

1 Purpose

This bulletin has been prepared by the Western Australian Planning Commission (WAPC) to assist users of the planning system in understanding the development approval process for public works throughout the state and when a body must obtain WAPC approval to undertake development under a region planning scheme.

The purpose of this bulletin is to clarify:

- which bodies are entitled to the public works exemption under section 6 of the *Planning and Development Act 2005* (PD Act);
- which bodies are a “public authority” under section 4 of the PD Act;
- the distinction between the terms “public authority” and “section 6 body”;
- when a “public authority” is exempt from the requirement to seek development approval under the Metropolitan Region Scheme (MRS), the Peel Region Scheme (PRS) and the Greater Bunbury Region Scheme (GBRS); and
- the distinction between public authorities and local authorities.

This bulletin supersedes Planning Bulletin 53 Development by Public Authorities on Land Reserved Under the Metropolitan Region Scheme.

The term “public authority” was used throughout planning bulletin 53 to describe the qualified public works exemption in section 32 of the Town Planning and Development Act 1928 (now section 6 of the PD Act) and to also describe the development control provisions that apply to public authorities under the MRS. These are two different types of exemptions, and the application of the term “public authority” to both

situations has led to confusion about when each one applies. This bulletin uses the terms ‘section 6 body’ and ‘public authority’ to differentiate between the two types of exemptions that can be claimed when undertaking a public work.

2 What is development?

The term “development” is defined under the PD Act as meaning:

“the development or use of any land, including -

- any demolition, erection, construction, alteration or addition to any building or structure on the land;
- the carrying out on the land of any excavation or other works;
- in the case of a place to which a conservation order made under section 59 of the *Heritage of Western Australia Act 1990*
 - is likely to change the character of that place or the external appearance of any building; or
 - would constitute an irreversible alteration of the fabric of any building.”

The definition of development is intentionally broad, and in many circumstances it may be unclear whether work on or use of the land will constitute development. The State Administrative Tribunal and the Supreme Court have provided some guidance on what constitutes development.

Generally, development requires approval under an applicable local and/or region planning scheme. However, planning schemes contain exemptions from this general requirement for development approval for public works in some circumstances

3 When does the public works exemption apply under section 6 of the PD Act?

Section 6 of the PD Act states:

“nothing in this Act interferes with the right of the Crown, or the Governor, or the Government of the state, or a local government -

- to undertake, construct or provide any public work; and
- to take land for the purposes of that public work.”

In general terms, this section gives the bodies referred to in section 6, “section 6 bodies”, the power to undertake a public work or take land for the purposes of a public work without obtaining development approval from the responsible authority under the relevant planning scheme.

The term “public work” is defined under section 4 of the PD Act as including any public work as defined in the *Public Works Act 1902*. The *Public Works Act 1902* defines what constitutes a public work under section 2 (appendix 1). Readers are advised to refer to the full text of the *Public Works Act 1902* available on the State Law Publisher's website.

If a private corporation undertakes a public work as part of a joint venture or private-public sector partnership with a government department, they are deemed to be undertaking that work on behalf of that body. As such, the section 6 exemption that the government department would be entitled to if it was undertaking the public work can be claimed by that private corporation.

Public works under a local planning scheme

Section 6 has the effect of exempting section 6 bodies from the requirement to obtain development approval for a public work under a local planning scheme. Despite this exemption, section 6 bodies are still

required to comply with the requirements of section 6(2) and (3), namely:

- to have regard to the purpose and intent of the local planning scheme;
- to have regard to the principles of proper and orderly planning and the amenity of the area; and
- to consult with the local government when a proposal is being formulated for any public work, or the taking of land for a public work

If a section 6 body undertakes a public work without consulting with the relevant local government under section 6(3), then it has breached the requirements of the PD Act.

Public works under a region planning scheme

Section 5(2) states that a region planning scheme binds the Crown (ie all section 6 bodies except local government). This means that the exemption provided by section 6 **does not** extend to the requirements of a region planning scheme. As such, section 6 bodies may be required to apply for approval to commence development, including public works, under a relevant region planning scheme.

If a section 6 body is exempt from requirements of the local planning scheme, but is required to make an application to the WAPC for development approval under the region planning scheme, then the section 6 body must provide the WAPC with evidence that the section 6 body has consulted with the local government as required under section 6(2) and (3) of the PD Act.

Public works undertaken by local governments

While local governments are stated in section 6(1) as bodies that are entitled to section 6 exemptions, they are not part of the Crown (under the *Local Government Act 1995*). Therefore, section 5(2) does not apply to local governments. This means that a region planning scheme does not bind a local government. So a local government is entitled to the section 6 public works exemption in respect of both local and region planning schemes (provided of course that the work falls within the definition of a public work).

