



Proposed amendments to the Northern Territory Water Act

Introduction

The Northern Territory (**NT**) is currently amending its legislative framework following its Water Reform Directions Paper (2018) and Report Card against the Directions Paper (January 2021).¹ These amendments are also being informed by the recommendations of the Territory Economic Recovery Commission Final Report (November 2020).²

The NT Government has not seized this timely opportunity to strengthen the regulatory regime and avoid environmental catastrophes such as those seen in the Murray Darling Basin. Instead, the proposed amendments will further weaken the protection of the NT's water resources by encouraging unsustainable development without adequate regulatory oversight.

Our review of the proposed amendments in this briefing note should be read in conjunction with our separate briefing note on the deficiencies in the existing water law and governance framework in the NT.

The amendments

Amendments to the *Water Act 1992* (NT) (**Water Act**) are proposed through the:

- (a) Statute Law Amendment (Territory Economic Reconstruction Bill) (**TERC Bill**), which has been introduced into the Legislative Assembly and is scheduled for debate in August 2021; and
- (b) Future amendments to be included in a further draft Bill which is proposed for finalisation in the second quarter of 2022 (**Further Draft Bill**).³

The future amendments were originally proposed for inclusion in two Environmental Laws Omnibus Bills scheduled for introduction in the Legislative Assembly in August 2021 and May 2022. On 4 August 2021, the Department of Environment, Parks and Water Security advised the EDO that the amendments would be deferred to seek feedback on the proposed legislation.

Despite the issues the existing legislative framework, the NT Government is proposing amendments to the Water Act that will:

- (a) further undermine the effectiveness of Water Allocation Plans (**WAPs**);
- (b) create new licence categories that will allow developers to trade and share entitlements with limited regulatory oversight; and

¹ Northern Territory Water Regulatory Reform, Directions Paper (October 2018); Report Card – Northern Territory Water Regulatory Reform (January 2021); both documents are available [here](#).

² Territory Economic Reconstruction Commission: Final Report (November 2020), available [here](#).

³ Details about the proposed amendments are set out in the NT Government's *Water Regulatory Reform 2021-23 Information Paper (Information Paper)*, at <https://depws.nt.gov.au/water/legislation/water-act>.



- (c) allow for the trading of water across the NT without an appropriate regulatory framework.

The TERC Bill

The first set of amendments are being introduced through the TERC Bill which is currently before Parliament. This bill allows creates new “developer licences”⁴ that would allow water entitlements to be transferred between licence holders in respect of a single development without adequate oversight that appropriate conditions are attached. While the NT Controller of Water Resources (**Water Controller or Controller**) will not be able to *increase* the total water available under the licences, there is no guarantee that any of the necessary conditions will be attached to the licences granted to subsequent parties.⁵

The TERC Bill amendments will also allow the Water Controller to grant water extraction licences for periods longer than the current 10-year limit so long as the Controller is “satisfied that special circumstances exist to justify the longer period”.⁶ Under the existing law such an extension can only be granted by the Controller with the concurrence of the Minister.⁷ This amendment will therefore add to the extraordinary discretion held by the Water Controller who will be able to unilaterally decide to grant extended licences. The further concentration of power in a single decision-maker is antithetical to good water governance.

The Further Draft Bill

The only publicly available information regarding the Further Draft Bill was placed online in an “Information Paper” with no community consultation.⁸ The actual proposed amendments have not yet been made public.

It will be necessary to carefully consider the proposed amendments when they are released. However, the Information Paper provides some worrisome insight into the changes. For example, the described amendments will:

- (a) Allow the Water Controller to disregard the relevant provisions of a WAP where there is new scientific information available in respect of the water source. This will provide legislative backing to the NT Government’s approach of relying on updated “guidance documents” or “technical papers” (as reflected in the Water Controller’s decisions regarding Singleton Station and the Larrimah Agricultural Precinct).⁹ Such documents may not reflect any actual improvement in scientific knowledge of the water resource and may in fact be used as a shield to justify approval of a particular licence which would otherwise be inconsistent with existing policy and statutory requirements.

⁴ See proposed ss. 71G and 71H of the Water Act.

⁵ See proposed s. 71H(4).

⁶ See ss. 45(4) and 60(4) of the TERC Bill.

⁷ See ss. 45(3)-(4) of the Water Act.

⁸ Water Regulatory Reform 2021-23 Information Paper, available for download [here](#). The Information Paper was updated in August 2021 to reflect the new timeframe for the amendments, but the substantive content regarding the amendments remains the same.

⁹ The decision to grant a water licence to Fortune Agribusiness on 8 April 2021 near Singleton Station was made against criteria set out in a departmental “guidance document” rather than the relevant WAP. 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. The Larrimah licence is discussed further below in this briefing note.



