42 Once a DAP application is made, the local government notifies the administrative officer of the DAP, provides them with all relevant information and documentation and prepares a responsible authority report that is submitted within certain timeframes.⁴⁰
- 2.43 A DAP makes a decision in accordance with the terms of the planning instrument under which the application is made.⁴¹ Its meetings are open to the public and each DAP member has a vote on a decision to be made. In addition to their own vote, the presiding member also has a casting vote in the event of an equality of votes.
- 2.44 The following diagram outlines the DAP application process, from the submission of the application to the determination by the DAP.

³⁸ Regulation 3(1), *Planning and Development (Development Assessment Panels) Regulations 2011*.

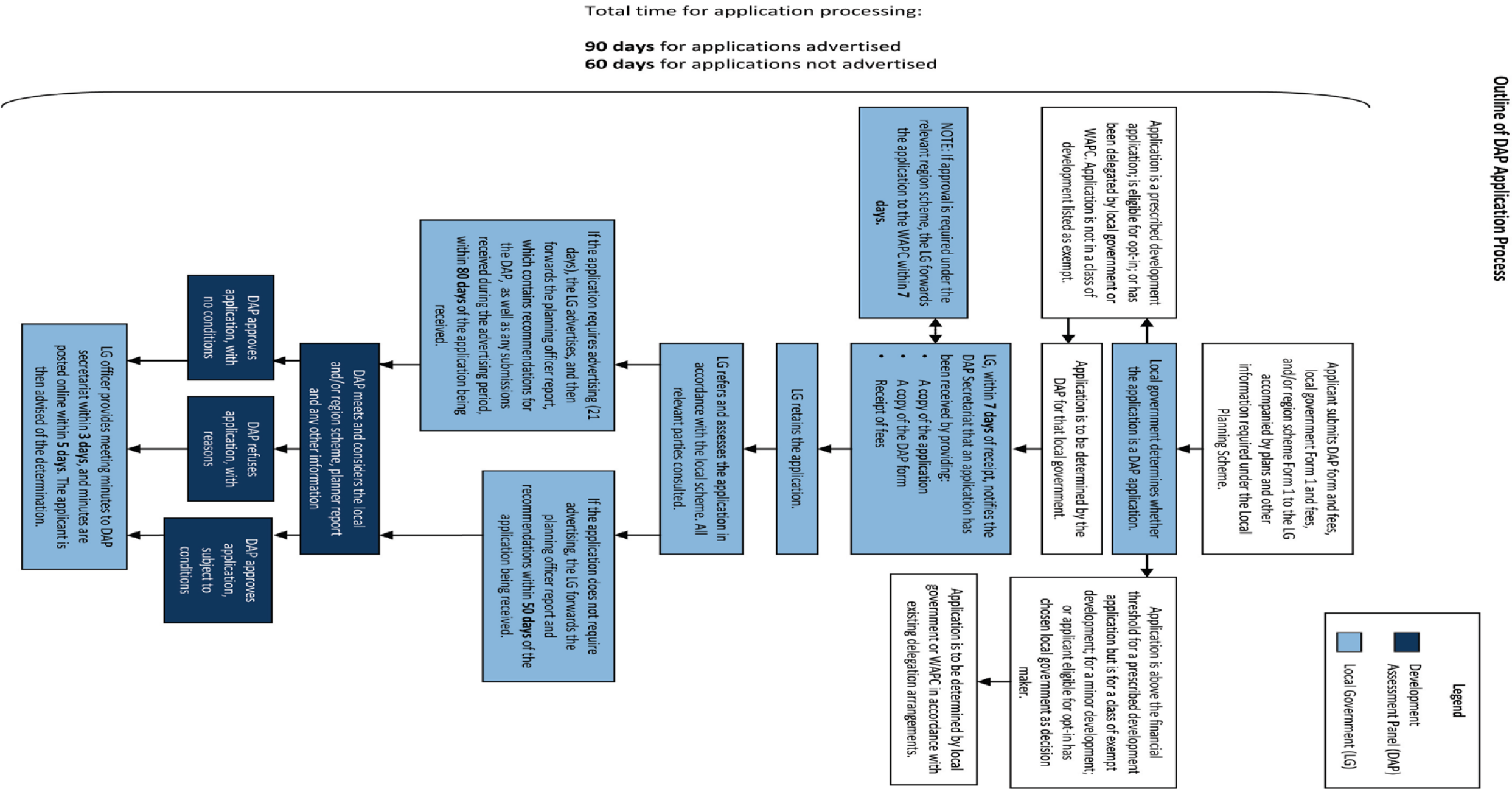
³⁹ Ibid, Regulation 10.

⁴⁰ Ibid, Regulations 11 and 12.

⁴¹ Ibid, Regulation 16.

Figure 1

The DAP application process⁴²



⁴² Source: <http://taylorburrellbarnett.com.au/dap-fact-sheet-ldap-jdap-wa/#.VWQegk0cSpo> (viewed 26 May 2015). See also *Development Assessment Panel Procedures Manual*, September 2013, <http://www.planning.wa.gov.au/daps/data/Publications/Procedures%20Manual/DAP%20Procedures%20Manual.pdf>, pp7-8.

Review by the State Administrative Tribunal

- 2.45 A DAP may approve an application, with or without conditions, or may refuse an application. An application may also be deemed refused where a determination is not made, or notice of the determination is not given to the applicant, within the time allowed under the Act or the planning instrument.
- 2.46 An applicant may apply to the State Administrative Tribunal (SAT) for a review of a determination by a DAP to refuse an application; any condition imposed by a DAP in the determination of an application or a deemed refused DAP application.⁴³

THE DEPARTMENT'S REVIEW OF THE REGULATIONS

- 2.47 The Department initiated its own review of DAPs in September 2013 (**Department Review**) and reported on its review in two reports:

- an initial review report dated September 2013
- a summary of submissions and outcome of review report dated August 2014.⁴⁴

- 2.48 It stated at the time:

*The DAPs have now been in operation for two years, allowing sufficient data and statistics to be accumulated to enable a review of how successfully they are operating and whether they are achieving their objectives. In addition to collating operating statistics, the Department of Planning has also conducted forums and surveys with DAP members and local government councillors and planning staff to gather qualitative data to aid the review.*⁴⁵

- 2.49 The Department Review considered:

- various operational statistics, including numbers of applications by application type and DAP panel as well as SAT applications; and
- feedback received by stakeholders at a number of review forums, which included DAP members, development industry representatives and senior

⁴³ Regulation 18, *Planning and Development (Development Assessment Panels) Regulations 2011*.

⁴⁴ Department of Planning, *Planning makes it happen: phase two, Review of the Development Assessment Panels*, September 2013, http://www.planning.wa.gov.au/dop_pub_pdf/DAPs_Review_final.pdf (viewed 26 May 2015); Department of Planning, *Review of the Development Assessment Panels, summary of submissions and outcomes of review*, August 2014, http://www.planning.wa.gov.au/dop_pub_pdf/Review_of_DAPs.pdf (viewed 26 May 2015).

⁴⁵ Department of Planning, *Planning makes it happen: phase two, Review of the Development Assessment Panels*, September 2013, p1.

local government planning staff, according to criteria such as significance of applications; decision timeframes and consistency of decision-making.

2.50 The initial report on the Department Review concluded that:

Since coming into operation, the DAPs have provided a consistent and reliable process, with positive support from industry and increasing confidence in the process from local government.

As a substantial planning reform, DAPs' operating statistics and analysis demonstrate they are mostly meeting their objectives of providing a greater measure of transparency, consistency and reliability in decision making on complex development applications.

The DAPs have made a significant contribution in ensuring consistency and clarifying the conditions imposed on the approval of development applications, providing greater certainty to industry. The contribution of expert advice from DAP members ensures a focus on the planning issues and consideration of broader issues of impact.

It has been observed that DAPs have influenced a more technical approach, where applications are determined on the basis of the local planning scheme, policies and principles and the appropriate application of conditions. It is entirely appropriate that decisions are based on consideration of these planning instruments and conditions. It is only in this way that the appropriate exercise of statutory planning discretion and a fair, consistent and transparent process can be ensured.⁴⁶

2.51 The Department then invited public submissions and conducted an online survey containing various questions on reform initiatives.

2.52 The report published in August 2014 summarised submissions and outlined amendments to the Regulations proposed by the Department, including:

- A variation of the DAP meeting quorum requirements from the presiding member, one specialist member and one local government member to the presiding member and any two other members.
- 'Stop the clock' mechanisms to pause the statutory timeframe for a DAP decision in circumstances where additional information is required from the applicant by the responsible authority, or where the presiding member, with

⁴⁶ Department of Planning, *Planning makes it happen: phase two, Review of the Development Assessment Panels*, September 2013, p12.

the applicant's consent, grants an extension of time for the submission of the responsible authority report.

- A lowering of the opt in financial threshold from \$3 million to \$2 million for all DAPs.
- An increase in the mandatory financial threshold from \$15 million to \$20 million for the City of Perth DAP and from \$7 million to \$10 million for all other DAPs.
- That the regulations shall prevail over any planning instrument to the extent of any inconsistency.
- Disbanding of the Short-List Working Group (**SLWG**) established to submit to the Minister for Planning short-lists of persons recommended for appointment as specialist members of DAPs.

2.53 The Amendment Regulations introduced these and a few other amendments to the Regulations, which came into effect on 1 May 2015.⁴⁷

⁴⁷ See *Planning and Development (Development Assessment Panels) Amendment Regulations 2015*, *Explanatory Memorandum* and Government of Western Australia, Development Assessment Panels, *Practice Note 10, 2015 DAP Amendment Regulations*.

CHAPTER 3

ISSUES IDENTIFIED BY THE COMMITTEE

- 3.1 During the Committee's inquiry, submissions and hearings by various witnesses raised a number of issues relevant to the operation and effectiveness of the Regulations.
- 3.2 This chapter canvasses issues identified by the Committee, and relevant evidence, and outlines how the issues raised impacts on the operation and effectiveness of the Regulations and whether they have produced outcomes consistent with the purposes of the Regulations and DAPs outlined in Chapter 2.
- 3.3 It is important to note that some of these issues are not unique to DAPs but apply more broadly to the planning system in Western Australia.

LOCAL GOVERNMENT PLANNING SCHEMES

- 3.4 Significant issues canvassed by witnesses during the inquiry was the currency of local planning schemes; their inconsistency, in some instances, with state planning policies and strategic planning frameworks and the inconsistencies of local planning requirements across local governments.
- 3.5 Some witnesses gave evidence that they regarded some local government planning schemes as out of date due to failures of local governments to ensure their compliance with state planning documentation. This was cited as a factor explaining some decisions of DAPs not being consistent with local planning schemes and policies.
- 3.6 Industry bodies the Urban Development Institute of Australia, the Property Council of Australia and the Housing Industry Association highlighted these shortcomings of local planning schemes as follows.

Mr Allingame: To us the biggest issue at the moment is the local authority's town planning schemes. The reality is that many of them are outdated, have not been updated for a long time; some of them are, you would almost say they are antiquated in terms of some of the definitions, and that is what is tending to give—or what is causing some of the conflict that presently occurs. If the town planning schemes were made to be brought up to date and also are more reflective, I suppose, of what the Planning Commission's or the state government's objectives are, that would go a long way to fixing the situation that we are presently facing. There is genuine confusion out

*there and some of the planning outcomes are not good when you look at the town planning schemes.*⁴⁸

...

*It is very difficult to try to achieve the objectives that the state and the pre-eminent Planning Commission is trying to push given the state of some of the local town planning schemes. Some of them have texts that go back to the 1970s. They are meant to be updated every five years, but some of them do not.*⁴⁹

...

Mr Iacomella: *The operation of a DAP can be even further improved if those town planning schemes are themselves improved, and there are a number of instances where town planning schemes may not be fully compliant with state planning policies and strategic planning frameworks. We believe that a number of the issues that have been discussed here today around the operation of DAPs will be even further addressed if all town planning schemes are uniformly and consistently complying with state planning policies, and particularly with state strategic planning frameworks.*⁵⁰

...

Mr Gelavis: *I have not had any direct feedback from members about inconsistencies among DAPs but certainly inconsistencies among local government jurisdictions in local planning requirements.*⁵¹

- 3.7 The Chairman of the WAPC is also of the view that local planning schemes need to be up to date. This is detailed in the following exchange.

Mr Lumsden: *The schemes need to be up-to-date, they need to be clear and they need to have appropriate parameters so that you have an appropriate, more rigorous framework in which to make a guide for decision-making.*

⁴⁸ Mr Nicholas Allingame, Vice President, Urban Development Institute of Australia, *Transcript of Evidence*, 22 June 2015, p13.

⁴⁹ Id.

⁵⁰ Mr Lino Iacomella, Deputy Executive Director, Property Council of Australia, *Transcript of Evidence*, 22 June 2015, p10.

⁵¹ Mr John Gelavis, Executive Director, Housing Industry Association, *Transcript of Evidence*, 22 June 2015, p7.

The CHAIR: *How often are the schemes updated? Is there a requirement for them to be updated on a regular basis? As one of my colleagues alluded to, they might not have been updated for 20 years in some cases.*

Mr Lumsden: *There is a requirement under the act for those to be at least reviewed and updated every five years, but often they are not.*

The CHAIR: *So perhaps that needs to be tightened and the language changed about how that is managed?*

Mr Lumsden: *Yes, I think there is a principle that it should be at least reviewed, and if not the whole scheme, certain parts of the scheme, where you look back over the past five years and see where there is need to review the scheme or amend the scheme, particularly with changes in government policy and those other issues, or even if there are issues within the community they wish to address, rather than try to address it through the use of discretion, go back and look at your fundamental planning instrument, which is the local government planning scheme, and if it is deficient, fix it.⁵²*

- 3.8 DAP presiding members who gave evidence to the Committee also highlighted the issue of inconsistent and outdated local planning schemes.

Mr Koltasz: *From my point of view, I cannot recall any at the moment, but in my experience over the years, yes, I have seen instances where outdated town planning schemes have stifled development or constrained the ability of development to occur, as opposed to a neighbouring local authority.⁵³*

...

...with the mechanisms in local government schemes, there is still that inconsistency amongst local authorities in terms of the older schemes and the newer schemes, but I think, as they now get updated, there are planning regulations that try to guide them into a more consistent approach.⁵⁴

⁵² Mr Eric Lumsden, Chairman, Western Australian Planning Commission, *Transcript of Evidence*, 19 June 2015, pp4-5.

⁵³ Mr Eugene Koltasz, Presiding Member, Metro East and Pilbara Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p10.

⁵⁴ Id.

Mr Gray: *I think the problem with schemes is the long lead time to making a new scheme. Many local governments have old schemes gazetted years ago, and I think 22 years is not unusual. Most of those have been updated in terms of the key provisions as they come to the attention of the council. It is a long, drawn-out process to review a scheme and to introduce a new scheme at the present time.*⁵⁵

...

Mr Johnson: *Town planning schemes can be very frustrating and they put the DAP into a situation where you have to apply the rules that apply with that existing scheme, whereas the council have moved on to oppose that sort of liquor store and tried to pass a policy to deal with something that should have been an amendment to the scheme, and certainly that failed because the scheme prevailed.*⁵⁶

- 3.9 The Department referred to the current work of local governments on reviewing and amending their planning schemes and cited the introduction of new local planning scheme regulations providing for mandatory reporting by local governments on such matters.

The majority of the State's 139 local governments are currently working towards compliance with requirements under the Planning Act. This includes the requirement to regularly review and amend their scheme through a 5-yearly consolidation process, prescribed under Part 5, Division 5 of the Planning Act.

These issues will largely be addressed through the new Local Planning Scheme Regulations. This is a major legislative project comprising six years of work by the Department, involving a 'once in a generation' reform comprising some 160-pages of new planning legislation. A full draft version of the regulations was published for public consultation at the end of 2014, and the Minister is expected to introduce them formally in 2015.

When the regulations commence later this year, local governments will have to undertake a review of their scheme and provide a report. This review report is expected to include such data as an overview of

⁵⁵ Mr David Gray, Presiding Member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p10.

⁵⁶ Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, p11.

*the subdivision and development activity, lot take-up and population changes, and the adequacy of their current legislation and policy.*⁵⁷

Committee comment

- 3.10 It is clear on the evidence provided during the inquiry that the currency of some local planning schemes; their inconsistency with state planning policies and frameworks and instances where they may not cater for the type of development being considered by a DAP have contributed to some of the determinations made by DAPs which have raised issues with some witnesses.
- 3.11 This impacts upon the operational effectiveness of the Regulations given one of the purposes of the Regulations outlined in paragraph 2.31 is to provide more consistency in decision-making.
- 3.12 The Committee notes, as alluded to in the evidence in paragraphs 3.8 and 3.9, there are plans to enact regulations to improve the consistency of local planning schemes. The draft Planning and Development (Local Planning Schemes) Regulations are being developed by the Government for the purposes of ensuring a more consistent approach in local planning schemes. One method by which this may be achieved is the introduction of deemed provisions, which will be automatically included in all schemes once prescribed in regulations.⁵⁸ Another is the requirement for local governments to carry out a review of their planning scheme every five years (which must consider whether the planning scheme is up to date) and report to the WAPC.
- 3.13 Given there is an existing requirement for local governments to review and consolidate their local planning schemes pursuant to section 88 of the Act, the Committee is of the view it remains to be seen whether the enactment of the Planning and Development (Local Planning Schemes) Regulations will assist in addressing some of the issues highlighted in evidence above, including greater consistency of decision making by DAPs based on more consistent and up to date local planning schemes. The fact that, on advice from the Department, there appears to be no provision for there to be a penalty imposed on local governments if they fail to review their local planning scheme, further underlines this point.⁵⁹

⁵⁷ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, pp17-18.

⁵⁸ See the discussion paper and consultation draft of the Planning and Development (Local Planning Schemes) Regulations 2014 at <http://www.planning.wa.gov.au/publications/7295.asp> (viewed 11 August 2015).

⁵⁹ Email from Mr Stephen Ferguson, Senior Solicitor, Department of Planning, 18 August 2015.

Finding 1: The Committee finds that the outdated nature of some local planning schemes; their inconsistency with state planning policies and strategic planning frameworks and the inconsistencies of local planning requirements across local governments have contributed to the types of determinations being made by development assessment panels.

Finding 2: The Committee finds that there appears to be no provision in the draft Planning and Development (Local Planning Schemes) Regulations for there to be a penalty imposed on local governments if they fail to review their local planning scheme.

THIRD PARTY RIGHT OF REVIEW

- 3.14 As outlined in Table 1, Leading Practice Ten of the DAF's Leading Practice Model states:

Opportunities for third-party appeals should not be provided where applications are wholly assessed against objective rules and tests.

Opportunities for third-party appeals may be provided in limited other cases.

Where provided a review of a decision should only be against the same policies and objective rules and tests as the first assessment.

- 3.15 The right to apply to the SAT for a review of the merits of a determination by a DAP is restricted under the Regulations to the applicant.⁶⁰ No provision is made for a third party, including a local government or a member of the public, to have a similar right of review.
- 3.16 This is consistent with the position which predated the introduction of DAPs and still applies today, which is that, in Western Australia, only applicants for planning approval may seek a review of the merits of decisions on their applications.
- 3.17 The issue of third party rights of review in planning applications in Western Australia and debate over whether such a right should be introduced has been well documented

⁶⁰ Regulation 18 of the *Planning and Development (Development Assessment Panels) Regulations 2011*.

in academic and other papers.⁶¹ This includes a detailed examination by the Standing Committee on Legislation in its 14th Report *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal*.⁶² That Committee recommended that the Act be amended to provide for a third party right of review to the SAT for planning proposals as well as giving third parties the right to apply to be joined as parties in any SAT proceedings.⁶³

- 3.18 On 3 June 2009, the then Minister for Child Protection, representing the Minister for Planning, advised the Legislative Council of the Government's position on third party appeals:

The Government does not currently have any plans to introduce third party appeal rights in Western Australia.

*The Government does not believe that the introduction of third party appeal rights in Western Australia is consistent with current attempts to simplify and streamline the planning approvals process. The Planning and Development Act 2005 requires public consultation in relation to the planning framework established in local and regional areas, with public consultation mandated for local and region planning scheme amendments, as well as State Planning Policies, local planning policies and structure plans. As such, the Government believes that the current planning process provides sufficient opportunity for the local community to have a say in what happens in their neighbourhoods.*⁶⁴

- 3.19 This remains Government policy.⁶⁵

⁶¹ See, for example, Hurley, J. Taylor, E. Cook, N. and Colic-Peisker, V, 'In the fast lane: Bypassing third party objections and appeals in planning approval processes', a paper presented at the State of Australian Cities National Conference 2011, Australian Sustainable Cities and Regions Network, Melbourne, Australia; [http://soac.fbe.unsw.edu.au/2011/papers/SOAC2011_0106_final\(1\).pdf](http://soac.fbe.unsw.edu.au/2011/papers/SOAC2011_0106_final(1).pdf) (viewed 25 March 2015); Hurley, J. Taylor, E. Cook, N, *Examining three planning pathways in the mediation of resident opposition to compact city*, <http://www.soacconference.com.au/wp-content/uploads/2013/12/Hurley-Governance.pdf> (viewed 25 March 2015); Judge Christine Trenorden, *Town Planning Law – Past, Present and Future: Third Party Appeal Rights: Past and Future*, presented at a conference to mark 80 years of town planning law in Western Australia, 18 November 2009, http://www.sat.justice.wa.gov.au/files/10_Hon_Judge_Christine_Trenorden_Presentation.pdf (viewed 25 March 2015).

⁶² Western Australia, Legislative Council, Standing Committee on Legislation, Report 14, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal*, 20 May 2009, pp197-227.

⁶³ Ibid, p227.

⁶⁴ Hon Robyn McSweeney MLC, Minister for Child Protection, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 3 June 2009, pp4610-11.

⁶⁵ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, p27.

- 3.20 Section 236 of the Act, which governs rights to apply to the SAT for a review of a planning decision, provides:

236. When this Part applies

- (1) *In this section —*

planning scheme includes any other instrument that regulations made under the State Administrative Tribunal Act 2004 specify to be a planning scheme for the purposes of subsection (3).

- (2) *This Part applies if a written law or a planning scheme or any other written law gives the State Administrative Tribunal jurisdiction to carry out a review in accordance with this Part.*

- (3) *Even if a planning scheme does not expressly give a person a right to apply to the State Administrative Tribunal for a review, in accordance with this Part, of a decision or matter, the planning scheme is to be taken to give that right if —*

(a) the planning scheme is expressed as conferring on the person a right to appeal against the decision, or to refer the matter, under this Act; or

(b) the planning scheme is expressed as conferring on the person a right to appeal or apply for review in respect of the matter and the matter involves the exercise by the responsible authority of a discretionary power.

- (4) *Subsection (3) applies even if the planning scheme provides for the appeal, referral or application to be made otherwise than to the State Administrative Tribunal or, in the circumstances described in paragraph (b) of that subsection, otherwise than in accordance with this Part.*

- (5) *A provision in a planning scheme of the kind described in subsection (3)(a) or (b) has no effect other than the effect given to that provision by subsection (3).*

- 3.21 Accordingly, both generally and in relation to DAPs, no third party right of review can be exercised unless it is conferred in a planning scheme or local or other law covering a planning application.⁶⁶
- 3.22 Sections 27 and 29 of the *State Administrative Tribunal Act 2004 (SAT Act)* describe the SAT's power of review. They provide:

27. Nature of review proceedings

- (1) *The review of a reviewable decision is to be by way of a hearing de novo, and it is not confined to matters that were before the decision-maker but may involve the consideration of new material whether or not it existed at the time the decision was made.*
- (2) *The purpose of the review is to produce the correct and preferable decision at the time of the decision upon the review.*
- (3) *The reasons for decision provided by the decision-maker, or any grounds for review set out in the application, do not limit the Tribunal in conducting a proceeding for the review of a decision.*

29. Tribunal's powers in review jurisdiction

- (1) *The Tribunal has, when dealing with a matter in the exercise of its review jurisdiction, functions and discretions corresponding to those exercisable by the decision-maker in making the reviewable decision.*
- (2) *Subsection (1) does not limit the powers given by this Act or the enabling Act to the Tribunal.*
- (3) *The Tribunal may —*
 - (a) *affirm the decision that is being reviewed; or*
 - (b) *vary the decision that is being reviewed; or*
 - (c) *set aside the decision that is being reviewed and —*

⁶⁶

See http://www.sat.justice.wa.gov.au/files/Third_Party_Pamphlet_DL.pdf (viewed 13 March 2015). In her paper, referenced in footnote 61, Judge Christine Trenorden argued that the adoption of third party appeal rights in Western Australia is inevitable. See also DAP Practice Note 7, pp2-3 and *Development Assessment Panel: Training Notes "Making Good Planning Decisions"*, June 2011, p42, where it states 'there are no third-party appeal rights, unless specifically granted in a planning scheme.' The fact there are no third party rights of merits review from decisions of DAPs was confirmed by Chaney J in *Hamersley v Bartle* [2013] WASC 191 at p16, paragraph 52.

-
- (i) *substitute its own decision; or*
 - (ii) *send the matter back to the decision-maker for reconsideration in accordance with any directions or recommendations that the Tribunal considers appropriate, and, in any case, may make any order the Tribunal considers appropriate.*
- (4) *The fact that a decision is made on reconsideration as required under subsection (3)(c)(ii), does not prevent the decision from being open to review by the Tribunal.*
- (5) *The decision-maker's decision as affirmed or varied by the Tribunal or a decision that the Tribunal substitutes for the decision-maker's decision —*
- (a) *is to be regarded as, and given effect as, a decision of the decision-maker; and*
 - (b) *unless the enabling Act states otherwise or the Tribunal orders otherwise, is to be regarded as having effect, or having had effect, from the time when the decision reviewed would have, or would have had, effect.*
- (6) *Without limiting subsection (5)(a), the decision-maker has power to do anything necessary to implement the Tribunal's decision.*
- (7) *Despite subsection (5)(a), the decision as affirmed, varied, or substituted is not again open to review by the Tribunal as a decision of the decision-maker.*
- (8) *Subsection (5)(a) does not affect an appeal under Part 5 against the Tribunal's decision.*
- (9) *To avoid doubt it is declared that this section and section 27 do not extend to requiring or enabling the Tribunal to deal with a matter that is different in essence from the matter that was before the decision-maker.*

3.23 A hearing 'de novo' (section 27(1) of the SAT Act) is a proceeding to decide a matter afresh, as if the original decision had not been made on its merits. It constitutes a new hearing.

3.24 This can be contrasted with the more limited right to apply to the Supreme Court for judicial review of administrative decisions. The power to confine inferior courts and tribunals within the limits of their authority to decide by granting writs of prohibition,

mandamus and certiorari on the grounds of jurisdictional error is a right at common law. It is also a 'defining characteristic of State Supreme Courts' which cannot be removed by State Parliaments.⁶⁷

3.25 Accordingly, it is open for a person other than an applicant for planning approval to apply to the Supreme Court for a judicial review of a decision by a DAP.⁶⁸ This could be on the basis that the DAP failed to accord procedural fairness to that person⁶⁹ or committed a jurisdictional error. However, as it is not a new hearing, the Court cannot substitute its own decision for that of the DAP. The appeal right is, therefore, more limited.⁷⁰

3.26 In the absence of a third party right of review in a planning scheme, there are four ways in which it may be possible for a third party to participate in an application to SAT for a review of a decision by a DAP. These are:

- being called as a witness by the respondent (i.e. the DAP);
- making submissions under section 242 of the Act;
- intervening under section 37(3) of the SAT Act; and
- possible participation in mediation.

3.27 In order for SAT to allow a third party to make submissions under section 242 of the Act:

- The third party must have a legal interest or some other direct, material and special interest in the outcome of the application that is unique to it and not shared by the public generally or a segment of the public.

⁶⁷ *Kirk v Industrial Court of New South Wales* [2010] HCA 1. See also Western Australia, Legislative Council, Standing Committee on Legislation, Report 25, *Custodial Legislation (Officers Discipline) Amendment Bill 2013*, 11 November 2014, p51 at footnote 106 and p68 at footnote 139.

⁶⁸ This was undertaken in *Hamersley v Bartle* [2013] WASC 191, where Ms Hamersley applied to the Supreme Court for a writ of certiorari (an order to set aside a decision) against the Metro West JDAP to set aside its decision to conditionally approve a four storey office building which was immediately opposite her property. The application was not successful. This is the same person as Angela Hamersley, who has made a submission to this inquiry.

⁶⁹ The three recognised rules for procedural fairness are the hearing rule (the right to a fair hearing); the bias rule (a requirement that the decision maker is impartial) and the no evidence rule (the requirement for decisions to be based on logically probative evidence, not on mere speculation or suspicion). Justice Pritchard, in *Aloi v Bertola (no2)* [2013] WASC 214, stated, at [67], 'Nothing in the PD Act or the DAP Regulations manifests any intention that a JDAP and its members are not subject to a duty to accord procedural fairness in making decisions in respect of applications for planning approval. Moreover, various provisions in the PD Act and the DAP Regulations are consistent with a requirement to afford procedural fairness by the application of the bias rule.'

⁷⁰ Prohibition directs a subordinate to stop doing something the law prohibits; mandamus is an order issued by higher court to compel or to direct a lower court or a government officer to perform mandatory duties correctly and certiorari is an order by a higher court directing a lower court to send the record in a given case for review.

- Generally, it is not sufficient that the third party holds genuine and strong views or has taken an active interest in relation to the matter even where the third party is a body such as a community association that has objects directed to promoting outcomes relevant to the application.⁷¹
- 3.28 If the SAT allows a third party to intervene under section 37(3) of the SAT Act, then the third party acquires rights and responsibilities as a party under s 36(1) of the SAT Act. Usually, an intervener may give evidence, call witnesses, ask questions of witnesses and exercise any appeal right available to a party, subject to any conditions imposed by the SAT.⁷²
- 3.29 Intervening in an appeal to the SAT does not amount to a third party right of review as it does not entitle third parties to initiate appeals. Rather, the right to intervene provides third parties with an opportunity to participate in an appeal once it has been commenced by the applicant.⁷³ If an application has been decided by a DAP to the satisfaction of the applicant, this opportunity will not be forthcoming.⁷⁴

Other jurisdictions

- 3.30 The position in Australian jurisdictions and some overseas jurisdictions regarding third party rights of review is summarised in Table 3.⁷⁵ A more detailed summary appears in **Appendix 3**.

Table 3

Third party appeal rights from planning decisions in other jurisdictions

Jurisdiction	Third party rights of review
New South Wales	Limited to uses such as polluting industries.
Victoria	Broad
Queensland	Limited. DAF based - limited to 'code assessable' developments.

⁷¹ http://www.sat.justice.wa.gov.au/files/Third_Party_Pamphlet_DL.pdf (viewed 2 July 2015).

⁷² Id.

⁷³ Western Australia, Legislative Council, Standing Committee on Legislation, Report 14, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal*, 20 May 2009, p201.

⁷⁴ http://www.sat.justice.wa.gov.au/files/Third_Party_Pamphlet_DL.pdf (viewed 2 July 2015). It has been observed that the proposed intervener must demonstrate at least an interest sufficient to meet the common law test for standing to seek judicial review as stated in the decision of the High Court in *Australian Conservation Foundation v Commonwealth of Australia* [1980] 146 CLR 493. This is that the applicant must either have a private right or be able to establish that he or she has a 'special interest in the subject matter.' Whether this test is satisfied depends on the particular circumstances of the case.

⁷⁵ Ibid, n61, Hurley, J. Taylor, E. Cook, N. and Colic-Peisker, V, at p6.

