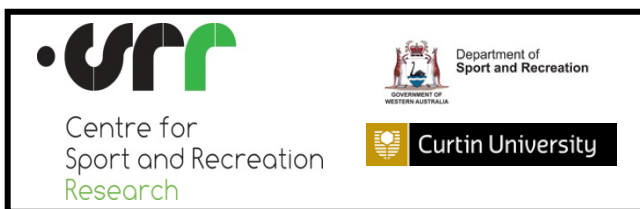


The Right to Roam: A review of policy and management of public access to land.

**An initiative of the Centre for Sport and Recreation Research
with research partner
Curtin Sustainable Tourism Centre**

Report for the WA Department of Sport and Recreation

October 2010



Curtin Sustainable Tourism Centre



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Executive Summary

Background

This report presents an international review of policy and management regarding public recreational access to land of varying tenure. This is an increasingly important issue in Australia with a growing population and the associated pressure on natural resources to provide a range of services and needs. Government has identified a need to clearly define 'access' and better understand the complex legislative and non-legislative determinants governing access to land in Australia. Reviewing policy and management in regions where the right to roam has been established will inform a strategic research direction for public access to land in Australia.

In the context of the Right to Roam (RTR) project, responsible outdoor recreation access relates to individual or group walking based activities (on land of various tenure) centred on responsible interaction within natural environments. Participation can provide personal satisfaction and enjoyment, promote positive behaviours within activity sites, and ultimately lead to appreciation of natural areas and stewardship of the environments where outdoor recreation occurs.

Objectives

- Identify a clear definition of responsible outdoor recreational access in the WA context
- Identify and collate the various legislative and non-legislative elements that form the current context for recreational access in UK and New Zealand (including Right to Roam)
- Identify and collate the various legislative and non-legislative elements that form the current context in WA for responsible outdoor recreational access
- Develop a summary of indicative issues resulting from comparisons of the WA, UK and NZ contexts
- Identify further opportunities for research in this area

Method

The report is based on a desktop exercise and collaboration with WA Government representatives to source information relating to the right to roam and land access legislation in the UK, New Zealand and Western Australia. A WA Department of Sport and Recreation steering group guided the focus of the project. Information was sourced from published material, official websites and personal communications.

Key Findings

Based on examples from the UK and New Zealand, establishment of the right to roam in legislation appears to require four key elements:

1. A clear case justifying the need for public access
2. Strong and broad community support

3. Protection of landholder's rights, especially regarding liability
4. Establishment of an umbrella body to oversee implementation and managing of right to roam laws and ensure a consistent approach.

1. A clear case justifying the need for public access to land

- UK land is mostly privately owned, this restricted public access to “open country” for recreation, owing to trespass laws.
- NZ has significant areas of privately owned land that block access to public recreation areas such as foreshores, river banks and lakes and restricting opportunities for recreation owing to trespass laws.
- WA land is mostly publically owned but has various management overlays that can restrict access (such as drinking water protection zones).

2. Strong and broad community support

- UK has a combination of a long history of public access ways and a strong public support for ‘rambling’ (hiking or walking in natural areas) providing a foundation for development of the right to roam.
- NZ has strong public support for walking access to areas “blocked” by private land coupled with Maori rights of land access. A government Walking and Cycling Strategy initiative promoted outdoor recreation and raised awareness of the right to roam.
- WA: closure of Logue Brook Dam resulted in strong community protests resulting in its reopening. However, the level of general community support for the right to roam is not known.
 - Native Title may provide one avenue for land access based on tradition.
 - The WA Physical Activity Taskforce could perform a similar function to the Walking and Cycling Strategy in NZ, promoting outdoor recreation and raising awareness of the need to access open land for this purpose.

3. Protection of landholder's rights

- UK right to roam legislation includes clearly defined parameters on how land may be accessed for recreation and where responsibilities lie. Landholders can appeal against rights of way. Recreationists have no right of appeal. Liability legislation is weakened such that the onus is on the public accessing the land.
- NZ right to roam legislation includes clearly defined parameters on how land may be accessed for recreation and where responsibilities lie. Landholders are exempt from liability where the public accesses their land for recreational purposes.
- WA: liability legislation in WA places the onus on landholders to ensure all reasonable action was taken to minimize risk to members of the public access their land. Members of the public using access ways such as roads, do so at their own risk. Private landholders and lessees currently have exclusivity over management of their land and who may access it.

4. Establishment of an umbrella body

Right to Roam legislation in both the UK and New Zealand included the establishment of government bodies to oversee application of the respective Acts. WA currently has a range of bodies responsible for land management and land access based on a range of legislation with varying mandates.

Implications

- Extensive community consultation would be required in any RTR development process. Past experience has demonstrated that attempts by WA government for a top down approach to providing public access to land, will be met with strong resistance from lessees and land owners.
- The NZ Walking and Cycling Strategy provided a basis for development of RTR policy and public awareness raising on the issue. The WA Physical Activity Taskforce could perform a similar function.
- Issues around liability of land holders in WA need to be considered. Currently the onus is on WA land holders to demonstrate due diligence except where a public access way is used. Alternatives could be based on the UK or NZ approaches where demonstration of intent to create a risk is required, rather than demonstration of lack of due diligence by land holders to minimise risks.
- There is scope for informal (non-legislative) pathways to allow access to land – such as access arrangements between recreation groups and land holders (private, lessees and public).
- It is evident that the WA legislative framework holds the relevant components for establishing a right of access, similar to the right to roam in UK and New Zealand. However, these components are dispersed across numerous government agencies and responsibilities.

Further research

- There is a need to accurately measure the extent to which public access for outdoor walking based recreation in natural areas is restricted in WA, particularly near population centres.
- There is a need to determine the level of wider community awareness and support in WA for the right to roam idea (outside the recreation associations and clubs).
- There is a need to identify opportunities for cross-government discussion on the right to roam, and land management and access issues.
- There is a need for further analysis of how legislation might be developed to enable the right to roam within the context of WA, particularly relating to liability.

1 Introduction

This report reviews legislation and management regimes in the UK, New Zealand and WA regarding public recreational walking access to land of varying tenure. Public demand for recreational access to land is an increasingly important issue in Australia with a growing population and associated pressure on natural resources to provide a greater range of services and needs. There is currently no legislation in Australia granting the public the right to roam (RTR) for recreational purposes. The Government has identified a need to clearly define ‘access’ and better understand the complex legislative and non-legislative determinants governing access to land in Australia.

Outlining international legislative and non-legislative management frameworks relevant to responsible outdoor recreation access, will contribute to an informed consideration of how RTR relates to the WA context.¹ This report also details current mechanisms in place that allow access to land in WA and highlights some implications associated with developing an appropriate management regime. Reviewing policy and management in regions where the right to roam has been established will also inform a strategic research direction for public outdoor recreation access to land in Western Australia.

In the context of this report, responsible outdoor recreation access relates to individual or group walking-based activities (on land of various tenure) centred on responsible interaction within natural environments and excludes recreational access organised by individuals or groups for commercial purposes.²

The study of management contexts reviewed and examples drawn from the research is orientated towards:

- Making sense of the definition of “recreation” and public access to land as applied to varying tenure types
- Identifying how the “right to roam” (RTR) functions in the chosen jurisdictions of UK and NZ
- Reviewing WA government policy, legislative contexts and non-legislative management regimes for land access management, and
- Identifying implications and issues from examples, practices and mechanisms in place in other jurisdictions regarding development of RTR or access to land in WA.

¹ This report is limited to the context of Western Australia and examples from the UK and New Zealand.

² A discussion of issues relating to access to foreshore and sea-bed is not provided as it is outside the scope of this report.

2 The Conceptualisation of “access” and “recreation”

Access refers to the rights of entry, which may be legally or conventionally defined.³ Sidaway (1986) classifies access rights to land for recreational purposes into four categories:

- use as of right with legislative origin (*de jure* access)
- use as of right with non-legislative origin (*de jure* access)
- permissive use (*de jure* or *de facto* depending on circumstance)
- use without permission (*de facto* use or trespass).

De jure rights and *de facto* rights provide the mechanisms for access. Landowners are often reluctant to move from *de facto* to *de jure* access owing to liability issues surrounding injury and damage, but *de facto* rights remain critical as a means of addressing the public’s express rights.⁴

The literature on access to land has stemmed from two broad perspectives.⁴ Firstly, the literature centering on property rights (i.e. landowners rights) that are inextricably linked to the debate about the rights of citizens. Secondly, there is discussion on the role and responsibility of the state, which focuses on a balancing of protecting landowners rights with recognising citizens rights. Several lobby groups have proliferated both in the UK and NZ arguing for a fair balance in the granting of RTR. Some authors describe an “allegiance” between landowners and the state.⁵ However, the lobby groups both in the UK and New Zealand have assisted a healthy input of the citizen’s voice into the debate. Consequently, issues regarding access to land from the private citizen’s point of view have been discussed significantly both in the UK and New Zealand prior to legislation on RTR being enacted.

Consideration of land access rights requires consideration of access for whom and for what purpose. The following sections describe the approaches taken in the UK, New Zealand and outlines the WA context.

2.1 Defining Access and Recreation in the United Kingdom:

Since the 1970’s public access to the countryside has been a much debated key rural issue in the UK. Many research projects have been commissioned by the UK’s Countryside Agency in response to strong public interest on how government policy ought to be fashioned with regard to access.⁶

³ Newby (1986)

⁴ Booth (2006)

⁵ Ravenscroft (1998); Pearlman (2001)

⁶ Booth (2006)

Currently, four classes of rights of way exist in the UK⁷:

- public footpaths (open only to walkers)
- public bridleways (open to walkers, horse-riders and pedal cyclists)
- restricted byways (open to walkers, horse-riders and drivers/riders of non-mechanically propelled vehicles such as horse drawn carriages and pedal cycles)
- Byways Open to All Traffic (BOATs) (open to all classes of traffic including motor vehicles although they may not be maintained to the same standards as ordinary roads).

Some of these rights may have been created “as of right” - that is, by agreement between landowners and the state or simply by landowner’s intention to dedicate access ways. Some access ways may have been in existence for centuries under the maxim “once a highway always a highway”⁸. In the UK, public rights of way that have been in existence for a certain number of years are deemed to have a legal basis and rights of access cannot be extinguished unless for state purposes.

In addition to the *Countryside and Rights of Way Act 2000*, UK (CROW Act), other Acts make provisions giving members of the public *de jure* rights to walk over areas of countryside, such as on common and waste land in urban areas (urban commons) in the UK and they are:⁹

- The *Law of Property Act 1925*, UK (section 193)
- The *Commons Act 1899*, UK (Part 1)
- The *National Parks & Access to the Countryside Act 1949*, UK (Part 4)
- The *Ancient Monuments & Archaeological Areas Act 1979* UK (Section 19)
- CROW Act Section 15 covers these providing “rights of access under other enactments”.

Permitted access constitutes examples of landowners granting access over their land on a genuinely altruistic basis. In the UK, some public bodies, charities or conservation organisations allow access in this context, including the Woodland Trust and some local and national park authorities, and some private landowners. *De facto* access arises when in some places the landowner has tolerated access, leading walkers to assume they have access rights to the particular property because they have always done so. However, there is a wide body of case law on the application to the courts by landowners to deny *de facto* rights. There are

⁷ http://www.ramblers.org.uk/rights_of_way/knowledge_portal/rights_of_way_law/

⁸ Kenny (2005)

⁹ <http://www.ramblers.org.uk/freedom/permissiveaccess/permissive.htm>

also strict guidelines courts will enforce to ensure public's rights of access are not unreasonably eroded.¹⁰

In the UK, the CROW Act provides access for open-air recreation including the following 'unpowered' activities:

- Walking
- Climbing
- Potholing
- Informal games
- Scrambling
- Scree-running
- Picnicking, and
- Ski-ing, tobogganning, etc.

