The Piddington Society

Property Law Masterclass

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Accrued rights and planning law - Does an applicant have a right to have planning review proceedings determined by reference to the planning scheme as it stood when the review application was made?

Introduction

Thank you to the Piddington Society for inviting me to speak on current issues in planning law. The particular issue I will be talking about today is whether an applicant in planning review proceedings before the State Administrative Tribunal (SAT) has a so-called 'accrued right' under s 37(1) of the *Interpretation Act 1984* (WA) to have the proceedings determined by reference to the provisions of the applicable planning scheme *as they stood at the date when the review application was made*, where those provisions are amended before the proceedings are finally determined by SAT. To put the question more sharply:
Which planning law must SAT apply? – Is it the planning scheme as it existed at the time when the application for review was filed or the planning scheme as it exists at the time when the application for review is determined?

This is a fundamental issue in planning review proceedings in SAT and equivalent environmental courts and tribunals and it was recently addressed and determined by the Western Australian Court of Appeal (comprising the President, Justice Buss, and Justices of Appeal Murphy and Mitchell) in ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 (***DCSC***).

But before I discuss ***DCSC*** and give you the answer to the question I posed, I need to put the issue into context, set out the terms of s 37(1) of the Interpretation Act and refer to a decision of the High Court of Australia concerning accrued rights in administrative review proceedings and three decisions of SAT which considered the effect of the High Court's decision in planning proceedings.

Context

This year marks an important milestone in the history of Western Australian (and Australian) town planning law. The first of November 2019 will be the 90th anniversary of the commencement of the *Town Planning and Development Act 1928* (WA) (TPD Act) on 1 November 1929. The TPD Act was the first modern town planning legislation in Australia, in that it provided for the regulation of land use and

development on private land through the preparation and making of town planning schemes.

From the commencement of the TPD Act, planning schemes have regulated land use and development in two main ways. First, by reserving certain land for particular public purposes. And second, by zoning other land for particular private purposes, prohibiting the carrying out of certain land uses in certain zones, requiring planning (now termed 'development') approval to be obtained under the scheme in order to carry out land use and development on zoned land, and prescribing development standards and requirements and matters for consideration by the planning consent authority (or review tribunal) in determining whether to grant development approval.

Town planning schemes (which are now called 'local planning schemes') and amendments to schemes are initiated by the local government of the district to which the scheme applies, but require approval by the Minister for Planning and publication in the *Government Gazette* in order to come into effect. Section 7(3) of the TPD Act stated that:[1]

> A town planning scheme or amendment to a town planning scheme, when approved by the Minister and published in the *Gazette*, shall have full force and effect as if it were enacted by this Act.

[1] Section 87(4) of the *Planning and Development Act 2005* (WA) (PD Act) is in essentially the same terms.

Town planning schemes therefore combine the status of legislation with the flexibility of being readily amended by approval of the Minister and publication in the *Gazette*. This flexibility is vitally important in planning, because strategic planning (like the painting of the Sydney Harbour Bridge) is continuous and never ending. Strategic planning is dynamic and never stands still. Thus, amendments to planning schemes can be proposed, approved and gazetted at the same time as specific land use and development proposals for the land are being formulated, assessed by the relevant planning consent authority (or review tribunal) and determined.

Indeed, it is not unusual for scheme amendments proposed by local governments to be prompted by, and even responsive to, particular development proposals. Consequently, the applicable planning legislation (that is, the scheme) under and in accordance with which a development application is required to be determined may change between the time when the development application is lodged with the planning consent authority and when it is determined by that authority. Furthermore, the applicable planning legislation (that is, the scheme) may change between the time when an applicant for development approval, who is dissatisfied with the determination of the planning consent authority, exercises their right of review of that decision to the

State Administrative Tribunal[2] and when the Tribunal determines the application for review.

On 9 April 2006, the TPD Act was replaced by the *Planning and Development Act 2005* (WA) (PD Act). Although the PD Act updated the language and expression of its predecessor and made some substantive changes to Western Australian planning law, the regulation of land use and development on private land through town planning schemes (now called 'local planning schemes' and 'region planning schemes'), remains the fundamental pillar on which land use planning and development in this State is based.

Accrued rights

Section 37(1) of the Interpretation Act prescribes general savings provisions on the repeal of legislation and relevantly states as follows:

> Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears -
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> (c) affect any right … accrued … prior to the repeal;
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> … [or]
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> (f) affect any investigation, legal proceeding or remedy in respect of any such right … ,

[2] Under s 252(1) of the PD Act.

> and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, … as if the repealing written law had not been passed or made.

Under the definitions set out in s 5 of the Interpretation Act, the term 'enactment' means 'a written law or any portion of a written law', the term 'written law' expressly includes 'subsidiary legislation' and the term 'subsidiary legislation' expressly includes 'local or region planning scheme'.

Thus, under s 37(1) of the Interpretation Act, where a planning scheme 'repeals' a planning scheme or a portion of a planning scheme, the repeal does not (unless the contrary intention appears) affect any 'right' which is 'accrued' prior to the repeal, or affect any investigation, legal proceeding or remedy in respect of any such right, and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, as if the repealing planning scheme had not been made.

So what does this mean where the planning scheme, by reference to the provisions of which a development application is to be determined, is amended *after* an application for review by SAT is commenced, but *before* it is determined by the Tribunal? Does the applicant have an *accrued right* to have the review proceedings determined by reference to the repealed provisions of the scheme?

