

**A GENERAL OVERVIEW OF ENVIRONMENTAL LAW  
IN WESTERN AUSTRALIA  
WITH AN EMPHASIS ON COASTAL WATERS**



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**DISCLAIMER**

**These materials provide a general outline of legal principles and should not be used as a substitute for legal advice on the facts of a particular case.**

*“Imagine for a moment that you are a green turtle trying to come to grips with Australia’s constitutional arrangements. You are a female, swimming in international waters but heading for an island on the Great Barrier Reef to lay your eggs. You enter Australia’s exclusive economic zone 200 miles off the coast; you enter Australia’s national waters 12 miles off the coast; as you approach the reef you enter the Great Barrier Reef Marine Park which is the joint responsibility of the Commonwealth and the Queensland governments. While in the sea of the Marine Park, approaching the island, the waters are Commonwealth (unless you are within three miles of the coastline, but outside the park, in which case you are in the State). But once you climb slowly onto the sand and above the low water mark, you come under the jurisdiction of Queensland. You would need to be a very astute turtle to work out which law is responsible for your protection....”*

Phillip Toyne, *The Reluctant Nation*

## **INTRODUCTION**

Environmental protection and conservation of our natural environment comes from a number of sources. One of those sources is the contribution from the various Environmental Defender's Offices ("EDO") around Australia<sup>ii</sup> which seek to promote public participation in environmental decision making.

The EDO in Perth commenced in 1996. We have three solicitors, two part time administrative staff, and a number of legal practitioners and researchers who assist as volunteers. We are a non-profit making legal practice, which provides legal advice and litigation assistance to individuals or environmental groups who cannot afford private legal assistance. We also promote law reform and undertake legal education.

The first part of my paper is a very brief overview of the Australian legal system. The second part contains an analysis of the legal context of environmental management of Western Australian coastal waters.

### **WHERE DOES LAW COME FROM?<sup>iii</sup>**

Law derives from five sources – international law, statutes, common law, subsidiary legislation and administrative policies.

Constitutions are written law and they govern *inter alia* what legislation parliament can pass. The role of parliament is to pass written laws (statutes) which are Acts of parliament.

The Commonwealth parliament can make laws only about matters authorised by the Commonwealth Constitution. State and Territory parliaments can make laws about everything else that pertains to their state.<sup>iv</sup> It is the role of government to enforce the laws made by parliament and to make subsidiary legislation and policy. It is the role of courts to interpret, apply and develop common law. Specialist tribunals hear appeals, disputes or objections in specific areas such as planning, mining and agriculture.

### **International Law**

The sources of international law are treaties and custom. The content of an international custom is discovered by looking at *inter alia* the habits, practices and unilateral acts by states and general principles of law observed worldwide.

Treaties (which usually reflect international custom) are made between nations. Treaties are also called international agreements or conventions. A protocol is a supplement to an existing treaty.<sup>v</sup>

## **Statute**

Australia State or federal parliaments enact written laws and these written laws are called statutes.

A State law that is inconsistent with a Commonwealth law is invalid to the extent of its inconsistency where both laws are validly made. State laws, subject to a few exceptions,<sup>vi</sup> do not bind the federal government.

Statutes can override common law decisions and many statutes have replaced much of the early common law.<sup>vii</sup>

There is a presumption that the laws of parliament do not bind the Crown<sup>viii</sup>. However, some statutes express that the provisions bind the Crown but many do not. The Crown does not include local government authorities<sup>ix</sup> which are subject to all the laws of the State.<sup>x</sup>

## **Common Law**

Common law (“judge made law”) is based on past decisions of courts. The origins of the common law are found in 12<sup>th</sup> and 13<sup>th</sup> Century England, where the common law courts of the King and his Council were established.<sup>xi</sup> The rules established by these courts and their successors were adopted in Australia on English settlement and underpin Australian law today.<sup>xii</sup>

Common law rules can be difficult to find because they are drawn from the decisions of many courts within and outside Australia. Important decisions are recorded in Law Reports.

Common law can be used to combat a range of activities causing environmental harm to private interests such as injury to a person by an oil spill. However, the common law has been largely unable to protect general public interests because:

- ⊘ The public interest often does not have a connection with private rights and an individual does not have a cause of action in simply protecting a public interest in preserving, for example, the marine habitat of particular marine fauna, and
- ⊘ Common law evolves slowly and is often behind contemporary needs.

## **Subsidiary Legislation**

A statute may provide for the making of subsidiary legislation, for example regulations or planning instruments such as town planning schemes. Subsidiary legislation contains binding provisions for the implementation of a statute.

## **Administrative Policies and Guidelines**

Words such as *may*, *might* or *can* are found in a number of statutes. These words indicate that the relevant authority has a discretion to exercise. Government through its various agencies develops policies and administrative guidelines to guide what is called discretionary decision making.

## **GUIDING PRINCIPLES OF ENVIRONMENTAL LAW**

There are two aspects of environmental law on which this paper focuses:

- € prevention of pollution, and
- € protection and conservation.

Environmental law is not a specific body of law like, for example, a Criminal Code.<sup>xiii</sup>

Statutes are the predominant source of environmental law. However, the common law source is expanding as more environmental actions are brought before the courts. Statute law prevails over common law, although there is a presumption that a statute is not intended to take away common law rights unless it clearly says so.<sup>xiv</sup> It is not unusual for a court to interpret a statute in a particular way which does not suit a government. When this happens, the parliament may enact a law to overcome the effect of the decision.<sup>xv</sup>

Parliamentary law making is increasingly exercised with reference to internationally recognised environmental principles which are:

- € ecologically sustainable development;<sup>xvi</sup>
- € the precautionary principle;<sup>xvii</sup>
- € conservation of biological diversity and ecological integrity;

- € economic valuation of environmental factors and the polluter pays principle; and
- € public participation.<sup>xviii</sup>

These principles are becoming accepted in the management of Australia's natural resources<sup>xix</sup> and are beginning to be used in Western Australian statutes<sup>xx</sup> to incorporate *environmental values*, which have been defined as,

*"... particular values for uses of the environment that are important for a healthy ecosystem or for public benefit, welfare, safety or health and which require protection from the effects of pollution, waste discharges and deposits..."<sup>xxi</sup>*

## **COMMONWEALTH, STATE AND LOCAL GOVERNMENT POWERS**

### **Commonwealth Law Making Powers**

The *Commonwealth Constitution*<sup>xxii</sup> gives specific law-making powers to the federal parliament. Although these powers do not include the power to make laws about the management of the State's natural resources, the Commonwealth does have powers that can be exercised for the purposes of environmental regulation including:

- € control of interstate and overseas, trade and commerce, for example the granting of export licenses with conditions for environmental protection;<sup>xxiii</sup>
- € external affairs, for example implementation of treaties such as the *World Heritage Convention* to protect world heritage areas;<sup>xxiv</sup> and
- € financial powers to make laws about taxation<sup>xxv</sup> and expenditure of Commonwealth money in ways which promote protection of our natural resources, for example the Commonwealth could make a grant to the State on condition that the money be spent in a certain way,<sup>xxvi</sup> for example to promote and facilitate good environmental management of our State ports.

### **State Law Making Powers**

There are a number of areas in which Western Australian statutes<sup>xxvii</sup> could or do contribute to environmental protection and/or conservation in the coastal waters of Western Australia.<sup>xxviii</sup>

- € Environmental Impact Assessment – a proposal likely to have a significant effect on the environment, or any new town planning scheme or amendment to or review of a town planning scheme, must be referred to the Environmental Protection Agency under the *Environmental Protection Act 1986*.
- € Pollution – important statutory pollution controls are contained in the *Environmental Protection Act 1986*. Other Acts which have role to play in water protection include the *Waterways Conservation Act 1976*; the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* and the *Health Act 1911*.
- € Planning – legislation for making State, regional and local planning schemes and strategies is contained in the *Town Planning and Development Act 1928*; the *Western Australian Planning Commission Act 1985*; the *Port Authorities Act 1999*; the various state agreement acts and the *Public Works Act 1908*. This legislation regulates *inter alia* local and State government development in coastal areas.
- € Water – water quality and usage is covered by many acts, the *Rights in Water and Irrigation Act 1914*; the *Metropolitan Water Supply, Sewerage and Drainage Act 1909*; the *Waterways Conservation Act 1976*; the *Environmental Protection Act 1986*; the *Soil and Land Conservation Act 1945*; the *Country Areas Water Supply Act 1947*; the *Health Act 1911*; the *Land Administration Act 1997*; the *Fish Resources Management Act 1994* and the *Pollution of Waters by Oil and Noxious Substances Act 1987*.
- € Threatened species – native species of flora and fauna are protected under the *Wildlife Conservation Act 1950*. Management of the *Wildlife Conservation Act 1950* is by the Department of Conservation and Land Management (“CALM”) under the *Conservation and Land Management Act 1984*. Some protection of flora on Crown land is also provided under the *Land Administration Act 1997*. Certain aquatic species are protected under the *Fish Resources Management Act 1994*.
- € Pesticides and herbicides – a number of Acts regulate the use of these chemicals and include the *Aerial Spraying Control Act 1966*; the *Agriculture and Related Resources Protection Act 1976*; the *Environmental Protection Act 1986* and the *Health Act 1911*.
- € Land and marine, parks and reserves - these areas are controlled and managed *inter alia* by Commonwealth departments, the Department of Conservation and Land Management and the Marine Parks and

Reserves Authority established under the *Conservation and Land Management Act 1984* and by the Fisheries Department under the *Fish Management Resources Act 1994*.

## **Local Government Law Making**

The Western Australian *Constitution*<sup>xxix</sup> requires a system of local government to be maintained throughout the State. This is chiefly done through the *Local Government Act 1995*.