Organised games, hang-gliding, paragliding, camping, swimming in non-tidal waters, hunting and fishing are specifically excluded as well as those undertaken for commercial purposes. (Crow Act Schedule 2, section 1 (s) and (t)).

2.2 Defining Access and Recreation in New Zealand

In the New Zealand context, outdoor recreation is conceptualised as including "a range of leisure, recreation, culture or sporting activities, undertaken in natural, heritage, rural and urban open space".¹¹ Outdoor recreation activities as defined by Sport & Recreation New Zealand include those that:

- are undertaken by people in their free time
- have a physical component
- require access to natural, rural and urban open spaces
- are not primarily focused on competitive outcomes, and
- meet a range of purposes that are determined by the needs of the individual participant.

Various bodies exist in New Zealand to ensure that outdoor recreational opportunities are provided to the public. The Walking Access Commission of New Zealand, established under the auspices of the *Walking Access Act* 2008, takes a lead role in managing and co-ordinating recreational access.

¹⁰ See for example *Meyrick Estate Management v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWCA Civ 53 which outlines in detail the various considerations court make in denying or confirming a challenge

¹¹ SPARC (2009)

2.3 Defining Access and Recreation in Western Australia

The DSR Recreation Strategy Working Group (2009) defined outdoor recreation, in part, as encompassing a range of leisure time activities encouraging responsible interaction in natural environments. The definition goes on to note that participation can provide personal satisfaction and enjoyment, promote positive behaviours and lead to appreciation of natural areas and stewardship of the environments where outdoor recreation occurs. In the specific context of this report and the right to roam, outdoor recreation includes individual or group walking based activities centered on responsible interaction within natural environments. Based on the examples from the UK and New Zealand, the right to roam would not include commercially based or formally organised group recreational activities.

The WA Department of Sport & Recreation (DSR) is the key state body responsible for the implementation of government policy and initiatives in sport and recreation. Its main role is to promote healthy lifestyles in Western Australia by encouraging and providing opportunities for physical activity in the community through sport and recreation. The DSR's main role is in advising various stakeholders on the benefits of healthy lifestyles and activities, with a view to achieving greater cognizance of the benefits of sports and recreation. In November 2006, the Department established a Recreation Advisory Panel as an initiative arising from the analysis of the recreation sector and mandated it to formulate a Strategic Reform Agenda for sport and recreation purposes. However, the DSR has no specific legislation that it governs or is governed by relating specifically to its main role of providing sport and recreation opportunities.

There is currently no legislation that specifically refers to the RTR in Australia, or WA. Access provisions vary across Australian states and territories and there is a diverse range of access mechanisms enabled across publicly held lands for recreational purposes.¹² In relation to privately held land, it has been suggested that Australian landowners have a well developed tradition of almost exclusive control of their land.¹³ This may be an issue requiring further debate, as land owners are likely to resist proposed legislative changes that could impose recreational access to their land. This was the case in New Zealand prior to the Walking Access Commission being established as a means of addressing public rights of recreational access to private land.

¹² Booth (2006)

¹³ McIntyre et al (2001)

2.4 Section Summary: Key points on access and recreation

Access to land may be formally instituted as a legislated right or as a result of a long tradition of access. Access may also be informally allowed based on the active or passive permission of land holders.

Law in the UK recognizes a range of public access ways enabling various types of non-powered recreational access to natural areas as part of the right to roam. Formally organised group or commercially based recreational activities are excluded.

New Zealand recognised the need for active outdoor recreation access in natural areas and defined a range of non-powered activities acceptable in the context of the right to roam. This excludes competitive and commercially based activities.

The UK and New Zealand have established national bodies linked to right to roam legislation that oversee a nationally consistent approach to outdoor recreation access.

Currently, there is no legislation relating to the right for responsible outdoor recreational access or the right to roam in Australia, including Western Australia. The tradition of Australian landholders having exclusive rights over access to their land could be a source of resistance to the right to roam.

The WA DSR is developing a definition of responsible outdoor recreation and is seeking to actively promote the importance of responsible outdoor recreation access to natural areas.

3 Types of land

Millward (1996) classified land into two broad categories of land, being either open or closed to public access where closed lands are mainly private property. Booth (2006) stated that closure may be overcome by purchase, permission or trespass. In other countries with the right to roam, the area available for public access has been conceptualised as “free space” that is left over after various restrictions are applied which may be economic, privacy, preservation, and purposes of landscape. Free space could be held privately or under public control, although in most countries it is held as Crown land and may be allocated or leased to private and public bodies for various uses.

It is interesting to note that in the UK, one percent of the population owns 52% of private land.¹⁴ In addition, 87% of land in the UK countryside is privately owned. According to Glyptis (1995) national parks in the UK are also commonly held in private ownership and consequently, only 17% of parklands in the UK are in public ownership. As a result of widespread private landownership in the UK, the public’s right to access land has been the subject of robust debate and confrontation. For example, the debate between ramblers and landowners involved drawn out and often heated arguments and confrontations when the Bill on Countryside and Rights of Way was being debated in the UK parliament. The debate also resulted in the introduction of approximately 25 related private member Bills submitted to parliament over many years. The Bills were intended to more firmly establish the public’s right to roam in open, uncultivated land.¹⁵

New Zealand has a land area of approximately 27.1 million hectares with over half in pasture and arable land, while a quarter of the land area is covered by natural forest. New Zealand land tenure is divided into three categories: Crown land 45%, Maori land 5% and privately held land 50%.¹⁶ Crown land in New Zealand takes several forms, including protected natural areas, land under lease or license to persons for farming or other purposes, land under development for settlement and land not currently required for any purpose, termed unoccupied Crown land.¹⁷ Public conservation lands are managed by the Department of Conservation and cover more than 30% of New Zealand’s land area.¹⁸

According to Booth (2006), New Zealand does not have common lands such as those in the UK. Crown land in New Zealand is governed by various legislation, such as the *Resource Management Act 1991*, *National Parks Act 1980* and *Reserves Act 1977*. These statutes define what may be done on the land (similar to provisions that apply to Crown land in Australia). While 5 % of New Zealand’s land area is Maori land and the remaining 50% general or private

¹⁴ Glyptis 1995; cited in Booth (2006)

¹⁵ Bonyhady 1987; cited in Booth (2006)

¹⁶ Booth (2006)

¹⁷ Hinde et al, (1997)

¹⁸ Ministry for Culture and Heritage (2005)

land, the Crown is the ultimate owner of all land in New Zealand.¹⁹ Of the Maori land, a significant proportion is held in tribal ownership. These lands may be held as Maori land or general land. However, private land owners merely hold rights to land.

3.1 Land Tenure and Access in Western Australia

Gaining permission for access to publicly held land in WA by individuals or groups wishing to hold outdoor recreation events, can be a complex process. The complexities largely stem from the overlap of responsibilities between various government departments with respect to land management. For example Crown land vested with the Department of Environment & Conservation may have certain pockets of land that are to be entirely under the management of Department of Water (Hughes et al 2008). Other land held by the Crown and leased to public bodies may be subject to legislation such as the Native Title Act. Consequently, debate has been raised regarding which legislation prevails. As a result, stakeholders in WA, unlike in the UK or New Zealand, are often unclear which authority has the prime responsibility to grant access to public lands for recreation purposes. To compound matters, occupier's liability provisions provided in state legislation have made public authorities extremely cautious in granting public recreational access to land under their responsibility. In the UK, the Countryside Agency provides all the information and requisite paperwork to members of the public wishing to access land for recreational purposes. The agency also co-ordinates granting of various permissions from public bodies to access public lands, by members of the public. In New Zealand the Walking Access Commission has been charged with a similar task. In WA there is no single body providing information or guidelines as to procedures required by the government that need to be followed prior to the granting of access for recreational purposes.

Various types of land tenures occur across the Metropolitan Regional Scheme as well as in the WA regions. Table 1 summarises the tenures, land area and status of public access. The majority of land in WA is crown land (93%) with privately owned (freehold) land amounting to less than 10% of the total WA land area. About half of the crown land is publically accessible land in the form of unallocated crown land and conservation reserves. About half is not readily accessible, being in the form of various restricted access reserves and leases, but mostly as crown leasehold land. This differs considerably to the UK and NZ contexts, where significant portions of land are privately owned. In the UK this may also include conservation reserves and national parks.

As is the case across Australia, privately held lands in WA are generally closed from the public's RTR. The proportion of privately held land in Western Australia is relatively small. However, much of it is concentrated in the southwest region of the state, where the majority of the state's population resides and demand for recreation is relatively high. Given that most land in WA is publically owned, consideration may be required as to whether or not private land access is crucial to the RTR in WA. Table 1 summarises the various types of land tenure in WA in terms of land area, public access and management control.

¹⁹ Alexander 2004, cited in Booth (2006)

Table 1: Summary of land tenure and public access in WA

Tenure	Land Area		Public Access	Main Access Control
	'000 km ²	%		
WA Total	2525.5	100%		
Aboriginal and TSI	325.5	12.89%		
Leasehold	126.1	4.99%	Restricted to public roads	Lessee Native title holder Traditional Owners
Reserve	199.4	7.90%	Restricted – permit required	
Public Land	1095	43.36%		
Conservation reserve	178.5	7.07%	Allowed – with some exceptions	WA DEC
Unallocated crown land	821.5	32.53%	Allowed	WA DEC
Other crown land	44.6	1.77%	Allowed	Depends on use designation
Forestry reserve	34.8	1.38%	Allowed	WA DEC
Water reserve	9	0.36%	Restricted	Water Corporation (WA)
Defence land	6.3	0.25%	Not Allowed	Cmnwlth Dept of Defence
Mining reserve	0.4	0.02%	Restricted	Mine lease holder
Private Land	1105	43.75%		
Freehold	205.1	8.12%	Not allowed	Land owner
Crown Leasehold	899.9	35.63%	Restricted to public roads	Pastoral lessee

While the majority of land in WA is publically owned Crown land, a considerable portion is land leased to private and public bodies for various purposes. Leasehold landholders have similar rights as private landholders where occupier's liability provisions apply and public access is entirely at the discretion of the lessee. The main concentration of the WA population resides in a more complex matrix of freehold and various crown land types in the southwest corner. Demand for recreation in this more complex tenure setting is understandably higher than in the less populated regions.²⁰

3.1.1 Aboriginal Leasehold and Reserve

Aboriginal leasehold and reserve land comprise about 18% of the WA land area. These lands are located mainly in remote areas, away from major population centres. Public access is restricted. Individuals wishing to access an Aboriginal reserve must obtain a permit from the Department of Indigenous Affairs. Members of the public wishing to access Aboriginal

²⁰ Hughes et al (2008)

Leasehold must obtain the permission from the lessees to do so, except for travel along existing public roads.

3.1.2 Unallocated Crown Land and Other Crown land

Public Crown land in WA mainly consists of unallocated crown land (about 34%) with a smaller portion in other crown lands (1.8%). Unallocated crown land is public land that has not been reserved for any specific purpose. Other crown land is public land that is held in reserve pending a dedication for some specific purpose. Public access by foot through unallocated and other crown land is lawful. Public access and behaviour is restricted by laws prohibiting permanent occupancy, dumping of waste and discharging firearms without approval and so on. There may also be restrictions relating to land where native title exists and cultural practices occur. In these instances, the native title holder or traditional owner should be approached for permission to access. Information on lands to which native title applies needs to be provided to the public.

