Deficiencies in the existing water law and governance framework in the Northern Territory

Introduction

The Environmental Defenders Office (**EDO**) is the largest public interest environmental law firm in the southern hemisphere. We have over 30 years' experience advising on water law and policy across all Australian jurisdictions and have accordingly developed an in-depth understanding of best practice water law and governance.

The EDO considers water law and governance in the NT to be amongst the poorest in the country. This conclusion is based on our analysis of the *Water Act 1992* (NT) (**Water Act**), various Water Allocation Plans (**WAPs**), relevant policy documents and decision-making processes and outcomes. This briefing note briefly sets out some of our particular concerns.

1. Seven specific problems with WAPs

A WAP is a document that sets out how water in a particular water resource is to be shared. Unlike most other Australian jurisdictions, WAPs do not take the form of delegated statutory instruments and often fail to provide clear, quantifiable, consistent and legally binding criteria and targets. As a consequence, they are arguably incapable of facilitating sustainable and equitable management of a vital, contested and increasingly constrained resource. Key deficiencies are summarised below.

a. There is no legal requirement to create a WAP

As a consequence, most of the NT is not covered by a WAP. Further, only 28% of licensed water entitlements fall within areas subject to a WAP.[1] This means that the vast majority of water use in the NT is governed by a two page, 21-year-old policy document known as the "Water Allocation Planning Framework". As with all policy documents, it is not legally binding and can be circumvented if it is deemed a barrier to development. This is in stark contrast to water use across the rest of Australia. Specifically, the Productivity Commission observed: "*Most jurisdictions have more than 80 per cent of water use managed under water plans.*"[2]

b. The Water Act imposes few requirements regarding the contents of WAPs

Water planning is highly complex and contested. Effective water legislation must therefore set out, in a sufficient level of detail, the binding contents of water plans for any given catchment. We note, however, that the Water Act includes one, brief section (22B) which contains few requirements regarding the contents of WAPs. The failure of the overarching legislation to elaborate on an adequate framework for WAPs in turn means the WAPs themselves are deficient in a number of key respects (as discussed below).

[1] Productivity Commission, *Draft Assessment of National Water Initiative (2017-2020)* (February 2021), p 20.
[2] 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).

c. WAPs contain few binding provisions

Section 22B(4) of the Water Act states that water resource management within a water control district is to be in accordance with the relevant WAP. However, this provision is only meaningful if a WAP contains specific, legally binding provisions. Based on our analysis, WAPs are largely descriptive in nature and contain few, if any, binding provisions. This confers a high level of discretion on decision makers (or a single decision maker, as discussed below in Section 6). By way of contrast, water plans in other jurisdictions contain extensive, binding rules which govern water sharing and use.

d. Problems with 'estimated sustainable yield'

One of the most important features of any water legislation is a requirement to set limits on extractions for each water resource, and that this limit be based on the best-available science and evidence regarding environmental and cultural requirements within the catchment. The Water Act requires that WAPs allocate water "*within the estimated sustainable yield*" (**ESY**).[3] However, the Act does not:

i. define ESY;
ii. include a methodology for determining the ESY;
iii. specify that it must be based on best-available scientific and cultural knowledge; or
iv. indicate that the ESY is legally enforceable.

As a consequence, ESYs in WAPs are variously defined and based on inconsistent (and often questionable) methodologies[4] and limited knowledge about the actual environmental and cultural requirements.[5] They also fail to take into account climate change, despite WAPs themselves acknowledging the risk posed to water resources by global warming)[6] There is accordingly little (if any) objective evidence that ESYs are indeed sustainable or capable of protecting ecosystem health and cultural values into the future. Indeed, it is likely that in some catchments the only factor preventing serious over-extraction and serious environmental degradation is 'under-use'[7] (which remains difficult to properly quantify given the dearth of tamper-proof meters and telemetry).

