REPORT OF THE
STANDING COMMITTEE ON ECOLOGICALLY SUSTAINABLE DEVELOPMENT

IN RELATION TO THE
CONSERVATION AND LAND MANAGEMENT AMENDMENT BILL 1999 & THE FOREST PRODUCTS BILL 1999

Presented by Hon Christine Sharp MLC

Report 7

STANDING COMMITTEE ON ECOLOGICALLY SUSTAINABLE DEVELOPMENT

Date first appointed:

June 26 1997

Terms of Reference:

1. A Standing Committee on Ecologically Sustainable Development is established.
2. The committee consists of five members.
3. The functions of the committee are to inquire into and report to the House on:
   (a) any matter in Western Australia concerning or relating to the planning for or management, use or development of natural resources and the environment having particular regard to demographic, economic, ecological, technological and lifestyle and settlement factors and concerns; and
   (b) any Bill or matter referred to it by the House.

Members as at the time of this inquiry:

Hon Christine Sharp MLC (Chairman)

Hon Dexter Davies MLC

Hon Greg Smith MLC

Hon Norm Kelly MLC

Hon Graham Giffard MLC

Staff as at the time of this inquiry:

Ms Anne Turner, Advisory Officer

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CHAPTER 1
EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

1.1 The *Conservation and Land Management Amendment Bill 1999* (**"CALM Bill"**) introduces a number of amendments to the *Conservation and Land Management Act 1984* while the *Forest Products Bill 1999* (**"Forest Products Bill"**) establishes a new Forest Products Commission to be responsible for the commercial timber harvesting activities currently being undertaken by the Department of Conservation and Land Management (**"CALM"**).

1.2 Severe time constraints imposed by the Legislative Council prevented the consideration of the entire content of the Bills. The Ecologically Sustainable Development Committee (**"Committee"**), guided by the second reading speeches in the Legislative Council, debate on the motion to refer the Bills to the Committee, and the evidence of witnesses, therefore restricted its examination to a number of issues of concern. These were:

- the Conservation Commission's functions and more particularly whether it should have a specific function to publish;
- membership of the Conservation Commission and how its Commissioners are to be appointed;
- the entitlement of the Executive Director of the proposed Department of Conservation to attend meetings of the Conservation Commission;
- the power of the Minister to issue directions to the Conservation Commission;
- management plans;
- the effect of the expiry date of management plans;
- ministerial approval of proposed management plans;
- the power of the Executive Director of the proposed Department of Conservation to grant forest leases and licences;
- tortious liability in the CALM Act;
- meetings of Conservation Commissioners;
- disclosure of pecuniary interests by Forest Products and Conservation Commissioners;
- the names of the Forest Products Bill and the Forest Products Commission;
- responsibility for thinning;
- representation of sectorial interests on the Forest Products Commission;
- application of the *Wildlife Conservation Act 1950* to the Forest Products Commission;
- whether there is paramountcy of Ministerial directions over the principles of

ecologically sustainable development;

- the deletion of commercially sensitive material from the statement of corporate intent;
- the power of the Forest Products Commission to apply the whole or part of its dividend for its own purposes;
- components of the contract price; and
- Parliamentary scrutiny of the contracts of the Forest Products Commission.

1.3 The Committee expressed doubt that the Committee process would reduce debating time in the Legislative Council on the passage of the two Bills. This is because during deliberations, it became apparent that very little consensus on the issues of concern would be achieved. Nevertheless, the Committee deliberated on the arguments surrounding these issues of concern with the objective of assisting the Legislative Council with informed debate on the two Bills.

1.4 The Committee has not examined, and does not purport to agree to, any of the clauses not addressed in detail in this Report.

1.5 For this Report, recommendations are made only by unanimous agreement of the Committee. Where the Committee has not agreed on a finding or recommendation, the arguments for and against the issue are outlined, and the matter reserved for debate in the Legislative Council.

1.6 As a result of its deliberations, the Committee made only two recommendations.

RECOMMENDATIONS

Recommendations are grouped as they appear in the text at the page number indicated.

Page 15:

Recommendation 1: That the proposed Memorandum of Understanding be tabled in Parliament.

Page 22:

Recommendation 2: That proposed sections 53(2) and (3) be relocated within the body of section 54.

CHAPTER 2
REFERRAL AND PROCEDURE

REFERRAL OF THE *CONSERVATION AND LAND MANAGEMENT AMENDMENT BILL 1999*

2.1 The long title of the *Conservation and Land Management Amendment Bill 1999* (**"CALM Bill"**) is as follows:

> *"An Act to amend the* Conservation and Land Management Act 1984, *to make consequential amendments to other Acts, and for related purposes."*

2.2 The CALM Bill was introduced and read a first time in the Legislative Council on a motion of the Attorney General, Hon Peter Foss QC MLC on April 6 2000[1]. Following debate on May 24 and 25 2000, the Bill was read a second time on May 25 2000[2]. The CALM Bill was referred to the Standing Committee on Ecologically Sustainable Development (**"Committee"**) on May 25 2000 on a motion of Hon Christine Sharp MLC[3]. A reporting date of June 20 2000 was fixed. The Committee commenced consideration of the CALM Bill on May 25 2000.

REFERRAL OF THE *FOREST PRODUCTS BILL 1999*

2.3 The long title of the *Forest Products Bill 1999* (**"Forest Products Bill"**) is as follows:

> *"An Act to establish the Forest Products Commission and for related matters."*

2.4 The Forest Products Bill was introduced and read a first time in the Legislative Council on a motion of the Attorney General on April 6 2000[4]. Following debate on May 30 2000, it was read a second time on May 30 2000[5]. The Forest Products Bill was referred to the Committee on May 30 2000 on a motion by Hon Christine Sharp

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1 Parliamentary Debates (Legislative Council) (Hansard) Thirty Fifth Parliament Third Session 2000, April 6 2000, p 6083

2 Parliamentary Debates (Legislative Council) (Hansard) Thirty Fifth Parliament Third Session 2000, May 25 2000, p 7240

3 Parliamentary Debates (Legislative Council) (Hansard) Thirty Fifth Parliament Third Session 2000, May 25 2000, p 7241

4 Parliamentary Debates (Legislative Council) (Hansard) Thirty Fifth Parliament Third Session 2000, April 6 2000, p 6086

5 Parliamentary Debates (Legislative Council) (Hansard) Thirty Fifth Parliament Third Session 2000, May 30 2000, p 7352

MLC[6]. A reporting date of June 20 2000 was fixed. The Committee commenced consideration of the Forest Products Bill on May 31 2000.

PROCEDURE OF THE COMMITTEE

2.5 Parliamentary proceedings are such that it is not the role of a Committee to bring into question the policy or principle of a Bill referred to it for consideration once the second reading has taken place. The policy of the Bill is taken to have been settled by the House upon the passage of the second reading and is therefore not the focus of the Committee's proceedings.

2.6 The role of the Committee is two-fold:

- to comment on whether a Bill is consistent with the claims made in the second reading debate, particularly by the Honourable Member promoting the Bill; and
- to consider matters of detail such as the feasibility or clarity of particular clauses.

2.7 The Committee identified a list of specific questions it considered required detailed attention. The Committee has not examined, and does not purport to agree to, any of the clauses not addressed in detail in this Report.

2.8 For this Report, recommendations are made only by unanimous agreement of the Committee. Where the Committee has not agreed on a finding or recommendation, the arguments for and against the issue are outlined, and the matter reserved for debate in the Legislative Council.

2.9 As June 20 2000 was fixed as the reporting date it was not possible for the Committee to conduct a detailed analysis on the clauses of the Bills. The Committee resolved to concentrate on specific areas of concern which were raised in the second reading debate of each Bill in the Legislative Council, the debate on the motion to refer the Bills to the Committee, and the evidence of witnesses.

2.10 The Committee is very concerned that this report does not represent sufficient research or consideration of the two Bills. The Forest Products Bill contains 72 clauses yet only 14 working days were available from referral to reporting, and for the CALM Bill's 53 clauses only 17 working days were available.

2.11 The Committee considers the time frames imposed by the Legislative Council were unreasonable and regrets it was not given adequate time in the first instance in which to deal with the Bills to the extent that the Committee would have preferred.

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6 Parliamentary Debates (Legislative Council) (Hansard) Thirty Fifth Parliament Third Session 2000, May 25 2000, p 7352

2.12 The Committee conducted a public hearing on June 6 2000, at which questions were put to persons whom the Committee regarded as well placed to give the Bills detailed consideration. The Committee thanks the witnesses for offering their time and expertise. A list of witnesses who appeared before the Committee is set out below.

- Hon Bob Pearce, Executive Director, Forest Industry Federation of Western Australia;
- Mr Tim Daly, Secretary, Australian Workers Union;
- Ms Rachel Siewert, Coordinator, Conservation Council;
- Mr Peter Robertson, Convenor, Western Australian Forest Alliance;
- Mr Michael Bennett, Principal Solicitor, Environmental Defender's Office (WA);
- Dr Wally Cox, Executive Director, Department of Conservation and Land Management; and
- Mr Simon Hancocks, Senior Policy Advisor, Department of Conservation and Land Management.

2.13 The Committee received an unsolicited submission from the Western Australian Aboriginal Native Title Working Group. The Committee was unable to give consideration to the submission. However, the Committee notes that proposed amendments in the name of Hon John Cowdell in Supplementary Notice Paper 30-3 (Tuesday, May 30 2000) give effect to the recommendations contained in the submission.

2.14 The Committee extends its appreciation to the staff of the Legislative Council Committee Office for their efforts in compiling this report within the short time frames allowed for in this Report.

