

A MATTER OF TRUST

**RESTORING FAITH IN THE
NORTHERN TERRITORY'S WATER
LAWS**

**Submission to the Northern Territory
Strategic Water Plan Directions Paper**

Environment Centre NT - 4 February 2022



THE ENVIRONMENT CENTRE NT ACKNOWLEDGES THE TRADITIONAL OWNERS OF THE LANDS AND WATERS NOW KNOWN AS THE NORTHERN TERRITORY. WE PAY OUR RESPECTS TO THEIR ELDERS PAST, PRESENT, AND EMERGING. WE ACKNOWLEDGE AUSTRALIA'S FIRST NATIONS WERE SELF-GOVERNING IN ACCORDANCE WITH THEIR TRADITIONAL LAWS AND CUSTOMS, AND THEY NEVER CEDED SOVEREIGNTY OF THEIR LANDS, SEAS, AND WATERS.

(a) INTRODUCTION – TERRITORIANS HAVE LOST FAITH IN OUR WATER MANAGEMENT

Water is our most precious resource and is essential to all life. The Northern Territory's interconnected ground and surface water systems, including our magnificent free-flowing rivers, are unparalleled for their beauty, abundance, and ecological and cultural values. They also underpin the Territory's economy, social, and cultural life through the creation of jobs and sustenance of livelihoods. However, there are numerous threats and challenges to the water of the Northern Territory.

1. There is significant and longstanding water insecurity in remote Indigenous communities, including due to the fact that drinking water is unregulated and unprotected in these places;¹
2. Climate change is significantly impacting our water resources, and the viability of life in the Northern Territory, including from harsher and longer droughts, erratic rainfall (and recharge of aquifers), and increased evapotranspiration. Recent research has found that three of the Northern Territory's principal ecosystems, the northern savannas and coastal mangrove forests of the wet/dry tropics in the "Top End", and the arid zone interior of Central Australia, all meet the criteria to be classified as "collapsing".² Climate change is also likely to worsen existing inequalities in health, infrastructure provision, lack of educational and employment opportunities, and income in Indigenous communities.
3. The Northern Territory Government is proceeding with plans for large-scale industrial and water-intensive agriculture across the Northern Territory. For example, there are plans for 168,000 hectares of agribusiness development across the Northern Territory, involving extensive land clearing of NT savannas and the arid zone (which are, as highlighted above, are ecosystems on the verge of collapse), and which will require billions of additional litres of the Northern Territory's groundwater and surface water.³

The Northern Territory's water laws and policies are not adequate to respond to the above threats and challenges. The Environmental Defenders Office recently diagnosed our water laws as amongst

¹ Howey, K. and Grealy, L. "Drinking Water Security: the neglected dimension of Australian water reform", *Australasian Journal of Water Resources*, (2021), VOL. 25, NO. 2, 111-120.

² Bergstrom, D. M., Wienecke, B. C., van den Hoff, J., Hughes, L., Lindenmayer, D. B., Ainsworth, T. D., Shaw, J. D. et al (2021). Combating ecosystem collapse from the tropics to the Antarctic. *Global change biology*.

³ NT Farmers, Northern Territory Plant Industries Economic Impact Analysis 2020.

the worst in the country.⁴ These flaws have meant that management of the Northern Territory's water has been a significant political issue for many years. Water controversies have regularly punctuated the news cycle, including:

- the grant of a controversial water licence at Stylo Station to a political candidate,⁵
- an independent review into water licensing in the Northern Territory which found significant flaws in the Northern Territory's water licensing system;⁶
- the revelation that there are no regulatory protections for drinking water in remote communities of the Northern Territory;⁷
- the unsustainable overallocation of aquifers in the Darwin rural area;⁸
- the unprecedented overturning of a 10 billion litre per annum groundwater licence at Larrimah;⁹
- ad hoc and regressive amendments to the *Water Act* made without public consultation, including to advantage development entities such as Northern Territory Land Corporation;¹⁰
- controversy over the circumstances surrounding the grant of the largest groundwater extraction licence in Northern Territory history, at Singleton Station;¹¹
- repeated controversies regarding perceptions of conflict of interest, bias and political interference with respect to significant water licence decisions.¹²

This has eroded trust in the Northern Territory Government's management of our most precious resource. Given the challenges of climate change, the collapse of our biodiversity and ecosystems, in parallel with the Northern Territory Government's proposed rapid expansion of agricultural development in the Northern Territory, it is more important than ever that Territorians have trust and confidence in the Northern Territory Government's management of our water resources, for all users and our precious ecosystems.

