

**COASTAL PLANNING AND DEVELOPMENT
CONTROL:
PROPOSALS FOR REFORM**

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**COASTAL PLANNING AND DEVELOPMENT CONTROL:
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MICHAEL BARKER QC

Introduction

1. On behalf of the Conservation Council of Western Australia (Inc) and the Coastal Planning Coalition, I have been requested to provide a report on coastal planning in Western Australia for presentation to the *Ministerial Taskforce investigating Structural Arrangements for Coastal Planning and Management in Western Australia*, established by the Hon Minister for Planning, Ms Alannah MacTiernan MLA.

Coastal Planning and Management as an issue

2. Unplanned and uncontrolled development of the coast has the real potential to damage the social, economic and environmental interests of the residents of Australia, each State and Territory and each region or unit of local government.
3. The final report of the Resources Assessment Commission (RAC) following its coastal zone inquiry in 1993, emphasised the importance of the coastal zone in the following terms –

The coastal zone has a special place in the lives of Australians. Most Australians want to live there and if they can't they want to take their holidays there. It contains diverse ecosystems and a high proportion of Australian's industrial activity occurs in the zone. It is a priceless national treasure.¹

Special protection measures

4. The importance attributed to the coastal zone squarely raises the question whether special measures are required to protect the social, economic and environmental resources found within the coastal zone. If the community discerns that unacceptable levels of damage are being caused in the coastal zone the need for special measures will be considered self evident. To do nothing or to do little may result in irremedial damage to the coastal zone.

¹ RAC Coastal Zone Inquiry Final Report 1993, Chapter 2, paragraph 2.01

5. The RAC Final Report 1993 recommended that a concerted national effort was essential if the management of Australia's coastal zone was to improve and if Australians were to continue to enjoy the economic, social and environmental benefits provided by the coastal zone. The action programme proposed by the RAC required a joint Commonwealth/State effort and involved the creation of national coastal zone objectives, arrangements for implementing and managing the programme, mechanisms for community and industry involvement and innovative management mechanisms.²
6. The initiatives since then have involved the establishment of an inter-departmental coastal working group (ICWG) focussed on aspects of coastal management issues. A number of States/Territories have negotiated and signed a memorandum of understanding (MOU) with the Commonwealth Government to advance the interests of coastal planning and management in particular focus areas. These MOUs involve the allocation of Commonwealth funds to State and Territory coastal planning programmes.³

Responses to the need for coastal zone planning and management

7. To date, the Australian response to the need for coastal zone planning and management has largely reflected the division of legislative and executive power in the Australian federation. Certain measures have been taken at the Commonwealth level of government in those areas of Commonwealth responsibility, namely, seaward of the three nautical mile limit around Australia. State and Territory responses have been limited to their particular jurisdictions within the three nautical mile limit and in the relevant adjacent, landward coastal zone.
8. Under the prevailing Commonwealth policy of "co-operative federalism", the Commonwealth Government has attempted to encourage national action by Commonwealth, State and Territory governments towards integrated coastal zone management by promoting the non-binding Commonwealth Coastal Policy 1995.

² RAC Final Report 1993 paras 19.28 and 19.29

³ See R Kay and C Lester "Benchmarking the Future Direction for Coastal Management in Australia" in Coastal Management, 25 at 265-292, 1997. An MOU achieves a measure of obligatory behaviour between governments, but does not bind the Parliaments of any jurisdiction.

9. In a survey of Australian responses to coastal zone planning and management over the course of the late 19th century and the 20th century, Kay and Lester have noted that the 1990s saw the most concerted effort to improve the country's coastal planning performance. Their assessment⁴ closely considers the fruits of the Commonwealth policy of co-operative federalism. They conclude that implementation of agreed Commonwealth and State/Territory administrative arrangements, through memorandums of understanding, has “*proved difficult*”.⁵ The authors also conclude that, despite assertions that the coast was to be “fixed” by various policy initiatives of State and Federal governments, “*this still is far from the case*”. They suggest that –

*“Perhaps the key issue in Australia is that the coast and its management are so intertwined with the Australian ‘psyche’ that the job of improving coastal management effectively is one of improving government and governance itself. It remains to be seen whether coastal management in Australia is the best that it can be under the present system of government and the existing relationship between indigenous and non-indigenous Australians.”*⁶

10. The current position, as Professor Geoff Wescott of Deakin University has observed, is that –

*“... to all intents and purposes the planning and management of the Australian Coastal Zone is carried out by State Governments (and local governments beneath the states)”*⁷

To this end, as explained below, a number of Eastern States, especially New South Wales, have taken considerable steps forward in ensuring effective coastal zone planning and management in accordance with principles of ecologically sustainable development (ESD). Western Australian policy development also reflects ESD principles in a number of growing areas of regulation: eg see Environmental Protection Authority, *Perth's Coastal Waters* (February 2000).

Unintegrated planning and management: the nature of the problem

11. Recent policy initiatives arising from and since the 1993 RAC Report into coastal zone management in Australia have recognised the need for “integrated coastal zone management”. All reports have emphasised the fact that the coastal zone has never

⁴ R Kay and C Lester, “*Benchmarking the Future Direction for Coastal Management in Australia*”, 1997

⁵ See page 282

⁶ Page 297

⁷ Geoff Wescott “*A Brief Assessment of Integrated Coastal Zone Management in Australia*” Scoping Paper, Integrated Oceans and Coastal Management, ACORN 2000, p.1

been identified and treated as a special resource management challenge of its own. Rather, the land, waters and air resource allocation decisions in the coastal zone have traditionally not been treated any differently from those in other, terrestrial zones.

12. Thus, laws of general application dealing with town and country planning, administration of Crown Lands, the management of ports, harbours and jetties, fisheries, marine species preservation controls, and national parks, to mention a few, have been applied without any requirement for an integrated approach to coastal planning needs.
13. As recognised by earlier inquiries in Western Australia and elsewhere in Australia, where coastal planning and management happens, it tends to do so more by accident than by design. While some legislative and policy steps have been taken to remedy this lack of focus and integration in relation to coastal planning and development control in some Australian States, little has been achieved in Western Australia.

The range of available special measures

14. When policy responses to resource allocation questions are called for, a range of responses or strategies is usually identified. Those who theorise about appropriate forms of official action properly point out that basically four strategies are available. These are –
 - (1) *information or moral suasion*;
 - (2) *facilitation or government investment*;
 - (3) *regulation*; and
 - (4) *incentives*.
15. The *information strategy* is probably the least well-used. Government may deploy it to alter behaviour by providing information to the public so that a new awareness will alter behavioural trends.
16. *Facilitation* depends on government making it easier for people to adopt new behaviour. It assumes that if means are available to do a certain thing people will avail themselves of the opportunity.

17. The last two strategies are those best-known to the law: *regulation* which requires people to adopt new behaviour under threat of penalty, and *incentives* which induce new behaviour because it will cost a deviant less to adopt the new than to continue the undesired behaviour. Regulation has been used as the primary tool of government intervention. Incentives, while often talked about, are less often utilised.
18. It may be said that good policy development necessarily involves a mix of strategies. Experience shows that, in relation to resource use questions, regulation is the most effective response upon which the other strategies involving incentives, information and facilitation may be developed.
19. In Australia, as noted above, the formulation of appropriate policy responses to the coastal planning issue is further complicated by the Commonwealth/State and Territory constitutional arrangements and a debate about which level or levels of government should bear the financial burdens associated with implementing agreed strategies.

Shortcomings in the Western Australian coastal zone planning and management regime

20. A development proposal within the coastal zone may involve the proposed use and development of land, waters and the atmosphere. In order to determine what controls are applicable in respect of any such proposal, a relevant starting point usually will be to ascertain what “town planning” controls are relevant in the place the subject of the proposed development.

Metropolitan Region of Perth

21. Within the Metropolitan Region of Perth, as that region is defined by the Metropolitan Region Scheme (MRS) gazetted under the *Metropolitan Region Town Planning Scheme Act 1959 (WA)*, all development (with certain exceptions) must be the subject of development approval. By and large, the MRS region is terrestrial, but also includes coastal waters adjacent to the Perth coastal region.
22. Within the Perth MRS region, there are also complementary local government town planning schemes made under the *Town Planning and Development Act 1928 (WA) (TP and D Act)*, often called town planning schemes or district zoning schemes. As in

the case of the MRS, save for a few exceptions, development proposed within the scheme area of a local planning scheme must be the subject of development approval.

23. Thus, in the Perth MRS region, development usually requires two approvals, one from the Western Australian Planning Commission (WAPC) (or a delegate) under the MRS and another from the relevant local government under the local planning scheme.⁸
24. Additionally, plans for subdivision of land must be approved by the WAPC (or a delegate) under s20 *TP and D Act*, and proposals for strata sub-division must be approved by the WAPC under the *Strata Titles Act 1985*.

Outside the Metropolitan Region of Perth – Balance of State

25. Outside the Perth Metropolitan Region the dual planning scheme approval system does not operate. Thus, the question in every case is whether there is a local planning scheme in place pursuant to the *TP and D Act*. If there is, then it is necessary to consult the terms of the relevant local planning scheme to determine whether a proposed development within the coastal zone falls within the scheme area and is the subject of development control. If the local planning scheme has application to the proposed development, the local government will usually have the sole power to grant planning consent.
26. If there is a relevant local planning scheme in these cases it may not have been drafted with any coastal planning objectives in mind. It may not address coastal planning issues at all. It may simply require any form of “development” (as defined by s2 *TP and D Act*) to be subject to the approval of the local government.
27. However, as in the Perth Metropolitan Region, where the development proposed also involves subdivision of land or a form of strata subdivision the approval of the WAPC (or its delegate) is required to the proposed subdivision or strata subdivision of the land.

⁸ There is a possibility that, in some instances, the scheme area of a local planning scheme will not extend so far westward as to include some of the waters that are within the MRS region and so, in those cases, only an MRS approval will be required, together with any relevant approvals required under the *Port Authorities Act, Jetties Act 1920 (WA)* and any other laws applying in that area.

28. Thus, in circumstances where a major development necessarily requires subdivision or strata subdivision approval, a dual approval system may in fact operate outside the Perth Metropolitan Region requiring both the approval of the local government and the WAPC (or its delegate).
29. In some areas of the State, both today and in recent years, parts of the coastal zone outside the Perth Metropolitan Region have not been affected by a local planning scheme. Historically, when country and more remote local governments first engaged in the planning process, they tended to limit themselves to *town* planning. Local planning schemes often only affected the principal town or towns within the municipal district and had no application in the balance of the municipal district. In a number of instances this remains the case. Accordingly, much of the vast Western Australian coastline will not be affected by a planning scheme.
30. In some remote areas, as discussed later in this report, the use of Crown land is controlled by devices contained in the *Land Administration Act 1997 (WA)*. Port developments are controlled by the *Port Authorities Act 1997 (WA)*.

Case study: The Gnarabup development

31. The planning history pertaining to the Gnarabup development within the municipal district of the Shire of Augusta-Margaret River is of particular interest.
32. In October 1992 the then owner of Sussex Location 815 at Gnarabup within the Shire of Augusta-Margaret River sought approval of a development of land on the coast which provided for 268 residential lots, 9 special rural lots, 1 tourist lodge site, 1 chalet park site, 1 caravan park site and 1 commercial/community purpose site.
33. At the time of proposal, Sussex Location 815 was unaffected by any relevant town planning scheme of the Shire of Augusta-Margaret River, but was affected by the Shire of Augusta-Margaret River Interim Development Order (IDO) No 10. An IDO is a planning instrument made pursuant to the *TP and D Act* pending the bringing into force of a detailed town planning scheme. IDO No 10 required any development of Sussex Location 815 to be the subject of approval by the local government.

