

PURPOSE

The EDO has received a request from the Roadside Conservation Committee to:

- (a) Prepare a report which outlines the current law concerning the protection and conservation of roadside conservation in Western Australia and considers options for law reform; and
- (b) Prepare a shorter fact sheet outlining the current law in this area.

I confirm your instructions to me of 9 January 2002 to undertake research in relation to this matter, and to provide you with a report outlining the application of the relevant laws.

THE ENVIRONMENTAL DEFENDER'S OFFICE (WA) INC

The Environmental Defender's Office WA (Inc)¹ (the EDO) is a non profit independent community legal centre specialising in public interest environmental law. The aim of the EDO is to inform and advise individuals and environmental groups about the operation and implementation of laws and policies pertaining to environmental protection and biodiversity conservation in Western Australia.

BACKGROUND

The Roadside Conservation Committee (the RCC) was established in the 1985² and is now an independent Ministerial Advisory Committee under the umbrella of the Western Australian Land Resources Policy Council.

Roadsides contain a large portion of the State's endangered flora communities. Roadside values include fauna habitat; preservation of biodiversity; seed stocks; wildlife corridors; local amenity; tourism; indigenous, cultural and historical artefacts; windbreaks; fire breaks; crop and stock protection. Activities which impact on roadside verges include mining; traffic including bicycles, road trains and even an occasional light aircraft; tourism; firebreaks; planting; clearing; mining; stock movement; firewood collection; traffic pollution; camping and comfort stops.

There are numerous laws and policies applying to clearing native vegetation³ and more particularly the management of road reserves in Western Australia.

In its publication *Guidelines for Managing Special Environmental Areas in Transport Corridors*, the RCC states:

There is a great diversity of legislation influencing the management of roadsides, and it is not surprising that uncertainty often arises amongst those working in the roadside environment.⁴

¹ The EDO is funded by the Commonwealth and State governments and by charitable grants, sales of publications, donations and membership fees. The objectives of the EDO include facilitation of effective community participation in environmental decision making. The EDO has published two texts: *A Guide to Environmental Law Western Australia* and *The Law of Landcare Western Australia 2002* 2nd edition; and a number of fact sheets.

² The RCC was first within the Department of CALM.

³ See Bennett MB *Land Clearing Reforming the law in Western Australia* (2002) Impact vol. 65, 1.

This report examines these laws to clarify the responsibilities and duties of different government authorities in respect of conserving biodiversity on roadsides.

GENERAL AUSTRALIAN LEGAL FRAMEWORK

1. Outline

Australia has developed an adversarial system of law based on the English system⁵ which arrived along with the C18th English settlers⁶. Our law is made up of international law⁷, common law, statutes, subsidiary legislation, policies and administrative guidelines. Customary Aboriginal law and its interrelationship with English based Australian law⁸ is an ongoing (sometimes contentious) issue of integration. All of these areas of law contribute to the legal framework embracing clearing and taking native vegetation in Western Australia.

The regulation of clearing remnant native vegetation in Western Australia spans all levels of government, and many government agencies and land tenures. It is important that the debate about the management of remnant native vegetation is not confined to four year electoral terms. It is salient at this point to remember the special difficulties government agencies have in Western Australia in managing the responsibility for the preservation and protection of remnant native vegetation on a third of our continent for a small population with limited resources.

2. The Common Law

2.1 Introduction

Common law principles apply to everyone (including the Crown) unless expressly excluded by an Act of parliament. Common law is often referred to as judge-made law and generally has been made in the following way. In the absence of a written law, a court will determine a matter by looking at the established principles of common law,⁹ custom, tradition and modern convention.

2.2 Some common law principles most relevant to clearing remnant native vegetation from road reserves

- Bundle of property rights attached to land;
- Cross boundary effects of activities of one landholder on another landholder;

⁴ *Guidelines for Managing Special Environmental Areas in Transport Corridors* at page 18.

⁵ There are other systems of law which include for example an Inquisitorial system.

⁶ 1829. For a history of the development of the law in WA see E Russell, *A History of the Law in Western Australia and its Development from 1829 – 1979* UWA Press, 1980.

⁷ Treaties and International Conventions create international legal obligations but do not create legal rights and obligations in our domestic law without more, for example by enactment in a Statute. See for example the *Convention on Biological Diversity* to which Australia became a signatory in 1992 and the subsequent enactment of the *Environmental Protection and Biodiversity Conservation Act (1999)* (Cth). International law will not be addressed in this paper.

⁸ For example see the draft policy published by CALM in August 2000 on the involvement of traditional owners in the management of CALM lands, *Aboriginal Involvement in Nature Conservation and Land Management*.

⁹ Past cases published in law reports, which may be referred to as a precedent, or a case authority.

- Negligence;¹⁰
- Trespass;¹¹ and
- Nuisance.¹²

Generally speaking common law principles have been unable to protect general public interests which have no connection with private rights, such as the public interest in the protection of remnant native vegetation.

3. Statutory Regulation

3.1 Statutes

Statutory law establishes and regulates the operation of our various levels of government and government agencies. A statute¹³ is a written law made by an Act of Parliament to pass a Bill before it.¹⁴ Statutes cover specific areas of law. Statutes prevail over the common law and can limit or modify common law rights.¹⁵ For example, the liability of the

¹⁰ The common law principle of *negligence* comprises the elements of a duty of care, a breach of the requisite standard of care, the type (not amount) of damage which was a foreseeable consequence of the breach, and the damage was caused by the breach: see *Donoghue v Stevenson* [1932] AC 562 ; *Jaensch v Coffey* (1984) 155 CLR 549. Negligent acts can occur in circumstances of an action, manufacture, contract, driving, advice or opinion in a business context, and by misstatement.

¹¹ *Trespass* to land is described as the intentional or negligent act of an individual which directly interferes with another individual's exclusive possession of land without lawful justification. To make out trespass there must be direct physical invasion of private land and the invasion must be intentional. Neither damage nor unreasonableness is required to be made out to establish trespass. If a dairy farmer deliberately ran his or her cattle on a road reserve, the farmer may be liable in trespass, whether or not there has been damage to the reserve: see for example *Yakamia Dairy Pty Ltd v Wood* [1976] WAR 57.

¹² *Nuisance* is an interference with a public or private interest, see *Halsey v Esso Petroleum* [1961] 1 WLR 683. The elements required to succeed in a private nuisance action are that there must be physical injury to land or to a person's use and enjoyment of the land, the interference causing the injury must be unreasonable, and the damage caused must have been foreseeable. Only a person in actual possession of the land can make claim in nuisance. A farmer who was disgruntled with a neighbour who refused to pay for his share of a dividing fence encouraged rabbits through the fence onto the property of his neighbour and was held to liable for damages in private nuisance. The malice of the farmer was an important element in the finding: see *Pratt v Young* (1952) 69 WN (NSW) 214. When a nuisance interferes with a right enjoyed by the public at large it is a public nuisance. Private individuals can take an action in public nuisance even if they have no interest in the land the subject of the interference, so long as they have suffered injury over and above the public at large. An activity or state of affairs that causes damage to land might be unreasonable interference with the use or enjoyment of land, see *Hargrave v Goldman* (1963) 110 CLR 40 at 60); or with the health, safety, comfort or convenience of the public at large. Where a nuisance is made by an accumulation of actions by a number of persons, an affected landowner might bring an action against all the other landholders contributing to the nuisance: see *Pride of Derby & Derbyshire Angling Association v British Celanese Ltd* [1952] 1All ER 1326. Any infringement of a public right to pass and repass on a public road is actionable by the Attorney-General as a public nuisance without proof of actual damage, or by individual members of the public who can prove special damage: see *Attorney-General (ex rel Pratt) v Brisbane City Council* [1988] 1 Qd R 346, where there was excessive user of a public way.

¹³ Often referred to as an 'Act'.

¹⁴ A Bill is the draft of a statute presented to parliament. The Bill progresses through the Parliament. When the Bill is passed by both Houses of Parliament, it is referred to as an Act of Parliament. The Act becomes operative on the date as proclaimed and recorded in the Government Gazette. The date of the Act may not be indicative of the contemporary relevance of the Act because it may have been amended numerous times since it was passed by the Parliament.

¹⁵ *British Railways Board v Pickin* [1974] AC 765 at 789, 793, 798.

Crown and management authorities¹⁶ responsible for management of Crown land is limited in certain circumstances by provisions of the *Land Administration Act 1997*.¹⁷

Statutes may impose restrictions on our activities, create obligations or provide sanctions against certain actions.

When there are a number of statutes regulating one particular activity, the principles of statutory interpretation apply to determine which statute will prevail in the face of inconsistent provisions. Some of these principles include:

- the Crown is presumed to not be bound by a statute;
- where Acts are not inconsistent both will operate and a number of approvals might be required;
- a later Act will prevail over an earlier Act; and
- a specific Act will prevail over a general Act.

3.2 Subsidiary legislation

A statute may authorise a certain person or body to make subsidiary legislation, which are often known as regulations,¹⁸ by-laws or local laws. Subsidiary legislation is generally binding in the same way as the statute which authorises it.

3.3 Offence provisions

Statutes may make some actions punishable by a fine or imprisonment.¹⁹ Specific persons may be nominated to prosecute certain offences and provide such persons or bodies with a discretion not to prosecute.²⁰

Where a restriction on private prosecution is not expressed in an Act, it is likely that the common law, which entitles private persons to take a prosecution, will prevail.

There is an extraordinarily strong presumption that the Crown is not liable to prosecution for criminal offences.²¹ This presumption is rebuttable by the express language of a statute.²² However, if the Crown through its agent or employee commits an offence of vital significance to a particular section of the community, and the employee works for a

¹⁶ For example Main Roads and local governments.

¹⁷ *Land Administration Act 1997* sections 66 and 264.

¹⁸ See for example the *Land Administration Regulations 1998* regulations 5 – 8 which regulate the local governments in respect of making and closing roads; or the *Wildlife Conservation Regulations 1970* which regulate the taking of fauna and flora, and activities on nature reserves and wildlife sanctuaries.

¹⁹ For some offence provisions see the *Environmental Protection Act 1985* numerous sections; the *Wildlife Conservation Act 1950* sections 16, 16A, 17, 17A, 18, 26, the CALM Act sections 103, 109, 110, 114; the *Land Administration Act* sections 99, 130, 199, 267, 269; the *Country Areas Water Supply Act* sections 12B, 12C, 45, 46, 82, 111, 113; the *Soil and Land Conservation Act 1977* sections 21, 22, 28, 35, 42.

²⁰ For example a prosecution under the *Wildlife Conservation Act 1950* can only be authorised by the Executive Director of CALM, see section 26(3) of that Act.

²¹ *Bropho v Western Australia* (1990) 171 CLR 1.

²² See *Cain v Doyle* (1946) 72 CLR 409 at 417 – 8, in respect of the liability of the Crown in the right of the Commonwealth for a penalty for a criminal offence.

government corporation, the presumption of immunity would be little more than a starting point.²³

3.4. Policies, codes of conduct, management plans, memoranda of understanding, intergovernmental government agreements and administrative guidelines

The provisions of policies, codes of conduct, management plans, memoranda of understanding and administrative guidelines are not generally enforceable by the parties to them or by third parties, without more. Furthermore, these instruments cannot change the effect of statutes, regulations or by-laws without more. They will carry more or less weight according to their nature. However, proper consideration of these instruments (or even draft instruments²⁴) may be enforceable, if they are a relevant consideration to be taken into account in administrative decision making.

3.4.1 Policies

There are two types of regulatory decisions that a government agency might make.

First a statute might require an agency to make a decision as to whether a person has undertaken an action prohibited by the statute. There is no discretion in such a decision. Either the proposed action is prohibited or it is not.

The other type of decision requires an exercise of discretion, for example to grant or refuse a particular licence. When a government or its agent wishes to guide or influence the way discretionary decisions are made, it may develop policies or administrative guidelines for that purpose.

One of the questions I am often asked is: *How can the provisions of a policy be enforced?* The short answer is that generally speaking,²⁵ a policy is not enforceable but the appropriate consideration of a policy by the material decision maker is enforceable. Policies and administrative guidelines are developed to guide (but not predetermine) a decision based on the exercise of the discretion of the decision maker.²⁶ The weight (or importance) to be given to a particular policy varies.

Legislative policy, (a policy adopted under an Act or subsidiary legislation) carries the greatest weight. An example of such legislative policies is a State Planning Policy (SPP) made under section 5AA of the *Town Planning and Development Act 1928*. The new *Agricultural and Rural Land Use Statement of Planning Policy* gazetted 12 March 2002 (the ARLUSPP) is a section 5AA SPP. Another example of a statutory policy would be the Water and Rivers Commission policy, *Policies and Guidelines: Granting of Licences to Clear Indigenous Vegetation in Catchments Subject to Clearing Control Legislation*.²⁷

²³ *Bropho v Western Australia* (1990) 171 CLR 1.

²⁴ Say for example if the *Final Report of the Native Vegetation Working Group* released on 25 January 2000 was the precursor to a code of conduct or a management plan, it may be a relevant consideration that a decision maker is bound to consider.

²⁵ But an Environmental Protection Policy made under the *Environmental Protection Act 1986* ("EPP") is binding on the world at large. EPPs could also be described as subsidiary legislation because they can make offences: see sections 35(1)(c) and 123(3)(a).

²⁶ French and Drummond JJ in *Minister for Immigration, Local Government & Ethnic Affairs v Gray* (1994) 50 FCR 189 at 208.

²⁷ *Water and Rivers Commission Act 1995* Section 10(2)(a); *Country Areas Water Supply Act 1947* section 12E(1); and the *Country Areas Water Supply (Clearing Licence) Regulations 1981*.

Other government policies (of progressively less weight) include cabinet endorsed, State government agency endorsed,^{28 29 30} local government endorsed³¹ and local government ad hoc policies.³²

It may be possible to amend legislation (or subsidiary legislation) to make certain provisions of a particular policy enforceable. Certain RCC policies could be incorporated into town planning schemes. Town planning schemes could incorporate special flora protection measures. For example, the Minister for Transport may direct the Commissioner for Main Roads to ensure that a flora and fauna survey is undertaken on a particular road reserve before a road proposal is finalised. A register of protected flora identified in a region could be held by local government. The town or region planning scheme could require special protection of registered flora by an amendment to the scheme.

Policies do not always state the authority under which they are made or describe their legal effect. Such clarification is essential for their effective implementation, acceptance and efficacy.

3.4.2 Codes of Conduct

Codes of conduct are rather like management plans and usually created with a particular activity in mind for example clearing of roadside vegetation.³³ This code is not enforceable of itself but provides a guide for decision makers when their decisions will impact on clearing roadside vegetation. A code of conduct would carry more weight if it were adopted as a local government policy and even greater weight if it were adopted as a State Planning Policy (SPP).³⁴ The Minister of the Environment has indicated to this office that she is considering making the *Code of Practice for Roadside Conservation in Road Construction and Road Maintenance* a Ministerial policy. If by this the Minister means an Environmental Protection Policy this would carry the greatest weight because EPPs have statutory force and regulations can be made to enforce them.

