Planning for Integrated Natural Resources Management in WA

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CONTENTS

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INTRODUCTION: ACHIEVING 'ECOLOGICALLY SUSTAINABLE DEVELOPMENT'

It is nearly 10 years since the World Commission on Environment and Development popularised the concept of 'sustainable development' and called for the integration of economic and ecological considerations in decision making.[1] In June 1996, the report *Australia: State of the Environment* concluded that, although environmental awareness has increased dramatically in the past decade:

> *We do not yet have an integrated, system-based approach to the management of natural resources.* Until we do, environmental management will be characterised by ad hoc responses to urgent, emerging problems.... Overall, economic planning appears to take little account of environmental impacts. It is assumed that the first priority should be a healthy economy, and that problems can always be solved using the wealth created. The economy is a subset of human society which, in turn, is part of the environment. Progress towards sustainability requires recognition of this fundamental truth, and *a willingness to build environmental thinking into our economic planning.*[2]

This article considers how the various planning systems affecting the management of natural resources in the south-west of Western Australia can be better designed to provide 'an integrated, system-based approach to the management of natural resources'. Creating such an integrated approach is fundamental to achieving ecologically sustainable development ('ESD').

The article is divided into three parts:

- A discussion of what integrated natural resources management ('INRM') is and the use of planning systems as a technique for integration;
- A review of the current planning systems affecting natural resources management and the extent to which they provide for INRM; and
- Some concluding comments on reforms of the planning systems for achieving INRM and ESD.

INTEGRATED NATURAL RESOURCES MANAGEMENT

1. A definition

What is the meaning of 'an integrated, system-based approach to the management of natural resources'?[3] I suggest that there are four aspects to

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McMullen of the Ministry for Planning (WA) and Ms Margaret Bond, Faculty of Law, The University of Wollongong, for the helpful comments they made on a draft of this article.

1. WECD *Our Common Future* (Oxford: OUP, 1987) 62-63.
2. CSIRO *Australia: State of the Environment* (Melbourne: CSIRO Publishing, 1996) 15 (emphasis added).
3. Related concepts are 'integrated catchment management' and 'integrated natural resource

INRM:

- Integration of ecological factors into resource management decision making (ie, the consideration of both ecological and economic considerations in decision making);
- Integration of decision making across time to manage cumulative effects;
- Integration of decision making by different government agencies and land owners and managers with interests in and responsibilities for natural resources, with management boundaries being principally, though not exclusively, defined by water catchment boundaries; and
- Integration of decision making of different levels of resource management (ie, Commonwealth, State, regional, local and property).

2. Planning and integrated natural resources management

The principal techniques used to achieve INRM are: (a) institutional arrangements, and (b) planning systems (including environmental impact assessment).

My review will focus on planning systems and the environmental impact assessment ('EIA') of planning decisions as these are the most important decision making techniques for achieving INRM. Planning systems are especially important for their role in considering the cumulative effects of natural resources management, something which is difficult to do at the stage of individual development control. To achieve ESD, one needs to manage cumulative effects.

Although the design of the relevant institutional arrangements is integral to the operation of the planning systems, the limitations of space do not permit me to discuss them here.[4] All I can do is to give a diagrammatic overview of the institutional arrangements: see Figure 1. This shows a set of sectoral government agencies responsible for particular aspects of natural resources management (town planning, public lands, water resources and agricultural lands) and an Environmental Protection Authority ('EPA') acting as an environmental regulatory advocate. The sectoral agencies in respect of each planning system are identified in bold

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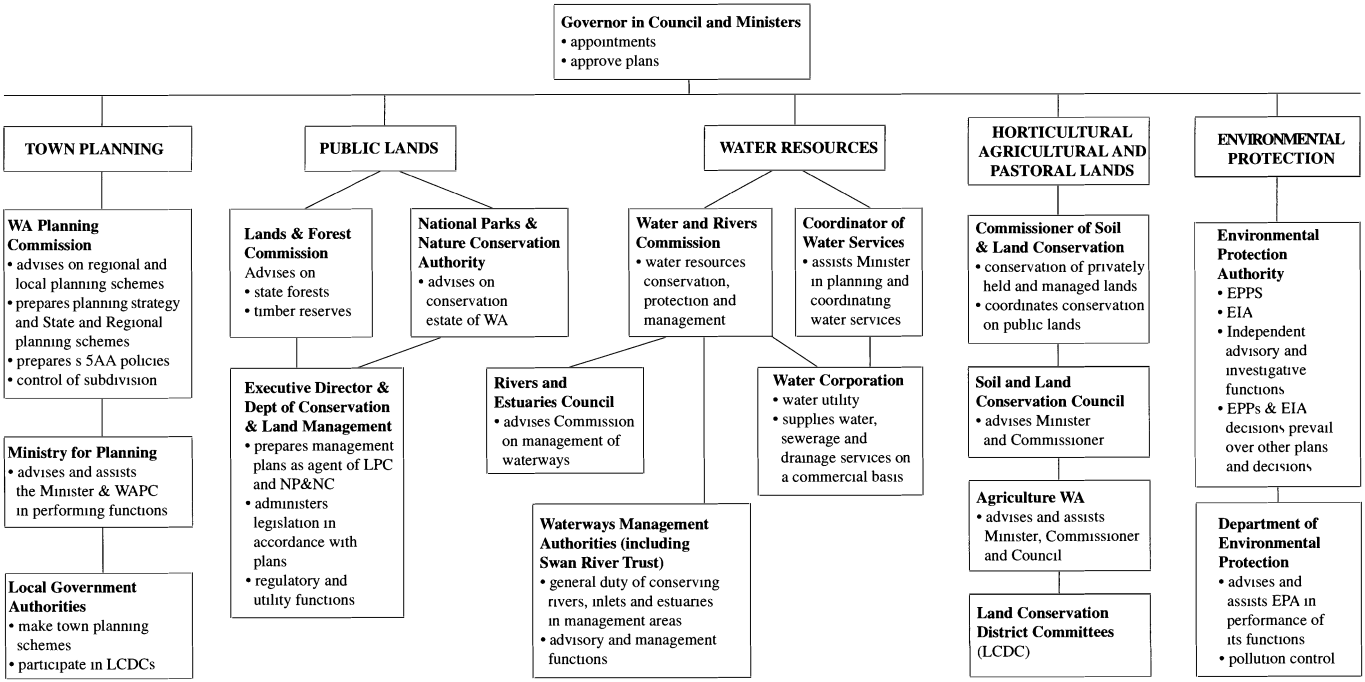
management': see R Wallis 'Integrated Natural Resource Management' 130 and A Gardner 'The Legal Framework for Planning and Integrated Resources Management' 142, 143-144 in R Bartlett, A Gardner & B Humphries (eds) *Water Resources Law and Management in WA* (Perth: Centre for Commercial and Resources Law, 1996).

4. I have previously described these institutions and discussed some of these issues: see Gardner ibid, 153-157; A Gardner 'Developing Norms of Land Management in Australia' (1994) Aust Journ of Natural Resources Law 127, 157-165; A Gardner 'Creating a Planning System for Integrated Natural Resources Management in WA' *Inaugural Conference on Integrated Water and Land Management* (Brisbane: QUT, July 1996).

Figure 1: Western Australian Institutional Structures for Natural Resources Management [5]



5 A simpler, but broader ranging, table listing the main natural resource management and regulation agencies is given in the draft WA Planning Commission *State Planning Strategy* (Perth, Nov 1996) 28

font. There are various non-statutory bodies and processes which are not included in the diagram.

3. Scope of natural resources management

Before reviewing the planning systems, I need to explain briefly the scope of resource management issues included in this paper. I have adopted a primary focus on the management of non-urban water resources and lands, including agricultural, forest and conservation lands and the flora and fauna that live on those lands.[6] I have also chosen a geographical focus on the south-west of Western Australia. I will not endeavour to discuss issues of Aboriginal land rights, waste management, point source pollution control, mining and fisheries. Nor will I specifically consider the regimes for management of natural resources for heritage and recreation purposes. I have not considered issues of integration with Commonwealth responsibilities, which raise issues of a different scale that I have addressed elsewhere.[7]

PLANNING SYSTEMS FOR NATURAL RESOURCES MANAGEMENT IN WESTERN AUSTRALIA

The planning systems included in the review are: (a) regional and local town planning; (b) management plans for public lands; (c) water resources management plans; (d) planning for the management of rural lands; and (e) environmental protection policies and environmental impact assessment.

The review addresses two basic points in respect of each planning system:

- Does the planning system have a statutory basis which provides for the following three factors:
  (i) objectives and content of the plans;
  (ii) procedures for making and amending the plans; and
  (iii) legal status and effect of the plans?
- Does the planning system provide for the integration of ecological factors into the resource use decision making?

