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Guy Charlton

*University of New England (Australia), gchart3@une.edu.au*

Ricardo Napper

*Aboriginal Legal Service of Western Australia*

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# ENVIRONMENTAL DEGRADATION AND THE LEGAL IMPERATIVES OF IMPROVEMENT: FOREST POLICY IN WESTERN AUSTRALIA FROM EUROPEAN SETTLEMENT TO 1918

GUY C CHARLTON\* AND RICARDO NAPPER\*\*

In the timbers of this State we have an asset on which we pride ourselves, which has advertised our State through the world ; and I say, therefore, that it is an asset which she should hold in trust not only for ourselves, but for unborn generations...<sup>1</sup>

William Purkiss, WA Legislative Council 1902

## I INTRODUCTION

The Australian forests have experienced deforestation since European settlement in 1788.<sup>2</sup> According to Bradshaw, Australia has lost nearly 40% of its forests and the remaining forest is highly fragmented and degraded.<sup>3</sup> In Western Australia (WA), Australia's only biodiversity hotspot, forests cover approximately 16% or 21.0 million hectares.<sup>4</sup> In the southwest and central parts of the state these forests are significantly cutover and degraded. In some instances, particularly in the wheatbelt, the local cutover has been complete. For example, in the Avon Botanical District (the central part of the wheatbelt) over 93% of the original vegetation and 97%

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\* Guy Charlton is an Associate Professor of Law at the University of New England, Australia and Adjunct Professor at Auckland University of Technology and The University of Notre Dame Australia Law School.

\*\* Ricardo Napper is a solicitor (restricted practitioner) licensed to practice in Western Australia. He is currently employed by the Aboriginal Legal Service of Western Australia and works in South Hedland. He graduated from Curtin University with a bachelor of laws with distinction in 2017. The authors would like to thank the reviewers for their helpful comments.

<sup>1</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 October 1902, 1457 (Sir James George Lee-Steere).

<sup>2</sup> Megan C. Evans, 'Deforestation in Australia: Drives, Trends and Policy Responses' (2016) 22 *Pacific Conservation Biology* 130 (Evans estimates that 40% of the original forest cover in Australia remains).

<sup>3</sup> Corey J. A. Bradshaw, 'Little left to lose: deforestation and forest degradation in Australia since European colonization' (2012) 5 *Journal of Plant Ecology* 1:109 -120; Michele Barson, Lucy Randall and Vivienne Bordas, *Land Cover Change in Australia. Results of the Collaborative Bureau of Rural Sciences—State Agencies Project on Remote Sensing of Land Cover Change* (Bureau of Rural Sciences, Kingston ACT, 2002). Bradshaw defines forest as 'an area, incorporating all living and non-living components, that is dominated by trees having usually single stem and a mature or potentially mature stand height >2 m and with existing or potential crown cover of overstorey strata >20%'. This is the same definition used by the Australian Government <http://www.environment.gov.au/system/files/pages/63b569ff-ae63-4d7b-be54-16f2e79900e0/files/nga-factsheet5.pdf>.

<sup>4</sup> Australian Government, Department of Agriculture and Water Resources, Australia's State of the Forests Report 2018, 47

<[http://www.agriculture.gov.au/abares/forestsaustralia/Documents/SOFR\\_2018/Web%20accessible%20PDFs/SOFR\\_2018\\_web.pdf](http://www.agriculture.gov.au/abares/forestsaustralia/Documents/SOFR_2018/Web%20accessible%20PDFs/SOFR_2018_web.pdf)>.

of the woodlands were removed.<sup>5</sup> William Wallace, an officer of the Forest Department, estimated that between 1829 and 1920, 1 million acres of forest was cut.<sup>6</sup> The Forests Department Annual 1921 Report lamented:

[S]eventy five years of practically uncontrolled cutting, and entirely uncontrolled burning have reduced this national asset to such a condition that only a negligible quantity of sound young trees is growing to the acre on the portion that has been cutover.<sup>7</sup>

Today the only significant forests that remain in Western Australia are the Jarrah, Karri and Wandoo forests. However, these forests have been significantly degraded and contain approximately 30% of their original forest cover.<sup>8</sup>

This cutover is unsurprising given the particular circumstances encountered by the Western Australian colonial settler and the state of scientific knowledge concerning the effects of deforestation. The Crown expected the colony to be self-supporting. With scarce labour and few funds for investment, agricultural land was considered to be the most valuable asset. In such circumstances the trees and wealth represented by the forest was seen as an impediment to progress. As such, it is likely that the initial phases of deforestation would have occurred even without the lumber industry activity that arose after the 1870s. As Twining (referring to the USA) noted:

In that agrarian society there was no question as to what was of ultimate importance —it was the land, and the trees were as much an obstacle in its utilization as was Indian title.<sup>9</sup>

The abundant timber was used in the early years of the colony for construction and improvement. Later, with the development of sufficient port, energy and transportation capacity, larger scale industrial timber operations became a major player in the colonial economy. Concern about deforestation, as outlined by Marsh in his seminal work *Man and Nature* in the 1860s and evident

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<sup>5</sup> D.A. Saunders, 'Changes in the Avifauna of a Region, District and Remnant as a Result of Fragmentation of Native Vegetation: The Wheatbelt of Western Australia. A Case Study' (1989) 50 *Biological Conservation* 99–135, 101.

<sup>6</sup> W.R Wallace, 'Fires in the Jarrah Forest environment' (1966) 49 *Journal of the Royal Society of Western Australia* 33, 44.

<sup>7</sup> Forest Department (WA), 'Annual Progress Report of the Woods and Forests Department for the Financial Year 1921' (Annual Report, 1898) 16.

<sup>8</sup> Beeston, G.R, Hopkins, J.M and D.P Shepherd D.P, 'Land-Use and Vegetation in Western Australia Project DAW27' (Final Audit Report, Department of Conservation and Land Management, July 2001) 21, 25028.

<sup>9</sup> William Twining, 'The Lumbering Frontier' in Susan L. Flader (ed), *The Great Lakes Forest: An Environmental and Social History* (Minneapolis, MN: University of Minnesota Press, 1983) 121,129.

in the popular press were brushed aside in favour of “progress”, was criticised for lack of scientific vigour.<sup>10</sup>

The material aspects of the economic and social environment were underscored by the Western Australian colonial commitment to “Improvement”. John Weaver describes “Improvement” as the increased market value and carrying capacity for land when labour and capital are applied to it. This doctrine informed countless decisions made by the colonial government and later the state government after Confederation over land.<sup>11</sup> The ideal of Improvement originated from British and French Enlightenment era thought.<sup>12</sup> The notion understood improvement in a colonial context as a part of a progressive advance of human endeavour resulting from European “civilisation.”<sup>13</sup> Colonial advance and improvement, initially emphasising on agriculture and pastoralism, but later focusing on other aspects of development which transformed the wilderness, was thus part of a larger effort to escape a “cycle of decline” of the civilisation and society.<sup>14</sup> As noted by Dunlap:

Legislatures from Perth to Fredrickson echoed with impassioned rhetoric about sturdy yeoman and the virtues of farm life. Land laws aimed (whatever the reality) to establish a country of small farms owned by those who worked them. There was a common conviction that what was on the land would be, must be, supplanted.<sup>15</sup>

Improvement was inextricably linked to faith in private enterprise and the romantic idea of sturdy yeoman farmers and the virtues of farm life. Generally early governments relied on individuals and companies to improve natural resources and compelled them contribute to the state’s economic development. This reliance was not only based on lack of capital resources but also was based on the notion that individual decision-making and the self-interested profit motive within a context of a laissez faire economy would produce the most efficient use of public resources and the most virtuous society. In short, development of the Western Australian frontier was both a fact and an

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<sup>10</sup> George P. Marsh, *Man and Nature; Or, Physical Geography As Modified By Human Action* (New York: Charles Scribner & Co., 1867); Stephan Marl Legg, ‘Views from the Antipodes: the ‘forest influence’ Debate in the Australian and New Zealand Press, 1827-1956’ (2018) 49(1) *Australian Geographer* 41-60.

<sup>11</sup> John C. Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1950* (McGill-Queen’s University Press, 2003) 81.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Thomas R. Dunlap, *Nature and the English Diaspora* (Cambridge University Press 1999) 48-9.

attitude; and deforestation as part of development was seen ‘as an engine for both social progress and individual material improvement’.<sup>16</sup>

This article explores the legal history of timber resource management and use in Western Australia from 1829 to 1918. It argues that deforestation was caused by this public policy to improve land through private enterprise. It examines how governments encouraged private investment to improve land by facilitating access to timber resources. This process set the basis for subsequent policy because the more land the government gave to private enterprise, the more it was expected that the private sector have access to the public social capital represented by natural resources. This cycle, facilitated by a series of expedient and often pragmatic policy decisions in response to particular historic circumstances led to widespread unregulated timber cutting and deforestation. Western Australian colonial and state governments sought to progress settlement by improving land to increase its market value (known as the ‘Improvement doctrine’). Further, Parliamentarians assumed that improvement was best left to private enterprise because they were allegedly more efficient and effective than governments. This belief led to vast areas of forest land being held or controlled by the private sector. Both the legislature and the judiciary protected private enterprise to ensure economic growth was not compromised. Thus, any activities or interests that were perceived to obstruct private enterprise were thwarted or modified. While Parliament was aware that deforestation was a problem toward the end of the 19<sup>th</sup> century, it did not regulate the timber industry until 1918 with the *Forests Act 1918 (WA)* (*‘Forests Act’*). This policy change reflected changing environmental attitudes away from the idea that forests were an impediment to progress. But the Improvement doctrine and faith in private enterprise were so deeply entrenched in both legal and social thinking that the *Forests Act* would embody the same principles that led to deforestation. Consequently, it would not significantly curb future cutting.

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<sup>16</sup> William Twinning, ‘The Lumbering Frontier’ in Susan L. Flader (ed), *The Great Lakes Forest: An Environmental and Social History* (Minneapolis, MN: University of Minnesota Press, 1983) 121,130; Stephan Marl Legg, ‘Views from the Antipodes: The ‘forest influence’ Debate in the Australian and New Zealand Press, 1827-1956’ (2018) 49(1) *Australian Geographer* 41-60, 49.