34. At the same time, because the proposal involved the subdivision of the land, the approval of the then State Planning Commission (now WAPC) was also necessary under s20 of the *TP and D Act*.
35. To the point at which the development was proposed, only low level development at the nearby Prevelly Park, near the mouth of the Margaret River, existed in the locality. On any view, the proposed Gnarabup development would significantly increase human habitation in the locality and carry with it the potential for significant environmental impacts in the coastal area.
36. The need to respond to the coastal planning challenges presented by potential development of the land had been recognised by the Shire of Augusta-Margaret River which then had in train, but not adopted and gazetted under the *TP and D Act*, draft Town Planning Scheme No 18. In the ordinary course of events, one might have expected the State Planning Commission and the Shire, through a process of consultation, to develop an appropriate coastal planning strategy to deal with development of the type proposed.
37. At the time subdivision and physical development was proposed it was, of course, also open to each authority to exercise its separate statutory powers according to its own lights. For example, the State Planning Commission could have rejected outright a proposal for subdivision approval. That would have entitled the proponent of the development to appeal either to the Minister for Planning or the Town Planning Appeals Tribunal under the *TP and D Act*. Similarly, the Shire could have decided to deal with the application for physical development approval under IDO No 10, having regard to draft Town Planning Scheme No 18 (TPS 18), and either rejected the development proposal or conditionally approved it. Again, the proponent would have been entitled to appeal the decision of the Shire either to the Minister for Planning or the Town Planning Appeals Tribunal.
38. What in fact happened was that the anticipated planning structure and procedures suggested by draft TPS 18 were adopted even though they then had no statutory basis. The consequence was that the proponent, with the concurrence of the Shire and the understanding of the SPC, advertised its development application for public comment.

The advertised proposal included a proposed “Structure plan” that reflected draft TPS 18.

39. Then the proponent proposed a modified structure plan which included land outside an area marked “Development Zone” on draft TPS 18, and the siting of a proposed waste water treatment plant close to the shoreline adjacent to a popular surfing break and 300m from the proposed residential development. Nonetheless, the Council of the Shire on 14 April 1993 adopted the modified structure plan.
40. In August 1993, prior to approval and gazettal of TPS 18, the Minister for Planning required the Council to include a tourist site outside the Development Zone indicated in the draft, and also required that the height limit of the development be increased from 6m to 8m. Additionally, the total number of lots had to be set at 243. It appears the Minister required the Council not to advertise these further amendments to draft Town Planning Scheme No 18 on the basis that the structure plan had already been advertised.
41. No doubt at this point the Council of the Shire was effectively obliged to comply with the Minister’s requirements. The draft TPS 18 was in the Minister’s hands for approval. Any rejection of a development application under IDO No 10 would have gone on appeal to the Minister who would have been in a position to impose his own requirements at that point, in any event. And, additionally, the WAPC had the power to approve whatever form of subdivision it considered appropriate.
42. In September 1993 the WAPC approved the modified Structure Plan.
43. Then the WAPC granted an initial subdivision approval in respect of Sussex Location 815 that was intended to reflect the approved Structure Plan.
44. Sometime later, on 30 June 1995, TPS 18 was gazetted and came into statutory effect.
45. As a result of this planning process, TPS 18 was eventually gazetted and intended to control the subsequent development of the affected land at Gnarabup. However,

coastal development at Gnarabup was approved by the Commission and the Shire prior to the gazettal of TPS 18.

46. *Lessons to be drawn from Gnarabup planning process:* To this point, a number of lessons concerning coastal planning can be drawn including –

∄# Central government exercised direct power and influence to dictate the planning outcomes, both through the Minister for Planning’s intervention and direction concerning TPS 18 and the role of the WAPC, through its delegate, the South West Region Planning Committee (SWRPC), in agreeing to a structure plan intended to guide subdivisional development and approving an initial subdivision.

∄# In relation to subdivision control, the WAPC or SWRPC, at the relevant time in 1993, would have been entitled, as a matter of planning law, to formulate and apply coastal planning objectives in respect of the proposed development at Gnarabup.

∄# At the relevant time, the question of coastal development along the south west coast was apparently the subject of planning concern and the following policies were then in place or in preparation –

3 · The Leeuwin Naturaliste Region Plan, Stage 2 (SPC 1988), which was a precursor to the Leeuwin Naturaliste Region State Planning Policy;

3 · Shire of Augusta-Margaret River Rural Strategy (1990);

3 · Prevelly Park Development Guidelines (1991);

3 · Country Coastal Planning Policy (June 1989) (development control policy of then Department of Planning and Urban Development).

However, these policies had no statutory basis and there was no requirement that the development control decisions should conform with their terms. Such policies may be relied upon by development control decision-makers as establishing sound planning principles, but they may also be departed from with legal impunity where decision-makers consider that they need not be applied.

- €# Because coastal planning was then (as now) still in its infancy, and there were no specific coastal planning principles enshrined by any relevant statutory instrument, the subdivision and development approvals granted by the WAPC and the Shire of Augusta-Margaret River in 1993 were not informed by any sophisticated coastal planning processes.
- €# To the extent that “coastal planning and management” was undertaken at all in 1993, it was through the process of adoption of an *ad hoc* local planning scheme, namely, TPS 18.
- €# The control of development at Gnarabup after the adoption of TPS 18 depended entirely on the terms and integrity of TPS 18 and the faithful adherence to it by the WAPC in the future exercise of its subdivision control power. If TPS 18 had been drafted ambiguously or had overlooked certain matters that might become important in the future, then its worth as a coastal planning instrument might be found sorely wanting. Moreover, if the WAPC ignored TPS 18 in its future exercise of subdivision controls, TPS 18 would not be worth the paper it was printed on.
- €# Additionally, the amendment of the *TP and D Act* in 1996 meant that the WAPC (or its delegate) no longer needed to make subdivision decisions that conformed with the requirements of a local scheme which the Minister had previously approved.
- €# It appears that the draft 1993 Structure Plan was the subject of “informal review with public advice” assessment by the EPA under the *Environmental Protection Act 1986 (EP Act)* in 1993. No formal, detailed assessment was then required, but a letter from the EPA in 1993 apparently indicated that if development was to occur with greater intensity than that shown on the draft Structure Plan that it might require formal assessment. The final endorsed Structure Plan, it appears, did in fact change the level of development from that shown in the draft, yet no further formal assessment was engaged in by the EPA. This emphasises the point that not all development within the coastal zone will necessarily be subject to any rigorous form of environmental assessment under the *EP Act*.

- €# This history and these lessons, to this point, emphasise how a significant development proposal in the coastal zone of South-Western Australia, and in particular in a portion of the coastal zone that at all material times was well-used and well appreciated by many Western Australians, was very much treated as if it were just another terrestrial form of development. The planning and development decisions made plainly owed little to any well-formulated, pre-existing coastal zone planning instrument. The decisions made were taken in circumstances where, to the extent that coastal planning objectives were regarded, such objectives had no paramountcy in the planning system.
47. *Recent developments at Gnarabup:* The history of dispute concerning the further development of Gnarabup Beach, including that which has been played out in the Supreme Court of Western Australia, and which is continuing, bears out the view that the planning process and techniques adopted in 1993 to deal with the Gnarabup future development, were deficient and emphasise the need for a State-wide and common system of control in respect of development in the coastal zone.
48. In August 2000, a further structure plan was submitted to the Shire by the proponent of development at Gnarabup, this time pursuant to TPS 18. In October 2000 the Shire advised the proponent that it would not advertise the 2000 structure plan because of the Shire's view that the development proposed did not conform with the terms of TPS 18. In particular, the Shire expressed the view that the number of residential lots that would be created within the relevant area would exceed the 243 limit imposed by TPS 18.
49. The Shire also advised the WAPC that it objected to the concurrent application of the proponent for further subdivision of the land which the proponent had lodged with the WAPC.
50. In December 2000, without the Shire making any substantive submissions to the Supreme Court and without any other submissions by any other person other than the proponent, a Justice of the Supreme Court of Western Australia accepted the proponent's submission that the Shire was not entitled to refuse to advertise the 2000 structure plan. As a result of a final order of the Court requiring advertising, the Shire

proceeded to advertise the 2000 structure plan. However, the Shire subsequently formed the view that the structure plan should not be adopted by it unless amended. It advised the WAPC accordingly, pursuant to the terms of TPS 18. The proponent then proceeded to appeal that “decision” of the Shire to the Town Planning Appeals Tribunal. On 28 February 2002, the TPAT rejected the appeal on the basis it was not a matter that the Tribunal had jurisdiction to determine.

51. At about the same time as the appeal was lodged, the WAPC, or a purported delegate, purported to grant an approval to the further subdivision of land at Gnarabup Beach land the subject of TPS 18. This purported approval is currently the subject of judicial review proceedings in the Supreme Court of Western Australia.
52. Without entering into the merits of the judicial review application before the Full Court of the Supreme Court of Western Australia, it can fairly be observed that this litigation, and the proceedings in the TPAT, directly arise from the unsatisfactory planning and environmental assessment processes and outcomes undertaken and produced during 1993.
53. Whatever the ultimate merits of the development proposal on Sussex Location 815 might be, there can be little doubt that if, in 1993, there had been in place a properly thought-out coastal planning and management system, many of the unsatisfactory aspects identified above would have been avoided.

Case study: The South Guilderton (Moore River) development proposal

54. Another instance of how the planning process has historically struggled to cope with significant coastal planning proposals, especially outside the metropolitan area of Perth, is provided by the history of the South Guilderton development proposal.
55. In 1993, the Moore River Company applied to the Shire of Gingin to have land on the south bank of the Moore River estuary rezoned from Rural to Urban Development. The developer proposed a residential development on 557 hectares to accommodate a projected population of 15,000 people. To that point the town of Guilderton nearby to the development site was a veritable sleepy hollow. There had been no prior local or regional planning to suggest that a major residential development, of the type one sees

in the northern and southern suburbs of the Perth Metropolitan Region, would be appropriate or sustainable in the Guilderton area.

56. The community objected to the development proposal put forward by the developer for a number of reasons –
- €# The scale of the development.
 - €# The possible environmental impact on the Moore River and adjacent bushlands.
 - €# The availability of more suitable land on the northern side of the River.
 - €# The social impact of such a large development without an economic base to support it.
 - €# A conflict of interest within the planning approval process in that the planning consultant retained by the Shire was also advising the developer.
57. At the time of the initial development proposal, which involved the developer requesting the Shire to rezone the relevant land from “Rural” to “Urban Development” in order to facilitate the proposed development, the proposed means of facilitating the residential development was the making of proposed Amendment 22 to the Shire of Gingin District Planning Scheme No 8 (GDPS 8).
58. At the outset questions were raised by the community group whether the gazettal of Amendment 22 would enhance or diminish the control of the Shire over the proposed land development and, in particular, whether the control and influence of the Minister for Planning would be increased as a result of the gazettal of the proposed amendment.
59. Legal advice that the present author provided at the time to the Guilderton Community Association Inc (which I understand was then made public) was that proposed Amendment 22, if gazetted under the *TP and D Act*, would result in the possibility of any refusal of the Shire to adopt an Outline Development Plan submitted by the developer in respect of the proposed development within the new Urban Development Zone, being the subject of an appeal under the Act either to the Minister for Planning or the Town Planning Appeals Tribunal.

60. The advice then given emphasised that planning control would effectively be transferred to the Minister for Planning if the proponent of the development did not achieve the development outcomes it requested of the Shire and then lodged an appeal against the Shire's decisions with the Minister for Planning.
61. Amendment 22 proposed two significant changes to GDPS 8. First it proposed the introduction into the scheme of a new zone called "Urban Development". Secondly, it proposed the rezoning of the relevant land from Rural to Urban Development. Once the land was rezoned in that way, any development or subdivision proposal in respect of the land fell to be considered in accordance with the terms of GDPS 8 as amended and the provisions of the *TP and D Act*.
62. The use of the Outline Development Plan procedure has become quite prevalent in Western Australian planning schemes over the past 15 years or so. This has happened in order to introduce "flexibility" into the planning process. It is often used in conjunction with a development control regime specified in the planning scheme that gives a broad discretion to the local government to consider more intensive development of a locality, without limiting the range of development proposals that might be entertained. The scheme typically provides that development should be in accordance with or in conformity with an Outline Development Plan submitted and approved by the local government. Sometimes the scheme requirements go further and require the Outline Development Plan or something called a "structure plan" (as we have seen in the case of the Gnarabup development) to be also approved by the Western Australian Planning Commission. When this latter technique is used, there is a degree of both local and central planning agency involvement. Additionally, to the extent that the central government agency – the WAPC – is responsive to the influence of the Minister for Planning of the day, government influence can be brought to bear on the local planning proposals. The "structure plan" process is intended to lay at least the parameters of future development options. However, if it states matters in a general fashion, or ambiguously or vaguely, problems can occur later.
63. The point of the legal advice provided to the community group in the context of the Shire's proposal to have gazetted Amendment 22, was that the creation of broad discretions within a local planning scheme would inevitably lead to planning appeals,

often to the Minister of the day, whenever a proponent of development was dissatisfied with the decisions of the local government. Thus, it followed, as night follows day, that the local government would lose planning and development control over areas of land to be the subject of Outline Development Plan consideration.