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6. I have previously considered the meaning of 'land management law' in similar terms: Gardner 'Developing Norms of Land Management in Australia' supra n 4, 127-128.
7. A Gardner 'Federal Inter-governmental Co-operation on Environmental Management: A Comparison of Developments in Australia and Canada' (1994) 11 EPLJ 104.

1. Regional and local town planning

The town planning system has seldom been applied to natural resources management.[8] This is despite the fact that it is the most established planning system in the State and that the Town Planning and Development Act 1928 (WA) proclaims in the long title that it is 'an Act relating to the Planning and Development of Land for Urban, Suburban, and Rural Purposes'. Nevertheless, it is important to consider the basic operation of the system in relation to integration because it raises some generic issues of relevance and because it is necessary to consider how the town planning system can be integrated with other planning systems directly applicable to natural resources management.

The town planning system utilises both formal (statutory) and informal (non-statutory) procedures and instruments. An overview of the planning process is illustrated in Figure 2. This shows:

- The non-statutory 'structure planning process' carried out at the regional, district and local levels;
- The statutory regional and local 'town planning schemes'; and
- The policies of the WA Planning Commission (both statutory and non-statutory) and local government authorities (solely non-statutory);

— all of them impacting on subdivision and development control decision making by the Planning Commission and local authorities.

(i) Legal basis

The regional and local town planning system has a detailed, if somewhat antiquated and poorly structured, statutory base.[9] There is also a statutory power for the Western Australian Planning Commission ('WAPC') to make a State Planning Strategy ('SPS'), the first version of which is currently in draft form.[10] The planning legislation does address each of the three factors identified above, though not as well as one would expect of modern planning legislation. Three points may be noted.

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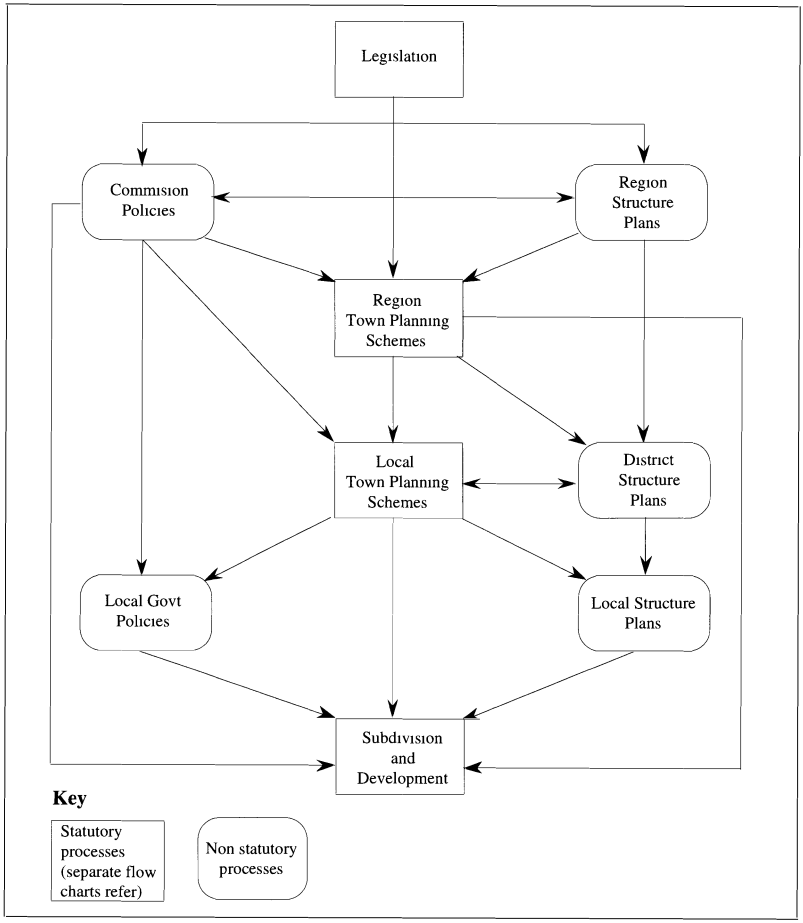
8. There are signs that this is beginning to change: see *Ironbridge Holdings Pty Ltd v State Planning Commission* (unreported) WA Town Planning Appeal Tribunal 28 Jul 1996; *Anglo Estates Pty Ltd v WA Planning Commission* (unreported) WA Town Planning Appeal Tribunal 22 Nov 1996. See also Shire of Serpentine-Jarrahdale Town Planning Scheme No 2, Amendment nos 39-40 *WA Govt Gazette* 3646-3650; though even these relate to rural residential developments on the outskirts of metropolitan Perth.
9. See, principally, WA Planning Commission Act 1985 (WA) ('WAPC Act'); Metropolitan Region Town Planning Scheme Act 1959 (WA) ('MRTPS Act'); Town Planning and Development Act 1928 (WA) ('TP&D Act'); Town Planning Regulations 1967. Other general legislation, such as the Local Government Act 1995 (WA); Strata Titles Act 1985 (WA); Subiaco Redevelopment Act 1994 (WA); and Swan Valley Planning Act 1995 (WA) are also relevant but not the core of the town planning system.
10. WAPC Act 1985 s 18(1)(b).

Figure 2: Overview of the planning process in Western Australia[11]



First, there is no general statement of objectives for the legislation. The statement of functions of the WAPC several times mentions the 'planning and co-ordination of land use and land development' but not once does it mention environmental protection or ESD.[12] As to the content of planning instruments, the draft SPS is to provide 'a basis for co-ordinating and promoting regional land use planning and land development and for the

11. Adapted from a chart in WA Planning Commission *Planning for People: An Introduction to the Planning System in WA* (Perth, Aug 1996) 17; reproduced with the Commission's permission.
12. WAPC Act 1985 s 18.

guidance of Government Departments and instrumentalities and local authorities on those matters'.[13] The content of regional and local planning schemes may address:

> the general object of improving and developing such land to the best possible advantage, and of securing suitable provision for traffic, transportation, disposition of shops, residence, factory and other areas, proper sanitary conditions and conveniences, parks, gardens and reserves, and of making suitable provision for the use of land for building or other purposes and for all or any of the purposes provisions, powers or works contained in the First Schedule.[14]

The provisions of the First Schedule of the Town Planning and Development Act 1928 contain detailed provisions for the matters which may be included in a town planning scheme but, having been drafted before the era of environmental concern, they do not mention environmental protection or conservation of natural resources for the purposes of ESD.

Secondly, the procedures for making and amending the planning schemes have a statutory basis,[15] though the detail of the procedures for making local planning schemes are set out in the Town Planning Regulations 1967 rather than in the statute.

Thirdly, the Metropolitan Region Town Planning Scheme and local town planning schemes have the force of law.[16] It is not clear whether non-metropolitan region planning schemes or the draft SPS have the force of law, though a regional planning scheme will prevail over an inconsistent local planning scheme.[17]

(ii) Integration of ecological factors

There has recently been much legal debate over the consideration of environmental factors in town planning decision making in Western Australia. This debate has concerned the impact of environmental factors under town planning legislation itself as well as the application of environmental impact assessment to town planning schemes. Despite the significant legal developments during the past year, there are still lingering problems involving consideration of environmental factors in relation to town planning instruments.

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13. WAPC Act s 18(1)(b).
14. TP&D Act s 6(1) and MRTPS Act s 30(2).
15. TP&D Act ss 7-7AA and MRTPS Act ss 30-33A.
16. MRTPS Act s 32 and TP&D Act s 7(3). The exact legal effect of planning schemes binding the subdivision decisions of the WA Planning Commission is an item of legal debate: see *State Planning Commission v Wallasley Pty Ltd* (unreported) Sup Ct 26 May 1995; *Ironbridge Holdings* supra n 8. See infra pp 440-442, for a discussion of the effect of the new TP&D Act s 20(5) and note the effect of TP&D Act s 32 regarding the undertaking of public works.
17. WAPC Act ss 18(1)(b), (ba), (1a)-(1g).