3.4.3 Management Plans

The enforceability of a management plan is in the main prescribed by its statutory foundation, that is by the legal nature of the plan.³⁵

²⁸ As well as the responsibility for flora and fauna under the WC Act, CALM has a program of identifying Threatened Ecological Communities (TECs). These are not recognised under the WC Act or the CALM Act and accordingly do not have statutory protection in Western Australia without more. TECs may be listed under the *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* sections 18 and 19.

²⁹ CALM has published guidelines for local governments undertaking road works that might impact on flora and fauna *Environmental Assessment of Road Works: Guidelines for Local Authorities* December 1984, Bulletin 184.

³⁰ Main Roads Environment Policy (undated) on website www.mainroads.wa.gov.au.

³¹ See for example the *Caves Road Planning Strategy* produced by the Shire of Busselton. In relation to the road verges there is concern with *ambience* of the Caves Road but no mention of biodiversity protection and conservation. See for example by contrast, the *Environmental Management Strategy (EMS) the Wildlife Corridor Strategy* November 2000 published by the Shire of Mundaring. This EMS applies to land in the Mundaring Shire.

³² For example the *Serpentine Jarrahdale Land Management Series No 1 Flora Roads*

³³ See for example the *Code of Practice for Roadside Conservation in Road Construction and Road Maintenance* published by the Roadside Conservation Committee.

³⁴ A policy under the *Town Planning and Development Act 1928* section 5AA.

³⁵ See for example the *First Roadside Vegetation Management Plan for WA: Shire of Chittering*. The Roadside Conservation Committee publication *Roadsides* might be described more as a management tool.

Management plans should be clear, precise and unambiguous in their drafting because they can:³⁶

- state the objectives of the administration of the statute under which they are made;
- state the policy basis for decision making;
- identify the decision making process and those responsible for making and implementing decisions;
- identify matters which can be taken into account in the decision making process;
- be an aid to decision making;
- set out and clarify constraints on and opportunities for the decision maker;
- communicate management issues to other stakeholders;
- promote equity;
- reduce the likelihood of arbitrariness and caprice;
- promote transparent decision making and accountability;
- provide information about how decisions will be made; and
- provide a defence to a particular claim against a person implementing a plan.

Certain practices set out in a management plan are not binding on the authority authorised to administer the plan without more. This means that departure from the plan can also be contemplated if there are factors against it. What is helpful in such circumstances is identification in a management plan of the appropriate criteria for departure from a plan.

An example of a management plan is a forest management plan³⁷ made pursuant to Part V of the CALM Act.³⁸

³⁶ Water Resources Law and Management in Western Australia Centre for Commercial and Resources Law 1996, University of Western Australia and Murdoch University, *Legislative Requirements for an Effective Regional Water Resources Planning and Management Framework*, Ventriss, H. 119, at 121.

³⁷ The Forest Products Commission (FPC) created under the *Forest Products Act 2000* (FP Act) provides that the FPC must give due regard to an FMP when developing its Strategic Management Plan, see section 22 of the FP Act. The FPC is under a duty to act in accordance with its strategic development plan and its statement of corporate intent: see the FP Act section 11; forest products contracts must be in accordance with a material forest management plan: see the FP Act section 58; an FPC production contract expires when the management plan expires: see the FP Act section 58; notwithstanding any contractual term to the contrary: the FP Act see section 61. The FPC does not enjoy Crown immunity, see the *Forest Products Act 2000* section 9; except in relation to *Wildlife Conservation Act 1950* where a production contract is undertaken in accordance with the applicable forest management plan see *Forest Products Act 2000* subsections 10(5) and (6) (and certain taxes: see *Forest Products Act 2000* section 43). A *road contract* is different from a *production contract*: see *Forest Products Act 2000* sections 3 and 55. Accordingly it appears that the provisions of the *Wildlife Conservation Act 1950* may apply to *road contracts* which are a contract (other than a production contract) providing for the construction or maintenance of roads for the purposes of managing or harvesting forest products: see *Forest Products Act 2000* section 55. Furthermore, any provisions in a *road contract* under the FP Act is of no effect if is inconsistent with the FP Act or (in relation to contracts on CALM land) the CALM Act or a relevant management plan: see FP Act section 61.

In regard to State forest management plans,³⁹ it has been held that,

“.... (the CALM Act) may impose legally binding duties on the Executive Director of CALM to manage State forests in accordance with the relevant management plans, but subject to acting in good faith, and in accordance with directions from the Minister, the Executive Director has a wide discretion as to the manner in which he discharges his duties (in relation to a management plan)...”⁴⁰

3.4.4 Memoranda of Understanding

A memorandum of understanding (MOU) may be entered into between government agencies to streamline the way the agencies process certain proposals that come before them.⁴¹ An MOU cannot alter or amend the effect of legislation without more, it is unlikely to be binding on the signatories to it nor is it likely to be enforceable by third parties.

3.4.5 Intergovernmental Agreements

Intergovernmental agreements⁴² are not generally enforceable by the parties or by third parties without more.⁴³ They act at the Commonwealth level rather like memoranda of understanding do at the state level.

3.4.6 Administrative Guidelines

Administrative guidelines are published by an agency of government to describe how one or more of the functions of that agency will be administered. An example of Administrative Guidelines are those published by the Environmental Protection Authority for the process of environmental impact assessment under the *Environmental Protection Act 1986*.

4. The Crown

4.1 Outline

The Crown includes Ministers and State government agencies, but not local governments.

³⁸ *Conservation and Land Management Act 1984*.

³⁹ *Conservation and Land Management Act 1984* Part V.

⁴⁰ Templeman, J in *Bridgetown/Greenbushes Friends of the Forest Inc. v Executive Director of the Department of Conservation and Land Management and Ors* (1997) 94 LGERA 380, at 428; 18 WAR 126.

⁴¹ See for example the government of Western Australia *Memorandum of Understanding for the Protection of Remnant Vegetation on Private Land in the Agricultural Region of Western Australia* between the Commissioner for Soil and Land Conservation, Environmental Protection Authority, Department of Environmental Protection, Department of Agriculture, Department of Conservation and Land Management and the Water and Rivers Commission, Perth 1997.

⁴² For example see the *Intergovernmental Agreement on the Environment* to which the Commonwealth and the Western Australian State governments are parties.

⁴³ See for example the Regional Forest Agreement 1999 which is an agreement more like a contract. This is because Part 3 is stated to bind the parties, there are clauses relating to breach and it became an Act of the Federal parliament on 5 April 2002, the *Regional Forests Agreement Act (2002)* (Cth) (not yet operative). In this way the provisions of the Agreement will prevail over certain provisions of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

The question of whether a body or person is a servant or agent of the Crown is determined by reference to the character of the relevant statute, and whether the statute indicates an intention that the relevant body or person forms part of the Crown.⁴⁴ This intention may be indicated by an express statement. Where there is no such statement the functions and duties of the relevant body or person may give rise to an inference that the body or person is the Crown.⁴⁵ Furthermore, courts will consider the extent or degree of ministerial control over the person or body, whether the person or body hold property on behalf of the Crown.⁴⁶ Where a person is entitled to claim Crown immunity for a particular purpose, then any persons or bodies who are contractors of the relevant person or body involved in effecting that purpose⁴⁷ may also claim such immunity.

Common law principles bind the Crown.⁴⁸ Statutes are presumed not to bind the Crown and do not unless there is an express or implied provision in a particular statute to the contrary.⁴⁹ Even if there is a provision in a particular statute that the Crown is bound by it, this may not be the last word if there is an overriding Act such as a State Agreement Act.⁵⁰

The other important distinction between the Crown and other parties is in respect of civil liability for certain actions. The time⁵¹ in which a complainant has to commence an action against the Crown, is generally much shorter than it would be against some other party.⁵² Furthermore, there is a statutory obligation to provide prior notice to the Crown of the possible action.

4.2. Land management and government agencies

It is understandable that government agencies might be concerned to prevent personal injury or property damage from events occurring on land under their control and forestall any liability of the agency arising from a negligent failure to undertake certain actions. The common law and statutory liability of the Crown in respect of damage, injury or loss suffered by a person on or from a cause emanating from public access routes, unmanaged

⁴⁴ Halsbury's Laws of Australia para 90-3020

⁴⁵ *Grain Elevators Board (Vic) v President Counsellors and Ratepayers of the Shire of Dunmunkle* (1946) 73 CLR 70, at 75 & 80.

⁴⁶ *Bradken Consolidated Limited and Another v the Broken Hill Proprietary Company Limited and Ors* [1979] 145 CLR 107, at 115.

⁴⁷ *Bradken Consolidated Limited and Another v the Broken Hill Proprietary Company Limited and Ors* [1979] 145 CLR 107.

⁴⁸ The *Crown Suits Act 1947* provides that the Crown is not immune from the common law.

⁴⁹ The test of whether or not a statute binds the Crown, depends on whether the statute was enacted prior to *Province of Bombay v Bombay Municipal Council* [1947] AC 58; between the *Bombay* case and *Bropho v Western Australia* (1990) 171 CLR 1; or after *Bropho*. For statutes in the middle period the Crown is not bound unless by express words or necessary implication. The rule is not so inflexible in the other periods. If an Act is not stated to bind the Crown, then it is presumed that the Crown is not bound unless this presumption may be rebutted by judicial interpretation of the provisions of the material Act, see *Bropho v Western Australia* (1990) 171 CLR 1; and *Bridgetown/Greenbushes Friends of the Forest Inc. v Executive Director of the Department of Conservation and Land Management and Ors* (1997) 18 WAR 126.

⁵⁰ State Agreement Acts have been a tool often used by successive Western Australian governments for example, to avoid the provisions of certain Acts applying to the Crown, private persons or companies when large infrastructure agreements are made. State Agreement Acts which were enacted prior to 1 January 1972 (before enactment of the first *Environmental Protection Act 1971*) may prevail over the *Environmental Protection Act 1986*: the EP Act section 5.

⁵¹ Generally referred to as the limitation period. For example, in respect of negligence, the limitation period generally commences to run after the damage is known or ought reasonable have been known to have occurred.

⁵² The *Crown Suits Act 1947* section 6.

reserves or unallocated Crown land has been limited by statute⁵³ but is not so limited in respect of road and mall reserves.⁵⁴

4.3. Liability and policy implementation

A discretionary decision following a particular policy not to widen a road or make a firebreak on a road reserve is unlikely, without more, to lead to a successful claim in negligence against the government agency or a local government making that decision. The law of negligence distinguishes between a mistake in making a policy, and a mistake in implementing a policy at the *operational* level.

This is so because our courts have held that governments must be free to govern.⁵⁵ Governments and their agents make policy decisions which involve the balancing of environmental, financial, economic, social, and political factors. This approach is reflected in judicial decisions which have held that public authorities are not under a duty of care in relation to policy decisions. Thus, a decision to follow a policy is unlikely to found a successful action in negligence because a duty of care is an essential element of a successful common law claim for damages in negligence.

On the other hand, mistakes at the *operational level* in implementing a policy might provide a basis for a claim for damages in negligence.

Examples of negligent *operational* mistakes might be,

- a failure to make a firebreak contrary to policy;
- inappropriate or unlawful herbicide use; or
- a rigid implementation of policy in circumstances where the policy is not apt.

Thus an action implementing a policy taking into account the full range of considerations, including public safety, risk to property and the impact on biodiversity, is unlikely to provide a foundation for a successful claim in negligence, unless the decision is then implemented in a negligent way.⁵⁶

This analysis indicates that:

- a perceived threat of legal action: for example property damage from herbicide use or for not making a firebreak may not be a valid reason for a government agency to ignore or not give appropriate weight to other statutory considerations (such as land degradation and biodiversity impacts) for not making a firebreak proposed to be made or not made, according to a policy; and

⁵³ *Land Administration Act 1997* section 264 (2) and the Crown in this section means a State agency or State instrumentality or an officer or employee of the Crown or of a State agency or State instrumentality, see section 264(4).

⁵⁴ *Land Administration Act 1997* Part 5 Roads.

⁵⁵ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; and *Parramatta City Council v Lutz* (1998) 12 NSWLR 293; and *Murphy v Brentwood District Council* [1991] 1 AC 398.

⁵⁶ See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Parramatta City Council v Lutz* 1(1988) 12 NSWLR 293; *Murphy v Brentwood District Council* [1991] 1 AC 398.

- it is in the interest of local government authorities and government agencies to have approved policies on certain matters, since these might provide a successful defence in a civil action for damages perceived to have been caused by some action or omission of the material agency.

In some matters that come before the courts a negligent action, undertaken by an employee or contractor, is well beyond the scope of the authorised activity. Such actions have been described as *off on a frolic of their own* and have led to personal liability for the consequences of a negligent action.⁵⁷

PARTICULAR LAWS APPLYING TO ROADSIDE CONSERVATION

1. What is a “road”?

When a term is not defined courts will look at a dictionary definition. The *Australian Oxford Dictionary* defines a road as a path or way with a specially prepared surface used by vehicles, pedestrians et cetera.⁵⁸

Roads can be created under common law or statute. A dedicated road includes the thoroughfare and that part of the land on either side of the thoroughfare both of which form part of the dedicated road reserve. The area of land of a road reserve varies.

The nature of the right of each member of the public to pass and repass on a public road is not an unlimited right which is independent of the nature of the place. The mode of enjoyment of the right of passage must accord with the fitness of the place. The right of passage only extends to reasonable use according to the character and purpose of the particular way.⁵⁹

1.1 A road at common law

At common law, a distinction is to be drawn between a *road* and a *highway*. A highway has been described as follows,⁶⁰

*It is the public right to use the land as a way, rather than its physical nature, that makes land a highway ... At common law a highway was created when a competent landowner manifested an intention to dedicate land as a public road, and there was an acceptance by the public of the proffered dedication.*⁶¹

Where there is freehold title of the land the subject of a public road, evidence will be required that legal title has been abandoned.⁶² Provision of services by a public authority to the road and use by members of the public are relevant considerations in any

⁵⁷ An employee *off on a frolic of his or her own* negates the vicarious responsibility of his or her employer for damages arising from that unauthorised action, see *Whitfield v Turner* (1920) 28 CLR 977 but see *Burnie Port Authority v General Jones Pty Ltd* (1994) 68 ALJR 331; 179 CLR 520 which held that in certain circumstances an owner has a non-delegable duty of care.

⁵⁸ *Rebecca Cooper Research Foundation Ltd v Woolhara Municipal Council* [2001] NSWLEC 220, at page 74.

⁵⁹ Dixon J in *Nickells v Melbourne Corporation* (1938) 59 CLR 219 at 225.