[3] Water Act, s 22B(5)(a).
[4] Compare the definition of sustainable yield in the *Ti Tree Water Allocation Plan 2020-2030*, p 72 with the definition in the *Berry Springs Water Allocation Plan 2016-2026*, p 45. The latter only refers to the need to protect water quality and prevent environmental damage, while the former also mentions cultural values, ecosystem functions and declared water quality standards, criteria or objectives. All water allocations plans are available here.
[5] For example, the *Oolloo Dolostone Aquifer Water Allocation Plan 2019-2029* recommends that more research is required to better determine cultural and environmental water requirements (p 7). This is despite (as discussed below) the plan being in development since at least 2009.
[6] For example, the *Oolloo Dolostone Aquifer Water Allocation Plan 2019-2029* acknowledges climate change, but concludes that the best available guide to future water availability is observations from the past (p 28).
[7] See for example the Adelaide River 2021 annual allocation announcement in which the Water Controller acknowledges that granting 100% allocations would breach the extraction limit AND makes a 100% allocation regardless (seemingly on the basis that one of the three licences in the area has never "reported" taking any water).

e. Adaptive management

WAPs refer to 'adaptive management' as a strategy for addressing uncertainty arising from significant knowledge gaps, future development pressure and the possible impacts of climate change.[8] In reality, the concept is poorly understood and rarely applied properly (that is, it is rarely used to adapt levels of development to better reflect environmental thresholds and cultural needs). Specific issues identified include:

i. the failure to embed any legally binding, adaptive 'triggers' in WAPs;
ii. reliance on annual announced allocations (**AAA**) to address future resource limitations (despite the fact that allocations under the AAAs are mostly 100 percent)[9]; and
iii. a general assumption that the Controller of Water Resources (**Water Controller**) would choose to exercise their discretion to impose appropriate conditions on licences to address specific issues (despite there being no legal obligation to do so).[10]

f. Absence of statutory timeframe for the declaration of WAPs

Despite their pressing need, the development of new WAPs across the NT is occurring at a glacial pace. For example, the Tindall Limestone Aquifer, Mataranka to Daly Waters (**Mataranka WAP**) has been in development since at least 2009. By 2012, a draft plan had been prepared, followed by consultation with stakeholders and the community, as well as research project investigations.[11] By 2017 the plan was still not in force, but Mataranka was described by the NT Government as "a priority area for water allocation planning" due to the social, cultural, environmental, and economic significance of the region.[12] The Mataranka WAP is yet to be implemented.[13]

The extraordinary delay in the introduction of WAPs means that water may already be allocated in excess of the sustainable limits within specific water sources. This was illustrated by the recent introduction of the *Oolloo Dolostone Aquifer Water Allocation Plan 2019-2029* (**Oolloo WAP**). The estimated sustainable yield of the northern groundwater management zone of the Oolloo Dolostone aquifer calculated for the WAP was found to be *less* than the existing entitlements already granted for use.[14]

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[8] See for example the *Oolloo Dolostonr Aquifer Water Allocation Plan 2019-2029*, p 93.
[9] 100% allocations were announced in all areas in 2021, see here.
[10] For example, the *Oolloo Dolostonr Aquifer Water Allocation Plan 2019-2029* indicates that licences can be granted subject to conditions, but does not require the imposition of certain conditions to meet desired outcomes. For example, it states the Water Controller "could" establish licence conditions to mitigate impacts on environmental or cultural values, p 77.
[11] A description of these developments is provided in *Background Brief: Water Allocation Plan for the Tindall Limestone Aquifer, Mataranka – Daly Waters* (June 2017), p 3. Available here.
[12] *Background Brief: Water Allocation Plan for the Tindall Limestone Aquifer, Mataranka – Daly Waters* (June 2017), p 7. Available here.
[13] Refer to the Department of Environment, Parks and Water Security website, here.
[14] *Oolloo Dolostone Aquifer Water Allocation Plan 2019-2029*, p 7, available here.

g. Strategic Aboriginal Water Reserves

As well as issues associated with overallocation, the failure to declare WAPs in a timely manner has also meant there is often no (or limited) accessible water for First Nations people through the Aboriginal Water Reserve framework in that zone. As the Oolloo WAP states: *"The Northern* [groundwater management zone] *is overallocated. As a consequence the Strategic Aboriginal Water Reserve is notional and cannot be provisioned."*[15]

