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Sustainability Policy Unit
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Dear Sustainability Policy Unit

Submission: Western Australian State Sustainability Strategy Consultation Draft

We refer to the Consultation Draft of the Western Australian State Sustainability Strategy ("the Draft Strategy") and thank you for the opportunity to make the following submissions.

The need for legislative reform

The Draft Strategy provides that "as the process of implementing sustainability unfolds, further institutional reform *may* be required, such as sustainability legislation." (page 212, italics added). Legislative reform will, in fact, be essential to the implementation of sustainability, and the final Strategy should therefore include recommendations for such reform. The reform should not simply focus on environmental legislation (which has traditionally been the primary forum in which sustainability is addressed), but should address legislation in all sectors. The magnitude of the changes which are needed in social and economic, as well as environmental, policy and legislation means it will not be sufficient to leave traditional environmental legislation to deal with sustainability.

Sustainability should be the object of legislation

The final Strategy should recommend that the principle of sustainability be inserted as the object of all relevant legislation. This will ensure that all people working with the legislation have their attention drawn to sustainability principles and ensure that sustainability influences and directs the agency responsible for implementing the legislation. It will also require decision makers to make decisions in furtherance of sustainability.

When inserting the principle of sustainability into legislation, care should be taken to ensure that the principle does not conflict with any other the other objects of the legislation. Objects clauses which conflict with each other either cancel each other out, or in some cases, one objects clauses is preferred above another and the other object is simply dismissed. This causes significant public concern and can have a paralysing effect on legislative schemes. For example, the preamble (a form of objects clause) of the *Conservation and Land Management Act 1985* (WA) ("CALM Act") is:

“An Act to make better provision for the *use, protection* and management of certain public lands and waters and the flora and fauna thereof” (italics added)

The CALM Act provides for conflicting objectives, in that it requires both the use (exploitation) and protection (conservation) of forests. Until recently, the sole agency charged with implementing this Act was the Department of Conservation and Land Management. This was of significant public concern for a long period of time, because:

“an operational forest manager empowered to sell off the resource (and retain the funds resulting), would have an inherent conflict with the role of conservationist-regulator.” (Report in relation to *The Sustainability of Current Logging Practices* tabled in WA Legislative Council on 9 December 1999.)

The CALM Act was amended in 2000 to create separate and distinct bodies, each charged with different responsibilities to carry out particular objects of the Act. While this amendment somewhat ameliorated the public concern in management of forests, the same concern exists today in respect of the object of the management of fisheries. The object of the *Fish Resources Management Act 1994* (WA) is:

“...to *conserve, develop* and share the fish resources of the State for the benefit of present and future generations.” (italics added)

This objects clause places the Department of Fisheries in the powerful position of being both conservation regulator of the State’s fish stocks and vendor by contract of those stocks. There is significant public concern about the potential for conflict of interests to arise and about the fact that the development object of the Act is given more weight than the conservation object.

Given the above experience, it is particularly important that inserting the object of sustainability in relevant legislation does not cause a conflict with another objects clause. Conflicting objects have a paralysing and diluting effect upon legislative schemes, and will cause one or more of the objects to be sidelined. In the event that there is a potential conflict, this can be resolved by providing that the principle of sustainability has primacy and is to be preferred in the case of any conflict.

Other legislative reform

While objects clauses are an important part of the legislative change which will be necessary to implement sustainability, they are by no means be the only legislative change which is required. Objects clauses do not prevail over express provisions of legislation, and no particular weight needs to be given to the factors in an objects clause, or indeed any weight at all, if the legislation merely provides that the objects clause have to be taken into account. Therefore other legislative change will be required to ensure that sustainability is in fact implemented. In order to ensure this, there should be an review of all legislation to assess its compliance with sustainability principles and to recommend ways in which such legislation could be reformed to ensure the implementation of sustainability.

Reform of legislation should address the following issues:

- Development of, and public participation in development of, a Sustainability Framework which incorporates sustainability principles, targets and measures;
- Requiring all relevant sectors to comply with the Sustainability Framework;
- Requiring all decisions to be made in accordance with sustainability principles and the Sustainability Framework;
- Requiring agencies to prepare and publish formal reasons for their decisions;
- Permitting third parties to bring actions to review whether decisions and actions are in accordance with sustainability principles and the Sustainability Framework;

- Providing formal mechanisms for public involvement in all decision making; and
- Penalties and enforcement for non compliance (including third party enforcement).

The need for institutional reform

As noted above, the Draft Strategy provides that “as the process of implementing sustainability unfolds, further institutional reform may be required, such as sustainability legislation.” (page 212). Institutional reform will, in fact, be essential to the implementation of sustainability, and the final Strategy should therefore include recommendations for such reform. The collective effort needed to implement sustainability must be mediated through institutions, and without institutional change this will not be possible.