64. The opinion provided by the author at the time also drew attention to many ambiguous, uncertain and inelegant provisions in the draft Amendment 22. This was pointed out not for the sake of it but because, if a local planning scheme which contains ambiguous or uncertain provisions is gazetted, administrative and legal problems will inevitably be encountered later. If these provisions are meant to protect the community interest or the position of the local government in exercising control over land development, and the provisions are later found to be ambiguous or uncertain, they may be given little or no effect. In short, the local planning scheme process in relation to planning development control is only as good as the terms of the planning instruments prepared, approved and gazetted. Where they contain broad statements of planning principle and broad discretions, usually there will be a loss of planning control when matters are the subject of appeal to the Minister or the Town Planning Appeals Tribunal.
65. This follows because s8A of the *TP and D Act* permits any *applicant* for consent, permission, approval or other authorisation under a town planning scheme which is in the discretion of the responsible authority, to appeal to the Minister or the Tribunal. Additionally, s37 in recognising the appeal jurisdiction of the Minister and the Town Planning Tribunal, permits an appeal in respect of the exercise of a discretionary power by the responsible authority under a town planning scheme. However, there is no third party right of appeal under the *TP and D Act* or this particular local scheme.
66. While planning appeals and related land use appeals may be made to the Minister for Planning of the day, it is inevitable that political decisions will be made and that there will be community dissatisfaction with such decisions.
67. It is noted that the current Minister for Planning, the Hon Ms Alannah MacTiernan, has initiated legislation to remove the dual appeal process, so that in the future appeals in respect of planning and related land use matters can only be made to the Town

Planning Appeals Tribunal. This long awaited reform to the planning process will remove the element of subjectivity and political decision-making from appeals and should introduce into the planning system at the review level increased rationality in planning decision-making. There is, however, no current proposal of Government to widen the third party appeal provisions.

68. The planning system in relation to coastal zone planning and management, if one uses the Guilderton example as a guide, is that the planning process again depends, as it has in respect of the Gnarabup example, on the particular terms of a local planning scheme and the influence of central government agencies from time to time.

69. A close study of the South Guilderton (Moore River) development proposal suggests a number of obvious deficiencies in the planning process that was undertaken within the Shire –

€# In May 1993 a draft structure plan produced by the Shire owed nothing to community involvement.

€# To the extent that the Shire endeavoured to engage the community, the draft plan was provided by the Shire at stages in the consultation process which did not permit the community to prepare fully and argue its case.

€# The then Department of Planning and Urban Development (DPUD) in early 1994 was attempting to prepare a comprehensive Central Coast Planning Strategy (CCPS) but it had not been finalised and the Shire planning scheme amendment process proceeded regardless.

€# The proposed Amendment 23 was referred by the community group to the EPA with the request it be formally assessed under Part IV of the *EP Act*, but this request was declined by the EPA. This emphasises that in some cases the EPA may cause a more comprehensive coastal planning strategy to be adopted – if there are identified “environmental impact” issues – but there is no guarantee that the EPA will become involved. On 26 February 1994 the EPA decided not to formally assess Amendment 22. Interestingly, in 1996 the then Chairman of the EPA said about that decision –

“Looking back at the records it was not formally assessed, on the grounds that the area was not of environmental significance. But I have to say that looking back and hearing all this additional information; with the wisdom of hindsight one might

have taken a different view. If I had all this information now I probably would have gone the other way.”⁹

70. The subsequent history of the development proposal within the Shire of Gingin would make an interesting case study for the politicisation of a community at the local government level. Members of the concerned community stood for and were elected to the local government. The merits of the proposed development became highly politicised on the Council of the local government. However, regardless of this politicisation of the issue at the local government level, with the gazettal of Amendment 22 the proponent of the development gained certain development rights, including, as pointed out earlier, rights of appeal to the Minister for Planning.
71. In such circumstances, it is to be expected that aggrieved members of the community should express considerable disaffection with the planning law procedures and the avenues open for review or appeal in respect of local government decisions. The planning scheme and planning scheme amendment process requires a local government to initiate the scheme or scheme amendment but relies on the Minister for Planning to grant approval of the scheme or scheme amendment prior to its gazettal and coming into force. By reason of amendments made to the *TP and D Act* and *Regulations* in 1996 the Minister gained considerable power to guide and influence the scheme-making and scheme-amendment process once a local government has resolved to initiate a scheme or an amendment to a scheme.
72. Important questions arise, especially when the system appears to work in an unsatisfactory or a political way, whether members of the community should be authorised by law to make appeals against “rezoning” decisions rather than leave the making of a scheme or its amendment in the hands of the local government and the Minister of the day.
73. Additionally, in such circumstances it is to be expected that members of the community, aggrieved by a decision of the EPA not to conduct formal assessment of Amendment 22, should clamour for a right to appeal against decisions of the EPA to another body.

⁹ “Home plan under a cloud”, C Amalfi at the *West Australian* 5 February 1996, p3.

74. Furthermore, one can understand concerned members of the community (being third parties) demanding a right to appeal against discretionary decisions made under a town planning scheme, in the same way that an applicant for approval may appeal under s8A of the *TP and D Act*. The current legal position is that so-called “third party appeals” are not permitted under the law. Concerned members of the community may on occasions be joined as if they were a party in an appeal in the Town Planning Appeals Tribunal, but there is no primary right under the law of Western Australia for “third party appeals” to be lodged against planning and development decisions.
75. *Lessons to be drawn from the South Guilderton (Moore River) planning process:*
They are numerous and include –
- ⌘ The local planning scheme and development control process can be seen to be an *ad hoc* manner in which to deal with significant development decisions.
 - ⌘ Many local governments will not have staff sufficiently experienced to advise the local government on a major development proposal.
 - ⌘ When coastal planning principles are at stake, an *ad hoc* planning and development approval process, particularly in a local government area outside the Perth Metropolitan Region, is unlikely to have a sophisticated appreciation of such complex issues as ecologically sustainable development (ESD).
 - ⌘ The “rezoning” planning process is subject to central government control, especially by the Minister of the day, and provides few, if any, opportunities for the community to have those decisions of the local government or the Minister reviewed.
 - ⌘ Where a planning scheme amendment is put in place and provides for the local government to make discretionary decisions, such as the adoption of an Outline Development Plan or the granting of development approval itself, the community is entirely reliant on the members of the local government Council to protect the community interests. This is because there are no rights in “third parties” to appeal against those discretionary decisions as a matter of law either to the Minister or the Town Planning Appeals Tribunal.

- €# The EPA may become involved in environmental impact assessment of a scheme, but it is entirely dependent on the EPA as to whether or not it will conduct formal assessment of a scheme.¹⁰
- €# No broadly accepted set of coastal planning policies objectives were in place at material times to govern or guide the planning and development decisions taken by the local government, DPUD or the Minister at relevant times; and even if they had been, such policies would not have been legally binding on the Council.

Case study: Leighton Marshalling Yards Redevelopment Proposal

76. The proposed redevelopment of the Leighton marshalling yards at Leighton Beach, partly within the municipalities of Fremantle and Mosman Park, provides yet another illustration of an inadequate planning process in relation to coastal zone development.
77. In many ways, the history of this redevelopment demonstrates the power of the community when it is well-informed and able to provide constructive comment in achieving sensible outcomes.
78. The redevelopment proposal was focused on a marshalling yard then vested in the Western Australian Government Railways (Westrail) for railway purposes. During the early 1990s, concern was expressed that the marshalling yard was under-utilised and that new uses were being established without any planning procedures. The government agency which proposed development wanted to see residential and related development of the site.
79. In terms of planning law, the marshalling yards seem not to have been directly affected by either City of Fremantle Town Planning Scheme 3 or Town of Mosman Park Town Planning Scheme 2. In each case, the land was reserved under the MRS and amendment to the MRS to permit residential and other relevant uses was required.

¹⁰ Since the South Guilderton referral decision was taken, the *Town Planning and Development Act 1928* was amended in 1996 to require new schemes and scheme amendments to be submitted to the EPA for assessment. However, it remains for the EPA to determine whether the environmental impacts of the proposal or scheme or scheme amendment are sufficient to warrant any level of environmental impact assessment.

80. Because of concerns which had been expressed, a Fremantle Regional Strategy (FRS), again a non-legally binding policy document, was finalised in 1994. The membership of the FRS taskforce was co-ordinated by the Department of Planning and Urban Development and included persons from the DPUD, City of Fremantle, Fremantle Port Authority, Main Roads Western Australia, Westrail and nominees of the Minister for Transport and Minister for Planning. No direct community involvement was provided for on the FRS taskforce.

81. The FRS taskforce was required –

- ⊘ To determine the best future use of the marshalling yards.
- ⊘ To consider appropriate management structures for the foreshore reserves on Leighton Beach.
- ⊘ To consider an unresolved proposal to link the coastal and nearby river foreshore reserves into an integrated regional park.
- ⊘ To consider the future regional road networks.

82. The FRS taskforce concluded in 1994 proposed that –

- ⊘ The marshalling yards and Port Beach Road be zoned “Urban” for residential, tourism and light industrial uses; and
- ⊘ some land be earmarked for increased beach parking and east-west linkages between the coastal and river foreshores.

The community response to the FRS taskforce inquiry identified the need for a coastal foreshore reserve to be made wider, but this was not specifically considered by the taskforce.

83. Subsequently, Westrail sought Cabinet endorsement of a project generally supported by the FRS process and called for tenders. Westrail proposed a mixed-use redevelopment of the marshalling yard and Port Beach Road. At the same time, the community and subsequently the local governments became increasingly concerned that the foreshore reserves that would remain following the Westrail proposal were inadequate and that the only means by which they could be increased was by utilising the adjoining road and marshalling yard reserves to supplement the foreshore zone. Thus, there were two incompatible processes at play – the Westrail desire to maximise

the mixed uses, and the community desire to “Save Leighton Beach” by increasing and improving the available foreshore reserves.

84. In 1999-2000, because of a major community participation campaign to “Save Leighton Beach”, the redevelopment proposal of Westrail was scuttled and a fresh proposal developed which took account of all points of view, including that of the community, and the need to achieve proper coastal zone planning and management.
85. The planning process engaged in, in 1994, with the setting up of the FRS taskforce, involved the two local governments. However, there is some reason to conclude that, in the circumstances, the subject land of the proposed redevelopment being an existing Westrail reserve, the local governments considered the redevelopment of the site as somewhat peripheral to their main planning responsibilities.
86. The campaign in 1999-2000, by contrast, achieved a community planning process which developed “Leighton Regional Guidelines 2000”.
87. Put another way, it might be said that because of the government agency ownership and initiation of the redevelopment proposal, the redevelopment of the land was taken as a given; and insufficient attention was ever provided to the community coastal zone planning and management objectives.
88. The legal and planning reality and background to the Leighton marshalling yards redevelopment proposal, was that there was no coastal planning policy in place at material times. In 1988 a draft coastal planning policy had been prepared by the then State Planning Commission which was intended to cover the whole State. It was subsequently divided into two documents, namely the draft Perth Metropolitan Region Coastal Development Policy and the Country Coastal Planning Policy. In terms of determining foreshore reserve widths, the two documents were very similar. Both recommended a minimum 100 metres setback as a guideline for stable or accreting sandy and rocky beaches. The country policy was adopted for coastal planning decision-making purposes. However, the metropolitan policy was never adopted. The country policy appears to have been used informally by the State Planning Commission as a guide document for coastal zone management in the metropolitan

area. Presently, a State Coastal Planning Policy is available for public comment, with a view to establishing it as a s5AA *TP and D Act* “Policy”.

