

FIRE AND THE LAW

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The Environmental Defender's Office (WA) Inc

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

Australian Law

In this paper² I will introduce the law relating to burning, by providing a synopsis of the general legal framework which underpins fire control and practice in the

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

² This paper is for general information purposes only and is not legal advice. Important legal details have been omitted to provide an overview of the law. If you require legal advice relating to specific circumstances you should contact the EDO or your own solicitor. The views expressed in this paper are those of the author, and do not necessarily represent those of the EDO. Acknowledgment is made of reference to the paper by M Bennett Solicitor EDO WA (Inc) *Pre-*

south west of Western Australia. I will then address issues of terminology, regulation and policy implementation employed in respect of burning practices in Western Australia.

Australia has developed an adversarial system of law based on the English system³ which arrived along with the C18th English settlers⁴. Our law is made up of international law⁵, common law, statutes, subsidiary legislation, policies and administrative guidelines. Customary Aboriginal law⁶ and its interrelationship with English based Australian law⁷ is an ongoing (sometimes contentious) issue of integration. All of these areas of law contribute to the legal framework embracing fire in Western Australia.

Fire issues span all levels of government, and many government agencies and land tenures. It is important that the debate about the management of fire is not confined to four year electoral terms or to the present owners and occupiers of the various land tenures. It is salient at this point to remember the special difficulties government agencies have in Western Australia in managing the responsibility for fire control on a third of our continent for a small population with limited resources.

When we ask, *Who is responsible for the control of wildfire?* and *Who can authorise pre-emptive burning in Western Australia?* there is no simple answer.

Fire and the Common Law

1. Introduction

Common law principles apply to everyone (including the Crown) unless expressly excluded by an Act of parliament. Common law is often referred to as judge-made law and generally has been made in the following way. In the absence of a

emptive Burning 1996 unpublished, and for the helpful comments from Alex Gardner Senior Lecturer of the University of Western Australia, Ian Bowden of FESA, Beth Schultz and Graham Rundle, and for the assistance in research for the paper by the EDO student volunteers.

³ There are other systems of law which include for example an Inquisitorial system.

⁴ 1829. For a history of the development of the law in WA see E Russell, *A History of the Law in Western Australia and its Development from 1829 – 1979* UWA Press, 1980.

⁵ Treaties and International Conventions create international legal obligations but do not create legal rights and obligations in our domestic law. International law will not be addressed in this paper.

⁶ The issues of Aboriginal customary/traditional practices in respect of burning have much greater impact on the lands in the north of our State, and have been addressed in my paper, *Burning Issues in the East Kimberley* presented to the Fire Forum held at *El Questro* in May 2001.

⁷ For example see the draft policy published by CALM in August 2000 on the involvement of traditional owners in the management of CALM lands, *Aboriginal Involvement in Nature Conservation and Land Management*.

written law, a court will determine a matter by looking at the established principles of common law,⁸ custom, tradition and modern convention.

2. Some common law principles

The common law principles most relevant to the management of fire are:

- € Negligence;⁹
- € Trespass;¹⁰
- € Nuisance.¹¹; and
- € Occupier's liability.¹²

⁸ Past cases published in law reports, which may be referred to as a precedent, or a case authority.

⁹ The common law principle of *negligence* comprises the elements of a duty of care, a breach of the requisite standard of care, the type (not amount) of damage which was a foreseeable consequence of the breach, and the damage was caused by the breach: see *Donoghue v Stevenson* [1932] AC 562 ; *Jaensch v Coffey* (1984) 155 CLR 549. Negligent acts can occur in circumstances of an action, manufacture, contract, driving, advice or opinion in a business context, and by misstatement.

¹⁰ *Trespass* to land is described as the intentional or negligent act of an individual which directly interferes with another individual's exclusive possession of land without lawful justification. To make out trespass there must be direct physical invasion of private land and the invasion must be intentional. Neither damage nor unreasonableness is required to be made out to establish trespass. A related principle is the common law principle of *Trespass ab initio*. This principle applies to a person who enters another's premises under statutory authority and abuses that authority by committing an unlawful act outside the scope of that authority, to say that the whole of his or her entry becomes unlawful or trespassory from the beginning: see *The Six Carpenter's Case* (1610) 8 Rep 146a; 77 ER 695. The continuing existence of this doctrine has been doubted, see *Baker v R* (1983) 153 CLR 338; 47 ALR 1.

¹¹ *Nuisance* is an interference with a public or private interest, see *Halsey v Esso Petroleum* [1961] 1 WLR 683. The elements required to succeed in a private nuisance action are that there must be physical injury to land or to a person's use and enjoyment of the land, the interference causing the injury must be unreasonable, and the damage caused must have been foreseeable. Only a person in actual possession of the land can make claim in nuisance. Where the nuisance interferes with a right enjoyed by the public at large it is a public nuisance. Private individuals can take an action in public nuisance even if they have no interest in the land the subject of the interference, so long as they have suffered injury over and above the public at large. An activity or state of affairs that causes damage to land, might be emissions of airborne pollution or by unreasonably interfering with the use or enjoyment of land, see *Hargrave v Goldman* (1963) 110 CLR 40 at 60); or with the health, safety, comfort or convenience of the public at large, for example by smoke or fire. Also see Halsbury's Laws of Australia 330 – 400; and *Burnie Port Authority v General Jones Pty Ltd* (1994) 68 ALJR 331.

¹² Common law *occupier's liability* can be described as the raft of common law legal responsibilities of an occupier of land towards visitors who have lawfully or unlawfully entered occupied land and suffered injury during the course of their visit. Early common law principles created special obligations of an occupier which differed depending on the class of entrant on their land, for example between trespassers, invitees or licensees. These old common law distinctions have merged into the general common law principle of the occupier's duty of care to all classes of entrants, see *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 469. In

The liability, of an owner (or occupier) arising from damage caused by the escape of fire from his or her land may be found in the common law principles of trespass, nuisance, negligence or occupier's liability. These principles may have been modified by statute.

3. Negligent fire management

The common law principle of negligence provides that if all the elements of negligence are made out in a particular case, a person is entitled to claim compensation for damage caused by that negligence. Case law records examples of civil¹³ liability for negligent fire management which have been decided before the courts and include:

- ≠ lighting a fire in an inappropriate manner or place;¹⁴
- ≠ failing to watch a fire;¹⁵
- ≠ failing to prevent a fire getting out of control;¹⁶
- ≠ failing to contain a fire even where there is no responsibility for the fire, such as following a lightning strike or the spreading of a fire lit by a trespasser;¹⁷ and
- ≠ creating a situation conducive to spontaneous combustion.¹⁸

It is important to remember that mere compliance with legislation, for example with a permit issued under the *Bush Fires Act 1954*, will generally not of itself be a complete defence to a civil claim for damages caused by the escape of that fire.¹⁹ Furthermore, a person held liable for the actual damage caused by fire, may also be liable for consequential expenses reasonably incurred in respect of that fire.²⁰

WA there is the *Occupier's Liability Act 1985* which in part replaces the common law. *Occupier* is defined for the purpose of this Act to be any person occupying or having control of the land or other premises (premises include any fixed or moveable structures including vessel, vehicle or aircraft): see section 2. The *Occupier's Liability Act 1985* binds the Crown: see section 3.

¹³ As opposed to criminal liability.

¹⁴ *Mullholland v Baker* [1939] 2 All ER 253; *Pickin v Hesk* [1954] 4 DLR 90.

¹⁵ *Bugge v Brown* (1919) 26 CLR 110; *Wise Bros v Commissioner of Railways* (1947) 75 CLR 59.

¹⁶ *Ibid.*

¹⁷ *Goldman v Hargrave* [1967] 1 AC 645 (P.C.); 115 CLR 458.

¹⁸ *Vaughan v Menlove* (1837) 3 Bing NC 468; 132 ER 490. See J G Fleming *The Law of Torts* The Law Book Company Limited 8th edn 1992 chapter 17, pages 349 – 352.

¹⁹ Halsbury's Laws of Australia 330 – 400; and see *Roberts v Webb* (1887) 21 SALR 96; *Hazelwood v Webber* (1934) 52 CLR 268.

²⁰ *NZ Forest Products v O'Sullivan* [1974] 2 NZLR 80.

4. Fire management and government agencies

It is understandable that government agencies might be concerned to prevent personal injury or property damage from wildfire, and forestall any liability of the agency arising from a negligent failure to undertake a pre-emptive burn. Protection of life and property is not a specific function of the Department of Conservation and Land Management (CALM) under the *Conservation and Land Management Act (1984)* (the CALM Act), nor is it a specific function of management plans authorised by the CALM Act.²¹ However, the common law principles described above apply to any occupier of land unless excluded by statute.

The Conservation Commission, the Forest Products Commission and CALM²² arguably may be described as occupiers²³ of land vested in the Conservation Commission.²⁴ The common law and statutory liability of the Crown in respect of damage, injury or loss suffered by a person on or from a cause emanating from unmanaged reserves or unallocated Crown land has been limited by statute to that which is the direct consequence²⁵ of an act or activity of the Crown.²⁶ The same limitation applies to management authorities in respect of managed unimproved reserves and is further limited to an action that is otherwise than in accordance with its management order.²⁷

5. Liability and policy implementation

A discretionary decision following a particular policy²⁸ not to carry out a particular pre-emptive burn²⁹ is unlikely, without more, to lead to a successful claim in negligence against the government agency or a local government making that decision. The law of negligence distinguishes between a mistake in making a policy, and a mistake in implementing a policy at the *operational* level.

²¹ Part V.

²² *Conservation and Land Management Act 1984* sections 26 AA, & 20(3)(b).

²³ An 'occupier' is a person in actual possession of or taking up a place in an area. 'Occupation' encompasses a degree of control, see *Donaldson v Bottroff* [1965] SASR 145 which is not necessarily ownership, see *Bulong v Cohn* [1901] 3 WALR 74. An occupier is to be contrasted with an invitee or entrant by contractual right. Under the *Occupier's Liability Act 1985* an occupier is defined to mean a person occupying or having the control of land or other premises. "Premises" is defined to include any fixed or moveable structure including a vessel, vehicle or aircraft.

²⁴ The *Conservation and Land Management Act 1984* section 19(1)(a).

²⁵ The common law is broader, that is that damage was a foreseeable consequence of an action.

²⁶ *Land Administration Act 1997* section 264 (2) and the Crown in this section means a State agency or State instrumentality or an officer or employee of the Crown or of a State agency or State instrumentality, see section 264(4).

²⁷ A management order is an order made under section 46(1) or 59(4) of the *Land Administration Act 1997*, and is not a management plan.

²⁸ For example see a forest management plan.

²⁹ For example a policy that a less intensive hazard reduction burning program be pursued.

This is so because our courts have held that governments must be free to govern.³⁰ Governments and their agents make policy decisions which involve the balancing of environmental, financial, economic, social, and political factors. This approach is reflected in judicial decisions which have held that public authorities are not under a duty of care in relation to policy decisions. Thus, a decision to follow a policy is unlikely to found a successful action in negligence because a duty of care is an essential element of a successful common law claim for damages in negligence or some other tort.

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

Examples of negligent *operational* mistakes might be,

- € a failure to undertake a fuel reduction burn contrary to policy;
- € a failure to control an authorised pre-emptive burn and undertaken pursuant to a particular policy; or
- € a rigid implementation of policy in circumstances where the policy is not apt.

