

October 2022 Update: 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.

In August 2021 EDO published its [Briefing Note: Deficiencies in the existing water law and governance framework in the Northern Territory](#) which emphasised that water law and governance in the NT is amongst the poorest in the country. This briefing note supplements the previous note. Together, both briefing notes can assist stakeholders and interested parties understand key issues relating to the legal framework for managing water in the NT and engage in the many key water initiatives planned for public consultation over the coming months.¹

The recent concerted push by government and industry to promote horticultural and gas developments in the NT underscores the urgent need for a modern, sustainable and best practice regulatory framework to manage water resources.² While the current regulatory framework is ill-equipped to meet the demands of the future, there remains a unique and increasingly short opportunity for reforming water regulation in the NT.

The EDO Acknowledges recent commitments made by the NT Government which are a step in the right direction. These include the introduction of safe drinking water legislation by 2024, the replacement of the *Water Act 1992* (NT) (**NT Water Act**) by 2026 and the appointment of a new Controller of Water Resources who is independent of the NT Government. However, with the current influx of developments in the NT, it is important that decisions made prior to the introduction of a reformed legislative regime do not lock in unsustainable levels of water extraction. The experience of the Murray Darling Basin States demonstrates the enormous difficulties, costs and environmental consequences of attempting to “unwind” unsustainable levels of extraction.

This briefing note focusses on the NT Water Act and Water Allocation Plans. Where appropriate, it draws comparisons with both the NT Government's commitments under the National Water Initiative, and the legislative regimes of other Australian jurisdictions.

¹ The NT Draft Territory Water Plan was released on 14 October 2022 with public consultation open until 25 November 2022. The Draft Western Davenport, Georgina and Wiso Water Allocation Plans are expected to be on public exhibition in October through early November 2022. The NT Government's draft surface water take (floodplain harvesting) policy is expected to be on public exhibition from late October through December 2022.

² See: Australian Government, *Our North, Our Future: White Paper on Developing Northern Australia* Canberra, Australia: Australian Government (2015), available [here](#); Northern Territory Government, *Cotton in the Northern Territory, Facts and Stats* (2021), available [here](#); Northern Territory Government, *Modern Cotton – A Cornerstone to the Northern Territory's Agricultural Sector* (2020), available [here](#); NT Farmers Association & PricewaterhouseCoopers Australia, *Business Case for the Construction of a Cotton Gin in the Northern Territory* (2019), available [here](#); Northern Territory Government, *Northern Territory Gas Strategy*, available [here](#).

The National Water Initiative (NWI)

The legislative framework for managing water resources should be considered in the context of the *National Water Initiative (NWI)* to which the NT is a signatory. The NWI was agreed to by State and Territory governments in 2004 and represented the culmination of a series of earlier inter-governmental reform frameworks. It is a national water reform blueprint, providing a framework and principles for the sustainable management of water resources.

Through the NWI the NT Government has committed to, among other things:

1. preparing water plans with provisions for the environment;
2. achieving sustainable water use in over-allocated or stressed water systems;
3. the application of the best available scientific knowledge and use of socio-economic analysis in the water planning processes;
4. consulting with stakeholders within or downstream of plan areas, and ensuring the “inclusion of indigenous representation in water planning wherever possible”; and
5. providing a statutory basis for environmental and other public benefit outcomes in surface and groundwater systems to protect water sources and their dependent ecosystems.³

The NWI also requires that persons seeking the consumptive use of water require a “water access entitlement” (water licence). However, the NWI acknowledges that water resources are highly variable and depend on specific climatic conditions and terrain. Therefore, one of its central elements is the development of “water plans” within areas in which entitlements are to be issued (generally at regional or catchment scales). In the NT, these are known as “water allocation plans” (**WAPs**). The purpose of water plans is to assist governments and the community to determine water management and allocation decisions to meet productive, environmental and social objectives.⁴ The NWI largely permits States and Territories to determine the scope and content of their water plans, however, it does provide for key components to be included.⁵

References to the NWI in this briefing note are intended to emphasise the divergence between the commitments made by the NT government, and the current state of its legislative framework relating to water management. However, this briefing note is not intended to be a full assessment of the NT’s compliance against NWI benchmarks. This has been documented in other studies, including most recently by O’Donnell et al, “Racialized Water Governance: the ‘hydrological frontier’ in the NT, Australia”, *Australasian Journal of Water Resources* 26 (2022) 1.⁶

³ General information regarding the NWI is available on the Australian Government’s Department of Climate Change, Energy, the Environment and Water website, [here](#). A copy of the NWI is available [here](#).