(a) Consideration of environmental factors under town planning legislation

The only express statement in the planning legislation that environmental factors must be taken into account either in the making or implementation of the planning instruments is the requirement that the Planning Commission shall have regard to 'conservation of natural resources for social, economic, environmental, ecological and scientific purposes' and to 'amenity and environment' in preparing Statements of Planning Policy under section 5AA(3) of the Town Planning and Development Act 1928. A local authority, in preparing or amending a town planning scheme, must have regard to any approved section 5AA policy and may incorporate it into its planning scheme in the original or a modified form. The provisions of a section 5AA policy incorporated into a planning scheme, with any modifications, have the same effect as any other provisions of a town planning scheme (ie, they have the force of law). Although there are other provisions in the Act which can be interpreted to permit or require the consideration of environmental factors in the exercise of subdivision and development control,[18] the relative lack of express provision in the legislation for the consideration of environmental factors has meant that, as recently as early 1996, there was still argument about whether town planning schemes and development decisions made pursuant to them could properly take into account environmental factors, especially in the absence of an applicable section 5AA policy. The issue now appears to have been resolved by the Supreme Court decision of Scott J in *Squarcini & Milino Pty Ltd v State Planning Commission,*[19] which holds that environmental factors can be taken into account. As well, the draft SPS released in November 1996 promotes the consideration of environmental factors in regional and local planning, and it advocates the use of regional planning to coordinate natural resources management by other government agencies.[20] I will briefly consider each of these legal developments.

In *Squarcini* an applicant for subdivision argued that environmental and conservation issues are not, in law, town planning considerations to be taken into account either by the WAPC in determining the application for subdivision or the Town Planning Appeals Tribunal in determining an appeal from the refusal of the application. The case concerned an application for subdivision of approximately 100 hectares of rural zoned land into two hectare lots to be used for rural residential development. Much of the land is still covered by native vegetation and has value as part of a proposed

18. TP&D Act ss 12A, 20A.
19. (Unreported) Sup Ct 17 Apri1996 no 960200, Scott J. I am informed by the solicitor for the applicant that there was no further appeal.
20. WA Planning Commission supra n 6, 19-29.

wetlands corridor. The WAPC's reasons for rejecting the subdivision application emphasised the land's high nature conservation value, especially the value of its inclusion in a proposed regional park reservation, as well as the absence of relevant planning controls over the land for rural residential purposes. On appeal to the Tribunal, it was held that:

> In appropriate circumstances, where the use, development or subdivision is interlinked with the environment then 'environmental considerations' become thereby relevant town planning considerations. The present appeal is such a case and the effect of the development on the wetlands is a relevant town planning consideration.[21]

The Tribunal held on the evidence that the environmental value of the land extended beyond its individual aspects and that, seen in the context of the area and the attendant public interest in its preservation, the deleterious effect on the environment of the subdivision proposal outweighed the suitability of the land for subdivision. On appeal to the Supreme Court, the applicant argued that the Tribunal was not entitled to determine the matter on the basis of environmental and conservation issues alone. Scott J held that the Tribunal could do so because, although the provisions relating to subdivision did not mention the factors that could be taken into account, the express mention of environmental factors in relation to Statements of Planning Policy indicated that they were proper town planning considerations.[22] Another reason given by Scott J was that the Environmental Protection Act 1986 (WA) provisions governing environmental impact assessment[23] did not require every proposal to be referred to the EPA, but only those likely to have a significant impact on the environment. The particular proposal had not been referred to the EPA nor had the EPA sought to comment upon it. The effect of his Honour's reasoning is that the consideration of environmental factors affecting a proposal is not the exclusive preserve or responsibility of the EPA and that planning authorities may properly consider such factors.

By contrast with planning legislation, the draft SPS enunciates an 'environmental principle' as the first of its guiding principles and is replete with references to the need for regional and local planning to consider environmental factors and to provide, especially through regional planning strategies, for the management of natural resources.[24] The draft SPS recommends that section 5AA policies be used more widely as a mechanism to assist in the management of critical environments and resources.[25] It

21. *Squarcini & Milino Pty Ltd v State Planning Commission* (unreported) Town Planning Appeal Tribunal 18 Aug 1995 (L Stein and CF Porter).
22. *Squarcini & Milino* supra n 19.
23. EP Act s 38.
24. WA Planning Commission supra n 6, xiii, 29 et seq.
25. Ibid, 27.

comments:

> One of the key roles of the WAPC is co-ordination of land use planning. This role is very important in resource management. Environmental issues, such as biodiversity, conservation and addressing land degradation, are largely a question of continuing management requiring the cooperation of resource managers and landowners. The WAPC should not necessarily take a dominant role in decision making, but it needs to take the lead in bringing agencies together where the statutory powers may lie elsewhere (such as the power to grant water extraction licences or control clearing).[26]

This coordinating function of planning authorities has been enhanced by the creation in 1996 of statutory duties for both the WAPC and local authorities to consult 'such public authorities and persons as appear ... to be likely to be affected' by a proposed planning scheme or amendment.[27] The coordinating role and duties of consultation will, at least, ensure that planning authorities will have to consider the environmental and natural resources management issues being confronted by other regulatory agencies. They will not, however, ensure that the planning decisions adequately provide for the management of those issues.

(b) Environmental impact assessment of planning schemes

The most detailed method for considering the environmental factors of a planning scheme is through an environmental impact assessment conducted by the EPA; this is especially important for the consideration of cumulative environmental effects. Here again there has been uncertainty which has led to the enactment of the Planning Legislation Amendment Act 1996 (WA),[28] providing for a specific regime of environmental impact assessment of town planning schemes.

In early 1993, legal opinion[29] began to emerge that regional and local town planning schemes, and amendments to them, were not assessable under Part IV of the Environmental Protection Act which had been in operation since 1 January 1987. In my view, this opinion was wrong.[30] In proposing the Planning Legislation Amendment Act as a response to this opinion, the Minister for Planning claimed[31] that the April 1995 decision

26. Ibid.
27. MRTPS Act s 33(2)(e); TP&D Act s 7(2aa) — inserted by the PLA Act 1996 ss 29 and 44, respectively.
28. No 23 of 1996, assented to on 11 Jul 1996 which came into operation on 4 Aug 1996: *WA Govt Gazette* 2 Aug 1996, 3615.
29. The then WA Department of Planning and Urban Development reportedly obtained this opinion but has not made it public.
30. A Gardner 'The Planning Legislation Amendment Bill 1994 (WA)' (1995) 12 EPLJ 10.
31. Second Reading Speech for the Planning Legislation Amendment Bill: see *Hansard* (WA) 29 Jun 1995, 6384.

of the Western Australian Supreme Court in *Chapple v the Environmental Protection Authority, Steedman and the State of Western Australia*[32] supported the view that town planning schemes were not subject to Part IV. In that case, the court held unanimously that the draft Burrup Peninsula Land Use and Management Plan, a non-statutory plan prepared under the auspices of the Department of Resources Development, was not a proposal that, if implemented, would have a significant effect on the environment and so could not be referred to the EPA for assessment under Part IV of the Environmental Protection Act. Again, I disagree with the Minister's claim, principally because statutory town planning schemes have an immediate legal effect when approved whereas the Burrup Peninsula Plan was a non-statutory instrument which the leading judgment of Pidgeon J held could not be implemented without further legislation to authorise executive decisions to alienate the land for industrial purposes. Nevertheless, as a result of advice from the Crown Solicitor's Office, the EPA began to do only informal comment on town planning schemes under section 16 of the Environmental Protection Act rather than a formal assessment under Part IV.

It was generally agreed that it is desirable for town planning schemes to be environmentally assessed. This gave the Minister for Planning the opportunity to introduce in the Planning Legislation Amendment Bill 1994 quite radical proposals for amendment of the Environmental Protection Act and the town planning legislation to provide a specific, and much reduced, process of environmental impact assessment for town planning schemes. The initial proposals caused a backbench revolt in the Government coalition and were withdrawn and re-submitted in the form of the Planning Legislation Amendment Bill 1995, which was passed by the State Parliament at the end of June 1996. It is not possible here to give a detailed description and analysis of the effect of the Planning Legislation Amendment Act. A flowchart of the basic application of the new EIA procedures in relation to local town planning schemes is shown as Figure 3 below.[33] My brief discussion aims only to identify the potential impact of the amendments for integrating environmental factors into planning decision making.