CHAPTER 3

PURPOSE OF THE *CONSERVATION AND LAND MANAGEMENT AMENDMENT BILL 1999* & THE *FOREST PRODUCTS BILL 1999*

INTRODUCTION

3.1 In the second reading speech of the CALM Bill the Attorney General stated that:

> *"Despite the many strengths of an integrated forest conservation agency, there has been an increasing level of community concern at the perceived conflict of interest in having the same agency responsible for conservation and commercial timber harvesting activities."*[7]

3.2 The Attorney General stated that the Government has listened to the community and determined that a new regime of forest management would apply in Western Australia. The result has been the CALM Bill and the Forest Products Bill, both designed to *"...ensure that the often competing needs of land conservation and commercial forestry will be kept completely separate."*[8]

3.3 In its Fourth Report, the Committee conducted a thorough investigation into the Department of Conservation and Land Management's (**"CALM"**) various roles, finding that the conflicts of interest between CALM's functions and responsibilities made it extremely difficult for CALM to make optimal decisions about forest management.[9] The Committee's 24th recommendation was that CALM's regulatory functions be separated from its operational function.

3.4 In the Fourth Report, the Committee also noted that even though there was strong sentiment for separating the functions of CALM, there was a wide range of views as to exactly which functions should be kept apart.[10] The Committee considered that there were four levels of separation:

- separation of forestry from conservation functions;

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7 Parliamentary Debates (Legislative Council) (Hansard) Thirty Fifth Parliament Third Session 2000, May 25 2000, p 6083

8 Parliamentary Debates (Legislative Council) (Hansard) Thirty Fifth Parliament Third Session 2000, May 25 2000, p 6083

9 *The Management of and Planning for the Use of State Forest in Western Australia - The Sustainability of Current Logging Practices*, Fourth Report, 1999, p 181

10 *The Management of and Planning for the Use of State Forest in Western Australia - The Sustainability of Current Logging Practices*, Fourth Report, 1999, p 150

- separation of operational from advisory functions;
- separation of operational from regulatory functions; and
- separation of Ministerial responsibilities.

3.5 As a first task, the Committee considered whether an internal separation of operational and regulatory functions within the proposed new structure has in fact occurred as claimed in the second reading speech. The Committee used the 36th Report of the Standing Committee on Government Agencies[11] **("36th Report")** as a benchmark to assess the separation.

THE 36TH REPORT

3.6 The 36th Report was tabled in the Legislative Council in 1994 and examined the nature and function of state agencies. It classified state agencies as being operational, regulatory, or advisory and recommended against creating dual classification structures. The 36th Report warned of an inherent risk associated with dual classification agencies, this being that their operational and regulatory functions become intertwined with one arm being essentially a sub-department with its own name but still reliant for administrative support on the parent department. The danger is that such an agency:

> *"...is not easily identifiable as a separate entity and may resist parliamentary or other external scrutiny on the basis that any responsibility or accountability remains with the parent department."*[12]

3.7 The Standing Committee on Government Agencies recommended against such operational and regulatory functions being vested in the same agency and that agencies should not possess competing or contradictory functions. Strict separation of an agency's operational and regulatory components was considered fundamental to achieving excellence in public administration.

3.8 The Committee discussed the implications of the 36th Report and did not reach a conclusion whether the CALM Bill or the Forest Products Bill satisfied its principles.

THE PROPOSED NEW STRUCTURE

3.9 The CALM Bill and Forest Products Bill provide for three new structures to separate the current activities of CALM and replace the Lands and Forest Commission and the National Parks and Nature Conservation Authority. The proposed new structures are

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11 Now called the Standing Committee on Public Administration

12 The 36th Report, p 8

the Conservation Commission, Department of Conservation and Forest Products Commission.

3.10 The Committee considered the two Bills in order to identify a number of specific clauses or amendments which suggest that the delineation between conservation (in a regulatory sense) and timber harvesting (operational) functions of these proposed new structures may have only been partly achieved. These are listed below:

CLAUSE 9: CHANGING THE PURPOSE OF LAND AND ALTERING BOUNDARIES

3.10.1 Clause 9 of the CALM Bill inserts proposed section 17(6a) in the *Conservation and Land Management Act 1984* (**"CALM Act"**). The subject matter of this clause is the cancelling, or changing the purpose of land and altering boundaries. Section 17 of the CALM Act generally prescribes that the Minister (to whom the administration of the CALM act is committed) has to refer these proposals to the body in which the land is vested and is not bound by the decision of that body. In the specific case of timber reserves under proposed section 17(6a) the procedure is quite different. Timber reserves are vested in the Conservation Commission and as such the Conservation Commission would give the Minister its opinion of the proposal. However, the proviso is that the Minister must additionally concur with the Minister for Forest Products about changes to timber reserves.

The Committee was unable to reach a unanimous decision on whether Clause 9 separates conservation (in a regulatory sense) and timber harvesting (operational) functions of the proposed new structures. There were a range of views concerning the meaning of the term 'concurrence' and whether that term suggested separation of function.

One argument is that because concurrence means "accordance in opinion or agreement" it is immediately suggestive of a 'separateness' of the two Commissions. The counter argument is that concurrence implies a binding power and hence there is no independent functioning.

CLAUSE 15 OF THE CALM BILL AND CLAUSE 10 OF THE FOREST PRODUCTS BILL: MEMORANDA OF UNDERSTANDING

3.10.2 Clause 15 of the CALM Bill inserts proposed section 33(1)(bb) into the CALM Act and clause 10(1)(l) of the Forests Products Bill. These clauses concern the proposed Department of Conservation entering into a Memorandum of Understanding (**"MoU"**) with the Forest Products Commission.

What is a MoU*?*

MoUs have their genesis in International Law, being mutually agreed upon diplomatic documents. Now, MoUs have evolved to become a standard mechanism for reflecting common interests between agencies. They establish principles, strategies and mechanisms for dealing with common issues. MoUs cannot restrict a party in the performance of its statutory functions or the exercise of its statutory powers. They are an alternative to legal prescriptions but the danger is they have no legislative force. Nevertheless, the parties see potential advantage in describing agreed processes and principles, to help provide a measure of predictability and consistency, or at the very least, to provide an agreed basis for discussion.

MoUs are a common device for government agencies to work co-operatively with each other as an alternative to legal prescriptions. As such they rely on the goodwill between the staff of agencies. The specifics or particulars of a MoU normally lie beyond the scrutiny of Parliament.

Proposed section 33(1)(b)(bb) of the CALM Act lists the subject matter of the MoU as relating to the performance of the *"...Department's and the Commission's respective functions and to any other prescribed matter"*. The Explanatory Memorandum (**"EM"**) to the CALM Bill states that the MoU *"...will address such matters as access to State forests and timber reserves by timber harvesting contractors of the Forest Products Commission."*[13.]

The Committee recognises that there may be matters within the MoU that require more precise legislative prescription or regulations. For this reason an MoU may be an inadequate device for prescribing these matters because it lacks transparency. A solution is to table the MoU in Parliament.

The Committee discussed whether it was significant that the MoU impaired separation of conservation (in an operational sense) and the timber harvesting functions (also operational) of the proposed new structures

The Committee agreed that the integration that is compelled by the MoU does not impede the separation of independent regulation because the regulatory function resides primarily with the Conservation Commission, which is not bound by these arrangements.

13 Explanatory Memorandum of the CALM Bill, p 10

CLAUSE 18: THE NATURE OF AN AGENCY RELATIONSHIP

3.10.3 Clause 18 of the CALM Bill inserts proposed section 34B(2) into the CALM Act. According to the EM, this clause permits the Executive Director of the proposed Department of Conservation to enter into timber sharefarming agreements *"...as an agent of the Forest Products Commission"*[14]. The question was raised as to how complete separation of land conservation and commercial forestry can be achieved when there is a continuing agency relationship of a commercial nature between the proposed Department of Conservation and the commercial forestry operator. An agent in its strict legal sense, is a person with an authority or capacity to create or affect legal relations between a principal and third parties by the making of contracts.

The law of agency defines relationships, and that body of legal principles when applied to the Executive Director of the proposed Department of Conservation and the Forest Products Commission, results in inconsistencies with the claim in the second reading speech that the functions of these two agencies are separate.

The Committee considered under what circumstances the Forest Products Commission might require an agency relationship with the Executive Director of the proposed Department of Conservation, particularly when the Forest Products Commission can, in its own right, contract for the harvesting of forest products from public and timber sharefarmed land.

Dr Wally Cox, Executive Director of CALM explained that the purpose of proposed section 34B(2) in the CALM Act is to achieve the function outlined in proposed section 33(1)(cc). Section 33(1)(cc) concerns the promotion and encouragement of the planting of trees for the purpose of rehabilitating land and conservation of biodiversity.

According to Dr Cox, an agency relationship with the Forest Products Commission is contemplated *because "…the Executive Director will be prevented from having a commercial interest in a timber sharefarming tree crop…and the Forest Products Commission has the powers to contract for the harvesting and sale of forest products…and to be a party to timber sharefarming agreements"*[15].

The Executive Director is denied a direct commercial interest in a timber sharefarming tree crop because of the definition of forest produce in

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14 Explanatory Memorandum of the CALM Bill, p 11

15 Dr Wally Cox, letter to the Committee, 8/6/2000

proposed section 87(1). Forest produce does not include trees, parts of trees, and so on. However proposed section 34B(2) contemplates more than that prescribed in proposed section 33(1)(cc) (above). Proposed section 34B(2) indicates that the Executive Director can indirectly re-acquire a commercial interest in timber as an agent when concerned with timber sharefarming agreements. This will be the Executive Director's only means to re-acquire this interest because he will lack capacity over timber generally under proposed section 87(1) of the CALM Act. Therefore the Executive Director will only be able to enter into agreements about the taking of timber as an agent of the Forest Products Commission in relation to a crop of trees.

