



Kimberley Land Council

March 2019

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Submission to the Joint Standing Committee on Northern Australia

***Inquiry into the Opportunities and Challenges of the
Engagement of Traditional Owners in the Economic
Development of Northern Australia***

"Getting back country, looking after country, getting control of our future..."

Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the

Economic Development of Northern Australia

14 March 2019

Committee Secretary

Joint Select Committee on Northern Australia

PO Box 6021

Parliament House

Canberra ACT 2600

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Dear Committee Members,

The Kimberley Land Council (KLC) welcomes the inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia by the Joint Select Committee on Northern Australia (JSCNA), and thanks the Joint Select Committee for providing the opportunity to produce a submission.

Please note that I travelled to attend a public hearing of the Inquiry at Parliament House on the 15th February 2019. I was perturbed while listening to the Chair of the JSCNA, the Honourable Warren Entsch, when he voiced concerns with the operations of the Cape York Land Council. In order for the Chair to impartially assess this submission there needs to be acknowledgement of the fact that the role and responsibilities of land councils differ significantly between regions. The KLC has been acting in the interests of its member groups for more than 40 years, it was founded 15 years prior to the enactment of the *Native Title Act 1993 (Cth)*. I trust that the committee will exercise its professional capacity to assess all submissions with objectivity and thoroughness.

In the Kimberley there are a range of exciting and innovative economic initiatives currently being driven by native title holders which should inform and enrich the Australian Government's vision for Northern Australia. In addition to resource extraction, Indigenous-owned and led pastoral and arable farming is maturing in the Kimberley. New economic opportunities also exist which leverage Indigenous knowledge, as exemplified by the success and scale of carbon abatement projects which are generating income from known and respected corporations looking to offset their economic footprints.

The KLC appreciates the Government's desire to renew focus on economic development in Northern Australia. We have listed a number of feasible recommendations in this Submission. These recommendations form the basis of a renewed approach to engaging Traditional Owners in these development endeavours. There is much room to improve the status quo and we at the KLC look forward to working with the JSCNA to create concrete commitments.

Yours Sincerely

Nolan Hunter

CEO

Kimberley Land Council

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Summary

For 40 years, the KLC has engaged with governments and industries to achieve recognition of Traditional Owners' rights in country. Today, more than 85% of the Kimberley has native title determination. This presents an exciting and valuable opportunity for Aboriginal landholders to drive innovation and opportunities across the region. The KLC appreciates the focus on the opportunities and challenges facing Traditional Owners in pursuit of regional development.

The submission will focus on four major points:

- I. That recognised representative Aboriginal and Torres Strait Islanders bodies¹ (NTRBs) operate differently across Australia and their role and commitment to pre and post determination native title outcomes vary. The KLC is a highly effective NTRB that works closely with native title holders within the region to fulfil members' ambitions for positive economic and social outcomes. The KLC performs this role whilst protecting cultural and environmental values of core importance to the Kimberley's Traditional Owners.
- II. Native title is not and should not be seen as, an impediment to economic development. Rather, it is a means by which to engage with the largest land holding constituency in Northern Australia, being native title holders, to deliver outcomes that are mutually beneficial to all stakeholders.
- III. Economic development in Northern Australia and the Kimberley must place Indigenous people at its centre rather than on the periphery. Native title holders need to be engaged early, often and respectfully.
- IV. Government should ensure that when awarding contracts relating to Indigenous affairs preference should be given more to wholly-owned Indigenous interests over joint ventures which include Indigenous entities so as to remove limit the incidence of 'black cladding'.