89. It might be observed, that if the Perth Metropolitan Region Coastal Development Policy had been adopted as a s5AA Policy, the FRS and the subsequent MRS amendment to permit the Leighton development may have been obliged to take into account the need to increase the coastal reserves at Leighton to at least 100 metres in width. No such policy or statutory requirement was then in place and it seems never came to the conscious attention of the FRS taskforce or other responsible agencies until the community involvement after 1994 pressed the need for good coastal zone management.
90. It should be appreciated that statements of planning policy made pursuant to s5AA of the *TP and D Act* have a curious legal status. There is nothing in s5AA that says that planning and development decisions made by local government, the WAPC, or other public authorities in Western Australia shall conform with it. Rather, when town planning schemes are made, a local government must have “due regard” to a s5AA statement of planning policy and “may include” in its scheme a provision that a specified statement of planning policy shall be read as part of the scheme: see s7(5)(a) and (b) of the *TP and D Act*. Additionally, s53(1) requires the Town Planning Appeals Tribunal to have “due regard” to any s5AA statement of planning policy.
91. The long and the short of these provisions is, that a s5AA statement of planning policy does not bind any local government or other public authority in its decision-making and does not bind the Minister for Planning or the Town Planning Appeals Tribunal in dealing with appeals against development decisions.
92. Accordingly, if a “State Coastal Planning Policy” is adopted in Western Australia under the current legislative provisions, it may influence certain planning outcomes, in terms of the drafting of local schemes and the terms of the Metropolitan Region Scheme, but it will not have any statutory force of itself. Particular development decisions will continue to be made, in all likelihood, on an *ad hoc* basis and without any requirement that there be conformity with the State Coastal Planning Policy. This position is to be contrasted with that which operates in New South Wales under the

Environmental Planning and Assessment Act 1979 (NSW) whereby State planning policies have a strict statutory effect and the exercise of development control powers can be tied to the terms of the State policy.

93. As to the work of the FRS taskforce in the Leighton case, it is possible to make the observation, which may produce a degree of contention, that the FRS taskforce failed to identify all of the issues that needed to be considered to establish a truly visionary, sustainable integrated regional strategy. Coastal planning and management issues were not required to be considered as an express topic of inquiry and, as events show, they did not figure prominently in the planning process.
94. As intimated earlier, part of the difficulty may have been that the local governments did not play a more active role in setting the agenda of the FRS taskforce in the first instance. That this is the case, appears to flow from the minor planning control function of the local governments. The major planning control function lay with the WAPC because an amendment to the MRS was required to facilitate the development of the marshalling yards. As suggested, the development seems to have been considered a central government development proposal and not one really within the province of the local government.
95. What is plainly discernible from the case study of the Leighton marshalling yards redevelopment is that there was –
- ⊘ no relevant and required coastal zone planning procedure;
 - ⊘ no coastal zone planning and management policy in place to govern the existing decision-making authorities;
 - ⊘ relatively minimal involvement of the two local governments or the local community representations concerning the appropriate future development of this portion of the coastal zone which is in the Metropolitan Region; and
 - ⊘ effective exclusion of the community voice on the FRS taskforce.
96. In short, there was a lack of integrated planning strategy in relation to this coastal zone planning proposal.

97. *Lessons to be drawn from the Leighton marshalling yards redevelopment:* These include –

- €# The need for a strong advocate within the planning and approval process of good coastal planning and management policies and principles.
- €# The creation of properly developed coastal zone policies and principles.
- €# The lack of any requirement that coastal zone planning policies and principles be considered in the formulation of “regional strategies”, “rezonings”, “development plans”, or “development approvals”.
- €# The unfortunate outcomes achieved when proponents of development, be they private or government agencies, are focused on maximising profit from land development at the expense of considering the public interest in optimal coastal zone development.
- €# Ministerial responsibility was avoided by the Ministers for Transport and Planning effectively “passing the buck” between them, whereas if there had been a single Minister (for Public Works, or Coastal Planning and Development) this breakdown in Government responsibility for the redevelopment proposal might not have occurred.
- €# The community, as noted, ultimately forced a planning and development outcome that was considered more satisfactory than that initially proposed by Westrail. The Leighton Action Coalition (LAC) took the running in the community action campaign and politicised the issue in order to have the Minister for Planning accept that the planning process, which had hitherto been engaged, had failed to approach the planning and development proposals having regard to good coastal zone planning policies and practices. The LAC did not have any statutory basis upon which to challenge the planning decisions made or for calling the Minister for Planning to account. It could only seek to bring about political accountability. This raises a question whether there should exist a more appropriate and responsive method for “third parties” to present rational arguments to planners and decision-makers than that which currently exists. At the very least, it suggests that planning processes that involve coastal zone development should make explicit provision for provision of relevant information to the community and for the opportunity for community input before planning and development, including subdivision, decisions are made by a responsible authority.

- ⊘ If nothing else, the episode concerning the redevelopment of the Leighton marshalling yards emphasises the lack of proper statutory or administrative processes in this State for dealing with important forms of development within the coastal zone.

Case study: Development of the Broome Port facility

98. The development of the Broome Port facility by the Broome Port Authority also raises a number of issues of relevance to proper coastal zone planning and management when port facilities are developed or redeveloped.
99. Such a facility may be seen as relevant not only to the movement of ships, and their loading and unloading, but also to the following activities –
- ⊘ recreational and commercial fishing;
 - ⊘ recreational and commercial boating;
 - ⊘ boat ramps and jetties operated for these activities;
 - ⊘ ship building and repair facilities;
 - ⊘ retail sale of petrol and oil;
 - ⊘ club rooms;
 - ⊘ historic buildings;
 - ⊘ sites of environmental, social and cultural significance;
 - ⊘ tourism;
 - ⊘ road networks servicing the port;
 - ⊘ railway networks servicing the port;
 - ⊘ shipping facilities;
 - ⊘ quarantine facilities and inspection services;
 - ⊘ air traffic such as helicopters and light aircraft;
 - ⊘ oil and gas storage;
 - ⊘ industrial pursuits such as a cattle-yard;
 - ⊘ marine and aqua-culture development;
 - ⊘ offshore processing;
 - ⊘ hospitality industry such as function centres, restaurants, hotels and shops;
 - ⊘ parking facilities;
 - ⊘ rest room facilities;

- ⊘ land surrounding the port and road reserves on land controlled by local government;
 - ⊘ polluting industries and extra industries which require a clean marine environment;
 - ⊘ waste and rubbish disposal sites;
 - ⊘ contaminated sites; and
 - ⊘ native flora and fauna, especially rare and endangered flora.
100. The Broome Port Land Use Study of August 1997 undertaken by ERM Mitchell McCotter (the 1997 Environmental Study) was prepared to provide environmental guidance to the Broome Port Authority in the re-development of the port facility. However local environmentalists considered the study to be deficient in a number of respects. For this reason, the question of the most appropriate coastal zone planning processes in such cases are nicely raised for consideration.
101. In the case of the 1997 Environmental Study, Environs Kimberley Inc considered the following matters were omissions or inadequacies in the study –
- ⊘ An environmental and cultural corridor around the contour of the dunal system, the significance of which was recognised under Shire of Broome Town Planning Scheme No 4 (TPS 4) and was recognised under previous Shire of Broome town planning schemes which TPS 4 replaced, was not recognised.
 - ⊘ There was a rare and endangered plant, *Keraudrenia exastia* of the family *Sterculiaceae* on Port land. It is declared rare flora under the schedule to the *Wildlife Conservation Act 1950 (WA)*. The topography of the peninsula, and specifically the watersheds, has particular significance and any development needs to take into account the direction of the run-off from the watershed to avoid damage to the *Keraudrenia exastia* from industrial run-off. Boundaries of lots proposed should be congruent with watersheds. The plants were not recognised as needing buffer constraints.
 - ⊘ Dunal systems were not included in the reserves, nor were there sufficient buffer zones recognised as necessary between reserves and development.
 - ⊘ A contaminated site was not recognised.
 - ⊘ Flood prone areas were not recognised.

- €# A ship building industry would create a need for a land fill area which was not considered.
102. The question for present purposes is not so much the legitimacy of the complaints concerning the 1997 Environmental Study, but the processes by which an integrated coastal planning and management policy exists to respond to these types of coastal development, especially in a remote location such as Broome.
103. The *Port Authorities Act 1999 (WA)* (the *Port Act*) regulates some ports in Western Australia, including those at Albany, Broome, Bunbury, Dampier, Esperance, Fremantle, Geraldton and Port Hedland (see schedule 1). Each State port is managed by its own port authority.
104. The land controlled by a port authority is Crown land. Port land includes the water and seabed within the boundaries of the port.
105. Port authorities are not agents of the Crown and do not have the status of, or the immunities or privileges of, the Crown. There is no presumption that port authorities are immune from State laws. Accordingly they are subject to State and Commonwealth laws including the *Environmental Protection Act 1986 (WA)* and the new *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)*.
106. Each port authority is required by the Act to submit a strategic development plan to the Minister for Transport each year. The plan must include, amongst other things, an environmental management plan (EMP). An EMP is important because it can address the cumulative environmental impact of the combined activities of a port. It can also facilitate or effectively set a framework for an environmental audit. The *Port Act* provides that a function of the port authority is to protect the environment of the port and to minimise the impact of port activities on the environment. The *Port Act* expressly states that this function does not impose a duty on the port authority. However, the *Port Act* does provide that the port authority should perform its functions according to a strategic development plan, which includes the EMP.

107. Thus, it may be appreciated that the content of an EMP is critical to the proper environmental impact assessment of port operations. However, there is no definition or requirement in the *Port Act* as to the content of an EMP, and there are no guidelines for the development of an EMP. Additionally, there is no requirement to advertise a draft EMP for public comment or to make the EMP publicly available once made. Nor is there any express requirement in the *Port Act* for a port authority to submit an EMP to the Environmental Protection Authority for assessment under the *EP Act*.
108. It seems that there is no standard approach taken by the port authorities or their CEOs to making EMPs publicly available. It appears at least one CEO has refused to make the EMP publicly available: see EDO June 2000 Newsletter, pp4-5.
109. Because of the coastal zone management issues that may be inherent in port developments, the policy question is why a coastal zone planning and management agency should not have some specific duty or entitlement under law to assess the development of a port facility.
110. In theory, the port authority area could be subjected to town planning controls under a scheme, although usually the view will be taken that the planning decisions fall to the port authority for decision under its EMP, and the local government should not include or zone the port area in its scheme.
111. However, it is arguable that Part IV of *Environmental Protection Act* potentially applies to an EMP, and could apply to physical developments or uses authorised by a port authority. Having regard to s38 of the *EP Act*, the development of an EMP plainly involves –
- ⌘ a “proposal” as it is a “plan” as defined in s2 *EP Act*; and
 - ⌘ a proposal in respect of which a “decision-making authority”, as defined in s2 *EP Act* has responsibility.

The only question is whether the proposal – the EMP - if implemented may “*have a significant effect on the environment*”. In my view, an EMP is capable of implementation – indeed it is intended to be implemented – and it could possibly have adverse environmental impacts on the port land and its surrounds.