⁶⁰ Windeyer J in *Permanent Trustee Company of NSW Limited v Council of the Municipality of Campbelltown & Anor.* (1960) [105 CLR 401](#); and see Talbot J in *Rebecca Cooper Research Foundation Ltd v Woolhara Municipal Council* [2001] NSWLEC 220, at page 75.

⁶¹ *Ibid*, at 420.

⁶² *Rebecca Cooper Research Foundation Ltd v Woolhara Municipal Council* [2001] NSWLEC 220, at page 75.

determination of a common law public road.⁶³ The pegging out and surveying of roads by Crown surveyors and then marking them on official maps may of itself be a reservation of Crown land for road purposes and sufficient to amount to a dedication as a common law public road.⁶⁴ Finally, the test for a common law public road must fulfil two conditions:

- (1) An express or implied intention to dedicate the road as a public road; and
- (2) Acceptance by the public of the dedication evidenced by uninterrupted user of the road by the public.⁶⁵

There is no reason why the trustees in who land is vested for a public purpose cannot dedicate the surface to the use of the public as a highway.⁶⁶

Accordingly, it is dedication of a public road by a landowner as a public right to pass along the way – not its physical character – that defines a highway or public road at common law. Rights of way which do not permit members of the public to pass along them are not *highways* or *public roads* at common law. If the public has the requisite right of passage over the land, it is a highway even if the passage over the road is difficult.⁶⁷ In isolated areas mere evidence of public user of a road may be sufficient to establish a public road at common law.⁶⁸

1.2 A road by statute

In Western Australia, roads are variously defined in a number of statutes.

1.2.1 Land Administration Act 1997

The *Land Administration Act 1997* binds the Crown.⁶⁹ *Road* under this Act is,

*land dedicated at common law or reserved, declared or otherwise dedicated under an Act as an alley, bridge, court, lane, road, street, thoroughfare or yard for the passage of pedestrians or vehicles or both.*⁷⁰

This definition includes roads *dedicated at common law . . . for the passage of pedestrians or vehicles or both*. Whilst this definition does not expressly indicate that a road must have been dedicated for *public use*, this can be implied by the reference to the passage of vehicles and pedestrians.

Private road means *alley, court, lane, road, street, thoroughfare or yard on alienated land, or a right of way created under section 167A(1) of the TLA, which —*

- (a) *is not dedicated, whether under a written law or at common law, to use as such by the public; and*
- (b) *is shown on a plan or diagram deposited or in an instrument lodged with the Registrar,*

⁶³ *Rebecca Cooper Research Foundation Ltd v Woolhara Municipal Council* [2001] NSWLEC 220, at page 76.

⁶⁴ *Ngalakan People v Northern Territory of Australia* [2001] FCA 654 at para 36.

⁶⁵ *Newington v Windeyer* (1985) 3 NSWLR 555 at 555 – 559.

⁶⁶ *Vale v Whiddon* (1949) 50 SR(NSW) 90 at page 102.

⁶⁷ *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151; 152 ALR 294, at 311.

⁶⁸ *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151; 152 ALR 294, at 311.

⁶⁹ *Land Administration Act 1997* section 4.

⁷⁰ *Land Administration Act 1997* section 3(1).

and which —

- (c) forms a common access to land, or premises, separately occupied;
- (d) once formed or was part of a common access to land, or premises, separately occupied, but no longer does so;
- (e) is accessible from an alley, court, lane, road, street, thoroughfare, yard or public place that is dedicated, whether under a written law or at common law, to use as such by the public; or
- (f) once was, but is no longer, accessible from an alley, court, lane, road, street, thoroughfare, yard or public place that was dedicated, whether under a written law or at common law, to use as such by the public.

Dedicated is used in the sense that the owner of the soil had so conducted himself as to make an offer of usage to the public which the public accepted.⁷¹

Public access route means a public access route providing members of the public with access through Crown land to an area of recreational or tourist interest.⁷²

Dedicated public roads and the width of the road reserve will generally be described on a plan registered at DOLA.

The Minister for Lands is authorised to grant an easement across a Class A Reserve provided certain procedures in both Houses of Parliament are followed.⁷³

The LA Act does not prevent or otherwise affect the system of registration under other Acts of mining or petroleum rights in respect of Crown land.⁷⁴

1.2.2 Public Works Act 1902

The *Public Works Act 1902* (the PW Act) is not stated to bind the Crown. *Road* under this Act means,

*. . . a public highway, whether carriage-way, bridle-path, or footpath, and unless repugnant to the context, includes all roads which have been or may hereafter be set apart, defined, proclaimed, or declared roads under any law or authority for the time being in force, and all bridges, culverts, drains, ferries, fords, gates, buildings, and other things thereto belonging, upon, and within the limits of the road, and includes arable soil of every road.*⁷⁵

Public work and *work* mean every work which the Crown, Governor, government, Minister or local government undertake under any Act.⁷⁶ *Public work* includes,

- the protection and preservation of places of scientific or historical interest⁷⁷
- the protection and preservation of indigenous flora and fauna⁷⁸

⁷¹ *Ngalakan People v Northern Territory of Australia* [2001] FCA 654 at para 32.

⁷² *Land Administration Act 1997* sections 3 and 64(1).

⁷³ *Land Administration Act 1997* sections 43, 44, 144 & 148.

⁷⁴ *Land Administration Act 1997* section 5(b).

⁷⁵ *Public Works Act 1902* section 85.

⁷⁶ *Public Works Act 1902* section 2.

⁷⁷ *Public Works Act 1902* section 2(14).

⁷⁸ *Public Works Act 1902* section 2 (14A).

- any road, stock route, viaduct or canal⁷⁹
- any survey in connection with a public work⁸⁰
- any land required for public work⁸¹

Government roads for the purpose of the PW Act are all public roads.⁸² Quarrying and excavating for public works is prohibited in the Metropolitan Area, any municipality or town site, subject to certain exceptions.⁸³

1.2.3 Main Roads Act 1930

The *Main Roads Act 1930* (MR Act) is not stated to bind the Crown. In respect of Main Roads roads, the MR Act prevails over the *Land Administration Act* to the extent of any inconsistency.⁸⁴ Under the MR Act *road* means,

*any thoroughfare, highway or road that the public is entitled to use and any part thereof, and all bridges (including any bridge over or under which a road passes), viaducts, tunnels, culverts, grids, approaches and other things appurtenant thereto or used in connection with the road.*⁸⁵

Main Roads road reserves vest in the Crown.⁸⁶ Control of Main Roads road reserves vests in the Commissioner for Main Roads.⁸⁷ The property of Main Roads vests in the Commissioner.⁸⁸

It is unlikely that the Commissioner for Main Roads is an agent of the Crown for the purpose of undertaking road works on road reserves that contain native vegetation.⁸⁹ The Commissioner is not expressed to represent the Crown but only to be responsible for the administration of the *Main Roads Act*.⁹⁰

1.2.4 Local Government Act 1995

The *Local Government Act 1995* (LG Act) does not generally bind the Crown except as particularly provided.⁹¹ Under the LG Act *thoroughfare* means *a road or other thoroughfare and includes structures or other things appurtenant to the thoroughfare that are within its*

⁷⁹ *Public Works Act 1902* section 2 (20).

⁸⁰ *Public Works Act 1902* section 2 (23).

⁸¹ *Public Works Act 1902* section 2 (22).

⁸² Pers comment Murray Robinson of Main Roads department.

⁸³ *Town Planning and Development By-Laws — By-laws in Respect of Excavations in Subdivided Areas 1937*

⁸⁴ *Land Administration Act 1997* section 53.

⁸⁵ *Main Roads Act 1930* section 6.

⁸⁶ *Main Roads Act 1930* section 15(1)

⁸⁷ *Main Roads Act 1930* section 15(2)

⁸⁸ *Main Roads Act 1930* section 15(3)

⁸⁹ The Commissioner for Main Roads takes the view that he is bound by the provisions of WA statutes, pers comment Murray Robinson of Main Roads.

⁹⁰ *Main Roads Act 1930* section 7.

⁹¹ *Local Government Act 1995*, section 1.6.

⁹¹ *Town Planning and Development Act 1928* section 35.

*limits, and nothing is prevented from being a thoroughfare only because it is not open at each end.*⁹²

Local road reserves are Crown land vested in the local government for care, control and management.

1.2.5 Town Planning and Development Act 1928

The *Town Planning and Development Act 1928* binds the Crown except where otherwise provided.⁹³ Roads and thoroughfares are not defined in the TP&D Act or regulations made pursuant to it.

It is likely that development under the TP&D Act and local, district and region town planning schemes includes clearing.⁹⁴

1.2.6 Native Title and road reserves

Provisions in statutes which vest ownership of land comprising roads in the Crown operate to extinguish native title.⁹⁵ This is because the unrestricted right of the public to use and enjoy public roads is incompatible with native title.⁹⁶

1.2.7 Conclusion

Having regard to the above discussion, for the purpose of this report, a *public road* is taken to have the following characteristics:

- a thoroughfare, highway or road that has been dedicated either under common law or statute for public use;
- all structures appurtenant to the road; and
- all land which forms the road reserve.

The status and tenure of private roads may vary from case to case. To the extent that many private roads are on Crown land, much of the discussion in this report will be relevant.

2. Is native vegetation part of a road?

The Crown owns the property in protected flora on Crown land.⁹⁷

- (1) *The property in protected flora on Crown land, until lawfully taken, is, by virtue of this Act, vested in the Crown.*
- (2) *The provisions of subsection (1) do not entitle any person to compensation.*

⁹² *Local Government Act 1995*, section 1.4.

⁹³ *Town Planning and Development Act 1928* section 35.

⁹⁴ *Perkins v Soil and Garden Suppliers Pty Ltd and Pollock Petty Sessions at Perth 2002?*

⁹⁵ *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151; 152 ALR 294

⁹⁶ *Ngalakan People V Northern Territory of Australia* [2001] FCA 654

⁹⁷ *Wildlife Conservation Act 1950* section 23A.

It has been held that it is impossible to make, manage or control a road, or control the timber thereon, without having possession of the roads and timber in and on the road reserve.⁹⁸

The absolute property in the land over which a highway or main road under Main Roads is declared shall vest in the Crown. The property in,

- (a) *the materials of all highways and main roads, and all live and dead timber and vegetation thereon, and all matters and things appurtenant thereto; and*
 - (b) *all buildings, fences, gates, posts, boards, stones, erections, and structures placed upon any highway or main road; and*
 - (c) *the scrapings of any highway or main road and all gravel, sand, and other material on any highway or main road,*
- shall vest in the Commissioner.*⁹⁹

The PW Act provides:

*The soil of all roads is hereby declared to be and is hereby vested in the Crown, including, in the case of Government roads, all materials and things of which such roads are composed, or which are capable of being used for the purpose thereof, and are placed or laid upon any such roads.*¹⁰⁰

The soil of all roads is vested in the Crown.¹⁰¹

It is interesting to contemplate whether this definition of *road* includes native vegetation growing on the road reserve verge. The definition applies to dedicated roads and *other things belonging upon, and within the limits of the road*. Examples of things which are part of the road for the purpose of this definition include bridges, culverts, gates and the arable soil of every road. The things listed (with the exception of the arable soil) are constructed by humans. In this case, it might be argued that the definition of road under this Act is not intended to include native vegetation growing on the verge. This will be considered further below.

The common law legal maxim, which provides that whatever is affixed to the soil, belongs to the soil,¹⁰² applies to roads but may be varied by legislation. This maxim is generally applied to determine the rights of owners of land to things fixed or embedded in the soil. I cannot find a case that applies the maxim to vegetation growing in the soil.

For the purpose of this report the vegetation on a road reserve is assumed to be part of a *road reserve*. This conclusion is confirmed by recent Supreme Court authority which found an unmade road reserve in the south west was Crown land for the purpose of vegetation protection laws.¹⁰³

⁹⁸ *Tinaroo Shire Council v Purcell* [1904] St R Qd 186, at page 188; [1904] QWN 54.

⁹⁹ *Main Roads Act 1930*, section 15(3).

¹⁰⁰ *Public Works Act 1902*, section 85.

¹⁰¹ *Public Works Act 1902* section 85.

¹⁰² *Quicquid platatur solo, solo cedit* and see *Commissioner for Main Roads v North Shore Gas Co Ltd* (1967) 120 CLR 118.

¹⁰³ *Russell v Pennings* (Unreported, 12 April 2001, Supreme Court of WA, WASCA [115??] 2001)

Any lack of clarity about what constitutes a road reserve could be resolved by providing that *any vegetation on a road reserve* is part of any *road* under the LA Act.¹⁰⁴ Native vegetation could also be included in the description of the LA Act *situation and configuration* of a road.¹⁰⁵ In the Northern Territory ownership of road includes *all things growing* on a road reserve.¹⁰⁶

3. How are public roads created?

3.1 Introduction

As discussed above, public roads can be created at common law, by the Crown or by a landowner dedicating the use of a way for a public thoroughfare.

There are a number of statutory methods for creating a public road in Western Australia, and these are outlined below. Where the Crown is authorised to make a public road by statute, the question of whether land is a public road constituted under a statute depends entirely on whether the statutory procedure has been followed.¹⁰⁷

Where there is legislative provision for the Crown to open public roads, the common law methods of opening public roads remain available to the Crown.¹⁰⁸ The Crown cannot create a road at common law by dedication alone, it requires acceptance by the public.¹⁰⁹ Any dealing in Crown land requires prior Ministerial approval.¹¹⁰ There is no compensation payable for the reversioning of a private road.¹¹¹ Leasing of private roads by the Minister for Lands requires the consent of the Commissioner for Main Roads or the Minister responsible for Public Works.¹¹²

Acquiring freehold land for Crown land that is a private road no longer requires advertising but requires notice to interested person to be given with a 30 day (or more) period to raise an objection to the proposal. The RCC could be a nominated body that must be notified of such proposals

Resumptions of private land¹¹³ for road works or road widening may be made before all the material environmental impacts are known or addressed.¹¹⁴ There are at least two options that could address this issue. Funding often comes from Main Roads to local

¹⁰⁴ *Land Administration Act 1997* section 3.

¹⁰⁵ *Land Administration Act 1997* section 54.

¹⁰⁶ (NT) *Local Government Act 1993* section 132

¹⁰⁷ *Fourmile v Selpam Pty Ltd & Anor; Fourmile v State of Queensland & Anor* 152 ALR 294; and *Permanent Trustee Co of NSW Ltd v Campbelltown Municipal Council* (1960) 105 CLR 401.

¹⁰⁸ *Attorney-General v Minister for Aboriginal Affairs* (1984) 23 FCR 536, per Lockhart J at 541.

¹⁰⁹ *Attorney-General v Minister for Aboriginal Affairs* Federal Court 3 August 1988.

¹¹⁰ *Land Administration Act 1997* section 18.

¹¹¹ *Land Administration Act 1997* section 55.

¹¹² *Land Administration Act 1997* section 57.