South Australia	Limited to 'category 3' developments.
Tasmania	Broad
Australian Capital Territory	Limited. DAF based - limited to 'merit based assessments'.
Northern Territory	Limited to developments in residential zones, in limited circumstances.
Republic of Ireland	Broad
Scotland	None
England	None
Ontario	Broad

A (now repealed) third party right of appeal in a local planning scheme

- 3.31 The City of Albany's Town Planning Scheme No. 3 provided for a third party right of appeal as follows:

*A person aggrieved by a decision of the Council in the exercise of discretionary powers conferred on it by the Scheme, may appeal in accordance with Part V of the Town Planning and Development Act.*⁷⁶

- 3.32 This was one of the only local government planning schemes to provide for such a right of appeal and has since been removed.⁷⁷

The position of a local government in Western Australia

- 3.33 A publication issued by the Shire of Denmark states as follows:

Third Party Appeal Rights

Council does not support and nor, generally, is it provided for by prevailing State legislation, of the giving of what is called 'third party' appeal rights to persons. Third Party appeal rights are what

⁷⁶ See *Buttfield & Ors v City of Albany & Anor* [2001] 27 SR (WA) 121, referenced in *The Owners of Strata Plan 18449 v City of Joondalup*, [2005] WASAT 304 at pp15-16, [http://decisions.justice.wa.gov.au/SAT/SATdcsn.nsf/PDFJudgments-WebVw/2005WASAT0304/\\$FILE/2005WASAT0304.pdf](http://decisions.justice.wa.gov.au/SAT/SATdcsn.nsf/PDFJudgments-WebVw/2005WASAT0304/$FILE/2005WASAT0304.pdf), (viewed 22 July 2015).

⁷⁷ See also Ms Alison Hailes, Executive Manager, Planning and Community Development, Western Australian Local Government Association, *Transcript of Evidence*, 4 May 2015, p7.

can best be described as “giving the right of review, objection or appeal, to a person other than the applicant who is aggrieved”.

An example of a third party whom might like to appeal, object or seek review of a decision issued by the Council or by Council officers under delegation, would be a neighbour aggrieved by an approval on land adjoining them.

Obviously neighbours and other persons (not being the applicant) can be impacted negatively or perceive that there will be a negative impact on their amenity by a Council decision, particularly in matters involving land use planning. Council attempts to minimise the potential for this impact by consulting as widely as possible and ensure that developments likely to cause impact on neighbours are advertised to those that might be negatively impacted. It then assesses the various submissions received but ultimately does have to make decisions that may have impacts on others. As a neighbour or adjoining landowner or occupier, there is no avenue to appeal in this instance (no third party appeal right).⁷⁸

Evidence considered

- 3.34 The Committee received evidence from a number of witnesses about whether a third party should have a right to apply to the SAT for a review of a DAP decision. Some submitters and witnesses supported such a right, while others did not.
- 3.35 For example, the Law Society of Western Australia submitted that third party appeal rights should be extended to those aggrieved by a decision of a DAP who have a special interest in the decision. The basis for this view was that, unlike before the Regulations were made, the representatives of the community no longer control the decision-making process for planning applications that go to DAPs.⁷⁹
- 3.36 Mr Denis McLeod held the same view, adding:

While the connection of local governments to the community is clear, there is not the same connection in the case of DAPs, and for that reason the possibility of third party rights of appeal have been recommended.⁸⁰

⁷⁸ Shire of Denmark, *Your Objection, Appeal or Review Rights Explained (of Local Government Decisions)*, 7 February 2012, p6, http://www.denmark.wa.gov.au/media/uploads/files/Objection_Appeal_or_Review_Rights_Explained_-_Pamphlet.pdf (viewed 20 August 2015).

⁷⁹ Submission No 43 from the Law Society of Western Australia, 27 February 2015, p3. See also Submission No 32 from Mr Denis McLeod, 30 January 2015.

⁸⁰ Mr Denis McLeod, Partner, McLeods Barristers and Solicitors, *Transcript of Evidence*, 29 June 2015, p3.

3.37 Mr McLeod further stated in evidence that it may be necessary, for practical reasons, to establish a general third party right of appeal on the basis that restricting them to decisions by DAPs could be seen as a disincentive for applicants to choose the DAP option. In his view, the adoption of a general third party right of appeal would be preferable to there being no such right at all.⁸¹

3.38 Community organisations and individual community members were also in favour of a third party right of appeal. For instance, *Striker Balance!* Community Action Group submitted:

*If the developer's current right of appeal against a JDAP decision is to be retained, that a parallel right of appeal for local residents against a JDAP decision that affects their community be similarly established.*⁸²

3.39 It also stated in evidence, with respect to the decision of the Metro Central JDAP in relation to the application to develop 94 Kitchener Road, Alfred Cove:

...we have been extremely frustrated at the lack of appeal for residents on our decision and I think that is probably why, 15 months on from the decision, we are still here and we are still fighting to try and get answers.

...

*I am sure you can appreciate that, as a general opinion from our community, we keep seeing that we are stonewalled and that we do not have any avenue to get any answers and there is no avenue to appeal, and this continues to perpetuate the feeling by the community that this system is seriously flawed.*⁸³

3.40 Additionally, Mr Andrew Rigg submitted:

*I would strongly recommend that, as a minimum...a review and appeal process is made available to all parties affected by these decisions, not just available to the developer.*⁸⁴

⁸¹ Mr Denis McLeod, *Questions on D McLeod Submission*, 29 June 2015, p1.

⁸² Submission No 8 from *Striker Balance!* Community Action Group, 23 January 2015, p5. See also Submission No 23 from Ms Angela Hamersley, 29 January 2015, p2; Submission No 20 from Councillor Julie Matheson, City of Subiaco, 28 January 2015, p4; Submission No 35 from Mr Lyle Lansdown, 30 January 2015 and Submission No 19 from Helen Lafuente 28 January 2015, p2.

⁸³ Mrs Marina Hansen, Committee Member, *Striker Balance!* Community Action Group, *Transcript of Evidence*, 29 June 2015, p10.

⁸⁴ Submission No 2 from Mr Andrew Rigg, 15 December 2015, p2. See also Submission No 46 from the City of South Perth, 10 July 2015, p4.

- 3.41 The City of Mandurah supports a right of appeal against a decision by a DAP by local governments only on the basis that, in its view, while a responsible authority report is considered by a DAP, the views of the council on the responsible authority report are not.⁸⁵
- 3.42 On the other hand, Government agencies, industry bodies, local government representative bodies and some local governments who provided evidence to the Committee are not in favour of a third party right of appeal.
- 3.43 For example, WALGA advised:

*WALGA's position on third party appeals has been in place for a number of years, and it is indicated in our submissions on the private member's bill, the planning and development amendment third party appeals bill in 2007. Local government does not support the introduction of third party appeal rights in Western Australia. It is considered that the current strategic and statutory planning processes in WA, and consideration of applications by local governments, already take into account the views of affected parties and the community generally. There is no justification for third party appeals legislation, and there are significant negative implications for local government, industry and the community, and as such local government continues to oppose the introduction of third party appeal rights.*⁸⁶

- 3.44 The Local Government Planners Association supports WALGA's view.

*Certainly in terms of DAPs, I do not think we ought to introduce third party appeals without realising that it will have implications throughout government in Western Australia.*⁸⁷

- 3.45 Industry bodies referred to the existing involvement of the community in the establishment of the legal framework within which DAPs operate, such as community consultation on local planning schemes as well as the ability to make submissions to and presentations at DAP meetings. For instance, the Housing Industry Association stated:

⁸⁵ Letter from Marina Vergone, Mayor, City of Mandurah, 3 June 2015. See the minutes of the meeting of the Council of the City of Mandurah of 26 May 2015, pp7-11 which set out the rationale for the Council's view. It is noted that the DAP Standing Orders provide that individuals may make submissions and presentations to DAPs, which could encompass the views of a local government council on an application.

⁸⁶ Ms Alison Hailes, Executive Manager, Planning and Community Development, Western Australian Local Government Association, *Transcript of Evidence*, 4 May 2015, p7.

⁸⁷ Mr Ian MacRae, President, Local Government Planners Association, *Transcript of Evidence*, 4 May 2015, p8.

*We would like to think, and expect, that the system provides sufficient opportunities to comment during the process and that those comments are recognised and then a decision made on its merits.*⁸⁸

3.46 Additionally, the Real Estate Institute of Western Australia is of the view that adding an appeal right would be a regressive step and add uncertainty to the system.⁸⁹

3.47 The Department reiterated existing Government policy on third party appeals as follows:

*It is Government policy that there are no third-party appeal rights in Western Australia for any planning decisions. Similarly, third parties cannot appeal decisions of local government Councils or the Planning Commission. This is a general planning issue not limited to DAPs.*⁹⁰

3.48 This was confirmed by the Chairman of the WAPC, who also referred to the right to appeal to the Supreme Court for judicial review, as follows:

It is my understanding that it is a matter of Government policy that there are no third party appeal rights for planning decisions in WA. This is not a DAP-only matter – this relates to all planning decisions. Therefore, in some sense this question is better answered by the Minister.

*However, the nub of the Committee's question seems to be how a planning decision that is not based on sound town planning principles can be challenged, if it is not appealed to SAT. The answer is by way of judicial review to the Supreme Court. As I explained in relation to the previous question, a decision that was not based on sound town planning principles would arguably be contrary to administrative law principles about relevant and irrelevant considerations.*⁹¹

Committee comment

3.49 The Committee notes the significant amount of evidence received, including from community organisations, individual community members and planning law experts,

⁸⁸ Ms Kristin Brookfield, Senior Executive Director, Building Development and Environment, Housing Industry Association, *Transcript of Evidence*, 22 June 2015, p6.

⁸⁹ Mr Rob Druitt, Member, Real Estate Institute of Western Australia, *Transcript of Evidence*, 22 June 2015, p5.

⁹⁰ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p27.

⁹¹ Western Australian Planning Commission, *DAP Parliamentary Public Hearing – 19 June 2015 Response by Chairman*, 19 June 2015, p12.

criticising the lack of a third party right of review from determinations by DAPs, which contrasts with the position in a number of other Australian jurisdictions. This should indicate to the Government there is a lack of confidence in the DAP process in some parts of the Western Australian community.

3.50 Based on this evidence, the Committee recognises that some stakeholders are of the view that planning decisions by responsible authorities may have an adverse impact on third parties, including members of the community in which approved development will take place and that the availability of a third party appeal on the merits may be an avenue to address this. This is not restricted to DAPs.

3.51 However, the Committee is not of the view that the introduction of a third party right of appeal from decisions by DAPs is warranted in order for the Regulations, as drafted, to be operationally effective. The Committee has formed this view on the basis that:

- DAPs ‘stand in the shoes’ of the responsible authority, such as the local government, in making a determination on a planning application and the relevant planning instrument under which the application is made applies to this determination.⁹²
- If the planning instrument does not provide for a third party right of appeal, determinations by the relevant local government or the DAP are not open to an appeal on the merits to the SAT other than by the applicant.
- While it may be possible for the Regulations to provide for a third party right of appeal from determinations by DAPs (by virtue of Regulation 16(2A)),⁹³ restricting this right to DAPs would disadvantage applicants for mandatory DAP applications.

3.52 The Committee is of the view that, should third party appeal rights be introduced in Western Australia in the future, this should be undertaken on a state-wide basis for all planning decisions to ensure a level playing field. This is a matter for Government policy.

3.53 The Committee notes the existing right for parties to apply to the Supreme Court for a judicial review of planning decisions. While this is not an appeal on the merits, the importance of the supervisory role of the Supreme Court over decision making bodies, including quasi-judicial bodies such as DAPs and local governments, cannot be overstated. This role ensures decisions are made according to the rules of procedural

⁹² See Regulations 8(1) and 16 of the *Planning and Development (Development Assessment Panels) Regulations 2011*.

⁹³ Regulation 16(2A) provides that the Regulations prevail to the extent of any inconsistency with a planning instrument.

fairness and that the exercise of discretion is in good faith and for the purposes for which it was conferred.

COMPLAINTS ABOUT DAPs

3.54 Part 7 of the DAP Procedures Manual contains a procedure for the submission and handling of complaints against DAPs.⁹⁴ It enables the consideration by the Department of issues with the DAP process raised by stakeholders.

3.55 The Department informed the Committee it was aware of only two or three formal complaints that had been made about DAPs:

*...I think we have actually had 824 form 1 DAP applications since the introduction or thereabouts of the system in 2011. We were aware of only two or three formal complaints made through the processes.*⁹⁵

3.56 It went on to qualify this by stating that a number of ‘informal’ complaints had been made about a number of matters, not all of which are concerned with the operation of DAPs.⁹⁶ These are not logged by the Department.⁹⁷ In light of the number of concerns expressed in evidence to the Committee during the inquiry about the DAPs process, the Committee was surprised at this evidence.

3.57 *Striker Balance!* Community Action Group were not aware there was a complaints process:

In actual fact, it was this question in your list of questions that you sent to us that actually drew to our attention that there was such a complaints mechanism available. We are very disappointed in actual fact to have found this out so late in the piece...

...

The fact that it actually appears in the DAP procedures manual does not really flag it as something that the public would be reading, I

⁹⁴ Government of Western Australia, Development Assessment Panels, *Development Assessment Panel Procedures Manual, Under the Planning and Development (Development Assessment Panels) Regulations 2011*, September 2013, p33. See also Government of Western Australia, Department of Planning, *Development Assessment Panel Code of Conduct 2011, Under the Planning and Development (Development Assessment Panels) Regulations 2011*, March 2011, p8.

⁹⁵ Ms Gail McGowan, Director General, Department of Planning, *Transcript of Evidence*, 19 June 2015, p12.

⁹⁶ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p36.

⁹⁷ Ms Gail McGowan, Director General, Department of Planning, *Transcript of Evidence*, 19 June 2015, pp4 and 12. The Director General also stated, at p12: ‘But we certainly could do some more work in logging claims.’

*would have thought, and that, in actual fact, why would we ever actually have read it and why would we ever have discovered it?*⁹⁸

3.58 In light of the concerns expressed in evidence to the Committee about the DAPs process and the small number of formal, written complaints made to the Department, the Committee is of the view the complaints process should be more accessible and transparent. This can be achieved by:

- The development of a more detailed complaints procedure, which builds upon the information already contained in Part 7 of the DAP Procedures Manual by containing more detailed information about how a complaint is made and dealt with. This could include the recording of complaints in a complaint log, risk assessment, prioritisation and response by the Department.⁹⁹
- The Department working to raise greater awareness of the availability of a complaints process on the DAP website.

3.59 The Committee also notes that a robust complaints process is particularly important given the lack of a third party right of appeal, the limited opportunity for third party participation in the SAT process, and the costs of lodging an appeal to the Supreme Court.

3.60 The Committee therefore makes the following recommendation.

Recommendation 1: The Committee recommends that the Department of Planning develop a more accessible and transparent process for the making of complaints about development assessment panels and raise greater awareness of its availability.

ROLE OF LOCAL COUNCILLORS ON DAPS

3.61 As stated in paragraph 2.31, one of the purposes of DAPs is to encourage an appropriate balance between independent professional advice and local representation in decision making.

3.62 The Regulations provide for two of the five members who sit on DAPs to be local government members. They are appointed by the Minister for Planning after being nominated by the relevant local government. If the local government fails to nominate,

⁹⁸ Mr Geoffrey Pearson, Joint Spokesperson, *Striker Balance!* Community Action Group, *Transcript of Evidence*, 29 June 2015, p11.

⁹⁹ The Department could adapt versions of its general Complaints Handling Policy and Complaint, Compliment and Feedback Form available on its website for use with respect to DAPs.

the Minister for Planning may select an eligible voter of the local government district.¹⁰⁰

3.63 Regulations 24 to 26 relevantly provide:

24. Local government members of LDAP

(2) *If, within 40 days after the date on which the Minister makes a request to a local government under subregulation (1) or such longer period as the Minister may allow, the local government fails to nominate a person for appointment in accordance with the request, the Minister may appoint under regulation 23(1)(a) a person who —*

(a) *is an eligible voter of the district for which the LDAP is established; and*

(b) *the Minister considers has relevant knowledge or experience that will enable that person to represent the interests of the local community of that district.*

25. JDAP members

(1) *The members of a JDAP, at any meeting of the JDAP to determine or otherwise deal with a development application or an application to amend or cancel a determination of the JDAP, are —*

(a) *the 2 local government members included on the local government register as representatives of the relevant local government in relation to the development application;*

26. JDAP local government member register

(4) *If, within 40 days after the date on which the Minister makes a request under subregulation (3) or such longer period as the Minister may allow, the local government fails to nominate a person for inclusion on the local government register in accordance with the request, the Minister may include on the register as a representative of the local government a person who —*

¹⁰⁰ Regulation 24(2) and 26(4) of the *Planning and Development (Development Assessment Panels) Regulations 2011*.

(a) *is an eligible voter of the district of the local government;*
and

(b) *the Minister considers has relevant knowledge or experience that will enable that person to represent the interests of the local community of that district. [Committee emphasis]*

3.64 The role of a local councillor is set out in section 2.10 of the *Local Government Act 1995*, which states:

2.10. Role of councillors

A councillor —

(a) *represents the interests of electors, ratepayers and residents of the district;*

...

(e) *performs such other functions as are given to a councillor by this Act or any other written law.*

3.65 Accordingly, one might form the view that it is the intention of the Regulations that a local government member of a DAP, whether they be a councillor or a member of the local government district, must act as a representative of their local government or community.

3.66 However, in training notes produced by the Department, the dual role of a local government member is emphasized:

4.6.1(b) The role of the local government representative is made difficult by their dual roles of local government Councillor and DAP member.

4.6.2(b) It is important to note that a DAP is not a local government, and a DAP member is not a Councillor. Unlike Councillors at local government, a DAP member is a decision-maker and not a representative of their constituents.¹⁰¹ [Committee emphasis]

3.67 The DAP Code of Conduct also provides the following guidance on decision making by local government members of a DAP:

¹⁰¹ Government of Western Australia, *Development Assessment Panel: Training Notes, 'Making Good Planning Decisions'*, pp53-54.

*2.1.2 A local government member of a DAP is not bound by any previous decision or resolution of the local government in relation to the subject-matter of a DAP application. In such a situation, the member is not prevented from voting for a decision that is the same as the local government's. However, the member must exercise independent judgment, and consider the application on its planning merits, in deciding how to vote.*¹⁰²

3.68 In *Aloi v Bertola (No2)*, Justice Pritchard remarked on the DAP Code of Conduct as follows:

*...the Code of Conduct makes clear that a local government member of a DAP is not bound by any previous decision or resolution of the local government in relation to the subject-matter of a DAP application and although the member may vote for a decision that is the same as the recommendation made in the responsible authority report, the member must exercise independent judgment and consider the application on its merits. The Code of Conduct thus makes clear that although the local government members represent the local government body on the JDAP, they are expected to act independently of the local government in carrying out their role as members of the JDAP.*¹⁰³

3.69 Further, DAP Practice Note 6 states:

*cl.2.1.2 of the DAP Code of Conduct requires local government DAP members to not be mere conduits of their local governments but to exercise independent judgment on the planning merits.*¹⁰⁴

...

It is arguable that local government DAP members maintain a membership of an association, that is connected to the DAP application, and which could reasonably be perceived as affecting the impartiality of the member. In any event, even if an impartiality interest is said to exist, cl.3.3.4 of the DAP Code of Conduct and cl.6.2.5 of the DAP Standing Orders state that this does not

¹⁰² Government of Western Australia, Department of Planning, *Development Assessment Panel Code of Conduct 2011, Under the Planning and Development (Development Assessment Panels) Regulations 2011*, March 2011, p2.

¹⁰³ [2013] WASC 214 at paragraph 99.

¹⁰⁴ Government of Western Australia, Development Assessment Panels, *Practice Note 6, Conduct of Local Government DAP Members*, p4.

*necessarily prohibit a DAP member from participating and voting in a DAP application. However, Councillors are strongly encouraged to avoid participating or voting in a prior Council decision in relation to a DAP application.*¹⁰⁵

- 3.70 The apparent inconsistency between the description of the status of local government members of DAPs in the Regulations and what is stated as their dual role in various departmental documentation and by the Supreme Court has created some confusion and concern. This has been demonstrated in evidence to the Committee by various witnesses and has particularly arisen in instances where a local government council has taken a view on a planning application contrary to a decision made by a DAP.¹⁰⁶

- 3.71 The following exchange provides a summary of the issue.

***The CHAIR:** Does WALGA believe the role of elected councillors on DAPs has been clearly articulated, given they are required to make their own independent decision on the planning merits of an application as well as be representatives of the local government?*

***Ms Hailes:** No, we do not believe that elected councillors' roles on DAPs have been clearly articulated. During the development of the regulations and the code of conduct, the association raised a number of queries with the department about whether requirements under the Local Government Act or the DAP regulations prevailed when it came to the role and powers of an elected member. When they sit on a DAP, are they there representing either the position of the local government or the interests of that local community, or are they there as an independent person who happens to be an elected member of that council? Certainly, there would not be any other circumstances in which an elected member made an independent decision on behalf of a council. Matters would always be considered and voted on by a full council, or a delegated committee with that authority. A number of local governments have actually received legal advice about what the elected member's role on the DAP is, and the advice that they have received is that they cannot put their own personal view or decision forward; that they need the authority of the council in order to respond to an application, and, therefore, those councils will put the applications to council meetings and form a council decision prior to a DAP meeting, and then the DAP representative would present that as his or her position at the DAP meeting. We would like clarity*

¹⁰⁵ Government of Western Australia, Development Assessment Panels, *Practice Note 6, Conduct of Local Government DAP Members*, p3.

¹⁰⁶ An example is the decision of the Metro Central JDAP with respect to the development at 94 Kitchener Road, Alfred Cove, DAP file number DP/13/00143/1, the subject of Petition No 35.

*on whether there is any conflict between the requirements under the various regulations when it comes to elected members and their participation in DAP meetings.*¹⁰⁷

3.72 Conversely, a number of other witnesses were of the view that the role of local government members of DAPs has been well articulated.¹⁰⁸

3.73 Both *Striker Balance!* Community Action Group and the Kennedy Street Collective consider it important that local government members of DAPs represent the local community.¹⁰⁹

3.74 *Striker Balance!* Community Action Group recommended:

*5. That the JDAP Regulations be revised to ensure that Councillors on JDAP's be required to actively represent and reflect the views of their communities and Councils in the decision-making process. This would also require the revocation of Clause 5.13.7 from the current Standing Orders.*¹¹⁰

3.75 The Chairman of the WAPC explained the need for local government councillors to exercise independent judgment on DAPs as follows:

If the implication in the Committee's question is that Councillors currently do not have to make their own independent decision on the planning merits, but must instead somehow simply act as conduits of their constituents' views, then this is factually and legally incorrect. I believe my written submission went into some detail explaining how Councillors, already currently, must exercise independent judgment in a "quasi-judicial manner" when making a planning decision

¹⁰⁷ Ms Alison Hailes, Executive Manager, Planning and Community Development, Western Australian Local Government Association, *Transcript of Evidence*, 4 May 2015, p9.

¹⁰⁸ Dr Linley Lutton, Director, Urban Planning, Urbanix, *Transcript of Evidence*, 25 May 2015, p9; Mr Lino Iacomella, Deputy Executive Director, Property Council of Australia, *Transcript of Evidence*, 22 June 2015, p7; Mr Nicholas Alligame, Vice President, Urban Development Institute of Australia, *Transcript of Evidence*, 22 June 2015, p10; Western Australian Planning Commission, *DAP Parliamentary Public Hearing – 19 June 2015 Response by Chairman*, 19 June 2015, p17.

¹⁰⁹ Mr Geoffrey Pearson, Joint Spokesperson, *Striker Balance!* Community Action Group, *Transcript of Evidence*, 29 June 2015, p2; Mrs Lorene-Lee Clohesy, Committee Person, Kennedy Street Collective, *Transcript of Evidence*, 11 May 2015, p12.

¹¹⁰ Submission No 8 from *Striker Balance!* Community Action Group, 23 January 2015, p5. See also Submission No 2 from Mr Andrew Rigg, 15 December 2014, p1 and Submission No 31 from Mr Dean Balzan, 30 January 2015, p5.

*according to the relevant considerations outline in their own local planning scheme.*¹¹¹

3.76 Further, Mr Denis McLeod stated:

*As a member of a deliberative body, making decisions on issues that affect the rights and property of Applicants, the representative local Council members should make their decisions on the basis of the merits of each Application coming before them, and having regard to the materials presented to them through the decision-making process.*¹¹²

3.77 The Department, in stating that it appreciated the concerns raised by the appearance of the words ‘representing the interests of the local community of that district’ in the Regulations, added:

*However, the question of a representative's role is not a new issue raised by the DAP system but in fact a very old one, fundamental to the Westminster tradition.*¹¹³

...

*The key word in that question is the word 'representative' and an elected official can be both a representative and still exercise independent judgment.*¹¹⁴

...

It is no different from the duties of any elected official today. For example, when Ministers make decisions, they must balance their duties as representatives of a local electorate versus their obligations to the wider community as a whole. Again, that is the nature of a system that draws officers of the executive branch of Government from the legislative branch. The DAP system also draws decision-makers from the quasi-legislative branch of local government, who makes the underlying planning system.

¹¹¹ Western Australian Planning Commission, *DAP Parliamentary Public Hearing – 19 June 2015 Response by Chairman*, 19 June 2015, p17. See also Submission No 18 from the Western Australian Planning Commission, 28 January 2015, which goes into some detail in explaining the decision-making process on DAPs.

¹¹² Mr Denis McLeod, *Parliament of Western Australia, Uniform Legislation and Statutes Review Committee – Public Hearings on Submissions, Questions on D McLeod Submission*, 29 June 2015, p4.

¹¹³ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p27.

¹¹⁴ *Ibid*, p28.

Clause 2.1.2 of the Code of Conduct must also be read in conjunction with clause 2.49 which states:

2.49 Nothing in this clause prevents a local government member from performing functions as a member of a local government.’¹¹⁵

- 3.78 The position of local government DAP members was also commented on in a hearing before the Standing Committee on Environment and Public Affairs during its consideration of Petition No 35 – Metro Central Joint Development Assessment Panel, as follows:

***The CHAIRMAN:** Do you ever have some feeling for the local councillors who find themselves as members of DAPs, and the conflict that they must encounter in a way?*

***Mr Johnson:** Absolutely. Firstly, it is very hard for an elected member. You have to acknowledge that an elected member has its role as a councillor as well as a quasi-judicial role in determining planning applications—and many councils now have the practice of referring DAP applications to them for consideration or advice, and councils make that. Often councillors find themselves attending those meetings and there is a guideline—I think it is number 6—that sort of tries to give advice to elected members to say to them in the first instance the government’s or the Department of Planning’s preference is that they do not attend council meetings where they are put into this role of then, you know, having to vote on it at a council meeting and then having to determine it from the DAP point of view.’¹¹⁶*

- 3.79 The City of Mandurah suggested the following amendment to the Regulations:

It is considered that the role of elected Councillors on the DAPs has not been clearly articulated and the removal of the term ‘representative’ from the Regulations when used to describe the local government member is recommended, with the word ‘nominee’ a suggested replacement.’¹¹⁷

¹¹⁵ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, pp28-29.

¹¹⁶ Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Petition No 35 – Metro Central Joint Development Assessment Panel, Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 22 October 2014, p8.

¹¹⁷ Letter from Ms Maria Vergone, Mayor, City of Mandurah, 3 June 2015.

Committee comment

3.80 The Committee makes the following observations.

- The dual role of local government members on DAPs has been clearly articulated in the guidance contained in various documentation, such as the DAP Code of Conduct and evidence before the Committee.
- Local government councillors exercise independent judgment when they vote in council on a development application and don't always follow the recommendation of planning staff or the views of some community members who have made submissions.
- Representing the interests of a local government or local community is not a certain concept. It is capable of various interpretations in different contexts and scenarios. For instance, if a council vote on a responsible authority report is not unanimous, whether an individual councillor has voted in a way consistent with the interests of the community depends largely on someone's own opinion of the merits of the relevant planning application.
- Nevertheless, it is clear that the role of local government councillors does not always align with the expectations of some stakeholders, including members of the community and, potentially, some councillors.

3.81 While there may have been instances where the intent of the guidance on the dual role of local government members on DAPs has not been reflected in DAP processes, this can be addressed by additional training of DAP members, as suggested by some witnesses, which is discussed further below.

3.82 However, despite the clarity in the guidance, the Committee does not consider this is reflected in the Regulations. For legislation to operate effectively, it should be capable of being clearly understood and not cause confusion, whether this is due to its interaction with other legislation or the perceptions of stakeholders affected by the legislation. The Committee is of the view that references to local government members being 'representatives' of the local community in the Regulations is a significant source of the confusion about their role on DAPs.

3.83 Accordingly, the Committee agrees with the recommendation of the City of Mandurah that the deletion of references to 'representation' in the Regulations would assist in removing this confusion.

3.84 The Committee is also of the view that it would be appropriate for the Regulations to refer to local government members of DAPs as independent decision makers on DAPs rather than solely in guidance documentation to underscore the importance of this role.

3.85 The Committee therefore makes the following recommendation.

Recommendation 2: The Committee recommends that regulations 24, 25 and 26 of the *Planning and Development (Development Assessment Panels) Regulations 2011* be amended to:

- **remove references to local government members of development assessment panels being representatives of the local government or community; and**
- **refer to local government councillors as independent decision makers on development assessment panels.**

FINANCIAL CRITERIA TO BE MET FOR AN APPLICATION TO BE HEARD BY A DAP

3.86 As noted in paragraph 2.39, the Regulations prescribe financial criteria to determine which development applications can, or must, be considered by a DAP. In summary, an applicant must apply to a JDAP to consider an application with an estimated cost of \$10 million or more (or \$20 million or more for the City of Perth LDAP) and may apply to a JDAP to consider an application with an estimated cost of between \$2 or more and less than million and \$10 million (or \$2 million or more and less than \$20 million for the City of Perth LDAP).

3.87 This financial criteria was set by the Government as a means of ensuring that DAPs only deal with applications that are complex and may raise issues of particular state, regional or local significance.¹¹⁸

3.88 This was one of the most contentious issues that arose during the inquiry on which witnesses had a range of views.

3.89 While the Committee recognizes that it was a policy decision of the Government to choose financial criteria as the method of determining which development applications are dealt with by DAPs, the Committee has detailed a selection of the evidence it has received to demonstrate the diversity of views on this issue for the information of the Legislative Council.

Financial criteria

3.90 WALGA questions the appropriateness of financial criteria.¹¹⁹ In its view:

*The DAP eligibility criteria has failed to ensure that development proposals of regional or state significance progressed efficiently through the approval process.*¹²⁰

¹¹⁸ See Government of Western Australia, Department of Planning, *Implementing Development Assessment Panels in Western Australia*, Policy Statement, April 2011, p2.

¹¹⁹ Submission No 30 from the Western Australian Local Government Association, 30 January 2015, p21.

3.91 Mr Andries Schonfeldt (Director of Development Services, Shire of Broome) is also of the view financial criteria does not reflect whether a development is of regional or state significance.¹²¹

3.92 Also, Dr Linley Lutton is of the view that the financial criteria is arbitrary and that the nature of the development itself should be a determining factor. In his view:

*The first thing to say about this is the reason that I believe the thresholds do not make any sense and are quite arbitrary. A \$20 million industrial hangar, for example, is a very simple thing to assess. A \$20 million apartment building right in the middle of an existing suburb, or something like that, is an incredibly complex thing to assess. I cannot see why the hangar needs to have the attention of a DAP devoted to it, whereas the apartment building needs some expert attention. Just putting values on these things does not really work.*¹²²

3.93 The Department recognised the difficulty of DAP financial criteria:

It is agreed that DAPs should be primarily aimed at more significant development applications, and the cost of the development does not always translate into significance. However, whilst a monetary threshold is not perfect it does provide a clear and fairly objective measure. The risk with a call-in system is that it may result in even more concerns about the subjectivity of such a measure.

*This is largely a question of Government policy. It is Government policy that in Western Australia monetary thresholds, combined with definitions of 'excluded development' in the DAP Regulations, is the best way to capture significant applications.*¹²³

3.94 The Department also noted that applications of a lower value are not always indicative of complexity.¹²⁴

¹²⁰ Submission No 30 from the Western Australian Local Government Association, 30 January 2015, p22.