The submission recommends that:

- i. The government policy position that native title land is not treated as a proprietary interest should be abandoned. This will allow native title holders to build their asset base and become economically self-sustaining.
- ii. NTRBs continue to be funded to support prescribed body corporates (PBCs), where capability gaps exist across a number of corporate functions. This support will enable the PBCs to focus on managing native title as per their statutory obligations. The KLC, however, is mindful of those PBCs that have capacity and capability to operate independently and do not require additional support.
- iii. NTRBs continue to play an integral role in assisting Traditional Owners, not only with native title determination applications, future acts and compensation claims, but also with regional matters and development. KLC, in partnership with Traditional Owners, has enabled

¹ Recognised pursuant to s203AD of the *Native Title Act 1993 (Cth)*

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numerous examples of sustainable, innovative and complex economic development projects within the Kimberley region and this should continue into the future.

- iv. Economic development in Northern Australia must place Indigenous people at its centre rather than on the periphery waiting for “trickle down” benefits. Past experience proves that, when engaged by government and industry in good faith, Traditional Owners are empowered to identify commercial opportunities which use resources sustainably, thus protecting Indigenous-held core values of country and culture whilst building strong communities and capability.
- v. The principle of free, prior and informed consent (FPIC) should be a cornerstone of engaging with Traditional Owners about their land. FPIC ensure that Traditional Owners have ‘equal opportunity’ to engage with a proposed agreement/development/project on their land or which impacts their land. Equal opportunity means equal access to financial, human, linguistic and material resources in order for communities to fully and meaningfully engage.
- vi. The *Native Title Act 2013 (Cth)* should be amended to incorporate the principles set out in the United Nations Declaration on the Rights of Indigenous People (UNDRIP) into the future acts regime, in particular the principle of Indigenous free, prior and informed consent (FPIC).
- vii. To ensure that Indigenous Australian are truly achieving self-determined outcomes, the Indigenous Procurement Policy (IPP) should require that Indigenous joint ventures be majority controlled by the constituent Indigenous entities. This is to address the perverse issue of ‘black cladding’ that positively skews government statistics and inhibits real outcomes for Indigenous people.

We trust that the JSCNA can take particular heed of the examples of successful Indigenous-led economic development in the Kimberley. The KLC looks forward to the shift from talking of potential opportunity to concrete commitment and action.

General Submissions to the Enquiry

The Kimberley Land Council is a highly effective peak body that works closely with native title holders within the region to fulfil members’ ambitions for positive economic and social outcomes. The KLC performs this role whilst protecting cultural and environmental values of core importance to the Kimberley’s Traditional Owners.

KLC’s Role as a Representative Body and Capacity Building Organisation

1. The KLC is the NTRB for the Kimberley region of Western Australia. The KLC was established in 1978, prior to the enactment of the *Native Title Act 1993 (Cth)*, and its organisational goals are to assist Kimberley Aboriginal people in getting country back, looking after country, and getting

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control of their future. The KLC is responsible for many projects that further the economic, social and cultural aspirations of Kimberley Aboriginal people.

2. The KLC is the recognised representative body that engages with, and delivers services pursuant to its statutory function to, PBCs and native title groups within the region. As at the end of the 2018 the KLC has facilitated native title determinations across 85% of the Kimberley region. This has been achieved because of strong leadership, the professionalism of KLC's staff and the connection the KLC has with its member groups. The KLC will continue work on the remaining native title claims in the region, although, it should be noted that these are likely to be more resource intensive and complex to resolve than those resolved to date. These outstanding claims require rigorous research, mediation and negotiation. Additionally, KLC continues to represent PBCs and native title claimants in future act processes, and will in the future (and following the guidance on the law of compensation provided by the decision of the High Court in the Timber Creek compensation claim²) be advising native title holders and PBCs on prospective compensation determination applications.
3. A major focus of the KLC is the continued support and development of PBCs in the region following native title determinations. The level of assistance varies depending on the needs of individual PBCs according to their capacity and resource constraints. The nature of this support ranges from legal services, to providing services for employing and managing staff, ongoing logistical and operational support, governance training for directors, as well as the administration of funding. These services are in addition to the statutory functions delivered by the KLC to all native title parties in the Kimberley, such as certification functions, receipt and application for assistance and notification functions. Given the number of native title claims which remain active, in particular determinations made in 2017 and 2018 where PBCs have yet to be nominated by native title holders, there will be a significant increase in number of PBCs in the region and, consequently, the level of support requested by PBCs to KLC.
4. In addition to building the capacity of PBCs, the KLC also facilitates PBC collaborative forums to bring key directors and staff from different PBCs together to discuss regional issues and form regional strategy on matters where PBCs have common interests.
5. Currently NTRBs receive funding under the Jobs, Land and Economy Programme administered by the Department of Prime Minister and Cabinet totalled approximately \$100m each financial year. Although efficiently managed by NTRBs, these funds are inadequate for the discharge of all statutory functions and certainly inadequate to, *in addition*, undertake the extensive work associated with native title compensation applications and future acts management. It should be noted here that future acts are processes triggered by third parties for their own – usually commercial – benefit with costs externalised to native title parties. It is critical that these costs be internalised to the relevant beneficiary / proponent of the future act, if needs be through appropriate legislative mechanisms, and not externalised to native title groups and, ultimately and unavoidably, NTRBs.