Despite the exemption from the requirements of a region planning scheme, the local government is still required to comply with section 6(2) and (3). So the local government is required to:

- have regard to the purpose and intent of the region planning scheme;
- have regard to the orderly and proper planning and the preservation of the amenity of that locality; and
- consult the WAPC to ensure that the public work will comply with subsection (2).

The section 6 exemption and statutory corporations

A statutory corporation should generally be regarded as being distinct from the Crown unless the legislation that gives power to that corporation expressly states that it is an agent of the Crown or that it has the status, immunities and privileges of the Crown. In such a circumstance, the corporation shall be deemed to be a section 6 body entitled to an exemption under a local planning scheme, but still bound by the requirements of a relevant region planning scheme (appendix 2).

There are certain statutory exceptions to this general position, where section 6 is specifically applied to a body that is no longer an agent of the Crown.

(a) Port authorities

Section 5 of the *Port Authorities Act 1999* provides that a port authority is not an agent of the Crown and does not have the status, immunities and privileges of the Crown. However, section 38 states that for the purposes of port works and port facilities, section 6 of the PD Act applies to a port authority as if it were an agency of the Crown in right of the state. It further states that port works and port facilities are to be regarded as being public works for the purposes of section 6.

As such, port authorities are deemed to be section 6 bodies. They do not need to seek development approval under a local planning scheme, but they are still bound by the requirements of relevant region planning schemes.

(b) Energy corporations

Section 5 of the *Energy Corporations Act 2005* provides that an energy corporation is not an agent of the state and does not have the status, immunities and privileges of the state. However, section 60 of that Act states that the Electricity Networks Corporation (Western Power) and the Regional Power Corporation are not required to comply with the provisions of an interim development order or a local planning scheme when undertaking works for the extension, expansion or enhancement of an electricity distribution or transmission system.

Therefore, the Electricity Networks Corporation (Western Power) and the Regional Power Corporation are deemed to be section 6 bodies undertaking a public work when undertaking works for the extension, expansion or enhancement of an electricity distribution or transmission system. They are exempt from the requirements of a local planning scheme, but are still required to comply with the requirements of a region planning scheme.

4 Which bodies are “public authorities”?

The term “public authority” is used throughout the three region planning schemes and all local planning schemes. It is defined in section 4 of the PD Act as meaning any of the following:

- a Minister of the Crown in right of the state;
- a department of the public service, state trading concern, state instrumentality or state public utility; and
- any other person or body, whether corporate or not, who or which, under the authority of any written law, administers or carries on for the benefit of the state, a social service or public utility.

Any body that can demonstrate compliance with 4(c) is deemed to be a public authority. For example, a corporation such as Western Power is deemed to be a public authority for planning and development purposes if:

- it carries out work under the *Electricity Corporations Act 2005* and the *Energy Operations (Powers) Act 1979*;

- (b) the work is for the benefit of the state; and
- (c) the work is a public utility (provision of electricity).

Region planning schemes do not refer to the term "public work". Instead, region planning schemes contain provisions which exempt public authorities from the general requirement to apply for development approval for specified classes of development. So if a body can demonstrate that it satisfies all of the elements of section 4(c) of the PD Act, then that body may be exempt from the requirement to obtain development approval under the relevant region planning scheme.

If a private corporation is undertaking development as part of a joint venture or private-public sector partnership with a government department, they are deemed to be undertaking that development on behalf of that body. As such, any exemption under the relevant region scheme that would apply to that department can also be claimed by that private corporation.

Can a local government be a public authority?

The WAPC has previously advised that the term 'public authority' does not include a local government under the *Local Government Act 1995* for the purposes of planning and development under the PD Act. Local governments are entitled to the public works exemption under section 6 in respect of both local and regional planning schemes, as discussed at point 3 of this bulletin. As such, there is no need for a local government to attempt to claim an exemption as a public authority. However, local governments must still comply with section 6(2) and pursuant to section 6(3) the WAPC requires evidence that the works will comply with these provisions.

5 When are public authorities exempt from the requirement to obtain development approval under the MRS?

Generally, all development under the MRS requires development approval. However, there are some exemptions from this general requirement, in relation to both reserved and zoned land.

Reserved land

Clause 16(1) of the MRS states that development approval under the MRS is not required if the reserved land is owned by or vested in a public authority and that public authority is proposing to **use** the land:

- for the purpose for which it is reserved;
- for any purpose for which it was lawfully used before the MRS came into force; or
- for any purpose for which the land may be lawfully used by the public authority.