112. If the port authority forms the view that the EMP proposal is unlikely to have any effect or any significant impact on the environment, it will not be under any duty under s38(1)(a) of the *EP Act*, to refer the proposal to the EPA. However, by s38(1)(b) the proposal can be referred to the EPA by “*any other person*” which includes a member of the public. Additionally, the Minister for Environment can, if there is public concern about the likely impact of a proposal, if implemented, refer the matter to the EPA under s38(2).
113. While the decision in *Chapple*¹¹ suggests that some planning documents may be insufficiently developed to be considered a “proposal” for the purposes of s38(1) of the *EP Act*, in my view the development of an EMP, which has a statutory basis, could well require assessment in appropriate circumstances. Nonetheless, the situation remains legally uncertain.
114. *Lessons learned from the Broome Port facility redevelopment*: The policy difficulty is that a port proposal will not necessarily be environmentally assessed in every case, and port authority decisions are not necessarily integrated with other coastal planning decisions. The policy question then is: Why should not port authority decisions be integrated with a broader coastal planning and management framework?

Case study: The Mauds Landing Marina Development

115. A proposal to carry out a marina development on and across the boundary of the Ningaloo Marine Park has caused environmental concern for some time.
116. A proposed development was assessed and reported on by the Environmental Protection Authority in EPA Bulletin 796 and the Minister for Environment ultimately refused consent for that development in 1995.
117. A new proposal was formalised in the Coral Coast Resort Public Environmental Report (PER) in November 2000. It was said to be a 40% reduction in the size of the previous proposal to develop 317 hectares of the townsite nearby.

¹¹ *Ex parte Chapple v EPA & Ors* (1995) LGERA 310

118. A dual environmental impact assessment of the proposal is presently being undertaken at State and Commonwealth level.
119. It seems that Mauds Landing was originally gazetted as a townsite in the 1890s and is currently vacant Crown land. It appears that the development proposal was promoted through a “Heads of Agreement” between the WA Government and the Coral Coast Marina Development Pty Ltd.
120. A “Heads of Agreement” apparently has been signed, involving the Government. However, it is not available for public consideration and is apparently considered not subject to disclosure under the *Freedom of Information Act* by reason of the “commercial in-confidence” exemption. Planning carried out in secret or partly secret circumstances plainly is unsatisfactory.
121. To bring about development of the land, not only will environmental impact assessment be required but, as explained above, subdivision approval will also required from the WAPC. The most recent PER contains a structure plan. If approved by the EPA and Minister for Environment, the structure plan will also guide the WAPC’s decision-making and that of the Shire under the local scheme.
122. Additionally, the proposed area is affected by Shire of Carnarvon Town Planning Scheme No 11 (TPS 11) (gazetted 11 August 1995). Under TPS 11 the area is zoned “Resort Development”. TPS 11 in that zone requires –
- €# A comprehensive structure plan to be prepared and endorsed by the Minister for Planning, prior to subdivision or development (clause 3.4.2);
 - €# The structure plan must be in accordance generally with the recommendations of the Gascoyne Coast Regional Strategy (clause 3.4.2); and
 - €# The structure plan shall not preclude the subdivision and development of land at the Mauds Landing townsite for residential purposes (clause 3.4.3).
123. Thus, in this case, we have the local government planning scheme intersecting with a regional plan study and a requirement for planning decisions to be made following environmental impact assessment of the proposal.

124. The proposed development area involves (at least in part) a townsite reserve which was gazetted on 27 November 1896, long before the environmental importance of the area was recognised. In April 1987 the Ningaloo Marine Park (State Waters) was gazetted. The proposed resort involves a marina opening into the marine park and is less than two kilometres from the Coral Bay Sanctuary Zone. The current State Marine Park Management Plan was written 14 years ago. The Plan is required to be reviewed every 10 years. A review, due in 1998, has not yet been undertaken.
125. Conservationists and many local community members are concerned that approval of the resort would pre-empt and compromise the community's capacity to decide how it wants to see the Ningaloo Marine Park managed in the future. While there have been various discussions continuing since August 1987, there appears to be a multitude of planning policies affecting the area, and there is no overarching integrated coastal planning process.
126. There is a concern that while this development has been the subject of environmental impact assessment, the EIA process is too "proposal-centred" and does not properly consider broader regional issues or possible cumulative and interactive impacts for existing, proposed or planned developments that might follow. In short, the proposal is not being considered in the broadest context.
127. There has been no socio-economic study as to the need for and effects of a new town in the region especially on other towns.
128. *Lessons to be learned from the Mauds Landing proposal:* It is considered that if the proposed development in this region were the subject of separate coastal zone planning and management processes, the highest level of socio-economic and environmental impact assessment could be conducted, and cumulative and regional issues could be taken into account and the full implications of the proposed development could be assessed.
129. Moreover, development proposals would not be developed that are subject to secret Government-Developer agreements.

Case study: The proposed Port Catherine marina development at Coogee Beach

130. The Port Catherine development site includes 1.2 kilometres of beach at Coogee within the municipality of the City of Cockburn and the Metropolitan Region Scheme area. The latest development proposal includes a marina that covers 850 metres of the shoreline and extends into the ocean some 380 metres beyond the existing high water mark. The site is approximately 50 hectares in size of which all but approximately 4.3 hectares is controlled by the State Government.
131. The existing foreshore area is degraded because of historical industrial activity over 50 years. Considerable erosion across the whole site has resulted because of the breakwaters at the old South Fremantle power station.
132. In terms of coastal planning, the redevelopment of this site does not necessarily raise any issues other than coastal set back. But what is of concern to urban planners is that the impact of the proposed construction of a residential marina and the loss of existing sand dunes and beaches, albeit presently degraded, has not been fully assessed. The concept of constructing the marina originated in the early 1980s, although it is unclear whether this was a government or private sector proposal.
133. In considering the issue properly, the regional context must be taken into account, as it needed to be in the Leighton Marshalling Yards proposal discussed earlier. The coastal zone from Fremantle to Rockingham is dominated by heavy and marine industry, including Kwinana, the now extensive Jervoise Bay facilities, and three harbours at Fremantle. Only a small proportion of the coastline in this region is available for recreational beach usage, with large areas of this backed by conservation reserves making it not very suitable for regional use.
134. Clearly a marina is coastal dependent and there may well be a need for additional boat pens in the region. However, there remains capacity in the Fremantle harbours for additional pens since not all jetties have yet been constructed to full length. There would also appear to be plenty of scope to incorporate such a facility in the huge Jervoise Bay complex by further developing recreational boat pens at the Cockburn Powerboat Association boat launching site. It is therefore questionable whether a new

facility is required at all and, if it is, whether the Port Catherine site is the most appropriate location having regard to the dynamics of this coastal zone.

135. The proposal to construct the residential lots on a canal style development at the expense of losing hundreds of metres of beach front may be considered controversial if this matter is fully aired in public.
136. Other coastal planning issues include to the impact the marina will have on the long shore movement of sand.
137. Approximately 5 hectares of the site requires remediation at an estimated cost of \$7 million.
138. It may further be said that very few people in the Perth region, and in the Cockburn region have even heard of the Port Catherine development, do not know where it is and are oblivious to the impact of the proposed development on social, economic and environmental values of the region.
139. *Lessons to be learned from the Port Catherine proposal:* The proposed development provides a very good example of why coastal development proposals should be considered as part of an integrated or single coastal planning and management system.

Case study: The Eco Beach Resort Development

140. The Eco Beach Resort is a popular tourist destination at Cape Villaret, near Broome in the northwest of the State. It presents an interesting example of coastal development because of the particular land tenure system and development approval process by which the development was permitted. Eco tourism is obviously an important and growing part of the Western Australian economy. The question is, as this particular instance illustrates, what coastal zone planning and management structures are in place in remote areas when these types of developments are proposed.
141. The land on which the Eco Beach Resort is established was excised from an existing Crown reserve and made the subject of Special Lease 3116/11239 which was granted to The Kimberley Connection Pty Ltd on 22 December 1993 for the purposes of the

Resort for the period of 10 years. The conditions attached to the Special Lease appear to reflect an outcome achieved following the Shire of Broome and Department of Land Administration (DOLA) assessment of the project.

142. The Resort is in an area that is not covered by any existing town planning scheme administered by the Shire of Broome. However, it appears that there is an Interim Development Order in place under the *TP and D Act* – IDO 1 – which was gazetted on 20 February 1998 and later replaced by IDO 2, pursuant to s7B(3) of the *TP and D Act*. An IDO is a very useful planning instrument, but it is intended to be, as it is described, merely an interim measure pending the imposition of more extensive town planning controls.
143. Development proposals pursuant to IDO 1 and IDO 2 must be approved by the Shire and, as we have noted earlier in this report, may be the subject of environmental impact assessment under Part IV of the *EP Act*.
144. The Special Lease granted to the Resort proponent attempted to lay down conditions designed to protect the fragile dune environment, in particular, in the area on the seaward side of the Resort. The conditions appear to be the outcome of a planning process involving the Shire under the IDO.
145. Militating against these environment protection lease conditions, is the need to make the Resort viable from a tourism perspective. A helipad was constructed on the dune area or nearby to it and a walkway, boat ramp and vehicle access was constructed across the dune system.
146. Since the coming into operation of the *Land Administration Act 1997*, a measure of environmental control is achieved, along with the environmental conditions attached to the Special Lease.
147. In April 2000, Cyclone Rosita effectively destroyed the Resort. It became necessary for the manager of the Resort to clean up the debris from the ruins of the Resort, which included a sand dune and beach clean up. I am instructed that during the clean up process part of the dune system between the Resort and the beach was levelled by

contractors using a number of bulldozers. On the face of it, the conditions of the Special Lease were breached in various respects.

148. The terms of the Special Lease include the following –

- ⊘ that the leased land can be resumed by the Crown without compensation if the lessee defaults in payment of the rent, the land is not used for the purpose for which it is leased or the lessee does not comply with any of the conditions of the lease;
- ⊘ all buildings and other works must comply with the requirements of the local government;
- ⊘ the lessee shall not destroy existing vegetation except for the purpose of the permitted development;
- ⊘ no development that departs from the Site Development Plan the subject of the lease will be permitted;
- ⊘ the dune system is out of bounds to development and pedestrian traffic;
- ⊘ the lessee is required to submit a management plan during the first 12 months of the lease to address the issues specified in Condition K and any other issues as required by the Shire of Broome.

149. The clean up process appeared to breach some of these conditions. This was subsequently confirmed by the Minister for Planning and Infrastructure in a letter to Ms Pat Lowe, Environs Kimberley Inc, dated 22 June 2001, in which it was expressly stated that –

“Investigations and inspections by DOLA in the aftermath of Cyclone Rosita identified that breaches of conditions, and sections of the Land Administration Act 1997, could have occurred at the Eco Beach tourist resort (resort). However, subsequent DOLA legal advice considered that prosecution in this instance was not in the public interest.”

150. The Minister in her letter to Environs Kimberley Inc explained that many agencies, and the traditional Aboriginal custodians for that area, “*have had a significant input*” into the recent restoration of the coastal dune system of the Resort and that DOLA is actively monitoring the redevelopment of the Resort in close liaison with the Departments of Conservation and Land Management and Aboriginal Affairs. The Minister, in her letter, added –

“In addition to the current conditions being reinforced, DOLA has directed that future tenure arrangements require six additional conditions to be imposed. These conditions will include the requirement for the lessee to submit to me a new Site Development Plan that will include an environmental management plan for the lease area.

DOLA is also currently negotiating with the lessee and Aboriginal interests in regard to future tenure options including access. I am advised that the lessee is fully aware of the requirement to strictly comply with the current conditions, and additional conditions that are to be imposed by way of a variation to the lease agreement.”