⁴ NWI, [36].

⁵ NWI, Schedule E.

⁶ This paper is available for download, [here](#). See also: Hart, B., O’Donnell, E. & Horne, A. 2019. Sustainable water resources development in northern Australia: the need for coordination, integration and representation. *International Journal of Water Resources Development* 36, 777-799; Productivity Commission 2017, National Water Reform: Productivity Commission Inquiry Report no. 87, available [here](#); Productivity Commission 2021, Assessment of NWI Implementation progress (2017-2020) Report No. 96, available [here](#).

The *Water Act 1992* (NT)

The NT *Water Act* provides the legislative framework for managing water resources in the NT, with its preamble stating it provides for the “investigation, allocation, use, control, protection, management and administration of water resources”.⁷

Crucially, the NT *Water Act* provides the application, scope and process for the creation of WAPs.

The NT *Water Act* does not include an objects clause

While operative decisions relating to water management are often made by reference to subordinate instruments such as WAPs or other policy documents, the Act itself provides the overarching framework within which all such actions take place. It is therefore crucial that the Act provides foundational principles upon which the framework is built.

Almost all pieces of Australian legislation now include specific “objects” sections which set out their purposes. Such clauses do not dictate the outcome of the exercise of functions under the Act, however, they do provide the overarching principles by which the regulatory framework should be applied. In addition, objects clauses are vital in resolving uncertainty and ambiguity among other provisions of the statute.

The NT’s *Water Act* contains no objects clause. Combined with the lack of mandatory requirements to be included in WAPs (discussed further below), this has resulted in WAPs containing their own, varied, and often inconsistent values and objectives provisions.

This can be contrasted with the detailed objects clauses contained in similar pieces of legislation across other Australian jurisdictions. For example, the NSW *Water Management Act 2000* (**NSW WMA**) contains an “objects” clause, which begins:

*The objects of this Act are to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations and, in particular— (a) to apply the principles of ecologically sustainable development, and (b) to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity and their water quality...*⁸

The NSW WMA also contains a series of “water management principles”, containing 8 subsections with varying levels of detail. Examples include that “sharing of water from a water source must protect the water source and its dependent ecosystem” and that “geographical and other features of major cultural, heritage or spiritual significance should be protected”.⁹

The Victorian *Water Act 1989* contains a “purposes” clause containing 14 sub-clauses. The fact that this clause was amended in 2019 emphasises that such clauses are not set in stone at the creation of legislation but can be amended to reflect evolving values and purposes relating to the management of water resources.¹⁰

⁷ *Water Act 1992* (NT), preamble.

⁸ NSW WMA, s 3.

⁹ NSW WMA, s 5.

¹⁰ See: *Water and Catchment Legislation Amendment Bill 2019* (Vic).

The NT’s legislative framework does not promote the concept of ecologically sustainable development

The principles of ecologically sustainable development (**ESD**) underpin most modern legislative frameworks dealing with natural resource management and are often embedded within the relevant objects clause.¹¹ This concept is found in the legislation covering water management in NSW, Queensland and South Australia, and also within the Commonwealth’s *Water Act 2007 (Commonwealth Water Act)*.¹²

For example, the first object within the NSW WMA, extracted above, refers to ESD. Similarly, the *Landscape South Australia Act 2019* states that the objects of the Act “include to support and enhance ecologically sustainable development...”¹³

The Commonwealth *Water Act* contains a section defining the “principles of ESD,¹⁴ and requires these principles be taken into account when certain powers and functions are being exercised.¹⁵

In stark contrast to the above, the NT *Water Act* contains no reference to ESD, nor any similar principles. As a result, some WAPs have sought to include similar principles, but have done so in a disparate and confusing manner.