In addition, clause 16(1a) states that development approval is not required where a public authority is undertaking **development** on reserved land that is owned by or vested in that public authority, where the development is:

- permitted development that does not involve the clearing of regionally significant vegetation on a site specified as a Bush Forever site in the Bush Forever report published by the WAPC in December 2000; or
- expressly authorised under an Act to be commenced or carried out without the approval of the WAPC.

Permitted development includes:

- works on land reserved for primary regional roads or other regional roads for the purposes of or in connection with a road within the meaning of the *Main Roads Act 1930*;
- works on land reserved for port installations for the purpose of or in connection with a port;
- works for the purpose of or in connection with the supply of water, electricity or gas, or the drainage or treatment of waste, water or sewerage;
- works on land reserved for railways for the purpose of or in connection with a railway, not including the construction or alteration of a railway station or any related car parks, public transport interchange facilities, or associated means of pedestrian or vehicular access;

- works on land reserved for parks and recreation where the works are in accordance with a management plan endorsed by the WAPC;
- works on land reserved for public purposes – high school for the purpose of or incidental to a high school;
- operational works on land reserved for state forests for the purpose of or incidental to a state forest.

Zoned land

Clause 24 of the MRS provides that development approval on land zoned under the scheme is not required if:

- that land is not the subject of a notice under clause 32 of the MRS or declaration under section 112 of the PD Act; and
- that development consists of:
 - the erection on a lot of a single dwelling house which will be the only building on the lot, no part of which lot is within the Swan development control area or abuts any part of the Swan development control area; or
 - the carrying out of any works on, in, over or under a street or road by a public authority acting pursuant to the provisions of any Act

If these limited circumstances do not apply, then the public authority is required to make an application for development approval under the MRS.

Determining authority

Usually an application for development on reserved land is determined by the WAPC. However, the WAPC has delegated to local governments the power to determine applications for development on land reserved under the MRS for the purpose of a regional road, in its delegation instrument gazetted on 20 September 2002 (as amended from time to time, "MRS Delegation Instrument").

Similarly, an application for development by a public authority on zoned land is usually determined by the relevant local government under the MRS Delegation Instrument. However, clause 1(v) of that

instrument states that the delegation arrangements do not extend to the power to determine an application "in respect of public works undertaken by public authorities". As such, the WAPC is the determining authority for a development application for development which is categorised as a "public work", which is to be undertaken on zoned land by a public authority. If the work is not a public work as defined in the *Public Works Act 1902* (appendix 1), then the application will be determined by the local authority

6 When are public authorities exempt from the requirement to obtain development approval under the PRS?

Development under the PRS requires approval where land is reserved or the development is subject to a clause 21 resolution. On zoned land, approval from the WAPC is not required for development unless a clause 21 resolution applies to the class of development proposed.

Clause 19 of the PRS provides an exception to the general requirement for development approval for specified classes of development on reserved land. In respect of reserved land owned by or vested in a public authority, **development** that does not require WAPC approval includes:

- works on land reserved for primary regional roads or other regional roads for the purpose of or in connection with a road within the meaning of the *Main Roads Act 1930*;
- works for the purpose of, or in connection with, the supply of water or wastewater services, electricity or gas, or the drainage of surplus water or treatment of water, wastewater or surplus water;
- works on land reserved for railways, or for primary regional roads or other regional roads, for the purpose of or in connection with a railway, but this does not include the construction or alteration of a railway station or any related carparks, public transport interchange facilities, or associated means of pedestrian or vehicular access;

- works on land reserved for regional open space where the works are in accordance with a management plan endorsed by the WAPC;
- works on land reserved for public purposes - high school for the purpose of or incidental to a high school;
- operational works on land reserved for state forests for the purpose of or incidental to a state forest;
- development that a public authority is expressly authorised under an Act to commence or carry out without the approval of the WAPC

Clause 20 also states that approval of the WAPC is not required for the **use** of reserved land owned by or vested in a public authority where the land is being used for the purpose for which it was reserved, or for the purpose for which it was lawfully used before the scheme came into force.

Determining authority

In its delegation instrument gazetted on 28 March 2003, the WAPC has delegated to local governments the responsibility for determining the following under the PRS:

- applications for planning approval in relation to development on land reserved under the PRS for the purpose of a regional road;
- applications for planning approval required pursuant to the resolution of the WAPC under clause 21 of the PRS made on 25 March 2003 in respect of development on land abutting regional roads reservations under the PRS; and
- applications for approval for private jetties and associated facilities located within an artificial waterway within the waterways reservation

However, the WAPC has retained its power to determine all other applications for development on reserved land. This includes public works undertaken by public authorities, except where these have been exempted, as described above.

