Comments by the Western Australian Aboriginal Native Title Working Group (WAANTWG)

Concerning the

State Sustainability Strategy

February 2003

INTRODUCTION

The advent of a Sustainability Strategy is a great advance for Western Australia, and one that is long overdue. It also serves as a timely opportunity to explore the difficulties that are experienced in what might be termed portfolios of WA society, and examine what improvements might be made.

WA Aboriginal Native Title Working Group (WAANTWG) of course, has an interest in Indigenous Affairs, and to be even more specific, in what might be termed the land based portion of the Indigenous Affairs portfolio – a portfolio that is complex and has a broad variety of issues.

The area of land is in our view one of the most fundamental areas of Indigenous Affairs, due to the fact that peoples cultural heritage and identity is defined by the land and which part of it they come from. Many of the issues that the Indigenous community faces today, especially in urban areas, have manifested from a dislocation from country – an event which has removed people from a cultural terms of reference and has left them bereft of an appropriate system of guidance and value.

While the results of this are dealt with do a which is beginning to give dividends, areas such as health, education, law and order, legal representation, domestic violence, alcoholism and the myriad of other social issues hat the Indigenous community faces, the one very fundamental question of land reform is one which remains underdeveloped. In essence then, it is in our view that the issue which is in many ways the root problem of the issues facing today's Indigenous community is overlooked to a great extent.

While the ideas put forward in the Indigenous Communities and Sustainability section of the Consultation Draft are supported with, it is the position of the Working Group that there are more fundamental issues to deal with if of sustainable outcomes are going to be made in the Indigenous community. This position is put as we assert that historically, the development of this state has occurred more to the expense of its Indigenous peoples, and quite deliberately so than any other sector.

The hangovers of this colonial past are still with us, both in laws that exist and processes that are run. We feel it is now time to reform the way in which the state acts towards its Indigenous community, and actually Govern for them rather than at the expense of them, their heritage and their rights.

Importantly, this submission from WAANTWG is targeted at land based outcomes and processes, rather than the other areas of Indigenous Affairs. This is the case as, due to the breadth and complexity of Indigenous Affairs, it is only possible to deal with a limited amount of issues at any given time. Even so, it is our strong belief that land reform and improvements in this area of the Indigenous Affairs portfolio will have a positive flow on effect for the Indigenous community in other areas. As such, while this submission is aimed at land policy, its aims are broader improvement in the lives of Indigenous Western Australians.

DEALING WITH THE ISSUES

Setting the Scene – Native Title

Objective

- **Native Title is recognised, protected and progressively used to help create Indigenous community sustainability**

P 63, State Sustainability Strategy Consultation Draft

While the Consolation draft describes many issues succinctly and well, there have been many developments since it was produced, mainly in the area of native title. At the time of writing, Indigenous people in Western Australia were optimistic in regards to native title, especially given the spoken position of the new state government, that is, negotiate not litigate, and were looking forward to the settlement of native title claims.

In most instances, this hope centred around access to land as well as the social development benefits that may flow from any settlement. At last, Indigenous people had a legislative regime, flawed though it was, to negotiate with Government in regard to outcomes that would develop sustainable outcome for the Indigenous community.

These hopes an this optimism have now disappeared, and Indigenous peoples now consider themselves to be in a similar position to that of the pre native title 1980's. This has occurred for 4 main reasons:

- After the Ward judgement (WA), the High Court of Australia has defined that the level of extinguishment of native title due to other interests is in fact larger than anyone anticipated, rendering a huge portion of the state unavailable to any type of native title outcome.
- Also from the Ward decision, the High Court has taken the view that native title is not a proprietal right in land, but is more akin to a bundle of rights. The practical outcome of this is that even when native title is able to be proven, the actual outcomes that people will win are more symbolic and actually reflect activities that people already undertake.
- After the Yorta Yorta decision (Vic), the High Court found that the type of connection that people are required to prove is of such a level as to render the vast majority of Aboriginal people in Australia unable to prove native title.
- The position of negotiate not litigate as espoused by the current Government appears to be more rhetoric than actuality. As a result, mediation opportunities are not taken, excessive amounts of litigation still occur and Government by its actions in litigation still pursues a policy of extinguishment of native title rather than settlement. It seems that only when there are major commercial outcomes available that Government is willing to settle native title claims in a way that shows leadership and commitment to the ideals of sustainability and reconciliation.

