

# KIMBERLEY LAND COUNCIL

ABN 96 724 252 047 ICN 21



23 April 2024

Joanne Chong and Anne Poelina  
Commissioner and Associate Commissioner  
Productivity Commission  
GPO Box 1428  
Canberra ACT 2601

Dear Commissioners,

## Kimberley Land Council submission on National Water Reform 2024 Interim Report

1. The Kimberley Land Council (**KLC**) welcomes the opportunity to provide a submission to the Productivity Commission regarding the National Water Reform 2024 Interim Report (**interim report**).

### Who we are

2. The KLC is an Aboriginal organisation established in 1978 for the purpose of working for and with Traditional Owners to get back country, care for country and get control of the future. As the native title representative body for the region, the KLC has achieved native title determinations across 97 per cent of the Kimberley, and there are currently 31 prescribed bodies corporate (**PBCs**) in the Kimberley holding and managing native title rights and interests. The KLC works with PBCs to expand capacity and capability, as well as economic development opportunities and activities. The KLC also supports 18 Aboriginal ranger groups through the Kimberley Ranger Network, and conducts a range of land and sea management activities. In its representative capacity, the KLC plays a leading role amplifying the views and voices of Kimberley Aboriginal people locally, nationally and internationally.

### Support for interim report's focus on First Nations

3. The KLC agrees that the National Water Initiative (**NWI**) requires renewal and welcomes the interim report's key point that a renewed NWI should include both an objective and a new element, recognising First Nations people's reverence and cultural responsibility for water and the continued involvement and participation of First Nations people in water management.
4. The incorporation of these components in the NWI is long overdue, as highlighted in previous Productivity Commission reports on national water reform.
5. Alongside the Productivity Commission's renewal advice, the KLC would like to see a greater focus in the NWI on Traditional Owners as partners in the management and governance of water. Advisory roles for First Nations typically do not go far enough. True co-design of management models and subsequent co-management of water resources, where First Nations have joint governance and decision-making rights and a central role in monitoring, is the standard for which we should be striving.

GETTING BACK COUNTRY.  
LOOKING AFTER COUNTRY.  
GETTING CONTROL OF OUR FUTURE.

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6. The benefits of co-management are that First Nations' unique knowledge, perspectives and priorities will be reflected in water management, which will benefit the health of water and environmental systems and the wellbeing of First Nations people. Indigenous knowledge systems have supported First Nations' sustainable livelihoods and custodianship of country for millennia, keeping country healthy and shaping the responsibilities and relationships between people, other creatures, land and waters.<sup>1</sup>

#### **State accountability for meeting NWI commitments**

7. States need to be held to account for failing to meet their NWI commitments. The KLC is concerned that the Western Australian Government in particular has failed to meet several of its commitments under the NWI. As recognised through the interim report and previous Productivity Commission reports, Western Australia is failing to comply with the NWI on various fronts, including though the absence of:
  - a. statutory perpetual water rights
  - b. statutory water allocation plans
  - c. statutory recognition of environmental water
  - d. power for WA independent economic regulators to set prices.
8. Unfortunately, the Western Australian Government's long-promised reform of water laws has now been taken off the table. This abandonment of reform is unacceptable, given the outdated current laws and the fact that law reform is essential for Western Australia to meet its NWI commitments.
9. The renewed NWI should include more robust review and accountability mechanisms to ensure the NWI achieves its intended outcomes and inadequate state action is addressed.

#### **Protecting the Martuwarra Fitzroy River**

10. A current priority for the KLC and Kimberley Traditional Owners is the protection of the Martuwarra Fitzroy River. The river is part of the West Kimberley National Heritage Listing for its outstanding natural and cultural significance. Aboriginal people have lived with the Martuwarra for tens of thousands of years and the river is central to their spirituality, identity and cultural practices. As KLC Chairperson Anthony Watson explains:

*The Martuwarra (Fitzroy River) is a vital, inseparable part of our spirit.*

*The Martuwarra is one living system; what happens in one part of the river, affects the whole river and therefore all voices must be considered.*

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<sup>1</sup> Poelina A, Webb T, Dhimurru Aboriginal Corporation, Aunty Shaa Smith, Smith N, Wright S, Hodge P, Daley L, Kimberly Land Council and Bardi Jawi Niimidiman Aboriginal Corporation, Woodward E, Yates P & Hill R (2020). Foundations of Our Knowledge Our Way. In: Woodward E, Hill R, Harkness P & Archer R (eds), *Our Knowledge Our Way in caring for Country: Indigenous-led approaches to strengthening and sharing our knowledge for land and sea management – best practice guidelines from Australian experiences*. North Australian Indigenous Land and Sea Management Alliance & Commonwealth Scientific and Industrial Research Organisation, Cairns.