## II NATURAL RESOURCE USE AND RELIANCE ON PRIVATE ENTERPRISE

Natural resource management and law in Western Australia began upon settlement of the Swan River Colony in 1829. Under the various laws for colonisation, premised on the Discovery doctrine and *Terra Nullius*, the British Crown acquired absolute ownership over the land and forests. Aboriginal occupation and any interests they held were ignored.<sup>17</sup> James Stirling, the first Governor, was authorised to ‘make ... all such laws, instructions and ordinances...’<sup>18</sup> for the colony and upon his arrival he proclaimed:

[h]is Majesty ... Command[ed] that a Settlement should forthwith be formed within the Territory of “Western Australia” and whereas a view of effecting that Object ... the Government of the proposed Settlement having been confided to me ... the Laws of the United Kingdom as far as they are applicable to the circumstances of the Case, do therein immediately prevail and become Security for the Rights, Privileges and Immunities of all His Majesty’s Subjects found or residing in such Territory.<sup>19</sup>

The vesting of ownership in real property in the Crown and the incorporation of statute and common law through “settlement” put the territory’s property and natural resource at the immediate disposal of the Legislative Council.<sup>20</sup>

Despite being a Crown colony, WA was primarily a private business venture, and natural resource usage was left primarily to private enterprise. Initially, the Imperial Parliament and Crown refused to incur any expenses to establish the settlement and left it for the most part entirely to private enterprise.<sup>21</sup> Mineral rights for example were not reserved for Crown ownership and lands with mineral deposit were sold at the same rate and on the same terms as agricultural land.<sup>22</sup> The first land grants were free, aimed at enticing potential colonists to emigrate and encourage settlement. These free allotments, however were conditional upon colonists improving land.<sup>23</sup> Preliminary land

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<sup>17</sup> ‘The Aborigines and their interests in the land were not acknowledged. The territory was, for the purposes of the law governing the relationships between the Crown and the settlers, treated as though it were “desert uninhabited”’ (50 Blackstone’s phrase: Commentaries on the Laws of England, 17th ed. (1830) Bk 1, ch 4, 107, discussed in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 34-37; *Western Australia v Commonwealth* [1995] HCA 47 [20].

<sup>18</sup> J.M Bennet and Alex C. Castles, *A Source Book of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries* (Lawbook, 1979) 210, 256.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 36.

<sup>21</sup> J.S Battye, *Western Australia: A History from its Discovery to the Inauguration of the Commonwealth* (University of Western Australia Press, first published 1924, 1978 ed) 75-6.

<sup>22</sup> M. Hunt, ‘The Mining Act 1978 of Western Australia’ (1979) 2(1) *Australian Mining and Petroleum Law Journal* 12 (online) < <http://www.austlii.edu.au/au/journals/AUMPLawAYbk/1979/1.pdf>>.

<sup>23</sup> Battye (n 21) 75-6.

regulations drawn up by Stirling allowed a grantee colonist 21 years to improve their land (later changed to ten years by the Colonial Office with the stipulation that some improvements had to be made within three years equalling the value of 1/6 of each acre).<sup>24</sup> The size of the land grant was in proportion to the perceived capacity to improve land, and the amount of capital and labour the settler was able to bring to the property. In the colony the lack of liquid capital was a major problem, so the more capital a colonist was able to bring into the colony, the bigger the grant.<sup>25</sup> Nevertheless, in 1830s, soil infertility, distance, inadequate inland transport, lack of infrastructure and capital as well as colonial administrative problems led to severe difficulties.<sup>26</sup> The failure to generate investment capital for productive enterprises led to imports far outstripping exports, further exacerbating the Colony's lack of money supply.<sup>27</sup> When Stirling requested assistance from the Imperial government, the Colonial Office replied that settlement issues 'must be left, as they ought to be, to private enterprise, and can in no way be urged, with justice, on the attention of the Government'.<sup>28</sup> This lack of Imperial investment restricted early public works investment activities and forced the colonial government to rely on the territory's natural resources and land resources to encourage economic activity.<sup>29</sup>

Reports of early explorers concerning the forests of New Holland were a factor in the decision to settle the area, but agricultural potential was considered the primary opportunity.<sup>30</sup> As such it was envisioned that agricultural and pastoral pursuits were to be the chief occupations of the settlers. While there were some early small export shipments of Jarrah (called "mahogany" at the time), the notion that timber could be a separate commercial public resource was not initially considered.<sup>31</sup> Access to timber -- for buildings, fencing and other household uses were included within the

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<sup>24</sup> Historical Records of Australia, Series III, Vol. VI. P. 594

<sup>25</sup> Ibid 606-8.

<sup>26</sup> J.M.R Cameron, *Ambition's Fire* (University of Western Australia Press, 1981) 124; D. Markey, *Historical Geography of Early Nineteenth Century Western Australia* (Mt. Lawley College of Advanced Education, 1976) Chapter 8, 97- 119 (online) < <https://ro.ecu.edu.au/cgi/viewcontent.cgi?article=7997&context=ecuworks>>.

<sup>27</sup> Western Australia, Department of Treasury and Finance, 'An Economic History of Western Australia since Colonial Settlement' (Research Paper December 2004) 4.

<sup>28</sup> Cameron (n 26)125.

<sup>29</sup> Ibid.

<sup>30</sup> Sir Hal Colebatch (ed), *A Story of A Hundred Years Western Australia 1829-1929* (Government Printer, 1929) 172. Carron however, finds little supporting evidence that reports in England of 'the existence of immense forests of valuable hardwoods in the southwestern corner of what was then generally known as New Holland' was the major impetus for settlement. L.T. Carron, *History of Forestry in Australia* (Canberra: Australian National University Press, 1985) 136.

<sup>31</sup> Nathaniel Ogle, *The Colony of Western Australia* (James Fraser, first published 1839, 1977 ed) 87.

grantees property rights but the trees were seen as a major impediment to farming and pastoralism.<sup>32</sup> The difficulties encountered by the settlers and the frustration with the large trees are surmised in a letter by an early agriculturalist in WA:

I have fenced in about 4 acres ... it had 90 large trees on it and covered with brushwood which I have cleared off (not the large trees). What was worse a grass tree covering more than two acres of it as thick as four or six on a yard square & horrid things they are to get up and death and destruction to our spades & hoes. I have only two good spades out of seven new ones, where the plant grows it must be grubbed out before the plough is put in, four horses ... could not move some of them.<sup>33</sup>

Land clearing and timber harvesting pursuant to agriculture was the basis for early economic development.

While trees were an impediment to agriculture, it was apparent that there were significant forest resources and marketable quantities of timber that could be harvested by entrepreneurs and investors as well as used by governments to encourage settlement and boost public revenues. The usefulness of various local timbers, particularly jarrah, wandoo, banksia and sandalwood were soon apparent to the settlers.<sup>34</sup> Jarrah wood was the most commercially valuable timber, used for construction, transport, power and water supplies.<sup>35</sup> Sandalwood was commercially valuable because it had an export market with Singapore as an incense material for religious ceremonies.<sup>36</sup> Karri's value derived from its use in building superstructures for public works.<sup>37</sup> The Colony sent a representative exhibit of its forest products to the Great Exhibition in 1852 which included: '[G]ums and resins, dye woods (Xanthorrhoea), tanning materials and...Banksia, cyress, jamwood, jarrah, morrell. Red ebony, redgum, salmon gum, sandalwood, satinwood, sheoak, tuart ad York gum' that received favourable comment from organisers.<sup>38</sup> In an effort to encourage the industry, governments began granting timber rights for commercial exploitation. Early regulations merely

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<sup>32</sup> Ibid app xi.

<sup>33</sup> Camfield Letters, 5 September 1830, quoted in Cameron (n 26) 114.

<sup>34</sup> Carron (n 30) 136.

<sup>35</sup> Ian Abbot et al, 'Short-term Logging and Burning Impacts on species Richness, Abundance and Community Structure of Birds in Open Eucalypt Forest in Western Australia' (2003) 30 *Wildlife Research* 321.

<sup>36</sup> Cameron (n 26) 178.

<sup>37</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 November 1892, 211 (Sir James George Lee-Steere).

<sup>38</sup> Colebatch (n 30) 173.

required colonists to obtain timber licences to cut down trees for a nominal fee.<sup>39</sup> Governments placed no cutting limit on the licensees so colonists had free access to cut down as many trees as they could.<sup>40</sup> There were no limits placed upon timber cutting since when the land was cleared, the government could then grant/sell it for agriculture or grazing.<sup>41</sup> By 1870 timber exports had risen to approximately £17500 and six mills were operating.<sup>42</sup> Nevertheless, the cost of handling and transporting heavy timber, lack of capital and technology problems hampered exports.<sup>43</sup>

Once the Colonial government appreciated the commercial potential of its timber resources, there was no hesitation in using it as an incentive to attract private enterprise and encourage development. This typically involved attaching improvement conditions to timber concessions. Between 1869 and 1871, Governor Weld conducted successful negotiations with three entrepreneurs for a substantial investment in the forest industry in exchange for exclusive concessions on 220,000 hectares of land.<sup>44</sup> While the details of the individual agreements differed, the terms of the agreements had the same basic conditions. These were: 1) the concessionaire had exclusive rights to cut timber on the lease area subject to the government also being able to cut for public purposes; 2) the concessionaire was to pay a licence fee determined by the area worked each year and pay sawyer's fees on the basis of the number of sawyers employed; and 3) the government would not charge duty on timber exported from the concession.<sup>45</sup> Timber companies constructed railways, ports, train stations and cleared land for land cultivation in exchange for timber rights.<sup>46</sup> The Jarrah Timber Company built the first railway in 1870 to develop timber production.<sup>47</sup> The Jarrah Station at Rockingham constructed the harbour and associated land clearing in exchange for a timber

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<sup>39</sup> Anon, *Report from the Select Committee on Western Australian Constitution Bill, together with the proceedings of the Committee* (House of Commons Vol 32, 1890) 102.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Colebatch (n 30) 175.