It was suggested that the existence of an agency relationship may have the effect of returning to the Executive Director a power to have a commercial interest in a timber sharefarming tree crop.[16]

By the law of agency, the Executive Director of the proposed Department of Conservation will then be invested with a facsimile of the Forest Products Commission's own power.[17] This effectively means the Executive Director can initiate legal relations with third parties on behalf of the Forest Products Commission whilst the Forest Products Commission is under a correlative liability to have its legal relations altered. This is the essence of 'agency' and is suggestive of re-integration of conservation and commercial functions.

CLAUSE 23: MANAGEMENT PLANS

3.10.4 Clause 23 of the CALM Bill inserts proposed section 53(2) into the CALM Act. This clause uses mandatory language, directing that *"...anything to be done..."* by the Conservation Commission in relation to a management plan for State forest or a timber reserve requires both the Conservation Commission or the Conservation Commission through the agency of the proposed Department of Conservation to act jointly with the Forest Products Commission. Proposed Section 53(2) is a broad general power indicating a legal relationship between the Conservation Commission and the Forest Products Commission because they must 'act jointly'. The term 'act jointly' in its literal meaning means sharing or behaving in common.

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16 Although under proposed section 34 B(2)(b) the Executive Director does not have access to the proceeds of the crop

17 Fridmanm GHL, *Fridman's Law of Agency*, 5th edition, Butterworths, 1983, p 16

The Committee was unable to reach a unanimous position on whether Clause 23 separates conservation (in a regulatory sense) and timber harvesting (operational) functions of the proposed new structures.

One argument is that because the Forest Products Commission and Conservation Commission are required to act jointly, this is (again) *prima facie* evidence of a 'separateness' of the two Commissions. 'Acting jointly' means no more than working together on a management plan and indicates that the two Commissions are brought together for the purpose of working through the process prescribed in later sections of the CALM Act.

The counter argument is that the separation created under this clause is illusory because it immediately re-integrates the two Commissions and mandates a general requirement to act jointly.

CLAUSE 24: PREPARATION OF PROPOSED MANAGEMENT PLANS

3.10.5 Clause 24 of the CALM Bill inserts proposed section 54(3)(a) into the CALM Act. This clause uses mandatory language, requiring that the Conservation Commission or the Conservation Commission through the agency of the proposed Department of Conservation is to act jointly with the Forest Products Commission when *"...preparing a proposed management plan"*.[18] Clause 24 contains a specific power, again creating a binding legal relationship between the parties, not a separation of function as evidenced from the second reading speech.

The Committee was unable to reach a unanimous position on whether Clause 24 separates conservation (in a regulatory sense) and timber harvesting (operational) functions of the proposed new structures. The arguments for and against are similar to clause 23 (above).

One argument is that the functions of the two Commissions demonstrate separation through the process by which each Commission contributes to the proposed management plan. Each Commission is required to provide input on the proposed management plan from their own perspective. It could be argued that their disparate values of protecting conservation versus protecting commercial forestry reflect an inherent separation.

The counter argument is that the separation created under clause 24 is negated by the fact that it immediately re-integrates the two Commissions and mandates a specific requirement to act jointly on a proposed management plan.

[18] CALM Bill, clause 24

CLAUSE 27: MINISTERIAL APPROVAL OF A PROPOSED MANAGEMENT PLAN

3.10.6 Clause 27 of the CALM Bill proposes to amend section 60 of the CALM Act. This clause likewise uses mandatory language about Ministerial approval to a proposed management plan. Interestingly, the mechanism for Ministerial approval is treated quite differently depending on which portfolio is at issue. For example, where the Ministers for Fisheries or Mines make submissions to the Conservation Commission, it is only the Minister (administering the CALM Act) who has to be satisfied that consideration has been given to their submissions. However, it is a different scenario with the Minister for Forest Products or Minister for Water Resources.[19] The Minister for Forest Products plays a more vital role in the submission process, in that the Minister for Forest Products must agree with the Minister administering the CALM Act that the proposed plan gives effects to submissions. The EM explains it thus:

> *"...the Minister administrating the CALM Act cannot approve such plans if the Minister for Forest Products has made a submission on a plan...and the Ministers cannot agree that the proposed plan gives effect to the Minister for Forest Products' submission."*[20]

The Committee was unable to reach a unanimous position on whether Clause 27 separates ministerial functioning within the proposed new structures. This is essentially because no agreement could be reached on which of the Ministers has paramountcy over the proposed management plan.

An argument is that the Minister for Forest Products has a large degree of control over decisions about proposed management plans because that Minister's decisions must be given effect to under proposed section 60(2c) by the Minister (administering the CALM Act).

The fact that the Ministers must 'agree' suggests that their functions are not so much independent of each other, but dependent and hence not effectively separated.

A counter argument is that the requirement for one Minister to agree with another Minister under proposed section 60(2c) is *prima facie* evidence of the equal status of the two Ministers within a framework of separated

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19 The issue of joint responsibility of the Minister for Water Resources and the Minister administering the CALM Act has also been raised but not as a significant concern

20 The Explanatory Memorandum to the CALM Bill, p 13

functioning. Within such a framework, compromise is a reasonable outcome when two Ministers are involved. Even so, there are sufficient checks and balances in the process because ultimately the Minister for the Environment has to ensure that the management plan is consistent with principles of ecologically sustainable forest management.

Another argument is that the need for an unresolved management plan of the Ministers to be referred to Cabinet indicates a clear separation of the functions of the Ministers.

FINDING

The Committee finds that:

- a Memorandum of Understanding, although a useful device for agencies to codify internal arrangements, lacks transparency and is not subject to Parliamentary scrutiny.

RECOMMENDATION

Recommendation 1: That the proposed Memorandum of Understanding be tabled in Parliament.

CHAPTER 4
THE *CONSERVATION AND LAND MANAGEMENT AMENDMENT BILL 1999*

SPECIFIC CLAUSES IN THE CALM BILL

4.1 The Committee identified a number of specific issues in the CALM Bill which were contentious in the light of the second reading debate. Where the Committee could not reach agreement the Report merely condenses the arguments for and against those particular clauses but does not make recommendations.

CLAUSE 10

4.2 Clause 10 repeals Part III, Divisions 1, 2 and 3 of the CALM Act and inserts proposed Division 1, subdivisions 1, 2, 3 and 4.

CLAUSE 10: PROPOSED SECTION 19 - FUNCTIONS OF CONSERVATION COMMISSION

4.3 The subject matter of clause 10 of the CALM Bill (proposed section 19 in the CALM Act) is the Conservation Commission's twelve general and specific functions. The Committee noted these functions and considered extending them to include a specific function to publish reports similar to the Environmental Protection Authority's (**"EPA"**) power to publish under section 16 of the *Environmental Protection Act 1986*.

4.4 The Committee was unable to reach a unanimous position on this issue.

4.5 The arguments for a prescribed function to publish so as to provide advice on conservation matters to members of the public, and to publish reports on conservation matters generally, are as follows:

- it is in the public interest to make this type of information publicly available;
- the Conservation Commission has the responsibility of developing policies for the *"…preservation of the natural environment of the State."*[21] This is an important task when considering the fact that the Conservation Commission not only maintains a watching brief over the Forest Products Commission but also over Crown land and unallocated Crown land[22] as well as its more

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[21] Proposed section 19(1)(c) of the CALM Act

[22] According to Mr Frank Battini, Director, Environmental Protection Branch, CALM, this comprises 20 million hectares of CALM managed land vested in the Conservation Commission, 16 million hectares of private land, 27 million hectares of aboriginal land including pastoral leases, 90 million hectares of other pastoral leases and 95 million hectares of unallocated crown land

general responsibilities with regard to flora and fauna throughout Western Australia; and

- although proposed section 19(1)(9k) states that a function of the Conservation Commission is to *"...provide advice...upon request...to any body or person, if the provision of the advice is in the public interest..."*, the clause fails to provide for a general dissemination of information by a pro-active Conservation Commission. It is reliant on an interested party making a request for information.

4.6 The arguments against a prescribed function of publication are as follows:

- the proposed Department of Conservation can publish at the direction of the Minister;
- proposed section 20(1) of the CALM Act gives the Conservation Commission the power to publish a document should that be required to fulfil a statutory function. It states: *"The Conservation Commission has power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Act";*
- with a net budget allocation of $600,000 for all functions including auditing,[23] publication would significantly reduce available funds for other services; and
- the EPA is currently publishing on conservation matters and if the Conservation Commission were to publish, this would be an unnecessary duplication.

CLAUSE 10: PROPOSED SECTION 21 - MEMBERSHIP OF CONSERVATION COMMISSION

4.7 The subject matter of proposed section 21 is the membership of the Conservation Commission. It provides for nine members to be appointed by the Governor on the nomination of the Minister.

4.8 The Committee considered whether the power of the Minister (to whom the administration of the CALM Act is committed) in nominating such appointments is a suitable power for the Minister to exercise.[24] Ministerial appointments are common for appointments to higher echelons within the public service, such as Chief Executive Officers of agencies. The Committee considered that because the power rests with the Minister, then some degree of prescription may be necessary to ensure equitable representation is achieved.

4.9 The Committee was unable to reach a unanimous position on this issue.

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23 Dr Wally Cox, letter to the Committee, 13/6/2000

24 CALM Bill, clause 21(1)

4.10 The Committee recognised that legitimate appointments have been made through long, well established ministerial practices. An alternative arrangement might be a requirement that all ministerial appointments be made in conformity with standard requirements such as consultation with stakeholders, advertising positions and inviting nominations within a selection process based on a proper assessment of merit and equity.

4.11 Alternatively the appointment of the Conservation Commissioners could be monitored by the Office of the Public Sector Standards Commissioner which would consider whether the Conservation Commission was complying with the Office of the Public Sector Standards' code of ethics and/or code of conduct.

CLAUSE 10: PROPOSED SECTION 23 - MEETINGS OF CONSERVATION COMMISSION

4.12 The subject matter of proposed section 23 is the entitlement of the Executive Director of the proposed Department of Conservation to attend meetings of the Conservation Commission.