3.1.3 Conservation reserves and Forest reserves (State Forest)

Conservation reserves cover about 7% of the WA land area. These are crown lands reserved for specific environmental conservation purposes such as protection of wildlife, habitat or preservation of an area with natural features of scientific or recreational value. They are managed by the Department of Environment and Conservation for biodiversity conservation and the benefit of the general public. Various land tenure types include natural areas designated as national parks, nature reserves, recreation areas, conservation parks, and environmental parks and so on. These different land tenure types allow a varying range of public activities. Forest reserves are public lands managed and controlled by State/ forestry services for the purposes of timber production in accordance with the Forestry Act and associated regulations. Conservation reserves and state forest are open to public access for recreational purposes except in areas where specific management regimes or zonings are overlaid. Such areas can include land designated as special conservation zones and disease risk areas. It is not uncommon in WA for such special zoning to occur in areas where recreation demand is high, for example, in the Darling Scarp and forests, adjacent to the main population corridor for WA.

This raises the issue of prevalence of the legislative mandates of various government departments and bodies associated with the management overlays. As there is no recognised RTR over public land in WA, it can be unclear as to which body should be approached for permission to access public lands, which permits are required for different zones or indeed which zones are barred from being accessed. It is pertinent to note that the *Conservation and Land Management Act 1984*, WA vests powers in the Planning Commission of WA to develop policies for the preservation of the natural environment of the State and the provision of facilities for the enjoyment of that environment by the community; and for promoting the appreciation of the flora and fauna of the state²¹. In this regard, the Department of Environment and Conservation has a significant role to play in providing access to the state's resources for the enjoyment of the environment by members of the public.

²¹ Section 19 *Conservation and Land Management Act 1984* WA

3.1.4 Water reserves

Water reserves in WA cover about 0.36% of the state land area but are mainly concentrated within a relatively confined region in the southwest. Water reserves are associated with drinking water source dams mainly located along the length of the Darling Scarp. Catchments for the dams are relatively large and zoned into three priority areas. Priority 1 zones include a buffer area covering a radius of 2km upstream of the dam wall where all public access is excluded. The remaining priority 2 and 3 zones allow certain restricted forms of public access. These zones overlay state forest reserves and conservation reserves. Currently, state regulations allow the re-designation of these zones by the Department of Water, for water-related purposes, which can result in exclusion of public access from previously accessible conservation reserves and state forest. Hughes et al (2008) provide examples from international practice where less stricter regimes apply in recognition of the public's right to access public land for recreational purposes, and a more detailed discussion of the issues and implications for recreation in areas in and around drinking water source protection areas in WA.

3.1.5 Crown Leasehold Land

A large proportion of the state's land falls under Crown Leasehold (35.6%), mainly in the form of pastoral leases. They are mostly located in the more remote/regional areas of WA, away from large population centres. Crown lease-holds grant the leaseholder the right to control access to the land although it is owned by the state government. This means public access to crown lease hold lands is effectively restricted in the same way as to freehold land, where permission to enter may or may not be granted by the leaseholder. However, unlike the exclusivity attached to freehold land, crown leasehold arrangements afford the state greater influence when determining how land ought to be used by the lessee (Holmes and Knight 1994). The state has powers to dictate the terms and conditions that may be agreed to by the lessee and the associated powers to resume land if conditions are not adhered to. Part 6 of the *Land Administration Act 1997 WA* and Sections 16 and 16A of the *Conservation and Land Management Act 1984 WA*, make provisions for agreement for the management of private land for public purposes. These powers provide suitable mechanisms for the state to more readily intervene in land use and recognise the public's right to access leased crown land.

Crown lease holders have no control over public access to the public roads that commonly traverse crown leasehold land. Accessing crown leasehold land beyond the public road system is not allowed without permission. Lessees may use their own discretion to grant individuals or groups access for recreational purposes. For example, Smith et al (2008) noted pastoral leaseholders in the WA Gascoyne - Murchison region had made informal arrangements with recreation clubs and other interest groups, to allow access to the crown lease for various purposes. These activities included camping, astronomy, photography, bird watching and wildflower viewing. In return, the groups would often conduct repair or maintenance work on infrastructure and facilities such as campgrounds, tracks, fences and sheds within the area granted access.

Pastoralists have a strong connection to their leasehold land and have a history of resisting formal government intervention in the management of their leases. O'Grady (2004) observed that pastoralists strongly maligned government intervention in pastoral lease management. Government intervention was commonly viewed by crown leaseholders (pastoralists) as usually

working against the best interests of pastoralists and was consequently unwelcome. It would follow that attempts by government to alter lease conditions relating to public access would not be received positively. This situation is evident in the resumption of crown lease land along the Gascoyne coast to allow tourism access. Pastoral Lease Boards established under Section 94 and 95 of the *Land Administration Act 1997* WA have powers to advise the Minister for Lands on policies relating to the management of pastoral lands.

3.1.6 Freehold Land

Freehold land comprises a relatively small proportion of the WA land area (8%). Freehold land is concentrated mainly in the southwest of WA where the majority of the state's population resides. Freehold land in WA generally includes freehold urbanised land, agricultural properties, hobby farms or privately held holiday homes/properties held in rural agricultural zones. Public access to private land is at the landowner's discretion. As with crown lease holders, private land owners in WA have a tradition of control of access and a strong belief in the exclusivity of their rights to manage their property without interference. Staley (2006) argued that private landowners rights are increasingly threatened by government imposed restrictions and controls in WA. With a relatively small percentage of WA land privately owned, it may not be necessary to argue for a right of way or access to private land for recreational purposes, unless, as in the NZ case, the private land in question must be crossed in order to access adjacent public land. However, at the heart of the debate is the larger right of access of members of the public to the state's resources and the onus on the state to ensure that members of the public are provided the opportunity to appreciate and enjoy those resources. Any proposal for access to private land for rights of way would require careful consultation to ensure a balance between public access and maintaining the rights of freehold land owners in WA.

3.1.7 Defence Land

Defence land is land reserved for use by the armed forces for training, research and military installations. Defence land covers a small portion of the state's land (0.25%), and public access to these lands is not allowed. However, in certain areas, public access may be tolerated for periods when the land is not being used by the military. An example includes the defence land on the Gascoyne Coast, south of the Cape Range National Park. In this area, public access is tolerated and activities such as camping, fishing and other recreational pursuits occur while management regimes have not been in place disallowing such activities. This has been mainly due to the logistical difficulties associated with policing such a remote area and the currently infrequent use of the area by the military.

3.1.8 Mining reserves

Mining reserves are lands held in reserve for mining and cover about 0.02% of the state. Public access is generally restricted or excluded where mining activity is occurring. However, public may access mining reserves using public roads. Mining areas may also have facilities for sightseers such as lookouts and visitor centres.

3.2 Section Summary: land tenure and access

Land may be defined as either open or closed to public access. The level of public access is usually determined after any preordained management restrictions are applied. Land open to public access may be publicly or privately owned.

About 87 percent of land in the UK is privately owned, including national parks and significant areas of 'natural' landscapes. The significant private ownership of land formed the foundation for a strong community drive to establish the right of outdoor recreation access to privately held 'open country'.

About 50% of land in New Zealand is privately owned. 45% is crown land that includes conservation reserves and leasehold. Crown land may or may not be accessible to the public as determined by its legislated allocation of use (similar to Australia).

In WA, 93% of land is Crown land with less than 10% privately owned. About half of the crown land is leasehold with access at the discretion of the lessee, effectively equivalent to private ownership status. Most freehold is concentrated in the southwest of the state where the bulk of the state's population resides and recreate. Access to freehold is at the discretion of the respective land holders who have a strong tradition of exclusivity.

Access to land in Western Australia is determined by a combination of the tenure and management regimes and is often affected by overlapping policy and management regimes and associated restrictions. For example, access to forestry reserves can be restricted by water catchment protection zones, disease risk areas and mining leases. This creates complications when seeking permission for public recreational access.

Gaining access to land in WA requires permission from the individual and often multiple relevant management bodies and/or land holders on a needs basis. This could include various local and state government bodies, lessees and private land holders.

4 RTR in the United Kingdom

UK has a strong history and tradition of recognising the public's RTR and enacting legislation providing access to the countryside²². The debate has a long history of development with bills introduced in parliament in the late 19th century. The campaign extended through the 20th century and culminated in the *Countryside and Rights of Way Act* in 2000. This Act was preceded by an evolving series of laws including the *National Park and Access to the Countryside Act 1949* UK, *Countryside Act 1968* UK, and *Wildlife and Countryside Act 1981* UK. This procession of laws has been cognisant of the individual citizen's right of access to common land. In 2000, the *CROW Act*²³ specifically recognised the right of access to include access to private land for recreational purposes.

The strong tradition of recognising the public's RTR is reflected in the work of the many organisations representing public and private interests and charged with the task of disseminating information on the public's RTR. For example, the Countryside Agency of the UK, the statutory body administering the CROW Act, has the mandate of making "the quality of life better for the people in the countryside; and the quality of the countryside better for everyone".²⁴ Other affiliated bodies such as the Countryside Management Organisation, English Heritage, The Moorland Association, British Mountaineering Council, English Nature, Country Land & Business Association, Forestry Commission England and the Association of National Park Authorities all work in collaboration in ensuring the UK public has every available opportunity provided to them in accessing the countryside for recreational purposes. These organisations are involved at varying capacities in coordinating recreational access and activities on CROW access land, providing information as to what recreational activities can be pursued on such land and disseminating information with regard to managing CROW access land. Thus, while preserving access rights of the public, the rights of landowners conferred upon by the various laws and regulations, as well as the *CROW Act*, are also protected.

4.1 A brief review of the Countryside & Rights of Way Act 2000 UK

The *CROW Act* in the UK confers a right on any person to enter and remain on "access land" for the purposes of open-air recreation, subject to the provisions of the Act. The *CROW Act* has opened up 936,000 hectares of mapped mountain, moor, heath, down and Common Land for walkers²⁵. Other areas may be open to walkers by permission of the landowner.

The legislation consists of several parts:

²² Pearlman (2001): *Journal of Planning & Environment Law* p754-762

²³ In Scotland, the equivalent to CROW Act is the *Land Reform Act* (Scotland) 2003

²⁴ Countryside Agency (2004) Positive access management: Practical ways to manage public access on your land

²⁵ This section is drawn from information provided by the concise review of CROW made by Pearlman (2001)

Part 1 deals with the right or freedom to roam. The land to which the public is to have access is referred to as Access Land and such land is shown as open country on maps prepared by the Countryside Agency for land in England and the Countryside Council for Wales for Welsh land. Access land also includes what is known as “Common Land”, which includes all land which was registered as common land under the *Common Registrations Act* (UK). Such open land or open country is defined as “land consisting wholly or predominantly of mountain, moor, heath or down but excluding improved or semi-improved grassland”.²⁶ It does not include coastal land (although there is provision in the legislation to allow for that in the future).

Part 2 of the legislation deals with rights of way and Part 3 relates to nature conservation and wildlife protection.

Part 4, produced at a later stage, relates to increased protection of what is termed in the legislation as Areas of Outstanding Natural Beauty (AONBs). Hence at the heart of the legislation lies the need to preserve and conserve the natural beauty of the countryside.