The most unfortunate aspect of these developments, irrespective of the way Government is dealing with native title and irrespective of the ways that other parties (including Indigenous groups) participate in these processes, is that through current ways of dealings with native title and within the current native title system, there is in fact a massive disenfranchisement of the Indigenous community occurring in the present day. It is incredible in an age of reconciliation and sustainability that this type of outcome should be the case.

It is very important to note that where there was once hope in the Indigenous community, there is now a realisation that we are currently witnessing what might become the last wave of dispossession. This is not a sustainable outcome, rather this continued disenfranchisement will and is already beginning to produce the next era of social and economic problems for the Indigenous people. These are expected to manifest more obviously in the years to come, and unless the current situation is taken seriously, there will be a new suite of issues to deal with in future years.

Accordingly, the objective as quoted at the beginning of this section from the Consultation Draft is no longer one which is valid except in the case of very few Indigenous groups on WA. Basically, native title and the native title regime will provide sustainable outcomes for only very few Indigenous people. Perhaps the objective should begin with the words "Where applicable" to reflect the reality of the native title regime.

In any case, the native title regime rolls on, many Indigenous groups will continue to attempt to prove their native title rights while others will seek to withdraw claims if settlement can be reached. Currently however, the lack of alternatives is alarming, and a distressing lack of political leadership and the poorly developed legislative setting that we contend with in WA only hinders moves in this direction.

It is these rather sad realisations that colour the body of this submission. Where once there was some optimism that the native title regime would bring some justice and sustainability to Indigenous parties, there is now a strong realisation that this simply isn't the case. What is the case however, is that Government can provide some leadership in Indigenous Affairs and move to protect Indigenous interests within its statutory regime.

Reaching for Sustainable Outcomes

If native title promises so little within a sustainability framework, it is important to seek alternatives which will provide sustainable land based outcomes for the Indigenous community of WA. This goes beyond the current scope of the objectives as listed on page 63 of the Consultation Draft, and involves the state moving towards developing a policy and legislative framework which:

- Recognises traditional owners and protects customary rights and law.
- Provides land tenure outcomes which will enable people to develop economically and socially within Governance structures that are more appropriate.

While not so called “sustainable” outcomes in themselves, these two major areas of reform have the ability to greatly contribute to the social, cultural and economic well being of Indigenous communities for long into the future. Further, they reflect the State Sustainability Strategy foundation principle that “recognises that an environment needs to be created where all people can express their full potential and lead productive lives…” (p28, State Sustainability Strategy Consultation Draft). Currently, this environment does not exist in WA, hence the need for fundamental reform rather than ones that build on the current system, one which is corrupted y WA’s colonial past.

Developing such a framework requires law and policy reform, a matter which has proven difficult to accomplish in Indigenous affairs WA in the past. As Brundtland (1987) asserts however, “*The starting point for a just and humane policy for* [Indigenous] *groups is the recognition and protection of their traditional rights to land and other resources that maintain their way of life – rights they may define in terms that do not fit into standard legal systems* (pp115 – 116).

This statement is of key importance, the legal system that exist in WA have only served and continue to disenfranchise Indigenous people. Accordingly, Government must have a commitment to implementing reform which is outside of the current legal system and policy framework, and which seeks to recognise and protect traditional or customary rights as well as include Indigenous people in a variety of other matters. This type of development is key to bringing sustainability to the Indigenous community of WA.

Further to this, and reflecting current processes, Brundtland (1987) asserts that *“In terms of size, these isolated, vulnerable groups are small. But their marginalisation is a symptom of a style of development that tends to neglect both human and environmental considerations. Hence a more careful and sensitive consideration of their interests is a touchstone of sustainable development policy”* Brundtland. 1987 p 116.