¹¹³ Resumption of private land containing remnant native vegetation for the widening of the Rosa Brook Road (a floral road and tourist route) in the Shire of Augusta Margaret River was made on the false assumption of the presence of a telecommunication fibroptic cable under land already cleared. Furthermore, clearing occurred before flora or surveys were carried out.

¹¹⁴ The works for the widening of Rosa Brook Road were in a number of stages, and each stage was not of such significance as the whole, yet it was only each stage that was referred to the EPA for assessment. Had the whole project been referred notwithstanding that it would occur over a number of years, the proposal may have attracted an assessment of the overall environmental impact under the *Environmental Protection Act 1986* section 38(1). Again this failure may have been prevented by certain conditions being placed on the Main Roads funding or an amendment of the local town planning scheme to require development approval for any road or public works that entails clearing of remnant vegetation.

government for road works. There could be material conditions on Main Roads funding to local governments in respect of biodiversity conservation. Local government town or district planning schemes could be amended to ensure that all plans for road works address roadside vegetation issues before decisions are made about how the road works will be implemented or what land will be resumed.

The Minister for Lands may place the care, control and management of a reserve ¹¹⁵ with any person or jointly with any 2 or more persons; and may impose conditions on the management.¹¹⁶

3.2. Land dedicated as roads through Crown subdivisions

The LA Act provides a process by which roads are dedicated when the Minister for Lands subdivides Crown land into lots.¹¹⁷

RCC should be a notifiable authority for any subdivision proposals. The RCC could have conditions for preservation of roadside vegetation in certain areas.

3.3. Land dedicated for roads through freehold subdivisions

The *Town Planning and Development Act 1928* provides that *a person shall to, without the approval of the Commission, lay out, grant or convey a street, road or way...and the Commission may give its approval...subject to conditions which shall be carried out before the approval becomes effective.*¹¹⁸ It is offence to breach this provision.¹¹⁹

The Western Australian Planning Commission must approve roads to service subdivisions.¹²⁰ Roads created by subdivision of freehold land must become dedicated roads under the care and control of the relevant local government.¹²¹

The *Local Government (Miscellaneous Provisions) Act 1960* (LGMP Act) provides the procedure for making roads in subdivisions.¹²² The LGMP Act is not stated to bind the Crown. The LGMP Act authorises local governments to require certain things in respect of roads, and the Crown may do those things if it is otherwise so empowered.¹²³ I have included the text of these provisions to provide the RCC with an opportunity to consider how the RCC might be involved in this process. There is clearly no reference to roadside vegetation in these sections.

- (1) *Where a person who is the owner of land in a district proposes to subdivide the land into lots for disposal, if the proposal is to include in the subdivision a street or streets for use by the public, he shall not commence to put the proposal into effect until he has notified the local government of the proposal in writing and delivered to the local government with the notification a plan of the subdivision,*

¹¹⁵ Reserved under the *Land Administration Act 1997* section 41.

¹¹⁶ *Land Administration Act 1997* section 46. A management order can be searched at DOLA. The Minister can request a management authority to prepare a management plan for a reserve: see *Land Administration Act 1997* section 49(2).

¹¹⁷ *Land Administration Act 1997*, sections 27 and 28.

¹¹⁸ *Town Planning and Development Act 1928* section 20(1)(a).

¹¹⁹ *Town Planning and Development Act 1928* section 27(1).

¹²⁰ *Town Planning and Development Act 1928* section 20(1)(a)

¹²¹ *Local Government (Miscellaneous Provisions) Act 1960* section 295(5).

¹²² *Local Government (Miscellaneous Provisions) Act 1960* section 295.

¹²³ *Local Government (Miscellaneous Provisions) Act 1960* section 682.

and received the approval prescribed by the Town Planning and Development Act 1928 to do so.

- (2) A person shall not, without the consent in writing of the Minister for Planning or his delegate under subsection (2a), as the case requires, set out or construct, or cause to be set out or constructed, any street unless the width thereof, to be ascertained by measuring at right angles to the course of the street from front to front of the boundary line on either side of it, is 20 metres, but any way shown on a subdivisional plan duly approved under this or any repealed Act shall be deemed to be lawfully set out and constructed.
- (2a) The Minister for Planning may, subject to subsection (2b), by writing signed by him delegate generally to the Western Australian Planning Commission the power to give or withhold consent conferred on him by subsection (2).
- (2b) If the Minister for Planning has under subsection (2a) delegated the power referred to in that subsection to the Western Australian Planning Commission and a local government to which a plan of subdivision has been delivered under subsection (1) objects to the exercise by the Western Australian Planning Commission of that power in relation to the relevant subdivision, the Minister for Planning shall, and the Western Australian Planning Commission shall not, exercise that power in relation to that subdivision.
- (3) (a) Where a person so delivers a plan of a subdivision of land in a city, town, or townsite, and the proposed subdivision includes the provision of a street for use by the public, he shall also deliver to the local government —
- (i) drawings showing longitudinal and cross sections of the proposed street;
 - (ii) specifications of the proposed street;
 - (iii) the name proposed to be given to the street; and
 - (iv) such other information including information relating to levels, drainage, nature of soil, and physical features, as the local government requires.
- (b) The local government may require the person so subdividing the land —
- (i) to amend the drawings or specifications or both;
 - (ii) to assign a name to the proposed street or, if a name has already been assigned, to alter or change that name;
 - (iii) to assign a name to the area the subject of the proposed subdivision, or if a name has already been assigned, to alter or change that name; and
 - (iv) to comply with such further conditions as the local government thinks fit to impose in respect of the proposed street.
- (3a) For the purposes of this section the Minister may from time to time by notice published in the Gazette—
- (a) fix minimum standards of construction with respect to streets to be constructed pursuant to this section within the district or districts, or part or parts thereof, specified in the notice for the purpose; and
- (3b) Any notice published pursuant to subsection (3a) may set out particulars relating to the width, kerbing, thickness, surfacing and foundation of streets, and the materials to be used in the construction thereof.
- (3c) Without limiting the powers conferred on a local government by subsection (3) (b), where —
- (a) a person delivers drawings and specifications of a proposed street to a local government pursuant to paragraph (a) of that subsection; and

- (4) (a) *Where proposals for the subdivision of land in a district include the provision of streets for use by the public, and the proposals have been approved, on or after 11 February 1933, whether under this or another Act, the owner of the land shall not, unless under paragraph (b) or (c), dispose of the land, or part of it, or an estate or interest in it, except to an authority which under an Act has power to take or resume it, until he has caused those streets to be constructed and drained to the satisfaction of the local government.*
- (b) *Notwithstanding that he has not caused those streets or some of them to be so constructed and drained, the owner of the land may, with the consent of the Governor, dispose of the land as one piece, with the exception of such, if any, of the parts of it, or estates or interests in it, as have been dedicated to public use, or have been disposed of to, or acquired by, an authority, which under an Act has power to take or resume it, and the Governor may grant his consent —*
- (i) *if of opinion that the owner is, for a good reason unable to carry out the proposals;*
- (ii) *if satisfied that the owner has not disposed of part of the land or an estate or interest in it, except as already mentioned in this paragraph; and*
- (iii) *if satisfied that the consent is sought in good faith and not for the purpose of evading or avoiding the prohibition imposed by paragraph (a).*
- (c) *Notwithstanding that he has not caused all of those streets to be so constructed or drained, if he has caused one or more of them to be so constructed and drained, and there is access from the latter to lots in the subdivision as approved, the owner of the land may, with the consent of the local government, dispose of those lots having that access, but the local government shall not refuse its consent arbitrarily or capriciously, nor where drawings and specifications submitted with the proposals for the subdivision have been approved, if the streets constructed have been constructed and drained substantially in accordance with those drawings and specifications.*
- (d) *A person may appeal to the Minister for Local Government against the refusal of a local government to grant a consent mentioned in paragraph (c), and, if of opinion that the owner has caused a street to be so constructed and drained, and that the street gives such access to lots in the subdivision, that the local government should have granted the consent, the Minister may give his consent to the disposal of the lots and the decision of the Minister is final.*
- (4a) *A person to whom the land is disposed of under subsection (4) (b) and any person who subsequently acquires the land, is subject to the provisions of that subsection, as though he were the owner referred to therein and shall comply therewith, in so far as those provisions have not been complied with, and has the right of appeal conferred by that subsection.*
- (5) *Where a plan of the subdivision is deposited in the Department within the meaning of the Transfer of Land Act 1893 and approved by any officer appointed to approve it then as from the date of that approval, any land delineated and shown on the plan as a new street shall become dedicated as a street and thereupon the local government has the care, control and management of it; but no way not exceeding 6 metres in width shall be dedicated or be deemed to have become dedicated as a street by virtue of this subsection.*

364. *Power to prescribe new street alignments*

- (1) *A local law made under the Local Government Act 1995 may prescribe a new street alignment for a street or part of a street for the purpose of extending the width of the street or part of the street to the new street alignment.*
- (2) *Where the local government by local law so prescribes a new street alignment, it shall immediately the local law is no longer liable to be disallowed by Parliament, cause written notice of the new street alignment to be served on the owners of land affected thereby and cause notice of the local law to be served on the Registrar of Titles and Registrar of Deeds.*
- (3) (a) *In this subsection "building operation" means constructing, building, placing, reconstructing, rebuilding, replacing, extending, enlarging, adding to or otherwise altering or repairing, a building or work or portion of a building or work, but does not include any such building operation that is carried out with the permission of a local government on any land acquired by that local government for or in relation to the provision of, or widening of, a street.*
 (b) *Except with the approval mentioned in paragraph (c), a person shall not in relation to any land, building or work affected by the new street alignment, commence to carry out a building operation upon the land, except for the purpose of completing a building operation already commenced at the time of the prescribing of the new street alignment.*
 (c) *The building surveyor, subject to directions which the local government may give, may approve the execution of minor but not substantial repairs, in order to permit of the reasonable preservation of an existing building or work.*
- (4) *The Governor may, by order specify any street or part thereof in any district to which the provisions of subsection (5) apply.*
- (5) (a) *This subsection applies to any street or part thereof specified in an order made pursuant to subsection (4).*
 (b) *Land that is affected by the new street alignment and which lies between that alignment and the old street alignment is, subject to rights, if any, reserved to the previous owners of the land at the time it was acquired by the local government, by virtue of this subsection —*
 - (i) *dedicated to use as part of the street so specified; and*
 - (ii) *revested in the Crown under section 55 of the Land Administration Act 1997,*
if the land —
 - (iii) *has no buildings thereon on the date the new street alignment is prescribed; or*
 - (iv) *is on or after that date cleared of buildings and other obstructions.*
- (6) *Notwithstanding land is dedicated and revested as provided in subsection (5), the local government may, subject to rights, if any, reserved to the previous owners of the land at the time it was acquired by the local government, lease that land or a portion of it to the owner of the land upon which it abuts as if the land or the portion had been acquired by the local government.*
- (7) *The local government shall pay compensation to the owner of the land, portion of which is dedicated and revested under subsection (5), but the compensation payable by the local government is limited to the amount by which the*

remainder of the land is depreciated in value by the portion being so dedicated and revested.

- (8) *If a question arises as to the amount of the compensation or the day on which the buildings, works, and other obstructions, have been cleared from the land, the question is determinable only on a reference to arbitration.*
- (9) *Immediately land has been revested under subsection (5), the local government shall cause written notice of the revesting to be served —*
 on the Registrar of Titles, if the land is subject to the provisions of the Transfer of Land Act 1893; or
 on the Registrar of Deeds if the land is not subject to the provisions of that Act;
 and the Registrar of Titles or the Registrar of Deeds, as the case may be, shall record the revesting in appropriate manner.
- (10) *In this section the term “building” does not include a fence.*
- (11) *When the provisions of subsection (5) do not apply to a street or portion thereof, with respect to land that is affected by the new street alignment and which lies between that alignment and the old street alignment the following provisions apply—*
- (a) *the land remains under the control of the owner thereof unless and until the local government purchases or otherwise acquires the land or the land is acquired under Part 9 of the Land Administration Act 1997, for the purpose of widening the street;*
- (b) *no compensation or purchase money may be claimed or is payable in respect of the land until the land is so acquired or purchased.*

3.4 Land dedicated for roads at request of local government

For land described in a plan of survey, sketch plan or document, a local government may request the Minister for Lands to be dedicate that land as a road where:

- (a) *land is reserved or acquired for use by the public, or is used by the public, as a road under the care, control and management of the local government;*
- (b) *in the case of land comprising a private road constructed and maintained to the satisfaction of the local government —*
- (i) *the holder of the freehold in that land applies to the local government, requesting it to do so; or*
- (ii) *those holders of the freehold in rateable land abutting the private road, the aggregate of the rateable value of whose land is greater than one half of the rateable value of all the rateable land abutting the private road, apply to the local government, requesting it to do so;*
 or
- (c) *land comprises a private road of which the public has had uninterrupted use for a period of not less than 10 years.¹²⁴*

3.5. Land dedicated for extensions or improvements to roads

Certain improvements or extensions to public streets or roads are automatically dedicated as part of the road reserve.¹²⁵ A local law may prescribe a new street alignment for the

¹²⁴ *Land Administration Act 1997* section 56(1).

purpose of extending the width of a street or road.¹²⁶ It may be the case that a road will be made or widened or extended across remnant roadside vegetation notwithstanding it is protected by a variety of policy instruments.¹²⁷

3.6 Declarations of main roads

Main roads¹²⁸ are created by declaring existing roads to be main roads.¹²⁹

3.7 Roads through Class A reserves

Land for public roads through Class A reserves is excised from those Class A reserves. If the Minister for Lands proposes to excise a road from a National Park, Conservation Park or a Nature Reserve the proposal is subject to certain procedures before Parliament.¹³⁰ Accordingly it appears that public roads through such reserves will not be subject to the same controls that apply to the reserves¹³¹ through which they pass, without more.¹³²

3.8. Dedications of roads under repealed legislation

Public roads were formally dedicated under a number of repealed statutes or provisions, including:

- dedication of private streets as roads¹³³;
- dedication of public roads through pastoral leases¹³⁴. Note: these are not the same as “public access routes” under LAA (see below); and
- declaration of land formerly used for railways as public roads¹³⁵.

¹²⁵ *Town Planning and Development Act 1928* section 28.

¹²⁶ *Local Government Act 1997* section 364(1).