The right of access is created by section 2 of the *Crow Act*: “Any person is entitled...to enter and remain on any access land for the purposes of open-air recreation... [subject to various matters which disentitle him to that right (see report section 4.1.1 for a summary of disentanglements)]. The right is granted only for those exercising access on foot. Voluntary dedication of a public right of way by a land owner or manager, however, may not be limited simply to persons accessing on foot

4.1.1 Disentitlements and restrictions under the CROW Act

The disentitlement to enter and remain on any access land is stipulated in general terms via Section 2 of the *CROW Act*, and by Chapter II in more specific terms. Section 2 decrees that a rambler must not do anything in contravention of “any prohibition contained in or having effect under any enactment, other than an enactment contained in a local...Act”. Section 2 also refers to trespassing and details a whole raft of restrictions outlined in Schedule 2 of *CROW Act*. Schedule 2 spells out in detail the restrictions to be observed by persons exercising rights of access and includes the following:

Prohibitions apply if a rambler

- “ (a) drives or rides any vehicle other than an invalid carriage...
- (b) uses a vessel or sailboard on any non-tidal water,
- (c) has with him any animal other than a dog
- (d) commits any criminal offence
- (e) lights or tends a fire or does any act which is likely to cause a fire
- (f) intentionally or recklessly takes, kills, injures or disturbs any animals, birds or fish
- (g) intentionally or recklessly takes, damages or destroys any eggs or nests
- (h) feeds any livestock
- (i) bathes in any non-tidal water

²⁶ Robinson J R (2003) Reform of the law relating to access to the countryside: realising expectations? *Journal of Planning & Environment Law* Nov 1394-1400

- (j) engages in any operations of or connected with hunting, shooting, fishing, trapping, snaring, taking or destroying of animals, birds or fish or has with him any engine, instrument or apparatus used for hunting, shooting etc
- (k) uses or has with him any metal detector
- (l) intentionally removes, damages or destroys any plant, shrub, tree or root or any part of a plant, shrub, tree or root
- (m) obstructs the flow of any drain or watercourse, or opens, shuts or otherwise interferes with any sluice-gate or other apparatus
- (n) without reasonable excuse, interferes with any fence, barrier or other device designed to prevent accidents to people or to enclose livestock
- (o) neglects to shut any gate or fasten it where any means of doing so is provided, except where it is reasonable to assume that a gate is intended to be left open
- (p) affixes or writes any advertisement, bill, placard or notice
- (q)....
- (r)....
- (s) engages in any organised games, or in camping, hang-gliding or para-gliding
- (t) engages in any activity which is organised or undertaken (whether by him or another) for any commercial purpose.”

Schedule 2 also gives powers for relevant authorities to amend the limitations of access. Thus, flexibility exists for the current provisions of Schedule 2 to be changed over time as the need arises. The flexibility reflects the need to balance the rights of the public and the rights of private landholders.

All access lands are denoted by maps prepared by the UK Countryside Agency (and in Wales the Countryside Council for Wales). Once draft maps have been circulated for public comment and amendments, they then become published and have the force of law.

Landowners in the UK can exclude or restrict access to ramblers for any reason for up to 28 days a year. These restrictions are limited and are based on advanced applications to the relevant authority. The “relevant authority” referred to in *CROW Act* Schedule 2 is a National Park Authority, or outside a National Park the Countryside Agency, or in the case of dedicated forests, the Forestry Commission. For example, access restrictions cannot take place on public (bank) holidays; on more than four Saturdays or Sundays a year; or on any Saturday or Sunday during the summer months from June to August/September. Owners of moorland used for the breeding and shooting of grouse may ban dogs from the land for up to five years. Landowners may also ban dogs from lambing enclosures for up to six weeks in any year. Landowners are also able to apply to restrict access over and above the 28-day discretionary limit. Extensions beyond the 28 day limit for access might include applications for purposes of land management, public safety or fire prevention. Where a direction for a formal restriction is requested, the least restrictive option necessary for the purpose stated in the application is ideally taken. For example, if land management operations can be undertaken with a restriction to a specific route, this option would be preferred rather than a complete ban on walkers.

Before granting access restrictions, consideration is also given to the use of informal management techniques used by land owners. These techniques may include encouraging the

use of paths, limiting car parking, creating entry points, or controls on dogs. Unlike formal restrictions, informal management techniques require no prior approval and may be used at any time and as often as necessary. However, informal management techniques have no legal power and the public are not required to comply. Groups at the local county level called Local Access Forums play an active role in commenting on proposals for long-term restrictions. Long-term restrictions are defined as those lasting six months or more.

The CROW Act has provisions to allow land owners and other groups with interests in land to submit objections to rights of way. Such appeals may be allowed when there is considered to be a false representation of rights of way denoted in the access maps produced. No such appeal rights are available to ramblers²⁷, however, there are provisions in other legislation. For example, the *Property Law Act and the Highways Act* make provision, subject to landowner's intention to dedicate, for a right to traverse if the access way in question has been established through common use and if the landowner has not made a conscious effort to withdraw such rights within a 20 year period.

Section 26 of the *CROW Act* makes provision for the relevant authorities to make a direction on restriction for the purposes of conservation, heritage and preservation. Before restrictions are imposed, the relevant authority must take into account any advice from the relevant advisory bodies. Restrictions on recreational access may also be applied for the purposes of defence or national security (Section 28).

4.1.2 Landowners Liability under the CROW Act

Section 13 of the CROW Act refers to the occupiers' liability provisions. These are liabilities owed by landowners to walkers exercising rights of access. Section 13 has been worded in terms that are less strict than the provisions of the *UK Occupiers Liability Act 1957* (Pearlman 2001). The watering down of liability provisions was the result of landowners' lobbying when the *CROW Act* was being debated as a Bill in the UK parliament. Section 13, in effect, excludes liability on the part of the landowner as a result of an injury caused by, or arising from, existence of a natural feature of the landscape. This includes "any river, stream, ditch or pond whether or not [they are] natural features". It also excludes liability for an injury caused when passing over, under or through any wall, hedge or gate except by "proper use" of such gate or of a stile erected along a right of way.

In addition, unless landowners have deliberately caused a risk, or are reckless about whether a risk is created, they owe no duty of care and cannot be sued for any damage or injury caused. Hence the higher duty of care under the *Occupiers' Liability Act 1957* has been diluted by the *CROW Act*.

A land owner could still be sued in limited circumstances by a walker who is injured exercising CROW access. In deciding whether a landowner owed a duty of care and to what extent, the courts are required to take the following into consideration:²⁸

²⁷ This information compiled from various pages from Ramblers UK, www.ramblers.org.uk

²⁸ The Countryside Agency (2004a)

- CROW access rights ought not to place an undue burden, whether financial or otherwise, on the landowner
- the importance of maintaining the character of the countryside, including features of historic, traditional or archaeological interest, and
- any other guidance or instruction as given by the UK Countryside Agency.

Hence the onus on the landowner to provide a strict duty of care to walkers is significantly reduced in exchange for granting the RTR.

Another source of liability to walkers that may apply is conferred by the *Liability under the Animals Act 1971*, UK. If an animal owned by a landowner causes injury or damage to a walker, liability may arise if:

- injury or damage may have been avoided if the animals were restrained
- injury or damage was severe, or
- the animal or animals causing injury or damage were prone to cause such a risk in particular circumstances known to the landowner, or the person responsible for the animals on behalf of the landowner.

Further provisions are given in the *Animals Act 1971*, UK about guard dogs and dangerous animals.

4.1.3 Creating a right of way under the CROW Act

The mechanics of creating a right of way to enable public access to land is contained in the *CROW Act* Sections 58 to 59. Rights of way can be created by the Countryside Agency UK or in Wales, the Countryside Council for Wales. Requests to create a “public path”²⁹ need to factor in any rights of way improvement plans that include the land where the footpath or bridleway is proposed.

Section 59 deals with the closure or diversion of rights of way. In exercising the power to “stop up or divert highways”, consideration is required by the relevant authority regarding the extent to which the proposed access is likely to be used by the public if the RTR was not present for a particular area of land. There are no provisions for appeals by members of the public against the various notices that can be served by the relevant authorities to generate alternative means of access.

4.2 Concerns about legislating for recreational use in the UK

The Countryside Agency and Natural England are two key bodies in the UK providing information to stakeholders on access to land and for state provided recreational uses. Growth in demand for access to the countryside in the UK resulted in a chain of attempts to provide access

²⁹ Section 58(1) & (2) CROW Act, UK

for recreational purposes from as early as the late 19th century.³⁰ However, this was tempered by concerns about limiting potential environmental damage caused by a “recreation explosion”.³¹ For example, country parks and picnic sites were introduced by local authorities in the 1970s under the *Countryside Act 1968*, UK presumably a means of “keeping people away from the deeper country side”.³²

Ravenscroft & Curry (2001) suggested that a body of both demand as well as consumption literature exists in the UK that would assist in the development of policy related to public recreation access to countryside. However they critiqued the role of the state as the facilitator for creating opportunities that, they believe, must be in keeping with the demand and consumption patterns of recreational uses of the public. They alleged the state has not been effective in taking a balanced approach to access provision despite ample literature being available. Thus, Ravenscroft and Curry (2001) claimed that as there was no “appreciable latent demand” for perceived “additional access” to the countryside, some important strategic decisions may be based on erroneous assumptions. Hence the state’s case in providing either greater or lesser access may not reflect public expectations and demand.

This work, based on the County of Surrey, highlighted a situation in which the “local needs” of the community were not adequately taken into consideration in creating state-based policy to provide facilities. The authors noted that policy makers needed to adopt a demand-led approach. Research to inform decision making on the part of the state is considered important in order to ensure recreation demands are accurately represented. This is of direct relevance to Western Australia when considering application of right to roam policies.

³⁰ Ravenscroft & Curry (2001)

³¹ Sidaway (1988) cited in Ravenscroft & Curry (2001)

³² Hockway (1989)

4.3 Section Summary: Right to Roam in UK

The right to roam in the UK has a long history of tradition of access with strong community support evident in the evolution of legislation over 100 years and existence of numerous associations focused on outdoor recreation access. Rights of recreation access are balanced by rights of land holders and protection of land.

The *Countryside and Rights of Way Act* (2000) (CROW) is the key legislation established to govern public access to land. It defines the right to roam, access land, rights of way and protection of areas of natural significance. It was developed in consultation with recreation groups and landholders and attempts to balance the rights of these respective groups

Walking rights of way are marked on official maps published by the Countryside Agency, the agency mandated by the *CROW Act* 2000.

The UK *CROW Act* 2000 specifies restrictions on recreation access including:

- no vehicular access,
- no companion animals other than a dog
- no criminal behaviour
- no hunting or killing animals or possession of equipment associated with hunting
- no organised competitions, camping, paragliding or hang-gliding, and
- no commercial activities.

Landholders may officially apply to the Countryside Agency to restrict public access for limited periods at significant times of year (such as breeding times) with some limiting conditions. Landholders may also lodge objections to rights of way while recreationists may not.

The *CROW Act* 2000 holds primacy over other liability legislation in relation to public rights of way. Responsibility for injury or damage is shifted to the public accessing land rather than the landholder. Landholders are held responsible only where intentional or reckless behaviour can be shown to have caused damage or injury.

Western Australia has a long tradition of access to land in the context of its indigenous heritage. This has a vehicle of recognition through the native title process. However, the tradition of non-indigenous access to land for cultural and social purposes is less established. Of greater prominence in WA is the tradition of exclusive land ownership and management in the form of lease hold or free hold land.

5 RTR in New Zealand

Recreation access rights in New Zealand evolved from diverse conventional and historical traditions reflecting specific socio-political circumstances.³³ Provision for Maori land rights has been a key factor guiding the debate on access rights in combination with the importance placed on access alongside waterways in New Zealand. This is partly due to rights of access to what was called a Queen's chain, meaning land margins along rivers, lakes and coastline for set aside public access. Access to land adjacent to water ways and water bodies can be hampered by adjoining privately held land, thus the right to cross private land on foot in order to access public land along water ways was considered necessary. In 2008 the RTR was formally recognised with the enactment of the *Walking Access Act 2008*, NZ.

