

Madjulla Inc



PO Box 2747

BROOME WA 6725

Email: majala@wn.com.au

ABN 88 537 537 070

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Productivity Commission

GPO Box 1428 Canberra City ACT 2601

Madjulla Inc commenting on:

Productivity Commission Draft Report: National Water Reform 2017.

Dear Commissioners,

Thank you for the opportunity for further input into your inquiry into Australian Water Reform.

Madjulla Association see our website: www.majala.com.au

Our vision is to adopt the world's best practice in environmental and agricultural sustainability and provide social and material prosperity to Nyikina riverside communities. As Traditional Owners, we have the responsibility to manage and act as guardians for our lands and waters, including the lower reaches of the Mardoowarra (Fitzroy River).

We are responding to **The Productivity Commission Draft Report to the National Reform** on the topics listed below.

Draft Recommendations 3.2 and 3.3 the interests and needs of Indigenous people in water planning processes

The interests and needs of First Peoples could be better accommodated and represented in water planning processes by adopting and investing in these Guiding Principles. *"Water and land cannot be separated. We look and care for country together, not separate...."* Mary River Statement 2009. We repeat the principles that guided the Indigenous Water Policy Group¹:

1. *Land, water and people are inextricably connected, which means unity of land, water and Indigenous people.*

¹ http://www.savanna.org.au/nailsma/projects/water_policy.html

2. *Water management and use includes all of cultural uses, environmental flows, consumptive and commercial uses; and all freshwater systems whether on the mainland or on sea country, on the surface or underground.*
3. *Adhering to a balanced revised 'Triple Bottom Line' (social and cultural, ecological and economic) to include the fourth element, political sustainability.*
4. *Water dealings are based on the free, prior, and informed consent, decisions and engagement of Indigenous communities. This means representative bodies, Indigenous communities and Traditional Owners on the ground be fully informed and participate in all associated processes.*
5. *Principles of International Law (e.g. UNDRIP, Ramsar) are implemented and guide the engagement of Indigenous water resource management in water reform processes.*
6. *Water allocation be linked with best practice, sustainable, efficient use and accurate and current information about environmental flows and conditions.*
7. *Indigenous people across north Australia are united in dealing with water issues and accordingly recognise that:*
 - *Indigenous peoples have cultural and kinship responsibilities and obligations under customary law to look after water;*
 - *Traditional Owners have a right to be involved in the management and decision making over water use;*
 - *Indigenous people need to be the primary interface in the planning and proposed development and regulation of water use; and,*
 - *Water is part of native title through cultural and ceremonial practices that are part of the birds, animals, plants and people.*

The IWPG adopted these principles from the [Mary River Statement](#)² in October 2009. The IWPG launched its [Indigenous Water Policy Statement](#)³ in March 2010.

Indigenous people in north Australia remain on the margins of government plans for national water reform. There is much work to do to close this gap.

The Fitzroy River Declaration, was issued last year by Traditional Owners who are guardians of the Fitzroy River Catchment. The Fitzroy River is a living ancestral being and has a right to life. In response to increasing development pressure, we have pledged to work together to protect and manage the Fitzroy River and its tributaries, one of the most iconic wild rivers in Western Australia. The 'Fitzroy River Declaration' aims to protect the traditional and environmental values that underpin the river's National Heritage Listing. It calls for the Fitzroy River to be managed jointly by the Traditional Owners of the river. Please see our most recent film.

Here is the link to the updated version of *Mardoowarra's Right to Life*:

<https://vimeo.com/211153521>

Password: Kimberley

² Delegates of the Mary River Water Forum 2009, *Mary River Statement*, Northern Australian Indigenous Land and Sea Management Alliance, Darwin, N.T. viewed <Available from: <https://www.nailsma.org.au/sites/default/files/publications/Mary-River-Statement%20text%20only.pdf>>.

³ Indigenous Water Policy Group 2009, *A Policy Statement on North Australian Indigenous Water Rights*, Northern Australian Indigenous Land and Sea Management Alliance, Darwin, N.T.

Recommendations of *The Productivity Commission Draft Report to the National Reform* must support Traditional Owners to manage water for current and future generations. Legal mechanisms are needed for First People to have control over decisions about water. First Law (“customary law”) must be recognised. This includes at the individual Prescribed Body Corporate (PBC) level and by supporting the joint decision-making processes of PBCs across catchments, such as the Fitzroy River Catchment.

Although the Productivity Commission’s recommendations (3.2, 3.3) have some merit, they do not provide sufficient recognition of First Law or enough support for cultural governance of water.

Recommendations 6.6 Water and wastewater services delivered to regional and remote communities

Please refer to our earlier submission for comments about the poor water quality in many WA regional and remote communities, especially nitrates. There is growing evidence⁴ to suggest that long-term, low grade nitrate exposure is more harmful than previously thought; possibly contributing to Type 2 diabetes and kidney disease. The relevant chapter of the Productivity Commission’s report (Chapter 6) is called ‘Urban water’. People living outside of urban areas need safe water too. None of the draft report’s recommendations directly address the WA situation. We would welcome further consideration on the role of national policy in ensuring safe drinking water for everyone.