4.13 The Committee considered whether the Executive Director or the Executive Director's representative should have this right, or attend only by invitation. The Committee considered whether proposed section 23 generally restricts the power of the Conservation Commission to organise itself and meet without the Executive Director or the Executive Director's representative.

4.14 The Committee was unable to reach a unanimous position on this issue.

4.15 The argument to exclude the Executive Director stems from the consideration that the Conservation Commission should have the power and flexibility to meet freely. This is in keeping with the principle of separation of internal regulatory function as described in Chapter 3 and the Conservation Commission being able to retain its own identity.

4.16 Dr Wally Cox, Executive Director of CALM, described the Conservation Commission as the custodian of land and the proposed Department of Conservation, the land manager. Therefore *"...it is desirable that the Executive Director has knowledge of matters before the* [Conservation] *Commission and provide it with information to fulfil its statutory functions."*[25]

4.17 Proposed section 23(5) provides some measure of flexibility in that the Conservation Commission can exclude the Executive Director or the Executive Director's representative when it is considering a matter that relates to the functions or actions of the proposed Department of Conservation.

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25 Dr Wally Cox, transcript of evidence, 5/6/2000

4.18 The Committee accepted that the intention of the proposed clause is to ensure that there is no barrier between the proposed Department of Conservation and the Conservation Commission being able to conduct business. The Committee notes that the Chief Executive Officer of the Department of Environmental Protection is entitled to attend meetings of the Environmental Protection Authority and participate in the deliberations but not vote.

CLAUSE 10: PROPOSED SECTION 24 - MINISTERIAL DIRECTIONS TO CONSERVATION COMMISSION

4.19 The subject matter of proposed section 24 is the power of the Minister (to whom the administration of the CALM Act is committed) to issue directions to the Conservation Commission.

4.20 The proposed section prescribes that even though the Minister has the option of giving directions to the Conservation Commission, when the Minister exercises this option, the Conservation Commission must give effect to those directions. The Committee then considered the implications of such mandatory language.

4.21 The Committee was unable to reach a unanimous position on this issue.

4.22 An argument is that when the Minister issues directions, this compromises the independence and work of the Conservation Commission. However the counter argument is that this power is in keeping with conventional notions of Ministerial responsibility. For example, the 1989 *Burt Commission on Accountability* emphasised that with respect to statutory authorities, the strictest level of accountability stems from an entity which is subject to ministerial control.[26]

CLAUSE 23: PROPOSED AMENDMENT TO SECTION 53 OF THE CALM ACT

4.23 The subject matter of the proposed amendment to section 53 is management plans involving the Conservation Commission[27]. The Committee first sought clarification of the phrase *"…anything to be done…"* in the proposed amendment. It reads:

> *"(2) Anything to be done by the Conservation Commission under this Division in relation to a management plan for land that is State forest or a timber reserve is to be done -*
>
> *(a) by the Conservation Commission; or*

[26] The Burt Commission on Accountability, *Report to the Premier*, 1989, p 103

[27] As well as the Marine Authority

(b) by the Conservation Commission through the agency of the Department,

as the case requires, acting jointly with the Forest Products Commission."

4.24 The Committee understands that the phrase 'anything to be done' is limited to the headings within Part V Division 1, that is; joint action is required on:

- the preparation of proposed management plans;
- dealing with public submissions;
- the referral of proposed management plans to other bodies and relevant Ministers; and
- approval of the management plans by the Minister (to whom the administration of the CALM Act is committed).

Drafting points

4.25 The Committee observed a sequential drafting problem with proposed sections 53(2) and (3). These proposed sections do not come under proposed section 54, which relates to the preparation of management plans, rather it comes prior, at the beginning of Part V headed 'Management of land' and Division 1'Management plans'. A concern was raised with Dr Wally Cox, Executive Director, CALM, that proposed sections 53(2) and (3) would apply not only to the preparation of a plan but also to anything done under the auspices of that plan.

4.26 Dr Wally Cox agreed that the problem was one of sequential drafting as opposed to concurrent drafting but despite this, the intent would be to "*…read the clauses as being about the preparation of a plan"*.[28]

4.27 In view of this admission, the Committee considered that there were two solutions. First, to amend clause 23 so that after the words 'anything to be done', insert the words "in the formulation of a management plan" or secondly, relocate clause 23 within the body of section 54 of the CALM Act. These suggestions would overcome the confusion that the phrase 'anything to be done' encompasses anything to be done within the scope of management plans, rather than just the preparation.

FINDING

The Committee finds that:

- proposed sections 53(2) and 53(3) are ambiguous in their current location.

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[28] Dr Wally Cox, transcript of evidence, 6/6/2000

RECOMMENDATION

Recommendation 2: That proposed sections 53(2) and (3) be relocated within the body of section 54.

The requirement to act jointly

4.28 The Committee also considered the meaning of the term 'act jointly' in clause 23 but was unable to reach a consensus as to its meaning and effect.

4.29 One argument is that the requirement to 'act jointly' with the Forest Products Commission negates the objective of both the CALM Bill and Forest Products Bill which is to separate commercial and conservation objectives. The requirement to act jointly is a serious curtailment of the independence of the Conservation Commission because it compels consensus.

4.30 Dr Wally Cox, Executive Director of CALM said that the term 'act jointly' was not defined in the interpretation section of the CALM Bill because a definition *"...was not considered necessary."*[29] However, Dr Cox considered the term meant a *"...working together..."* in the preparation of the management plan. It would *"...necessitate joint administrative support and liaison..."* between the Conservation Commission, the Forest Products Commission and the Waters and Rivers Commission.

SECTION 55(1) AND (2) OF THE CALM ACT: EXPIRY OF MANAGEMENT PLANS

4.31 The subject matter of section 55 of the CALM Act is the content of the management plan and even though no amendments have been made to this section, the Committee considered the specific impact of section 55(2) due to its relationship with other amendments in the CALM Bill. It states:

> *"A management plan shall state the date on which it will, unless it is sooner revoked, but notwithstanding anything in this section or in the plan, a plan which would otherwise expires shall, unless it is revoked, remain in force until a new plan is approved."*

4.32 The Committee considered the scenario that if agreement could not be reached on a replacement forest management plan could the existing plan continue beyond its

[29] Dr Wally Cox, transcript of evidence, 5/6/00

original term? If so, the consequence of this would be that the original plan would continue indefinitely until a new forest management plan was approved.

4.33 The danger of this situation was explained by Hon Bob Pearce, Executive Director, Forest Industry Federation (WA). Mr Pearce told the Committee that:

> *"…NSW is still working on forest management plans for 1980 for some forest areas because it has been unable to get agreement on a new one due in part to the convoluted nature of the process. That State just keeps working on the old forest management plan by artificially extending it."*[30]

4.34 The Committee was unable to reach a unanimous position on this issue.

4.35 Dr Wally Cox, Executive Director of CALM, confirmed that the original plan would continue indefinitely until a new forest management plan was approved. However, Dr Cox explained that existing forest contracts will expire on December 31 2003, coinciding with the expiry date of the current forest management plan. Section 55 (2) of the CALM Act must be read against clause 61 of the Forest Products Bill which provides that *"...any provision or condition in a contract that is inconsistent with the CALM Act or the relevant forest management plan is of no effect"*, and clause 58(2) of the Forest Products Bill which states that *"…a production contract has no effect after the relevant management plan has expired."*

4.36 Dr Cox considers that these two clauses *"…provide a significant incentive for an appropriate agreement to be reached promptly about the content of a proposed plan…".*[31] However, a counter argument is that if the forest management plan is extended under section 55(2) of the CALM Act, this would allow for logging contracts to be signed for that extended period.

CLAUSE 27: PROPOSED SECTION 60 - MINISTERIAL APPROVAL OF MANAGEMENT PLANS

4.37 The subject matter of proposed amendments to section 60 is the Minister, who administers the CALM Act, approving proposed management plans.

4.38 The Committee considered the relationship between the Minister for Forest Products,[32] and the Minister administering the CALM Act to determine whether there is a power of veto within this clause.

4.39 The Committee was unable to reach a unanimous position on this issue.

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30 Hon Bob Pearce, transcript of evidence, 6/6/2000

31 Dr Wally Cox, letter to the Committee, 13/6/2000

32 As well as the Minister for Water Resources

4.40 One argument is that there are significant legal implications when the Minister administering the CALM Act has to give effect to submissions of the Minister for Forest Products in order to approve a management plan. Under the proposed amendment, the Minister for Forest Products has a right to make submissions on a proposed plan. The status of that submission is of paramount importance because the Minister administering the CALM Act, is prevented from approving a proposed management plan until either:

- the Minister administering the CALM Act and the Minister for Forest Products agree that effect has been given to the submission of the Minister for Forest Products; [33]
- the Governor (acting on the advice of Cabinet) decides that the proposed management plan may be approved; or
- in order to maintain the integrity of forest management plans, the paramountcy of the Minister for Forest Products' submissions needs to be removed. This could be achieved by changing the word 'agree' in section 60 (2c)(a)(i) to 'is satisfied'; and the word 'effect' to 'consideration' as well as deleting any reference to the Minister for Forest Products.

4.41 The counter argument is that the synergy of the separated operational and regulatory functions would not be maintained if one Minister could function separately of the other, in the preparation of the forest management plan. It is also argued that both Ministers must agree so neither has paramountcy.

4.42 The Committee was provided with an "Indicative Forest Management Plan Process" (Flow Chart) by Dr Wally Cox, Executive Director of CALM, which is found at Appendix 1. This explains the relationship between the *Conservation and Land Management Act 1984* (when amended) and the *Environmental Protection Act 1986.*

CLAUSE 36: PROPOSED SECTIONS 97 AND 97A

4.43 The subject matter of proposed section 97 is the power of the Executive Director of the proposed Department of Conservation to grant forest leases and in proposed 97A licences, for the use of land. The Committee considered that, as land will be vested in the proposed Conservation Commission, it may be appropriate for the Conservation Commission to approve leases and licences.