Thus an action implementing a policy taking into account the full range of considerations, including public safety, risk to property and the impact on biodiversity, is unlikely to provide a foundation for a successful claim in negligence, unless the decision is then implemented in a negligent way.³¹

This analysis indicates that:

- € a perceived threat of legal action, for example arising from property damage for not undertaking a pre-emptive burn, may not be a valid reason for a government agency to ignore or not give appropriate weight to other statutory considerations (such as land degradation and biodiversity impacts)³² of such a burn proposed to be undertaken or not undertaken, according to a policy; and
- € it is in the interests of local government authorities and government agencies to have approved policies on pre-emptive burning, since these might provide

³⁰ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; and *Parramatta City Council v Lutz* (1998) 12 NSWLR 293; and *Murphy v Brentwood District Council* [1991] 1 AC 398.

³¹ See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Parramatta City Council v Lutz* 1(1988) 12 NSWLR 293; *Murphy v Brentwood District Council* [1991] 1 AC 398.

³² See the Executive Summary of the Progress Report on Environmental Performance and mid-term Report on Compliance: Forest Management Plan 1994 – 2003: EPA Bulletin 912 November 1998.

a successful defence in a civil action for damages perceived to have been caused by some action or omission of the material agency.

In some matters that come before the courts a negligent action, undertaken by an employee or contractor, is well beyond the scope of the authorised activity. Such actions have been described as *off on a frolic of their own* and have led to personal liability for the consequences of a negligent action.³³

Fire and Statutory Regulation

1. Statutes

Statutory law establishes and regulates the operation of our various levels of government and government agencies. A statute³⁴ is a written law made by an Act of Parliament to pass a Bill.³⁵ Statutes cover specific areas of law. Statutes prevail over the common law and can limit or modify common law rights.³⁶ For example, the liability of the Crown and management authorities responsible for management of Crown land is limited by the provisions of the *Land Administration Act 1997*.³⁷

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

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

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

³³ An employee *off on a frolic of his or her own* negates the vicarious responsibility of his or her employer for damages arising from that unauthorised action, see *Whitfield v Turner* (1920) 28 CLR 977 but see *Burnie Port Authority v General Jones Pty Ltd* (1994) 68 ALJR 331; 179 CLR 520 which held that in certain circumstances an owner has a non-delegable duty of care. Also see the *Pyrenees Shire Council v Day* 192 CLR 330 about the liability of government agencies failure to follow up on a statutory notice to reduce a fire risk.

³⁴ Often referred to as an 'Act'.

³⁵ A Bill is the draft of a statute. The Bill progresses through the Parliament. When the Bill is passed by both houses parliament it is referred to as an Act of Parliament. The Act becomes operative on the date as proclaimed and recorded in the Government Gazette. The date of the Act may not be indicative of the contemporary relevance of the Act because it may have been amended numerous times since it was passed by the Act of Parliament.

³⁶ *British Railways Board v Pickin* [1974] AC 765 at 789, 793, 798.

³⁷ *Land Administration Act 1997* section 264.

≠ a more specific Act will prevail over a general Act.

2. Subsidiary legislation

A statute may authorise a certain person or body to make subsidiary legislation, which are often known as regulations.³⁸ Subsidiary legislation is binding like a statute.

3. Policies, management plans, memoranda of understanding and administrative guidelines

3.1 Policies

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

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

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

One of the questions I am often asked is: *How can the provisions of a policy be enforced?* The short answer is that generally speaking,³⁹ a policy is not enforceable but the appropriate consideration of the policy by the material decision maker is enforceable. Policies and administrative guidelines are developed to guide (but not predetermine) a decision based on the exercise of the discretion of the decision maker.⁴⁰ The weight (or importance) to be given to a particular policy varies.

Legislative policy, (a policy adopted under an Act or subsidiary legislation) carries the greatest weight. An example of such legislative policies is a State Planning Policy (SPP) made under section 5AA of the *Town Planning and Development Act 1928*. The new *Agricultural and Rural Land Use Statement of Planning Policy*

³⁸ See for example the *Conservation and Land Management Regulations 1992* which regulate camping and commerce undertaken on CALM managed lands; or the *Wildlife Conservation Regulations 1970* which regulate the taking of fauna and flora, and activities on nature reserves and wildlife sanctuaries.

³⁹ But an Environmental Protection Policy can be made under the *Environmental Protection Act 1986* ("EPP") is binding on the world at large. EPPs can also be described as subsidiary legislation because they are enforceable and unfortunately the existence of such 'policies' leads to confusion about the role of policies generally.

⁴⁰ French and Drummond JJ in *Minister for Immigration, Local Government & Ethnic Affairs v Gray* (1994) 50 FCR 189 at 208.

gazetted 12 March 2002 (the ARLUSPP) is a section 5AA SPP. The ARLUSPP describes related policies to include *Policy DC 3.7 Fire Planning*, and the policy *Planning for Bush Fire Protection*⁴¹ published in December 2001 as a joint policy of the Department of Planning and Infrastructure and FESA.⁴²

Other government policies (of progressively less weight) include cabinet endorsed, State government agency endorsed,⁴³ local government endorsed and local government ad hoc policies.

It may be possible to amend legislation (or subsidiary legislation) to make certain provisions of a particular policy enforceable. So, for example, a forest management plan, might require notification of the local government by the proponent of each pre-emptive burning proposal proposed to be undertaken according to that policy, which then must be recorded on a register held by the local government. An amendment to the relevant town planning scheme could require that implementation of such a proposal requires prior approval from that local government.

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

3.2 Management Plans

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

Management plans should be clear, precise and unambiguous in their drafting because they can:⁴⁴

- ≠ state the objectives of the administration of the statute under which they are made;
- ≠ state the policy basis for decision making;

⁴¹ This policy is described as a protection planning tool that has been prepared by FESA in close consultation with the Department of Planning and Infrastructure (DPI). The main focus of the document is bush fire protection within new land development in bushfire prone areas and to provide a benchmark for bush fire prevention planning within existing communities. The policy at page 4 requires it to be read in conjunction with the *Policy No. DC 3.7 Fire Management* of the DPI. The policy also provides that building fire safety matters should be informed by the *Australian Standard for the Construction of Buildings in Bushfire-Prone Areas* (Australian Standard 3959). Local governments are encouraged to adopt this policy: see page 3.

⁴² Fire and Emergency Services Authority of Western Australia.

⁴³ For example the *Fire Management Policy Statement 19* published by CALM in May 1987.

⁴⁴ Water Resources Law and Management in Western Australia Centre for Commercial and Resources Law 1996, University of Western Australia and Murdoch University, *Legislative Requirements for an Effective Regional Water Resources Planning and Management Framework*, Ventriss, H. 119, at 121.

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

The fact that fire management and pre-emptive burning practices set out in a management plan are not binding on the authority authorised to administer it without more, means that departure from the plan can also be contemplated if there are factors against it. What is helpful in such circumstances is identification in a management plan of the criteria for departure from a plan, say for example in an extreme seasonal variation.

An example of a management plan is a forest management plan⁴⁵ made pursuant to Part V of the CALM Act.⁴⁶

In regard to State forest management plans,⁴⁷ it has been held that,

“.... (the CALM Act) may impose legally binding duties on the Executive Director of CALM to manage State forests in

⁴⁵ The Forest Products Commission (FPC) created under the *Forest Products Act 2000* (FP Act) provides that the FPC must give due regard to an FMP when developing its Strategic Management Plan, see section 22 of the FP Act. The FPC is under a duty to act in accordance with its strategic development plan and its statement of corporate intent: see the FP Act section 11; forest products contracts must be in accordance with a material forest management plan: see the FP Act section 58; an FPC production contract expires when the management plan expires: see the FP Act section 58; notwithstanding any contractual term to the contrary: the FP Act see section 61.

⁴⁶ *Conservation and Land Management Act 1984*.

⁴⁷ *Conservation and Land Management Act 1984* Part V.

*accordance with the relevant management plans, but subject to acting in good faith, and in accordance with directions from the Minister, the Executive Director has a wide discretion as to the manner in which he discharges his duties (in relation to a management plan)...”*⁴⁸

Even if an action under a forest management plan is a violation of policies and strategies in the forest management plan, this not enough to render that action invalid unless the action was in violation of a fundamental principle of the management plan.⁴⁹ The ministerial environmental conditions on a forest management plan are binding.⁵⁰

3.3 Memoranda of Understanding

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

3.4 Administrative Guidelines

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

4. Offence provisions

Statutes may make some actions punishable by a fine or imprisonment.⁵¹ Specific persons may be nominated to prosecute certain offences and provide such a person with discretion not to prosecute.⁵²

⁴⁸ Templeman, J in *Bridgetown/Greenbushes Friends of the Forest Inc. v Executive Director of the Department of Conservation and Land Management and Ors* (1997) 94 LGERA 380, at 428; 18 WAR 126.

⁴⁹ Scott J in *Bridgetown/Greenbushes Friends of the Forest Inc. v Executive Director of the Department of Conservation and Land Management and Ors* (1997) 18 WAR 126, at page 154.

⁵⁰ Templeman, J in *Bridgetown/Greenbushes Friends of the Forest Inc. v Executive Director of the Department of Conservation and Land Management and Ors* (1997) 18 WAR 126, at 175.

⁵¹ For some offence provisions see the *Environmental Protection Act 1985* numerous sections; the *Wildlife Conservation Act 1950* sections 16, 16A, 17, 17A, 18, 26, the CALM Act sections 103, 109, 110, 114; the *Land Administration Act* sections 99, 130, 199, 267,269; the *Country Areas Water Supply Act* sections 12B, 12C, 45, 46, 82, 111, 113; the *Soil and Land Conservation Act 1977* sections 21, 22, 28, 35, 42.

⁵² For example a prosecution under the *Wildlife Conservation Act 1950* can only be authorised by the Executive Director of CALM, see section 26(3) of that Act.

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

Fire and the Crown

The Crown includes Ministers and State government agencies, but not local governments.⁵³

Common law principles bind the Crown.⁵⁴ Statutes are presumed not to bind the Crown and do not unless there is an express or implied provision in a particular statute to the contrary.⁵⁵ Even if there is a provision in a statute that the Crown is bound by it, this may not be the last word if there is an overriding Act such as a State Agreement Act.⁵⁶ The *Mining Act 1978* and State Agreement Acts prevail over the CALM Act to the extent of any inconsistency.

So for example the *Conservation and Land Management Act 1984* and the *Fire and Emergency Services Authority of Western Australia Act 1998* are not stated to bind the Crown so one looks to the provisions of the Acts to find that CALM, its employees and agents are bound by the requirements of the CALM Act to manage land in a certain way but they are not bound by the *Fire and Emergency Services Authority of Western Australia Act 1998* and vice versa; but both CALM and FESA are bound by the provisions of the *Environmental Protection Act 1986* and the *Land Administration Act 1997* because these latter Acts are stated to bind the Crown.

⁵³ One exception to this rule is the Bradken doctrine. Crown immunity may extend to other agencies which do not enjoy Crown immunity through the Bradken doctrine, or where an agency is subject to Ministerial direction: see *Soil Conservation Authority v Read* [1979] VR 557.

⁵⁴ The *Crown Suits Act 1947* overturned the immunity of the Crown to the common law.