ECNT concedes that trust in water management is not just a Northern Territory problem. The Productivity Commission's most recent report states:

⁴ <https://www.edo.org.au/publication/briefing-note-deficiencies-in-the-existing-water-law-and-governance-framework-in-the-northern-territory/>.

⁵ <https://www.abc.net.au/news/2013-03-22/stylo-station-water-permit-licence-mcfarlane-country-liberals/4588832>.

⁶ <https://www.abc.net.au/news/2017-12-13/nt-water-licences-review-should-be-referred-to-new-icac-says-nlc/9254182>.

⁷ <https://www.sbs.com.au/nitv/article/2020/07/31/high-levels-uranium-drinking-water-nt-community>.

⁸ <https://www.abc.net.au/news/rural/2021-05-13/darwin-rural-water-aquifer-agricultural-development/100116664>.

⁹ <https://www.abc.net.au/news/rural/2021-06-23/water-allocation-revoked-larrimah-agricultural-precinct/100238158>.

¹⁰ <https://www.ntnews.com.au/news/northern-territory/environmentalists-farmers-cross-swords-over-water-act-changes/news-story/f3a83c76044813991d8c6ad9bdddc92f> and <https://theconversation.com/regressive-changes-to-northern-territory-water-laws-could-undermine-indigenous-rights-166561>.

¹¹ <https://www.abc.net.au/news/2021-11-11/nt-water-licence-singleton-station-fortune-agribusiness-foi/100608364>.

¹² <https://www.abc.net.au/news/2021-11-13/nt-water-licence-singleton-station-environmental-lawyers/100617064> and <https://www.ntnews.com.au/news/special-features/in-depth/perceived-conflicts-and-secretive-governance-risks-nts-most-precious-resource-environmental-advocates-warn/news-story/815d21af48a03488a6b3752758cbfcd>.

‘Given the demands on water in Australia, water users and the broader community must be able to trust in water resource management. They need to have confidence that water users are complying with their obligations and that water managers are managing this valuable resource to best effect. In other words, system management should have integrity. The integrity of Australia’s water resources management rests on the provision of credible and relevant information combined with effective compliance and regulation. Information plays a critical role in all decision making in water resource management. Robust processes and trusted institutions can provide confidence that water users are complying with their obligations and that water system managers are undertaking their roles to best effect for the benefit of all entitlement holders and the environment. Integrity can be gauged by the degree of trust in water management institutions and systems held by water users, communities and the market. Where there is integrity in water system management, public confidence follows.’¹³

Despite the aspirations identified in the Directions Paper, ECNT is concerned that in actual fact the current Northern Territory Government appears to be taking an approach to water management which will further undermine its credibility as a water manager.

Specifically, the Northern Territory Government appears to be primarily concerned with facilitating even easier access to more of our precious water for industry, using the COVID-19 pandemic and the desire to kickstart the Northern Territory economy as a rationale. For example, the Territory Economic Reconstruction Report was released in November 2020 and emphasised on numerous occasions on the need to improve “access to water” for irrigators, for a “more productive pastoral estate”. ECNT notes that irrigators and industry already have easy access to water – with water licences granted for free to developers while Indigenous communities do not have the most basic protections for their drinking water supply. The Northern Territory Government pursued this agenda in 2021, including “streamlining” significant environmental approvals, introducing substantive amendments to the *Water Act* without adequate public consultation, having a licence granted to an Northern Territory Government-related entity at Larrimah overturned due to the use of the wrong (and unsustainable) criteria, subsequently publicly disagreeing with many of the substantive findings of the independent review of that licence, and granting a huge groundwater licence at Singleton Station which was inconsistent with the declared water allocation plan and despite overwhelming public opposition.

This has had predictable and profound negative impacts on the Northern Territory’s reputation as a regulator of water. There is undoubtedly a perception in the community – which in ECNT’s view is well founded - that the Northern Territory Government is primarily concerned with favouring industry interests over the public interest, and is putting at risk the cherished environmental and cultural values associated with our water systems that make the Northern Territory and its lifestyle so unique.