4.44 The Committee was unable to reach a unanimous position on this issue.

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[33] The Memorandum of Advice given to the Western Australian Forest Alliance by the Environmental Defender's Office suggests that at the next stage when the Minister for the Environment approves the plan, the Minister must consult with 'decision-making authorities' which under section 3 of the *Environmental Protection Authority Act 1986* would include the Minister for Forest Products

4.45 Dr Wally Cox, Executive Director of CALM, explained that proposed section 97 had to be read against proposed section 87A(1) of the CALM Act.[34] That is, the Executive Director of the proposed Department of Conservation has to satisfy the following stringent criteria before a lease could be granted:

- Ministerial approval;
- consultation with the Conservation Commission;
- keeping consistency with any existing management plan;
- keeping consistency with legislation protecting water quality; and
- conforming with that section of the CALM Act which provides constraints on the function to manage land.

4.46 Dr Cox concluded that even though *"...State forest and timber reserves will be vested in the Conservation Commission, the day to day land management, including the issuing of instruments to authorise entry and use of land, is a function of the Department* [of Conservation]."[35]

4.47 Despite the reassurance that the Executive Director of the proposed Department of Conservation has to consult with the Conservation Commission, it is merely a requirement to consult, and not to either 'act jointly' with the Conservation Commission or give effect to the Conservation Commission's advice.

4.48 The counter argument is that there are sufficient safeguards in proposed section 87A(1) and for this reason the requirement for the Conservation Commission to approve the issuing of leases or licences is unnecessary.

CLAUSE 48: PROPOSED SECTION 132

4.49 The subject matter of proposed section 132 of the CALM Act is the exemption of a various range of personnel and controlling bodies from personal liability involving acts or omissions done in good faith in connection with their performance under the CALM Act and the *Wildlife Conservation Act 1950*.

4.50 The substance of the amendment is to delete the *words "Commission, Authority or Council"* and insert the words *"Conservation Commission, Marine Authority or Marine Committee"*.

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34 As well as (presumably because they are captured under the same Division), section 100 which deals with leases of land and section 101 which deals with licences for the use of land

35 Dr Wally Cox, Submission No 3 tabled on 06/06/2000

4.51 The Committee considered that section 132 in the CALM Act could be updated to reflect a more modern drafting style about tortious liability. The Committee noted that clause 67 of the Forest Products Bill might serve as a template.

4.52 The Committee was unable to reach a unanimous position on this issue.

4.53 Proposed section 132 essentially provides an exemption from personal liability for employees. It also covers members of the Conservation Commission, the Executive Director and others. However, it is silent on the matter of vicarious liability.[36] This means that it fails to protect members of the public who might suffer damage as a result of government employees' acts or omissions.

4.54 When comparing proposed section 132 of the CALM Act to clause 67 of the Forest Products Bill it becomes apparent that clause 67 specifically addresses the issue of vicarious liability. It refers to both the Forest Products Commission and the Crown being liable for actions in tort (civil wrongs) by persons performing a function under the proposed *Forest Products Act 1999*.[37]

4.55 However, Forest Products Commissioners are treated differently. They are protected from personal liability but because the Forest Products Commission will be a public trading enterprise, their personal liability is also subject to the *Statutory Corporations (Liability of Directors) Act 1996.*[38] That is, they are bound under that Act to:

- act honestly in the performance of the functions of office;
- exercise care and diligence; and
- not make improper use of the position so as to gain an advantage.

4.56 There is a problem in transposing the whole of clause 67 of the Forest Products Bill into proposed section 132 of the CALM Act because, for example, clause 67(4) is of no relevance to the Conservation Commissioners as they are not deemed to be Directors.

4.57 Dr Wally Cox, Executive Director of CALM confirmed that the corresponding protection from liability in the Forest Products Bill is not as wide as that currently enjoyed by CALM under the CALM Act.

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36 Vicarious liability is the liability imposed on one person for the wrongful act of another on the basis of the legal relationship between them, usually employer and employee

37 The 36th Report of the Standing Committee on Government Agencies recommended in 1994 (at page 12) that the presumption of Crown immunity from the effect of statutes be abolished as regards operational agencies

38 Forest Products Commissioners are deemed to be Directors under Schedule 3(3) of the Forest Products Bill

CLAUSE 49: PROPOSED AMENDMENT TO THE SCHEDULE IN THE CALM ACT

4.58 The subject matter of item 4 in the Schedule lists the methods by which Conservation Commissioners can meet. Item 4 refers to the ability of the Conservation Commissioners to hold meetings when convened by the Chairman and any four members.

4.59 The Committee noted that item 4 is silent on the issue of conflicts of interest within the controlling body.

4.60 The Committee was unable to reach a unanimous position on whether item 4 should prescribe matters pertaining to conflicts of interest in a similar way to Schedule 1 item 18 of the Forest Products Bill, which deals with the subject matter of declaring conflicts of interest.

4.61 An argument is that disclosure of direct or indirect pecuniary interests in a matter before a meeting of the Conservation Commission should not be left to custom and practice but be updated to reflect modern methods of disclosing interests.[39] More prescription concerning the nature of interests is required to demonstrate accountability of the Conservation Commissioners to the community.

4.62 Dr Wally Cox, Executive Director of CALM, claims that conflicts of interest under the CALM Act have been *"...dealt with by members voluntarily identifying that they have a conflict of interest in a matter and abstaining from participating in the* [controlling] *bodies' consideration and determination of the matter."*[40] The Committee notes that this is traditional practice.

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39 Similar to how the *Local Government Act 1995* prescribes such matters by devoting Division 6 and three subdivisions of that Act to the issue of disclosure of interests

40 Dr Wally Cox, Submission No 3 tabled on 06/06/2000

CHAPTER 5
THE *FOREST PRODUCTS BILL 1999*

SPECIFIC CLAUSES IN THE FOREST PRODUCTS BILL

5.1 The Committee identified a number of issues in the Forest Products Bill which were contentious in the light of the second reading debate. The Committee makes no comment on other issues due to time constraints, and leaves those clauses where no comment has been made for consideration in the Legislative Council. Where the Committee could not reach agreement, the Report merely condenses the arguments for and against those particular clauses but does not make recommendations.

Competitive neutrality

5.2 As the second reading speech characterised the Forest Products Commission as a government trading enterprise[41], the Committee considered competitive neutrality in examining individual clauses of the Forest Products Bill. The Competition Principles Agreement defines the aim of competitive neutrality policy as:

> *"…the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public ownership. These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities"*[42].

5.3 The Committee requested the "National Competition Policy Review of the *Conservation and Land Management Amendment Bill 1999* and the *Forest Products Bill 1999"* (**"NCP Review"**) which had been undertaken into the provisions of the CALM Bill and Forest Products Bill. The NCP Review was requested on June 6 2000 and a draft report (dated June 13 2000) was not received until June 15 2000. This delay in providing the report did not allow sufficient time for the Committee to fully research and deliberate its issues. The NCP Review identifies certain competitive neutrality issues which remain outstanding. For example a review of native forest

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41 Hon Peter Foss MLC, Parliamentary Debates (Legislative Council) (Hansard) Thirty Fifth Parliament, Third Session 2000, April 6 2000, p 6087

42 Council of Australian Governments, *Competition Principles Agreement* 1999, subclause 3(1)

operations is intended to be undertaken by the proposed Forest Products Commission.[43]

Competitive advantages

5.4 This Chapter examines several issues where the Forest Products Commission may have a competitive advantage as a result of its nature as a State agency. These are:

- representation of sector interests on the Forest Products Commission;
- application of the *Wildlife Conservation Act 1950*;
- the paramountcy of Ministerial directions over the principles of ecologically sustainable forest management;
- local government rate equivalents; and
- recovery of the cost of the Conservation Commission's audit of the Forest Products Commission.

Competitive disadvantages

5.5 The Forest Products Bill contains references to community service obligations which are the non-business, non-profit activities of the Forest Products Commission. Community service obligations represent a competitive disadvantage of government entities, so are treated differently from the advantages that clause 3(1) of the Competition Principles Agreement contemplates.

5.6 Competitive neutrality in the area of community service obligations is achieved by compensating the Forest Products Commission for the performance of community service obligations from the Consolidated Revenue Fund. An example of a community service obligation is the maritime pine project, (which is based on environmental rather than strictly commercial objectives), the requirement to act on the principles of ecologically sustainable forest management,[44] and the Forest Products Commission's non-commercial functions under clause 10 of the Forest Products Bill[45].

5.7 Compensation places the Forest Products Commission on an even footing with private enterprises, which generally do not perform community service obligations from revenue they generate.

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43 NCP Review, p 15

44 NCP Review, p 27

45 NCP Review, p 13

THE NAMES OF THE FOREST PRODUCTS BILL AND THE FOREST PRODUCTS COMMISSION

5.8 The Committee received a submission that the names of the Forest Products Commission and the Forest Products Bill place undue emphasis on native forest logging by the use of the word 'forest', as opposed to moving toward a greater use of plantation timber.[46] The submission proposed an amendment to change the name of the Forest Products Commission and the title of the Forest Products Bill.

5.9 The Committee was unable to reach a unanimous position on this issue.

5.10 An argument in favour of an amendment:

- The name of the Forest Products Commission should be the 'Timber Resources Commission', or the 'Wood Products Commission', in order to have a name with less bias towards native forests as a source of forest products. This would reflect the additional responsibility for plantations and sharefarming which has been included in the Forest Products Bill.

5.11 An argument against changing the name of the Forest Products Commission and the Forest Products Bill:

- The name reflects the definition of forest products used throughout the Forest Products Bill. If any change is to be made, it should be to that definition, to expressly include the sources of the products listed.

