HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

Matter No P47/2016

WESTERN AUSTRALIAN PLANNING COMMISSION — APPELLANT

AND

SOUTHREGAL PTY LTD & ANOR — RESPONDENTS

Matter No P48/2016

WESTERN AUSTRALIAN PLANNING COMMISSION — APPELLANT

AND

TREVOR NEIL LEITH — RESPONDENT

Western Australian Planning Commission v Southregal Pty Ltd
Western Australian Planning Commission v Leith
[2017] HCA 7
8 February 2017
P47/2016 & P48/2016

ORDER

Matter No P47/2016

1. *Appeal allowed.*

2. *Set aside orders (a) and (b) of the Court of Appeal of the Supreme Court of Western Australia made on 24 March 2016, and in their place order that:*

   (a) appeal allowed;

   (b) the respondents pay the appellant's costs; and

(c) set aside orders 2, 3 and 4 of Beech J made on 22 December 2014, and in their place order that:

(i) the question of law be answered: No; and

(ii) the plaintiffs are to pay the defendant's costs.

3. The respondents pay the appellant's costs of the appeal to this Court.

Matter No P48/2016

1. Appeal allowed.

2. Set aside orders (a) and (b) of the Court of Appeal of the Supreme Court of Western Australia made on 24 March 2016, and in their place order that:

(a) appeal allowed;

(b) the respondent pay the appellant's costs; and

(c) set aside orders 2, 3 and 4 of Beech J made on 22 December 2014, and in their place order that:

(i) the question of law be answered: No; and

(ii) the plaintiff is to pay the defendant's costs.

3. The respondent pay the appellant's costs of the appeal to this Court.

On appeal from the Supreme Court of Western Australia

Representation

K M Pettit SC with T C Russell for the appellant in both matters (instructed by State Solicitor (WA))

D F Jackson QC with P McQueen for the respondents in both matters (instructed by Lavan)

CATCHWORDS

Western Australian Planning Commission v Southregal Pty Ltd
Western Australian Planning Commission v Leith

Town planning (WA) – Compensation – Where land reserved for public purpose under planning scheme – Where s 173 of *Planning and Development Act* 2005 (WA) makes provision for landowner to be compensated where land injuriously affected by making or amendment of planning scheme – Where, under s 177, compensation not payable until land first sold after reservation or responsible authority refuses development application or grants application on unacceptable conditions – Where landowners purchased land affected by planning scheme after date of reservation – Where purchasers applied to develop land and were refused – Whether purchasers entitled to compensation.

Words and phrases – "compensation", "injurious affection", "planning scheme", "reservation".

Metropolitan Region Town Planning Scheme Act 1959 (WA), s 36.
Planning and Development Act 2005 (WA), ss 171, 173, 174, 176, 177.
Town Planning and Development Act 1928 (WA), ss 11, 12.

1 KIEFEL AND BELL JJ. The Peel Region Scheme is a planning scheme made pursuant to the provisions of the *Planning and Development Act* 2005 (WA) ("the PD Act"). It came into effect in March 2003[1] and relevantly reserved the land in question in these appeals for a public purpose, namely for regional open space. At that time the land was owned by persons other than the respondents. In October 2003 Southregal Pty Ltd ("Southregal") and Mr Wee, the respondents in the first appeal, purchased land affected by the reservation and in 2008 applied to develop it. In June 2003 Mr Leith, the respondent in the second appeal, purchased land affected by the reservation and in 2009 applied to develop it. Both applications were refused on account of the reservation. The respondents each claimed compensation pursuant to the provisions of Pt 11 of the PD Act. The claims were refused by the appellant, the Western Australian Planning Commission ("the WAPC"), on the basis that compensation under the PD Act was only available to the person who owned the land at the time of its reservation.

2 Each of the respondents brought proceedings in the Supreme Court of Western Australia, in which they claimed to be entitled to compensation. The Court directed that a Special Case be prepared. The primary judge (Beech J) stated the question arising on each Special Case as:

> "Whether a person to whom s 177(2)(b) of [the PD Act] would otherwise apply can be entitled to compensation pursuant to ss 173 and 177(1)(b) of the PD Act, in circumstances where the land has been sold following the date of the reservation, and where no compensation has previously been paid under s 177(1) of the PD Act."

Beech J answered the question arising on each Special Case in the affirmative[2]. The Court of Appeal upheld that decision[3].

The provisions of Pt 11 of the PD Act

3 Part 11 of the PD Act makes provision for a landowner to be compensated, including where land has been injuriously affected by a planning scheme. Section 173(1) provides:

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1 Although the Peel Region Scheme came into effect prior to the commencement of the PD Act, the effect of the statutory regime is that any entitlement of the respondents to compensation for injurious affection is governed by the PD Act.

2 *Leith v Western Australian Planning Commission* [2014] WASC 499.

3 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487.

"Subject to this Part any person whose land is injuriously affected by the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority."

4 Section 174 details the circumstances in which land may be injuriously affected. Section 174(1) relevantly provides:

"Subject to subsection (2), land is injuriously affected by reason of the making or amendment of a planning scheme if, and only if –

(a) that land is reserved (whether before or after the coming into operation of this section) under the planning scheme for a public purpose;

…"

5 Section 176(1) provides that a claimant or responsible authority may apply to the State Administrative Tribunal to determine any question as to whether land is injuriously affected. Sub-section (2) provides that any question as to the amount and manner of payment of compensation is to be determined by arbitration, in the absence of agreement on some other method of determination.

6 Section 177(1) and (2) deals with when compensation "is payable" and to whom it is payable. It provides:

"(1) Subject to subsection (3), when under a planning scheme any land has been reserved for a public purpose, no compensation is payable by the responsible authority for injurious affection to that land alleged to be due to or arising out of such reservation until –

(a) the land is first sold following the date of the reservation; or

(b) the responsible authority –

(i) refuses an application made under the planning scheme for approval of development on the land; or

(ii) grants approval of development on the land subject to conditions that are unacceptable to the applicant.

(2) Compensation for injurious affection to any land is payable only once under subsection (1) and is so payable –

(a) under subsection (1)(a) to the person who was the owner of the land at the date of reservation referred to in subsection (1)(a); or

(b) under subsection (1)(b) to the person who was the owner of the land at the date of application referred to in subsection (1)(b),

unless after the payment of that compensation further injurious affection to the land results from –

(c) an alteration of the existing reservation of the land; or

(d) the imposition of another reservation of the land."

7 Section 177(3)(a) provides that, "[b]efore compensation is payable" under s 177(1), in the case of the first sale, the person appointed to determine the amount of compensation must be satisfied of three matters:

(i) the owner of the land has sold the land at a lesser price than the owner might reasonably have expected to receive had there been no reservation of the land under the planning scheme;

(ii) the owner before selling the land gave written notice to the responsible authority of the owner's intention to sell the land; and

(iii) the owner sold the land in good faith and took reasonable steps to obtain a fair and reasonable price for the land.

In the case of refusal of a development application, or approval on conditions unacceptable to the applicant, s 177(3)(b) provides that the person determining compensation must be satisfied that the application was made in good faith.

8 Section 178(1)(a) relevantly requires that a claim for compensation for injurious affection to land by the making or amendment of a planning scheme where land is reserved is to be made within six months of either the sale of the land, the refusal of a development application or its approval on unacceptable conditions.

9 Section 179(1) provides that the amount of compensation for injurious affection arising out of the land being reserved for public purposes is not to exceed the difference between the value of the land as so affected by the existence of the reservation and the value of the land if it were not so affected. Section 179(2) provides that the values are to be assessed as at the date on which the land is sold; an application for approval of development is refused; or the approval is granted subject to unacceptable conditions.

10 The focus of these appeals is on ss 173, 177(1) and 177(2).

Western Australian Planning Commission v Temwood Holdings Pty Ltd

11 In *Western Australian Planning Commission v Temwood Holdings Pty Ltd*[4], consideration was given by this Court to s 11 of the *Town Planning and Development Act* 1928 (WA) and s 36 of the *Metropolitan Region Town Planning Scheme Act* 1959 (WA) ("the MRTPS Act"). Section 11(1) is in terms substantively equivalent to s 173 of the PD Act; s 36(3)(a) and (b) is substantively equivalent to s 177(1)(a) and (b); and s 36(3a)(a) and (b) is substantively equivalent to s 177(2)(a) and (b). For ease of reference we will refer to the equivalent provisions of the PD Act when discussing the reasons in *Temwood*.

12 In *Temwood*, a developer purchased land that included coastal foreshore which had previously been reserved under a town planning scheme. The WAPC approved the development application for three subdivisions of the land subject to a condition in each case that the developer cede the relevant portion of the foreshore reserve to the Crown, free of costs and without compensation.

13 The condition was held to be valid. More relevantly for present purposes, what was described by Gummow and Hayne JJ as a "threshold issue" arose concerning the provisions equivalent to ss 173 and 177. As their Honours explained[5], if the developer, as successor in title to the owner of the land when the foreshore was reserved, enjoyed no statutory right to compensation for injurious affection, then much of its case would fail. Their Honours held that the developer was not entitled to claim compensation. McHugh J and Callinan J came to the opposite view. Heydon J considered that the issue did not arise and did not address it.

14 McHugh J's reasons did not differ from those of Gummow and Hayne JJ on all aspects of the construction of the provisions in question. It was the introduction of the equivalent of s 177(2)(b) in 1986 which provided the critical point of departure in his Honour's reasons, as will be explained.

15 Gummow and Hayne JJ and McHugh J were agreed[6] that the equivalent of s 173(1) conferred on the owner of land injuriously affected by a planning

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4 (2004) 221 CLR 30; [2004] HCA 63.

5 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 67-68 [94].

6 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 45 [30] per McHugh J, 68 [95] per Gummow and Hayne JJ.

scheme an entitlement to compensation. McHugh J considered[7] that the entitlement was best described as a "liberty" or "expectation". However, his Honour and Gummow and Hayne JJ considered[8] it to be possible that the nature of the entitlement was such that it might survive any repeal of the equivalent of s 173(1), by the application of the provisions of the *Interpretation Act* 1984 (WA)[9].

16 These observations may be put to one side. The point made by McHugh J[10] was that the equivalent of s 177(1) had the effect of postponing the entitlement. Until one of the three events there listed occurred, "there is no interest, right or privilege that the owner of the Land could enforce against anyone"[11]. Gummow and Hayne JJ also held[12] that the equivalent of s 177(1) had the effect that the right to payment was deferred until one of those events occurred.

17 The point of departure between Gummow and Hayne JJ and McHugh J is as follows. Gummow and Hayne JJ were of the view[13] that the equivalent of s 177(1) is to be construed by treating the deferral of the entitlement to payment as terminated upon the first of the three events to occur. Once one of the three events triggered a claim for compensation, the later occurrence of the two remaining events could not trigger a further claim. On this construction, because the land in question in these proceedings was first sold to the respondents by persons who owned the land at the date of reservation, the respondents are not able to claim compensation.

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7 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 45 [30].

8 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 46 [31] per McHugh J, 68 [96] per Gummow and Hayne JJ.

9 *Interpretation Act* 1984 (WA), s 37(1)(c).

10 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 45 [30].

11 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 45 [31].

12 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 70 [102].

13 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 70 [103].

18 McHugh J accepted that had the question in *Temwood* arisen before 1986, the better construction of the equivalent of s 177(1) would have yielded the result referred to above[14]. However, his Honour considered that the amendments made in 1986, which effectively inserted the equivalent of s 177(2)(b) ("the 1986 amendments"), changed the category of persons who could claim compensation.

19 Prior to the 1986 amendments, the then s 36(3a) provided that[15]:

> "Compensation for injurious affection to any land is payable only once under paragraph (a) of subsection (3) of this section and is payable *to the person who was the owner of the land at the date of reservation* referred to in that paragraph …" (emphasis added)

20 In 1986[16], the part emphasised became, with a few minor changes, par (a) of s 36(3a). It referred to compensation payable under s 36(3)(a), which is the equivalent of s 177(1)(a). There was then inserted a par (b) into s 36(3a), in essentially the same terms as s 177(2)(b), which is set out above. It referred to compensation payable under the equivalent of s 177(1)(b) and provided that it is payable to "the person who was the owner of the land at the date of application". It may be observed that the equivalent to s 173(1) was not amended at the time the equivalent of s 177(2)(b) was inserted.

21 The respondents contend that these amendments must be taken to acknowledge that the owner of the land at the date of application for development approval may be a different person from the person who was the owner of the land at the date of reservation.

22 It may be inferred that Gummow and Hayne JJ did not consider that the equivalent of s 177(2)(b) had any effect on the operation of the statutory scheme. It did not entitle a subsequent purchaser, such as the developer in that case, to claim compensation. Their Honours considered that its inclusion might simply accommodate special situations, such as the death of the owner before sale or development applications made by those taking the land by testamentary or

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14 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 47-48 [37].

15 *Metropolitan Region Town Planning Scheme Act* 1959-1982 (WA), s 36(3a).

16 *Metropolitan Region Town Planning Scheme Amendment Act* 1986 (WA), s 9.

intestate succession[17], but that par (b) did not have any application where there has been a sale by the owner as indicated in par (a).