<sup>43</sup> Roger Underwood, 'Trees and Timber – The Forestry Heritage of Western Australia' (Paper presented at Inaugural Industrial Heritage Conference, Institution of Engineers, 1994) 24.

<sup>44</sup> The concessions were to Mason's Canning Concession (40,000 ha); and two concessions in favour of the Western Australian Timber Company (approximately 80,000 ha referred to as Ballarat Concession), and the Jarrahdale concession of about 100,000 ha. Annual rental on the Jarrahdale Concession was £50. The Ballarat Concession was free. Carron (n 30) 137-8.

<sup>45</sup> Ibid.

<sup>46</sup> See W.C. Thomas, 'Outlines of the Timber Industry in W.A.' (1929) 1(5) *The Journal and Proceedings of the Western Australian Historical Society* 31.

<sup>47</sup> Ibid.

concession covering 250,000 acres.<sup>48</sup> The Millar's Timber Company received large forest concessions in exchange for building a railway and clearing land.<sup>49</sup>

As development continued, the government granted more rights to exploit additional natural resources and land on the condition that the grantee improved the productive capacity of the land and associated industry. In 1872, the Colonial government enacted that mineral lands could only be sold after the erection by the grantee of such physical plant that was deemed necessary to work the land.<sup>50</sup> In 1875, the Legislative Council enacted regulations that entitled "labouring class" immigrants to select up to 50 acres of unimproved Crown lands on the condition that the land would be improved.<sup>51</sup> Around the same time, approximately 25,000,000 acres was opened in the Kimberly region for agricultural and pastoral development.<sup>52</sup> Governor Weld introduced "Special Timber Licences" the same year providing a timber concession to applicants for up to 14 years.<sup>53</sup> Some of these concessions were renewed for several decades.<sup>54</sup> By 1881, the government was granting special timber leases 'to companies prepared to establish in this Colony a large a timber export business'.<sup>55</sup>

An important aspect of the Colonial government's economic development plans was to increase the amount of railway track. Commenting on the history of railway construction in WA the 1947 Royal Commission on Railways stated that 'whenever industry needed an outlet, or where development took place, a railway was constructed'.<sup>56</sup> Constructing railways required a mixture of financial capacity, access to land and resources and the legal authority to extract the resources without interfering with opposing property and rights claims. One approach used to fund private railway companies was with Imperial government loans.<sup>57</sup> Another approach, similar to the policy used in the USA and Ontario, allowed private rail companies access to adjoining forests to use in

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<sup>48</sup> Ibid 44.

<sup>49</sup> Ibid 39.

<sup>50</sup> Hunt (n 25) 1

<sup>51</sup> Batty (n 21) 318.

<sup>52</sup> Ibid 326-327. [https://en.wikisource.org/wiki/History\\_of\\_West\\_Australia/Chapter\\_18](https://en.wikisource.org/wiki/History_of_West_Australia/Chapter_18)

<sup>53</sup> B.F Hamling, 'Maurice Coleman Davies' (1969) 6(8) *Early Days* 39, 40.

<sup>54</sup> Ibid 41.

<sup>55</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 6 December 1881, 408.

<sup>56</sup> Western Australia, *Royal Commission into the Management Workings and Control of the Western Australian Government Railways* (without Graphs) (Report, December 1947) 7.

<sup>57</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 19<sup>th</sup> December 1870, 50; Western Australia, *Parliamentary Debates*, Legislative Council, January 5<sup>th</sup> December 1870, 88; See also *Land Act* schs.

track construction.<sup>58</sup> *The Railways Act 1878* (WA) granted rail companies the right to harvest timber on adjacent private land to construct railways.<sup>59</sup> The Act stipulated that '[w]here such railway shall pass through any plantation, woodlands, or forests, it shall be lawful ... to fell or remove any trees standing thereon within the distance of a hundred yards from either side of such railway...'.<sup>60</sup> In addition, Government land grants and leases specifically reserved rights for entities with public authority to enter upon privately owned land and to extract timber and construct and repair railways.<sup>61</sup> This legal regime enabled the construction of 590 miles of railway during the first 1880s gold rush.<sup>62</sup>

The discovery of gold in 1885 at Halls Creek in the Kimberley dramatically changed the economic and social environment for the colony and increased the colony's capital and resources.<sup>63</sup> Export and import values increased tenfold and sevenfold respectively.<sup>64</sup> The value of crude gold exported from 1890 to 1900 was £19,391,337. The miners demanded rights from the government to clear land to find gold. In response, the government enacted the *Goldfields Act 1886* (WA). The Act granted a possessory interest to any occupying miner and conferred on the miner the right to 'cut any timber and to remove the same, to strip and remove the bark from any such timber ... for any Crown lands, for the purpose of building for himself or themselves any place of residence, or for mining purposes'.<sup>65</sup> On the ground, miners broadly construed this provision and there was extensive timber cutting across the goldfields.<sup>66</sup>

The prosperity led an increased sense of nationalism, which led colonists to question the colony's relationship to Imperial Britain. From 1829 the governors were appointed directly by the Crown

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<sup>58</sup> For example, the proposal to build the Great Southern railway from Perth to Albany which was accepted by the Government in 1884 provided the winning syndicate with nearly 3 million acres (1,215,00 ha) of land in exchange for 390 miles of track and 5000 settlers. In Roy Lourens, '1829-1901' in Peter Firkins (ed), *A History of Commerce and Industry in Western Australia* (Nedlands, WA: University of Western Australia Press, 1979) at 35.

<sup>59</sup> *The Railways Act 1878* (WA) s 12.

<sup>60</sup> *The Railways Act 1878* (WA) s 12.

<sup>61</sup> See *Land Act* schs.

<sup>62</sup> *Ibid* s 9.

<sup>63</sup> Department of Treasury and Finance (WA), 'An Economic History of Western Australia Since Colonial Settlement' (Research Paper, December 2004) 7 <[http://www.treasury.wa.gov.au/uploadedFiles/1593-econhistory-5a\(1\).pdf](http://www.treasury.wa.gov.au/uploadedFiles/1593-econhistory-5a(1).pdf)>.

Battye (n 21) app iv.

<sup>64</sup> David Black (ed), *The House on the Hill: A History of the Parliament of Western Australia 1832-1990* (Parliament of Western Australia, 1991) 68.

<sup>65</sup> *Gold-fields Act 1886* (WA) s 9.

<sup>66</sup> Western Australia, *Royal Commission on Forestry & Timber* (First Progress Report, 1903) 46.

on the advice of the UK Government. Assisted by an appointed Executive Council, the Governor exercised wide-ranging powers and controlled the British military and naval forces in the Colony. In the 1880s there were increasingly strident demands for Responsible Government in a manner similar to the eastern colonies. While the movement for Responsible Government was purported to simply provide the colonist with the “boon of home Rule”, an important objective of the movement was to gain full control over Crown lands.<sup>67</sup> This is evident in John Forrest’s 1889 Report to the Legislative Council criticising Imperial land policy, development constraints and administration over on land. After 1890, when Responsible Government was granted,<sup>68</sup> the key electoral issues in the first election were “distribution and location of public works” as well as how much borrowed funds could be safely spent on public projects, policy areas intimately related to land policy<sup>69</sup> John Forrest subsequently succeeded in forming a government due in part to its “progressive” policy of increasing expenditure on public works for land improvement and economic development.<sup>70</sup>

Before the 1890s, there was virtually no forest conservation system. In 1890 Sir F. N. Broome advised the Imperial House of Commons Select Committee on the Western Australia Constitution Bill that forest conservation:

[i]s still in a very rudimentary state ... and can hardly be said to be initiated yet. There was an inspector of forests appointed some time ago, and there were some regulations made under legislation in connection with the matter, but they have been insufficiently carried out, and forest conservation can hardly be said to be initiated yet. The fact is that the whole of the south-west division is so thickly covered with forests that the great desire of everybody is to get rid of many trees as they possibly can.<sup>71</sup>

The closest element of a government policy to forest management were timber reserves. The reserves were managed by the Woods and Forests “Department” within the Lands Department.<sup>72</sup> The Lands Department described the process of reservation as ‘setting aside ... Crown land for a

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<sup>67</sup> Ibid 58; Jeremy Martens, ‘Crown Land, Territorial Integrity and Responsible Government in Western Australia’ 30 (2016) *Studies in Western Australian History* 29-41, 30. Availability: (online) <<https://search.informit.com.au/documentSummary;dn=159757539793404;res=IELHSS>> ISSN: 0314-7525> [cited 16 Sep 19].

<sup>68</sup> See *Constitution Act 1889* (WA).

<sup>69</sup> Black (n 65) 68.

<sup>70</sup> Ibid; Thomas (n 46) 40.

<sup>71</sup> Anon, *Report from the Select Committee on Western Australian Constitution Bill, together with the proceedings of the Committee* (Great Britain, House of Commons Vol 32, 1890) 102.

<sup>72</sup> Ibid.

specified purpose, generally a public purpose – in effect, the dedication of land to that purpose'.<sup>73</sup> The governments classified these reserves as “Timber: Government Requirements”.<sup>74</sup> This reveals an important aspect of the conceptual and policy basis for timber reserves in Western Australia. Rather than establish a territory for scientific forestry management, conservation or preservation, the reserves were not intended to preserve or conserve timber resources; rather they were established to restrict alienation so lands could be logged in the future. The “reserve” ethos was not directed toward scientific or sustainable management of forests rather it was directed toward sequential cutover to stabilize employment and timber supply. While there was space within the policy to set aside land for preservation purposes, the reserve system was premised on the continued granting of cutting rights for commercial purposes.