There is certainly a strong policy argument in favour of the applicant having such a right, because it has formulated its development application and presented supporting information and evidence, sometimes at considerable cost, on the basis of the scheme provisions as they stood when the development application was made and determined by the planning consent authority, and the applicant has a right of review of that decision on the merits by SAT if it is dissatisfied with the decision (or if the authority fails to make any decision within the prescribed period for a deemed refusal).[3] There is a strong policy argument that the applicant should be entitled to exercise that right of review on the merits on the basis of the same planning law as applied when the decision the subject of the review application was made.

However, there is also a strong policy argument against the applicant having such a right and in favour of SAT having to apply the planning law as it stands at the time of its decision upon review. As I said earlier, strategic planning is continuous and dynamic. It never stands still. It would arguably be inconsistent with orderly and proper planning to enable the approval by SAT on review of a land use which has become prohibited on the land in question or for SAT to apply development standards and requirements, or other aspects of a planning scheme,

[3] Under s 252(1) of the PD Act.

which are out of date and would not be applied by the planning consent authority if it were considering an application for the same development at the same time as SAT. This is particularly the case, because development approval is not personal to the applicant, but runs with the land, and a development, once constructed, will remain as a physical reflection of the planning legislation applied in its approval.

As a planning lawyer and planning judge, it had always been my understanding that an applicant in planning review proceedings does not have an accrued right to have the development application determined in accordance with the planning law as it stood at the time when the application for review was commenced, where the law had changed in the interim, and that the planning law to be applied in the determination of the planning review or appeal proceedings is the law as it exists at the time of the determination of the review or appeal. This understating was based on:

- the well-established position in Australian planning law, which is consistent with the continuous and dynamic nature of strategic planning, that the law to be applied on merits review or appeal is the law as it exists at that date (which I discussed in a decision in 2007 that I will refer to later);

- what appeared to me, on careful analysis in that 2007 decision (and which I confirmed in a decision in 2014 that I will also refer to later), the limited application of the concept of 'accrued rights' under s 37(1) of the Interpretation Act in administrative review and, in particular, planning review proceedings; and
- the terms of s 27(2) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) which provides as follows:[4]

  > The purpose of the review is to produce the correct and preferable decision *at the time of the decision upon the review*.

In ***DCSC***, the Court of Appeal has recently confirmed that this understanding is correct. But before referring to ***DCSC***, I will discuss four earlier cases concerning the issue of accrued rights in administrative review proceedings, beginning with the decision of the High Court in ***Esber v Commonwealth of Australia*** (1992) 174 CLR 430 (***Esber***).

Esber

Esber was not a planning case, but it did concern proceedings before an administrative review tribunal and, in particular, considered whether legislation, under which a review application was commenced, but which

[4] Emphasis added. As the Court of appeal held in ***LS v Mental Health Review Board*** [2013] WASCA 128 at [93]-[94], the 'time of the decision upon the review' is the time of the Tribunal's decision in relation to the application for review.

was subsequently repealed, continued to apply as an 'accrued right' in relation to the determination of the review. The significance of ***Esber*** is that it was considered, applied and distinguished in the planning cases to which I will come.

Mr Farage Esber enlisted in the Australian Armed Forces. About 16 months later, Mr Esber injured his back while involved in organised army sport. He was subsequently discharged from the army as a result of his injury. Before he was discharged, Mr Esber made a claim for compensation under the *Compensation (Commonwealth Government Employees) Act* 1971 (Cth) (1971 Act). It was determined that he was entitled to compensation and he received compensation in excess of $50 per week under s 46 of the 1971 Act.

The 1971 Act contained a provision enabling a recipient of weekly payments, who had been receiving weekly payments continuously for no less than six months, to apply to the Commissioner for Employees' Compensation (Commissioner) for future payments to be redeemed by means of a lump sum. Mr Esber made an application for redemption which was refused by a delegate of the Commissioner. Mr Esber then sought review of that decision by the Commonwealth Administrative Appeals Tribunal (AAT). After the application for review was made, but before the hearing of the application for review by the AAT, the 1971 Act

was repealed by the *Commonwealth Employees' Rehabilitation and Compensation Act* 1988 (Cth) (1988 Act). The 1988 Act provided that weekly payments of compensation over $50 were not redeemable by way of a lump sum. The 1988 Act also contained a transitional provision stating that proceedings instituted under the 1971 Act, but not completed upon the repeal of that Act, 'may be continued on and after that day and, where the proceedings are so continued, the relevant authority and the Commonwealth shall be parties to those proceedings'.

The AAT determined on review that the 1971 Act applied and granted Mr Esber's application for redemption in terms of a lump sum of $199,742. The Commonwealth and the Commissioner successfully appealed from the AAT's decision to the Full Court of the Federal Court in which a majority (Davies and Hill JJ, Lee J dissenting) held that the application before the AAT should have been determined in accordance with the 1988 Act. Mr Esber appealed, by special leave, from the judgement of the Federal Court to the High Court.

By a majority of 4 to 1, the High Court (Mason CJ and Deane, Toohey and Gaudron JJ, Brennan J dissenting) allowed Mr Esber's appeal. The majority held that the transitional provision in the 1988 Act 'should be given the effect which its language indicates'.[5] Their Honours

[5] ***Esber v Commonwealth of Australia*** (1992) 174 CLR 430 at 438.

determined that the transitional provision 'ensures the continuance of the application to the Tribunal and the resolution of the entitlement to redeem in accordance with the 1971 Act'.[6] The majority then said the following:[7]

> This conclusion is enough to dispose of the appeal in favour of the appellant. But the alternative ground was fully argued and should be dealt with. As will be seen, it lends strong support for the construction of [the transitional provision in the 1988 Act] already reached.