The potential significance of the Planning Legislation Amendment Act amendments for the integration of environmental factors into planning schemes lies in the power of the EPA, as an independent environmental advocate, to:

- Issue instructions concerning the scope and content of an environmental

32. (1995) 89 LGERA 310. The case is discussed in greater detail: see infra pp 445-447.
33. Infra pp 456-457. For one analysis: see V McMullen 'Planning and the Environment: How the Assessment of Town Planning Schemes will Work in Practice' (Dec 1996) Aust Environ Law News 30-35.

review of a planning scheme proposal,[34] which instructions must be made public;[35]

- Determine whether an environmental review has been undertaken in accordance with the EPA's instructions;[36] and
- Report to the Minister for Environment on its assessment of the scheme proposal and the 'conditions, if any, to which that scheme should be subject',[37] which report must also be made public.[38]

It should be noted, of course, that the EPA's instructions and report may be the subject of appeals by any person, including the planning authority,[39] and that the appeals will be determined by the Minister for the Environment in agreement with the Minister for Planning or, failing their agreement, by the Cabinet.[40] Similarly, the EPA's determination that a review has not complied with its instructions may be challenged by the planning authority requesting the Minister for Planning to consult with the Minister for the Environment with a view to agreeing on the question and, failing their agreement, the question will be determined by Cabinet.[41] Further, the final determination of the conditions to be imposed on a planning scheme or amendment will be made by the Minister for the Environment in agreement with the Minister for Planning or, failing such agreement, by the Cabinet.[42] These procedures add a strongly political dimension to the environmental assessment process, but the decisions of the Ministers and Cabinet will take place in the context of public knowledge of the EPA's decisions. Other Ministers will also be heeding the advice of their own departments which may be seeking to promote their own regulatory agendas through the EIA procedures. The practice of the EPA to consult other agencies on the preparation of the environmental review instructions, which is initiated by the statutory requirement of the EPA to inform 'any relevant decision making authority' of its decision to assess a planning proposal,[43] creates the opportunity for a range of natural resource management issues to be incorporated into the environmental review. The system provides the potential to build into planning schemes fundamental environmental standards for natural resources management.

34. EP Act s 48C(1)(a), inserted by PLA Act s 20.
35. EP Act s 48B, inserted by PLA Act s 20.
36. EP Act s 48C(2); MRTPS Act s 33F(1)(b); TP&D Act s 7A2(2) — inserted by PLA Act ss 20, 31 and 45, respectively.
37. EP Act s 48D(1)(d), inserted by PLA Act s 20.
38. EP Act s 48D(3), inserted by PLA Act s 20.
39. EP Act ss 100(1)-(2), as amended by PLA Act s 22.
40. EP Act ss 101(2a)-(2d), as amended by PLA Act s 23.
41. EP Act s 48J; MRTPS Act s 33F(3); TP&D Act s 7A2(3) — inserted by PLA Act ss 20, 31 and 45 respectively.
42. EP Act ss 48F, 48J, inserted by PLA Act s 20.
43. EP Act s 48A(1)(b), inserted by PLA Act s 20.

Early experience with the preparation of the environmental review instructions suggests that the EPA will endeavour to incorporate fundamental environmental research into the environmental assessment of planning proposals with a view to recommending fundamental environmental standards as conditions for the implementation of the planning schemes. For example, the environmental review instructions for the Peel Region Scheme[44] have identified environmental factors under the headings of 'biophysical impacts' (on terrestrial fauna and flora, regionally significant wetlands, water quality in the Peel-Harvey Estuary, and coastal areas), 'pollution management' (to protect water and air quality) and 'social surroundings' (including regionally significant urban and rural vegetation). In particular, the review instructions require the Environmental Review to estimate the possible changes to:

- 'Water quality in the [Peel-Harvey] estuary because of growth (including the industrial area)'; and
- 'Air quality to the greater Perth region through the additional [urban] growth'.

It is suggested that environmental conditions could be imposed on the Peel Region Scheme to require the allocation of land for the purposes of preserving water quality (eg, by the application of the principles of 'water sensitive urban design'[45]) and to set quality standards for water drainage to be met by any proposed urban development, even if that standard is a requirement to demonstrate that water draining from the urban development will not cause a deterioration in regional groundwater or surface water. Further, the environmental conditions could set regional air quality targets to be met before further urban development could proceed. In other words, the environmental conditions could really set standards for ESD. Although planners may baulk at implementing such conditions under the current planning legislation, there would appear to be no limits in the Environmental Protection Act to confine the scope of the conditions that may be imposed.

(c) Some lingering problems

The amendments in the Planning Legislation Amendment Act have been heralded as the solution to the environmental assessment of planning decisions. All proposals to make or amend a town planning scheme must now be referred by the planning authority to the EPA for a determination of whether the proposal will be subject to formal assessment.[46] The EPA will have 28 days to decide whether or not to assess the proposal and may

44. Issued by the EPA on 25 Oct 1996.
45. The WA Water and Rivers Commission is currently developing a manual of guidelines for water sensitive urban design.
46. MRTPS Act s 33E; TP&D Act s 7A — inserted by PLA Act ss 31 and 45, respectively.

offer advice on those proposals it decides not to assess. It is estimated that there will be approximately 550 referrals per year, of which only about five per cent will be assessed formally by the EPA.[47] The advice offered on unassessed proposals will be formularised and non-binding on the planning authority. Only the major planning proposals with very significant environmental impacts will be assessed by the EPA. The reality is that the environmental assessment of most planning proposals (the small and medium proposals with potentially significant cumulative effects) will continue to be done by planning authorities under the existing planning legislation.

There are two significant ramifications arising from this. First, as explained above, there is no clear statutory duty on planning authorities to consider the environmental impacts of their planning proposals. This is a serious problem, given that it is only recently that a clear legal view has emerged that planning authorities may take account of environmental factors in their decision making. Secondly, it is only environmental conditions on assessed planning schemes that are binding on the development decisions of planning authorities.[48] The Planning Legislation Amendment Act included an amendment which provides that subdivision decisions are in the discretion of the WAPC and are 'not fettered by the provisions of a town planning scheme except to the extent necessary for compliance with an environmental condition relevant to the land under consideration'.[49] Further, the town planning appeals system permits development proponents to appeal to the Minister against the decision of a planning authority and the Minister has a complete discretion in the determination of the appeal.[50] Should the proponent opt to appeal to the Town Planning Appeals Tribunal, the issues are to be determined 'according to the substantial merits of the case'.[51] It would appear that any environmental conditions that may be included in a planning instrument by a planning authority may be set aside in an appeal decision on a development proposal.

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47. I am grateful to Mr Gary Middle of the Department of Environment Protection for providing me with these estimates on 13 December 1996. Of course, they do not represent the official policy of the EPA.
48. Just how binding these conditions will be remains to be seen. The enforcement of the environmental conditions is primarily the prerogative of the planning authority: EP Act s 48H, inserted by PLA Act s 20; MRTPS Act s 43B; TP&D Act s 10A. Further, a proponent may appeal under the TP&D Act against the decision of a planning authority to refer a development proposal to the EPA on the grounds that the proposal raises environmental issues which were not assessed in the assessment of the planning scheme or that the proposal does not comply with the assessed scheme: TP&D Act s 8B, inserted by PLA Act s 46.
49. TP&D Act s 20(5), inserted by PLA Act s 50.
50. TP&D Act s 40.
51. TP&D Act s 52.

The interaction of the statutory and non-statutory plans with development controls may also test the environmental assessment system. The Planning Legislation Amendment Act amendments apply only to statutory planning schemes, yet non-statutory structure plans and policies may be implemented through development control decisions without first having been implemented through the statutory planning schemes. The Ministry for Planning says of its structure plans:

> Structure plans are an integral part of the planning process.... They provide a framework for the co-ordinated provision of services, infrastructure, land use and development.... They highlight the opportunities and constraints in the area of the plan and can provide the basis for amendments to town planning schemes. They are also used by the Commission and local government to help with the subdivision and development of land.[52]

The Town Planning Appeal Tribunal has held that non-statutory structure plans and policies may be relevant considerations for planning authorities exercising development control powers, including the discretionary approval of land uses under statutory town planning schemes.[53] Thus there is a loophole by which planning decisions may be implemented without being subjected to the new environmental assessment procedures. The remedy for this loophole could be to use section 38 of the Environmental Protection Act to refer to the EPA either such development proposals or the structure plans and non-statutory policies, if they are likely to have a significant effect on the environment. This would be the occasion to test the effect of the judicial opinions in *Chapple v the Environmental Protection Authority*.[54]

2. Public lands: CALM management plans

(i) Legal basis

Part V of the Conservation and Land Management Act 1984 (WA) creates a system of management plans for public lands (State forests, timber reserves, national parks, conservation parks and nature reserves)[55] managed by the Department of Conservation and Land Management ('Department of CALM'). The Act makes the controlling bodies (the Lands and Forests Commission and the National Parks and Wildlife Authority) responsible for the preparation of the management plans through the agency of the Department of CALM. The Act provides for the objectives[56] and contents[57]

52. WA Planning Commission supra n 9, 6.
53. *Permanent Trustee Aust Ltd v City of Wanneroo* (1994) 11 SR(WA) 1, 14-18.
54. Supra n 32. For a discussion of the case in relation to water resources management plans: see infra pp 445-447.
55. Conservation and Land Management Act 1984 (WA) ('CALM Act') s 5.
56. CALM Act s 56.
57. CALM Act s 55.

of the plans and sets out the procedures for making and amending the plans. It is arguable that section 33(3)(a) of the Act creates a legal duty on the Department to manage lands in accordance with a management plan. On the other hand, section 55(1) describes the content of management plans as:

(a) a statement of the policies or guidelines proposed to be followed; and

(b) a summary of the operations proposed to be undertaken.