23 McHugh J, on the other hand, considered[18] that the inclusion of the provision meant that the equivalent of s 173(1) could no longer operate to confine the persons entitled to receive compensation. In his Honour's view, the equivalent provision to s 177(2)(b) must be given effect in its terms, which apply it to a subsequent owner.

24 His Honour considered[19] it to be an unlikely construction that that provision would operate only where the owner at the date of reservation made a development application or where land was conveyed other than by sale, for example by will or operation of law. In his Honour's view, a purchaser who was not the owner at the date of reservation and whose development application was refused or was approved subject to unacceptable conditions may be entitled to compensation, for otherwise the words "owner of the land at the date of application" would have little scope for operation. His Honour concluded that the provision must be regarded as giving an independent claim of compensation unrelated to the fact of ownership at the date when the scheme was made.

25 McHugh J does not appear to have considered how this construction of the equivalent of s 177(2)(b), extending the right to claim compensation, is conformable with the terms and effect of the equivalent of s 173(1). Callinan J did and held[20] that the provision equivalent to s 173(1) should not be read as confined to persons who actually owned the land at the time the scheme was made. Gummow and Hayne JJ rejected such a construction. Their Honours considered that the equivalent of s 173(1), and the words "by the making of" appearing in it, controlled the provisions which followed[21].

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17 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 71 [108].

18 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 48 [38].

19 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 48-49 [40].

20 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 89-90 [161].

21 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 70 [102].

The courts below

26 The primary judge adopted the approach of McHugh J to the construction of s 177(2). Beech J held[22] that s 177(1) and (2), read together, provided for two alternative, independent rights to compensation. Further, in defining, in s 177(2)(b), the class of persons who might claim compensation under s 177(1)(b), Parliament had specifically chosen to distinguish the position under s 177(1)(a), so as to include a person who is the owner at the date of the development application but who need not have been the owner at the date of reservation[23]. The Court of Appeal upheld that decision. Martin CJ, with whom Newnes JA and Murphy JA agreed, said[24] that s 177(2) is specifically directed to the identification of the person entitled to claim compensation. It expressly refers to the entitlement of two classes of persons: the owner at the date of the reservation; and the owner at the date of an application for development approval which is refused or is approved subject to unacceptable conditions.

The construction of the relevant provisions

27 The relevant part of Pt 11 has a discernible structure. The provisions in question deal with different subject matters but are to be read together.

Entitlement to compensation

28 There can be no doubt that s 173(1) confers an entitlement to compensation in the event that land is injuriously affected by a planning scheme. It confers an entitlement on the landowner, as evinced by the words "any person whose land". This is confirmed by s 173(3), which provides that "[a] responsible authority may make agreements with owners for the development of their land during the time that the planning scheme or amendment is being prepared". Some such provision for compensation has been provided at least since 1928[25].

29 That entitlement is provided because the person's land is injuriously affected by "the making or amendment of a planning scheme". These words are reiterated in ss 174(1) and 175. Pursuant to s 174(1)(a), land is injuriously affected if it is reserved for a public purpose. Section 179 acknowledges that the

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22 *Leith v Western Australian Planning Commission* [2014] WASC 499 at [50].

23 *Leith v Western Australian Planning Commission* [2014] WASC 499 at [52].

24 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 515-516 [110], [112]-[113].

25 *Town Planning and Development Act* 1928 (WA), s 11.

value of land reserved under a planning scheme may be affected by the existence of the reservation.

30 In *Temwood*, Gummow and Hayne JJ, adopting what was said by Ipp J (Wallwork and Owen JJ agreeing) in *Bond Corporation Pty Ltd v Western Australian Planning Commission*[26], said[27] that the legislation may be seen to recognise that owners of land suffer loss merely by the reservation of land for public purposes, without any action on their part. They suffer loss by way of a reduction in the market value of their land by reason of the reservation.

31 No reference is made in s 173(1) to a person who purchases land which is already affected by a reservation. It does not suggest that anyone but a landowner at the time of reservation will be entitled to compensation. A purchaser does not fall within the description of a person whose land is affected "by the making" of a planning scheme. A purchaser would only be entitled to compensation if there was, subsequent to that person becoming the owner, an amendment of the planning scheme which injuriously affected the purchaser's land.

Compensation is payable

32 Section 173(1) provides for an entitlement "to obtain compensation". It does not say it is payable on the event of reservation. Section 177(1) provides the point at which a responsible authority becomes liable to pay compensation. According to that provision, compensation will not be payable "until" either (a) the land is first sold; or (b) a development application is refused or is approved on conditions unacceptable to the applicant. It follows that it is only when one of these three events occurs that a claim may be made for compensation.

33 It appears to us also to follow from the use of the disjunctive "or" that once one of the three events triggers a claim for compensation, the later occurrence of the other two events cannot trigger a further claim, as was held[28] by Gummow and Hayne JJ in *Temwood*. The reference in s 177(2) to

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26 (2000) 110 LGERA 179 at 187-188 [34].

27 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 68 [95].

28 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 70 [103].

compensation being "payable only once" supports this construction[29]. It further follows that in the present case, since the land has been "first sold" to the respondents, the refusal of their development application cannot trigger a further claim.

34 The respondents submit that this is not a correct construction of s 177(1) and that it requires the words "the first to occur of" to be read into s 177(1). That submission should not be accepted. It is not necessary to read words into s 177(1) for it to operate in the way described. It follows from the structure and language of the provision, as explained above. It is not possible, as the respondents submit, to read the sub-section as allowing a claim for compensation despite the fact that it has been "first sold".

35 The respondents also rely upon what was said by the Court of Appeal with respect to the position of a purchaser from the owner at the time of reservation. Martin CJ considered[30] that a purchaser could have a claim to compensation in the event that the vendor had not claimed compensation. In these proceedings, it would appear that the owners of the land at the time of its reservation did not claim compensation when the land was sold to the respondents.

36 Section 177(1) does not identify who may claim compensation. It states three events, one of which will trigger an entitlement to make a claim for compensation. It does not need to identify who may make a claim. Section 173(1) has already done so. The person entitled to obtain compensation is the owner of the land when it is reserved.

37 Reading the words "payable only once", which appear in s 177(2), with s 177(1) does not advance the construction for which the respondents contend. Those words do not convey that compensation must be paid at least once. If one assumes that every owner of land which is reserved will suffer some loss, an assumption which appears to be made by the statute, the fact that an owner might not make a claim for compensation is not comprehended by the statute and it makes no provision for it.

38 Something further needs to be said concerning the persons involved in the events referred to in s 177(1), before turning to s 177(2).

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29 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 71 [108].

30 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 514 [103]-[105].

39 The owner of the land at the time that it is reserved is, obviously enough, the person referred to in the first event, that is, the person who may first sell after reservation. The owner may also be the person who makes an application for development on the land which is refused or is approved subject to unacceptable conditions. But s 177(1) also allows for the possibility that another person might be the applicant, a person who is not an owner at all. That possibility arises from the reference in s 177(1)(b)(ii) to the conditions being unacceptable to "the applicant", not the owner. Section 177(3)(b) likewise refers to "the applicant".

40 It is not difficult to understand why these provisions do not assume that only an owner of land could, or would, apply for development approval. Not all landowners could afford to develop their land or wish to bear the cost of an application to develop, particularly over land the subject of a reservation for public purposes. A developer, however, might wish to investigate the likelihood of approval before committing to a purchase. The form provided for such an application under the Peel Region Scheme[31] would appear to allow for this possibility, provided that the application was made with the consent of the owner of the land.

41 It is with this understanding, and an understanding of the scheme of the provisions generally, that one approaches s 177(2).

"Payable to" and s 177(2)(b)

42 Section 177(2) is not concerned with the identification of persons who may claim compensation. Rather, the purpose of s 177(2) is to identify the person to whom payment is to be made. This identification occurs after a claim is made and the responsible authority has agreed to pay compensation or a determination has been made that it must be paid.

43 It seems to us that s 177(2)(b) is simply concerned to ensure that, whoever was the applicant for development approval, the payment must be made to the owner. In drafting s 177(2) and its predecessor it may have been overlooked that, in reality, the owner referred to in par (b) would in fact be the owner of the land at the date of reservation. A refusal of an application for development or its approval on unacceptable conditions could only trigger a claim for compensation under s 177(1)(b) if the land had not been first sold by the owner at the date of reservation. In that case it would be retained by that owner.

44 It does not seem to us to matter unduly that s 177(2)(b) is not really necessary. The rationale for it – its intended operation – is clear enough. It was intended to ensure that payments were made to owners and not to someone else.

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31 Peel Region Scheme (WA), cl 28, Sched 1.

It was not intended to extend the category of persons who could make a claim for compensation upon the refusal, or approval on unacceptable conditions, of a development application beyond persons identified by s 173(1).

45 Nothing in the provisions of Pt 11 suggests that a subsequent purchaser of land, rather than its owner at the time of the reservation, was to be a claimant for compensation. The references to "first sold" and "payable only once" point the other way.

46 In the second reading speech of the Bill which, in 1968, added the reference to compensation being payable "only once"[32], the responsible Minister said[33]:

> "The provision for the payment of compensation in such cases was designed to protect the owner of land at the time the scheme – or an amendment – included land in a reservation so that when he later sells the property he is compensated by the authority if he is unable to realise the full market value. Subsequent purchasers are aware of the scheme provisions at the time of purchase … and would not be at the same disadvantage as the original owner."

This statement recognises what may be obvious enough. A purchaser may be taken to be aware of the status of land, as subject to reservation, and may be expected to adjust the purchase price accordingly. This is the loss which the statute predicts the original owner will suffer.

47 The MRTPS Act was relevantly amended again in 1969 to add the words "and is payable to the person who was the owner of the land at the date of reservation"[34]. Martin CJ in the Court of Appeal[35] referred to two – apparently

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32 *Metropolitan Region Town Planning Scheme Act Amendment Act* 1968 (WA), s 3(d).

33 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 September 1968 at 754.

34 *Metropolitan Region Town Planning Scheme Act Amendment Act* 1969 (WA), s 2.

35 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 503-504 [57].

conflicting – statements made by the Minister for Town Planning with respect to this amendment. In the second reading speech the Minister[36] said that:

> "Subsequent owners are expected to acquaint themselves with details affecting the land before purchasing",

but went on to say:

> "Such owners are, of course, protected by the provisions relating to development and compensation in the event of an adverse decision by the authority."

48 However, in response to a question from the Deputy Leader of the Opposition in the Legislative Assembly, the Minister for Education confirmed[37] that the Bill introducing the amendment:

> "is designed to ensure that the owner at the time of reservation, *and he alone*, will be compensated for any loss of value due to reservations." (emphasis added)

49 Up until 1986 the legislation consistently referred only to the owner of land at the time the planning scheme came into effect as entitled to obtain compensation. It was concerned to compensate the owner for what was recognised to be an injurious affection to the land by the planning scheme.

50 The courts below considered that the 1986 amendments changed this position. However, one would have to wonder why Parliament would then suddenly decide to extend that entitlement to subsequent purchasers by permitting them to claim compensation when their development application was refused or subjected to unacceptable conditions. They do not suffer the loss that the original owner has suffered. The circumstances relating to the respondents furnish examples. Southregal and Mr Wee purchased their land for $2.6 million and claim compensation of $51.6 million; Mr Leith paid $1.28 million for his land and now claims $20 million in compensation.

51 There is no background from which it may be inferred that the 1986 amendments had the effect for which the respondents contend and which the

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36 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 4 November 1969 at 2098.

37 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1969 at 2608.

courts below held. Further, at the time the Bill which inserted the equivalent of s 177(2)(b) was read the second time, the Minister for Planning said[38] that:

> "The matters provided for in this Bill do not constitute major changes to the present … legislation".

This was repeated in the Legislative Council[39]. The responsible Ministers identified the concern to which the amendments with respect to the payment of compensation were addressed as claims being paid more than once in relation to the same portion of land.

52 A construction of s 177(2)(b) which does not read it as referable to a subsequent purchaser who makes a development application has the advantage of consistency, which, after all, is the primary object of statutory construction[40]. Sections 173 and 177(1) and (2) may be understood to refer to the owner at the time of reservation as the person entitled to compensation; the person who claims compensation; and the person to whom compensation is paid.

53 The construction favoured by the Court of Appeal, on the other hand, would be productive of inconsistency as between ss 173 and 177(2). Instead of s 173 conferring an entitlement only on the owner at the time of reservation, if s 177(2) is to have the operation which the Court of Appeal held, an entitlement to compensation must be taken somehow to run with the land and pass to the subsequent owner. An argument to that effect was rejected by Gummow and Hayne JJ in *Temwood*[41].

54 In *Temwood*, Callinan J implicitly acknowledged that an inconsistency would arise, for his Honour considered it necessary[42] to read the equivalent of s 173(1) so as to permit a broadening of the class of claimant. However, the

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38 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 June 1986 at 173.

39 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 2 July 1986 at 1199.

40 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28.

41 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 69-70 [100]-[102].

42 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 89-90 [161].

proper construction of s 177(2)(b) does not necessitate such a drastic step. The opening words of s 173(1) – "Subject to this Part" – do not warrant reading s 173(1) as subject to a provision dealing with another topic. In context, those words merely require that s 173(1) be read with what follows. This is not to say that s 173(1) should be regarded as the controlling provision, as the appellant submits, but simply that it be read with s 177(1) and (2) so that it produces a harmonious result.