CLAUSE 3: THINNING – THE DEFINITION OF "MANAGE"

5.12 Clause 3 provides:

> **"manage"**, in relation to forest products, includes establish, regenerate, grow, tend and protect;"

5.13 There was discussion whether labour intensive tasks to be performed by the proposed Department of Conservation which contribute to the long term viability of the industry, such as non-commercial thinning, will be caught within the definition of "manage", and whether the costs can be recovered in the contract price for forest products (clause 59). It was suggested to insert 'commercial thinning' and 'non-commercial thinning' after 'tend' in the definition of "manage".

5.14 The Committee was unable to reach a unanimous position on this definition.

5.15 Arguments in favour of an amended definition:

- Thinning is a major aspect of forest management, therefore it should be

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[46] Australian Conservation Foundation, Conservation Council of Western Australia, Kimberley Land Council, Environmental Defender's Office (WA), the Wilderness Society (WS), Australian Marine Conservation Society (WA), *Position Statement*, June 5 2000, p 6

specified in the definition.

- Thinning is a labour intensive task associated with the long-term production of saw logs. As such, it clearly falls within the functions of the Forest Products Commission.
- The State needs to be able to recoup the costs for such thinning from timber companies, as a specific component of the price of native forest timber.
- The Forest Products Bill does not indicate how long the Forest Products Commission will control the land (clause 10(3)(b)) to the extent required for managing forest products. Consequently, it is uncertain what these obligations for management of forest products and land precisely entail. Evidence taken during the Committee's hearing indicates that the Forest Products Commission will only undertake tasks directly related to commercial operations[47]. For example, thinning a stand 30 years after replanting, with no commercial return, will be undertaken by the proposed Department of Conservation. However the Forest Products Bill's provisions are silent on these matters.

5.16 Arguments in favour of the clause as it stands:

- "Manage" could be said to include non-commercial thinning and other forest management tasks that occur outside the period of time that the Forest Products Commission controls the land to harvest the forest products. Thinning is within the scope of the definition of "manage", which includes 'regenerate, grow, tend'.
- Clause 59(1)(a) provides for the recovery of the costs incurred by the Forest Products Commission in "managing" and harvesting forest products; clause 59(1)(c) provides for the recovery of costs incurred by the proposed Department of Conservation in managing land and forest products. Regardless of which entity is performing the management tasks, whenever in the harvesting cycle, the costs incurred are recoverable.

CLAUSE 6: REPRESENTATION OF SECTOR INTERESTS ON THE FOREST PRODUCTS COMMISSION

5.17 Clause 6(1) provides:

> *"6. **Commissioners***
>
> *(1) The Commission is to have 7 commissioners appointed by the Governor on the nomination of the Minister as having such*

[47] Dr Wally Cox, transcript of evidence, June 6 2000, pp 13-14

expertise in commercial activities as is relevant to the functions of the Commission."

5.18 The Committee received a submission that indicates that a representative Forest Products Commission is more appropriate than one with solely commercial expertise[48]. Another submission suggested that the Forest Products Commission would benefit from the flexibility allowed by Ministerial nominations, and that representative Forest Products Commissioners are conceptually inconsistent with the primary duty of Forest Products Commissioners: which is to act in the best interests of the Forest Products Commission[49].

5.19 The Committee notes that there is an amendment in Supplementary Notice Paper 30-3, (Tuesday, May 30 2000) proposing that a representative of the Australian Workers' Union (West Australian Branch) be appointed to the Forest Products Commission as well as two representatives from the plantation industry. It has also been proposed that the clause be amended to more generally prescribe one Forest Products Commissioner to represent workers' interests[50].

5.20 The Committee was unable to reach a unanimous position on this issue.

5.21 Arguments in favour of an amendment to clause 6:

- Representation of forest products workers on the Forest Products Commission would assist in performance of the function to promote employment in and the development of the forest products industry under clause 10(1)(j). Mr Daly stated: *"Our concern is to ensure that the commission represents the legitimate interests of working people in that environment; in other words, it is not a commission run solely by business people from a business perspective"*[51].
- Representation of the plantation sector of the forest products industry would ensure that there is no undue preference by the Forest Products Commission for the harvesting of forest products sourced from native forests.
- Worker representation is distinguishable from sectorial representation because workers are engaged across all sectors of the industry.

5.22 Arguments against an amendment to Clause 6:

- Accountability measures, when provided for, are a sufficient restraint on Ministerial discretion to appoint. Where an appointment is sensitive, it is not

48 Mr Tim Daly, transcript of evidence, June 6 2000, p 5

49 Hon Bob Pearce, transcript of evidence, June 6 2000, p4

50 Mr Tim Daly, transcript of evidence, June 6 2000, p5

51 Mr Tim Daly, transcript of evidence, June 6 2000, p5

in the Minister's interest to make a 'grace and favour' appointment, because of the political consequences.

- Statutory corporations function best when they are not dominated by sector interests because the Forest Products Commissioners' responsibility is clearly to the corporation, rather than to the body the Forest Products Commissioner represents.
- Once sectorial representation is given to one group other sectorial groups will demand representation on the grounds of equity.
- Specific union representation could be at the expense of other relevant union representation and non-union workers.

CLAUSE 10(5): APPLICATION OF THE *WILDLIFE CONSERVATION ACT 1950* TO THE FOREST PRODUCTS COMMISSION

5.23 Clause 10(5) provides:

> *"10 **Functions of Commission***
>
> *(5) This Act does not limit or otherwise affect the operation of the* Wildlife Conservation Act 1950 *in relation to the Commission or any other person."*

5.24 Section 9 of the *Wildlife Conservation Act 1950* binds the Crown in relation to the protection of flora. This is reflected in the EM to the Forest Products Bill, which indicates that clause 10(5) will operate to ensure the protection of all flora protected under that Act, including forest products indigenous to the State.

5.25 The Committee notes that clause 10(6) provides new protection to the Forest Products Commission from the provisions of the *Wildlife Conservation Act 1950*, which are not currently found within the corresponding provisions of the CALM Act.

5.26 The *Wildlife Conservation Act 1950* does not have a mirror provision to explicitly bind the Crown in relation to fauna. Concerns were raised that as an agent of the Crown (clause 5(4)), the Forest Products Commission is not bound to protect fauna under the Act. In a submission[52], an amendment was proposed to subject the Forest Products Commission to the application of the *Wildlife Conservation Act 1950*.

5.27 The Committee was unable to reach a unanimous position on this issue.

5.28 An argument in favour of an amendment:

- It is inappropriate for a body with a commercial function to harvest forests to be immune from liability (as provided for in clause 10(6)) for damage to

[52] Mr Michael Bennett, transcript of evidence, June 6 2000

protected fauna. The Forest Products Commission should be held liable as would any other person under the *Wildlife Conservation Act 1950*. Crown immunity represents a competitive advantage for the Forest Products Commission.

5.29 An argument against an amendment:

- It is not appropriate to alter the application of the *Wildlife Conservation Act 1950* to the Crown by means of the Forest Products Bill, the *Wildlife Conservation Act 1950* itself should be amended.

CLAUSE 12(4): THE PARAMOUNTCY OF MINISTERIAL DIRECTIONS OVER THE PRINCIPLES OF ECOLOGICALLY SUSTAINABLE FOREST MANAGEMENT

5.30 Clause 12(4) provides for a Ministerial direction given under clause 14 to prevail over the principles on which the Forest Products Commission is to act, as contained in clause 12(1). These principles are:

- the long term viability of the forest products industry; and
- principles of ecologically sustainable forest management.

5.31 Evidence taken by the Committee indicates that the intention of the provision is to place ultimate responsibility for the actions of the Forest Products Commission with the Minister for Forest Products[53]. Concerns raised were that the independence of the Forest Products Commission and the principles of ecologically sustainable forest management are compromised by this subclause.

5.32 A discussion took place about whether to subject a Ministerial direction under Clause 12(4) to the principles of ecologically sustainable forest management, and place the principles contained in clause 12(1) in a new objects clause at the beginning of the Forest Products Bill in order to apply the principles to all aspects of the Forest Products Commission's operations[54]. Clause 12(1) limits the application of the principles to making a profit consistent with planned targets (as contained in the strategic development plan and the statement of corporate intent).

5.33 The Committee was unable to reach a unanimous position on this issue.

5.34 Arguments in favour of an amendment:

- It is inappropriate that the Minister can override the principles of ecologically sustainable forest management and the long-term viability of the industry. The principles of ecologically sustainable forest management (incorporating

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53 Department of Conservation and Land Management, Submission No 3 tabled on 06/06/2000

54 In light of Hon John Cowdell's amendments to Clause 61 on the Legislative Council of Western Australia's Supplementary Notice Paper No 30-3, Tuesday, May 30 2000

the long-term viability of the industry in this context) should have paramountcy in the legislation.

- The concerns regarding the impact of the Ministerial direction are not alleviated by the requirement that a direction be tabled in both Houses of Parliament (clause 14(3)).
- From a technical perspective, it is appropriate that the principles of ecologically sustainable forest management be defined with reference to the entire Forest Products Bill (preferably in an objects clause), as opposed to being limited to application to clause 12 only.

5.35 Arguments against an amendment to clause 12:

- It is more appropriate that the actions of the Forest Products Commission can be directed by a flexible mechanism such as Ministerial directions. Ministerial directions can be responsive to special or unusual circumstances as they arise.
- Ministerial directions are accountable by reason of the requirement for directions to be tabled before both Houses of Parliament (clause 14(3)). For this reason, the Parliament can exercise control over the use of Ministerial directions.
- The Minister's power is in keeping with conventional notions of Ministerial responsibility. For example, the 1989 *Burt Commission on Accountability* emphasised that with respect to statutory authorities, the strictest level of accountability stems from an entity which is subject to ministerial control.[55]
- In the interests of competition, the Forest Products Commission should be able, with the approval of the Minister, to operate unimpeded by the requirements of clause 12[56].