Following significant pressure by Territorians in the lead up to the 2020 Northern Territory election, including a call by all four land councils for the enactment of safe drinking water laws across the

¹³ Productivity Commission. 2021, p.4-5. ‘Ensuring the integrity of water resource management Supporting Paper E: National Water Reform 2020 Inquiry Report no.96: 28 May 2021.

Territory, the Northern Territory Government committed to developing a “long-term, comprehensive water strategy if re-elected”. The Northern Territory Strategic Water Plan Directions Paper is the first opportunity for the public to be consulted about the proposed water plan.

This submission to the Directions Paper is aimed at assisting the Northern Territory Government find a pathway to restoring trust in the Northern Territory’s water management. While ECNT can see the utility of an overarching strategic water plan, this submission is primarily aimed at the regulatory reform required to achieve long-lasting reform of our water management that should form the basis of any coherent strategy or plan.

While water will always be a contentious issue, particularly as we confront a radically altered climate present and future, ECNT believes that if the recommendations contained in this submission are implemented, this will go a significant way towards achieving this aim.

(b) PRINCIPLES OF WATER MANAGEMENT

The Northern Territory’s water laws do not currently reflect the following basic principles of good water management (and indeed good administrative decision-making). These include:

- (a) that water is a public good and should be managed as such;
- (b) that water management should embed principles of consistency, equality and predictability;
- (c) that water management should not be arbitrary and capricious;
- (d) that water regulation should be independent, arms-length, free of bias and in the public interest;
- (e) that water management should embed principles of participatory design, reflective of the fact that the participation of affected communities in policy design is important in contested and complex policy domains.

Any reform of the Northern Territory’s water laws should be guided by the principles outlined above.

Furthermore, the Northern Territory’s waters laws should reflect the unique ecological, social and cultural values of the Northern Territory’s waterways, by explicitly ensuring these values are recognised and protected.

In recognition of extensive Indigenous property interests across the vast majority of the land and waters of the Northern Territory, Traditional Owners and their representative institutions must be centred in all decisions about management and use of water in the Northern Territory.

(c) A CLARION CALL FOR WHOLESALE REFORM OF THE *WATER ACT*

The Northern Territory’s outdated water laws are a product of a mid-20th century, rather than a 21st century mindset. The *Water Act* is skeletal in form and substance, lacks prescription, embeds significant discretion in most water management decisions, facilitates conflicts of interest and political interference, and barely refers to the environmental or cultural values that are so cherished in the Northern Territory.

Nothing short of complete reform of the Northern Territory's *Water Act* is required to bring the Northern Territory's regime into line with contemporary standards of water governance and environmental regulation.

The current approach of "continuous improvement" of our water laws in fact embeds *ad hoc* lawmaking on-the-run, inhibits meaningful engagement with the public and key stakeholders, and further undermines confidence in the Northern Territory Government's social licence to regulate.

ECNT submits that any further reforms of the *Water Act* should be deferred until the Strategic Water Plan is finalised, including so that the Northern Territory Government, and the public, have had an opportunity to consider and synthesise submissions received as part of this process.

If the Northern Territory Government proceeds with its proposed *ad hoc* reform agenda, before the Strategic Water Plan is finalised, then this will undermine the legitimacy and goodwill of this process and possible beneficial outcomes.

ECNT requests that all submissions to this Directions Paper be published on the website to enhance transparency and accountability with respect to the Strategic Water Plan and any regulatory reform process. Any reforms to the *Water Act* should occur as a holistic package, following considerable consultation and deliberation about the package as a whole.

ECNT acknowledges the work of the Environmental Defenders Office in analysing the deficiencies in the Northern Territory's water laws,¹⁴ the Northern Land Council's submission in relation to this Directions Paper,¹⁵ the collaborative work of the Territory Rivers: Keep 'Em Flowing campaign, and the Arid Lands Environment Centre's submission in relation to this Directions Paper. The following recommendations owe much to these analyses, and to numerous discussions with other stakeholders and colleagues. ECNT also acknowledges the deliberative and robust discussions about Northern Territory water management that have occurred as part of NT Farmers' water reference group during 2021, which have enhanced and sharpened the thinking in this submission.

ECNT makes the following recommendations:

Recommendation 1 – reform the Water Act utilising principles of participatory design

The Northern Territory's weak regulatory system means that we are ill-equipped to manage increasing threats and challenges to our water. There are also numerous injustices embedded in our water laws. To give just one example, while irrigators are granted water for free (which occurs in no other jurisdiction, bar Western Australia), our remote communities do not have basic protections for their drinking water supply.