Local government authorities have the power to make local laws (formerly called by-laws) including laws to regulate the management of the coast as far as the high water mark adjacent to their area.<sup>xxx</sup> The jurisdiction of local authorities generally ends at the high water mark along the foreshore although foreshores may be placed under the control of local authorities.<sup>xxxi</sup>  
<sup>xxxii</sup> A local government authority is authorised to make laws outside its areas under certain conditions.<sup>xxxiii</sup> For the purpose of State laws relating to land, the high water mark is defined in the *Land Administration Act 1997* as the high water mark at spring tides.<sup>xxxiv</sup>

Local government authorities also exercise important powers under the *Health Act 1911* and the *Town Planning and Development Act 1928*.

Local laws are inoperative to the extent of any inconsistency with a written law of the State or Commonwealth.<sup>xxxv</sup> The State government can disallow a local law.<sup>xxxvi</sup> This can cause difficulties. For example a State port may be within a local town planning area but the port will be exempt from the requirements of the local town planning laws.<sup>xxxvii</sup> The local authority may have environmental planning regulations and policies but the port may not have an environmental management plan.<sup>xxxviii</sup> Individual developments in a port may be licensed under the *Environmental Protection Act 1986* but the overall impact of all port activities on a local area and its marine environment in such circumstances may be uncontrolled.

## **THE COURT SYSTEM**

- € **The World Court**      The World Court is the most important international court and is the name commonly given to the Permanent Court of International Justice. The Security Council and the General Assembly of the United Nations elect judges. The court usually sits as a full court of 15 judges and the court gives a single collegiate judgement,<sup>xxxix</sup> although dissenting judgements may be

published. Only the federal government has access to the Court,<sup>xi</sup> but not individuals, or the governments of the States or Territories. Access to the World Court is not confined to nations who are members of the United Nations.

The Western Australian justice system (which includes federal courts) is made up by a number of courts, boards and tribunals as follows:

- € **High Court** The final appellate court in Australia. Decisions of the High Court are binding on all Australian courts and tribunals. Decisions of higher courts bind lower courts thus creating a system of precedents which is at the heart of our common law.<sup>xii</sup>
- € **Federal Court** Primary jurisdiction to hear matters of commonwealth law.
- € **Supreme Court** Jurisdiction to hear, civil matters above \$250,000, major criminal matters and a review administrative decisions. It also hears appeals from lower Western Australian courts.
- € **District Court** Jurisdiction to hear serious criminal matters and civil matters up to \$250,000.
- € **Specialist Courts** Specialist courts have been established to hear environmental and/or planning matters in some States.<sup>xiii</sup>
- € **Magistrate's Courts** These courts are called Petty Sessions in Criminal matters and Local Court in civil matters. Petty Sessions courts have the jurisdiction to hold preliminary hearings for major and to determine minor matters. Local Courts have the jurisdiction to hear civil disputes up to \$25,000.
- € **Specialist Tribunals** In Western Australia see for example, *The Town Planning Appeals Tribunal*, and *the Mining Wardens Court*.
- € **Family Court** A partly separate hierarchy.

€ **Administrative Appeals Tribunal (Commonwealth)** Hears appeals against Commonwealth administrative decision making.

## **INTERNATIONAL, CRIMINAL, CIVIL AND ADMINISTRATIVE LAW**

Legal action can be international, criminal, civil or administrative and take place in international, Commonwealth or State Courts.

### **International law**

This subject is complex and I will not address it in this paper save to say as follows.

Treaties do not have direct legal effect in Australia until they are implemented by legislation.<sup>xliii</sup> The federal parliament has the power under the external affairs power<sup>xliv</sup> to enact legislation to meet its obligations under international treaties. However, there is no requirement to implement treaties.

Australia is not necessarily bound by the terms of a treaty. This will depend on the terms of the treaty and it is often not until implementing legislation is in force. Only a party (a nation) to a treaty can enforce the obligations under it. An Australian citizen cannot compel an Australian government to comply with its international obligations unless the obligations under a treaty have been enacted in domestic law and the domestic law authorises the citizen to take action.

### **Criminal Law**

Under criminal law, it is an offence to do certain things. An offence against a criminal law may lead to a prosecution. If a prosecution is successful a fine or custodial sentence may be imposed on the offender. A person accused of causing environmental harm contrary to criminal law can be charged and required to attend court. To obtain a conviction the prosecution will have to discharge the criminal burden of proof of, “beyond reasonable doubt”.

Statutes may specify who can prosecute a person for an offence. For example under the *Environmental Protection Act 1986* only the Chief Executive Officer (“CEO”) of the Department of Environmental Protection acting with the consent of the Minister for the Environment or her delegate can commence a prosecution under this Act.<sup>xlv</sup> Furthermore, the CEO has a discretion whether or not to prosecute.

A statute might not limit who can prosecute a person for an offence.<sup>xlvi</sup> If an offence is committed under such a statute, a member of the public may be

entitled to take private legal action for an injunction or commence a private criminal prosecution against the offender.<sup>xlvii</sup>

## **Civil Law**

In civil law there is a legal dispute between two or more people. A person in breach of a civil law is not exposed to a fine or imprisonment. Accordingly, the burden of proof is the lesser standard, “on balance of probabilities”. However, there may be an order to pay damages or to refrain from or take an action.

## **Administrative Law**

This area of law concerns decisions made by public authorities, such as by the Minister for the Environment or the CEO of the Department of Environmental Protection.

If a public authority acts contrary to a rule of administrative law, that action can be reviewed by legal action commenced by a person affected by the decision as follows:

- ∄ A Commonwealth authority: Review by the Federal Court or the Commonwealth Administrative (Judicial Review) Tribunal.
- ∄ A Western Australian State or local authority: Review by the Supreme Court.

The primary remedies available to the Supreme Court are court orders called prerogative writs which are:

- ∄ Certiorari: to set aside an invalid decision and refer the matter back to the decision maker to remake the decision.
- ∄ Prohibition: to prohibit a decision maker from making or implementing an invalid decision.
- ∄ Mandamus: to compel an authority to come to a decision (where there has been unreasonable delay) or to perform a duty.

Similar remedies are available before the Federal Court and the Commonwealth Administrative (Judicial Review) Tribunal.

Some of the administrative law grounds for obtaining one or more of the above remedies are that the public authority in question:

- ≠ Has acted or proposes to act in a way that is not authorised by the statute establishing that authority;
- ≠ Has failed to give a person affected by its decision a fair opportunity to be heard; and/or
- ≠ Is biased (for example, by having a financial interest in the decision it is making).

### **Standing**

It is much harder to commence legal proceedings if you are seeking to enforce a general public right rather than a private right because you have to satisfy the court that you have a special interest going beyond that of other members of the public. This is called, “standing before the court”.

Environmental litigation has expanded the common law definition of standing for environmental groups seeking to be heard before a court. An environmental group can be a person if it is incorporated and can have standing if it can establish a special interest over and above other members of the public.<sup>xlviii</sup>

### **Limitation Periods**

The most important thing to remember if you are contemplating legal action is any limitation period.<sup>xlix</sup> This area of law (statute) controls the time after a cause of action has accrued, in which a plaintiff, applicant or appellant can commence a legal action. This law is complex and is different for public authorities. For example, if you owned an oyster farm, a civil action in negligence against a private person who polluted the farm must be commenced within six years<sup>i</sup> of the cause of action being known. If a public authority caused the damage then legal action must be commenced within one year and notice of the intention to bring an action must be given to the authority as soon as practicable.<sup>ii</sup>

## THE LEGAL CONTEXT OF WESTERN AUSTRALIAN COASTAL WATERS

### Introduction

The Australian coastline follows 77,000 kilometres. There has long been recognition that there needs to be a national strategy to manage the coastline.<sup>lii</sup>

The coast is important for recreation, nature conservation, tourism, scientific research and education as well as for commercial use and exploitation. Until recently, water quality management focused on human health needs for safe recreational pursuits such as swimming and boating, and obtaining seafood fit for human consumption. We now place a high value on *inter alia* a healthy environment for its own sake.<sup>liii</sup>

There have been dozens of reports and official inquiries<sup>liv</sup> relating to the Australian coastal zone urging restraint on private development. Developers seeking to house millions of tourists and holidaymakers on the coastline have a think big mentality. This mindset has marginalised environmental concerns about the impact of this development on our marine waters. Furthermore, Australia is the fifth biggest user of shipping in the world and 97% by volume of our trade is moved by sea.<sup>lv</sup> Western Australia has a greater dependence on shipping than all other States except Tasmania.<sup>lvi</sup> Shipping poses a pollution risk to coastal waters.

Decades of reclamation, filling, dredging and development have left many areas of coastline sensitive to erosion and pollution. One example of the effect of these activities is the shrinking of the world's seagrass. It has been estimated that the 51,000 square kilometres of seagrass on Australia's coastline (slightly less than the size of Tasmania) contains half the world's estimated 70 species of seagrass – more than anywhere else has in the world. Scientists estimate that in the past 15 years, 450 square kms of Australian seagrass has been lost.<sup>lvii</sup>

Western Australia has one of the world's most diverse communities of plants<sup>lviii</sup> and animals.<sup>lix</sup> Marine waters which contain many of these plants and animals are protected by a combination of State, Commonwealth and international laws.

The Western Australian coastline stretches for over 14,000 kilometres. It includes seasonal estuaries, mangroves and tidal flats in the north to the wide sandy beaches, limestone cliffs and granite headlands in the south. Western Australia has nearly twice the estuarine habitat of any other Australian State.<sup>lx</sup> Approximately 80% of the Western Australian population live within 10 kilometres of this coastline.<sup>lxi</sup>

Western Australian coastal waters provide a good example of the jurisdictional difficulties which face persons seeking to enforce observation of environmental laws in our coastal marine waters. This is not to deny the equally important legal environment of international waters and Western Australian land,<sup>lxii</sup> and their interrelationship with the environment of our coastal land and waters.<sup>lxiii</sup>

What are coastal waters in Western Australia? A legal definition depends on which law is sought to be applied.