CLAUSE 35 (3) AND (4): DELETION OF COMMERCIALLY SENSITIVE MATERIAL FROM THE STATEMENT OF CORPORATE INTENT

5.36 Clause 35(3) provides that the Forest Products Commissioners may request the Minister to delete from the copy of a statement of corporate intent that is to be laid before Parliament a matter that is of a commercially sensitive nature, and the Minister may, despite subsection (2) comply with the request. Subsection (2) compels the Minister to table the statement of corporate intent in each House of Parliament.

5.37 Clause 35(4) provides that any copy of a statement of corporate intent to which subsection (3) applies must contain a statement detailing the reasons for the deletion at the place in the document where the information deleted would otherwise appear and

55 The Burt Commission on Accountability, *Report to the Premier*, 1989, p 103

56 NCP Review, p 27

be accompanied by an opinion from the Auditor General stating whether or not the information deleted is commercially sensitive. It was discussed whether to amend the clause to require the approval of the Auditor General for such a deletion.

5.38 The Committee was unable to reach a unanimous position on this issue.

5.39 Arguments in favour of amendment:

- Independent assessment and approval by the Auditor General is an appropriate procedure in relation to the deletion of material from statements tabled in the Parliament. There should be an independent determination of whether commercial sensitivity can be claimed, as it is contrary to the transparency achieved by the tabling of the statement of corporate intent.
- The procedure for sealed papers would, in any case, provide sufficient restriction on the information, while permitting the tabling of the complete document.

5.40 Arguments against amendment:

- The clause contains adequate safeguards as it stands.
- The Forest Products Commission cannot operate on the same terms as a private enterprise if it is not permitted to determine for itself whether material is commercially sensitive. The Forest Products Commissioners are best placed to determine whether material is likely to jeopardise its operations so as to warrant its deletion from the statement of corporate intent.

CLAUSE 44: THE POWER TO APPLY THE DIVIDEND IN WHOLE OR IN PART FOR THE PURPOSES OF THE FOREST PRODUCTS COMMISSION

5.41 Government trading enterprises, which generate profit in their activities, are required by their governing Acts to pay a dividend to the Consolidated Revenue Fund at the end of each accounting period as determined under the respective Acts. In the cases of the *Water Corporation Act 1995* and the *Gas Corporation Act 1994*, the whole of the dividend (profit) is required to be paid into the Consolidated Revenue Fund: there is no capacity for those entities to apply the dividends for their own purposes.

5.42 The capacity of the Forest Products Commission to apply part of the dividend for the purposes of the Forest Products Commission appears to be unique amongst government trading enterprises. Clause 44(2) requires the agreement of the Minister and the concurrence of the Treasurer clause 44(3) for the Forest Products Commission to pay the dividend into the Consolidated Revenue Fund. It is a parallel to a private commercial enterprise's capacity to decide whether to pay a dividend to shareholders or to invest the profits back into the business.

5.43 The Committee was unable to reach a unanimous position on this issue.

5.44 Argument in favour of the clause as it stands:

- This provision provides an incentive for the Forest Products Commission to operate dynamically, while under appropriate supervision by the Minister and the Treasurer, and under the regulation of the Conservation Commission.

5.45 Argument against the clause as it stands:

- Whilst there is incomplete separation of the operational and regulatory functions within the Forest Products Commission, the potential for new conflicts of interest to emerge is given scope under these provisions.

CLAUSE 59: COMPONENTS OF THE CONTRACT PRICE

5.46 The subject matter of clause 59 is the components of the contract price for the sale of forest products. The Committee considered whether the pricing provisions under Clause 59 adequately address:

- recovery of the non-financial costs of the loss of native forests;
- recovery of the cost of providing for subsequent sawlog rotations;
- recovery of the cost of the Conservation Commission's audit of the Forest Products Commission's performance; and
- a price component representing local government rates and charges which would be payable by the party to the production contract if it were the owner of the land containing the forest products.

Recovery of the cost of providing for subsequent sawlog rotations

5.47 Consideration was given to the time taken for regrowth and recovery of forests as a crop, and the commercial viability of replanting. The Committee considered the costs of replanting and management over the harvesting cycle (for example, 80 years in duration) are such that it would be commercially unviable for private enterprise to invest in regeneration. If the Forest Products Commission is to act on the principle of long term viability of the industry (clause 12), it should be able to recover the costs incurred between saw log rotations, in addition to making a profit (clause 59(1)(g)). There was a discussion held about whether to insert a component representing the replacement cost for subsequent sawlog rotations, including thinning.

5.48 The Committee was unable to adequately research or give full consideration to this issue due to time constraints.

Recovery of the non-financial costs of the loss of native forests

5.49 The Committee discussed the issue of the non-financial losses caused by the harvesting of forest products in native forests, and considered whether a price component representing such a loss should be included in clause 59(1).

5.50 The Committee was unable to reach a unanimous position on this issue.

5.51 Arguments in favour of inclusion of a component representing the non-financial costs of the loss of native forests:

- In its Fourth Report, the Committee addressed the issue of accounting for the non-financial values of old growth and native forests[57]. The harvesting of a native forest represents an economic loss of a public good in loss of habitat for flora and fauna, and other economic values, such as tourism and recreation, as provided for by conservation of native forests.
- By including a component representing the loss of native forests, forest products sourced from plantations will not bear this cost, providing an incentive for purchasers to choose plantation timber in preference to native forest timbers.
- Australian Accounting Standard AASB 1037 provides a model for accounting for self-generating and regenerating assets, such as native forests, fauna and flora. The contract price for forest products should expressly include a component to offset the loss of old growth native forests in accordance with standard accounting practice.

5.52 Argument against the inclusion of a component representing the economic loss of native forests:

- In the short to medium term, plantations will be unable to supply sufficient forest products to maintain the industry at a level to satisfy consumers' demand for timber. Access to native forests should not be limited by an additional pricing component until plantations are able to supply a greater proportion of the harvestable timber.

Local government rate equivalents

5.53 In relation to the contract price components, the question of local government rates and charges, or equivalents, arises. Land vested in the Conservation Commission, or held by the Forest Products Commission under clause 43(2), is exempt from local government rates and charges, while sharefarmed land is not. The liability for rates owing on sharefarmed land would be apportioned under the contract under Part 7 of the proposed *Forest Products Act 1999*. It would be passed onto the purchaser of forest products, where products harvested from departmental land would not bear this additional cost. The Committee discussed whether clause 59(1) should include a component representing local government rates and charges on forest products sourced from departmental land.

5.54 The Committee was unable to reach a unanimous position on this issue.

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[57] *The Management of and Planning for the Use of State Forest in Western Australia - The Sustainability of Current Logging Practices*, Fourth Report, 1999, p 13

5.55 Arguments in favour of including a component representing local government rates and charges:

- The inclusion of such a component would be justified if the land were used for producing forest products. If the land had additional uses, such as recreation and water catchment protection, the component could be calculated to represent the proportion of the land used to source forest products.
- Forest products sourced from departmental land should bear a price component representing local government rates and charges to bring the price into line with that for forest products sourced from sharefarmed land, in the interests of competitive neutrality.[58]

5.56 An argument against the inclusion of a price component representing local government rates and charges:

- Dr Wally Cox contended that Conservation Commission land also produces 'public goods' such as conservation, recreation and water catchment protection, and it would be inappropriate to contemplate a full local government rate equivalent.[59]

Recovery of the cost of the Conservation Commission's audit of the Forest Products Commission

5.57 Clauses 59(1)(b), (c) and (d) provide for recovery of costs incurred by the proposed Department of Conservation in relation to work, services and facilities provided in accordance with proposed section 35 of the CALM Act[60], and in managing forest products on departmental and sharefarmed land. There is no provision specifically addressing recovery of the costs incurred by the Conservation Commission in performing its function of auditing the performance of the Forest Products Commission.[61]

5.58 There was discussion about concerns that the Conservation Commission is entirely reliant on appropriations by Parliament for funds to perform its functions. A concern raised was whether the Conservation Commission's ability to perform the function of auditing the performance of the proposed Department of Conservation and the Forest Products Commission would be diminished, removed or politically influenced as it is subject to an annual Budget allocation. The Committee discussed whether the cost of

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58 NCP Review, p 5

59 Department of Conservation and Land Management, Submission No 3 tabled on 06/06/2000, p 10

60 But the Department of Conservation is not permitted to factor in a component for profit

61 Under clause 10 of the CALM Bill which inserts a new section 19(1)(g)(iii)

the Conservation Commission audit should be recoverable through the contract price for forest products.

5.59 The Committee was unable to reach a unanimous position on this issue.

5.60 Arguments in favour of the inclusion of an audit cost recovery component:

- Notwithstanding the Conservation Commission's general power to do all things necessary in connection with the performance of its functions (proposed section 20(1) of the CALM Act), it is desirable that a price component recovering the cost of the Conservation Commission audit be specified in Clause 59(1).
- A cost recovery mechanism would partly insulate the auditing function from political influence by making the cost component representing the audit of the Forest Products Commission dependent on the revenue the Forest Products Commission generates.

5.61 Arguments against the inclusion of an audit cost recovery component:

- The general power provision (proposed section 20(1)) would permit the Conservation Commission to charge the Forest Products Commission a fee for its auditing services, and clause 59(1)(a) provides for recovery of costs incurred by the Forest Products Commission in performance of its functions[62].
- A general conflict of interest may arise from the Conservation Commission obtaining funds from its auditing function.