¹²⁷ A local government proposal to build a local road through a Class C Reserve reserved for Parks and Recreation under the MRS that was also part of the M23 under System 6, part of a former railway reserve with historical and cultural significance for the town, part of the Darling Range Regional Park, was a recognised part of an environmental cultural corridor did not attract an environmental impact assessment and required only the approval of the Western Australian Planning Commission which merely must have regard to but may depart from all the relevant policy considerations. Furthermore, local roads on local government scheme maps and the MRS maps may be a no zone areas. The status of a local road under the MRS may be unclear if it is a no zone area. Land under the MRS is either land for the purpose of Part 11 (Reserves) or Part 111(Zoned): see clause 23(1) of the MRS. Local roads may not be identified as belonging to either category. However, land that is reserved for a certain purpose under the MRS and vested in the Shire may not be used for another purpose without the approval of the Commission: see clause 10 of the MRS. Furthermore, it is arguable that if the local government is a proponent of the construction of a local road, it is required to submit a development application to itself: see *Glowpace Pty Ltd v South Sydney City Council* [2001] 111 LGERA 84 at page 87; and to refer the proposal to the EPA for assessment if it is a proposal that is likely to cause significant harm to the environment.

¹²⁸ While secondary roads still appear in the *Main Roads Act 1930*, this designation is no longer used by Main Roads, per comment Murray Robinson of the Department of Main Roads.

¹²⁹ *Main Roads Act 1930* section 13.

¹³⁰ *Land Administration Act 1997* section 43.

¹³¹ See for example the restrictions on taking flora in National Parks, *Conservation and Land Management Act 1984* section 99A; the prohibition from taking protected flora from Crown land see *Wildlife Conservation Act 1950* section 23 B

¹³² *Land Administration Act 1997* section 418(4)

¹³³ *Local Government Act 1995* section 3.49 (repealed).

¹³⁴ *Land Act 1933* – section 106 (repealed).

¹³⁵ *Public Works Act 1902* section 105 (repealed).

Public roads created under repealed legislation will continue as public roads within the meaning of the LA Act and PW Act.

3.9 Roads not dedicated

Some roads that are open to the public are not contained within dedicated road reserves. For example, roads through vacant Crown land, Crown leases or State forest may have no separate reserve created.¹³⁶ Roads used in State forests may be open to the public. Local government may even maintain such roads on behalf of CALM because the public use the road. As far as the right to fell trees and clear native vegetation on or near these roads, one would have to look at the vesting order and any management plan.

The question as to whether these roads are *public roads* may be relevant for questions of liability of the Crown, owners and occupiers and their agents to users, but this is an issue beyond the scope of this paper.

Public access routes over Crown land (often across pastoral leases) for access to remote tourism and recreation spots are not dedicated roads. These roads, reflect public demand where local government is not prepared to dedicate a road.¹³⁷ There is no requirement for the State or local government to develop or maintain *public access routes*. Information from the Department of Land Administration (DOLA) indicates that the creation of public access routes is an important measure aimed at relieving local governments of the responsibility for care and maintenance of public roads especially in remote areas.¹³⁸

3.10 Leasing public roads

Road reserves including the land on, below or above the surface may be leased to the owner of land abutting the road reserve,¹³⁹ but in certain cases the consent of local government or the Commissioner for Main Roads is required.¹⁴⁰

3.11 Logging roads

A private road may be made on Crown land under the *Forest Products Act 2000* (FP Act). A *road contract* means a contract (other than a production contract) providing for the construction or maintenance of roads for the purposes of managing or harvesting forest products.¹⁴¹ The *Wildlife Conservation Act 1950* does not apply to production contracts¹⁴² where they are undertaken according to a forest management plan.¹⁴³ The exemption does not apply to *road contracts*.¹⁴⁴ Accordingly, a road contractor will require a licence to take fauna and protected flora that are at risk from a roading operation. Furthermore, a provision in a *road contract* that is inconsistent with the *FP Act*¹⁴⁵ or (in relation to

¹³⁶ *Creation of Roads*, DOLA, April 1999.

¹³⁷ *Land Administration Act 1997* section 64.

¹³⁸ *Creation of Roads*, DOLA, April 1999.

¹³⁹ *Land Administration Act 1997* section 57; *Local Government (Miscellaneous Provisions) Act 1960* section 364(6).

¹⁴⁰ *Land Administration Act 1997* section 57.

¹⁴¹ *Forest Products Act 2000* section 55.

¹⁴² *Production contract* means a contract for the management, harvesting or sale of forest products to which the Commission is a party, see the *Forest Products Act 2000* section 55.

¹⁴³ *Forest Products Act 2000* section 10(6).

¹⁴⁴ *Forest Products Act 2000* section 10 (5).

¹⁴⁵ *Forest Products Act 2000* section 61(a)

contracts on CALM land) the CALM Act or a relevant management plan, is of no effect.¹⁴⁶ These roads may become public roads at common law and may even be maintained by local government. In such circumstances where the control of the road reserve is unclear, the local government should apply for licences to take protected flora and fauna at risk from road maintenance and seek authorisation for works from CALM.

4. How wide is a road?

It is likely that the width of a road reserve dedicated under the *Land Administration Act 1997* will be surveyed. I have been informed by a number of sources that many rural roads are not in the position that the DOLA maps indicate or may be part on the road reserve and part on other land. This presents some difficulty when determining the authority responsible for a road or authorised to take vegetation from roadsides. The misdescription of a road on a map does not preclude the road from being a public road.¹⁴⁷ Where there is doubt about the creation of a public road, there is a rebuttable presumption that any statutory duties have been duly and properly performed.¹⁴⁸ The fact that land of a road is also part of public reserve does not preclude it from being a public road.¹⁴⁹

The width of a common law public road must be taken to include cleared and otherwise altered land forming the carriageway and incidental to its use. There is an obvious need for contiguous land to allow for a variety of services such as signage, drainage and visibility.¹⁵⁰ The prevailing weather conditions may also play a part in the width of a road reserve.¹⁵¹

5. Who owns public roads?

The absolute property in,

- Roads under the *Public Works Act 1902* ¹⁵²
- Conventional roads under the *Land Administration Act 1997* ¹⁵³
- Highways and main roads under the *Main Roads Act 1930* ¹⁵⁴
- Public access routes under the *Land Administration Act 1997*,

is vested in the Crown. ¹⁵⁵

6. Who controls and manages public road reserves?

¹⁴⁶ *Forest Products Act 2000* section 61(b).

¹⁴⁷ *Ashfield Municipal Council v Roads & Traffic Authority of NSW* [2001] NSWCA 370 at para 43

¹⁴⁸ *Wilover Nominees Ltd v Inland Revenue Commissioners* [1973] 2 All ER 977 at 983.

¹⁴⁹ *Ashfield Municipal Council v Roads & Traffic Authority of NSW* [2001] NSWCA 370

¹⁵⁰ *Ngalakan People v Northern Territory of Australia* [2001] FCA 654 at para 28.

¹⁵¹ *St Vidgeon's Case Wandarang, Alawa Marra and Ngalakan Peoples v Northern Territory* (2000) 177 ALR 512 at para 127.

¹⁵² *Public Works Act 1902*, section 85.

¹⁵³ *Land Administration Act 1997* section 55

¹⁵⁴ *Main Roads Act 1930* section 15(1)

¹⁵⁵ *Land Administration Act 1997* section 55.

6.1 Local roads

Subject to the MR Act and the PW Act, the local government within the district of which a road is situated has the care, control and management of the road.¹⁵⁶ The majority of roads in Western Australia are local roads under the control of a local government.

The vesting of the care, control and management of a road in local government does not confer an interest in the land to the local government,¹⁵⁷ nor does the care, construction and management of public roads by a council make the council in possession of such roads.¹⁵⁸ However, it has been held that the conferral of management and control of a road in a local government is sufficient for a local government to maintain an action in trespass and conversion in respect of trees on the road.¹⁵⁹

6.2 Highways and main roads

The Commissioner shall have the care, control and management of the land over which a highway or main road is declared.¹⁶⁰

7. How are activities on road reserves controlled?

7.1 The Environmental Protection Authority

The Environmental Protection Authority has published a number of policies that are applicable to proposals for works on road reserves. These include,

- *Environmental Protection of Native Vegetation in Western Australia Preliminary Position Statement No 2*, a position statement for application to areas other than agricultural areas,¹⁶¹
- *Guidance for the Assessment of Environmental Factors (in Accordance with the Environmental Protection Act 1986) Level of Assessment for proposals affecting bushland areas within the System 6 and the southern Swan Coastal Plain No.10 Draft January 2001*. These guidelines are concerned with areas of bushland outside the Bush Forever study area and rely on other documents including the *Urban Bushland Strategy (Government of Western Australia) 1995* and the *National Heritage Trust Partnership Agreement (Commonwealth of Australia and State of Western Australia) 199*. The guidelines recommend that,

“...proposals within or adjacent to a recommendation area that would result in direct loss of bushland ... (are likely to have a)...formal EIA ... (level of assessment...”

¹⁵⁶ *Land Administration Act 1997*, section 55(2).

¹⁵⁷ *Municipal District of Concord v Coles* (1905) 3 CLR 96. In this matter it was held that the council did not have caveatable interest in a road reserve vested in it for management.

¹⁵⁸ *Self v MccLure* (1906) 23 WN (NSW) 3. In this case the council was not liable for failure to control rabbits on the road reserve under the *Pasture Protection Act 1902*.

¹⁵⁹ *Tinaroo Shire Council v Purcell* [1904] St R Qd 186; [1904] QWN 54. Thus the Council could maintain an action against a person for cutting down and removing a tree from a road reserve.

¹⁶⁰ *Main Roads Act 1930*, section 15(2).

¹⁶¹ Released December 1999 and I have been advised that this is now a final position paper.

- A referral questionnaire for local government road works, a referral questionnaire for road works.¹⁶²

7.2 .Environmental impact assessment of proposals

Where a proposal is likely to have a significant effect on the environment, a decision making authority is required to (or any third party may) refer the proposal to the Environmental Protection Authority (the EPA) for an environmental impact assessment of the impacts from clearing or taking flora or fauna.¹⁶³ One of the difficulties is that road works often take place in stages. Each stage of itself may not amount to a significant impact but the whole project. There should be a requirement on any funding for a proposal that is to be completed in stages, that the whole must be referred as a single proposal.

New environmental harm offences and clearing offences are proposed as amendments to the *Environmental Protection Act 1986* (EP Act).

Some larger proposals might trigger the operation of the environmental impact assessment provisions of the *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* (EPBC Act). The EPBC Act regulates the assessment and approval of activities:

- which have a significant effect on matters of national environmental significance
- by Commonwealth government agencies anywhere in the World
- by any person on Commonwealth land.

Matters of national environmental significance are:

- World Heritage properties
- Ramsar wetlands
- Nationally listed threatened species and ecological communities
- Listed migratory species
- Activities relating to nuclear energy
- The Commonwealth marine environment

Biodiversity is also protected under the EPBC Act by:

- Identifying and monitoring biodiversity, and by the preparation of bioregional plans
- The identification of and preparation of threat abatement plans for key threatening processes
- Creation and management of protected areas.

Unlike the State EP Act any person cannot make a referral of a proposal for environmental impact assessment under the EPBC Act. However, any one can lobby the State and Federal Ministers for the Environment to refer a proposal.

You may wish to investigate the possibility of having the roadsides of rural Western Australia listed as protected area or bioregion requiring management under the EPBC Act.

¹⁶² EPA December 1996, Bulletin 828.

¹⁶³ *Environmental Protection Act 1986*, section 38(1). New administrative guidelines were published by the EPA in 2002.

7.3 Pollution of Road Reserves

It is an offence to cause pollution or to dispose of waste in such a way as pollution may occur.¹⁶⁴ Pollution can be caused by inappropriate use of chemicals and fertilisers. The primary regulatory control of pollution in Western Australia is through the *Environmental Protection Act 1986* which makes it an offence to pollute or otherwise cause environmental harm.¹⁶⁵ The EP Act binds the Crown.¹⁶⁶ Other provisions in specific legislation control polluting activities and supplement the EP Act.¹⁶⁷

Controls on agricultural and veterinary chemicals is exercised through a national registration system known as the AgVet Code,¹⁶⁸ and through Western Australian Acts such as the *Aerial Spraying Control Act*, the *Health Act* and the *Agricultural Produce (Chemical Residues Act)*. No agricultural or veterinary chemical can be sold or used in Australia unless it has been approved by the National Registration Authority.¹⁶⁹ Persons using agricultural chemicals must do so in strict accordance with the instructions on the label,¹⁷⁰ and it is an offence not to comply with the instructions on a label without a permit.¹⁷¹ Subject to limited qualifications,¹⁷² a person cannot apply pesticides for payment without a licence. Pesticide contractors must be licenced.¹⁷³ Unwanted chemicals must be disposed of according to the label and any spill must be reported to the DEP and the Department of Agriculture as soon as possible. Chemicals can be restricted in certain areas.¹⁷⁴ Some chemicals are banned altogether.¹⁷⁵

The power of the EPA to enforce penalties in respect of land degradation under the EP Act were considered in the *Palos Verdes*¹⁷⁶ case. It was held in this matter *pollution* for the purpose of the EP Act means to alter the environment so as to make it harmful or potentially harmful to living things such as the discharge of toxic wastes. Accordingly physical damage (such as clearing) to the environment fell outside the ambit of pollution. The WA government responded to this decision by drafting amendments to the EP Act which make it an offence to cause land degradation. This Bill has yet to be passed by the parliament.

7.4 Clearing Road Reserves

¹⁶⁴ *Environmental Protection Act 1986*, sections 49 and 50.

¹⁶⁵ *Environmental Protection Act 1986* sections 49 and 50

¹⁶⁶ *Environmental Protection Act 1986* section 4

¹⁶⁷ For example it is an offence to pollute rivers, streams, lakes, swamps or groundwater supplies controlled by the Water and Rivers Commission, see *Waterways Conservation Act 1976* section 48; to operate certain a prescribed premises for example (piggeries, abattoirs and cattle feedlots) without a works approval and/or a licence, see *Environmental Protection Regulations 1987* Regulation 5 Schedule 1 for prescribed premises.

¹⁶⁸ Operative since 1995 and all States are party to it.

¹⁶⁹ *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) Division 2; (adopted by the *Agricultural and Veterinary Chemicals (Western Australia) Act 1995*

¹⁷⁰ *Health (Pesticides) Regulations 1956*, regulation 20C.

¹⁷¹ Either from the NRA see *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) section 108(3)(b) and 114; or the Executive Director of Health see *Health (Pesticides) Regulations 1956* regulation 20(1)

¹⁷² Person is licensed under the *Health (Pesticides) Regulations*; certificate under the *Aerial Spraying Control Act* or a casual employee in an agricultural activity working under direction of a licensed operator

¹⁷³ *Health (Pesticides) Regulations 1956*, regulation 82

¹⁷⁴ By the Executive Director of Health; the Minister for Agriculture under the *Agriculture and related Resources Protection Act 1976* section 105(c) and also see the *Agriculture and Related Resources Protection (Spraying Restrictions) Regulations 1979*, regulation 3(a), (b) & (h).

¹⁷⁵ *Poisons Act 1964* section 22. Organochlorines were banned from use in Western Australia 1 July 1996

¹⁷⁶ *Palos Verdes Estates v Carbon* (1991) 6 WAR 223.