There was initially little appreciation for the relationship between habitat and wildlife during the colony’s infancy. However, as mining and agricultural activities intensified, so too did the appreciation of scenic landscapes and recreation. Colonists often refrained from cutting individual trees in towns for “good taste”.<sup>75</sup> When the colony started to expand and mature, the government created a series of recreational reserves.<sup>76</sup> The first reserves for these recreational/conservation objectives were set up in 1872. Under these 1872 regulations, Governor Weld established Perth (now Kings) Park in 1872. Additional 1887 regulations allowed for the creation of more reserves.<sup>77</sup> In 1895 the *Park and Reserves Act 1895* (WA) was enacted. This Act was the first piece of legislation wholly dedicated to conservation. The purpose of this Act was to make the ‘towns and their surroundings as attractive as possible’.<sup>78</sup> However aesthetic objection ‘generally had little to do with scientific interest’ and more ‘to do with community pleasure in the outdoors and scenery’.<sup>79</sup> The Act empowered the government to vest conservation reserves into “Boards” who would

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<sup>73</sup> Department of Regional Development and Lands (WA), ‘Reserves’ (Brochure) <[http://www.lands.wa.gov.au/Publications/Documents/State\\_Land\\_brochure\\_Reserves.pdf](http://www.lands.wa.gov.au/Publications/Documents/State_Land_brochure_Reserves.pdf)>.

<sup>74</sup> G.E Rundle, ‘History of conservation reserves in the south-west of Western Australia’ (1996) 79 *Journal of the Royal Society of Western Australia* 225, 228.

<sup>75</sup> Ogle (n 31) 31.

<sup>76</sup> Rundle (n 74) 226.

<sup>77</sup> *Ibid* 226-7.

<sup>78</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 25 September 1895, 1116 (Thomas Cockburn-Campbell).

<sup>79</sup> *Ibid* 225.

control and manage them. While the Act itself did not have any impact on timber cutting, it would later come to be an invaluable asset for conservation when supplemented by subsequent law.

In 1898 Parliament enacted the *Land Act 1898 (WA)*<sup>80</sup> which consolidated existing land regulations.<sup>81</sup> Part of the policy behind the Act was to include a new enforcement regime regarding improvements.<sup>82</sup> Where previously some land owners had lied about their improvements, the Act now required inspectors to ensure improvement requirements had been satisfied. Failure to build or maintain the requisite level of required improvements would result in the loss of access to the forest for cutting.<sup>83</sup> The policy reflected the continued emphasis on development and progress. The Act controlled access to timber until replaced by the *Forests Act 1918*.

### *A Timber Licences and Leases*

The *Land Act* regime for timber-cutting in practice provided unrestricted access to private entities and settlers to the publicly owned forest estate either for settlement or commercial purposes. The Minister was empowered to reserve land for the ‘conservation of timber and indigenous flora or fauna, grant timber licenses and leases’.<sup>84</sup> Section 112 granted cutting rights on:

any lease, licence, or occupation certificate...permitting the lessee, licensee, or selector to cut such timber on Crown lands as may be required for domestic uses, for the construction of building, fences, stockyards, or other improvements on the lands.<sup>85</sup>

the positive language employed in the section indicated its permissive intent and broad discretion conferred on the licensees and leases, as evident from the common wording of a timber-cutting licenses issued under the Act.[This license] Author[ises] the licensee to fell, cut, split and remove any timber growing or standing on any Crown lands in the locality named in the license, for the purpose of logs for sawmills, fencing, shingles, laths, buildings, or Railway or other sleepers...

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<sup>80</sup> (Hereinafter ‘*Land Act*’).

<sup>81</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 July 1898, 629 (Sir James George Lee-Steere).

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> A License allowed the holder a non-exclusive right to cut timber on any Crown land. A timber lease provided for an “exclusive Right” to cut, remove and sell any kind of timber across the leased territory. *Land Act* ss 110 & 112.

<sup>85</sup> *Land Act* ss 25, 39(7) & 112.

Timber leases, the core of the commercial timber industry, had equivalent language but also gave the lessee additional rights to sell the timber collected.<sup>86</sup> Consistent with this commercial objective and the developmental impetus of government policy, a lessee was usually legally obligated to build and maintain in good working order a “substantial and fully equipped” sawmill plant ‘within two years from the date of his lease’ with a certain level of efficiency based on the size of the leasehold.<sup>87</sup> The larger the lease, the larger the mill, implying the rate of timber cutting would correspond directly with the size of the area leased by the Minister.<sup>88</sup> The government temporarily suspended granting timber leases through the *Land Act Amendment Act 1904* (WA).<sup>89</sup> The suspension, enacted in response to the Royal Commission on Forestry and Timber, expired in 1906.<sup>90</sup>

### *B Land Grants and Leases for Agriculture*

Aside from basic financial obligations to the government and certain reserved rights, land grants and pastoral leases enabled settlers to essentially do what they liked with the timber resources on the subject territory. Unsurprisingly, agricultural land grants and pastoral leases under the *Land Act* granted access to timber. First, instruments allowed the grantee/lessee to cut timber for domestic purposes to construct improvements.<sup>91</sup> These domestic uses and the necessary clearance for fields and pasturage inevitably involved deforestation; trees prevented intensive agriculture. Secondly, grantees/lessees were required to fence their land, a requirement that was usually met by harvesting the available timber on the parcel.<sup>92</sup> An additional provision in the Act enabled a pastoralist to cut down timber for non-domestic purposes at no cost with approval of the Minister.<sup>93</sup> Once the land had been improved per the statute, and the relevant fees paid, the grantee/lessee the land would be conveyed in fee simple. Land grants, contrary to land leases, had no limitations on timber usage and provided unrestricted access to timber to the grantee.

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<sup>86</sup> Ibid.

<sup>87</sup> Ibid s 118.

<sup>88</sup> Ibid.

<sup>89</sup> *Land Act Amendment Act 1904* (WA) s 10.

<sup>90</sup> Ibid s 20.

<sup>91</sup> *Land Act* s 106.

<sup>92</sup> Ibid s 57.

<sup>93</sup> Ibid s 119.

In 1899, the government passed the *Permanent Reserves Act 1899* (WA). The Act had profound legal consequences for reserves because it was the first Act to afford them Parliamentary as opposed to Ministerial, protection. Nevertheless, contrary to any sustainable forestry management programme with may be implied by the Act title, the classification system introduced by the *Permanent Reserves Act 1899* (WA) rendered most timber reserves vulnerable to exploitation by private enterprise. The Act enabled the Governor to classify lands into “A”, “B” and “C” reserves. Parliament granted A level reserves the highest level of legal protection. An Act passed by both Houses of Parliament was required to modify or revoke it.<sup>94</sup> Level A reserves were to be areas with high aesthetic value such as national parks. Level B reserves had a lesser level of protection. They could be modified or revoked by the Governor without Parliamentary consent but the Governor needed to present a report outlining the reasons to Parliament.<sup>95</sup> Level C reserves provided the least protection. They could be modified or revoked at the discretion of the relevant Minister without Parliamentary consent or tabling a report to justify the action.<sup>96</sup> It is evident that Parliament at the time felt Class C reserves were a temporary expedient designed to moderate and stabilise settlement and land prices. All Timber reserves were designated Class C reserves suggesting that there was little perceived need to preserve timber.<sup>97</sup> Curiously, the bill in its original form did not contain a classification system outlining various levels of protection.<sup>98</sup> Member J.W Hackett, who proposed the amendment that included the classification system, provided no reason for its inclusion.<sup>99</sup> However, it is likely the intent was to continue to enable the government to grant natural resources in favour of various industries without Parliamentary or public interference.<sup>100</sup>

### *C Deforestation*

The intensifying economic development and increasing exports in the 1890s led to a relentless exploitation of the remaining forest. This is evident from statistics gathered by the 1904 Royal

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<sup>94</sup> *Permanent Reserves Act 1899* (WA) s 2(1).

<sup>95</sup> *Ibid* s 2(2).

<sup>96</sup> *Ibid* s 2(3).

<sup>97</sup> Rundle (n 74) 228.

<sup>98</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 14<sup>th</sup> September 1899, 1312 (Sir James George Lee-Steere).

<sup>99</sup> *Ibid* 1312–1313.

<sup>100</sup> Parliamentarian Lee-Steere perhaps gave some insight when he stated that the original bill ‘was of perhaps too sweeping a character in a colony like this, where many reserves were made almost temporarily in the first instance’. Western Australia, *Parliamentary Debates*, Legislative Assembly, 12<sup>th</sup> October 1899, 1661 (Sir James George Lee-Steere).

Commission on Forestry and Timber. The Royal Commission was appointed ‘in view of the increased appreciation ... of our timber industry, and of the need for forest conservation’.<sup>101</sup> It made several proposals that would have a profound influence on future policy and law regarding forest conservation. The Commission estimated the Northern Jarrah Forest from 1829 to 1904 had 750 million cubic feet of forest removed<sup>102</sup> and that across two years (1897 & 1898) approximately 50,625 acres of Jarrah were cut per year.<sup>103</sup> The Royal Commission estimated that there remained 2,000,000 million acres of Jarrah forest which was being cut at a rate of 60,000 acres per year as of 1904.<sup>104</sup> The Commission noted that the Karri forests, which lay spread throughout the southern corner of the state were less exploited due to their relative inaccessibility.<sup>105</sup> Nevertheless, the 1904 Report did note that in those areas where there were existing timber leases, the Karrie forest had been cleared.<sup>106</sup> Moving farther east, the Commission reported that approximately 550,000 tonnes of firewood were harvested annually on the Goldfields.<sup>107</sup> It also estimated that the forests in the Murchison area would be completely cut over in two years.<sup>108</sup>

The Royal Commission Report was preceded by an increasing concern about deforestation. Policymakers, Parliamentarians and much of the general public had presumed that the colony’s timber resources were ‘inexhaustible’.<sup>109</sup> However, as early as the 1880s, Parliamentary Hansards reveal discussions regarding deforestation.<sup>110</sup> In 1898 deforestation concerns led to the appointment of John Brown as the first Conservator of Forests. Brown was to report on the extent and value of the colony’s remaining forests. However, Brown vastly overestimated the extent of forest in the colony (est. 8 million ha); a number which ‘must have provided comfort to a government not strongly motivated to the reform of forest use and ready to take convenient shelter in the old myth of unlimited resources’.<sup>111</sup>

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<sup>101</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 16<sup>th</sup> July 1903, 2 (George Shenton).