The 'alternative ground [of appeal]' referred to by their Honours was that Mr Esber had an accrued right to have the application for review determined by the AAT on the basis of the repealed 1971 Act under s 8 of the *Acts Interpretation Act* 1901 (Cth), which was in similar terms to s 37(1) of the WA Interpretation Act. The majority allowed the appeal on this ground as well, holding as follows:[8]

> Once the appellant lodged an application to the Tribunal to review the delegate's decision, he had a right to have the decision of the delegate reconsidered and determined by the Tribunal. It was not merely "a power to take advantage of an enactment". Nor was it a mere matter of procedure; it was a substantive right. Section 8 of the *Acts Interpretation Act* protects anything that may truly be described as a right, "although that right might fairly be called inchoate or contingent". This was such a right. It was a right in

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[6] ***Esber v Commonwealth of Australia*** (1992) 174 CLR 430 at 438.
[7] ***Esber v Commonwealth of Australia*** (1992) 174 CLR 430 at 438.
[8] ***Esber v Commonwealth of Australia*** (1992) 174 CLR 430 at 440-441 (citations omitted).

existence at the time the 1971 Act was repealed. That being so, and in the absence of a contrary intention, the right was protected by s. 8 of the *Acts Interpretation Act* and was not affected by the repeal of the 1971 Act.

CPP, Miller *and* Scolaro

Before I discuss ***DCSC***, I need to refer to three decisions of SAT made in 2006, 2007 and 2014 concerning the ambit of accrued rights in planning cases, to set the scene for the discussion of ***DCSC***.

The first SAT decision was that of Justice Barker, the inaugural President of the Tribunal, in ***Western Australian Planning Commission and CPP Pty Ltd*** [2006] WASAT 379 (***CPP***). As I mentioned earlier, the PD Act replaced the TPD Act on 9 April 2006 and made some substantive changes to Western Australian Planning law. One of the substantive changes relates to the determination of subdivision applications. Whereas s 20(5) of the TPD Act stated that the discretion to approve a subdivision application was not relevantly 'fettered' by a provision of a town planning scheme, that provision was not re-enacted by the PD Act and, rather, s 138(2) of the PD Act states that, subject to any one of six exceptions set out in s 138(3), the planning consent authority 'is to have due regard to the provisions of any local planning scheme that applies to the land under consideration and is not to give an approval that conflicts with the provisions of a local planning scheme'. In ***CPP***, an application for review of the decision of

the Western Australian Planning Commission (Commission) to refuse to grant subdivision approval was commenced, but was not determined by SAT, before the repeal of the TPD Act. Justice Barker said the following:[9]

> The decision in ***Esber*** seems to have been accepted, for some years, as an unassailable authority for the proposition that provisions such as s 37 of the Interpretation Act protect the right of a person who has commenced an administrative review proceeding before the right to commence such proceeding is taken away *or the law governing the substantive subject matter on the proceeding is changed by a repealing law*, to have the review proceeding determined in accordance with the law as it stood before the repealing law came into operation; subject of course to any clear statutory expression in the repealing statute or other law to the contrary.

His Honour expressed strong reservations about the correctness of the decision in ***Esber*** concerning accrued rights in an administrative review proceeding, but ultimately felt compelled to follow it to determine that the applicant in ***CPP*** had an accrued 'right', within the meaning of s 37(1)(c) of the Interpretation Act, to have the Commission's decision to refuse subdivision approval reviewed by the Tribunal by reference to (the repealed) s 20(5) of the TPD Act. His Honour reasoned as follows:[10]

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[9] ***Western Australian Planning Commission and CPP Pty Ltd*** [2006] WASAT 379 at [58] (emphasis added).

[10] ***Western Australian Planning Commission and CPP Pty Ltd*** [2006] WASAT 379 at [77].

Thus, while I consider there is a strong case to be made in support of the view that no right, interest, title, power or privilege is thereby created, acquired, established or exercisable prior to the operation of the repealing law in circumstances where an owner of land -

- has no existing right to subdivide land and may only subdivide if a statutory prohibition on subdivision is removed by a relevant approval authority;
- applies for such approval;
- is denied approval;
- then applies for review of that refusal as part of an administrative review process; and then
- before such review is complete finds that the law governing the exercise of the subdivision approval power has been changed by a repealing or amending law,

the decision in ***Esber*** stands as high authority in support of the contrary view and I can see no persuasive ground to distinguish ***Esber*** from the case before me. It is not for me, as a single judge, to purport effectively to set aside the decision in ***Esber***. As a result, I should follow ***Esber***.

The second SAT case I will refer to is my decision in ***Miller and City of Stirling*** [2007] WASAT 247; (2007) 56 SR (WA) 128 (***Miller***). In ***Miller***, a preliminary issue was identified in each of two planning review proceedings that involved similar circumstances as to whether a proposed aged persons' housing development was capable of approval

having regard to housing density requirements under the applicable local planning scheme. To answer this preliminary issue, the Tribunal needed to determine an 'underlying preliminary issue' as to whether a special scheme provision that specified a greater maximum density for aged persons' dwellings than was otherwise applicable, and which was deleted from the scheme after lodgement of the development applications, but before their determination, continued to apply in the determination of the proceedings. The applicant relied on the general savings provisions in s 37(1) of the Interpretation Act and argued that at the time of the deletion of the special scheme provision specifying a greater maximum density for aged persons' dwellings then was otherwise applicable, it had an accrued 'right' under that provision to have that development application determined on review on the basis of the law at the time of the deemed refusal of the application, which was before the deletion of the special scheme provision.