### **International Law**

Sovereignty in the coastal waters of Australia is vested in the Commonwealth by international law.<sup>lxiv</sup> The most important treaty in the context of coastal waters<sup>lxv</sup> is the *Law of the Sea 1994 No.31* which recognises the custom of countries which are signatories to it. This treaty defines the boundaries of Australian sovereignty as follows:<sup>lxvi</sup>

- ∄ In the internal waters of Australia which are any waters on the landward side of the low water mark (the baseline) of the territorial sea;<sup>lxvii</sup>
- ∄ In the territorial sea<sup>lxviii</sup> of Australia which is the sea extending seawards from the low water mark<sup>lxix</sup> for a distance of 12 nautical<sup>lxx</sup> miles.<sup>lxxi</sup> In the territorial sea Australia has sovereignty over the sea, airspace, seabed and the subsoil, the right of passage; the right to exercise customs, immigration, sanitary law and police powers; and to control traffic around historic and archaeological sites. A nation state can choose the territorial sea to be less than 12 nautical miles but not more. These waters are often referred to as Australia's national waters.
- ∄ In the contiguous zone, which is the sea between 12 and 24 nautical miles from the low water mark being a zone contiguous with the territorial sea. In this zone Australia has the right of hot pursuit and search. All ships have the right of innocent passage<sup>lxxii</sup> from the outer boundary of the zone and within the zone submarines have to be on the surface of the sea and fly a flag. Australia has the right to prevent infringement of any laws relating to customs, fiscal powers, immigration and sanitary laws and to prosecute any breaches of Australian laws;
- ∄ In the exclusive economic zone which is the sea between the low water mark and 200 nautical miles from the low water mark.<sup>lxxiii lxxiv</sup>

Australia can explore and exploit this zone. It can control fisheries, material resources, artificial reefs, and marine scientific research protection and exercise controls for marine conservation and protection in the exclusive economic zone. Other nation states have right of free passage by navigation and overflight and can lay pipes and cables on the seabed; and

- ∉ Over and in the continental shelf<sup>lxxv</sup> Australia has the rights of a coastal nation<sup>lxxvi</sup> which can be as far as 350 nautical miles from the low water mark or the 2500 metre isobath, whichever is the closer.

## Statutes

### A. Commonwealth

The Commonwealth has sovereign power over the coastal waters and seas around Australia including the waters around its external Territories.<sup>lxxvii</sup> Notwithstanding the Commonwealth sovereignty, legislative capacity in respect of the coastal waters of Australia to the extent of 3 nautical miles was transferred to the States in 1980 under the terms of the Offshore Constitutional Settlement.<sup>lxxviii</sup> At this time Australian sovereignty over the territorial sea extended only as far as 3 nautical miles. In 1990 the early *Law of the Sea* treaty was implemented and the territorial sea was extended to 12 nautical miles from the low water mark but the jurisdiction conferred by the Commonwealth on the States and the Northern Territory remained at 3 nautical miles.

The federal government can exercise shared (with the States and Northern Territory) or exclusive power over pollution and waste dumping in Australian coastal waters<sup>lxxix</sup> and all lighthouses, lightships, beacons and buoys.<sup>lxxx</sup> The federal government could also theoretically control land based sources of pollution discharging into coastal waters. In practice control is left to the States to regulate through the terms of the Offshore Constitutional Settlement.

There is a new Commonwealth Act called the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* ("EPBC Act").<sup>lxxxi</sup> This Act will enter into force on or around 16 July 2000. The EPBC Act replaces the *Environment Protection (Impact of Proposals) Act 1974 (Cth)*; the *National Parks and Wildlife Conservation Act 1975 (Cth)*; the *Whale Protection Act 1980 (Cth)*; the *World Heritage (Properties Conservation) Act 1983 (Cth)*; and the *Endangered Species Protection Act 1992 (Cth)*. The *EPBC Act* binds the Crown<sup>lxxxii</sup> and is not intended to exclude the operation of State laws unless the contrary intention

appears by the words of the Act.<sup>lxxxiii</sup> This means that the Acts can operate concurrently.

The ambit of the EPBC Act will include:

- € Environmental impact assessment;
- € World Heritage properties;
- € Protection of threatened species and communities;
- € Protection of the marine environment; and
- € Protection of biodiversity.

Regulations and bilateral agreements with the States and Territories will be drafted under the EPBC Act. Significant elements of the EPBC Act include:

- € A transparent environmental assessment regime;
- € Implementation of the principles of ecologically sustainable development;
- € A wide array of environmental offences; and
- € Extended standing provisions for applicants seeking injunctions to restrain breaches of the Act and judicial review of decisions under the Act.

There are six matters of environmental significance listed in the EPBC Act which will trigger the exercise of Commonwealth powers under the EPBC Act:

- € World Heritage properties;<sup>lxxxiv</sup> this applies to World Heritage properties in State coastal waters on or over the seabed and suggests bilateral agreement with the relevant State for management. Financial assistance from the Commonwealth to the relevant State or Territory<sup>lxxxv</sup> is available for World Heritage properties.
- € RAMSAR wetlands;<sup>lxxxvi</sup>
- € Protected species or communities;<sup>lxxxvii</sup>

- ∄ Protected migratory species;<sup>lxxxviii</sup>
- ∄ Declared Commonwealth marine areas;<sup>lxxxix</sup>
- ∄ Nuclear actions;<sup>xc</sup>

and furthermore,

- ∄ Any additional matters designated by the making of regulations under the EPBC Act.<sup>xc</sup>

It is a matter of regret that there are some matters of national environmental significance, which have been omitted from the EPBC Act. Some of these relate specifically to the marine environment and include:

- ∄ Marine pollution and ballast water (except into Commonwealth marine protection areas) ; and
- ∄ Multi-state water catchment degradation, the impact of which may reach estuarine coastal waters.

The environmental assessment and approval process will be triggered by a proposal, which may have significant impact on a matter of national environmental significance. The process can be triggered by:

- ∄ The proponent;<sup>xcii</sup>
- ∄ Referral by a relevant state, territory<sup>xciii</sup> or commonwealth agency;<sup>xciv</sup> or
- ∄ Unilateral action by the Federal Environment Minister.<sup>xcv</sup>

Under the *World Heritage (Properties Conservation Act) 1983 (Cth)*,<sup>xcvi</sup> the Commonwealth parliament can proclaim World Heritage areas, which are described to have significant natural and cultural heritage values. Shark Bay in Western Australia has been listed in the UNESCO world heritage list.<sup>xcvii</sup> Such a declaration results in the property becoming *identified property* for the purpose of the Act. This in effect facilitates the State's ability to restrict activities to be carried on in that region which would be incompatible with World Heritage status, if there is the political will to do so.<sup>xcviii</sup> There are controls which can be exercised if the Governor makes a proclamation under a relevant section of the Act.

Under the *National Parks and Wildlife Conservation Act 1975* (Cth)<sup>xcix</sup> the Commonwealth can declare marine reserves over Australian coastal waters but not inland waters of a State.<sup>c</sup> In State coastal waters, the Commonwealth will require the consent of a State to the declaration of a reserve under this Act if the State has a reserve over the same area under State law.<sup>ci</sup> This Act applies to the territorial sea other than State coastal waters and the exclusive economic zone, the continental shelf and to waters outside the continental shelf with agreement with other nations. Thus the States have effective control over the declaration of marine parks or reserves in coastal waters<sup>cii</sup> but the jurisdiction can be shared with the Commonwealth.<sup>ciii</sup>

The *Fisheries Management Act 1991* (Cth),<sup>civ</sup> which applies concurrently with State laws,<sup>cv</sup> provides the legal framework for the management of fisheries in the territorial and extra territorial sea.<sup>cvi</sup> It applies to all persons including foreigners and all boats including foreign boats:<sup>cvi</sup>

- ∄ In the Australian Fishing Zone ("AFZ"); and/or
- ∄ Fishing for sedentary organisms outside the AFZ.

The *Fisheries Management Act 1991* (Cth) also applies to:

- ∄ Managed fishing outside the AFZ by Australian boats and foreign persons on Australian boats;<sup>cviii</sup> and
- ∄ Fishing for sedentary organisms on the continental shelf.<sup>cix</sup>

The *Fisheries Management Act 1991* (Cth) defines<sup>cx</sup>:

- ∄ "fish" as all species of bony fish, sharks, rays, crustaceans, molluscs and other marine organisms, but does not include marine mammals or marine reptiles.
- ∄ "Australian fishing zone" as:
  - (a) the waters adjacent to Australia within the outer limits of the exclusive economic zone; and

(b) the waters adjacent to each external territory within the outer limits of the exclusive economic zone;

but does not include:

(c) coastal waters of, or waters within the limits of, a State or internal Territory; or

(d) waters that are excepted waters within 200 nautical miles from the baseline, subject to certain conditions.

∉ “coastal waters”

(1) For the purposes of this Act, the coastal waters of a State or internal Territory are:

(a) the part or parts of the territorial sea of Australia that are:

(i) within 3 nautical miles of the baseline by reference to which the territorial limits of Australia are defined for the purposes of international law; and

(ii) adjacent to that State or Territory; and

(b) any marine or tidal waters that are on the landward side of that baseline and are adjacent to that State or Territory but are not within the limits of a State or Territory.

## B. State

Commonwealth sovereignty over coastal waters did not include the sovereign rights of the States in respect of any waters of the sea that were waters of or within any bay, gulf, estuary, river, creek, port or harbour within the limits of the State on 1 January 1900. These areas were then and now remain within the limits of the States. In relation to marine pollution it is open to the Commonwealth to rely on the external

affairs power to legislate with respect to land, internal waters and the territorial sea where there is Commonwealth legislation implementing treaty obligations.

Any wharf, jetty, pier, breakwater, building platform, pipeline, lighthouse beacon, navigational buoy, cable or other structure or works remains the property of the State even if it is in Commonwealth waters.<sup>cxix</sup> This includes the outermost permanent harbour works of ports, which are considered part of the coast.