<sup>102</sup> *Ibid.*

<sup>103</sup> Forest Department (WA), ‘Annual Progress Report of the Woods and Forests Department for the Financial Year 1897-8’ (Annual Report, 1898) 16.

<sup>104</sup> Western Australia, *Royal Commission on Forestry & Timber* (Final Report, 1904) 6, 8.

<sup>105</sup> *Ibid* 7.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid* 8.

<sup>108</sup> *Ibid* 9.

<sup>109</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 6 September 1881, 412.

<sup>110</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 18 September 1882, 393.

<sup>111</sup> Carron (n 30) 143.

Ironically, the push for better forestry management and concerns about forestry management consolidated due to an amalgamation of the license and lease areas of the major timber operations in the state. Several timber companies in the state combined to form Millars Karrie & Jarrah Forests Limited<sup>112</sup> (colloquially known as the “timber combine”<sup>113</sup>) due to competition and weak prices. The new company held several large timber leases, creating fears among policy makers of monopolistic practices (and the consequent closing of developmental opportunities and frustration of private initiative) in the industry. Robert Hastie in Parliament warned:

if the policy of the past is to be pursued in the future, if large concessions continue to be granted, very soon the whole of our available timber lands will have been swallowed up, and we shall have this large combine controlling all our forest.<sup>114</sup>

When these concerns were combined with increased awareness over forest waste and excessive timber cutting,<sup>115</sup> it ultimately led to the government appointing the Royal Commission into Forestry.

The Royal Commission published a progress report in 1903 and released its Final Report in 1904.<sup>116</sup> The Commission made the 1903 Progress Report in response to an urgent need (due to the timber combine) to stop the further issuance of timber leases.<sup>117</sup> The Commission published the Final Report in 1904.<sup>118</sup> The 1904 Report noted that the main enemies to forests were:

[t]he timber trader, whose only aim is to get all he can out of the forest, heedless of its future; the second enemy is the agriculturist, who is interest in the uprooting of the forest for the sake of the rich soil beneath. It is not surprising, therefore, that under the united strength of these two influences, that the interests of posterity in timber suppliers have been so long ignored in many lands.<sup>119</sup>

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<sup>112</sup> Thomas (n 46) 56. The names was later changed to Millars Timber & Trading Co. Ltd.

<sup>113</sup> ‘The Westralian Timber Combine’ *The Western Mail* (Perth), 27 June 1903), 38.

<sup>114</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 October 1902, 1457 (Sir James George Lee-Steere).

<sup>115</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 September 1918, 343-344 (George Taylor); see also ‘Forest Conservation’, *The Western Mail* (Perth), 13 September 1895, 32; ‘Forest Conservation’, *The Western Mail* (Perth), 20 December 1895, 27; ‘Forest Destruction’, *The Daily News* (Perth), 21 July 1897.

<sup>116</sup> Western Australia, Royal Commission on Forestry & Timber, *First Progress Report* (1903).

<sup>117</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 21<sup>st</sup> December 1904, 2150 (Mathieson Jacoby).

<sup>118</sup> See Western Australia, *Royal Commission on Forestry & Timber* (Final Report, 1904).

<sup>119</sup> *Ibid.*

Both Reports identified a conflict of interest between forest conservation and land clearing for agriculture.<sup>120</sup> This resulted from the Land Department being tasked to both conserve forests on the one hand while granting land for agriculture and providing natural resources incentives for investment.<sup>121</sup> This conflict bred the perception within the Land Department that any action to conserve forest was “locking up” land and impeding economic development and progress.<sup>122</sup> As such, the Commission proposed ‘no forest conservation...is practicable until the forest lands shall have been placed by Statute under the control of a well-manned and properly equipped Forests Department’.<sup>123</sup>

The Commission also made some policy recommendations based on material value of the trees and underlying land. It recommended that trees with marketable value should be conserved.<sup>124</sup> Otherwise, the Commission concluded that forest conservation was not worthwhile.<sup>125</sup> This suggestion ironically spared much of the existing Jarrah forests because the underlying soil was not suitable for agricultural purposes,<sup>126</sup> but it adversely impacted the Southern Karri Forest as the Commission determined that the agricultural and settlement potential of these forest lands was too great to justify controlling the cutover.<sup>127</sup> Where the forest contained no marketable timber, the Commission suggested no conservation or control of cutting was necessary.

The State Government did not implement the Commission’s recommendations for ‘various reasons’.<sup>128</sup> Instead, it enacted the *Land Act Amendment Act 1904* (WA) as a temporary measure. The Amendment appointed an Inspector General of Forests charged with administering State forests and timber reserves. It also empowered the Governor to make regulations for various purposes, including the prevention of ‘all unnecessary injury or destruction of growing timber’.<sup>129</sup> And called for the appointment of an an advisory board which was to give advice on forestry matters.<sup>130</sup> This board introduced the first regulations on timber cutting and it attempted to separate

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<sup>120</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17<sup>th</sup> September 1918, 347 (George Taylor).

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid*; See also Rundle (n 74) 228.

<sup>123</sup> Western Australia, *Royal Commission on Forestry & Timber* (First Progress Report, 1903) 3.

<sup>124</sup> Western Australia, *Royal Commission on Forestry & Timber* (Final Report, 1904) 12.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 21<sup>st</sup> December 1904, 2150 (Mathieson Jacoby).

<sup>129</sup> *Land Act Amendment Act 1904* (WA) s 15(7).

<sup>130</sup> *Ibid* ss 4 – 5.

the Forestry Department from the Lands Department.<sup>131</sup> This attempted re-organisation however was a failure as ‘the political hand intervened, and the country sank back into that slough of apathy which it did not emerge again until 1913’.<sup>132</sup> Indeed, a review of the Amendment provisions reveals that it had no actual impact on logging and cutting practices, essentially preserving existing rights; a point stressed in Parliamentary debate prior to its passage by Representative Jacoby who observed that the Amendment ‘interferes with no one’.<sup>133</sup> The *Land Amendment Act* operated for 12 months and was not renewed.<sup>134</sup>

After the Royal Commission and the *Land Amendment Act 1904*, there was little further interest in forest conservation until 1913. David Hutchins was appointed to investigate WAs forests and the timber industry. Hutchins published a report which led the government to appoint a State forester, Charles Edward Lane-Poole, who drafted the language which later became the *Forests Act 1918* under the Labour Government.<sup>135</sup>

#### D *Forests Act*

The *Forests Act 1918* completely reworked forestry policy within the State. It adopted the forest management practices proposed by the first appointed Western Australian Conservator of Forests John Brown two decades previously. At the time, the Act was extremely controversial. Despite the fact that many of its provisions had been enacted in other jurisdictions, ‘the notion that forests should be preserved as a resource – in this case, a utilitarian resource for the timber industry – was a radical one that received a lot of opposition in the forests areas’.<sup>136</sup> The Act addressed a longstanding complaint regarding forest management by separating the Forestry Department from the Lands Department.<sup>137</sup> The Act also sought to introduce ‘a continuity of policy’ across the forest sector.<sup>138</sup> It reserved all remaining prime timber country (subject to sustainable cutting, conservation or preservation), restricted timber cutting to sustainable levels as part of the timber

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<sup>131</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17<sup>th</sup> September 1918, 344. (George Taylor).

<sup>132</sup> *Ibid.*

<sup>133</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 21<sup>st</sup> December 1904, 2151 (Mathieson Jacoby); see also Western Australia, *Parliamentary Debates*, Legislative Council, 23<sup>rd</sup> December 1904, 2232 (Mathieson Jacoby).

<sup>134</sup> *Land Act Amendment Act 1904* (WA) s 20.

<sup>135</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14<sup>th</sup> March 2000, 4701. (George Strickland).

<sup>136</sup> *Ibid.*

<sup>137</sup> *Forests Act* pt II.

<sup>138</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17<sup>th</sup> September 1918, 346 (George Taylor).

licensing and grant process and implemented silvicultural practices. The two important tools to accomplish these objectives were the creation of “State Forests” on unoccupied Crown land which contained prime timber<sup>139</sup> and forest cutting plus afforestation work plans for private logging enterprises.<sup>140</sup> The Act also introduced a series of property rights to forest timber resources. These consisted of licences,<sup>141</sup> permits,<sup>142</sup> and “Forest Leases”,<sup>143</sup> which were analogous to a leasehold interest or profit-a-prendre within a State forest. Although these new policies were significant advances, the Act nevertheless preserved all rights to timber for improvements previously held by agriculturalists, pastoralists and miners conferred by the earlier *Lands Act*.<sup>144</sup> Nevertheless, even with these *Lands Act* exemptions, the opposition by agricultural and pastoral sectors (who were interested in continued clearances) was such that Chief Forester Lane-Poole was dismissed.<sup>145</sup>

### III DEFORESTATION, THE IMPROVEMENT DOCTRINE & FAITH IN PRIVATE ENTERPRISE

Deforestation at the turn of the 20<sup>th</sup> century was not necessarily the result of deliberate policy to clear all forest and replace it with waste, farms and pastures. To be sure, it was accepted that settlement would lead to forest clearance, but this cutting was incidental to the desire to develop and improve the settler economy. As observed by the *Western Mail* newspaper, commenting on the 1920 Sandalwood controversy, deforestation was akin to a natural process, because ‘it was inevitable, perhaps, that sandalwood should be destroyed as *settlement progressed*’.<sup>146</sup> Another perspective suggests that massive deforestation was more a product of what Hurst describes as ‘inertia and undirected drift put in motion by the cumulative impact of countless narrowly focused actions than by plan or conscious choice of values’.<sup>147</sup> These “countless narrowly focused actions”

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<sup>139</sup> *Forests Act* pt III.

<sup>140</sup> *Ibid* s 31.

<sup>141</sup> *Ibid* s 35(1).

<sup>142</sup> *Ibid* s 33.

<sup>143</sup> *Ibid* s 40(1).