55 Lastly, whilst it must be accepted that words chosen by the legislature should be given meaning and endeavours should be made to avoid them being seen as redundant, they should not be given a strained meaning, one at odds with the scheme of the statute. Moreover, it has been recognised more than once that Parliament is sometimes guilty of "surplusage" or even "tautology"[43]. The possibility that Parliament may not have appreciated that the reference in s 177(2)(b) was not necessary, and was liable to confuse, is not a reason for giving it a literal interpretation[44].

Conclusion

56 The appeals should be allowed with costs. The orders of the Court of Appeal should be set aside and in lieu thereof it should be ordered that the appeals from the decision of Beech J made on 22 December 2014 be allowed with costs and the answer to the question of law for determination in each Special Case and the declarations made by his Honour be set aside. The question of law stated for determination in each Special Case should be answered "no". The respondents should pay the costs of the hearing before Beech J.

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43 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679; [1979] HCA 26; *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 589; see also *Beckwith v The Queen* (1976) 135 CLR 569 at 574; [1976] HCA 55.

44 See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 12; [1992] HCA 64.

57 GAGELER AND NETTLE JJ. Section 177(2) of the *Planning and Development Act* 2005 (WA) ("the PD Act") stipulates to whom compensation is payable if land is injuriously affected by the making or amendment of a planning scheme reserving land for public purposes. The issue in these appeals is whether s 177(2) of the PD Act affords a right of compensation only to the owner of the land at the time of the land's reservation under the planning scheme or whether s 177(2) also affords an alternative right of compensation to a subsequent purchaser of the injuriously affected land. The judge at first instance (Beech J) and the Court of Appeal of the Supreme Court of Western Australia (Martin CJ, Newnes and Murphy JJA agreeing) held for the latter. For the reasons which follow, we consider that the right of compensation is confined to the former and, on that basis, that the appeals to this Court should be allowed.

58 The facts and relevant legislation are as set out in the reasons of Kiefel and Bell JJ and need not be repeated.

Proceedings at first instance

59 At first instance, the following question of law was said to arise in each case from the special case[45]:

> "Whether a person to whom s 177(2)(b) of the [PD Act] would otherwise apply can be entitled to compensation pursuant to ss 173 and 177(1)(b) of the PD Act, in circumstances where the land has been sold following the date of the reservation, and where no compensation has previously been paid under s 177(1) of the PD Act."

60 In answering that question, Beech J acknowledged that, "considered in isolation", the natural reading of s 173 is that it provides compensation only to a person who owns land at the time that a planning scheme is made or amended and thereby injuriously affects the land, and requires that the injurious affection must arise from the making or amendment of the planning scheme, as opposed to its existence[46]. But, his Honour said, to read s 173 as so imposing an unqualified temporal restriction on the entitlement to compensation would be inconsistent with the terms of s 177(2)(b)[47]:

> "In defining, in s 177(2)(b), the class of persons entitled to make a claim under s 177(1)(b), Parliament has specifically, and unmistakeably,

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45 *Leith v Western Australian Planning Commission* [2014] WASC 499 at [15].

46 *Leith* [2014] WASC 499 at [42].

47 *Leith* [2014] WASC 499 at [44], [52].

chosen to distinguish the position under s 177(1)(a). Under s 177(1)(a), it is those who own at the time of reservation who can claim. Under s 177(1)(b), it is those who own at the time of the development application. The legislature can be taken to know that most owners acquire title by purchase. One of the two alternative triggering events in s 177(1) is the first sale. In those circumstances, if the legislature had intended that:

(1) upon the first of the alternative triggering events in s 177(1)(a) and s 177(1)(b), the single right to compensation is exhaustively activated; and

(2) thus upon the first sale of the land no further claim for compensation could ever be made;

I think it unlikely that the legislature would have chosen to define the class of persons upon whom the right to claim compensation under s 177(1)(b) was conferred by the general words 'the person who was the owner at the date of the application'. In my view, there is no sufficient foundation in s 177, or elsewhere in pt 11 of the PD Act, for treating the general words of s 177(2)(b) as intended to capture only a (relatively small) subset of those within the ambit of the words used, namely only those who acquired title other than by sale. For these reasons, I consider that the breadth and generality of the language of s 177(2)(b) provides strong support for [the respondents'] construction."

61 Beech J concluded[48] that the language of s 177(1) and (2) read together is consistent with the creation of two alternative but otherwise independent rights: the first in favour of the owner of the land at the date it is reserved under a planning scheme, being a right to claim compensation when the land is first sold following reservation; and the second in favour of the owner of the land at the date that a development application is made in respect of the land, being a right to claim compensation when and if the application is refused, or granted on unacceptable conditions.

Proceedings in the Court of Appeal

62 The reasoning of the Court of Appeal was substantially to the same effect and, in the result, Martin CJ, with whom Newnes and Murphy JJA agreed, held

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48 *Leith* [2014] WASC 499 at [50].

that Beech J was correct[49]: on the proper construction of s 177(2)(b) of the PD Act, a person who was not the owner of the land at the time it was reserved for a public purpose, but who acquired the land by purchase after reservation, and who was the owner at the time an application for approval of development on the land was refused, or granted subject to unacceptable conditions, has an entitlement to compensation for injurious affection, provided that compensation arising out of the relevant reservation has not previously been paid.

Constructional choice

63 In *Western Australian Planning Commission v Temwood Holdings Pty Ltd*[50], this Court was divided as to the proper construction of s 36(1), (3) and (3a) of the *Metropolitan Region Town Planning Scheme Act* 1959 (WA) ("the MRTPS Act"). Those provisions were the legislative predecessors of, and in relevant respects identical in their effect to, ss 173 and 177(1) and (2) of the PD Act. Gummow and Hayne JJ held[51] that s 36(1)[52] established but one entitlement to compensation, which inured in favour only of the owner of the land at the date of the making of a relevant planning scheme, and that the effect of s 36(3) (now, in effect, s 177(1) of the PD Act) was to defer the enforceability of that right until the first to occur of the sale of the land or the rejection, or grant subject to conditions unacceptable to the applicant, of an application for development approval made by the owner of the land. Their Honours reasoned that s 36(3a) (now, in effect, s 177(2) of the PD Act) supported that conclusion. They posited that the reference in s 36(3a)(b) (now, in effect, s 177(2)(b) of the PD Act) to the owner of the land at the date of application "accommodates such special situations as the death by the owner before any sale and the making of a development application by those volunteers taking the land by testamentary or intestate succession from that owner"[53], and does not apply to purchasers of the land.

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49 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 492 [9], 515-516 [110] per Martin CJ (Newnes and Murphy JJA agreeing at 516 [112], [113]).

50 (2004) 221 CLR 30; [2004] HCA 63.

51 *Temwood* (2004) 221 CLR 30 at 70 [102]-[103].

52 Section 36(1) incorporated, and provided for the application of, ss 11 and 12 of the *Town Planning and Development Act* 1928 (WA).

53 *Temwood* (2004) 221 CLR 30 at 71 [108].

64 McHugh J held[54], to the contrary, that it was impossible to escape the conclusion that s 36(3a)(b) applied to a subsequent owner, and that there was no reason to confine the class of subsequent owner to those who had obtained ownership otherwise than by purchase of the land. His Honour was of the view[55] that Gummow and Hayne JJ's explanation of s 36(3a)(b), as providing for the special situations of testate and intestate succession, was such an "unlikely construction that it must be rejected". McHugh J concluded[56] that s 36(3a)(a) and (b) created two independent rights and that there was no reason to think that one of those rights should lapse where the other was not pursued.

65 To similar effect, although for different reasons, Callinan J held[57] that, upon its correct construction, s 11(1) of the *Town Planning and Development Act* 1928 (WA) ("the TPD Act") (which was imported by s 36(1) of the MRTPS Act (see now, s 173 of the PD Act)) did not confine the right to compensation to the owner of the land at the time of a reservation. It afforded a right to compensation to "[a]ny person" whose land was injuriously affected by the making of a planning scheme and, in Callinan J's view, that included any person who owned the land at the time of reservation or subsequently, if affected by its reservation. Callinan J did not accept that s 36(3) should be read as confined to the first to occur of the sale of the land or the rejection, or grant subject to unacceptable conditions, of a development application, but considered that s 36(3a) prevented double or multiple payments[58]. Heydon J found[59] it unnecessary to deal with the point.

66 As Martin CJ observed[60] in the Court of Appeal, given the division of opinion in *Temwood*, it is surprising that the Parliament did not make any change to the form of s 36(3a) of the MRTPS Act when the provision was reconstituted as s 177(2) of the PD Act in 2005. Its retention makes it necessary for this Court now to choose between the competing interpretations of s 36(3a) of the MRTPS Act expressed in *Temwood*.

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54 *Temwood* (2004) 221 CLR 30 at 48 [38].

55 *Temwood* (2004) 221 CLR 30 at 48-49 [40].

56 *Temwood* (2004) 221 CLR 30 at 49 [41].

57 *Temwood* (2004) 221 CLR 30 at 89-90 [161].

58 *Temwood* (2004) 221 CLR 30 at 90-91 [164]-[167].

59 *Temwood* (2004) 221 CLR 30 at 95 [180].

60 *Southregal* (2016) 49 WAR 487 at 497 [30].

67 Standing alone, s 177(1) of the PD Act conveys the meaning that there is but one right to compensation, which inures in favour of a person whose land is injuriously affected by its reservation for a public purpose under a planning scheme and which becomes payable to that person only once upon the first to occur of the two events specified in pars (a) and (b) of s 177(1)[61]. As will become apparent, that meaning also accords with the legislative predecessors of s 177(1). By contrast, if the purpose of s 177(1) were to create two independent rights to compensation (and assuming that were consistent with the remaining provisions of Pt 11, Div 2 of the PD Act) – as Beech J and the Court of Appeal held to be the case – it is to be expected that s 177(1) would have been drafted in terms that compensation is not payable:

> (a) under par (a), until the land is first sold following the date of the reservation; and
>
> (b) under par (b), until the responsible authority refuses an application made under the planning scheme for approval of development on the land or grants approval of development on the land subject to conditions that are unacceptable to the applicant.

68 Admittedly, as McHugh J identified in *Temwood*[62] in relation to s 36(3a) of the MRTPS Act, the difficulty with construing a provision like s 177(1) as providing for compensation to be payable only once upon the first to occur of the two events specified in pars (a) and (b) of s 177(1) is the difference between the way in which the payee is described in s 177. Section 177(2)(a) provides that, where compensation becomes payable upon the first sale of the land following its reservation under a planning scheme, it is payable to "the owner of the land at the date of reservation". In contrast, s 177(2)(b) provides that, where compensation becomes payable upon refusal, or grant subject to unacceptable conditions, of an application for development approval, it is payable to "the owner of the land at the date of application". The difference might be thought to suggest that the owner of the land at the date of the application for development approval could be a person other than the owner of the land at the date of the reservation of the land. That would create the possibility of compensation consequent upon the refusal, or grant subject to unacceptable conditions, of an application for development approval not becoming payable until after the first sale of the land

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61 See and compare *Kettering Pty Ltd v Noosa Shire Council* (2004) 78 ALJR 1022 at 1028-1029 [28]-[30]; 207 ALR 1 at 9-10; [2004] HCA 33; *Temwood* (2004) 221 CLR 30 at 70-71 [103]-[108] per Gummow and Hayne JJ.

62 *Temwood* (2004) 221 CLR 30 at 47-48 [35]-[38].

following the reservation. But, as will be seen, the history of the legislation and the extrinsic materials demonstrate that that is not the purpose of the provision.

History of the legislation – s 177 of the PD Act and its predecessors

69 Consideration of a statutory provision's legislative history, and particularly the provision's predecessors, serves to illuminate the meaning most apt to be attributed to it, especially where its meaning appears equivocal[63]. The history of this legislation begins with the TPD Act. So far as is relevant, ss 11 and 12 of the TPD Act provided that:

> "**11** (1) Any person whose land or property is injuriously affected by the making of a town planning scheme shall, if such person makes a claim within the time, if any, limited by the scheme (such time not being less than six months after the date when notice of the approval of the scheme is published in the manner prescribed by the regulations), be entitled to obtain compensation in respect thereof from the responsible authority[.]
>
> ...
>
> (3) Where a town planning scheme is altered or revoked by an order of the Minister under this Act, any person who has incurred expenditure for the purpose of complying with the scheme shall be entitled to compensation from the responsible authority, in so far as any such expenditure is rendered abortive by reason of the alteration or revocation of the scheme.
>
> ...
>
> **12** (1) Where land or property is alleged to be injuriously affected by reason of any provisions contained in a town planning scheme, no compensation shall be payable in respect thereof if or so far as the provisions are also contained in any public general or local Act, or in any order having the force of an Act of Parliament, in operation in the area, or are such as would have been enforceable without compensation, if they had been contained in by-laws lawfully made by the local authority."

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63 *Beckwith v The Queen* (1976) 135 CLR 569 at 578-583 per Mason J; [1976] HCA 55; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 306 per Gibbs CJ, 310-311 per Stephen J, 319-323 per Mason and Wilson JJ, 324, 334 per Aickin J; [1981] HCA 26. Cf Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 88-89 [3.2]. See also *Interpretation Act* 1984 (WA), s 19(1).