For example: the *Katherine Tindall Limestone Aquifer WAP 2019-2024* and the *Western Davenport WAP 2021-2022* include objectives referring to “ecologically sustainable regional economic development”.¹⁶ The *Alice Springs WAP 2016-2026* includes a principal objective of ensuring “sustainable development”, but indicates that this refers to the “development of sustainable water consumptive industries...”¹⁷ While the Alice Springs WAP includes a separate principle objective to “protect the environment”, there is no hierarchy as to which principle must be promoted over another when they inevitably conflict.

These ill-defined terms found within WAPs do not provide the same clarity offered by the internationally recognised principles of ESD found in over 60 pieces of Australian legislation.¹⁸ Most importantly, the use of such terms within WAPs rather than within the NT *Water Act* itself undermines their effectiveness and ensures they have little applicability to decision makers exercising various functions under the Act.

The NT Water Act contains few provisions to guide decision making

In many jurisdictions, water legislation not only includes objects clauses and integrates the concepts of ESD, but also contains separate provisions establishing relevant duties.

¹¹ For further analysis of the application of ESD in Australian legislation see: EDO, *What is Ecologically Sustainable Development (ESD)?* (February 2022), available [here](#).

¹² See: WMA, s 3(1); *Water Act 2000* (Qld), s 2(2)(a); *Landscape South Australia Act 2019* (SA), s 7(1); *Water Act 2007* (Cth), s 21(4).

¹³ Section 7(1).

¹⁴ Section 4(2).

¹⁵ Section 21(4).

¹⁶ *Katherine Tindall Limestone Aquifer WAP 2019-2024*, p 9; *Western Davenport WAP 2021-2022*, p 8.

¹⁷ Alice Springs Water Allocation Plan 2016-2026, p 37.

¹⁸ <https://www.edo.org.au/wp-content/uploads/2022/02/220214-What-is-ESD.pdf>

For example, the water management principles in the NSW WMA (see above) are given effect by a separate provision which imposes a duty on all persons exercising functions under the Act to:

- “take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act”; and
- in relation to the sharing of water from a water source, give priority to the protection of the water source and its dependent ecosystems.¹⁹

The practical effect of this duty is the removal of any scope for the application of a “triple bottom line” approach to water management. The “triple bottom line” approach is the notion that economic and social considerations must be considered and balanced equally with environmental considerations. Rather, the NSW WMA very clearly identifies that social and economic benefits are only to be fostered through the environmentally sustainable use of water resources.²⁰

As discussed above, The Commonwealth *Water Act* imposes a duty that the preparation of the Murray Darling Basin Plan *must*:

- take into account the principles of ESD;
- be based on the best available scientific knowledge and socio-economic analysis; and
- have regard to various matters, including the NWI.²¹

These, and other provisions in the Commonwealth *Water Act*, led the Murray Darling Basin Royal Commission to find that “there is no triple bottom line legislated in the Water Act” in the setting on limits for extraction.²² Instead, it found that the Commonwealth *Water Act* requires that limits for extraction must not “compromise” the key environmental assets and ecosystem functions of the Murray Darling Basin.²³

The NT *Water Act* contains no such duties and fails to ensure that the economic and social benefits of water extraction only occur within an environmentally sustainable framework. As discussed above, this results in instances, such as in the Alice Springs WAP, where economic and environmental outcomes are identified equally as “principle objectives”.

WAPS

The NT Water Act does not provide a framework for WAPs

Our previous briefing note emphasised that the NT *Water Act* does not include an adequate framework for preparing and making WAPs, which in turn means the WAPs themselves are deficient in several key respects.

¹⁹ NSW WMA, s 9(1)(a)-(b).

²⁰ For a detailed discussion of the objects, water management principles and duties of the WMA, as well as the related applicability of the “triple bottom line approach”, see: NSW Independent Commission Against Corruption, *Final Report, investigation into complaints of corruption in the management of water in NSW and systemic non-compliance with the Water Management Act 2000* (November 2020), available [here](#), pp 30-35.

²¹ Section 21(4).

²² Murray Darling Basin Royal Commission Report (January 2019), p 53.

²³ Murray Darling Basin Royal Commission Report (January 2019), p 71.