5.1 Relevant Acts and key regulatory bodies in New Zealand

Key bodies associated with land management and public access in New Zealand includes the New Zealand Landcare Trust, Ministry of Environment and Department of Conservation. The New Zealand Landcare Trust works closely with government departments to promote "sustainable land management through community involvement".³⁴ Its main aim is to encourage community involvement in organised events, such as field days and workshops. This is seen as a way for people to become better informed and share information about land care and management issues.

New Zealand's Department of Conservation (DOC) administers all Crown land, which comprises almost a third of New Zealand's land area. This includes national parks, forest and maritime parks, marine reserves, river margins, some coastline, several hundred wetlands, and many offshore islands. Most of the land under DOC control is protected for scenic, scientific, historical or cultural purposes, or set aside for recreation.³⁵ The *Conservation Act 1987*, NZ is administered by DOC and has provisions relating to RTR. Under this Act, DOC has responsibilities for managing footpaths and byways providing access to the areas it manages.

DOC has undertaken a number of initiatives in promoting access and ensuring promotion of outdoor recreation.³⁶ For example, in August 2007, DOC produced a key set of strategies known as Recreation Action. These were the result of a consultation exercise known as the Recreation Summit held by DOC. DOC also conduct surveys to evaluate whether the New Zealand public's recreational needs were met in a timely and appropriate manner.

The Ministry for the Environment administers the *Resource Management Act 1991*, NZ (RMA). The RMA regulates access to natural and physical resources. The Act contains provisions granting the Ministry powers to manage and regulate public access to areas under its control.

³³ Booth (2006)

³⁴ <http://www.landcare.org.nz/about-us/what-we-do/>

³⁵ Department of Conservation (2007)

³⁶ Department of Conservation (2008)

In addition to the above-mentioned legislation, the law relating to trespass, *Trespass Act 1980* NZ, features significantly in the RTR legislation. Trespass laws apply to privately owned land as well as some public lands. It limits public access by giving landowners powers to exclude walkers from entry to their land. Although the provisions of the *Trespass Act* are not directly referred to in the *Walking Access Act 2008*, landholders owning land adjoining a walkway are protected by the *Trespass Act*. Consequently, RTR in New Zealand is derived from a wide range of statutes administered, controlled or managed by a number of government departments and Ministries.

5.2 Events leading up to *Walking Access Act 2008* New Zealand

A key feature of land tenure in New Zealand is that significant areas are owned or managed by private companies.³⁷ For example 37% of New Zealand's planted forest is owned and managed by a single company, 20% is owned by seven medium-sized forestry companies and 35% owned by a large number of groups including Maori Trusts. Consequently, some parts of the publically owned coastline and waterways are bounded by privately owned land, restricting public access.³⁸ As a result, access issues across private land to publicly held land and the foreshore were significant in the New Zealand RTR debate. It was declared that all public foreshore land be Crown Land and hence appropriate to provide *de jure* access to public foreshore areas.³⁷

Prior to the *Foreshore and Seabed Act 2004*, New Zealand's Minister for Rural Affairs appointed a group called the Land Access Ministerial Reference Group to investigate and report on issues regarding:³⁹

- access to the foreshore of the lakes and sea and along rivers of New Zealand
- access to public land across private land, and
- access to private rural land to better promote public RTR and the enjoyment by the public of New Zealand's natural environment.

The Reference Group consulted widely with interest groups and stakeholders⁴⁰. Subsequently, New Zealand's Ministry of Agriculture and Forestry undertook a series of public meetings and consultations with community groups who had interests in the RTR. Written submissions were invited culminating in a report published in 2004. Based on the report and further consultations, the New Zealand Government proposed legislation that would provide for the creation of footpaths along the coast, around lakes and rivers.

Efforts to encourage more New Zealanders to walk and cycle were boosted with the announcement of the first National Walking and Cycling Strategy (2005). Funding of \$1.15

³⁷ Booth (2006)

³⁸ Kelly 2003; cited in Booth (2006)

³⁹ Walking Access Consultation Panel (2006)

⁴⁰ This information has been sourced from the above publication and various sources cited therein

million was allocated by the New Zealand government for national walking and cycling initiatives. This was supplemented with funding provided through the National Land Transport Fund (NLTF) of New Zealand. Over three years, NLTF funded 65 walking and cycling infrastructure projects with \$65 million over ten years budgeted for further walking and cycling projects.

The national Walking and Cycling Strategy titled “Getting there – on foot, by cycle – A strategy to advance walking and cycling in New Zealand transport” had the vision that “by 2010 New Zealand will have an affordable, integrated, safe, responsive and sustainable transport system”. The strategy is hailed as an integral part of the “transport mix” and contributes, in tandem, to a variety of other government strategies and policies. These include: the New Zealand Health Strategy, Sustainable Development for New Zealand Program of Action, New Zealand Energy Efficiency, New Zealand Tourism Strategy and the Healthy Eating – Healthy Action Strategy. It was based on dedicated research on walking and cycling patterns of New Zealanders and statistical information gained from detailed surveys of household travel undertaken by the Land Transport Safety Authority. The policy framework of the strategy has been informed by the New Zealand Transport Strategy and has the following objectives:

- improving access and mobility
- protecting and promoting public health
- ensuring environmental sustainability
- assisting economic development, and
- assisting safety and personal security

A comprehensive approach was taken, guided by the following principles:

- Walking and cycling are important means of transport
- Providing a transport system that works for pedestrians and cyclists means catering for diversity of users
- Walking and cycling are important for communities especially in urbanised areas
- The provision of access for walking and cycling as means of transport must require a comprehensive approach in planning
- Safety requirements must be integrated, and
- The needs of current users must be addressed alongside those of new users.

Hence the strategy called for integrated action from all stakeholders in providing support for walking and cycling based activities, while preserving the natural beauty and sustainability of the environment. The Strategy paved the way for greater recognition of the right of members of the public to accessible spaces and for greater enjoyment of the environment. It was a springboard for a variety of initiatives in New Zealand to promote public access to land. The strategy raised awareness amongst members of the public regarding rights of access to land, eventually leading to the creation of RTR legislation.

However, in June 2005, for political reasons, the New Zealand government announced that it would not proceed with the proposed legislation on walking access or the RTR. Rather, it opted

to consult further with key stakeholders as means for gaining greater consensus on land access rights in the community. In June 2005 a Walking Access Consultation Panel was appointed under the Ministry of Rural Affairs. The objective of the panel was “to reach, as far as possible, agreement on walking access along the coast, significant rivers and lakes, and to public land that is surrounded by private land”.

The appointed panel had 5 key principles which guided their mandate, including:

- That access should be free of charge for recreational purposes in areas as being open to access. Further, that the public and landholders must expect enduring legal certainty in the grant of access.
- That people exercising a RTR on land should take proper care of the environment and not interfere with private property or activities
- The public and landowners should be able to access information including maps about the land that is open to recreational use by the public
- The restoration of the water-margins should be pursued in a fair manner, and
- RTR along and to water margins and other public land is to be established preferably by negotiation and agreement.

Members of the public were again invited to make submissions regarding these principles and a series of meetings were held in 2006. From this, it is evident that there was a prolonged debate around the right to roam that was initiated by a public concern about the ability to access public land across intervening private property.

5.3 A brief review of Walking Access Act 2008, NZ

The *Walking Access Act 2008*, NZ (WAANZ) came into force on 30 September 2008. It was designed to enhance and extend walking access to New Zealand’s outdoor spaces. The legislation followed extensive and lengthy consultation with community groups and individuals, including landowners, conservation groups, local authorities, recreational walkers, hunters, fishers and a range of outdoor associations⁴¹. WAANZ established the New Zealand Walking Access Commission, the central body responsible for the coordination of all walking access in New Zealand. The Commission is also responsible for creating walkways. This responsibility was formerly under the *New Zealand Walkways Act 1990*. The day-to-day administration of walkways on conservation land remains with the Department of Conservation under the auspices of key legislation vested with it such as the *Resource Management Act 1999*, NZ.

Part 2 of WAANZ vests powers in the Walking Access Commission. The Walking Access Commission is therefore the equivalent of the UK Countryside Agency, taking on the prime responsibility of ensuring the public has knowledge of and access to public land. The objective of the Commission is to “lead and support the negotiation, establishment, maintenance and improvement of walking access and types of access that may be associated with walking access

⁴¹ <http://www.walkingaccess.org.nz/default.aspx>

such as access while carrying firearms, dogs, bicycles, or motor vehicles” and so it has vast powers vested via the legislation to declare and control access-ways and further enhance the public’s RTR.⁴² Part 2 details the functions of the Commission whose work is to be primarily based on a dedicated national strategy for providing walking access.

The legislation enabled the Commission to create subordinate legislation, the “code of responsible conduct in relation to walking access” for:

- users of walking access, and
- landholders of land on which walking access is located, and
- landholders of adjoining land on which walking access is located, and
- controlling authorities of walkways.”⁴³

This code guides all stakeholders and is to be referred to when deliberating on such matters as:

- (a) benefits conferred and obligations imposed by the Act and other enactments on the public as well as landholders in relation to walking access
- (b) recommendations for standards of behaviour by users of walking access and relevant landowners
- (c) information for stakeholders, and
- (d) information on Maori customary relationships with land and waterways.

Part 3 outlines the mechanisms of how walkways are to be created and administered and gives powers to the Commission to “appoint a department, local authority or public body or the Commissioner of Crown Lands to be the controlling authority of a walkway”.⁴⁴ In this way, the Commission acts as a central body coordinating all activities related to the RTR.

It is interesting to note that, unlike in the provisions of the *CROW Act* UK, the WAANZ leaves actions, such as erecting and maintaining poles, markers or suitable indicators to mark walkways, and erecting and maintaining stiles, fences or other structures enabling members of the public to use walkways, to the discretion of the responsible organisation or controlling body, enabled and guided by the legislation⁴⁵. Controlling authorities may be a government department, local authority or public body or the Commissioner of Crown Lands.⁴⁶ The controlling authority of a walkway has the power to do anything that is reasonably necessary or desirable to:

- develop, improve and maintain the walkway
- establish camping grounds, huts, hostels, accommodation houses or other facilities and amenities on the walkway or on land adjoining the walkway, and

⁴² WAANZ Section 2

⁴³ WAAZ Section 12

⁴⁴ WAANZ Section 35

⁴⁵ WAANZ Section 37

⁴⁶ WAANZ Section 35

- impose charges for the use of facilities and amenities.

In exchange for the provision of these facilities and amenities by controlling authorities, the liability on the part of landholders for any loss or damage suffered by a person using a walking access on the private landholder's land has been specifically excluded from the WAANZ⁴⁷, unless loss or damage is a result of the landholder's deliberate act or omission. The provisions of the *Occupiers' Liability Act 1962*, NZ and any liability arising out of any common law rule referred to in that legislation are not applicable to landholders in relation to walking access ways.

A controlling authority also has the powers to close or revoke walkways if it is justifiable on reasonable grounds. Reasonable grounds include for safety reasons, emergency purposes or for maintenance and development work, or at the request of a landholder adjoining a walkway and if it considers that the closure is necessary to comply with a condition imposed in relation to a walkway.⁴⁸

Part 4 deals with the compliance and enforcement of the miscellaneous provisions of WAANZ. It gives the Commission powers to appoint enforcement officers, that is, personnel in addition to members of the police force and fish and game rangers. Part 4 also provides the list of offences which include⁴⁹:

- (a) Taking of any plant (other than noxious weeds) growing on or adjacent to walkways
- (b) Possession of a firearm while on a walkway
- (c)...
- (d) bringing a horse or dog onto or has control of a horse or dog on a walkway
- (e)...
- (f) lighting a fire on a walkway
- (g)...
- (h) using a vehicle on a walkway, or
- (i) erecting a structure on or over a walkway.