¹²¹ Mr Andries Schonfeldt, Director of Development Services, Shire of Broome, *Transcript of Evidence*, 4 May 2015, p4.

¹²² Dr Linley Lutton, Director, Urbanix, *Transcript of Evidence*, 25 May 2015, p11. See also Submission No 25 from the Housing Industry Association, 29 January 2015, p3, where it is stated that 'Value is not always a proxy for complexity' and it is argued that, for applications over the mandatory financial criteria which are not considered complex, an applicant should have the ability to 'opt-out' of the DAP determining their application.

¹²³ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p37.

¹²⁴ Ibid, p38. See also Mr Paul Kotsoglo, Presiding Member, City of Perth Local Development Assessment Panel, *Answers to Questions on Notice*, 17 August 2015, p5.

3.95 Submitters and witnesses expressed the following views on the appropriateness of the level of the financial threshold for optional and mandatory DAP applications.

- The minimum financial threshold for an application to be eligible for consideration by a DAP should be increased to:
 - a) at least \$30 million;¹²⁵
 - b) ‘\$20 million plus’;¹²⁶
 - c) \$50 million.¹²⁷
- The current opt-in and mandatory financial criteria is sufficient.¹²⁸

The option to opt-in or out of the DAP process

3.96 As noted in paragraph 3.86, applicants may opt-in or out of the DAP process if the application meets certain financial criteria.

3.97 The Committee heard the following views in support of the DAP process being purely voluntary, with the ability of an applicant to choose a DAP as the decision-maker.

- The DAP system should be amended to be an opt-in only process, so that when an application does meet the minimum financial criteria, the proponent still has to elect to have the application determined by a DAP. This will identify individual local governments that are unable to adequately satisfy applicant expectations and allow the industry to determine the relevance of DAPs.¹²⁹
- Consideration should be given to making all DAP applications optional, given the number of instances where the DAP approves the recommendation in the responsible authority report, which increases the costs of the process and the time to make a decision.¹³⁰

¹²⁵ Submission No 30 from the Western Australian Local Government Association, 30 January 2015, p10. Part of the rationale for this view, stated in the submission, is that applications below \$30 million in value are unlikely to have regional or State significance.

¹²⁶ Submission No 20 from Councillor Julie Matheson, City of Subiaco, 28 January 2015, p4; Submission No 7 from the Local Government Planners Association, 23 January 2015, pp4-5. See also Submission No 46 from the City of South Perth, 10 July 2015, p3.

¹²⁷ Submission No 28 from Mr Max Hipkins, Mayor, City of Nedlands, 29 January 2015, p1.

¹²⁸ Mr Lino Iacomella, Deputy Executive Director, Property Council of Australia, *Transcript of Evidence*, 22 June 2015, p9; Mr Rob Druitt, Member, Real Estate Institute of Western Australia, *Transcript of Evidence*, 22 June 2015, p7.

¹²⁹ Submission No 30 from the Western Australian Local Government Association, 30 January 2015, p10.

¹³⁰ Submission No 12 from Mr Ian Birch, Town Planner, Deputy Presiding Member of the Metro Central JDAP and Presiding Member of the South West JDAP, 27 January 2015, p2.

- There should be a broader opt-in threshold to enable market forces to determine the most efficient process.¹³¹

3.98 The Department referred to the ability of applicants to opt-out of the DAP process up to a limit of \$10 million and is of the view this is a relatively high level of discretion. It also stated that it was a matter of Government policy that applications of a value over \$10 million are considered matters of significance.¹³²

Criteria to determine state or regional significance

3.99 WALGA is of the view that criteria used in New South Wales to determine whether an area is a 'State significant site' could be used in Western Australia to assist in determining the types of applications that should be dealt with by DAPs.¹³³ If a site meets the criteria, the Minister is able to establish a planning regime for that site.

3.100 The following criteria applies in New South Wales:

Criteria for a State Significant Site

A State Significant Site must be of State or regional planning significance because of its social, economic or environmental characteristics.

When considering whether a site can be categorised as being of State significance, the Minister will consider whether the site meets one or more of the following criteria:

(a) be of regional or state importance because it is in an identified strategic location (in a State or regional strategy), its importance to a particular industry sector, or its employment, infrastructure, service delivery or redevelopment significance in achieving government policy objectives; or

(b) be of regional or state environmental conservation or natural resource importance in achieving State or regional objectives. For example protecting sensitive wetlands or coastal areas; or

¹³¹ Submission No 17 from the Urban Development Institute of Australia, 28 January 2015, p2. See also Mr Nicholas Allingame, Vice President, Urban Development Institute of Australia, *Transcript of Evidence*, 22 June 2015, p4.

¹³² Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p37.

¹³³ Ms Allison Hailes, Executive Manager, Planning and Community Development, Western Australian Local Government Association, *Transcript of Evidence*, 4 May 2015, p4. See also Western Australian Local Government Association, *Presentation to Standing Committee on Uniform Legislation and Statutes Review, Inquiry into Planning and Development (Development Assessment Panels) Regulations 2011 - 4 April 2015*, 4 May 2015, p5.

(c) *be of regional or state importance in terms of amenity, cultural, heritage, or historical significance in achieving State or regional objectives. For example sensitive redevelopment of important heritage precincts; or*

(d) *need alternative planning or consent arrangements where:*

(i) *added transparency is required because of potential conflicting interests;*

(ii) *more than one local council is likely to be affected.*¹³⁴

3.101 Further to what is stated in paragraph 3.93, the Department added, on recognising the difficulty in determining the types of applications that can be dealt with by DAPs:

*New South Wales does have a call-in system. It is a difficult issue generally as to what the most objective determinant might be, and I recognise the comments on different costings between regional, particularly remote regional, and the metropolitan. This is largely a question of government policy that has had the approach with monetary thresholds, and certainly that combined with definitions of some excluded development as well. I think in the document “Review of the Development Assessment Panels—summary of submissions and outcomes of review” the notion of issues of call-in was discussed, and it was felt that that would be more subjective or possibly challenged for being more subjective.*¹³⁵

Committee comment

3.102 Whether the Regulations capture the types of applications that can be considered by DAPs identified by the Government prior to establishing DAPs is a matter about which reasonable minds may differ.

3.103 The Government’s view is that the current financial criteria, while not perfect, is clear and objective.¹³⁶

3.104 The Committee recognises the evidence regarding the possibility of using non-financial criteria to determine applications considered by DAPs.

¹³⁴ New South Wales Government, Department of Planning, *Guideline for State Significant Sites under the Major Project SEPP*, http://www.planning.nsw.gov.au/assessingdev/pdf/gu_statesignificantsites.pdf (viewed 29 July 2015).

¹³⁵ Ms Gail McGowan, Director General, Department of Planning, *Transcript of Evidence*, 22 June 2015, p13.

¹³⁶ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p37.

VALUING OF APPLICATIONS TO ACHIEVE THE DAP FINANCIAL CRITERIA

- 3.105 Applicants for planning approval are required to submit an estimated cost of their development when lodging their application with the responsible authority.¹³⁷ Fees imposed are based on the estimated cost of the development.¹³⁸ With respect to DAPs, the quantum of this estimate will determine whether the development meets the financial criteria for opt-in or mandatory DAP applications.
- 3.106 The following regulations deal with the ‘estimated cost’ of developments.

Part 2 — Development applications and determinations***5. Mandatory DAP applications (Act s. 171A(2)(a))***

Any development application that —

- (a) is not an excluded development application; and*
- (b) in the case of an application for development in the district of the City of Perth — is for the approval of development that has an estimated cost of \$20 million or more; and*
- (c) in the case of an application for development in a district outside of the district of the City of Perth — is for the approval of development that has an estimated cost of \$10 million or more,*

is of a class prescribed under section 171A(2)(a) of the Act.

6. Optional DAP applications (Act s. 171A(2)(ba))

Any development application that —

- (a) is not —*
 - (i) an excluded development application; or*
 - (ii) a development application in respect of which the responsible authority has under regulation 19 delegated the power of determination; and*

¹³⁷ Government of Western Australia, *Development Assessment Panels: Applicant’s Brochure*, July 2011, <http://www.planning.wa.gov.au/daps/data/Publications/Information%20for%20applicants/Applicants%20brochure.pdf>, (viewed 18 August 2015) pp11-12.

¹³⁸ Regulation 48A and Schedule 2, *Planning and Development Regulations 2009*. See also Western Australian Planning Commission, *Planning Bulletin 93/2010*, May 2010 http://www.planning.wa.gov.au/dop_pub_pdf/Planning_Bulletin_93-2010.pdf (viewed 8 July 2015).

- (b) *in the case of an application for development in the district of the City of Perth — is for the approval of development that has an estimated cost of \$2 million or more and less than \$20 million; and*
- (c) *in the case of an application for development in a district outside of the district of the City of Perth — is for the approval of development that has an estimated cost of \$2 million or more and less than \$10 million, is of a class prescribed under section 171A(2)(ba) of the Act.*

Part 3 — Delegation to DAPs

19. Determination of certain development applications may be delegated to DAP

- (1) *A development application is an application of a class prescribed for the purposes of this regulation if —*
 - (a) *the application is for approval for development that has an estimated cost of \$2 million or more; and*
 - (b) *the application is one of the following —*
 - (i) *an application that is not an excluded development application;*
 - (ii) *an application for approval for the construction of less than 10 grouped dwellings and any associated carport, patio, outbuilding and incidental development;*
 - (iii) *an application for approval for the construction of less than 10 multiple dwellings and any associated carport, patio, outbuilding and incidental development.*
[Committee emphasis]

3.107 Also, clause 4.3.1 of the DAP Procedures Manual states:

How is the estimated cost of a development determined?

The development cost is the estimated total cost to construct the development, including car parking and landscaping, but does not include the value of land or construction finance costs. The

*applicant is responsible for submitting an accurate cost for the proposed development.*¹³⁹

- 3.108 Accordingly, the onus is placed on the applicant to provide an accurate estimate of the value of the development to determine whether the application qualifies for determination by a DAP.

Evidence considered

- 3.109 Witnesses informed the Committee that there may have been instances where some applicants have modified cost estimates of developments in order to meet the financial criteria for DAPs¹⁴⁰ or even staged developments to avoid them having to be dealt with by a DAP.¹⁴¹ They were of the view that estimates should be subject to at least some level of scrutiny by the responsible authority, or even an independent expert, before the application can be decided upon by a DAP.¹⁴²

- 3.110 *Striker Balance!* Community Action Group expressed its concerns as follows:

*A further area for concern is that the DAP system allows developers to set their own projected costs for developments. In doing so this effectively gives developers the green light to manipulate the system by inflating costs, thereby enabling them to reach the trigger threshold (in accordance with Regulation 5 of the DAP Regulations) for DAP-assessed development applications (i.e. >\$3 million), rather than assessment under the more stringent local government planning processes and regulations.*¹⁴³

- 3.111 It recommended:

*That projected costs for developments set by developers be subjected to assessment by the relevant local government Planning Office before the application can proceed to deliberation by a JDAP.*¹⁴⁴

¹³⁹ Government of Western Australia, Department of Planning, *Development Assessment Panel Procedures Manual*, September 2013, p17.

¹⁴⁰ Submission No 8 from *Striker Balance!* Community Action Group, 23 January 2015, p5; Submission No 26 from Kennedy Street Collective, 29 January 2015, p2; Submission No 5 from Mr Ian Bignell, Director, Development and Sustainability, Town of Cambridge, 15 January 2015, p6.

¹⁴¹ Email from Mr Matthew Burnett, Strategic Planning Officer, Town of Cambridge, 22 May 2015, pp5-6.

¹⁴² Submission No 14 from Marina and Jeff Hansen, 27 January 2015, p3.

¹⁴³ Submission No 8 from *Striker Balance!* Community Action Group, 23 January 2015, p4. See also Submission No 31 from Dean Balzan, 30 January 2015, p4;

¹⁴⁴ Submission No 8 from *Striker Balance!* Community Action Group, 23 January 2015, p5.

- 3.112 Some industry bodies were of the view that the local government or the DAP presiding member should be able to assess the estimate and determine if it is reasonable.¹⁴⁵ For example, the Housing Industry Association stated:

*Local governments already have ways and means of looking at the cost of something and say, "That's in the realm of reasonableness", and those should be applied.*¹⁴⁶

- 3.113 Mr Andries Schonfeldt advised this is the practice of the Shire of Broome:

*We actually check the values of the applications as a matter of course, so I would expect that that is just general practice to determine what that actual value is. Obviously, the fees are attached to it as well, so you would check it to make sure that your income is correct.*¹⁴⁷

- 3.114 However, WALGA advised:

*Informally, members have advised that there is at best limited expertise in local government to undertake such an assessment. Perhaps the applicant should be required to submit certification of the estimated value (from a QS or someone appropriately qualified) with the application.*¹⁴⁸

- 3.115 Practical issues are encountered by DAP members and local governments regarding the valuation of development costs by applicants. Specialist DAP member Mr Ian Birch submitted:

Applicant to provide evidence of estimated cost

Where there have been applications which are close to the minimum threshold and the matter is contentious within the community, and opposed by Council, this has been hotly disputed. There appears to be no direction given in either the regulations or practice notes on how to resolve such matters. Recognising that estimating development cost at the planning stage is far from exact, it would be helpful if at least

¹⁴⁵ See Ms Kristin Brookfield, Senior Executive Director, Building Development and Environment, Housing Industry Association, *Transcript of Evidence*, 22 June 2015, p7; Mr Rob Druitt, Member, Real Estate Institute of Western Australia, *Transcript of Evidence*, 22 June 2015, p7.

¹⁴⁶ Ms Kristin Brookfield, Senior Executive Director, Building Development and Environment, Housing Industry Association, *Transcript of Evidence*, 22 June 2015, p7.

¹⁴⁷ Mr Andries Schonfeldt, Director of Development Services, Shire of Broome, *Transcript of Evidence*, 4 May 2015, p8.

¹⁴⁸ Western Australian Local Government Association, *Presentation to the Standing Committee on Uniform Legislation and Statutes Review*, 4 May 2015, p19.

the applicant was to provide evidence/justification of how they arrived at their figure.

*As things are at present, this only adds to the cynicism that disenchanted community members feel towards the DAP process.*¹⁴⁹

3.116 Mr Matthew Burnett (Strategic Planning Officer, Town of Cambridge) advised:

*The Town suspected a DAP for 3 Oxford Close DAP/14/00639 was overvalued to qualify as a DAP but without detailed valuing could not prove this and it is not considered the responsibility of local governments to undertake this investigative role. In this case, the Town sought further details from the applicant who provided commercial contract information. The applicant was advised that in the event the construction cost was significantly overestimated, as would be determined upon lodgement of a Building Permit, that the validity of the DAP determination may be refuted.*¹⁵⁰

3.117 Mr Ian Bignell (Director, Development and Sustainability, Town of Cambridge) is also of the view that specific guidance is required where there may be an under or over-valuing of applications to meet the financial criteria for DAPs or local government consideration.¹⁵¹

3.118 DAP presiding members who gave evidence to the Committee provided the following feedback:

Mr Gray: *I have not experienced any situation where the value has been questioned at a meeting. I think that this is an issue which has been open to discussion ever since the applications first required a value estimate. There has always been discussion about whether the estimates are too low or too high. You have referred to some applicants inflating values to get over the opt-in threshold. Talking to local government planners anecdotally, there are suggestions that some applicants also deflate their values in order to have their application determined by local government. I think it cuts both ways, but there is no clear evidence. We essentially have never questioned the values that come before us. On one occasion somebody looked at the value and thought that it was a bit high, but I do not think that the issue is so widespread or so significant that it would warrant a more*

¹⁴⁹ Submission No 12 from Mr Ian Birch, Town Planner, Deputy Presiding Member of the Metro Central JDAP and Presiding Member of the South West JDAP, 27 January 2015, pp1-2.

¹⁵⁰ Email from Mr Matthew Burnett, Strategic Planning Officer, Town of Cambridge, 22 May 2015, p4.

¹⁵¹ Submission No 5 from Mr Ian Bignell, Director, Development and Sustainability, Town of Cambridge, 16 January 2015, p6.

*close assessment of the values that the applicant notes. I suggest also that many of the applications we get are well in excess of the mandatory value. We are talking only of those in the opt-in threshold, which is now between \$2 million and \$10 million.*¹⁵²

Mr Koltasz: *I have not seen any evidence in any of the JDAPs I have been with where we have queried the value. As a local government planner I always used to look at some of the applications that would come in and I think a lot of developers used to fiddle, perhaps, the value just to reduce the amount of fees they paid, more than anything else, but that was pre-JDAP days. They would marginally save a few dollars, but it all helps...I have not heard of any submitters changing values or anything, but as with David, I suppose there may be some who do massage it at the margins, either to get on to a DAP or to stay off a DAP.*¹⁵³

Mr Johnson: *My expectation is that in a lot of applications there is some check about the value. My experience for my local government years was that that occasionally occurred, where developers would try to reduce the application fees, and in some circumstances there was a call to review the actual value of the applications. I had one experience where this issue of the \$3 million threshold was raised and that occurred at a City of Bayswater JDAP on December 14 regarding 58 Kennedy Street where there was a regulation 17—a reconsideration of modification of conditions and plans. The opponents to the development tried to lodge an argument with the JDAP that because the modifications possibly could have taken that application below \$3 million it should have been considered by the council and not the JDAP. The JDAP took the view that because this was a regulation 17 consideration, it was all part of the original application, therefore it was a modification rather than a new application.*¹⁵⁴

I consider the ‘opt in’ approach to be a way which could address such concerns. As I understand it may also be appropriate for referral to a

¹⁵² Mr David Gray, Presiding Member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p6.

¹⁵³ Mr Eugene Koltasz, Presiding Member, Metro East and Pilbara Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p7.

¹⁵⁴ Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, p7.

*quantity surveyor or other professional to undertake a formal assessment of the value submitted.*¹⁵⁵

- 3.119 The Department confirmed that the responsibility for evaluating cost estimates of developments rests with the local government, which forms the basis for the fee they charge for assessing the application under the *Planning and Development Regulations 2009*.¹⁵⁶
- 3.120 Mr Ian Macrae of the Local Government Planners Association is of the view that it is inevitable that if there is financial criteria in place to determine whether an application can be made to a DAP, there will be attempts to abuse it. He gave an example of where different estimates were given for the same application in order to satisfy the financial criteria for an optional DAP application.¹⁵⁷
- 3.121 The Chairman of the WAPC is of the view that recent changes to the Regulations introduced by the Amendment Regulations, including the ‘stop the clock’ mechanisms and the widening of the opt-in financial criteria, ‘should go some of the way to addressing this issue.’¹⁵⁸
- 3.122 Mr Denis McLeod provided the following advice to the Committee:

*There would be clear advantages in having an independent valuation of applications, but it would be expensive, troublesome and time consuming, and I do not think the extra trouble and expense would be justified. The better course would be for the responsible local government officers to continue to exercise some control by forming their own judgments on the valuation of an application, and ensuring that blatant cases of manipulation do not occur. I believe it would be open to a local government officer who believes that there has been a blatant undervalue or overvaluing of an application to require that the valuation at least be confirmed by the applicant’s architect, designer or engineer.*¹⁵⁹

¹⁵⁵ Mr Paul Kotsoglo, Presiding Member, City of Perth Local Development Assessment Panel, *Answers to Questions on Notice*, 17 August 2015, p5.

¹⁵⁶ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, pp38-39. See also Western Australian Planning Commission, *DAP Parliamentary Public Hearing – 19 June 2015 Response by Chairman*, 19 June 2015, p19.

¹⁵⁷ Mr Ian Macrae, President, Local Government Planners Association, *Transcript of Evidence*, 4 May 2015, p9. See also Mr Denis McLeod, Partner, McLeods Barristers and Solicitors, *Transcript of Evidence*, 29 June 2015, pp9-10.

¹⁵⁸ Western Australian Planning Commission, *DAP Parliamentary Public Hearing – 19 June 2015 Response by Chairman*, 19 June 2015, p19.

¹⁵⁹ Mr Denis McLeod, Partner, McLeods Barristers and Solicitors, *Transcript of Evidence*, 29 June 2015, p10. See also Mr Neil Foley, Professor, Urban and Regional Planning, School of Earth and Environment, University of Western Australia, *Transcript of Evidence*, 29 June 2015, pp5-6.

Committee comment

3.123 The estimate of the cost of a development provided by an applicant for planning approval became a significant issue after the introduction of DAPs, given its role in determining whether an application meets the opt-in or mandatory financial criteria.

3.124 The Committee considers the following factors relevant to this issue.

- It is important that only those applications that qualify for DAP consideration are determined by DAPs. This is the intention of the financial criteria in the Regulations.
- Estimating the value of a development is not an exact science. Reasonable minds may differ about the value to attribute to a particular development, especially when it is complex.
- There may be an option for a party to apply to the Supreme Court to review a DAP decision on the basis of jurisdictional error if there is a question over the estimate of the value of a development. However, the fact that the DAP would not have undertaken its own assessment of the estimate may present an issue with any such application.
- The capacity to scrutinise the estimated cost of a development may vary between local governments. Some local governments may lack the resources or skills to undertake a detailed assessment.

3.125 The Committee is satisfied that the risk that the purpose of the Regulations may be subverted by under or over valuation of applications, deliberate or otherwise, is best managed by scrutiny of cost estimates by either local government staff or an independent expert.

3.126 The Committee is of the view that local governments should be able to subject any estimate of development cost to analysis by an independent expert, if they feel a need to do so. This would provide some assurance of the veracity of estimates. The Department could provide guidance on this matter to assist local governments.

3.127 The Committee therefore makes the following recommendation.

Recommendation 3: The Committee recommends that the Department of Planning introduce guidance, if not already available, to local governments to assist them in verifying the estimates of the cost of planning applications, including when it is appropriate to obtain independent expert advice on an estimate submitted by an applicant.

CONFIDENTIAL PROCESSES

3.128 In a number of cases, an applicant has appealed to the SAT from a decision of a DAP to refuse an application, which has been subject to mediation and a subsequent reconsideration by the DAP.¹⁶⁰ Witnesses raised concerns about the confidentiality of SAT mediations and reconsideration meetings by DAPs.¹⁶¹

3.129 In the planning system in Western Australia some processes are open to the public, whereas others are conducted in private and are confidential to the parties involved. For instance:

- DAP meetings, with the exception of meetings to determine applications under regulation 17, are open to the public.¹⁶²
- Meetings of local government councils and committees to which the council has delegated powers are generally open to the public.¹⁶³
- Hearings of the SAT are held in public, except mediations, which are held in private unless the mediator directs otherwise.¹⁶⁴

3.130 *Striker Balance!* Community Action Group referred to an instance where they had not been able to participate in the SAT mediation process, following an appeal by the applicant to the SAT. It submitted, with respect to the development application for 94 Kitchener Road:

The community, in particular local residents and neighbours of the development site, are considered to be “not an interested party” by

¹⁶⁰ The case the subject of Petition No 35 was one such instance, where, following an appeal by the applicant to the SAT, a mediation was conducted in private and a subsequent reconsideration by the DAP approved the application. Section 31 of the *State Administrative Tribunal Act 2004* provides that the SAT may invite a decision-maker to reconsider its decision.

¹⁶¹ Submission No 20 from Councillor Julie Matheson, City of Subiaco, 28 January 2015, p2; Submission No 8 from *Striker Balance!* Community Action Group 23 January 2015, p2.

¹⁶² Regulation 40(2) and (4) of the *Planning and Development (Development Assessment Panels) Regulations 2011*. See also Government of Western Australia, Development Assessment Panels, *Development Assessment Panel Practice Notes: DAP Standing Order 2012*, Standing Order 2.11, p5; Government of Western Australia, *Development Assessment Panels, Development Assessment Panel Procedures Manual*, clause 5.1, p19.

¹⁶³ Section 5.23(1) of the *Local Government Act 1995*. See also section 5.23(2) of the *Local Government Act 1995*, which provides that a council or committee may hold a closed meeting if it is scheduled to deal with a number of matters, including the consideration of legal advice, discussion of a matter which, if disclosed, would reveal a trade secret or information that has a commercial value to a person. Also, Regulation 6(2) of the *Local Government (Rules of Conduct) Regulations 2007* prevents a council member from disclosing, otherwise than in a closed meeting, any information obtained from a confidential document or in another closed meeting.

¹⁶⁴ Section 54(6) of the *State Administrative Tribunal Act 2004*.

*SAT, and so all further representation of the people's views was completely shut out of this mediation process.*¹⁶⁵

- 3.131 Councillor Julie Matheson of the City of Subiaco referred the Committee to a number of applications approved by the Metro West JDAP in meetings in 2012 for which there was no published agenda, responsible authority report or minutes.¹⁶⁶ For example, for the meeting of 21 March 2012, the Department website states:

*The Metro West JDAP is scheduled to meet on Wednesday 21 March 2012 to determine an application that was submitted to the State Administrative Tribunal. As this meeting is confidential, the agenda and minutes are not available for public viewing.*¹⁶⁷

- 3.132 WALGA is of the view that:

*The DAP meetings should reflect the same governance arrangements as Local Government does in the consideration of any applications that have been returned from SAT mediation.*¹⁶⁸

- 3.133 WALGA added in relation to meetings of local government councils:

The only time the meeting would be closed to the public is in the following circumstances: -

if there was some commercial sensitivity in the application, which usually can be addressed by circulating this information to elected members as a confidential attachment; still allowing the item to be discussed and the debate remains public, but confidentiality is preserved.

*where it was required by the SAT mediation process and it would be issued as part of the orders following mediation. In that circumstance, it is a Tribunal order rather than a local government decision to have the meeting closed.*¹⁶⁹

- 3.134 Other witnesses supported DAP meetings being as open as possible. For example, the Real Estate Institute of Western Australia is of the following view:

¹⁶⁵ Submission No 8 from *Striker Balance!* Community Action Group, 23 January 2015, p2. See also Submission No 44 from Greg Benjamin, 11 May 2015, p4.

¹⁶⁶ Submission No 20 from Councillor Julie Matheson, City of Subiaco, 28 January 2015, p2.

¹⁶⁷ Department of Planning, <http://www.planning.wa.gov.au/Metro-West-JDAP.asp> (viewed 4 June 2015).

¹⁶⁸ Western Australian Local Government Association, *Presentation to Standing Committee on Uniform Legislation and Statutes Review*, 4 May 2015, p17.

¹⁶⁹ Id.

*In the bigger picture, I think it should be open. We believe it should be open and consistent and available—the decisions available—so that then the whole community has a better perspective of what decisions are being made so that future decisions can be in line, or an understanding of how to go about doing their developments.*¹⁷⁰

- 3.135 Mayor Max Hipkins of the City of Nedlands is of the view that a DAP does not have the authority to hear reconsiderations in private:

*So I contend that the DAP does not have the authority to hear DAP reconsiderations in private. Also, I believe the DAP does not have the ability to not publish minutes. Regulation 40—I think it is 40; I have it in my notes, which I am happy to leave with you—specifies that the DAP shall produce minutes of all meetings. There is no let-out clause that allows them not to produce minutes. Certainly, there have been examples—at least one—at the City of Nedlands where a meeting was held confidentially and there were no minutes produced, which I believe is contrary to the DAP's orders.*¹⁷¹

- 3.136 In response to these concerns, the Department advise:

*This was changed in 2012 with the result that all section 31 decisions are open to the public. Hence examples from 2012 would not be replicated today.*¹⁷²

...

*The circumstances when a DAP will conduct anything in private are extremely limited, including for the purpose of obtaining confidential legal advice.*¹⁷³

- 3.137 The Department also referred the Committee to DAP Practice Note 7, which contains detailed guidance on this issue and confirms that reconsideration meetings by DAPs are now open to the public.¹⁷⁴

¹⁷⁰ Mr Rob Druitt, Member, Real Estate Institute of Western Australia, *Transcript of Evidence*, 22 June 2015, p8.

¹⁷¹ Mr Max Hipkins, Mayor, City of Nedlands, *Transcript of Evidence*, 4 May 2015, p2.

¹⁷² Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p34. See also <http://www.mcleods.com.au/news/planning-law-updates/meetings-behind-closed-doors-mediation-and-development-assessment-panels> (viewed 6 July 2015), which questioned the legal basis upon which reconsiderations by DAPs were conducted in private.

¹⁷³ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p34.

¹⁷⁴ Government of Western Australia, Development Assessment Panels, *Practice Note 7, Tribunal, Court Reviews and Other Legal Proceedings*, 22 May 2013, pp5-6.

- 3.138 Mr Charles Johnson, presiding member, Metro Central and Goldfields-Esperance Joint Development Assessment Panels, provided the following feedback in a hearing before the Committee:

We should reference that meeting which was a section 31 reconsideration on 13 August 2012 of the Metro Central JDAP. The advice from the department—I understand it was with discussion—up until that time, in fact, until 2013 was that section 31 reconsiderations should be behind closed doors as they considered them part of the SAT process. I questioned that at the time and I was very pleased to see that advice note 7, when it came out in 2013, clarified that reconsiderations under section 31 should be open to the public. I was very pleased to see that. I see no reason why a section 31 reconsideration should be closed. We took, at the time of that meeting on 30 August, the advice of the department.¹⁷⁵

...

All of the section 31 reconsiderations, certainly from 2013, have been open. They have been on the advice or the consideration of a responsible authority report from the appropriate local government. Since that time, all our meetings have been open. As was stated, on some occasions we have gone behind closed doors to consider legal advice but that is during those meetings, and the meetings are always open again after that legal advice.¹⁷⁶

...

If we are talking about the actual SAT mediation—what happened in the mediation—then no, they should not be open because SAT mediation is confidential under the SAT process. If we are talking about a responsible authority report following, for example, the lodgement of revised plans following a mediation process, that is open, but what is not discussed and is not available publicly is the contents of negotiations and mediation. That is not part of the process.¹⁷⁷

- 3.139 Mr David Gray, presiding member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels, added:

¹⁷⁵ Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, p4.

¹⁷⁶ Ibid, p5.

¹⁷⁷ Id.

*I was just going to make the point that local government operates in exactly the same way—any mediation session which is reported to council to obtain direction for the people who are attending on behalf of the council is behind closed doors. The procedures are well established in local government and they have simply been extended onto the JDAPs.*¹⁷⁸

- 3.140 Dr Linley Lutton holds the following view on SAT mediations being conducted in private:

*I do not have any problem and I do not think most professionals would. They would say that something that is done in mediation does not have to be something that is done in public, and it is between two parties. I do not have any problem with that. I think if you opened that up, you are just dealing with two people or two parties. You cannot possibly be involving a third de facto party.*¹⁷⁹

- 3.141 Furthermore, Mr Denis McLeod gave the following evidence:

As a matter of general comment, in my view it would assist the deliberations of a planning decision-making body, and would be consistent with the normal practice of the SAT, if the decision-making body was able to consider matters related to SAT mediations, behind closed doors.

*At the same time however, I recognise the desirability of local government Councils, and DAPs exercising the powers of local government Councils in planning decision-making, should undertake their deliberations and make their decisions in public, so as to foster the element of community ownership of the planning processes in their community.*¹⁸⁰

Committee comment

- 3.142 The Committee is of the view that, in the interests of transparency, DAP meetings should be conducted in public unless there are exceptional reasons for not doing so, including when a meeting is considering the types of matters set out in DAP Practice Note 7 and section 5.23(2) of the *Local Government Act 1995* (as set out in footnote 163).

¹⁷⁸ Mr David Gray, Presiding Member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p5. See also Ms Fiona Mullen, Manager, Planning and Land Services, City of Mandurah, *Transcript of Evidence*, 4 May 2015, p9.

¹⁷⁹ Dr Linley Lutton, Director, Urbanix Design, *Transcript of Evidence*, 25 May 2015, p9.

¹⁸⁰ Mr Denis McLeod, *Questions on D McLeod Submission*, 29 June 2015, p6.