The Northern Territory Government should immediately commit to reforming the *Water Act*. The Northern Territory Government should commit to completing the reform process before the next election (August 2024).

¹⁴ <https://www.edo.org.au/wp-content/uploads/2021/08/Deficiencies-Water-Law-NT.pdf>.

¹⁵ <https://www.nlc.org.au/uploads/pdfs/20220114-Submission-NT-Water-Directions-Paper.pdf>.

The reform process must embed principles of deliberative and participatory design, by ensuring that key stakeholders and the public are meaningfully engaged throughout the reform process. Similarly, the legislation itself must enshrine participatory principles (including through the establishment and operation of enhanced water advisory committees and catchment management authorities). Evidence and policy about water is increasingly political and contested, making meaningful participation by affected communities in designing policy solutions increasingly important. While the public is the “proving ground for competing knowledge claims”.¹⁶, policy is frequently developed by policy-makers using taken-for-granted assumptions about the kinds of values held by the public, inhibiting creative thinking and genuine policy solutions. It is crucial that the Northern Territory Government take the public and its considerable interest and expertise in water seriously.

In aid of this objective, ECNT suggests that the Northern Territory Government establish a Water Reform Steering Group comprised of key stakeholders from government, industry, the environment sector, Indigenous representative institutions and other civil society organisations to guide the reform process. This should be chaired by an independent person, appropriately resourced, and have strong and accountable governance processes. The minutes of the meetings of the Water Reform Steering Group should be made public, and it should report directly to the Minister.

Recommendation 2 – strengthen water allocation planning processes

Water allocation plans (WAPs) set out how water in an area of the NT is to be shared, and are the key mechanism for strategic planning of water resources across Australia, including to ensure water is allocated to safeguard environmental and cultural values.

In the Northern Territory, there is no legal requirement to create WAPS, and there is scant information about what they should encompass.

The Northern Territory has very few declared WAPs, with only 28% of the volume of water licences currently captured within the area of those plans. This means that the vast majority of water licence decisions in the NT (72%) are occurring without appropriate planning oversight, a rigorous and publicly tested scientific basis, or appropriate stakeholder and public engagement. This contrasts with water use across the rest of Australia, which have more than 80% of water use managed under water plans.¹⁷ Water licensing in the rest of the NT is governed by a two-page policy from 2000 (the NT Water Allocation Planning Framework).

Also, unlike water sharing instruments in most of Australia, WAPs are not legally binding. This is partly because the *Water Act* doesn't include sufficient detail about what WAPs should say and how they should be applied. This undermines the purpose of WAPs and creates many governance issues, including inconsistent and unfair water decision making.

¹⁶ Jasanoff, Sheila. 2011. *Designs on nature: Science and democracy in Europe and the United States*. Princeton, NJ: Princeton University Press.

¹⁷ Productivity Commission, *National Water Reform 2020*, Draft Report, p 23. Further information on the breakdown of water plan coverage, refer to Table 1.2 on page 20 of the Productivity Commission, *Draft Assessment of National Water Initiative (2017-2020)* (February 2021).

In addition, by the time WAPs are declared, water systems are typically already completely allocated (or overallocated). There is no ability to withhold water from allocation, as occurs in other jurisdictions. This means that the water is often allocated in excess of sustainable limits.¹⁸ A further consequence is that the vaunted Strategic Aboriginal Reserve is (currently) largely hypothetical, since SARs only take legislative effect upon the declaration of a WAP, undermining the utility and efficacy of water planning processes.

Reform of the *Water Act* should ensure that water allocation plans are the centrepiece of water management in the Northern Territory and comply with the recommendations of the most recent report of the Productivity Commission,¹⁹ including that:

