



Kimberley Land Council

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Productivity Commission
GPO Box 1428 Canberra City ACT 2601

Dear Commissioners,

**Re: Kimberley Land Council submission
Productivity Commission Draft Report: National Water Reform 2017**

Thank you for the opportunity to comment on the Productivity Commission's Draft Report, as part of the inquiry into the reform of Australia's water resources sector.

Kimberley Land Council (KLC) is the peak Indigenous body in the Kimberley region working with Aboriginal people to secure native title recognition, conduct conservation and land management activities and develop cultural enterprises. Traditional Owner's rights and interests in water are a key concern, particularly in light of the Northern Australian development agenda.

In brief, our recommendations are that:

Native Title holders are given support to respond to water reform;

The perspective of the commission's review be broadened to properly consider Traditional Owner's rights and interests under the Native Title Act, as related to land use planning and water management;

Any new water reform agreement includes mechanisms that ensure States and Territories uphold their commitments, especially commitments that might affect Native Title and any other rights and interests of Traditional Owners.

These recommendations and comments are made within the context of the major land access and resource development decisions under consideration as part of the Northern Australia development agenda. Aboriginal people make up a significant proportion of the population in Australia's north. Our interests include property rights under the Native Title Act, but also in Aboriginal pastoral leases, Indigenous Protected Areas, reserve lands, freehold land and more.

The current inquiry provokes the question: is the National Water Initiative (NWI) achieving what it set out to do, and would further reforms be effective in progressing change? Your draft report notes (pg 11.) the failure of Western Australia and the Northern Territory to establish mechanisms for 'engaging Indigenous people in water planning'. Even the relatively low bar set by the current NWI has not been met. Traditional Owners have an inherent right to not just be engaged; but to take a leading

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role in managing water on country and to protect their interests. If, as the Commission suggests, a renewed NWI is negotiated, strategies must be developed to ensure the new commitments are honoured, compliance mechanisms are effective, and the new NWI results in substantial and meaningful changes.

Momentum was gained under the Indigenous Community Water Facilitator Network and other components of the 'Raising National Water Standards' program. However, government investment finished in 2012, leaving people on the ground to wonder what direction water reform was going- if anywhere. Although strong interest in reform was generated, this interest has not always been met by various State governments. Furthermore, regional capacity of representative bodies to engage with, and to develop, policy is limited.

We recommend that any further reforms be accompanied not just by an Indigenous working group (Productivity Commission's recommendation 9.2), but also, by supporting representative bodies to respond. The Commission will be aware that there is no 'one size fits all' policy response that encompasses the views of all Aboriginal people and interests of all Traditional Owners in different regions. The situation in the Kimberley, for example, is different to the Murray Darling Basin. Land Councils and Registered Native Title Bodies Corporate (RNTBCs) need support to engage with water planning and water reform. It is essential to lift the capacity in many areas; governance, access to information, interpretation of technical detail, and to undertake the logistics of remote area consultation meetings.

Kimberley Land Council does as much as we can to support Traditional Owners. Last year we welcomed the opportunity to facilitate the Fitzroy River Declaration¹; an action plan for establishing a cultural governance framework for the Fitzroy River. We would like to continue this work. We would also like support to employ a staff member(s) to address water issues arising from the Northern Development agenda, as it relates to water reform.

I invite the Commission to view Traditional Owner's rights and interests not as an obstacle, but rather as an integral part of the national water management framework. In Northern Australia, discussions about agriculture and industry would benefit greatly from Traditional Owners playing a strong role and directing the vision for the region.

Rights under the Native Title Act must be supported, although not replicated, by any new NWI. The Productivity Commission's view of Native Title interests in water (pg. 312) is narrowly focused on rights to take water. In fact, Native Title interacts extensively with water management and land use planning. A recent AIATSIS review 2 found that:

'...exclusive possession rights can be decisive in preventing or attaching conditions to the use of water resources. The future acts regime gives an opportunity to be heard, or in some cases to negotiate, and in any case presents a credible threat of compensation liability that can be leveraged towards the protection of things valued by native title holders. Administrative law treats native title holders as important players with voices worth hearing, instead of mere advocates or interest groups'.

Under W.A.'s current framework, there are inherent issues in the interactions between proponents and Traditional Owners. Recent examples highlight inadequate procedural requirements and the limited capacity of RNTBCs to make full use of the legal options available.

¹ Available from <http://www.klc.org.au/news-media/newsroom/news-detail/2016/11/15/kimberley-traditional-owners-unite-for-the-fitzroy-river>

² 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.

As a final comment, we would like to draw the Commission's attention to previous recommendations of groups such as the First People's Water Engagement Council (FPWEC) and the Indigenous Water Policy Group (IWPG). Traditional Owner's rights, interests and cultural obligations exceed the Commission review's somewhat narrow focus on water for economic development and achieving cultural objectives in water plans. There is more to the picture.

I would be pleased to discuss this matter further, should you require more information from Kimberley Land Council.

Yours sincerely,

Nolan Hunter
Chief Executive Officer