70 Plainly enough, s 11(1) of the TPD Act created but one right to compensation – a right which inured solely in favour of the owner of the land at the time of the making of the town planning scheme – in respect of injurious affection caused to land by the making of a town planning scheme. That was necessarily implicit in the way in which the provision framed injurious affection as an event coincidental with the making of a town planning scheme the occurrence of which immediately gave rise to a right to compensation in the person "whose land" was affected by the event of injurious affection. As is also apparent, the right to compensation so created was liable to be defeated unless the owner of the land at the time of the making of the town planning scheme made his or her claim for compensation within the time limited by the scheme.

71 The next step was the enactment in 1959 of the MRTPS Act, which established the Metropolitan Region Scheme consequent upon a report commissioned by the Western Australian Government published in 1955 and entitled *Plan for the Metropolitan Region: Perth and Fremantle: Western Australia*[64]. Section 36 of the MRTPS Act in effect imported ss 11 and 12 of the TPD Act and applied them to the Metropolitan Region Scheme, in modified form, as follows[65]:

> "(1) For the purposes of applying the provisions of sections eleven and twelve of the [TPD] Act to the provisions of the [Metropolitan Region] Scheme, the former provisions shall be read and construed as if –
>
> (a) the [Metropolitan Region Planning] Authority were the 'responsible authority or local authority' wherever referred to in the sections; and
>
> (b) the passage, 'varied, amplified or revoked by the Authority' were substituted for the passage, 'altered or revoked by an order of the Minister under this Act' in subsection (3) of section eleven; and
>
> (c) those provisions included subsections (3), (4), (5) and (6) of this section.
>
> ...

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64 Stephenson and Hepburn, *Plan for the Metropolitan Region: Perth and Fremantle: Western Australia*, (1955).

65 As it appeared immediately prior to its amendment in 1968, discussed below at [74]-[76].

(3) Subject to subsection (4) of this section, where under the Scheme any land has been reserved for a public purpose, no compensation is payable by the responsible authority for injurious affection to that land alleged to be due to or arising out of such reservation until –

(a) the land is first sold following the date of the reservation; or

(b) the responsible authority refuses an application made under the Scheme for permission to carry out development on the land or grants permission to carry out development on the land subject to conditions that are unacceptable to the applicant.

(4) Before compensation is payable under subsection (3) of this section –

(a) where the land is sold, the person lawfully appointed to determine the amount of the compensation shall be satisfied –

(i) that the owner of the land has sold the land at a lesser price than he might reasonably have expected to receive had there been no reservation of the land under the Scheme;

(ii) that the owner before selling the land gave notice in writing to the responsible authority of his intention to sell the land; and

(iii) that the owner sold the land in good faith and took reasonable steps to obtain a fair and reasonable price for the land; or

(b) where the responsible authority refuses an application made under the Scheme for permission to carry out development on the land or grants permission to carry out development on the land subject to conditions that are unacceptable to the applicant, the person lawfully appointed to determine the amount of compensation shall be satisfied that the application was made in good faith.

(5) A claim for compensation under subsection (3) of this section shall be made at any time within six months after the land is sold or the application for permission to carry out development on the land is refused or the permission is granted subject to conditions that are unacceptable to the applicant.

(6)(a) Subject to this section, the compensation payable for injurious affection due to or arising out of the land being reserved under the scheme for a public purpose, where no part of the land is purchased or acquired by the Authority, shall not exceed the difference between –

(i) the value of the land as so affected by the existence of such reservation; and

(ii) the value of the land as not so affected.

(b) The value referred to in subparagraphs (i) and (ii) of paragraph (a) of this subsection shall be assessed as at the date the land is sold as referred to in paragraph (a) of subsection (3) of this section or the date on which the application for permission to carry out development on the land is refused or the permission is granted subject to conditions that are unacceptable to the applicant."

72 In the second reading speech relating to the introduction in 1962 of sub-ss (3)-(5) into s 36 of the MRTPS Act, the Minister explained that the relevant statutory body lacked sufficient immediate resources to compensate all owners whose land might be injuriously affected by the reservation of the large amounts of land which were to be reserved under the Metropolitan Region Scheme. In order to overcome that difficulty, the purpose of s 36(3) was to defer the need to pay compensation until the injurious affection resulting from the reservation of the land came home to the owner upon sale of the land or upon rejection, or grant subject to unacceptable conditions, of an application for development approval[66]:

"It can properly be argued that reservation under the scheme depreciates the value of land. However, the depreciation is, in many cases, hypothetical and becomes real only when the land is sold at a price which reflects this depreciation, or when development is frustrated by a refusal of consent under the scheme. The amendment proposes that compensation for injurious affection be limited to two circumstances: where a sale is effected at a depressed value attributable to reservation under the scheme, or where consent to develop is refused on the ground of reservation under the scheme."

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66 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 September 1962 at 820.

73 Pausing here, the following points may be noted:

(1) By so importing the provisions of s 11(1) of the TPD Act, s 36(1) of the MRTPS Act created a right to compensation − which inured solely in favour of the owner of the land at the time of the making of the relevant town planning scheme − for the injurious affection caused to the owner's land due to or arising out of the making of the scheme.

(2) By s 36(3) of the MRTPS Act, the enforceability of the right to compensation so created by s 36(1) was deferred so as not to become "payable" until and unless the land were first sold or the relevant statutory body refused an application for development approval or granted the application on conditions which were unacceptable to the applicant.

(3) Because the right to compensation created by s 36(1) inured solely in favour of the owner at the time of the making of the relevant town planning scheme, it was necessarily implicit in s 36(3) that the deferral of the enforceability of that right was a deferral until the first to occur of the first sale of the land following its reservation under the scheme, or a refusal, or grant subject to unacceptable conditions, of an application for development approval.

(4) Perforce of s 36(4)(a)(ii), in the case of the sale of the land, compensation was not "payable" unless, before selling the land, the owner gave notice in writing to the responsible authority of the owner's intention to sell the land.

(5) Perforce of s 36(6)(b):

(a) in the case of a claim for compensation due to or arising out of the sale of the land, compensation was to be assessed as at the date of sale; and

(b) in the case of a claim for compensation arising out of an application for approval to carry out development on the land being refused, or being granted subject to conditions unacceptable to the applicant, compensation was to be assessed as at the date of the refusal, or grant subject to unacceptable conditions, of the application.

(6) In either case, compensation was not payable unless the owner of the land at the time it was reserved made his or her claim for compensation within six months after the first sale of the land, or after the refusal, or grant subject to unacceptable conditions, of an application for development approval, as required by s 36(5).

(7) Since the owner of the land at the date of the reservation under the scheme was the only person capable of making the first sale of the land following the reservation, he or she was referred to in s 36(4)(a)(i), in relation to a claim for compensation consequent upon that sale, as "the owner of the land".

(8) By contrast, since it was possible for a person other than the owner of the land at the date of reservation to make an application for approval to develop the land before the first sale of the land following reservation, s 36(3)(b), (4)(b) and (6)(b) referred, in relation to a claim for compensation consequent upon refusal, or grant subject to unacceptable conditions, of such an application, to conditions that were unacceptable to "the applicant", rather than unacceptable to the owner.

74 In 1968, the MRTPS Act was amended by the *Metropolitan Region Town Planning Scheme Act Amendment Act* 1968 (WA) ("the 1968 Amendment Act") by, inter alia, the insertion of a new s 36(3a), as follows[67]:

> "(3a) Compensation for injurious affection to any land is payable only once under paragraph (a) of subsection (3) of this section, unless after the payment of that compensation further injurious affection to the land results thereafter from an alteration of the existing reservation on the land or the imposition of another reservation thereon."

75 As may be apparent from what has already been said about the history of the legislation, the effect of that amendment was implicit in s 36(3) without the amendment. But, as is clear from the second reading speech concerning the introduction of sub-s (3a), it emerged that there was some doubt about the matter which needed to be resolved[68]:

> "[The amendment] clarifies a provision of subsection (3) of section 36. The wording of the present section leaves some doubt as to the intent of the provision, which indicates that compensation for injurious affection does not become payable – in the case of land reserved under the provisions of the metropolitan region scheme – until the land is first sold.
>
> The provision for the payment of compensation in such cases was designed to protect the owner of land at the time the scheme – or an

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67 *Metropolitan Region Town Planning Scheme Act Amendment Act* 1968 (WA), s 3(d).

68 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 September 1968 at 754.

> amendment – included land in a reservation so that when he later sells the property he is compensated by the authority if he is unable to realise the full market value. Subsequent purchasers are aware of the scheme provisions at the time of purchase ... and would not be at the same disadvantage as the original owner."

76 The absence from the second reading speech of any mention of doubt about the identity of the intended payee of compensation consequent upon refusal, or grant subject to unacceptable conditions, of an application for development approval implies that, at that stage, it was not thought that there was any doubt that compensation under s 36(3)(b) was payable only to the person who was the owner of the land at the date of its reservation under the relevant planning scheme.

77 In 1969, s 36(3a) of the MRTPS Act was amended by the *Metropolitan Region Town Planning Scheme Act Amendment Act* 1969 (WA) ("the 1969 Amendment Act") so as to introduce the following words into the provision (as indicated by italics)[69]:

> "Compensation for injurious affection to any land is payable only once under paragraph (a) of subsection (3) of this section *and is payable to the person who was the owner of the land at the date of reservation referred to in that paragraph*, unless after the payment of that compensation further injurious affection to the land results thereafter from an alteration of the existing reservation on the land or the imposition of another reservation thereon."

78 Once again, it may be appreciated from what has already been said that the effect of this amendment was implicit in s 36(3) prior to the further amendment in 1969, especially following the introduction of s 36(3a) in 1968. But, as was explained in the second reading speech pertaining to the 1969 Amendment Act, some doubt had arisen since the last occasion[70]:

> "Last year I introduced an amendment to the Metropolitan Region Town Planning Scheme Act which, among other things, attempted to define more clearly the meaning of 'first sold' as it relates to the payment of compensation for injurious affection.

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69 See *Metropolitan Region Town Planning Scheme Act Amendment Act* 1969 (WA), s 2(b).

70 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 November 1969 at 2285.

> Under section 36 of the Metropolitan Region Town Planning Scheme Act the authority is responsible for the payment of compensation for injurious affection of land reserved under the provisions of the metropolitan region scheme.
>
> Payment of this compensation is deferred, however, until either, firstly, the land is first sold after it has been reserved or, secondly, an application to develop it is refused by the authority or, alternatively, approved but with conditions attached which are unacceptable to the owner.
>
> *The compensation provisions are intended to protect the interest of the owner of land at the time it is reserved and are not intended to be transferable. It devolves upon subsequent owners to acquaint themselves of the details affecting the land before purchasing it.*
>
> The Crown Law Department is of the opinion that the provisions of the 1968 amendment are capable of a much wider interpretation than the one intended. It appears that as the Act now stands if a seller who is unaware of the provisions of the Act disposes of his property at less than the unaffected market value and fails to claim compensation for injurious affection, then this right passes to the new owner. The original owner is thus deprived of his right to be compensated for loss of value through the reservation. *The purpose of this amendment is to ensure that compensation for injurious affection is received only by the person who owned the land at the time of the reservation*." (emphasis added)

79 Pausing at that point, it is to be observed that, despite the stated doubts about the meaning of s 36(3a) and, consequently, about the meaning of s 36(3)(a), it was not then suggested that there was any doubt about the meaning of s 36(3)(b). Noting the emphasised sections of the second reading speech last referred to, it appears to have been thought clear that compensation was payable under s 36(3)(b) only in relation to a refusal, or grant subject to unacceptable conditions, of a development application lodged before the date of the first sale of the land following reservation and, in that event, only to the person who was the owner of the land at the date of reservation.

80 In 1986, s 36 of the MRTPS Act was further amended by the *Metropolitan Region Town Planning Scheme Amendment Act* 1986 (WA) ("the 1986 Amendment Act") as follows[71]:

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71 *Metropolitan Region Town Planning Scheme Amendment Act* 1986 (WA), s 9.

"Section 36 of the [MRTPS] Act is amended by repealing subsection (3a) and substituting the following subsection –

'(3a) Compensation for injurious affection to any land is payable only once under subsection (3) and is so payable –

(a) under paragraph (a) of that subsection to the person who was the owner of the land at the date of reservation; or

(b) under paragraph (b) of that subsection to the person who was the owner of the land at the date of application,

referred to in that paragraph, unless after the payment of that compensation further injurious affection to the land results from –

(c) an alteration of the existing reservation thereof; or

(d) the imposition of another reservation thereon.'"

81 As was earlier noticed[72], standing alone, s 36(3a) as so amended could perhaps be read as signifying that the person referred to in s 36(3a)(a) as "the person who was the owner of the land at the date of reservation" need not be the same person as the person referred to in s 36(3a)(b) as "the person who was the owner of the land at the date of application". But if that were so, it would have meant that, as a result of the 1986 amendment to s 36(3a), the effect of s 36(3) also had been changed with effect that, thenceforth, if the owner of the land at the date of reservation did not claim compensation under s 36(3)(a) or (b), a subsequent purchaser of the land could claim compensation under s 36(3)(b). Read against the background of the legislative history that has been referred to, that presents as most unlikely.