2. Annual announced allocations (AAAs)

By May 1 each year, the Water Controller announces allocations for licences in the Top end for the coming year. This process is known as 'AAAs'.[16] However, there is nothing in the Water Act, the Regulations or the Allocation Planning Framework that requires, sets out or explains the process for making AAAs. As a consequence, there is no clear, legally binding and consistent method underpinning the determination of allocations across different catchments. In some instances, the WAP may include provisions which relate to AAAs. For example, the Katherine Tindall Limestone Aquifer Water Allocation Plan 2019-2024 (**Katherine WAP**) includes impact thresholds to 'guide' allocation determinations. It also includes a table which sets out flow information 'to be used' in these determinations. This is problematic for two reasons. First, 'guidance' is not legally enforceable. Second, a close reading of the WAP makes it abundantly clear that little is known about the environmental water requirements of ecosystems and species in the catchment.[17] The flow information that is used to inform allocation determinations is therefore unlikely to correspond to actual environmental requirements in the catchment.

Finally, we note that the framework described above means that the Water Controller has significant discretion with respect to AAAs. We note that this has given rise to AAAs that are in excess of the ESY for a catchment[18] and a tendency to grant 100 percent allocations (which defeats the purposes of an allocation framework).

3. Licensing

The Water Act confers very broad discretion on the Water Controller with respect to the granting and conditioning of licences. Specifically, the Water Controller is only required to "take into account" certain factors (which requires mere consideration of those factors) when issuing licences.[19] Further, while the Water Act requires that water resource management "*be in accordance with the water allocation plan declared in respect of the district,*"[20] WAPs are largely descriptive documents with few (if any) binding obligations. Thus, in practice there is little to stop the Water Controller from issuing licences that are largely inconsistent with the stated (non-binding) objectives of a WAP.

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[15] *Oolloo Dolostone Aquifer Water Allocation Plan 2019-2029*, p 73, available here.
[16] Announced Allocations - Department of Environment, Parks and Water Security
[17] The Katherine Tindall Limestone Aquifer Water Allocation Plan 2019-2024 states that long-term volumetric water requirements to ensure ecosystem and cultural values are not compr0omised has not been determined (p 47).
[18] The 2021 Adelaide River allocation provides an example of where the Water Controller acknowledges in the determination that granting 100% allocations would breach the extraction limit AND makes a 100% allocation regardless (seemingly on the basis that one of the three licences in the area has never "reported" taking any water).
[19] Water Act, s 90(1)(ab).
[20] Water Act, s 22B(4).

Further, even where a WAP contains specific prohibitions, the Water Controller has been known to take advantage of the legislative deficiencies discussed above. For example, when approving the controversial 40,000 ML/year licence at Singleton Station this year, the Water Controller stated in her reasons that "*…I am satisfied that the water resource management will be in accordance with the* [water allocation] *plan*".[21] This is despite the Controller explaining in the same set of reasons that she did not rely on the criteria for protecting groundwater dependent ecosystems set out in the WAP, but instead relied on an updated criteria set out in a "guideline document".[22] This allowed the Water Controller to avoid a provision in the WAP otherwise restricting her from approving a licence that would cause the maximum depth to the water table to exceed 15 metres below ground level.[23] The licence that was approved is expected to drawdown the aquifer by up to **50** meters, based on the NT Governments own modelling.[24]

4. Metering

The Non-Urban Water Metering Code of Practice for Water Extraction Licences (**Metering Code**)[25] is a non-binding code which requires, *inter alia*, new meters installed after 30 June 2017 to reflect the code (while pre-existing meters have until 2027 to comply). The Metering Code is not referenced in the Water Act or Regulations and to that extent is only legally enforceable when compliance with its terms is included as a condition on new or renewed licences. However, it is not clear how many water licences in the NT include a condition requiring the licence holder to install a meter.

Further, there is no publicly available information regarding the extent to which the Metering Code has been voluntarily implemented by existing water users or enforced by the government in relation to new meters installed since mid-2017. We do understand that telemetery (which is the most reliable method of confirming compliance with licence conditions and other relevant laws) is non-existent amongst private water users and that self-reading and reporting of metering data (which is widely considered to be poor practice) is the norm.

5. Compliance and enforcement

The Water Act contains several offences. Relevantly, the Act creates offences where a person takes surface water or groundwater where they are "not authorised under [the Water] Act to take the water".[26] However, the Water Act does not define or otherwise say what is meant by "authorised" or expressly state that a person cannot take water other than in specified circumstances e.g., in accordance with a licence or in accordance with particular rights to take water as provided for in the Water Act.[27] Accordingly, it is highly unlikely that any such offences could be prosecuted, given

[21] Water Extraction Licence Decision in respect of licence WDPCC10000 granted to Fortune Agribusiness Funds Management Pty Ltd on 8 April 2021, p 6. A copy of the decision can be downloaded from the NT Water Licence Portal, here. This decision has been reviewed by multiple applicants under s 30 of the Water Act.

