NATIONAL NATIVE TITLE COUNCIL

Fitzroy-Derby Water Planning
Department of Water and Environmental Regulation
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Consultation draft – Fitzroy-Derby water resources management plan: policy and guidance

This submission is made by the National Native Title Council (**NNTC**) in response to the *Consultation Draft – Fitzroy-Derby Water Resources Management Plan* (**Management Plan**). We make this submission in our capacity as the peak body for Australia's native title organisations, including Traditional Owners of Australia's lands, waters and resources, and their representative bodies.

The NNTC provides this submission in support of, and complementary to, the submission made by the Kimberley Land Council (**KLC**). As the recognised Native Title Representative Body (**NTRB**) for the Kimberley region, the KLC possesses detailed knowledge of the Fitzroy-Derby catchment, the aspirations and concerns of Traditional Owners, and the practical implications of the proposed Management Plan. The NNTC endorses the KLC's recommendations and seeks to highlight the broader national policy, legal and governance issues raised by the draft Management Plan. In particular, those issues relating to First Nations water rights, decision-making authority, free, prior and informed consent (**FPIC**), and the participation of Traditional Owners in water governance.

The Management Plan is a decisive commitment by the West Australian government to address the challenges of licensing such a significant water resource. Inland Water resource management is a complex environment that, across the country, inadequately recognises the multiplicity of Traditional Owners' relationships to water. The Western Australian government has appropriately committed to a Water Advisory Committee that includes Traditional Owner representation however, as outlined below, the unique rights and needs of Traditional Owners can be further implemented.

In providing this submission, we acknowledge the historical and ongoing impacts of statutory and institutional barriers effecting prescribed Bodies Corporate (**PBCs**) and other Aboriginal and Torres Strait Islander statutory entities. These barriers continue to influence the capacity of First Nations organisations to participate equitably in complex natural resource management and water planning processes. The NNTC therefore considers it essential that the Management Plan adopt approaches that include Traditional Owner governance and decision-making at all stages of licensing and regulation, and recognise that only the Traditional Owners of cultural heritage can make decisions for that heritage through their representative entities.

Regards,

Jamie Lowe
Chief Executive Officer

1 A Collective of Voices

The NNTC works with PBCs, NTRBs, Native Title Service Providers and other Aboriginal and Torres Strait Islander representative bodies. Through our work as co-chair of the Coalition of the Peaks Inland Waters Target Working Group, we are aware of the wide-ranging concerns and issues facing Traditional Owners in exercising their rights. Those rights to water are articulated in the *United Nations' Declaration on the Rights of Indigenous Peoples* (**UNDRIP**) as being to:

- maintain a spiritual relationship with water (Article 25),
- govern waters according to Indigenous laws and customs (Article 27), and
- decide what activities happen on territories, including water-related activities (Article 32).

The KLC contribution to the broader conversation and this Management Plan is shared by many Traditional Owner organisations. We support their submission and call for:

- recognition of Traditional Owners' unique relationship to and understandings of water,
- genuine partnership and shared decision-making between government, license holders and Traditional Owner representative bodies,
- reform of the legislative and regulatory environment governing inland water,
- the Aboriginal Water Holding being set at 50% of the general component,
- inclusion of Aboriginal community water supply over the long term, and
- appropriate management of inland waters including their use for economic development.

2 A New Standard of Traditional Owner Engagement

Current revision of the federal legislative regimes that affect Traditional Owner rights is inclusive of a regulatory standard for engagement with Traditional Owners on their cultural heritage. Both the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (***EPBC Act***) and *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (***ATSIHP Act***) are seeking to implement a regime that recognises the collective nature of Traditional Owner decision-making, akin to that already implemented under the *Native Title Act 1993* (Cth) (***NT Act***)**.**

The 2025 recommendations made by the KLC to the Western Australian Government for Fitzroy-Derby Water Planning, articulated a similar standard. These minimum standards reflect the requirements of FPIC required under UNDRIP. Such a First Nations Engagement Standard requires that:

- the right to Cultural Heritage is a collectively held right and so decisions are made by a representative Traditional Owner entity (such as a PBC),
- Traditional Owners are engaged early in the project planning process,
- there is genuine engagement between Traditional Owners and proponents,
- Traditional Owners and proponents reach an agreement on the project (such as an Indigenous land Use Agreement (**ILUA**) or Heritage Protection Agreement), and
- adherence to the Standard is a primary consideration by the decision-maker in consideration of project plans and licenses.

3 An Inclusive and Respectful Process

Fundamental to any regulatory regime that interacts with Aboriginal and Torres Strait Islander cultural heritage must be a decision-making role for those affected Traditional Owners. From the first stages of licensing consideration, through to ongoing project management and eventual end of project processes, Traditional Owners must be engaged through a regulatory and legislative process. Central to such inclusion is primacy of cultural rights and implementation of FPIC.

The impact on cultural heritage of a project must be considered by those affected Traditional Owners through their representative institutions from the start. It is only these Traditional Owners who can identify their cultural heritage and make decisions collectively about any risks to it. It is not for third parties to make decisions about what is and is not cultural heritage and what level of risk to that cultural heritage is acceptable. Only the Traditional Owners of that cultural heritage can make such identification and decisions.

4 Recognising Native Title Rights

The recently released Australian Law Reform Commission (**ALRC**) report, "*Fulfilling the Promise of Mabo: Reforming the Future Acts Regime in the Native Title Act 1993 (Cth)*", acknowledges the significance of water and that changes are needed to better recognise its use. Recommendation 41 calls for changes to the way the *NT Act* deals with the grant of water licences where native title exists and proposes that the right to negotiate (featured in Part 2, Division 3 of Subdivision P) would apply to water licences where there is a significant impact.

In its present form, s 24HA(5) of the *NT Act* provides both an entitlement to compensation for water licences and for the use of water in other contexts. In that regard, we note the comments of Justice Burley in the recent decision in *Yindjibarndi Ngurra Aboriginal Corporation RNTBC v State of Western Australia (No 2)* [2026] FCA 585 where his Honour found at [982]:

> Although it is true, as FMG submits, that the Determination does not confer exclusive rights in relation to water in any watercourse, wetland or underground water source, as defined in the *Rights in Water and Irrigation Act*, in my view the point goes nowhere. The compensation sought is in respect of cultural loss or spiritual loss arising from the effects on the watercourses which are, as I have found, direct effects of the Solomon Hub Project. I have in section 24 referred to the evidence of the spiritual significance of the watercourses. Pools and springs are loaded with spiritual power. The watercourses are made by the Barrimirndi and this Marrga punishes those who break the law for water places. In my view compensation is payable for the spiritual group harm experienced by the Yindjibarndi people arising from the damage to the flow of the groundwater into the Weelumurra creek and the Kangeenarina Creek and the harm caused to country arising from the reduction in water for the vegetation. Contrary to the submission advanced by the State, in my view, it is a factor to take into account when assessing cultural loss.

It is essential that in a federated context, state and federal laws support in each other to provide protections. In this regard, a recommendation for reform of the *NT Act* must be accorded significant weight in other jurisdictions. The emerging case law demonstrates that when Traditional Owners are excluded from the management of their water there is unnecessary and avoidable cultural and environmental loss for which compensation can be claimed. Including Traditional Owners in the management of their water will potentially mitigate cultural loss and the impact of the taking of water. This will lead to better and more sustainable management of resources, and also reduce the compensation ultimately owed.