⁵⁵ Whether or not a statute binds the Crown depends on whether it was enacted prior to *Province of Bombay v Bombay Municipal Council* [1947] AC 58; between the *Bombay* case and *Bropho v Western Australia* (1990) 171 CLR 1; or after *Bropho*. For statutes in the middle period the Crown is not bound unless by express words or necessary implication. The rule is not so inflexible in the other periods. If an Act is not stated to bind the Crown, then it is presumed that the Crown is not bound unless this presumption may be rebutted by judicial interpretation of the provisions of the material Act, see *Bropho v Western Australia* (1990) 171 CLR 1. For example under the *Forest Products Act 2000* (FP Act) any employee of the Forest Products Commission (FPC) is protected from liability that might have been incurred in good faith implementing actions authorised by the FPC but the Crown and the FPC are stated not to be exempt for liability for an action of that employee: see the FP Act section 67(1): see *Bridgetown/Greenbushes Friends of the Forest Inc. v Executive Director of the Department of Conservation and Land Management and Ors* (1997) 18 WAR 126.

⁵⁶ State Agreement Acts have been a tool often used by successive Western Australian governments for example, to avoid the provisions of certain Acts applying to the Crown, private persons or companies when large infrastructure agreements are made. There are a number State Agreement Acts in the south west of WA which relate to mining and to plantation forestry operations. State Agreement Acts which were enacted prior to 1 January 1972 (before enactment of the first *Environmental Protection Act 1971*) may prevail over the *Environmental Protection Act 1986*: the EP Act section 5.

The other important distinction between the Crown and other parties is in respect of civil liability for certain acts. The time⁵⁷ in which a complainant has to commence an action against the Crown, is generally much shorter than it would be against another party.⁵⁸ Furthermore, there is a statutory obligation to provide prior notice of the action to the Crown.

Fire Management of General Application

1. Introduction

The control of wildfire⁵⁹ and pre-emptive burning is critical to the good management of land in Western Australia. Fire occurs over a variety of land tenures and for a number of different reasons. Sources of wildfire include weather events; conservation, agricultural, horticulture and industrial practices; rubbish and hazardous waste disposal; criminal negligence or arson;⁶⁰ the activities of government agencies; local government; companies; private persons such as campers and tourists; and traditional owners. Accordingly, the management of fire is ranges across many statutes, regulations and policies. Non-neutral terminology can colour issues, cause unnecessary conflict, or create false expectations and understandings.

Bushfire or wildfire?

Fuel reduction or hazard reduction?

Prescribed, controlled or pre-emptive burn?

Disturbance or destruction?⁶¹

Where there is any doubt about a term, it should be defined for the purpose for which it is used,⁶² especially in any Act or regulation that creates authority, duties or obligations of State government agencies, companies or individuals.

⁵⁷ Generally referred to as the limitation period. For example, in respect of negligence, the limitation period generally commences to run after the damage is known or ought reasonable have been known to have occurred.

⁵⁸ The *Crown Suits Act 1947* section 6.

⁵⁹ The impact of fire on land in WA has been documented by a number of sources including by satellite imagery. DOLA and the CSIRO have undertaken a fire history of WA and have been mapping hot spots daily for six years. Records, photographs and satellite surveys of these records and other information are available for inspection at the DOLA/CSIRO.

⁶⁰ Fire caused by arson or criminally negligent acts are criminal offences and will not be addressed in this paper. An analysis of arson is to be found in the combined discussion paper published in 1999 by the Arson Taskforce comprising the State government, the WA Police Service, the Fire and Rescue Service and the Department of CALM, *Flame Out: Combating Deliberate Fire Lighting in Western Australia*.

⁶¹ D Mercer *A Question of Balance* 1995 2nd edn The Federation Press page 98.

⁶² For example the broad definition of take under the *Wildlife Conservation Act 1950*.

The source of the powers and functions of government departments may be found in the Act that creates the department⁶³, the Acts which the department administers⁶⁴ and any delegated authority under various Acts⁶⁵. Furthermore, the common law applies to government department officers unless it has been modified by statute.

Some statutes regulate specific entities or specific land tenures. Other statutes can regulate the impact of wildfire and burning practices on a variety of land tenures in Western Australia. The four examples of general application to burning practices I have examined are statutes relating to environmental impact, taking flora and fauna, clearing generally and clearing in a water catchment.

2. Fire and environmental impact

The *Environmental Protection Act 1986 (WA)* establishes a system for assessing the environmental impact of certain proposals. The Crown is bound by the Act.⁶⁶ The Act prevails over every other State act to the extent of any inconsistency, except a State Agreement Act signed before 1 January 1971⁶⁷ or an order by the Minister for the Environment approved by the Governor.⁶⁸

Any person may refer, to the Environmental Protection Authority (the EPA), a proposal to burn which will, if implemented, have a significant effect on the environment.⁶⁹ The EPA, on advice from the Department of Environmental Protection (the DEP), will decide whether the proposal should be assessed and if so, determine the appropriate level of assessment. Thus, a particular proposal to undertake pre-emptive burning could be referred to and assessed by the EPA, if it is likely to have a significant effect on the environment.⁷⁰

⁶³ Government departments are generally created under section 35 of the *Public Sector Management Act 1994*. Departments are generally not separate legal entities which can sue or be sued.

⁶⁴ For example the powers and obligations of the Department of CALM under the *Conservation and Land Management Act 1984*.

⁶⁵ For example the powers and functions of the Minister for Lands are delegated to various officers of the Department of Land Administration (DOLA).

⁶⁶ *Environmental Protection Act 1986* section 4.

⁶⁷ *Environmental Protection Act 1986* section 5.

⁶⁸ *Environmental Protection Act 1986* section 6.

⁶⁹ *Environmental Protection Act 1986* section 38(1).

⁷⁰ There are other adverse environmental effects from pre-emptive burning, including:

- € The smoke levels in urban areas caused by pre-emptive burns may be of concern. The Conservation Commission's fire management objectives should include avoidance of air pollution in urban areas. The CEO of the Department of Environmental Protection has broad powers in relation to pollution. Smoke resulting from pre-emptive burning can fall within the definition of "pollution" under the *Environmental Protection Act 1986* section 3. That definition is extremely broad, and includes alteration to the environment to its degradation. The Supreme Court qualified the definition of pollution to require that to be *pollution*, the alteration of the environment must be harmful or potentially harmful to the health, welfare, safety or property of human beings or potentially harmful to animals or plants. Even with this qualification, the production of large quantities of smoke through burning

In the past the EPA has assessed State forest management plans (FMP). These plans may provide for certain burning regimes. The EPA has formed the view that any specific burning proposal undertaken pursuant to an assessed management plan cannot be assessed because of the prohibition in the Act against assessing the same proposal twice.⁷¹ If a proposed burn is not consistent with an assessed management plan, it is arguable that it should be assessed as a different proposal. Nevertheless, this situation results in the somewhat bizarre situation where a small proposed pre-emptive burn on private property requires referral to the EPA but a large scale burn proposed to be undertaken on reserved Crown land in the area the subject of an assessed FMP (in a way not contemplated by the assessed FMP) cannot.

The Environmental Protection Authority (the EPA) has concluded (at least in relation to State forests and timber reserves) that publicly acceptable methods of pre-emptive burning should be developed which are aimed at achieving the multiple objectives of human safety and protection of the timber resource, and the protection of sensitive species and ecosystems.⁷²

The *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* (the EPBC Act) applies in Western Australia. The flora and fauna provisions of the EPBC Act bind the Crown. The likely triggers under the EPBC Act in respect of burning in the south west of Western Australia include possible threats to threatened species and ecological communities.

In areas of Western Australia covered by the Regional Forests Agreement⁷³ the State and Commonwealth governments have agreed to the requirements for ecologically sustainable forest management.⁷⁴ In respect of reserves identified

operations may fall within the definition of *pollution*: see D Mercer *A Question of Balance* 1995 2nd edn the Federation Press, page 202.

∄ A further environmental impact of forest fires is the contribution to atmospheric warming by the production of significant amounts of carbon dioxide.

⁷¹ Under the *Environmental Protection Act 1986* a "proposal" can only be assessed once, unless it is significantly different from the initial proposal. Under proposed amendments to the EP Act there will be a new class of proposal called a strategic proposal. If implemented this will mean that a proponent can refer a strategic plan for assessment and conditions imposed on that plan can be imposed on significant proposals that form part of that strategic plan. If a significant proposal is different from that contemplated by the strategic plan, it may be separately assessed. Proposed amendments to the EP Act are likely to introduce environmental harm offences which extend to the removal of indigenous vegetation by burning, see the *Environmental Protection (Land Clearance) Amendment Bill 2001*.

⁷² In the Executive Summary of the Progress Report on Environmental Performance and mid-term Report on Compliance: Forest Management Plans 1994 – 2003, *EPA Bulletin* 912, November 1998 at page ii, clause 6.

⁷³ The Bill enacting the Regional Forest Agreement as an Act of Federal Parliament passed through the Senate on 21 March 2002. This Act received royal assent on 5 April 2002 but is not yet operative.

⁷⁴ RFA at paras 40 – 55.

under the CAR⁷⁵ reserve system, the parties have agreed that the EPBC Act; actions under the *Wildlife Conservation Act 1950* and the then *Endangered Species Protection Act 1992 (Cth)*;⁷⁶ and the Western Australian forest management system provide for the protection of rare or threatened flora and fauna species and ecological communities.⁷⁷ Where species restricted to Western Australia are listed under both Acts, any new or revised recovery plan must be jointly prepared and funded by the parties to the Regional Forest Agreement.

3. Fire, flora and fauna

The *Wildlife Conservation Act 1950 (WA)* (“the WC Act”)⁷⁸ is the primary statute for the protection and preservation of native flora and fauna in Western Australia. The Conservation Commission is responsible for the conservation and protection of flora and fauna⁷⁹ throughout Western Australia through the agency of CALM and its Executive Director.⁸⁰ The WC Act does not bind the Crown with respect to fauna,⁸¹ but it binds the Crown in respect of *taking* rare or endangered flora.

The WC Act prohibits the *taking* of rare or endangered flora, and fauna declared to be protected.⁸² *Taking* under the WC Act is defined broadly⁸³ and there is little doubt that this includes *taking* by fire.⁸⁴ Accordingly, statutory authorities enjoying Crown immunity and proposing pre-emptive burning activities require a licence to *take* declared flora⁸⁵ but are not a licence to *take* fauna.

⁷⁵ The CAR system is an acronym for Comprehensive, Adequate and Representative as applied to the Conservation Reserve System for WA forests.

⁷⁶ This Act has been repealed in favour of the *Environmental Protection Biodiversity Conservation Act 1999(Cth)*.

⁷⁷ RFA agreement clause 56.

⁷⁸ It has been proposed to replace the WC Act with State biodiversity conservation legislation but there is as yet no Bill before State parliament.

⁷⁹ *Conservation and Land Management Act 1984* sections 19(1)(c)(iii) and 56(1)(d) and 55(1)(g).

⁸⁰ *Wildlife Conservation Act* section 7; and the *Conservation and Land Management Act 1984* section 33 (1)(d).

⁸¹ *Bridgetown-Greenbushes Friends of the Forest v the Conservation Commission* Supreme Court of WA, Unreported, 17 June 1997, library number 970301.

⁸² Declared by the Minister for the Environment. All native fauna are declared to be protected in WA, unless otherwise gazetted.