The Tribunal did not accept this submission, because, assuming that the applicants had an accrued right when the special scheme provision was deleted from the scheme to have their application determined on review on the basis of the law at the time of the deemed refusal of the application, the applicants had not in fact sought review of the deemed refusal of the applications, and the applications for review were made in

relation to the actual refusal of the development applications, which took place after the deletion of the special scheme provision from the scheme. The decisions in ***Esber*** and ***CPP*** were therefore distinguishable, because, in contrast to those cases, the applications for review in ***Miller*** were made to the Tribunal only *after* the special scheme provision relied on had been deleted from the scheme.[11] The Tribunal observed that this reasoning was 'sufficient to dispose of the accrued right argument in this case'[12] and then said the following:[13]

> … While it is therefore unnecessary to express a concluded view in relation to the following analysis, it may well be the case that even if Ourwise (or Mr Miller) had commenced proceedings for review of the deemed refusal of the development application in accordance with r 9 and r 10 of the SAT Rules, they would not have had an accrued right to have the development application determined on review on the basis of the law at the time of the deemed refusal of the application.
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> It is well established in Australian planning law that a development or subdivision application is to be determined on the basis of the law as it stands at the time of the determination, whether by an original decision maker or on review/appeal by a court or a tribunal such as SAT.
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> …

[11] ***Miller and City of Stirling*** [2007] WASAT 247; (2007) 56 SR (WA) 128 at [32].
[12] ***Miller and City of Stirling*** [2007] WASAT 247; (2007) 56 SR (WA) 128 at [34].
[13] ***Miller and City of Stirling*** [2007] WASAT 247; (2007) 56 SR (WA) 128 at [34]-[35].

The point that it is well-established in Australian planning law that a planning application 'is to be determined on the basis of the law as it stands at the time of the determination' was then illustrated by reference to decisions of the New South Wales Court of Appeal,[14] the Full Court of the Supreme Court of Victoria,[15] the Queensland Planning and Environment Court,[16] and the former WA Town Planning Appeal Tribunal,[17] which all held that a planning application is to be determined on the law as it stands at the time of the determination, including when it is determined on administrative appeal or review by the relevant environmental court or tribunal, in the absence of a legislative provision to the contrary. In ***Miller***, the Tribunal also observed that the established principle of planning law was assumed to be correct in a decision of the Full Court of the Supreme Court of Western Australia.[18] In ***Miller***, the Tribunal concluded its analysis as follows:[19]

> 43 Having regard to the established position in Australian planning law, it may well ultimately be determined that ***CPP*** (and ***Esber***) should only

[14] At [35] - ***The Dubler Group Pty Ltd v The Minister for Infrastructure, Planning and Natural Resources*** (2004) 137 LGERA 178 at [20]. As the Tribunal observed in ***Miller and City of Stirling*** [2007] WASAT 247; (2007) 56 SR (WA) 128 at [38], in ***The Dubler Group*** the New South Wales Court of Appeal referred to and discussed ***Esber*** at [31]-[36] and did not consider that ***Esber*** called into question the established principle of planning law.

[15] At [36] - ***Robertson v City of Nunawading*** [1973] VR 189; (1973) 29 LGRA 44 and ***Ungar v City of Malvern*** [1979] VR 259 at 265.

[16] At [37] - ***Beaudesert Shire Council v Smith*** [1998] QPELR 368 at 370.

[17] At [42] - ***Bonton Pty Ltd v City of South Perth [No 2]*** (1982) 4 APA 108 and ***Hillgrove Pty Ltd v Town of Claremont*** (1996) 18 SR (WA) 376 at 382.

[18] At [39]-[41] - ***Carcione Nominees Pty Ltd v Western Australian Planning Commission*** (2005) 30 WAR 97.

[19] ***Miller and City of Stirling*** [2007] WASAT 247; (2007) 56 SR (WA) 128 at [43]-[47] (emphasis added).

be applied in strictly comparable circumstances to the facts of those cases, namely circumstances in which a written law repeals both an enactment that confers a right to seek review/appeal and an enactment that regulates the way in which the application is to be determined, including on review/appeal. In both ***CPP*** and ***Esber***, a written law repealed an enactment that conferred a review/appeal right, which is a "right" within the meaning of s 37(1)(c) of the Interpretation Act, and an enactment that regulated the way in which the application was to be determined, including on review/appeal.

44 The effect of ***Esber***, as applied by the President in ***CPP***, appears to be that where a written law repeals an enactment that confers a right to seek review by the Tribunal, the repeal does not, unless the contrary intention appears, affect the review right. A SAT review proceeding, whether instituted before the repeal of an enactment that confers a review right or after the repeal, but in accordance with r 9 and r 10 of the SAT Rules, is relevantly an "investigation ... or remedy in respect of any such [review] right", within the meaning of par (f) and the concluding words of s 37(1) of the Interpretation Act. Section 37(1) has the effect that the review proceeding "may be instituted [or] continued ... as if the repealing written law had not been passed or made".