1. There must be a legal requirement to create WAPS within certain specified timeframes;
2. There must be an ability for relevant decision-makers to withhold water from allocation so that the resource is not fully allocated by the time a WAP is established;
3. Minimum criteria for WAPS must be established by legislation, including a definition of the estimated sustainable yield;
4. WAPs must be legally binding/enforceable;
5. WAPs must define pathways for returning to sustainable levels of extraction where resources are overallocated;
6. WAPs must recognise the needs of Aboriginal and Torres Strait Islander people, including appropriate engagement with Traditional Owners, and the incorporation of cultural values into WAPs;
7. WAPs must include clear, measurable and well-informed cultural and environmental objectives and outcomes that can be monitored and reported against;
8. WAPs should ensure that trade-offs are made in line with community values, with the following principles to guide the decision-making process: effective community engagement; use of the best available scientific, social and economic data to inform decisions; consideration of all economic, social and environmental values associated with the system, including dependent downstream environments and industries.
9. WAPs must include modelling for climate change;
10. WAPs must require public reporting on compliance, monitoring and enforcement activities with respect to water licences and water allocation plans, including with respect to environmental and cultural water objectives and outcomes;
11. WAPs must ensure that planning processes include independent review, which is necessary for improving transparency, holding governments to account, and identifying areas for improvement.

¹⁸ For example, in the Ooloo Dolostone Aquifer Water Allocation Plan the ESY of the northern groundwater management zone was less than existing entitlements already granted for us. This was also the case for the Katherine Tindall Aquifer Water Allocation Plan, and may well be the case for the Mataranka to Daly Waters Water Allocation Plan.

¹⁹ <https://www.pc.gov.au/inquiries/completed/water-reform-2020#report>.

Recommendation 3 – impose evidence-based and legally binding sustainable limits of extraction for both WAPs and water licences

Effective water legislation must establish the limits of sustainable extraction of water resources, and must be based on the best available science and evidence regarding environmental and cultural requirements.

While the *Water Act* requires that WAPs allocated water “within the estimated sustainable yield”, this term is not defined or explained, nor is the estimated sustainable yield for a resource legally binding.

Further, in deciding whether to grant a water extraction licence, the Water Controller is not required to ascertain the estimated sustainable yield for a resource, nor allocate licences in accordance with that sustainable yield.²⁰ This has led to inconsistent and capricious decision-making. For example, in the case of the overturned Larrimah licence (to NT Land Corporation), the Acting Water Controller capriciously departed from established practice to apply the arid zone contingent allocation rules instead of the Top End contingent allocation rules in the Water Allocation Planning Framework.

The *Water Act* must be amended to clearly define “estimated sustainable yield”, include a methodology for determining the estimated sustainable yield, specify that it must be based on best-available scientific and cultural knowledge, and indicate that the estimated sustainable yield is legally enforceable.

Recommendation 4: clearly define and report on environmental objectives and outcomes and ensure transparency of scientific information

The *Water Act* contains little in the way of prescription or guidance to safeguard the high ecological, cultural, and social value of the Northern Territory’s waterways. While a proportion of the Territory’s water resources are set aside for “environmental and cultural” use in WAPs and licences, there is little or no reporting against these environmental and cultural values. Environmental objectives and outcomes are not clearly specified or well-defined. There are often not clear, measurable, and well-informed environmental objectives and outcomes defined in WAPs or licences, nor are long-term performance indicators established to enable monitoring of outcomes and objectives. There is no public reporting on environmental or cultural values and flows.

There should be clear, measurable and well-informed environmental objectives and outcomes defined in WAPs and licences, performance indicators should be established, and there should be public reporting on environmental or cultural values and flows, and how these are being protected.

All scientific and technical models and information underpinning water management (including water allocation plans and water licences) should be made publicly available, and be peer reviewed. The methodologies used to underpin modelling for water allocation planning and water licence decisions should be consistent.

²⁰ There are a number of factors to be “considered” when granting a water licence, including the availability of water in the area in question, which falls far short of imposing requirements to comply with evidence-based sustainable extraction limits in licensing decisions.

Recommendation 5 – enhance public participation in water and catchment management

Water advisory committees are currently the only mechanism by which the public can participate in strategic water management in the Northern Territory, through advising on the development of WAPs. However, these are typically only constituted for the duration of the development of a WAP, and disbanded shortly thereafter, meaning there are no public oversight mechanisms for implementation, monitoring and enforcement of WAPs. Furthermore, the value of public participation in WAPs can be undermined if licences are already fully allocated by the time a WAP is declared.