There is litigation in the Supreme Court at this time which raises as one of its issues the legal status and effect of the CALM forest management plans.[58]

(ii) Integration of ecological factors

The statutory provision for the management plans clearly requires the consideration of ecological factors in decision making,[59] as does the Forest Management Plan 1994-2003. However, one of the main allegations in the present litigation is that the Department of CALM is not fulfilling this requirement of the Management Plan in relation to certain proposed logging operations because the Department does not do pre-logging surveys to gather information for the non-timber production values in the same way as it does particular surveys to gather information about the timber production values.

3. Water resources: a non-statutory planning system

(i) Legal basis

There is no statutory basis for the water resources planning system that has been developed by the previous Water Authority of Western Australia and has now been adopted by the new Water and Rivers Commission ('WRC'). Although the Water and Rivers Commission Act 1995 (WA) provides[60] that the functions of the WRC include assessing water resources

58. *Bridgetown Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (unreported) Sup Ct CIV 2092 of 1994 is one of 3 present actions against CALM raising this issue. On 13 February 1996, the Full Court of the Supreme Court gave the plaintiffs leave to appeal against the decision of Parker J striking out this ground of the statement of claim: see (unreported) Sup Ct 9 Aug 1995 no 950415.

59. Eg CALM Act s 55(1a) provides that '[a] management plan for an indigenous State forest shall specify the purpose, or combination of purposes, for which it is reserved being one or more of the following purposes — (a) conservation; (b) recreation; (c) timber production on a sustained yield basis; (d) water catchment protection; (e) other purpose being a purpose prescribed by the regulations'. The Forest Management Plan 1994-2003 declares that all State forests to which the Plan applies are reserved for the same combination of purposes listed in the Act: s 55(1a).

60. Water and Rivers Commission Act 1995 (WA) s 10(2).

and planning for the use of water resources and developing plans for flood management, the Act makes no provision for the three aspects of a planning system mentioned above. Despite this, there has developed a quite sophisticated six stage system of water resources planning which has been described (if not always applied) in the following hierarchical way:[61]

- Strategic water resources planning;
- Regional water allocation planning;
- Regional water resources development planning;
- Strategic public source planning;
- Management area planning; and
- Management of use.

This executive planning system seems to be guided by clear objectives, to have a defined content and to adopt conventional planning processes, including appropriate levels of public consultation. Nevertheless, there is much concern amongst water resources administrators that it has a limited impact on other government agencies regulating land use because it lacks legislative support.[62]

There are statutory powers to protect water resources for public water supply through the creation of catchment areas and water reserves (including groundwater resources) in which land use activities can be controlled by means of regulation or by-laws.[63] In addition, there is a strong statutory regime for the control of clearing in certain country areas water supply catchments where it was not possible to reserve whole catchments of unalienated Crown land.[64] However, these systems of water reserves still have to contend with the problems of other government agencies, such as the Ministry for Planning and local government authorities exercising their powers inconsistently with the objectives of the water resources plans. This has been a particular problem in the Metropolitan Region with the rezoning for urban development of land which lies above valuable groundwater supplies.[65] In this regard, the former Western Australian Water Authority has commented that: 'The most pressing need is for stronger by-laws to reflect the [priority source protection] system and the ability to influence integrated land planning processes'.[66]

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61. H Ventriss 'Legislative Requirements for an Effective Regional Water Resources Planning and Management Framework' in Bartlett et al supra n 3, 122.
62. Ibid, 126-128.
63. Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA) and the Country Areas Water Supply Act 1947 (WA).
64. Country Areas Water Supply Act 1947 (WA) Part IIA.
65. WA Legislative Assembly *Select Committee on Metropolitan Development and Groundwater Supplies* (Perth, Dec 1994) ch 9, 94.
66. WA Water Authority *Perth's Water Future: A Water Supply Strategy for Perth and Mandurah* (Perth, Jun 1995) 2-11.

There are also statutory responsibilities for the WRC to maintain an 'Arterial Drainage [Planning] Scheme' for the metropolitan region.[67] A drain is essentially a conduit or channel, whether natural or artificial, for carrying surplus storm water. The provisions are a legacy from earlier times when a single Water Authority performed both regulatory and utility functions. The responsibilities under the provisions are now divided, with the principal regulatory functions being vested in the WRC and the utility functions of providing rateable drainage services being vested in the Water Corporation. It seems that the regulatory functions of maintaining an Arterial Drainage Scheme are really only being performed in respect of major new urban developments.[68] There is some statutory provision for the content and procedures for making the Scheme, but no statement of its legal effect. In short, the Arterial Drainage Scheme has not been a significant water resources planning tool.

There is a limited statutory basis for the creation of waterway management programs by the WRC and waterway management authorities.[69] Where a management program is in force, a management authority may not act inconsistently with it.[70]

(ii) Integration of ecological factors

The approach adopted for water resources planning purports to take account of ecological factors, such as an environmental allocation of water resources.[71] However, there is no statutory statement of such a requirement. Indeed, it is debatable whether the Water and Rivers Commission may in administering the water licensing provisions of the Rights in Water and Irrigation Act 1914 (WA) take into account ecological factors in setting or reducing the amount of water that may be drawn under a licence. Similarly, the Land Drainage Act 1925 (WA) has regulated the drainage of many significant wetlands on the coastal plain south of Perth for the sole purpose of securing land for agricultural production and mitigating flooding without any regard for the serious environmental effects of the drainage.

A further problem in the integration of ecological considerations in water resources planning has been the interpretation of the effect of the Supreme Court's judgment in *Chapple*.[72] The facts were as follows. Chapple, an environmentalist, sought an order of mandamus to compel the

67. Metropolitan Water Authority Act 1982 (WA) Part IX.
68. Personal communication to the author from Mr P George, Water and Rivers Commission 13 Feb 1997.
69. Waterways Conservation Act 1976 (WA) s 35.
70. Waterways Conservation Act s 26(3).
71. Eg WA Water Authority supra n 66, 2-6.
72. Supra n 32. A full analysis of this case is given in (1995) Aust Journ of Natural Resources Law and Policy 205-210.

Department of Resources Development to refer to the EPA under section 38 of the Environmental Protection Act the draft Burrup Peninsula Land Use and Management Plan, a non-statutory plan prepared under the auspices of the Department to guide industrial development and conservation of land on the peninsula. Section 38 provides that a 'proposal that appears likely, if implemented, to have a significant effect on the environment' shall be referred to the EPA by a decision making authority as soon as that proposal comes to the notice of the authority. The court held unanimously that the Plan did not come within the terms of section 38. The leading judgment, given by Pidgeon J, adopted a two-stage process of reasoning to determine whether the Plan was such a proposal:

- First, he ascertained how the Plan could be implemented under existing law; and
- secondly, he considered whether this implementation was likely to have a significant effect on the environment.

His Honour concluded that the Plan could not be implemented under existing law in respect of the industrial zone.[73] He explained that the adoption of the Plan by the government would have no legal or physical effect on the land which could constitute a significant effect on the environment. He said:

> The adoption of the Plan would not, at law, commit the proposed industrial zone to industry. The land would remain vacant Crown land without any zoning until some decision making body makes the decision as to the use of the land. The Plan is no more than a recommendation. A future proposed determination as to use would be required to be assessed. That assessment could well be that that piece should not be used for industry but should be added to the adjoining national park, if such were created.[74]

The EPA, acting on legal advice from the Crown Solicitor's Office, has re-considered its approach to environmental impact assessments of other resource management plans. As a result, it has decided not to conduct a formal assessment under Part IV of the Environmental Protection Act of the Water Supply Strategy for Perth and Mandurah.[75] This document is a planning strategy for meeting public water supply needs to 2021 (with a focus on 2010). It identifies the possible sources (including water efficiency) for meeting future demands on the public water supply system. The Strategy document states, with respect to environmental impact assessment:

> The Water Authority's strategy has been submitted to the Environmental Protection Authority and State Government for approval. However, the Water Authority is not seeking environmental approval for any of the water supply sources proposed

73. *Chapple* supra n 32, Pidgeon J 321.
74. Ibid, 322.
75. WA Water Authority supra n 66.