The *Soil and Land Conservation Act 1945* (SLC Act) is administered by the Minister for Agriculture. The Soil Conservation Committee is established under the Act. The Committee is made up of land users and representatives from government departments and agricultural industries. The Committee advises the Commissioner of Soil Conservation. The operation of this Act is unnecessarily unclear and complex. This is particularly in respect of whether which parts of the Act (if any) bind the Crown.

The Commissioner has the power to act in respect of soil erosion, salinity, flooding, waterlogging and removal or deterioration of natural or introduced vegetation.¹⁷⁷ Proceedings under the Act can only be taken by the Minister, the Commissioner or their authorised agents.

The express provisions of the Act empower the Commissioner to take a more active role in preventing land degradation through Soil Conservation Notices. The Commissioner has, subject to the direction of the Chief Executive Officer of the Department of Agriculture or the Minister for Agriculture,¹⁷⁸ the discretion to issue a Soil Conservation Notice in respect of any land in Western Australia including road reserves.

The Commissioner appears to take the view that the *Soil and Land Conservation Act 1945* is subordinate to the *Town Planning and Development Act 1928*. Accordingly, the Commissioner does not require a Notice of Intent to clear to be lodged when clearing is for the purpose of an urban subdivision. There is little support for this view to be found in the SLC Act. It is open to interpretation whether or not *land degradation*¹⁷⁹ for the purpose of the SLC Act might include biodiversity conservation where this impacts on the potential long term use or likely future use of land.¹⁸⁰

Government departments and public authorities are authorised but not required to cooperate with the Commissioner.¹⁸¹ Cooperative approaches such as an MOU¹⁸² can assist the integration of the powers of government agencies. The Commissioner can provide advice in connection with the alienation of Crown land¹⁸³ where matters of land degradation or soil conservation are relevant in respect to the alienation, disposal, occupation, care or use of such land.¹⁸⁴

Clearly there is potential for the Commissioner to be influential in the management of land released¹⁸⁵ for development. The fundamental problem in respect of land degradation is

¹⁷⁷ *Soil and Land Conservation Act 1945* section 13.

¹⁷⁸ *Soil and Land Conservation Act 1945* section 7.

¹⁷⁹ *Soil and Land Conservation Act 1945* section 4.

¹⁸⁰ See the Macquarie definition of degradation; *Sherritt Gordon Mines Limited v FCT* (1976) 10 ALR 441 at 445; *Re Gray; ex parte Marsh* (1985) 62 ALR 17; and the long title to the *Soil and Land Conservation Act 1945*.

¹⁸¹ *Soil and Land Conservation Act 1945* section 18.

¹⁸² *Memorandum of Understanding between the Commissioner for Soil and Land Conservation, the Environmental Protection Authority, the Department of Environmental Protection, Agriculture Western Australia, the Department of Conservation and Land Management and the Waters and Rivers Commission for the protection of remnant vegetation on private land in the agricultural region of Western Australia* 6 March 1997. The MOU was developed to produce an integrated system for assessing land clearing proposals in agricultural regions of Western Australia at least on private agricultural land in Western Australia. The MOU only applies to proposals to clear more than one hectare of native vegetation on land rural zoned in the southern Western Australia and that on land zoned for other purposes, biodiversity maintenance is to be considered through other mechanisms, in particular the statutory planning process.

¹⁸³ *Soil and Land Conservation Act 1945* section 19.

¹⁸⁴ *Soil and Land Conservation Act 1945* section 19.

¹⁸⁵ For example vested in government agencies and authorities, special lease or alienated as freehold title.

that a short to intermediate term gain to a landholder will drive his or her decisions notwithstanding the cost to the common property resources¹⁸⁶ or the public good.

Furthermore, while the Crown is not bound and therefore not regulated by a number of our land conservation statutes in circumstances where 90% of land in Western Australia is Crown land, their credibility lacks some weight. There are a number of mechanisms to control land degradation including education, licensing, regulation and town planning. Voluntary soil conservation through legislation has not been successful.¹⁸⁷

Land holder (owner or lessee) self interest does not appear to be an answer. Neither has education¹⁸⁸ combined with the present regulatory system. Criminal sanctions are reactive, are difficult to apply to landowners operating in their own land, require the proof beyond reasonable doubt and penalties may not be equitable in their effect. Appropriate guidelines for taxation incentives may be difficult to establish and would only apply to those land owners who pay tax.

7.5 Taking flora and fauna from public road reserves

7.5.1 Protection of native flora and fauna

The primary statute protecting fauna and native vegetation on Crown land (which includes all public roads) is the *Wildlife Conservation Act 1950* (WC Act).

7.5.2 Protection of fauna

Fauna for the purpose of the WC Act means,

- (a) *any animal indigenous to any State or Territory of the Commonwealth or the territorial waters of the Commonwealth;*
- (b) *any animal that periodically migrates to and lives in any State or Territory of the Commonwealth or the territorial waters of the Commonwealth; and*
- (c) *any animal declared as fauna.*¹⁸⁹

To take in relation to any fauna includes,

*to kill or capture any fauna by any means or to disturb or molest any fauna by any means or to use any method whatsoever to hunt or kill any fauna whether this results in killing or capturing any fauna or not; and also includes every attempt to take fauna and every act of assistance to another person to take fauna and derivatives and inflections have corresponding meaning.*¹⁹⁰

Except to the extent which the Minister otherwise declares by notice published in the Government Gazette, all fauna is wholly protected throughout the whole of the State at all

¹⁸⁶ The costless externalities are often not in the equation of landowners' decisions, see FB Cross *Natural Resource Damage Valuation* (1989) 42 *Vanderbilt Law Review* 269, cited in Barton *Soil and Land Conservation in Agricultural Areas of WA* (1993) EPLJ 251, 258.

¹⁸⁷ Barton *Soil and Land Conservation in Agricultural Areas of WA* (1993) EPLJ 251, 257

¹⁸⁸ See the numerous publications, policies and guidelines named in this report.

¹⁸⁹ *Wildlife Conservation Act 1950*, section 6(1).

¹⁹⁰ *Wildlife Conservation Act 1950* section 6.

times.¹⁹¹ Under the current declaration all fauna (with the exception of the Australian Dingo and certain invertebrates) are protected throughout the State.¹⁹²

7.5.3 Protection of flora

Flora for the purpose of the WC Act means any plant (including any wildflower, palm, shrub, tree, fern, creeper or vine) which is —

(a) *native to the State; or*

(b) *declared to be flora,*¹⁹³

*and includes any part of flora and all seeds and spores.*¹⁹⁴

Flora can be declared to be *protected* either generally or in relation to particular parts of the State.¹⁹⁵ The latest declaration declares certain flora native to the State to be rare or protected for the purposes of the WC Act.¹⁹⁶

To take in relation to flora includes,

*to gather, pluck, cut, pull up, destroy, dig up, remove or injure the flora or to cause or permit the same to be done by any means.*¹⁹⁷

Flora may also be declared to be rare, extinct or otherwise in need of special protection throughout the State.¹⁹⁸ It is an offence to take *rare flora* on any land (including private land) without the written approval of the Minister for the Environment.¹⁹⁹

It is an offence to take protected flora from Crown land without a licence.²⁰⁰

- (1) *A person shall not on Crown land wilfully take any protected flora unless the taking of the protected flora is authorized by, and carried out in accordance with the terms and conditions of, a licence issued to him under section 23C.*
- (2) *In any proceedings for an offence against subsection (1) it is a defence for the person charged to prove that the taking occurred as an unavoidable incident or consequence in the performance of any right, power or authority conferred upon, or in the discharge of any duty or obligation imposed upon, the person by or under any Act or agreement to which the State is a party and which is ratified or approved by an Act or notwithstanding the fact that the performance of that right, power or authority, or the discharge of the duty or obligation, was exercised in a reasonable manner.*

¹⁹¹ *Wildlife Conservation Act 1950* section 14(1).

¹⁹² The current notice was published in the Government Gazette on 14 August 2001.

¹⁹³ *Wildlife Conservation Act 1950*, section 6(4)

¹⁹⁴ *Wildlife Conservation Act 1950* section 6.

¹⁹⁵ *Wildlife Conservation Act 1950* section 6(6).

¹⁹⁶ The current notice was published in the Government Gazette on 14 August 2001

¹⁹⁷ *Wildlife Conservation Act 1950* section 6

¹⁹⁸ *Wildlife Conservation Act 1950* section 23F. Most recent notice is included at Appendix to Report.

¹⁹⁹ *Wildlife Conservation Act 1950* section 23F(4).

²⁰⁰ *Wildlife Conservation Act 1950* section 23B.

A licence can only be granted to take flora from Crown land for certain purposes.²⁰¹

23C. Licences to take protected flora on Crown land

- (1) *Any person may, in the prescribed form containing or accompanied by the prescribed particulars and on payment of the prescribed fee, apply to the Minister for the issue to him of a licence to take protected flora on Crown land —*
 - (a) *for commercial purposes; or*
 - (b) *for scientific purposes or any prescribed purpose,**and the Minister may issue or refuse to issue such a licence.*
- (2) *Subject to this section a licence issued authorizes the licence holder, subject to such terms and conditions as are specified in the licence, to take for the purposes so specified on such areas of Crown land as are so specified and during such period or periods as are so specified, the classes or descriptions of protected flora so specified.*
- (2a) *Subject to subsection (5), a licence is valid from the date of issue for the period stated in the licence.*
- (3) *Without limiting the terms or conditions which may be included in a licence issued under this section, the terms and conditions on which a licence to take protected flora for commercial purposes may be granted may include terms or conditions —*
 - (a) *providing that flora taken under the authority of the licence be charged with payment of royalties to the Executive Director by the licence holder at such rate or rates as are specified in the terms or conditions;*
 - (b) *requiring the licence holder to ensure that any protected flora taken pursuant to the licence is marked, tagged or otherwise made identifiable as flora taken by him.*
- (4) *Any royalties payable pursuant to the terms or conditions of a licence issued under this section —*
 - (a) *shall be credited by the Executive Director to the Fund; and*
 - (b) *may be sued for and recovered by the Executive Director as a debt due to him in his capacity as such.*
- (4a) *The Minister may reduce or waive the fee payable in respect of a licence issued under this section.*
- (5) *The Minister may at any time, by notice in writing served on a person to whom a licence has been issued under this section, revoke the licence, but the revocation does not affect any liability or obligation incurred by the person prior to the revocation.*

On private land, *protected flora* can be taken by the owner or occupier or with the permission of the owner or occupier. However, *protected flora* taken from private land cannot be sold without a licence from the Department of Conservation and Land Management (“CALM”) (called a Commercial Producer's Licence or a Nurseryman's Licence).²⁰²

²⁰¹ *Wildlife Conservation Act 1950* section 23C.

²⁰² *Wildlife Conservation Act 1950* section 23D

7.5.4 Flora and fauna protection laws and the Crown

The fauna protection provisions of the WC Act do not bind the Crown.²⁰³ This means that Government agencies (which enjoy Crown immunity) working on public road reserves are not subject to the terms of the WC Act as they apply to fauna. This may also include any contractor or other person undertaking works on behalf of the Crown.²⁰⁴

Local government is not part of the Crown so it is bound by the fauna (and flora) provisions of the WC Act.²⁰⁵

In contrast to the fauna provisions, the flora provisions of the WC Act bind everyone including the Crown.²⁰⁶ However, it is unclear to what extent a government entity (or a local government) is subject to prosecution for breach of the WC Act. The WC Act provides:²⁰⁷

Where in relation to a provision of this Act relating to flora a matter arises, or may arise, with respect to any right, power or authority of, or the discharge of any duty by, a government department or a local government, the following provisions apply —

- (a) where the matter relates to a government department — the Minister charged with the administration of the government department may consult with the Minister for the Environment;*
- (b) where the matter relates to a local government — the local government shall refer the matter to the Minister charged with the administration of the Local Government Act 1995, who may consult with the Minister for the Environment;*
- (c) where the Ministers agree, the Minister for the Environment shall give such directions as are agreed to as a result of those consultations;*
- (d) where the Ministers do not agree the matter shall be referred to the Governor; and*
- (e) the Governor may finally and conclusively determine the matter and effect shall be given to any such determination.²⁰⁸*

In *Bridgetown Greenbushes Friends of the Forest Inc v. Executive Director of CALM*,²⁰⁹ Justice Parker held that section 9(2) of the WC Act is *clearly designed to facilitate the application of the Act's provisions relating to flora without the need for recourse to official prosecutions.*²¹⁰ Similarly, Justice Murray in the Full Court appeal of the same case expressed *grave doubt* as to whether the Executive Director of CALM could ever commit an offence of taking rare flora under the WC Act *in circumstances where that procedure will apply.*²¹¹

²⁰³ *Bridgetown-Greenbushes Friends of the Forest v. CALM* (1997) 18 WAR 126.

²⁰⁴ *Ibid*, p143.

²⁰⁵ Hogg, P., *Liability of the Crown*, 2nd edition, 1989.

²⁰⁶ *Wildlife Conservation Act 1950* section 9(1).

²⁰⁷ *Wildlife Conservation Act 1950* section 9(2).

²⁰⁸ A similar provision applies to any other person undertaking work affecting flora, where the person must apply to the Minister for the Environment for a determination of the matter: *Wildlife Conservation Act 1950* section 9(3).

²⁰⁹ *Bridgetown Greenbushes Friends of the Forest Inc v. Executive Director of CALM* (Unreported, Supreme Court of WA, 9 August 1995) at page 44.

²¹⁰ *Ibid*.

²¹¹ *Bridgetown Greenbushes Friends of the Forest Inc v. Executive Director of CALM* (1997) 18 WAR 126, per Murray J at page 144.

Taken together, these statements suggest that the administrative arrangement established under section 9(2) exclude the offence of unlawfully taking flora under the Act from applying to either government departments or local governments. Thus, the offence of taking protected flora on Crown land and taking rare flora on any land arguably do not to apply to government departments or local governments in respect of works undertaken on road reserves. Instead, the administrative arrangement under section 9(2) would apply, where *there is ministerial consultation, ministerial direction where ministers agree, and arbitration by the Governor where they do not.*²¹²

However, this conclusion is not without difficulty. Section 9(3) of the WC Act provides:

Where in relation to a provision of this Act relating to flora a matter arises, or may arise, with respect to the exercise of any right or the performance of any duty or obligation conferred or imposed on a person, not being a government department or local government, by or under any Act or agreement to which the State is a party and which is ratified or approved by an Act the matter shall be finally and conclusively determined by the Minister upon a written application by that person to the Minister and effect shall be given to that determination.

This section is in similar terms to section 9(2), and provides an administrative procedure for dealing with questions about the statutory authority of a person (not being a government department or local government) to take action that may affect flora. In such cases, the matter is to be determined *finally and conclusively* by the Minister for the Environment on written application of that person.