<sup>144</sup> *Ibid* s 5(1).

<sup>145</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14<sup>th</sup> March 2000, 4701 (George Strickland); see also Per Christensen, *The Karri Forest* (Department of Conservation and Land Management Como WA, 1992) 62.

<sup>145</sup> *Ibid* 61.

<sup>146</sup> ‘Sandalwood’, *The Western Mail* (Perth, 23 September 1920), 20. [emphasis added].

<sup>147</sup> James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Madison: University of Wisconsin Law School, 1984, 2nd ed) 47.

simply did not include a consideration of the environmental degradation and problems of deforestation. As noted by Hurst:

Policy making is always limited by an environment. This environment includes not only resistant fact outside the policy makers, but also the policy makers' own perceptions, and the subtle limits set to their will and imagination, beyond their awareness, by their whole experience. Perhaps, indeed, the most significant dimension of policy is its relation to the massive weight of surrounding circumstance. So great seem the odds at all times against men's limited store of ideas, resolution, and energy, that there is a special and poignant need to ask whether, how, and in what degree men add to the opposing inertia or drift of their total situation by the defects of their own contrivances.<sup>148</sup>

Robert Robinson, the Attorney General at the time, reflected this notion when he introduced the bill that became the *Forests Act*, describing previous governmental attitudes towards forest conservation as a 'slough of apathy'.<sup>149</sup> This apathy towards conservation and sustainable use of public resources was directly related to colony wide effort to utilise public resources and private enterprise to achieve economic development; or as Robert Robinson explained it, 'we say, "let us get it out as fast as we can and make as much profit as we can upon it"'.<sup>150</sup> Put simply, the legislature and policy-makers in the 19<sup>th</sup> century simply did not consider forest management and deforestation as issues, even when concerns were raised. Trees were both an impediment to agriculture as well as a capital resource to stimulate investment, employment and development and the problems of "deforestation" were not considered important until they became so manifest that it could not be ignored.

As mentioned above Western Australia was essentially settled as a private enterprise; an enterprise driven by laissez faire capitalism using the publicly owned natural resources and land.<sup>151</sup> Since the colony's beginning, progressing settlement and "improvement" was at the centre of law-making. Newspapers often featured articles that discussed "progressing" settlement.<sup>152</sup> Representatives

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<sup>148</sup> Ibid 5.

<sup>149</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 September 1918, 344-345 (James Gardiner).

<sup>150</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 September 1918, 344-345 (James Gardiner).

<sup>151</sup> Roy Lourens, '1829-1901' in Peter Firkins (ed), *A history of Commerce and Industry in Western Australia* (Nedlands, WA: University of Western Australia Press, 1979) at 35.

<sup>152</sup> See 'The Great Southern Country: Progress and Settlement', *The Western Mail* (Perth, 20 February 1904) 5; 'Modern Progress and Land Settlement', *The Daily News* (Perth, 6 May 1922) 6.

often recited notions of progress and settlement in debate both before and after Confederation.<sup>153</sup> For example, Member William Marmion, during a debate on the 1871 budget, emphasised the importance of “advance and progress” in the colony.<sup>154</sup> Member Henry Whittal Venn stated that government policy was “promoting the advancement of the colony and helping forward settlement.”<sup>155</sup> A sentiment similar was expressed by Member Timothy Quinlan who maintained that ‘the policy of this State, and may I say even the policy of the Commonwealth, should be a progressive land-settlement policy’.<sup>156</sup> This emphasis on development and improvement was not simply a policy objective but was in some ways a categorical imperative; for the failure to join the world-wide progression of English speaking peoples across the globe risked “decline” of the “race.”<sup>157</sup> As Representative Henry Underwood stated, ‘unless we had progress in agricultural and pastoral settlement, then the State would be bound to stagnate’.<sup>158</sup> In 1912, Representative James Gardiner noted that ‘A country cannot remain stationary; it must progress or retrogress...’.<sup>159</sup>

The method by which “improvement” would be achieved was through the mobilization of public resources and private laissez faire decision-making. This notion directly informed land policy, forest policy and development policy.<sup>160</sup> Governments measured settlement progress by

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<sup>153</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 11 July 1871; Western Australia, *Parliamentary Debates*, Legislative Council, 24 July 1871, 36; Western Australia, *Parliamentary Debates*, Legislative Council, 30 July 1872, 1; Western Australia, *Parliamentary Debates*, Legislative Council, 10 July 1874, 23; Western Australia, *Parliamentary Debates*, Legislative Council, 25<sup>th</sup> January 1875, 35; Western Australia, *Parliamentary Debates*, Legislative Council, 8<sup>th</sup> August 1876, 16.

<sup>154</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 9<sup>th</sup> December 1870, 36.

<sup>155</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 2 August 1898, 732 (Sir James George Lee-Steere).

<sup>156</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 July 1907, 16 (Timothy Quinlan); see also Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 July 1905, 11 (Mathieson Jacoby); Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 June 1906, 3 (Timothy Quinlan).

<sup>157</sup> The developmental model underscored the notion that European-derived people were undergoing a progressive and transformative evolution through colonial expansion and settlement of the frontier. In the United Kingdom, colonialism and imperial expansion was associated with a confidence that British progress was in some sense in harmony with progressive forces in the universe, a sentiment shared by the British colonists in Australia, New Zealand and Canada. Macaulay writing in the 1850’s reflects this idea in his introduction to the *History of England*. ‘...the history of our country during the last hundred and sixty years is eminently the history of physical, of moral, and of intellectual improvement...no man who is correctly informed as to the past will be disposed to take a morose or desponding view of the present.’ Ronald Hyam, *Britain’s Imperial Century 1815-1914 A Study of Empire and Expansion* (London: B.T. Batsford, 1976) 49.

<sup>158</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 January 1909, 1241 (Timothy Quinlan).

<sup>159</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 June 1912, 23 (Frank Troy).

<sup>160</sup> Weaver (n 11) 81.

determining how much of its land had been improved. An example of what was considered to be an “improvement” is outlined in Section 145 of the *Land Act 1898*.

wells of fresh water, reservoirs, tanks, or dams of permanent character and available for the use of stock ... fences, sheds, and buildings erected for farm or shearing and station purposes, not being dwelling houses ... or of cultivation, subdivision fences, *clearing*, grubbing, draining, *ringbarking* (at not more than two shillings and sixpence per acre), or any improvement for maintaining or improving the agricultural or pastoral capabilities of the land.<sup>161</sup>

Deforestation was both a direct and incidental impact of this “improvement” process. The process was led by private decision-making within a laissez faire capitalist political economy. While the Crown owned the public domain and the forests, private entrepreneurs worked with the colony and then state to improve the land and facilitate development objectives by exploiting those public resources. Except in a few areas, publicly owned and directed natural resource enterprises were considered by colonial/state elites to be an inapposite, indeed an unconstitutional method, of state development.<sup>162</sup> Individual use, individual decision making and individual profit, and paradoxically reliance upon the government and the subsidized use of public resources was the policy framework of the day. Public resources ultimately were for private use. As Hancock noted:

To the Australian, the State means collective power at the service of individualist “rights.” Therefore, he sees no opposition between his individualism and his reliance upon Government.<sup>163</sup>

The “collective power” mentioned in the above statement, moreover, would not be used to direct development outcomes except in the most general way. For the most part, public ownership over the resources ‘was not used to assert any major public claim on the natural resource development

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<sup>161</sup> *Land Act* s 145.

<sup>162</sup> While it is beyond the scope of this paper to examine where such a commitment reflected an underlying societal consensus or is better explained through the prism of social/class conflict, it is evident that this an developmental approach privileged policymaking and legal innovation/protection in favour of private enterprise. Moreover this model militated against popular efforts to conserve the forest and embrace scientific management. Sidney L. Haring and Barry R. Strutt, ‘Review: Lumber, Law, and Social Change: The Legal History of Willard Hurst’ (1985) 10 *American Bar Foundation Research Journal* 1, 123-137.

<sup>163</sup> W.K. Hancock, *Australia* (London, 1985) 62. See also, Richard N. Rosecrance, ‘The Radical Culture of Australia’ in Louis Hartz (ed), *The Founding of New Societies* (San Diego, CA: Harcourt Brace Jovanovich, 1964) 309-12.

process'.<sup>164</sup> This resulted in governments giving privately owned extractive industries, agriculture, timber and transport high priority in the use of public resources.

The drive to facilitate private laissez faire development is evident when reviewing the development of the Western Australian common law. While we often tend to be uncomfortable with the idea that courts privilege economic or political interest and development policies in their decision-making, colonial and settler courts seemingly had less difficulty with this instrumental decision-making style. For many of the colonial and frontier jurists, adjudication involved value judgements as to which interests are to be advantaged within the polity. In Western Australia, the development of the common law followed, in some measure, the public imperative to progress settlement at the expense of native forests. First, the courts narrowly construed the Minister's Authority to deny a timber license or grant application under the *Lands Act*. *In Re Sooka Nand Verma*<sup>165</sup> involved the Minister for Lands who instructed his agent not grant timber licences to an individual because of their ethnicity.<sup>166</sup> The relevant section in dispute (s 110) stipulated that the Minister "may" grant timber licenses.<sup>167</sup> The central issue in *Verma* was whether the statutory "may" conferred either a discretionary or imperative meaning. In other words, if an applicant paid the relevant fees, did the Minister retain any further discretion whether to grant the license. The Court acknowledged that the natural meaning of the word "may" imports a notion of discretion.<sup>168</sup> However, the Court observed that the meaning of the term "may" could be imperative in certain circumstances.<sup>169</sup> In these circumstances, the Court looked to the nature of the authority conferred by the statute and the intention of Parliament.<sup>170</sup> The Court held that the Parliamentary intent behind s 110 was to make as much revenue as possible for the government.<sup>171</sup> As such, for the *Verma* Court the term "may" in s 110 was imperative. Simply put, the Minister could not refuse to grant a licence under any circumstances; in effect depriving the Minister any legal means to withhold licenses should he become concerned with issues of deforestation or waste.