> in the Strategy. Rather, the Strategy is intended to provide a planning context and framework for the approval of individual schemes at a later date. The *individual scheme EIAs would not re-address the issue of need or the question of alternative sources of supply* but focus on the environmental impacts of the specific proposed schemes in a local and regional context.[76]

The ramifications of this statement and of the EPA's decision not to assess the Strategy are that the cumulative effects of the supply strategy will never be subjected to formal environmental impact assessment. If the EPA's decision is based on an understanding of the *Chapple* case, then it is mistaken on the effect of the Supreme Court's reasoning. An analysis of the relevant water resources legislation shows that there is current statutory authority for the government to implement the terms of the Strategy, something that was missing for the Burrup Peninsula Plan.

4. Rural lands: landcare, catchment management and regional development — a nascent planning system

(i) Legal basis

There is no statutory planning system for the management of horticultural, agricultural and pastoral lands in Western Australia. However, there are the beginnings of a non-statutory planning system founded on the landcare movement, the institutional structure of which does have statutory support.[77] I will briefly review this nascent planning system.

The report of the recent Landcare Review Committee states:

> The landcare movement in Western Australia flourished, with the rapid establishment of Land Conservation District Committees under the Soil and Land Conservation Act, and the burgeoning growth of sub-catchment groups. Similarly, the establishment of the Integrated Catchment Management philosophy has seen the establishment of large catchment groups. Some groups are well advanced down the path of planning and implementation, others are struggling with the process of formation, or have become moribund; new structures emerge sometimes in co-operation with old, sometimes not.[78]

The report says that there is evidence that landcare group activity has changed land management practices and that there are examples of new, more sustainable and profitable farming systems.[79] One aspect of the new

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76. Ibid, vi (emphasis added).
77. Soil and Land Conservation Act 1945 (WA). This Act is discussed in A Gardner 'A Consensus System of Planning and Management for Land Conservation: A Grassroots Solution to a National Problem' (1989) 6 EPLJ 249.
78. WA Landcare Review Committee *A Review of Landcare in WA* (Perth, Dec 1995) 19. The Committee was appointed by the Minister for Primary Industry.
79. Ibid, 26.

land management practices has been the development of farm planning, with more Western Australian farmers than the national average having information about the soil and land capability of their properties and property plans with information on landcare works, capital improvements, native vegetation and wildlife habitats as well as the farm enterprise.[80]

To some extent the success of the landcare movement has fostered the formation in recent years of river basin and coastal catchment groups (eg, the Blackwood Catchment Co-ordinating Group and the Swan-Avon ICM Co-ordinating Group). The establishment of these groups was sponsored by the State government's Office of Catchment Management ('OCM'), but their success, if any, is probably due mainly to the impetus of local environmental concern and local input. The OCM and the Integrated Catchment Management Co-ordinating Group were created in the late 1980s as an executive body principally to coordinate the activities of government departments with responsibilities affecting natural resources management.[81] It was initially located in the Department of Premier and Cabinet, but the passage of time saw it shifted to the former Waterways Commission. For a time there was an endeavour to establish a whole new institutional structure to undertake the processes of integrated catchment management. To a certain extent, the OCM saw its role as building on the success of the grassroots landcare movement. In July 1995, the OCM was effectively disbanded and its function allocated to a Catchment Management Branch of the Department of Environment Protection. The role of this Branch is to advise on the formulation of environmental objectives for water and land management (eg, with respect to remnant native vegetation and the protection of wetlands). These objectives could be expressed through instruments such as Environmental Protection Policies, which are discussed below. It will be the function of the general resource management agencies to provide the organisational structures and programs to achieve the environmental objectives.[82] This leaves one wondering what will happen to the river basin and coastal catchment coordinating groups. To some extent they are nascent regional planning groups which can draw upon the energy and personnel of landcare groups (ie, Land Conservation District Committees). However, I doubt whether the constitution of these groups has the legitimacy to provide a vehicle for the ongoing processes of natural resources management.

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80. Ibid, 28.

81. A Gardner 'Legislative Implementation of Integrated Catchment Management WA' (1990) 7 EPLJ 199, 204.

82. I am grateful to Mr Charlie Nicholson of the Catchment Management Branch, Environmental Protection Dept for assisting me with my understanding of the Office of Catchment Management and the relocation of its functions to the Catchment Management Branch of the Environment Protection Dept (telephone conversation, 9 July1996).

In the last three years, there have been established yet more regional institutions associated with landcare. Regional Assessment Panels and Regional Planning Groups have been established at the request of the Soil and Land Conservation Council.[83] The Assessment Panels were initially formed to evaluate applications for national and state funding of landcare projects. This function was subsequently expanded into the development of regional land conservation strategies to set priorities for landcare at the regional level as a basis for funding applications.[84] These groups are now seen as providing the regional infrastructure for the Sustainable Rural Development Program which has been devised as part of the restructuring of the Ministry of Agriculture.[85]

Yet another institutional structure for regional development is being established under the Regional Development Commissions Act 1993 (WA), which has as its focus the economic development of the regions. I have not had the opportunity to investigate how these regional development commissions might relate to the other regional bodies described.

(ii) Integration of ecological factors

There is no statutory expression of the integration of ecological factors into the decision making of any of the processes described here. The provisions of the Soil and Land Conservation Act 1945 (WA) indicate that its objectives are almost exclusively the conservation of land for productive uses such as agriculture. The long title provides that it is an Act 'relating to the Conservation of Soil and Land Resources, and to the mitigation of the effects of Erosion, Salinity and Flooding'. The functions of the Commissioner include the 'prevention and mitigation of land degradation'[86] which is defined to include: '(a) soil erosion, salinity, eutrophication and flooding; and (b) the removal or deterioration of natural or introduced vegetation, that may be detrimental to the present or future use of land'.[87] Thus, a commonly held view is that the administrative powers in the Act could not be used to protect remnant native vegetation solely for the purposes of ecological conservation, such as the protection of wildlife habitat. This has been a particular issue with regard to the administration of the land clearing controls under the Soil and Land Conservation Regulations 1992.[88] The Regulations require that an owner or occupier of

83. Landcare Review Committee supra n 78, 21.
84. Ibid, 37. The Committee supports the move towards the regional assessment and delivery of landcare funding.
85. Agriculture WA *Primary Focus* (Perth, Nov 1996).
86. Soil and Land Conservation Act 1945 (WA) s 13(a).
87. Soil and Land Conservation Act s 4.
88. *WA Govt Gazette* 17 Jun 1992, 2521.

land who proposes to clear more than one hectare of land shall, where that clearing will result in a change of land use, give notice of the proposal to the Commissioner 90 days before commencing the clearing. Even if it may be argued that the Commissioner may consider only land degradation issues in determining the application, it is clear that the EPA may consider ecological issues in conducting an environmental impact assessment of environmentally significant clearing proposals.[89]

In May 1995, the Minister for Agriculture announced a new policy on clearing and retention of native vegetation which amounts to a very simple form of planning exercise. The policy restricts clearing on a property where there is less than 20 per cent remnant vegetation or equivalent deep-rooted perennial vegetation or where the property is located in a shire where there is less than 20 per cent total remnant vegetation. The new policy is based on advice from the Commissioner of Soil and Land Conservation that any clearing where remnant vegetation is less than 20 per cent of the land area is a land degradation hazard. Applications for clearing on properties where there is more than 20 per cent vegetation or in shires with more than 20 per cent vegetation will still be determined on land degradation criteria. Thus, the policy criteria being applied by the Commissioner still do not include ecological conservation.

5. Environmental protection policies and EIA

The Environmental Protection Act binds the Crown[90] and prevails over any other inconsistent law[91] so this Act has the potential to be used as a tool for integrating all planning systems.

(i) Legal basis

The Environmental Protection Act creates the statutory basis for Environmental Protection Policies ('EPPs') and EIA.[92] EPPs may be used to protect any portion of the environment or to prevent, control or abate pollution.[93] The content[94] of an EPP should set out the objectives to be achieved, programs for achieving those objectives in respect of any activity or any discharge of waste or emissions of noise, odour or electromagnetic

89. An example of the EPA recommending against approval of a clearing application on ecological conservation grounds is the assessment of an application by Mr Matthew King to clear 197 hectares of land for agriculture at Kukerin: EPA Bulletin (Perth, July 1993) 689.
90. EP Act s 4.
91. EP Act s 5.
92. EP Act, Parts III and IV respectively.
93. EP Act s 26.
94. EP Act s 35.

waste. The EPP may declare the beneficial uses of the environment to be protected, set indicators to measure environmental quality and specify standards for achieving environmental quality objectives. An EPP may create offences. The Act provides quite detailed procedures for the preparation of EPPs for Ministerial approval, involving public notice and comment and consultation with affected parties.[95] An approved EPP has the force of law.[96] Since the enactment of the Planning Legislation Amendment Act, a planning scheme which is formally assessed by the EPA will prevail over an earlier inconsistent EPP.[97]

Because of the general familiarity with environmental impact assessment, I will not describe the statutory basis of the Western Australian system.[98] It is sufficient to say that the determination of a proposal pursuant to the EIA procedures results in a 'Ministerial statement that a proposal may proceed', which may set conditions and procedures to which the proposal is subject. The failure to implement a proposal in accordance with the Ministerial statement is an offence.[99]

(ii) Integration of ecological factors

The defining purpose of EPPs and EIA is to integrate ecological factors into natural resources management and other governmental decision making affecting the environment. It is worth reviewing briefly how this may be achieved through each technique.