WAPs are not the only mechanism by which appropriate management of waterways can occur in Australia. Catchment-based management of waterways in the Northern Territory would enable considerable of a wider array of issues (including protection of environmental and cultural values, biodiversity, land clearing, non-pastoral use permits, planning proposals, pollution concerns). While there is no single model, the basic principles of 'integrated' catchment management are to:

- (a) Take a holistic approach to the management of land, biodiversity, water and community resources at the water catchment scale;
- (b) Involve communities in planning and managing their landscapes;
- (c) Find a balance between resource use and resource conservation.²¹

The Northern Territory Government was once a leader in the space of integrated catchment management, with the Daly River Management Advisory Committee operating between 2006 and 2013 and bringing together a wide array of stakeholders from across government, the community, industry and civil society organisations. It was disbanded for political reasons, and was not re-established with the change of government in 2016.

In recent years, there has been significant innovation in the space of integrated catchment management, particularly with the growing awareness across Australia of the need to appropriately elevate and respect First Nations governance systems in land management. For example, the Martuwarra Fitzroy River Council was established in the Kimberley region of Western Australia and operates as a management body for the river catchment founded on cultural governance. It has called on the Western Australian Government to recognise the Fitzroy Declaration in State Law. The Martuwarra Fitzroy River Council has led the way in raising Australian awareness of Indigenous governance systems, including arguing that their cultural governance approach is founded upon First Law and provides a voice for the river as a living entity and ancestral being.²²

The Northern Territory should lead the way in these kinds of innovations. Unfortunately, despite Indigenous people in the Northern Territory owning 50% of the land, with nearly all the remainder being subject to native title rights and interests, the Northern Territory now lags behind other jurisdictions such as Victoria in recognising Indigenous freshwater rights in water management, policy and legislation.²³

²¹ <https://wentworthgroup.org/wp-content/uploads/2014/01/Williams-Catchment-Management.pdf>.

²² Anne Poelina, Kathrine Taylor, Ian Perdrisat, 'Martuwarra Fitzroy River Council: an Indigenous cultural approach to collaborative water governance' (2019) 26(3) *Australasian Journal of Environmental Management* 236, p. 236.

²³ The Northern Land Council, accessed 15 May 2021, <https://www.nlc.org.au/our-land-sea>.

The Northern Territory Government should consider establishing mechanisms for integrated whole of system catchment or ecosystem-based management of waterways in the Northern Territory. The model for this should be developed collaboratively with key stakeholders and the public. This function should be performed by an independent (government-funded) panel of experts, land and water users, key civil society organisations and community members, including Traditional Owners or their representative institutions.

Recommendation 6 – establish independent water regulation

There is no institutional separation between service delivery, policy-making and regulation with respect to water in the Northern Territory. This is a requirement of the NWI, and good environmental regulation. The Productivity Commission has stated:

“As far as possible, the bodies making policy should be separate from those administering it, whatever the level of government involved.”²⁴

However, in the Northern Territory all these roles appear to be performed by the one department, and often one decision-maker. Notably, a single individual currently:

- (a) acts as Water Controller (responsible for water allocations and licensing approvals);
- (b) is the Chief Executive Officer of the Department of Environment, Parks and Water Security (responsible for drafting and implementing WAPs and other policy documents, and directly answerable to the Minister); and
- (c) sits on the board of a significant land development company, the Northern Territory Land Corporation (which benefits from licensing decisions and the development and interpretation of WAPs).

These multiple and overlapping roles have created the perception of conflicts of interest on a number of occasions in recent times. For example, in relation to the approval of the Singleton Station licence, the “guideline document” that the Water Controller relied upon to avoid provisions of the WAP had been approved by the Water Controller in their separate capacity as CEO of the Department of Environment, Parks and Water Security. In relation to the overturned Larrimah licence, the Water Controller had to step aside as decision-maker due to their board position on a private entity and licence grantee, the NT Land Corporation.

An independent water regulator should be established in the Northern Territory to avoid these issues. Consistent with the National Water Initiative, and basic principles of good environmental governance, there should be institutional separation between water service delivery, policy-making, and regulation in the Northern Territory to prevent political interference in water regulation and the perception of bias, as has occurred in the controversies surrounding Singleton Station and Larrimah.

Furthermore, the responsibilities of the Water Resources Branch within the Department of Environment, Parks and Water Security must be much more clearly delineated. For example, ECNT is concerned that the Branch has become a default promoter of the agricultural industry, as well as

²⁴ *Performance Benchmarking of Australian Business Regulation: Planning Zoning and Development Assessments*, Volume 1, April 2011 at 407.

purporting to be an environmental regulator. For example, it is not appropriate for the Water Resources Branch to be undertaking agricultural feasibility assessments such as “Mapping the Future” designed to support, promote and facilitate development, while the same staff simultaneously undertake technical reports that form the basis of water licensing decisions.