A Sustainability Commission

An independent statutory Sustainability Commission should be created to develop and implement sustainability objectives. Specifically, the Sustainability Commission should:

- Be responsible for preparing a Sustainability Framework which incorporates sustainability principles, targets and measures;
- Be responsible for promoting sustainable development in Western Australia;
- Promote law reform to implement sustainability;
- Report to Parliament on the performance of government agencies and relevant sectors in applying sustainability principles;
- Educate decision makers about sustainability;
- Provide advice on the sustainability of major proposals; and
- Track Western Australia’s progress against sustainability indicators.

The Sustainability Commission should not, however, replace the environmental impact assessment process undertaken by the Environmental Protection Authority (“EPA”) or other environmental approval processes. The assessments undertaken by the EPA and as part of other environmental approval processes are primarily directed to assessment of a single sustainability principle, being “biodiversity and ecological integrity”, just as assessments by Treasury or government agencies charged with exploitative functions are focussed solely on another single principle, being “long term economic health”. Removing or replacing the environmental impact assessment process with a sustainability assessment would therefore remove focussed assessment of one of the foundation principles of sustainability while assessment of the other factors remain. This would result in a biased assessment and would not achieve sustainability.

A Sustainability Commission such as the one proposed should be created by statute as an independent, well resourced body. Legislation should determine the make-up of the Commission, its powers, and its relationship to other Government agencies. Legislation should allow the proposed Commission to require inputs from other government agencies, Ministers and local governments, and to monitor those bodies’, and the community’s, progress to sustainability.

Government agencies

To incorporate sustainability within Government, each Government agency needs to:

- develop, with public input, its mission statement to include a commitment to sustainability;
- amend its corporate and business plans to incorporate the concept of sustainability and its implementation;

- commit to fully engaging the community in sustainability issues;
- prepare a sustainability assessment and action plan reporting on sustainability issues including key sustainability performance indicators for ongoing reporting;
- provide independent audit reports against any sustainability plans, using a public reporting system and employing targets and milestones;
- improve understanding of the concept of sustainability at all levels within each agency;
- prepare and implement purchasing policies to reflect sustainability principles; and
- introduce annual environmental performance reporting requirements and mandated targets in areas such as energy consumption, waste disposal, vehicle fuel efficiency and recycling.

The precautionary tale of the precautionary principle

The Draft Strategy refers to the precautionary principle as a “process principle” and therefore a principle which is integral to the implementation of sustainability. Careful consideration should be given to how to implement this principle, given the judicial treatment of this principle to date. In the opinion of at least one judge, the precautionary principle is no more than a statement of common sense which is already applied by decision makers in appropriate circumstances: *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270 at 282, per Stein J. Therefore it is arguable that the precautionary principle would not cause agencies to alter their decision-making processes. Further, it has been held in WA that while the precautionary principle does dictate caution, it does not dictate inaction, and it will not generally dictate one specific course of action to the exclusion of others: *Bridgetown /Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102, per Wheeler J. That is, it will rarely affect the actual outcome of a decision. Given these cases, implementing the precautionary principle in any meaningful way in the future will require that the principle be given a resilient definition and paramountcy in legislation.

Reason for decisions

Implementation of the final Strategy will require decision makers to make decisions in accordance with sustainability principles. These decision makers should be required to provide readily available public reasons for their decisions. As Volker notes:

“Probably the most significant of all the changes for improving administration was the requirement to provide written statements of reasons and findings of fact. This meant that public servants had to be more systematic and disciplined in their approaches to decision making. They even had to ensure that their decisions were in accordance with the applicable legislation and any policy guidelines that might apply.” (Volker, “Just Do It – How the Public Service Made It Work” Volume 8 *Australian Journal of Administrative Law* August 2001 at 204.)

Reasons for decisions should be made a part of a comprehensive public record of sustainability decisions. Such a record of reasons will ensure that the public is informed of decision makers’ actions, will form a valuable body of precedent, and will also assist government departments in making consistent and efficient future sustainability decisions.

Public participation in sustainability decision making

Any legislative and/or institutional change must include ample opportunities for public participation in sustainability decision making. Not only is the public an integral part of sustainability, they are a vital source of knowledge about sustainability and will bring different and valuable perspectives to sustainability decisions. Effective provision of public participation requires formal legislative rights to participate, access to all relevant information and capacity building.

We trust that these submissions will assist the Sustainability Policy Unit in its deliberations. Please contact Lee McIntosh on 9221 3030 if you have any questions.

Yours sincerely

Lee McIntosh
Solicitor