- 3.143 The Committee notes the Department's assurance that all reconsideration meetings of DAPs arising from section 31 of the SAT Act are now conducted in public, as provided for in DAP Practice Note 7.
- 3.144 The reasons why SAT mediations are conducted in private has been explained by the SAT as follows.

*...confidentiality is integral to mediation as the parties, in an effort to negotiate a solution between themselves, must feel able to discuss matters freely, and this may involve the release of confidential information.*¹⁸¹

- 3.145 The Committee supports them remaining so for this reason. A third party can always apply to take part in a SAT mediation and it is up to the relevant parties to decide upon any such request. This is not unique to appeals from DAP determinations.
- 3.146 Regarding concerns expressed in evidence about the confidentiality of SAT mediations, the Government may wish to consider the possibility of mediations being conducted by DAPs, despite them currently being restricted to making decisions. Such mediations would be open to all concerned parties. This could be initiated by the DAP or conducted at the discretion of the presiding member, especially on applications which attract significant stakeholder interest.

DAP MEMBERS REPRESENTING DEVELOPERS

- 3.147 Some witnesses informed the Committee that DAP members have represented developers in applications before DAPs on which they sit, after being excused from sitting on the DAP for that particular application due to having a conflict of interest.¹⁸²
- 3.148 The Committee is aware of a recent example of this having occurred.¹⁸³
- 3.149 Section 266 of the Act contains general provisions covering duties of those performing functions under the Act, including acting honestly, disclosure of conflicts of interest, duty of non-disclosure and improper use of information.

¹⁸¹ Western Australia, Legislative Council, Standing Committee on Legislation, Report 14, *Inquiry into the Jurisdiction and operation of the State Administrative Tribunal*, 20 May 2009, p103.

¹⁸² Submission No 20 from Councillor Julie Matheson, City of Subiaco, 28 January 2015, p4; Submission No 23 from Angela Hamersley, 29 January 2015, p1; Submission No 36 from Emeritus Professor Linda Rogers, 30 January 2015, p1; Submission No 5 from Mr Ian Bignell, Director, Development and Sustainability, Town of Cambridge, 16 January 2015, pp3-4.

¹⁸³ Government of Western Australia, Development Assessment Panels, *Minutes of the Metro West Joint Development Assessment Panel*, Meeting No. 101, 15 July 2015, p2, <http://www.planning.wa.gov.au/DAPS/DATA/Metropolitan%20DAPs/Metro%20West%20JDAP/Meeting%20minutes/20150715%20-%20Metro%20West%20JDAP%20-%20Minutes%20-%20No%20101%20-%20Town%20of%20Cambridge.pdf> (viewed 22 July 2015). See also Callaghan, Linda, 'Developers win and lose', *Post*, 18 July 2015, p5, where it was reported Mr Malcolm Mackay, a specialist member of the Metro West JDAP, declared a financial interest at the meeting and thereafter represented the applicant.

3.150 More specifically:

- Clause 2.3.1 of the DAP Code of Conduct provides that a DAP member is not to have any involvement with a development application that is before a DAP during its assessment by the local government or Department;¹⁸⁴
- Standing Order 6.2.4 of the DAP Standing Orders provides:

*A DAP member who has a conflict of interest or proximity interest relating to an application to be determined at a DAP meeting is not prevented from performing the member's functions under the Act in relation to any other application to be determined at the same meeting in relation to which the member does not have a conflict of interest.*¹⁸⁵

3.151 Accordingly, while a DAP member taking part in considering an application on which they have provided advice to the applicant would be considered in breach of the DAP Code of Conduct or Standing Orders, being involved in a scenario referred to in paragraph 3.147 may not. However, as demonstrated by the following evidence, this may still give rise to a perception of a conflict of interest.

3.152 The Committee received a range of views on this issue. Some individual community members, community representative organisations and local councils expressed concerns about there being a perception of a conflict of interest arising out of the scenario referred to in paragraph 3.147.¹⁸⁶

3.153 For example, Mr Ian Bignell (Director, Development and Sustainability, Town of Cambridge) submitted:

A further concern regarding specialist DAP members is the opportunity available to them to represent development clients with applications within the JDAP area on which they are appointed members. Whilst the member may appropriately declare an interest and be excluded from consideration of the application, this adds to negative community perceptions about the independence and propriety of the DAP process. It is considered there should be a

¹⁸⁴ Government of Western Australia, Department of Planning, *Development Assessment Panel Code of Conduct 2011, Under the Planning and Development (Development Assessment Panels) Regulations 2011*, March 2011, p3.

¹⁸⁵ Government of Western Australia, *Development Assessment Panel Practice notes: DAP Standing Orders 2012*, July 2012, p21.

¹⁸⁶ Submission No 23 from Ms Angela Hamersley, 29 January 2015, p1; Submission No 20 from Councillor Julie Matheson, City of Subiaco, 28 January 2015 p4; Submission No 36 from Emeritus Professor Linda Rogers, 30 January 2015, p1; Ms Lorene-Lee Clohesy, Committee Person, Kennedy St Support Group, *Transcript of Evidence*, 11 May 2015, p11.

*blanket ban on appointed specialist members carrying out commissioned work for development clients for likely DAP proposals within the JDAP area they are appointed to.*¹⁸⁷

- 3.154 In response to a Committee question on whether such a ban would be reasonable, Mr Matthew Burnett (Strategic Planning Officer, Town of Cambridge) advised:

*This is a complex matter and needs further consideration. A 'blanket ban' may in some cases be too harsh and eliminate many people from involvement given most DAP panellists one way or the other will have other interests by the very nature of having professionals on the panels.*¹⁸⁸

- 3.155 Mr Denis McLeod recognised the issue as arising from the fact DAP specialist members also act as planning consultants as part of their private business interests as well as the limited pool of planning professionals in Western Australia.¹⁸⁹

- 3.156 The evidence of industry witnesses was varied. While the Housing Industry Association did not object to there being a ban on DAP members representing applicants in the area of the DAP they are appointed to, as proposed in the evidence in paragraph 3.153,¹⁹⁰ the Property Council of Australia was opposed to any ban, adding:

*Requiring all DAP members to not have interests in potential DAP hearings would significantly erode the competency base of expert persons who can be members of a DAP.*¹⁹¹

- 3.157 The Property Council of Australia and the Real Estate Institute of Australia are of the view the existing conflict of interest requirements are sufficient.¹⁹²

- 3.158 DAP presiding members who provided evidence to the Committee also held a variety of views on this issue.¹⁹³ Mr David Gray stated:

¹⁸⁷ Submission No 5 from Mr Ian Bignell, Director, Development and Sustainability, Town of Cambridge, 16 January 2015, pp3-4.

¹⁸⁸ Email from Mr Matthew Burnett, Strategic Planning Officer, Town of Cambridge, 22 May 2015, p3.

¹⁸⁹ Mr Denis McLeod, *Questions on D McLeod Submission*, 29 June 2015, pp6-7. See also Mr Neil Foley, Professor, Urban and Regional Planning, School of Earth and Environment, University of Western Australia, *Transcript of Evidence*, 29 June 2015, p4.

¹⁹⁰ Ms Kristin Brookfield, Senior Executive Director, Building Development and Environment, Housing Industry Association, *Transcript of Evidence*, 22 June 2015, p8.

¹⁹¹ Mr Lino Iacomella, Deputy Executive Director, Property Council of Australia, *Transcript of Evidence*, 22 June 2015, p9.

¹⁹² Id. See also Mr Rob Druitt, Member, Real Estate Institute of Western Australia, *Transcript of Evidence*, 22 June 2015, p7.

*I think from time to time we have all declared an indirect pecuniary interest and withdrawn from discussion of any item. I was not aware that a situation had arisen with members of the panel acting as an advocate before that panel. I think that practice is not acceptable. I think it raises too many other issues and certainly the public perception that there is a conflict.*¹⁹⁴

3.159 On the other hand, Mr Eugene Koltasz and Mr Paul Kotsoglo expressed the following views:

*I slightly differ. Because the geographic area of a development assessment panel is quite large, if somebody's on the panel for, say, the City of Swan and they have a client who has a development application or some interest in the City of Swan, they should excuse themselves from that panel. I do not see any difficulty with, say, a consultant or somebody dealing with an application in the Shire of Serpentine–Jarrahdale being able to represent people there. Basically, I think that as long as you do not participate in the decision-making process and excuse yourself from the panel, you should be able to represent people that have developments in that area.*¹⁹⁵

*It would be highly simplistic, and potentially highly limiting in terms of those persons able to sit on the panels in Western Australia were parties to be precluded from acting in a particular jurisdiction.*¹⁹⁶

...

*The issues around the involvement of members serving on panels is not as simple as excluding people from areas given the relationships which do exist in a professional/personal sense.*¹⁹⁷

...

¹⁹³ Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, p6; Mr Eugene Koltasz, Presiding Member, Metro East and Pilbara Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p6; Mr David Gray, Presiding Member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p6.

¹⁹⁴ Mr David Gray, Presiding Member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p6.

¹⁹⁵ Mr Eugene Koltasz, Presiding Member, Metro East and Pilbara Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p6.

¹⁹⁶ Mr Paul Kotsoglo, Presiding Member, City of Perth Local Development Assessment Panel, *Answers to Questions on Notice*, 17 August 2015, p3.

¹⁹⁷ *Ibid*, p4.

*Avenues for review exist, and it would be, in my opinion and (sic) unnecessary impost upon the pool of specialist members to preclude people from operating in a particular jurisdiction if they were to serve on that panel.*¹⁹⁸

3.160 The Department's response on this issue follows.

It is Government policy that specialist DAP members primarily come from the private sector.

In terms of managing conflicts of interests, the Department already has the DAP Code of Conduct, Standing Orders and Practice Note 6, which specifically address this issue. Conflicts of interest are also discussed in member training. Furthermore, as a commitment to continuous improvement, the Department is looking at further measures to manage both real and perceived conflicts.

*In addition to the DAP Code of Conduct, all DAP members are bound by section 266(1)(f) of the Planning Act, as well as general principles of public administrative law (especially the 'hearing rule').*¹⁹⁹

3.161 The Chairman of the WAPC, advised as follows:

*...I do appreciate the issue raised here. I do not disagree that steps should be taken to ensure that conflicts, not just real but perceived conflicts, are probably [sic] managed. However, I do note that it is primarily the responsibility for the current Director General of the Department, who has the responsibility of creating, amending and enforcing the DAP Code of Conduct and Standing Orders. What the Committee suggests is certainly worth further consideration.*²⁰⁰

Committee comment

3.162 The prescriptive nature of the DAP Code of Conduct is such that it should address most instances of actual or perceived conflicts of interest of DAP members, resulting in them being disqualified, if necessary, from considering the application in question.

3.163 However, rules covering conflict of interest, no matter how prescriptive and regardless of the professionalism and experience of the decision-makers in question, cannot

¹⁹⁸ Mr Paul Kotsoglo, Presiding Member, City of Perth Local Development Assessment Panel, *Answers to Questions on Notice*, 17 August 2015, p3.

¹⁹⁹ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, pp31-32.

²⁰⁰ Western Australian Planning Commission, *DAP Parliamentary Public Hearing – 19 June 2015 Response by Chairman*, 19 June 2015, p19.

always prevent a perception of a conflict of interest arising in the mind of those subject to such decisions. Such a perception has the potential to undermine the credibility of the entire decision-making process.

3.164 The Committee is of the view that, regardless of it being an unavoidable consequence of the DAP system, the type of scenario referred to in paragraph 3.147 whereby a DAP member represents a developer in an application before the DAP on which they sit should be avoided. It would be open to any observer to question the propriety of a DAP member undertaking this practice and, in turn, the effectiveness of the DAP process.

3.165 However, any consideration of banning such a practice should take into account the following considerations.

- Unlike tenured decision-making officials such as magistrates and judges, the role of a DAP member is not full time and a number carry on private practice in the planning industry.
- The relatively limited number of planning professionals in Western Australia, bearing in mind that in many instances there will be three specialist members sitting on a DAP at any one time.
- A number of members sit on more than one DAP and the higher the number, the greater the effect of any ban may be upon the members' private business interests.

3.166 The Committee agrees with the recommendation made by Mr Ian Bignell noted in paragraph 3.153 and makes the following recommendation.

Recommendation 4: The Committee recommends that the Department of Planning ensures that the Development Assessment Panel Code of Conduct 2011, (pursuant to regulation 45(3) of the *Planning and Development (Development Assessment Panels) Regulations 2011*), and the Development Assessment Panel Practice Notes: DAP Standing Orders prohibit members of development assessment panels representing applicants on applications before development assessment panels on which they sit.

REASONS FOR DECISIONS BY DAPS

3.167 The extent to which DAPs are required to give reasons for determinations was a significant issue during the inquiry. The issue arose from evidence given by some witnesses about there being a lack of reasons in minutes of some DAP meetings where the DAP approved a planning application by amending or refusing the recommendation contained in the responsible authority report. It is these approvals by DAPs which appear to have attracted the most controversy in the community.

- 3.168 Decisions of DAPs are administrative in character and DAPs apply legislation to a particular case. This is reinforced by an applicant's ability to apply to the SAT, which undertakes reviews of administrative decisions.
- 3.169 The Committee notes the guidelines given by the Western Australian Ombudsman regarding the giving of reasons for administrative decisions, which notes that they provide the following benefits:
- More public confidence in the decision;
 - More consistency in decision-making; and
 - Fairness and transparency in decision-making.²⁰¹
- 3.170 These guidelines also state that 'Giving reasons also demonstrates transparency, accountability and quality of decision-making'.²⁰²
- 3.171 There is no general rule at common law, or principle of procedural fairness, that requires reasons (adequate or otherwise) to be given for administrative decisions.²⁰³
- 3.172 Unless a statute, either expressly or by necessary implication, requires reasons to be given, an application for judicial review to the Supreme Court of such a decision cannot encompass a request for an order requiring the decision-maker to give reasons for the decision.
- 3.173 Section 171A(2)(a)(i) of the Act provides:

171A. Prescribed development applications, DAP to determine and regulations for ...

(2) The Governor may make regulations —

(a) providing that, despite any other provision of this Act or a planning instrument, a development application of a class or kind prescribed for the purposes of this paragraph —

²⁰¹ Ombudsman Western Australia, Guidelines, Giving reasons for decisions, July 2009, p1, <http://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Giving-reasons-for-decisions.pdf> (viewed 19 August 2015).

²⁰² Id.

²⁰³ Per Gibbs CJ in *Public Service Board of New South Wales v Osmond* [1986] 159 CLR 656 at 662. See also Groves, Matthew, *Reviewing Reasons for Administrative Decisions: Wingfoot Australia Partners Pty Ltd v Kocak*, Sydney Law Review, volume 35, p627 and Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 66, *Supreme Court Amendment Rules 2013*, 24 October 2013, which contains an overview of the relevant law. On the recommendation of that Committee, the Legislative Council disallowed the *Supreme Court Amendment Rules 2013* which would have prescribed that an applicant may apply to the Supreme Court for an order requiring an administrative decision-maker to give reasons.

- (i) *must be determined by a DAP as if the DAP were the responsible authority under the relevant planning instrument in relation to the development;*

3.174 Regulation 16(1) provides:

16. Determination by DAP

- (1) *Except as provided in subregulations (2A) and (2B), the provisions of the Act and the planning instrument under which a DAP application is made apply to the making and notification of a determination by a DAP to whom the application is given under regulation 11 as if the DAP were the responsible authority in relation to the planning instrument.*

3.175 Accordingly, there is an implication that section 171A(2)(a)(i) of the Act requires DAPs to give reasons for decisions if the relevant planning instrument provides that reasons must be given, and this requirement is reinforced by regulation 16(1).

3.176 However, regulation 17(5)(d) contains the only reference in the Regulations to the giving of reasons by a DAP. It provides:

17. Amending or cancelling development approval

- (5) *As soon as practicable after the application is determined, the presiding member must give the applicant, the relevant responsible authority and the administrative officer of the DAP written notification of the determination which must include the following —*

- (d) reasons for any refusal;*

3.177 While clause 5.1.2(d) of the DAP Standing Orders²⁰⁴ (referring to regulation 44, which governs minutes of DAP meetings but makes no mention of reasons), contains the following broad requirement to give reasons:

5.1.2 The content of minutes of a DAP meeting must include the following:

- d. details of each decision made at the meeting and the reasons given for each decision;*

clause 5.2 of the DAP Standing Orders provides:

²⁰⁴

This is replicated in clause 5.6.1 of the DAP Procedures Manual.

5.2 Determination of DAP applications

A DAP application may be determined by resolution of the DAP in one of the following ways:

- a. by approving the application subject to conditions;*
- b. by approving the application without any conditions;*
- c. by refusing the application with reasons.*

3.178 It therefore appears there is no provision requiring DAPs to give reasons for determinations of the type described in 3.167 unless the relevant planning instrument provides for this. Also, if the relevant planning instrument does not require the responsible authority to give reasons for a particular decision, it is arguable this overrides the DAP Standing Orders as regulation 16(2A) refers to the Regulations prevailing over any inconsistent provision of a planning instrument, not the DAP Standing Orders.

3.179 The Committee has surveyed the provisions in a number of local government planning schemes covering the giving of reasons, as follows.

Table 4

Local planning scheme references to whether the local government must give reasons for decisions

Scheme	Provision
Town of Cottesloe Local Planning Scheme No.3	Clause 10.4.2: <i>Where the local government refuses an application for planning approval the local government is to give reasons for its refusal.</i>
City of Nedlands Town Planning Scheme No.2	No specific reference to the giving of reasons. Clause 6.5.1: The Council may determine an application by granting approval, refusing approval or granting approval subject to such conditions as it thinks fit, having regard to the orderly and proper planning of the area.
City of Mandurah Town Planning Scheme	Appendix 8:

No.3	Notice of Decision on Application of Planning Approval contains provision for reasons to be given for a refusal of planning consent.
Town of Cambridge Town Planning Scheme No.1	<p>Clause 41:</p> <p><i>NOTICE OF COUNCIL DECISION</i></p> <p><i>As soon as is practicable after making a decision in relation to an application for planning approval, the Council is to give to the applicant, in writing, generally in the form prescribed in Schedule 6:-</i></p> <p><i>(a) notice of the approval or refusal;</i></p> <p><i>(b) the reason or reasons for the approval or refusal; and</i></p> <p><i>(c) the conditions, if any, to which approval is subject.</i></p> <p>Schedule 6:</p> <p>Notice of Planning Approval/Refusal contains provision for reasons to be given for a refusal of planning consent.</p>
City of Melville Community Planning Scheme No.5	<p>No specific reference to the giving of reasons.</p> <p>Clause 7.9:</p> <p><i>DETERMINATION OF APPLICATION</i></p> <p><i>To ensure certainty of outcome for planning applications:</i></p> <p><i>(a) in determining an application for planning approval the Council may in accordance with the Scheme:</i></p> <p><i>(i) grant its approval with or without conditions;</i></p> <p><i>(ii) refuse to grant its approval;</i></p>

	<i>(b) the Council shall convey its decision to the applicant in writing.</i>
City of Subiaco Town Planning Scheme No.4	<p>Clause 31:</p> <p><i>NOTICE OF COUNCIL DECISION</i></p> <p><i>As soon as is practicable after making a decision in relation to an application, the Council is to give to the applicant, in writing, in the form set out in Schedule 4:</i></p> <p><i>(a) notice of the approval or refusal;</i></p> <p><i>(b) the reason or reasons for the refusal; and</i></p> <p><i>(c) the conditions, if any, to which approval is subject.</i></p> <p>Schedule 4:</p> <p>Notice of the Council's Decision contains provision for reasons to be given for a refusal of planning consent.</p>
Shire of Broome Local Planning Scheme No.6	<p>Clause 10.4.2:</p> <p><i>Where the local government refuses an application for planning approval the local government is to give reasons for its refusal.</i></p>
City of Bayswater Town Planning Scheme No.24	<p>Clause 3.8.2:</p> <p><i>Where the local government refuses an application for planning approval the local government is to give reasons for its refusal.</i></p>

3.180 The Committee notes the Model Scheme Text, which appears in Appendix B of the *Town Planning Regulations 1967*, does not require a local government council to give reasons if there is an approval of a planning application. It does provide that where the local government refuses an application for planning approval it must give reasons for its refusal.²⁰⁵

3.181 The Committee also surveyed the minutes of a number of decisions of DAPs approving planning applications where the recommendation in the responsible

²⁰⁵ Clause 10.4.2 of the Model Scheme Text, http://www.planning.wa.gov.au/dop_pub_pdf/MST_Appendix_B.pdf.

authority report is modified or refused and no or limited²⁰⁶ reasons are given. The results of this survey are as follows.

Table 5

Decisions of DAPs approving planning applications – no/limited reasons given

DAP	Decision details
Metro Central JDAP	
01/02/2012	<ul style="list-style-type: none"> • Guildford Road, Maylands, Proposed Shops and Offices Development • Approve application (3/2) subject to 28 conditions; no substantive reasons given • 3/2 in favour of application (3 specialist members for and 2 councillors against) • Reasons recorded for motion by councillors for refusal of application
10/03/2014	<ul style="list-style-type: none"> • Lot 120 (94) Kitchener Road, Alfred Cove, 90 multiple dwellings (reconsideration following SAT mediation) • Approve application (4/1), subject to 16 conditions; no substantive reasons given
16/04/2014	<ul style="list-style-type: none"> • Eric Street, Como, proposed Thirty Three (33) Multiple Dwellings in a 5-Storey Building • 3/2 in favour of application (3 specialist members for and 2 councillors against) subject to 23 conditions; no substantive reasons given • Reasons recorded for motion by councillors for refusal of application.
25/08/2014	<ul style="list-style-type: none"> • Lot 54, No 58 Kennedy Street, Maylands, proposed three storey residential development comprising 11 multiple dwellings and associated basement car parking. • Responsible authority report recommends refusal. • 3/2 in favour of application (3 specialist members for and 2 councillors against) subject to 22 conditions and 6 advice notes; no substantive reasons given • Reasons recorded for motion by councillors for refusal of application.

²⁰⁶

In some instances, these are restricted to one or two sentences.

NW Metro JDAP	
31/01/2013	<ul style="list-style-type: none"> • Tassels Place, Innaloo, multi-storey development • Approve application (4/1) subject to 22 conditions; no substantive reasons given (motion to refuse not carried – was 2/2 but Presiding Member exercised casting vote in accordance with Regulation 42(1)). • Reasons recorded for motion by councillors for refusal of application
SW Metro JDAP	
22/10/2012	<ul style="list-style-type: none"> • Redevelopment of aged care facility, Harvest Road, Fremantle • Approve application (3/1) subject to 15 conditions; no substantive reasons given (motion to refuse not carried – 3/1 against) • Reasons recorded for motion by councillors for refusal of application
West Metro JDAP	
21/02/2013	<ul style="list-style-type: none"> • 5 storey mixed use development, Railway Road, Subiaco • Approve application subject to 10 conditions, no reasons given • No motion on the responsible authority report recommendation to refuse application was moved due to lack of a proposer or seconder (Council supported the application and motion to approve was carried unanimously by both specialist and local government members)
05/09/2013	<ul style="list-style-type: none"> • Brewer Street, Perth, multi-storey residential dwellings • Approve application subject to 7 conditions, no reasons given • Motion to refuse not carried – was 2/2 but Presiding Member exercised casting vote in accordance with Regulation 42(1). • Reasons recorded for motion by councillors for refusal of application
17/04/2014	<ul style="list-style-type: none"> • Stirling Street, Perth, construction of 4 storey residential development • Approve application subject to 7 conditions, no reasons given apart from “<i>The proposed development has the</i>

	<p><i>potential to meet the development standards required by the City and the Design Advisory Committee.”</i></p> <ul style="list-style-type: none"> • Responsible authority report recommendation to refuse the application was lost due to the lack of a seconder (only one councillor in attendance at the meeting who moved the motion in support of the recommendation to refuse) • Reasons recorded for recommendation to refuse.
07/03/2014	<ul style="list-style-type: none"> • Beaufort Street, Perth, 6 storey multi use development • Approve application subject to 7 conditions, limited explanation given for approval (carried unanimously) • Reasons recorded for recommendation to refuse.

3.182 The data in tables 4 and 5 suggests the lack of reasons for decisions in the minutes of DAP meetings could, in some instances, be attributable to whether the relevant planning scheme requires reasons for decisions.

3.183 Some submitters expressed concern about DAPs not giving reasons for decisions approving applications, particularly when these went against the recommendation in the responsible authority report.²⁰⁷

3.184 WALGA is of the view that reasons are required for DAP decisions:

*As stated previously, the minutes of DAP meetings should clearly set out all discussions about an item and provide in detail, any rationale for the approval, refusal, or condition setting of a development. This is particularly the case when there is a change from the RAR or when discretion has been applied.*²⁰⁸

3.185 The Local Government Planners Association articulated a practice of councils which highlights the issue identified earlier of DAPs not providing reasons where they approve a planning application by amending or refusing the recommendation in the responsible authority report.

It is always taken as read that if you go against it and refuse, you have to give the reasons but if you go against it and approve, there is something missing there now. If a council is dealing with it,

²⁰⁷ Submission No 14 from Jeff and Marina Hansen, 27 January 2015, p2; Submission No 8 from *Striker Balance!* Community Action Group, 23 January 2015, attaching letter to Mr Charles Johnson of 16 March 2014. See also Submission No 46 from the City of South Perth, 10 July 2015, p5. The Committee also received some evidence during the inquiry on the adequacy of minutes in general, noting they varied in quality and detail. See Submission No 33 from the City of Mandurah, 30 January 2015, p5 and Submission No 2 from Andrew Rigg, 15 December 2014, p1.

²⁰⁸ Western Australian Local Government Association, *Presentation to the Standing Committee on Uniform Legislation and Statutes Review*, 4 May 2015, p17.

*whichever way you disagree with an officer's recommendation, it is written in the minutes as a preamble to the recommendation so the public know. I cannot see why you would not apply the same standard for DAPs.*²⁰⁹

3.186 The Real Estate Institute of Western Australia requests transparency in the process.

*We feel that there should be transparency in the process. I guess, from a developer's point of view, it is "approved; thanks very much; let's move on", but from a consistency point of view, we do not feel it should be too prescriptive in the sense that they have to justify the reason for the development. But some context around it would be very helpful so that developers and planners and the public can then say, "This was approved and these were some of the reasons for it, so now we can look at our development; we have got exactly the same situation and we have a precedent for it" and be able to use that. Some context around the approvals and disapprovals would give some better consistency, I think, to the whole process.*²¹⁰

3.187 Mr Denis McLeod expressed strong support in the following terms for the giving of reasons by DAPs in all circumstances.

It is reprehensible for a DAP to fail to give reasons for its decision, whether they be for approval or refusal.

It is particularly inappropriate for a DAP to fail to give reasons for its decisions where it fails to decide in accordance with the recommendations in an RAR.

*A local government Council in making a decision on an application is required to give reasons if it does not follow the recommendations of its reporting officers. I have not had time to check the DAP Regulations or any directions given by the CEO as to the required practice of DAPs. However there is no reason why a DAP should be excused from giving full and clear reasons for its decision where it fails to follow the recommendation of the RAR.*²¹¹

3.188 The Chairman of the WAPC supports reasons being given when a decision goes against the recommendation in the responsible authority report:

²⁰⁹ Mr Ian MacRae, President, Local Government Planners Association, *Transcript of Evidence*, 4 May 2015, p9.

²¹⁰ Mr Rob Druitt, Member, Real Estate Institute of Western Australia, *Transcript of Evidence*, 22 June 2015, p4.

²¹¹ Mr Denis McLeod, *Questions on D McLeod submission*, 29 June 2015, p8.

*...concerning reasons, yes, DAPS should be giving reasons for decisions when their decision is contrary to the recommendation set out in the recommendation report (RAR). This is a general planning-law principle and is also I believe reflected in our Making Good Planning Decisions manual.*²¹²

...

I broadly agree that where any decision is contrary to the recommendation of planning staff, sufficient reasons should be given. The reason for this is quite logical. If the decision-maker is simply following the recommendation as set out in the report, then the reasons are largely said to reflect the report. However, where the reasons are contrary to the recommendation of professional planning staff, then decision makers should explain why they have come to a different conclusion.

*I also agree this is arguably as much an issue of local government decision-making as DAP decision-making. To this end, I understand the Department, advising the Commission, is working to introduce new Local Planning Scheme Regulations. I believe this issue could be addressed through those new regulations, particularly as a new deemed provision.*²¹³

3.189 This was also the view of some DAP presiding members who provided evidence to the Committee.²¹⁴

3.190 Also, *Striker Balance!* Community Action Group advised it had unsuccessfully sought an explanation from Mr Charles Johnson about the decision by Metro Central JDAP in relation to the application to develop 94 Kitchener Road, Alfred Cove. When this was put to Mr Johnson,²¹⁵ he advised the Committee that:

I do recall that the DAP Secretariat at the Department of Planning (DoP) did send me a copy of the correspondence from Striker Balance. It was my understanding and recollection that the DoP were

²¹² Western Australian Planning Commission, *DAP Parliamentary Public Hearing – 19 June 2015 Response by Chairman*, 19 June 2015, p11.

²¹³ Ibid, pp11-12.

²¹⁴ Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, p7; Mr Eugene Koltasz, Presiding Member, Metro East and Pilbara Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p7; Mr David Gray, Presiding Member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p7.

²¹⁵ Email to Mr Charles Johnson, Presiding Member, Metro Central and Goldfields-Esperance Joint Development Assessment Panels, 2 July 2015.

going to provide a general response to the Group as they had been dealing with a range of correspondence from them and a number of individuals addressed to the Department and the Minister for Planning.

I note that you have referred to regulation 48 that the DAP Presiding Member has the power to make public comments which I have used on occasions to respond to media enquiries. The issue of interring into ongoing correspondence with private groups and individuals is less clear.

On three occasions now I have received letters through DoP requesting a response from people who have been dissatisfied with a JDAP decision. I have discussed my role in preparing a response with the DAP Secretariat and have sort (sic) an agreement that they would fund my costs of preparing a response by paying me a fee for doing so. In this regard it needs to be appreciated that a significant amount of time is needed to prepare a response to the specific questions being asked often relating to the full range of issues that the JDAP considered and how they were considered against existing Council scheme provisions and policies. This could amount to significantly more than the summary that is provided in the minutes of the meeting as the reasons for making the decision.

For your information the advice that I received from DoP in regard to one of these letters was that they would not cover my costs and that they would provide the responses themselves. I am unsure how they did respond as they were not involved in the meeting concerned. As a small business owner I do not believe that I should be expected to cover the costs of spending several hours preparing a response to follow up letters.

My recommendation would be that the JDAP fee structure should be amended to provide a fee to JDAP Presiding Members to allow them to prepare correspondence. It is unreasonable in my view to expect that this should be done within the standard sitting fee of \$500.

Request for Further Comment on the JDAP decision on Kitchener Road

I consider that I have already provided to the Standing Committee with my evidence on this matter. This took the form of a written statement and the answers to the questions asked at that enquiry. I do not have anything to add to what I have already said. I consider that I

have given an adequate explanation of the reasons for the JDAP decision on this matter.

For your information preparation of my evidence for that hearing took 8 hours and 2 hours at the hearing. I did receive a payment of \$500 for my time which in no way covers the actual costs.

I also want to state that from my long experience in planning that those that are dissatisfied with a planning decision are very rarely satisfied with the reasons given for making a decision that is not in accord with their wishes. In this regard I don't think I would ever be able to provide the Striker Balance Group with what they consider to be sufficient clarity for the decision that was made.²¹⁶

- 3.191 In response to the concerns expressed, the Department advised that it is not opposed to providing that DAPs give reasons for decisions in all circumstances:

Reasons are usually only expected for a refusal because an approval is expected to be for the reasons set out in the planning officer's recommendation report. Nonetheless, the Department does not oppose the notion that where a report recommends refusal, and a decision-maker grants approval, then reasons should be given.