[22] Ibid, pp 12 & 13; *Guideline Limits of acceptable change to groundwater dependent vegetation in the Western Davenport Water Control District* (13 February 2020), available here.

[23] *Western Davenport Water Allocation Plan 2018-2021*, p 42.

[24] *Groundwater extraction licence resource assessment: AG06221 (Singleton Station), Technical Report 5/2021*, p 18. A copy of this report can be downloaded from the NT Water Licence Portal, here.

[25] factsheet-non-urban-water-metering-code-of-practice.pdf (nt.gov.au)

[26] ss. 44(1) and (2); ss. 59(1) and (2).

[27] See, for example, ss. 11 and 14 of the Water Act concerning the rights of owners or occupiers of land in contact with waterways or of land overlying ground water to take surface or ground water for certain specified purposes.

the difficulty in proving to the criminal standard that a person was "not authorised" to take water under the Act. Any ambiguity in what constitutes an offence, as is apparent here, would be construed in favour of a defendant.

The Water Act also makes it an offence for the holder of a licence to take surface water or ground water[28] to contravene a term or condition of the relevant licence.[29] However, these offences are unlikely to be of great utility unless:

i. there are clear and binding licence conditions around water extraction;
ii. there is accurate measurement and data collection around water take, so that alleged breaches of extraction conditions can be proven to the criminal standard (as identified above, metering in the NT appears to be poor); and
iii. there is an effective regulator to deal with compliance and enforcement issues.

In this respect, 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 has been amply demonstrated in NSW where a 2017 expose by Four Corners regarding water theft, inadequate resourcing and maladministration of water laws resulted in multiple inquiries and investigations[30] and the subsequent establishment of an independent water regulator. Since its establishment in 2018, that regulator has gone on to bring 30 prosecutions for breaches of the state's water laws.[31]

By way of contrast, we have been unable to find any information relating to enforcement activities by the NT Government. The Department of Environment, Parks and Water Security Annual Report details the number of onsite compliance inspections completed, but provides no indication of what, if any, subsequent enforcement action was undertaken.[32] We have been advised that the Department has very few compliance and enforcement staff (in the order of 5 to cover most of the NT) which is manifestly inadequate to actually undertake any meaningful level of compliance and enforcement work across such a large geographic area.[33]

6. Centralisation of decision-making

Good water governance (and good governance in general) requires decision-making functions to be split so as to avoid the concentration of power in one or a small number of individuals and any subsequent conflicts of interest. It is also best practice to ensure that individuals involved in making policies should be separate from those administering the policies.[34]

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[28] Issued under ss. 45 and 60 respectively.
[29] ss. 46(1) and 61(1).
[30] Ken Matthews AO, *Independent Investigation into NSW Water Management and* Compliance, Final Report (December 2017); NSW Ombudsman, *Investigation into water compliance 2007-17* (special report to Parliament under section 31 of the *Ombudsman Act 1974)* (November 2017).
[31] https://www.dpie.nsw.gov.au/nrar/news/nrar-commences-30th-prosecution
[32] Department of Environment and Natural Resources, Annual Report 2019-20, p 24.
[33] We note that the regulator in NSW (the Natural Resources Access Regulator) has over 100 staff, including highly trained experts across a range of disciplines (law, remote sensing, regulation and so on).
[34] As the Productivity Commission has emphasised: *as far as possible, the bodies making policy should be separate from those administering it, whatever the level of government involved.*" See: *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, Volume 1, April 2011 at 407.

These principles have not been adhered to in the NT. Notably, a single individual:

i. acts as Water Controller (responsible for water allocations and licensing approvals);
ii. 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
iii. sits on the board of the Northern Territory Land Corporation (which benefits from licensing decisions and the development and interpretation of WAPs).

This is, in our experience, highly irregular and cause for considerable concern. 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 drafted by the Water Controller themselves in their separate capacity as CEO of the Department of Environment, Parks and Water Security.

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