151. The Minister further noted that she is *“fully supportive of world’s best practice being observed with allowing developments to occur within the region.”*
152. I understand that the Environmental Protection Authority (EPA) initially were given notice of a proposal to establish a wilderness adventure camp on the site of the present Resort, in 1992. The proposal for the Resort was referred to the EPA in 1998, as a result of an automatic reference process within DOLA. That is to say, DOLA has a system whereby it automatically notifies the EPA and any other relevant agencies about Crown land it proposes to release, including by way of a Special Lease or lease. This notification, however, was made after the lease was granted for the Resort.
153. The result in relation to the Eco Beach Resort is that the process by which the coastal development was permitted was principally driven by the proponent, DOLA and to an extent the Shire of Broome. It appears the primary land use controls are those imposed through the conditions attached to the Special Lease.
154. For present purposes, this example of the development of the Eco Beach Resort emphasises, once again, the unintegrated process by which coastal zone development tends to occur. Rather than any integrated process of planning and development control, here we have DOLA in conjunction with the local government, determining whether a development proposal should proceed and imposing conditions on it pursuant to a Special Lease instrument.
155. The extent to which the old *Land Act 1933* required any public input into the process of planning and environmental assessment of the project was minimal. The extent to which the Shire’s planning process, pursuant to an IDO, require public input, depends

very much on the ordinary administrative processes adopted and undertaken by the Shire. In neither case, at material times, was there any statutory requirements designed to ensure public notification of the proposal, public comment in relation to the proposal, environmental impact assessment of the proposal, or any special coastal zone assessment of the proposal.

156. *Lessons learned from the Eco Beach Resort development:*

- €# The unintegrated nature of this development tends to be confirmed by the fact that, following Cyclone Rosita, there appears to have been a measure of confusion as to which agency, DOLA or the Shire of Broome, had responsibility for monitoring the conditions of the Special Lease and the requirements of IDO 1. DOLA is under the control of a different Minister from the Minister responsible for the administration of the *TP and D Act*.
- €# A concerned citizen would be well justified in complaining about who it is exactly they might complain to in relation to this type of coastal development, especially when the conditions of development are not complied with.
- €# It should be noted in passing that the relatively new *Land Administration Act 1997* contains some very useful provisions in relation to the enforcement of leases. For example, s267(6) of the *LA Act* enables a lessee of Crown land to be compelled to re-establish, revegetate and rehabilitate land where there has been breach of conditions. Nonetheless, what we have here is an instance of unintegrated coastal zone planning and management. The question remains whether DOLA should effectively be responsible in some remote portions of the State for coastal planning and management, rather than some other body with expertise, and familiarity with public consultation, environmental assessment and enforcement of planning conditions.

The Way Forward – Proposals for law reform

157. Once it is accepted that special protection measures are required to overcome the unintegrated nature of coastal planning and management, it is necessary to identify the options for a more integrated approach and an approach that ensures public accountability in respect of coastal development decisions.

Introduction

158. The case studies considered above have highlighted the unintegrated approach to coastal zone planning and management in Western Australia. The case studies in one sense do no more than confirm what we already know and what was emphasised in the seminal inquiry of the Resources Assessment Commission in 1993 and referred to earlier in this report.
159. What the case studies illustrate reasonably starkly is that the current system, whereby resource allocation decisions are made, fails adequately to achieve optimal outcomes in relation to coastal zone planning and management proposals.
160. The case studies emphasise that to achieve the best outcomes, the current *ad hoc* system of coastal zone planning and management needs improvement that will result in a system in which the following actions will necessarily occur –
- €# Coastal zone policies exist for the State, as well as regional and local areas.
 - €# Coastal zone policies espouse appropriate planning principles and management techniques in respect of the protection, use and development of land and waters in the coastal zone.
 - €# That the policies, principles and management techniques developed for the coastal zone be informed by principles of ecologically sustainable development (ESD).
 - €# Planning and development control agencies necessarily take into account the protection requirements, as well as use and development constraints set out in policies, and otherwise seek to take into account the need to manage conservatively the land and waters in the coastal zone for the benefit of present and future generations.
 - €# The public of Western Australia have an appropriate opportunity to be informed, and to comment on and contribute to the development of policies and the making of use and development decisions in respect of proposals within the coastal zone.
 - €# Members of the public have the right to seek tribunal or judicial review of major use and development decisions.
 - €# All major use and development proposals are the subject of environmental impact assessment.

161. One approach by way of improvement would be to build these requirements or attributes into the existing *ad hoc* system of coastal zone planning and management by way of administrative requirement, without any radical overhaul of the existing system.
162. For example, if part of the problem appears to be that existing decision-making authorities do not appear consciously to consider coastal planning objectives according to due process, responsible Ministers could be required to take steps to ensure that, to the fullest extent possible, agencies under their control adopt these objectives. In all likelihood, however, legislative changes would be needed to mandate these reforms and to authorise agencies that currently have limited charters to undertake the new processes.
163. A second approach would be to ensure that existing decision-makers have made available to them much more information concerning coastal planning principles and good coastal planning and management practices so that, in the performance of their existing responsibilities, decision-makers find it easier to adopt the new requirements.
164. Under this approach, an existing or a new central agency could be made responsible for consulting with interested members of the public and facilitating the provision of information to decision-makers. In Western Australia, it is probably the Western Australian Planning Commission that is most closely associated with this co-ordinating and facilitating function. Legislative changes would in all likelihood be required to facilitate this change of process.
165. A third approach, and one more likely to be considered if the existing “system” of coastal zone planning and management is considered to be lacking in integration, is the empowerment of an existing agency, or the creation of a new agency, to deal expressly with coastal zone planning and management issues. This approach would require the passage of new legislation giving the agency (whether old or new) express statutory power to consult with the interested public and to plan and control development within the coastal zone.

166. As suggested in the discussion of strategies in the earlier part of this report, good policy development in the area of coastal zone planning and management will usually involve a mix of approaches. Experience shows that in relation to land use questions, regulation is usually accepted as a bottom-line response upon which other strategies can be built. There is no doubt that information and facilitation strategies are extremely important in encouraging proponents of development to propose forms of development in the coastal zone that meet existing community expectations through stated policies and principles. Incentive strategies, at least financial incentives, may well be considered out of place or difficult to implement. Usually the community would consider that the community should not have to pay financially for developments in the coastal zone to meet community expectations.

Approaches taken elsewhere in Australia

167. The policy approaches settled upon in a number of Australian States to the coastal zone planning and management problem reflect aspects of these approaches. The New South Wales legislation reflects the “strongest” regulatory approach. More detail of the position elsewhere is contained in the Appendix.
168. *New South Wales*: has a Coastal Council which is a dedicated coastal lead agency whose principal functions are to advise the Minister for Works. The Coastal Council acts on ecologically sustainable development principles and usually takes a cooperative approach with other agencies, often in a facilitating role. The *Coastal Protection Act 1979 (NSW)* as amended in 1998 provides a statutory framework with clear objectives for coastal management based on ESD principles.
169. Other key agencies involved in New South Wales coastal management are Local Government, Fisheries, National Parks and Wildlife Service and the Environmental Protection Agency, all acting under their related legislation.
170. It is considered that the most strategic coastal planning document in New South Wales is the State Coastal Policy 1997. It is described as being very comprehensive and shows the benefit of being the only statutory strategy/policy in the country to have gone through a thorough assessment process before promulgation.

171. It is understood that amendments to the *New South Wales Coastal Protection Act* are foreshadowed, whereby coastal management plans will become statutory, with development occurring collaboratively between State and local governments: see M Walker, “*Coastal Management in Australia’s Eastern States: a comparative analysis*”, ‘Finding our Seagrass Roots’, paper delivered to EDO Network Conference 2001.
172. It should be recognised, however, that in New South Wales the coastal management system is heavily dependent on other legislation. The *Environmental Planning and Assessment Act 1979 (NSW) (EP & A Act)* is one of the primary statutes relevant to planning of coastal areas. The New South Wales Coastal Policy is “embedded” in that Act and the Minister has powers to direct Councils to conform with coastal policy under the *EP & A Act*.
173. Thus, implementation of the New South Wales Coastal Policy is through a range of mechanisms including local environmental plans prepared by local governments. Under s117 of the *EP & A Act (NSW)* these plans must take into consideration the New South Wales Coastal Policy. In short, the New South Wales *EP & Act (NSW)* gives teeth to coastal plans.
174. *Northern Territory*: the Northern Territory does not have a specific coastal agency and the Northern Territory Coastal and Marine Co-ordination Group provides co-ordination in this regard. There is no coastal legislation that deals specifically with coastal zone planning and management. An NT Coastal Management Policy 1985, revised 1999, is a non-statutory pamphlet of a few pages.
175. *Queensland*: In Queensland, the Coastal Protection Advisory Council established under the *Coastal Protection Act* has the function of advising the Minister about coastal management.
176. However, the Queensland Environmental Protection Agency is the lead agency for coastal management matters and administers the *Coastal Protection and Management Act 1995*, *Environmental Protection Act 1994* and the *Beach Protection Act 1968 (as amended)*.

177. The *Coastal Protection and Management Act 1995* is essentially based on ESD principles. The major strategic document is the State Coastal Management Plan as specified in the Act.
178. The Queensland State Coastal Management Plan is a statutory instrument which is designed to have the effect of a State Planning Policy under the *Integrated Planning Act 1997 (Qld)*. Local governments must have regard to the policies of the plan when preparing plans and assessing development applications.
179. *South Australia:* the South Australian Coast Protection Board has a mainly “protective” role rather than an over-arching role under the *Coast Protection Act 1972 (SA)*. It advises the Minister for Environment and Heritage and prepares the management plans under the Act and advises on coastal development applications to planning authorities. The *Coast Protection Act 1972* has the main objective of preventing erosion and managing public use of the “coast” as defined.
180. *Tasmania:* Tasmania has no dedicated coastal agency or specific legislation. A State Coastal Policy 1996 has no statutory basis and is used as a non-statutory policy guide for other relevant decision-makers.
181. *Summary:* The weaknesses and strengths of the New South Wales, Victorian and Queensland coastal planning systems have been summarised by Walker as follows –
- ⌘ New South Wales has a number of strengths which relate to the robust nature and capacity of the planning system. Examples include the requirement for local government to prepare local environmental plans and to ensure these comply with the New South Wales Coastal Policy.
 - ⌘ In addition, in NSW, the existence of State environmental planning policies with relevance to coastal management outcomes, such as coastal wetlands, is important; as is the leadership of the Coastal Council.
 - ⌘ In New South Wales the direct reporting to a Cabinet sub-committee by the New South Wales Coastal Council is consistent with the range of coastal management issues not confined to the environmental portfolio. Through a

Cabinet sub-committee arrangement, issues can be addressed directly to the relevant Minister.

⚡ The strength of the Victorian model relates to the existence of the three regional coastal boards and their integration with the Victorian Coastal Council. While this is not a legislative arrangement, it apparently works effectively.

⚡ The strengths of the Queensland system relate to the completion of its first State-wide coastal policy, and the preparation of regional level plans to support the State document, as well as the long-standing expertise of the Beach Protection Authority gained over more than 30 years.

: See Michelle Walker, *Coastal Management in Australia's Eastern States: A Comparative Analysis* "Finding our Seagrass Roots", paper to EDO Network Conference 2001.

A Coastal Planning & Development Act

182. Approached in a simple and theoretical way, the easiest means by which to achieve the requirements of an integrated and effective coastal zone management system would be by the passage of a "*Coastal Planning And Development Act*" which –

⚡ Specifies the "coastal zone";

⚡ Prohibits all forms of "development" (as defined in the *Town Planning and Development Act*) within the coastal zone unless approved by a nominated agency;

⚡ Nominates an agency to prepare coastal planning and management policies and principles;

⚡ Specifies and encourages the adoption of good coastal zone planning and management practices in accordance with ESD principles;

⚡ Provides for community involvement in the preparation of the policy and practice documents which the agency has the primary responsibility to prepare;

⚡ Ensures community participation, in appropriate ways, when development decisions are made; and

⚡ Effects the other requirements listed above.

183. An important question in the enactment of a *Coastal Planning and Management Act* would be the selection of the appropriate agency to perform the functions under the

Act. The Western Australian Planning Commission could be nominated. It is currently the primary State agency with responsibilities for State-wide planning. It has developed structures to deal with regional planning and development control issues. It may reasonably be suggested that new coastal planning and development controls could best be exercised by such a body with existing planning experience.