² *Northern Territory v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA-7

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The KLC's Role in Enhancing Economic Development Opportunities

6. Economic development is fundamental to the future wellbeing of the Kimberley region. At present, Aboriginal people in the Kimberley are significantly underrepresented in mainstream employment. The KLC plays a significant role in the development of local economies that Aboriginal people and Aboriginal businesses participate in, and advocates for native title holders themselves determining their own position on development on their own country and its associated effects on cultural heritage, communities and the environment. The KLC's position as a peak regional body allows it to engage with all stakeholders to identify and pursue opportunities which have the potential to benefit the native title holders as well as the broader Kimberley region. Our pursuit of the economic and social advancement of Traditional Owners is guided by:
 - a) traditional law and culture, which remains strong in the Kimberley and is an enduring part of the everyday lives of Traditional Owners;
 - b) economic development consistent with cultural obligations;
 - c) principles of regional connectivity to effectively address systemic problems; and
 - d) recognition of Traditional Owners as primary interest holders of the land, water, and resources of the region. This ownership should be respected in accordance with the principles set out in the UNDRIP, which was endorsed by Australia on 3 April 2009, in particular, the principle of FPIC.
7. The KLC works with Traditional Owners to develop economic self-sufficiency through projects which provide environmental services on native title land, involve Traditional Owners in emerging enterprises and facilitate agreements between Traditional Owners and third parties for mutually beneficial development on country. Examples include the KLC-driven Northern Kimberley Fire Abatement Project (a recognised offsets project under the Commonwealth Carbon Farming Initiative) and the Kimberley Indigenous Rangers Program.
8. Furthermore, in order to address gaps in government services, and in direct consultation with member communities, the KLC has assisted with the establishment of a number of organisations that preserve and celebrate Indigenous culture in the Kimberley region. The Kimberley Language Resource Centre and Kimberley Aboriginal Law and Cultural Centre are example organisations that the KLC provided assistance to establish.
9. A further example is the Browse LNG Precinct Regional Benefits Agreement which was negotiated by the KLC on behalf of all Kimberley Traditional Owners. Under this agreement, the KLC, Woodside Energy Limited, the WA Minister for Lands and the Conservation Commission of Western Australia committed to delivering a regional benefits package to improve the educational, health, social and economic well-being of Aboriginal people across the Kimberley. Aarnja Ltd was established using the funds from this agreement to address the concerns of Traditional Owners about the future of Aboriginal people and communities in the region. Aarnja Ltd is now also a member organisation of the 'Empowered Communities' initiative. Recently, Aarnja has developed their Economic Development Framework that provides the blueprint that sets out a practical direction for business growth and job generation in the Kimberley. The KLC endorses this framework and commends it to the joint committee.

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10. The KLC demonstrates the positive role that NTRBs can perform in working closely with Traditional Owners to further their ambition to pursue sustainable economic development and improve socioeconomic outcomes of Aboriginal people whilst ensuring care of country is maintained.

