



Submission: Protecting the Fitzroy River (WA)

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With thanks:

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About ANTaR

ANTaR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Peoples. We do this primarily through campaigns, advocacy and lobbying.

Our current national campaigns include:

- Constitutional Recognition and Equality – for Constitutional change to recognise Australia's First Peoples and remove discriminatory elements from our founding document; and
- Advocating for treaty and agreement-making processes across Australia.

We also engage in national advocacy across a range of policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including native title, languages and cultures, economic and community development, remote communities' services and infrastructure, health and human rights.

ANTaR is a foundational member of the Close the Gap Campaign Steering Committee, the Change the Record Campaign Steering Committee and the Redfern Statement Alliance.

ANTaR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTaR is a non-government, not-for-profit, community-based organisation.

Introduction

Thank you for the opportunity to provide some comments to inform the consideration of the WA Government's, *Managing water in the Fitzroy Catchment: Discussion paper for stakeholder consultation*, begun in November 2020 (herein referred to as Discussion Paper). We acknowledge the research and stakeholder consultations undertaken to date, set out options to find a pathway to meet the twofold goal of protecting the Fitzroy River and supporting sustainable economic development in its catchment area. Concerned feedback from our First Nations partners and stakeholders, about some 'serious absences' in this Discussion Paper compels ANTaR to raise the issues set out in the submission below. We do not presume to speak to the technical detail of the Paper but rather to the broader social and environmental principles that we would hope underpin it. We welcome the Government's intention to undertake another series of face to face consultations with traditional owner groups and other stakeholders based on feedback from this Paper.

1. Free prior and informed consent of traditional owners

The Discussion Paper addresses seven topics with Topics 1, 5 and 6 dealing with matters concerning governance, cultural heritage protection and economic opportunities for First Nations native title holders of the region. We do not see sufficient evidence of commitment to the place of traditional owners as core stakeholders in all future negotiations related to development of the Fitzroy River.

The Discussion Paper informs us that Aboriginal people hold native title over most of the catchment and about 30 percent of the pastoral leases and that the Fitzroy River Catchment has outstanding Aboriginal, historic, aesthetic, cultural and natural heritage values (National Heritage listing 2011). We would add that this region is of outstanding international significance. Reference is made throughout the Discussion Paper to ensuring consultation with traditional owners but with no evidence of structural certainty or follow through.

We note that contents of the *Fitzroy River Declaration 2016*¹, and the *Martuwarra Fitzroy Council Statement 2018*², call for the development of a management plan for the entire

¹ <http://nationalunitygovernment.org/content/kimberley-traditional-owners-unite-fitzroy-river-declaration>

² <https://static1.squarespace.com>

catchment based on traditional and environmental values and the creation of a legislated Management Body / Statutory framework for the entire catchment founded on cultural governance. The Discussion Paper fails to mention these proposals and instead offers to engage with Traditional Owners through a poorly defined advisory group.

In 2016, the signatories to the Fitzroy River Declaration intimated that legal avenues to pursue their aspirations could include lobbying to strengthen protections under the WA Aboriginal Heritage Act. The Discussion Paper inaccurately claims there are many existing State and Federal government legislative protections already in place to protect these areas (*Topic 6 Regulatory requirements*). All Australian governments are currently responsible for outdated, egregiously inadequate cultural heritage laws that still do not recognise the primary role of traditional owners in processes of protecting cultural heritage. This has been the case long before the destruction of the Juukan Gorge Caves, Pilbara in May 2020, an event that shocked the world and propelled the WA and Federal governments to address this parlous situation. We are concerned that the WA government may be operating in a current policy vacuum as a result of an incomplete and highly criticised new draft Cultural heritage Bill process begun immediately after Juukan.

At the 2019 Inaugural Indigenous Water Forum³, the Chairman of the Kimberley Land Council acknowledged that the Fitzroy Catchment region is considered key to the Commonwealth's 'Developing Northern Australia' agenda. The Chair emphasised that with native title rights and interests, his people were not *just* another stakeholder and that Aboriginal participation on water management should be entrenched in WA legislation. He expressed fear that these rights may be taken away. In light of the current status of the new Draft Cultural Heritage Bill and this Discussion Paper those fears are not yet allayed.

Over 60 percent of stakeholder respondents to the new draft bill oppose it in its present form.

³ <http://regnet.anu.edu.au/news-events/podcasts/video/7706/inaugural-indigenous-water-forum>

Kimberley Land Council leadership has been most articulate in its opposition stating that their legal rights as exclusive Native Title holders of at least 60 percent of the region are being overridden⁴. Their reasons include that:

- the wishes, concerns and opinions of Native Title holders are not included in the current Bill, nor is it in line with their rights under the Native Title Act 1993;
- it allows mining companies and other proponents to make decisions about Aboriginal cultural heritage without consulting Native title holders;
- that it makes no reference to complying with the UN Declaration of Rights of Indigenous people (UNDRIP); and
- it makes no reference to Best Practice Standards in Indigenous Heritage Management and legislation⁵.

A wide ranging panel discussion, *Destruction of Juukan Gorge: Law, Mining and the Protection of Aboriginal Heritage*⁶ similarly judges the WA draft Cultural Heritage legislation as very weak. The panel of legal experts claims that the Bill fails to place First Nations people at the centre of Aboriginal cultural heritage policy; it makes no reference to Australia's ratification of United Nations Declaration of Rights of Indigenous People (UNDRIP), in particular the right of Indigenous people to maintain, protect and develop the past, present and future manifestations of their cultures⁷; and its compliance funding mechanism is totally inadequate (with an annual \$4M compliance fund compared to many \$billions available in resources).