45 This appears to be, in effect, what occurred in ***CPP***. The review right that was exercised in ***CPP*** was conferred by s 26(1)(a)(i) of the TPD Act. The repealing written law in that case repealed the whole of the TPD Act, including both s 26(1)(a)(i) - the enactment that conferred the review right - and s 20(5) - the enactment that regulated the way in

which the application was to be determined, including on review. The effect of s 37(1) of the Interpretation Act was that the repeal of s 26(1)(a)(i) of the TPD Act did not affect the review "right" or the proceeding in respect of the review right, and the proceeding could be continued as if the repealing law had not been passed. Had the repealing law in ***CPP*** not been passed, s 20(5) of the TPD Act would have continued in operation, and the Tribunal was therefore correct in ruling that the proceeding should be determined by reference to it.

46 *However, in the present case, the written law did not repeal an enactment that conferred a right to seek review. Rather, it repealed an enactment to which the Council, and the Tribunal on review, was required to have regard while it remained a provision of DPS 2, but not after it was deleted from DPS 2.*

47 It may, therefore, ultimately be determined that although ***CPP*** qualifies the principle of planning law referred to earlier, the qualification is of limited practical significance in relation to the repeal of provisions of planning instruments. *The qualification may be restricted to cases in which a planning instrument, which both confers a review right and also regulates the way in which an application is to be determined, is repealed, and an application for review has been or is subsequently commenced under the repealed provision.* Although most planning instruments confer a right to seek review of a decision made under the instrument, most applications for review of the refusal or conditional approval of a development application are made under s 252(1) of the PD Act, not under the right conferred by the planning instrument.

> Section 252(3) of the PD Act states that the exercise of the right to seek review under s 252(1) of the PD Act extinguishes any right to seek review under a planning scheme.

There was no appeal from the decision in ***Miller***. My analysis that 'it may well be the case' that, even if the applicant had commenced proceedings for review of the deemed refusal of the development application before the deletion of the special scheme provision, 'they would not have had an accrued right to have the development application determined on review on the basis of the law at the time of the deemed refusal of the application'[20] was clearly *obiter* and expressed in somewhat cautious terms (as I was, after all, suggesting that a decision of the High Court and a decision of the President of the Tribunal who felt compelled to follow it may not have as broad an application, at least in planning review proceedings, as may have been thought). However, six-and-a-half years later, I was given - and took - the opportunity to again consider and to endorse the correctness of the *obiter* analysis in ***Miller***.

Scolaro and Shire of Waroona [2014] WASAT 37; (2014) 85 SR (WA) 38 (***Scolaro***) concerned an application by Maria Scolaro for an extension of time in which she could seek review of the deemed refusal

[20] ***Miller and City of Stirling*** [2007] WASAT 247; (2007) 56 SR (WA) 128 at [34].

of a development application by the Shire of Waroona. The delay in the commencement of the proceedings was almost five years, or approximately 64 times the 28 day period for the commencement of review proceedings. I refused to extend time for the commencement of the proceedings, because although an extension of time was supported by the considerations that there was a generally satisfactory explanation for the delay and that there would be no prejudice to the Shire or to any other person if an extension were granted, in the exercise of discretion, these factors were strongly outweighed by two other considerations. First, the period of delay of almost five years was 'extraordinary and inordinate'[21] and the delay had two significant consequences, namely that allowing such an extension would 'greatly undermine the utility and purpose of the 28 day period for commencement of proceeding'[22] and the applicable local planning scheme was amended in a material respect as it concerns the proposed development during the delay. Secondly, I found that Mrs Scolaro did not have an arguable case for review, because, in consequence of the amendment of the scheme, the proposed development could not be approved.

In considering whether Mrs Scolaro had an arguable case for review, I rejected a submission, based on ***Esber*** and ***CPP***, that she had an

[21] ***Scolaro and Shire of Waroona*** [2014] WASAT 37; (2014) 85 SR (WA) 38 at [8].
[22] ***Scolaro and Shire of Waroona*** [2014] WASAT 37; (2014) 85 SR (WA) 38 at [10].

accrued right under s 37(1) of the Interpretation Act to seek review and to have the review determined on the basis of the scheme as it stood at the time of the deemed refusal. I found that the circumstances of the case were relevantly indistinguishable from the *ratio* of ***Miller*** and followed it, because even if Mrs Scolaro's late husband who had applied for development approval had an accrued right to have the development application determined on review on the basis of the law as it stood at the time of the deemed refusal, 'he did not seek review of the deemed refusal prior to the repeal of the relevant provision'.[23]

However, I then went on to consider again the analysis in Miller that 'it may well be the case' that even if the applicants had commenced proceedings for the review of the deemed refusal of the development applications, 'they would not have had an accrued right to have the development application determined on review on the basis of the law at the time of the deemed refusal of the application' which I characterised as 'an *obiter*, but considered, view'.[24] After setting out that analysis in full, I said:[25]

> In this respect also, the present case is not distinguishable from ***Miller***. Although in this case, like in ***Miller***, it is not necessary to express a final view, having reviewed the reasoning in ***Miller*** at [43] - [47] it is, in my view, sound

[23] ***Scolaro and Shire of Waroona*** [2014] WASAT 37; (2014) 85 SR (WA) 38 at [39].
[24] ***Scolaro and Shire of Waroona*** [2014] WASAT 37; (2014) 85 SR (WA) 38 at [42].
[25] ***Scolaro and Shire of Waroona*** [2014] WASAT 37; (2014) 85 SR (WA) 38 at [44].

> and correct. Thus, even if Mrs Scolaro's late husband had sought review of the deemed refusal of the development application prior to the change in the definition brought about by Amendment No 12, there would not be an accrued right, interest, power or privilege to have the development application determined on the basis of the law as it stood at the time of the deemed refusal. Amendment No 12 did not repeal an enactment that conferred a right to seek review. Rather, it repealed a definition which the Shire (and the Tribunal on review) was required to apply while it remained a provision of the Scheme, but not after it was deleted from the Scheme.