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<sup>164</sup> H.V. Nelles, *Politics of Development: Forests, Mines, and Hydro-Electric Power in Ontario, 1849-1941* (Montreal and Kingston: McGill-Queens University Press, 2005) 491.

<sup>165</sup> *In Re Sooka Nand Verma* [1905] 7 WLR 225.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Land Act* s 110.

<sup>168</sup> *In Re Sooka Nand Verma* [1905] 7 WLR 225, 227, 234.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid* 227, 235.

<sup>171</sup> *Ibid* 228, 235.

Second, the courts modified common law negligence principles and expanded the notion of statutory authority to facilitate economic activity by private enterprise. In *Midland Railway Company v Connolly*<sup>172</sup> a dispute arose around s 5 of the *Guildford-Greenough Flats Railway Act 1886* (WA). The Act had vested a range of statutory powers held by the Commissioner of Railways into a private company charged with building a railway. McMillan CJ stated that the statutory powers conferred to the company enabled them to enforce their rights ‘against a member of the public complaining of an infringement of his common-law rights’.<sup>173</sup> In support of its decision, the Court reiterated the principle enunciated in *Vaughan v The Taff Vale Railway Company*:

It may be true, that if a person keeps ... a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the ... instrument ... yet when the legislature has sanctioned and authorized the particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible.<sup>174</sup>

Consequently, Midland Railway was not negligent because it had taken all the reasonable steps required to prevent harm to the public and the statute authorizing the railways was a defence for any action resulting from a fire caused by sparks.<sup>175</sup> In effect, Western Australia could choose to allocate who should bear certain costs associated with the development and use of railways.<sup>176</sup>

Third, the courts weakened nuisance common law rights in favour for private enterprise by broadly construing statutory exemptions and minimising private enterprise obligations.<sup>177</sup> In *R v White*<sup>178</sup> the court accepted that the noise emanating from a water pump station caused a nuisance.<sup>179</sup> The activity was arguably authorised by a statute, but the extent and scope of the activity arguably took

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<sup>172</sup>[1919] WAR 1.

<sup>173</sup> *Ibid* 3.

<sup>174</sup> *Vaughan v The Taff Vale Railway Company* [1860] EngR 679, 685.

<sup>175</sup> *Ibid*.

<sup>176</sup> Mark Lunney, *A History of Australian Tort Law 1910-1945: England Obedient Servant?* (Cambridge University Press, 1918) 163-5.

<sup>177</sup> See *London, Brighton and South Coast Railway Co v Truman* (1885) LR 11 App Cas 45

<sup>178</sup> (1910) 12 WALR 31.

<sup>179</sup> *Ibid* 33, 39.

the complained nuisance out the statutory exemption. Ordinarily, the Court observed the plaintiff ‘... is undoubtedly entitled to relief’.<sup>180</sup> Nevertheless, it held:

[W]here a statute has authorised the doing of a particular act or the user of land in a particular manner, either of which may have caused a nuisance, there is no cause of action if every reasonable precaution, consistent with the exercise of the statutory power, has been taken to prevent injuries occurring.<sup>181</sup>

This principle followed a long line of precedent in other jurisdictions in favour of weakening nuisance protections<sup>182</sup> and it has been cited in subsequent case law.<sup>183</sup> Burnside J explained the utilitarian policy behind the principle was ‘that the convenience of the individual must give way to the benefit of the many...’.<sup>184</sup> While not directly endorsing a “public benefit” defence to nuisance, the *White* Court’s robust use of the utilitarian justification (namely the “benefit of the many” standard is equated with economic development by private enterprise) in opposition to private rights that could impede development suggests the common consensus among policy makers and elites about the means through which development is achieved.

In this solicitous legal environment, governments believed that private decision-making within a system of public “assistance” was the best way to raise productive capacity and development. During the early cash poor years of the colony, various public works were given to private entities in hopes of both improving the land and contributing to the economic development.<sup>185</sup> On one hand, this was an economically sound strategy for the cash poor - natural resources rich colony. On the other hand, it also reflected an underlying faith in the superiority and efficiency of private business decisions when utilising public capital. This faith in and use of private enterprise persisted even when the government possessed sufficient revenue to construct improvements itself. For example, in the 1881 Legislative Council debates concerning whether the colony should have a

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<sup>180</sup> *Ibid* 33.

<sup>181</sup> *Ibid*.

<sup>182</sup> See *R v Pease* (1832) 110 ER 366; *Vaughan v The Taff Vale Railway Company* [1860] EngR 679; *London, Brighton and South Coast Railway Co v Truman* (1885) LR 11 App Cas 45; *Mayors and Councilors of East Fremantle v Annois* [1902] AC 213.

<sup>183</sup> See *Allen v Gulf Oil Refining Ltd* (1979) 3 WLR 524; *Kempsey Shire Council v Lawrence* (1996) Aust Torts Reports ¶81-375; *Ex Parte Elwood and Anor* [2007] WASCA 137; *Southern Properties (WA) Pty Ltd v Executive Director of the Dept of Conservation and Land Management* [2012] WASCA 79.

<sup>184</sup> *Ibid* 39.

<sup>185</sup> Cf Governor in Western Australia, *Parliamentary Debates*, Legislative Council, 19 December 1870, 51. suggested that harbour improvements ‘...might be more fitly carried out by private enterprise...’ to facilitate the timber industry.

public or privately run mail service, Member Stephen Parker argued: '[a]s a general rule, he believed it would be found that the Governments could not carry out undertaking as economically and successfully as private enterprise'.<sup>186</sup> In 1895, Parliamentarian S.J Haynes argued that 'I think it is better to throw as much as possible on private enterprise, because there is no doubt private individuals manage their business affairs in a closer and more economical manner than the government'.<sup>187</sup> This normative belief in the superiority of private enterprise resulted in a willingness of the government to use policy and law to assist private enterprise. For example, in 1879 during a debate relating to establishing a government station the Colonial Secretary noted:

Clearly it was the duty of the Government to extend to these pioneer settlers that protection and assistance which the establishment of a station such as that contemplated in the resolution before the Committee would afford, and thus to further throw its advance guard for the purposes of colonization.<sup>188</sup>

As a corollary, when Parliamentarians felt a proposed bill, regulation or law would obstruct or interfere with private enterprise; they would take action in favour of business and maximise the potential for private profit. It was assumed that without business activity the resources of the colony would be under-utilised, idle or "wasted." From this perspective the forest conservation issue resolved itself into dichotomous policy positions -- either allow current laissez faire practices and assist improvement or regulate and destroy all the beneficial social, economic and development impacts the timber industry created. For instance, in 1882, there was a Legislative Council debate regarding jarrah forest conservation.<sup>189</sup> At the time, the effects of rapid trees loss were becoming more apparent, and a Forest Commission had been appointed to investigate. Of particular concern was the 'prevention of wilful waste, or wanton destruction by fire, and the protection of young trees'.<sup>190</sup> These occurrences lowered government revenues, available wood resources, damaged property and jeopardized future timber supplies. During the debate it was observed that "the destruction of our jarrah forests was unnecessarily great – very much so indeed, and that there is urgent necessity for some steps being taken by the Government to prevent the present waste" and a resolution was proposed to protect the jarrah forests. However, the proposed resolution was

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<sup>186</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 31 August 1881, 359.

<sup>187</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 26 June 1895, 42 (George Shenton); see also Western Australia, *Parliamentary Debates*, Legislative Council, 8 July 1896, 23 (George Shenton).

<sup>188</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 30 September 1879, 230.

<sup>189</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 18 September 1882, 393.

<sup>190</sup> Carron (n 30) 140.

rejected by the Council due to potential adverse effects it might have on the timber industry; a sentiment evident in Member William Marmion's observation that unregulated practices were the only practical and profitable policy postures for the industry. Indeed, for Marmion, any conservation or scientific management programme would hamper the industry to such an extent 'as to virtually ... prevent it [from] remaining a profitable industry'.<sup>191</sup> He observed that the 'question resolved itself into this – are we going to have out timber cut down, or let it grow in our forests unutilized?'<sup>192</sup>

The Export Branding Bill introduced in 1892 suggests a similar commitment to unregulated business practices. The 1892 bill proposed a requirement that timber enterprises mark or brand timber as either Jarrah or Karri.<sup>193</sup> The desire for an identification system arose because jarrah and karri were used for different purposes, and timber merchants were often representing karri as jarrah.<sup>194</sup> In his comments supporting the legislation, Member James Paterson justified the bill as promoting private enterprise. He stated that without the Bill, 'the timber of the colony [could get] a very bad name, and a very important industry may be very much injured'.<sup>195</sup> He downplayed the potential compliance issue that the bill would place on private enterprise.<sup>196</sup> The bill passed first reading in the Legislature, but quickly elicited an intense adverse reaction due to the potential impact on the timber export trade.<sup>197</sup> The Select Committee appointed to review the bill stated that its provisions would damage the timber export trade by unreasonably increasing the potential liability for exporters.<sup>198</sup> Sir Winthrop Hackett stated that the core criticism against 'a Bill of this kind is that it interferes with private enterprise...'.<sup>199</sup> This ethos would influence policy makers as they considered forest conservation and the effects of deforestation.

This commitment to the maximum profitability of private enterprise militating against efforts for forest conservation remained a deep-seated commitment and bias of Western Australian policy makers beyond the initial forest policy changes in the last two decades of the 19<sup>th</sup> century and the

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<sup>191</sup> Ibid 394.

<sup>192</sup> Ibid 395.

<sup>193</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 1892, 181 (George Shenton).

<sup>194</sup> 'The Export Timber Branding Bill', *The Western Australian* (Perth, 12 December 1892) 6.

<sup>195</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 November 1892, 211 (George Shenton).

<sup>196</sup> '[the] Bill will not entail much expense, and it will cause very little trouble.' Ibid 212.

<sup>197</sup> See Western Australia, *Parliamentary Debates*, Legislative Council, 7 December 1892, 314 (George Shenton).

<sup>198</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 20 December 1892, 459 (George Shenton).