Arguably this is a matter that concerns all planning decision-making - not just decisions by local governments. Similarly, even were there to be a prescription requiring reasons, what something does or does not constitute 'reasons' is a largely subjective judgment. In all planning decisions, including decisions by local government, the Planning Commission and SAT, relevant planning reasons including 'amenity', 'character' and 'orderly and proper planning' can be difficult to define.²¹⁷

Committee comment

Providing reasons

- 3.192 It may appear justified, from a legal perspective, for a decision-maker only being required to give reasons in certain circumstances. For example, reasons for refusing to grant planning approval assists an applicant, who wishes to apply to the SAT for a review of this refusal, in formulating their grounds for a review.

²¹⁶ Email from Mr Charles Johnson, Presiding Member, Metro Central and Goldfields-Esperance Joint Development Assessment Panels, 3 July 2015. This evidence also raises the issue of fees for DAP members which will be explored later in this report.

²¹⁷ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, p34.

- 3.193 However, the Committee is of the view that the Regulations cannot be operationally effective unless reasons are given for all determinations by DAPs.
- 3.194 This is because:
- One of the purposes of DAPs is to provide more transparency in decision-making.
 - Stakeholders should have a right to be advised of the reasons for all planning determinations which may have a significant and far reaching impact on the surrounding locality (this not being unique to DAPs).
- 3.195 Reasons may not be required in circumstances where they are given in a responsible authority report and the DAP agrees with the relevant recommendation(s) without imposing any conditions. The same cannot be said where the DAP deals with an application by amending or refusing the recommendation contained in the responsible authority report.
- 3.196 It is relevant to note that regulation 11(da) of the *Local Government (Administration) Regulations 1996* provides that the minutes of a meeting of a council or a committee is to include ‘written reasons for each decision made at the meeting that is significantly different from the relevant written recommendation of a committee or an employee’. However, the Regulations do not make any provision for this regulation to apply to DAPs.
- 3.197 As stated in paragraph 3.175, there is an implication that section 171A(2)(a)(i) of the Act requires DAPs to give reasons for decisions if the relevant planning instrument provides that reasons must be given, and this requirement is reinforced by regulation 16(1). However, the Committee is of the view there may be some uncertainty whether this authorises the making of regulations requiring DAPs to give reasons, regardless of what is stated in a planning instrument. This is because it is arguable that a requirement to give reasons is not a mere matter of practice or procedure but rather a substantive right of a party to the proceedings²¹⁸ and should be provided for in primary rather than subsidiary legislation. Any amendment to the Regulations for this purpose, purporting to rely upon the regulation making power in Section 171A(2)(a)(i), may, as a result, risk being disallowed by the Parliament.
- 3.198 Accordingly, in its consideration of this issue, the Committee canvassed the following legislative options for requiring that reasons are given for all planning determinations by DAPs.

²¹⁸ See Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 66, *Supreme Court Amendment Rules 2013*, 24 October 2013, p12.

- Amending Part 11A of the Act to require DAPs to give reasons for determinations;
- Amending Part 11A of the Act to provide for a regulation making power requiring DAPs to give reasons for determinations and enacting a new regulation to effect this;
- Amending the Act to require the giving of reasons for the determination of planning approvals by all decision-making bodies, including local governments, the WAPC and DAPs.

3.199 The Committee is of the view that the first option noted in paragraph 3.198 provides the most direct and certain means to effect the requirement for DAPs to give reasons because it enables this to be undertaken, directly, by primary legislation enacted by the Parliament rather than subsidiary legislation at a later time.

3.200 Accordingly, the Committee makes the following recommendation.

Recommendation 5: The Committee recommends that the Minister representing the Minister for Planning introduce an amendment to the *Planning and Development Act 2005* to provide for development assessment panels to give reasons for all determinations.

3.201 The Committee considered the third option noted in paragraph 3.198 on the basis that, because:

- applicants may choose to have a DAP determine their application if it falls within certain financial criteria;
- certain applications are excluded from being determined by DAPs, and, therefore, will be considered by other decision-making bodies such as local governments and the WAPC,

such an amendment would ensure a level playing field and consistency across all decision-making bodies. While the scope of the Committee's inquiry is restricted to a review of DAPs, this is a matter which the Committee believes the Government should consider.

Content and length of reasons

3.202 There is a legitimate question over what a statement of reasons should include and how detailed they should be. The Government should consider these matters.

3.203 One option would be to amend the Act to prescribe what reasons for DAP determinations must include, such as:

- a summary of the issues;
- any relevant findings of fact and the evidence on which they are based;
- the rationale for the DAPs determination; and
- a summary of any dissenting views.²¹⁹

3.204 The Committee makes the following recommendation.

Recommendation 6: The Committee recommends that the Minister representing the Minister for Planning introduce an amendment to the *Planning and Development Act 2005* to prescribe what reasons for determinations by development assessment panels must include.

Fee for preparing reasons

3.205 Given Schedule 2 to the Regulations does not appear to provide for a fee to cover the time necessary for the presiding member (or other member of any majority of the DAP) to prepare reasons, the Committee is of the view the Government should consider an amendment to this effect. This would assist in addressing the issue identified by Mr Charles Johnson in paragraph 3.190 regarding the need to reimburse a DAP member for time taken to prepare reasons.

Finding 3: The Committee finds that if there will be a requirement for development assessment panels to provide reasons for all determinations, at least one panel member will be required to draft reasons and that it would be appropriate for the Government to remunerate this accordingly. The quantum of this remuneration is a matter for the Government to determine.

EXERCISE OF DISCRETIONARY POWERS

3.206 Some witnesses expressed concern that in some instances DAPs exercise their discretion and make decisions on planning applications that are significantly

²¹⁹ It is noted that section 77(2) of the *State Administrative Tribunal Act 2004* provides:

77. Reasons for final decision

(2) *Reasons that the Tribunal gives for a final decision have to include the Tribunal's findings on material questions of fact, referring to the evidence or other material on which those findings are based.*

Also, the Committee was provided with examples of decisions of joint regional planning panels in operation in New South Wales by the Housing Industry Association, which contained statements of reasons.

inconsistent with requirements in local planning schemes and the Residential Design Codes (**R Codes**).²²⁰ One submission stated:

*The DAPs unfettered use of the discretionary clauses in a Local Planning Scheme are currently without any public scrutiny or justification of their decision.*²²¹

3.207 The decisions approving developments at 94 Kitchener Road, Alfred Cove on 10 March 2014 (DAP Application reference DP/13/00143) and 58 Kennedy Street, Maylands on 15 December 2014 (DAP Application reference DP/14/00548) were cited by *Striker Balance!* Community Action Group and the Kennedy Street Collective as examples of the exercise of discretion which were, in their view, unjustified.²²²

3.208 *Striker Balance!* Community Action Group advised that the approval by the DAP of the development at 94 Kitchener Road involved:

- a plot ratio more than double that provided for in an R40 density coded area;²²³
- a height 23% above the maximum allowable height under the local planning scheme (more than two metres above the maximum nine metres);²²⁴ and
- a lack of explanation in the minutes of the meeting on 10 March 2014 for the approval of the variations.²²⁵

3.209 The Committee sought feedback from witnesses on the exercise of discretionary powers by DAPs. It posed the following question.

²²⁰ See Submission No 8 from *Striker Balance!* Community Action Group, 23 January 2015, p2 and Mr Geoffrey Pearson, Joint Spokesperson, *Striker Balance!* Community Action Group and Mrs Marina Hansen, Committee Member, *Striker Balance!* Community Action Group, *Transcript of Evidence*, 29 June 2015, p7. Information on the R Codes can be found at http://www.planning.wa.gov.au/dop/pub/pdf/Residential_Design_CodesExplanatory_GuidelinesPrint_version2.pdf (viewed 9 July 2015).

²²¹ Submission No 14 from Jeff and Marina Hansen, 27 January 2015, p2.

²²² Submission No 8 from *Striker Balance!* Community Action Group, 23 January 2015, p2; Mr Geoffrey Pearson, Joint Spokesperson, *Striker Balance!* Community Action Group and Mrs Marina Hansen, Committee Member, *Striker Balance!* Community Action Group, *Transcript of Evidence*, 29 June 2015, p3; Submission No 26 from Kennedy Street Collective, 29 January 2015; Mrs Lorene-Lee Clohesy, Committee Person, Kennedy Street Collective, *Transcript of Evidence*, 4 May 2015.

²²³ Submission No 8 from *Striker Balance!* Community Action Group, 23 January 2015, p2. R40: limit of 40 dwellings per hectare.

²²⁴ Mr Geoffrey Pearson, Joint Spokesperson, *Striker Balance!* Community Action Group, *Transcript of Evidence*, 29 June 2015, p6.

²²⁵ Mrs Marina Hansen, Committee Member, *Striker Balance!* Community Action Group, *Transcript of Evidence*, 29 June 2015, p5.

*Regarding concerns by some submitters that have been expressed about the exercise of discretionary powers by DAPs, which have been described as unfettered and ‘without justification or scrutiny’, one submitter has recommended that any exercise of discretion be limited to variations of no greater than one R-Code above that of the site in question. What is [...] view on the exercise by DAPs of discretionary powers and this recommendation?*²²⁶

3.210 Many witnesses emphasised what is implicit in regulation 16(1), which is that the DAP is able to exercise the same discretionary powers available to the responsible authority under the relevant planning scheme.

3.211 For example, Dr Linley Lutton provided the following evidence:

*All DAP members sit in the shoes of the regulatory authority, so they are bound by the limitations of the planning framework that they work in and they are supposed to know it. It is not technically unfettered at all, so that term is not really appropriate. There is a regulatory framework in which every decision is made. You cannot just pluck decisions out of the air, the same way as elected members cannot. It is not unfettered, but to put arbitrary limits on things, like one R-code above, does not make any sense to me at all. DAPs should not be given any discretionary powers in any way that a local government is not given any. You cannot have discretionary powers; all you can do is work within the regulatory framework, which gives you a clause about variations that says you can vary it, provided you go to this clause, and you make sure all of those 20 or 30 points are attended to. Just to give DAPs discretionary powers would not make any sense at all.*²²⁷

3.212 Industry bodies commented that:

- The discretion is no different from what local government or the WAPC is able to exercise.²²⁸
- The fact that about 95% of DAP decisions have been in accordance with recommendations made in responsible authority reports suggests some of those reports have been based on a ‘discretionary element’.²²⁹

²²⁶ See Submission No 20 from Councillor Julie Matheson, City of Subiaco, 28 January 2015, p1.

²²⁷ Dr Linley Lutton, Director, Urbanix Design, *Transcript of Evidence*, 25 May 2015, p11.

²²⁸ Ms Kristen Brookfield, Senior Executive Director, Building, Development and Environment, Housing Industry Association, *Transcript of Evidence*, 22 June 2015, p7. See also Mr Neil Foley, Professor, Urban and Regional Planning, School of Earth and Environment, University of Western Australia, *Transcript of Evidence*, 29 June 2015, pp7-8.

- There should be flexibility provided to DAPs but limiting DAPs to only one R-code would be too prescriptive.²³⁰
- 3.213 DAP presiding members who provided evidence to the Committee were also of the view that DAPs ‘stand in the shoes’ of the local government and that it is up to the local government to make amendments to their planning schemes to deal with the exercise of discretion.²³¹
- 3.214 The Department holds a similar view.

The basic legal requirement underlying DAPs is that they 'stand in the shoes' of the original decision-maker. Whatever discretion the local government had - the DAP now has. It would be disingenuous to suggest a Council be given extra discretion that a DAP not be entitled to use.

Moreover, the above suggestion would be quite difficult to implement in terms of legislative drafting. A far easier and simpler way for this issue to be addressed is for local governments to tighten up their own scheme provisions and policies. This is an implicit advantage of the DAP system.

In terms of incremental-pragmatic planning theory, as opposed to Government policy, DAPs highlights day-to-day planning pitfalls, and can stimulate (if indirectly) future planning reform.²³²

- 3.215 The Chairman of the WAPC made the same points about the schemes and policies of local governments:

If local governments wish to confine the discretion of DAPs, then they need to look at their own planning framework. I believe that many, if not most, local governments have not reviewed, updated and consolidated their own schemes as required under the Planning and Development Act. Therefore, whilst there might be a perception that DAPs are exercising discretion in a particular unforeseen way, local

²²⁹ Mr Lino Iacomella, Deputy Executive Director, Property Council of Australia, *Transcript of Evidence*, 22 June 2015, pp7-8.

²³⁰ Mr Rob Druitt, Member, Real Estate Institute of Western Australia, *Transcript of Evidence*, 22 June 2015, p6.

²³¹ Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, pp9-10; Mr Eugene Koltasz, Presiding Member, Metro East and Pilbara Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p10; Mr David Gray, Presiding Member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p10.

²³² Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p41.

governments themselves are somewhat to blame if they have not taken sufficient steps to have a sufficiently robust scheme that would fetter the DAP's decision.

In other words, far from being a criticism of the DAP system, the perceived application of DAPs has actually proved its worth. In particular, it has highlighted areas where local governments have failed to have adequately robust planning frameworks. If local governments began acting more strategically, focusing on their system as a whole, than many of the perceived issues with DAP decisions would fall away.²³³

- 3.216 The Minister for Planning, in his response to Hon Simon O'Brien MLC in relation to Petition No 35 – Metro West Joint Development Assessment Panel, also highlighted the relevance of the provisions in relevant planning schemes and policies:

Without commenting on the actual planning merits of this case, as a general planning principle, the more intangible and subjective a planning consideration, such as character and design, the more such a decision is dependent upon the robustness of the local government's own existing policy framework.²³⁴

...

Thus, to the extent there are concerns about the scope of the JDAP's discretion, it is arguably more a question as to how the relevant local government establishes its own local planning system, which the JDAP is bound to apply.

For these reasons, criticisms about DAP decisions sometimes fail to take into account the underlying local planning framework, which already limits a DAP's discretion.²³⁵

Committee comment

- 3.217 A decision-maker, when exercising discretion, must balance and weigh up various factors, considerations and evidence and then exercise their judgment on what decision should be made. This exercise will inevitably result in decisions on which

²³³ Western Australian Planning Commission, *DAP Parliamentary Public Hearing – 19 June 2015 Response by Chairman*, 19 June 2015, p20.

²³⁴ Letter from Hon John Day MLA, Minister for Planning, to Hon Simon O'Brien MLC, Chairman, Standing Committee on Environment and Public Affairs, 16 July 2014, pp5-6.

²³⁵ Ibid, p6. See also Western Australia, Legislative Assembly Estimates Committee B, Hon John Day MLA, Minister for Planning, 11 June 2015, pE48.

views may differ. Decision-making in planning is no exception.²³⁶ The exercise of discretion was an inherent feature of the planning system which preceded the introduction of DAPs.

- 3.218 The Committee appreciates that some exercises of discretion can attract significant opposition from various stakeholders, including members of the community. There can be a real disconnect between what some in the community expect from planning decision makers and the decision-making process. This was recognised by the City of Melville when it gave evidence to the Standing Committee on Environment and Public Affairs in relation to Petition 35 – Metro West Joint Development Assessment Panel as follows:

*There is a massive disconnect between the community and any delegated planning authority, like a local government. What I mean by that is that the community generally does not understand planning principles and what has to be applied. They have a view about what is acceptable and what is not acceptable, but officers have to assess planning applications based on planning grounds. Many of those are in policy, and also from legal advice or from SAT decisions. A SAT decision will have an influence on what officers will deem to be acceptable in discretions, because of what SAT has accepted in the past. There is a lot of precedent; there is legal advice and the like. The community does not see all that, but the officers live that on a daily basis. There is a massive disconnect between what the community understands and what officers have to apply in planning. That disconnect also goes in relation to councillors and the officers. Some councillors will have a view, whether politics or popularity is brought in, some have views of customer service functions; all those things are not planning requirements. The officers can only put forward decisions or discretions based on planning grounds, based on precedent or previous decisions. Where there is a discretionary situation and we are not sure, we go and seek legal advice, and that is generally what we present in our reports to council.*²³⁷

- 3.219 While the Committee heard evidence of the exercise of discretionary power by DAPs in some decisions which could be viewed as out of character with the area in which the development will take place, the fact remains that such an exercise of discretion

²³⁶

This was underscored in the evidence given by Dr Shayne Silcox, Chief Executive Officer, City of Melville, to the Standing Committee on Environment and Public Affairs on Petition No 35 – Metro Central Joint Development Assessment Panel, where he stated, on page 9:

You can have the officers exercise judgment. Councillors might have a different view of that judgment. The DAP might have a different view of that judgment. SAT might have a different view of the judgment. It is all about judgment.

²³⁷

<http://www.parliament.wa.gov.au/Parliament/commit.nsf> (viewed 9 July 2015) at p7.

would appear to have been open to the local government if it was making the decision. The weight of evidence in that regard during the inquiry was clear and the operational effectiveness of DAPs is not undermined by them exercising a discretion open to them under a planning scheme.

- 3.220 Furthermore, as previously noted, it is open to any party to challenge the exercise of discretion by applying to the Supreme Court for a judicial review, as has already been undertaken with respect to a decision by a DAP.²³⁸ While this does not enable a reconsideration of the merits of a DAP decision, the Court does have the power to require a DAP to reconsider its decision where it has acted unreasonably or beyond power. This includes where the original decision was based on irrelevant considerations or failed to take into account relevant considerations.
- 3.221 Accordingly, the Committee is of the view DAPs have been undertaking their role as envisaged by the Regulations by exercising the discretion available to them under the relevant planning scheme.
- 3.222 Local governments may limit the discretion of DAPs by considering the way in which their own planning schemes and policies govern the exercise of discretion. This occurred when the Town of Cottesloe expressly limited the exercise of discretionary power in its Local Planning Scheme No 3 with respect to height.²³⁹ On the other hand, when the City of Melville recently released its proposed Local Planning Scheme No.6 for public comment, a number of submissions to the City expressed disappointment that there had been no changes to restrict the exercise of discretionary power of the type exercised by the DAP with respect to the development at 94 Kitchener Road, Alfred Cove.²⁴⁰
- 3.223 The Committee understands that some local governments may be reluctant to amend their local planning schemes to limit the exercise of discretion provided to DAPs. Doing so may result in their planning scheme becoming too prescriptive and prevent the approval, by them or DAPs, of developments that, while not conforming with deemed to comply provisions in the planning scheme, are well-designed and worthy of approval.
- 3.224 The Committee also notes reported moves by the Government to impose restrictions on the number of multiple dwellings in areas zoned R30 and R35 and permit local governments to impose other restrictions in higher density areas not within 800 metres

²³⁸ *Hamersley v Bartle* [2013] WASC 191.

²³⁹ See clause 5.5 and Schedule 13 (Residential Development), http://www.cottesloe.wa.gov.au/Development-Planning_-_Planning_Controls_Local_Planning_Scheme_Policies_Local_Laws_and_Design_Guidelines.htm (viewed 9 July 2015).

²⁴⁰ See Submission No 3 from Aileen Hulbert, 11 January 2015 and Submission from No 4 from David Hulbert, 11 January 2015. See also Mr Geoffrey Pearson, Joint Spokesperson, Striker Balance Community Action Group, *Transcript of Evidence*, 29 June 2015, pp3-4.

of a train station or activity hub.²⁴¹ It is anticipated these changes may affect the types of decisions made by DAPs for relevant applications for multiple dwelling development, thereby limiting their discretion.

DELAYS IN THE DAPs PROCESS

- 3.225 As noted in paragraph 2.31, one of the purposes of the Regulations was to enable more effective and efficient decision-making in development applications at local, regional and State levels.²⁴² The Department's discussion paper released in 2009 also stated:

*Timeliness: As a development assessment panel will be the only decision-making body responsible for determining development applications for significant projects where dual assessment would ordinarily be required, the overall time taken to determine the application shall be reduced. For panels established voluntarily, the participation of independent and technical experts will save the costs and time delays usually incurred by the hiring of such experts to brief the decision-making authority.*²⁴³

- 3.226 WALGA's research indicates that DAPs have added delays to the planning system. It submitted:

*There is clear evidence that the DAP system has failed to streamline the approval process with results from the 2014 survey indicating that 75% of respondents believe DAP applications were often or occasionally subject to delays and the data analysis indicating the average DAP application processing time is in excess of 100 days.*²⁴⁴

- 3.227 WALGA also stated, in its fourth year review of DAPs:

The processing times of DAPs in the fourth year has again increased on previous years, with a weighted average of 104.4 days to process, up from 101.6 in the previous year, 86.1 in the second year and 76.1 in year one. This indicates that the DAP system is increasingly failing to provide a more efficient determination process, as it set out to do in 2011. At this time, it currently take(sic) an average of 144.4 days to

²⁴¹ Emery, Kate, 'State eases pressure for apartments', *The West Australian*, 22 July 2015, p11.

²⁴² Approval and Related Reforms (No.4) (Planning) Bill 2009, *Explanatory Memorandum*, p1.

²⁴³ Government of Western Australia, Department of Planning, *Implementing Development Assessment Panels in Western Australia, Discussion Paper*, September 2009, p23.

²⁴⁴ Submission No 30 from Western Australian Local Government Association, 30 January 2015, p22.

*process each DAP application, including the 10 days required to communicate the decision.*²⁴⁵

*A new trend has emerged this year with a significantly higher proportion of DAP applications being subject to deferral. In many cases, a DA that is recommended for refusal or approval has been deferred to allow the applicant to address a number of issues. Generally, the Development Application is approved at the next DAP meeting. The total number of deferrals for the first three years of DAP operations was 7, while in this most recent year, there were 37 deferrals. Of those, 13 were originally recommended for approval while the remaining 24 were recommended for refusal, the majority of them were then approved in a following meeting.*²⁴⁶

- 3.228 The Department cited feedback from industry that DAPs had improved the timeliness and efficiency of decision-making.

*As outlined above, the Department's feedback comes from its 2012-2013 survey. 100% of industry respondents considered DAPs offered an improvement in the timeliness and efficiency of decision-making. If WALGA's view was shared by proponents, who are the ones most affected by the suggested delays, then it could be expected that industry and not local governments would be most likely to raise these concerns.*²⁴⁷

- 3.229 The Department added:

*Proponents primarily bear any adverse effects of delays in decision-making, as well as the additional costs, by way of an additional fee, for the DAP system. Therefore, although some parties have concerns about whether the system is indeed more efficient, consistent and transparent, in some respects the level proponent engagement is the best and most objective measure.*²⁴⁸

- 3.230 Industry bodies the Housing Industry Australia and the Real Estate Institute of Western Australia have not received any detailed feedback on the timeliness of decision-making by DAPs. They advised:

²⁴⁵ WALGA, *Development Assessment Panels, 4th Year Review*, 7 July 2015, p9.

²⁴⁶ Ibid, p2. See also Western Australian Planning Commission, *DAP Parliamentary Public Hearing – 19 June 2015 Response by Chairman*, 19 June 2015, p22.

²⁴⁷ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p39.

²⁴⁸ Ibid, p8.

Ms Brookfield: *The only submission we have received at this point went to the fact that in some cases the timing may be the same or even marginally more, yet the additional costs have been paid. That is the sort of feedback we have had to this point but not particularly as an issue.*²⁴⁹

Mr Druitt: *We feel it is incumbent on the applicant to provide the right information. It is quite clear, when you make your application, the information that is required. We are not aware of any other specific instances of that.*²⁵⁰

- 3.231 The presiding member of the Metro East and Pilbara JDAPs is also not aware of delays in the process.

*I have not heard of any delays or deemed refusals on the DAPs I have been on. I think developers by and large understand the processes. I think the only delay is that the time taken for a decision on a DAP is a little bit longer than a local authority application, and that is simply to allow for the process to occur. In terms of the delays, I do not think it is the DAP that does that; it would be the applicant or the council in their dealing with their documentation that they submit and the council in the way they deal with it. Look, most, if not all, of the applications that have come before my DAPs have had a good session fleshing them out with council officers. Where they have not, I think it has been because at the end of the process there may have been some changes required, either by council or the developer has decided to make some changes, and consequently we get late information to us. But, by and large most of the applications come to us with the required amount of information.*²⁵¹

Committee comment

- 3.232 It is difficult for the Committee to reconcile the conflicting evidence regarding whether the DAP process has suffered from delays.

- 3.233 However, the Committee observes that:

- Current Department analysis is inadequate to determine whether DAPs are causing delays. Case studies of development applications conducted by the

²⁴⁹ Ms Kristin Brookfield, Senior Executive Director, Building Development and Environment, Housing Industry Association, *Transcript of Evidence*, 19 June 2015, p7.

²⁵⁰ Mr Rob Druitt, Member, Real Estate Institute of Western Australia, *Transcript of Evidence*, 19 June 2015, p6.

²⁵¹ Mr Eugene Koltasz, Presiding Member, Metro East and Pilbara Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p12.

Department before the introduction of the Regulations and DAPs, which demonstrated delays in planning approvals (including those attributable to the need to obtain dual approvals from local government and the WAPC)²⁵² are no substitute for a comparative analysis between the performance of DAPs and local governments in providing timely decision-making.²⁵³

- A comparative analysis of the timeliness of decision-making by local government and DAPs would assist in determining whether the Regulations have been operationally effective in this regard. The Committee notes there is a regulation making power in section 263(2)(ea) of the Act, introduced in 2010, providing for the making of regulations dealing with local governments reporting on planning matters.²⁵⁴ No such regulations have yet been introduced, which may enable such an analysis to be undertaken.
- While responses to surveys (such as the surveys undertaken by the Department and WALGA) may be useful to gauge feedback from stakeholders and those impacted by a decision-making process, they are not always an adequate substitute for an analysis of hard data, from which more objective conclusions can be drawn. This is because responses to surveys may be influenced by the personal views and experiences of the person being surveyed.

3.234 The Committee considers that a proper assessment of whether DAPs have been operationally effective in terms of timeliness of decision making could be undertaken by an independent analysis of all relevant data once comparative data from local governments is available.

3.235 The Committee therefore makes the following recommendations.

²⁵² Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p13. See also Government of Western Australia, Department of Planning, *Implementing Development Assessment Panels in Western Australia, Discussion Paper*, September 2009, pp8 and 23 http://www.planning.wa.gov.au/dop_pub_pdf/Discussion_Paper.pdf (viewed 22 May 2015). See also Western Australian Local Government Association, *Presentation to Standing Committee on Uniform Legislation and Statutes Review, Inquiry into Planning and Development (Development Assessment Panels) Regulations 2011 - 4 April 2015*, 4 May 2015, p3, where it pointed to the small role played by dual approvals in the planning system.

²⁵³ See Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, pp17-18 and WALGA, *Presentation to Standing Committee on Uniform Legislation and Statutes Review, Inquiry into Planning and Development (Development Assessment Panels) Regulations 2011 - 4 April 2015*, 4 May 2015, p6.

²⁵⁴ See Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p17.

Recommendation 7: The Committee recommends that the Government introduce regulations pursuant to section 263(2)(ea) of the *Planning and Development Act 2005* to provide for the reporting by local governments in relation to applications for planning approval, including the time taken to determine applications to development assessment panels.

Recommendation 8: The Committee recommends that the Department of Planning arrange for an independent analysis to be undertaken of all data relating to development assessment panels once sufficient comparative data is available with respect to planning determinations by local governments.

TRAINING OF DAP MEMBERS

3.236 Regulation 30(1) provides:

30. Training of DAP members

(1) A person who is appointed as a DAP member cannot perform any functions as a member of that DAP until the Director General is of the opinion that the member has satisfactorily completed the training for DAP members provided by the department.

3.237 The Department developed a training manual as part of the guidance material to facilitate the implementation of DAPs.²⁵⁵ The Committee understands the training delivered by the Department is a presentation based on the contents of this manual. While the quality of the training manual was praised by the Local Government Planners Association, concerns were raised about the adequacy of training provided to DAP members.²⁵⁶

3.238 For example, a number of submitters and witnesses raised concerns about the content and frequency of training given to DAP members and expressed support for mandatory follow up training.

3.239 Concerns were also raised about the qualifications of local government members to make decisions on DAPs.²⁵⁷

²⁵⁵ Government of Western Australia, Development Assessment Panels, *Development Assessment Panel: Training Notes*, 'Making Good Planning Decisions', June 2011 <http://www.planning.wa.gov.au/Development-Assessment-Panels.asp>.

²⁵⁶ Mr Ian MacRae, President, Local Government Planners Association, *Transcript of Evidence*, 4 May 2015, p6; Mr Neil Foley, Professor, Urban and Regional Training, School of Earth and the Environment, University of Western Australia, *Transcript of Evidence*, 29 June 2015, p13.

²⁵⁷ Submission No 8 from *Striker Balance!* Community Action Group, 23 January 2015, p4.

3.240 WALGA conducted a survey where WALGA members were asked if they thought training provided by the Department was adequate. The survey results indicated inadequacies in follow up training:

*The most common view was that training has not been followed up since 2011 and some DAP members have demonstrated non-observance of DAP regulations, which indicates that follow up training is required. As DAPs have been in operation for a number of years, there is an opportunity to utilise case studies to improve the decision making process in follow up training courses.*²⁵⁸

3.241 Some specific feedback received about DAP member training is as follows:

- The initial training of local government members of DAPs is inadequate.²⁵⁹
- Training needs to be reinforced regularly due to the change of councillors following local government elections.²⁶⁰
- Specific training is required on setting planning approval conditions and training presiding members to deal with interruptions at a meeting.²⁶¹
- It is unclear whether standard levels of training continue to be applied to all DAP members.²⁶²
- Training for local government members of DAPs should focus on enabling them to effectively introduce local knowledge into the decision making process of DAPs.²⁶³
- Some DAP members have been appointed without having received their training as required by regulation 30.²⁶⁴

²⁵⁸ Western Australian Local Government Association, *Presentation to Standing Committee on Uniform Legislation and Statutes Review, Inquiry into Planning and Development (Development Assessment Panels) Regulations 2011 - 4 April 2015*, 4 May 2015, p20.

²⁵⁹ Mr Ian MacRae, President, Local Government Planners Association, *Transcript of Evidence*, 4 May 2015, p6.

²⁶⁰ Mr Eric Lumsden, Chairman, Western Australian Planning Commission, *Transcript of Evidence*, 19 June 2015, p8.

²⁶¹ Submission No 17 from Urban Development Institute of Australia, 28 January 2015, p2; Mr Nicholas Allingame, Vice President, Urban Development Institute of Australia, *Transcript of Evidence*, 22 June 2015, p8.

²⁶² Submission No 41 from Mr Andries Schonfeldt, Director of Development Services, Shire of Broome, 5 February 2015, p3.

²⁶³ Mrs Marina Hansen, Committee Member, *Striker Balance! Community Action Group*, *Transcript of Evidence*, 29 June 2015, p8.

- 3.242 The Chairman of the WAPC expressed support for mandatory follow up training as follows:

How would you ensure there is adequate information and training on assessment processes and the exercise of discretion for those making decisions on planning applications?

*One practical suggestion would be to mandate refresher training somehow. However, as to the practical mechanics of that, this would probably best be addressed by the Department.*²⁶⁵

- 3.243 DAP presiding members who provided evidence to the Committee also supported mandatory follow up training.²⁶⁶

- 3.244 The Department is open to suggestions on improving training:

The Department is open to suggestions on enhancing training for members of DAPs.

*The DAP regulations do not mandate repeat training. However, DAP members may attend refresher training, if they request it. The Department will shortly be reviewing the adequacy of DAPs training.*²⁶⁷

Committee comment

- 3.245 In any field, it is not always appropriate that training is just a one-off activity. Ongoing training assists in the effective running of an organisation or process by ensuring that a person's skills and knowledge are retained and current.
- 3.246 The weight of evidence received during the inquiry favours mandatory follow up training of DAP members. The Committee is of the view that follow up training

²⁶⁴ Western Australian Local Government Association and Local Government Planners Association, *DAP Three Year Review*, November 2014, p21, (<http://api.ning.com/files/W8k9GghxLBuQQ6gY30aG3Mfo0bsLkkieoGH5DpYQviJ7aRP31Sq0rs-Vnq7tEoXWnO3xRc0NP2gysi7ZCYH8EdfxehCwcTrU/DAPCARreportYear1and2Review.pdf>); Hon Fred Riebeling, Councillor, City of Mandurah, *Transcript of Evidence*, 4 May 2015, p4.