7 When are public authorities exempt from the requirement to obtain development approval under the GBRS?

Clause 24 of the GBRS states that development requires approval where land is reserved or the development is of a kind or class specified in a clause 27 resolution. Approval from the WAPC is generally not required for development on zoned land unless a clause 27 resolution applies to the class of development proposed.

Clause 25 provides an exception to the general requirement for development approval on reserved land. In respect of reserved land owned by or vested in a public authority, **development** that does not require WAPC approval is the same as under the PRS (listed bullet points under paragraph 6 regarding exceptions under clause 19 of the PRS). Clause 25 of the GBRS also exempts works on land reserved for port installations for the purpose of or in connection with a port.

In addition, clause 26 of the GBRS states that approval of the WAPC is not required for the **use** of reserved land by a public authority where the land is being used for the purpose for which it was reserved, or for the purpose for which it was lawfully used before the scheme came into force.

Determining authority

In its delegation instrument gazetted on 25 January 2008, the WAPC has delegated to local governments the responsibility for determining the following types of development on land reserved under the GBRS:

- applications for development on land in a regional road reservation;
- applications for development of private jetties and associated facilities located in an artificial waterway in a waterways reservation.

In a clause 27 resolution gazetted on 25 January 2008, the WAPC has specified what classes of development on land zoned under the GBRS requires WAPC approval. The WAPC has delegated responsibility for determining applications for the following classes of development to local governments:

- applications for development on zoned land abutting a regional open space reservation, primary regional roads reservation, regional roads reservation, public purposes reservation, railways reservation, state forests reservation or waterways reservation;
- applications for development on zoned land in a water catchments special control area;
- applications for development on zoned land adjacent to or in close proximity to the strategic agricultural resource policy area;
- applications for development on zoned land adjacent to or in close proximity to the strategic minerals and basic raw materials resource policy areas;
- applications for development for shopping purposes on zoned land;
- applications for development on land in the rural zone, other than a poultry farm; and
- applications for development of a new poultry farm, or for any extension or addition to an existing poultry farm, on zoned land.

8 Building approvals

Part XV of the *Local Government (Miscellaneous Provisions) Act 1960* states that a person wishing to construct or alter a building must obtain a building licence from the local government. However, section 373(3) provides that "buildings owned or occupied by, or under the control or management of the Crown in right of the state, or a department, agency or instrumentality of the Crown in right of the state" are exempt from the requirements of part XV.

A government department relying on the public works exemption under section 6 of the PD Act *may* also be entitled to rely on the quite different exemption under section 373(3) of the *Local Government (Miscellaneous Provisions) Act 1960*. However, both exemptions operate differently and government departments should not assume that an exemption from the building

requirements of part XV of the Local Government (Miscellaneous Provisions) Act entitles them to an exemption under section 6 of the PD Act. Conversely, entitlement to an exemption under section 6 of the PD Act does not necessarily entitle a government department to an exemption under the building provisions of part XV of the *Local Government (Miscellaneous Provisions) Act*.

Note that an exemption under section 6 of the PD Act or a provision of a region planning scheme does not affect any requirement to obtain approvals under other legislation.

9 Information and comment

Enquiries concerning this bulletin should be directed to:

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10 Disclaimer

This planning bulletin is intended to clarify the position in respect of the exemptions available to public authorities and section 6 bodies when undertaking public works. It endeavours to provide a summary of the operation of complex provisions.

This bulletin is intended as a guide only. It is not intended to be comprehensive or to cover particular circumstances.

Readers are advised to refer to the legislation, which is available from the State Law Publisher, and to seek professional legal advice should they have specific legal questions in relation to their particular circumstances.