11. In 2016, Traditional Owners from the Fitzroy Valley released the Fitzroy River Declaration.<sup>2</sup> The historic declaration identified eight key steps to protect and manage the river, including a buffer zone for development, a joint position on fracking, a management plan complemented by an Indigenous Protected Area, and a management body for the river.
12. The Western Australian Government intends to develop a Fitzroy water allocation plan to make water available for economic development. Whilst the Western Australian Government has said it will not licence any further surface water, it has said it supports the licenced take of groundwater, up to a volume of 108.5 gigalitres per year.<sup>3</sup> Kimberley Traditional Owners hold strong concerns about this proposed groundwater take.<sup>4</sup>
13. It is problematic to be facing these proposals in the face of sub-standard state laws and a government that is not meeting its NWI commitments. While the Western Australian Government has indicated its willingness to work with Traditional Owners regarding the Fitzroy allocation plan, the nature of Traditional Owner involvement in the Fitzroy River's governance and management arrangements remains to be seen. Further, because they are not statutory, water allocation plans in Western Australia are not legally binding. The absence of a best-practice legal framework to underpin the river's management is concerning, with policy positions and non-statutory allocation plans and management bodies offering much less certainty than statutory or agreement-based measures.
14. For Kimberley Traditional Owners, a merely advisory role in the management of the Martuwarra Fitzroy River is insufficient. Traditional Owner involvement and decision-making should not be limited to current (insufficient) legal frameworks. Further rights and mechanisms for Traditional Owner involvement and decision-making are required on all aspects of water planning and management.

### **Policy, administrative or other barriers to First Nations Peoples being able to access and own water**

#### *Out-of-date laws*

15. Western Australia's water laws are seriously out of date and in need of urgent reform. The shortcomings of current water laws are a significant factor in Western Australia's failure to meet a number of its NWI commitments, as noted above at paragraph 7.
16. A major problem with Western Australia's water laws is that they do not recognise or incorporate First Nations' rights in water – as noted by numerous academics, they reflect the myth of aqua nullius.<sup>5</sup> The failure of current laws to recognise the relationship of First Nations people to water and give expression to First Nations' rights in water must be urgently rectified.
17. For almost two decades, the Western Australian Government indicated its intention to reform water laws. Its announcement in December 2023 that the long-awaited reform would not go ahead was a surprise to many stakeholders and has been widely criticised. This backflip on much-needed law reform

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<sup>2</sup> Kimberley Land Council. Kimberley Traditional Owners unite for the Fitzroy River. 15 November 2016.

<https://www.klc.org.au/kimberley-traditional-owners-unite-for-the-fitzroy-river>.

<sup>3</sup> Government of Western Australia. *Water allocation planning in the Fitzroy: Policy Position Paper*. October 2023.

<https://www.wa.gov.au/system/files/2023-10/water-allocation-planning-fitzroy-policy-position-paper.pdf>

<sup>4</sup> Kimberley Land Council. *Martuwarra Fitzroy River Water Forum Traditional Owner Report*. January 2024.

<sup>5</sup> See, for example, Taylor K, Garlett E, O'Donnell E, Poelina A. Western Australia, 'be the change' for water. 23 April 2023.

<https://www.globalwaterforum.org/2023/04/23/western-australia-be-the-change-for-water/>

is concerning, and it is very difficult to see how Western Australia can appropriately facilitate First Nations' improved access to and ownership of water without legislative reform.

*Lack of information and understanding of Aboriginal water reserves*

18. At a Traditional Owner water forum held in Fitzroy Crossing in late 2023, the concept of Aboriginal water reserves was raised by Western Australian Government representatives. Based on discussions at the forum, it is clear that Kimberley Traditional Owners still have many questions about how Aboriginal water reserves might work and whether they will serve Traditional Owner interests. There remains a lack of information and understanding about the pros and cons of Aboriginal water reserves.
19. It is unclear whether making water available for Traditional Owners will increase their opportunity to gain economic advantage from the granting of licences, with the cost of licences just one factor to consider. Further, if Aboriginal water reserves place a limitation on water being used only for economic development and not other purposes – such as cultural, social and ecological purposes – this may not align with Traditional Owner aspirations and priorities.
20. Other questions relating to Aboriginal water reserves – particularly in the context of the Martuwarra Fitzroy River – relate to how water would be allocated between Traditional Owner groups, how customary law would be reflected, and what percentage of the total groundwater allocation the Aboriginal water reserve would comprise.
21. Thank you for the opportunity to provide a submission on the interim report. The KLC looks forward to reading the Productivity Commission's final report later this year.

Yours sincerely

Tyronne Garstone  
Chief Executive Officer