Recommendations 9.1, 9.2: Further reform

It is encouraging to see that a path has been suggested for addressing the deficiencies of the current National Water Initiative (NWI). We support, in principle, recommendation 9.2a (establishing an Indigenous working group on reform). Further reform is needed to address the issues noted above, and the right to life of rivers. In general, the NWI does not adequately reflect the needs, interests, rights and responsibilities of Australia’s First Peoples.

However, Productivity Commission’s view of First People’s role in water governance and management is too narrow. The draft report, although extensive in some areas, fails to consider:

- Cultural governance of water and first Law⁵ and how these might interact with State/ Commonwealth water governance
- Sovereign/ inherent rights of First Peoples, as custodians of water, under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁶. Traditional Owners have responsibilities and the obligation to make decisions over lands and waters

⁴ Reported here: <http://www.abc.net.au/news/2016-06-28/kidney-disease-in-wa-communities-linked-to-nitrates-in-water-su/7551852>

⁵ As described, for example, in Lim, M, Poelina, A & Bagnall, D 2017, ‘Can the Fitzroy River Declaration ensure the realisation of the First Laws of the River and secure sustainable and equitable futures for the West Kimberley?’, *Australian Environmental Review*, vol. 32, no. 1, pp. 18–24.

- The role of First People’s knowledges and science in water management (notwithstanding the relationship between this science and ‘cultural objectives’)
- A full suite of Native Title rights and interests⁷. The draft report refers to the right to ‘access water resources,’ as a simple water allocation to native title holders for ‘traditional cultural purposes.’
- The ramifications of the States and Territory’s current piecemeal, inconsistent approach to First People and water.

It is disappointing that terminology developed and adopted by First People, such as ‘cultural flows’⁸ or ‘Aboriginal water’⁹, and the associated concepts, were not adopted in the recommendations. Taylor, Moggridge and Poelina recommend that ‘...reform goes further than government ‘engaging’ First peoples. Rather, *non-Indigenous people need to be ‘engaged’ in the issues, institutions, policy and Law of First Peoples*’¹⁰.

Furthermore, the draft report fundamentally misinterprets allocations of water to First Peoples for economic purposes as a type of special assistance or ‘favouritism’ designed to address economic disadvantage. Indigenous peoples have the inherent right to make use of their waters (and lands).

The key point is cultural governance. Although various strategies are suggested as convenient proxies for cultural governance (such as allocation of cultural flows or Strategic Aboriginal Reserves in water plans), it is essential to be clear on the overarching objective: upholding First Law.

Madjulla Inc. further recommends that the final report:

- Provide a more critical evaluation of NWI progress (or rather, lack of) on Indigenous water access, and hold the States to account
- Support Indigenous led research via a National First Peoples Think Tank or Centre of Excellence

⁶ United Nations General Assembly 2007, *United nations declaration on the rights of indigenous peoples*, United Nations. viewed 13 May 2016, <Available from: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.

⁷ For a detailed explanation, see: Duff, N 2017, *Fluid mechanics: practical use of native title for water outcomes*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, A.C.T.

⁸ ‘Cultural Flows’ are defined in the Murray and Lower Darling Rivers Indigenous Nations 2007, ‘MLDRIN Echuca Declaration’, viewed <Available from: http://www.environment.sa.gov.au/files/sharedassets/public/corporate/about_us/aboriginal_partnerships/mldrin-echuca-declaration-2009.pdf>.

⁹ ‘Aboriginal water’ was suggested as an overarching term by the First People’s Water Engagement Council 2012, *Advice to the National Water Commission*, National Water Commission, Canberra, A.C.T. viewed <Available from: <http://webarchive.nla.gov.au/gov/20160615062343/http://www.nwc.gov.au/organisation/partners/fpwec>>.

¹⁰ Emphasis added. As recommended by: Taylor, KS, Moggridge, BJ & Poelina, A 2016, ‘Australian Indigenous Water Policy and the impacts of the ever-changing political cycle’, *Australasian Journal of Water Resources*, vol. 20, no. 2, pp. 132–147.

- The 'Indigenous Working Group' recommendation be extended to a longer-term 'First People's Water Council' to provide independent oversight and advice
- Any future NWI agreement be accompanied by a National First Peoples Water Strategy

I would be pleased to discuss this matter further, should you require more detail. please contact Dr Anne Poelina, (Nyikina Warrwa Traditional Custodian and Inaugural Chair of the First People's Water Engagement Council) on majala@wn.com.au.

Your sincerely,

Dr Anne Poelina (Managing Director)

And

Kat Taylor (PhD Scholar, Australian National University)