Native title is not and should not be seen as, an impediment to economic development. Rather, it is a means by which to engage with the largest land holding constituency in Northern Australia, being native title holders, to deliver outcomes that are mutually beneficial to all stakeholders.

Key Limitations and Constraints

11. Native title is a significant property asset of one of the largest constituencies, Indigenous Australians, in Northern Australia. This constituency is actively and passionately seeking ways to advance its social and economic standing through the positive use of its own property. In Western Australia, the current policy positions taken by state government undermine the spirit of the *Native Title Act 1993 (Cth)* and a number of High Court rulings that imply Traditional Owners are able to make use of native title land in commercial ventures. The state government's policies and processes misinterpret these rulings and create risk and uncertainty in commercial contexts. This is due to the lack of recognition of native title as a form of property right that can be utilised by its owners in ways afforded to those with freehold rights.
12. Native title lands are recorded and registered and can be searched through the publicly available 'National Native Title Register' (NNTR) on the National Native Title Tribunal (NNTT) website. The NNTR contains determinations of native title made by either the High Court of Australia, the Federal Court of Australia or a recognised body such as South Australia's Supreme Court and Environment Resources and Development Court. This provides certainty surrounding land ownership by Traditional Owners similar to leasehold property as exemplified by the Australian Capital Territory.
13. Post determination efforts to generate sustainable economic opportunities are thwarted by current government policies and commercial perceptions. Traditional Owners in the Kimberley (and elsewhere across Northern Australia) are land rich. Yet, despite more than 85% of the Kimberley region being subject to native title determinations; Traditional Owners lack access to necessary capital to unlock the economic potential of their own land. Due to the commercial perception of native title as being less certain or more risky than non-native title tenure, it is difficult for Traditional Owners to finance development of their assets, as land subject to native title is, currently, not readily collateralisable in traditional loan agreements.
14. Moreover, current government policy in Western Australia requires native title to be wholly extinguished for a grant of freehold to be made. However, extinguishment is not required as a matter of law required for a grant of valid freehold title to occur. Furthermore, interests in land other than freehold can and do provide sufficient certainty for the commercial use of land. At present, native title holders are therefore faced with the double whammy (based entirely on misperception and policy) that commercial certainty requires freehold and freehold requires

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extinguishment of native title. The policy which finds this position should be rejected by government and the misconception of native title within industry arising out of this policy should be corrected through appropriate strategies to properly educate industry and government on the value of native title to Aboriginal people and the community generally.

15. The Committee should maintain its focus on economic development and make recommendations that overturn the misconceptions that native title monies represent charitable welfare. Too often, current approaches by industry and government engaging with native title holders about their land, position native title holders primarily as passive and bound beneficiaries of the resources exploited on their land. Indigenous people have the right to govern and steward native title land in self-determined ways in line with their peoples' aspirations.
16. Any native title monies currently received are an Indigenous community's opportunity to develop private wealth and prosperity for present and future generations which can be leveraged to create opportunities and fund further development in regional communities. In the absence of legislative reform, at a minimum, the Committee should continue to work with Indigenous Business Australia and Authorised Deposit-Taking Institutions to deliver products that serve the financing needs of native title holders.

Economic Opportunities Accessed and Derived from Native Title

17. The KLC recommends that the Committee should recognise that a diverse number of viable examples of sustainable, innovative and complex economic development on native title land and sea country exist in the Kimberley region. These initiatives are led by Traditional Owners supported by the KLC and other peak regional organisations with the express goal of promoting sustainable economic development. Examples of these successful initiatives include the following:
 - (a) For the past 10 years, native title holders, with the assistance of the KLC have been drawing on their extensive Indigenous knowledge and expertise to deliver cultural and natural resource management projects across the region. The KLC facilitates the Kimberley Ranger Network which employs approximately 80 full-time rangers annually in support of the vision of Kimberley Aboriginal people: to live and work on their traditional lands to develop enterprises that build capacity, create employment and are founded on traditional knowledge, culture and connection to country. Kimberley Indigenous Ranger groups are generating income from feral animal and weed management, visitor management and cultural sites protection, contributing to biodiversity research and providing cultural immersion experiences. The Kimberley Ranger Network creates stable jobs in remote communities while enhancing connection to country.
 - (b) In the Kimberley, native title holders are successfully managing savanna fire carbon projects that have generated \$10M in income direct to native title holders and resulted in significant reduction to wildfire across the region. Recently, the KLC has been named as a leading project partner in a new international savanna fire management project which will see Australia's knowledge of Indigenous fire management exported to the world.