⁸³ “to take” in relation to any fauna, includes to kill or capture any fauna by any means or to disturb or molest any fauna by any means or to use any method whatsoever to hunt or kill any fauna whether this results in killing or capturing any fauna or not; and also includes every attempt to take fauna and every act of assistance to another person to take fauna and derivatives and inflections have corresponding meaning;

“to take” in relation to any flora includes to gather, pluck, cut, pull up, destroy, dig up, remove or injure the flora or to cause or permit the same to be done by any means, see the *Wildlife Conservation Act 1950* section 6.

⁸⁴ *Corkhill v Forestry Commission (NSW)* (1991) 73 LGRA 126; and *Forestry Commission (NSW)* (1991) v *Corkhill* (1991) 73 LGRA 247.

⁸⁵ By the written approval of the Minister for the Environment or her delegate.

Local governments do not enjoy Crown immunity and would require a licence to *take* protected fauna, or rare or endangered flora by pre-emptive burning.

Together with the management of nature reserves⁸⁶ and wildlife sanctuaries⁸⁷ on Crown land, the Executive Director of CALM can enter agreements for the management of private land as a nature reserve or for some other public purpose, provided the affected local government has prior notice.⁸⁸

On private land:

- ≠ the fauna provisions of the WC Act apply;
- ≠ protected flora can be *taken* by burning undertaken by the owner or occupier or by some other person with the permission of the owner or occupier; and
- ≠ flora which is declared rare, extinct or otherwise in need of special protection cannot be taken without the permission of the Minister for the Environment.⁸⁹

4. Fire and soil and land conservation

The *Soil and Land Conservation Act 1945* and the *Soil and Land Conservation Regulations 1992* limit a landowner's common law right to clear his or her land. This Act is not expressed to bind the Crown. However, in applying the principles of statutory interpretation, it is arguable that although the Crown may not be bound by the requirement to lodge a notice of intention to clear land, it may be bound by other provisions of the Act.

Burning can be said to effect clearing⁹⁰ for the purpose of this Act. However, it is important to recognize that for provisions in respect of the notice of intention to clear to apply, the clearing by burning must effect *land degradation*⁹¹ that is detrimental to the present or future use of the land.⁹² Whether *land degradation* and *change of use* includes biodiversity loss is unclear but it is my opinion that law reform should be implemented to include biodiversity loss as a certain trigger of the requirement to Lodge a notice of intention to clear and that the provision should clearly bind the Crown.

⁸⁶ Declared under the *Wildlife Conservation Act 1950*.

⁸⁷ Declared under the *Wildlife Conservation Act 1950*.

⁸⁸ *Conservation and Land Management Act 1984* section 16.

⁸⁹ *Wildlife Conservation Act 1950* section 23F.

⁹⁰ *Soil and Land Conservation (Clearing Control) Regulations 1991*, regulation 2, "to clear" under these regulations in relation to any land means to cut down, destroy or otherwise damage trees, shrubs, grass or other plants on that land but does not include the cutting of trees for firewood or posts for timber.

⁹¹ By the use of the word *includes* in the definition of *land degradation* it is arguable that *land degradation* has a wider ambit than that described in the section: see Bennett MB & Clement JP *The Law of Landcare in Western Australia 2nd* ed page 94 at footnote 9.

⁹² *Soil and Land Conservation act 1945* section 4.

4.1 The Commissioner of Soil and Land Conservation

The Commissioner of Soil and Land Conservation⁹³ has functions which include the:

- € prevention and mitigation of land degradation;⁹⁴ and
- € supervision of land vested in and managed by public authorities,⁹⁵

which accordingly provides a role in the management of burning practices of private landowners and government agencies which might cause land degradation.

Government departments and public authorities are authorised to cooperate with the Commissioner to carry out the purposes of the *Soil and Land Conservation Act*.⁹⁶ The Commissioner may advise any government department or public authority as to the care and use of any Crown lands, in any case where the Commissioner considers that land degradation issues are raised by particular burning practices.⁹⁷

A memorandum of understanding has been entered into by a number of agencies to coordinate the exercise of their respective powers in respect of the protection of remnant vegetation on rural zoned land in southern Western Australia.⁹⁸

4.2 Soil Conservation Notice

Under the *Soil and Land Conservation Act*, to *clear*⁹⁹ in relation to land means to cut down, destroy or otherwise damage trees, shrubs, grass or other plants on that land.¹⁰⁰ An occupier or owner of land or a third party¹⁰¹ (but arguably not the

⁹³ *Soil and Land Conservation Act 1945* section 7(1).

⁹⁴ Defined to include soil erosion and the removal or deterioration of natural or introduced vegetation that may be detrimental to the present or future use of the land: the *Soil and Land Conservation Act 1945* section 4.

⁹⁵ *Soil and Land Conservation Act 1945* sections 14(h) and 17.

⁹⁶ *Soil and Land Conservation Act 1945* section 18(b).

⁹⁷ *Soil and Land Conservation Act 1945* section 19(1).

⁹⁸ These include the Commissioner of Soil and Land Conservation, the Environmental Protection Authority, the Water and Rivers Commission and the Departments of Environmental Protection, Agriculture, CALM, and was signed in 1997.

⁹⁹ This would include by burning.

¹⁰⁰ *Soil and Land Conservation Regulations 1992* regulation 2.

¹⁰¹ Under the *Soil and Land Conservation Act 1945* section 4 defines *owner* and *occupier* for the purpose of that Act, thereby modifying the common law definition as follows:

“Occupier”, in relation to land, means the person by whom or on whose behalf the land is actually occupied, or, if there is no such person, the person entitled to possession, and includes a person who, under a licence or concession relating to specified land vested in the Crown, has the right to take a profit à prendre in respect of the land.

Crown unless it is an owner land) which proposes to clear more than one hectare of land (where that clearing will result in a change of use of the land) must give a Notice of Intention to clear land, to the Commissioner of Soil and Land Conservation at least 90 days before the clearing.¹⁰² Where the clearing is for a firebreak,¹⁰³ there may be an exemption from filing a notice of intention to clear.

A Soil Conservation Notice (Notice) can be imposed (on any owner or occupier or any other person and may therefore include the Crown)¹⁰⁴ on any person who is causing or is liable to cause land degradation, to compel that person to take adequate precautions to prevent soil erosion or destruction of vegetation.¹⁰⁵ The Notice can direct that the owner or occupier refrain from or undertake certain activities.¹⁰⁶ It can reasonably be said that this includes prohibition against clearing effected by fire.¹⁰⁷

4.3 Soil Conservation Reserves

Crown land or private land may be compulsorily acquired, on the recommendation of the Minister, as a soil conservation reserve.¹⁰⁸ These reserves are placed under the control and care of the Minister for Agriculture to conserve the land and soil of the reserve and prevent injury to other land.

It is an offence to light a fire in a soil conservation reserve without the consent of the Minister.¹⁰⁹ The maximum fine for this offence is \$2,000.00¹¹⁰ but a further penalty equal to the market value of any damage done is recoverable as a

“Owner” in relation to land, includes every person who jointly or severally whether at law or in equity —

- (a) is entitled to the land for an estate of freehold in possession; or
- (b) is a person to whom the Crown has lawfully contracted to transfer the fee simple under the Land Administration Act 1997, or any other Act relating to the alienation of lands of the Crown; or
- (c) is entitled to receive or is in receipt of, or if the land were let to a tenant would be entitled to receive the rents and profits thereof whether as beneficial owner, trustee, or mortgagee; or
- (d) is the holder of any lease granted under the *Land Administration Act 1997*, or any other Act relating to the disposition of lands of the Crown.

¹⁰² *Soil and Land Conservation Regulations 1992* regulations 4 (1) and 4(3)(a).

¹⁰³ Firebreak is not defined and should be to avoid any possible use of this provision to effect land clearing.

¹⁰⁴ However a government entity maybe exempt from complying with a soil conservation notice if to do so would cause a substantial interference with the lawful operations: section 3 of the *Soil and Land Conservation Act* and the Schedule which lists Acts supplementary to the Act.

¹⁰⁵ *Soil and Land Conservation Act 1945* section 32(1), and also see the LA Act section 112 for the effect of a Soil Conservation Notice.

¹⁰⁶ *Soil and Land Conservation Act 1945* section 32(2).

¹⁰⁷ The Commissioner of Soil and Land Conservation has adopted the view that he will not require notice for public works in certain circumstances.

¹⁰⁸ *Soil and Land Conservation Act 1945* section 26.

¹⁰⁹ *Soil and Land Conservation Act 1945* section 28(1)(a).

¹¹⁰ *Soil and Land Conservation Act 1945* section 28.

fine.¹¹¹ The declaration of a soil conservation reserve is seen as a serious step, and I understand that only four such reserves have been declared.

4.4 Land Conservation Districts

Any part of the State can be declared a Land Conservation District (LCD).¹¹² In LCD areas, the WA Governor is authorised to make regulations for a variety of purposes, including prohibition against certain burning practices, clearing or changes in the use of the land.¹¹³ To date, only one LCD committee has sought and obtained such regulations.¹¹⁴

4.5 Other Acts

In respect of the interrelationship with other Acts, the *Soil and Land Conservation Act* has a special provision. The Act is to be read in conjunction with and supplements Acts listed in the Schedule to the Act. The Schedule includes the *Bush Fires Act 1954* and the *Environmental Protection Act 1971*¹¹⁵ but not the *Conservation and Land Management Act*.¹¹⁶ The Schedule has modified the common law principles of statutory interpretation. It appears that:

- € the *Soil and Land Conservation Act* prevails over the *Bush Fires Act* and the *Environmental Protection Act*¹¹⁷ to the extent of any inconsistency, unless the operation of *Soil and Land Conservation Act* substantially interferes with the operation of the provisions of those Acts listed in the Schedule, in which case those Acts prevail; and
- € the *Conservation and Land Management Act*¹¹⁸ does not appear in the Schedule so it appears on ordinary principles of statutory interpretation that it

¹¹¹ *Soil and Land Conservation Act 1945* section 28(2).

¹¹² Also referred to as a Soil Conservation District, and see *Soil and Land Conservation Act 1945* section 22 (1)(a).

¹¹³ *Soil and Land Conservation Act 1945* section 22 subsections (2)(a)(b)&(c).

¹¹⁴ *Soil and Land Conservation (Clearing Control) Regulation 1991 Part 2 - Bruce Rock* which prohibit the clearing of remnant native vegetation, which would include by burning.

¹¹⁵ And the *Closer Settlement Act 1927*; *Country Areas Water Supply Act 1947*; *Forests Act 1918*; *Land Administration Act 1997*; *Land Drainage Act 1925*; *Local Government Act 1995*; *Local Government (Miscellaneous Provisions) Act 1960*; *Main Roads Act 1930*; *Mining Act 1978*; *Petroleum Act 1967*; *Rights in Water and Irrigation Act 1914*; *Sandalwood Act 1929*; *Stock (Identification and Movement) Act 1970*; *Town Planning and Development Act 1928*.

¹¹⁶ *Soil and Land Conservation Act 1945* section 3 and see the Schedule to the Act.

¹¹⁷ The current *Environmental Protection Act 1986* has replaced the earlier *Environmental Protection Act 1971*. It is not clear how one should interpret the fact that the old Act remains in the Schedule as there have been other additions and changes to the Schedule since 1986. For example the *Land Administration Act 1997* has replaced the *Land Act* that it repealed.