Importantly, unlike the *CROW Act* of UK, dogs and horses are not allowed on walkways and the onus is on the defendant to prove that at the time of the alleged offence the activity in question was authorised.

Controlling authorities appointed by the Commission are also granted powers to make by-laws for the maintenance of good order on walkways and provide for the conditions under which the public may use any walkway. The Commission works in collaboration with controlling authorities and is seen as a body that oversees these and other government agencies and authorities concerned with regulating and exercising the functions and responsibilities relating to access

⁴⁷ WAANZ Section 66

⁴⁸ WAANZ Section 38

⁴⁹ WAANZ Section 54

5.4 Section Summary: Right to Roam in New Zealand

As with the UK, right to roam in New Zealand developed out of a defined issue of concern to the general public associated with ability to access areas for outdoor walking based recreation. The New Zealand issue revolved around geographical positioning of privately owned land limiting access to natural areas and public land for recreation. Issues associated with Maori access to traditional land also drove the debate. Public awareness of rights for recreational access were aided by a walking and cycling health and sustainability related campaign funded by the NZ government.

The *Walking Access Act 2008* is the key legislation enabling the right to roam in New Zealand. It was the result of extensive, lengthy public consultation with land holders, land management bodies and recreation interest and community groups.

A central body known as the Walking Access Commission was established associated with public access legislation. It oversees other government bodies to regulate functions and responsibilities relating to access. Land vested under Acts associated with land management agencies such as DOC remains the responsibility of those agencies.

The *Walking Access Act 2008* NZ details procedures for the creation and management of walk ways and the functions of the Walking Access Commission. The Act takes primacy over other liability legislation. Landholder liability for injury or damage has been excluded unless shown to be deliberate on the part of the landholder. New Zealand access legislation also clearly outlines the type of recreation access allowed (walking) and emphasizes protection of natural areas and other land.

As with the Maori land access debate, native title and land access for Aboriginal cultural and social practices in WA may afford one plank for the development of the broader right to roam platform. Based on the UK and NZ examples, eventual introduction of right to roam legislation in WA requires a clearly defined problem where necessary public access to land for walking based recreation is restricted or prevented and a clear solution is and apparent.

Demonstration of broad community support (recreationists, managers and land holders) for the right to roam would be a vital component for its introduction to WA.

6 RTR in Western Australia

Unlike the UK and New Zealand, there is no specific legislation governing the RTR in WA. There are a variety of federal, state and local legislation and associated regulations that impact upon the public's potential RTR on lands that are publicly held. However, no specific rights currently exist for the public to have access to privately owned land for recreation or to traverse privately owned land to access adjacent recreational areas on public land.

6.1 WA Land Use Planning

In WA the *Planning & Development Act 2005* governs land-use planning of all land pertaining to the state. Hence, the Planning Commission in WA has a lead role in determining land-use in collaboration with other relevant government departments. The Planning legislation is intended to provide for an “efficient and effective land-use planning system” while promoting sustainable use and development of land⁵⁰. Consequently all planned activities on state land must be approved by the Planning Commission of WA. The key-word is “development” and the definition includes development or use of any land including:

- (a) any demolition, erection, construction, alteration of or addition to any building or structure on the land
- (b) the carrying out on the land of any excavation or other works
- (c) in the case of a place to which a Conservation Order made under section 59 of the *Heritage of Western Australia Act 1990* applies, any act or thing that —
 - (i) is likely to change the character of that place or the external appearance of any building, or
 - (ii) would constitute an irreversible alteration of the fabric of any building.

Whether or not the creation of footpaths, bridleways or public access ways constitute the term “development” under the legislation, may be an issue to be determined. Freedom of access for outdoor recreation or recreation requiring access by foot does not necessarily require any modification of the land accessed and hence the creation of walkways and access routes may well fall outside the ambit of planning legislation.

⁵⁰ Planning & Development Act 2005, WA section 3

For planning purposes, the state is divided into 9 regions⁵¹:

- Gascoyne
- Kimberley
- Pilbara
- Goldfields-Esperance
- Midwest
- Wheatbelt, and
- Greater Southern
- Peel
- Southwest.

In addition The Metropolitan Region Scheme (MRS) functions as the key town planning scheme for land use in the Perth metropolitan area. This area stretches from Singleton in the south to Two Rocks in the north and east to The Lakes. The MRS defines the future use of land, dividing it into broad zones and reservations. Planning legislation mandates that local government town planning schemes provide detailed plans for any land-use within their jurisdiction. These schemes must be consistent with the land uses designated in the MRS. The MRS uses a set of maps and a scheme text which provides planning rules for zones and reservations which are shown on published maps. These maps may be amended from time to time. The MRS has been in operation since 1963 and provides the legal basis for planning in the Perth metropolitan region.

Any scheme to incorporate walkways, footpaths or right of ways must be approached through the planning process of the state. Currently, any proposal to implement a right of way must be initiated through the local government authority to which such access applies; and be subjected to rigorous public consultation. The land use planning system coordinates planning, land use and development through the review, approval and monitoring of planning schemes, policies, strategies, structure plans and subdivision and development applications. This is overseen by the Department for Planning.

Land use planning policies are created at state level and there are state policies that guide the Western Australian Planning Commission in devising appropriate land uses and respective strategies. Currently state-wide Planning Policy 2⁵² (entitled Environment and Natural Resources Policy) guides the WAPC in:

- integrating environment and natural resource management
- protecting, conserving and enhancing the natural environment, and
- promoting and assisting in the “wise and sustainable use” and management of natural resources.

The implementation of this policy is conducted “through the preparation of strategic plans, regional and statutory schemes, conservation and management strategies and other relevant plans” by the WAPC, in collaboration with the Department for Planning, local governments and redevelopment authorities.

Planning in Western Australia ideally aims to incorporate community, economic, environmental, infrastructure and regional development principles as set out in the *Western Australian Planning*

⁵¹ Per Regional Development Commissions Act 1993, WA

⁵² WAPC (2003) Statement of Planning Policy No. 2, *Government Gazette*, WA p2050

Commission State Planning Strategy 1997 and various state planning policies. This strategy and the ensuing policies are the key instruments that form the foundation on which any planning decisions are taken with regard to land-use in WA.

The Department of Planning has indicated that any proposed walking paths could only be incorporated into land-use plans where they are not in conflict with the primary purpose of the reserved land uses (Duckham, 2009). The department's advice is that in each case, where it is not reserved for Parks and Recreation, the relevant authority administering the land would decide whether walking would be acceptable (for example land reserved by DEC for State Forest, Water Corporation for water catchment protection areas, local government for municipal land).

6.2 The WA Physical Activity Taskforce

With regard to initiatives involving public recreation, the WA Government is currently promoting walking as part of a healthy lifestyle.⁵³ There are seven different government departments involved in the implementations of this campaign. These are referred to as “Walking Programs designed to help promote and increase people’s levels of walking activity”⁵⁴ programs and associated government agencies include:

- Walking for transport: Department of Transport
- Walking for health: Department of Health
- Walking for recreation: Department of Sport & Recreation
- Walking for transport, health & recreation: Departments for Planning and Infrastructure, Sport and Recreation, Education and Training, Main Roads WA, National Heart Foundation
- Walking for tourism: DEC, and
- Walking for other purposes: Department of Education & Training

All of these programmes have emanated from the work of the WA Premier’s Physical Activity Taskforce. The task force was formed in 2001 to address the declining level of physical activity in Western Australia. The Taskforce combines the expertise of a number of government departments and relevant agencies. The Taskforce presents an important foundation from which initiatives for greater access to public land could be launched, walking access strategies could be developed (as was the case in New Zealand) and funding advocated for the planning and implementation of transport options involving walking and cycling.

The primary focus of the mandate of the WA Taskforce is not centered on ensuring the public right to access certain lands. It stems from a concern to redress the perceived declining physical health of Western Australians. Such a focus was also identified in New Zealand’s initiatives to generate

⁵³ <http://www.transport.wa.gov.au/walking/713.asp>

⁵⁴ *ibid*

greater walking access opportunities. However, the difference in the New Zealand context was that addressing health issues was one of many integral parts of an overall, holistic walking and cycling access strategy. The strategy itself was complementary to the New Zealand Transport Strategy, covering a comprehensive range of issues. The New Zealand experience demonstrates that a number of government departments working together under a common umbrella can result in more effective development of initiatives and benefits.

The creation of the New Zealand Walking Access Commission was the culmination of many collaborative exercises. The Commission was the final step in formally recognizing the oversight function across a number of government bodies. In WA, the Physical Activity Task Force has begun some significant initiatives and may well provide the opportunity to link together government and related public and private sector organisations with regard to recognizing the rights of access to public land for recreational purposes. This could lead to the commissioning and granting of powers to a parallel or higher body (as was the case in New Zealand) with a mandate specifically geared towards acquiring a right to access to lands for outdoor recreational purposes.

6.3 Key WA Legislation that may impact upon RTR

Planning legislation is central for procedural purposes for any initiation and establishment of access respecting RTR and is referred to elsewhere in this report. This section very briefly outlines other key legislation that may have a substantive bearing on RTR. Table 2 summarises the various WA land tenures in terms of associated legislation and organisations with legislative responsibilities.

6.3.1 Conservation and Land Management Act 1984, WA

The *CALM Act* provides the mandate to the Conservation Commission established by the legislation to develop policies⁵⁵ —

- (i) for the preservation of the natural environment of the State and the provision of facilities for the enjoyment of that environment by the community, and
- (ii) for promoting the appreciation of flora and fauna and the natural environment.

Hence it is part of the legislative mandate of the Conservation Commission to advise the Minister as to policies and mechanisms to facilitate access rights to members of the public in order that they may enjoy the natural resources of the state.

⁵⁵ Conservation and Land Management Act 1984 WA Section 19

Table 2; Summary of WA land tenure with associated legislation and governing bodies

Tenure	Land Area		Relevant Government Organisations	Relevant Legislation
	'000 km ²	%		
WA Total	2525.5	100%		
Aboriginal and TSI	325.5	12.9%		
Leasehold	126.1	5%	Aboriginal Lands Trust	Native Title Act 1993
Reserve	199.4	7.9%	WA Dept of Indigenous Affairs Aboriginal land councils	Aboriginal Heritage Act 1972 <i>Aboriginal Affairs Planning Authority Act 1972</i>
Public Land	1095	43.4%		
Conservation reserve	178.5	7.1%	WA DEC Conservation Commission	Conservation & Land Management Act 1984 <i>Environmental Protection Act 1986</i> <i>Swan River Trust Act 1988</i> Swan & Canning River Management Act 2006 Wildlife Conservation Act 1950
Unallocated crown land	821.5	32.5%	WA DEC Dept of Regional Development and Lands	Land Administration Act 1997
Other crown land	44.6	1.8%	Dept of Regional Development and Lands	Land Administration Act 1997
Forestry reserve	34.8	1.4%	WA DEC Conservation Commission Forest Products Commission	
Water reserve	9	0.4%	WA Dept of Water Water Corporation (WA)	Country Areas Water Supply Act 1947 Land Drainage Act 1925 Metropolitan Water Supply Sewerage & Drainage Act 1909 Rights in Water & Irrigation Act 1914 Waterways Conservation Act 1976
Defence land	6.3	0.2%	Cmnwlth Dept of Defence	
Mining reserve	0.4	0.02%	WA Dept of Mines and Petroleum	<i>Petroleum and Geothermal Energy Resources Act 1967</i> <i>WA Mining Act 1978</i>
Mixed category lands	-	-		
Private Land	1105	43.8%		
Freehold	205.1	8.1%	Local Government WA Dept of Planning WA Planning Commission	Planning and Development Act 2005
Crown Leasehold	899.9	35.6%	WA Dept of Regional Development and Lands Pastoral Lease Board	Land Administration Act 1997

Source: Australian Natural Resources Atlas accessed at <http://www.anra.gov.au/topics/land/landuse>; DPI Crown Land Management' Brochure Sept 2005, accessed http://www.dpi.wa.gov.au/crown_management0905.pdf; Forest Products Commission at <http://www.fpc.wa.gov.au>; Dept of Environment and Conservation <http://www.dec.wa.gov.au>; Conservation Commission <http://www.conservation.wa.gov.au/>; Dept Regional Development and Lands <http://rdl.wa.gov.au>; WA Planning Commission <http://www.planning.wa.gov.au/>

The *CALM Act* applies to:

- state forest
 - timber reserves
 - national parks
 - marine parks
 - conservation parks
 - nature reserves
 - marine nature reserves
 - marine management areas
- any other land reserved under the *Land Act 1933* and vested by order under that Act in the Conservation Commission or the Marine Authority, and
 - any other land, other than excluded waters, reserved under Part 4 of the *Land Administration Act 1997* the care, control and management of which are placed by order under that Part with the Conservation Commission or the Marine Authority.