This careful and sensitive consideration of interests has not occurred to any real extent in this state, rather, history has shown us that where Indigenous may hamper those of corporate entities and other citizens considerable effort is taken to either erode or remove these rights. The history of native title in the past 10 years is proof enough of this.

In our view, one of the greatest test of Government commitment to sustainability is it willingness to develop and implement reforms which go to the heart of issues rather than deal with the symptoms. There is scant history of this type of progressiveness in WA, it will be interesting to see if the sustainability framework can provide some change to this unfortunate history.

<u>Recognising Traditional Owners and protecting Customary Rights and Law</u>

The first step as Brundtland (1987) correctly asserts is to recognise and protect traditional rights. This need not and indeed cannot occur solely through the native title system. As such, the state needs to move towards recognising traditional owners and protecting their interests within its own legal system.

This already occurs to some extent, however with the rapid reforms that are required to meet the challenges of the 21st Century, recognition and protection of the Indigenous law and culture needs to be incorporated into the psyche and *modus operandii* of policy writers and law makers.

The concept behind protecting customary law is pivotal to the sustainability of Indigenous culture and communities. At one end of the spectrum we have native title law, which is essentially a non-Indigenous interpretation of traditional Indigenous laws governing land (although Indigenous people contend that interpretations are incorrect and are in fact coloured by colonial concepts and a general unawareness of Indigenous culture). This body of law will confer rights and interest to a finite number of Indigenous Western Australians.

If native title is found not to exist, does this mean that Indigenous people no longer exist on a given piece of land? Indigenous Western Australian's contend that no, this is not the case. Even though white law has not "certified" people to being native title holders, there are still traditional owners and people with customary responsibilities to land as embodied in traditional law and custom, that is Indigenous law. So, even while white law has sought to extinguish the rights of Indigenous people, **Indigenous law dictates that these obligations to land never cease**, and in fact obliges traditional owners to continue to care for country.

Western Australia must recognise this fact. It is obvious to Indigenous people that native title does not equate to customary law as customary law exists with or without a native title right as defined through non-Indigenous law. The State must therefore facilitate the protection and continued practice of these customary rights and activities.

If it fails to do so and does not support people in these activities, the State will be a major party in preventing people from maintaining connection to land, transmitting traditional knowledge, maintaining culture and identity and generally surviving as an intact cultural unit.

Clearly then, if the State is not going to associate itself inadvertently with an ongoing process of cultural genocide, it needs to provide key law reforms so as to allow Indigenous people to carry out their customary responsibilities and activities whether they are native title holders or not.

There are many ways in which this occurs. It begins however, with the legislative acknowledgement of Traditional Owners and the legislative acknowledgement of customary law. This is not to say that customary law is declared in a manner similar to that of native title in the Mabo decision of 1990, it is recognition that people have a set of laws which govern their responsibilities to land, that is, culture, and that the State recognises the continued practice of the laws and customs. Following this, there are several key factors or actions that need to be considered and implemented in all natural resource management policy and legislation which will facilitate the ongoing practice of customary law.

- Maintain rights of access of lands for cultural activities: The cessation of people ability to access land for various cultural activities strikes at the very

heart of Indigenous sustainability as it prevents people from fulfilling their customary obligations and passing on traditional knowledge. Rights to access lands irrespective of native title outcomes must be maintained and protected.

- Protect customary fishing, hunting and gathering rights: Not only are these rights necessary to allow an underprivileged set of people supplement the diets of their families, but once again, these activities are pivotal exercise in the passage of knowledge and culture. These rights must be protected in state law and policy and not subject to decisions which will affect them without broad ranging consultation or consideration of the effects of these decisions.