¹¹⁸ However, the *Forests Act 1918* does appear in the Schedule but this Act was replaced by the *CALM Act* and by leaving the *Forests Act 1918* in the Schedule when it might have been removed may lead to the conclusion that the *Soil and Land Conservation Act 1945* prevails over the *CALM Act* unless there is substantial interference with the *CALM Act*.

would prevail over the *Soil and Land Conservation Act* to the extent of any inconsistency although the position is certainly not clear.

Fire and Water Catchments

The Water and Rivers Commission:

- € holds parcels of land in freehold title;
- € has vested in it Crown Reserves¹¹⁹ the larger of which are primarily major active water supply catchments; or
- € small reserves for uses of little relevance today.¹²⁰

The Water and Rivers Commission is authorized to establish bylaws to control land management practices that might affect water quality in any of the catchments under the *Country Areas Water Supply Act 1947*, the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* and the *Rights in Water and Irrigation Act*.

The primary protection of water resources in the south west of Western Australia is found in the *Country Areas Water Supply Act 1947*. The Act is not stated to bind the Crown. There are at least 45 surface water catchments in the south west of WA and there are 9 major storage reservoirs.¹²¹ Six surface water catchments¹²² have been declared to be controlled catchments under the Act. A person may not clear¹²³ (including by burning) more than 2,000 square metres of native or non-native vegetation (not under cultivation) from land without a licence from the Water and Rivers Commission.¹²⁴

Any action by any person (which arguably includes burning vegetation) that diminishes the quality of water in any water catchment is an offence under the *Metropolitan Water Supply, Sewerage and Drainage Act 1909*.¹²⁵ This Act is not stated to bind the Crown.

¹¹⁹ Changes to tenure or purpose of these reserves are administered by DOLA.

¹²⁰ For example water for travellers and stock.

¹²¹ Discussion paper January 2002: *A new forest management plan for Western Australia* published by CALM, at page 16.

¹²² These include the catchment areas of the Wellington Dam, Mundaring Weir, Denmark River, Kent River, Warren River and the Harris River Dam.

¹²³ *Country Areas Water Supply Act 1947* section 12AA: in respect of controlled catchments, this Act defines "to clear" to mean to cause or permit the indigenous undergrowth, bush, or trees on the land to be removed or destroyed, or so damaged as to eventually be destroyed, or to cause the removal from the land of vegetation not under cultivation.

¹²⁴ *Country Areas Water Supply Act 1947* section 12B.

¹²⁵ *Metropolitan Water Supply, Sewerage and Drainage Act 1909* section 16(c).

Management areas can be declared over watercourses and wetlands under the *Waterways Conservation Act 1976*.¹²⁶ The Act binds the Crown.¹²⁷ There are five such areas in the State.¹²⁸ The powers of the Water and Rivers Commission and its management authorities apply to public and private (with the consent of the owner) lands and to Crown land under the control of the Commission.¹²⁹ It is an offence to disturb the bed, banks or foreshores of any waters in such a way to endanger the stability of the banks or foreshores or vegetation under the *Waterways Conservation Regulations 1987*.¹³⁰

It is an offence to damage or clear native vegetation around a wetland registered¹³¹ under the South West Agricultural Zone Wetlands Environmental Protection Policy.¹³² These wetlands can be registered on private land with the consent of the owner, on Crown land with the consent of the management authority or unallocated Crown land on a motion of the EPA.

The importance of water catchment areas is recognised in the CALM Act.¹³³ CALM has the function of protecting the quantity and quality of water on lands vested in the Conservation Commission¹³⁴ and to prepare policies accordingly.¹³⁵

A management plan under the CALM Act that includes a public water supply catchment must be prepared by the Conservation Commission jointly¹³⁶ with the Water and Rivers Commission and any other relevant water utility.¹³⁷ Water catchment areas must be identified in a management plan.¹³⁸ A management plan that includes a water catchment area requires the approval of the Minister for Water Resources as well as the Minister for the Environment.¹³⁹ Where there is such a management plan in place, protection of water resources must be undertaken in accordance with a material management plan,¹⁴⁰ and in so far as

¹²⁶ *Waterways Conservation Act 1976* section 10.

¹²⁷ *Waterways Conservation Act 1976* section 6.

¹²⁸ Peel/Harvey Estuaries; Leschenault and associated rivers; Albany Harbour and associated rivers; Avon River; and Wilson and associated rivers.

¹²⁹ *Waterways Conservation Act 1976* section 25(2)(a).

¹³⁰ *Waterways Conservation Regulations 1987* regulation 8(f).

¹³¹ There is one such registered wetland, being Lake Monjingup in the Shire of Esperance.

¹³² Environmental Protection Policy (EPP) published by the EPA pursuant to the *Environmental Protection Act 1986* Part 111, the *South West Agricultural Wetlands Policy*. It covers land between Geraldton and Esperance that is not part of the Swan Coastal Plain which has its own EPP, the *Swan Coastal Plain Lakes Policy*.

¹³³ For example see the *Conservation and Land Management Act* section 55(1a)(d).

¹³⁴ *Conservation and Land Management Act* section 33(1)(dc).

¹³⁵ *Conservation and Land Management Act* section 33(1)(dd).

¹³⁶ Under amendments to the *Conservation and Land Management Act* presently before State Parliament, management plans will be prepared by the Conservation Commission only through the Department of CALM in **consultation** with the Water and Rivers Commission: see *Conservation and Land Management Amendment Bill 2002*.

¹³⁷ *Conservation and Land Management Act* section 54(3)((a)(iii).

¹³⁸ *Conservation and Land Management Act* section 55(1a)(d).

¹³⁹ *Conservation and Land Management Act* section 60(2d).

¹⁴⁰ *Conservation and Land Management Act* section 33(4).

land that is in a public water catchment, undertaken by the Conservation Commission¹⁴¹ or if undertaken by CALM, jointly¹⁴² with the Water and Rivers Commission and any relevant water utility.

Water allocation plans prepared by the Water and Rivers Commission and source protection plans prepared by the Water Corporation include objectives that CALM must take into account in preparing its forest management plans.¹⁴³

The exercise of the powers of the Executive Director of CALM in Part VIII Division 1¹⁴⁴ and Division 2¹⁴⁵ and of the CALM Act in respect of permits, leases, contracts and licences in State forests, timber reserves, certain Crown land and other land must be consistent with the *Country Areas Water Supply Act 1947* and the *Metropolitan Water Supply Sewerage and Drainage Act 1909*.

Fire and Regional Parks

Regional parks are large areas of land identified by the planning process to require special protection. Regional parks may include a variety of tenures including private land and Crown reserves. CALM prepares management plans for regional parks on behalf of the Department of Planning and Infrastructure. Examples of regional parks include the Swan Coastal Plain regional park and the Peel Regional Park.

Management plans for regional parks may address issues of wildfire control and pre-emptive burning. The responsibility for the management of wildfires can be confusing especially where there are mixed land tenures and different owners or occupiers of those land tenures, as there are in regional parks. Management plans can be helpful in describing the responsibilities of each owner and occupier of land in respect of the control of wildfire and pre-emptive burning practices.

Fire on Crown Land

1. General

The *Land Administration Act 1997* (the LA Act) regulates the control and management of, transfer of interests in and activities on Crown land in Western

¹⁴¹ *Conservation and Land Management Act* section 53(3)(a): will be repealed by the *Conservation and Land Management Amendment Bill 2002*.

¹⁴² *Conservation and Land Management Act* section 54(3)(a)(iii): *acting jointly* will be amended to *in consultation*: see *Conservation and Land Management Amendment Bill 2002*.
see *Conservation and Land Management Amendment Bill 2002*.

¹⁴³ The discussion paper at page 12.

¹⁴⁴ *Conservation and Land Management Act* section 87A (1)(d)

¹⁴⁵ Permits, licences, contracts and leases on Crown land which is not a timber reserve, State forest or certain other land.

Australia. Crown land comprises approximately 90% of Western Australian land. The LA Act binds the Crown.¹⁴⁶

Under the LA Act the Minister is authorised to delegate the powers under the LA Act to certain authorised individuals,¹⁴⁷ for example to the Departments¹⁴⁸ of Land Administration (DOLA) and CALM. DOLA administers the LA Act.

2. Policies and Land Act management plans

A Land Act management plan is a statutory policy authorised by the LA Act.¹⁴⁹ It may or may not be binding on the management authority responsible for its implementation¹⁵⁰ but it will not create obligations on the world at large without more.

The Memorandum of Understanding signed between CALM and the Forest Production Commission¹⁵¹ is in effect an agreed policy. It is unlikely to be binding on or enforceable by the parties to it without more, let alone the world at large.

3. Unallocated unreserved Crown land

The Minister for Lands is responsible for Crown lands,¹⁵² and is authorised to delegate this responsibility.¹⁵³ Unallocated Crown land is managed by DOLA. It is an offence to clear Crown land without the permission of the Minister for Lands.¹⁵⁴ CALM may be authorised by the Minister to manage unvested reserved Crown land.¹⁵⁵ There is lack of clarity as to the roles of DOLA and FESA in respect of the wildfire prevention and pre-emptive burning on unallocated Crown land.¹⁵⁶

An owner or occupier of land¹⁵⁷ that is adjacent to unoccupied Crown land can make a firebreak on that Crown land, and on obtaining a permit,¹⁵⁸ burn the bush which is on the firebreak and the shared boundary of his or her land (but not

¹⁴⁶ *Land Administration Act 1997* section 4.

¹⁴⁷ *Land Administration Act 1997* section 18. The classes of pre-scribed persons to whom the Minister may delegate powers under the LA Act is provided under the *Land Administration Regulations 1998* regulations 3A and 3B.

¹⁴⁸ Departments created under the *Public Sector Management Act 1994* section 35.

¹⁴⁹ *Land Administration Act 1997* section 49.

¹⁵⁰ The requirement of the statute under which it is made, the wording of the plan, and the objects of the plan will all play a role in determining the justiciability of a decision affected by a management plan.

¹⁵¹ See the *Conservation and Land Management Act 1984* section 33(1)(bb) and the *Forest Products Act 2000* section 10(l).

¹⁵² *Land Administration Act 1977* section 10(1)(a).

¹⁵³ *Land Administration Act 1977* section 9.

¹⁵⁴ *Land Administration Act 1977* section 267(2)(c).

¹⁵⁵ *Conservation and Land Management Act 1984* sections 33(1)(a), and 5(h), 5(g) & 7(4).

¹⁵⁶ See the application of the *Bush Fires Act 1954* section 34(1)(a).

¹⁵⁷ For example a leaseholder on Crown land.