An example of the use of an EPP to achieve INRM is the Draft EPP for the South West Agricultural Zone Wetlands.[100] The policy will apply to the whole of the south-west region of the State, including public lands managed by CALM, but not to the Swan Coastal Plain for which there is already a separate wetlands EPP.[101] The principal objective of the draft policy is to conserve wetlands for the purposes of biological diversity. The draft policy proposes to:

- Categorise wetlands for their conservation value;
- Create a register of wetlands with conservation value ('conservation wetlands');

95. EP Act ss 26-31.
96. EP Act s 33.
97. EP Act s 3(1) definition of 'assessed scheme', inserted by PLA Act s 12; and EP Act s 33(4)-(5), inserted by PLA Act s 16.
98. See Fig 3 infra pp 456-457 , giving an overview of the EIA system in respect of town planning schemes. The general system is similar.
99. EP Act s 47(1).
100. Environmental Protection Authority, May 1995. The Policy is currently being prepared for final Ministerial approval.
101. Environment Protection (Swan Coastal Plain Lakes) Policy 1992 *WA Govt Gazette* 18 Dec 1992, 6100.

- Establish in partnership with other government agencies, local authorities, land conservation district committees and private land owners programs for the protection of conservation wetlands, principally through a system of 'Priority Catchment Plans' as the basis for catchment management; and
- Protect conservation wetlands by prohibiting certain activities such as the filling in and mining of wetlands, certain forms of drainage and clearing of fringing vegetation.

The EPP is an integration mechanism to protect the ecological values of wetlands by the combined actions of other resource management agencies and private land owners and managers.

Finally, the use of EIA to integrate environmental and economic considerations in governmental decision making was the subject of a decision of the Western Australian Supreme Court in March 1996. In *Re Environmental Protection Authority; ex parte Coastal Waters Alliance of WA Inc*,[102] the Full Court held unanimously that the report of the EPA on its assessment of a management plan for dredging shell sand from areas of sea grass in Cockburn Sound was invalid because the EPA had considered economic factors and State Agreement Act obligations and balanced these factors against the environmental factors in an attempt to resolve the conflict between the need for the shell sand resource and the protection of the environment. It was held that the EPA's function was limited to a consideration of the environmental factors. It was for the Minister to resolve the conflict between the economic and environmental factors. The court went on to hold that the Minister's decision to approve the Plan was also invalid because the Minister, in expressing reasons for his decision, had expressly relied upon the terms of the EPA advice.[103]

CONCLUSION: COMMENTS ON REFORM

1. Pressures for reform

INRM is currently receiving significant attention in Western Australia. There are two basic natural resource management issues which are causing this attention and generating pressure for the reform of natural resources law to better achieve INRM.

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102. (1996) 90 LGERA 136.

103. The case raises interesting questions about the definition of 'environment' and 'environmental factors' which it is not possible to consider here. The effect of the decision is discussed in S Bache, J Bailey & N Evans 'Interpreting the Environmental Protection Act 1986 (WA): Social Impacts and the Environment Redefined' (1996) 13 EPLJ 487-492; and in A Gardner '"Environmental Factors": The Western Australian EPA's Response to the Coastal Waters Case' (1997) 14 EPLJ (forthcoming).

(i) Landcare and ESD in agriculture

The State and Commonwealth governments are promising significantly increased public expenditure to redress land degradation and achieve ESD in agriculture.[104] With the recent passage of legislation authorising the partial privatisation of Telstra,[105] the Commonwealth will be able to fund its proposed natural heritage trust fund.[106] The injection of very large sums of public money is going to require significant planning processes at the catchment and property management levels.[107] Planning decisions for the allocation of large sums of public money will need to be made by persons and bodies who have legal authority and legitimacy in the eyes of the local community. It is questionable whether the current landcare structures are adequately constituted for the purpose. In this regard, the current review of the processes and legislation applicable to natural resources management which are administered by Agriculture WA may offer some solutions. Both the terms of reference for the review and the discussion paper issued by the Task Force conducting the review have acknowledged the need to develop a better basis for regional conservation of natural resources.[108]

(ii) National water resource policy

In April 1995, the Council of Australian Governments ('COAG') committed itself through the National Competition Policy Agreement[109] to implement before July 1999 'the strategic framework for the efficient and sustainable reform of the Australian water industry'. The National Competition Policy Agreement creates a compelling incentive for the water industry reforms by making the second tranche of the Commonwealth's competition policy payments to the States (due in 1999-2000) conditional on the achievement of the reforms. This commitment builds on the National Water Resource Policy adopted by COAG in February 1994 which expresses agreement on a host of reforms, including the following commitments to institutional reform:

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104. WA Govt *Salinity Action Plan* (Perth, Nov 1996) which was released after more than 1 year in preparation.
105. Telstra (Dilution of Public Ownership) Bill 1996 (Cth).
106. Natural Heritage Trust of Australia Bill 1996 (Cth).
107. The Natural Heritage Trust of Australia Bill cl 16(2) defines 'sustainable agriculture' as 'property management planning in relation to the farm unit'. Cf WA Govt supra n 104, 19.
108. Agriculture WA *Review of Natural Resource Management and Viability of Agriculture in WA* (Perth, Jun 1996) 29-32.
109. COAG (communique) *Agreement to Implement the National Competition Policy and Related Reforms* (Canberra, 11 Apr 1995) Attachment A.

> 6(a) ... [the] develop[ment of] administrative arrangements and decision-making processes to ensure an integrated approach to natural resources management,
>
> (b) the adoption, where this is not already practised, of an integrated catchment management approach to water resource management and ... arrangements to consult with the representatives of local government and the wider community in individual catchments.[110]

Discussion papers about the implementation of the National Water Resource Policy make clear that the development of a planning system for INRM is fundamental to the management of water resources.[111]

2. Suggestions for reform

There are some obvious deficiencies in the current planning systems for achieving INRM.

(a) Not all of the sectoral government agencies have an established planning system, let alone one supported by statute and having legal effect.

(b) There is inadequate provision for the sectoral planning systems to consider ecological factors and to consider the provisions of other agencies' plans. The use of EPPs and EIA are for special situations and are not an adequate remedy for this general deficiency.

(c) There is poor integration of the sectoral planning systems so that the plans of some agencies can be frustrated by other agencies. There is also no clear indication of a 'whole of government' commitment to a legally enforceable plan governing natural resources management. Although EPPs can be used to integrate the action of the various sectoral agencies, the rigour of the procedures for making them has restricted their use to special issues which the EPA has the time and resources to pursue. Also, since the Planning Legislation Amendment Act, assessed planning schemes can prevail over earlier EPPs.

In developing an overall planning system for achieving INRM, I suggest that the following basic criteria should be applied.

(a) Because of the importance of planning for achieving INRM, I would advocate the legislative (as opposed to merely executive) establishment of a planning system for managing natural resources. Whilst I understand the desire of resource managers (both governmental and private) for flexibility, plans inevitably affect the exercise of important governmental powers (eg, the disbursement of public monies and administrative determination of resource use rights) and of private

110. COAG (communique) ibid (Hobart, 25 Feb 1994) Attachment A.

111. Agriculture and Resource Management Council of Aust and NZ, Task Force on COAG Water Reform *Water Allocations and Entitlements: A National Framework for the Implementation of Property Rights in Water* Occasional Paper No 1 (Oct 1995) 5-6.

legal rights and obligations in respect of natural resources, not to mention the effect on expectations which may be the basis of governmental decision making and commercial investment. It is, therefore, essential that there be a clear legal basis for the exercise of planning authority.

(b) The powers (whether executive or legislative) to make and amend planning instruments which have legal force should be vested in democratically accountable office-holders. The preparation and execution of plans could be undertaken by government agencies and appointed councils or committees, but they should not bear ultimate responsibility for them. Plans which are made by agreement with the intention of being binding legal contracts (eg, between the government and a private landholder) should also be approved or entered into on behalf of the government by a democratically accountable office-holder. Plans which are adopted and applied voluntarily could, of course, be made by appointed bodies or government officers who are not democratically accountable.