There was no appeal from ***Scolaro*** and, to my knowledge, the analysis in ***Miller*** and ***Scolaro*** was not challenged in any other planning case before SAT or on appeal over the decade following the publication of ***Miller***. The analysis was assumed to be correct in the not infrequent circumstance that the relevant planning scheme was amended between the commencement of review proceedings and their determination.

DCSC

The foregoing long-winded prologue finally brings me to the decision of the Court of Appeal in ***DCSC***, which was published on 3 December 2018. The proceedings concerned a somewhat controversial Puma development application involving the sale of petrol from three double-sided fuel bowsers and the sale of groceries from an adjoining retail building on a large corner lot in the Dunsborough Town Centre. DCSC

sought review by the Tribunal of the decision of the Southern Joint Development Assessment Panel (JDAP) to refuse to grant development approval for the proposed development under the applicable local planning scheme. The Tribunal dealt with the proper classification of the proposed use under the scheme as a preliminary issue (preliminary decision). The Tribunal found in the preliminary decision that DCSC's proposed use was properly classified as a 'Convenience Store', rather than as a 'Service Station', under the scheme as it then stood.
This classification was significant for the determination of the application for review, because a 'Convenience Store' was a Permitted ('P') use, while a 'Service Station' was a Discretionary ('D') use, under the scheme. After the preliminary decision was made, the Tribunal conducted the final hearing in relation to the review application over two days and reserved its decision.

Shortly before the development application was lodged for approval of the JDAP, the relevant local government, the City of Busselton, initiated an amendment to the scheme. The scheme amendment was ultimately approved by the Minister and came into force upon gazettal about three weeks before the Tribunal delivered its reserved final decision. In its final decision, the Tribunal granted conditional development approval for the development under the local planning scheme (final decision).

Relevantly, the scheme amendment changed the definition of 'Service Station' in such a way that it captured the proposed use on the facts which had been agreed before the Tribunal for the purposed of the preliminary decision. The Tribunal was unaware of the fact that the scheme amendment had come into force when it delivered its reserved decision and that decision proceeded on the basis that the proposed use was properly classified as 'Convenience Store' (as had been determined in the preliminary decision), whereas, by that date, the proposed use fell within the definition of 'Service Station' (as it had been amended) on the facts which had been agreed before the Tribunal.

The presiding member of the JDAP appealed against the Tribunal's final decision to the General Division of the Supreme Court under s 105 of the SAT Act. The presiding member contended that the Tribunal erred in law by failing to have regard to the terms of the scheme as in force at the date of the final decision (which incorporated the scheme amendment). The appeal was heard by Justice Smith, who granted leave to appeal, but dismissed the appeal for two reasons.[26] First, her Honour held that the preliminary decision was binding upon the parties and the Tribunal in making the final decision and was not a matter open to be challenged in the appeal to the General Division of the Supreme

[26] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASC 145.

Court.[27] Alternatively, her Honour held that DCSC had an accrued 'right' to have the review application determined in accordance with the Tribunal's determination on the preliminary issue, which was preserved by s 37(1)(c) of the Interpretation Act.[28]

Her Honour '[w]ith respect … [did] not agree'[29] with my view expressed in ***Miller*** that:[30]

> Having regard to the established position in Australian planning law, it may well ultimately be determined that ***CPP*** (and ***Esber***) should only be applied in strictly comparable circumstances to the facts of those cases, namely circumstances in which a written law repeals both an enactment that confers a right to seek review/appeal and an enactment that regulates the way in which the application is to be determined, including on review/appeal. In both *CPP* and *Esber*, a written law repealed an enactment that conferred a review/appeal right, which is a "right" within the meaning of s 37(1)(c) of the Interpretation Act, and an enactment that regulated the way in which the application was to be determined, including on review/appeal.

Her Honour also disagreed with my observation in ***Miller*** that the Full Court of the Supreme Court in ***Carcione Nominees Pty Ltd v Western Australian Planning Commission*** assumed the correctness of the

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[27] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASC 145 at [37]-[99], especially at [98].
[28] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASC 145 at [102]-[156], especially at [154]-[156].
[29] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASC 145 at [127].
[30] ***Miller and City of Stirling*** [2007] WASAT 247; (2007) 56 SR (WA) 128 at [43].

principles stated in the New South Wales, Victorian, Queensland and Western Australian decisions that I referred to, that a development or subdivision application is to be determined on the basis of the law as it stands at the time of the determination, whether by an original decision-maker or on review/appeal by the relevant environmental court or tribunal. Her Honour followed ***Esber*** (and ***CPP***).

The presiding member of the JDAP appealed to the Court of Appeal from Justice Smith's decision on two grounds. Ground 1, in effect, contended that the primary judge erred in law in holding that the preliminary decision was binding on the parties and the Tribunal. The presiding member of the JDAP contended that her Honour should have held that, despite the preliminary decision, the Tribunal was required to make the correct and preferable decision on the law applicable at the time of the final decision. Ground 2, in effect, contended that the primary judge erred in law in holding that DCSC had an accrued 'right' to have the review application determined in accordance with the Tribunal's determination on the preliminary issue.