¹⁵⁸ *Bush Fires Act 1954* section 34(1)(b).

more than 3 metres in width and not more than 200 metres from the shared boundary).¹⁵⁹ If an agency such as CALM has satisfied FESA that there is a sufficient management plan in respect of such land, this right may be removed by a public notice to that effect published in the Government Gazette.¹⁶⁰ A bush fire control officer can burn a firebreak on Crown land (which is not State forest) to abate a fire hazard, if the hazard cannot otherwise reasonably be abated,¹⁶¹ without a permit but subject to restricted times.¹⁶²

4. Crown reserves

4.1 General

There is no limit on the number and type of reserves over land that can be created under the LA Act. An agency responsible for the care, control and management of a reserve¹⁶³ can draft a management plan for amongst other things the prevention, control and extinguishment of bush fires in the reserve, subject to the approval by FESA.¹⁶⁴ Once a plan is approved, the powers in relation to burning on a Crown reserve might still be varied or cancelled for that reserve by notice published in the Government Gazette.¹⁶⁵

Certain Crown lands are vested in the Conservation Commission for management. The Conservation Commission is subject to the direction and control by the Minister for the Environment. Land must be managed according to any management plans as approved by the Conservation Commission¹⁶⁶ and the Minister for the Environment.¹⁶⁷

The *Conservation and Land Management Act 1985* (CALM Act) provides for the use, protection and management of certain public lands and waters and their flora and fauna, the establishment of management authorities for that purpose, and any incidental or connected purposes.¹⁶⁸ The CALM Act is not stated to generally bind the Crown, although Part VII of the Act in respect of the control and eradication of forest diseases does bind the Crown.¹⁶⁹ This is important because the control of wildfire and pre-emptive burning regimes can effect the spread of forest diseases.

¹⁵⁹ *Bush Fires Act 1954* section 34(1)(a).

¹⁶⁰ *Bush Fires Act 1954* section 34(1a).

¹⁶¹ *Bush Fires Act 1954* section 34(1)(c).

¹⁶² *Bush Fires Act 1954* sections 17 and 18.

¹⁶³ For example a nature reserve created under the *Wildlife Conservation Act 1950*, vested in the Conservation Commission and managed by CALM.

¹⁶⁴ *Land Administration Act 1997* section 49; and the *Bush Fires Act 1954* sections 7 and 34(1a)(a)

¹⁶⁵ *Bush Fires Act 1954* section 34(1a)(b).

¹⁶⁶ *Conservation and Land Management Act 1984* section 4.

¹⁶⁷ *Conservation and Land Management Act 1984* section 60.

¹⁶⁸ See the long title to the *Conservation and Land Management Act 1984*.

¹⁶⁹ *Conservation and Land Management Act 1984* section 80.

Under the CALM Act it is an offence to set fire to bush or grass on any land that is contiguous with a State forest or timber reserve,¹⁷⁰ without notice to a forest officer¹⁷¹ unless it is a fire for camping or cooking permitted under the *Bush Fires Act 1954*.¹⁷² It is unlawful to light or leave a fire within or within eight kilometres of a boundary of land to which the CALM Act applies or CALM managed land.¹⁷³ A CALM forest officer can enter CALM land which is under permit, lease, licence or contract to some other person, to prevent or suppress fire;¹⁷⁴ or call on anyone working or residing within 8kms of a fire occurring on land adjacent to any State forest or timber reserve.¹⁷⁵ CALM has published policies relating to fire.¹⁷⁶

4.2 Reserved Crown land not vested in the Conservation Commission and without a management plan

Unvested reserved Crown land is land which has been set aside by the Minister for Lands for a specific purpose but not vested in a management authority. Such land may be placed under the management of CALM even if the land is not vested in the Conservation Commission.¹⁷⁷ Unless the Minister has created an instrument in writing authorising an agency or person to burn on unvested reserved land, no one has statutory authority to undertake pre-emptive burning on that land.

4.3 Reserved Crown Land vested in the Conservation Commission under the CALM Act but without a management plan

In the absence of a management plan, a national park or conservation park¹⁷⁸ vested in the Conservation Commission, must be managed in such a manner that only *compatible operations* are undertaken.¹⁷⁹ *Compatible operations*¹⁸⁰ are defined to mean *necessary operations* which are approved by the Minister as being in her or his opinion compatible with the purposes for which the land is managed under the CALM Act. *Necessary operations* means those operations

¹⁷⁰ *Conservation and Land Management Act 1984* section 105.

¹⁷¹ Appointed under the *Conservation and Land Management Act 1984* sections 3 and 45.

¹⁷² *Bush Fires Act 1954* section 25(1)(a).

¹⁷³ *Conservation and Land Management Act 1984* section 104.

¹⁷⁴ *Conservation and Land Management Act 1984* section 120.

¹⁷⁵ *Conservation and Land Management Act 1984* section 113.

¹⁷⁶ For example, the Fire Management Policy No 19 produced in May 1987 to guide protection of the community and prevention of environmental harm from wildfire (objective 2.1) and for using fire as a management tool; and the CALM departmental guidelines *Fire as a sivicultural tool in the jarrah forest* 1997.

¹⁷⁷ *Conservation and Land Management Act 1984* section 33(2)(b).

¹⁷⁸ National Parks and Conservation Parks are created under the *Land Act 1933* or *Land Administration Act 1997*. Can only be cancelled by approval of both Houses of Parliament.

¹⁷⁹ Within the meaning of section 33A (2), *Conservation and Land Management Act 1984* section 33(3)(b)(ii).

¹⁸⁰ *Conservation and Land Management Act 1984* section 33A.

that are necessary for the preservation or protection of persons, property, land, waters, flora or fauna.¹⁸¹

Before the Minister approves any proposed *necessary operation* (including a pre-emptive burn) in the absence of management plan, the Executive Director of CALM must, in the manner specified in the CALM Act publicly advertise the proposal.¹⁸² An opportunity must be given to the public to make written submissions on any such operation, as if the proposal were a proposed management plan.¹⁸³ Subject to these conditions, the Minister may approve the proposal, with or without modifications, and may attach conditions to his or her approval.¹⁸⁴ The Minister may at any time revoke or amend the conditions of her approval.¹⁸⁵

A Conservation Zone¹⁸⁶ without a management plan must be managed according to management plan objectives.¹⁸⁷

4.4 Reserved Crown Land vested in the Conservation Commission and having a management plan

Management plans are in effect statutory policies, the development of which are detailed in Part V of the CALM Act. Management plans have been held not to bind CALM in so far as the detail of their implementation,¹⁸⁸ notwithstanding the provision in the CALM Act that land must be management in accordance with an approved management plan.¹⁸⁹

Management plans may contain plans for wildfire control including pre-emptive burning regimes. Under a management plan, CALM officers may be authorised to undertake pre-emptive burning to implement that management plan.

4.5 State Forest and Timber Reserves

The Executive Director of CALM own some land in freehold title. Most of this land¹⁹⁰ is managed by CALM as if it were State forest, although it is not bound by any management plans in respect of such land.

¹⁸¹ *Conservation and Land Management Act 1984* section 33A (1).

¹⁸² *Conservation and Land Management Act 1984* section 57.

¹⁸³ *Conservation and Land Management Act 1984* section 58.

¹⁸⁴ *Conservation and Land Management Act 1984* section 33A (4).

¹⁸⁵ *Conservation and Land Management Act 1984* section 33A (5).

¹⁸⁶ *Conservation and Land Management Act* section 62.

¹⁸⁷ *Conservation and Land Management Act 1984* sections 33(3)(b)(iii) and 56.

¹⁸⁸ *Bridgetown-Greenbushes Friends of the Forest v the Conservation Commission* (1997)18 WAR 126.

¹⁸⁹ *Conservation and Land Management Act 1984* section 33(3)(a).

¹⁹⁰ *Conservation and Land Management Act 1984* section 131.

State forests and timber reserves¹⁹¹ are vested in the Conservation Commission.¹⁹² The purpose and area of State forests can only be amended with the approval of both houses of State parliament.¹⁹³ State forests and timber reserve must be managed in accordance with a management plan.¹⁹⁴ If there is no management plan these reserves must be managed in accordance with the provisions for a management plan.¹⁹⁵ The current forest management plan (FMP) contains fire protection strategies which include requirements as to:

- € fire management and burning programs based on wildfire threat analysis;
- € taking into account threatened species in fire programs;
- € research; and
- € minimisation of smoke impacts on urban areas.¹⁹⁶

The EPA has assessed recent forest management plans. The Minister for the Environment set binding environmental conditions on the 1987 Forest Management Plan (FMP). These same conditions applied to the 1994 FMP in so far as they were consistent with the 1994 FMP. The Ministerial Conditions are binding on CALM and the Forest Products Commission. CALM is required to inform the public about its fire management in State forests and timber reserves each year in its annual report.¹⁹⁷ The annual report must include but is not limited to the following:

- € occurrences and causes of wildfires;
- € the purpose of all burns;
- € areas burned under different regimes of season and periodicity;
- € escapes; and
- € the contribution of prescribed burning to reducing wildfire.

¹⁹¹ Timber reserves have been created under section 25 of the *Forests Act 1918*, the *Conservation and Land Management Act 1984* section 10 and the *Land Act 1933*. Timber reserves created under the *Forests Act* or the *CALM Act* can be cancelled by the Governor on the recommendation of the Minister for the Environment according to section 10(1)(b) of the *CALM Act*. Timber Reserves created under the *Land Act 1933* require the approval of both Houses of Parliament.

¹⁹² *Conservation and Land Management Act 1984* section 19(1)(a).

¹⁹³ *Conservation and Land Management Act 1984* section 9, and the Forest Management Plan 1994 – 2003.

¹⁹⁴ *Conservation and Land Management Act 1984* section 33(3)(a).

¹⁹⁵ *Conservation and Land Management Act 1984* sections 33(3)(b)(iii) and 56.

¹⁹⁶ Forest Management Plan 1994 – 2003: Fire Protection Strategies at page 28.

¹⁹⁷ Forest Management Plan 1994 – 2003: environmental condition 15-2.

Furthermore under the RFA Agreement 1999,¹⁹⁸ it was agreed between the parties to the RFA that:

- € fire management plans would be established in consultation with local government, the bushfires brigade and landholders within the plan area;¹⁹⁹ and
- € annual and medium term fire management plans would be made publicly available.

A new FMP is being developed and the first stage of that process is through the document, “*A new Forest Management Plan for WA: Discussion Paper January 2002*”. The new FMP will apply to State forests and timber reserves vested in the Conservation Commission and will describe burning regimes for the management of the land for logging and the conservation of biodiversity applicable to State forests and timber reserves.²⁰⁰

One issue that has been raised with me is that under the previous arrangements for wildfire control CALM machinery was made available for fire fighting as were a number of CALM officers and field staff who fulfilled a secondary role as fire fighter. CALM still has a fire fighting role but much of the equipment now belongs to the Forest Products Commission (FPC) and many former CALM field staff are employed by the FPC. An arrangement between these separate entities may have been entered into but if not, may need clarification.

4.6 Nature reserves and wildlife sanctuaries

Nature reserves²⁰¹ and wildlife sanctuaries are created under the *Wildlife Conservation Act 1950* and vested in the Conservation Commission for management by CALM.

If there is a management plan²⁰² for a nature reserve or wildlife sanctuary,²⁰³ CALM is required to manage the nature reserve or wildlife sanctuary according to that plan.²⁰⁴

¹⁹⁸ Now enacted in the *Regional Forest Agreement Act 2002 (Cth)* which received royal assent 5 April 2002 but is not yet operative.

¹⁹⁹ See the CALM response to the Progress Report on Environmental Performance and mid-term Report on Compliance: Forest Management Plan 1994 – 2003: EPA Bulletin 912 November 1998, at Appendix 2, page 8 as to the obligations to prepare master burn plans and wildfire threat analysis.

²⁰⁰ The principles in respect of burning suggested for this new FMP are identified at Appendix 5.14 of the Discussion Paper.

²⁰¹ Nature Reserves are created for the purpose of conservation of flora and fauna. Changes to class A nature reserves require approval of both Houses of Parliament. Nature Reserves which are not Class A can be cancelled or amended by the Minister for Lands.