One of the objectives of the NWI is the “*statutory provision for environmental and other public benefit outcomes, and improved environmental practices*”.²⁴ States and Territories agreed to identify these outcomes “*with as much specificity as possible*.”²⁵ However, the NT *Water Act* has been described by the authors of *Australian Water Law* as containing “*little detail about water planning, environmental water and environmental considerations*.”²⁶

This can be contrasted with the approach adopted by other jurisdictions which require that their statutory water plans contain certain mandatory provisions. For example, the NSW WMA requires its water sharing plans include certain “core provisions” in relation to water sharing, water use, drainage management and floodplain management. Other “additional provisions” are set out which “may” be included in relation to those areas, as well as environmental protection.

These mandatory provisions mean that all water sharing plans in NSW *must*, amongst other things:

- establish environmental water rules;
- contain provisions for the identification, establishment and maintenance of planned environmental water;
- recognise limits to the availability of water; and
- establish rules according to which water licences are to be made, and to which water may be allocated to licences. This includes limiting the water available to licence holders through their “annual water determinations” where extraction limits set by the plan are being exceeded.²⁷

Certain provisions of water sharing plans are also *required* to be consistent with the water management principles set out in the WMA.²⁸

In contrast, the NT *Water Act* simply provides that water is to be allocated “within the estimated sustainable yield to beneficial uses” and requires that an allocation is to be made to the environment.²⁹ However, since “estimated sustainable yield” is not defined in the NT *Water Act*, it is left entirely up to individual WAPs to work out how this is done. There is no express requirement regarding the volume of the allocation for the environment, or the process by which the volume should be calculated. This can be contrasted with the definition of “environmentally sustainable level of take” which is found within the Commonwealth *Water Act*:

Environmentally sustainable level of take for a water resource means the level at which water can be taken from that water resource which, if exceeded, would compromise:

- (a) *key environmental assets of the water resource; or*
- (b) *key ecosystem functions of the water resource; or*
- (c) *the productive base of the water resource; or*
- (d) *key environmental outcomes for the water resource.*³⁰

²⁴ NWI, [23](iii).

²⁵ NWI, [78].

²⁶ Kate Stoeckel et al. *Australian Water Law*, Lawbook Co 2012, p 501.

²⁷ NSW WMA, ss 20(1)(a), 8(1A), & 20(2)(a)-(b).

²⁸ NSW WMA, s 20(2)(f).

²⁹ NT Water Act, s 22B.

³⁰ *Water Act 2007* (Cth), s 4.

Ultimately, the NT *Water Act* provides very little guidance as to the specific types of provisions which must be included in WAPs. This results in WAPs adopting different structures and approaches with key concepts such as the estimated sustainable yield not required to be applied consistently.

In Queensland and NSW, water plans are drafted in the manner of subordinate legislation and are made available on their states' legislation websites. In NSW, the final draft of most water plans is prepared by the Parliamentary Counsel's Office. This drafting process ensures that all plans across the state adopt a consistent approach, reducing ambiguity and uncertainty.

However, in the NT, water allocation plans are simply published online by the Department of Environment, Parks and Water Security, with different plans adopting different structures and formats.

Community consultation in relation to WAPs is insufficient

One of the core elements of the NWI is “community partnerships”, which includes the “open and timely consultation with all stakeholders” in relation to “significant decisions that may affect the security of water access entitlements or the sustainability of water use.”³¹ Relevant “actions” under this element include such things as the:

“provision of accurate and timely information to all relevant stakeholders in relation to the progress of water plan implementation and other issues relevant to the security of water access entitlements”³²

To this end, the NT *Water Act* provides for the creation of “water advisory committees”. However, there are a number of issues with the relevant legislative provisions.

Firstly, there is no requirement that committees actually be established. Even in relation to the development of a new WAP the creation of these committees is entirely discretionary, with the Act only stating that the Minister “may” establish them.

Secondly, these committees are to “consist of such members as the Minister thinks fit and the members shall hold office at the Minister’s pleasure.” This means there is no guarantee of adequate representation from key stakeholders, including Traditional Owners and local community representatives.

Thirdly, there are no requirements set out relating to fundamental issues such as the:

- a. duration of committees;
- b. term of office for committee members;
- c. filling of vacancies on the committee;
- d. disclosure of conflicts of interests among committee members;
- e. requirements that meetings be recorded; or
- f. general procedures, such as meeting frequency or decision-making protocols.

³¹ NWI [95].

³² NWI, Schedule A.