- (b) Remove the need for water extraction licences applications to be separately advertised publicly by allowing the relevant information to be included in the public advertisement for a development under separate legislation.¹⁰ This reduces transparency and will likely limit public awareness of proposed licence applications.
- (c) Abolish the Water Resources Review Panel and have all appeals dealt with through the (non-specialist) Northern Territory Civil and Administrative Tribunal (**NTCAT**). The Review Panel is an expert panel established under the Water Act which can be tasked with advising the Minister in relation to appeals against the granting of licences.¹¹
- (d) Limit standing to challenge licensing decisions to the applicant, a directly affected person or a person who participated during the public consultation process associated with a decision. Combined with changes to public advertising requirements, this has the potential to significantly reduce public participation in decision-making.
- (e) Allow for water trading across the NT and remove the need for the Water Controller to have regard to the factors set out under section 90 of the Act when approving trades. This means the Water Controller would not be required to consider things such as any adverse effects resulting from the trade.¹²
- (f) Increase discretion in the making of licence application decisions by allowing the Water Controller to ignore section 90 factors without providing a justification as to why they are irrelevant to the applicable decision.¹³

Case Study – Larrimah

In November 2020, the Water Controller granted a 10GL/year licence to the NT Land Corporation for development of the Larrimah Agricultural Precinct (**Larrimah Licence**).¹⁴ The Larrimah Agricultural Precinct is one of three large scale agricultural sites being developed by the NT Land Corporation in partnership with the NT Farmers Association. The NT Land Corporation sought expressions of interest from private developers who were to be involved in the development of the precinct.

The Northern Land Council and the Environment Centre of the NT challenged the licence through the Water Act’s statutory review process.¹⁵ They alleged that it was unsustainable in the long term and did not adequately consider impacts on the Aboriginal Water Reserve.¹⁶

¹⁰ Information Paper, page 12.

¹¹ The Review Panel is established under s 24 of the Water Act. Its role in the review process is set out in ss 30(3)(b), 30(4) and 31-32 of the Water Act.

¹² The Information Paper states on page 9 “Part 6A and s.90 of the Act will not to [sic] apply to a trade application.” The adverse effects factor is 90(1)(c).

¹³ Information paper, page 12.

¹⁴ Licence TLAM10002 granted to the NT Land Corporation on 27 November 2020 and revoked by the NT Minister for Health on 18 June 2021.

¹⁵ The ECNT and the NLC each submitted separate review applications. Reviews of certain decisions can be made in accordance with section 30 of the Water Act.

¹⁶ An NLC Media Release relating to the review is available [here](#).



The Minister referred the matter to the Water Resources Review Panel. The Review Panel is an expert panel established under the Water Act. It is not responsible for deciding the outcome of reviews but is tasked with advising the Minister on what action should be taken.¹⁷

The review panel advised the Minister that a “technical report” prepared by the Department of Environment, Parks and Water Security (**Department**) should not have been relied upon by the Water Controller to grant the Larrimah Licence. In particular, the Review Panel criticised the Department’s report because it was based on limited and inconsistent modelling and because it did not consider climate change.¹⁸

Based on the Review Panel’s advice, the Minister for Health determined that the licence should be revoked.¹⁹

The proposed amendments to the Water Act detailed in this paper would:

- (a) increase the Water Controllers discretion to rely on ad-hoc departmental reports (such as the Department’s “technical report”) on the basis that it represented “new scientific information” instead of legislative criteria, water allocation plans or territory-wide policies when deciding to grant licences.
- (b) ensure that reliance on such reports cannot be scrutinised by the expert Water Resources Review Panel.
- (c) permit a licence to be granted to a single entity (such as the NT Land Corporation) which could then transfer entitlements under the licence to private developers with limited legislative oversight.

Conclusion

There is currently a push for greater development of water resources in the NT and an appetite for updating the regulatory regime. This provides a unique opportunity to strengthen the laws to promote the sustainable use of water while protecting ecological and cultural values. However, the proposed amendments will only serve to further undermine an already inadequate regulatory framework and risk permanently jeopardising the health of water sources and their dependent ecosystems.

We recommend that the proposed amendments be reconsidered, and that any future amendments to the Water Act be developed through a consultative process that seeks to ensure the sustainable use of the NT’s precious water resources.

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¹⁷ The Review Panel is established under s 24 of the Water Act. Its role in the review process is set out in ss 30(3)(b), 30(4) and 31-32 of the Water Act.

¹⁸ We note that the Review Panels report has not been released publicly. However, the findings of the report were summarised in the Minister’s review decision dated 18 June 2021. A copy of this decision is available for download through the [NT Water Licencing Portal](#).

¹⁹ Ordinarily this decision would be made by the Minister for Environment and Water Security. However, due to a conflict of interest with the NT Land Corporation, the decision was made by the Minister for Health.