82 If it had been so, it would have meant that the amendment had worked a fundamental change to the central concept of s 36(1) (that the right to compensation for which it provides should inure solely to the benefit of a person who was the owner of land at the date of the making of a town planning scheme) and further a fundamental change to the central concept of s 36(3) (that the enforceability of the right to compensation for which s 36(1) provides should be deferred until the first to occur of the first sale of the land following its reservation under a scheme or the refusal, or grant subject to unacceptable conditions, of an application for development approval). There is, however,

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72 See [68] above.

nothing otherwise about the 1986 Amendment Act which suggests that its purpose was to make fundamental changes to the MRTPS Act and, so far as may be relevant, the second reading speech relating to the 1986 Amendment Act expressly states to the contrary[73]:

> "The matters provided for in this Bill *do not constitute major changes* to the present metropolitan region scheme legislation but they are part of the Government's comprehensive package of initiatives for speeding up and improving the statutory planning process. ...
>
> [I]t is proposed to amend the Act in relation to the payment of compensation for land which has been reserved under the metropolitan region scheme so that it is clear that compensation for injurious affection is paid only once to the person who is the owner at the date of reservation when the land is first sold following the date of reservation; or the person who is the owner at the time when the responsible authority refuses an application for development on the land or grants permission subject to conditions which are unacceptable to the owner. At present there is uncertainty about claims being able to be paid more than once in respect of the same portion of land." (emphasis added)

83 Admittedly, it is not entirely clear what other purpose the drafter of the 1986 Amendment Act had in mind in drawing the distinction between "the person who was the owner of the land at the date of reservation" in s 36(3a)(a) and "the person who was the owner of the land at the date of application" in s 36(3a)(b). But, if the object of the exercise had been to create two independent rights to compensation, to amend s 36(3a) in the way that was done would have been a very odd way of going about it. For, as has been emphasised, prior to 1986, the only right to compensation was the right to compensation created by s 36(1) (read in conjunction with s 11 of the TPD Act), which inured solely in favour of the owner of the land at the time of the making of the relevant planning scheme. Thus, it is clear that until 1986 the sole function of s 36(3) (read in conjunction with s 36(3a)) was to defer the enforceability of the right created by s 36(1) until the first to occur following the reservation of the land under a scheme of the sale of the land or the rejection, or grant subject to unacceptable conditions, of a development application. Accordingly, if the purpose of the 1986 amendment to s 36(3a) had been to create a new right in favour of a subsequent purchaser – that is, a right in favour of a subsequent purchaser to compensation consequent upon an unsuccessful application for development approval lodged by the subsequent purchaser after the first sale of the land – it is

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73 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 2 July 1986 at 1199.

only to be expected that the 1986 Amendment Act would have been directed to restructuring the right-creating provisions of s 36(1), rather than amending the deferment-of-enforceability provisions of s 36(3a) while making no change to s 36(1).

84 If, however, the purpose of the 1986 amendment were merely to emphasise that the enforceability of the right to compensation created by s 36(1) was deferred until the first to occur of a sale of the land and a rejection, or grant subject to unacceptable conditions, of a development application – as was stated to be the case in the second reading speech – it makes evident sense that the amendment was confined to the deferment-of-enforceability provisions of s 36(3a) and made no change to the right-creating provisions of s 36(1).

85 No doubt the purpose of so emphasising the deferment of the right to compensation could have been achieved without drawing the distinction in s 36(3a) between the "owner of the land at the date of reservation" and the "owner of the land at the date of application". But it will be recalled[74] that, even as it stood prior to the 1968 Amendment Act, and certainly at each point afterwards until the 1986 Amendment Act, s 36 drew a comparable distinction. Since the owner of the land at the date of reservation was understood to be the only person capable of making the first sale of the land following reservation, he or she was referred to in s 36(4)(a)(i) (in relation to a claim for compensation consequent upon the first sale of the land following the reservation) simply as "the owner of the land". By contrast, since it was possible for a person other than the owner of the land at the date of reservation to make an application for development approval before the first sale of the land following reservation, s 36(3)(b), (4)(b) and (6)(b) referred to "the applicant", rather than the owner, in relation to a claim for compensation consequent upon a refusal, or grant subject to unacceptable conditions, of such an application. The distinction drawn in s 36(3a) as amended by the 1986 Amendment Act – between the owner of the land at the date of reservation and the owner of the land at the date of application – is consistent with that approach and more generally with the history of the legislation.

86 More particularly, when s 36(3a) was amended in 1969, the fact that compensation consequent upon the first sale of the land following reservation was payable only to the owner of the land at the date of reservation was emphasised by an express statement to that effect. The fact that a corresponding amendment was not made in relation to compensation arising from an anterior rejection, or grant subject to unacceptable conditions, of an application for development approval implied that, at least at that stage, it was not considered to

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74 See [73] above.

be in doubt that compensation of the latter variety was payable only to the owner of the land at the date of reservation. As a result, when in 1986 it was decided that an amendment was required to make that position clearer (as was stated to be the case in the second reading speech pertaining to the 1986 Amendment Act) it appears most likely that the reason the drafter referred in s 36(3a)(b) to "the person who was the owner of the land at the date of application" was to recognise that a person other than the owner of the land at the date of reservation was capable of making a development application in relation to the land before the first sale of the land, and, therefore, to make clear that, in the event of such an application being made, compensation would be payable to the owner of the land at the date of application, rather than to the applicant.

87 As counsel for the appellant emphasised in argument, it had been commonplace since at least 1963 for an owner of land to allow a prospective purchaser of the land to apply for development approval in order to assess the development potential of the land. If such an application were successful, the sale price could then be structured accordingly and, in that event, there would be no occasion for compensation. If the application were unsuccessful, the owner might then claim compensation under s 36(3)(b) without proceeding to sale. Hence it appears that the purpose of s 36(3a)(b) was to stress that the compensation would be payable to the "owner of the land at the date of application" rather than to the "applicant".

88 A further and related reason to draw such a distinction between the owner at the date of reservation and the owner at the date of application was that the expression "owner of the land at the date of application" aligned with the circumstance that, under s 36(6)(b), the amount of compensation payable pursuant to s 36(3)(b) was to be assessed as at the date on which the application was refused, or granted subject to conditions unacceptable to the applicant. Yet another reason might have been that, because s 36(3a)(a) provided that compensation arising upon the first sale of the land following reservation was payable to the owner of the land at the date of reservation (in contradistinction to the owner of the land at the date of sale), and by that means excluded the possibility of compensation being payable to the purchaser, consistency of approach was thought to require that s 36(3a)(b) should provide for compensation payable to the owner of the land at the date of application (in contradistinction to the owner of the land as at the date of rejection, or grant subject to unacceptable conditions, of the application), and by that means to exclude the possibility of compensation being payable to a purchaser under a contract of sale made between the date of application and the date of refusal, or grant subject to unacceptable conditions, of the application.

89 As was earlier observed, in *Temwood* Gummow and Hayne JJ posited that the reason for the distinction between "owner" in s 36(3a)(a) and (b) was to make specific provision for the testate and intestate successors of the owner of the land

at the date of reservation[75]. McHugh J regarded that idea as untenable[76]; and, with respect, it is difficult to defend. The improbability of the purpose of the distinction being to provide for testate and intestate succession is illustrated by the circumstance recognised by Beech J and the Court of Appeal[77] that, although the testate and intestate successors of the owner of the land at the date of reservation would be able to claim compensation in the event of the refusal, or grant subject to unacceptable conditions, of a development application, they would be denied the right to claim compensation upon the first sale of the land. There is no logic in that. Alternatively, if it is to be assumed that "the person who was the owner of the land at the date of reservation" includes the testate and intestate successors in title of the person who was the legal owner of the land at the date of reservation, the distinction would be pointless.

90 It remains, however, that, because there were other logical and more compelling reasons for the drafter of the 1986 Amendment Act to draw a distinction between the owner at the date of reservation and the owner at the date of application, there is good reason to eschew a construction of the amendment to s 36(3a) that would have brought about a fundamental change in the structure of the compensation provisions of the MRTPS Act. Viewed against the history of the legislation, it is very much more probable, and therefore the preferable construction, that the amendment proceeded from the assumption implicit in the MRTPS Act from its inception that the right to compensation identified in s 36(3)(b) could only ever arise in the event of an unsuccessful development application lodged before the first sale of the land following reservation and, in that event, compensation would be payable to the owner of the land, rather than the applicant for development approval.

91 Is that sufficient reason to prefer the meaning of s 36(3a) identified by Gummow and Hayne JJ to the meaning identified by McHugh J? Counsel for the respondents submitted that to construe the legislation in the manner identified by Gummow and Hayne JJ would require reading in a large number of words or reading the terms of the legislation otherwise than according to their natural and ordinary meaning. That is not so. It is true that, according to orthodox statutory interpretation principles, the difference between the expressions "owner of the land at the date of reservation" and "owner of the land at the date of application" prima facie suggests that each expression has a different meaning. But, given that the right to compensation created by s 36(1) was the right to compensation

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75 *Temwood* (2004) 221 CLR 30 at 71 [108].

76 *Temwood* (2004) 221 CLR 30 at 48-49 [40].

77 *Leith* [2014] WASC 499 at [51]-[52]; *Southregal* (2016) 49 WAR 487 at 510-511 [89]-[91].

under s 11(1) of the TPD Act (as modified by s 36(1) and following provisions), which inured solely for the benefit of the owner of land at the time the relevant planning scheme was made, it logically accords with the scheme of the legislation and is not repugnant to the natural and ordinary meaning of the text to construe the difference between the two expressions as denoting no more than the two different circumstances in which compensation was payable to the person who was the owner of the land at the time it was reserved for a public purpose under a planning scheme: either the first sale of the land following reservation (hence, "the owner of the land at the date of reservation"); or, if an application for development approval were lodged before the first sale of the land following reservation, rejection, or grant subject to unacceptable conditions, of that application (hence, "the owner of the land at the date of application").

92 Counsel for the respondents further submitted that to construe the legislation in the manner identified by Gummow and Hayne JJ would lead to the irrational consequence that, if a person who was an owner of land at the date of reservation entered into a contract for sale of the land which remained uncompleted at the date of reservation, the owner of the land at the date of reservation would receive the benefit of having sold the land at a pre-reservation price, and yet would be entitled to claim compensation, whereas the purchaser, who agreed to pay a pre-reservation price, would be precluded from claiming compensation. By contrast, it was said that, if the provisions were construed as creating two independent rights to compensation in the manner identified by McHugh J, it would conduce to the more just and, therefore, more likely intended result that the purchaser would be entitled to claim compensation. But that submission is not persuasive either.

93 Assuming the facts were as suggested, the vendor would have been the owner of the land at the date of reservation and the only person entitled to claim compensation under s 36. Although a purchaser under an uncompleted contract of sale of land has an equitable interest in the land, or at least acquires an equitable interest in the land once the contract becomes enforceable by specific performance[78], the way in which s 36 referred to *the* owner and provided for payment of compensation only once signifies that what was meant by "the owner of the land" was the legal owner of the land[79]. But it is unlikely that an owner of land would have been able to sell the land at a pre-reservation price so shortly

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78 *Chang v Registrar of Titles* (1976) 137 CLR 177 at 184-185 per Mason J, 189-190 per Jacobs J; [1976] HCA 1.

79 *Bond Corporation Pty Ltd v Western Australian Planning Commission* (2000) 110 LGERA 179 at 188 [37] per Ipp J (Wallwork and Owen JJ agreeing at 191 [58], [59]).

before the land was to be reserved that the contract of sale would remain uncompleted at the date of reservation. (The notice provisions of the MRTPS Act meant that the possibility of reservation would have been announced long before the date of reservation[80].) And, even if that did occur, the amount of compensation payable to the owner under s 36(3)(a) would have been nil. Section 36(6) capped the amount of compensation payable at the difference between the values of the land as unaffected by the reservation and the land as so affected, and, *ex hypothesi*, the owner would have received under the contract the value of the land as unaffected. Certainly, in those circumstances, the purchaser would have had no right to compensation. But, as was submitted in the course of argument, the only circumstance in which a purchaser would have need of compensation would be where the purchaser had failed to undertake the kinds of inquiries which the Parliament considered ought ordinarily to be undertaken and if undertaken would have revealed that the land was likely to be reserved[81]. As was noticed in the second reading speech pertaining to the 1968 Amendment Act, purchasers are aware of the scheme provisions at the time of purchase and are not at the same disadvantage as the original owner.

94 When the PD Act was enacted in 2005, it had as one of its objects consolidation of the MRTPS Act and the TPD Act[82]. Consequently, as has been seen, Div 2 of Pt 11 of the PD Act (ss 172-183) appears in substantially identical terms to the comparable provisions of the MRTPS Act and the TPD Act. It is accepted that *mutatis mutandis* the provisions of the PD Act are to be construed as having the same effect as the predecessor provisions[83]. It follows that s 177(2)(b) is to be construed as having the same operation as s 36(3a)(b) of the MRTPS Act.

Conclusion

95 For these reasons, we consider that the appeals should be allowed with costs and agree with the orders proposed by Kiefel and Bell JJ.