“Coastal marine waters” include that part of the territorial sea that extends seawards to the extent of three nautical miles.<sup>cxii</sup> It is in this area that the State laws and regulations apply.<sup>cxiii</sup>

Under the *Offshore (Application of Laws) Act 1982*, “coastal waters” are defined to mean the same as in the *Coastal Waters (State Powers) Act 1980* (Cth).<sup>cxiv</sup> By that Act, “coastal waters” includes the seabed, subsoil below and the airspace above the coastal waters.<sup>cxv</sup>

The jurisdiction of many Western Australian Acts overlap and cause added complications in deciding jurisdiction and determining which authorities are responsible for environmental management in coastal waters.<sup>cxvi</sup> Some examples are as follows:

#### 1. Pollution Control

(a) The *Environmental Protection Act 1986* establishes the Environmental Protection Authority to prevent, control and abate pollution. The *Environmental Protection Act 1986*. It is the main source of legal control over pollution in Western Australia. Four important features of the Act make it a powerful tool and these are as follows:

- € It binds the Crown.<sup>cxvii</sup>
- € Where there are any inconsistencies with any other act the *Environmental Protection Act 1986* prevails.<sup>cxviii</sup>
- € The controls are wide ranging.
- € The penalties for non-compliance are large.

Under the Act, individuals, companies, directors, managers and employers can be liable for damage caused by pollution.

Although it does not specifically say so there is nothing to suggest that the *Environmental Protection Act 1986* does not apply in appropriate circumstances to the “coastal waters” within 3 nautical miles of the low water mark of the coastline of Western Australia. “Waters”, in the Act is defined as waters whether sea, or on or under the surface of the land.<sup>cxix</sup>

- (b) The *Pollution of Waters by Oil and Noxious Substances Act 1987* is the source of control of pollution by ships in Western Australia. This is complementary legislation to Commonwealth legislation, the *Protection of the Sea (Powers of Intervention) Act 1981 (Cth)*.<sup>cxx</sup> The Commonwealth Act does not define “coastal waters” but the Act is said to apply to within and out of Australia.<sup>cxxi</sup> The State Act<sup>cxxii</sup> defines “state waters” to include:

- € The territorial sea adjacent to the State;
- € The sea on the landward side of the territorial sea adjacent to the State not within the limits of the State; and
- € Waters within the State.

“State waters” under this Act extend to the 3 nautical mile limit and include the tidal and estuarine waters of the State.<sup>cxxiii</sup>

Under this Act, which binds the Crown, it is an offence<sup>cxxiv</sup> for a ship to discharge oil, oily mixture<sup>cxxv</sup> or any liquid substance<sup>cxxvi</sup> (described in the Act or the Regulations<sup>cxxvii</sup> and includes ballast water, tank washings and oil residue<sup>cxxviii</sup>) (“the Substance”) from a ship or any apparatus<sup>cxxix</sup> transferring<sup>cxxx</sup> the Substance between ships or between land<sup>cxxx</sup> and ships, onto any land or state waters.<sup>cxxxii</sup>

There is no limitation period on the time in which a prosecution can be taken. Only the Attorney General of the State can authorise a prosecution under this Act.<sup>cxxxiii</sup>

- (c) The *Waterways Conservation Act 1976* makes provisions for the conservation and management of certain waters and of the associated land environment. “Waters” means rivers, estuaries and inlets for the purpose of the exercise of the powers to obtain information as to pollution and the discharge of waste includes tidal waters and parts of the sea adjacent to any river, inlet or estuary. Furthermore “waters” for the purpose of a working plan can include any artificial reef, canal, canal system, lake, lagoon, harbour or embayment connected to a river, inlet or estuary in a management area if it is associated within land in the management area.<sup>cxxxiv</sup>

Under the *Waterways Conservation Act 1976* it is an offence to cause or permit to be caused any poisonous, noxious or polluting matter,<sup>cxxxv</sup> or any industrial effluent<sup>cxxxvi</sup> to be discharged or deposited in or on any waters or land, or to do or omit to do anything where the use of navigational, recreational or other beneficial purpose is impaired or adversely affected.<sup>cxxxvii cxxxviii</sup>

Only a person authorised under the Act can commence a prosecution<sup>cxxxix</sup> or commence proceedings for an injunction.<sup>cxl</sup>

- (d) The *Fish Resources Management Act 1994*, which binds the Crown, provides a framework for using and managing fish stocks and fishing by the Department of Fisheries in Western Australian waters.<sup>cxli</sup> Under the *Fish Resources Management Act 1994* “WA Waters” is defined as:

- ∉ Waters in the State;
- ∉ Waters in the Australian Fishing Zone not including Commonwealth fisheries;
- ∉ Any declared state fishery; and
- ∉ Waters under control of the State for the purpose of the management of recreational fishing.<sup>cxlii</sup>

The Act contemplates:

- € management of commercial fishing;
- € management of recreational fishing;
- € fish processing;
- € aquaculture;
- € controlling noxious fish;
- € designating fishing zones;
- € create fish habitat protection areas; and
- € joint fishery management with Commonwealth.

The Minister for Fisheries may prohibit any person from engaging in any activity if it causes pollution, or is likely to pollute<sup>cxliii</sup> the aquatic environment. A management plan for particular areas can be prepared under the Act and breaches of it are specified to be an offence and carry harsh penalties.

Aquaculture is an increasingly significant industry in Western Australia. Many operations commence in or near marine waters. It has the potential to cause significant pollution. The *Fish Resources Management Act 1994* defines “aquaculture” as the “keeping, breeding, hatching or culturing of fish”.<sup>cxliiv</sup> There are various restrictions on starting and operating an aquaculture development. To commence aquaculture in a marine environment, approval is needed from a variety of authorities. It is an offence not to obtain a licence.

The Minister cannot grant an exclusive licence to take fish in a marine nature reserve or a marine park.<sup>cxlv</sup>

An environmental group cannot undertake a private prosecution under this Act.<sup>cxlvi</sup> Only an “affected person” can object to a permit or licence being granted.<sup>cxlvii</sup>

- (e) Under the *Port Authorities Act 1999* an independent statutory port authority manages each State port listed in the Schedule to that Act. The area of a State port includes the land, water and seabed and area is vested in the port authority.<sup>cxlviii</sup> Each authority is answerable to the Minister for Transport. State port authorities are not agents of the Crown and do not have the status, immunities or privileges of the Crown.<sup>cxlix</sup> There are other authorities which also contribute to the regulation of the operational control of State ports.<sup>cl</sup>

A Marine Operations Council was established in July 1998 to improve collaboration between Transport, Fisheries Western Australia, Conservation and Land Management and the Western Australian police force.<sup>cli</sup>

The federal “Association of Australian Ports and Marine Authorities” has endorsed the pursuit of principles of Economically Sustainable Development (“ESD”) in their *Draft Environmental of Practice for Australia Ports* which encourages environmental assessment, auditing and pollution control of ports.<sup>clii</sup> There is also a Western Australian Port Authorities’ Association.

The *Port Authorities Act 1999 (WA)* provides for each State port authority to prepare a Strategic Development Plan (“SDP”) each year with a forecast for five years.<sup>cliii</sup> An Environmental Management Plan (“EMP”) must be part of the SDP.<sup>cliv</sup>

It is my understanding that the Western Australian government is drafting a Bill<sup>clv</sup> for the regulation of private ports.

## 2. Conservation

The power of the Western Australian State government to declare marine waters reserves can be found in a number of different acts.

### (a) Flora and Fauna in Marine Habitats

- (i) The *Land Administration Act 1997* authorises the reservation of Crown land for public purposes. Land can be set aside as a national park<sup>clvi</sup>, conservation park,<sup>clvii</sup> class “A” nature reserve or nature reserve.<sup>clviii</sup> An “A”

reserve can only be changed by an act of parliament. “Land” is defined in this Act as *inter alia* as:

- € All marine and other waters within the limit of the State;<sup>clix</sup>
- € All coastal waters of the State as defined in *Coastal Waters (State Powers) Act 1980 (Cth)*;<sup>clx</sup> and
- € All the seabed and subsoil beneath.<sup>clxi</sup>

The *Land Administration Act 1999* does not apply to the registration of rights in minerals and petroleum.<sup>clxii</sup> Mining tenements can be held, renewed, applied for and granted in marine nature reserves, marine parks or marine management areas.<sup>clxiii</sup> However, the Minister for Mines must consult and obtain the concurrence of the Minister for the Environment,<sup>clxiv</sup> and consult and obtain the recommendation of the Fisheries Minister and the Marine Minister before making a decision.<sup>clxv</sup> Similar restrictions apply to mining on the foreshore, sea bed, navigable waters or townsites.<sup>clxvi</sup>

- (ii) The *Conservation and Land Management Act 1984*<sup>clxvii</sup> authorises the making of marine nature reserves, marine parks<sup>clxviii</sup> and marine management areas. The Minister for Mines must agree to the creation of these reserves. If he or she does not, the Governor is authorised to make the decision.<sup>clxix</sup> These reserved marine areas are vested<sup>clxx</sup> in the *Marine Parks and Reserves Authority* (“Marine Authority”).<sup>clxxi</sup> Furthermore, the Act creates the *Marine Parks and Reserves Scientific Advisory Committee*.

“WA waters” is defined as including all state waters and all waters of the State as defined in the *Offshore (Application of Laws) Act 1982*.<sup>clxxii</sup>

Marine waters is classified as follows:<sup>clxxiii</sup>

- (a) all waters that are reserved under section 13 as a marine nature reserve, a marine park or a marine management area;

- (b) all land reserved under Part III of the Land Act 1933 3, or Part 4 of the Land Administration Act 1997, for the purpose of a marine nature reserve, a marine park or a marine management area; and
- (c) all land and waters that under any other Act become reserved for the purpose of a marine nature reserve, a marine park or a marine management area, and includes —
- (d) the airspace above such waters or land;
- (e) in the case of waters, the sea-bed or other land beneath such waters and the subsoil below that sea-bed or other land to a depth of 200 metres; and
- (f) in the case of land other than waters, the subsoil below such land to a depth of 200 metres.