Adequacy of the Conservation Commission's 2000-2001 Budget allocation for the purposes of auditing

5.62 The 2000-2001 Budget allocation for resources and services provided to the Conservation Commission, within the Recurrent Outputs of the proposed Department of Conservation budget allocation, is $610 000, with no forward estimates provided.[63] This figure represents the funds allocated for all operations of the Conservation Commission. In addition to this allocation, the proposed Department of Conservation is required to provide such assistance to the Conservation Commission as the Conservation Commission requests.[64] Discussion took place as to whether the Budget allocation enabled the Conservation Commission to properly perform its functions (see section 4.3 to 4.6 on page 17 of this report).

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62 Dr Wally Cox, letter to the Committee, June 12 2000

63 Budget Paper No 2: Budget Statements, Volume 1, p253

64 Dr Wally Cox, letter to the Committee, June 12 2000

5.63 The Committee was unable to adequately research or give consideration to this issue due to time constraints.

CLAUSE 61: CONTRACTS UNDER PARTS 7 AND 8

5.64 As the Forest Products Bill stands, there is no requirement for the Forest Products Commission to disclose details of contracts it enters into either the Parliament or the Conservation Commission, which has the function of auditing the performance of the Forest Products Commission (CALM Bill, clause 10). There is also no provision within the contracting function (clause 10(1)(l)) for involvement of the Minister in the process of entering contracts.

5.65 The Committee discussed concerns that the accountability and supervision of the Forest Products Commission by the Parliament is compromised by the absence of a requirement to publicly disclose contract details, including the contractor's name, the quantity of forest products sold, the purchase price and the value adding required, and the absence of the involvement of the Minister. The Committee considered whether the Parliament must be informed of contract details to enable it to hold the Minister properly accountable for the performance of one of the primary functions of the Forest Products Commission.

5.66 The Committee considered whether certain details of contracts should be made public, and whether those details should not be protected by claims of 'commercial in confidence'. The Committee notes the procedure relating to sealed papers in the House[65], and acknowledges that this procedure may be appropriately applied in relation to contract disclosure. The Committee also considered the effects of contract disclosure on the market for forest products.

5.67 The Committee was unable to reach a unanimous position on this issue.

5.68 Arguments in favour of an amendment to require tabling of contracts:

- Details such as the contract price, the volume and the grade of logs must be disclosed to enable the Parliament and the Conservation Commission to determine whether the Forest Products Commission is acting in accordance with the relevant management plan and its production targets.
- Information on the going rate for forest products would aid competing contractors to determine a market price, with a potential side effect of raising the price through competition, reaping a greater return for the State.
- Contract disclosure would minimise any possibility that particular contractors would have preferential treatment in the form of lower prices.

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65 Tabled documents kept in a sealed envelope by the Clerk, available to Members on a read-only basis

5.69 Arguments against an amendment to require tabling of contracts:

- A requirement to table contracts would be onerous on both the Forest Products Commission and the entities it contracts with, because of the commercial sensitivity of the terms of the contract.
- Parliament should not be involved in the day to day running of the Forest Products Commission because it is an operational issue.

SCHEDULE 1: PROCEDURES FOR DISCLOSURE OF CONFLICTS OF INTEREST

5.70 Proposed Division 2 of Schedule 1 of the Forest Products Bill provides for Forest Products Commissioners' disclosure of interests. Clause 17 of the Schedule provides that a Forest Products Commissioner who has a material personal interest in a matter being considered by the Forest Products Commissioners must disclose the nature of the interest at a meeting. Clause 18 provides that a Forest Products Commissioner with a declared interest must not vote and must not be present while the matter in which the Forest Products Commissioner has the interest is considered. Clause 19 provides for the Forest Products Commission to pass a resolution that clause 18 is inapplicable in specific cases; clause 21 provides that the Minister may declare clause 18 inapplicable.

5.71 The Committee discussed whether clauses 19 and 21 are sufficient safeguard against conflicts of interest within the Forest Products Commission.

5.72 The Committee was unable to reach a unanimous position on this issue.

5.73 An argument in favour of the clause as it stands:

- The provisions permit the Forest Products Commission itself to regulate its own proceedings in determining when a Forest Products Commissioner's conflict of interest is material so as to render that Commissioner disqualified from attending and voting on the matter.

5.74 Arguments against the Clause as it stands:

- The provisions dilute the strength of the prohibition on Forest Products Commissioners participating in meetings when there is a conflict of interest. It is inappropriate for the Forest Products Commission or the Minister to declare that a particular conflict is effectively irrelevant, given the importance of accountability to the public in the area of commercial forestry operations.
- It is crucial that the Forest Products Commission not be permitted to operate if one or more Commissioners have a material conflict of interest in light of its composition (clause 6), being of persons with expertise in commercial activities. Absolute prohibition on conflicts of interest is a more satisfactory safeguard of the public interest than the Forest Products Bill currently provides. Given the sensitive nature of the Forest Products Commission's

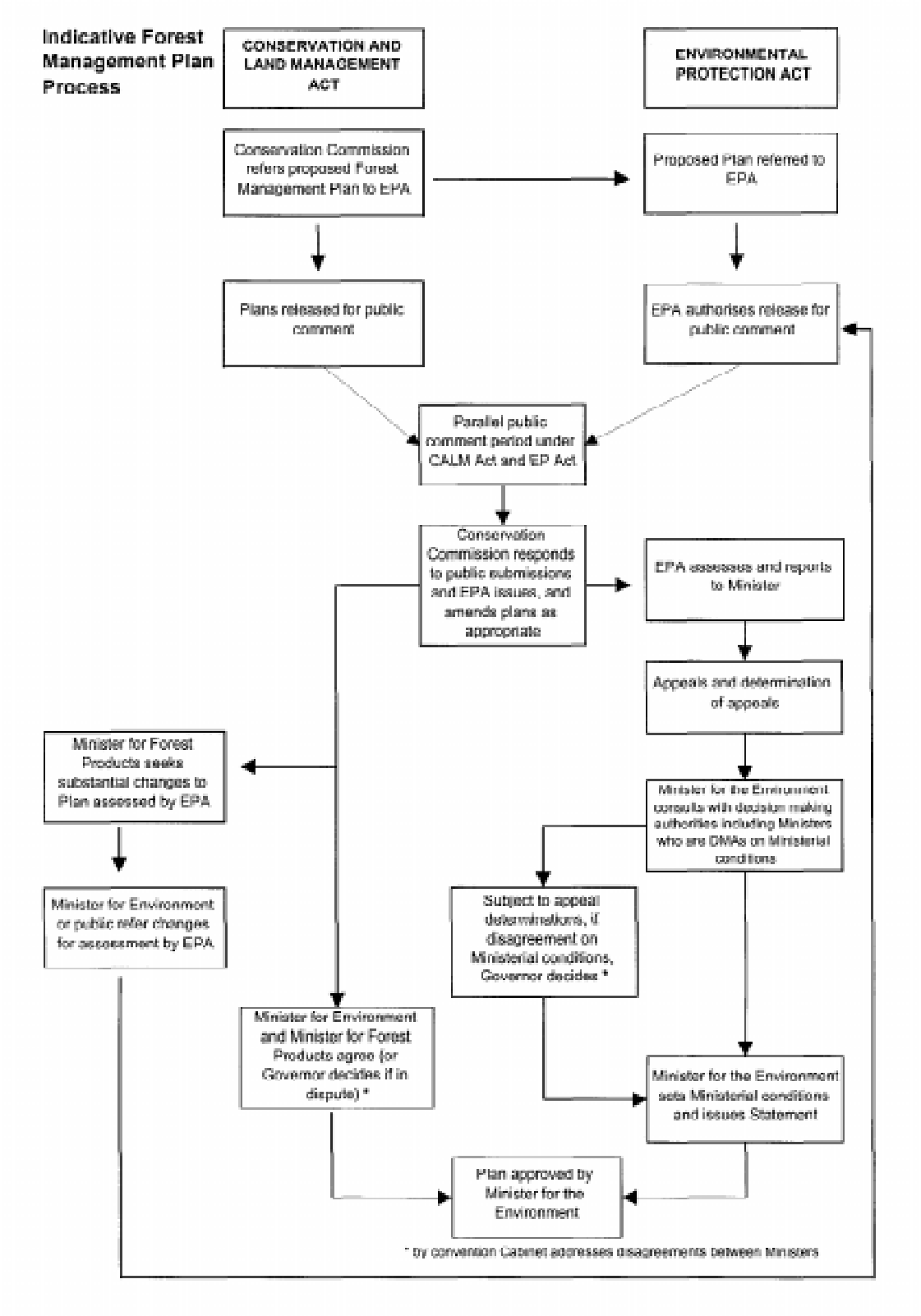
functions, any conflict of interest offends against accountability, and potentially, public confidence in the Forest Products Commission.

- Division 6 of the *Local Government Act 1995* provides for a more satisfactory model to deal with conflicts of interest within statutory bodies.

Hon Christine Sharp MLC

Date: June 20 2000

APPENDIX 1


Indicative Forest Management Plan Process
CONSERVATION AND LAND MANAGEMENT ACT
ENVIRONMENTAL PROTECTION ACT
Conservation Commission refers proposed Forest Management Plan to EPA
Proposed Plan referred to EPA
Plans released for public comment
EPA authorises release for public comment
Parallel public comment period under CALM Act and EP Act
Conservation Commission responds to public submissions and EPA issues, and amends plans as appropriate
EPA assesses and reports to Minister
Appeals and determination of appeals
Minister for Forest Products seeks substantial changes to Plan assessed by EPA
Minister for the Environment consults with decision making authorities including Ministers who are DMAs on Ministerial conditions
Minister for Environment or public refer changes for assessment by EPA
Subject to appeal determinations, if disagreement on Ministerial conditions, Governor decides *
Minister for Environment and Minister for Forest Products agree (or Governor decides if in dispute) *
Minister for the Environment sets Ministerial conditions and issues Statement
Plan approved by Minister for the Environment
* by convention Cabinet addresses disagreements between Ministers