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80 *Metropolitan Region Town Planning Scheme Act* 1959 (WA), ss 33(2)(b), (c), (e), (h), (i), 33A(2)(b), (c) and (8)(a). See also *Planning and Development Act* 2005 (WA), ss 43, 54, 58.

81 See [78] above.

82 *Planning and Development Act*, s 3(1)(a).

83 *Planning and Development Act*, s 3(2).

96 KEANE J. The Peel Region Scheme ("the PRS") came into effect in Western Australia on 20 March 2003. The PRS reserved certain land within the scheme area for public purposes, as regional open space. After the PRS came into effect, the respondents in both appeals became the owners of parcels of land within the PRS area. Southregal Pty Ltd and Mr Wee entered into a contract to purchase their land before the PRS came into force, but settlement of that contract did not occur. They entered into a new contract, which subsequently settled, after the PRS came into force. Mr Leith made, and completed, a contract to buy his land after the PRS came into force.

97 The respondents applied to the appellant in each appeal ("the Planning Commission") for development approval in respect of their land. Their applications were refused by the Planning Commission and the respondents claimed compensation for injurious affection.

98 It was common ground that, although the PRS came into effect before the enactment of the *Planning and Development Act* 2005 (WA) ("the Act"), by virtue of the *Planning and Development (Consequential and Transitional Provisions) Act* 2005 (WA) the respondents' claims for compensation for injurious affection were to be determined under Pt 11 of the Act[84].

99 The claimants contended that compensation was payable to them under s 177(2)(b) of the Act, as the persons who were the owners of the land at the time that the applications for development approval were refused. The Planning Commission declined each claim for compensation on the basis that none of the claimants was a "person whose land is injuriously affected by the making ... of a planning scheme" within s 173(1) of the Act, in that none of the claimants was the owner of land affected by the PRS at the time it came into force.

100 Pursuant to s 176 of the Act, the claimants commenced arbitration proceedings in respect of their claims for compensation. By consent of the parties, special cases were stated for the determination of a question of law by the Supreme Court of Western Australia. The question, as reformulated by the primary judge, was:

> "Whether a person to whom s 177(2)(b) of [the Act] would otherwise apply can be entitled to compensation pursuant to ss 173 and 177(1)(b) of [the Act], in circumstances where the land has been sold following the

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84 *Leith v Western Australian Planning Commission* [2014] WASC 499 at [7]-[9]. It is convenient henceforth to refer to the respondents in both appeals compendiously as "the claimants".

> date of the reservation, and where no compensation has previously been paid under s 177(1) of [the Act]."[85]

101 The question was resolved in the claimants' favour, by both the primary judge (Beech J)[86] and the Court of Appeal (Martin CJ, Newnes and Murphy JJA)[87].

102 It may be noted that the final formulation of the question reflected the Planning Commission's insistence that it was irrelevant that there had not been a claim for compensation by the person who was the owner of each parcel of land at the time the PRS came into effect[88]. Given the position taken by the Planning Commission, and the absence of any suggestion in the record that the owners of the claimants' parcels of land at the time the PRS came into effect have made a claim for compensation under the Act, one may fairly approach the question posed for determination on the basis that the persons who sold the land to the claimants made no claim for compensation under the Act.

103 For the sake of completeness, it may also be noted that an issue between the parties as to whether the interest of two of the claimants, Southregal and Mr Wee, in the land under their contract at the time of the reservation was sufficient to entitle them to claim compensation was hived off for separate determination after the resolution of the present appeals[89].

104 The focus of attention in this Court, as in the Courts below, was upon the interrelation between ss 173(1) and 177 of the Act. It is convenient to turn now to summarise those provisions, and the context in which they appear in Div 2 of Pt 11 of the Act.

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85 *Leith v Western Australian Planning Commission* [2014] WASC 499 at [15].

86 *Leith v Western Australian Planning Commission* [2014] WASC 499.

87 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487.

88 *Leith v Western Australian Planning Commission* [2014] WASC 499 at [12]-[15].

89 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 489 [4].

The Act

105 Section 171(1) of the Act provides that:

> "If compensation has been paid under a provision of this Part in relation to a matter or thing no further compensation is payable under any other provision of this Act as a result of the same matter or thing."

106 Section 173 of the Act relevantly provides:

> "(1) Subject to this Part any person whose land is injuriously affected by the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority.
>
> (2) Despite subsection (1) a person is not entitled to obtain compensation under this section on account of any building erected, or any contract made, or other thing done with respect to land included in a planning scheme after the date of the approval of a planning scheme or amendment …
>
> (3) A responsible authority may make agreements with owners for the development of their land during the time that the planning scheme or amendment is being prepared."

107 By virtue of s 4(1) of the Act, the Planning Commission is a "responsible authority" for the purposes of s 173, and the term "land" is defined to include "any interest in land".

108 The Planning Commission contended that s 173 creates an entitlement to compensation for injurious affection at the moment in time when the planning scheme comes into force, and that this entitlement arises exclusively in favour of the then owner of the land, so that a person who purchases affected land has no entitlement to compensation under the Act.

109 It is convenient to note here that s 173(3) speaks expressly of "owners" during the time before the planning scheme actually comes into force. This express reference to owners during that period of time may be contrasted with the more expansive reference in s 173(1) to "any person whose land is injuriously affected by the making or amendment of a planning scheme" unconfined by an express temporal association with respect to the coming into force of the planning scheme.

110 Section 174 explains what s 173 means when it speaks of land being injuriously affected by the making or amendment of a planning scheme. It relevantly provides:

"(1) ... [L]and is injuriously affected by reason of the making or amendment of a planning scheme if, and only if –

(a) that land is reserved (whether before or after the coming into operation of this section) under the planning scheme for a public purpose;

(b) the scheme permits development on that land for no purpose other than a public purpose; or

(c) the scheme prohibits wholly or partially –

(i) the continuance of any non-conforming use of that land; or

(ii) the erection, alteration or extension on the land of any building in connection with or in furtherance of, any non-conforming use of the land, which, but for that prohibition, would not have been an unlawful erection, alteration or extension under the laws of the State or the local laws of the local government within whose district the land is situated."

111 The injurious affection of relevance in this case is described in s 174(1)(a). It should be noted that the reservation in question did not involve restrictions on development or use of the kind referred to in s 174(1)(b) or (c). It may also be noted that s 174 contains an express provision as to its temporal operation.

112 Section 176(2) provides for the determination by arbitration of "[a]ny question as to the amount and manner of payment … of the sum which is to be paid as compensation under [Div 2]".

113 Section 177 provides:

"(1) Subject to subsection (3), when under a planning scheme any land has been reserved for a public purpose, no compensation is payable by the responsible authority for injurious affection to that land alleged to be due to or arising out of such reservation until –

(a) the land is first sold following the date of the reservation; or

(b) the responsible authority –

(i) refuses an application made under the planning scheme for approval of development on the land; or

(ii) grants approval of development on the land subject to conditions that are unacceptable to the applicant.

(2) Compensation for injurious affection to any land is payable only once under subsection (1) and is so payable –

(a) under subsection (1)(a) to the person who was the owner of the land at the date of reservation referred to in subsection (1)(a); or

(b) under subsection (1)(b) to the person who was the owner of the land at the date of application referred to in subsection (1)(b),

unless after the payment of that compensation further injurious affection to the land results from –

(c) an alteration of the existing reservation of the land; or

(d) the imposition of another reservation of the land.

(3) Before compensation is payable under subsection (1) –

(a) when the land is sold, the person lawfully appointed under section 176 to determine the amount of the compensation is to be satisfied that –

(i) the owner of the land has sold the land at a lesser price than the owner might reasonably have expected to receive had there been no reservation of the land under the planning scheme;

(ii) the owner before selling the land gave written notice to the responsible authority of the owner's intention to sell the land; and

(iii) the owner sold the land in good faith and took reasonable steps to obtain a fair and reasonable price for the land;

or

(b) when the responsible authority refuses an application made under the planning scheme for approval of development on the land or grants approval of development on the land subject to conditions that are unacceptable to the applicant, the person lawfully appointed under section 176 to

determine the amount of the compensation is to be satisfied that the application was made in good faith."

114 Section 177(2)(b) is the provision which is the nub of the Planning Commission's difficulty in this case. It expressly provides that compensation is payable to the person who is the owner of affected land at a time after the reservation has come into effect. The provision thus applies literally to persons such as the claimants. To uphold the Planning Commission's argument would be to deny s 177(2)(b) its literal operation.

115 The Planning Commission suggested that the purpose of s 177(2)(b) is to ensure that it is the owner of the land, rather than the applicant for development approval, to whom compensation is payable. That may well be so, but that suggestion does not explain how the language used in s 177(2)(b) is consistent with the Planning Commission's contention that the owner of the land referred to in s 177(2)(b) is the same person as the owner of the land referred to in s 177(2)(a).

116 Section 178 provides for time limits within which a claim for compensation may be made. It provides:

"(1) A claim for compensation for injurious affection to land by the making or amendment of a planning scheme is to be made –

(a) in the case of a claim in respect of injurious affection referred to in section 174(1)(a) or (b), at any time within 6 months after –

(i) the land is sold;

(ii) the application for approval of development on the land is refused; or

(iii) the approval is granted subject to conditions that are unacceptable to the applicant;

or

(b) in the case of a claim in respect of injurious affection referred to in section 174(1)(c), within the time, if any, limited by the planning scheme.

(2) The time limited by a planning scheme under subsection (1)(b) is to be not less than 6 months after the date when notice of the approval of the scheme is published in the manner prescribed by the regulations."

117 Section 179 sets limits on the amount of compensation which may be paid for injurious affection arising out of the reservation of land for public purposes. Section 179(1) relevantly provides that:

> "the compensation payable for injurious affection due to or arising out of the land being reserved under a planning scheme … is not to exceed the difference between –
>
> (a) the value of the land as so affected by the existence of such reservation; and
>
> (b) the value of the land as not so affected."

118 Section 179(2) provides that these two values are to be assessed as at the date on which:

> "(a) the land is sold as referred to in section 178(1)(a);
>
> (b) the application for approval of development on the land is refused; or
>
> (c) the approval is granted subject to conditions that are unacceptable to the applicant."

119 Section 181 of the Act should also be noted. It provides that a responsible authority may recover compensation from an owner of land to whom compensation for injurious affection to land has been paid if a reservation is revoked or reduced. It entitles a responsible authority to recover a refund, determined as a proportion of the value of the land as at the date on which the refund becomes payable. It is relevant to note that the section operates where compensation for injurious affection to land has been "paid to *an* owner of land in the circumstances set out in section 177" (emphasis added). In this way, s 181 acknowledges that compensation under s 177(2) is payable to an owner of affected land who may not have been *the* owner of the land at the date a reservation for public purposes came into effect.

The primary judge

120 The primary judge accepted that the "natural" meaning of s 173(1), considered in isolation, is that only a person who owned the land at the date it became injuriously affected is eligible for compensation[90]. However, his Honour

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90 *Leith v Western Australian Planning Commission* [2014] WASC 499 at [42]-[43].

considered that to read s 173 as imposing an unqualified temporal restriction on the entitlement to compensation would not be consistent with s 177(2)(b)[91].

121 The primary judge considered that s 177(2)(b) expressly contemplates that compensation payable under s 177(1)(b) is not restricted to the person who was the owner at the time of the making or amendment of a planning scheme[92]. His Honour did not accept that the unqualified language of s 177(2)(b) encompasses only those successors in title of the owner at the time of the making of a planning scheme who acquire title otherwise than by sale by that owner[93].

The Court of Appeal

122 In the Court of Appeal, Martin CJ, with whom Newnes and Murphy JJA agreed, acknowledged that, read in isolation, s 173 is capable of supporting the construction for which the Planning Commission contended; however, his Honour held that s 173 must be read in the context of the Act as a whole[94]. In this regard, his Honour noted[95] that the construction advanced by the Planning Commission could be accepted only if the ordinary effect of the words of s 177 was constrained by limitations not found in the actual words of the Act.

123 Martin CJ rejected the Planning Commission's suggestion that s 177(2)(b) confers an entitlement to compensation only upon a person who obtains ownership of the land through succession or intestacy from the owner at the time the planning scheme came into force[96]. His Honour noted[97] that there was nothing in s 177(2), or in any of the secondary materials, which would suggest that this was the legislature's intention, and there was no reason in public policy why such a distinction would be intended.

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91 *Leith v Western Australian Planning Commission* [2014] WASC 499 at [44].

92 *Leith v Western Australian Planning Commission* [2014] WASC 499 at [44].

93 *Leith v Western Australian Planning Commission* [2014] WASC 499 at [52].

94 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 508 [80].

95 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 515-516 [110].

96 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 510-511 [90]-[91].

97 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 510-511 [91].

The appeals to this Court

124 The Planning Commission contended that s 177(2)(b) should not be given its literal meaning but should be construed on the basis that its reference to the person who was the owner of the land at the date of the application referred to in s 177(1)(b) should be understood as referring exclusively to the person who was the owner of the land at the date of reservation.

125 The construction of s 177(2)(b) urged by the Planning Commission does not accord with the approach described by Gaudron J in *Marshall v Director General, Department of Transport*[98], where her Honour said:

> "The right to compensation for injurious affection following upon the resumption of land is an important [property] right … and statutory provisions conferring such a right should be construed with all the generality that their words permit. Certainly, such provisions should not be construed on the basis that the right to compensation is subject to limitations or qualifications which are not found in the terms of the statute."