Marine nature reserves<sup>clxxiv</sup> are for conservation and restoration of the natural environment; protection care and study of indigenous flora and fauna; and preservation of features of archaeological, historic or scientific interest.<sup>clxxv</sup>

Marine parks<sup>clxxvi</sup> are required to meet the demand for recreation and commercial fishing which are permitted insofar as it is consistent with the objectives of a marine nature reserve. Marine Parks are zoned to separate the various activities. The provisions of the *Fish Resources Management Act 1994* prevail to the extent of any inconsistency.

Marine management areas<sup>clxxvii</sup> are for conservation, recreation, scientific research and commercial fishing. The provisions of the *Fish Resources Management Act 1994* prevail to the extent of any inconsistency.

The taking<sup>clxxviii</sup> of flora or fauna in any of these areas is prohibited, except for flora or fauna taken for scientific study; or in a marine park or management area, fish taken

in accordance with the *Fish Resources Management Act 1994*.

There are lists of endangered fauna and flora attached to the *Conservation and Land Management Act 1984*. For example, in Table 8B to the Act there is a list of gazetted rare fauna species known to occur in the Southern Forest Region or adjoining waters and includes *inter alia*, the Blue Whale.

In Table 9 to the Act, the Major Wetlands managed by CALM in the Southern Forest Region are recognised and include the Walpole, Nornalup and Irwin estuaries and Broke Inlet, which include estuarine waters. These management strategies affect coastal waters.

- (iii) Under the *Wildlife Conservation Act 1950* fauna cannot be taken from a nature reserve<sup>clxxxix</sup> or a wildlife sanctuary<sup>clxxx</sup> without authorisation. These reserves have the same meaning as a nature reserve<sup>clxxxii</sup> or marine reserve under the *Conservation and Land Management Act 1984*.<sup>clxxxii</sup> A sanctuary is set aside by agreement with the CEO of the Department of Conservation and Land Management.

Under the *Wildlife Conservation Act 1950* and the *Wildlife Conservation Regulations 1970*, “fauna” includes indigenous fish.<sup>clxxxiii</sup> All indigenous fish are protected fauna under the *Wildlife Conservation Act 1950* unless they have been declared unprotected. It is an offence to, “do or take anything that may interfere with the natural environment” under the *Wildlife Conservation Regulations 1970*.<sup>clxxxiv</sup>

To “take” is defined in the *Wildlife Conservation Act 1950* to include in respect of fauna, “to kill or capture any fauna by any means or disturb or molest any fauna by any means or to use any method whatsoever to hunt or kill any fauna whether this results in killing or capturing any fauna or not”.

The prohibition on recreational fishing within a nature reserve imposed by regulation 42(2)(a) of the *Wildlife Conservation Regulations 1970* is consistent with the prohibition on recreational fishing within marine nature

reserves under the *Conservation and Land Management Act 1984*.

It is an offence to harm any native fauna<sup>clxxxv</sup> unless:

- ⊘ You are an authority under the protection of Crown privilege;
- ⊘ You have a licence from CALM;
- ⊘ The species has been declared, not to be protected;
- ⊘ An open season has been declared on the species and you take that species in the manner specified;
- ⊘ You are an aboriginal person taking fauna for subsistence reasons, provided the fauna is not endangered and you have the consent of the occupier of land;<sup>clxxxvi</sup>
- ⊘ You harmed the fauna by accident, or by reason of an honest and reasonable mistake of fact; or
- ⊘ You hold a commercial fishing or fish processors licence under the *Fish Resources Management Act 1994*.

It is an offence to harm native flora<sup>clxxxvii</sup> unless:

- ⊘ In the case of protected flora on Crown land, you hold a licence from CALM;
- ⊘ In the case of rare flora you have the written approval of the Minister for the Environment or CALM;
- ⊘ The flora is not rare, is on private land and is not taken for the purpose of sale;
- ⊘ You are an aboriginal person taking the flora for subsistence reasons, provided the flora is not rare and you have the consent of the occupier of the land;
- ⊘ You harmed the flora by accident or by reason of an honest mistake of fact; or

- ∄ The flora (not being rare flora) was harmed as an unavoidable consequence of performing an authorised activity.
- (iv) Under the *Fish Resources Management Act 1994* the Minister may set aside an area of Western Australian waters as a fish habitat protection area<sup>clxxxviii</sup> for:
- ∄ the conservation and protection of fish, fish breeding areas, fish fossils or aquatic eco-system;
  - ∄ the culture and propagation of fish and experimental purposes related to that culture and propagation; and/or
  - ∄ the management of fish and activities relating to the appreciation or observation of fish.

An area of a marine nature reserve, marine park or marine management area set aside under *Conservation and Land Management Act 1984* cannot be set aside as a fish habitat protection area.<sup>clxxxix</sup> However, there is no restriction on a fish habitat protection area being imposed over waters within a nature reserve set aside under the *Wildlife Conservation Act 1950*.

A fishery cannot be declared in a marine nature park, a marine reserve or marine management area.<sup>cxc</sup>

If you wish to import or export plants or animals, you may also be required to obtain a licence from the Australian Quarantine and Inspection Service and/or Australian Customs.

(b) Waterways Conservation

Five waterway conservation management areas have been declared under the *Waterways Conservation Act 1976*. These are part of the coastal waters and include the:

- ∄ Peel/Harvey estuaries;
- ∄ Leschenault Estuary and associated rivers;

- € Albany harbour and associated rivers;
- € Avon River; and
- € Wilson Inlet and associated rivers.

A local management authority carries out joint management of these areas with the Rivers and Estuaries Council.<sup>cxcix</sup> All of these areas except the Avon River have a direct connection to the Western Australian coast and good environmental management of these areas has the capacity to reduce marine coastal pollution.

I have made note of some important Western Australian legislation which has effect in the coastal waters.<sup>cxci</sup> It is not intended to be a comprehensive analysis of all Western Australian laws nor is it a comprehensive examination of the legislation referred to in the paper.

## **Court Decisions**

Three examples of the operation of the courts in the environmental arena follow:

### 1. Definition of Pollution

“Pollution” is defined<sup>cxci</sup> in the *Environmental Protection Act 1986* as any direct or indirect alteration of the environment:

- € To its detriment or degradation;
- € To the detriment of any beneficial use; or
- € Of a prescribed kind.

On the face of it, this definition is very wide however the definition has been significantly narrowed in *Palos Verdes Estates Pty Ltd v Carbon*.<sup>cxci</sup>

A landowner was charged with causing pollution under the *Environmental Protection Act 1986* after authorising the clearing of a seven kilometre portion of native bush on Crown land west of Albany. On one reading of the definition in the Act this was pollution but the Supreme Court held that the ordinary meaning of the word should be

given to pollution, which is, “to make foul, impure or filthy” and therefore this disturbance of the environment was not pollution.

## 2. Fauna Provisions of the *Wildlife Conservation Act 1950*

The Supreme Court in Western Australia has held that the fauna provisions of the *Wildlife Conservation Act 1950* do not bind the Crown, while the flora provisions do.<sup>CXCV</sup>

## 3. Effect of Ecologically Sustainable Development Principles in Legislation

The Conservation Council in South Australia successfully appealed against the approval of the statutory planning authority in South Australia, of 42 new tuna feedlots in Louth Bay in the Spencer Gulf. In allowing the appeal, the South Australian Environment Resources and Development Court has recognised the importance of ecologically sustainable development and the precautionary principle as those principles apply to marine waters and fisheries in South Australia. The Tuna Boat Owners Association has appealed this decision to the Full Court of the Supreme Court of South Australia.<sup>CXCVI</sup>

## **Subsidiary Legislation**

Two examples of subsidiary legislation which impact on Western Australian coastal waters are:

1. The *Environmental Protection Act Regulations 1987* provide that certain premises which must be licensed and a number of the premises are so designated because of the potential to discharge polluting waste onto land or into water.
2. The *Fish Resources Management Regulations 1995*. Under these regulations it is an offence to deposit, or cause or permit to be deposited, any refuse or waste in any place that might cause pollution of any waters where fish are or are likely to be.
3. Town planning schemes made under the *Town Planning and Development Act 1928*.

## **Policies and Administrative Guidelines**

Some policies which influence or affect the control of polluting activities in the Western Australian coastal marine waters are:

## A. Commonwealth

1. *Australia's Oceans Policy Reviews and Recommendations: Background Paper Four: Analysis of Marine and Coastal Reviews and their Recommendations in Relation to Development of an Oceans Policy for Australia.*<sup>cxvii</sup>
2. There is an *Intergovernmental Agreement on the Environment* in 1992 between the Commonwealth, the States and the Territories to allocate various environmental responsibilities. However, the measures undertaken by that agreement have no legal effect<sup>cxviii</sup> and are merely a guide to what is expected of each Australian government, federal state or territory.
3. In 1995, the Commonwealth formed the *Australian Ballast Water Management Advisory Council* with the aim of reducing the risk of introducing foreign marine pests into the marine environment via ship's ballast and to advise the Federal Minister for Transport on water ballast issues. The Western Australian Transport department is a member of the Council.<sup>cxix</sup>

## B. The Western Australian Government

1. The Western Australian Planning Commission (formerly the Western Australian State Planning Commission) has produced:
  - € The *Perth Metropolitan Region Coastal Development Policy: Statement of Planning Policy No.2: Draft for Public Comments* in August 1988.
  - € The *Country Coastal Planning Policy* in December 1987.
  - € The *Leeuwin-Naturaliste Ridge Statement of Planning Policy* in September 1998. ("LNRSP")<sup>cc</sup> It is a matter of regret that in circumstances where the policy is said to encompass the near shore waters that there is not a specific objective of the preservation of the coastal marine environment or recognition of other applicable coastal management strategies.