²⁰² See Part V of the *Conservation and Land Management Act 1984*.

Under the *Wildlife Conservation Regulations 1970*, pre-emptive burning is prohibited in a nature reserve (or wildlife sanctuary) without the authority of the Executive Director of CALM.²⁰⁵ This authority can only be given if the proposal complies with an approved management plan or in the absence of a plan only if it is a *necessary operation*.

In the absence of a management plan, CALM is required to manage land and the associated flora and fauna in nature reserves (and wildlife sanctuaries) in such a manner that only *necessary operations* are undertaken.²⁰⁶ *Necessary operations* are operations which are necessary for the preservation or protection of persons, property, land, waters, flora or fauna;²⁰⁷ for the purpose for which the land was reserved; or for which the care, control and management of the land was placed with CALM.²⁰⁸

So, protecting human safety and property from wildfire by pre-emptive burning is within the ambit of *necessary operations* under the CALM Act.²⁰⁹

Fire Management on Local Government Managed Land Including on Private Land

1. Introduction

Local governments are responsible for fire protection in all areas of Western Australia within their districts except for the Conservation Commission estate, other CALM managed lands and gazetted fire districts:²¹⁰ see the *Bush Fires Act 1954*; the *Local Government Act 1995*; the *Town Planning and Development Act 1928*: local, district and region planning schemes; and local laws.

Generally local government areas are divided into zones which have different fire control requirements. Local governments issue fire prevention plans, fire break notices, fire response plans, fire equipment strategies and planned fire permits. Local governments are required to notify CALM if they are conducting a pre-emptive burn within 3kms of a conservation reserve of national park.

²⁰³ Note that a *wildlife sanctuary* is a *nature reserve* for the purpose of the *Conservation and Land Management Act 1984* and the *Wildlife Conservation Act 1950*: see section 3 of the CALM Act and section 6 of the WC Act, including on private land: see section 16 of the CALM Act.

²⁰⁴ *Conservation and Land Management Act 1984* section 33 (3)(a).

²⁰⁵ *Wildlife Conservation Regulations 1970* regulation 46.

²⁰⁶ *Conservation and Land Management Act 1984* sections 33(3)(b)(i), and 33A(1).

²⁰⁷ *Conservation and Land Management Act 1984* section 33A (1).

²⁰⁸ *Conservation and Land Management Act 1984* section 56(1)(e).

²⁰⁹ *Conservation and Land Management Act 1984* section 33A(1).

²¹⁰ See the *Fire and Emergency Services Authority of Western Australia Act 1998* under which FESA operates. FESA is responsible for gazetted fire districts.

2. Fire management and FESA

The Fire and Emergency Service (FESA) was established 1 January 1999 following the gazettal of the *Fire and Emergency Services Authority of Western Australia Act*.²¹¹ FESA administers the *Fire and Emergency Services Authority of Western Australia Act 1998*, the *Bush Fires Act 1954*²¹² and the *Fire Brigades Act 1942*.²¹³

FESA²¹⁴ is authorised to act in conjunction with a person, local government, government department or other agency or instrumentality of the State or Commonwealth.²¹⁵ These entities are relieved of civil liability for anything done in good faith in the performance of a function under the emergency services Acts.²¹⁶

FESA's functions²¹⁷ relate to the provision and management of emergency services.²¹⁸ FESA administers the Bush Fire Service,²¹⁹ the Fire and Rescue Service and the State Emergency Service.²²⁰ FESA is an agent of the Crown and enjoys Crown Immunity.²²¹ FESA advises the Minister on policies²²² and develops plans for the coordination of emergency services.²²³

The Fire Services Division of FESA is responsible for fire control. This is done through the Fire and Rescue Service²²⁴ in gazetted fire districts²²⁵ and through

²¹¹ *Bush Fires Act 1954* section 7; and the *Fire and Emergency Services Authority of Western Australia Act 1998* section 4.

²¹² See prescribed functions under the *Bush Fires Act 1954* section 10.

²¹³ For FESA's functions under the *Fire Brigades Act 1942*, see Part VI of the *Fire Brigades Act 1942*.

²¹⁴ FESA is answerable to the Minister for Emergency Services in respect of its functions under the FESA Act, while local government is answerable to the Minister for Local Government in respect of its functions under the *Bush Fires Act 1954*.

²¹⁵ *Fire and Emergency Services Authority of Western Australia Act 1998* section 12(f).

²¹⁶ *Fire and Emergency Services Act 1998* section 37(1) and (3).

²¹⁷ FESA has the functions of —

- (a) advising the Minister on all aspects of policy in relation to emergency services;
- (b) developing plans for, and providing advice on, the management and use of emergency services; and
- (c) undertaking, coordinating, managing and providing practical and financial assistance to activities and projects relating to emergency services.

²¹⁸ *Fire and Emergency Services Act 1998* sections 11 and 13.

²¹⁹ A semi operational part of the Fire Services Division of FESA which operates outside gazetted Fire Districts.

²²⁰ *Fire and Emergency Services Act 1998* section 13.

²²¹ *Fire and Emergency Services Act 1998* section 5.

²²² See for example the Standing Orders and Administrative Procedures and Standing Operating Instructions introduced in 2000 – 2001 to guide operational and administrative functions of FESA.

²²³ *Fire and Emergency Services Act 1998* section 11.

²²⁴ Approximately 850 career fire fighters and 2,500 volunteer fire fighters from 130 urban areas.

²²⁵ Primarily in the Perth metropolitan area and major regional centres. Gazetted fire districts are staffed by permanent or volunteer staff. Where centres are managed by volunteers, FESA staff

the Bush Fire Service under the control of local government²²⁶ for areas that are not within gazetted fire districts,²²⁷ with infrastructure provided under the *Bush Fires Act 1954* and the *Fire Brigades Act 1942*.²²⁸

The Minister is authorised²²⁹ to declare prohibited burning times.²³⁰ However, FESA may suspend the operation of this prohibition as it determines to be necessary.²³¹ FESA may authorise a person to regulate, permit or define the class of burning which can be carried out during the period of suspension.²³² FESA may declare restricted burning times²³³ which means that fires cannot be lit except in accordance with a permit in writing²³⁴ from a bush fire control officer or the local government delegate.²³⁵

3. Fire management and local government

3.1 Local Government Act 1995

The *Local Government Act 1995* prescribes the functions and powers of local government. It does not generally bind the Crown.²³⁶

A local government is authorised to make local laws²³⁷ and these laws may relate to fire management.²³⁸ Local laws do not operate to the extent that they are

have a role in coordinating fire services. Local government is primarily responsible for fire prevention rather than fire fighting in gazetted fire districts.

²²⁶ The *Fire and Emergency Services Legislation Amendment Bill 2002* is before parliament to amend a number of Acts, but a significant change will authorise local governments to delegate their fire control responsibilities to a FESA officer in certain circumstances.

²²⁷ Gazetted fire districts are prescribed in Schedule 2 to the *Fire Brigades Act 1942*. In areas that are not gazetted fire districts, the local government is responsible for fire fighting and fire prevention. Local government is assisted by (but cannot be directed by) professional bush fire liaison officers appointed under the *Bush Fires Act 1954* sections 13 and 14.

²²⁸ Approximately 700 Bush Fire Brigades.

²²⁹ By a declaration published in the *Government Gazette*, *Bush Fires Act 1954* section 17.

²³⁰ For example in the Bridgetown-Greenbushes local government district restricted burning times are between 2 November – 26 April and prohibited burning times are between 15 December – 14 March.

²³¹ *Bush Fires Act 1954* section 17(4): The local government cannot issue a permit to burn in a prohibited burning time, but FESA may suspend the operation of the prohibited time by a written notice. Local government can vary restricted burning times: see the *Bush Fires Act 1954* section 17 and 18.

²³² *Bush Fires Act 1954* section 17(5).

²³³ By a notice published in the *Government Gazette*.

²³⁴ Regulation of permits is found under the *Bush Fires Regulations 1954*.

²³⁵ Or the CEO of the local government if there is no bush fire control officer, see the *Bush Fires Act 1954* section 18(6).

²³⁶ *Local Government Act 1995* section 3.3.

²³⁷ *Local Government Act 1995* section 3.5(1); the *Bush Fires Act 1954* sections 20(3) and 62.

²³⁸ See for example the Shire of Williams Firebreaks Local Law as amended in 2001.

inconsistent with the Act or any other written law.²³⁹ Local laws may prescribe fines for up to \$5,000 for offences under the local laws.²⁴⁰

The area in which a local government has control and in which its town planning scheme(s) and local laws apply is any part of the State as approved by the Governor and any part of another district by agreement with that other district.²⁴¹ The local government may perform its functions on land outside of its authorised district with the consent of the owner, occupier or manager of the land.²⁴² The local government is authorised to give notices in respect of certain things to any owners or occupiers of land.²⁴³

3.2 Bush Fires Act 1954

Legislation to control wildfires has been in place in Western Australia for over 140 years. Ordinance 15 of 1847 put in place penalties for anyone willfully or carelessly setting fire to grass, stubble, scrub or other natural vegetation between September and April. The penalty was a fine of up to 50 pounds, unless you were an *aboriginal native* or a *boy under 16*, in which case the penalty was up to 50 lashes. This ordinance preceded a series of Bush Fires Acts, leading to the enactment of the *Bush Fires Act 1954* in force today (as amended).²⁴⁴

The *Bush Fires Act 1954* does not bind the Crown. This means that its provisions do not bind CALM or DOLA without more,²⁴⁵ but they do bind local government, companies and individuals. *Bush* for the purpose of the *Bush Fires Act*, includes trees, bushes, plants, stubble, scrub and undergrowth, alive or dead, severed or not severed.²⁴⁶ *Occupier* is defined for the purpose of the Act.²⁴⁷

The *Bush Fires Act 1954* is primarily responsible for regulating the response to wildfire that threatens human health and private property on private land or land under the control of local government which is not in a gazetted fire district,²⁴⁸ but

²³⁹ *Local Government Act 1995* section 3.7.

²⁴⁰ *Local Government Act 1995* section 3.10.

²⁴¹ *Local Government Act 1995* section 3.19.

²⁴² *Local Government Act 1995* section 3.20.

²⁴³ *Local Government Act 1995* section 3.25.

²⁴⁴ The *Bush Fires Act 1954* has numerous provisions all of which cannot be explored in this paper. Any State Act or regulation can be purchased from the State Government Printer at 10 William Street Perth.

²⁴⁵ However, see the *Bush Fires Act 1954* section 33(1) if DOLA or CALM is an occupier for the purpose of the Act.

²⁴⁶ *Bush Fires Act 1954* section 7.

²⁴⁷ *Bush Fires Act 1954* section 7: *Occupier* is a person residing on the land or having charge or control of it, whether the person is the owner or tenant or a bailiff, servant, caretaker, or other person residing or having charge or control of the land and includes a person who as mortgagee in possession has possession of the land, while the land is unoccupied, and also a person who has the charge or control of 2 or more separate parcels of land, although the person resides on only one of the parcels.