<sup>199</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 7 December 1892, 314 (George Shenton).

first decade of the 20<sup>th</sup> century. Importantly, these policy and normative commitments had little to do with the ecological condition of the resource itself as suggested by the 1920 Sandalwood controversy. The controversy arose when the Conservator of Forests promulgated a regulation pursuant to the *Forests Act* prohibiting the harvesting of any sandalwood tree less than 14 inches in circumference in the Eastern Goldfields.<sup>200</sup> Legislator John Francis Mullany from the Goldfields area argued for a repeal of the regulation. While recognising “wide powers” granted to the Conservator of Forests, Mullany argued that ‘we want a man in charge of the department who will use the powers given by Parliament with some degree of discretion’.<sup>201</sup> He succeeded in removing the regulation, but the *Western Mail* recognised that ‘[o]ne immediate result of the removal of the wise regulation will be that sandalwood will practically disappear from other districts in which it is now being pulled’.<sup>202</sup> A situation it returned to two years later, when the *Mail* lamented that sandalwood ‘was becoming scarcer and scarcer, and it would seem to be only a question of time when the supplies in the eastern portion of the State will be exhausted’.<sup>203</sup>

This underlying commitment to “improvement” through private access to public resources, private decision-making and limited regulation is evident even in the *Forests Act* and its consequent inability to dramatically arrest the rate of deforestation in the State after 1918. As Bradshaw has pointed out, this deforestation is ‘all the more tragic because it happened mainly in the mid-20th century; indeed, 54% of all land developed for agriculture was cleared from 1945 to 1982’.<sup>204</sup>

The *Forests Act 1918*, which was celebrated at the time as the best forest management system among the states would not prevent future forest degradation in WA because it was undergirded by the “improvement” philosophy that led to deforestation in the first place.<sup>205</sup> First, rather than committing to conservation or preservation in light of the ecological consequences from diminished forest, proponents of the Act focused on the inefficiencies and wastage in logging operations, and the consequent loss of wealth and revenue.<sup>206</sup> For example, at second reading

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<sup>200</sup> ‘Sandalwood’, *The Western Mail* (Perth, 23 September 1920) 20.

<sup>201</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 September 1920, 516-517 (George Taylor).

<sup>202</sup> ‘Sandalwood’, *The Western Mail* (Perth, 23 September 1920) 20.

<sup>203</sup> ‘Sandalwood’, *The Western Mail* (Perth, 28 December 1922) 28.

<sup>204</sup> Bradshaw (n 3) 113.

<sup>205</sup> Colebatch (n 30) 188

<sup>206</sup> ‘Disgraceful Waste’, *The Daily News* (Perth, 6 December 1897) 3; ‘Waste Timber At-The Mills’, *The Daily News* (Perth, 21 April 1900) 3; ‘Waste Karri Timber’, *The West Australian* (Perth, 19 August 1904) 6; ‘Timber Mill

before the legislature, the Attorney General cited “waste” as a major reason for the measure.<sup>207</sup> He argued that ‘waste is a direct outcome of the policy of the past, which aimed at mining our forests instead of working them on conservative lines’.<sup>208</sup> Given the aversion to “waste” it was unsurprising that the major argument in favour of the legislation was the relationship between logging and fire. The Attorney General asserted that due to lack of legislative policy Western Australia ‘allow[ed] annually 500,000 tonnes of wealth to be burnt’.<sup>209</sup>

Second, as the Act was adopted in accordance with the underlying ethos of the Improvement doctrine, it would also adhere to the reliance for conservation on private enterprise. The policy remained premised on the idea that WAs forests were utilised to assist state development by facilitating private enterprise and ameliorating the worst effects of the market. As stated by the Conservator of Forests, the Western Australian policy and law was formulated:

[t]o provide as far as possible a continuous yield from our forests, not only to supply timber, which is a basic raw material, but also to ensure stability and long life in the timber industry which, as a rural industry, has provided employment for thousands of people, and has meant so much to the development of the State.<sup>210</sup>

While numerous proponents of conservation across many jurisdictions advocated continued cutting rather than preservation, the regulatory apparatus under the Act continued to privilege private decision making and interests. The Act did not interfere with private enterprise property rights. Section 5 of the Act preserved all the existing rights to timber held by pastoral lessees and existing timber concessions. Working Plans, the main tool for conservation in the Act, presumed extensive logging and sawmilling operations over the plan area. Yet the working plans never set aside areas for non-exploitation nor did it prevent private enterprise from gaining access to State forests or timber reserves. As a corollary, the WA government did not actively regulate cutting in an effort to limit the adverse effects of market-based decision-making. Rather, the policy continued to assume that private decision-making was more economically efficient and would provide for better conservation outcomes. This assumption is apparent when considering the auction system

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Waste’, *The West Australian* (Perth, 5 July 1904) 6; ‘Waste, Waste – Nothing But Waste’ *Kalgoorlie Miner* (Kalgoorlie, 23 July 1908) 1; ‘Waste Timber and State Progress’, *The Western Mail* (Perth, 15 October 1912) 8.

<sup>207</sup> See Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 September 1918, 349 (James Gardiner).

<sup>208</sup> *Ibid* 346.

<sup>209</sup> *Ibid* 350.

<sup>210</sup> Western Australia, *Royal Commission on Forestry & Timber* (Final Report, 1951) 40.

established under the Act.<sup>211</sup> The 1951 Royal Commission on Forestry & Timbers Report explained this reliance:

All private property production, including forest produce, is sold competitively. As a matter of sound business, there appears to be no reason why the product of Government forests should be sold differently, particularly in the case of larger quantities. It is considered to be in the interests of the sawmilling industry itself that the forests of the state should be managed on businesslike lines, and the production sold to those firms who have the most efficient organisations, staffs, plant and equipment, in both production and sales...<sup>212</sup>

This continued reliance upon the market and private decisionmaking suggest that forest policy in WA was not bound up in changing notions of government, the economy and society which often accompanied more intensive regulation of industries at the turn of the 19<sup>th</sup> century. For many proponents of forest management, anti-cutting measures were part of a set of policy positions that questioned the developmental and settlement models that relied upon private decision making and public subsidies. In short, forest conservation was not simply about using the forest resources and scientific management, it was part of a new “progressive” vision of society where the benefits of economic development would be more widely distributed.<sup>213</sup>

Third, the overall scheme of the Act was to use continued cutting to drive socio-economic and political objectives of the State. Indeed, the Act attempted to expand colonial conceptions of improvement by deeming tree planting to be an “improvement” within the meaning of the *Land Act*.<sup>214</sup> Nevertheless, consistent with the Improvement doctrine, it preserved all rights to timber for improvements conferred to agriculturalists, pastoralists and miners by the *Lands Act*.<sup>215</sup> In addition, the improvement aspect was evident in the *Forest Act*’s reservation of all prime timber country.<sup>216</sup> In 1916, the Lands Department, representing agricultural interests, and the Forests Department, representing forestry interests, undertook a collaborative land classification project.<sup>217</sup> The project

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<sup>211</sup> *Forests Act 1918* s 34.

<sup>212</sup> Western Australia, *Royal Commission on Forestry & Timber* (Final Report, 1951) 45.

<sup>213</sup> John Freemuth, ‘The Progressive Movement and Conservation (1890s - Present)’ in Sally K. Fairfax and Edmund Russell (eds), *Guide to U.S. Environmental Policy* (London: CQ Press Sage, 2014) 129, 134-5.

<sup>214</sup> *Forests Act 1918* s 73(2).

<sup>215</sup> *Ibid* s 5(1).

<sup>216</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 September 1918, 346 (James Gardiner).

<sup>217</sup> J Williamson & S. Moore, ‘1919 to 1935: A Pivotal Period for the Forests of the South West of Western Australia’ in Michael Calver et al, *A Forest Consciousness – Proceedings 6<sup>th</sup> National Conference of the Australian Forest History Society Inc* (IOS Press, 2005) 503, 505.

put different forest areas of the southwest into four categories:<sup>218</sup> 1) Prime timber country to be dedicated as State Forest subject to logging; 2) Second class timber country was designated a timber reserve until the marketable timber had been removed (then sold as agricultural land); 3) Agricultural land which was to be immediately thrown open for selection and purchase, and; 4) Waste barren land which was to be afforested where appropriate.<sup>219</sup> The category system provided protection for marketable timber, allowing settlers to continue to cut all non-marketable timber without restriction. Ironically, the result has been that the only remaining forest in Western Australia are forests with marketable timber.<sup>220</sup>

#### IV CONCLUSION

For most of the 19<sup>th</sup> century and early 20<sup>th</sup> Centuries the model of economic development in Western Australia subscribed to the idea that economic development and progress could be best achieved through the utilisation of public resources by private enterprise and individual initiative (by way of grants, concessions or subsidies) using the market. These models privileged agriculture and pastoralism and assumed that the public interest and “progress” would be best achieved through private decision-making and private exploitation of public resources.

Deforestation in Western Australia was a consequence of the drive to improve land by vesting natural resources into private hands. It seems that the resultant large-scale forest destruction by private hands was never a goal. Rather, as Hurst explains, ‘this kind of disposition desponded to a popular faith in productive increase and expansion ... tended to dominate men’s imagination and desires as the century unfolded, to the practical subordination of considerations addressed more to the balance of social and political power’.<sup>221</sup> While governments had long-term economic plans, they simply never truly appreciated the long-term environmental consequences of their actions. So, mainstream political thought thwarted or defaulted to any attempt to undertake forest conservation before 1918. This characterised the legal history of natural resource management in the colony where governments continuously dispersed decision-making authority over timber resources to

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<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> G.R Beeston, A.J Hopkins and D.P Shepherd, ‘Land-Use and Vegetation in Western Australia Project DAW27’ (Final Audit Report, Department of Conservation and Land Management, July 2001) 21.

<sup>221</sup> Hurst (n 147) 33.

various individuals and companies. By 1918, the improvement doctrine and faith in private enterprise were so firmly entrenched in social and political thinking that it resulted in the *Forests Act* embodying these principles in forest conservation. Consequently, the Act would not prevent future timber cutting and prevent current day forest loss.