The LNRSP has been adopted pursuant to section 18 of the *Western Australian Planning Commission Act 1985 (as amended)*. Town Planning Schemes must be consistent with

such a policy and the policy has the same statutory force as a town planning scheme. Local planning strategies must also be consistent with such a policy. In determining planning appeals the LNRSP must be taken into account.

2. The Environmental Protection Authority has produced:

- € *Perth's Coastal Waters: Environmental Values and Objectives: The position of the EPA – a working document, February 2000.*
- € *Guidance for the Assessment of Environmental Factors (in accordance with the Environmental Protection Act 1986) Seagrass Habitat Protection No.22 Draft, May 1998 (WA).*
- € *Guidance for the Assessment of Environmental Factors (in accordance with the Environmental Protection Act 1986) Assessment of Development Proposals in Shark Bay World Heritage Property No.49 Draft, March 2000.*

3. The Department of Conservation and Land Management (“CALM”) formerly the Department of Conservation and Environment produced:

- € *Guidelines for a Coastal Zone Management Policy – Preliminary Working Draft in 1975.*

4. The Department of Transport:

- € Has produced a draft policy clarifying the roles and responsibilities in the undertaking of financing and maintenance of coastal protection measures in Western Australia.<sup>cci</sup>
- € Is formulating a State coastal protection policy.<sup>ccii</sup>
- € Is seeking to develop a new regulatory framework to support the new port and maritime legislation.<sup>cciii</sup>

### C. Local Government

Local authorities may produce statements of planning policy or combine with other local authorities to make a memorandum of understanding as a guide to their discretionary decision making about

development proposals. An example is the “*Memorandum of Understanding*” between the Shires of Augusta – Margaret River and Busselton adopted to facilitate a consistent approach to policies, called CAPEROC.

## **SOME ISSUES IN COASTAL ENVIRONMENTAL LAW IN WESTERN AUSTRALIA**

Some recurrent issues in our coastal marine environment which concern environmental groups in Western Australia include:

- ∄ The overlapping jurisdiction over marine reserves between Commonwealth and State legislation, and various State legislation.
- ∄ The translocation of marine and freshwater plants for aquaculture, intra and inter state.
- ∄ The lack of sufficient accountability of shipping for its actions relating to pollution of our coastal waters from oil spills or releases; introductions of ballast organisms,<sup>cciv</sup> TBTs and sea dumping.
- ∄ The three nautical mile zone is included in Crown land managed by the Lands Department. Aquaculture and Land Act leases can now be granted along with mineral tenements in coastal waters.
- ∄ Multiple use marine reserves which can be established under CALM do not in general exclude environmentally damaging activities. Marine parks are the equivalent of state forests in that licenses or contracts to take fish from State waters can be granted the same as trees from State forests.
- ∄ Management of ports.

## **TAKING ACTION<sup>ccv</sup>**

Legal action<sup>ccvi</sup> should be a last resort.

Options to explore first are contacting the polluter, the industry or enforcement body, the relevant enforcement agency or the ombudsman.

Information can be obtained from:

- ∄ A private lawyer.
- ∄ The local Environmental Defender’s Office.

- € The local umbrella conservation group.
- € The relevant government department.
- € The relevant Minister, opposition spokesperson, local Member of Parliament, local council environment officer or local councillor.
- € The Ombudsman if a government authority is causing the harm.
- € The person causing the harm.

Information required in deciding on an appropriate course of action includes:

- € The legal environment: legislation can be obtained from the government bookshop or Internet.
- € Environmental reviews, policies, guidelines from library of the Department of Environmental Protection.
- € Government policies.
- € Submissions made by environmental groups.
- € Text books, journals, etc.
- € Maps.
- € Company and business name searches to identify the polluter/offender.
- € If you cannot get the information you want from a government department, a Freedom of Information application should be considered.

Always keep a detailed contemporary record of the activity of concern including:

- € Documentary evidence.
- € Photos.
- € Witness statements as soon as possible.
- € Diary record.

## CONCLUSION

The interrelationship of every type of law exists in a coastal marine environment. There is overlapping legislation and jurisdiction.<sup>ccvii</sup> Under the *Coastal Waters (State Powers) Act 1980 (Cth)* there is a statutory base for integrated land and marine management as it relates to pollution and conservation.<sup>ccviii</sup> There are a number of activities which threaten the coastal environment including tourism, fishing, development, chemical and oil contamination, and waste discharges. It is suggested that a better integration of all the laws and policies that regulate activities in our coastal marine environment, combined with better opportunities for third party objections and prosecution may facilitate better management of Western Australian coastal waters.

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- i Toyne, Phillip *The Reluctant Nation* ABC Books, Sydney 1994.
- ii See annexure for information about EDOs in the Australian States and Territories.
- iii The overview of general law is taken from, Clement J-P, M. Bennet *Law of Landcare in Western Australia* Environmental Defender's Office WA (Inc), Perth, 1998.
- iv The Western Australian parliament can make laws for the, "peace, order and good government" of the State, the *Constitution Act 1889*, section 2 (1).
- v A list of treaties to which Australia is a signatory can be found in the *Australian Treaty Series* at the Department of Foreign Affairs, and at the website, [www.dfat.gov.au](http://www.dfat.gov.au).
- vi For example, if the Commonwealth is a developer on Commonwealth land it has to comply with State law, see *Botany Municipal Council v Federal Airports Commission* 1992 CLR 453.
- vii For example, the common law rights in privately owned land have been gradually but significantly eroded over time by real property and environmental protection statutes.
- viii This doctrine may have been relaxed in *Bropho v Western Australia* (1990) 93 ALR 207 and see commentary in Bates G. M., *Environmental Law in Australia* 4<sup>th</sup> edition, Butterworths, Sydney 1995, page 102.
- ix Hogg, P.W., *Liability of the Crown* 2<sup>nd</sup> edition, Carswell Company, Toronto 1989, pages 10 and 239.
- x Subject to an acquired an immunity. See what is known as the Bradken doctrine, in *Bradken Consolidated Ltd v Broken Hill Pty Ltd* (1979) 145 CLR 107 but cf *Bropho v Western Australia* (1990) 171 CLR 1.
- xi Morris, G., C Cooke, R Creyke and R Geddes, *Laying Down the Law* 2<sup>nd</sup> edition, Butterworths, Sydney 1988, page 6.
- xii *Constitution Act 1889*, section 57.
- xiii See Western Australia, Queensland and Tasmania which are Criminal Code states, and see the Commonwealth Criminal Code.
- xiv Pearce, D., and R. Geddes, *Statutory Interpretation in Australia*, 4<sup>th</sup> edition, Butterworths, Sydney 1996 at paras 5.16 – 5.22.
- xv For example see, *Conservation Council of South Australia v Development Assessment Commission & Tuna Boat Owners Association (No.2)* [1999] SAERDC 86, 16 December 1999; and the subsequent legislative changes, which were made to regulations to overcome the effect of the decision.
- xvi The new *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), section 3A.
- xvii *Ibid*, Chapter 6, Part 16.

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- xviii *Natural Heritage Trust of Australia Act 1997* (Cth) section 3, and see generally the new *Environmental Protection and Biodiversity Act 1999* (Cth).
- xix Christie, E., *Biodiversity Convention, Endangered Species Legislation and the Precautionary Principle* (1993) EPLJ 470.
- xx Although these guiding principles are relatively new, they have been incorporated into some Western Australian statutes, see the *Agricultural and Veterinary Chemicals (Western Australia) Act* and the *Land Administration Act 1997* with respect to conditions on pastoral leases.
- xxi National Water Quality Management Strategy (NWQMS: ANZECC and ARMCANZ, 1994).
- xxii *Commonwealth Constitution 1901* (Cth).
- xxiii *Ibid*, section 51(i).
- xxiv *Ibid*, section 51(xxix).
- xxv *Ibid*, section 51 (ii).
- xxvi For example the *Natural Heritage Trust of Australia Act 1997* (Cth).
- xxvii Where an Act in this paper has (Cth) in the citation, it is Commonwealth legislation and where it does not, it is Western Australian legislation. Legislation which is from other states or territories will be indicated accordingly.
- xxviii The following list is by way of example and does not purport to be a comprehensive examination of all laws which impact on Western Australian coastal waters.
- xxix *Constitution Act 1889*, section 52.
- xxx For example, see the Town Planning Scheme of Broome No.4 which provides for a cultural environmental corridor around the land on which the port is situated.
- xxxi Bates G. M., *supra* no. viii, page 210 at footnote 34.
- xxxii Some States have a central coastal authority, see the *Coastal Council (NSW)*; the *Beach Protection Authority (QLD)*; the *Coast Protection Board (SA)*; the *Coastal Crown Lands (NSW) Policy*:
- xxxiii The *Local Government Act 1995*, section 3.6.
- xxxiv *Land Administration Act 1997*, section 3.
- xxxv *Constitution Act 1889*, section 53.
- xxxvi *Local Government Act 1995*, section 3.7
- xxxvii *Town Planning and Development Act 1928*, section 32.
- xxxviii The *Port Authorities Act 1999*, section 51 (1)(b).
- xxxix Harris, J., *Cases and Materials on International Law* Sweet & Maxwell 1991 4<sup>th</sup> edition London, page 911-912.
- xl United Nations Charter, Article 34.
- xli See court hierarchy at annexure two.
- xlii There is a Land and Environment Court in New South Wales; a Planning and Environment Court in Queensland; a Civil and Administrative Tribunal in Victoria and a Resources and Development Court in South Australia. There is no equivalent court in Western Australia, nor is there a Western Australian State administrative appeals tribunal. Appeals from administrative decisions are heard before the Western Australian Supreme Court.
- xliii For example, the *World Heritage Properties Conservation Act 1983* (Cth) implemented the *World Heritage Convention 1972*. A challenge to the right of the Commonwealth to pass this legislation was heard by the High Court in *Commonwealth v Tasmania* (1983) 158 CLR 1. The passage of the legislation was found by the High Court to be a valid exercise of power.
- xliv The *Commonwealth Constitution*, section 52 xxxix.
- xlv The *Environmental Protection Act 1986*, section 114.
- xlvi For example, anyone may commence a prosecution for an offence under the *Local Government Act*, section 9.24.
- xlvii It will only be in exceptional cases that courts will grant injunctions or allow a private prosecution to be brought, see *Bridgetown-Greenbushes Friends of the Forest v Department of Conservation and Land Management* (1997) 18 WAR 126.
- xlviii For example see, *Coastal Waters Alliance of Western Australia Inc v Environmental*