126 This approach to construction was approved by McHugh, Gummow, Hayne, Callinan and Heydon JJ in *Kettering Pty Ltd v Noosa Shire Council*[99].

127 The Planning Commission urged a departure from a literal reading of s 177(2)(b), with its more expansive view of the right to compensation, by reference to limitations which are not to be found in the terms of the statute. In particular, the Planning Commission relied upon the legislative precursors of s 177, which were said to indicate that s 177, in its current form, has a narrower operation than its literal meaning. That approach not only departs from that supported by *Marshall* and *Kettering*, but also requires the drawing of an inference of a legislative intention not to alter the effect of earlier legislation. The drawing of that inference becomes more and more problematic the farther the inference travels from the statutory language used by the legislature. In this case the inference has to travel a long way and to overcome a number of hurdles.

128 For the reasons that follow, I consider that the primary judge and the Court of Appeal were correct to answer the question posed by the parties in the affirmative. That answer best accords with the settled approach to the construction of legislation of this kind and with the text, context and purpose of

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98 (2001) 205 CLR 603 at 623 [38]; [2001] HCA 37.

99 (2004) 78 ALJR 1022 at 1029 [31]; 207 ALR 1 at 10; [2004] HCA 33.

Pt 11 of the Act[100]. The reasons which follow address the submissions made by the parties under the following topics: the temporal operation of s 173(1); whether s 173 controls the subsequent provisions of Pt 11; the textual and contextual considerations bearing upon the legal meaning of s 177; and the purpose of s 177.

The temporal operation of s 173(1)

129 The Planning Commission submitted that the reference in s 173(1) to "any person whose land is injuriously affected by the making or amendment of a planning scheme" fastens on the impact upon the owner at the time of the making of the scheme to vest exclusively in that owner a right to compensation, rather than looking to the ongoing operation of the scheme upon owners from time to time of land affected by the scheme.

130 The Planning Commission submitted that, if the mere existence of a planning scheme were sufficient to create an entitlement to compensation, there would be no need for the words "making or amendment of" in s 173(1)[101]. In this regard, the Planning Commission placed particular reliance upon the circumstance that, in *Western Australian Planning Commission v Temwood Holdings Pty Ltd*[102], Gummow and Hayne JJ treated the words "by the making of" in the then statutory equivalent of s 173(1) as suggesting the necessary temporal connection between ownership of land and the making of the planning scheme in order to give rise to an entitlement to compensation. This view did not, however, command the assent of a majority of this Court in *Temwood*; and so it was not regarded as decisive by the Court of Appeal in this case. In addition, the Court of Appeal did not regard this view as persuasive.

131 Martin CJ said[103] that the injurious affection resulting from the making or amendment of a planning scheme may have an effect upon a person who comes to own affected land, which may or may not entitle that person to compensation. The question depends upon the operation of the later provisions of Pt 11, to which s 173 is expressed to be subject. On this view, the relevant question is as

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100 See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388-390 [23]-[26]; [2012] HCA 56.

101 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71]; [1998] HCA 28.

102 (2004) 221 CLR 30 at 68 [95]-[96]; [2004] HCA 63 ("*Temwood*").

103 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 512 [97].

to the identity of the person entitled to compensation upon the occurrence of the events which crystallise the inchoate entitlement conferred by s 173. Those events are the subject matter of the express provisions of s 177.

132 Murphy JA, in addition to agreeing with Martin CJ, observed that the interpretation advanced by the Planning Commission would "have greater force if s 173(1) used the word 'upon', so that the relevant phrase in s 173(1) read 'upon the making or amendment of a planning scheme'"[104].

133 The claimants submitted that, as the Court of Appeal held[105], there is no difficulty in reading the reference in each of s 173(1) and s 174(1) to injurious affection arising from "the making or amendment of a planning scheme" as recognition that each occasion on which a planning scheme is made or amended may result in injurious affection for which compensation is to be provided by the Act. The claimants submitted that it would be wrong to treat s 173(1) as having an operation, temporal or otherwise, that is unaffected by the other provisions which inform its meaning (such as s 174) and practical operation (such as s 177).

134 The claimants' submission should be accepted. The temporal operation attributed to s 173(1) by Gummow and Hayne JJ in *Temwood* depends upon inference from the language in which s 173(1) is expressed. It is significant, in this regard, that within s 173, sub-s (3) is explicit in its temporal operation whereas sub-s (1) is not. Further, the circumstance that s 173(1) creates an entitlement in "any person" is not entirely consistent with the notion that the entitlement is exclusive to the person who is the owner at the time that the planning scheme comes into force. The collocation of s 173(1) and (3) is significant in this regard. The circumstance that s 173(3) expressly refers to "owners" of land while the planning scheme is being prepared, and therefore before it comes into force, suggests that the benefit of s 173(1) is not confined exclusively to owners of affected land at the time the planning scheme comes into force.

135 In addition, the temporal significance placed by the Planning Commission on the circumstance that s 173(1) speaks of land being injuriously affected "by the making" – rather than by the existence – of a planning scheme appears to be overstated, if not misplaced, when one looks at the context in which s 173 appears. In this regard, it may be noted that s 179(1)(a) speaks of the value of land as affected "by the existence" of a reservation under a planning scheme, and not by the making of the planning scheme.

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104 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 516 [115].

105 *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 512 [97].

136 More importantly, s 177(2)(b) is explicit in its temporal operation in favour of the person who is the owner of affected land at a time *after* the reservation has come into force. As noted above, a literal reading of the express provisions of s 177(2)(b) provides an answer to the specific question to be determined. The answer for which the Planning Commission argued can be sustained only if s 173(1) confines, in some way, the scope of the operation of s 177(2)(b). One must, therefore, turn to consider the Planning Commission's submission that s 173(1) controls s 177 so as to deny a literal operation to the latter provision.

Section 173(1) controls s 177

137 The Planning Commission's argument under this rubric commenced with the uncontroversial proposition that, in order to reconcile apparently conflicting provisions of a statute, a court may be required to determine which is the leading provision and which is the subordinate provision and which must give way to the other[106]. The Planning Commission went on to submit that the effect of s 173(1) is that the meaning of the provisions which follow is controlled by it, because s 173(1) is the leading provision.

138 In *Temwood*[107], Gummow and Hayne JJ said that the opening words of the then statutory equivalent of s 173(1) were "controlling words of what follows". The Planning Commission argued that the sequence of provisions in Div 2 of Pt 11 of the Act supports the "controlling" effect of s 173(1). But while the Planning Commission was able to draw support from what was said by Gummow and Hayne JJ, McHugh and Callinan JJ took a contrary view[108].

139 Prior to 1986, s 36(3a) of the *Metropolitan Region Town Planning Scheme Act* 1959 (WA) ("the MRTPS Act") provided:

> "Compensation for injurious affection to any land is payable only once under paragraph (a) of subsection (3) of this section and is payable to the person who was the owner of the land at the date of reservation referred to in that paragraph".

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106 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70].

107 (2004) 221 CLR 30 at 70 [102].

108 *Temwood* (2004) 221 CLR 30 at 48 [38], 89-92 [161]-[172].

140 In 1986[109], s 36(3a) was repealed and a new sub-section was substituted; the sub-section then provided:

> "Compensation for injurious affection to any land is payable only once under subsection (3) and is so payable –
>
> (a) under paragraph (a) of that subsection to the person who was the owner of the land at the date of reservation; or
>
> (b) under paragraph (b) of that subsection to the person who was the owner of the land at the date of application".

141 In *Temwood*[110], McHugh J agreed that the interpretation favoured by Gummow and Hayne JJ represented the better view during the period prior to the 1986 legislative amendments, but considered that the amendments, which added the express reference to development applications now contained in s 177(2)(b), altered the effect of the legislation so that it is "impossible to escape the conclusion … that [the provision] applies to a subsequent owner".

142 The Planning Commission's submission should not be accepted. Section 173(1) begins with the words "Subject to this Part". These words are distinctly inconsistent with the proposition that the later provisions of Pt 11 of the Act are subordinate to and controlled by s 173(1). The introductory words of s 173(1) are consistent with the view that, while s 173(1) gives rise to an inchoate entitlement to compensation for injurious affection, it is necessary to go to the later provisions of Pt 11 to ascertain the nature and extent of that entitlement and its practical effect.

143 Given that the content of the entitlement to compensation which arises under s 173(1) is expressed to be subject to the later provisions of Pt 11, it is hardly surprising that McHugh J concluded in *Temwood*[111] that the effect of the then equivalent of s 173(1) was altered by the enactment of what was to become s 177(2). One cannot resolve the difficulty which s 177(2)(b) poses for the Planning Commission's argument by treating s 173(1) as the controlling provision, which creates a right to compensation exclusive to the owner at the date of reservation, and s 177 as an ancillary provision, which serves no purpose other than to defer the realisation of that right by that owner.

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109 *Metropolitan Region Town Planning Scheme Amendment Act* 1986 (WA), s 9.

110 (2004) 221 CLR 30 at 48 [38].

111 (2004) 221 CLR 30 at 48 [38].

Section 177: textual considerations

144 The Planning Commission submitted that the reference to "owner" in s 177(2)(b) of the Act, consistently with its view of the exclusivity of the entitlement created by s 173(1), includes a person who obtains ownership of land otherwise than by purchase, for example by testamentary or intestate succession, from the original owner[112]. It was argued that the use of a different date in s 177(2)(b), the date of a development application, rather than the date of reservation, accommodates the possibility of a successor in title by then having become the owner[113].

145 The Planning Commission's attempt to give meaning to s 177(2)(b) as serving to accommodate the position of those owners who obtain property through testamentary or intestate succession is not persuasive. To confine the entitlement to the payment of compensation to those who have obtained property "otherwise than by purchase", and thereby to limit the provision's operation by reading into it words to confine its operation, would be contrary to the orthodox approach to the interpretation of provisions such as this. But in any event, there is no reason why these words would have been used if their only purpose was to cover such successors in title of the owner at the date the reservation came into effect: such persons would have been covered simply by use of the term "owner".

146 The claimants submitted that s 177(2) clearly distinguishes between the entitlement of the owner of the land at the date of reservation and the entitlement of the owner at the date of application for the development approval. It may be that an application might be made for development approval by a person who has not yet become the owner of the land, but that possibility is no reason to disregard, or to confine, the express language in which s 177(2)(b) is expressed. And as will be seen, there was no hint of an intention to confine the scope of s 177(2)(b) in the ministerial statement of purpose which accompanied the enactment of its direct legislative predecessor.

147 The Planning Commission sought to argue that s 177(2)(b), by its reference to the owner of the land at the date of an application for approval, exhibits a concern to ensure that if the application for approval was made by a person who was not, at that time, the owner, compensation would be payable to the owner at that time, even if the applicant subsequently became the owner. The Planning Commission argued that a consequence of the claimants' argument is that contemporaneous applications for compensation may be made by the

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112 *Temwood* (2004) 221 CLR 30 at 71 [108] per Gummow and Hayne JJ.

113 Cf *Western Australian Planning Commission v Southregal Pty Ltd* (2016) 49 WAR 487 at 514-515 [106].

previous owner (arising from the sale) and the new owner (arising from the development application) and the Act contains no provision to resolve such competing claims.

148 The difficulty with this aspect of the argument of the Planning Commission is that the Act, in s 177(2) and (3), addresses the possibility of competing claims by alternative owners. Consistently with s 171(1), sub-ss (2) and (3) of s 177 ensure that compensation is payable only once, and that it will become payable upon the first to occur of the events described in s 177(2). The person described in s 177(2)(a) will be in a position to determine that issue, subject to complying with s 177(3)(a). In the absence of compliance by that person with s 177(3)(a), compensation under s 177(2)(a) can never become payable to that person. As noted above, this case has proceeded on the footing that the owners of the parcels of land in question at the date of reservation did not comply with s 177(3)(a). And so, while s 177(2) may be understood as providing for compensation to be payable upon the first of the events referred to in s 177(2)(a) or (b) to occur, in this case compensation never became payable under s 177(2)(a).

149 The purpose of s 177 is to identify the events upon which compensation is to be payable, and the person to whom it is to be payable. That person is the first person to satisfy the requirements of s 177(3). It is not only the owner of the land at the date of reservation who can satisfy the requirements of s 177(3). A consideration of the context in which s 177 appears is not apt to alter that conclusion.

Section 177: contextual considerations

150 The Planning Commission submitted that eligibility for compensation for the two non-reserve forms of injurious affection can stem only from s 173(1), because there is no provision comparable to s 177(2) that applies to s 174(1)(b) and (c). For those types of injurious affection, it was submitted that only the owner at the date of the making or amendment of the scheme is entitled, and a sale of the land necessarily terminates all entitlement. The Planning Commission submitted that s 173(1) cannot have two meanings – a non-temporal meaning for s 174(1)(a) and a temporal meaning for s 174(1)(b) and (c); rather, the natural meaning of s 173(1) controls all eligibility for compensation. Therefore, it was argued, s 173(1) retains its "natural" meaning and controlling status for the purposes of s 174(1)(b) and (c).