The grounds of appeal and the parties' submissions in relation to them gave rise to several issues for determination of significance for planning law.[31] However, for the purposes of this talk, it is necessary to refer to

[31] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [48].

only two of those issues and to the way they were determined by the Court of Appeal.

The first relevant issue was whether the preliminary decision had a binding effect so as to preclude the Tribunal from considering the effect of the scheme amendment in making the final decision, as to which the Court of Appeal answered 'no'. The Courts observed and held as follows:[32]

> 76 The starting point for the consideration of this issue is to recognise that what is involved in the Final Decision is the exercise of a purely executive power by an administrative tribunal. The legal effect of the grant of development approval by the Tribunal, if valid, is to:
>
> (1) preclude the City from exercising its powers as a responsible authority to issue directions under s 214 or take action under s 215 of the Planning Act on the basis that the respondent has commenced or carried out development in contravention of cl 60 of the Deemed Provisions;
>
> (2) preclude the Supreme Court from granting an injunction under s 216 of the Planning Act on the basis that the respondent has contravened cl 60 of the Deemed Provisions; and

[32] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [76]-[77].

(3) prevent the respondent from committing an offence against s 218 of the Planning Act by carrying out development in contravention of cl 60 of the Deemed Provisions.

77 It is no part of the Tribunal's function in exercising this purely executive power to make any final or binding determination as to the legal effect of a planning scheme. The Preliminary Decision was no more than a step taken by the Tribunal in the exercise of its purely executive power to grant or refuse development approval under the Scheme. Neither the Preliminary Decision nor the Final Decision were capable of making any binding determination as to the operation of the Scheme.

The Court then determined as follows:[33]

80 Therefore … the Preliminary Decision could not bind the parties in the appeal before the primary judge. The Tribunal may determine a preliminary question, and may decline to revisit the issue in the absence of a change of law or a change of circumstances. However, its determination of the preliminary question cannot insulate the Tribunal's ultimate determination from judicial review by the Supreme Court on appeal.

81 *In any event, the Preliminary Decision determined no more than the classification of the proposed use under the Scheme as it stood prior to the Scheme Amendment. It said nothing about the proper*

[33] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [80]-[81] (emphasis added). Interestingly, the Court of Appeal left open the possibility that a declaration made by the Tribunal constituted by a judicial member under s 91(1) of the SAT Act may have a different effect. Section 91(1) of the SAT Act enables the Tribunal, when constituted by a judicial member, to make 'a declaration concerning any matter in a proceeding instead of any orders it could make, or in addition to any orders it makes, in the proceeding'.

> *classification of the proposed use under the Scheme as amended by the Scheme Amendment.* If, as contended by ground 2 of the appeal, the Tribunal was required to have regard to the classification of the proposed use under the Scheme as affected by the Scheme Amendment, the Preliminary Decision did not determine that classification.

The Court of Appeal therefore determined that ground 1 of the appeal was established as the primary judge erred in finding that the determination of the proper classification of the proposed use in the preliminary decision was binding upon the parties and the Tribunal and was not a matter open to be challenged in the appeal to the General Division.

The Court of Appeal held that, because of its determination in relation to ground 1 of the appeal (that the preliminary decision was not binding on the parties and the Tribunal in its determination of the application for review, although the Tribunal 'may decline to revisit the issue in the absence of a change of law or a change of circumstances'[34]), ground 2 (which contended that the primary judge erred in law in holding that DCSC had an accrued right to have the review application determined in

[34] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [80].

accordance with the Tribunal's determination of the preliminary issue) was also established. As their Honours held:[35]

> The Preliminary Decision did not give rise to any rights, accrued or otherwise.

However, DCSC advanced an alternative, and broader, contention in the appeal that 'it had an accrued right to have its review application to the Tribunal determined in accordance with the Scheme as it stood prior to the Scheme Amendment'.[36] Their Honours summarised DCSC's submissions in relation to its alternative contention as follows:[37]

> The respondent submits that, prior to the Scheme Amendment, it had an accrued right to have its review application determined in accordance with the law as it stood at the time of the Panel's allegedly erroneous decision. It submits that the repeal of the former definition of 'Service Station' did not affect that right or the Tribunal proceedings in respect of that right. For this purpose, the respondent principally relied on the decision of the High Court in ***Esber v The Commonwealth***.

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[35] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [84].
[36] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [85].
[37] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [88].

The Court of Appeal then reviewed ***Esber*** and ***CPP***.[38] In the course of that review, their Honours observed that '[t]he holding in ***Esber*** cannot be divorced from the particular statutory context with which the High Court was concerned' and held that, when ***Esber*** is considered in its statutory context:[39]

> While the result in ***CPP*** may have been correct, in our view Barker J stated the general principle for which ***Esber*** stands too broadly.

In discussing the statutory context with which the High Court was concerned in ***Esber***, their Honours said the following:[40]

> 96 ***Esber*** relevantly dealt with the following scenario. Before an enactment providing for certain entitlements under a statutory regime was repealed, Mr Esber:
>
> (1) had a right to have a determination of a claimed entitlement or benefit under the regime provided for by the enactment;
>
> (2) had asserted or claimed the entitlement or benefit; and
>
> (3) had a vested right to have the decision of the administrative decision maker reviewed.

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[38] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [89]-[97].

[39] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [91].

[40] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [96]-[100] (citations omitted) (emphasis added). In support of the proposition at [99], the Court of Appeal referred to cases including ***Robertson v City of Nunawading*** [1973] VR 819 at 825 – 826 which was also referred to in ***Miller*** at [36].