²⁶⁵ Western Australian Planning Commission, *DAP Parliamentary Public Hearing – 19 June 2015 Response by Chairman*, 19 June 2015, p14.

²⁶⁶ Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, p15; Mr Eugene Koltasz, Presiding Member, Metro East and Pilbara Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p14; Mr David Gray, Presiding Member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p15; Mr Paul Kotsoglo, Presiding Member, City of Perth Local Development Assessment Panel, *Answers to Questions on Notice*, 17 August 2015, p10.

²⁶⁷ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p27.

should be provided, to assist the operational effectiveness of the Regulations and DAPs, for the following reasons.

- It is important for DAP members to keep apprised of changes to procedures and laws affecting DAPs (the Amendment Regulations being an example).
- Some DAP members sit on DAPs infrequently, therefore do not have the benefit of regular meetings.
- Training provides DAP members with an opportunity to seek guidance and feedback on practical issues they have encountered, in a training environment, which can be shared by others attending the training session.

3.247 Evidence also suggests that some DAP members have been appointed without being initially trained as required by regulation 30.²⁶⁸ The Committee is of the view that ensuring that this training takes place as soon as possible after appointment of a DAP member would increase the operational flexibility of DAPs as more members would be able to immediately take part in DAP meetings. This is especially the case if they need to stand in for members at short notice.

3.248 The Committee is also of the view that there is scope for the Department to reevaluate whether the initial training of DAP members is adequate, given:

- concerns raised in evidence (including in relation to local government members, both appointed and alternate, not all of whom will have the same level of expertise with respect to planning as specialist members)
- the Department's evidence that it will be reviewing the adequacy of training of DAP members.

3.249 The Committee therefore makes the following recommendations.

Recommendation 9: The Committee recommends that the Department of Planning reviews the adequacy of the training provided to members of development assessment panels.

²⁶⁸ Western Australian Local Government Association and Local Government Planners Association, *DAP Three Year Review*, November 2014, p21, (<http://api.ning.com/files/W8k9GghxLBuOQ6gY30aG3Mfo0bsLkkieoGH5DpYQviJ7aRP31Sq0rs-Vnq7tEoXWnO3xRc0NP2gvsI7ZCYH8EdfxehCwcTrU/DAPCARReportYear1and2Review.pdf>).

Recommendation 10: The Committee recommends that the Department of Planning ensures members appointed to development assessment panels and their alternates receive training pursuant to regulation 30 of the *Planning and Development (Development Assessment Panels) Regulations 2011* as soon as possible after their appointment.

Recommendation 11: The Committee recommends that regulation 30 of the *Planning and Development (Development Assessment Panels) Regulations 2011* be amended to require mandatory follow up training of development assessment panel members and their alternates at regular intervals.

DAP APPLICATION FEES

3.250 The Regulations, at Schedule 1, set out the fees payable to the relevant local government for DAP applications and Schedule 2 sets out the fees payable to DAP members.

3.251 The adequacy of these fees in terms of cost recovery and remuneration of DAP members was questioned during the inquiry.

Fees for DAP applications

3.252 Regulation 10(1)(b) requires an applicant to pay to the local government the relevant fee under Schedule 1. This is in addition to any fees, costs and expenses imposed by the local government for assessing the application in accordance with the *Planning and Development Regulations 2009*.

3.253 Regulation 17(2)(c) imposes an equivalent requirement with respect to applications to amend or cancel development approvals.

3.254 The Department commissioned Ernst & Young to assist it develop the DAP fee model which determines the fees for various DAP applications according to the class and financial criteria set out in the Regulations.²⁶⁹

3.255 Both the Local Government Planners Association and WALGA are of the view the fees generated by DAP applications are inadequate to cover the costs of administering DAPs and that full cost recovery should be applied.²⁷⁰

²⁶⁹ *Planning and Development (Development Assessment Panel) Regulations 2011, Explanatory Memorandum*, p6.

²⁷⁰ Submission No 7 from the Local Government Planners Association, 23 January 2015, pp5, 10-11; Submission No 30 from the Western Australian Local Government Association, 30 January 2015, pp13, 18 and 22.

3.256 The Local Government Planners Association recommended substantial increases in DAP application fees to reflect cost recovery.²⁷¹ In its view:

*...fees paid for DAP applications do not cover the costs of administering DAPs. Certainly the subsidy is greater for optional DAP applications as the fees payable are half those for the mandatory applications notwithstanding the similar, if not identical, administrative costs. To leave the determination of whether a large public cost should be incurred to the discretion of a private developer is most inappropriate.*²⁷²

...

The Department of Planning originally estimated that DAPs would cost \$716,000 per annum, and this was budgeted for in the 2011/12 budget and its forward estimates. However the costs have been rising every year resulting in the State budget being modified to \$1,137,000 (2013/14 State Budget) and \$1,701,000 (2014/15 State Budget). This represents a 238% increase in the budget—and this is considered to be less than [sic] the true full cost. Certainly the acknowledged increasing cost of running DAPs is not reflected in the increase in fees over the past three years. Between 2011 and 2014 the fees were increased by amendment to the Regulations by 3.75% (234.25% less than the budget cost!). There is a clear growing public cost in running DAPs although this has not been publicly acknowledged.

*Fees are also levied for matters subject to Regulation 17 (amended plans and reconsiderations). These secondary decisions do sometimes incur similar administrative costs to those dealt with under Item 1. Schedule 1 Item 2 specifies that the fees for Regulation 17 applications (revisions and amended plans) be \$150 per application. In view of 27% of Form 2 decisions being made at a DAP where there are no other items on the agenda and would therefore cost \$2,100 in sitting fees alone, the regulated fee is obviously far too low.*²⁷³

²⁷¹ Submission No 7 from Local Government Planners Association, 23 January 2015, p11.

²⁷² Ibid, p5.

²⁷³ Ibid, pp10-11.

- 3.257 The Property Council of Australia, the Urban Development Institute of Australia and the Real Estate Institute of Western Australia support retaining the existing DAP application fees.²⁷⁴
- 3.258 The Department supports full cost recovery, which would require a 3.76% increase in fees.

The review of DAP fees in 2013 indicated that full cost recovery would be achieved with a 3.76% increase in DAP's fees. The revenue, and costs associated with generating the revenue, was expected to be \$1.13m. The actuals for 20/3/14 and 20/4/15 YTD are shown below.

DAPS	Expenses \$'000	Revenue \$'000	Recovery Percentage
2013-14 Actual	1,251	1,152	92%
2014-15 as at 31 May 2015	1,059	1,306	123%
TOTAL	2,310	2,458	106%

The view of the Department is that the fees are currently set at a reasonable level.

The recovery percentage for the past two years is within an acceptable range and indicates that the fee review undertaken for 20/3/14 resulted in fees that fulfilled the requirements of the cost recovery model. Future reviews will need to take into account proposed staffing level changes and the variations in application numbers.

*Full cost recovery should be applied.*²⁷⁵

- 3.259 In response to a question from the Committee about whether the Department was able to provide cost recovery percentages on individual fees, the Department provided the basis upon which it believes full cost recovery will be achieved as follows:

The Department does not capture costs associated with each of the DAP sessions where fees are charged; (e.g. staff time is not captured and allocated by individual activities to make up costs that constitute individual fees). The financial system is not set up to identify and allocate costs to such a granular level of detail. Nor is the

²⁷⁴ Mr Lino Iacomella, Deputy Executive Director, Property Council of Australia, *Transcript of Evidence*, 22 June 2015, p7; Mr Nicholas Allingame, Vice President, Urban Development Institute of Australia, *Transcript of Evidence*, 22 June 2015, p2; Mr Rob Druitt, Member, Real Estate Institute of Western Australia, *Transcript of Evidence*, 22 June 2015, pp4-5.

²⁷⁵ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, pp29-30.

*Department able to provide cost recovery percentage of an individual fee. However, the Department is able to accurately identify the overall DAP costs such as remuneration, meeting costs, travel, accommodation costs and other direct and indirect costs. Costs associated with DAPs cover all of the costs of administering DAP applications. The Department could then define the overall cost recovery percentage.*²⁷⁶

Fees for DAP members

- 3.260 Regulations 30 and 31 provide for the payment of DAP members for various activities, including attending training, DAP meetings and presiding members attending SAT proceedings.
- 3.261 The Committee received feedback on whether these fees could be considered reasonable in view of the roles undertaken by DAP members.
- 3.262 In his submission to the Committee, Mr Max Hipkins expressed the view that the \$50 fee he received for attending a regulation 17 DAP meeting payable under item 4 of Schedule 2 to the Regulations was inadequate to cover the time involved in attending the meeting as well as the costs of travel and parking.²⁷⁷ The following exchange details further evidence he gave on this issue.

***The CHAIR:** There is an email that we have received that talks about fees for members attending DAPs, and I thank you for providing that to us. Regarding your comments about the level of fees for DAP members—the subject of the email attached to your submission—can you elaborate why the \$50 did not cover your costs for attending the DAP meeting in question?*

***Mayor Hipkins:** First of all, I should state that I am aware that the regulations do allow requests for travel to be lodged. However, I believe in the metropolitan area the amounts of money are small, and I believe the request for travel allowances should only apply to country members. Within the metropolitan area, to avoid lots of paperwork, I would recommend that the fees be such that they include travel allowances and costs.*

***The CHAIR:** As part of the actual sitting fees?*

***Mayor Hipkins:** As part of the sitting fee, yes.*

²⁷⁶ Email from Mr Stephen Ferguson, Senior Solicitor, Department of Planning, 28 July 2015.

²⁷⁷ Submission No 28 from Mr Max Hipkins, Mayor, City of Nedlands, 29 January 2015, p3.

The CHAIR: *So would you support an increase in the fees; and, if you do, what sort of amount would you suggest?*

Mayor Hipkins: *I most certainly would. As a professional planner, my previous consultancy payment was over \$200 an hour, and I believe that for appearing at SAT, my time is worth that much at least. So I would say, just in round figures, all of the fees should be doubled for the SAT members.*²⁷⁸

3.263 Some feedback from DAP presiding members who gave evidence to the Committee was to the effect that the fees do not distinguish between the location and duration of meetings, some of which can last for a significant length of time. The volume of paperwork and preparation time for meetings was also highlighted.²⁷⁹

3.264 Presiding members Mr Charles Johnson and Mr David Gray are of the view that the fees should be reviewed. Mr Johnson stated:

*Certainly you would not say that you were on the panels to make money from the fees you receive. It is quite correct that you regularly get agendas of 700 or 800 pages. You might spend three or four hours at the actual meeting, but there is quite a number of hours in preparation for that. There have also been situations in which I have sat in SAT hearings all day for the standard fee of \$500. Certainly if I was in my consultancy, my charge-out rates would be significantly higher than is represented in the fees we get. I believe that the fee should be reviewed. There should be a system after a certain level of triggers in which additional allowances are paid, but that is to be worked out. I would be happy to be involved in those discussions.*²⁸⁰

3.265 The Department informed the Committee that the 2015/16 annual review of fees and charges will include a consideration of the DAP fees, including the \$50 sitting fee payable under item 4 of Schedule 2 of the Regulations for a minor amendment decision intended to be expeditiously addressed.²⁸¹ On this fee, the Department added:

²⁷⁸ Mr Max Hipkins, Mayor, City of Nedlands, *Transcript of Evidence*, 4 May 2015, p3.

²⁷⁹ Mr Eugene Koltasz, Presiding Member, Metro East and Pilbara Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p16; Mr David Gray, Presiding Member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p16; Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, pp16-17.

²⁸⁰ Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, pp16-17.

²⁸¹ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p30.

...the Department appreciates that the current fee may not always capture the complexity of this process and does not adequately cover attendance time at meetings.²⁸²

Committee comment

Fees for DAP applications

- 3.266 There is a clear discrepancy between the estimate of the costs of running the DAP system given by the Local Government Planners Association and those given in evidence by the Department. The Committee is not in a position to reconcile this discrepancy.
- 3.267 The Committee is of the view that the Department's 2015/2016 review of fees and charges should involve detailed consultation with bodies such as WALGA and the Local Government Planners Association in order that their views on cost recovery are taken into account.
- 3.268 The Committee is also of the view that the inability of the Department to capture costs at other than a general level and provide cost recovery percentages for individual fees may affect its ability to accurately determine whether cost recovery is being achieved.

Fees for DAP members

- 3.269 In terms of administrative efficiency and consistency, the Committee understands why the Regulations provide for fixed fees for DAP members. The Committee also acknowledges there can be a variation in preparation time and meeting duration, including for regulation 17 applications to amend or cancel a DAP decision previously approved. The Committee is of the view this should be taken into account by the Department when it reviews fees for DAP members.
- 3.270 The Committee also refers to its Finding 3 with respect to an additional fee for preparing reasons.

RESUBMITTING PLANNING APPLICATIONS PREVIOUSLY REFUSED

- 3.271 There is no restriction in Western Australia on applicants re-submitting a planning application which has previously been refused.²⁸³ In other words, the principle of *res judicata* (a latin term for 'a matter already judged') which restricts a matter from being

²⁸² Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p30.

²⁸³ Submission No 43 from the Law Society of Western Australia, 27 February 2015, pp2-3. See also Mr Denis McLeod, Partner, McLeods Barristers and Solicitors, *Transcript of Evidence*, 29 June 2015, pp4-5 and McLeod, Denis, *SAT Conference: Town Planning, Past, Present and Future*, 16 November 2009, p16, http://www.sat.justice.wa.gov.au/files/Combined_presentations_and_powerpoints.pdf (viewed 27 July 2015).

pursued further once it has been adjudicated, does not apply to these planning decisions in Western Australia, which includes those made by DAPs.

3.272 The Law Society of Western Australia drew a distinction between an applicant reapplying to the same responsible authority after a decision has been made and the option for an applicant under the Regulations to choose between two decision-makers (a DAP or the relevant responsible authority). It expressed the following views in its submission:

- It can be expected that an applicant will not be inclined to make repeated applications to the same decision maker without a change in planning law. However, the same cannot be said if there is an option to apply to another body, where there may be a temptation to have ‘two bob each way’ by making a fresh application to the other decision making body if the first refuses it.
- It is not apparent that the Regulations intended for an applicant to be able to make a fresh application to a DAP or a local government (or the WAPC) if its initial application has been refused.²⁸⁴

3.273 The Law Society of Western Australia recommended the Regulations be amended to restrict an applicant from making the same application to a local government or a DAP after its initial refusal (outright refusal or approval with conditions) by the other decision-making body, within 12 months of the initial refusal.²⁸⁵

3.274 Mr Denis McLeod also expressed concern about this issue in his evidence as follows.

*And that is one of the concerns that we have with the present situation; the ability of applicants at this time to double dip. Either to start with the local government, and when they think they are going to get a hard time or they do get a refusal, then having a go at the JDAP or vice versa. Now, in our view, that cherrypicking approach is not appropriate, and there should at the very least be a delay. If an applicant wants to start the application process with the local government, chooses that option, then there should at least be a delay before he can try the other option of an application to the JDAP, otherwise the system allows itself to be manipulated.*²⁸⁶

3.275 The Department’s views follow:

It was our preliminary view that such essentially duplicate applications could amount to an abuse of process. When applications

²⁸⁴ Submission No 43 from the Law Society of Western Australia, 27 February 2015, p2.

²⁸⁵ Ibid, pp2-3. See also Submission No 46 from the City of South Perth, 10 July 2015, p3.

²⁸⁶ Mr Denis McLeod, Partner, McLeods Barristers and Solicitors, *Transcript of Evidence*, 29 June 2015, p5.

of this type first arose, the Department counselled refusal. However, when those refusals were appealed to the State Administrative Tribunal, the DAP's legal representatives, in consultation with the Tribunal, came to a different view and the refusals were overturned by agreement.

The primary point to note here is that the concern is not principally one of local Council versus DAP. Rather, it is a concern about DAPs versus SAT. Proponents have publicly stated in DAP meetings that the primary reason they are submitting a duplicate application to the DAP, when there was a previous refusal by the local Council, was because they believe a more expedited outcome will be obtained from the DAP than the Tribunal.²⁸⁷

- 3.276 When the Committee asked the Department whether it would support an amendment to the Regulations to provide clarity about whether an applicant can resubmit the same application for approval, the Department gave the following feedback.

The major reason against introducing such a provision is the counterargument that res judicata does not and should not apply to any original decisions. In other words, this is not a DAP issue but a planning issue more generally.

The main barrier to such duplicate applications is that an applicant has to pay a new application fee, including a new fee to the local government. Applicants are not prevented from submitting a new application for development approval to their local government, notwithstanding they may already have an existing approval.²⁸⁸

Committee comment

- 3.277 The Committee is of the view that there is merit in the Government investigating the appropriateness of an applicant resubmitting an application to a local government or a DAP that has already been decided and in doing so consider the recommendation of the Law Society of Western Australia.
- 3.278 However, despite the distinction drawn by The Law Society of Western Australia in its submission described in paragraph 3.272, the Committee notes this may need to be considered as part of the wider planning system in Western Australia and not in isolation with respect to the Regulations.

²⁸⁷ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, p33.

²⁸⁸ Id.

Recommendation 12: The Committee recommends that the Government investigate the appropriateness of applicants being able to resubmit applications which have previously been refused in the planning system in Western Australia.

THE DAP WEBSITE

3.279 Regulation 51 provides:

51. DAP website

The Director General must establish a website (the DAP website) containing —

- (a) information required under these regulations to be published on the website; and*
- (b) such other information about DAPs as the Director General considers appropriate.*

3.280 Mr Ian Bignell gave the following feedback on the DAP website.

As an important part of providing information on DAP applications to the general public, it is recommended that improvements are made to the DAP section of the Department of Planning website. There are issues in navigating the website to find reports and the Agendas and Minutes are in large file formats and are very time consuming to download. The files are also split randomly and not according to the particular application, so it becomes difficult to access particular reports. The attachments could also be separated as these would cause files to be very large and difficult to download.²⁸⁹

3.281 When the Department was asked if it had received feedback on the usefulness and accessibility of its website and how often it is updated, the Department responded:

The original DAP website was created as a sub-site of the previous WA Planning website, hosted by the Department of Planning. The early information architecture sometimes made navigation around the sub site difficult. Over time these issues were addressed to improve navigation as well as users becoming more familiar with the sub-site.

More recently the Department has totally refreshed its website and brought the previous DAP sub-site fully into the main site. Many of

²⁸⁹ Submission No 5 from Mr Ian Bignell, Director, Development and Sustainability, Town of Cambridge, 16 January 2015, p8.

these issues are now resolved, and the Department remains committed to the continuous improvement of our website and other electronic services.

*Content management of the DAP's site is constant and ongoing on an almost daily basis. DAP decisions are required to be published to the website within 10 (ordinary) days.*²⁹⁰

- 3.282 The Committee is of the view it is important that the Department continue to monitor the accessibility and effectiveness of the DAP website to ensure it is always fit for purpose for users. The Committee's commentary on the accessibility of the complaints process in paragraphs 3.58 to 3.59 is an example of where an improvement can be made in this regard.

REGULATION 17 APPLICATIONS

- 3.283 Regulation 17 provides for an application to be made to amend or cancel any existing development which a DAP has previously approved. Any application to amend a development has been referred to as a request for a 'minor amendment' as it cannot substantially change the development if approved.²⁹¹

- 3.284 Regulation 17 introduces a new process into Western Australia's planning system.²⁹²

- 3.285 Regulation 40(4) provides:

(4) Unless the presiding member otherwise directs, a DAP meeting to determine an application under regulation 17 —

(a) is to be held by each other person at the meeting being in contact by telephone, or other means of electronic communication; and

(b) is not open to the public.

- 3.286 DAP Practice Note 4 contains detailed guidance on this type of application, including the decision making principles to be applied by the DAP.²⁹³

²⁹⁰ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, p43.

²⁹¹ Regulation 17(1)(c) of the *Planning and Development (Development Assessment Panels) Regulations 2011*.

²⁹² Government of Western Australia, Development Assessment Panels, *Practice Note 4, Form 2, Regulation 17, Minor Amendments*, 26 July 2012, p3.

²⁹³ Government of Western Australia, Development Assessment Panels, *Practice Note 4, Form 2, Regulation 17, Minor Amendments*, 26 July 2012.

3.287 Some of the evidence received by the Committee regarding regulation 17 applications during the inquiry was as follows.

- The Kennedy Street Collective questioned whether an application under regulation 17 with respect to the development at 58 Kennedy Street, Maylands amounted to a minor amendment. In its submission and evidence, it alleged the application for a minor amendment brought the value of the development below the then \$3 million threshold. It is of the view the amendment was not minor and warranted a new application.²⁹⁴
- The Property Council of Australia submitted that minor amendments should be dealt with by local governments without the need to convene another DAP meeting to assist the timeliness of decision-making.²⁹⁵
- The Local Government Planners Association submitted that regulation 17 was an example of an overly bureaucratic, lengthy and complicated process, which was previously dealt with by local governments as a routine matter.²⁹⁶

3.288 The Department, in response to this evidence, stated that the question of whether regulation 17 applies to an application is one of planning merit and that any interested person with sufficient standing could apply to the Supreme Court for judicial review on the basis that a jurisdictional error may have occurred.²⁹⁷ It also cited the continuity of decision-making in the planning system as a factor in having DAPs determine regulation 17 applications.

3.289 The Committee, when inquiring into the transparency of the regulation 17 process, also asked the Department why DAP meetings under this regulation were not open to the public, as provided for in regulation 40(4)(b). The Department emphasised that minor applications were originally intended to be dealt with in an informal and

²⁹⁴ Submission No 26 from Kennedy Street Collective, 29 January 2015, p2; Mrs Natalie Server, Member, Kennedy Street Collective, *Transcript of Evidence*, 11 May 2015, p3. See also Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, p7, where he stated 'The opponents to the development tried to lodge an argument with the JDAP that because the modifications possibly could have taken that application below \$3 million it should have been considered by the council and not the JDAP. The JDAP took the view that because this was a regulation 17 consideration, it was all part of the original application, therefore it was a modification rather than a new application'.

²⁹⁵ Submission No 15 from Property Council of Australia, 27 January 2015, p2.

²⁹⁶ Submission No 7 from the Local Government Planners Association, 23 January 2015, p7. See also Mr Ian MacRae, President, Local Government Planners Association, *Transcript of Evidence*, 4 May 2015, p6.

²⁹⁷ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, pp44-45. See also Mr Stephen Ferguson, Senior Solicitor, Department of Planning, *Transcript of Evidence*, 19 June 2015, p6.

expeditious fashion and that if they were required to be dealt with in a public meeting this would defeat the purpose of this intention.²⁹⁸

Committee comment

3.290 The exercise of discretion involves considerations of planning merit and, as stated in paragraph 3.217, it may result in decisions on which views may differ. A decision by a DAP on whether an application is minor in nature to bring it within the ambit of regulation 17 is an example.

3.291 The Committee believes it is appropriate for DAPs to decide on applications to amend or cancel determinations made by the same DAP rather than the relevant responsible authority. The DAP is best placed to do so, having determined the original application. Continuity of decision-maker, in this instance, provides certainty for the applicant.

3.292 Regarding the transparency of the regulation 17 process, the Committee observes as follows.

- A number of meetings at which regulation 17 applications have been determined have been open to the public. This is by virtue of them being included on the agenda for regular DAP meetings.²⁹⁹ This may occur in circumstances where it was appropriate to consider a regulation 17 application at a scheduled meeting rather than determine it out of session.
- There are other examples of planning decision-making bodies determining applications out of session, such as the WAPC which can, pursuant to clause 9 of Schedule 1 to the Act, pass a resolution assented to in writing by each member as if it had been passed at a meeting.
- When local governments have a delegation in place for staff to determine planning applications, determinations are not ordinarily made at meetings, let alone those open to the public.

3.293 Accordingly, the Committee is of the view that the regulation 17 process is no less transparent than that followed by the equivalent local government and WAPC processes and is, largely, satisfied with its transparency.

²⁹⁸ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, p45.

²⁹⁹ See, for example, Government of Western Australia, Development Assessment Panels, *Minutes of Metro Central Joint Development Assessment Panel* 15 December 2014, pp26-29 <http://www.planning.wa.gov.au/DAPS/DATA/Metropolitan%20DAPs/Metro%20Central%20JDAP/Meeting%20minutes/20141215%20-%20Minutes%20-%20No%2081%20-%20City%20of%20Bayswater.pdf> (viewed 27 July 2015); Government of Western Australia, Development Assessment Panels, *Minutes of Metro Central Joint Development Assessment Panel*, 15 May 2015, pp17-25, <http://www.planning.wa.gov.au/DAPS/DATA/Metropolitan%20DAPs/Metro%20Central%20JDAP/Meeting%20minutes/20150515%20-%20Minutes%20-%20No%20104%20-%20City%20of%20Belmont%20-%20City%20of%20South%20Perth%20-%20Town%20of%20Bassendean.pdf> (viewed 27 July 2015).

3.294 However, the Committee is also of the view that transparency would be enhanced if the Department introduced guidance regarding the exercise of the presiding member's discretion pursuant to regulation 40(4) to hold a DAP meeting to determine a regulation 17 application in public. A practice note could include factors a presiding member would take into account, such as:

- as referred to above, whether there is an ordinary meeting scheduled at which a regulation 17 application can be determined
- where the proposed amendment is such that the public should have an opportunity to make submissions at the meeting.

Recommendation 13: The Committee recommends that the Department of Planning issue a practice note containing guidance on the exercise of the presiding member's discretion pursuant to regulation 40(4) of the *Planning and Development (Development Assessment Panels) Regulations 2011* to hold a meeting of a development assessment panel to determine a regulation 17 application in public.

STANDING ORDERS PROCEDURE - ADVANCE NOTICE OF MOTIONS

3.295 Clause 5.5.1(b) of the DAP Standing Orders requires a DAP member wanting to move a motion in relation to an application to put the motion in writing if:

- in the opinion of the presiding member, the motion or amendment represents a significant departure from the relevant recommendation of a responsible authority's report; or
- the presiding member otherwise requires it.

3.296 Councillor Julie Matheson and Jeff and Marina Hansen advised in their submissions that proper notice of such motions had not been given at DAP meetings. They criticised motions being introduced at DAP meetings rather than included in the agenda, depriving those in attendance of the opportunity to consider the rationale for their introduction and prepare a response.³⁰⁰

3.297 The Department's view on the requirement to give advance notice for motions is:

Clause 5.51(b)(i) contemplates the need for advance warning of a different primary motion, if that new primary motion is different from the motion set out in the RAR. This is to give the DAP members some time before the meeting to think about the new primary motion.

³⁰⁰ Submission No 14 from Marina and Jeff Hansen, 27 January 2015, p2; Submission No 20 from Councillor Julie Matheson, City of Subiaco, 28 January 2015. They cited the decision of the Metro Central JDAP regarding 94 Kitchener Road on 10 March 2014 as an example.

Nonetheless, the Presiding Member has discretion to depart from this under clause 5.51(b)(ii). This is relevant to situations where for example a primary motion in a RAR was considered, debated and voted down (whether it be a recommendation for approval or refusal). In that situation, it is highly likely that a new primary motion would be to the opposite effect, and in that situation no one would reasonably expect the meeting be deferred pending someone taking the time to put that new primary motion in writing.

Clause 4.12 (no business not specified in the agenda) and clause 4.2 (quorum) also contributes to this. A DAP member could not, presumably, raise a primary motion not connected to the DAP application at hand. It could not, for example, pass a resolution advising a local government to amend its scheme.

*This framework exists to restrain DAPs and confine them to the narrow range of development application matters the legislative framework empowers them to decide. This is quite distinct from both local governments and the Planning Commission, who have a wide range of other responsibilities that could potentially be discussed at a meeting.*³⁰¹

Committee comment

- 3.298 The Committee notes that clause 10.1 of WALGA's pro forma Local Government (Council Meetings) Local Law also provides for a substantive motion (and any amendments) to be put in writing if required by the presiding member.³⁰² Provisions in standing orders of local government councils dealing with notices of motion can vary.³⁰³
- 3.299 The Committee is satisfied there may be instances where it is appropriate for the presiding member to approve a motion being put during a meeting with no advance notice being given. However, when considering whether approval ought to be given, the presiding member should bear in mind the potential consequences of permitting this practice, such as those outlined in the submissions of Councillor Julie Matheson and Jeff and Marina Hansen. If possible, steps should be taken to ensure all parties have an opportunity to give proper consideration of motions put at DAP meetings.

³⁰¹ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, pp46. In this quote, RAR is short for 'responsible authority report.'

³⁰² <http://www.walagovernance.com.au/website-manuals/local-laws.aspx> (viewed 29 July 2015).

³⁰³ See, for example, Part 10, City of Nedlands Standing Orders Local Law 2014; Part 10, Town of Cottesloe Standing Orders Local Law 2012.

TIMEFRAMES UNDER THE REGULATIONS

- 3.300 The Regulations mandate various steps in the DAP process to be undertaken in certain timeframes.
- 3.301 For example, regulation 12(3) specifies the number of days in which a responsible authority report must be submitted to the DAP.
- 3.302 Regulation 39(1), with respect to notice of DAP meetings, requires that the time, date, location and agenda for DAP meetings must be published five days before the meeting.
- 3.303 Some submissions recommended changes to some of these timeframes. Specialist DAP member Mr Ian Birch stated that more time should be given for notice of DAP meetings where there are a large number of items on the agenda and applications are complex. He recommended between seven and ten days in these instances.³⁰⁴
- 3.304 Mr Andries Schonfeldt is of the view that amendments to the Regulations should be made to exclude public holidays and the period between 25 December and 1 January from timeframes, including the time in which to submit a responsible authority report.³⁰⁵
- 3.305 The Department pointed to the DAP needing to comply with the deemed refusal period enshrined in the relevant planning scheme.³⁰⁶

Committee comment

- 3.306 The Committee notes that the DAP Procedures Manual provides that references to days in the Regulations are to ordinary days, as stipulated in section 61 of the *Interpretation Act 1984*, which also provides that public holidays are excluded for the purposes of calculating timeframes.³⁰⁷
- 3.307 The Committee is of the view there is merit in the presiding member having a discretion to extend the timeframe for the notice of DAP meetings in certain circumstances, such as where the matters to be discussed are complicated and likely to attract significant interest amongst stakeholders and makes the following recommendation.

³⁰⁴ Submission No 12 from Mr Ian Birch, 27 January 2015, p3. See also Submission No 44 from Mr Greg Benjamin, 11 May 2015, p4, where concern was expressed about inadequate notice of hearings.

³⁰⁵ Submission No 41 from Mr Andries Schonfeldt, Director of Development Services, Shire of Broome, 5 February 2015, p4.

³⁰⁶ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015 Written Response by the Department of Planning*, 19 June 2015, pp40-41.

³⁰⁷ Government of Western Australia, Development Assessment Panels, *Development Assessment Panel Procedures Manual, Under the Planning and Development (Development Assessment Panels) Regulations 2011*, September 2013, p1.

Recommendation 14: The Committee recommends that the *Planning and Development (Development Assessment Panels) Regulations 2011* be amended to provide for the presiding member to have a discretion to extend the notice period for meetings of development assessment panels in appropriate circumstances.

CHAPTER 4

THE AMENDMENT REGULATIONS ENACTED DURING THE INQUIRY

- 4.1 On 17 April 2015, the Amendment Regulations were published in the *Government Gazette* and they were tabled in the Legislative Council on 21 April 2015.³⁰⁸ They came into force on 1 May 2015. A copy can be accessed on the State Law Publisher website.³⁰⁹
- 4.2 The Amendment Regulations amended the Regulations, which the Committee was charged with reviewing, and therefore consideration of these Amendment Regulations falls within the scope of the Committee's terms of reference. It is also relevant that the Statutory Review required by section 171F of the Act (referred to in the inquiry's terms of reference) requires a review of the operation and effectiveness of all regulations made under that Part of the Act.
- 4.3 The introduction of the Amendment Regulations, which amends the Regulations in material ways, caused considerable delay in the Committee undertaking its inquiry and hampered the Committee's ability to conduct its Statutory Review of the Regulations for the reasons set out in paragraphs 4.59 to 4.60.