151 But, as the claimants noted, s 174 sets out three circumstances in which land is affected by the making or amendment of a planning scheme. In this regard, s 174(1)(a), on the one hand, refers to reservations for public purposes, whereas pars (b) and (c) deal with terms of the planning scheme which have immediate effect on the ability to develop land. It is hardly surprising that the legislation should make different provision for the payment of compensation in

respect of the different effects of these different kinds of restrictions upon the value of the interest of an owner in land.

152 Next, s 178(1) provides relevantly that – in a case arising under s 174(1)(a) – a claim for payment of compensation may be made at any time within six months after the events set out in either s 177(1)(a) or (b) have occurred. The Planning Commission argued that it would be anomalous if different claims should be subject to different time limits. The claimants responded that s 178(1)(a) gives rise to the question "a claim by whom", and that that question is answered in different ways by s 177(2)(a) and (b).

153 Section 177(2) expressly provides that compensation is "payable only once under subsection (1)", and defines the persons to whom such compensation may be payable. Those persons fall into two categories, defined by different criteria, being: the person who was the owner at the date of reservation[114], where the claim for compensation is based on an entitlement arising under s 177(1)(a) (ie on the first sale after the reservation); and the person who was the owner at the time of the application referred to in s 177(1)(b), where that application was unsuccessful, or granted on conditions unacceptable to that applicant[115]. That the terms of Pt 11 refer to two different sets of circumstances, arising at different times, may also be seen from the use of differing criteria in s 177(3)(a) and (b), and the differing dates for assessment provided for by s 179(2)(a) on one hand, and by s 179(2)(b) and (c) on the other.

154 The Planning Commission submitted that the assessment of compensation is governed by s 179(1), so that, whether at first sale or upon a development application, the assessment is based on an opinion on what is likely and unlikely to be approved. The Planning Commission submitted that it is this assessment which establishes the extent of loss apparent, not the sale or development application outcome. But the terms of s 179 expressly contemplate that the compensation payable for injurious affection may reflect not only the diminution in the price the land may command upon sale in the market, but also the diminution in value attributable to refusal of development approval or a grant of approval upon unacceptable conditions.

155 In any event, one should not approach the construction of Pt 11 of the Act, and s 179 in particular, on the assumption that the compensation for which the Part provides is confined to compensation for loss suffered by reason of a diminution in the value of land realisable by sale. This notion is better discussed in the context of a discussion of the purpose of s 177.

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114 Section 177(2)(a).

115 Section 177(2)(b).

The purpose of s 177

156 Several excerpts from Hansard may usefully be noted here as having a bearing upon an understanding of the purpose of s 177 of the Act. A concern directly on the point at issue here was raised in 1969 in the Legislative Assembly[116] in response to the Second Reading Speech[117] for the enactment of a Bill[118] to amend s 36 of the MRTPS Act. In answer to the question, the Minister for Education said[119]: "The Bill ... is designed to ensure that the owner at the time of reservation, and he alone, will be compensated". This answer supports the view urged by the Planning Commission.

157 It may be accepted that, before the 1986 amendments, it was clear that only the owner of land at the date of the reservation was entitled to be paid compensation, but it is not apparent that that intention survived the amendment. The more explicit the change in the text of the legislation effected by an amendment, the less compelling is an inference, based on legislative history, that no change in effect was intended by the amendment.

158 When one looks at the materials which explain the introduction of the then equivalent of s 177(2)(b), it is apparent that the principal concern was to ensure that compensation is paid only once. That concern was pursued by the enactment of a measure which, read literally, contemplated that more than one owner of affected land may be eligible for a payment of compensation for injurious affection.

159 In 1986, in the Second Reading Speech[120] by the Minister for Planning, in relation to the Bill[121] for the enactment of provisions in the same terms as would ultimately become s 177 of the Act as a further amendment to the MRTPS Act, it was said that "[t]he matters provided for in this Bill do not constitute major

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116 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1969 at 2607-2608.

117 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 4 November 1969 at 2098.

118 Metropolitan Region Town Planning Scheme Act Amendment Bill 1969 (WA).

119 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1969 at 2608.

120 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 June 1986 at 173.

121 Metropolitan Region Town Planning Scheme Amendment Bill 1986 (WA).

changes to the present metropolitan region scheme legislation". The Minister went on to refer to a "comprehensive package of initiatives for speeding up and improving the statutory planning process", and then, having discussed those matters of process, the Minister said:

> "Next, it is proposed to amend the Act in relation to the payment of compensation for land which has been reserved under the metropolitan region scheme so that it is clear that compensation for injurious affection is paid only once to the person who is the owner at the date of reservation when the land is first sold following the date of reservation; or the person who is the owner at the time when the responsible authority refuses an application for development on the land or grants permission subject to conditions which are unacceptable to the owner.
>
> At present there is uncertainty about claims being able to be paid more than once in respect of the same portion of land."

160 The Second Reading Speech is significant in two respects. First, it identifies the mischief at which s 177 was directed. That mischief was uncertainty as to the possibility of more than one claim for compensation becoming payable in respect of the same parcel of land. The proposed measure was clearly intended to ensure that compensation is paid once only in respect of the one reservation; but there was no indication of an intention that only the owner at the time of reservation should be paid compensation. Much less was there an indication that compensation should not be paid at all if it were not payable to the person who was the owner at the date the reservation came into effect, even though a subsequent owner actually suffers a diminution in value because the refusal of a development approval (or approval on unacceptable conditions) means that the land may not be exploited to its highest and best (and most valuable) use. It cannot be said that the language of s 177, in its ordinary meaning, "leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended"[122].

161 Secondly, the Second Reading Speech contains no hint that the then equivalent to s 177(2)(a) and (b) was intended to refer to the very same person, ie the owner of the land at the date the reservation came into effect. It offers no reason to suppose that s 177(2) does not intentionally differentiate between the person who was the owner at the date of reservation and the person who was the owner at the date of an application for development approval in respect of reserved land. Indeed, the assumption on which s 177(2) proceeds is that

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122 Cf Langan, *Maxwell on the Interpretation of Statutes*, 12th ed (1969) at 228.

compensation may be claimable by more than one owner. That is why it provides that it is to be payable only to one of them.

162 The Planning Commission submitted that a person who comes to purchase land reserved under a planning scheme knows, or should know[123], of the restriction giving rise to the injurious affection. It submitted that the decision of the Court of Appeal would allow a person who has paid an "affected" price, and has therefore suffered no loss on the purchase, to be paid compensation. The Planning Commission submitted that it is an implicit object of the regime not to "compensate" persons who have suffered no loss.

163 The argument advanced on behalf of the Planning Commission proceeds on the assumption that the adverse effect of a planning scheme in relation to a particular parcel of land will be manifest in the reduction of the market value of the land reflected in the price achieved upon the first sale of the land after the planning scheme comes into effect. But this case offers a concrete example of the fragility of that assumption. In this regard, at the time of the reservation, two of the claimants, Southregal and Mr Wee, were not the owners of the land; they entered into the first contract of sale before the reservation had come into effect. More generally, Pt 11 of the Act does not employ the concept of "loss" as a measure of compensation. As the primary judge observed, Pt 11 of the Act is concerned to provide for the payment of compensation where land is injuriously affected by a planning scheme, as explained by s 174[124].

164 It is wrong to approach the proper interpretation of Pt 11 of the Act as if it were solely concerned to provide compensation measurable by reference to the first sale by an owner of affected land. While the sale price may be less than it otherwise would have been because the effect of the reservation is factored in, in some general way, to the price of the first sale after the reservation comes into effect, s 177(2)(b) and s 179(2)(b) and (c) expressly contemplate a diminution in value arising out of the reservation and the subsequent refusal of an application for development approval or grant of an approval on unacceptable terms. It must be borne in mind that the reservation of land for public purposes does not operate to resume land or effect an absolute prohibition on development. Whether a reservation of land for public purposes actually diminishes the value of land in a sufficiently material way, so as to entitle the owner of the land to payment of compensation, may not be known until an application for a development approval is refused. And that diminution in value may bear little relationship to the price paid by the owner.

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123 See cl 47(1) of the PRS, under which a "certificate" is issued on settlement requisitions "stating the manner in which [the land] is affected by the Scheme".

124 *Leith v Western Australian Planning Commission* [2014] WASC 499 at [59].

165 The Planning Commission's argument sits uneasily with the reasoning of the Full Court of the Supreme Court of Western Australia in *Bond Corporation Pty Ltd v Western Australian Planning Commission*[125]. In that case, the Full Court held[126] that "sale" in the then statutory equivalent of s 177(1) of the Act meant "conveyance" rather than "agreement to sell". It is not necessary in these appeals to consider whether *Bond Corporation* was correctly decided because no party sought to challenge the decision or the reasoning of the Court in that case. It is sufficient for present purposes to note the difficulty in accommodating the terms of s 177(3)(a)(iii), which expressly contemplate the taking of steps which can only be taken *before* the making of an agreement to sell, with the view that sale means a conveyance which may occur after a reservation has come into effect, in circumstances where the vendor had no opportunity to comply with s 177(3)(a)(iii).

166 More relevantly for present purposes, in *Bond Corporation*, Ipp J, with whom Wallwork and Owen JJ agreed, said[127]:

> "Owners of land suffer loss merely by the reservation of land for public purposes. That loss is constituted simply by the reduction in the market value of the land caused by the reservation and the inability of the owner to use the land for purposes conflicting with the reservation (even where the owner does not intend to develop the land in any way). The loss sustained on reservation occurs without the owner taking any action in connection with the land, and while the owner still holds the land in the form it was in immediately prior to the reservation. When compared to the kind of loss sustained on conveyance or development refusal where owners are prevented from developing land in accordance with their genuine intent, the loss suffered on reservation is less concrete or tangible. The point to be noticed is that Parliament, by s 36(3), provided that compensation was not to be payable upon that kind of loss being sustained."

167 The reference by Ipp J to "s 36(3)" is a reference to s 36(3) of the MRTPS Act, which was a precursor to s 177(1) of the Act. The point to be made here is that Ipp J rejected the proposition that the loss "constituted simply by the reduction in the market value of the land caused by the reservation" was the

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125 (2000) 110 LGERA 179 ("*Bond Corporation*").

126 (2000) 110 LGERA 179 at 190-191 [50]-[51].

127 *Bond Corporation* (2000) 110 LGERA 179 at 187-188 [34].

object of the compensation for which the legislation provided. His Honour went on to say[128]:

> "It seems to me that loss caused by the entering into of an agreement of sale at a price lower than the price the land would have fetched but for the reservation, is a loss that falls into the same category as loss sustained on reservation. Until the owner actually receives payment of the purchase price for the land (ordinarily upon conveyance), the loss suffered upon the agreement of sale being entered into differs little in character from the loss suffered upon the land being reserved. In a limited sense each of those losses can be described as 'paper' losses inasmuch as they do not result in the owner of land actually receiving less for the land on sale, or being unable to use the land as genuinely intended."

168 Having made the point that the legislation is not concerned to provide compensation for notional or paper losses, Ipp J went on to say[129]:

> "In my opinion, the philosophy underlying the deferment of payment of compensation as provided for by [the MRTPS Act] is that compensation for injurious affection should only be payable when the owner of the land involved suffers a significantly more tangible loss than that which occurred when the land was reserved. … I prefer the argument that Parliament intended [the MRTPS Act] to provide that payment for compensation should be only be made [sic] when the owner of land actually receives less money for the land than he or she would have received had there been no reservation, or when the genuine intention of the owner to develop the land is frustrated by a development refusal brought about by the reservation."

169 Two points may be made here. First, as Ipp J explained in *Bond Corporation*, the Act contemplates the possibility of a diminution in the value of land which does not crystallise sufficiently to entitle an owner to a payment of compensation until the refusal of an application for development approval or the approval of an application on unacceptable conditions. The Act provides that this diminution in value is compensable by a payment of compensation, whatever price the owner at that time may have paid for the land. The extent of compensation payable for injurious affection in such a case will, by the application of s 179(1), reflect the diminution in the value of the land attributable to the owner's inability to use the reserved land in accordance with its highest and best use at the date specified in s 179(2)(b) or (c).

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128 *Bond Corporation* (2000) 110 LGERA 179 at 188 [35].

129 *Bond Corporation* (2000) 110 LGERA 179 at 188 [37].

170 Secondly, while it is no doubt possible to draw a formal distinction between the creation of a right and the deferment of its realisation by payment, the difference may have no significance as a matter of substance. While it may be possible to say that s 173(1) of the Act creates a right to compensation, the realisation of which is deferred by s 177(1), it is no less true to say as a matter of substance that injurious affection by reservation is not compensable until the diminution in value is determined by sale or the refusal of a development application or approval on unacceptable terms, whichever first occurs. Accordingly, to accept that the right to compensation created by s 173(1) is not realisable until the occurrence of the first of the events contemplated by s 177(2) is to accept no more than that s 173(1) is subject to s 177, which is what s 173(1) expressly states. This is not to assert that s 173(1) creates a right of compensation which "runs with the land". Rather, it is to acknowledge that the operation of s 177, and in particular s 177(2)(b) and s 177(3)(b), explains the nature, effect and practical operation of s 173(1).

Conclusion

171 Each appeal should be dismissed with costs.