Recommendation 9 – compliance, monitoring and enforcement mechanisms must be strengthened

The Northern Territory is the only jurisdiction (apart from Western Australia) that does not charge irrigators for water. This means that the key mechanism to fund water resource management is absent, seriously impeding the compliance, monitoring and enforcement functions that are essential for the success of any water allocation system. The Northern Territory has recently introduced water trading within water allocation plan areas, which means that irrigators can trade at a profit a public resource obtained by them for free. This is considered to be a gross injustice by many Territorians, particularly given the poor drinking water security extant in many remote parts of the Northern Territory.

Monitoring, compliance, and enforcement functions in the Northern Territory are poor or absent. There is no public reporting of these functions, undermining the transparency of the water regulatory regime. There is no compliance and enforcement framework for water management in the Northern Territory. Offence provisions are only effective if they are backed up by an independent, well-resourced, and publicly respected regulator that has a mandate to enforce the law. This is currently lacking in the NT.

The Northern Territory Government must ensure that water management and regulation is appropriately resourced, including compliance and enforcement mechanisms. The Northern Territory should immediately commence discussions about setting a price on water for consumptive use by irrigators to ensure that water management in the NT is adequately resourced. The proposed Water Reform Steering Group is an appropriate forum to guide those discussions.

(d) DRINKING WATER SECURITY

Drinking water is key to human health and to the security of communities. Yet the Northern Territory has no laws protecting drinking water quality. There are no legally enforceable minimum standards for drinking water in remote communities. Drinking water services in remote communities and outstations and homelands are unregulated and under-resourced. This has potential adverse impacts on the health of residents of Indigenous communities. It also affects investment in critical infrastructure in remote communities, such as housing, which depends on a reliable drinking water supply. Urgent reform is needed.²⁵

Recommendation 10 – the Northern Territory Government should legislate for safe drinking water laws

²⁵ This section of the submission draws directly from work undertaken by Liam Grealy and Kirsty Howey for the Housing for Health Incubator. For a summary, see <https://www.hfhincubator.org/wp-content/uploads/2020/11/HFHI-NT-Drinking-Water-Factsheet.pdf>. See also Howey, K and Grealy, “Drinking water security: the neglected dimension of Australian water reform”, *Australasian Journal of Water Resources* 25(2), 2021, pp 111-120.

Drinking water supply in the NT is regulated by the *Water Supply and Sewerage Services Supply Act 2000* (NT) (*WSSSA*). It requires that 'water supply services' in 'water supply licence areas' are licensed by the Utilities Commission. The government-owned Power and Water Corporation (PAWC) is the sole licensee.

The *Water Act* (s73), the *WSSSA* (s45), and the *Public and Environmental Health Act 2011* (s133), each include a power to establish minimum standards for drinking water quality. However, this power has not been used. Instead, the Department of Health and Power and Water Corporation have a Memorandum of Understanding (MoU) that states the *Australian Drinking Water Guidelines* 'will be used as a peak reference'. The MoU appears to have expired in 2015. Legally, the MoU and PAWC's customer contract are unenforceable.

The 'water supply licence areas' specified in Power and Water Corporation's licence include 18 gazetted towns where the vast majority of the NT's non-Indigenous population lives. Outside of these towns, drinking water provision is not regulated. There are no legal requirements for risk management plans (including monitoring programs and incident protocols), audits, reporting, and compliance with minimum standards in those contexts. In 72 remote communities and 79 outstations, Indigenous Essential Services Pty Ltd (IES), a not-for-profit subsidiary of PAWC, provides water services. There is no legislation mandating service standards by IES.

IES is funded by a recurrent grant payment from the Department of Local Government, Housing, and Community Development according to an unpublished Service Level Agreement. This arrangement lacks transparency and does not meet National Water Initiative expectations for Community Service Obligation (CSO) payments. Annual reports suggest that IES in turn pays PAWC to manage drinking water services in those remote communities and outstations.