²⁴⁸ See the long title to the *Bush Fires Act 1954*.

not land degradation or loss of flora and fauna caused by fire. The Act does authorise certain activities on certain Crown lands to protect private property.²⁴⁹

Fire under this Act is controlled by:

- € *Bush fire brigade officers* appointed by local government to manage smaller fires or assist at larger wildfires;²⁵⁰
- € *Bush fire liaison officers* appointed by FESA who provide advice and may be called on to assist at larger wildfires;²⁵¹
- € *Bush fire control officers* who are the firefighters appointed by local government.²⁵² These officers have a number of powers.²⁵³ They can issue permits to burn subject to certain fire weather restrictions.²⁵⁴ Where a bush fire is burning in or on forest land, or in or on Crown lands, a forest officer present at the fire has the powers and authorities conferred by the *Bush Fires Act 1954*.²⁵⁵
- € *Fire weather officers*²⁵⁶ who are appointed by local government and categorise determine fire risk times such as extreme and high; and
- € *Forest officers*²⁵⁷ who can act as bush fire control officers in certain circumstances.²⁵⁸

The *Bush Fires Act* authorises local government to appoint bush fire officers to undertake a number of functions under the Act.²⁵⁹ The local government is authorised to take such measures as appear to it to be necessary or expedient for preventing the outbreak of bush fires²⁶⁰ including a notice to the owner or occupier to make a firebreak²⁶¹ or abate a fire risk.²⁶² The nature of a firebreak in

²⁴⁹ *Bush Fires Act 1954* section 34(1)(a). See also certain sections of the *Bush Fires Act* which would bind CALM if it is an owner or occupier of land: see section 33(3).

²⁵⁰ *Bush Fires Act 1954* section 7.

²⁵¹ *Bush Fires Act 1954* section 12.

²⁵² *Bush Fires Act 1954* section 38.

²⁵³ *Bush Fires Act 1954* section 39.

²⁵⁴ *Bush Fires Act 1954* subsections 38(6)(h)&(i).

²⁵⁵ *Bush Fires Act 1954* section 39(2)(a).

²⁵⁶ *Bush Fires Act 1954* section 38(6)(c).

²⁵⁷ An enforcement officer of the Department of CALM appointed under the *Conservation and Land Management Act 1984* sections 3 and 45(1)(b).

²⁵⁸ For example *Bush Fires Act 1954* sections 39(2), 46 and 56.

²⁵⁹ *Bush Fires Act 1954* section 38(4)(a).

²⁶⁰ Subject to other provisions of the *Bush Fires Act 1954* and subject to directions from the local authority

²⁶¹ The width of firebreaks is generally not stated in the *Bush Fires Act 1954* but:

1. Three able bodied persons must be in attendance of a fire lit in restricted times until there is no smouldering or burning within 30 metres of a firebreak: see regulation 15B of the *Bush Fires Regulations 1954*.

each particular circumstance is not generally defined and this leaves the various firebreak provisions open to abuse in respect of unnecessary clearing of native vegetation.

Bush fire officers²⁶³ are authorised to enter land the subject of a valid notice which has not been complied with to undertake the works that the notice requires to be done.²⁶⁴

The responsibility for extinguishing wildfires in local government areas that are not gazetted fire districts rests with local government and bush fires brigades.²⁶⁵

Other rights and obligations under the *Bush Fires Act* include:

- ≠ the duty of occupiers of rural land to use all means possible to extinguish fires burning on their land during fire danger periods²⁶⁶ (while it is not an offence to fail to comply with this obligation, a breach of this duty could give rise to a claim for civil damages);
- ≠ the duty of occupiers of any land to extinguish bush fires occurring on their land;²⁶⁷
- ≠ the duty of occupiers of land to notify the outbreak of fire during fire danger periods;²⁶⁸
- ≠ the duty of occupiers of rural land to report the existence and location of a fire which cannot be extinguished, if practicable means of communication are available;²⁶⁹ and
- ≠ the right of local government to require an occupier of land to clear a firebreak.²⁷⁰

2. When burning *proclaimed plants* a firebreak must be 6 metres: see regulation 33 of the *Bush Fires Regulations 1954*.

3. A firebreak to the satisfaction of the local government must be made around an airstrip: regulation 39B(2) of the *Bush Fires Regulations 1954*.

4. A place where welding or cutting operations take place must have 5 metre wide firebreak: see 39C(d) of the *Bush Fires Regulations 1954*.

5. The form for a permit to burn clover in prohibited times under regulation 18 requires a firebreak of 3 metres: see the Standard form at the appendix to the *Bush Fires Regulations 1954*.

²⁶² *Bush Fires Act 1954* section 33(1).

²⁶³ In certain circumstances FESA can take over this role: see the *Bush Fires Act 1954* section 35.

²⁶⁴ *Bush Fires Act 1954* section 33(4)(a).

²⁶⁵ *Bush Fires Act 1954* Part IV.

²⁶⁶ *Bush Fire Act 1954*, section 28.

²⁶⁷ *Bush Fires Act 1954* section 28.

²⁶⁸ *Bush Fire Act 1954*, section 28.

²⁶⁹ *Bush Fire Act 1954*, section 28(1).

²⁷⁰ *Bush Fires Act 1954* section 33.

Local governments may issue permits to burn in controlled burn times.²⁷¹ A permit to burn is not necessarily a defence to the charge of lighting a fire.²⁷² The local government is not required to consider the biodiversity loss associated with a pre-emptive burn²⁷³ of native vegetation when considering an application for a permit to burn. It would be helpful in terms of biodiversity conservation if there were certain well defined clearing principles to which the local government must have due regard when considering an application for a permit to burn.

3.3 Town Planning and Development Act 1928

The *Town Planning and Development Act 1928* regulates the subdivision and development of land. This Act binds the Crown unless stated otherwise.²⁷⁴

Conditions can be applied by the Western Australian Planning Commission to an approval by the Commission of an application to it for a grant of subdivision of land. The subdivision approval conditions may, for example, include a condition that a bush fire management plan be prepared to protect subdivided land from wildfire or neighbouring land from the escape of fire from the subdivided land.

The Commission is authorised to determine the conditions of a subdivision and may depart from the recommendation of the relevant agency or local government. The Commission is not required under the *Town Planning and Development Act* to implement a recommendation of FESA or CALM even if such a recommendation is made a condition of the subdivision decision. This is because the Commission is the agency responsible for deciding that subdivision conditions have been satisfied and may do so notwithstanding that the conditions have not been satisfied.

The *Town Planning and Development Act 1928* also authorises the making of Interim Development Orders, town planning schemes or district planning schemes for the regulation of development on subdivided lots. Development decisions are made by local government after subdivision decisions are made. The local government can require bushfire protection conditions in respect of building types, building envelopes and the like. If the protection mechanisms are only included in a management plan or a policy they are unlikely to be enforceable.

The Commission and the Bush Fire Service have produced a joint publication the *Bush Fire Survival Manual 2nd edn March 1998*.

²⁷¹ *Bush Fires Act 1954* Division 5.

²⁷² *McCutcheon v Bateman*, unreported decision of the Supreme Court of WA, Appeal number 171 of 1985, delivered 8 November 1985, Pidgeon, J.

²⁷³ Unless the protection provisions under the *Wildlife Conservation Act* or the *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* are triggered.

²⁷⁴ *Town Planning and Development Act 1928* section 35.

3.4 Town Planning Schemes

Each local government area may be subject to one or more town planning schemes and may also be subject to a region planning scheme.²⁷⁵ These schemes control development in the scheme area. Development can be defined to include clearing by certain types burning, which would in turn require development approval by the Shire. Scheme can require certain fire prevention measures as part of a development approval.

Conclusion

The interlocking provisions of the various statutes that form the framework for fire management on the variety of land tenures in Western Australia are complex and fraught with difficulties of interpretation and application both for fire fighting and fire prevention. I have nursed patients with horrific burns in my past occupation as a nurse. I have stood in the face of bush fires and been pleased to leave it to others. It must make the burden on those people with the responsibility for wildfire management, and biodiversity protection and preservation so much more onerous where their powers, roles, duties and obligations are not abundantly clear to all concerned.²⁷⁶ Where this is so, it can reasonably be said that law reform and administrative guidelines should be high on the State government agenda.

²⁷⁵ Peel Region Scheme may be introduced into parliament at the end of 2002.

²⁷⁶ Angie Lyndon cartoonist provided her work pro bono: phone 9336 7517.

APPENDIX 1: Application of the law

Entities bound by which law	Crown (DOLA, CALM, Water and Rivers Commission, Western Australian Planning Commission)	Local government	Owner or occupier of private land	State Agreement Act parties
Common Law	*	*	*	*
EPBC Act	Yes	Yes	Yes	Yes
Regional Forests Agreement Bill 2002 once operative	Yes	Yes	Yes	Yes
Environmental Protection Act 1986	Yes	Yes	Yes	*
Environmental Protection Policy	Yes	Yes	Yes	*
Conservation and Land Management Act 1984	Crown is bound by the forest diseases Part. Otherwise the Crown is not bound, except CALM which is generally bound by the provisions of the Act			
Land Administration Act 1997	Yes	Yes	Yes	*
Unallocated Crown land – not managed	Yes, and require permission of Minister for Lands to burn unless a bush fire control officer making a firebreak if not in restricted time.	Adjacent owner or occupier may burn firebreak with permit	Adjacent owner or occupier may burn firebreak with permit	*
Unallocated Crown land with management plan	Yes, and burn according to management plan, all other things being equal.	Yes	Yes	*
Reserved Crown land not vested in CALM	Yes, no burning without permission of Minister for Lands	Yes, and no burning without permission of Minister for Lands	Yes, and no burning without permission of Minister for Lands	*
Crown land reserves vested in CALM without management plan.	The Crown is not bound but the Department of CALM is. Only permitted burning is a necessary operation under the CALM Act, which is an operation necessary for the protection of person, property, land, waters, flora or fauna which operation must first have been advertised.	Yes	Yes	*
State forest and timber	The Crown is not bound	Yes	Yes	*

reserves vested in the Conservation Commission	but the Department of CALM is. Burn generally according to management plan. Must comply with Ministerial conditions on plan.			
Soil and Land Conservation Act 1945	The Crown is not expressly bound but may be in part. The Crown is obliged to cooperate with the Commissioner for Soil and Land Conservation.	Yes	Yes	*
Soil and Land Conservation Act 1945 Notice of Intention to Clear	Unlikely	Yes	Yes	*
Soil and Land Conservation Act 1945 Soil Conservation Notice & Soil Conservation Reserve	Possibly	Yes	Yes	*
Soil and Land Conservation Act 1945 Land Conservation District Regulations	Possibly	Yes	Yes	*
Country Areas Water Supply Act 1947	No	Yes	Yes	*
Country Areas Water Supply Act 1947: Declared catchment	No	Yes	Yes	*
Metropolitan Sewerage and Water Supply Act 1909	No	Yes	Yes	*
Waterways Conservation Act 1976 and Regulations 1987	Yes	Yes	Yes	*
Local Government Act 1995	No	Yes	Yes	*
Bush Fires Act 1954	No	Yes	Yes	*
Fire Brigades Act 1942	No	Yes	Yes	*
Fire and Emergency Services Authority of Western Australia Act 1998	No but FESA is by specific provisions.	Yes	Yes	*
Town Planning and Development Act 1928	Yes, unless otherwise provided.	Yes	Yes	*
Town or Region Planning Schemes	Yes, but not in respect of subdivision applications.	Yes, but not with schemes outside district where these seek to operate within district unless by agreement.	Yes	*

* Bound unless expressly or impliedly excluded or qualified by statute, but where the Crown is a party to a State Agreement Act it is likely to enjoy the Crown immunities it otherwise has.

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