There are a number of practical outcomes which can directly facilitate this. Some examples may be:

- Development of joint management outcomes: Joint management of the protected are estate not only allows customary activities to be practiced, it allows them to be incorporated into management planning. It also improves the management of the lands in question by involving traditional knowledge and provides excellent employment outcomes for traditional owners and their families. Western Australia is the only state of Australia which has no joint management regime, as a result, we see legislative amendment to enable this type of arrangement as pivotal.
- Development of a State based Indigenous Protected Area programme: Similar to the Commonwealth programme, this should seek to enter into voluntary arrangements with Indigenous people in order to manage Indigenous lands for nature conservation purposes. This is a very practical way of supporting customary laws and activities while gaining an environmental outcome and providing employment, training and community development opportunities.

In general though, it is important that Government develops a policy framework which seeks to guide agencies and Government alike to ensure that their activities, policies and legislation, both present and future, do not further erode the ability for the States Indigenous people to carry out their customary law and culture as required by Indigenous law.

As a result of these factors, we make the following recommendation:

Recommendation

The state move to legislate to

- **Recognise traditional owners, irrespective of native title outcomes, as the cornerstone of its Indigenous affairs portfolio and activities**
- **Support the ongoing maintenance of customary law and culture**
- **Seek to reflect this position in existing and new legislation continued access, hunting and fishing rights**
- **Enable Joint Management on the conservation estate to occur**
- **Develop an appropriate mechanism for a state based Indigenous Protected Areas programme**

It is further recommended that the state develop a sustainability policy framework which seeks to guide agencies and Government alike to ensure that their activities, policies and legislation, both present and future, do not further

erode the ability for the States Indigenous people to carry out their customary law and culture as required by Indigenous law.

Land Tenure

A further issue that faces Indigenous communities and renders sustainable community development virtually impossible is the fact that there is no appropriate Indigenous land tenure system in WA.

Currently, some 27 million hectares of land are vested in the Aboriginal Lands Trust (ALT). Much of these lands are termed Part III reserves – they have been declared to be exclusively for the use and benefit of Aboriginal people by the Governor through Part III of the Aboriginal Affairs and Planning Authority Act (1972) (AAPA Act). This is an extremely strong land tenure in terms of controlling access, as non – Indigenous people and companies are required to have an entry permit before accessing the land. This permit is issued by the Minister for Indigenous Affairs.

While this allows controlled access to these lands, problems arise in the area of community development. The main problem being that whenever a community wishes to develop, it requires the consent of the ALT board and the Minister.

When the ALT was first incorporated, it was in essence a step from the Native Welfare system. While at the time (1972) it probably represented a reasonable model of Governance, it is now out of date and a constraint to community. It is now understood that successful communities have a level of sovereignty, that is, the power to make their own decisions, as well as structures which are more closely matched to the traditional decision making structure.

If an Indigenous community resides on a Part III reserve however, while it may live on what is termed Aboriginal land, it has no sovereignty and is required to seek permission for any development from the ALT and the Minister. This is a major constraint, and one that has severely hampered the development of self sufficient and sustainable communities in WA. In addition to this, a community must subject itself to a non-cultural decision making process that is inappropriate, and to many, quite offensive.

Part III reserves also hinder investment, or perhaps more accurately, sue to the controls placed on these lands, effectively prevent investment. This means that not only is a community required to seek permission for any development on the land, but the land tenure and administrative arrangements effectively stifle investment and therefore employment and training and all social benefits that go with it.

Put simply, Part III reserves are a poverty trap, and the land tenure and its restrictions, by preventing and sort of commercial and community development actually has the effect of creating and compounding the social problems that the Government spends a huge amount of time trying to prevent. Quite simply, if there can be no investment and development of these lands due to the land tenure, there will be no employment, there will be no training, families will continue to live below the poverty line and the raft of social issues that Indigenous people are required to

deal with will be exacerbated and compounded by the blind alley within which community is situated.

Quite obviously, this is in need of critical change as in the end, Government can create as many initiatives as it wishes to deal with the social problems that communities face on these lands, but they will amount to little if the community is subject to outdated decision making processes, unable to invest and develop and are trapped in poverty. Keeping in mind that many thousands of Indigenous Western Australians are resident on these Part III reserves, the problem is sizeable.