The reasoning of Justices Murray and Parker, indicates that section 9(3) is likely to exclude the general flora offence provisions in cases where a person is claiming to be acting under authority of another Act. However, section 23B (2) of the WC Act provides:

In any proceedings for an offence against subsection (1) [taking protected flora on Crown land without a licence] it is a defence for the person charged to prove that the taking occurred as an unavoidable incident or consequence in the performance of any right, power or authority conferred upon, or in the discharge of any duty or obligation imposed upon, the person by or under any Act or agreement to which the State is a party and which is ratified or approved by an Act or notwithstanding the fact that the performance of that right, power or authority, or the discharge of the duty or obligation, was exercised in a reasonable manner.

This provision clearly contemplates that a person acting under purported authority of an Act may be prosecuted for unlawfully taking flora on Crown land notwithstanding the administrative procedure established by section 9(3). This suggests that the administrative procedure is intended as an alternative mechanism for dealing with offences under the Act – not a mechanism that excludes prosecution under relevant provisions. In *Russell v. Pennings*²¹³ an accused raised a defence under section 23B (2). Although the point does not appear to have been raised, the matter proceeded on the basis that the person could validly be charged for an offence under section 23B (1) notwithstanding the administrative procedure under section 9(3).

²¹² Ibid.

²¹³ Unreported decision of the Supreme Court of Western Australia, WASCA [115] 2001

As to whether such a conclusion can be drawn with respect to the administrative procedures for *government departments and local government* under section 9(2) is more problematic.

Section 9(3) refers to *a person not being a government department or local government*. Section 23B(2) simply refers to *a person*. *Person* is not defined in the Act, but is defined in the *Interpretation Act 1984* to include *a public body, company, or association or body of persons, corporate or unincorporate*. It is therefore arguable that the term *person* includes government departments and local government. This view is fortified by section 9(3) itself, which in referring to *person* expressly excludes *government departments and local government* from its meaning. By expressly excluding government departments and local government from the definition of the word *person*, the implication is that the term would ordinarily encompass these entities. Accordingly, where the word *person* is used in section 23B without such a qualification, it is arguable that Parliament intended that it include *government departments and local government*. It is therefore arguable that the offence provisions created with respect to flora apply to government departments and local government. The administrative procedures in section 9(2) of the Act operate in concert with, not to the exclusion of, the normal offence provisions with respect to flora.

7.5.5 Procedural point – wilfully taking flora

It is an offence under the WC Act to *wilfully* take flora without a licence. The meaning of the term *wilfully* was considered by Justice Parker J in *Russell v. Pennings*:

“In Louis v Judge Ogden (1984) 153 CLR 682 at 688 the High Court considered s 54A (1)(a) of the County Court Act 1958 (Vic) which constituted it to be an offence to wilfully insult a judge. In the decision of the Court at 688 it was said:

... the word 'wilfully' means 'intentionally', or 'deliberately', in the sense that what is said or done is intended as an insult, threat etc. Its presence does more than negative the notion of 'inadvertently' or 'unconsciously' (Bell v Stewart (1920) 28 CLR 419 at 427). The mere voluntary utterance of words is not enough. 'Wilfully' imports the notion of purpose..

Applying this approach to s 23B(1) of the Act the offence relevantly is constituted by intentionally or deliberately destroying, digging up, removing or injuring the protected flora.

. . . There can be no doubt on the evidence that the appellants went about the task of clearing a track through the vegetation so that there could be vehicular access along the cleared track. . . . This was a situation in which the appellants used bulldozers to clear a track through bush so that other vehicles might thereafter pass along Doggerup Road. The actions of the bulldozers, for which the appellants were responsible, cannot sensibly be described as in the exercise of the right of the appellants, along with all others, to pass and repass along Doggerup Road. They were there to clear a track.²¹⁴

²¹⁴ *Russell v. Pennings* (Unreported, 12 April 2001, Supreme Court of WA, WASCA [115] 2001), at paras 37 – 42.

Actions that are not *wilful* (that is, which are unintentional) are not liable to prosecution under the WC Act. Much will depend on the facts of each case, but it is likely any activity directed at removing vegetation on Crown land (albeit primarily for another purpose) will require the person undertaking the work to obtain a licence to take flora from CALM.

7.6 Control of declared animals, plants and poisons

Animals and plants may be declared to require control under the *Agriculture and Related Resources Protection Act 1976* (ARRP Act). A Government department²¹⁵ shall control declared plants and declared animals on public land under its control.²¹⁶ Public land for the purpose of the ARRP Act is not land which is under the control of local government.²¹⁷ An inspector or authorized person who finds declared plants or declared animals or signs or marks of declared animals on or in the vicinity of public land that is under the control of a Government department shall notify and provide advice to the department.²¹⁸

A local government will commit an offence if it does not control declared plants and declared animals on and in relation to land under its control.²¹⁹ If an inspector or authorized person is of the opinion that a local government²²⁰ or occupier of private land²²¹ is not making all reasonable endeavours to comply with that section a notice in writing may be served on that local government directing control of declared plants or animals. It is an offence not to comply with such a notice.²²² If that local government does not comply with a notice, an authorised person may enter the land to carry out the requirements of the notice and recover the expense from the local government.²²³

For the purpose of the ARRP Act an owner or occupier of private land shall be regarded, as owning or occupying as the case may be, in addition to that land,

- the land comprising any road that,
 - (i) intersects the private land; or
 - (ii) bounds the private land and is fenced only on the side further from the common boundary of the road and the private land;
- the land comprising half of the width of any road that bounds the private land and is fenced on both sides being the half that is nearer the common boundary of the road and the private land; and
- the land comprising half the width of any road that separates the private land from other private land being the half that is nearer the common boundary of the road and the first-mentioned private land; but
- not the land in relation to a road dedicated and open to public use and fenced on both sides.²²⁴

An occupier of private land must notify the Protection Board of any declared plants or animals on his or her land.²²⁵

²¹⁵ The Agriculture Protection Board constituted under the provisions of the *Agriculture Protection Board Act 1950*.

²¹⁶ *Agriculture and Related Resources Protection Act 1976* section 39.

²¹⁷ *Agriculture and Related Resources Protection Act 1976* section 7.

²¹⁸ *Agriculture and Related Resources Protection Act 1976* section 40.

²¹⁹ *Agriculture and Related Resources Protection Act 1976* section 42.

²²⁰ *Agriculture and Related Resources Protection Act 1976* section 43.

²²¹ *Agriculture and Related Resources Protection Act 1976* sections 50 - 52.

²²² *Agriculture and Related Resources Protection Act 1976* section 44(1) & 51(1).

²²³ *Agriculture and Related Resources Protection Act 1976* section 45.

²²⁴ *Agriculture and Related Resources Protection Act 1976* section 47.

A plant or animal may be declared to be a natural predator and be protected for that purpose.²²⁶

It is an offence to cross, damage or open,²²⁷ travel along²²⁸ or run stock along²²⁹ a barrier fence erected to control declared animals.²³⁰

Agriculture and related resources are specially protected from harm likely to result from the storage, use, or transport of prescribed agricultural chemicals.²³¹ It is an offence to transport a prescribed agricultural chemical in breach of the regulations.²³²

7.7 Public access routes

There is provision for the Minister to declare *public access routes* over Crown land²³³ (often on pastoral leases) for access to remote tourism and recreation areas, reflecting the public demand and where local government is not prepared to dedicate or maintain a road.²³⁴

Where a *public access route* crosses Crown land held subject to an interest, the consent of that interest-holder will be required and a public consultation process must be followed. As a matter of policy, during the consultation process, the management of the tourist, recreation or other area to be accessed by a proposed public access route will be discussed.

7.8 Constructing, maintaining or widening a road

The construction, maintenance or widening of a road is usually undertaken by the Commissioner of Main Roads or a local government. These activities may result in the loss of native vegetation especially in rural areas.

The Commissioner of Main Roads or local governments are vested with the care, control and management of land comprising a road. In *Russell v. Pennings*,²³⁵ Justice Parker can be said to have found that the opening and maintenance of an unmade road reserve was a power vested in and at the discretion of the *responsible authority*.²³⁶ So although a member of the public clearing a track on land dedicated as a road reserve committed an offence of taking flora under section 23B of the *Wildlife Conservation Act*, it appears from the reasoning of Justice Parker that the local government may not commit such an offence when undertaking a similar activity.

This conclusion is consistent with the defence in section 23B(2) of the WC Act – where the *taking* of flora is an unavoidable incident or consequence of the performance by the road

²²⁵ *Agriculture and Related Resources Protection Act 1976* section 48 and 49.

²²⁶ *Agriculture and Related Resources Protection Act 1976* section 70.

²²⁷ *Agriculture and Related Resources Protection (Fencing) Regulations 1985* regulation 8.

²²⁸ *Agriculture and Related Resources Protection (Fencing) Regulations 1985* regulation 10.

²²⁹ *Agriculture and Related Resources Protection (Fencing) Regulations 1985* regulation 9.

²³⁰ *Agriculture and Related Resources Protection (Fencing) Regulations 1985*

²³¹ *Agriculture and Related Resources Protection Act 1976* section 83A(1).

²³² *Agriculture and Related Resources Protection Act 1976* section 83A(2); and the *Agriculture and Related Resources (Declared Plants and Restricted Animals) Regulations 1982*.

²³³ Described on a plan registered at DOLA see *Land Administration Act 1997* section 64(1).

²³⁴ *Land Administration Act 1997* section 64(1).

²³⁵ *Russell v. Pennings* (Unreported, 12 April 2001, Supreme Court of WA, WASCA [115] 2001, at para 49.

²³⁶ In this case, the Shire of Manjimup

authority of a statutory power – that is, the power to construct or maintain a road. What is an *unavoidable incident or consequence* will depend on the facts of each case. The following examples may qualify for exemption from obtaining a licence to take flora:

- Widening a road for safety reasons;
- Constructing a road through an unmade road reserve;
- Constructing a culvert or bridge; or
- Removing vegetation posing a danger to motorists or other road users.

Activities which may not qualify for the statutory defence and would therefore require a licence include:

- Widening a road beyond what which is necessary to achieve normal traffic flows in the area
- Extracting gravel for use in the road construction especially where there are alternative sources of supply from cleared land
- Removing vegetation from the reserve for a reason unconnected with the use of that land as a road (e.g. taking timber for firewood).

To avoid *taking protected native vegetation* without authority, authorities undertaking any road works should obtain a licence from CALM before commencing work. Relying on the statutory defence provided by section 23B(2) is problematic, as the road authority will have to establish (on the balance of probabilities) that the *taking* was an unavoidable incidence of the performance of its statutory power. It would be preferable to apply for a licence in the first place to ascertain if there is any protected flora and avoid the risk of prosecution for taking protected flora.

7.9 Clearing vegetation interfering with power lines, gas and water services

Under the *Energy Operators (Powers) Act 1979*, Western Power may enter land and carry out works (including felling timber) required for the construction or maintenance of works.²³⁷

Consistent with the previous discussion, it is likely that an energy operator (such as Western Power) would be afforded a defence under section 23B of the WC Act if it enters a road reserve and removes vegetation posing a threat to transmission lines and other works.

Similar rules may apply to other service providers such gas service providers under the *Energy Corporations (Powers) Act 1979*.

Under the *Water Agencies (Powers) Act 1984*, the Water and Rivers Commission and the Water Corporation may take trees from land to make way for works.²³⁸

7.10 Access to private land through a road verge

²³⁷ *Energy Operators (Powers) Act 1979* section 49.

²³⁸ *Water Agencies (Powers) Act 1984* Section 83.

An occupier of private land may apply to the relevant local government for approval to construct an access way to that land through a public road verge.²³⁹ It is likely that this power will afford a defence to a person taking native vegetation by constructing (with approval of a local government) an access way through a road reserve. However, it would be preferable for such a person to apply for a licence in the first place to ascertain if there is any rare or protected flora at risk and to avoid the risk of prosecution under the WC Act.

7.11 Firebreaks and burning off in a road reserve

Firebreaks may not be burned on road reserves without authorisation.²⁴⁰ The *Bush Fires Act 1954*²⁴¹ provides authority for the burning or clearing of native vegetation of road reserves in the following circumstances:

- a local government may issue a permit to an occupier of land adjoining a road reserve to burn that reserve during a restricted²⁴² burning time if his or her crops are at risk from a fire;²⁴³ and
- a local government may clear a road or reserve under its control, of bush and other inflammable material, for the purpose of preventing the occurrence or spread of a fire.²⁴⁴

It must be assumed that in the absence of a permit from a local government, a land owner may not burn or clear a road reserve for a firebreak. Undertaking such activity without authority would make the person liable to prosecution for an offence under section 23B of the WC Act and it is unlikely the statutory defence provision would apply. Accordingly, a private person or company contemplating burning a road verge should apply for and obtain a permit from local government and a licence from CALM before commencing a planned burn.

7.12 Taking timber for firewood etc

It is unlawful for a person (including a local government) to take firewood from a road reserve without a licence from CALM.²⁴⁵

7.13 Clearing a fence line adjoining a road reserve

The *Dividing Fences Act 1961*²⁴⁶ provides:

*Every person engaged in constructing or repairing a fence under this Act and his agents and servants may, at all reasonable times during the construction or repairing, enter upon the lands adjoining the fence and do upon those lands such acts, matters and things as are necessary or reasonably required to carry into effect the construction or repairing of the fence.*²⁴⁷

²³⁹ Regulation 12, *Local Government (Uniform Local Provisions) Regulations 1996*.

²⁴⁰ *Bush Fires Act 1954* section 34(1)(a).

²⁴¹ *Bush Fires Act 1954* is not stated to bind the Crown.

²⁴² *Bush Fires Act 1954* Division 5.

²⁴³ *Bush Fires Act 1954*, sections 18(9) and 23(1)(b)(i).

²⁴⁴ *Ibid*, section 36(b).

²⁴⁵ *Wildlife Conservation Act 1950* section 23B(1).

²⁴⁶ *The Dividing Fences Act 1961* does not bind the Crown, section 4.

²⁴⁷ *Dividing Fences Act 1961*, section 21.

It is likely that a fence dividing private property from a road reserve is a fence within the meaning of the *Dividing Fences Act* (DF Act). It may be that removing vegetation from Crown land is *necessary or reasonably required* to construct or repair a fence, although it is arguable (having regard to the rarity of native vegetation in certain rural areas) that the more *reasonable* option is for the private landholder to construct the dividing fence within his or her own property, thus avoiding the need to *take* native vegetation.

The DF Act does not require dividing fences to be built on the common boundary of adjoining lands:

*“dividing fence” means a fence that separates the lands of different owners whether the fence is on the common boundary of adjoining lands or on a line other than the common boundary.*²⁴⁸

Having regard to the importance of retaining native vegetation on Crown land, it is arguable that the removal of vegetation is not an *unavoidable incident* of constructing a fence. Instead, the landholder could set the fence back to avoid interference with native vegetation on a road reserve on Crown land. In any event, it would be prudent for a landholder to apply for a licence from CALM before clearing a road verge to ensure that protected flora is not put at risk by the construction of a dividing fence or risk prosecution.