6.3.2 Water-legislation

The Department of Water has the legislative mandate to manage the water resources of the state and the key legislation they administer are:

- *Water Resources Legislation Amendment Act 2007*
- *Country Areas Water Supply Act 1947*
- *Land Drainage Act 1925*
- *Metropolitan Water Supply Sewerage & Drainage Act 1909*
- *Rights in Water & Irrigation Act 1914*
- *Water Agencies (Powers) Act 1984, and*
- *Waterways Conservation Act 1976.*

Any initiative to introduce the public's RTR over land subject to the above cited laws may have to be approved by the Department of Water and any subsequent provisions to amend existing rights may be required to comply with the Department's stipulations on water conservation. Hence the Department of Water is a key stakeholder to any debate on public access to land albeit insofar as such access on land under its management is concerned.

6.3.3 Native Title Act 1993, C'th

Native title rights comprise a bundle of rights and interests in relation to who owns and has access to land and waters. They are dependent on the traditional laws and customs of the native title holders⁵⁶. Native title may exist in places where indigenous people continue to follow their traditional laws and customs and have maintained a link with their country, and where this connection has not been extinguished because of acts done, or allowed by government. The areas where native title may exist include:

- vacant or unallocated crown land,

⁵⁶ This information has been sourced from the website of the Department of Mines & Petroleum: <http://www.dmp.wa.gov.au/1884.aspx>

- some reserve lands (such as national parks, forests and public reserves)
- some types of pastoral lease
- land held by or for Aboriginal people or Torres Strait Islanders, and
- beaches, oceans, seas, reefs, lakes, rivers, creeks, swamps and other water bodies that are not privately owned.

Given that up to 93% of WA is crown land, native title claims can apply to most of the state. According to the Department of Mines, the native title rights may include the right to possess and occupy a particular area to the exclusion of all others (often called exclusive possession). In other areas, the native title rights are most likely to be a set of ‘non-exclusive’ rights (which means there is not right to control access to, and use of, the area).

Any RTR initiative that may fall over native title land may require collaboration with the Native Title Authority in each state as they have:

- The right to negotiate over certain proposed developments such as petroleum exploration, production and development (future acts)
- The right of access to some pastoral and agricultural leases if certain conditions are met, and
- Other rights such as the right to be notified or to comment on some proposed developments (future acts).

The WA Native Title Office operates out of the Department of the Attorney General. The state is divided into six native title regions for the purposes of claim management. Each region has a federally funded statutory body that provides assistance to local aboriginal groups wanting to establish a native title claim.

6.3.4 Occupier’s Liability Act 1985, WA

Provisions of the *Occupier’s Liability Act 1985* apply to all persons occupying or having control of land or other premises. The legislation applies to private as well as public landholders. The scope of the duty of care owed by landowners is to ensure that in all the circumstances of the case reasonable care is taken that persons entering land or premises will not suffer injury or damage⁵⁷. The liability is strict.

The duty of care does not apply in respect to risks willingly assumed by the person entering but the onus is on the owner not to create “a danger with the deliberate intent of doing harm or damage to the person or his property and not to act with reckless disregard of the presence of the person or his property”⁵⁸. The UK legislation in respect to RTR has adapted a diluted approach to liability on the part of landowners on whose land rights of way are created. Alternatively, in New Zealand the

⁵⁷ Section 5(1), Occupiers Liability Act 1985, WA

⁵⁸ Section 5(2) *ibid*

provisions of the Occupiers Liability legislation do not apply, that is, landowners have been absolved of any liability.

The extent to which the duty may be scoped in relation to any proposed RTR legislation for WA is a key issue to be debated. However, provisions under the *Land Administration Act 1997* WA absolve liability on the part of public bodies in charge of controlling access ways.

Section 66 of the *Land Administration Act 1997* refers to restriction on liability on the part of the relevant government body in respect of public access routes. Subject to this section neither the Minister for Lands, the relevant local government, any holder of an interest in the subject Crown land on which public access routes are provided, nor any other person acting under the authority or direction of the Minister are liable or owe a duty of care to persons walking on access ways. In other words, members of the public use a public access route entirely at their own risk.

6.3.5 Main Roads Act 1930 WA

Section 24 of the *Main Roads Act* gives the Commissioner of Roads the power to declare roads as what is termed in the legislation as “secondary roads”. One of the considerations for such declaration is whether the proposed road is, or will be, the main means of access to a national park, scenic reserve or site, or seaside resort.

6.3.6 Mining legislation

All of WA's petroleum resources and adjacent submerged lands are Crown Land. The right of access to search for, and recover resources is at the discretion of the state government. Legislation applying to WA and its adjacent submerged lands are⁵⁹:

- The *Petroleum and Geothermal Energy Resources Act 1967* (WA) (PGERA67) covers all onshore areas of the State, including its islands and, in certain circumstances, areas of submerged lands internal to the State (i.e. those waters landward of the base line), other than ‘subsisting’ permit areas under the *Petroleum (Submerged Lands) Act 1982* (WA) (PSLA82)
- The *Petroleum (Submerged Lands) Act 1982* (WA) (PSLA82) applies to WA’s territorial sea, including the territorial sea around State islands, and under certain circumstances, some areas of internal waters, and
- The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cwlth) (OPGGSA06) applies to the submerged lands of the continental shelf beyond the territorial sea, which are within the area designated as being offshore to WA

Both the *Petroleum and Geothermal Energy Resources Act 1967* (WA) and the *Petroleum (Submerged Lands) Act 1982* (WA) are administered solely by WA, while the Commonwealth Act is administered jointly by both the Commonwealth and State Ministers responsible for petroleum

⁵⁹ Sourced from Department of Mining: <http://www.dmp.wa.gov.au/3337.aspx>

administration. The division of State and Commonwealth Waters occurs offshore at the three nautical mile mark.

6.3.7 Land Administration Act 1997

The *Land Administration Act 1997* gives considerable powers to the Minister for Lands to conduct a number of activities on Crown lands including subdivision and development. The Minister may also reserve Crown land for one or more purposes in the public interest. The Act also grants powers to lease Crown land in unmanaged reserves.

Section 64 grants powers to the Minister for Lands to declare public access routes through Crown land. Reference is also made in this Act as to the types of access: a person may travel by any means along the whole or part of a public access route which is not closed under section 67. Hence the ambit of this section is wider than similar provisions in both the UK and New Zealand.

The Act makes provision for the Minister to cause the route of each public access route to be signposted so as to enable members of the public using that public access route to follow it. It can be interpreted from sections 65 and 66 of the Act that it is the government's responsibility to maintain and signpost public access ways and erect structures, control and maintain them.

Further, Section 68 states that "if the route of a public access route intersects with the line of a fence, the Minister must provide, or arrange with the relevant holder of an interest in the subject Crown land at the expense of the Minister to provide, a grid or other means of passage through or over that fence at the point of that intersection". Similar to the New Zealand context, members of the public are not required to play any part in providing for the maintenance or control of access ways or land adjoining access ways.

Offences with respect to the use of public access ways are provided in Section 71:

- (1) A person must not without reasonable excuse create or place any obstruction across or on a public access route which, or the relevant part of which, is not closed under section 67.
- (2) A person using a public access route must not hinder or obstruct the proper care, control or management of the subject Crown land.
- (3) A person using a public access route must not camp —
 - (a) on the public access route; or
 - (b) without the consent of the holder of an interest in the subject Crown land, elsewhere on the subject Crown land.

In the UK and New Zealand examples, such provisions have been incorporated into RTR legislation and complemented with much more detail, in keeping with balancing the needs of walkers and respecting the rights of other stakeholders.

6.4 Key WA government bodies involved in land access

In WA, as in the UK and NZ, there are several key government departments whose activities impact significantly on the public's RTR. Crown land, as the dominant land tenure type in WA, is administered by a range of government agencies and bodies depending on the type of tenure and management regime. For example, various agencies administer parks and recreation reserves, including the Swan River Trust, WA Planning Commission, and DEC. In addition to the State parks and recreation reserves, there are local parks administered by local government. The initiation of any land use change is through local government. In this context it would be important to include all of these agencies and bodies in a discussion of RTR in WA.

One key organization is the Department of Environment and Conservation (DEC), managing the conservation reserves, state forest and unallocated crown lands in WA. This equates to approximately 41% of the state's land area. DEC works in collaboration with the WA Planning Commission to ensure the legislative mandates conferred upon DEC operate efficiently. This includes the heavily used and contested Darling Scarp and Southern Forests area in the southwest of the state (Hughes et al, 2008).

DEC has a role in influencing and advising land use planning decision makers on environmental matters and public access to land. DEC's role is to ensure environmental protection is adequately integrated into the State's policy, strategic and statutory land use planning processes. It is important to note that the department's advisory role in the land use planning system is linked closely with the formal referral and assessment processes of the Environmental Protection Authority (EPA). The EPA maintains its independent role (under the *Environmental Protection Act 1986*) in assessing planning proposals and schemes that are likely to have a significant impact on the environment.

The legislative mandate of DEC also includes provision of access to natural areas for recreational purposes, termed "access for all". This mandate has resulted in some conflict regarding access to DEC land subsequently overlaid with water protection management regimes that exclude public access to land known as public drinking water source protection areas. The declaration of water protection zones by the Department of Water in the Darling Scarp resulted in loss of public access to key water catchment areas. This has raised community concerns about public access rights. Although these concerns relate to the context of access to water catchment protection areas on public land (Hughes et al (2008), they are indicative of a lack of a mechanism to ensure that the perceived access rights of the public are protected and addressed fairly in balancing the needs of members of the public and those of other stakeholders.

The former WA Department of Planning & Infrastructure (DPI) had a central role in planning and allocating land use. From July 1st, 2009, the DPI was split into:

- Department of Planning
- Department of Transport, and
- Department of Regional Development & Lands.

All three agencies are also central to the discussion around the introduction of RTR in WA in the context of land use and public access ways.

The Department of Environment and Conservation is the key state body responsible for administering the legislation concerning management of Crown land and environmental protection in Western Australia. The legislation includes the following related and relevant Acts:

- *Environmental Protection Act 1986*
- *Swan River Trust Act 1988*
- Conservation & Land Management Act 1984
- Litter Act 1979
- Swan & Canning River Management Act 2006, and
- Wildlife Conservation Act 1950.