(c) In recent decades there has been a proliferation of planning systems, both statutory and non-statutory, for natural resources management. Having a number of different systems can create problems of conflict and coordination between agencies and possible confusion for those subject to the different plans, not to mention the exhaustion of the financial and personal resources of members of the community who are expected to participate in the planning processes. A significant challenge, therefore, to the creation of a planning system for INRM will be the rationalisation of various planning systems that have been or are being created. In achieving that rationalisation, three points seem important:

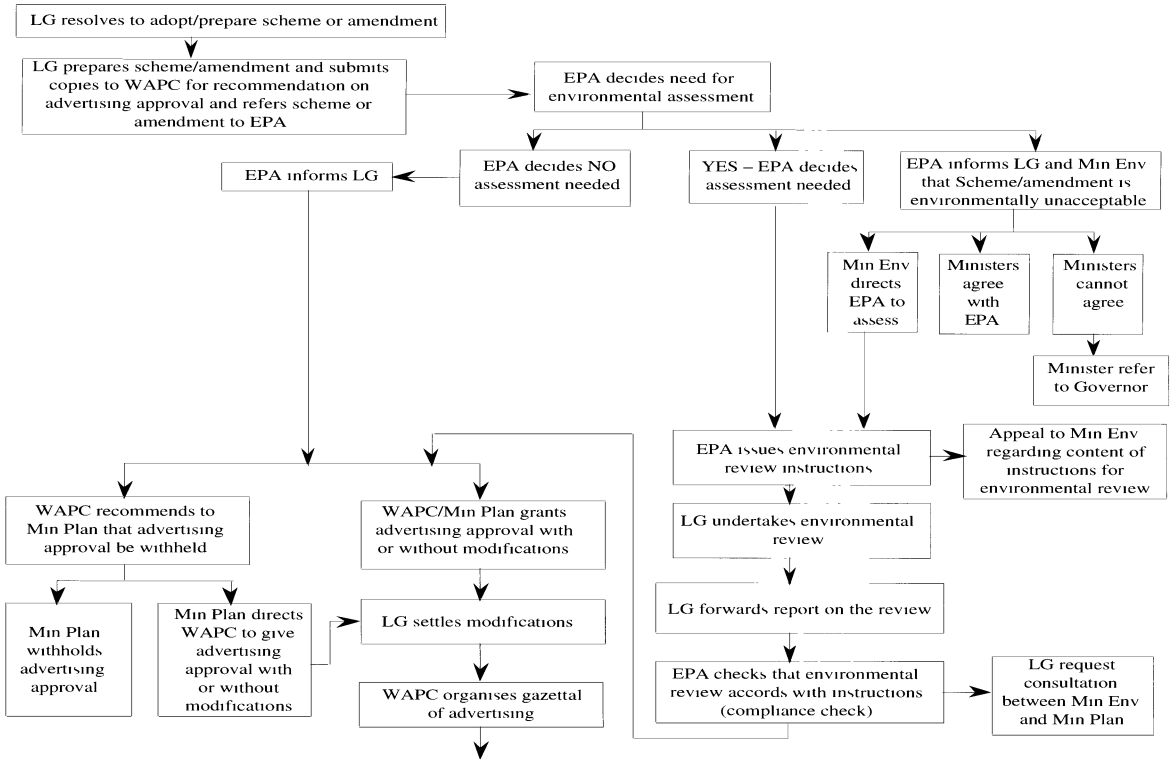
(i) There is general agreement that INRM should be conducted on a water catchment basis. This may well require the re-drawing of jurisdictional boundaries of the institutions responsible for making the plans.

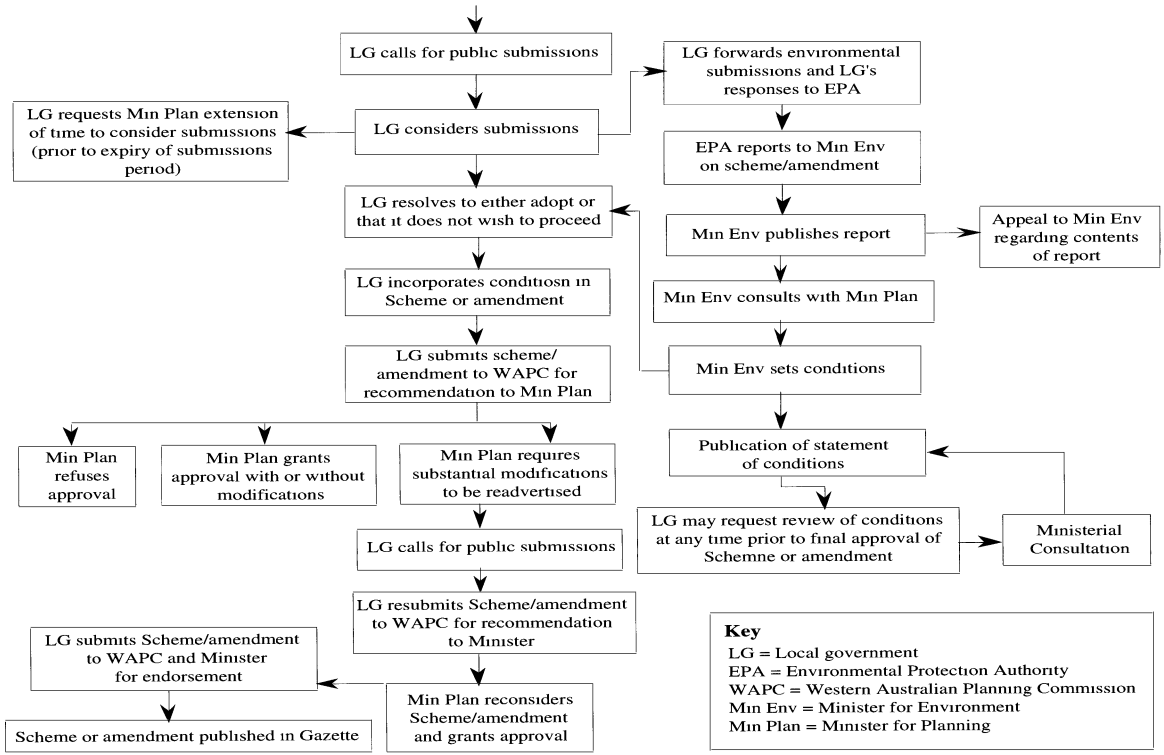
(ii) If sectoral government agencies are each to maintain their own planning systems, there should be requirements for the various sectoral agencies to have regard to the plans of other agencies and mechanisms to determine which is to prevail in the event of conflict.

(iii) All sectoral agencies should have a clear legal duty to consider the environmental effects of their decisions when making and implementing their plans.

The following *specific* reforms would assist in the development of 'an integrated, system-based approach to the management of natural resources'.

Figure 3: Preparation and environmental assessment of local schemes and amendments[112]





112 This flowchart is adapted from WA Planning Commission supra n 9, 20

(a) The statutory town planning system should be broadened in effect and strengthened to provide for a comprehensive, central, coordinating planning system which is legally binding on all persons, including all government agencies. Any government agency should be able to propose an amendment to this central plan, at either the regional or local level.

(b) Regional government institutions should be strengthened by being:
   (i) rationalised to single institutions in each region;
   (ii) structured, to the extent possible, on the basis of large catchment boundaries; and
   (iii) constituted on the basis of some accountability mechanism, even indirect accountability.

(c) Local government should be restructured around larger shires based, to the extent possible, on catchment boundaries and given enhanced powers and greater funding.

(d) All sectoral agencies should be given clear legislative support for their resource management planning systems which should be required to integrate ecological considerations and be subject to referral to the EPA under Part IV of the Environmental Protection Act if they are likely to have a significant effect on the environment. These sectoral plans should create administrative duties for the relevant agency and relevant considerations for other government agencies in the exercise of their powers.

(e) EPPs should be used as integrative tools for addressing special environmental problems.

These suggestions all relate to the structure of institutions and the procedures for their planning decision-making. However, if we are really to achieve ecologically sustainable development, we need to incorporate into our natural resources management legislation a general set of ESD objectives which *all* agencies are required to meet. Further, each natural resources management statute should include a uniform requirement that all plans made under the statute include a statement of: (i) the management objectives to be achieved in the implementation of the plan; and (ii) the criteria to be applied in determining the achievement of those objectives.

In Western Australia, we have hardly begun to define the management objectives we need to pursue in order to achieve ecologically sustainable development of our natural resources, let alone define the criteria we shall need to apply in order to measure our achievement of those objectives.