In sum, in 72 remote communities and 79 outstations, the drinking water services provider is unlicensed, operates without minimum quality standards in place, and with limited public information relating to its funding and service arrangements, day-to-day operations, and planning for future infrastructural needs. However, in areas nearby those same communities, private interests (including for agribusiness, mining, and petroleum), can access water (in the form of water extraction licences granted under the *Water Act*) for free.

South Australia has enacted the *Safe Drinking Water Act 2011* and created the *Safe Drinking Water Regulations 2012*.

Under these laws, all drinking water providers who supply water to the public must:

- be registered with the Department of Health;
- implement an approved risk management plan that complies with the *Australian Drinking Water Guidelines*;
- provide water quality results to consumers; and
- have regular audits and inspections.

It is an offence under these laws to supply drinking water without registration. It is also an offence to supply unsafe drinking water to the public. Registration can be suspended if the water supplier fails to comply with conditions of registration.

A Safe Drinking Water Act, similar to South Australia's, is urgently needed to guarantee drinking water for all Territorians and to bring the NT into line with other Australian jurisdictions. This should be developed in collaboration with peak Aboriginal organisations in the NT and should, at a minimum:

- guarantee the security of water supply above other uses;
- set minimum quality standards for drinking water;
- establish licensing requirements for water service providers in remote communities;
- establish the NT Department of Health as the regulator of drinking water safety in the Northern Territory;
- create offences for failure of drinking water suppliers to supply safe drinking water.

Recommendation 11: The Northern Territory should ensure that funding for water service infrastructure and management is adequate, transparent and risk-based.

A key challenge with respect to drinking water security is the resourcing of water service delivery and infrastructure. In the Northern Territory, not only is current resourcing inadequate, but it is completely opaque to those outside the Northern Territory Government.

There are numerous key problems with respect to the resourcing and transparency of water infrastructure and water service delivery in remote communities in the NT. These include that:

- the main water supplier in remote communities, Indigenous Essential Services Pty Ltd (IES), is a private company with no regulatory oversight, and whose operations are opaque;
- the methods used to calculate the amount of funding for water infrastructure and water service delivery in remote communities are unknown;
- the risk assessment methods used to prioritise water infrastructure and water service delivery in remote communities are unknown;
- the breakdown between funding for water infrastructure and water service delivery in remote communities is unknown;
- there are no publicly available key performance indicators to measure the effectiveness of IES' operations and how it is meeting its stated policy objectives.

New South Wales (NSW) has proactively, transparently, and strategically addressed issues regarding drinking water service delivery and infrastructure funding in remote Aboriginal communities.

The \$200m Aboriginal Communities Water and Sewerage Program is a joint initiative of the NSW Aboriginal Land Council and the NSW Government, and has raised the standard of water provision in 63 communities (former missions or reserves), including through maintenance agreements between local Aboriginal land councils and local water utilities.

Water infrastructure funding in regional areas of NSW (including in Aboriginal communities) is dealt with strategically, transparently, and pursuant to a risk-based priority framework.

In 2017, the NSW Government introduced the Safe and Secure Water Program to fund water infrastructure across NSW. This Program established a \$1billion fund to co-fund regional water infrastructure with local water utilities (usually local councils), to address key risks to regional water safety and security in NSW.

The Safe and Secure Water Program prioritises infrastructure projects that address the highest risks and issues for regional NSW town water. This program is not subject to a mandatory requirement for a positive cost benefit, meaning that it ensures an adequate level of service in smaller towns where the cost of critical infrastructure may outweigh economic benefits. Funding is allocated according to a transparent risk-based priority framework.

The NSW Government maintains a database of known significant risks and issues across all 93 eligible regional water and sewerage service providers throughout the state. There is a publicly available methodology detailing how risks are assessed and prioritised, with different categories for funding. The most relevant stream (Funding Stream 1) is for water quality, water security, and environmental solutions, and the risk assessment methodology includes water security (i.e. supply) assessment criteria, water quality assessment criteria, environment assessment criteria, and socio-economic factors assessment criteria.

The NT Government must partner with Aboriginal peak organisations to address existing problems in water service delivery and infrastructure funding, including by:

- entering a partnership (with appropriate resourcing) with land councils with the aim of raising the standard of water service delivery and infrastructure provision in remote communities;
- taking a strategic, transparent, and risk-based approach to water infrastructure funding in remote communities such as that adopted by NSW; and
- identifying any shortfalls in funding and working collaboratively to identify potential sources of funding to address them.