97 The latter right, ie, the right of review, was protected by s 8 where the enactment providing for the statutory regime of entitlements and the right of review was repealed prior to the determination of the review instituted by Mr Esber. That was so even though Mr Esber had not established his entitlement before the primary decision maker and, in that sense, was assumed not to have an accrued right to the entitlement.

98 ***Esber*** is therefore authority for the proposition that a right to obtain a merits review by a tribunal of an administrative decision may be a right protected by provisions such as s 37 of the Interpretation Act. That may be so even if the making of the initial application to the primary decision-maker did not result in the acquisition or accrual of an entitlement or benefit provided for under the repealed enactment.

99 *Generally, a person seeking planning approval from a planning authority does not have, or claim, an existing right to a particular planning decision. Rather, the person seeks a decision in their favour which, if and once made in their favour, gives the person, at that point, an accrued right. Ordinarily, a person seeking planning permission is only entitled to a decision based on the planning law as it stands as at the date of the decision.*

100 Consistently with ***Esber***, an accrued right may nevertheless arise once an application for review by an administrative tribunal is instituted after planning consent is refused by the planning authority. However, it remains necessary to consider the statutory scheme and the nature of the right to review which is said to be affected by the repeal.

The Court of Appeal distinguished the statutory context in ***DCSC*** (in which an operative provision of the planning scheme is amended after the application for review was commenced, but the enabling Act conferring the right of review is not repealed) with the statutory context with which the High Court was concerned in ***Esber***. Although their Honours did not refer to ***Miller***, they distinguished the circumstances of a scheme amendment during the course of planning review proceedings from the circumstances in ***Esber*** consistently with the distinction drawn in ***Miller***, namely that, as their Honours said, in ***Esber*** 'it is significant that both the operative provision … and the provisions conferring the right of review … of the 1971 Act had been repealed' and that '[b]ut for the operation of s 8 of the *Acts Interpretation Act***,** what would have been lost was Mr Esber's right to have the AAT hear and determine his review application (which had already been made) in respect of the Commissioner's decision …'[41], whereas '[i]n the present case, [DCSC's] right [of review] was conferred by s 252(1) of the [PD Act]', which continued, and s 27 of the SAT Act 'provided for the review to be conducted by way of a hearing de novo, and identified the purpose of the review as being to produce the correct and preferable decision at the

[41] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [101].

time of the decision upon review'.[42] Significantly, the only change in the present case was to *the operative provisions of the planning law* that applied to the determination of the development application, *not to the right of review*, which would be an accrued 'right' under s 37(1) of the Interpretation Act if exercised before it were repealed. This is the same point as was made in ***Miller***:[43]

> The effect of ***Esber***, as applied by the President in ***CPP***, appears to be that where a written law repeals an enactment that confers a right to seek review by the Tribunal, the repeal does not, unless the contrary intention appears, affect the review right. A SAT review proceeding, whether instituted before the repeal of an enactment that confers a review right or after the repeal, but in accordance with r 9 and r 10 of the SAT Rules, is relevantly an "investigation ... or remedy in respect of any such [review] right", within the meaning of par (f) and the concluding words of s 37(1) of the Interpretation Act. Section 37(1) has the effect that the review proceeding "may be instituted [or] continued ... as if the repealing written law had not been passed or made".

The Court of Appeal concluded its decision in relation to ground 2 as follows:[44]

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[42] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [102].
[43] ***Miller and City of Stirling*** [2007] WASAT 247; (2007) 56 SR (WA) 128 at [44].
[44] ***Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd*** [2018] WASCA 213 at [104], [106] and [107] (emphasis added).

104 Having regard to these provisions, *the right which the respondent had was not a right to have its application for development approval determined by reference to the provisions of the Scheme as they stood at the date that the review application was made. Rather, the right was to have the Tribunal consider whether, at the time of the Tribunal's decision, the correct and preferable decision, having due regard to the provisions of the Scheme then in force, was to grant (conditionally or unconditionally) or refuse development approval for the proposed development.*

…

106 In this case, the only possible repeal is the deletion of the former definition of 'Service Station' in the Scheme. Quite apart from s 37 of the Interpretation Act, that repeal did not in any way affect the right of the respondent referred to at [104] above. As a consequence, there was no relevant work for s 37 to do. Nor did the deletion of the former definition of 'Service Station' have any effect on the appellant's rights. The deletion of the definition did not affect the classification of the proposed use of the Land as a 'Convenience Store' for the purposes of the Scheme. It was rather the introduction of the new definition of 'Service Station' which is said to have altered the classification of the proposed use under the Scheme. However, the introduction of that new provision was not a 'repeal' to which s 37 could apply. *In any event, the introduction of the new definition did not affect the right referred to at [104] above*.

107 Therefore, when the Scheme Amendment came into force, *the respondent did not have a right to have its application for development approval determined in accordance with the provisions of the Scheme as they stood prior to the Scheme Amendment*. Nothing in the Scheme Amendment had any effect on the respondent's right to a review of the Panel's decision refusing development approval. *The Tribunal was required to have due regard to the provisions of the Scheme as they stood at the time of its determination of the respondent's review application*.

Conclusion – Which planning law must SAT apply?

So the answer to the question we started with - *Which planning law must SAT apply? – Is it the planning scheme as it existed at the time when the application for review was filed or the planning scheme as it exists at the time when the application for review is determined?* – is now authoritatively determined. The planning law that applies is the scheme as it stands at the time of the determination of the review. An applicant does not have an accrued right to have planning review proceedings determined by reference to the scheme as it stood when the review application was made.