

27 June 2019

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719
CANBERRA ACT 2600

For attention: Mr Mike Clayton

By email: mike.clayton@lawcouncil.asn.au

Dear Mr Smithers

PROPOSED LAW COUNCIL POLICY ON SUSTAINABLE DEVELOPMENT

I refer to your memo dated 21 May 2019, inviting the Law Society to provide input regarding a proposed Law Council Policy on Sustainable Development (the Proposed Policy). Thank you for the opportunity to comment.

Overall, the Law Society supports the Proposed Policy. The Proposed Policy sets out the well known expositions of the sustainable development principles and there would be benefit in the Law Council adopting the Proposed Policy, particularly if it were to fall under the Law Council remits to protect and promote the rule of law.

Whilst supporting the Proposed Policy, the Law Society would like to make some further suggestions for consideration in the Proposed Policy.

As the peak body for lawyers and law societies in Australia, there may be an opportunity for the Law Council to seek wider consultation, to take into account possible different insights. The International Bar Association has done a lot of work on climate change, human rights and the rule of law, all of which feature in or are related to the Law Council's Proposed Policy. The National Environmental Law Association is very strong in WA, and there are various State-based environmental associations in the Eastern States.

It may be that the result of any further consultation leads to discussion around principles already included in the Proposed Policy. However, there would be benefit in seeking the views of many like-minded organisations and individuals as possible, which would help promote recognition of the Law Council's interest in the subject.

The Law Society proposes that the lists of statutes and cases included in the Proposed Policy Background Paper should be expanded. The statutes list for Western Australia does not mention the *Environmental Protection Act 1986*, which by virtue of section 4A would be a worthy inclusion to the list. The *Planning and Development Act 2005* should also be mentioned, in particular because of section 3(1)(c), which expressly incorporates sustainable development into the purposes of the Act.

Level 4, 160 St Georges Terrace Perth WA 6000, DX 173 Perth

Telephone: (08) 9324 8600 Facsimile: (08) 9324 8699

Email: info@lawsocietywa.asn.au Website: www.lawsocietywa.asn.au

It may be worth noting that footnote 9 in the Proposed Policy Background paper includes a reference to the *Conservation and Land Management Act 1984* (WA), which is not included in the list of statutes. However, this Act is now of marginal importance, so there may be a query as to whether it needs to be mentioned at all.

It is noted that the cases are mostly listed from New South Wales, as a result of a search centred on the case of *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256. Whilst the very strong contribution to the jurisprudence on sustainable development and related subjects by the NSW Land and Environment Court must obviously have central place in the references, as the Law Council has a national remit, there could be a broader reference to cases in other states, including Western Australia.

Some cases from other States are mentioned, including cases from Western Australia. However, there is a broader range of Western Australian State Administrative Tribunal cases on the subject including but not limited to the Moore River Case¹ and the Tall Donkey Orchid case.²

Finally, it may be considered that the *Environmental Protection Act 1986* (WA) (the EP Act) is worthy of a special mention for two reasons. First, in its enunciations of the principles of Ecologically Sustainable Development (ESD) in section 4A, the EP Act omits reference to economic considerations. Whilst there is a long standing historical approach, the main point is that our EP Act and its appeal system are incapable of dealing with sustainable development in the sense set out in the *Telstra* case.

The exception to this is when the Minister for Environment consults under section 45 before issuing or refusing to issue an authorisation for a proposal under section 45(7) and 45(8) of the EP Act. In that consultation phase, there is a policy to take into account broader ESD principles. However, no reasoned decision which would be acceptable in a judicial or quasi judicial sense is issued by the Minister applying those principles when making a decision under those sections.

Secondly, the Ministerial Appeals systems under the EP Act cannot deal with sustainable development because of the way environment is defined and the limitations mentioned in section 4A of the EP Act. These shortcomings are exacerbated by the weaknesses of the Ministerial Appeal system, which has faced consistent criticisms since 1988, not least from the Law Society of WA.

It is no accident therefore that the State Administrative Tribunal (SAT) in planning matters has been able to apply the principles of sustainable development, in stark contrast to the environmental system, partly because the SAT has a statutory basis for doing so in planning matters. It is also a true quasi judicial appeal body which acts in an appropriately judicial manner and within the usual framework applicable to such bodies. The environmental appeals system in contrast doesn't rate in the context of

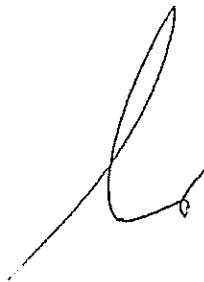
¹ *Moore River Company Pty Ltd v Western Australian Planning Commission* [2007] WASAT 98.

² *WA Developments Pty Ltd v Western Australian Planning Commission* [2008] WASAT 260.

the rule of law and cannot therefore deal with a relatively complex and nuanced system like sustainable development.

If you would like to discuss the above further, please do not hesitate to contact Mary Woodford, General Manager Advocacy at mwoodford@lawsocietywa.asn.au or on (08) 9324 8646.

Yours sincerely

A handwritten signature in black ink, appearing to be 'G. McIntyre', written in a cursive style.

Greg McIntyre SC
President