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This project was announced at COP 23 (Conference of the Parties) in Bonn, in the presence of the then Minister for the Environment and Energy, Josh Frydenburg and current CEO of the KLC, Nolan Hunter. This ground-breaking project will see the implementation of savanna burning at a number of pilot sites in Botswana, southern Africa. With funding of \$3.87 million provided over four years, the project will deliver savanna carbon abatement methodologies suitable to the Botswana landscape and facilitate Indigenous knowledge exchange between Kimberley Aboriginal people and communities in Botswana. Today, Indigenous fire management continues to be practised right across northern Australia and now, through methodologies recognised under the Federal Government's Carbon Farming Initiative (CFI), there are 75 projects registered under the CFI across northern Australia worth over \$100 million and employing more than 400 Indigenous rangers.

- (c) KAPCO, as a fully Indigenous-owned pastoral venture, is revitalising Aboriginal pastoral industry in the Kimberley and is a cooperative comprised of four Indigenous-owned pastoral stations: Myroodah, Mt Anderson, Kupartiya (Bohemia Downs) and Frazier Downs. With a 50,000-strong herd these stations are taking advantage of economies of scale by working together to develop a year-round supply chain leveraging modern breeding, herd management and cropping techniques. KAPCO provides an avenue for Indigenous people to gain training, skills and meaningful employment on country and in remote communities.
- (d) The Yawuru Prescribed Body Corporate Indigenous Land Use Agreement and the Yawuru Area Agreement Indigenous Land Use Agreement between Yawuru native title holders and the State of Western Australia, and the Ord Final Agreement between Miriuwung and Gajerrong native title holders and the State of Western Australia serve as examples of native title agreements which promote active Indigenous participation in their own economic futures.

18. These examples above demonstrate that native title can be effectively utilised or, at least leveraged, to precipitate Indigenous-led economic development. This is largely in spite of aforementioned constraints and limitations. There is a continued need to enhance the ability of native title holders to create economic opportunities on their lands without having to forfeit hard fought native title rights.

Economic development in Northern Australia and the Kimberley must place Indigenous people at its centre rather than on the periphery. Native title holders need to be engaged early, often and respectfully.

Honouring Procedural Fairness

19. Native title holders and registered native title claimants must be consulted appropriately on applicable projects and development on native title land. The principle of Indigenous Peoples' right to free, prior and informed consent (FPIC) with respect to proposed developments on their

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traditional lands is established in international law. The most recent and authoritative articulation of this fact can be found in the UNDRIP.

20. Under the current future act regime, when a right to negotiate (RTN) is enlivened, native title holders have as little as six months to reach an agreement that may include royalties or royalty equivalents (such as equity in a project) with a land use proponent. Royalties and equity are the recognised benchmark of best practice agreements with indigenous peoples.
21. If an agreement is not reached within 6 months a proponent can seek a determination by the NNTT. The NNTT is prohibited from imposing any conditions relating to royalties (or equivalents) in its determination (*Native Title Act 1993 (Cth)*, section 38(2)). In practice, the determinations of the NNTT have outrageously favoured proponents over native title parties in proportions not seen in any other area of the law³. The current legislative framework therefore does not encourage best practice outcomes, but rather provides a mechanism for proponents to tread water while they wait to seek a determination from the NNTT, where proponents obtain outcomes in their favour at a rate 38.3 times higher than native title parties. In the case of such an enormous disparity in outcome, the legislature must review the RTN processes in the NTA to ensure they encourage best practice outcomes and are balanced and fair, as they are evidently not at present.
22. Collectively, these structural arrangements are fundamentally unfair to native title holders and undermine the beneficial intent of the NTA. The NTA should be amended to incorporate the principles set out in the UNDRIP into the future acts regime, in particular FPIC, to ensure that proponents, both private and government, engage with native title groups in a fair and just manner that is in accordance with international standards.