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- Protection Authority*, unreported, Full Court of the Supreme Court of Western Australia, 26 March 1996, Library No 960159 in which an environmental group in Western Australia successfully challenged a decision of the Environmental Protection Authority.
- xlx The *Limitation Act 1935*.
- i Ibid, section 31.
- ii *Crown Suits Act 1947*, section 7(1); and for limitation periods generally on criminal actions see *The Law of Landcare* supra, page 23-24.
- iii See Bates G. M. supra no. viii, page 210; the RAC Bulletin, August 1993: *Coastal Zone Inquiry, Final Report Overview*, AGPS 1993; the ANZECC (1992); Australian Water Quality Guidelines for Fresh and Marine Waters (Australian and New Zealand Environment and Conservation Council, ACT); ARMCANZ and ANZECC (1994); and the National Water Quality Management Strategy, Policies and Principles (NWQMS) – a reference document: Agriculture and Resource Management Council of Australia and New Zealand and the Australian and New Zealand Environment and Conservation Council, Canberra, ACT. ANZECC = Australia and New Zealand Environment and Conservation Council. ARMCANZ = Agriculture and Resource management Council of Australia and New Zealand.
- liii The Walpole Wilderness Proposal: A formal proposal by the South Coast Environment Group Inc. Walpole, Western Australia, 1998.
- liv See for example *Resource Assessment Commission, 1993a*. This report follows the *Inquiry into the Protection of the Coastal Environment*, House of Representatives Standing Committee instituted in 1979. Also see the report by White: *Bureau of Transport and Communications Economics (1991)*.
- lv ANZECC 1996.
- lvi Sea Freight Council of Western Australia report 1999, page 8.
- lvii Butler, A., CSIRO in Bates, supra no.viii, page 210.
- lviii Plants include sea flora, see the *Wildlife Conservation Act 1950*; section 6 defines flora to include any plant native to the State (the State extends to the three nautical mile limit); and see the *Conservation and Land Management Act 1984*, section 101B which includes flora in marine areas.
- lix Government of Western Australia, *State of the Environment Reference Group Draft Working Papers*, Section 7, Perth 1997, page 5.
- lx WA estuarine area of 24,000 square kilometres, see Earthsystems Pty Ltd, Kew Melbourne, Victoria.
- lxi Brown, V. A., *Turning the Tide*, Centre for Resource and Environmental Studies ANU 1995, page 1.
- lxii Approximately 70% of marine environmental pollution comes from sources on land (domestic, urban, agricultural and industrial, including burial of waste, runoff including storm water, sewerage, packaging materials), 10% from maritime transport and 10% from marine dumping, see Fisher, D.E., *Land-Sourced Pollution of the Marine Environment*, at page 116. There is also the issue of noise pollution (military, seismic searching, scientific projects) for marine mammal societies, see *Habitat* vol.28 no.2. April 2000. See also the environmental group, *Project Jonah*.
- lxiii See Management Structure for water resources in WA at figure 4.1 *The Law of Landcare* page 109.
- lxiv Implemented in the *Seas and Submerged Lands Act 1973* (Cth).
- lxv For a discussion of international law and marine pollution generally see, Dzidzornu, D. M., *Marine Pollution Control: The Evolving International Law* The Australian Journal of Natural Resources Law and Policy (1995) Vol.2 No.1, pages 111 –160.
- lxvi Other important treaties are against marine pollution such as the *South Pacific Regional*

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- Environment Program (SREP) 1995 No24; the Convention on Biological Diversity 1992; the International Convention for the Prevention of Pollution by Ships; the International Convention for the Prevention of Pollution of the Sea by Oil and the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention).*
- lxvii Ibid, section 10.
- lxviii Ibid, section 7.
- lxix The low water mark is the baseline whether in charts or not, declared or not, and where there are enormous tidal variations and a low water mark is very far from shore, see *Li Chia Hsing v Rankin* 1978 CLR 182.
- lxx One nautical mile is 1.852 kilometres.
- lxxi Supra number lxvi, section 6.
- lxxii “Innocent”, in this context means to proceed in a way not prejudicial to the coastal state.
- lxxiii Supra, number lxvi, section 10B inserted by section 10 of the *Maritime Legislation Amendment Act 1994* (Cth).
- lxxiv Fisher, D. E., *Land-Sourced Pollution of the Marine Environment* EPLJ vol.12 April 1995, pages 116 - 139.
- lxxv Rights over the continental shelf include the seabed, submarine subsoil of shelf, bottom dwelling marine flora and fauna.
- lxxvi Supra, number lxviii, section 11.
- lxxvii *Constitutional Powers (Coastal Waters) Act 1980* (Cth), section 7( c).
- lxxviii *Constitutional Powers (Coastal Waters) Act 1980* (Cth); *Coastal Waters (State Title) Act 1980* (Cth); *Coastal Waters (State Powers) Act 1980* (Cth); the *Constitutional Powers (Coastal Waters) Act 1979* (WA); and see the *Offshore (Application of Laws) Act 1982* (WA), which replaced and repealed the *Offshore (Application of Laws) Act 1977 –79*.
- lxxix Taylor, J.D. *Legal Environmental Protection of the Coast and the Coastal Zone in Queensland* (1991) Queensland Law Society Journal 485 –506.
- lxxx The *Commonwealth Constitution*, section 51 (vii).
- lxxxi Blake Dawson Waldron Solicitors *Environmental Law Update* Issue No 7 September 1999.
- lxxxii The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), section 4.
- lxxxiii Ibid, section 10.
- lxxxiv Ibid, sections, 12-15A, 136, 137, 313 –324. For list of properties see the website, [www.environment.gov.au/heritage/awhg/whul/auswha.html](http://www.environment.gov.au/heritage/awhg/whul/auswha.html).
- lxxxv Ibid, section 324.
- lxxxvi Ibid, sections 16 –17B, 136,138, 325 - 336The international RAMSAR convention (*The Convention on Wetlands*, Ramsar, Iran 1971). The conservation of wetlands is a major focus of the EPBC Act which aims to arrest the decline in Australian biodiversity. There are now at least 53 Australian wetlands recognised in this Act.
- lxxxvii Supra lxxx, sections 18 –19, 136, 139, 165 and sections 225 – 247 as to permits relating to whales, dolphins and porpoises.
- lxxxviii Ibid, sections 23 –24A, 136, 248.
- lxxxix Ibid sections 23 –24A, 136, 248,
- xc Ibid, sections 21 –22A, 136,140A.
- xcI Ibid, section 25.
- xcii Ibid, section 68.
- xciii Ibid, section 69.
- xciv Ibid, section 71.
- xcv Ibid section 70.
- xcvi To be repealed and replaced by the EPBC Act.
- xcvii Incorporated into Australian legislation by the *World Heritage Properties Conservation Act 1983*, section 3A.
- xcviii Ibid, section 10, and see Bates, supra no.viii, page 255.
- xcix To be repealed and replaced by the EPBC Act, see sections 344 –390A in the new

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- Environmental Protection and Biodiversity Conservation Act 1999 (Cth), Act. For a list of national parks in Western Australia see the website, [www.calm.wa.gov.au/national-parks/previous-parks-month/pm-splash.html](http://www.calm.wa.gov.au/national-parks/previous-parks-month/pm-splash.html).
- c *National Parks and Wildlife Conservation Act 1975* (Cth), section 3(b) and see *Seas and Submerged Lands Act*, section 14.
- ci *National Parks and Wildlife Conservation Act 1975* (Cth), Section 6(2).
- cii See supra no. lxxvii.
- ciii Bates, supra no.iii page 266.
- civ Sections 146 – 154. See website for fish habitat protection areas, [www.wa.gov.au/westfish/hab/broc/fhpa/fhpa.html](http://www.wa.gov.au/westfish/hab/broc/fhpa/fhpa.html). Also see the Commonwealth *Fisheries Amendment Legislation Bill* passed in December 1999 means that Australia’s navy patrol vessels can now seize fishing gear from boats caught illegally fishing in our waters thus forcing them to return home without their fishing gear.
- cv *Fisheries Management Act 1991* (Cth), section 210.
- cvi Ibid, section 7 (1), and see the *Commonwealth Constitution* section 51(x).
- cvii Ibid, section 7 (2).
- cviii Ibid, section 7 (3).
- cix Ibid, section 12.
- cx Ibid, section 4.
- cxii Supra number xcvi, section 15.
- cxiii The historical reason for the three nautical mile limit on the jurisdiction of the States is that this was the approximate furthest distance of a canon shot.
- cxiv *Offshore (Application of Laws) Act 1982*.
- cxv *Offshore (Application of Laws) Act 1982*, section 2.
- cxvi The *Coastal Waters (State Powers) Act 1980* (Cth), section 3.
- cxvii There is a Maritime Bill before the Western Australian parliamentary autumn session 2000. This Bill seeks to repeal and incorporate into one Act the following Acts: *Harbours and Jetties Act 1928*; *Jetties Act 1926*; *Lights (Navigation) Protection Act 1938*; *Marine and Harbours Act 1981*; *Marine Navigation Aids Act 1973*; *Pilots Limitation of Liability Act 1962*; *Shipping and Pilotage Act 1967*; *Western Australian Marine Act 1982*; *Western Australian Marine Amendment Act 1987*; and the *Western Australian Marine Amendment Act 1990*.
- cxviii The *Environmental Protection Act 1986*, section 4.
- cxix Ibid, section 5(1).
- cxx Ibid, section 3(1).
- cxxi Also see the *Admiralty Act 1988* (Cth).
- cxxii The *Protection of the Sea (Powers of Intervention) Act 1981* (Cth), section 6.
- cxxiii This Act is complementary Western Australian legislation to the *Powers of the Sea (Powers of Intervention) Act 1982* (Cth) and *Powers of the Sea (Powers of Intervention) Regulations* (applicable to ships on high seas, exclusive economic zone and any ship on the Australian coastal sea) which implements in Australia the “*International Convention for the Prevention of Pollution by Ships 1973*”, the 1978 Protocol and subsequent amendments to the Protocol. Also see *Pollution of Waters by Oil and Noxious Substances Regulations 1993*.
- cxxiv Bates supra no.viii, page 454.
- cxxv The *Pollution of Waters by Oil and Noxious Substances Act 1987*, section 8.
- cxxvi Ibid, section 8(1).
- cxxvii Ibid, section 8(3).
- cxxviii Ibid, section 18.
- cxxix Ibid, section 18.
- xxx Ibid, section 8 (3).
- xxxi Ibid, section 8 (5).
- xxxii Ibid, section 8 (2).
- xxxiii Ibid, section 20.
- xxxiv Ibid, section 30.
- xxxv The *Waterways Conservation Act 1976*, section 3 (3).
- xxxvi Ibid, section 3 (a).