SIGNIFICANT PROVISIONS IN THE AMENDMENT REGULATIONS

- 4.4 The Amendment Regulations made a number of significant changes to the Regulations and the operation of DAPs including:
- reducing the optional financial criteria from \$3 million to \$2 million for a matter to be heard by a DAP
 - increasing the mandatory financial criteria from \$15 million to \$20 million for the City of Perth DAP and from \$7 million to \$10 million for all other DAPs
 - broadening the types of developments a responsible authority may delegate to a DAP

³⁰⁸ *Planning and Amendment (Development Assessment Panels) Amendment Regulations 2015*, [https://www.slp.wa.gov.au/gazette/gazette.nsf/searchgazette/BBDAEA555D43B3D648257E290012CAED/\\$file/gg057.pdf](https://www.slp.wa.gov.au/gazette/gazette.nsf/searchgazette/BBDAEA555D43B3D648257E290012CAED/$file/gg057.pdf) (at pages 1380-1386)

³⁰⁹ [https://www.slp.wa.gov.au/gazette/gazette.nsf/searchgazette/BBDAEA555D43B3D648257E290012CAED/\\$file/gg057.pdf](https://www.slp.wa.gov.au/gazette/gazette.nsf/searchgazette/BBDAEA555D43B3D648257E290012CAED/$file/gg057.pdf)

- changing the quorum requirements from three DAP members, which must include the presiding member, another specialist member and a local government member, to any three DAP members, including the presiding member
- introducing ‘stop the clock’ mechanisms whereby the time period for the submission of the responsible authority report to the DAP does not include the time between the applicant being given a notice to provide specified information or documents
- disbanding the SLWG (which was established to submit to the Minister for Planning short-lists of persons recommended for appointment as specialist members of DAPs)
- providing for regulations to prevail over a planning instrument to extent of any inconsistency.³¹⁰

ISSUES IDENTIFIED DURING THE INQUIRY

4.5 This part of the report considers issues the Committee identified arising from its consideration of the Amendment Regulations, where the issue was a ‘new’ issue not previously identified in Chapter 3.

New regulation 41 – quorum for DAP meeting

4.6 Regulation 41 of the Regulations, prior to the enactment of the Amendment Regulations, provided:

41. Quorum

(1) At a meeting of a LDAP, 3 members of the LDAP including —

(a) the presiding member; and

(b) another specialist member; and

(c) a local government member,

constitute a quorum.

(2) At a meeting of a JDAP, 3 members of the JDAP including —

³¹⁰

For details on all amendments made, see *Planning and Amendment (Development Assessment Panels) Amendment Regulations 2015*, Explanatory Memorandum and Practice Note 10, *2015 DAP Amendment Regulations*, signed by the Acting Director General of the Department of Planning, Mr David MacLennan, on 17 April 2015, <http://www.planning.wa.gov.au/daps/data/Publications/Practice%20Notes/DAP%20Practice%20Note10%20-%202015%20DAP%20Amendment%20Regulations.pdf> (viewed 11 May 2015).

(a) the presiding member; and

(b) another specialist member; and

(c) one of the local government members referred to in regulation 25(1)(a),

constitute a quorum.

- 4.7 Regulation 22 of the Amendment Regulations replaced regulation 41 of the Regulations so that it now reads:

41. Quorum

At a meeting of a DAP, 3 members of the DAP, including the presiding member, constitute a quorum.

- 4.8 Accordingly, there is no longer a requirement that a local government member must be in attendance in order for a DAP meeting to achieve quorum. As the presiding member must be a specialist member as required by regulation 27(1), quorum requires the attendance of at least one specialist member.

- 4.9 The Explanatory Memorandum to the Amendment Regulations seeks to justify this amendment as follows:

5 DAP meeting quorum requirements

*It is important in terms of the efficiency and effectiveness of DAP decision making that DAP meetings be held as frequently as necessary. Therefore, DAP meeting quorum requirements will be amended. A quorum will be achieved if a presiding member and any two other members are in attendance, whether they are specialist members or local government members.*³¹¹

- 4.10 DAP Practice Note 10, issued by the Department pursuant to regulation 40(5) to explain the introduction of the Amendment Regulations, contains the following additional information:

What are the new DAP meeting quorum requirements under the 2015 DAP Amendment Regulations?

34. DAP meetings will be held as often as necessary. Specialist and local government members should attend all DAP meetings

³¹¹ *Planning and Development (Development Assessment Panels) Amendment Regulations 2015, Explanatory Memorandum, p1.*

following their appointment. As of 1 May 2015, the quorum of a DAP will be achieved when a presiding member and any two DAP members are in attendance (irrespective of whether they are specialist members or local government members).³¹²

- 4.11 Further, during the briefing to the Committee on the Amendment Regulations, the Department provided the following information justifying the change in the quorum requirements for DAP meetings:

The CHAIR: *Regarding new regulation 41, which adjusts the quorum requirements so that a quorum can now comprise any three members of the DAP, including the presiding officer, does the department believe that this may result in less local government representation on DAPs given that their need for inclusion in a quorum has now been removed?*

Ms McGowan: *No, is the short answer. Because we have two specialists and two alternative local government nominees from each local government instrumentality, we believe there should not be an issue. Certainly, again, as a matter of practice, our DAP secretariat works hard to ensure local government representation. There may be occasions where, in fact, the councillors prefer not to have a representative there. They are probably in the minority, but I think we have had a couple of instances where something is, you know, quite controversial, quite divided at the local level, and they have actually felt it useful to put it up into the development assessment panel process, which is an effective way of that running. We have not had an issue but what we have had an issue with when we are being fairly prescriptive about the quorum requirement is meetings being cancelled at the last minute because of the unavailability of one of the cluster of members. So again, it is intended to give us much more flexibility to ensure that the meeting can go ahead. When you have people that have done their preparation and all of the relevant parties are all geared up, ready to go, it is often a frustration when something has to be cancelled.³¹³*

Mr Ferguson: *Just again, to repeat, each local government has four people nominated—two primary members, two alternatives—so the chances that all four cannot attend the meeting are quite rare.*

³¹² Government of Western Australia, Development Assessment Panels, Practice Note 10, 2015 DAP Amendment Regulations, 17 April 2015, p8 <http://www.planning.wa.gov.au/daps/data/Publications/Practice%20Notes/DAP%20Practice%20Note10%20-%202015%20DAP%20Amendment%20Regulations.pdf> (viewed 10 July 2015).

³¹³ Ms Gail McGowan, Director General, Department of Planning, *Transcript of Evidence*, 4 May 2015, p12.

*Further to what Gail said, in terms of meetings being cancelled at the last minute, it is just as likely, if not more likely, in my experience that that occurs because the two specialists are conflicted out because of conflicts of interest, so you actually may well end up with scenarios where there will be one presiding member and two local government members and no other specialists. In terms of quorum requirements, we have taken the approach, per the previous answer, that when you get appointed to the DAP you are an independent person, and there really should not be the “us” or “them” mentality of prescribing that specialist or a local government member attend.*³¹⁴

4.12 The Committee received a range of views from other witnesses.³¹⁵

4.13 The Real Estate Institute of Australia, the Urban Development Institute of Australia and the Property Council of Australia expressed support for the change in their evidence.³¹⁶

4.14 The Housing Industry Association expressed a slightly different view:

*...I was a little intrigued as to why five is difficult to form, and it may go to workload to bring everybody together. The New South Wales framework is five and I can see a lot of consistencies in how they must have drafted the regulations here and there. I would certainly think that the nub of the issue is the balance and perhaps there should be at least one from each category in the room; I do not necessarily have an objection to that.*³¹⁷

4.15 The Chairman of the WAPC expressed the following view in his evidence:

From, I suppose, a representation and community-interest point of view, certainly I would support having a councillor there, but my understanding—I have been out of the DAP system for quite a while now, but certainly before that—is that the main issue we had was

³¹⁴ Mr Stephen Ferguson, Senior Solicitor, Department of Planning, *Transcript of Evidence*, 4 May 2015, pp12-13.

³¹⁵ See letter from Andre Schonfeldt, Director Development Services, Shire of Broome, 5 June 2015; Ms Caroline Knight, Councillor, City of Mandurah and Hon Fred Riebeling; Councillor, City of Mandurah, *Transcript of Evidence*, 4 May 2015, p13; Mr Geoffrey Pearson, Joint Spokesperson, *Striker Balance!* Community Action Group, *Transcript of Evidence*, 29 June 2015, pp12-13; Dr Linley Lutton, Director, Urban Planning, Urbanix, *Transcript of Evidence*, 25 May 2015, p13.

³¹⁶ Mr Rob Druitt, Member, Real Estate Institute of Western Australia, *Transcript of Evidence*, 22 June 2015, p8; Mr Nicholas Allingame, Vice President, Urban Development Institute of Australia, *Transcript of Evidence*, 22 June 2015, p12; Mr Lino Iacomella, Deputy Executive Director, Property Council of Australia, *Transcript of Evidence*, 22 June 2015, p10.

³¹⁷ Ms Kristin Brookfield, Senior Executive Director, Building Development and Environment, *Transcript of Evidence*, 22 June 2015, p9.

*presiding members either away or ill or the councillors not being there. Bearing in mind there is the fact that you have potentially four members—two permanent and two deputies—I would expect there to be very rare instances, if not nil, where the issue would revolve around the councillor representation; it may be the independent representation.*³¹⁸

4.16 He further stated:

If the inference is that there may be DAP decisions without any local government DAP members present, then that is indeed a possibility. However, the reality is more likely the opposite, with DAP specialist members not being able to attend due to a conflict of interest. There have been a few instances to my knowledge where there had to be an urgent Ministerial appointment because both the Presiding Member and Deputy Presiding member were conflicted out from attending.

Moreover, this change is necessary because the previous system did not account for the possibility of local government DAP members being completely conflicted out. This has also nearly happened several times, including in one notable case that resulted in the Supreme Court matter of Aloï v Bertola [No 2][2013] WASC.

With respect to local government involvement, the reality is each local government is permitted to submit four names to the Minister for appointment as members and alternative members. The chances of all four being conflicted, sick or other unavailable to attend is highly unlikely

*My understanding is this provision is largely administrative in purpose. In particular, it is to save the DAP Secretariat much grief, when it has to make several last-minute appointments where a DAP member could or should have known they would be unable to attend.*³¹⁹

4.17 DAP presiding members who gave evidence to the Committee were not in favour of a DAP meeting being held without the presence of a local government member. They gave the following evidence.

³¹⁸ Mr Eric Lumsden, Chairman, Western Australian Planning Commission, *Transcript of Evidence*, 19 June 2015, p8.

³¹⁹ Western Australian Planning Commission, *DAP Parliamentary Public Hearing – 19 June 2015 Response by Chairman*, 19 June 2015, p24.

Mr Gray: *I feel uncomfortable with not having a local government member. That situation has not arisen because the secretariat is at pains to check and to adjust meetings wherever possible to have at least one local government member in attendance. I think that is an important component and we do need to have at least one local government member attend panel meetings.*

Mr Koltasz: *I agree with that. I think it is important to have that.*

Mr Johnson: *Yes, I certainly agree with that. I would see that as a matter of last resort and I would be extremely reluctant to proceed with a meeting just presiding with three specialist members. The only situation I could imagine where that might occur is that the council representative, for whatever reason, decides to basically go on strike and not attend. At the moment the situation is you need that forum and if the elected members do not turn up then you cannot consider the matter. That has never occurred, but it is a potential, so I think that would be a very far fallback and only in situations where councils were deliberately not participating in the process.*³²⁰

Committee comment

- 4.18 The Committee understands the practical reasons why the Amendment Regulations changed the quorum requirement for DAP meetings, as set out in the evidence from the Department and the WAPC.
- 4.19 However, given that one of the purposes of DAPs is to encourage an appropriate balance between independent professional advice and local representation in decision-making, new regulation 41 no longer reflects this purpose.³²¹
- 4.20 Also, considering:
- the number of alternative local government and specialist members available to replace members of DAPs, should the need arise owing to illness, a conflict of interest or other reason
 - the other changes introduced by the Amendment Regulations to improve efficiency and flexibility, including new regulation 27(3A)³²²

³²⁰ Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, p18; Mr Eugene Koltasz, Presiding Member, Metro East and Pilbara Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p18; Mr David Gray, Presiding Member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels, *Transcript of Evidence*, 2 July 2015, p18.

³²¹ It should be noted that a range of views were expressed in evidence on whether the membership of the City of Perth LDAP and the JDAPs were appropriately balanced.

- the weight of the evidence the Committee has received opposing this change,
- the Committee is of the view that the previous quorum requirement should be reinstated and makes the following recommendation.

Recommendation 15: The Committee recommends that regulation 41 of the *Planning and Development (Development Assessment Panels) Regulations 2011* be repealed and substituted with the following provision:

41. Quorum

(1) At a meeting of a Local Development Assessment Panel, 3 members of the LDAP including —

- (a) the presiding member; and
- (b) another specialist member; and
- (c) a local government member or their alternate,

constitute a quorum.

(2) At a meeting of a Joint Development Assessment Panel, 3 members of the JDAP including —

- (a) the presiding member; and
- (b) another specialist member; and
- (c) one of the local government members referred to in regulation 25(1)(a) or their alternate,

constitute a quorum.

Lowering of optional financial criteria to \$2 million

- 4.21 Information on the rationale for the lowering of the optional financial criteria from \$3 million to \$2 million appears in the following documentation.

Department's August 2014 Review

*It has been determined that a widening of the opt-in range would provide the additional flexibility for proponents and decision-making authorities that was sought in a large number of submissions on the DAP thresholds.*³²³

...

³²² This enables the Director General, where both the presiding member and deputy presiding member of a DAP are unable to act as presiding member for any reasons, to appoint the presiding member of another DAP to act as presiding member.

³²³ Department of Planning, *Review of the Development Assessment Panels, summary of submissions and outcomes of review*, August 2014, p16, http://www.planning.wa.gov.au/dop_public/Review_of_DAPs.pdf (viewed 22 July 2015).

*By making the minimum threshold \$2 million, it is anticipated that many more significant proposals will meet the threshold, thus providing the proponent with the ability to opt-in to DAP determination.*³²⁴

Explanatory Memorandum to the Amendment Regulations

*Widening of the opt-in threshold provides added flexibility as a greater number of development applications will fall within the opt-in range where proponents may decide whether they want a DAP to determine their application.*³²⁵

- 4.22 A number of witnesses were opposed to the lowering of the financial threshold to \$2 million for a number of reasons, including how a project of \$2 million can be considered of regional or state significance or strategic importance.³²⁶

- 4.23 Dr Linley Lutton stated in his evidence:

*...the first one about reducing it to \$2 million is completely inappropriate. All that does is it just opens a floodgate of mediocrity to come in and it would be completely inappropriate to see that stand.*³²⁷

- 4.24 The Real Estate Institute of Western Australia supports the lowering of the financial threshold to \$2 million³²⁸ and the Housing Industry Association of Australia stated it had received positive feedback from its membership.³²⁹

- 4.25 The Committee repeats what is stated in paragraphs 3.103.

³²⁴ Department of Planning, *Review of the Development Assessment Panels, summary of submissions and outcomes of review*, August 2014, p16, http://www.planning.wa.gov.au/dop_pub_pdf/Review_of_DAPs.pdf (viewed 22 July 2015).

³²⁵ *Planning and Development (Development Assessment Panels) Amendment Regulations 2015, Explanatory Memorandum*, p1.

³²⁶ Mr Andries Schonfeldt, Director of Development Services, Shire of Broome, *Transcript of Evidence*, 4 May 2015, p10; Mr Warwick Carter, Member, Local Government Planners Association, *Transcript of Evidence*, 4 May 2015, p10.

³²⁷ Dr Linley Lutton, Director, Urbanix, *Transcript of Evidence*, 25 May 2015, p12. See also Mrs Lorene-Lee Clohesy, Committee person, Kennedy Street Support Group, *Transcript of Evidence*, 11 May 2015, p11; Mrs Maria Hansen, Committee Member, *Striker Balance!* Community Action Group, *Transcript of Evidence*, 29 June 2015, p12; Mr Denis McLeod, Partner, McLeods Barristers and Solicitors, *Transcript of Evidence*, 29 June 2015, p12; Mr Neil Foley, Professor, Urban and Regional Planning, School of Earth and the Environment, University of Western Australia, *Transcript of Evidence*, 29 June 2015, pp9-10.

³²⁸ Mr Rob Druitt, Member, Real Estate Institute of Western Australia, *Transcript of Evidence*, 22 June 2015, p7.

³²⁹ Mr John Gelavis, Executive Director, Housing Industry Association, *Transcript of Evidence*, 22 June 2015, pp8-9.

‘Stop the clock’ mechanisms

4.26 The Amendment Regulations introduced what has been termed ‘stop the clock’ mechanisms. The Department Review and DAP Practice Note 10 provides detailed rationale for the introduction of these mechanisms,³³⁰ the effect of which is to exclude from the period between when the application is made and when it is determined:

- the period after an applicant is given a notice by the local government, pursuant to regulation 11A, requiring the applicant to give it further specified information or documents
- any period of extension for providing the responsible authority report by the presiding member, with the consent of the applicant, pursuant to regulation 12(4).³³¹

4.27 A few witnesses expressed concern about:

- the seven day timeframe within which a local government must issue any notice pursuant to regulation 11A; and
- the need for the local government to obtain the consent of the applicant should a need for further information arise later in the process, pursuant to regulation 12(4A).

4.28 For instance, in response to a question from the Committee seeking views on the stop the clock mechanisms, the Strategic Planning Officer of the Town of Cambridge stated:

It is noted, however, that this mechanism is only available to the local government within one week of receiving a DAPs application. It is more common, however, for circumstances to evolve beyond one week of lodgement which would require the Town to seek further information or amended plans from the applicant and where a 'stop the clock' mechanism would be warranted.

It is not considered a reasonable time frame for a full assessment to be able to be undertaken of DAPs application within one week of lodgement and for the full set of issues which may require additional

³³⁰ Department of Planning, *Planning makes it happen: phase two, Review of the Development Assessment Panels*, September 2013, p1; Government of Western Australia, *Development Assessment Panels, Practice Note 10 2015 DAP Amendment Regulations*, 17 April 2015, pp4-5, <http://www.planning.wa.gov.au/daps/data/Publications/Practice%20Notes/DAP%20Practice%20Note10%20-%202015%20DAP%20Amendment%20Regulations.pdf> (viewed 20 July 2015). See also Planning and Development (Development Assessment Panels) Amendment Regulations 2015, *Explanatory Memorandum*, p2.

³³¹ Section 16(2B) of the *Planning and Development (Development Assessment Panels) Regulations 2011*.

*time to resolve to be established within five business days. Often issues will evolve throughout the course of assessment and upon liaising with applicants which will require attention and additional time to require the information which is needed for a planning officer to confidently report on a matter.*³³²

- 4.29 Mr Denis McLeod gave an example of where a local government with limited resources found it very difficult to comply with the timeframe to prepare a responsible authority report imposed by the Regulations. He stated:

*I think some local governments are concerned about the fact that they often have unrealistic time limits for dealing with their responsible authority report.*³³³

...

*So I think that the concern expressed by local governments in that regard is a realistic one and there should be a greater opportunity for local governments to have an extension of time and it should not depend upon the chairman being able to achieve an agreement from the applicant in order to extend the time.*³³⁴

- 4.30 While Mr Andries Schonfeldt expressed support for the introduction of the mechanisms, he was also of the view that the seven day timeframe for a local government to issue a notice pursuant to regulation 11A was inadequate. He suggested a timeframe of 21 days.³³⁵
- 4.31 WALGA questioned why incomplete applications were being lodged in the first place and late information given by applicants, noting the pressure it places on the assessment process undertaken by local governments.³³⁶
- 4.32 Both Dr Linley Lutton and the WAPC referred to the existing practice of local governments stopping the clock when insufficient information had been given by an applicant for planning approval.³³⁷

³³² Email from Mr Matthew Burnett, Strategic Planning Officer, Town of Cambridge, 25 May 2015. See also Mr Ian MacRae, President, Local Government Planners Association, *Transcript of Evidence*, 4 May 2015, p6.

³³³ Mr Denis McLeod, Partner, McLeods Barristers and Solicitors, *Transcript of Evidence*, 29 June 2015, pp11-12.

³³⁴ Ibid, p12.

³³⁵ Mr Andries Schonfeldt, Director of Development Services, Shire of Broome, *Transcript of Evidence*, 4 May 2015, p4.

³³⁶ Ms Allison Hailes, Executive Manager, Planning and Community Development, Western Australian Local Government Association, *Transcript of Evidence*, 4 May 2015, p9.

- 4.33 The Property Council of Australia expressed support for the initiative,³³⁸ while the Urban Development Institute of Australia, while expressing support, is of the view that it was too early to tell whether it was an effective initiative.³³⁹
- 4.34 When the Committee asked the Department for its views on whether it would be more reasonable and efficient for the local government to be able to obtain a further extension of time to provide a responsible authority report pursuant to regulation 12(4) without having to obtain the applicant's consent, the Department responded as follows:

Not necessarily. It could perhaps be seen as more efficient, but that then would reenliven concerns mentioned above about delays in the approvals process. It is not unreasonable for the proponent, at this late stage of the process, to give their consent if further time is required.

If the applicant disagrees with the amount of time taken, then it is not unreasonable for the proponent to have a deemed-refusal trigger to take the matter to SAT. By virtue of new regulation 16(2B)(b), if such an amendment the Committee now proposes was introduced, it would be possible to 'trap' applications theoretically forever, without any ability to take a matter to SAT.

*The current effect of regulations 12(4) and 16(2B)(b) says that where the applicant agrees to an extension, then and only then, the deemed refusal trigger is frozen in time. However, to suggest a Presiding Member could unilaterally deprive a proponent of that right to lodge an application for review at SAT, without an applicant's consent, may be unreasonable.*³⁴⁰

Committee comment

- 4.35 The Committee agrees with the Department that there may be an unreasonable outcome if the requirement for the applicant's consent is withdrawn from regulation 12(4) and that it may cause delays in the process. However, it is also satisfied on the evidence it has received that:

³³⁷ Dr Linley Lutton, Director, Urbanix, *Transcript of Evidence*, 25 May 2015, p13. Mr Eric Lumsden, Chairman, Western Australian Planning Commission, *Transcript of Evidence*, 19 June 2015, p7.

³³⁸ Mr Lino Iacomella, Deputy Executive Director, Property Council of Australia, *Transcript of Evidence*, 22 June 2015, p9. See also Mrs Fiona Mullen, Manager, Planning and Land Services, City of Mandurah, *Transcript of Evidence*, 4 May 2015, p12.

³³⁹ Mr Nicholas Allingame, Vice President, Urban Development Institute of Australia, *Transcript of Evidence*, 22 June 2015, p12.

³⁴⁰ Department of Planning, *DAP Parliamentary Public Hearing – 19 June 2015, Written Response by the Department of Planning*, 19 June 2015, p40.

- Seven days is not a sufficient timeframe within which a local government must give a notice to an applicant pursuant to regulation 11A.
- It is inappropriate for the local government to have to rely on the consent of an applicant for an extension of time when an applicant has been responsible for submitting late information. In those circumstances, the presiding member should have the sole discretion to grant an extension of time under regulation 12(4).

4.36 Accordingly, the Committee makes the following recommendations.

Recommendation 16: The Committee recommends that the *Planning and Development (Development Assessment Panels) Regulations 2011* be amended to give a local government not less than 14 days to give the administration officer of the development assessment panel a notice given to the applicant under regulation 11A.

Recommendation 17: The Committee recommends that the *Planning and Development (Development Assessment Panels) Regulations 2011* be amended to provide the presiding officer of the development assessment panel with the sole discretion to extend the period within which the responsible authority report must be given in certain circumstances, including where the applicant has submitted late information to the local government.

Disbanding of the Short-List Working Group

4.37 The Amendment Regulations effected the disbanding of the SLWG by deleting regulations 36, 37(1) and 38.

4.38 This was foreshadowed in the Department Review, which stated:

*removing references to the short-list working group to reflect an administrative need for this process to be less regulated;*³⁴¹

4.39 The SLWG, established by former regulation 38, comprised of persons nominated by various stakeholders, including the Housing Industry Association and the Real Estate Institute of Western Australia. Its role was to submit to the Minister for Planning, under former regulation 36, short-lists of persons recommended for appointment as specialist members of DAPs. The Minister for Planning was required to have regard to these short-lists when appointing a person as a specialist member to a DAP.

³⁴¹ Department of Planning, *Review of the Development Assessment Panels, summary of submissions and outcomes of review*, August 2014, p19.

- 4.40 The Committee sought further feedback from the Department on the rationale for the disbanding of the SLWG. The Department provided the following evidence:

*Ms McGowan: I think, again, this was a part of the streamlining of the overall processes but not taking away from the intent that the stakeholders will be consulted, in fact, it is what we do in practice. All of the appointments to DAPs still have to go through the cabinet appointment process and are still subject to notification on the register of boards and committees et cetera, so it was seen as an unnecessary step. That said, we rely quite heavily on the input from those stakeholder groups. We advertise for, obviously, appointments to DAPs and in practice we actually do include them, but we did not see that there was a need for it to be regulated.*³⁴²

...

*Mr Ferguson: Added to that, again, is the stakeholders cannot just put forward any old name. The regulations are quite prescriptive as to who is allowed to be on or not on the list anyway and it has reference to certain tertiary qualifications. So of course we have to consult with stakeholders because of the prescriptive nature of that list, but in terms of having a cumbersome, formalised process, that did not really add much value and in some cases just hindered, I guess, the expeditious nature of appointing people.*³⁴³

- 4.41 Mr Charles Johnson questioned the disbanding of the SLWG, emphasising the importance of the vetting of peers of potential members of DAPs.³⁴⁴
- 4.42 Both the Housing Industry Association and the Local Government Planners Association highlighted the resources involved in administering the SLWG.³⁴⁵

Committee comment

- 4.43 The Committee is of the view the Department is in the best position to decide upon the most efficient and effective process for the selection of specialist members of DAPs.

³⁴² Ms Gail McGowan, Director General, Department of Planning, *Transcript of Evidence*, 4 May 2015, p10.

³⁴³ Mr Stephen Ferguson, Senior Solicitor, Department of Planning, *Transcript of Evidence*, 4 May 2015, p11.

³⁴⁴ Mr Charles Johnson, Presiding Member, Metro Central Joint Development Assessment Panel, *Transcript of Evidence*, 2 July 2015, p18.

³⁴⁵ Ms Kristin Brookfield, Senior Executive Director, Building Development and Environment, Housing Industry Association of Australia, *Transcript of Evidence*, 22 June 2015, p9; Submission No 7 from the Local Government Planners Association, 23 January 2015, p9.

- 4.44 That being said, it could be argued that providing for a formalised process of input from stakeholders into the selection process by regulation rather than leaving it up to administrative arrangement enables greater transparency.
- 4.45 The Committee also notes regulation 54 of the *Planning and Development Regulations 2009* provides for members of a Fees Arbitration Panel, who are appointed by the Minister, to be nominated by various organisations, including WALGA, the Housing Industry Association and the Real Estate Institute of Western Australia.

Regulation 17 meetings by electronic means

- 4.46 The Amendment Regulations replaced the word ‘instantaneous’ with ‘electronic’ in regulation 49(4)(a), so that it now reads:

(4) Unless the presiding member otherwise directs, a DAP meeting to determine an application under regulation 17 —

(a) is to be held by each other person at the meeting being in contact by telephone, or other means of electronic communication;

- 4.47 This was noted in a media article.³⁴⁶
- 4.48 The Committee refers to its commentary in paragraphs 3.290 to 3.294.

TIMING AND IMPACT OF THE AMENDMENT REGULATIONS ON THE INQUIRY PROCESS

- 4.49 The Explanatory Memorandum for the Amendment Regulations was signed by the Director General of the Department of Planning, Ms Gail McGowan, on 9 March 2015 and by the Minister for Planning, Hon John Day MLA, on 11 March 2015. This was before the Committee sought and obtained from the Legislative Council an extension of time to table its report.
- 4.50 While a number of the matters the subject of the Amendment Regulations were foreshadowed by the Department in the Department Review,³⁴⁷ the Committee only became aware of their introduction on their tabling in the Legislative Council on 21 April 2015.
- 4.51 The Committee’s concerns about the timing of the Amendment Regulations and absence of warning in their being enacted, was raised during the second hearing with

³⁴⁶ Lloyd Gorman, ‘DAPs can make changes in secret’, *Subiaco Post*, 9 May 2015, p9.

³⁴⁷ Department of Planning, *Review of the Development Assessment Panels, summary of submissions and outcomes of review*, August 2014, http://www.planning.wa.gov.au/dop_pub_pdf/Review_of_DAPs.pdf (viewed 12 May 2015).

the Department on 4 May 2015 to discuss this matter. The following exchanges with Ms Gail McGowan and Mr Stephen Ferguson from the Department illustrate some of the concerns held by the Committee about the potential effect of the enactment of the Amendment Regulations on this inquiry.

***The CHAIR:** For the committee, given that submissions had already been made by a number of witnesses on the DAP regulations as they were at the date that the inquiry was referred to our committee by the Legislative Council, on 21 October last year, why were the amendment regulations introduced during the committee's inquiry into the DAP regulations and not beforehand or afterwards?*

***Ms McGowan:** That is probably a matter that I would need you to address to the minister, in terms of why the government chose to proceed at a particular point in time, but broadly speaking, as indicated, the proposal to deal with some of the issues we have canvassed as part of the broader planning reform process and the minister, in announcing those in August 2014, signalled his intention to move with those changes as quickly as possible, so that is the process we have been going through there.³⁴⁸*

...

***Hon BRIAN ELLIS:** I am concerned that there is not much point looking at the old regulations. The new ones have only just come in, so we can ask at different hearings what people think about those new regulations, but they will not have been in long enough to get an idea whether they are positive or negative.*

***Ms McGowan:** Possibly one way of approaching it—obviously, it is not my place to direct your work in any sense—because the substantive changes were canvassed in the public discussion document and we have subsequently had a number of submissions and hearings is, in fact, the committee may choose to look at whether the changes that have been made adequately address the sorts of issues that have come in the submissions and whether there is anything that in a sense has not been dealt with. That may be the tidiest way for the committee to do it, because I think it is certainly open to the committee to do that.³⁴⁹*

³⁴⁸ Ms Gail McGowan, Director General, Department of Planning, *Transcript of Evidence*, 4 May 2015, pp2-3.

³⁴⁹ *Ibid*, pp3-4.

*The CHAIR: Perhaps the tidiest way might have been for the government to have waited until after this inquiry was finished to see what it came up with before it rolled out the new regulations. That might have been the tidiest way and might not have caused this dilemma for us.*³⁵⁰

- 4.52 The Committee wrote to the Minister for Planning on 13 May 2015, outlining its concerns about the introduction of the Amendment Regulations during this inquiry.³⁵¹ A copy of this letter is attached as **Appendix 4**. The Committee stated:

*The Committee considers that the introduction of the Amendment Regulations by Government during the Committee's inquiry into the Principal Regulations has hampered its ability to conduct the Statutory Review referred to it by the Legislative Council as required by the Act.*³⁵²

- 4.53 The Minister for Planning responded on 18 May 2015. A copy of this letter is attached as **Appendix 5**.³⁵³ The Minister stated:

The Planning and Development (Development Assessment Panels) Amendment Regulations 2015 ('Amendment Regulations') are consistent with the review outcomes and contain nothing which hampers the Committee's ability to conduct the statutory review provided for by Section 171f of the Planning and Development Act 2005.