Participatory Engagement

23. Identification of development potential is critical to native title holders being able to negotiate land use agreements which promote positive economic outcomes for native title holders. The negotiation of agreements is often complex in nature and resource intensive hindering the ability of native title holders to realise the economic potential of their traditional lands. Where adequate resourcing is provided, such as occurred in negotiations for the Ord Final Agreement, the Yawuru Native Title Agreements and the Browse LNG Precinct Agreements, culturally appropriate negotiation processes can be deployed which ensure that outcomes are sustainable and reflect the collective will of native title holders.
24. When engaged by government and industry early and in good faith, native title owners are able to optimise the benefits of applying their local knowledge of country to identify further sustainable commercial opportunities. There is a role to be played by organisations like the KLC in identifying sustainable opportunities, gaining commitment from interested parties and

^{3 3} Since the commencement of the NTA, there have been 3,778 future act determination applications before the NNTT. Of these, 115 have resulted in a determination that the act may be done, or may be done subject to conditions (that is, in favour of proponents), and only three have resulted in determinations that the act may not be done (in favour of native title parties).

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subsequently facilitating the alignment of commercial and cultural decision-making processes and timelines.

Government should ensure that when awarding contracts relating to Indigenous affairs preference should be given more to wholly-owned Indigenous interests over joint ventures which include Indigenous entities.

Indigenous Procurement

25. Whilst the Commonwealth Government has since 2015 implemented a well-intentioned IPP, which has increased the number of contracts awarded to Indigenous organisations, the majority of contracts, in both dollar amount and volume, are still disproportionately non-Indigenous entities. In 2017-18 the Commonwealth awarded 4,597 new contracts to 735 Indigenous businesses valued at \$802m⁴, however the total amount of contracts awarded was 73,458 with a total value of \$71,127m⁵. Indigenous contracts represented 6% of the total volume of contracts but only 1% of the total value of the contracts.
26. Despite the increase of contracts awarded to Indigenous organisations, the Productivity Commission has found that the proportion of funding that goes directly to Indigenous-run organisations has significantly reduced over the past nine years; while funding to other organisations that earmarked as Indigenous spending has increased by one third.
27. Changes were introduced to the IPP on 1 January 2019. Joint ventures which include Indigenous entities (JVs) must now be at least 50% Indigenous owned, and demonstrate 50% Indigenous involvement in the management and control of the joint venture. In order to ensure that Indigenous Australians are truly achieving self-determined outcomes JVs should be majority controlled and managed by Indigenous organisations. This would stamp out the common practise of “black cladding” a practice that positively skews IPP statistics surrounding benefits delivered to Indigenous communities and enterprises.
28. The IPP should be amended to further address this issue of “black cladding” by promoting businesses that are wholly Indigenous owned or at the very minimum that more than 50% is controlled/managed by Indigenous organisations in a JV. Indigenous-owned businesses are 100 times more likely to employ Aboriginal staff than non-Indigenous owned businesses.
29. Further scrutiny of JVs is also warranted as, while they allow Indigenous organisations to scale and increase their capabilities, there is an increasing issue surrounding the rising number of disputes between involved parties in JVs due to perceived or real lack-of-control voiced by collaborating Indigenous parties.

⁴ February 2019. *Indigenous Procurement Policy*. Retrieved from <https://www.pmc.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp>

⁵ January 2019. *Statistics on Australian Government Procurement Contracts* Retrieved from <https://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/>