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- cxxxvi Ibid, section 3 ( b).
- cxxxvii Ibid, section 3 ( c).
- cxxxviii Also see other acts especially state agreement Acts, for example see *Iron Ores (Robe River) Cape Lambert Ore and Service Wharves By-Laws 1995* which by regulations 39 – 41, prohibits discharge of rubbish and oil from ships which are berthed and which authorise the Company to recover damages for a clean up operation from a vessel owner.
- cxxxix The *Pollution of Waters by Oil and Noxious Substances Act 1987*, section 71.
- cxl Ibid, section 40.
- cxli Gardner A., and S. Mascher *Current Developments in Western Australia* Australasian Journal of Natural Resources Law and Policy 1999, pages 133 –146.
- cxlii The *Fish Resources Management Act 1994*, section 5.
- cxliiii Ibid, section 255.
- cxliv The *Fish Resources Management Act 1994*, section 5.
- cxlv Ibid, section 257.
- cxlvi Ibid, section 201.
- cxlvii Ibid, section 146, but note that an aboriginal group or person seeking to preserve traditional usage is an affected person, see section 166.
- cxlviii The *Port Authorities Act 1999*, sections 24 and 25.
- cxlix Ibid, section 5.
- cl For example, see the *Port Operations Task Force*; the *Sea Freight Council of Western Australia*; the *Western Australian Port Authorities' Association* and the *Director of Maritime Policy* at the Department of Transport.
- cli Transport Annual Report, page 31.
- clii Ibid, page 103; Transport is committed to minimising the adverse impacts of transport on the community and the environment.
- cliii *Port Authorities Act 1999*, sections 49 and 50.
- cliv Ibid, section 51(1).
- clv A Bill is the draft of an Act which goes before parliament for debate. Once it is passed it becomes an Act of parliament, that is a statute.
- clvi The *Conservation and Land Management Act*, section 6(3).
- clvii Ibid, section 6(4).
- clviii Ibid, section 6(5).
- clix The *Land Administration Act 1997*, section 3(b).
- clx Ibid, section 3 (c).
- clxi Ibid, section 3 (d).
- clxii Ibid, section 5.
- clxiii The *Mining Act 1978*, section 24A.
- clxiv Ibid, section 24A (3) (a).
- clxv Ibid, section 24A (3) (b).
- clxvi Ibid, section 25.
- clxvii See the effect of the *Mining Act 1978*, the *Petroleum Act 1967* or other State agreements ratified by an Act of parliament, on the *Conservation and Land Management Act 1984*.
- clxviii *Conservation and Land Management Act 1984*, sections 6(6) and 13.
- clxix Ibid, section 13(4)(a).
- clxx Ibid, section 26B(1)(a).
- clxxi Ibid, section 26A.
- clxxii Ibid, section 13(8).
- clxxiii Ibid, section 6(6).
- clxxiv Ibid, section 13A and 13D.
- clxxv There is one marine nature reserve, Hamelin Pool Nature Reserve. There are six marine parks which are at Marmion, Ningaloo, Rowley Shoals, Shark Bay, Shoalwater Islands and the Swan Estuary.
- clxxvi Ibid, section 13B and 13 D.
- clxxvii Ibid, section 13C and 13D.
- clxxviii Under the *Fish Resources Management Act 1994*, section 4: “take” means ” catch, capture,

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- entrap, enclose, gather, remove, poison, stun, kill or destroy fish.
- clxxix *Wildlife Conservation Regulations 1970*, regulation 42.
- clxxx *Ibid*, regulation 43.
- clxxxii *Wildlife Conservation Act 1950*, sections 6 defines a nature reserve to be the same as in the *Conservation and Land Management Act 1984* see sections , 6(5) and 16B(3) which describes nature reserves as lands vested by section 7(4) or section 7(2) by operation of the *Land Administration Act* or vested in the Authority under any other Act. Section 16B(3) refers to section 16(1) which provides that land can be in state forest, timber reserves, national park, conservation park, nature reserve, marine reserve or land reserved for any other public purpose.
- clxxxiii *Wildlife Conservation Act 1950*, section 6, and see the *Conservation and Land Management Act 1984*, sections 6(5) and 16B(2).
- clxxxiv *Ibid*, section 6.
- clxxxv Regulation 46.
- clxxxvi The *Wildlife Conservation Act 1950*, section 16 and see section 23.
- clxxxvii This exception does not exist in all comparable legislation in Australia. However the High Court in *Yanner v Eaton* (1999) 73 ALJR 1518 has held in the context of an examination of the Queensland Fauna Act that it is likely, provided the native title to hunt and fish can be proven to exist, that the right will be protected by a native title Act such as the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* and continue to be exercisable, notwithstanding the provisions of that Act, see Hammond, C., *An Analysis of Yanner v Eaton and its Implications for the Western Australian Wildlife Conservation Act* in *Brief Volume 27 No.2 March 2000*, 34 at 38. See also *State of WA v. Ward* [2000] FCA 191; and *The Wik Peoples v. State of Queensland* (1996) 187 CLR 1.
- clxxxviii *Ibid* no.186, sections 23 A-F.
- clxxxix *Fish Resources Management Act 1994*, section 115 (1).
- cxc *Ibid*, section 116(1).
- cxci *Ibid*, sections 109 - 110. These areas have same meaning as in the CALM Act. Also see the *Abrolhos Islands Reserve* is vested in a body corporate established under the *Fish Resources Management Act 1994*, section 122.
- cxcii Established under the *Water and Rivers Commission Act 1995*, section 4 to advise the Water and Rivers Commission on the performance of the Council's functions under the *Water Conservation Act 1976*.
- cxci Also see the *Litter Act 1979* section 26(2)(c)(ix); the *Public Works Act 1902* section 5A(g); the *Rottneest Island Authority Act 1987*; the *Western Australian (Sea Dumping) Act 1981*; the *Constitution Acts Amendment Act 1899*, Schedule V Part 3; the *Geraldton Foreshores and Marina Development Act 1990*; the *Land Administration Act 1997* sections 159(f) and 160(1)(f); and the *Mining Act 1978* sections 24A(3) and (6).
- cxci Section 3.
- cxci (1991) 6 WAR; (1991) 72 LGRA.
- cxci *Bridgetown – Greenbushes Friends of the Forest v The Department of Conservation and Land Management*, (1997) 18 WAR 126.
- cxci *Conservation Council of South Australia v Development Assessment Commission & Tuna Boat Owners Association (No.2)* [1999] SAERDC 86, 16 December 1999.
- cxci Zann, Leon; Earley, Owen Canberra: Department of the Environment, 1997.
- cxci Fisher supra no. lxxii, page 125.
- cc Transport Annual Report 1998-99, 441 Murray Street, Perth , Western Australia, page 34.
- cc This Western Australian Planning Commission policy applies over the scenically spectacular, narrow coastal strip stretching from the near-shore waters of Cape Naturaliste to Cape Leeuwin and inland to Bussell Highway and the eastern extent of townsites along the highway. One of its objectives at page ix is to manage water quality through land use controls to protect both surface and groundwater systems of streams, wetlands, damplands and caves; associated plant and animal incentives for landowner responsibility.
- cci Transport Annual Report, supra no. 193, page 34.
- ccii *Ibid*, page 36.

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- cciii Ibid, page 36.
- cciv There are a number of publications on this problem for example:
- € [Canberra]: Department of Primary Industry and Energy, Australian Quarantine and Inspection Service, 1995 *Australian Ballast Water Management Strategy* [1995].
  - € Hutchings, Pat; Vau Der Velde, Jos; Keable, Steve *Guidelines for the Conduct of Surveys for Detecting Introductions of Non-Indigenous Marine Species by Ballast Water and Other Vectors – And a Review of Marine Introductions to Australia* Sydney: Australian Museum, 1987.
- ccv Environmental Defender's Office (WA) Inc *A Guide to Environmental Law*, Perth 1997.
- ccvi For further discussion about how to institute legal action see Chapter One in *The Law of Landcare*, supra no. iii.
- ccvii See the Western Australian government report, *A Representative Marine Reserves System for Western Australia* 1986; the second reading speeches for the amendments to the *Conservation and Land Management Act* no.5 of 1997 which introduced the *Marine and Reserves and Parks Authority*, Parliamentary Reports, Hansard (1997) vol. 339, page 1622, and *New Horizons in Marine Management*, a Western Australian government report, 1994.
- ccviii *Final Report of the Review of Coastal Management in Western Australia*, May 1995 p.4.(The Donaldson Report).