*I do acknowledge that whilst the Government's intent to progress with the Development Assessment Panel reforms was well canvassed and communicated, it is regrettable that the Committee was not advised in advance of the Amendment Regulations being tabled on 21 April 2015.*³⁵⁴

- 4.54 The Minister for Planning subsequently gave notice to the Committee, in a letter dated 22 July 2015 and received by Committee staff by ordinary post on 28 July 2015, of the publication of the *Planning and Development (Development Assessment Panels)*

³⁵⁰ Hon Kate Doust MLC, Chair, Standing Committee on Uniform Legislation and Statutes Review, *Transcript of Evidence*, 4 May 2015, p4.

³⁵¹ Letter from Hon Kate Doust MLC, Chair, Standing Committee on Uniform Legislation and Statutes Review to Hon John Day MLA, Minister for Planning, 13 May 2015.

³⁵² Ibid, p3.

³⁵³ Letter from Hon John Day MLA, Minister for Planning to Hon Kate Doust MLC, Chair, Standing Committee on Uniform Legislation and Statutes Review, 18 May 2015.

³⁵⁴ Ibid, pp1-2.

Order 2015, which was published in the *Government Gazette* on 24 July 2015.³⁵⁵ This consolidated the number of regional JDAPs from nine to three.

- 4.55 *Striker Balance!* Community Action Group and WALGA stated in evidence that they were disappointed the Amendment Regulations were introduced before the conclusion of this inquiry.³⁵⁶

Notice of motion to disallow

- 4.56 The Joint Standing Committee on Delegated Legislation (**Delegated Legislation Committee**) tabled in the Legislative Council a notice of motion recommending the disallowance of the Amendment Regulations on 18 June 2015 pursuant to Standing Order 67 of the Standing Orders of the Legislative Council.³⁵⁷

- 4.57 The notice of motion was discharged from the Notice Paper after the Minister for Planning gave the following undertakings to the Delegated Legislation Committee:

- Amend regulation 32(5A) of the Regulations to include a reference to local government members of joint Development Assessment Panels under regulation 26;
- Amend the Act by inserting a provision in the nature of regulation 16(2A).³⁵⁸

- 4.58 The Committee notes with interest, in light of the points made in paragraphs 4.59 to 4.60, the Minister for Planning has agreed to make these amendments after the Committee has concluded this inquiry. This contrasts with the timing of the enactment of the Amendment Regulations.

Committee comment on the timing of the introduction of the Amendment Regulations

- 4.59 The Committee is of the view that the introduction of the Amendment Regulations by the Executive Government has hampered the work of the Committee and should have

³⁵⁵ Letter from Hon John Day MLA, 22 July 2015; *Planning and Development (Development Assessment Panels) Order 2015*, [https://www.slp.wa.gov.au/gazette/gazette.nsf/searchgazette/9C3BD6240B38D3DE48257E8C000800C4/\\$file/Gg116.pdf](https://www.slp.wa.gov.au/gazette/gazette.nsf/searchgazette/9C3BD6240B38D3DE48257E8C000800C4/$file/Gg116.pdf) (viewed 28 July 2015).

³⁵⁶ Mrs Maria Hansen, Committee Member, *Striker Balance!* Community Action Group, *Transcript of Evidence*, 29 June 2015, p12; Ms Alison Hailes, Executive Manager, Planning and Community Development, Western Australian Local Government Association, *Transcript of Evidence*, 4 May 2015, p11.

³⁵⁷ Hon Robin Chapple MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 June 2015, p4576.

³⁵⁸ [Internet Undertakings List for Departments in 39th Parliament.pdf](#) (viewed 10 July 2015). The basis for the Delegated Legislation Committee's request for the undertakings was a drafting error in regulation 17 (inserting new regulation 32(5A)) and that the subject matter of regulation 10 (inserting new regulation 16(2A)) was more appropriate for primary, not subsidiary legislation.

been postponed until the conclusion of the Committee's inquiry into the Regulations. It is important to note that:

- The Committee was undertaking a Statutory Review required under section 171F of the Act, an Act which the Department administers. Amending regulations being considered during the course of the review interfered with the Committee's ability to properly undertake the review.
- The Executive Government was aware of the Committee's inquiry into the Regulations but failed to alert it of its intention to introduce the Amendment Regulations and obtain the Committee's views on how it may affect its inquiry.
- The Amendment Regulations amended and replaced a number of the regulations the Committee was considering during the course of its inquiry.
- It is not possible to conduct a meaningful inquiry into the operation and effectiveness of the Regulations amended by the Amendment Regulations as these would have only been in force for a few months prior to the tabling of this report (by 8 September 2015).
- Stakeholders providing submissions to the Committee did so in good faith on the basis that the Committee was inquiring into the Regulations as they were at the time.

4.60 It is also relevant to note that, had the Committee not been required to seek an extension of time to report from the Legislative Council on 17 March 2015 and tabled its report on 14 May 2015, the introduction of the Amendment Regulations on 1 May 2015 would have rendered parts of its report obsolete. The Committee would have reviewed the operation and effectiveness of out-dated regulations.

4.61 The Committee welcomes the acknowledgement by the Minister for Planning in his letter of 18 May 2015 that it was regrettable the Committee was not advised in advance of the Amendment Regulations being tabled on 21 April 2015 and makes the following recommendation.

Recommendation 18: The Committee recommends that the Department of Planning give sufficient advance notice of its intention to introduce legislation to any committee of the Legislative Council which is inquiring into any matter to which such legislation is relevant.

CHAPTER 5

FURTHER REVIEW OF THE REGULATIONS

- 5.1 The Committee is of the view the Regulations would benefit from further, periodic reviews by a standing committee of the Legislative Council. The practices and procedures of DAPs will continue to evolve³⁵⁹ and the operation and effectiveness of the Regulations should be assessed to ensure they continue to fulfil their purposes.
- 5.2 Further periodic reviews of the Regulations would reinforce that review clauses are an appropriate mechanism for parliamentary accountability and oversight of the operation of legislation.³⁶⁰
- 5.3 Accordingly, the Committee makes the following recommendation.

Recommendation 19: The Committee recommends that the Minister representing the Minister for Planning introduce an amendment to section 171F of the *Planning and Development Act 2005* to provide for further periodic reviews of the operation and effectiveness of the *Planning and Development (Development Assessment Panels) Regulations 2011* by a standing committee of the Legislative Council.

³⁵⁹ See Ms Kristin Brookfield, Senior Executive Director, Building Development Environment, Housing Industry Association, *Transcript of Evidence*, 22 June 2015, p5.

³⁶⁰ See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 90, *Rail Safety National Law (WA) Bill 2014*, 24 March 2015, p24.

CHAPTER 6

CONCLUSION

- 6.1 As part of its review of the operation and effectiveness of the Regulations, the Committee has received evidence of a broad range of matters concerning DAPs, some of which could be regarded as contentious and about which there were differing views.
- 6.2 One aspect of the inquiry which underpinned a number of the matters raised in evidence was the level of concern in some sectors of the community with the DAP system. This arose from certain decisions made by DAPs which have caused frustration and anxiety, especially to some who reside in close proximity to the site of approved developments. One source of frustration was a feeling by some of being disempowered and unable to influence the outcome of determinations as well as a lack of engagement in the process.
- 6.3 Another aspect which was clear from the evidence was the level of disconnect between what some in the community expect from and understand about the planning process and what is actually delivered by the DAP system. The Committee is of the view that the level of this disconnect could be reduced by the Government addressing community expectations of transparency of the DAP process and undertaking further engagement with the community on the planning process.
- 6.4 The Committee has made a number of recommendations that it believes will enhance the operation and effectiveness of the Regulations and ensure they better reflect the purposes identified by the Government prior to their introduction.



Hon Kate Doust MLC
Chair

8 September 2015

APPENDIX 1
BACKGROUND TO SECTION 171F OF THE *PLANNING AND DEVELOPMENT*
ACT 2005

APPENDIX 1

BACKGROUND TO SECTION 171F OF THE *PLANNING AND DEVELOPMENT ACT 2005*

Section 171F of the Act, inserted by section 43 of the *Approvals and Related Reforms (No. 4) (Planning) Act 2010*, was not in the original *Approvals and Related Reforms (No.4) (Planning) Bill 2009* presented to the Parliament. It was introduced by an amendment moved by Hon Sally Talbot MLC on 29 June 2010. The debate on the amendment in the Legislative Council is noted below.

Hon SALLY TALBOT: *Mr Deputy Chairman, have we got to the end of clause 43? If we have finished the substance of clause 43, I have one amendment to insert after line 25. I move —*

Page 34, after line 25 — To insert —

171F. Review of Regulations

(1) The appropriate Standing Committee of the Legislative Council is to carry out a review of the operation and effectiveness of all regulations made under this Part as soon as practicable after the expiry of 2 years from the day on which regulations made under this Part first come into operation.

(2) The Standing Committee is to prepare a report based on the review and, as soon as practicable after the report is prepared, is to cause the report to be laid before each House of Parliament.

I think I have already covered in previous debate the reasons I think this would be a good move, and I understand that the government has, in principle, supported the idea of a review. It is still my firm belief, and the belief of members on this side of the house, that that review would be most efficiently and effectively done by a standing committee. At the time the legislation comes up for review, the Legislative Council can determine which standing committee it will go to. I believe the minister would be happier if the review were to be carried out by the minister. I would happy to move that subsequent amendment by the minister after I have moved this one, but I want to first move that the review be carried out in the terms I have just enumerated—by a standing committee of the Legislative Council.

Hon LYNN MacLAREN: *I rise to speak in support of this amendment. One of the concerns that the Greens (WA) have had about this legislation and the planning reforms in general is the centralising of decision-making power in*

the minister's hands. This is a very sensible way of reviewing how well the legislation will be working two years from now. A standing committee of the Legislative Council would be a very appropriate body to carry out such a review, and the Greens (WA) support this amendment.

Hon ROBYN McSWEENEY: *Obviously the government would prefer the review to be carried out by the minister, but the minister is quite happy for a standing committee of the Legislative Council carry out the review, and how can I disagree, as a member of the Legislative Council?*

...

Amendment put and passed.³⁶¹

On 10 August 2010 Hon John Day referred to this amendment in stating:

..... and proposed new section 171F will be inserted. In fact, amendment 6 relates to this aspect and also to development assessment panels.

*In particular, it introduces a new section 171F to ensure that a review of the regulations supporting the provisions of development assessment panels is carried out by an appropriate standing committee of the Legislative Council after they have been in operation for two years. It was always intended that there would be a review of the regulations relating to development assessment panels. The Legislative Council, and the opposition in the Council in particular, was very keen for that review to be carried out by a committee of the Legislative Council and we have agreed to that.*³⁶²

³⁶¹ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 29 June 2010, pp4736-27.

³⁶² Hon John Day MLA, Minister for Planning, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 10 August 2010, p5102.

APPENDIX 2
STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION, SUBMISSIONS
RECEIVED AND HEARINGS

APPENDIX 2

STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION, SUBMISSIONS RECEIVED AND HEARINGS

Stakeholders invited to provide a submission

1. Department of Planning
2. Department of Local Government
3. Local Government Planners Association
4. Western Australian Local Government Association
5. The Law Society of Western Australia
6. Planning Institute of Australia, WA Division
7. Western Australian Planning Commission
8. Housing Industry Association
9. Urban Development Institute of Australia
10. Property Council of Australia
11. Real Estate Institute of Western Australia
12. Master Builders Association of Western Australia
13. Justice Jeremy Curthoys, President, State Administrative Tribunal
14. Urbanix Design
15. Dr Paul Maginn, Senior Lecturer, The University of Western Australia
16. Professor Richard Weller, Adjunct Professor, The University of Western Australia

Submissions received

1. Justice Jeremy Curthoys, President, State Administrative Tribunal
2. Andrew Rigg, private citizen
3. Aileen Hubert, private citizen

4. David Hubert, private citizen
5. Ian Bignell (Director, Development and Sustainability, Town of Cambridge)
6. Joffre Sexton, private citizen
7. Local Government Planners Association
8. *Striker Balance!* Community Action Group
9. Edward Bacon, private citizen
10. Peta Bacon, private citizen
11. Department of Planning
12. Ian Birch, presiding member, South West Joint Development Assessment Panel
13. Ike Nielsen, private citizen
14. Marina and Jeff Hansen, private citizens
15. Property Council of Australia
16. Robert Nicholson, specialist member, South-West Joint Development Assessment Panel
17. Urban Development Institute of Australia
18. Western Australian Planning Commission
19. Helen Lafuente, private citizen
20. Councillor Julie Matheson, City of Subiaco
21. Trina Glover, private citizen
22. Michael Quinlan CSM and Maria Papaluca, private citizens
23. Angela Hamersley, private citizen
24. Private submission
25. Housing Industry Association
26. Kennedy Street Collective
27. Lynette and Geoffrey Pearson, private citizens

28. Max Hipkins, Mayor, City of Nedlands
29. Michelle and Eran Smith, private citizens
30. Western Australian Local Government Association
31. Dean Balzan, private citizen
32. McLeods Barristers and Solicitors
33. City of Mandurah
34. Ines Janca, private citizen
35. Lyle Lansdown, private citizen
36. Emeritus Professor Linda Rogers, private citizen
37. Real Estate Institute of Western Australia
38. Urbanix Design
39. Teresa and Joseph Keszi, private citizens
40. Rev George Davies, private citizen
41. Andries Schonfeldt (Director of Development Services, Shire of Broome)
42. Kate and Ron Hastings, private citizens
43. The Law Society of Western Australia
44. Greg Benjamin, private citizen
45. Cecilia Brooke, Chair, City of South Perth Residents' Association
46. City of South Perth
47. The Neighbours of Sacred Heart College – Sorrento

Public hearings

The Committee held public hearings with the witnesses noted below. Transcripts of the public hearings are available on the Committee's website at <http://www.parliament.wa.gov.au/uni>

4 May 2015

1. Shire of Broome

-
- Mr Andries Schonfeldt, Director of Development Services
 2. City of Mandurah
 - Hon Fred Riebeling, Councillor
 - Ms Caroline Knight, Councillor
 - Mr Tony Free, Director, Sustainable Development
 - Mrs Fiona Mullen, Manager, Planning and Land Services
 3. Western Australian Local Government Association
 - Ms Alison Hailes
 - Ms Vanessa Jackson
 4. Local Government Planners Association
 - Mr Ian MacRae
 - Mr Warwick Carter
 5. Mr Max Hipkins, Mayor, City of Nedlands

11 May 2015

6. Kennedy Street Collective
 - Mrs Lorene-Lee Clohesy, Committee Member
 - Mrs Natalie Server, Member

25 May 2015

7. Dr Linley Lutton, Director, Urbanix

19 June 2015

8. Department of Planning
 - Ms Gail McGowan, Director-General
 - Mr Stephen Ferguson, Senior Solicitor
9. Western Australian Planning Commission
 - Mr Eric Lumsden, Chairman

22 June 2015

10. Housing Industry Association
 - Mr John Gelavis, Executive Director
 - Ms Kristin Brookfield, Senior Executive Director, Building, Development and Environment

11. Property Council of Australia
 - Mr Lino Iacomella, Deputy Executive Director,
 - Ms Rebecca Douthwaite, Policy Advisor
12. Urban Development Institute of Australia
 - Mr Nicholas Allingame, Vice President
 - Ms Rebecca Douthwaite, Policy Advisor
13. Real Estate Institute of Australia
 - Mr Neville Pozzi, Chief Executive Officer
 - Mr Rob Druitt, Member

29 June 2015

14. Striker Balance! Community Action Group
 - Mr Geoffrey Pearson, Joint Spokesperson
 - Ms Marina Hansen, Committee Member
15. Mr Denis McLeod, Partner, McLeods Barristers and Solicitors
16. Mr Neil Foley, Professor, Urban and Regional Planning, School of Earth and Environment, The University of Western Australia

2 July 2015

17. Presiding members of DAPs
 - Mr Charles Johnson, Presiding Member, Metro Central and Goldfields-Esperance Joint Development Assessment Panels
 - Mr David Gray, Presiding Member, Metro South-West, Great Southern and Wheatbelt Joint Development Assessment Panels
 - Mr Eugene Koltasz, Presiding Member, Pilbara and Metro East Joint Development Assessment Panels

APPENDIX 3
THIRD PARTY APPEALS FROM PLANNING DECISIONS IN OTHER
JURISDICTIONS

APPENDIX 3

THIRD PARTY APPEALS FROM PLANNING DECISIONS IN OTHER JURISDICTIONS

Jurisdiction	Third party rights of review
New South Wales	<p><u>Limited</u></p> <p>Section 98 of the <i>Environmental Planning and Assessment Act 1979</i> provides for an appeal by an objector (a person who made a submission objecting to the development) against a determination of an authority (which can include a council and a regional planning panel) approving an application for ‘designated development’.</p> <p>This is development that is declared to be designated development by an environmental planning instrument or the regulations, but does not include ‘State significant development’, which may be declared under a State environmental planning policy or by the Minister.</p> <p>Part 1 of Schedule 3 of the <i>Environmental Planning and Assessment Regulation 2000</i> prescribes 33 matters as designated developments, including aircraft facilities, coal works, petroleum works and shipping facilities (but not houses, flats or retail buildings).</p> <p>Section 115ZK of the <i>Environmental Planning and Assessment Act 1979</i> also provides there are no third party appeals regarding development which is ‘State significant infrastructure’ (which can also be declared under a State environmental planning policy).³⁶³</p>
Victoria	<p><u>Broad</u></p> <p>Section 82(1) of the <i>Planning and Environment Act 1987</i> provides that a person who objected to the grant of a planning permit may appeal to the Victorian Civil and Administrative Tribunal. A planning scheme may set out classes of planning permits which are exempted.³⁶⁴</p> <p>Exceptions: no appeal can be made if a concept plan has been</p>

³⁶³ For further information, see http://www.lawlink.nsw.gov.au/report%5C1pd_reports.nsf/pages/lec-working-5-appeals (viewed 12 August 2015).

³⁶⁴ For further information, see <http://www.lawhandbook.org.au/handbook/ch11s01s02.php> (viewed 12 August 2015).

	approved for the project; or the project has been the subject of either the Planning Assessment Commission or a report prepared by a panel of experts; or when the project has been declared critical infrastructure.
Queensland	<p><u>Limited</u></p> <p>Section 462 of the <i>Sustainable Planning Act 2009</i> provides that a submitter (a person who makes a properly made submission about an application), may appeal to the Planning and Environment Court only against the part of the approval for development requiring impact assessment (assessment about the environmental effects of proposed development and the ways of dealing with the effects) or a preliminary approval which seeks to vary the effect of any local planning instrument for the relevant premises.</p> <p>Sections 465 to 467 provides for an appeal by various entities for extensions, changes and cancellations of approvals.</p> <p>Exceptions: a developer can request the Minister remove the third party appeal process from applying to a development assessment, provided there has been some form of public consultation.</p>
South Australia	<p><u>Limited</u></p> <p>Section 86(1)(b) of the <i>Development Act 1993</i> provides that a person who is entitled to be given a notice of a decision (those who made a representation to the relevant authority) in respect of a category 3 development (development which requires a general public notification, such as a kind described as non-complying under a development plan) may appeal to the Environment, Resources and Development Court.</p> <p>Section 86(f) of the <i>Development Act 1993</i> also gives the owner or occupier of the land constituting the site of the proposed development or the owner or occupier of a piece of adjacent land, a right to apply to the Court for a review.³⁶⁵</p>
Tasmania	<p><u>Broad</u></p> <p>Section 61(5) of the <i>Land Use Planning and Approvals Act 1993</i> provides that any person or relevant agency who has made a representation relating to an application for a discretionary permit (a use or development which a planning authority has a discretion to refuse or permit) within 14 days of notice being given may appeal to</p>

³⁶⁵

For further information, see the 'Guide to Development Assessment' produced by Planning SA, http://www.sa.gov.au/data/assets/pdf_file/0003/17049/Guide_to_development_assessment.pdf (viewed 12 August 2015).

	the Resource Management and Planning Appeal Tribunal.
Australian Capital Territory	<p><u>Limited</u></p> <p>Schedule 1 to the <i>Planning and Development Act 2007</i> lists reviewable decisions, eligible entities and interested entities for the purposes of appeals on development matters to the ACT Civil and Administrative Appeals Tribunal.</p> <p>An application can be made by an entity for reconsideration of a merit or impact track development assessment (DAF assessment tracks 5 and 6).³⁶⁶</p>
Northern Territory	<p><u>Limited</u></p> <p>Third party appeals are restricted to development applications for land within a residential zone or land adjacent to or opposite a residential zone. Non-residential uses such as bed and breakfast accommodation and childcare centres are excluded from third party appeal rights if the use complies with the provisions of the planning scheme and the consent authority has not varied or waived any requirements of the provisions.</p> <p>Appeals are made to the Northern Territory Civil and Administration Tribunal.³⁶⁷</p> <p>Section 117 of the <i>Planning Act 2009</i> provides that a person or a local authority who made a submission with respect to a development application may to the Tribunal for a review of a determination.</p>
Republic of Ireland	<p><u>Broad</u>³⁶⁸</p> <p>Section 37 of the <i>Planning and Development Act 2000</i> provides that any person who has made a submission or observation on a planning application may appeal a planning decision to the Planning Appeals Board. Appeals must be made within 4 weeks of the decision. In an appeal, the planning application is considered anew by the Board, which examines all relevant issues independently.</p>
Scotland	<u>None</u>

³⁶⁶ For further information, see http://www.planning.act.gov.au/topics/design_build/lodging/reconsiderations (viewed 12 August 2015).

³⁶⁷ For further information, see <http://lands.nt.gov.au/planning/system/planning-appeals> (viewed 12 August 2015).

³⁶⁸ For further information see <http://www.environ.ie/en/DevelopmentHousing/PlanningDevelopment/Planning/Overview/AppealsandJudicialReview/> (viewed 12 August 2015).

England	<u>None</u>
Ontario, Canada	<u>Broad</u> ³⁶⁹ The Planning Act contains broad third party appeal rights, including those who made oral submissions at a public meeting or written submissions to the council, to appeal to the Ontario Municipal Board.

³⁶⁹

For further information, see
http://www.omb.gov.on.ca/english/OMBInformation/OMB_How_To_File_An_Appeal.html (viewed
13 August 2015).

APPENDIX 4

LETTER TO THE MINISTER FOR PLANNING DATED 13 MAY 2015

APPENDIX 4

LETTER TO THE MINISTER FOR PLANNING DATED 13 MAY 2015



STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Our Ref: PDR

Hon John Day MLA
Minister for Planning
11th Floor
Dumas House
2 Havelock Street
West Perth WA 6005

By email: Minister.Day@dpc.wa.gov.au

13 May 2015

Dear Minister

Inquiry into Planning and Development (Development Assessment Panels) Regulations 2011

I refer to s171F of the *Planning and Development Act 2005 (Act)*, which provides for a Statutory Review as follows:

171F. Review of regulations

- 1) An appropriate Standing Committee of the Legislative Council is to carry out a review of the operation and effectiveness of all regulations made under this Part as soon as practicable after the expiry of 2 years from the day on which regulations made under this Part first come into operation.*
- 2) The Standing Committee is to prepare a report based on the review and, as soon as practicable after the report is prepared, is to cause the report to be laid before each House of Parliament.*

The Committee wrote to you, as the responsible Minister, on 27 October last year advising you of its inquiry. This inquiry commenced on 21 October 2014, when the *Planning and Development (Development Assessment Panels) Regulations 2011 (Principal Regulations)* were referred to the Standing Committee on Uniform Legislation and Statutes Review (**the Committee**) by the Legislative Council.

us.pdr.150512.let.001.jd (A498755)

PARLIAMENT HOUSE PERTH WESTERN AUSTRALIA 6000
TELEPHONE: +61 8 9222 7222 FACSIMILE: HOUSE +61 8 9222 7809 COMMITTEES +61 8 9222 7805
EMAIL (GENERAL OFFICE): council@parliament.wa.gov.au

The Committee was required to report on the Statutory Review to the Legislative Council by 14 May 2015. On 17 March 2015 the Legislative Council granted the Committee an extension of time to report until 8 September 2015.

The Committee called for submissions on the operation and effectiveness of the Principal Regulations by way of an advertisement in *The West Australian* on Saturday 29 November 2014, with submissions closing on 30 January 2015. A considerable number of submissions were subsequently received by the Committee. In addition, the Committee held hearings on 21 November 2014 with the Department of Planning (**Department**) and the Western Australian Local Government Association (**WALGA**). The Committee also scheduled a raft of hearings with witnesses through May and June in response to the submissions received.

On 17 April 2015 the *Planning and Amendment (Development Assessment Panels) Amendment Regulations 2015 (Amendment Regulations)* were published in the *Government Gazette* and subsequently tabled in the Legislative Council on 21 April 2015.¹ The Amendment Regulations came into force on 1 May 2015.

The Amendment Regulations made a number of changes to the Principal Regulations which the Committee regards as material to the operation of Development Assessment Panels (**DAPs**), including:

- A lowering of the opt in threshold from \$3m to \$2m for all DAPs;
- An increase in the mandatory threshold from \$15m to \$20m for the City of Perth DAP and from \$7m to \$10m for all other DAPs;
- Broadening the types of developments a responsible authority may delegate to a DAP;
- A change in the quorum requirements from three DAP members, which must include the Presiding Member, another specialist member and a local government member, to any three DAP members, including the Presiding Member;
- The introduction of a 'stop the clock' mechanism whereby the time period for the submission of the responsible authority report to the DAP does not include the time between the applicant being given a notice to provide specified information or documents;
- Disbanding of the Short-List Working Group (which was established to submit to the Minister for Planning short-lists of persons recommended for appointment as specialist members of DAPs); and

¹ *Planning and Amendment (Development Assessment Panels) Amendment Regulations 2015*, [https://www.slp.wa.gov.au/gazette/gazette.nsf/searchgazette/BBDAEA55D43B3D648257E290012CAED/\\$file/gg057.pdf](https://www.slp.wa.gov.au/gazette/gazette.nsf/searchgazette/BBDAEA55D43B3D648257E290012CAED/$file/gg057.pdf) (at pages 1380-1386).

us.pdr.150512.1et.001.jd (A498755)

- Providing for regulations to prevail over any planning instrument to extent of any inconsistency.²

The Committee notes that the Explanatory Memorandum for the Amendment Regulations was signed by the Director General of the Department on 9 March 2015 and by you as Minister, on 11 March 2015.

While a number of the matters falling within the scope of the Amendment Regulations were foreshadowed by the Department in its own review of the Principal Regulations,³ the Committee only became aware of their introduction when they were tabled in the Legislative Council on 21 April 2015. The Committee is disappointed that neither you nor the Department paid the Committee the courtesy of advising it of the Government's intention to proceed with the gazettal of the Amendment Regulations during the Committee's inquiry.

When it became aware that the Amendment Regulations had been tabled, the Committee requested a briefing on the Amendment Regulations from the Director General, Ms Gail McGowan. During this briefing on 4 May 2015, the Committee sought an explanation from the Director General as to why the Amendment Regulations had been gazetted by Government when it was well aware of the Statutory Review being conducted by this Committee. This point was specifically raised with your Director General as follows:

***The CHAIR:** For the committee, given that submissions had already been made by a number of witnesses on the DAP regulations as they were at the date that the inquiry was referred to our committee by the Legislative Council, on 21 October last year, why were the amendment regulations introduced during the committee's inquiry into the DAP regulations and not beforehand or afterwards?*

***Ms McGowan:** That is probably a matter that I would need you to address to the minister, in terms of why the government chose to proceed at a particular point in time, but broadly speaking, as indicated, the proposal to deal with some of the issues we have canvassed as part of the broader planning reform process and the minister, in announcing those in August 2014, signalled his intention to move with those changes as quickly as possible, so that is the process we have been going through there.⁴*

The Committee considers that the introduction of the Amendment Regulations by Government during the Committee's inquiry into the Principal Regulations has hampered its ability to conduct the Statutory Review referred to it by the Legislative Council as required by the Act.

² For details on all amendments made, see Planning and Amendment (Development Assessment Panels) Amendment Regulations 2015, *Explanatory Memorandum* and Practice Note 10, 2015 DAP Amendment Regulations, signed by the Acting Director General of the Department of Planning, Mr David MacLennan, on 17 April 2015, <http://www.planning.wa.gov.au/daps/data/Publications/Practice%20Notes/DAP%20Practice%20Note10%20-%202015%20DAP%20Amendment%20Regulations.pdf> (viewed 11 May 2015).

³ Department of Planning, *Review of the Development Assessment Panels, summary of submissions and outcomes of review*, August 2014, http://www.planning.wa.gov.au/dop/pub_pdf/Review_of_DAPs.pdf (viewed 12 May 2015).

⁴ Ms Gail McGowan, Director General, Department of Planning, Transcript of Evidence, 4 May 2015, p3.

Uniform Legislation and Statutes Review Committee

Page 4

Before the Committee considers how to further proceed with its inquiry, it requests your response to the foregoing concerns.

It would be appreciated if you could provide your views to the Committee by no later than **midday on Monday 18 May 2015**.

Yours sincerely



Hon Kate Doust MLC
Chair

CC: Ms Gail McGowan, Director General, Department of Planning, (by email: gail.mcgowan@planning.wa.gov.au)

APPENDIX 5

LETTER FROM THE MINISTER FOR PLANNING DATED 18 MAY 2015

APPENDIX 5

LETTER FROM THE MINISTER FOR PLANNING DATED 18 MAY 2015



**Minister for Planning; Culture & the Arts
Government of Western Australia**

Our Ref: 33-29083
Your Ref: PDR

Hon Kate Doust MLC
Chair, Standing Committee on Uniform Legislation and Statutes Review
Legislative Council of Western Australia
Parliament House
PERTH WA 6000

Email: ahickman@parliament.wa.gov.au

Dear Ms Doust

INQUIRY INTO THE PLANNING AND DEVELOPMENT (DEVELOPMENT ASSESSMENT PANELS) REGULATIONS 2011

I refer to your letter dated 13 May 2015 concerning the inquiry by the Standing Committee on Uniform Legislation and Statutes Review (the Committee) into the *Planning and Development (Development Assessment Panels) Regulations 2011* ('DAP Regulations'). I understand that the Director General and internal legal counsel of the Department of Planning recently presented to the Committee and also provided supplementary information following that presentation.

Following introduction of the DAP Regulations the State Government undertook a review of the operation of the Development Assessment Panel System as part of Planning Reform Phase Two. The review commenced with the Department of Planning release of '*Review of Development Assessment Panels* (September 2013) for comment.

The subsequent release of '*Review of Development Assessment Panels, summary of submissions and outcomes of review*' (August 2014) provided a summary of the outcomes of the review and changes to be made to the DAP system as a result.

I understand this information was available to the Committee upon commencement of its review on 21 October 2014 and it is anticipated that this information would be included in, or inform the scope of the Committee's review. I also understand that the Committee was briefed on the review when Department of Planning officers attended briefings with the Committee on 17 November 2014.

The *Planning and Development (Development Assessment Panels) Amendment Regulations 2015* ('Amendment Regulations') are consistent with the review outcomes and contain nothing which hampers the Committee's ability to conduct the statutory review provided for by Section 171f of the *Planning and Development Act 2005*.

11th Floor, 2 Havelock Street, West Perth, Western Australia 6005
Telephone: +61 8 6552 6200 Facsimile: +61 8 6552 6201 Email: Minister.Day@dpc.wa.gov.au

I do acknowledge that whilst the Government's intent to progress with the Development Assessment Panel reforms was well canvassed and communicated, it is regrettable that the Committee was not advised in advance of the Amendment Regulations being tabled on 21 April 2015.

I appreciate and support the work of the Committee and look forward to the completion of its review. I also note that should the Committee make recommendations regarding amendments to the DAP Regulations these will be considered and can be made in the future.

I understand the Committee's review is due to be presented to the Legislative Council on or before 8 September 2015. My office and the Department of Planning are available to continue to provide advice should the Committee seek further support in its review.

Yours sincerely



**JOHN DAY
MINISTER FOR PLANNING;
CULTURE AND THE ARTS**

18 MAY 2015