The NSW WMA includes express provisions with respect to *all* of the above in relation to its equivalent committees.³³ Victoria also includes provisions requiring that “all relevant interests are fairly represented” on its equivalent committees.³⁴

It is therefore unsurprising that Water Advisory Committees in the NT are failing to achieve their intended outcomes. The Northern Land Council’s March 2021 Submission to the Productivity Commission on National Water Reform provides examples of this – including the Mataranka Committee which was created, disbanded and recreated without a WAP being declared in respect of the relevant water source; and the Howard Springs Committee, whose role was to provide advice and recommendations on the development of a WAP, being disbanded after nine years of operation and without the declaration of a WAP.³⁵

A further issue is that while advisory committees are established by the Minister, there is no legislative mechanism by which the advisory committee is actually required to brief or report to the Minister. Instead, the NT *Water Act* only requires that the advisory committee provides advice to the Water Controller.³⁶ Once a WAP is declared in the NT, the relevant water advisory committee is usually disbanded. This is despite one of the functions of the committees being described in the NT *Water Act* as to “*advise the Controller on the effectiveness of the water allocation plan in maximising economic and social benefits within ecological constraints*” – indicating that the role of Committees ought to include the assessment of WAPs after their implementation.³⁷

It is therefore unsurprising that in its May 2021 Assessment of the NWI implementation, the Productivity Commission noted in relation to the NT that “*While water plans remain under development, community concern around the level of water extraction and the lack of community engagement is increasing.*”³⁸ It pointed out that since 2017 there has been a decline in the number of water advisory committees, with some committees ceasing as WAPs are declared, but others, such as the Howard Water Advisory Committee ceasing despite a WAP never being finalised.³⁹

WAP’s are not subject to *independent* reviews

The NT *Water Act* requires that the Minister “*must ensure that a review of a water allocation plan is conducted at intervals not longer than 5 years*”.⁴⁰ However, the Act is silent as to who must undertake the review, the extent to which public consultation is required and whether reviews themselves must actually be made available to the public.

As a result, the statutory reviews of WAP’s are conducted on an ad hoc basis by the very Department which prepared the WAP in the first place.

This approach can be contrasted to that in NSW where water plans are required to be reviewed independently by the NSW Natural Resources Commission. Relevantly, NSW legislation requires that the Natural Resources Commission is to call for, and have regard to, public submissions (and

³³ WMA, Schedule 6.

³⁴ *Water Act 1989* (VIC), s 29(2)(a)(i).

³⁵ Northern Land Council, Submission to the Productivity Commission on National Water Reform 2020 (March 2021), available [here](#).

³⁶ NT *Water Act*, ss 23(1B)(a) & (3).

³⁷ NT *Water Act*, s 23(1B)(a).

³⁸ NWI Implementation Report, p 27.

³⁹ NWI Implementation Report, p 37.

⁴⁰ NT *Water Act*, s 22B(3).

must release its report to the public). Before deciding to extend a water plan or make a new plan, the Minister is required to consider the Natural Resources Commission's report.⁴¹

Conclusion

The recent announcement that the NT *Water Act* will be replaced by 2026 provides an opportunity to for the NT Government to address many of the issues raised in this briefing note. While by no means an exhaustive list of what should be prioritised under a revised legislative framework, at a minimum, a revised water act in the NT should:

1. put into effect the NT Government's commitments under the NWI;
2. include suitable "objects" and "principles" provisions which, among other things, embed the principle of ESD into the legislative framework;
3. provide clear and enforceable duties which require individuals exercising functions under the Act to do so in a manner that prioritises the environmentally sustainable use of water resources;
4. provides clear guidance on the provisions that must be included within WAPs, including environmental water rules and the methods for determining limits on extraction, as well as the definition of fundamental concepts such as the "estimated sustainable yield"; and
5. prioritise community engagement and stakeholder consultation, including by ensuring relevant interests, such as Traditional Owners and local communities, are represented on water advisory committees, and that such committees provide advice directly to relevant decision makers.

However, it is also vital that unsustainable levels of extraction are not locked in prior to the commencement of a future regulatory regime. Decision makers must ensure that the broad discretion granted to them by the current NT *Water Act* is wielded appropriately by prioritising environmental interests as necessary and committing to widespread and transparent community consultation in respect of all decision making.

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⁴¹ NSW WMA, ss 43-44.