The Department of Environment and Conservation manages approximately 41% of the land area in WA. This includes unallocated Crown land, conservation parks, regional parks, nature reserves, state forest and timber reserves (vested in the Conservation Commission of Western Australia). As an agency with integrated responsibilities, DEC manages lands and waters for the conservation of biodiversity and ecosystem integrity. This includes management for the renewable resources they provide, and for the recreation and visitor services they can sustainably support.

In accordance with the *Conservation and Land Management Act 1984*, WA DEC prepares management plans for these protected areas on behalf of the Conservation Commission and the Marine Parks and Reserves Authority. Management plans are prepared in consultation with the community to identify and guide long-term management directions and strategies for protected areas. A draft management plan is published following discussions with key stakeholders, public meetings and various other forms of public participation. These plans are authorized by statute and hence have the force of law in WA.

The Department of Lands has considerable powers vested in it via the *Land Administration Act 1997* for the creation of access to public land. The Department of Mines and Petroleum have jurisdiction insofar as agricultural, horticultural and mining land are concerned.

6.5 Establishing a public right of way in WA

Any proposed new or changed public rights of way, such as walkways and footpaths, are formally proposed at local government level. The preparation and environmental assessment of local government planning scheme amendments require the involvement of the local government as a

starting point. The amendments are then referred to the Environmental Protection Agency for assessment⁶⁰. The input from community consultation and submissions from key interest groups and individuals are then sought prior to changes introduced. The EPA will make a decision whether a formal assessment process is required.

The Department of Planning then assesses the consistency of the proposal with planning legislation, and regional planning schemes. If consistent with existing planning laws and schemes, the draft proposal is referred to the WA Planning Commission (WAPC) for permission to advertise the proposed scheme. The WAPC may approve or not approve the changes. If approved, the proposed amendments are advertised and a period of 42 days is allowed for public comment.

Local government then considers submissions and resolves to adopt or not to proceed with any proposed amendments. A submission is again made to the WAPC with a summary of public consultations and information from advertising. WAPC in turn makes a recommendation to the Minister for Planning who may then grant approval with or without modification. Local government authorities again call for public submissions before resubmitting with amendments to WAPC. The Minister then reconsiders and grants approval. Subsequently the amendments will be published in the government gazette.

⁶⁰Duckham (2009) WA Dept of Planning

6.6 Section Summary: RTR in WA

There is no specific legislation in WA regarding the RTR and hence no single organisation responsible for overseeing or managing policy on the RTR. However there is existing legislation that relates to public access to land.

There is a range of relevant legislation and processes currently in place for establishing public rights of way in the form of road reserves, footpaths and walkways. Establishing these rights of way does not necessarily include building infrastructure.

The process of establishing or altering a public right of way commences at the local government level, followed by a state government assessment and review process that is then either accepted or rejected by the local government. The state government can override local government schemes and decisions.

Creating a public right of way that crosses several local government areas would require a specific planning process to be initiated with each local government that includes respective state government involvement and community consultation for each local government area. While approval of the right of way is required to fit into the state planning scheme it is also dependent on individual local government planning schemes and priorities and whether the right of way is deemed compatible with the primary use of the land.

Establishing public access to Crown land that is overlaid with management regimes restricting public access require negotiation with the responsible land management agency. For example, access to a water catchment protection area in a state forest would require permission from Water Corporation with involvement of the Department of Water and DEC.

Liability for injury or damage while using a public right of way in WA (such as a road) is placed on those using the public right of way. However, for injury or damage incurred while accessing land, it is the responsibility of the land holder to demonstrate due diligence in ensuring risks were minimised for those accessing the land. This differs from the UK and NZ where landholders are only liable where it is demonstrated that risks were intentionally created by the land holder.

Developing rights of way in WA is of relevance to a range of organisations including:

- WA Department of Planning
- WA Department of Transport
- WA Department of Regional Development & Lands
- WA Department of Environment and Conservation
- WA Planning Commission
- Conservation Commission of WA

- WA Department of Lands
- WA Department of Indigenous Affairs
- WA Department of Local Government
- Local governments, possibly through the Local Government Association
- Physical Activity Taskforce
- WA Department of Health, and
- WA Department of Sport and Recreation

Given the range of government departments and other groups with vested interests, UK and NZ have established umbrella organisations to oversee policy and management of the right to roam.

The Physical Activity Taskforce currently promotes walking and cycling based activity and could form the foundation for development of right to roam policy, similar to the scenario documented in New Zealand.

7 Discussion and Implications

Both the UK and New Zealand cases highlight that the right to roam stems from the community demand for access to natural areas by foot for recreational purposes. This relates to predominantly natural areas outside urban environments, referred to as “Open Country” in the UK. It is apparent from these examples that there are three main elements that drive legislative changes to enable rights of way and the freedom to roam:

7.1 Clear Case Argument and Solution

The UK and New Zealand cases for the right to roam were based on a strong argument around the restriction of opportunities for outdoor recreation. The UK right to roam campaign stemmed from the extensive private land holdings in the UK that prevented public access to natural areas and “open country” owing to trespass laws (see Chpt4).

The right to roam laws in New Zealand stemmed from the significant proportion of privately owned land that inhibited access to adjacent public land for recreation (see Chpt 5 and section 5.2). In both cases, it was evident that laws were required in order to ensure the public had adequate access to natural areas for walking based outdoor recreation.

7.2 Popular and Grassroots Support

It is also important to note that both the UK and New Zealand right to roam laws had popular support. This was founded on public awareness of the issues around access to land and how this relates to opportunities for outdoor recreation. The UK campaign included mass trespass events in protest against access restrictions to natural areas and open country. The New Zealand case included wide community consultation with all interest groups to establish that the community (including land owners) supported laws to enable better access to outdoor areas.

In the New Zealand case, The Walking and Cycling Strategy (section 5.2) paved the way for greater recognition of the right of members of the public to accessible spaces and for greater enjoyment of the environment and was a springboard for a variety of initiatives in New Zealand to promote public access to land. The strategy was based on comprehensive research into walking and cycling patterns in New Zealand. The WA Physical Activity Taskforce could provide a similar platform for RTR policy development (*section 6.3*).

7.3 Protection of landholders rights

In both the UK and New Zealand, right to roam legislation included clearly defined restrictions on how land may be accessed and where responsibilities lie. This is particularly pertinent in relation to liability. These concessions encouraged support from land holders and enabled access legislation to be successfully enacted.

Right of access legislation in the UK weakened the original landholder's liability legislation such that the onus was on the public using the rights of way. In New Zealand, rights of access legislation exempt landholders from liability in relation to public use of right of way on their land. In WA, liability legislation places the onus on the landholder to ensure reasonable action is taken to minimize risk to members of the public accessing their land. The exception is where the public uses an established public right of way, such as a road. In this case, the public uses access routes at their own risk.

7.4 Right to Roam Umbrella Organisation

It is evident that the WA legislative framework holds the relevant components for establishing a right of access, similar to the right to roam in UK and New Zealand. However, these are dispersed across numerous government agencies and responsibilities.

As Table 1 and 2 demonstrate, to traverse the variety of land tenures in WA, a range of agencies and individuals would need to be approached for permission to access land under restricted management regimes or tenure.

The process of establishing a public right of way currently requires individual application processes to respective local governments responsible for the areas a right of way crosses coupled with a comprehensive community consultation process for each area of land. In some cases it is unclear who has primary responsibility and what legislation is most applicable.

7.5 WA Recreation and Demand

The majority of the WA population resides in the southwest corner, primarily in an urban corridor extending 120km along the coast from Yanchep to Dunsborough. Much of the population is confined to a narrow coastal plain area (about 40km wide) defined by the Indian Ocean coast to the west and the Darling Scarp to the east. As a result, a significant proportion of recreation demand in WA is focused in the southwest region, especially areas immediately adjacent to this urban corridor and includes the Darling Scarp and the forested area extending to the south coast.

The southwest region also hosts the majority of freehold land and crown land with access restrictions imposed (such as water protection reserves). Establishing walking rights of way in the southwest of the state could prove to be politically complex. Based on the examples from UK and New Zealand, establishing right to roam laws in this region would require considerable community support and political will.

Given the extent of public land in WA, in contrast with the significant portion of private land in UK and NZ, it would seem the issue of right to roam in WA is more related to policy and management overlays than actual tenure. For example, access to timber reserves and conservation areas in the high recreation demand Darling Scarp and Southern Forests regions, can be restricted through declaration of disease risk areas or commencement of mining operations in mining leases that overlay the area. Restrictions may also result from track closures on public land for various managerial reasons (erosion control, disease control, rehabilitation).

Hughes et al (2008) noted that publically accessible land in timber reserves and the conservation reserve can have access disallowed through declaration of high priority drinking water protection zones. A high profile case in WA relates to the acquisition of an irrigation dam for the purposes of drinking water supply. The dam was used heavily for public recreation. Acquisition for addition to the drinking water supply network resulted in the immediate exclusion of public access while the tenure remained as state forest and conservation reserve.

7.6 Risk and liability

It is apparent that rights of access require careful consideration of public liability. The UK legislation weakens liability on the part of land holders where public rights of way exist and where no intentional action or inaction by the land holder caused or increased public risk (section 4.1.2).

The New Zealand legislation exempts land holder from liability where public rights of way exist except where intentional actions or inaction creates a public risk (section 5.3).

The situation in WA places the onus on the landholder where land holders are required to demonstrate that a reasonable duty of care was taken to minimise public risk except where the public is using an existing public right of way, such as a road. (See sections 6.3.4 & 6.3.7).

7.7 Implications

- The NZ and UK examples may not be directly transferable to WA given the different contexts of tenure and history. (*see Chpt 4 intro & 5.2*).
- It is apparent from the UK and NZ examples that active community support is vital to the development of right to roam policies and laws (*see Chpt 4 intro & 5.2*)
- The rights of landholders need careful consideration when balancing with rights of public access (*sections 4.1.1, 4.1.2, 5.2, 5.3*)
- The NZ Walking and Cycling Strategy provided a basis for development of RTR policy and public awareness raising on the issue (*section 5.2*). The WA Physical Activity Taskforce could perform a similar function (*section 6.2*)
- There is a need to accurately measure the extent to which public access for outdoor walking based recreation in natural areas is restricted in WA, particularly near population centre's
- There is a need to determine the level of wider community awareness and support in WA for the right to roam idea (outside the recreation associations and clubs). This might involve awareness raising where the issue of restriction of access is real but incremental over time, meaning the public could be generally unaware
- Concerns of landholders in UK and NZ resulted in RTR legislation having elements sympathetic to these groups in terms of liability and access restrictions (*sections 4.1.1, 4.1.2, 5.3*)
- Past experience has demonstrated that attempts by WA government for a top down approach to providing public access to land will often be met with strong resistance from lessees and land owners (eg pastoral leases near Ningaloo Reef (*section 3.1.5, 3.1.6*)). Extensive community consultation would be required in the RTR development process to balance landholder rights with recreation access
- There is scope for informal (non-legislative) pathways to allow access to land – such as access arrangements between recreation groups and land holders (private, lessees and public) (*section 3.1.5*)
- Issues around liability of land holders in WA needs clarification. Currently the onus is on WA land holders to demonstrate due diligence (*section 6.3.4*). Alternatives could be based on the UK or NZ approaches where demonstration of intent to create a risk is required rather than demonstration of lack of due diligence by land holders to minimise risks (*sections 4.1.1, 4.1.2, 5.3*)
- As with NZ Maori land access rights, native title in WA could form one conduit for developing policies on the right to roam based on tradition of access (*Chpt 4 intro and 5 intro, sections 5.4*)

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