184. Alternatively, it might be contended that the WAPC and its predecessors have very few “runs on the board” when it comes to coastal zone planning and management outcomes, and that a separate, new agency is justified. Thus, just as “environment” and “planning” are segregated into two agencies in Western Australia, so might “coastal zone planning and management” and “planning” be separated into different agencies.
185. In either case, the agency would necessarily have coastal zone planning and development control as a particular, statutory focus. While it might be required to have regard to other relevant social and economic factors in its decision-making, it might be expected that the agency would be required by its Act primarily to have regard to the protection of the existing social, economic and environmental values inherent in the coastal zone.
186. If a separate agency were established, it would be a powerful one. If it were established to be independent of the Government of the day, real tensions could develop over time between it and the elected representatives of the people.
187. Thus, it might be necessary to create some sort of “pressure valve” to ensure that certain types of development in the coastal zone might be the subject of a “call in” power in the hands of the Premier or some other nominated Minister, exercisable in special circumstances. In this way, political accountability could be maintained while the principal need for strong coastal zone planning and management would be recognised.
188. Another approach would involve the establishment of a new agency, but an agency which does not have the power to control development in the coastal zone.

189. Under this option, the new agency could be established –
- ⌘ To develop coastal planning policies and principles and good coastal zone planning and management practices in accordance with ESD principles;
 - ⌘ To provide information and facilitate adoption by existing agencies with responsibilities for planning and development control decisions in the coastal zone; and
 - ⌘ Have the function of providing advice in respect of use and development decisions to be made by existing decision-making agencies.
190. Under this approach, existing decision-makers, such as local governments, the WAPC and Ministers of Government, would be obliged to refer proposals for use and development within the coastal zone for which they have the responsibility to make decisions, to the new agency for advice and recommendations as to how the development should be responded to in light of coastal planning management policies and principles, and good coastal planning and management practices.
191. In this way, the new agency would, in effect, provide coastal planning and management assessment in a manner similar to the way the Environmental Protection Authority provides environmental impact assessment in respect of proposals that may affect the environment.
192. Of course, this coastal assessment function could conceivably be given to an existing agency, such as the EPA. However, the functions and objectives of the EPA are largely directed to the physical environment whereas the functions and objectives of a Coastal Zone Authority would be broader and necessarily encompass the social, economic and environmental attributes of the coastal zone which make the coastal zone, in the words of the Resources Assessment Commission's 1993 Final Report, "*a priceless national treasure*".

Other Reform proposals

193. At the very least, what appears to be necessary by way of improvement of the existing "system" whereby planning and development control decisions are made in respect of land and waters in the coastal zone, is an overhaul of the planning responsibilities and powers of the WAPC and local governments, which between them have the primary

responsibility for land and water use and development control throughout the State. As we have seen, between them, these bodies are able to plan for and control development, including subdivisional development and strata title development, throughout most, if not all, of the State.

194. Yet, as we have seen, the existing “system” often depends upon local town planning schemes having addressed the coastal zone planning and management issues in appropriate ways. Local schemes in effect become separate pieces of legislation designed to control particular development projects.
195. A particular deficiency in the existing planning process is that there is no general provision, apart from s5AA of the *TP and D Act*, whereby State or regional planning policies can be put in place and which have to be adhered to by the WAPC and local governments in the exercise of their planning functions.
196. As indicated above in relation to s5AA statements of planning policy, the making of such a policy has a limited legal effect and, even where there is some legal effect, it does not require a decision-maker to make a decision in conformity with the published policy. The decision-maker is merely required to have “due regard” to the published policy. Local governments are not required to adopt the published policy as part of their schemes. The existing planning system more or less involves a process of negotiation between essential government agencies and local government as to whether or not particular published s5AA policies, or parts of them, find their way into a published local scheme. The Town Planning Appeals Tribunal is required merely to have “due regard” to a published s5AA policy.
197. Moreover, the matters that have to be taken into account by planning decision-makers, whether the WAPC for the purposes of the MRS or a local government under a local scheme, are not stipulated in the *TP and D Act* or any other planning legislation. Rather, the relevant matters are specified in each and every town planning scheme. They vary from one scheme to another, although many matters are common to each scheme.

198. Additionally, the extent to which the public is entitled to contribute to policy formulation and comment on development control decisions, not to mention the lack of opportunities aggrieved members of the public have to appeal to the Town Planning Appeals Tribunal in respect of major development control decisions, is dealt with separately in each and every town planning scheme.
199. There is an obvious urgent need, and has been for some time, for the planning legislation to be amended in order to standardise these matters. The *TP and D Act* should be amended as follows –
- (1) section 5AA should be amended to make it possible for the Minister for Planning, on the advice of the WAPC, to publish State and regional planning policies with which development control decisions made by the WAPC and local governments must conform;
 - (2) a provision should be inserted which enumerates the various matters that must be taken into account when development control decisions are made, whether by the WAPC or a local government. These matters might, in the present circumstances, include the special planning and development control requirements pertaining to a development in the coastal zone; and
 - (3) proper consideration should be given to permitting what is sometimes referred to as “third party appeals” in respect of major development control decisions, whether by the WAPC or a local government, including subdivision decisions, in the coastal zone.
200. Additionally, the *TP and D Act* should be amended by repealing s20(5) which currently enables subdivision decisions to be made by the WAPC that do not conform with the requirements of a town planning scheme. This provision was added relatively recently. Why it should have been included is something of a policy mystery. Good town planning culminating in the gazettal of a town planning scheme – necessarily involving the WAPC, the Department and the Minister – should be subsequently adhered to and not departed from in the subdivision development process.
201. As a further protective device, the *Town Planning and Development Act* could be further amended by prohibiting all development within the coastal zone without the approval of the WAPC. In this way, no major developments could “slip through the

net”, central and co-ordinated control could be achieved and environmental impact assessment could be effectively guaranteed by appropriate protocols between the WAPC and the EPA.

Michael Barker QC
Francis Burt Chambers
March 2002

GLOSSARY

CEO	— Chief Executive Officer
Crown land	— Land not alienated from the Crown by way of, for example, freehold title
Development (1)	— Term used generally to include subdivisions and any works on land
Development (2)	— Term distinct from subdivision of land to describe works on a subdivided lot
DOLA	— Department of Land Administration
DPUD	— Department of Planning and Urban Development (forerunner of WAPC)
EDO	— Environmental Defender’s Office Inc (WA)
EMP	— Environmental Management Plan
<i>EP Act</i>	— <i>Environmental Protection Act 1985 (WA)</i>
EPA	— Environmental Protection Authority
ESD	— Ecologically sustainable development
FRS	— Fremantle Regional Strategy
GDPS 8	— Shire of Gingin District Planning Scheme No 8
ICWG	— Interdepartmental Coastal Working Group
IDO	— Interim Development Order
<i>LA Act</i>	— <i>Land Administration Act 1997 (WA)</i>
LAC	— Leighton Action Coalition
MOU	— Memorandum of Understanding
MRS	— Metropolitan Region Scheme
PER	— Public Environmental Review (under <i>EP & A Act (WA)</i>)
Perth Metropolitan Region	— The metropolitan area as defined by the <i>Metropolitan Region Town Planning Scheme Act 1959 (WA)</i>
RAC	— Resources Assessment Commission (Commonwealth body)
SPC	— State Planning Commission (forerunner of WAPC)
Subdivisions	— Division of land by creating a new certificate of title for the divided part
SWRPC	— South West Region Planning Committee
‘third party’	— A person not party to a decision
Three nautical mile limit	— The extent of State or Territory jurisdiction and is measured from the baseline which is generally but not always contiguous with the low water mark on the coast
<i>TP and D Act</i>	— <i>Town Planning and Development Act 1928 (WA)</i>
TPS 18	— Augusta-Margaret River Town Planning Scheme No 18 Gnarabup
WAPC	— Western Australian Planning Commission

APPENDIX

New South Wales

1. In New South Wales, the Minister for Public Works, advised by a Coastal Council, is responsible for development control in the “coastal zone”. The *Coastal Protection Act 1979 (NSW)* explicitly deals with the “coastal zone” which is defined in the Act to be the western boundary of the coastal zone shown on maps (generally 1 kilometre inland of the coastal waters or other defined coastal land features) and the boundary of the coastal waters of the State (ss4(1), 4A). However, it is important to note that the urban regions of Sydney, Newcastle, Illawarra and the Central Coast are excluded (s4A(3)(e)). The “coastal region” is defined to include the coastal zone (s4(1)).

2. The Act establishes the “*Coastal Council of New South Wales*” (s8). The Coastal Council is subject to the control and direction of the responsible Minister (s27(2)).

3. The *Coastal Protection Act* then effectively requires the Coastal Council to provide relevant advice to the Minister for Public Works. The Minister for Public Works must then specifically concur with any proposed development in the coastal zone which a public authority proposes to carry out or which requires the approval of a “public authority”. The details of this system are as follows.

4. The Coastal Council and the Minister, in the exercise of their functions, are to have regard to the principles of ecologically sustainable development (s27(3)).

5. The functions of the Coastal Council are principally advisory, as set out in s28 –

“28 *Functions of the Coastal Council*

(1) *The principal functions are to give advice and make reports and recommendations to the Minister for the purpose of encouraging, promoting or securing:*

 - (a) *the protection and maintenance and, where practicable, the enhancement and restoration of the environment of the coastal region and its natural and man-made resources, and*

 - (b) *the orderly and balanced utilisation and conservation of the coastal region and its resources, having regard to*

the financial resources of the State and the social and economic needs of the people of the State.

- (2) *Without affecting the generality of subsection (1), the principal functions of the Coastal Council include the giving of advice and the making of reports and recommendations to the Minister with respect to:*
- (a) *policies that may or should be adopted by the Government and public authorities concerning the planning and management of the coastal region,*
 - (b) *the co-ordination of the policies and activities of the Government and public authorities relating to the coastal region, and*
 - (c) *the lands that should be acquired in the coastal region by or on behalf of the State or any public authority, whether for the purpose of coastal protection, access or enjoyment or for other purposes.*
- (3) *For the purpose of exercising its principal functions, the Coastal Council may:*
- (a) *enter into an arrangement or agreement with any person on such terms and conditions as may be agreed upon between the Coastal Council and the person with respect to the conduct of any investigation, study, research or inquiry relating to the coastal region,*
 - (b) *carry out such investigations, studies, research and inquiries as it considers relevant, and*
 - (c) *record and evaluate such information respecting the natural and man-made resources of the environment of the coastal region as it considers relevant.*
- (4) *The Coastal Council may also:*
- (a) *arrange and co-ordinate consultations, discussions, seminars and conferences relating to the matters referred to in any of the foregoing provisions of this section, and*
 - (b) *provide information and publicity concerning its functions and activities.”*

6. The Coastal Council may establish standing or special committees for the purpose of advising the Coastal Council (s29).

7. There is an obligation upon public authorities to provide information and assistance to the Coastal Council (s34).
8. Pursuant to s38(1), a “public authority” shall not, without the concurrence of the Minister for Public Works, carry out any development in the coastal zone, or grant any right or consent to a person to use or occupy any part of the coastal zone or carry out any development in the coastal zone, if in the opinion of the Minister the development or the use or occupation may in any way adversely affect or, in some cases be adversely affected by, certain aspects of the coastal environment referred to therein. Further, the Governor may, on the recommendation of the Minister for Public Works, in respect of an area within the coastal zone, provide that a public authority shall not, without the concurrence of the Minister, carry out development or grant any right or consent to a person to use or occupy any area or carry out development (s39).
9. “Development” is defined broadly (s37).
10. In exercising functions under this Part, the Minister must have regard to the principles of “ecologically sustainable development” (s37A).
11. In determining any matter relating to the granting or refusal of a concurrence, the Minister shall have regard only to whether or not the development or the use or occupation may, in any way, adversely affect or, in some cases be adversely affected, by certain aspects of the coastal environment referred to therein (s44).
12. The Minister for Public Works may direct that work be carried out for the preservation, protection, maintenance, restoration or improvement of the coastal zone or any part of the coastal zone where the estimated cost does not exceed \$1 million (s55(1)(a)). Where the estimated cost exceeds \$1 million, the Governor may so direct (s55(1)(b)).
13. In exercising functions under this part, the Minister must have regard to the principles of “ecologically sustainable development” (s54A).