Appendix 1 Public works listed under the *Public Works Act 1902*

Section 2 Terms used in this Act

In this Act, if not inconsistent with the context -

“**public work**” and “**work**” mean and include -

- (1) every work which the Crown, or the Governor, or the Government of Western Australia, or any Minister of the Crown, or any local authority is authorised to undertake under this or any other Act;
- (2) any railway authorised by special Act or any work whatsoever authorised by any Act;
- (3) tramways;
- (4) any works for or in connection with the supply of water to, or for or in connection with the sewerage of, any city, town, or district, including all reticulations;
- (5) buildings for the occupation of either or both of the Houses of Parliament or for public offices;
- (6) hospitals within the meaning given to that term by section 2 of the *Hospitals and Health Services Act 1927*, medical clinics, hostels and institutions including residences for staff, court-houses, gaols, watch-houses, lock-ups, police barracks, or quarters;
- (7) observatory;
- (8) public schools or any other schools authorised to be established wholly or in part at the public cost by any Act in force for the time being, universities, colleges, technical and other educational institutions, including residences or hostels for teachers or students, and play-grounds;
- (9) public libraries, mechanics' or miners' institutes, agricultural halls, or schools of art;
- (9a) public housing;
- (10) wharves, ferries, piers, jetties and bridges;
- (11) parks or gardens or grounds for public recreation or places for bathing, and for the reclamation of land for or in connection therewith;
- (12) public cemeteries;
- (13) public wells or works for the conservation of water;
- (14) the protection and preservation of any cave or place of scientific or historical interest;
- (14A) the protection and preservation of indigenous flora and fauna;
- (15) the establishment of public abattoirs;
- (16) harbours and ports, including the provision of storage, handling and wharfage areas and other facilities normally ancillary to the conduct of shipping operations, break-waters, leading marks, navigational aids, docks, slips, the alteration or improvement of channels, waterways and rivers, the protection of foreshores and banks, the provision of new channels and related works, including the landing and disposal of silt;
- (17) quarries or works for procuring stone, gravel, earth, or any other material required for the construction of, or any purpose connected with any public work as aforesaid;
- (17A) the procuring from land (other than Crown lands and public reserves) of timber, stone, gravel, earth and any other material required by or for the state for or in connection with the carrying on of any industrial or other undertaking or activity which is being carried on by or for the state under any law authorising the same;
- (17B) buildings and structures required for fire brigade purposes;
- (17C) the establishment and the extension by the Governor of sites for towns;
- (17D) the establishment and the extension by the Governor of agricultural research stations;
- (18) drainage works in connection with any city, town, or district, and the improvement of rivers, watercourses, lakes, or inlets, including deepening, widening, straightening or otherwise altering, and disposal of silt;
- (19) any building or structure of whatsoever kind which, in the opinion of the Governor, is necessary for any public purpose;
- (20) any road, stock route, viaduct, or canal;
- (21) any work incidental to any of the aforesaid works;
- (22) any land required for or in connection with any work as aforesaid;
- (23) any survey in connection with any proposed public work.

Appendix 2 Status of statutory corporations

Body	Applicable instruments	Section 6 body?	Public authority?
Alinta Gas (Alinta is an energy operator under s 11ZO of the <i>Energy Coordination Act 1994</i> . It holds a distribution licence and a trading licence under s11D of that Act.)	<i>Energy Operators (Powers) Act 1979</i>	-	-
	<i>Planning and Development Act 2005</i>	NO Not an agent of the Crown specified in s 6	YES* Carries out a public utility for the benefit of the state under a written law. * Exemptions under the MRS may apply
Port authorities (applies to all port authorities named in schedule 1 of the Port Authorities Act 1999)	<i>Port Authorities Act 1999</i>	NO* Not an agent of the Crown [s 5] *Deemed to be a section 6 body when undertaking port works and port facilities [s 38(3)] - exempt from requirements of local planning scheme	-
	<i>Planning and Development Act 2005</i>	-	YES* Carries out a social service or public utility for the benefit of the state under a written law. *Exemptions under the MRS may apply
Synergy (Synergy is the Electricity Retail Corporation established by s 4(1)(c) of the <i>Electricity Corporations Act 2005</i>)	<i>Electricity Corporations Act 2005</i>	NO Not an agent of the Crown [s 5]	-
	<i>Energy Operators (Powers) Act 1979</i>	-	-
	<i>Planning and Development Act 2005</i>	-	YES* Carries out a public utility for the benefit of the state under a written law. *Exemptions under the MRS may apply
Water Corporation	<i>Water Corporation Act 1995</i>	NO Not an agent of the Crown [s 5]	-
	<i>Water Agencies (Powers) Act 1984</i>	-	-
	<i>Planning and Development Act 2005</i>	-	YES* Carries out a public utility for the benefit of the state under a written law. *Exemptions under the MRS may apply.
Western Power (Western Power is the Electricity Networks Corporation established by s 4(1)(b) of the <i>Electricity Corporations Act 2005</i>)	<i>Electricity Corporations Act 2005</i>	NO* Not an agent of the Crown [s 5] *Deemed to be a section 6 body when undertaking works for the extension, expansion or enhancement of an electricity distribution system or electricity transmission system [s 60(3)] - exempt from requirements of local planning scheme or interim development order	-
	<i>Energy Operators (Powers) Act 1979</i>	-	-
	<i>Planning and Development Act 2005</i>	-	YES* Carries out a public utility for the benefit of the state under a written law. * Exemptions under the MRS may apply

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