In summary, and with particular reference to Topics 1, 5 and 6, this Discussion Paper does not unequivocally accord primary authority to Aboriginal stakeholders' participation in the Water Management Plan. We urge the WA government to incorporate important cultural heritage and environmental recommendations from the Federal government policy publications, the *Dhawura Ngilan* Report (2020) and the Report of the Independent *Review of*

⁴<https://nit.com.au/exclusive-kimberley-aboriginal-leaders-say-new-cultural-heritage-bill-must-be-scrapped/>

⁵ <https://www.environment.gov.au/heritage/publications/dhawura-ngilan-vision-atsi-heritage>

⁶<https://law.anu.edu.au/multimedia/videos/panels-and-seminars/destruction-juukan-gorge-law-mining-and-protection-aboriginal>. Nov 2020

⁷<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> Articles 11, 13, 25, 26, 31 and 32.

*the Environment Protection and Biodiversity Conservation Act 1999 (2020).*⁸ The new WA Cultural Heritage Bill should provide the legal foundation for recognition of the primacy of traditional owners' roles in Australia's cultural heritage conservation pertaining to the precious heritage of 60,000 plus years. Finally we urge the WA government to pursue legislation that ensures traditional owners have an established structural guaranteed and permanent seat at the table of negotiations on the future of the Fitzroy River, not merely an advisory role.

2. The Australian public have expectations that our environment will be protected

The remaining topics addressed in the Discussion Paper, Topics 2, 3 4 and 7 deal with one broad promise not to dam the river or its tributaries and then focus on detailed scientific methodologies of which forms of water extraction may be possible in the future. Readers are asked to comment on each of these topics. ANTaR's concerns here as communicated to us by First Nations stakeholders is not to attempt to master the complexities of such a specific task but to take a step back and raise broader environmental principles.

Protecting the Kimberley's Fitzroy River, Science Statement of Support⁹ provides a lengthy description of the cultural life and biodiversity existing in the Kimberley. We quote at length from this statement written and signed by nine co-ordinating authors and supported by upward of one hundred supporting scientists.

*With such enviable relatively intact freshwater, riparian and adjacent terrestrial ecosystems that support endemic, endangered and scientifically significant species and communities, the creation of protected areas and a management plan in the Fitzroy River catchment is an opportunity to establish an internationally acclaimed and scientifically endorsed conservation regime. **However, the ecological, cultural and natural values of the river and new protected areas are also tied to the overall***

⁸ <https://epbcactreview.environment.gov.au/resources/final-report>;
<https://www.environment.gov.au/heritage/publications/dhawura-ngilan-vision-atsi-heritage>

⁹ <http://www.fitzroystatement.org/statement> 2018

condition of the river system which is threatened by agricultural practices and long-running proposals for large-scale irrigation schemes, mining and gas extraction.

The statement concludes with a brief outline of *how* to ensure these dangers can be averted. Its guidelines are contrary to some of the options put forward in the Discussion Paper and we urge the WA government to reconsider aspects of its Water Management Plan against the criteria outlined in this Science Statement of Support.

‘Water is the new gold’ - Martuwarra Fitzroy River Council¹⁰

In this four minute video Dr Anne Poelina, one of the supporting scientists and a member of the Kimberley Land Council suggests that a balance between cultural caring for country and industry development is possible. Dr Poelina explains that the Science Statement supporting protection of the River is not a blanket ‘No’ to further agricultural and other extractive industry development, however, there are questions regarding the accuracy of some of the modelling and measurements of water flows contained in the Discussion Paper.

We urge the WA government to heed the advice of experts like Dr Poelina as it proceeds with the next phase of its Water Management planning.

The 2020 Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999.¹¹ (EPBC)

ANTaR acknowledges that this report was only made public late in 2020 and that apart from a media release acknowledging receipt of it, no action has yet been foreshadowed. It is a seminal report that presents an urgent wake up call to the Federal government that fundamental reform is necessary to manage the state of the environment. Its bleak key message states that the environment is not sufficiently resilient to withstand current emerging or future threats including climate change. Australia’s environmental trajectory is currently unsustainable.

ANTaR suggests that the contents of this report are of immediate relevance to WA in light of its current major environmental tasks, to update its Cultural Heritage Bill and pursue development of the Fitzroy River Catchment. In particular we point to the new legally

¹⁰ <https://www.facebook.com/watch/?v=668341807200322> Nov 2020

¹¹ <https://epbactreview.environment.gov.au/resources/final-report>

enforceable National Environmental Standards that form the centrepiece of the Report's reforms. Professor Graeme Samuel AC, the independent reviewer says that the national environmental standards for Indigenous Engagement and participation in decision making should be adopted **immediately to deliver initial improvements**. He further states in the key message that current Indigenous Cultural Heritage laws do not deliver the protections that Indigenous Australians deserve and the community expects.

ANTaR urges the WA government to take a leading role in applying the EPBC Report recommendations wherever they are pertinent to the State's reform and development agenda. In this way WA could become an exemplar in this critical area of cultural and environmental well being of the nation.

Conclusion

Thank you again for the opportunity to provide a submission on this important piece of work.

ANTaR offers our ongoing support to a process that meets the expectations of Aboriginal and Torres Strait Islander peoples, and we would also welcome the opportunity to meet with any relevant groups, to discuss any of the points raised in this submission.

Sincerely

Paul Wright

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