South Australia – *Coast Protection Act 1972 (SA)*

14. In South Australia, a “Coast Protection Board” has limited advisory, restoration and management functions in relation to the “coast”.
15. “Coast” under the Act means, generally, all land that is between 100 metres above the mean high water mark and 3 nautical miles below the mean low water mark, within any estuary, inlet, river, creek, bay or lake and subject to the ebb and flow of the tide, or declared by regulation to constitute part of the coast for the purposes of the Act (s4).
16. The *Coast Protection Act* establishes the Coast Protection Board (the Board) (s6). The Board is subject to the control and direction of the Minister (s7).
17. The duties of the Board set out in s14, are –

“General duties of the Board

14. (1) *The duties of the Board are as follows:-*
 - (a) *to protect the coast from erosion, damage, deterioration, pollution and misuse; and*
 - (b) *to restore any part of the coast that has been subjected to erosion, damage, deterioration, pollution or misuse; and*
 - (c) *to develop any part of the coast for the purpose of aesthetic improvement, or for the purpose of rendering that part of the coast more appropriate for the use or enjoyment of those who may resort thereto; and*
 - (ca) *to manage, maintain and, where appropriate, develop and improve coast facilities that are vested in, or are under the care, control and management of, the Board; and*
 - (d) *to report to the Minister upon any matters that the Minister may refer to the Board for advice; and*
 - (e) *to carry out research, to cause research to be carried out, or to contribute towards research, into matters relating to the protection, restoration or development of the coast; and*
 - (f) *to carry out such other duties as are imposed upon the Board by or under this Act.*

(2) *The Board may prepare and issue bulletins, memoranda, maps and plans for the information of the public.”*

18. Section 19 provides for the constitution by the Governor, on the recommendation of the Board, of any part of the coast as a “coast protection district”.
19. Where a coast protection district has been established, the Minister shall appoint a consultative committee in respect of that district (s15). The duties of the consultative committee are to advise the Board upon any matters referred to the consultative committee for advice, and to consider any matters pertinent to the protection, restoration or development of any portion of the coast within the relevant coast protection district, and to advise the Board on any matters that should in the opinion of the committee be considered by the Board (s17).
20. Further, the Board may appoint such advisory committees as it considers necessary for the purpose of providing the Board with expert advice on matters pertinent to the protection, restoration or development of the coast (s18).
21. Section 20 provides for the preparation of management plans by the Board setting forth in general terms the measures that the Board considers necessary or expedient for the protection, restoration or development of the coast comprised in the coast protection district in the best interests of the public. A management plan may be declared to be an approved management plan (s20(9)).
22. The Board is authorised to execute all works in relation to land within a coast protection district as may be necessary or expedient for the purpose of implementing an approved management plan or for the purpose of repairing or restoring any damage to any portion of the coast resulting from a storm, or from pollution (s21). The Board is also authorised to remove sand and other material from one part of the coast (not being private land) to another for the purpose of protecting, restoring and developing the coast or any part of the coast (s21A).

23. The Board may acquire any part of the coast for the purpose of executing works authorised under the Act or, with the approval of the Minister, for any other purpose consistent with the functions and duties of the Board under the Act (s22).
24. There is provision for grants by the Board to councils in respect of works carried out by a council for the protection, restoration or development of any part of the coast, and land acquired by a council for such purposes (ss32, 32A). Where the Board carries out such works within a coast protection district, it may recover a contribution from the relevant council (s33).
25. The Minister may declare any part of a coast protection district, other than private land or a public road, to be a restricted area, with such prohibitions and restrictions upon access as the Minister thinks fit (s34).
26. The Minister may require the Board to make such inquiries pertinent to the administration of the Act as he considers necessary or expedient (s36).

Victoria – *Coastal Management Act 1995 (Vic)*

27. “Coastal Crown land” is the focus of development under the Victorian Act, not all land.
28. “Coastal Crown land” under the Act means, effectively, in addition to any land reserved under the *Crown Land (Reserves) Act 1978 (Vic)* for the protection of the coastline and any Crown land which is declared by the Governor in Council to be coastal Crown land, any Crown land within 200 metres of the high water mark of the coastal waters of Victoria or any sea within the limits of Victoria, and the sea-bed of such coastal waters and seas (s3(1)). “Sea” is defined to include bay, inlet, estuary and any waters within the ebb and flow of the tide (s3(1)).
29. The Act establishes the “Victorian Coastal Council” (the Council) (s6). The Council is subject to any directions of the Minister (s8(2),(3)).
30. The functions of the Council set out in s8(1) are –

“8 Functions of Council

- (1) *The Council has the following functions –*
- (a) *to undertake statewide strategic coastal planning;*
 - (b) *to prepare and submit to the Minister a draft Victorian Coastal Strategy;*
 - (c) *to provide advice to the Minister and report to the Minister on –*
 - (i) *the implementation of the objectives of this Act and the implementation of the Victorian Coastal Strategy; and*
 - (ii) *matters relating to coastal planning and management, including coastal development proposals; and*
 - (iii) *proposed Coastal Action Plans and management plans for coastal Crown land; and*
 - (iv) *priorities for the provision of funding for the development of coastal Crown land; and*
 - (v) *research into coastal issues; and*
 - (vi) *the administration of the Act;*
 - (d) *to facilitate the operation of Regional Coastal Boards;*
 - (e) *to monitor the development of Coastal Action Plans;*
 - (f) *to co-ordinate the implementation of the Victorian Coastal Strategy and Coastal Action Plans;*
 - (g) *to prepare and publish guidelines for the planning and management of the coast;*
 - (h) *to liaise with and encourage the co-operation of Government departments, public authorities, municipal councils, industry, community groups and persons and bodies involved in the planning, management and use of the coast in furthering the objectives of the Act;*
 - (i) *to provide opportunities for the public and interested groups to be informed of and involved in the work of the Council;*
 - (j) *to encourage the work of volunteers in using and conserving coastal resources;*

- (k) to give consideration to the needs of Aborigines and other interested groups in relation to the coast;*
- (l) to carry out any other functions conferred on it by or under this Act or any other Act.”*

31. The Minister may determine an area to be a coastal region (s9). As soon as practicable thereafter, the Minister must establish a Regional Coastal Board (“a Board”) for that region (s10). The functions of a Board are set out in s12, and include, to develop Coastal Action Plans for land within the region (s.12(1)(a)) and, with the approval of the Council, to prepare and publish guidelines for coastal planning and management in the region (s.12(1)(d)). A Board is subject to any directions of the Minister (s12(2) and (3)). The Board must report to the Council each year (s13).
32. As soon as practicable after the commencement of s14 of the Act, the Council was required to commence to prepare a “Victorian Coastal Strategy”, to provide for the long term planning of the Victorian coast (ss14, 15). There are consultative provisions (s16). The draft is to be submitted to the Minister, who may endorse it (ss17-19). Section 20 provides for review of the Victorian Coastal Strategy by the Council. In carrying out a function involving land management, a Minister or certain public bodies must take all reasonable steps to give effect to the Victorian Coastal Strategy (s21).
33. A Board may prepare a Coastal Action Plan for any part of its region, and must do so at the direction of the Minister (s22). The contents of Coastal Action Plans are set out in s23. There are consultative provisions (s24). The draft is to be submitted to the Council, and may in turn be submitted to the Minister, who may endorse it (ss25-27). Section 28 provides for review of a Coastal Action Plan by the Board. In carrying out a function involving land management, a Minister or certain public bodies must take all reasonable steps to give effect to a Coastal Action Plan applying to that land (s29).
34. The Secretary established under the Conservation, Forests and Land Act 1987 (Vic), and a committee of management of coastal Crown land reserved under the Crown Land (Reserves) Act 1978 may prepare a management plan for any area of coastal Crown land, or any part of that land, respectively, and must do so at the direction of the Minister (s30). The contents of a management plan are set out in s31, and must be

consistent with and give effect to the Victorian Coastal Strategy and any Coastal Action Plan as well as any recommendation of the Land Conservation Council (s31(2)). A management plan must be referred to the Minister, who may approve it (ss32-34). Section 35 provides for amendment of the management plan. In carrying out a function involving the management of coastal Crown land, a Minister or certain public bodies must take all reasonable steps to give effect to an approved management plan applying to the land (s36).

35. A person must not use or develop coastal Crown land unless the written consent of the Minister has first been obtained (s37). The Minister must have regard to the Victorian Coastal Strategy, any Coastal Action Plan applying to the land, any recommendation of the Land Conservation Council, and the purposes for which land was reserved in the case of land reserved under the *Crown Land (Reserves) Act 1978* (s40(2)). “Use” and “development” are widely defined (s3(1)).

Queensland – *Coastal Protection and Management Act 1995 (Qld)*

36. The “coastal zone” is defined as the coastal waters and all areas to the landward side of coastal waters in which there are physical features, ecological or natural processes or human activities that affect, or potentially affect, the coast or coastal resources (s11). The Act contains broad definitions of “coast” (s.6), “coastal resources” (s.8) and “coastal waters” (s.9).
37. The Act establishes the Coastal Protection Advisory Council (“the Advisory Council”) (s15).
38. The functions of the Advisory Council set out in s16 are –

“Functions of advisory council

- 16 (1) *The functions of the advisory council are to advise the Minister about coastal management including the following issues—*
- (a) *areas of the coastal zone needing special coastal management;*
 - (b) *coastal plans and their relationship with other plans, prepared by a State agency or local government, for the coastal zone;*
 - (c) *appropriate preventive and remedial measures for coastal management;*

- (d) *assistance local governments and other management agencies need in the application of coastal management techniques;*
 - (e) *developing public and community programs for coastal management;*
 - (f) *research and other studies relating to the coastal zone and disseminating information about coastal management;*
 - (g) *submissions received on coastal management plans.*
- (2) *The measures mentioned in subsection (1)(c) may relate to —*
- (a) *preventing a thing having an unacceptable effect on the coastal zone; and*
 - (b) *mitigating damage to property from erosion or encroachment by tidal water.*
- (3) *In performing its functions, the advisory council must, as far as practicable -*
- (a) *monitor the integration of coastal zone management; and*
 - (b) *have regard to Aboriginal tradition and Island custom of Aboriginal and Torres Strait Islander people particularly concerned with land in the coastal zone; and*
 - (c) *liaise and consult with Aboriginal people and Torres Strait Islanders particularly concerned with land in the coastal zone; and*
 - (d) *have regard to the existing tenure of, interests in, and rights to land in the coastal zone.”*

39. The Minister must appoint a regional consultative group to assist during the preparation of a regional coastal management plan (“regional plan”) referred to below (s19). The functions of a regional consultative group are set out in s20.

40. The Minister must prepare a State coastal management plan (“the State plan”) for the coastal zone (s25). The content of the State plan is set out in s26. There are consultative provisions (ss27-28). The State plan has effect when approved by the Governor in Council (s29).

41. The Minister must also prepare regional plans for parts of the coastal zone as soon as practicable (s30). The content of regional plans is set out in s31. There are consultative provisions (ss32-35). A regional plan has effect when approved by the Governor in Council (s36).
42. The Minister must review the State plan and regional plans (together defined as “coastal plans”) within 7 years of commencement (s37). There are consultative provisions (ss38-41).
43. The chief executive of the Advisory Council must implement coastal plans (s43).
44. There is provision for the amendment of coastal plans (s44).
45. An area may be declared as a control district under a regional plan or, if not covered by a regional plan, if the Minister considers the area requires protection or management (s47). A control district may be declared over various coastal features as specified in s48. As to the criteria, see s49. There are consultative provisions (s50).
46. The chief executive of the Advisory Council may give a coastal protection notice requiring a person to take reasonable action stated in a notice or to stop or not start an activity stated in the notice, in a control district (s52). The chief executive may also give a tidal works notice requiring a person to repair works in, on or over the foreshore or land under tidal water, or to remove the works and restore the site (s53).
47. A person must not be given development approval to build a structure completely or partly seaward of a coastal building line within a control district without the approval of the Minister (s59).