Compounding these issues is the fact that while these lands are termed “Aboriginal lands” they are in fact crown lands upon which Aboriginal people are resident. In order to remedy this, the Bonner Review of the ALT recommended that these lands be transferred to the direct ownership of Aboriginal groups, a move that was calculated to remove many of the problems spoken of. However, since these recommendations were made in 1996, little has occurred.

This lack of progress is not due to a lack of government commitment, indeed, bot the previous Liberal and the current Labor Government have supported this recommendation through a like to like style transfer process, that is, if a parcel of land is a C class reserve, it is transferred as a C class reserve. However, a Pert III proclamation cannot be transferred, and, according to the AAPA Act, it can only be vested in the AAPA itself. Therefore, for a parcel of land proclaimed as a Part III reserve to be transferred, the land must be de-proclaimed and transferred as an ordinary C class reserve.

While the problems spoken to earlier are large, Indigenous people have expressed that this is not an outcome that they see is just, as the strength of the tenure would be lost in the de-proclamation process. It would then be possible for such entities as mining companies to have unfettered access to these reserves, a process which would disrupt community lifestyles and marginalise communities on their own lands. While not anti mining or development, unfettered access is seen as a total loss of control and self determination.

This is a realistic concern, as, even though the current situation is far less that desirable, communities wish to gain a control over their own direction, not give away what little controls that currently assert. In addition, transferring a C class reserve is not vesting ownership of the land into the Indigenous group, rather, it is giving them the responsibility to manage a crown reserve. Clearly this falls short of a desirable result.

The answer to these issues us a more appropriate land tenure for these lands, a land tenure through which a community can actually own, which it can make its own decisions about, which can still control access and which can attract investment and commercial activity so as to provide much sought after opportunities for the community.

Such a land tenure is not a new concept, and in fact there are Indigenous specific land tenures which do all of these things in all other states of Australia. The lack of

this type of development in WA is testament to the states inability to provide real outcomes to Indigenous communities which will allow sustainable development.

While this will obviously not resolve all issues in Indigenous Western Australia, it is a fundamental development which will enable Indigenous communities to actually own these lands, to make decisions regarding their use, to use them to prosper economically and not be trapped in a cycle of poverty by virtue of the poor opportunities that this land currently provides.

As has been stated, such opportunities exist in all other states, and further, other states have converted existing reserves to these new tenures. WA could mirror this process and create a more appropriate land tenure, and then legislatively converted Part III reserves to this land tenure before and transferred to the ownership of Indigenous groups as recommended by the Bonner review.

In saying this, such a tenure need not be limited to Part III reserves, it has a use in joint management arrangements, native title settlements, compensation packages and a variety of other outcomes.

Recommendation:

In the manner of the Northern Territory, the Government must legislate to develop an Inalienable Indigenous Freehold Tenure which will allow:

- **True ownership of lands**
- **Control of Access**
- **A Governance structure that is culturally appropriate**
- **Investment and development to occur**

In the manner of the Northern Territory, and that Government legislates to convert all Part III reserves to this land tenure so as to allow transfer of ownership as recommended in the Bonner Review of the ALT.

This is fundamental to Indigenous reform in this state. For too long have communities been stifled and trapped in the poverty cycle by a system of law which is only a minor step on from the colonial past. It is now time to enable these Indigenous communities to develop in a manner which they see fit, a move that will only occur through a more appropriate land tenure, the manner of which exists is all other states.

CONCLUSION

While only two major topic areas have been spoken of in this submission, they represent a challenge that no Government has been able to meet. However, if sustainability is to be for Indigenous Western Australians as much as it is for non-Indigenous Western Australians, then these issues need to be take seriously and a reform programme commenced upon.

There is no use in trying to patch up a system that is so deeply flawed, rather, there is a need for strong reforms which will lay a foundation for Indigenous communities in the future. These will not be the panacea for the resolution of all Indigenous

issues, one must be realistic about this, however reform in these areas will firstly conserve and maintain culture and customary law and secondly provide an opportunity for Indigenous community to advance as they see fit.