7.14 Clearing a survey line

Surveyors may clear the line of a new boundary for surveying purposes.²⁴⁹ The power to clear a survey line requires trees to be retained even though they may be on the boundary line²⁵⁰ and the extent of marking the boundary is generally restricted to blazing (i.e. marking) the trees within 0.5 metres of the boundary. This contrasts with the rules applying prior to September 2000 which required the line to be cleared of vegetation to a width of 0.5 metres.

Provided surveyors do nothing more than is strictly required under the Regulations, and they are undertaking a survey that is authorised under the *Licensed Surveyors Act 1909*, then it is likely they will have a defence to a charge of taking flora under section 23B of the WC Act. Should the surveyor be undertaking work that goes beyond that which is required under the Regulations, then a licence should be obtained from CALM. In any event, the application for a licence may generate important information to the surveyor regarding the presence of protected flora and fauna.

7.15 Gravel extraction

State and local governments and private developers require gravel for road making. State Agreement Acts may also make provision for the taking of gravel for road making.²⁵¹

7.15.1 Gravel on Crown land

All Crown land is available for mining²⁵² and this includes Crown road reserves.

²⁴⁸ Ibid, section 5.

²⁴⁹ Regulation 52(1), *Licensed Surveyors (Guidance of Surveyors) Regulations 1961*

²⁵⁰ Ibid, reg 52(3).

²⁵¹ State Agreement Acts take effect according to their terms regardless of the terms of other Acts; see the *Government Agreements Act 1971* section 3(b); and may exclude the provisions of the *Environmental Protection Act 1986* especially if the State Agreement Act is made before 1 January 1972 the EP Act section 5(2).

²⁵² *Mining Act 1978* section 18.

A local government is not required to hold a mining tenement:

- to exercise the power given to it by section 3.27 and clause 3 of Schedule 3.2 of the *Local Government Act 1995*; or
- *remove from local government property (as defined in that Act), rock, stone, clay, sand or gravel for use in the construction of local government facilities.*²⁵³

A local government may, in performing its general function, do any of the things prescribed in Schedule 3.2 even though the land on which it is done is not local government property and the local government does not have consent (but must provide notice) to do it.²⁵⁴ Schedule 3.2 cl 3 provides that local government can take from land any native growing or dead timber, earth, stone, sand, or gravel that, in its opinion, the local government requires for making or repairing a thoroughfare, bridge, culvert, fence, or gate.

Gravel on public land is a mineral and the provisions of the *Mining Act 1978* apply to persons other than local government. Gravel is of low intrinsic value so its regulation is not a priority. In most cases the only mining tenement involved will be a mining lease. It is possible to object to a mining lease and objection should be in writing within 35 days of the application.²⁵⁵ If there is objection, both parties put their case to the mining warden and the mining warden will make a recommendation to the Minister for Mines about the application for the tenement. The Minister is obliged to refer the application to the Environmental Protection Authority if it is a proposal that might cause significant harm to the environment.²⁵⁶ The Minister may impose any reasonable condition for the prevention of, reduction or repair of any injury to the natural surface, anything on the natural surface or consequential damage to other land.²⁵⁷

Planning requirements of town planning schemes may apply to gravel extraction. The *Mining Act* provides for consideration of town planning schemes by the Minister or the mining warden in determining whether or not to grant a mining tenement²⁵⁸ but even a prohibition in a scheme is not binding on the Minister or the mining warden. However, development approval is required under the Metropolitan Region Scheme²⁵⁹ which affects land in the metropolitan region as defined.²⁶⁰ Accordingly, gravel extraction is prohibited in the MRS region unless that development approval is obtained.²⁶¹

²⁵³ *Mining Act 1978* section 6(2)(a).

²⁵⁴ *Local Government Act 1995* section 3.27(1).

²⁵⁵ *Mining Act 1978* section 75(1) and the *Mining Regulations 1981* regulation 67(1).

²⁵⁶ *Environmental Protection Act 1986* section 38(1) and *Serpentine Jarrahdale Ratepayers and Residents Association Inc v Minister for Mines* [2001] 203

²⁵⁷ *Mining Act 1978* section 84 (1).

²⁵⁸ *Mining Act 1978* sections 24 and 84.

²⁵⁹ The MRS is a statutory planning scheme which applies to the Perth Metropolitan Region: see the *Metropolitan Region Town Planning Scheme Act 1959*. Under the MRS development approval is required from the Western Australian Planning Commission in respect of reserved land and in most cases the approval is delegated to the local government. However, in the case of State agencies carrying out public works see *City of Bayswater v Minister for Family and Children's Services* [2001] WASCA 151 in which it was held that the approval to commence development on land zoned under the MRS is required for public works by the Crown (State agencies) in respect of land both zoned and reserved under the MRS. Development for the purpose of the *Town Planning and Development Act 1928* is the development or use of any land, including any demolition, erection, construction, alteration or addition to any building or structure on the land and the carrying out on the land or an excavation or other works: see section 2. In the case of a place to which a Conservation Order applies section 59 of the *Heritage Act 1990* provides that it includes any act or thing that is likely to change the character of that place. Also see *City of Cockburn v Boral Resources (Australia) Ltd* 97 LGERA 232 which held??

²⁶⁰ There is only one operative region scheme but it is likely that the Peel Harvey Region Scheme will be put before parliament this year. I understand that there are other region schemes being developed which include

Under the MRS development on a regional reserve requires the permission of the Western Australian Planning Commission.²⁶² There are limited exceptions to this rule where the reserve has been vested in a public authority and the proposed development is consistent with the purpose of the reserve or is something that the public authority could otherwise do.²⁶³

7.15.2 Gravel on Private Land

Limestone, rock, gravel, shale, sand or clay are not considered minerals on private land and the *Mining Act 1978* will not apply.²⁶⁴ Accordingly the control of extraction of gravel from private land is primarily through town planning laws.

I understand that gravel extraction by State government agencies is controlled by interdepartmental memoranda to ensure that environmental conditions are set and complied with.²⁶⁵ The Western Australian Planning Commission has published a section 5AA Statement of Planning Policy No 10 Basic Raw Materials. This policy was gazetted on 28 July 2000.

7.16 Drainage works

The local government may be entitled to drain water from a road into a natural watercourse which the road crosses. The local government is not authorised without more to interfere with private rights of a property owner except to the extent that it is authorised to in performing its duties.²⁶⁶ A local government may have the right to recover damages for damage to a road reserve from a drain on nearby private land.²⁶⁷

7.17 Port Land

The land and waters of State ports²⁶⁸ are Crown land vested in the port authority. Port authorities are not agents of the Crown and do not enjoy Crown immunity. Accordingly, port authorities are subject to Western Australian statutes unless expressly excluded from such application.

Local town planning schemes do not apply over port lands but there is an obligation on a port authority to consult with local governments about port plans that will impact on the local government managed land. Ports are industrial sites and the roads within and accessing port land may contain native vegetation. Port authorities need to be mindful of their legal obligations in respect of *taking* of flora or fauna by any activity on a port road or road works in respect of port roads.

one for the Bunbury Region. MRS like provisions in respect of mining and gravel pits may apply to these region schemes.

²⁶¹ The *Town Planning and Development Act 1928* section 32 relieves State agencies and local governments undertaking, constructing or providing any public work from obtaining development approval otherwise required under town planning schemes. However, see the Metropolitan Region Scheme clause 13; and see *City of Bayswater v Minister for Family and Children's Services* [2001] WASCA 151 in which it was held that the approval to commence development on land zoned under the MRS is required for public works by the Crown (State agencies) in respect of land both zoned and reserved under the MRS.

²⁶² MRS clauses 13 and 18.

²⁶³ MRS clause 16.

²⁶⁴ *Mining Act 1978* section 8.

²⁶⁵ For example I understand that CALM and the Department of Minerals and Energy agreed that CALM would manage gravel and other basic raw materials occurring on CALM managed land: see the State Gravel Supply Strategy.

²⁶⁶ *Rudd v Hornsby Shire Council* (1975) 31 LGRA 120.

²⁶⁷ *Kingsborough Municipality v Bratt* [1957] Tas SR 173; (1957) 7 LGRA 295

²⁶⁸ Ports under the *Port Authorities Act 1999*.

7.18 Planning for road reserves

7.18.1 Town Planning Schemes

The things which can be regulated under a town planning scheme are listed.²⁶⁹ There are a number of categories which could include protection of roadside vegetation. Nevertheless, if such protection were expressly made²⁷⁰ this would be at least a signal of the significance of remnant native vegetation in road reserves. A town planning scheme can promote preservation of native vegetation, certain ecosystems or even certain trees in its district.²⁷¹

There is a regime for environmental assessment of new or amendments to town and region planning schemes.²⁷² Unless, a proposal has been specifically considered in the assessment of a scheme, that specific proposal can be referred and assessed.²⁷³ The purpose of this approach is to identify environmental issues that might affect development and include appropriate conditions or limitations in the scheme or scheme amendment. Consultation by the RCC with the Department of Environmental Protection about the impact of the clearing of native vegetation for road works required by subdivision and development proposals may be helpful. The Minister for the Environment is authorised to make binding environmental conditions on planning schemes and such conditions might relate to the protection of remnant native vegetation in road reserves.

7.18.2 Local government laws

Local government legislation confers legislative power on councils to make local laws or by-laws in regard to traffic areas.²⁷⁴ The Governor may amend or repeal local laws.²⁷⁵ Where persons have dug up or deliberately interfered with roads they may be obliged to restore the road reserve,²⁷⁶ or the local government may do the works and recover the cost.²⁷⁷ Local governments are also authorised to make local laws in respect of damage to property under its control.²⁷⁸ The Minister administering public works legislation may make local laws in respect of government roads.²⁷⁹

Local governments are authorised to protect roads from a condition on adjoining land which threatens the road.²⁸⁰

²⁶⁹ *Town Planning and Development Act 1928* Schedule 1.

²⁷⁰ For example in the *Town Planning and Development Act 1928* Schedule 1; and in the Model Scheme text provisions.

²⁷¹ See for example in the Shire of Mundaring Town Planning Scheme No3 – District Zoning Scheme provides for the protection of trees of certain diameter and natural vegetation by requiring Council approval for to remove the trees or natural vegetation.

²⁷² *Environmental Protection Act 1986* section 48.

²⁷³ *Re Environmental Protection Authority; Ex Parte Sandbourne Holdings Pty Ltd & Anor* [2002] WASCA 75.

²⁷⁴ *Local Government Act 1995* section 3.5(1).

²⁷⁵ *Local Government Act 1995* section 3.5(4).

²⁷⁶ *Local Government Act 1995* section 3.25(1) and Schedule 3.1 cl 3.

²⁷⁷ *Local Government Act 1995* section 3.26.

²⁷⁸ *Local Government Act 1995* section 3.5.

²⁷⁹ *Public Works Act 1902* section 87(2).

²⁸⁰ To remedy condition see *Local Government Act 1995* section 3.25, Schedule 3.1 cl 4; and see *Main Roads Act 1930* section 16(1)(b); to remedy the damage see *Local Government Act 1995* section 3.25, 3.26(2), Schedule 3.1; *Local Government (Uniform Local Provisions) Regulations 1996* regulations 11 & 20(2) and *Main Roads Act 1930* section 16(1); to recover cost see *Local Government Act 1995* section 3.26(3).

7.18.3 Regional Parks

A regional park²⁸¹ is a planning strategy or policy without legislative force. Regional parks combine a variety of land tenures and are managed by CALM. CALM will develop management plans for these parks. Such management plans may include protection of remnant native vegetation in road reserves within the regional parks.

7.18.4 Taking Flora in *Bush Forever* Sites

The *Bush Forever* arose from *Bushplan*. *Bush Forever* is a planning tool which identifies for protection certain areas native vegetation within part of the Perth metropolitan region. *Bush Forever* does not have statutory force and is not more than a policy for consideration by decision makers contemplating *taking* vegetation identified in *Bush Forever* sites.

6.19 Aboriginal Heritage on road reserves

The *Aboriginal Heritage Act 1972* binds the Crown.²⁸² It is an offence for any person to interfere with a site of cultural and spiritual significance to Aboriginal people,²⁸³ without the authorisation of the Registrar²⁸⁴ or the consent of the Minister.²⁸⁵

7.20 Aboriginal traditional practices on road reserves

Under the WC Act²⁸⁶ a person who is *a person of Aboriginal descent* as that term is defined in section 4 of the *Aboriginal Affairs Planning Authority Act 1972* may take fauna or flora upon Crown land or upon any other land, not being a nature reserve or wildlife sanctuary, but where occupied, with the consent of the occupier of that land, sufficient only for food for himself and his family, but not for sale and the Governor may, if he is satisfied that the provisions of this section are being abused or that any species of fauna or flora which is being taken under the authority of this section is likely to become unduly depleted, by regulation suspend or restrict the operation of this section in such manner and for such period and in such part or parts of the State as he thinks proper.

7.21 European Heritage Places on road reserves

The *Heritage Act of Western Australia 1990* provides the primary protection for European sites of historical interest. The Act provides for conservation orders and stop work orders.

The Heritage Council is required to compile a record of the places which in its view might relate to or be associated with cultural heritage of the State; and to assess the conditions and the cultural heritage significance of such places.²⁸⁷ The record is to be kept at the local government offices and lodged with the Executive Director of DOLA and the

²⁸¹ A regional park is identified in the *Conservation Reserves for Western Australia as recommended by the Environmental Protection Authority – 1983 THE DARLING SYSTEM – SYSTEM 6 Part 11: Recommendations for Specific Locations. Regional parks are.. open spaces of regional significance.*: see page 39 of the System Six Report.

²⁸² *Bropho v Western Australia* (1990) 171 CLR 1

²⁸³ *Aboriginal Heritage Act 1972* section 17.

²⁸⁴ *Aboriginal Heritage Act 1972* section 16

²⁸⁵ *Aboriginal Heritage Act 1972* section 18.

²⁸⁶ *Wildlife Conservation Act 1950* section 23.

²⁸⁷ *Heritage Act 1990* section 44(1).

Registrar of Titles.²⁸⁸ In compiling this record and register the Heritage Council must ascertain and have regard to the recommendations of and information compiled by the Australian Heritage Commission, the National Trust of Australia (WA) Inc, local governments.²⁸⁹ A special tract of road side vegetation might be promoted for such protection.

The Heritage Council as far as practicable must ensure that all public authorities responsible for planning matters are aware of places that are affected by the *Heritage Act 1990*.²⁹⁰

²⁸⁸ *Heritage Act 1990* section 44(2).

²⁸⁹ *Heritage Act 1990* section 43

²⁹⁰ *Heritage Act 1990* section 58.